

A microscopic view of numerous red and purple virus particles, likely coronaviruses, against a dark background. The particles are spherical with a textured surface of small protrusions. The image is framed by a white border and a green diagonal stripe.

Hogan
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ADG Insights

Defense Production Act and other special contracting authorities being used to address the COVID-19 pandemic

Special series focused on the impact of the COVID-19 pandemic on the Aerospace, Defense, and Government Services industry

March 31, 2020

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Through ADG Insights, we share with you the top legal and political issues affecting the aerospace, defense, and government services (ADG) industry. Our ADG industry team monitors the latest developments to help our clients stay in front of issues before they become problems and seize opportunities in a timely manner.

This issue in our special series on the impact of the novel coronavirus (COVID-19) pandemic focuses on the special statutory and regulatory procurement-related authorities available to the federal government for addressing the COVID-19 pandemic. Understanding these authorities will assist ADG companies in addressing the opportunities and challenges presented by the government's approach to combating COVID-19.

On 30 January 2020, the World Health Organization (WHO) declared the outbreak of illness caused by COVID-19 a “public health emergency of international concern.”¹

Less than two months later, on March 11, the WHO officially characterized the COVID-19 outbreak as a pandemic.² Shortly thereafter, the United States government issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease Outbreak.³ COVID-19 has disrupted global business activity and public life on a massive and growing scale. Disruptions due to illness among workers, travel restrictions, facility closures, work stoppages and delays, and supply chain disruptions are impacting businesses, including government contractors operating in the ADG industry sector.

The federal government has available several statutory and regulatory authorities that facilitate the government's ability to obtain needed supplies and services in a timely manner. These authorities include:

1. Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) (Jan. 30, 2020), [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).
2. WHO Director-General's opening remarks at the media briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>.
3. Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

The Defense Production Act

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As discussed below, each of these authorities provides the government a strong mechanism to acquire or incentivize the production of needed supplies or services.

The Defense Production Act

The Defense Production Act (DPA) is the President's primary authority to mobilize resources and expedite the acquisition of critical industrial items for national defense and emergency preparedness. As COVID-19 has increased the need for certain supplies and provisions, the federal government has started calling on manufacturers to meet its procurement needs through the DPA. On 18 March 2020, President Trump announced that he would invoke the DPA for health resources,⁴ and by executive order designated the Department of Health and Human Services (HHS) as the lead agency in carrying out the necessary contracting and allocation efforts under the statute.⁵ Since then, both the Department of Defense (DoD) and HHS have been issuing “rated” orders under the DPA's implementing regulations for the purpose of prioritizing the government's orders for needed supplies over commercial and other non-rated orders. Most recently, on March 27, 2020, President Trump invoked the DPA

when signing a Presidential memorandum directing the secretary of HHS to “use any and all authority available under the Act to require General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate.”⁶

Current DPA authorities include, but are not limited to:

- **Priorities and allocations.** Allows the president (and agency heads)⁷ to require persons (including businesses and corporations) to prioritize and accept contracts for materials and services as necessary to promote the national defense;⁸ and
- **Expansion of productive capacity and supply.** Allows the president to incentivize the domestic industrial base to expand the production and supply of critical materials and goods. Authorized incentives include loans, loan guarantees, direct purchases and purchase commitments, and the authority to procure and install equipment in private industrial facilities.⁹

While these authorities are most frequently used by, and commonly associated with DoD, they can be and have been used by numerous other executive departments and agencies.¹⁰

Rated orders issued under the government's prioritization authority

Title I of the DPA (50 U.S.C. § 4501 et seq.) and implementing regulations, such as the Defense Priorities and Allocation System (DPAS)¹¹ and Health Resources Priorities and Allocation System (HRPAS),¹² authorize the government to “require

4. Traditionally, this has been defined as “drugs, biological products, medical devices, materials, facilities, health supplies, services and equipment required to diagnose, mitigate or prevent the impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.” Executive Order 13603.

5. Through a March 18 Executive Order, President Trump broadened the authority delegated to the secretary of HHS to determine the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States. The secretary may also issue such orders and adopt and revise appropriate rules and regulations as may be necessary. See Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19 (Mar. 18, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>.

