

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2561 Rayburn House Office Building  
Washington, DC 20515-6515

**MEMORANDUM**

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**TO:** Members, Subcommittee on Contracting and Infrastructure  
**FROM:** Jared Golden, Chairman  
**RE:** Subcommittee Hearing: “An Overview of the Dynamic Between the Defense Production Act and Small Contractors.”  
**DATE:** June 24, 2020

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The Committee on Small Business Subcommittee on Contracting and Infrastructure will convene for a remote hearing titled, “An Overview of the Dynamic Between the Defense Production Act and Small Contractors.” The hearing is scheduled for **Wednesday, June 24, 2020, at 1:00 p.m. and will be conducted through WebEx.** The hearing will provide an overview of the Defense Production Act and its authorities, including those that relate to small businesses. It will also examine how those authorities could be leveraged to assist small firms affected by the COVID-19 pandemic and what legislative actions could be taken to strengthen the DPA on behalf of our small business industrial base.

The witnesses for this hearing are:

- Mr. Ian Patterson, Senior Associate, Koprince Law, Lawrence, KS
- Mr. David Black, Partner, Holland & Knight, Tysons, VA
- Ms. Mary Lockhart, President & CEO, PEMDAS Technologies & Innovations-  
\*Testifying on behalf of the National Defense Industrial Association (NDIA), Small Business Division
- Ms. Traci Tapani, Co-President, Wyoming Machine, Inc., Stacy, MN

**Background**

On March 18, 2020, the President first invoked the Defense Production Act (DPA) to address the shortages of medical equipment and supplies needed to respond to the COVID-19 pandemic.<sup>1</sup> Since then, there has been a lot of conversations surrounding the DPA and the role it should play in the relief and recovery efforts.

**The Defense Production Act**

The DPA confers the President with a series of authorities to mobilize the domestic industrial base for purposes of national defense.<sup>2</sup> The law was first enacted in 1950 in response to the

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<sup>1</sup> The Hill, *Trump Invokes the Defense Production Act as Coronavirus Response (Mar 2020)*, available at: <https://thehill.com/policy/healthcare/488226-trump-in-vokes-defense-production-act-as-coronavirus-response>

<sup>2</sup> 50 U.S.C. §§4501 et seq.

Korean War.<sup>3</sup> Originally, it included seven titles, four of which expired in 1953. The remaining three (Title I, III and VII) have been reauthorized on numerous occasions.<sup>4</sup>

Under the DPA, the term “national defense” includes military and energy programs, homeland security, stockpiling, space, and emergency preparedness activities under the Stafford Act.<sup>5</sup> Given its broad definition, it extends to public health emergencies such as the COVID-19 pandemic.<sup>6</sup>

The next sections aim to describe some of the authorities of the DPA. It does not represent an exhaustive list of authorities.

### **Title I - Priorities and Allocations**

For purposes of promoting national defense, under Sec 101(a) of Title I, the President is authorized to:

- require businesses to prioritize government contracts or orders (other than contracts of employment) over the performance of any other contract or order;
- require acceptance of contracts or orders for purposes of ensuring such prioritization and;
- allocate or distribute materials, services, and facilities in the manner, terms or extent needed.<sup>7</sup>

#### *Delegation of Title I Authorities*

Through E.O. 13603,<sup>8</sup> the priorities and allocations authority was delegated to six agency heads based upon their area of expertise.<sup>9</sup> To make use of the authority, there needs to be a determination in writing first that the program “is necessary or appropriate to promote national defense.”<sup>10</sup> Moreover, E.O. 13603 requires the six Secretaries to issue regulations establishing standards and procedures to implement Title I authorities.<sup>11</sup> Five Secretaries have done so and, in conjunction, these regulations are known as Federal Priorities and Allocations System (FPAS).<sup>12</sup>

In practice, the priority authority held by a Cabinet Secretary can be used by other agencies.<sup>13</sup> For example, the Department of Defense (DOD) frequently issues priority contracts and orders

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<sup>3</sup> MICHAEL CECIRE & HEIDI PETERS, CONG. RESEARCH SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES AND CONSIDERATIONS FOR CONGRESS (2020) [hereinafter CRS R43767].

