

**Alert | Health Emergency Preparedness Task Force:  
Coronavirus Disease 2019**



**March 2020**

## **The Impact of Recent Stafford Act and Defense Production Act Declarations on COVID-19 Procurements**

The expanding Coronavirus Disease 2019 (COVID-19) pandemic has forced federal, state, and local governments to explore a variety of emergency procurement tools to meet critical needs for medical and other resources. On March 13, 2020, President Trump **declared an emergency** under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (Stafford Act). Subsequently, on March 18, 2020, President Trump issued an Executive Order (DPA E.O.) finding that medical resources needed to respond to COVID-19 qualified as “critical and strategic materials” under the Defense Production Act of 1950 (the DPA), as amended.<sup>1</sup> As described below, these declarations unlock potentially important emergency procurement tools for federal, state and local governments to acquire the resources necessary to respond to COVID-19.

### **Stafford Act**

President Trump’s March 13 Stafford Act emergency declaration included a finding that the COVID-19 pandemic is of sufficient severity and magnitude to warrant a *nationwide* emergency determination under section 501(b) of the Stafford Act. The declaration of a nationwide emergency (as opposed to a specific

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<sup>1</sup> 50 U.S.C. § 4501 *et seq.*

jurisdiction) is unprecedented,<sup>2</sup> and authorized federal assistance to state and local governments “for emergency protective measures not authorized under other federal statutes.”<sup>3</sup>

When issuing the emergency declaration, the president indicated that he may also declare a “major disaster” under the Stafford Act, which may make available additional federal assistance. On March 20, 2020, President Trump approved a “major disaster” declaration for the state of New York. On March 23, 2020, the president approved “major disaster” declarations for the states of California and Washington. We anticipate that the president will declare “major disasters” in other states as the number of cases of the virus continues to climb across the country. This would continue to open up additional federal funding for various supplies and services.

In short, the president’s use of the Stafford Act will, in part: (1) enable the federal government to utilize emergency procurement flexibilities to acquire goods faster, and (2) enable state and local governments to access federal funding to support COVID-19 response efforts.

### *Emergency Procurement Flexibilities*

Based on the president’s emergency declaration, the emergency procurement flexibilities identified in Federal Acquisition Regulation (“FAR”) 18.202, “Defense or recovery from certain events,” can be used to support COVID-19 response efforts. In a March 20, 2020 Memo, the Office of Management and Budget (OMB) summarized these significant flexibilities as:

- (1) The **micro-purchase threshold** is raised from \$10,000<sup>1</sup> to \$20,000 for domestic purchases and to \$30,000 for purchases outside the U.S.;
- (2) The **simplified acquisition threshold** is raised from \$250,000<sup>2</sup> to \$750,000 for domestic purchases and \$1.5 million for purchases outside the U.S.; and
- (3) **Agencies may use simplified acquisition procedures** up to \$13 million for purchases of commercial item buys.

OMB emphasized that the flexibilities did not need to be used, but that “agencies should feel fully empowered to use the acquisition flexibilities, as needed, consistent with good business judgment in response to the national emergency.” The use of the emergency flexibilities will help to expedite the government’s response to pressing demands and to reduce the contracting requirements for contractors.

### *Preferences and Set-Asides for Local Firms Under the Stafford Act*

Typically, there is a preference given by contracting officers to local firms in the area designated for a Stafford Act emergency declaration. However, the COVID-19 emergency declaration is *nationwide* and, therefore, no specific locally affected area exists. In its March 20 memo, OMB confirmed that this means the acquisition workforce does not need to create preferences for local firms. However, OMB indicated that this issue may be revisited going forward and encouraged agencies to work together “regarding potential circumstances where application of local set asides may make sense, especially for small business contractors.”

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<sup>2</sup> Congressional Research Service, “The Stafford Act Emergency Declaration for COVID-19” (IN11251, Version 2) (Mar. 13, 2020), available at <https://crsreports.congress.gov/product/pdf/IN/IN11251>.

