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At the Hearing Entitled

**"An Overview of the Dynamic Between the Defense Production Act
and Small Contractors"**

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1:00 p.m.**

**Before the
House Committee on Small Business,
Subcommittee on Contracting and Infrastructure**

Thank you Chairman Golden, Ranking Member Stauber and Members of the Subcommittee for the opportunity to submit written testimony regarding the An Overview of the Dynamic Between the Defense Production Act and Small Contractors.

I am a government contracts attorney in the law firm of Holland & Knight LLP, where I have worked since 1998. I am Co-Chair of the Firm's National Government Contracts Team. I work in the Firm's Tysons, Virginia, office. In my practice, I provide advice and representation on a full range of issues, matters, and disputes encountered by small and mid-tier Federal contractors and subcontractors through every stage of growth. I serve contractors in a broad array of industries, with an emphasis on innovative technology, cutting-edge products, professional services, healthcare, and research and development. Many of my clients participate in small business contracting programs as either a prime contractor or subcontractor. I also advise clients regarding participation in various authorities and programs under the Defense Production Act, including priority rated orders under Title I and Federal investments to build production capacity under Title III. It is a privilege to provide some perspective today from this part of the small business contracting community.

I. Executive Summary

We are here today because the coronavirus pandemic has highlighted the importance of ensuring that the authorities under the Defense Production Act of 1950 (the DPA),

effectively promote the participation of small businesses in the broader effort to ensure necessary capacity and production of materials critical to national defense.

In seeking to engage small businesses under the DPA, the authorities that are the subject of my testimony include small business preferences and other direction to maximize small business opportunities under DPA activities. However, in some cases the statutory requirements lack direction on implementation. The effectiveness of these small business authorities is also hindered by a lack of organized data collection and reporting. The result is that the authorities of the DPA intended to assist small businesses are largely underutilized.

To enhance the effectiveness of the existing small businesses authorities under the DPA, the following changes are recommend:

1. Information Regarding Implementation of the “Strong Preference” for Small Businesses in Providing Assistance Under Title III

Congress should expand the scope of the DPA Committee activities under 50 U.S.C. § 4567 to include reporting on information concerning efforts to provide the “strong preference” for small businesses under Title III awards, as required under section 4518(a). In its annual report, the DPA Committee should report all Title III awards, including awards to small businesses. The DPA Committee should report on the status of procedures implemented by agencies to provide the “strong preference” for small business in providing Title III assistance.

2. Establishment of Procedures to Apply the Title III Small Business Preference

Congress should require agencies to issue regulations relative to how they will apply Title III’s strong preference for small businesses, required under section 4518(a), for purposes of Title III assistance.

3. Establish a Small Business Advisory Subcommittee that Includes Small Business Concerns under 50 U.S.C. 4551(c)

Congress should direct the DPA Committee to establish a “Small Business Participation Advisory Subcommittee” to provide annual recommendations on how to increase small business participation in DPA orders and promote the strong preference for small businesses under Title III funding.

4. Require Information on How Agencies are Making Information About DPA Activities Available to Small Businesses under 50 U.S.C. 4551(d)

Congress should require the DPA Committee to address how the information required under 50 U.S.C. § 4551(d), concerning the DPA and activities undertaken in accordance with the DPA, is made available to small business concerns.

5. Require Data Collection Under the Federal Procurement Data System (FPDS) Regarding the Use of DPA Title I Priority Rated Orders

When entering data into the Federal Procurement Data System (FPDS), Congress should direct federal agencies to list the priority rating (DX or DO) and the program identification symbol for all rated orders placed under the DPA, including awards placed with small and other-than-small businesses. Congress should direct that such information be publicly available through a computer-based FPDS for collecting, developing, and disseminating procurement data to the Congress, Executive Branch, and private sector, currently the Federal Procurement Data System-Next Generation.

II. Introduction

The DPA confers broad authorities upon the President over the means of production in the United States economy when deemed necessary to promote the national defense. In its current form, the DPA statute retains three of its original seven titles, Titles I, III, and VII. Titles I and III include a number of key provisions relevant to small businesses. Title I allows for the President to prioritize certain orders over others, to allocate certain materials, services, and facilities, and prevent the hoarding of certain goods. Most commonly, Title I is utilized to place priority orders, which are called rated orders. DPA Committee annual reports note that the Department of Defense utilizes the authorities

under Title I approximately 300,000 times annually. Title III authorizes the President to arrange for loan guarantees, direct loans, purchase commitments, and other financial mechanisms to encourage increased production including the purchase of manufacturing equipment.