6. Memorandum on Order Under the Defense Production Act Regarding General Motors Company, March 27, 2020, <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/>.

7. See Executive Order No. 13603.

8. 50 U.S.C. §§ 4511-4518.

9. *Id.* §§ 4531-4534.

10. While DoD regularly uses the priorities authority in the defense context with the DPAS system, the allocations authority has not been invoked since the Cold War.

11. Codified at 15 C.F.R. § 700 et seq. The DPAS implements the priorities and allocations authority of the DPA with respect to industrial resources. Certain national defense and energy programs (including military, emergency preparedness, homeland security, and critical infrastructure protection and restoration activities) are approved for priorities and allocations support.

12. Codified at 45 C.F.R. § 101.1 et seq. These regulations ensure the timely availability of health resources, including “drugs, biological products, medical devices, health supplies, services and equipment.” Executive Order No. 13603; 45 CFR § 101.20.

preferential acceptance and performance of contracts and orders supporting certain approved national defense and energy programs and to allocate materials, services, and facilities in such a manner as to promote these approved programs.”¹³ These preferential orders known as “DPAS-rated orders” (or HRPAS rated order) apply to all U.S. companies and must be prioritized ahead of orders to consumers or other private purchasers.¹⁴

Rated orders may be issued against existing government contracts,¹⁵ but they also can be issued to companies that do not currently hold government contracts. The regulations contain a series of mandatory acceptance, mandatory rejection, non-discrimination, and timely response rules. For DPAS orders relating to emergency preparedness, the minimum times for acceptance or rejection are as short as six hours when a hazard has occurred or twelve hours to prepare for an imminent hazard.¹⁶ Once a rated order has been accepted, a company is generally bound by contract. However, if a company can no longer meet the required delivery date for the rated order, the company must notify the government and supply the soonest date on which the order can be filled. If a company rejects the order because it cannot meet a delivery date with its existing workforce in existing facilities, 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.

In terms of pricing and other terms, companies are not permitted to discriminate in any manner against the procuring agency, such as by charging higher prices or imposing different terms and conditions than for comparable commercial orders or non-rated government orders.¹⁷ Companies receiving rated orders must also provide preferential scheduling and must ensure delivery of all needed

production items or services in a timely manner to satisfy contract requirements.¹⁸

Rated orders can come directly from the government or from prime contractors or higher tier subcontractors who hold rated contracts or subcontracts. Companies that receive rated orders are required to flow down the rated orders to any of their suppliers for the items or services needed to fulfill an order.¹⁹ A prime contractor that issues a proper rated order to its subcontractor, thus, can require the subcontractor to prioritize the rated work over its unrated work. However, if a contractor or subcontractor holds a rated order and suffers a supply chain impact, the contractor or subcontractor should use whatever supplies it has or can obtain, and should notify the customer immediately to advise of a new shipment or performance date as necessary.

The DPA does not apply to facilities overseas. However, the government expects companies, to know their supply chain, including normal lead times for their foreign suppliers. When placing an order with a foreign supplier, a company may extend a rated order so that the entity can see the need for urgency. If a foreign supplier is unable or unwilling to fill a U.S. contractor’s rated order in time, the contractor should immediately reject the order and propose a date that can be met. If a contractor has already accepted a rated order, it is important to notify the ordering agency of any issue with a foreign supplier and provide the soonest date on which the order can be filled. The federal government does authorize certain foreign countries to issue rated orders from time to time, but this approach has seldom been used.

The government’s approach to using DPA authorities is evolving rapidly to better enable the government to leverage these authorities in its battle against COVID-19. For example, on 19 March 2020, the General Services Administration (GSA) published an

acquisition letter that provides guidance for placing rated orders under DPAS to ensure continuity during the COVID-19 emergency.²⁰ The DPAS regulations at 15 C.F.R. § 700 et seq., FAR 11.6, and GSA Acquisition Regulation (GSAR) 511.6 set forth policies applicable to GSA for placing rated orders. GSA contracting officers (CO) may need to place rated orders to acquire key items for essential operations of federal buildings or other government functions, including laptop computers, accessories, and other information technology (IT) products to support sharply increasing levels of telework. Accordingly, GSA outlined instructions for placing “DO” priority rated orders, identified by the symbol “DO-N1” for telework emergency response equipment contracts or orders supporting GSA’s COVID-19 response and recovery activities. GSA recommends that COs contact vendors by phone when placing a rated order because many companies may not be familiar with DPAS.

