



Defense Production Act and Rated Orders

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Executive Order 13909 (3/18/20)

Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19



- Includes finding that “health and medical resources needed to respond to the spread of COVID-19, including PPE and ventilators” meet the criteria of 50 USC 4511(b)
 - (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.
 - Finding allows for DPA Priorities and Allocations authority to be used to control distribution of said materials

Agenda

- Overview of DPA and Different DPA Authorities
- Detailed Look at DPA Title I – DPAS Rated Orders
- What to Do When You Receive a Rated Order
- Intersection between shelter in place (stay at home) orders and rates/unrated order

History of the Defense Production Act

- Based on War Powers Act (WWII), which gave Executive Branch broad authority to regulate industry during wartime
- DPA passed in 1950 in response to Korean War, has been reauthorized by Congress over 50 times
- Four of the seven titles (Titles II, IV, V, and VI), those which related to requisitioning, rationing, wage and price fixing, labor disputes, and credit controls and regulation, terminated in 1953 when Congress allowed them to lapse.

Defense Production Act (USC Title 50, Chapter 55)

Title I – Priorities and Allocations (50 USC 4511 – 4518)	Title III – Expansion of Productive Capacity and Supply (50 USC 4531-4534)	Title VII – General Provisions, Including Voluntary Agreements (50 USC 4551-4568)
<p>Require acceptance and preferential performance of contracts and orders</p> <ul style="list-style-type: none">• Priorities Authority• Allocations Authority	<p>Provide financial incentives and assistance for U.S. industry to expand productive capacity and supply needed for national defense and homeland security purposes</p> <p>Also authorizes Federal Government procurement and installation of equipment in plants, factories, and other industrial facilities owned by the Government or private persons.</p>	<p>Provide antitrust protection (through DPA voluntary agreements) for businesses to cooperate in planning and operations for national defense purposes, including homeland security.</p> <p>Allows President to stop certain M&A.</p> <p>Prohibits certain defense contractor acquisition by entities controlled by foreign governments</p>

DPA Title III Authority Basics

- Mechanisms:
 - Loans and Loan Guarantees - to reduce current/projected shortfalls of industrial resources, critical tech. items, or essential materials needed for national defense
 - *Authority has not been used in over 30 years*
 - Purchase, Purchase Commitments, and Installation of Equipment – helps create a sufficient domestic supply, or capacity to supply, of essential goods and technology in the interest of national defense
 - Purchasing or making purchase commitments of industrial resources or critical technology items
 - Making subsidy payments for domestically produced materials
 - Installing and purchasing equipment for government and privately owned industrial facilities to expand production capacity
- DPA Fund
 - Current appropriation for FY2020 -- \$64.4m
 - Proposed additional appropriation in Senate Coronavirus Bill -- \$1B (unclear if intended for Title III or for Title I DPA priority rated orders)