Congress has long recognized the importance of small businesses to support production for national defense, particularly when mobilizing capacity in times of war. During World War II the need for goods and services critical to the war mobilization effort led Congress to create the Smaller War Plants Corporation (SWPC) “to mobilize the productive facilities of small business in the interests of successful prosecution of the war, and for other purposes”.¹ The SWPC was authorized to enter into contracts with the federal government and subcontract the performance of those contracts to small businesses for the manufacture, supply, or assembly of articles, equipment, supplies or materials.² The authority of SWPC expired in 1946.

During the Korean War, Congress amended the DPA to create the Small Defense Plants Administration (SDPA). In establishing the SDPA Congress recognized that the government’s “mobilization program must extend down into the small plants, since they are a major source of our productive strength.”³ Among the SDPA’s powers was the authority to certify the capacity and credit of small businesses, a predecessor to the Small Business Administration’s (SBA’s) Certificate of Competency Program. Contracting officers were required to accept SDPA’s certifications and Congress believed this authority would “give small businesses definitive assurance of a fair share of prime contracts.”⁴ The SDPA also had authority for extensive data collection to promote the award of prime and subcontracts to small businesses. The SDPA’s other powers included the ability to make studies and recommendations to ensure small businesses could provide a fair and equitable share of materials, supplies and equipment for defense programs and essential civilian production. In addition, the

¹ Act of June 11, 1942, Pub. L. No. 77-603, 56 Stat. 351.

² *Id.* § 4(f)(4).

³ H.R.Rep.No.639, 82d Cong., 1st Sess. 31, reprinted in (1951) U.S.Code Cong. & Ad.News 1626, 1645-46.

⁴ *Id.*

SDPA was authorized to establish advisory boards and committees wholly representative of small businesses as needed to achieve the purposes of the statute.

Both the SWPC and the SDPA were seen by Congress as temporary emergency agencies to promote small business participation during war mobilization efforts. After the Korean War, Congress sought a permanent, independent agency that would continue many of the functions of the SDPA, which led to the creation of the SBA under the Small Business Act of 1953.

While SBA was granted authority to assist small businesses and promote small business participation in federal procurements on a government-wide basis, the DPA retains separate authorities related to small business participation in capacity and production activities related to national defense. However, as noted, in the absence of clear direction and more detailed guidance from the statutory provisions, the authorities of the DPA intended to assist small businesses are largely underutilized.

III. Potential Points of Reform For The DPA's Small Business Authorities

A review of the current provisions of the DPA intended to assist small businesses identifies opportunities for additional direction and guidance from Congress to enable agencies, Congress and the public to have better information related to small business activities under the DPA and provide for more effective implementation of these small business authorities. The opportunities for reform are discussed in more detail below.

The discussion below identifies each of the current DPA authorities and related practices regarding small businesses that appear ripe for reform. After discussing the current practices, the potential areas of reform are presented. The proposed reforms will enable more effective implementation of the small business preferences and efforts to engage small businesses under the DPA.

A. Information Regarding Small Business Preference Procedures and Awards Under Title III

i. Current Practices – Information Regarding Small Business Preference Procedures and Awards Under Title III

50 U.S.C. § 4518 of the DPA, addresses the effort to modernize small business suppliers under Title III. Under section 4518(a) “the President shall accord a strong preference for small businesses subcontractors and 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.” Section 4518(b)(2) further provides that for small businesses seeking financial assistance under section 4518, the President must give a strong preference to proposals that: 1) have the support of the agency providing the guarantee; 2) indicate that the small business has arrangements to obtain qualified outside to support the use of the advanced manufacturing equipment being proposed for installation; and 3) meets the requirements of sections 4531, 4532, and 4533 of the DPA, which, as detailed below, address loan guarantees, direct loans other presidential actions, such as purchase commitments.

Section 4518 does not include any provisions on the collection and reporting of information related to the strong preference that must be given to small business suppliers and subcontractors.