In this regard, the order intake function at many companies does not include procedures that address the requirements posed by rated orders. Companies should consider developing, reviewing and/or updating internal procedures for prioritizing rated orders. These efforts should include training employees on procedures, including: identifying rated orders (by being familiar with rating symbols); responding promptly when such an order is placed by either accepting or rejecting the order; and addressing preferential scheduling issues. Contractors should check their manufacturing and production line capabilities when a rated order is received to quickly determine whether it is possible to meet the government’s delivery date, even with prioritization. Contractors should also ensure their compliance with applicable regulations, including the requirements that recipients of rated orders place rated orders with their own suppliers to secure items needed to fulfill the government’s order.

As the federal government’s approach to the COVID-19 pandemic is ever evolving, companies should continue to look out for updated or new agency-specific guidelines on the issuance and performance of rated orders.

20. Placing Rated Orders Under the Defense Priorities and Allocation System for Novel Coronavirus Disease 2019 (COVID-19) (Mar. 19, 2020), https://www.gsa.gov/cdnstatic/MV-20-05_w_Attach.pdf.

21. 15 CFR § 700.30; 45 CFR § 101.50.

Allocation orders

Title I of the DPA also authorizes the federal government to issue “allocation” orders, which may be placed when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements.²¹ There are three types of allocation orders:²²

- **Set-aside.** An official action that requires a company to reserve materials, services, or facility capacity in anticipation of the receipt of rated orders;
- **Directive.** An official action that requires a company to take or refrain from taking certain actions. A directive can require a halt or reduction in 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; and
- **Allotment.** An official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use.

Allocations can be postponed or adjusted in certain limited circumstances, but need to be addressed on a case-by-case basis. Given the expansive reach of the DPA into both federal contracting and commercial business activity, its use can raise a wide variety of legal concerns, including its impact on a contractor’s supply chain. If a contractor willfully fails to follow the DPA’s prioritization and allocation requirements, it may be subject to a civil penalty or criminal violation of up to one-year imprisonment or a fine of up to US\$10,000, or both.

Expanding productive capacity and supply

The DPA includes additional authorities that provide encouragement and funding to develop and promote critical national infrastructure. These authorities permit the president to incentivize the domestic industrial base to expand the production and supply of critical materials and goods.²³ Authorized incentives include loans, loan guarantees, direct purchases and purchase commitments, and the authority to procure and install equipment in private industrial facilities. This authority also allows the federal government to take over distribution chains for national defense purposes.

22. See e.g., 15 CFR § 700.33; 45 CFR § 101.53.

23. 50 U.S.C. §§ 4531-4534.

13. 48 C.F.R. § 11.602(a).

14. Each of the regulations that make up the Federal Priorities and Allocation System (FPAS) establish two levels of priority for issued orders notated as “DO” and “DX.” In the DPAS regulations, a “DO” rating is lower than a “DX” rating. A “DO” rating order for a product means that it must be prioritized over all other nonrated orders. However, if a product that has a “DO” rated order is needed for a different “DX” rated order, the “DX” rated order takes precedence. As a matter of practice, few select programs may receive a “DX” rating. See e.g., 15 C.F.R. § 700.11.

15. Typically, a DO or DX rating will appear on the front page of the contract, subcontract, or order. On Standard Form 1449, the rating information appears in Box 13. See also Federal Acquisition Regulation (FAR) 52.211-14 & 52.211-15.

16. 15 C.F.R. § 700.13(d). In contrast, the HRPAS require acceptance or rejection within 2 days. See 45 C.F.R. § 101.33(e).

17. 15 CFR §§ 700.10-700.18; 45 CFR §§ 101.30-191.38.