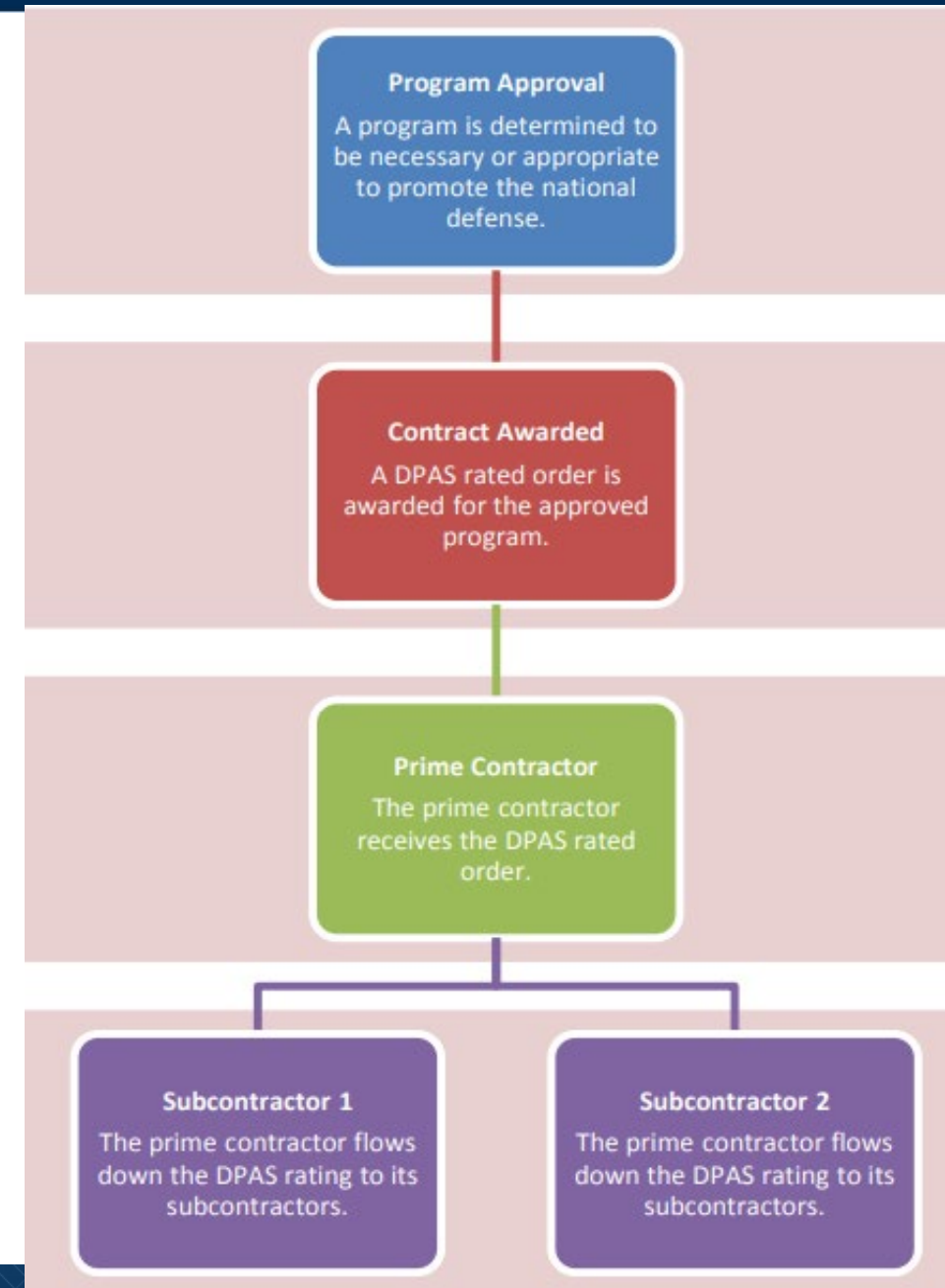
Allocations Authority Basics

- Three Types
 - Set-Aside Order
 - Requires contractor to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.
 - Directive Order
 - Requires contractor to take or refrain from taking certain actions, such:
 - stop or reduce production of an item;
 - prohibit the use of selected materials, services, or facilities; or
 - divert the use of materials, services, or facilities from one purpose to another.
 - Allotment Order
 - Specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.
- Only to be used if Priorities Authority would not suffice
- Mandatory acceptance
- *Authority has not been used since the Cold War*
- 13 CFR 700.30 – .36

DPA TITLE I – PRIORITY RATED ORDERS

Priorities Authority Basics

- In a nutshell:
 - Allows government to issue rated orders for materials and services that contractors must (with very limited exceptions) accept and prioritize over all else, with standard terms and pricing, and strict performance deadlines → prime contractors must in-turn use rated orders down through their service/supply-chain to meet requirements of the prime rated order.
- Examples
 - Most aerospace defense and weapons system orders
 - DoD places approx. 300,000 rated order per year
 - Natural disaster preparedness & recovery
 - Hurricane Maria (FEMA / DLA / USACE)
 - Re-build of electrical grid
 - Bottle water
 - COVID-19?
 - Medical supplies?
 - Healthcare construction?
 - Emergency relief?