<sup>3</sup> P.L. 93-288, as amended; 42 U.S.C. §§ 5121 *et seq.*

### *GSA Disaster Purchasing Program*

State and local governments may place orders against GSA Schedule contracts through the Disaster Purchasing Program “to facilitate recovery from a major disaster declared by the President under the [Stafford Act] to facilitate disaster preparedness or response...”<sup>4</sup> Authorized Schedule contractors, contracts, products, and services are identified with a Disaster Purchasing icon in GSA eLibrary and on GSA Advantage.

### *Availability of Federal Funds to Support Emergency Protective Measures*

The Stafford Act authorizes the president to issue two types of declarations: (1) emergency<sup>5</sup> and (2) major disaster.<sup>6</sup> Both types of declarations authorize the president to provide supplemental federal disaster assistance in the forms of Public Assistance (PA) and Individual Assistance (IA).<sup>7</sup> PA may be available under emergency and major disaster declarations for “Emergency Work” in Category A- “Debris Removal” and Category B- “Emergency Protective Measures.” For major disaster declarations only, PA also may be available for “Permanent Work,” in Categories C-G for “Restoration of damaged facilities.” IA that may be available under an emergency declaration is the “Individuals and Households Program” (IHP). More types of IA may be made available under major disaster declarations: IHP, Crisis Counseling Program, Disaster Case Management, Disaster Unemployment Assistance, Disaster Legal Services, Disaster Supplemental Nutrition Assistance Program. Additionally, for major disaster declarations, Hazard Mitigation Assistance (HMA) is available in the form of the Hazard Mitigation Grant Program.

The Federal Emergency Management Agency (FEMA) coordinates and provides federal assistance under the National Response Framework.<sup>8</sup> FEMA’s efforts support the U.S. Department of Health and Human Services (HHS), which is the lead for the Federal Government’s response to the COVID-19 pandemic.<sup>9</sup>

**FEMA has stated** that “eligible emergency protective measures taken to respond to the COVID-19 emergency at the direction or guidance of public health officials may be reimbursed under Category B of FEMA’s Public Assistance program.”<sup>10</sup> State, territorial, tribal, and local government entities, as well as certain non-profit organizations (PNP) are eligible to apply for PA.<sup>11</sup> PA assistance “will require execution of a FEMA-State/Tribal/Territory Agreement, as appropriate, and execution of an applicable emergency plan. Local governments and other eligible PA applicants will apply through their respective state, tribal,

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<sup>4</sup> GSAR 552.228-113, Scope of Contract (Eligible Ordering Activities).

<sup>5</sup> “Emergency’ means 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.

<sup>6</sup> “Major disaster’ means any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” 42 U.S.C. § 5122.

<sup>7</sup> FEMA, “The Disaster Declaration Process,” available at <https://www.fema.gov/disaster-declaration-process>.

<sup>8</sup> The National Response Framework provides foundational emergency management doctrine for how the U.S. responds to all types of incidents. The current National Response Framework is the Fourth Ed. (Oct. 28, 2019), which is available at [https://www.fema.gov/media-library-data/1582825590194-2f000855d442fc3c9f18547d1468990d/NRF\\_FINALApproved\\_508\\_2011028v1040.pdf](https://www.fema.gov/media-library-data/1582825590194-2f000855d442fc3c9f18547d1468990d/NRF_FINALApproved_508_2011028v1040.pdf). See also 44 C.F.R. Part 206, Federal Disaster Assistance.

<sup>9</sup> 42 U.S.C. § 300hh(a).

<sup>10</sup> FEMA HQ-20-017-FactSheet, COVID-19 Emergency Declaration (Mar. 13, 2020), available at <https://www.fema.gov/news-release/2020/03/13/covid-19-emergency-declaration>.

<sup>11</sup> *Id.*

or territorial jurisdictions.”<sup>12</sup> Assistance will be provided at a 75% cost share.<sup>13</sup> In other words, assistance applicants will be reimbursed for 75% of eligible costs that are incurred while performing emergency protective measures. However, FEMA will not reimburse for work that is supported by the authorities of another agency.<sup>14</sup>

On March 19, 2020, **FEMA stated** that it may provide assistance for emergency protective measures that include, but are not limited to, a wide variety of activities including:

- Management, control and reduction of immediate threats to public health and safety:
  - Emergency Operation Center costs
  - Training specific to the declared event
  - Disinfection of eligible public facilities
  - Technical assistance to state, tribal, territorial or local governments on emergency management and control of immediate threats to public health and safety
- Emergency medical care:
  - Non-deferrable medical treatment of infected persons in a shelter or temporary medical facility
  - Related medical facility services and supplies
  - Temporary medical facilities and/or enhanced medical/hospital capacity (for treatment when existing facilities are reasonably forecasted to become overloaded in the near term and cannot accommodate the patient load or to quarantine potentially infected persons)
  - Use of specialized medical equipment
  - Medical waste disposal
  - Emergency medical transport
- Medical sheltering (e.g. when existing facilities are reasonably forecasted to become overloaded in the near future and cannot accommodate needs)
  - All sheltering must be conducted in accordance with standards and/or guidance approved by HHS/CDC and must be implemented in a manner that incorporates social distancing measures
  - Non-congregate medical sheltering is subject to prior approval by FEMA and is limited to that which is reasonable and necessary to address the public health needs of the event, is pursuant to the direction of appropriate public health officials and does not extend beyond the duration of the Public Health Emergency
- Household pet sheltering and containment actions related to household pets in accordance with CDC guidelines

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<sup>12</sup> FEMA Fact Sheet, “Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures” (Mar. 19, 2020), *available at* <https://www.fema.gov/news-release/2020/03/19/coronavirus-covid-19-pandemic-eligible-emergency-protective-measures>.

<sup>13</sup> *Id.* The Stafford Act authorizes FEMA to reimburse for not less than 75% of the eligible costs for specific work undertaken by eligible PA applicants. *See* 42 U.S.C. § 5193(a).

<sup>14</sup> 42 U.S.C. § 5155.



- Purchase and distribution of food, water, ice, medicine, and other consumable supplies, to include personal protective equipment and hazardous material suits
- Movement of supplies and persons
- Security and law enforcement
- Communications of general health and safety information to the public
- Search and rescue to locate and recover members of the population requiring assistance
- Reimbursement for state, tribe, territory and/or local government force account overtime costs<sup>15</sup>

The major disaster declarations for the states of California, New York, and Washington have made federal emergency aid available for recovery efforts in the areas affected by COVID-19 and have made federal funding available for Crisis Counseling for affected individuals in those states.

Billions of dollars have been made available for FEMA’s response to the COVID-19 pandemic to date. In turn, state and local governments will use the federal funds made available through the COVID-19 Stafford Act emergency declaration to make purchases of critically needed supplies and services. FEMA’s list of emergency protective measures for which assistance may be used provides insight into the various industries that likely will be needed to respond to the COVID-19 emergency.

Companies interested in assisting with COVID-19 response efforts should not only monitor federal procurement websites, but also state and local procurement websites to identify opportunities that might result from the Stafford Act emergency declaration.

### **Defense Production Act**

As noted in a [prior COVID-19 alert](#), the DPA provides the president with broad powers to ensure “national defense” preparedness, which includes: (i) various military and energy activities and “homeland security, stockpiling, space, and any directly related activity,”<sup>16</sup> (ii) emergency preparedness activities under the Stafford Act, which Act has been used for public health emergencies,<sup>17</sup> and (iii) “critical infrastructure protection and restoration.”<sup>18</sup> As a result, DPA authority extends beyond traditional military preparedness, and may be used to support domestic preparedness response, recovery from national emergencies and manufacture and acquisitions of medical supplies (e.g., ventilators, respirators). Prior to COVID-19, the DPA has not been employed for public health emergencies.<sup>19</sup>

Once invoked, the DPA provides the president, and delegated agencies,<sup>20</sup> with several distinct but interrelated, procurement powers and authority. First, the DPA provides the authority to compel

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<sup>15</sup> Additional information about the Public Assistance Program can be found in FEMA’s *Public Assistance Program and Policy Guide*, FP 104-099-2 (Apr. 2018), available at [https://www.fema.gov/media-library-data/1525468328389-4a038bbef9081cd7dfe7538e7751aa9c/PAPPG\\_3.1\\_508\\_FINAL\\_5-4-2018.pdf](https://www.fema.gov/media-library-data/1525468328389-4a038bbef9081cd7dfe7538e7751aa9c/PAPPG_3.1_508_FINAL_5-4-2018.pdf).