18. *Id.*

19. 15 C.F.R. § 700.15; 45 C.F.R. § 101.35; *but see* 15 CFR 700.17(f) vendors are not required to flow down priority rated orders to subcontractors for orders less than US\$125,000, provided that delivery can be obtained in a timely fashion without the use of a priority rating).

Although the DPA's prioritization and allocation authority are most often discussed, the statute's productive capacity and supply authorities also provide powerful tools for the government to utilize during the COVID-19 response. Specifically, authorities included in Title III and VII permit the president to take the following actions:

- **Loan authority.** Allows the president to provide direct loans or loan guarantees to reduce shortfalls of industrial resources, critical technology items, or materials, and to support production or supply capabilities that are necessary to create, maintain, expedite, expand, protect, or restore production and deliveries or services essential to the national defense.²⁴
- **Purchase or commitments to purchase.** Allows the president to make purchases of or commitments to purchase an industrial resource or a critical technology item for government use or resale to create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense. This authority also allows the president to transport, store, process, or refine any materials procured under these provisions.²⁵
- **Installation of equipment in industrial facilities.** Allows the president to procure and install additional equipment, facilities, processes or improvements to plants, factories, and other industrial facilities owned by the federal government; to procure and install equipment owned by the federal government in plants, factories, and other industrial facilities owned by private persons; to provide for the modification or expansion of privately owned facilities, including the modification or improvement of production processes; and to sell or otherwise transfer equipment owned by the federal government to the owners of such plants, factories, or other industrial facilities.²⁶

24. *Id.* §§ 4531-4532.

25. *Id.* § 4533(a).

26. *Id.* § 4533(e).

27. *Id.* § 4533(g).

28. *Id.* § 4534.

29. *Id.* § 4558.

- **Substitutes.** Allows the president, in aid of the national defense, to make provision for the development of substitutes for strategic and critical materials, critical components, critical technology items, and other industrial resources.²⁷
- **Defense Production Act Fund.** Allows the Department of Treasury to establish a fund to carry out the expansion of productive capacity and supply.²⁸
- **Voluntary agreements and plans of action.** Allows the president to consult with representatives of industry to provide for voluntary agreements and plans of action between private industry interests – with the approval of the President – for preparedness programs and the expansion of productive capacity and supply. Those parties that enter into such voluntary agreements are provided a special legal defense that can be used in civil suits or criminal actions brought against them under antitrust laws or for breach of contract.²⁹

As mentioned above, the president recently invoked Title III of the DPA in directing the secretary of HHS to “use any and all authority available under the Act” to require a leading automotive company “to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate.”³⁰ Although this most recent use of Title III of the DPA has been much publicized, it was not the first time that President Trump has invoked the DPA Title III authorities. For example, on 10 June 2019, President Trump signed a presidential memorandum invoking Title III to support the production capability in the U.S. for small unmanned aerial systems, which the president determined to be a “critical capability.”³¹

Accordingly, the president has many tools at his disposal to incentivize the domestic industrial base to expand the production and supply of critical materials and goods. As demonstrated by his determination

30. Memorandum on Order Under the Defense Production Act Regarding General Motors Company, March 27, 2020, <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/>.

31. Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, <https://www.whitehouse.gov/presidential-actions/memorandum-presidential-determination-pursuant-section-303-defense-production-act-1950-amended/>.

regarding General Motors, the president is willing to invoke these authorities to support the production of those supplies deemed necessary for addressing the COVID-19 pandemic. Indeed, the president has stated that his “invocation of the DPA should demonstrate clearly to all that [the government] will not hesitate to use the full authority of the federal government to combat this crisis.”³²

Protection from liability

The DPA provides protection from liability for actions taken by companies in compliance with the statute. In this regard, the DPA provides that a company cannot be held liable for damages or penalties for any act or failure to act, which results from compliance with rules, regulations, or rated orders issued under the DPA. This holds true even if the rule, regulation, or rated order is eventually found to be invalid.³³ Thus, for example, a company filling a rated order is protected from liability for contract breaches of other orders caused by the requirement for the company to prioritize the rated order.³⁴ These exculpatory provisions have been successfully invoked to relieve from liability companies that are delayed in fulfilling orders to other customers due to prioritizing rated government orders.³⁵ The exculpatory provisions do not protect contractors from every risk, however. Contractors cannot claim immunity from violations of other statutes, such as the Clean Air Act, due to performing rated orders under the DPA.³⁶ Moreover, the DPA only promises “immunity,” not “indemnity,” from liabilities flowing from filling government rated orders.³⁷

