



## PTACs of Michigan COVID-19 Playbook

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### **Summary**

Due to the rapidly evolving nature of the response to the COVID-19 pandemic, the PTACs of Michigan are committed to keeping our clients fully informed. This summary will include Executive and Legislative action at the federal and state levels specific to contracting and small business assistance. During this time of uncertainty, do not hesitate to contact your PTAC to help clarify or address questions about any of the items included herein.

### **Federal Contracting Updates**

#### **Prioritizing Health and Medical Resources to Respond to the Spread of COVID-19**

On 18 March 2020, President Trump issued an Executive order on "Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19" (the COVID-19). In doing so, he cited the authority vested in the President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (The "Act"), and section 301 of title 3, United States Code. <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>

#### **Defense Industrial Base Essential Critical Infrastructure Workforce**

On 20 March 2020, the Defense Industrial Base (DIB) is identified as a Critical Infrastructure Sector by the Department of Homeland Security. The DIB sector is defined as the worldwide industrial complex that enables research and development as well as design, production, delivery, and maintenance of military weapons systems/software systems, subsystems, and components or parts, as well as purchased services to meet U.S. Military requirements. The attached (link) Department of Homeland Security memorandum dated March 19, 2020, identifies the essential critical infrastructure workers during COVID-19 response emergency, and provides guidance to State and Local officials as they work to protect their communities while ensuring continuity of functions critical to public health and safety as well as economic and national security. <https://media.defense.gov/2020/Mar/22/2002268024/-1/-1/1/DEFENSE-INDUSTRIAL-BASE-ESSENTIAL-CRITICAL-INFRASTRUCTURE-WORKFORCE-MEMO.PDF>

#### **Preferential Acceptance and Performance of Contracts or Orders**

"Under Title I of the Defense Production Act of 1950, as amended, the President is authorized to require preferential acceptance and performance of contracts or orders (other than contracts of employment) 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. The Department of Commerce is delegated authority, through Executive Order 13603, to implement these priorities and allocations

provisions for industrial resources. The Bureau of Industry and Security administers this authority through the DPAS regulation (15 CFR Part 700)." <https://www.bis.doc.gov/index.php/other-areas/strategic-industries-and-economic-security-sies/defense-priorities-a-allocations-system-program-dpas>

### **Contractors Should Know COVID-19 Executive Order Authority**

Contractors should know that the COVID EO provides authority to the "... Secretary of Health and Human Services to use the authority under section 101 of the Act to determine, in consultation with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, 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." <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>

### **Familiarize Yourself with Defense Priorities and Allocation System (DPAS)**

PTAC clients may be familiar with the Defense Priorities and Allocation System (DPAS) and how to comply with "DO" and "DX" rated orders and the requirement to prioritize performance of rated orders over non-rated orders. However, some may not be familiar with the "*Priorities and Allocation System*" and may now receive rated orders from the Departments of Defense, Commerce, Energy, Homeland Security, Health and Human Services, and GSA.

If you are not familiar with Federal Priorities and Allocation Systems review the training at

<https://www.bis.doc.gov/index.php/documents/other-areas/strategic-industries-and-economic-security/1615-dpas-training-slides/file>.

Contractors should understand the following about rated orders.

- ***Identifying a Rated Contract.*** Rated contracts generally must include at least four elements: (1) a priority rating (*e.g.*, DO-HR or DX-HR); (2) a specific required delivery date or dates; (3) a signature certifying that the rated order is authorized and regulatory requirements are being followed; and (4) a statement that the rated order is certified for national defense use or is placed in support of emergency preparedness requirements. Rated contracts can come directly from the government or from prime contractors or higher tier subcontractors who hold rated contracts or subcontracts. Subcontractors must comply with rated orders, but when receiving a rated subcontract, subcontractors can and should ask the prime contractor to verify that the prime contract is indeed rated and that the subcontract is necessary to fulfill the prime contract's requirements. The subcontract should include at least the elements described above.
- ***Identifying the DPA Authority.*** It may also be helpful to identify the DPA authority being exercised, *i.e.*, which priorities and allocations system is triggered and which agency has issued the prime contract. While DPA authority has been delegated and in some instances sub-delegated-for example, the DPAS is used by the Departments of Commerce, Defense, Energy, and Homeland Security, as well as the General Services Administration-not every agency directly holds DPA authority.

- **Acceptance or Rejection of a Rated Order.** A company that is subject to a priorities system generally must reject a rated contract if they are unable to satisfy the contract by the date specified (scheduling conflicts do not constitute an inability to fill the order, unless with another, higher- or identically rated contract). In such cases, the company must offer to fill an order on the earliest acceptable date. A company generally may reject a rated contract on various other specified grounds, including if (1) the prime contractor or higher level subcontractor placing the order is unwilling or unable to meet regularly established terms of sale or payment; (2) the contract is for an item the receiving company does not supply or a service the receiving company is unable to perform, with some exceptions for recent provisions of supplies or services; or (3) the prime contractor or higher level subcontractor placing the rated order (as opposed to the Government) makes the item or performs the service being ordered.
- **Sourcing Materials for a Rated Contract.** Companies may (and, under HPAS, are required to) generally flow down the rating on their contract to any suppliers in order to obtain items or services needed to fulfill the rated contract-at whatever level throughout the procurement chain.
- **Negotiation of Terms for a Rated Contract.** Rated contracts must generally follow the terms of the usual dealings among companies. A company receiving a rated contract is prohibited from discriminating against it in any way, for example by charging higher prices or by imposing different terms and conditions than for comparable unrated orders. However, as mentioned above, the entity placing a rated order must be willing and able to meet regularly established terms of sale or payment.
- **Potential Breach of Non-Rated Contracts.** As mentioned above, rated contracts must be prioritized against non-rated contracts—even if this may cause the contractor to breach the non-rated contract. However, the DPA and the relevant priorities and allocations systems provide that a company cannot be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rated contract. That said, courts have found in the past that the federal government does not have an obligation to reimburse a company for potential lost profits attributable to nonperformance of unrated contracts." <https://www.insidegovernmentcontracts.com/2020/03/the-defense-production-act-and-the-coronavirus-executive-order-key-considerations/>

