

On March 18, 2020, President Trump issued an Executive Order on prioritizing and allocating health and medical resources to respond to the spread of COVID-19 in the US, citing the *Defense Production Act of 1950* (DPA), as amended (50 U.S.C. 4501 *et seq.*).

The DPA, which confers on the President, and his administration, a broad set of authorities to ensure domestic industry can meet national defense requirements, has been used routinely by the Department of Defense (DoD), Department of Homeland Security (DHS) and Federal Emergency Management Agency (FEMA) to acquire spare parts, protective equipment and supplies to ensure readiness, especially in times of natural disasters. Contrary to some media reports, a federal agency's use of the DPA does not require a declaration of national emergency. The President made his announcement specifically to respond to the need for medical supplies to address the COVID-19 pandemic.

Enacted on September 8, 1950 under Pub. L. 81-774, the DPA defines national defense to include "emergency preparedness activities conducted pursuant to Title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration." 50 U.S.C. §4552(14) and was reauthorized, until September 30, 2025, in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, P.L. 115-232. It, however, lies within the legislative jurisdiction of the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs.

DPA authorities are generally conferred to the President, who then delegates these authorities to department and agency heads under Executive Order 13603.<sup>1</sup> Title I of the DPA specifically outlines the President's ability to require persons (including businesses and corporations) to prioritize and accept contracts for materials and services as necessary to promote the national defense. Further, the President may use authorities under Title III of the DPA to provide appropriate financial incentives for the domestic industrial base to develop materials and goods necessary for the national defense.

<sup>1</sup> The Secretary of Defense makes determinations related to military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by DoD, space, and directly related activities; the Secretary of Energy makes determinations related to energy production and construction, distribution and use, and directly related activities; and the Secretary of Homeland Security makes determinations related to all other defense programs, including civil defense and continuity of government.

The Secretary of Homeland Security routinely transfers authority to other Cabinet Secretaries based upon areas of expertise.

50 U.S.C. §4517. Authorized incentives under Title III include loans, loan guarantees, direct purchases and purchase commitments, and the authority to procure and install equipment in private industrial facilities.

In the nation's emergency response to the coronavirus outbreak, FEMA, as the agency responsible for the Federal Priorities and Allocations System (FPAS), has a prominent role since the President named it the lead agency for the war against COVID-19. The FPAS is a body of regulations that establishes standards and procedures for implementing the President's priorities authority under Section 101(a) of the DPA relative to agriculture, energy, health resources, transportation and defense. Each of those priority and allocation systems are administered by US Department of Agriculture (USDA), Department of Energy (DOE), Department of Health and Human Services (HHS), Department of Transportation (DOT) and Department of Commerce (DOC), respectively.

In this case, the President cited his authority under the DPA to delegate to head of HHS the ability to require performance of contracts to promote the national defense over performance of any other contracts to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, with respect to all health and medical resources needed to respond to the spread of COVID-19 within the US.

Also, under his executive order, the head of HHS may, in consultation with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, determine the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials in the civilian market, for responding to the COVID-19 outbreak.

Of particular relevance to the COVID-19 outbreak, the Defense Priorities and Allocations System (DPAS) regulation (15 C.F.R. Part 700) implements the Title 1 priorities and allocations authority contained in the DPA of 1950, that has been delegated to the DOC. After a brief background, DPAS processes and requirements are outlined below.

## DPAS Background

The primary purpose of DPAS is to ensure the timely availability of industrial resources to meet national defense and emergency preparedness requirements of the US government. DPAS is used to prioritize national defense-related contracts/orders throughout the US supply chain in order to support such areas as military programs, energy programs, homeland security, emergency preparedness and critical infrastructure.

DPAS provides the authority to US government agencies, as well as prime contractors and subcontractors, to order priority performance and delivery on contracts and orders as well as to allocate materials to meet national security requirements.

There are two levels of priority established by this regulation, identified by the rating symbols "DO" and "DX." All DX-rated orders take preference over DO-rated orders and unrated orders.

Any person who places or receives a rated order is required to be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation. Willful violation of the provisions of the DPA is a crime and, upon conviction, a person may be punished by a fine or imprisonment or both. The maximum penalty provided by the DPA is a \$10,000 fine and one year in prison.