Looking ahead

DoD has formed a Joint Acquisition Task Force (JTAF) to coordinate the approach to acquisition in response to the COVID-19 pandemic. At a press

briefing held on March 25, 2020, Under Secretary of Defense for Acquisition and Sustainment, Ellen Lord, announced the formation of the JTAF to “synchronize the DoD acquisition response to this crisis, working closely with all the services and defense agencies.”³⁸ According to Under Secretary Lord, “the task force will leverage DoD authorities for maximum acquisition flexibility...to provide resilient capability in the current health crisis.”³⁹ These authorities include the “[DPA] authorities and funding in response to this immediate crisis.”⁴⁰ Thus, the JTAF is expected to promote additional guidance across DoD on the use of available acquisition tools, including the DPA, to address issues relating to the COVID-19 pandemic.

More recently, on 27 March 2020, the “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act) was enacted into law. In addition to other stimulus measures, the Act provides for US\$1 billion for “Defense Production Act” purchases “to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally.”⁴¹ The Act authorizes an additional US\$1.45 billion for Defense Working Capital Funds to prevent, position, prepare for, and respond to the COVID-19 pandemic. The increased funding provides additional opportunities for industry to support the government's battle against COVID-19.

Finally, President Trump recently named Peter Navarro, Director of the Office of Trade and Manufacturing Policy, to serve as National DPA Policy Coordinator for the federal government.⁴² According to a recent press report, Dr. Navarro has “said the full arsenal of federal measures are on the table, from raids on warehouses to compelling suppliers to retool factories” to aid in the government's battle against COVID-19.⁴³

32. Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing (Mar. 27, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-13/>.

33. 50 U.S.C. § 4557.

34. See 15 C.F.R. § 700.90.

35. See *Eastern Airlines, Inc. v. McDonnell Douglas, Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 996-998 (5th Cir. May 17, 1976) (contractor successfully invoked the DPA's statutory exculpatory provision to defend a breach of contract claim that it had failed to timely deliver jets on the basis that its delay was excused because it had to fulfill the government's orders first).

36. *United States v. General Dynamics Corp.*, No. 4-87-312-K (N.D. Tex. June 9, 1988).

37. *Hercules Inc. v. United States*, 516 U.S. 417, 429 (1996).

38. Department of Defense Acquisition and Sustainment Leaders Hold a Press Briefing on the Defense Department's COVID-19 Acquisition Efforts, March 25, 2020, <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2125737/department-of-defense-acquisition-and-sustainment-leaders-hold-a-press-briefing/>.

39. *Id.*

40. *Id.*

41. H.R. 748 at 643.

42. Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing, March 28, 2020, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-13/>.

43. Alex Leary, *This is War: President's Equipment Czar to Use Full Powers to Fight Coronavirus*, Wall Street Journal, March 28, 2020.

The Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act), codified at 42 U.S.C. §§ 5121 et seq., authorizes the president to issue certain declarations that allow the federal government to provide assistance to state and local governments in responding to an emergency.⁴⁴ On March 13, 2020, the president declared a national emergency under the Stafford Act in response to the COVID-19 pandemic.⁴⁵ Doing so activated the authorities available to the president to provide federal assistance to state and local governments responding to the COVID-19 emergency, including financial assistance.