50 U.S.C. § 4567 of the DPA, establishes the DPA Committee, which is required to coordinate and plan for on the effective use of the priorities and allocations authorities under Title I. The Committee’s members include the head of each federal agency with delegated authority under the DPA and the Chairperson of the Council of Economic Advisors. Under section 4567(d), the DPA Committee must issue an annual report to the House Committee on Financial Services. The information required in the annual report addresses only activity related to priorities and allocations authorities under Title I and does not require information on Title III awards made to small businesses in the preceding year. Given its exclusive focus on priorities and allocations activity under Title I, the report is not required to address how the “strong preference for small

business concerns” under 50 U.S.C. 4518(a) was applied in the Title III award process. Therefore, there are currently no data collection and reporting efforts with regard to the requirement to provide a “strong preference to small businesses” under Title III awards.

ii. Potential Reforms – Information Regarding Small Business Preference Procedures and Awards Under Title III

As noted above, section 4518 of the DPA does not direct the collection or reporting of data on application of the strong preference given to small businesses under Title III awards. In addition, although the DPA Committee’s annual report includes information on priorities and allocations activity, it does not address information on Title III awards, nor is it required to explain agency application of the “strong preference for small businesses” under such awards. This lack of information on Title III small business awards hinders the ability to assess the effectiveness of this small business preference requirement. Given that under section 4567, the DPA Committee annual report addresses only priorities and allocations activity under Title I, Congress should expand the scope of the DPA Committee activities to cover Title III activity. With this expanded scope, Congress should require that the annual report to address Title III actions, including information on an efforts to provide a strong preference for small businesses under Title III awards. Expanding the scope of the DPA Committee report would increase transparency while raising the profile of small business issues under the DPA. An expended DPA Committee report would also provide useful information for policy-makers in determining the extent to which the small business preferences under Title III are being met.

B. Procedures to Apply the Title III Small Business Preference

i. Current Practices – Procedures to Apply the Title III Small Business Preference

As noted above, section 4518(a) of the DPA, provides that under Title III awards, a strong preference shall be given to small businesses subcontractors and 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. Although section 4518 directs agencies

to provide a strong preference to small businesses under Title III awards, it does not direct them to issue regulations to implement this statutory requirement.

ii. Potential Areas of Reform – Procedures to Apply the Title III Small Business Preference

The absence of direction from Congress with regard to how agencies are to provide a strong preference for small businesses under Title III has resulted in a lack of information and awareness of this statutory requirement. Therefore, the desire of Congress to promote small business participation in Title III awards is not being fulfilled. Therefore, Congress should require agencies to issue regulations relative to how they will apply the strong business preference for purposes of Title III. Establishing a regulatory framework for the small business preference under Title III, in conjunction with effective data collection and reporting, will assist agencies meeting this statutory requirement and thus further the small business goals of section 4518.

C. Small Business Advisory Committee

i. Current Practices – Small Business Advisory Committee

50 U.S.C. § 4551(c) provides that representatives of small business concerns shall be afforded the maximum opportunity to participate in “such advisory committee as may be established pursuant to this chapter.” 50 U.S.C. § 4567, establishes the Defense Production Act Committee which is directed to coordinate and plan for on the effective use of the priorities and allocations authorities under the DPA by the departments, agencies, and independent establishments of the Federal Government to which the President has delegated authority. Committee members include the head of each Federal agency to which the President has delegated authority under the DPA and the Chairperson of the Council of Economic Advisors. The Committee currently does not include any representative from SBA. Thus, to the extent the DPA Committee is considered such an “advisory committee,” small businesses are not presently afforded any opportunity to participate.

ii. Potential Areas of Reform – Small Business Advisory Committee

The absence of a small business presence on the DPA Committee means that concerns of small businesses are not given consideration by the Committee, which is evident from the lack of small business issues addressed in the Committee’s annual report. As small businesses do not presently have representation in the DPA Committee, Congress might consider directing the DPA Committee to establish a “Small Business Participation Advisory Subcommittee” to provide annual recommendations on how to increase small business participation in DPA orders and promote the strong preference for small businesses under Title III funding. Small business participation in the DPA Committee would serve to raise the profile of small business issues, provide more information on small business activity, thus furthering the statutory goal of promoting small business opportunities under the DPA.

D. Providing Information on DPA Activities to Small Businesses

i. Current Practices - Providing Information on DPA Activities to Small Businesses

50 U.S.C. § 4551(d) provides that information about the DPA and activities undertaken in accordance with the DPA “shall be made available to small business concerns.” Section 4551(d) does not direct agencies to issue regulations implementing this provision and therefore it is unclear how any agency to whom the President has delegated DPA authority is complying with this provision.

ii. Potential Areas of Reform - Providing Information on DPA Activities to Small Businesses

The lack of clear direction in the DPA statute concerning the requirement to provide small businesses information about the DPA and activities undertaken in accordance with the DPA, has resulted in uncertainty regarding agency compliance with the requirement to provide information on DPA activities to small businesses. In addition to the need to assess agency compliance with the requirement under section 4551(d), greater transparency regarding the DPA program, particularly transparency directed at small businesses, would result in a more information for small business community with

regard to DPA activities. Other small business programs, such as those administered by SBA, include extensive information directed at small businesses for such programs. Such efforts inform small businesses and promote their participation in such programs. Therefore, Congress should require the DPA Committee to address how such information is being made available to small businesses in its annual report under section 4567.