<sup>4</sup> CRS R43767

<sup>5</sup> 50 U.S.C. §4552(14); Section 702(14) of the DPA

<sup>6</sup> MICHAEL CECIRE & HEIDI PETERS, CONG. RESEARCH SERV., IN11231, THE DEFENSE PRODUCTION ACT (DPA) AND COVID-19: KEY AUTHORITIES AND POLICY CONSIDERATIONS (2020) [hereinafter CRS IN11231].

<sup>7</sup> 50 U.S.C. §4511(a); Section 101(a)

<sup>8</sup> Exec. Order No. 13603, 77 Fed. Reg. 16651 (March 22, 2012) [hereinafter E.O. 13603].

<sup>9</sup> Section 201(a) of E.O. 13603. For example, the Secretary of Transportation holds the authority with respect to all forms of civil transportation. The 5 other secretaries are: The Secretary of DOD, the Secretary of HHS, the Secretary of Energy, the Secretary of Commerce and the Secretary of Agriculture.

<sup>10</sup> Section 202 of E.O. 13603. This determination is done by the Secretary of Defense, the Secretary of Energy or the Secretary Homeland Security, depending on the issue.

<sup>11</sup> Section 201(b) of E.O. 13603

<sup>12</sup> CRS R43767.

<sup>13</sup> CRS R43767.

typically using the delegation of authority provided by Department of Commerce (DOC) and pursuant to DOC's regulations known as Defense Priorities and Allocations System (DPAS).<sup>14</sup>

### *Application of Title I Authorities to the COVID-19 Pandemic*

On March, the President issued E.O. 13909, invoking and thereby, making available the priority and allocations authority in Title I.<sup>15</sup> Under E.O. 13909, those authorities were delegated to the Secretary of Health and Human Services (HHS) so they could be used in response to the COVID-19 pandemic.<sup>16</sup> This delegation of authority was consistent with E.O. 13603 as it is with respect to health resources.<sup>17</sup> Through a posterior executive order, E.O. 13911, Title I authorities were also delegated to the Secretary of Homeland Security.<sup>18</sup> The first DPA-rated contract issued in response to the COVID-19 emergency was a \$489.4 million HHS contract awarded to GM. The extent to which small businesses are participating in priority-rated contracts or orders as primes or subcontractors is unclear. However, the priority rating can be flow-down to subcontractors, therefore it is likely that small businesses are supporting priority-rated contracts in this role.

### **Title III - Expansion of Productive Capacity and Supply**

Title III authorities provide economic incentives to create, maintain, restore and expand the domestic production and supply of goods that are necessary for national defense.<sup>19</sup> In particular, Section 301 and 302 authorize the issuance of loans and loan guarantees, to reduce the shortfall of industrial resources, critical technologies, or essential materials necessary for national defense."<sup>20</sup>

Similarly, Section 303 seeks to create, maintain, expand or restore industrial base capabilities essential for the national defense through various presidential authorities. Some of those authorities include:

- purchasing or committing to purchase for government use or resale;<sup>21</sup>
- provide subsidy payments for certain domestically produced materials, and;<sup>22</sup>
- procuring and installing equipment in government or privately-owned industrial facilities.<sup>23</sup>

The authorities under Section 301, 302 and 303 are subject to multiple restrictions and to making certain determinations first. For example, for the purchasing or committing to purchase authority, the President must first determine, on non-delegable basis, that there is an industrial shortfall,

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<sup>14</sup> CRS R43767.

<sup>15</sup> Exec. Order No. 13909, 85 Fed. Reg. 16227 (March 18, 2020) [hereinafter E.O. 13909].

<sup>16</sup> E.O. 13909.

<sup>17</sup> MICHAEL CECIRE & HEIDI PETERS, CONG. RESEARCH SERV., IN11280, COVID-19: INDUSTRIAL MOBILIZATION AND DEFENSE PRODUCTION ACT (DPA) IMPLEMENTATION (2020) [hereinafter CRS IN11280].

