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HOUSE COMMITTEE ON SMALL BUSINESS

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**“An Overview of the Dynamic Between the
Defense Production Act and Small Contractors.”**

Good afternoon, Mr. Chairman, Representative Golden, Ranking Member Stauber, and members of the Subcommittee. I am Ian Patterson, and I am a Senior Associate Attorney at Koprince Law LLC. My practice focuses exclusively on federal government contracting, with an emphasis on small businesses matters.

Thank you for the opportunity to appear before you to discuss the utilization of small businesses under Defense Production Act procurements to support COVID-19 response efforts. To support the Subcommittee’s investigation into small business utilization, I have been called to testify on the general structure of the Defense Production Act, as well as the considerations it contains for small businesses.

General Structure of the Act

The Defense Production Act of 1950 (the “DPA”) was enacted to prepare America’s private sector should it need to mobilize for national defense. For purposes of the DPA, “national defense” is broadly defined to include both direct military threats, as well as emergency preparedness actions.¹

Since its enactment, the DPA has been regularly reauthorized by Congress. Over time, however, some provisions have been repealed. In its current iteration, the DPA contains three distinct subchapters, Title I, Title III, and Title VII. These have been codified at 50 U.S.C. § 4501 *et seq.*

Title I endows the president with authority to compel private businesses to accept contracts and prioritize projects to support national defense.² Concurrently, this Title also provides the president with authority to allocate resources to support national defense.³

Title III allows the president to make investments to support national defense. This can take the form of providing loan guarantees to private institutions to develop industrial capabilities

¹ 50 U.S.C. § 4552(14); DPA § 702(14). Concurrent citations to both the United States Code, and the Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (hereinafter “DPA”) have been provided for clarity.

² 50 U.S.C § 4511(a); DPA § 101(a).

³ *Id.*

to purchasing critical components for future use.⁴

Title VII compiles miscellaneous provisions, including investigative authorities, rulemaking power, and jurisdictional considerations.⁵ This Title also contains the DPA’s small business section.⁶

The DPA in Operation

With respect to business participation, the DPA provides two general methods for rallying the private sector to benefit to national defense: project prioritization under Title I and production infrastructure investment under Title III.

Title I

Title I of the DPA provides the president with the extraordinary ability to compel private entities to accept contracts and orders, as well as prioritize those contracts and orders.⁷ To facilitate project prioritization, the DPA also authorizes the president to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.”⁸ In practice, prioritization is accomplished through the use of priority rated-orders, which prioritize DPA procurements.⁹

The so-called “priority performance” authorization in Title I is best understood as a tool to quickly react to challenges facing the United States. It gives the president the authority to direct performance to meet immediate needs. It also allows for the president to prioritize resources. In a crisis, such as the COVID-19 pandemic, this authority allows the president to muster America’s industrial capability to meet the needs of the nation.

A crisis, however, is not a precondition for invoking Title I authorities. According to the Defense Production Act Committee, priority authorities authorized under Title I of the DPA are used extensively by the Department of Defense.¹⁰ As of 2018, the Department of Defense estimated that it placed roughly 300,000 priority orders annually.¹¹ Civilian agencies, however—principally the Department of Homeland Security—placed less than 2,000 priority orders during the same period.¹² The majority of these civilian orders were placed by FEMA to support natural disaster relief efforts.

⁴ 50 U.S.C. §§ 4531(a)(1), 4533(a)(1); DPA §§ 301(a)(1), 303(a)(1).

⁵ 50 U.S.C. §§ 4551 *et seq.*; DPA Title VII.

⁶ 50 U.S.C. § 4551; DPA § 701.

⁷ 50 U.S.C. § 4511(a); DPA § 101(a).

⁸ *Id.*

⁹ 7 C.F.R. § 789.11(a); 10 C.F.R. § 217.31(a); 15 C.F.R. § 700.3; 45 C.F.R. § 101.31(a); 49 C.F.R. § 33.31(a).

¹⁰ THE DEFENSE PRODUCTION ACT COMMITTEE, CALENDAR YEAR 2018 REPORT TO CONGRESS 9 (2019), available at https://www.fema.gov/media-library-data/1582898704576dc44bbe61cce3cf763cc8a6b92617188/2018_DPAC_Report_to_Congress.pdf at 9.