Under the current COVID-19 emergency declaration, the president can direct federal agencies to use their resources to provide public assistance to state and local efforts and emergency protective measures. With respect to public health incidents, the Stafford Act has mostly been leveraged to deliver assistance through emergency protective measures undertaken to reduce an immediate threat to life, public health, or safety, including emergency shelter and medicine, hazard communication, and provision and distribution of necessities, such as food and medicine.⁴⁶ The federal government can also leverage the priorities and allocation authority of the DPA (and its implementing regulations) to support emergency preparedness activities⁴⁷ pursuant to the Stafford Act.⁴⁸ Also, because the president issued a Stafford Act national emergency, state and local governments are eligible to order supplies and services from the Federal Supply Schedules program to support responses to the public health emergency.⁴⁹ This authority applies to both GSA and Department of Veterans Affairs Schedules.

Under current law, a major disaster declaration has not been authorized in response to a public health incident under the Stafford Act. But if the president were to subsequently declare a major disaster, a wider range of federal assistance would be available, including disaster unemployment assistance and crisis counseling, and other recovery programs, such as community disaster loans, among others.⁵⁰

Regulatory provisions addressing essential contractor services

With the expanding impact of COVID-19, defense contractors may find that they are required to begin implementing their mission-essential services plans. According to the Defense Federal Acquisition Regulation Supplement (DFARS) 252.237-7023, a contractor must develop a “Mission-Essential Contractor Services Plan” for services that are viewed as essential contractor services in support of mission-essential functions. Contractors are responsible to perform those services identified as essential contractor services during crisis situations, including a pandemic,⁵¹ at the direction of the CO and in accordance with its mission-essential contractor services plan.

As a general rule, the designation of services as essential contractor services does not apply to an entire contract, but will apply to those service function(s) that have been specifically identified as essential contractor services. Essential contractor services include the support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea or associated

support activities, including installation, garrison, and base support services.⁵² Services are considered essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of the services.⁵³ Mission-essential functions are those DoD organizational activities that must be performed under all circumstances to achieve DoD component missions or responsibilities.⁵⁴ Failure to perform or sustain these functions would significantly affect DoD’s ability to provide vital services or exercise authority, direction, and control.⁵⁵

A mission-essential contractor services plan generally must identify the steps taken by the contractor for the acquisition of essential personnel and resources, if necessary, for continuity of operations for up to 30 days or until normal operations can be resumed.⁵⁶ Contractors must also address the challenges associated with maintaining essential contractor services during the crisis, such as a pandemic that occurs in repeated waves, and must also account for any potential delay between the initiation of the plan and on site availability of essential personnel and resources. The DFARS also requires the mission-essential service plan to address the identification, training, and preparedness of personnel who are capable of relocating to alternate facilities or performing work from home. Moreover, contractors should outline their alert and notification procedures for mobilizing identified “essential contractor service” personnel and their approach for communicating expectations to contractor employees regarding their roles and responsibilities during a crisis.

As necessary, COs will notify contractors to activate their plans, and may also request that contractors update existing plans as needed given the current COVID-19 outbreak, which would require a contractor to submit its changes for approval. The DFARS clause also requires a contractor to expeditiously notify the CO if it anticipates being unable to perform any of the essential contractor services during the crisis situation.⁵⁷ At the same time, a contractor is required to make its best efforts to cooperate with

44. An “emergency” is “any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” 42 U.S.C. §5122(1).

45. Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

46. Stafford Act Assistance for Public Health Incidents (Mar. 2, 2020), CRS Report No. IN11229.

47. As defined by the Stafford Act, “emergency preparedness” means “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.” 42 U.S.C. § 5195(a)(3).

48. 15 C.F.R. § 700.1.

49. GSA Disaster Recovery Purchasing Program Fact Sheet, 9580.103 (July 7, 2008), https://www.fema.gov/media-library-data/20130726-1824-25045-8806/gsa_disaster_recovery_purchasing_program.pdf; State and Local Disaster Purchasing, GSA.gov, <https://www.gsa.gov/buying-selling/purchasing-programs/gsa-schedules/schedule-buyers/state-and-local-governments/state-and-local-disaster-purchasing>.

50. Congressional Primer on Responding to Major Disasters and Emergencies (Sept. 13, 2018), CRS Report No. R41981.

51. See 75 Fed. Reg. 66680-02 (Oct. 29, 2010) (“The current changing threat environment, particularly under the additional challenges caused by such potential crises as destructive weather, earthquakes, or pandemic disease, has increased the need for continuity of operations capabilities and plans that enable agencies to continue their essential functions during a broad range of emergencies and crises”).