Federal Priorities and Allocations System (FPAS)

- FPAS is body of 5 regulations implementing DPA Title I
 - Agriculture Priorities and Allocations System (APAS) [7 CFR part 789], administered by USDA with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer;
 - Energy Priorities and Allocations System (EPAS) [10 CFR part 217], administered by Department of Energy with respect to all forms of energy;
 - Health Resources Priorities and Allocations System (HRPAS) [45 CFR part 101], administered by HHS with respect to health resources;
 - Transportation Priorities and Allocations System (TPAS) [49 CFR part 33], administered by DOT with respect to civil transportation; and
 - **Defense Priorities and Allocations System (DPAS) [15 CFR part 700]**, administered by Dept. of Commerce with respect to all other materials, services, and facilities, except water resources
 - *Historically DPAS has been the most frequently used by the executive branch*
 - *Rated order regulations for HPRAS, TAP, EPA and APAS are nearly mirror DPAS in substance and procedure*
- Delegations and Redelegations

Steps Upon Receiving a Rated Order

- (1) Does it meet all requirements of a rated order?
- (2) Assess whether to accept/reject (note: most rejections must actually be phrased as conditional acceptances)
- (3) Issuing rated orders down supply/service chain
- (4) Performing rated orders
- (5) Compliance, Penalties, Protections

(1) Does it meet all requirements of a rated order?

- Must have a Priority Rating + Program ID Symbol
 - Rating Symbol
 - DX (higher priority)
 - All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders.
 - DO
 - All DO-rated orders have equal priority with each other and take precedence over unrated orders.
 - Program ID Symbol
 - do not connote any priority

Priority Ratings

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30				1. REQUISITION NUMBER	PAGE 1 OF
2. CONTRACT NO.	3. AWARD EFFECTIVE DATE	4. ORDER NUMBER	5. SOLICITATION NUMBER	6. SOLICITATION ISSUE DATE	
7. FOR SOLICITATION <input type="checkbox"/>		a. NAME	b. TELEPHONE NUMBER (No collect calls)	8. OFFER DUE DATE/ LOCAL TIME	
13a. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)			13b. RATING		
			14. METHOD OF SOLICITATION		
			<input type="checkbox"/> RFQ	<input type="checkbox"/> IFB	<input type="checkbox"/> RFP
16. ADMINISTERED BY			CODE		
TELEPHONE NO.					
17a. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER <input type="checkbox"/>			18a. SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 18a UNLESS BLOCK BELOW IS CHECKED <input type="checkbox"/> SEE ADDENDUM		
19. ITEM NO.	20. SCHEDULE OF SUPPLIES/SERVICES	21. QUANTITY	22. UNIT	23. UNIT PRICE	24. AMOUNT
(Use Reverse and/or Attach Additional Sheets as Necessary)					
25. ACCOUNTING AND APPROPRIATION DATA			26. TOTAL AWARD AMOUNT (For Govt. Use Only)		
27a. SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4, FAR 52.212-3 AND 52.212-5 ARE ATTACHED. ADDENDA <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED			27b. CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4, FAR 52.212-5 IS ATTACHED. ADDENDA <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED		
28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED			29. AWARD OF CONTRACT: REF. _____ OFFER DATED _____ YOUR OFFER ON SOLICITATION (BLOCK 5), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:		
30a. SIGNATURE OF OFFEROR/CONTRACTOR			31a. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER)		
30b. NAME AND TITLE OF SIGNER (Type or print)	30c. DATE SIGNED	31b. NAME OF CONTRACTING OFFICER (Type or print)	31c. DATE SIGNED		

(1) Does it meet all requirements of a rated order?