<sup>16</sup> See 50 U.S.C. § 4552.

<sup>17</sup> *Id.*

<sup>18</sup> 50 U.S.C. § 4552(14).

<sup>19</sup> The Bureau of Industry and Security (Department of Commerce) administers this authority through the Defense Priorities and Allocations System Program (“DPAS”) regulation. See 15 C.F.R. § 700 *et seq.* Supplemental implementing regulations have been promulgated by other federal agencies with delegated DPA authority. See 10 C.F.R. § 217.1 *et seq.* (Department of Energy); 15 C.F.R. § 700.1 *et seq.*; 45 C.F.R. § 101.1 *et seq.* (Department of Health and Human Services); 49 C.F.R. § 33.1 *et seq.* (Department of Transportation).

<sup>20</sup> Executive Order 13603, “National Defense Resource Preparedness,” 77 Fed. Reg. 16651, March 22, 2012, *inter alia*, delegates key authorities under the DPA to Secretary of Agriculture, the Secretary of Energy, the Secretary of Health and Human Services, the Secretary of Transportation, the Secretary of Defense, the Secretary of Commerce, and the Secretary of Homeland Security (re-delegated to the Administrator of FEMA).

corporations to accept government orders or contracts.<sup>21</sup> The DPA also provides authority to require that contractors prioritize federal contracts (through the issuance of “rated orders”) for critical materials, equipment, and services before contractors satisfy any other competing interest. This authority to order prioritization extends to the performance of federal subcontracts between two private parties, such as a contract between a prime contractor and a subcontractor (and even contracts between lower tier subcontractors if performed under a federal prime contract).<sup>22</sup> While there are some exceptions to the government’s power under the DPA to compel performance under a prioritized or “rated order,”<sup>23</sup> in most cases a company receiving a DPA order has little choice other than to comply or to offer the closest practicable alternative and otherwise comply to the maximum extent possible.

The DPA additionally provides the authority to allocate or control the general distribution of materials, services, and facilities.<sup>24</sup> Pursuant to this authority, the president and delegated federal agencies can issue the following types of “allocation orders”:

- (a) *Set-aside Order*. A set-aside order requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.<sup>25</sup>
- (b) *Directive Order*. A directive order is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. For example, a directive can require a person to stop or reduce 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.<sup>26</sup>
- (c) *Allotment Orders*. An allotment order is an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.<sup>27</sup>

The implementing regulations applicable to the use of allocation actions pursuant to the DPA include additional, detailed guidance regarding the government’s proper exercise of this authority, and the rights and obligations of businesses that are subject to allocation orders.<sup>28</sup> Importantly, both the language in the DPA and agency implementing regulations provide that persons shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with DPA prioritization or allocation directions, notwithstanding that such action shall subsequently be declared invalid by judicial or other competent authority.<sup>29</sup> Importantly, both the language in the DPA and agency implementing regulations provide that persons shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with DPA prioritization or allocation directions, notwithstanding that such action shall subsequently be declared invalid by judicial or other competent authority.<sup>30</sup>

Finally, the DPA provides the government authority to provide financial incentives and assistance for the development, maintenance, modernization, restoration, and expansion of the production capacity of

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<sup>21</sup> 50 U.S.C. § 4511(a)(1).

<sup>22</sup> See, e.g., 15 C.F.R. § 700.3(d).

<sup>23</sup> Implementing regulations provide detail regarding circumstances when businesses can and must reject priority or “rated orders.” See, e.g., 15 C.F.R. § 700.13(a) & (b).

<sup>24</sup> 50 U.S.C. § 4511(a)(2). Traditionally this authority has been utilized to maximize the production of goods needed in war efforts, and allocation authority has not been utilized outside of this context.

<sup>25</sup> See 15 C.F.R. § 700.33.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See 15 C.F.R. § 700.30-36.

<sup>29</sup> See, e.g., 50 U.S.C. § 4557; 45 C.F.R. § 101.90; *Eastern Air Lines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 996 (5th Cir. 1976) (finding delay in performance of commercial contract excusable under DPA’s exoneration provision).