## Requirements Upon Receiving a Rated Order

### A. Review the Order

Any contract or purchase order you receive should contain language indicating that it is rated and a priority rating (i.e., DX or DO) should be given. When you receive a rated contract or order, check to make sure you identify the **four** key elements of a rated order:

- Priority rating (e.g. DO-A1, DX-A4, DO-H1)
- Required delivery date(s) ("immediately," "as soon as possible" or words to that effect do not constitute a delivery date)
- Authorized written or digital signature of an individual authorized to sign rated orders for the person placing the order
- Certification statement as follows: "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 regulation (15 C.F.R. part 700)"

See 15 C.F.R. § 700.12.

A person may not place a DO- or DX-rated order unless entitled to do so under the DPAS regulation. 15 C.F.R. § 700.18. Rated orders may not be used to obtain delivery on a date earlier than needed, a greater quantity of the item than needed or items in advance of the receipt of a rated order, unless the Department of Commerce specifically authorizes an exception.

### B. Notify the Customer

Once you have identified that you have received a rated order, you must either accept or reject a rated order and transmit the acceptance or rejection in writing (hard copy), or in electronic format, within 15 working days after receipt of a DO-rated order and within 10 working days after receipt of a DX-rated order. 15 C.F.R. § 700.13. If the order is rejected, the person must also provide the reasons for the rejection in writing (hard copy) or electronic format.

A company receiving a rated order has one of three possible courses of action:

- **Mandatory Acceptance** (15 C.F.R. § 700.13(a)) – Any company in the US must accept and fill a rated order regardless of any other rated or unrated orders that have been accepted. A company may not discriminate against rated orders in any manner, such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders. If a company accepts a rated order, the company must meet the requirements of that rated order, such as delivery date.
- **Mandatory Rejection** (15 C.F.R. § 700.13(b)) – A company may not accept a rated order delivery on a specific date if it is unable to meet that date. However, the company must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. The existence of previously accepted unrated or lower rated orders is not sufficient reason for rejecting a rated order.
- **Optional Rejection** (15 C.F.R. § 700.13(c)) – A company may reject a rated order in any of the following cases, as long as it does not discriminate among customers:
  - If the customer placing the order is unwilling or unable to meet regularly established terms of sale or payment.
  - If the order is for an item not supplied or a service not performed.
  - If the order is for an item produced, acquired or provided only for the company's own use for which no orders have been filled for two years prior to the date of the receipt of the rated order. If, however, the company has sold some of these items, it must accept rated orders up to the quantity or portion of production, whichever is greater, sold within the past two years.
  - If the customer placing the order, other than the US government, makes the item or performs the service being ordered.

### C. Prioritize the Rated Orders

Once the rated order is accepted, you must note the rating and input that information in the company's business process/order system so tracking of that order is done.

You 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.

DO-rated orders must be given production preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery against unrated orders. Similarly, DX-rated orders must be given preference over DO-rated orders and unrated orders.

## D. Additional Requirements for Certain Emergency Preparedness Rated Orders

If a rated order is placed for emergency preparedness purposes, the expedited action is necessary or appropriate to meet such emergency preparedness requirements, and the below mandatory statement is included, the order must be accepted or rejected and the decision must be transmitted in writing or in an electronic format within the time specified in the order. 15 C.F.R. § 700.13(d)(2).

The mandatory statement to be included is as follow:

**“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)].”**

See 15 C.F.R. § 700.12(b).

The minimum time for acceptance or rejection of an emergency preparedness rated order is six hours after receipt of the order if the order is issued by an authorized person in response to a hazard that has occurred, or 12 hours after receipt if the order is issued by an authorized person to prepare for an imminent hazard. 15 C.F.R. § 700.13(d)(2).

## DPAS Record Keeping Requirements

You are required to make and preserve, for at least three years, accurate and complete records of any DPAS rated order transaction for examination on demand by duly authorized representatives of the US Department of Commerce. Such records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of the DPAS Regulation or any official action. However, the DPAS Regulation does not specify any particular method or system to be used. See 15 C.F.R. §700.91.

## DPAS Contractor Protections

DPAS requires a contractor to prioritize performance of rated government contracts over other non-rated government orders and commercial contracts. However, DPAS provides protections for contractors against certain liabilities. In particular:

**“a person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.”**

15 CFR § 700.90. Whether actions or inactions of a contractor are protected from liability under DPAS is specific to the circumstances.

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