¹¹ *Id.*

¹² *Id.*

Title III

Title III of the DPA allows the president to invest in private infrastructure to “reduce current or projected shortfalls of industrial resources, critical technology items, or essential materials needed for national defense purposes[.]”¹³ To this end, the president can authorize loans to private businesses to “reduce current or projected shortfalls of industrial resources, critical technology items, or materials essential for the national defense[.]”¹⁴ Similarly, the president may authorize federal agencies to guarantee loans to private institutions to allow manufacturers and suppliers to develop component and material manufacturing capabilities.¹⁵ The president may also make purchases or purchase commitments to “create, maintain, protect, expand, or restore domestic industrial base capabilities[.]”¹⁶

Unlike Title I, the authorities granted under Title III are intended to provide proactive tools to develop the industrial base ahead of a crisis. Specifically, the goal is for spending under Title III to develop industrial resources that could meet national defense demands in the event of a crisis. If necessary, these resources could be leveraged under Title I. Whereas Title I allows for immediate mobilization, Title III provides for the buildup of capabilities.

With respect to utilization, the loan authorities provided under Title III are used infrequently, if at all.¹⁷ According to a 2011 report, it had been more than three decades since Title III loan authorities had been leveraged.¹⁸

The purchase authorities provided under Title III, however, are used with some frequency. For example, in Fiscal Year 2017 the Department of Defense reported it had managed 22 projects under Title III.¹⁹ Many of these projects were for military applications, such as bio-fuel and metallurgy development.²⁰

Small Business Participation

Under the Small Business Act, “[i]t is the declared policy of the Congress that the Government should . . . insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises[.]”²¹ Given this policy, the DPA allows small business participation, though the mechanisms for driving inclusion are left largely undefined.

¹³ 50 U.S.C. § 4531(a)(1); DPA § 301(a)(1).

¹⁴ 50 U.S.C. § 4532(a); DPA § 302(a).

¹⁵ 50 U.S.C. § 4531(a)(1); DPA § 301(a)(1).

¹⁶ 50 U.S.C. § 4533(a)(1); DPA § 303(a)(1).

¹⁷ MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RESEARCH SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 14 (2020), *available at* <https://fas.org/sgp/crs/natsec/R43767.pdf>

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ 15 U.S.C. § 631(a).

The DPA's consideration of small businesses begins with a finding that "the inability of industries in the United States, *especially smaller subcontractors and suppliers*, to provide vital parts and components and other materials would impair the ability to sustain the Armed Forces of the United States in combat for longer than a short period."²² While not expressly stated within the DPA, Congress's finding suggests that the Title III investment authorities were designed, at least in part, to strengthen small business capabilities.

Congress's desire for small business participation is made clearer in other provisions. Title VII contains an entire section on small business involvement. Specifically, "[s]mall 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 chapter."²³ To facilitate involvement, small businesses were to be "afforded the maximum opportunity to participate in such advisory committees" and "small business concerns shall be accorded, to the extent practicable, a fair share of such material" whenever the president exercises material allocation authority under Title I.²⁴

Title I further identifies the modernization of small businesses as an objective of the DPA itself.²⁵ "In providing any assistance under this chapter," the Act states, "the President shall 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, as identified by the Secretary of Labor."²⁶

Despite the stated desire to include small businesses in procurements, and the Act's encouragement that the president grant small businesses a "strong preference" for inclusion in actions undertaken, the DPA leaves the methods for small business inclusion largely undefined. Unlike, for example, the Small Business Act, which encourages small business participation through set-aside awards and other contracting benefits, there is no statutory apparatus to facilitate small business participation under the DPA. Neither does the DPA cross reference to any procurement assistance provisions of the Small Business Act or associated regulations. Thus, as a practical matter, the DPA's small business involvement is largely aspirational without any direct mechanisms to ensure small business participation.

The challenge DPA authority presents to small businesses is readily apparent considering Title I's prioritization authorities. Priority performance is an extraordinary power that greatly modifies the traditional contracting landscape. Federal contracts are typically publicized and open for competition among offerors.²⁷ Consequently, private businesses may self-select whether they would like to participate in a federal procurement. This also allows otherwise unknown small

²² 50 U.S.C. § 4502(a)(8) (emphasis added); DPA § 2(a)(8).

²³ 50 U.S.C. § 4551(a); DPA § 701(a).