<sup>30</sup> See e.g., 50 U.S.C. § 4557; 45 C.F.R. § 101.90; *Eastern Air Lines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 996 (5th Cir. 1976) (finding delay in performance of commercial contract excusable under DPA’s exoneration provision).

domestic sources for critical components, critical technology items, materials, and industrial resources.<sup>31</sup> In the context of the COVID-19 pandemic, these authorities could be used to encourage private sector investment in additional production capacity for medical equipment, personal protective equipment, vaccines and antivirals. The types of incentives and assistance available under this authority include:

(a) *Loan Guarantees*: The government can guarantee loans by private institutions for the purpose of financing any contractor, subcontractor, provider of critical infrastructure, or other person in support of production capabilities or supplies that are deemed by the guaranteeing agency to be necessary to create, maintain, expedite, expand, protect, or restore production and deliveries or services essential to the national defense.<sup>32</sup>

(b) *Direct Loans*: The government can make direct loans to private business enterprises (including nonprofit research corporations and providers of critical infrastructure) for the creation, maintenance, expansion, protection, or restoration of capacity, the development of technological processes, or the production of essential materials, including the exploration, development, and mining of strategic and critical metals and minerals.<sup>33</sup>

(c) *Other Actions*: The government can take other actions necessary to create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense, including actions:

(1) for purchases of or commitments to purchase an industrial resource or a critical technology item, for government use or resale;

(2) for the encouragement of exploration, development, and mining of critical and strategic materials, and other materials;

(3) for the development of production capabilities; and

(4) for the increased use of emerging technologies in security program applications and the rapid transition of emerging technologies—

(a) from government-sponsored research and development to commercial applications; and

(b) from commercial research and development to national defense applications.<sup>34</sup>

The applicable statutory provisions of the DPA provide significant additional detail regarding the scope and exercise of these financial incentive and assistance tools.<sup>35</sup>

President Trump's [March 18, 2020 DPA E.O.](#) invoked the DPA and included a specific finding that “health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators” constitute critical and strategic materials pursuant to section 101(b) of the DPA.<sup>36</sup> The DPA E.O. further noted that authority had been delegated to the Secretary of Health and

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<sup>31</sup> See 50 U.S.C. § 4531-§ 4534.

<sup>32</sup> 50 U.S.C. § 4531(a)(1).

<sup>33</sup> 50 U.S.C. § 4532(a).

<sup>34</sup> 50 U.S.C. § 4533(a)(1).

<sup>35</sup> See, e.g., 50 U.S.C. § 4531-§ 4534.

<sup>36</sup> 50 U.S.C. § 4511(b).

Human Services (“HHS”) to identify additional specific health and medical resources that qualify as critical and strategic materials under section 101(b) of the DPA. This finding constitutes the requisite statutory trigger to unlock the authority under the DPA to control the general distribution in the civilian market of the materials specifically identified in the DPA E.O., as well as additional materials identified by the HHS Secretary. Finally, the DPA E.O. delegated authority to the Secretary of HHS, in consultation with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, 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.

On March 18, 2020, the Congressional Research Service (CRS) published CRS Insight IN11231 entitled *The Defense Production Act (DPA) and COVID-19: Key Authorities and Policy Considerations*. This insight includes a case study that discusses how the DPA authority described above might be utilized to expand medical protective gear production. On March 24, 2020, FEMA announced that it would formally implement the DPA to secure medical equipment needed to fight the coronavirus pandemic. Specifically, the FEMA Administrator indicated that the DPA would be used to access COVID-19 test kits, and that “DPA language” would be inserted into mass contracts for the acquisition of personal protective masks. Additional use of the significant DPA emergency procurement tools discussed above may occur in the coming days and weeks.

## Conclusion

The recent Stafford Act and DPA declarations unlock powerful emergency procurement tools for federal, state and local governments to acquire the resources necessary to respond to COVID-19. Companies that might provide assistance pursuant to these declarations should carefully examine any resulting solicitation and contract language, as well as applicable statutory and regulatory requirements related to the procurement authority utilized, to properly assess risks and ensure compliance.

For more information and updates on the developing situation, visit [GT’s Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

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