E. Small Business Data Collection under the Federal Priorities and Allocations System

i. Current Practices – Data Collection Under the Federal Priorities and Allocations System

Despite the existence of a robust information system for collecting data about Federal contract awards, Federal agencies are not currently required to include information about the use of the Title I priority rating order. As a result, Congress lacks any visibility into the extent of small business participation in priority rated contracts and orders. Collecting such data would not be difficult and would provide information to Congress about how agencies utilize priority rating authority for both large and small businesses, which would aid future decisions about DPA policy.

The President's priorities and allocations authority under Title I, at 50 U.S.C. § 4511, allows the President to require contractors to prioritize and accept contracts for materials and services as necessary to promote the national defense. This Title I authority is delegated to certain agencies⁵ who are required to issue regulations establishing standards and procedures for a consistent and unified federal priorities and allocations system.

The regulations issued by the agencies with delegated authority are known collectively as the Federal Priorities and Allocations System (FPAS). Under the FPAS regulations rated orders are identified by a priority rating and a program identification symbol. Rated

⁵ Section 201 of Executive Order 13603, National Defense Resources Preparedness, designates the following agencies with priorities and allocations authority under the DPA: Agriculture, Energy, Health and Human Services, Transportation and Commerce, which has delegated authority to place priority ratings on contracts or orders to the Department of Defense.

orders take precedence over all unrated orders as necessary to meet required delivery dates. Among rated orders, DX rated orders take precedence over DO rated orders. Persons receiving rated orders must give them preferential treatment and must in turn place rated orders with their suppliers for the items they need to fill the orders. This provision ensures that suppliers will give priority treatment to rated orders from contractor to subcontractor to suppliers throughout the procurement chain. Although regulations provide for mandatory acceptance of rated orders, a rated order must not be accepted for delivery on a specific date if the contractor is unable to fill the order by that date.

Under 50 U.S.C. § 4551(a), small businesses be given “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 the [DPA].” Further, 50 U.S.C. § 4551(d) provides that when making priority allocations of material under section 4511 “small business concerns shall be accorded, to the extent practicable, a fair share of such material, in proportion to the share received by such business concerns under normal conditions, giving such special consideration as may be possible to emerging small business concerns.”

The Office of Federal Procurement Policy Act, as amended, 41 USC § 401 et seq., requires the Administrator for Federal Procurement Policy to establish a computer-based Federal Procurement Data System for collecting, developing, and disseminating procurement data to the Congress, Executive Branch, and private sector. The Federal Procurement Data Center, run by the General Services Administration, oversees the operation of the Federal Procurement Data System - Next Generation (FPDS-NG). FAR 4.602 requires executive departments and agencies to collect and report procurement data to FPDS-NG. FAR 4.606 identifies the contract actions that agencies must report to FPDS-NG, including for example, definitive contracts, task and delivery order contracts, multi-agency contracts and basic ordering agreements. However, information on rated orders, including rated orders issued to small businesses, is not required to be submitted to FPDS-NG under FAR 4.606.

ii. Potential Areas of Reform – Data Collection Under the Federal Priorities and Allocations System

The absence of data collection and reporting on rated orders, including those awarded to small businesses, means that there is no information available on the percentage of rated orders awarded to small businesses. As a result, although the Department of Defense (DoD) reported that it had made more than 300,000 priority awards in a recent fiscal year (prior to the pandemic), Congress has no information regarding the extent of small business participation and the effectiveness of the section 4551(a) requirement that they be given the “maximum practicable opportunity to participate as contractors, and subcontractors at various tiers.” 50 U.S.C. § 4551(a). Furthermore, agencies other than DoD are not reporting the number of priority orders and contracts for either large or small businesses. Thus it is impossible to determine the extent to which the mandate to maximize small business participation in the priorities and allocations system is being met. Given that the FPDS-NG does not currently collect and report information about priority-rated orders, Congress should direct agencies to list the rating (DX or DO) and the program identification symbol for all rated orders placed under the DPA, including awards placed with small and other-than-small businesses. Congress should direct that such information be publicly available through FPDS-NG. Collecting this data would impose minimal burden, as it involves adding another field to dozens of data fields that already exist for procurement actions reported in FPDS-NG.

The collection and publication of information on rated orders would assist agencies, policy-makers and the public in monitoring small business participation in the rated order process. Such information would also enable future changes in the law, as needed to promote small business participation under Title I of the DPA.