²⁴ 50 U.S.C. § 4551(c), (e); DPA § 701(c), (e).

²⁵ 50 U.S.C. § 4518; DPA § 108.

²⁶ 50 U.S.C. § 4518(a); DPA § 108(a).

²⁷ FAR 5.002 (requiring the publication of contract actions); FAR 6.101 (requiring the use of "full and open" competition).

businesses to enter the federal marketplace.

Procurements conducted under Title I authorities, however, reverse this dynamic. In turn, this defeats other federal procurement schemes that are designed to encourage small business participation. For example, the Federal Acquisition Regulations (the “FAR”) require contract publication to “[b]roaden industry participation in meeting Government requirements” and “[a]ssist small business concerns . . . in obtaining contracts and subcontracts.”²⁸ This latter objective is particularly important since the government may be unaware of otherwise capable small businesses. Procurements conducted under Title I, however, do not provide the same participation opportunities, as there is no publication requirement.

Consequently, the DPA’s prioritization authorities upset some of the traditional methods employed to increase small business participation. In some ways, DPA prioritization authority can stifle the ability of small businesses to perform at the prime contract level.

While it is clear the DPA desires to include small businesses to the greatest extent feasible in DPA procurements, the DPA lacks the necessary mechanisms to truly facilitate small business participation on a practical level. This is also true of the regulations that support the DPA. By way of example, the president has delegated Title I authority to the Department of Health and Human Services for medical items; however, the regulatory authority published to facilitate these purchases does not even contain the phrase “small business.”²⁹

Administration of the DPA

In an effort to aid administration of the DPA, the president has delegated DPA authority to the Secretaries of Agriculture, Energy, Health and Human Services, Transportation, Defense, and Commerce.³⁰ Each secretary is responsible for overseeing DPA procurements that impact their agency’s mission. For example, the Secretary of Health and Human Services is responsible for health resource DPA procurements.

Additionally, the president has also named at least 17 Secretaries, Directors, and other Administrators to the Defense Production Act Committee. This statutorily-required committee is responsible for planning and coordinating “the effective use of the priorities and allocations authorities under this chapter by the departments, agencies, and independent establishments of the Federal Government to which the president has delegated authority under this chapter.”³¹

Utilization of the DPA to Combat COVID-19

Prior to the COVID-19 pandemic, the DPA was largely used as a tactical tool to prioritize specific projects, typically for the Department of Defense. The response to COVID-19 is the first time the DPA is being called on to provide comprehensive acquisition solutions to address

²⁸ FAR 5.002(b)–(c).

²⁹ 45 C.F.R. § 101.1 *et seq.*

³⁰ Exec. Order No. 13603 § 201(a), 77 Fed. Reg. 16,651 (Mar. 16, 2012).

³¹ 50 U.S.C. § 4567; DPA § 722.

concurrent shortages.

Since March of this year, the Government primarily used the DPA to acquire resources and make investments to battle COVID-19. On March 18, the president issued an executive order authorizing the Secretary of the Department of Health and Human Services to use Title I authorities to obtain medical supplies to address COVID-19.³² Subsequent executive orders delegated authority to combat resource hoarding,³³ as well as providing for the utilization of Title III authorities.³⁴

Congress subsequently allocated \$1 billion under the CARES Act for DPA purchases to respond to COVID-19.³⁵ With the delegations of authority and appropriations, both Title I and Title III authorities have been exercised to respond to the COVID-19 pandemic.

Under Title I authority, General Motors has been contracted to produce 30,000 ventilators by the end of August 2020 for \$489.4 million.³⁶ An additional Title I procurement for ventilators was issued to Philips for \$646.7 million.³⁷ More Title I prioritized contracts for ventilators were subsequently issued to General Electric, Hill-Rom, Medtronic, ResMed, and Vyair.³⁸ The value of these awards ranged from \$9.1 million to \$552 million.³⁹

With respect to Title III, the Department of Defense invested \$133 billion to increase N95 mask production.⁴⁰ The recipients of these investments included 3M, Honeywell, and O&M Halyard.⁴¹ In another example, the Department of Defense and Department of Health and Human Services jointly awarded a contract under Title III to ApiJect Systems America to increase the production of syringes.⁴² The value of this contract totaled \$138 million.⁴³

³² Exec. Order No. 13909 § 2(a), 85 Fed. Reg. 16,227 (Mar. 18, 2020).