- Must have Required Delivery Dates
- Must have Authorized Written or Digital Signature
- Must have Certification Statement
 - DPAS: “This is a rated order certified for national defense use and you are required to follow all the provisions of the Defense Priorities and Allocations System regulations (15 CFR part 700).”
- If rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, then must have:
 - DPAS: “This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within [Insert a time limit no less than the minimum applicable time limit specified in § 700.13(d)(2)].”
 - Time period can be as little as 6 or 12 hours
- ***IF ORDER DOESN'T MEET ALL REQUIRED ELEMENTS YOU MUST REJECT (ASK FOR FIX) → YOU NEED PROPER RATED ORDER TO ISSUE RATED ORDERS DOWN CHAIN (15 CFR § 700.18)***
 - *Rated orders issued down-chain must contain all the same required elements*

(2) Assess whether to accept/reject

- Must Accept *unless* Mandatory or Optional Rejection Criteria Applies
- Conflicts with ability to meet unrated orders NEVER basis for rejection
- Mandatory Rejection
 - (1) unable to fill the order by the specified date
 - (2) acceptance would interfere with delivery of any equal or higher rated orders accepted prior to date
 - (3) if unable to fill all the rated orders of equal priority status received on the same day, must accept, based upon the earliest delivery dates, only those orders which can be filled, and reject the other orders
- All mandatory rejections require condition acceptance → must offer to accept the order based on the earliest delivery date otherwise possible

(2) Assess whether to accept/reject

- Optional Rejection
 - **(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;**
 - *Is pricing and terms and conditions consistent with comparable unrated orders?*
 - (2) If the order is for an item not supplied or for a service not performed;
 - (3) If the order is for an item produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order.
 - If, however, a supplier has sold some of these items, the supplier is obligated to accept rated orders up to that quantity or portion of production, whichever is greater, sold within the past two years;
 - (4) If the person placing the rated order, other than the U.S. Government, makes the item or performs the service being ordered;
 - (5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of the Department of Commerce issued under the authority of the Defense Production Act or the Selective Service Act and related statutes [See § 700.75].
- *Optional Rejections do not require conditional acceptance, but would be wise nevertheless if rejecting under #1*

(2) Assess whether to accept/reject

- What if you are not the end supplier or service provider?
 - Immediately reach out to supply chain to confirm whether they can meet delivery commitment (explain rated order priority implications), and if not why/when
 - Can start issuing rated orders to service/supply chain as soon as you *receive* a rated order (700.18), or sooner if authorized under 700.51(c)
 - Provide clear written notice/guidance to subs/supply-chain that this involves a rated order, and what that means (Cover Letter)
- What if you cant find supplier to meet requirement?
 - Must use inventory if available
 - Special Priorities Assistance

(2) Assess whether to accept/reject

- Time to Accept or Reject
 - DO: 15 working days after receipt
 - DX: 10 working days after receipt
 - Less time if specified as a emergency preparedness expedited order
- Mandatory Rejection bases require conditional acceptances

(3) Issue rated orders down supply/service chain

- Contractor must use rated orders with suppliers to obtain items needed to fill a rated order.
 - Same priority rating flows down (unless exception applies or otherwise legally directed)
- Subs/supplies must flow-rated orders down entire supply chain

(3) Issue rated orders down supply/service chain

- Contractor working on a rated order must use rated orders to obtain:
 - (1) Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed, or converted into scrap or by-products, in the course of processing;
 - (2) Containers or other packaging materials required to make delivery of the finished items against rated orders;
 - (3) Services, other than contracts of employment, needed to fill rated orders; and
 - (4) MRO needed to produce the finished items to fill rated orders.

(3) Issue rated orders down supply/service chain

- Contractor may also use a DO rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, but the rated order must be placed within 90 days of the date of use of the inventory.
- Contractor can (and sometimes must) combine rated and unrated orders to subs/supplies (special rules apply)
- Contractor may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum (but must combine rated orders, if possible, to obtain minimum procurable quantities)
- A person is not required to place a priority rating on an order for less than \$75,000, or one half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulation (FAR)) (see FAR section 2.101), whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

(3) Issue rated orders down supply/service chain

- Rated (sub-)orders may not be used to obtain:
 - (i) Delivery on a date earlier than needed;
 - (ii) A greater quantity of the item than needed, except to obtain a minimum procurable quantity;
 - (iii) Items in advance of the receipt of a rated order, except as specifically authorized by the Department of Commerce (see § 700.41(c) for information on obtaining authorization for a priority rating in advance of a rated order); or
 - (iv) Any of the following items unless specific priority rating authority has been obtained from a Delegate Agency or the Department of Commerce:
 - (A) Items for plant improvement, expansion or construction, unless they will be physically incorporated into a construction project covered by a rated order; or
 - (B) Production or construction equipment or items to be used for the manufacture of production equipment (for information on requesting priority rating authority, see § 700.41).
 - (v) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense.