<sup>18</sup> Exec. Order No. 13911, 85 Fed. Reg. 18403 (March 27, 2020) [hereinafter E.O. 13911].

<sup>19</sup> 50 U.S.C. §4517; Section 107(a). See also: CRS R43767.

<sup>20</sup> 50 U.S.C. §4531(a)(1); Section 301(a)(1) and 50 U.S.C. §4532(a); Section 302(a).

<sup>21</sup> 50 U.S.C. §4533(a)(1)(A); Section 303(a)(1)(A).

<sup>22</sup> 50 U.S.C. §4533(c)(2); Section 303(c)(2).

<sup>23</sup> 50 U.S.C. §4533(e)(1); Section 303(e)(1).

providing notification to Congress.<sup>24</sup> One of the instances in which this presidential finding is waived, is when a national emergency has been declared.<sup>25</sup>

### Delegation of Title III Authorities

E.O. 13036 delegates most of the authorities under Sections 301, 302 and 303 to those secretaries involved in procurement for the national defense.<sup>26</sup> As such, they are able to make all the determinations not explicitly required from the President in the DPA.<sup>27</sup>

### Application of Title III Authorities to the COVID-19 Pandemic

With respect to COVID-19, many of the determinations that would precede the usage of these authorities are not required given the statutory waiver that exempts these determinations in times of a declared emergency which is the current state. Moreover, under the CARES Act, Congress waived other requirements that would be needed before using these authorities.<sup>28</sup>

The President invoked Title III authorities in E.O. 13911 and delegated such authorities to the HHS and Homeland Security Secretaries.<sup>29</sup> Most recently, Title III authorities were delegated to the Chief Executive Officer of the International Development Finance Corporation through E.O. 13922.<sup>30</sup> On April 21, 2020, it was announced that the first Title III COVID-19 project for masks had been awarded to three large firms.<sup>31</sup>

### DPA Fund

The DPA establishes a separate fund, known as the Defense Production Act Fund (DPA Fund), to implement the provisions and incentives of Title III.<sup>32</sup> The Act requires the President to designate a Fund Manager, which pursuant to E.O. 13603, is the Secretary of Defense.<sup>33</sup> While the Fund is technically available to all agencies, in practice it has worked as a DOD account.<sup>34</sup> The CARES Act appropriated \$1 billion for the DPA Fund.<sup>35</sup> Recently, it was reported<sup>36</sup> that DOD plans to spend \$312 million of it to expand production capacity of COVID-19 medical supplies and \$688 million to invest in the defense industrial base.<sup>37</sup>

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<sup>24</sup> 50 U.S.C. §4533(a)(5); Section 303(a)(5) and 50 U.S.C. §4533(a)(6); Section 303(a)(6).

<sup>25</sup> 50 U.S.C. §4533(a)(7); Section 303(a)(7)

<sup>26</sup> See Title III of E.O. 13603.

<sup>27</sup> See Section 305 of E.O. 13603.

<sup>28</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136 (2020).

<sup>29</sup> E.O. 13911

<sup>30</sup> Exec. Order No. 13922, 85 Fed. Reg. 30583 (May 14, 2020) [hereinafter E.O. 13922].

<sup>31</sup> Department of Defense, *DOD Details \$133 Million Defense Production Act Title III COVID-19 Project* (Apr. 2020), available at: <https://www.defense.gov/Newsroom/Releases/Release/Article/2158351/dod-details-133-million-defense-production-act-title-3-covid-19-project/>

<sup>32</sup> 50 U.S.C. §4534(a); Section 304(a)

<sup>33</sup> 50 U.S.C. §4534(f); Section 304(f) and Section 309 of E.O. 13603.

<sup>34</sup> MICHAEL CECIRE & HEIDI PETERS, CONG. RESEARCH SERV., IN11387, COVID-19: DEFENSE PRODUCTION ACT (DPA) DEVELOPMENTS AND ISSUES FOR CONGRESS (2020) [hereinafter CRS IN11387].

<sup>35</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136 (2020).

