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Trump Administration Moves to Broaden Federal Contracts by Invoking Defense Production Act (DPA)

This week, President Trump announced he is invoking the Defense Production Act of 1950 (“DPA”), allowing the administration to force American industries to manufacture medical supplies that are in short supply in the fight against the COVID-19 pandemic.

Current supply shortages of medical goods and equipment are a major concern to U.S. healthcare workers, particularly the shortage of N95 respirators, considered more effective at protecting workers than other masks, such as looser fitting surgical masks. Supply chains were already strained due to tariffs on China, a main supplier of medical goods. Demand for N95 masks and other medical equipment is likely to remain high across the world.

The DPA, 50 U.S.C. §§4501 *et seq.*, was enacted during the Korean War to provide the president “an array of authorities to shape national defense preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base.” The DPA has been reauthorized over 50 times, though significant authorities were terminated from the original law in 1953. Most recently, the DPA was reauthorized in Section 1791 of the John S. McCain National Defense Authorization Act (“NDAA”), extending its provisions to September 20, 2025.

Under the DPA, the term “national defense” is not limited to matters of military conflicts, but also includes emergency preparedness conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5195 *et seq.*) The unprecedented concerns raised in respect to COVID-19 likely justify the president’s invocation of the DPA and gives the executive branch additional tools to combat the disease.

Title I – Priorities and Allocations

Among the “array of authorities” given the president are control authorities to determine priorities and allocations.

Priorities

Under Title I of the DPA, a government order can be given a priority rating, requiring the order them to be prioritized over any competing obligations, including prior commitments to commercial partners. These priority orders are referred to as “rated orders.”

Rated orders support on-time delivery of critical items and services. When a rated order is placed with a business, the business must accept the rated order if the ordered material or service is normally sold by that business; provide preferential delivery or performance against the rated order, but only if necessary to meet the delivery or performance date(s) specified in the order; and place rated orders with subcontractors and suppliers to ensure on-time delivery of the materials and services needed to support the rated order. Subcontractors and suppliers throughout the supply chain must place rated orders with their vendors to ensure on-time delivery of materials and services needed to support the original rated order.

Orders are rated either DX or DO and include a program identification symbol (PIS). All DO orders are of the same priority, but DX orders take precedence over DO orders. The PIS is important because not all federal agencies can issue rated orders for all goods or services. For example, the Federal Emergency Management Agency (FEMA) does not have authority to issue rated orders involving energy; health resources; or civil transportation. Rated orders involving those industries are under the jurisdiction of the Department of Energy (DOE), Health and Human Services (HHS) and Department of Transportation (DOT), respectively.

Allocations

The allocation authority allows the president to allocate or control materials, services, and facilities as necessary or appropriate to promote our national defense. Such allocation authority can extend to technical data to achieve technology transfer if so ordered. Allocation authority cannot be used for wage or price controls

unless accompanied by a joint resolution of Congress.

Title III – Expansion of Productive Capacity and Supply

Title III provides financial measures, such as loans, loan guarantees, purchases, and purchase commitments, to improve, expand, and maintain domestic production to support national defense and homeland security procurement requirements. Title III even allows the federal government to purchase and install equipment in plants, factories, and industrial facilities owned by private persons. Such projects are intended to increase production capacity and reduce production costs for new technologies needed for national security purposes.

DOD is the only federal agency that currently has an active Title III Program, but COVID-19 raises the distinct possibility that other agencies may use Title III authority to assist during this crisis.

Programs undertaken under Titles I and III are funded through the Defense Production Act Fund. Unless augmented by Congress, the fund is capped at \$750 million per year. The political will to take aggressive steps in response to the current pandemic greatly increases the chances that DPA funding augmentation will be passed by Congress and signed into law by President Trump.

Special Preference for Small Businesses

The DPA directs the president to give special preference to small businesses when issuing contracts under DPA authorities, instructing him to “accord a strong preference for small business concerns which are subcontractors or suppliers, and, to the maximum extent practicable, to such small business concerns located in areas of high unemployment or areas that have demonstrated a continuing pattern of economic decline, as identified by the Secretary of Labor.” To what extent the president can fulfill the small business preference aspirations of the DPA during a crisis is difficult to ascertain, but future manufacturing and supply stockpile creation may provide opportunities for small businesses on the back side of the current health and economic

crisis.

Should you need assistance addressing this or any U.S. government contracting concern, please contact one of Frost Brown Todd's experienced [government contract attorneys](#) to assist you during this unprecedented time.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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