

Denver Law Review

Volume 56 | Issue 1

Article 13

February 2021

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Peter J. Schaumberg

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Recommended Citation

Peter J. Schaumberg, Defense Production Act Section 101(c), 56 Denv. L.J. 307 (1979).

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Defense Production Act Section 101(c)

PETER J. SCHAUMBERG*

INTRODUCTION

The authority of the Government to require priority performance of contracts and to allocate materials under the Defense Production Act of 1950 (DPA)¹ was, for many years, the exclusive domain of national defense programs and regarded as essential to assure timely procurement. As a result of the 1973-74 oil embargo, energy was elevated to a level of importance comparable to national defense, and a need was recognized to facilitate completion of energy programs and projects essential to further this nation's energy independence.

In 1975, in an effort to stimulate the energy production and development necessary to mitigate the effects of any future embargo, Congress extended to energy programs authority previously available exclusively to national defense programs, that is, the priority assistance provisions of the Defense Production Act of 1950. The 1973-74 embargo underscored the need for accelerated energy development, and since most energy projects could not avail themselves of the provisions of section 101(a) of the DPA, section 104 of the Energy Policy and Conservation Act of 1975 (EPCA) added a new subsection (c) to DPA section 101.²

DPA section 101(c) authorizes the President to require, in certain circumstances, priority performance of contracts for supplies of materials and equipment needed to maximize domestic energy supplies.³ The right to obtain a priority rating is

* Attorney, Office of General Counsel, U.S. Department of Energy. B.A., 1972, Tulane University; J.D., 1975, George Washington University National Law Center.

1. Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-62, 2071-73, 2091-94, 2151-63, 2164-68 (1970 & Supp. V 1975).

2. 50 U.S.C. app. § 2071(c)(1) (Supp. V 1975).

3. *Id.* DPA section 101(c) provides in part the following:

(c) Domestic energy supplies.

(1) Notwithstanding any other provision of this Act, the President may, by rule or order, require the allocation of, or the priority performance under contracts or orders (other than contracts of employment) relating to, supplies of materials and equipment in order to maximize

available both to public and private energy programs or projects, and the Department of Energy (DOE) is designated to play an essential role in distributing scarce materials and equipment to deserving energy projects. However, for reasons discussed in detail below, access to the provisions of section 101(c) have been limited, restricting DOE's role to directing materials to essential energy programs and projects in order to facilitate energy production and construction.

THE NEED FOR AN ADDITIONAL DPA SECTION

The terminology of the new subsection (c) is similar to that of DPA section 101(a) enacted in 1950.⁴ In essence, if to do so promotes the national defense, the President is authorized by section 101(a) to direct a company to accept an order, and further to mandate delivery ahead of all other nonrated commercial orders of the supplier. This authority has long been recognized as an effective tool for assuring that defense-related programs are not delayed by an inability to obtain deliveries on schedule.

domestic energy supplies if he makes the findings required by paragraph (3) of this subsection.

* * *

(3) The authority granted in this subsection may not be used to require priority performance of contracts or orders, or to control the distribution of any supplies of materials and equipment in the marketplace, unless the President finds that—

(A) such supplies are scarce, critical, and essential to maintain or further (i) exploration, production, refining, transportation, or (ii) the conservation of energy supplies, or (iii) for the construction and maintenance of energy facilities; and

(B) maintenance or furtherance of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in paragraph (1) of this subsection.

(4) During any period when the authority conferred by this subsection is being exercised, the President shall take such action as may be appropriate to assure that such authority is being exercised in a manner which assures the coordinated administration of such authority with any priorities or allocations established under subsection (a) of this section and in effect during the same period.

4. 50 U.S.C. app. § 2071(a) (1970) provides that:

The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the *national defense* shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the *national defense*. (Emphasis added.)

The national defense requirement of section 101(a), however, limits its usefulness for energy programs. The term "national defense" is defined in section 702(d) of the DPA as "programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, space, and directly related activity."⁵ This definition excludes from the scope of section 101(a) most energy programs other than atomic energy programs, which often rely upon DPA section 101(a) for procurement, although use of DPA section 101(a) authority was extended on a limited basis to the builders of the Trans-Alaska Pipeline System and presumably would be available to an energy program which had a demonstrable national defense nexus.

The vast majority of energy projects, however, are not national defense-related, and the 1973-74 energy supply interruption underscored the need for expeditious development of energy resources, unhindered by nonenergy programs competing for scarce energy development-related resources. Congress responded by enacting the new section 101(c), extending priorities assistance to energy programs, whether governmental or nongovernmental, for purposes of materials and equipment procurement.