52. DFARS 252.237-7023(a)(1).

53. *Id.*

54. DFARS 252.237-7023(b)(1).

55. *Id.*

56. DFARS 252.237-7024 (establishing minimum plan requirements for DoD solicitations supporting mission-essential functions).

57. DFARS 252.237-7023(d)(2).



the government's efforts to maintain the continuity of operations. This could involve allowing the government to use federal employees, military personnel, or contract support from other contractors, or to enter into new contracts for the essential contractor services, which could lead to a deductive change or partial termination of the contract.⁵⁸

While performing essential services during a crisis, contractors must segregate and separately identify all costs incurred.⁵⁹ A contractor has up to 90 days (or at another time agreed upon) to notify the CO if there is any increase or decrease in costs after the CO has directed continued performance. The notice serves as a proposal for an equitable adjustment and initiates the negotiation between the contractor and CO for an equitable adjustment to the contract price, delivery schedule, or both.

Given the current landscape, contractors should review their contracts to confirm whether they include mission-essential services and/or similar provisions. Although there is no civilian counterpart to the DFARS mission-essential contractor service requirements, contractors should examine their entire contract, including Section H clauses, to determine whether there might be any other relevant provisions.⁶⁰ Contractors should also assess their readiness if directed to activate their mission-essential services plan. It would also be prudent for contractors to ensure that any subcontractor performing essential services is likewise directed to activate their mission-essential services plan. Lastly, contractors should be prepared to identify and segregate costs associated with continued performance once a plan is activated in order to support a request for equitable adjustment.

Increased contracting flexibility under raised dollar acquisition thresholds

Both the DoD and GSA are encouraging agencies to use available emergency acquisition flexibilities.⁶¹ For instance, on March 6, 2020, DoD issued a memorandum reminding heads of contracting activity that they have delegated authority to invoke emergency acquisition flexibilities including the increase of acquisition thresholds.⁶² DoD later invoked Class Deviation 2018-00018, Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority,⁶³ for DoD acquisitions of supplies or services funded by DoD appropriations that the head of the contracting activity determines are to be used to support COVID-19 emergency assistance activities.

Specifically, the direction increases the micro-purchase threshold for contractor performed in the United States to US\$20,000 and the simplified acquisition threshold to US\$750,000. For contracts performed or purchases to be made outside the United States, the micro-purchase threshold is increased to US\$30,000, while the simplified acquisition threshold increased to US\$1.5 million. For the acquisition of commercial items, the threshold for use of simplified acquisition procedures for certain commercial items was designated as US\$13 million.

The increased dollar thresholds for use of micro-purchase and simplified acquisition procedure will result in more contracts being awarded through streamlined procedures and with fewer burdensome clauses that typically are required by regulations.

58. DFARS 252.237-7023(e).

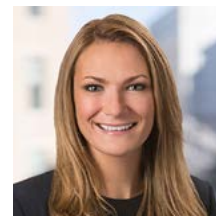
59. DFARS 252.237-7023(f).

60. See e.g., NASA FAR Supplement 1852.242-72, "Denied Access to NASA Facilities (OCT 2015)," which allows NASA to deny contractors access to NASA facilities resulting from "non-appropriation of funds by Congress."

61. DoD Coronavirus Disease 2019 (COVID-19) Emergency Acquisition Flexibilities, https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html#Exemption_and_Waiver_FAR. Applicable emergency flexibilities are identified in FAR 18.203, *Emergency Declaration or Major Disaster Declaration* and DFARS 218.203, *Incidents of national significance, emergency declaration, or major disaster declaration as they relate to the COVID-19 pandemic*. Additionally, FAR Subpart 18.1 and DFARS Subpart 218.1 provide contracting officers other available acquisition flexibilities when certain conditions are met. See also Memorandum for All GSA Contracting Activities and Heads of Contracting Activity, March 14, 2020, https://www.gsa.gov/cdnstatic/SPE-2020-07_0.pdf.

