Subpart 504.11—Central Contractor Registration

Sec.
504.1103 Procedures.

Subpart 504.11—Central Contractor Registration

504.1103 Procedures.

In addition to the requirements found in FAR 4.1103, prior to awarding a contractual instrument the contracting officer must—

(1) Verify that the prospective contractor's legal business name, Doing-Business-As (DBA) name (if any), physical street address, and Data Universal Number System (DUNS) number or DUNS+4 number, as found in the CCR, match the information that will be included in the contract, order, or agreement resulting from the vendor's quote or proposal. Correct any mismatches by having the vendor amend the information in the CCR and/or the quote or proposal. The CCR information can be accessed through GSA's CCR repository (contact the GSA Systems Programming Branch for instructions, a user ID, and password).

(2) Ensure that the contractor's address code exists in Pegasys and that it is CCR enabled with the contractor's DUNS or DUNS+4 number. This can be done by searching Pegasys records using the contractor's Taxpayer Identification Number (TIN). If no code exists, request that a new address code be established by the Finance Center for CCR compliance.

(3) Ensure that the contractor's identifying information is correctly placed on the contractual instrument, using special care to ensure that the legal name and ''remit to'' name match exactly. (Note: Lockbox names or numbers should not be used to replace the contractor's name in the remittance block on the contractual instrument.)

(4) Unless one of the exceptions to registration in CCR applies (see FAR 4.1102(a)), the contracting officer must not award a contract to a prospective contractor who is not registered in CCR. If no exceptions are applicable, and the needs of the requiring activity allows for a delay in award, see FAR 4.1103(b)(1).

■ 11. Add Subpart 504.13 to read as follows:

Subpart 504.13—Personal Identity Verification of Contractor Personnel

Sec.
504.1301 Policy.
504.1303 Contract clause.

Subpart 504.13—Personal Identity Verification of Contractor Personnel

504.1301 Policy.

Contracting officers must follow the procedures contained in CIO P2181.1—GSA HSPD–12 Personal Identity Verification and Credentialing Handbook, which may be obtained from the CIO Office of Enterprise Solutions, to ensure compliance with Homeland Security Presidential Directive-12 (HSPD–12) ''Policy for a Common Identification Standard for Federal Employees and Contractors,'' Office of Management and Budget Memorandum M–05–24, and Department of Commerce FIPS PUB 201.

504.1303 Contract clause.

Insert the clause at 552.204–9, Personal Identity Verification Requirements, in solicitations and contracts when it is determined that contractor employees will require access to federally controlled facilities or information systems to perform contract requirements.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Add section 552.204–9 to read as follows:

552.204–9 Personal Identity Verification Requirements.

As prescribed in 504.1303, insert the following clause:

Personal Identity Verification Requirements (Date)

(a) The contractor shall comply with GSA personal identity verification requirements, identified at *http://www.gsa.gov/hspd12,* if contractor employees require access to GSA controlled facilities or information systems to perform contract requirements.

(b) The Contractor shall insert this clause in all subcontracts when the subcontractor is required to have access to a GSA-controlled facility or access to a GSA-controlled information system.

(End of clause)

[FR Doc. 2012–24028 Filed 9–28–12; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 33

[Docket No. OST 2010–0298]

RIN 2105–AD83

Prioritization and Allocation Authority Exercised by the Secretary of Transportation Under the Defense Production Act

AGENCY: Office of the Secretary of Transportation (OST), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This final rule clarifies the priorities and allocation authorities exercised by the Secretary of Transportation (Secretary) under title I of the Defense Production Act of 1950 (Defense Production Act), and establishes the administrative procedures by which the Secretary will exercise this authority. In addition, in this final rule the Department is seeking comments on certain revised definitions found in section 33.20. This rule complies with the requirement in the Defense Production Act Reauthorization of 2009 (Pub. L. 111–67) to issue final rules establishing standards and procedures by which the priorities and allocations authority is used to promote the national defense, under both emergency and nonemergency conditions, and is part of a multi-agency effort that forms the Federal Priorities and Allocations System.