PREREQUISITES TO THE USE OF SECTION 101(c)

Section 101(c) priorities are not available for all energy projects. Congress legislated certain explicit prerequisites to the availability of priorities for energy programs so as not to interfere unduly with the national defense priorities under section 101(a). Since, for the first time, DPA section 101 priorities are available to nongovernmental projects, DOE exercises a critical control function in determining which energy programs or projects are entitled to priorities assistance.

The President is authorized to exercise the authority to require allocation of, or priority performance of contracts relating to, supplies of materials and equipment to maximize domestic energy supplies only if findings are made by the President that:

- (A) such supplies are scarce, critical, and essential to maintain or further (i) exploration, production, refining, transportation, or (ii) the conservation of energy supplies, or (iii) for the construction and maintenance of energy facilities; and

5. 50 U.S.C. app. § 2152(d) (1970).

(B) maintenance or furtherance of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in [section 101(c)(1)].⁶

As a result of a series of delegations and redelegations of the President's responsibilities in Executive Order 11,912, as amended,⁷ the following must occur before a rating under DPA section 101(c) may be authorized:

(1) DOE must determine that the proposed use of the authority will maximize domestic energy supplies.⁸

(2) DOE must find that the specific supplies in issue are critical and essential⁹ to maintain or further exploration, production, refining, transportation, or the conservation of energy supplies, or for the construction or maintenance of energy facilities.

(3) Thereafter, the Department of Commerce must find that:

(a) such supplies are scarce; and

(b) maintenance or furtherance of the purposes described in two (2) above cannot reasonably be accomplished without use of the DPA authority.¹⁰

A "critical and essential" finding made by DOE will be based primarily upon evidence that the required items are in the "critical path" of the energy project. However, the scarcity finding to be made by the Department of Commerce turns on

6. 50 U.S.C. app. § 2071(c)(3)(A) (Supp. V 1975).

7. Exec. Order No. 11,912, 41 Fed. Reg. 15,825 (1976), as amended by Exec. Order No. 12,038, 43 Fed. Reg. 4,957 (1978).

8. Congress provided no guidance in the statute or the legislative history of EPCA as to what was meant by the phrase "maximize domestic energy supplies." However, the factors to be considered by DOE in determining whether a program or project maximizes domestic energy supplies are listed in the DOE regulations, 43 Fed. Reg. 6,209, at 6,213 (1978) (to be codified in 40 C.F.R. § 216.4), and include, but are not limited to: (1) quantity of energy involved; (2) benefits of timely energy program furtherance or project completion; (3) socioeconomic impact; (4) the need for the end product for which the materials and equipment are allegedly required; and (5) established national energy policies.

9. The statute and legislation lists again provide no insight into what was meant by the terms "critical" and "essential." The factors DOE will consider in determining the critical and essential nature of needed materials and equipment are listed in the DOE regulations, 43 Fed. Reg. 6,209, at 6,213 (1978) (to be codified in 40 C.F.R. § 216.4), and include, but are not limited to: (1) availability and utility of substitute materials or equipment; (2) impact of the unavailability of the specific supplies of materials and equipment on the furtherance or timely completion of the approved energy program or project.

10. The only available guidance as to what factors the Department of Commerce will consider in making the scarcity and need to use the system findings is in proposed regulations 42 Fed. Reg. 43,038 (1977).

different criteria: The applicant must be able to demonstrate that there is a shortage of the necessary materials or equipment and that attempts to obtain them in normal commercial channels, even at a premium price, were unsuccessful. This finding is indispensable, since section 101(c) of the DPA cannot be used merely to obtain a better price. As stated in section 101(c)(3)(B), there must be a need to use the DPA system in order to accomplish the program's purpose, that is, no alternative means of satisfying current needs is available. Furthermore, it must be commercially possible for a contractor to provide the desired item within the time limits deemed necessary by the applicant. A DPA priority obviously cannot shorten the time physically needed to fabricate equipment.

USE OF SECTION 101(c)

Once the appropriate findings are made by DOE and the Department of Commerce, the priority rating is issued. With the rating, a purchaser may go to its supplier, and the order must be placed ahead of other nonrated commercial orders according to the terms of the priority rating. DOE regulations¹¹ provide that use of the rating is governed by the same Department of Commerce regulations as a defense rating under section 101(a).¹² Congress preferred to integrate the defense and energy priorities systems, thereby avoiding parallel systems with competing claims and competing justifications for distributing scarce resources.¹³ If a defense and energy program are competing for the same limited resources, the Commerce Department would act as arbiter and determine which program is entitled to the highest priority.

