



Defense Production Act & COVID-19

To spur the production of critically needed medical supplies, President Trump announced he would invoke the Defense Production Act (DPA) on Wednesday, March 18, 2020. The law, passed in 1950 as a response to the Korean War and based on the War Powers Act of World War II, gives the President a broad set of powers to influence domestic industry in the interest of national defense.

Background

Congress has gradually expanded the definition of national defense under the DPA and it has been invoked multiple times since passed to help the federal government for a range of emergencies including war, hurricanes and terrorism prevention. Some past examples of use of the act include in 2001 when both President Bill Clinton and George W. Bush invoked the act to ensure that emergency supplies of electricity and natural gas was supplied to California helping to avoid electrical blackouts. In 2017, President Trump invoked the DPA to prioritize contracts for food, bottled water, and manufactured housing for victims of the hurricane in Puerto Rico. Just last year, Trump again used the DPA to spur the production of rare-earth magnets used in consumer electronics, military hardware and medical research amid concern of export restrictions by China.

The DPA gives the federal government the ability to require companies to accept and prioritize government contracts and orders for services and materials necessary to aid in the fight against COVID-19. It also authorizes the President to use incentives such as loans and direct purchases for the critical materials.

Process

The federal government uses the Federal Priorities and Allocation System (FPAS) to issue priority orders under DPA. These priority orders are rated either "DO" or "DX." Most rated orders are designated as DO. However, between the priority ratings, DX rated orders take precedence over DO orders.

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 and the business can meet the specified delivery requirements. Upon acceptance, the business must provide priority treatment ahead of other customers to fulfill the order, if necessary, to meet the government's specified delivery or performance dates. The government can also prioritize contracts between two private companies, such as a prime contractor and a subcontractor, if needed to fulfill a priority contract under the DPA. Subcontractors and suppliers, in turn, must place rated orders with their vendors and suppliers, and so on throughout the entire supply chain to ensure on-time delivery of materials and services needed to support the original rated order.

A business may reject a rated order, but only if it is unable to fulfill the delivery requirements. The business must then, however, inform the customer of the earliest date when delivery of the order could be made and offer to accept the order based on that delivery date.

Orders are issued by contracting officers through the GSA to businesses registered to contract with the federal government. Payment is handled just like any government contract, the only difference in the order is the priority rating.

Companies do not have to prove that they are charging the same amount, however, discrimination against rated orders such as charging higher prices or placing different terms and conditions vs an unrated order, is considered a violation of the act and could carry the fine and prison term punishment.

Willful failure to comply is a criminal violation and is punishable by a \$10,000 fine, one year in prison, or both.