### **Justification and Approval Threshold for 8(a) Contracts**

For procurements valued at \$100M or less, KOs are not required to execute a J&A for award of a sole source contract under the 8(a) program. KOs must use the threshold of \$100M million in lieu of the \$22M threshold in FAR Parts 6 and 19. This class deviation implements section 823 of the NDAA for FY2020.

**Impact:** allows sole source awards to 8(a) concerns owned by an Indian tribe or an Alaska Native Corporation without a J&A (up to \$100M). For sole source awards (> \$7M) to other 8(a) concerns, if there is not a reasonable expectation that at least two eligible 8(a) participants will submit offers at a fair price, the AA/BD may accept the requirement for a sole source 8(a) award if he or she determines that an eligible Participant in the 8(a) portfolio is capable of performing the requirement at a fair price.

### **Progress Payment Rates**

In response to COVID-19 national emergency, the progress payment rates in DFARS 232.501-1 are increased to 90% (was 80%) for large business and 95% (was 90%) for small business concerns.

### **Dedicated Webpage for COVID-19 Acquisition Information**

This site is dedicated to Coronavirus *acquisition* related Information and resources such as the OMB Memo guidance and managing Federal Contract Performance issues associated with the Novel Coronavirus (COVID-19). <https://www.acquisition.gov/coronavirus>

### **U.S Department of Defense Coronavirus Response**

This site provides up-to-date information on the Defense Department effort's, working closely with the Department of Health and Human Services and State Department, to provide support in dealing with the coronavirus outbreak. Visit this site for additional information on DoD Town Hall announcements, recordings, and transcripts, as well other information related to the Coronavirus: DOD Response. <https://www.defense.gov/>

## **Other Resources and Updates**

### **Pure Michigan Business Connect | COVID-19 Virtual Procurement Assistance**

Health & Human Service providers in need of critical supplies to help serve individual patients, staff, or members of your community. Also, suppliers that have goods that might be able to support organizations responding to the COVID-19 (Coronavirus) outbreak. PMBC is looking for both buyers and suppliers of critical health & human service supplies across a broad range of product categories. <https://pmbc.connect.space/covid19/forms>

### **\$300 Billion in Loans for Small Businesses**

Following the U.S. Treasury Department's recommendations for an emergency stimulus package, Senate Republicans released their economic relief [plan](#) on March 19, 2020. The plan would provide \$300 billion in loans for small businesses, \$50 billion in loans for passenger air carriers, \$8 billion in loans for cargo air carriers, and an additional \$150 billion in loans for other affected industries. The plan would also appropriate \$500 billion in direct payments for individuals on a tiered income scale. Under the plan, individuals making up to \$75,000 would qualify for a \$1,200 payment, with the payment for individuals above this threshold decreasing until \$99,000, at which payments are phased out completely.

### **SBA Approves Economic Injury Disaster Loan Declaration Request**

On March 19, 2020, the U.S. Small Business Administration approved Governor Whitmer's prior request for a statewide Economic Injury Disaster Loan declaration, providing small businesses, small agricultural cooperatives, and nonprofits having suffered substantial economic losses the ability to apply for some of the \$1 billion in low-interest loans appropriated by Congress earlier this month. Click [here](#) to view an application for loan assistance.

### **Michigan Strategic Fund**

In response to COVID-19's widespread economic impact, the Michigan Strategic Fund approved a \$20 million economic relief program to help lessen the impact of foregone revenue for Michigan businesses. Approved on March 19, 2020, the board granted the Michigan Economic Development Corporation the authority to distribute \$10 million in grants and \$10 million in low-interest loans to businesses throughout Michigan, with the MEDC planning on dispersing the funds by April 1, 2020. Qualified businesses are eligible to receive up to \$10,000 in grant funding, and must meet the following criteria for eligibility: 1) the company is in an industry affected by Whitmer's executive orders or can demonstrate it is otherwise affected by the COVID-19 outbreak; 2) the company has 50 employees or less; and 3) the company needs working capital to support payroll expenses, rent, mortgage payments, utility expenses, or other similar expenses that occur in the ordinary course of business. Loan amounts range anywhere between \$50,000-200,000, and require the following criteria to be met: 1) the company is in an industry affected by Whitmer's executive orders or can demonstrate it is otherwise affected by the COVID-19 outbreak; 2) the company has 100 employees or less; 3) the company needs working capital to support payroll expenses, rent, mortgage payments, utility expenses, or other similar expenses that occur in the ordinary course of business; and 4) the company can demonstrate that it is unable to access credit through alternative sources.

### **In-Kind Donations Related to COVID-19 Response**

Financial, material and in-kind donations can be directed to the Michigan Community Service Commission at [COVID19@donations@michigan.gov](mailto:COVID19@donations@michigan.gov) or 517-335-4295.