Since the enactment of DPA section 101(c), DOE has received six applications for priorities assistance,¹⁴ of which three were withdrawn before an opportunity for full consideration was given. Of the three applications processed, the U.S. Army

11. 43 Fed. Reg. 6,209, at 6,213-14 (1978) (to be codified in 10 C.F.R. § 216.5).

12. 32A C.F.R. pt. 621 (1977) of the Defense Management System Regulation 1 relates to priorities for certain controlled materials such as copper, brass, nickel, etc. 32A C.F.R. pt. 651 (1977) of the Defense Priorities System Regulation 1 relates to all other priorities.

13. 121 CONG. REC. S5,364 (daily ed. April 7, 1975) (remarks of Sen. Proxmire). 50 U.S.C. app. § 2071(c)(4), *supra* note 4, requires that priorities and allocations under subsection (a) be coordinated with those under subsection (c).

14. This includes applications received by the Federal Energy Administration, which was responsible for DPA section 101(c) before DOE's organization in October 1977.

Corps of Engineers received priority authorization in two separate instances for circuit breakers for hydroelectric projects. The third request was by a Federal government agency for a priority to expedite delivery of a computer system needed for quantitative analysis to support energy legislation. This application was rejected by DOE as legally insufficient in meeting the tests required by DPA section 101(c) for maximization of domestic energy supplies.

Although both sections 101(a) and (c) authorize the granting of priorities for essential needs, there are significant differences in the scope of the priorities which can be issued. Section 101(a), by its terms, could be utilized to obtain a priority on any national defense-related contract, except contracts of employment, including, among other items: equipment, services,¹⁵ petroleum, gas, electric power, transportation, as well as contracts for materials and facilities.

Section 101(c) was intended to be more restrictive in its scope. In addition to the prerequisites discussed above that the needed items must be scarce, critical, and essential to production, conservation, construction, etc., section 101(c) is limited by its terms to "materials and equipment,"¹⁶ which would include such items as pumps, valves, hardware, pipe, etc.¹⁷ It would appear that items such as transportation, facilities, and electric power are beyond the scope of section 101(c).¹⁸

The availability of section 101(c) for energy programs outside of the United States is limited both by the terms of the statute and the regulations. Priorities only are available to maximize "domestic" energy supplies.¹⁹ In addition, DPS Regulation 1, section 23(a), restricts the scope of the DPA by pro-

15. Basic Rules of the Defense Priorities System (DPS Reg. 1), 32A C.F.R. pt. 651, § 13 (1977).

16. "Materials" are defined in section 702(b) of the DPA, 50 U.S.C. app. § 2152(b) (1970), as including "raw materials, articles, commodities, products, supplies, components, technical information, and processes."

17. A question exists as to whether a priority could be obtained under section 101(c) for certain "services." Section 101(c) also does not specifically mention services, although the Department of Commerce has read services into that section. See 32A C.F.R. pt. 621, § 13 (1977).

18. 43 Fed. Reg. 6,209, at 6,210 (1978). The exclusion of energy sources from section 101(c) priorities is reasonable since, if these items were covered, the Department of Commerce would have the authority to allocate energy, and conflicts could arise between DOE allocation regulations promulgated pursuant to authorities other than the DPA and the DPA directives issued by the Department of Commerce.

19. 50 U.S.C. app. § 2071(c)(1) (Supp. V 1975).

viding that: "All regulations and orders of BDC [Bureau of Domestic Commerce], unless specifically stated otherwise in such regulations and orders, shall apply to transactions in any state, territory, or possession of the United States and the District of Columbia."²⁰

These restrictions seemingly would not prevent a domestic firm from seeking priorities assistance for materials to construct a facility on foreign territory so long as the ultimate benefit is to maximize United States energy supplies.

CONCLUSION

The effectiveness of DOE in directing scarce materials to essential energy projects is, of course, limited by the number of applications for priorities assistance. As noted above, since the enactment of the EPCA in December 1975, DOE has received fewer than ten applications for priorities assistance under DPA section 101(c). Perhaps this is a result of there being no shortages of materials and equipment needed for energy programs. It is also possible, however, that the extensive applications, requirements, and findings have discouraged potential applicants from resorting to priorities assistance under DPA section 101(c).

It would be more likely, however, that a lack of general familiarity by the energy industry with DPA section 101(c) has resulted in its limited use: priorities assistance always had been the exclusive domain of the defense industry, with recipients of Government defense contracts being the primary beneficiaries. However, given the recent emphasis on energy development and the resourcefulness of private industry, requests for priority assistance may begin to proliferate, expanding DOE's role in allocating scarce resources to essential energy programs.

20. 32A C.F.R. pt. 651, § 23(a) (1977).