62. See DoD Memo Emergency Acquisition Flexibilities – Disaster of Assistance Activities (Mar. 6, 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Emergency_Acquisition_Procedures_DPC.pdf.

63. <https://www.acq.osd.mil/dpap/policy/policyvault/USA002260-18-DPC.pdf>.



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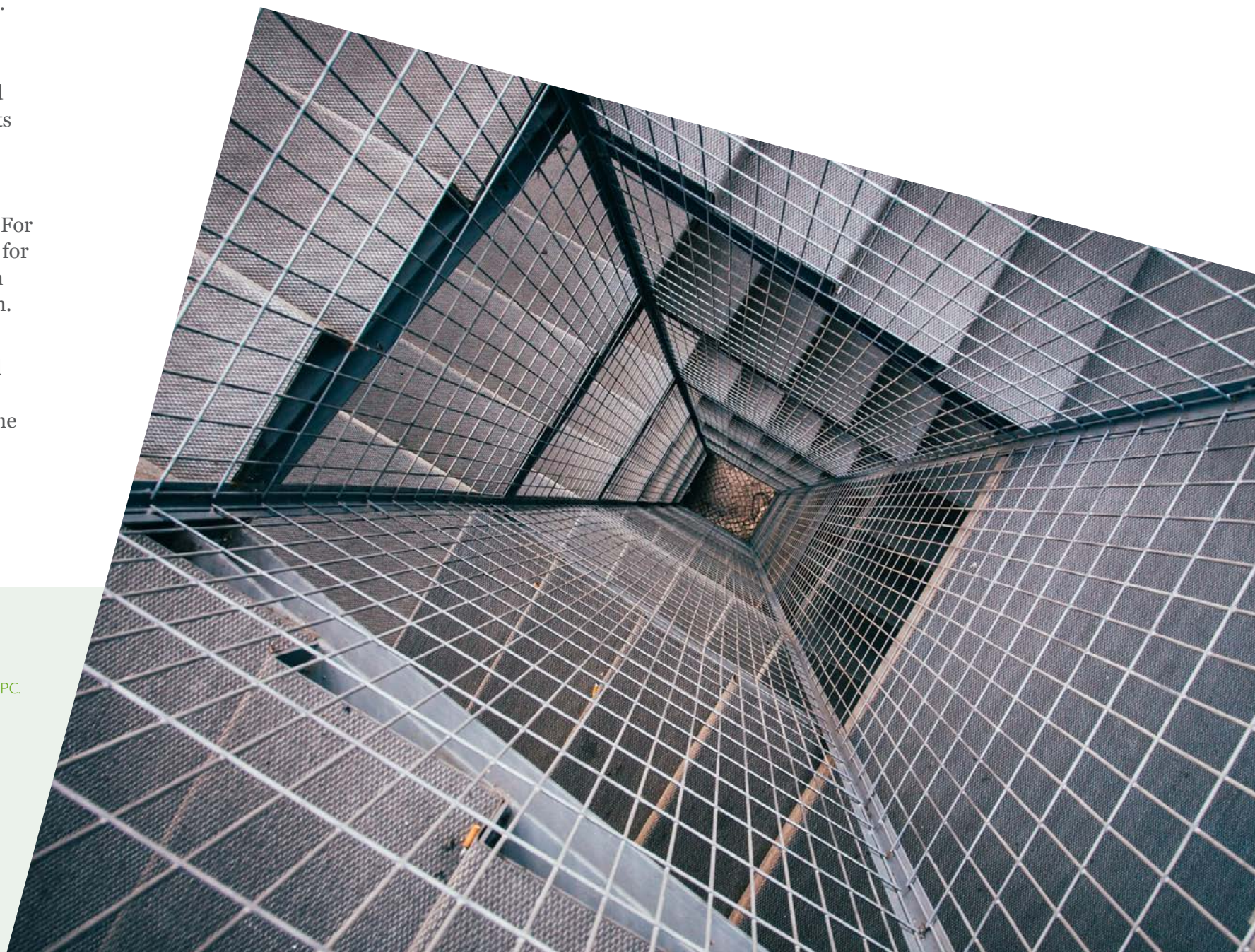
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