

ALERT

COVID-19 Disaster Funding for Government Contractors

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As the COVID-19 pandemic continues to have severe impact on the economy, Congress has been debating the Coronavirus Aid, Relief, and Economic Security Act or the “CARES Act” to provide additional funding to states, localities, companies, and workers to help weather the economic storm. Although still being fiercely debated in the Senate, the CARES Act is expected to contain provisions that could potentially assist many government contractors, including increased government loan guarantees for small businesses under Section 7(a) of the Small Business Act; U.S. Small Business Administration (SBA) loan forgiveness and additional Emergency Disaster Loans; extension of non-mission critical contract performance deadlines for small businesses; continued payments for small businesses even if unable to perform contracts due to COVID-19; and direct assistance in the form of loans and guarantees to certain impacted industries, states, and cities. Wiley is closely monitoring developments concerning debate over the CARES Act.

In addition to this emergency legislation, there are several other existing sources of disaster funding that contractors should be aware of, including the SBA Economic Injury Disaster Loan Program, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), and the Defense Production Act of 1950 (DPA).

SBA Economic Injury Disaster Loans

The SBA provides low-interest, long-term loans for physical and economic damage caused by a declared disaster under Section 7(b) of the Small Business Act (15 U.S.C. § 636(b)). Under the Coronavirus Preparedness and Response Supplement Appropriations Act, passed last week, the SBA is empowered to issue Economic Injury Disaster

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Loan declarations upon request from a state or territory governor designating their state a COVID-19 disaster area eligible for the loan program. Unlike other disasters, the declaration will not require a county-by-county designation but will apply statewide. The Act also added \$20 million to the SBA Disaster Loan program, but only for administrative expenses.

Small businesses, or non-profits of any size, which do not have other credit available from a private financial institution may apply for these loans "to pay fixed debts, payroll, accounts payable, and other bills" that cannot be paid as a result of the disaster. Disaster loans cannot exceed 4% interest rates, and SBA has stated that interest rate for COVID-19 loans is 3.75% for small businesses and 2.75% for non-profits. The loan terms can be up to 30-years, based on the borrower's ability to pay.

To be considered a small business under a Section 7(b), SBA's regulations provide that:

[F]or Disaster Loans (other than physical disaster loans), an applicant business concern must satisfy two criteria:

- (1) The size of the applicant alone (without affiliates) must not exceed the size standard designated for the industry in which the applicant is primarily engaged; and
- (2) The size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, which ever is higher. These size standards are set forth in § 121.201.

13 C.F.R. § 121.301. The SBA's affiliation rules applicable to the Disaster Loan program are set forth in the same section of SBA's regulations.

Eligible entities can find more information and apply for disaster assistance [here](#).

The Stafford Act Sections 502 and 503

On March 13, 2020, President Trump declared an emergency under the Stafford Act, 42 U.S.C. § 5121 et seq, and directed the Federal Emergency Management Agency (FEMA) to provide assistance under Sections 502 and 503 of the Act. The Stafford Act was passed "to provide an orderly and continuing means of assistance by the federal government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters."

Once an emergency has been declared, the President may direct any federal agency to utilize its authorities and the resources (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of state and local emergency assistance efforts to, among other things, save lives, protect property, and public health and safety; coordinate disaster relief efforts; provide advisory assistance; and provide emergency assistance.

Section 502 of the Stafford Act involves “providing federal assistance programs for both public and private losses sustained in disasters.” Section 503 of the Act mandates that assistance contain no less than a 75% federal cost share. According to FEMA’s press release, COVID-19 grants through the FEMA Public Assistance Program will be set at 75%.

FEMA has announced that per section 502, eligible emergency protective measures taken by recipient governments to respond to the COVID-19 emergency at the direction or guidance of public health officials may be reimbursed under Category B, Emergency Protective Measures, of FEMA’s Public Assistance grant program. State, Territorial, and Tribal entities are eligible to apply for COVID-19 Public Assistance once they have executed an applicable agreement and emergency plan with FEMA. Local governments and other eligible applicants can then apply for funding through their respective state, territorial, and tribal jurisdictions. FEMA will not duplicate assistance provided by the U.S. Department of Health and Human Services (HHS), including the Centers for Disease Control (CDC).

FEMA’s Public Assistance Program is typically used to provide grants for recovery efforts after a disaster. Recipients of these grants can use the funds for goods and services needed for the emergency measures, including by obtaining support from government contractors, following the applicable procurement regulations and procedures at 2 C.F.R. § 200 et seq. and FEMA’s Public Assistance rules. Under FEMA’s Grants Management Life Cycle, FEMA coordinates with recipients and applicants to develop scopes of work and costs, approve subrecipients, and provide other assistance. Generally, applicants to the Public Assistance program may not duplicate benefits with insurance and must comply with certain eligibility conditions, many of which will not apply to the COVID-19 pandemic (e.g. historic preservation).

FEMA has announced that the following categories of Public Assistance will be available to recipient governments if not covered by HHS:

- Management, control and reduction of immediate threats to public health and safety
- Emergency medical care
- Medical sheltering (e.g. when existing facilities are reasonably forecasted to become overloaded in the near future and cannot accommodate needs)
- Household pet sheltering and containment actions related to household pets in accordance with CDC guidelines
- 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

Defense Production Act Title III

The DPA, 50 U.S.C. § 2061 et seq. allows the federal government to direct private companies to produce goods to meet national security needs. Under Title I of the DPA, the U.S. Department of Defense, Energy, Health and Human Services, Homeland Security, including FEMA, and Transportation have authority to issue “rated orders” to prioritize government purchases over commercial production. Title I has been invoked by President Trump on a limited basis for certain medical equipment for the pandemic, which FEMA announced it would use for the first time on March 24.

Title III of the DPA—which has not yet been invoked to combat the COVID-19 virus—allows the President to use loans, direct purchases, and other incentives to boost production of critical items. The President must issue a determination to use Title III to address a domestic industrial base shortfall meeting three statutory criteria:

- The industrial resource, material, or critical technology item is essential to national defense;
- Without presidential action under this section, U.S. industry cannot reasonably be expected to provide the capability for the needed industrial resource, material, or critical technology item in a timely manner; and
- Title III actions are the most cost effective, expedient, and practical alternative method for meeting the need.

Under Sections 301 and 302 of the DPA, the President can authorize loan guarantees and loans for activities supporting production of critical supplies to the extent private credit is unavailable to an entity. But these loan provisions of the DPA are capped at an aggregate \$50 million and have thus been rarely used in the decades since the DPA was passed.

Under Section 303 of the DPA, federal contracts and grants are available for direct purchases of critical items. The U.S. Department of Defense DPA Title III office is responsible for posting Funding Opportunity Announcements (FOAs) on its website and on beta.sam.gov. Interested companies can review the opportunities and apply based on the terms of the specific FOA. Many of these FOAs are grants with a 50/50 cost sharing component, but they also include contracts and purchase commitments.

If the President invokes Title III, COVID-19 FOAs will likely be posted to these websites, presumably with coordination between the DPA Title III Office and HHS to define the scope of the need.

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Wiley continues to closely monitor the government response to the COVID-19 crisis, and is actively advising numerous clients on opportunities to provide assistance.

Visit our COVID-19 Resource Center