(4) Performing rated orders

- Contract mods to add a rating
- Preferential scheduling
- Conflicting Rated Orders of Equal Priority Rating
- Customer Notifications After Acceptance
- Special Priorities Assistance

Contract Mods to Make an Order Rated

- If an unrated order is amended so as to make it a rated order, or a DO, rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.
- A person adding a rating to an unrated order, or changing or cancelling a priority rating must promptly notify all suppliers to whom the order was sent of the addition, change or cancellation.

Preferential scheduling

- Contractor must schedule operations, including the acquisition of all needed production items, in a timely manner to satisfy the delivery requirements of each rated order.
- Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.
- Rated orders must be given production preference over unrated (or lower rated) orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery against unrated (or lower rated) orders

Conflicting Rated Orders of Equal Priority Rating

- If Contractor finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, contractor shall give preference to the conflicting orders as follows:
 - (1) first by delivery deadline
 - (2) second by order receipt date
- Contractor unable to resolve conflicts under this section, should promptly seek Special Priorities Assistance

Customer Notifications After Acceptance

- If a contractor has accepted a rated order and subsequently finds that shipment or performance will be delayed, the contractor must notify the customer (or contractor up-chain) immediately, give the reasons for the delay, and advise of a new shipment or performance date. If notification is given verbally, written (hard copy) or electronic confirmation must be provided within one working day of the verbal notice.

Special Priorities Assistance

- SPA may be provided for any reason in support of DPAS regulation
- Request should be promptly made to Delegate Agency (through the Contract Administration Office), and may be elevated to Dept of Commerce
- Request must be:
 - Timely
 - Establish urgent need
 - Applicant has made reasonable effort to resolve problem
- Request can be made by anyone in the rated order chain

Special Priorities Assistance

- SPA in form of Request for Priority Rating Authority
 - Request SPA to obtain items using rated sub-orders that normally are not rated
 - Production/construction equipment
 - Items for plant facilities improvement/expansion
 - Request to issue rated sub-orders in advance of receiving a prime rated order
 - *Specific form to use for these requests*

Special Priorities Assistance

- Examples where SPA may be provided:
 - Contractor is experiencing difficulty in obtaining delivery against a rated order by the required delivery date
 - Contractor cannot locate a supplier for an item needed to fill a rated order
 - Contractor needs assistance ensuring that rated orders receive preferential treatment by suppliers
 - Resolution production or delivery conflicts between various rated orders
 - Assisting in placing rated orders with suppliers
 - Verifying the urgency of rated orders
 - Determining the validity of rated orders

Special Priorities Assistance

- SPA will not be provided to:
 - Secure a price advantage;
 - Obtain delivery prior to the time required to fill a rated order;
 - Gain competitive advantage;
 - Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or
 - Overcome a supplier's regularly established terms of sale or conditions of doing business.

(5) Compliance/Penalties/Protections

- Compliance/Penalties
 - Subject to audits/investigations at Government's election, failure to comply may be a criminal act (15 CFR 700.71 - .73)
 - Willful violation of the provisions of Title I or Sections 705 or 707 of the DPA is a crime, with max. penalty \$10,000 fine / 1 year in prison (15 CFR 700.71, .74)
 - Govt may obtain injunctive relief from court to prohibit violation of, or to enforce compliance with, the DPA

(5) Compliance/Penalties/Protections

- Protections
 - Protection against claims related to DPAS implementation is outlined in 15 CFR § 700.90:
 - A company shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with the DPAS or official DPAS action.

Additional Resources

- [DoD Priorities and Allocation Manual, DoD 4400.1-M \(2018 Update\)](#)
- [DPAS Regulations](#)
- [Defense Production Act \(50 USC chapter 55\)](#)

Questions

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