<sup>36</sup> Inside Defense, *DOD Details Spending Plans for \$10.5B in COVID-19 Relief Funds (May 2020)*, available at: <https://insidedefense.com/daily-news/dod-details-spending-plan-105b-covid-19-relief-funds>

<sup>37</sup> See CRS IN11387.

## **Title VII- General Provisions**

### **Small Business Preferences**

Section 701 establishes a small business preference in contracts and subcontracts issued pursuant to the DPA.<sup>38</sup> In particular, it states that “small business concerns shall be given the maximum practicable opportunity to participate as contractors, and subcontractors at various tiers, in all programs to maintain and strengthen the Nation’s industrial base and technology base undertaken pursuant to this Act.”<sup>39</sup> This provision complements and builds upon Section 108 of Title I that requires the President 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” when providing assistance under the DPA.<sup>40</sup> With these two provisions, the DPA provides preferential treatment to small businesses in all of its authorities. Additionally, Section 701(d) establishes that all information relative to the DPA and to DPA activities must be made available to small businesses.<sup>41</sup>

In general, and with respect to the COVID-19 efforts, it is unclear how agencies are complying with the small business provisions of the DPA. Certainly, standing regulations such as FPAS (which relate to Title I authorities only) do not seem to provide guidance on how to appropriately apply the small business preference. It is also unclear what information about DPA activities is being made available to small businesses.

When it comes to applying the small business preference to Title I authorities, it is important to realize that not all small businesses are in a position to handle a priority-rated contract given their limited resources. Thus, any effort to encourage participation should strike the right balance between ensuring small business inclusion and ensuring their well-being. With that said, there are real opportunities to apply the small business preference to Title III authorities.

### **DPA Committee and Report**

Section 722 of Title VII establishes the Defense Production Act Committee (DPAC).<sup>42</sup> DPAC is a multiagency committee first created through the 2009 reauthorization of the DPA to advise the President on the effective use of all DPA authorities.<sup>43</sup> However, since then, its scope has been narrowed. Currently, DPAC is only tasked with coordinating and planning for the effective use of the priorities and allocations authority in Title I.<sup>44</sup> DPAC must annually issue a report to Congress pertaining to the use of the priorities and allocations authority.<sup>45</sup>

### **Policy Considerations**

When it comes to the COVID-19 efforts, it is unclear how and to what extent the small business preferences in the DPA will play a role, particularly when it comes to Title III programs and funding. Thus, Congress may want to inquire with the pertinent agencies how do they intend to

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<sup>38</sup> CRSR43767.

<sup>39</sup> 50 U.S.C. §4551(a); Section 701(a)

<sup>40</sup> 50 U.S.C. §4518(a); Section 108(a).

<sup>41</sup> 50 U.S.C. §4551(d); Section 701(d).

<sup>42</sup> 50 U.S.C. §4567(a); Section 722(a).

<sup>43</sup> CRSR43767.

<sup>44</sup> 50 U.S.C. §4567(a); Section 722(a).

<sup>45</sup> 50 U.S.C. §4567(d); Section 722(d).

comply with this mandate. There are also opportunities to strengthen the DPA for the benefit of small firms. For example, Congress could require agencies to promulgate regulations regarding DPA Title III implementation to address the application of the “strong preference” for small firms. In addition, Congress could require DPAC to collect data about small business participation in Title III funding or to address how information relative to DPA activities is being shared with small firms. Finally, Congress may want to direct DPAC to create a small business subcommittee to advise on how to increase small business participation in DPA programs and funding.

### **Conclusion**

As the country deals with the COVID-19 pandemic and small business struggle to stay afloat, it is essential for the Federal Government to utilize the tools at its disposal, like the DPA, which can offer significant relief. While it has been used on limited occasions for the COVID-19 pandemic, it is foreseeable that its authorities will keep being leveraged in the days to come. Thus, it is important to ensure small business participation, particularly when it comes to Title III authorities, to guarantee the Federal government will have the necessary supplies it needs and to preserve and protect the industrial base. Through this hearing, members will gain and understanding of the DPA framework, its application to COVID-19 efforts and steps that can be taken to strengthen the statute.