³³ Exec. Order No. 13910 § 2, 85 Fed. Reg. 17,001 (Mar. 23, 2020).

³⁴ Exec. Order No. 13911 § 2, 85 Fed. Reg. 18,403 (Mar. 27, 2020).

³⁵ CARES Act, Pub. L. No. 116-136, Division B, Defense Production Act Purchases, 134 Stat. 281 (2020).

³⁶ Press Release, Dep't Health & Human Servs., HHS Announces Ventilator Contract with GM under Defense Production Act (Apr. 8, 2020), *available at* <https://www.hhs.gov/about/news/2020/04/08/hhs-announces-ventilator-contract-with-gm-under-defense-production-act.html>.

³⁷ Press Release, Dep't Health & Human Servs., HHS Announces Ventilator Contract with Philips under Defense Production Act (Apr. 8, 2020), *available at* <https://www.hhs.gov/about/news/2020/04/08/hhs-announces-ventilator-contract-with-philips-under-defense-production-act.html>.

³⁸ Press Release, Dep't Health & Human Servs., HHS Announces New Ventilator Contracts, Orders Now Totaling Over 130,000 Ventilators (Apr. 13, 2020), *available at* <https://www.hhs.gov/about/news/2020/04/13/hhs-announces-new-ventilator-contracts-orders-now-totaling-over-130000-ventilators.html>.

³⁹ *Id.*

⁴⁰ Press Release, Dep't Def., First DOD Defense Production Act Title 3 COVID-19 Project (Apr. 11, 2020), *available at* <https://www.defense.gov/Newsroom/Releases/Release/Article/2146692/first-dod-defense-production-act-title-3-covid-19-project/>

⁴¹ David F. Dowd & Marcia G. Madsen, Use of the Defense Production Act: Expanding Capacity, MAYER BROWN (Apr. 22, 2020), *available at* <https://www.mayerbrown.com/en/perspectives-events/publications/2020/04/use-of-the-defense-production-act-expanding-capacity>.

⁴² Press Release, Dep't Def., DOD Awards \$138 Million Contract, Enabling Prefilled Syringes for Future COVID-19 Vaccine (May 12, 2020), *available at* <https://www.defense.gov/Newsroom/Releases/Release/Article/2184808/dod-awards-138-million-contract-enabling-prefilled-syringes-for-future-covid-19/>.

⁴³ *Id.*

Unfortunately, the examples identified above may provide an incomplete picture of the Act's utilization in response to COVID-19. As the Congressional Research Service noted in April 2020, "[p]ublic reporting and congressional oversight of DPA activities is fragmented and irregular."⁴⁴

As relevant to the Committee, inconsistencies in the data make it difficult to assess how involved small businesses are in DPA procurements. This is particularly true with respect to information about suppliers and subcontractors. Nevertheless, based on the publicized awards, it is evident that the majority of DPA prime contracts are being made to large businesses. The extent to which small businesses are involved at the subcontract or supplier level is unknown.

Conclusions

COVID-19 represents the first time the DPA has been called upon to achieve its intended purpose—a large scale mobilization of America's resources to address a national defense threat. As American industry mobilizes to address the challenges COVID-19 presents, it appears small businesses are not frequently engaged at the prime contract level for DPA procurements. Additionally, given the scarcity of data, it is difficult to know the extent small businesses are involved as subcontractors and suppliers under the DPA.

It is clear that the DPA provides powerful tools for the president to support and advance business, including small businesses. While prioritization has been at the forefront of recent conversations regarding COVID-19, the DPA also provides substantial investment opportunities that could be leveraged to provide small businesses the tools and resources they need to play their part in producing for America's defense against COVID-19. I encourage Congress to utilize the tools present in the DPA to invest in America's small businesses, as well as provide further assistance for small businesses to gain access to DPA procurements.

I hope the above information has provided insight into the operation of the DPA, as well as its utilization to combat the COVID-19 pandemic. I appreciate the opportunity to appear before this subcommittee. I look forward to answering your questions.

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⁴⁴ MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RESEARCH SERV., IN11337, THE DEFENSE PRODUCTION ACT (DPA) AND THE COVID-19 PANDEMIC: RECENT DEVELOPMENTS AND POLICY CONSIDERATIONS 3 (2020), available at <https://crsreports.congress.gov/product/pdf/IN/IN11337/>