DATES: This rule is effective on November 30, 2012. *Comment Closing Date:* Comments on the revised definitions are due on October 31, 2012.

ADDRESSES: You may submit written comments on the revised definitions, as well as those regarding the burden-hour estimates or other aspects of the information collection requirements, (identified by the agency name and DOT Docket ID Number OST–2010–0298) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Note that all comments received will be posted without change to *www.regulations.gov* including any personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://DocketsInfo.dot.gov.*

Docket: For internet access to the docket to read background documents and comments received, go to *www.regulations.gov*. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave. SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Donna L. O'Berry, Office of the General Counsel, Department of Transportation, 1200 New Jersey Avenue SE., Room W96–317, Washington, DC 20590; telephone: (202) 366–6136; email: *donna.o'berry@dot.gov;* or Lloyd E. Milburn, Office of Intelligence, Security and Emergency Response, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone: (202) 366–4397; email: *lloyd.milburn@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Regulatory Action

This final rule clarifies the priorities and allocation authorities exercised by the Secretary under title 1 of the Defense Production Act, and establishes the administrative procedures by which the Secretary will exercise this authority. In addition, in this final rule the Department is seeking comments on certain revised definitions found in section 33.20. This rule complies with the requirement in the Defense Production Act Reauthorization of 2009 (Pub. L. 111–67) to issue final rules establishing standards and procedures by which the priorities and allocations authority is used to promote the national defense, under both emergency and nonemergency conditions, and is part of a multi-agency effort that forms the Federal Priorities and Allocations System.

B. Summary of Major Provisions

The Defense Production Act Reauthorization of 2009 requires each Federal agency with delegated authority under section 101 of the Defense Production Act to issue final rules establishing standards and procedures by which the priorities and allocations authority is used to promote the national defense, under both emergency and non-emergency conditions. Congress further directed that, to the extent practicable, the Federal agencies should work together to develop a consistent and unified Federal priorities and allocations system.

In order to meet this mandate, the Department of Transportation (DOT) worked in conjunction with the Departments of Agriculture (USDA), Commerce (DOC), Defense (DoD), Energy (DOE), Health and Human Services (HHS), and Homeland Security (DHS) to develop common provisions that can be used by each Department in its own regulation. The six regulations to be promulgated by each Department with delegated Defense Production Act title I authority comprise the Federal Priorities and Allocations System (FPAS) of rules. DOT's regulation is known as the Transportation Priorities and Allocations System (TPAS). DOT published a Notice of Proposed Rulemaking (NPRM) establishing the proposed structure for TPAS on February 15, 2011 (76 FR 8675). DOT solicited comments on the proposed rule, but did not receive any comments.

C. Cost and Benefits

This regulation sets criteria under which DOT, or agencies to which DOT delegates authority, will authorize prioritization of certain orders or contracts, as well as criteria under which DOT will issue orders allocating materials, services, or facilities. Because the rule mainly affects larger commercial transportation operations, DOT believes that small organizations and small governmental jurisdictions are unlikely to be affected by this rule. To date, DOT has not exercised its existing priorities authority and has only exercised its existing allocations authority for one aviation program and one sealift program, both of which rely on voluntary engagement by industry. Therefore, DOT has no basis on which to estimate the number of small businesses that might be affected by promulgation of this rule.

Although DOT cannot determine precisely the number of small entities that are affected by this rule, for the reasons explained in section IV.D, DOT believes that the overall impact on such entities is not significant and, therefore, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

II. Background

The Defense Production Act of 1950 (Defense Production Act) (50 U.S.C. App. § 2061 *et seq.*) was enacted during the Korean War to ensure the availability of resources to meet national security needs. The Defense Production Act provides a number of important authorities to expedite and expand the supply of critical resources from the U.S. industrial base to support the national defense. While Defense Production Act provisions initially focused on DoD acquisition needs, several significant changes to the Defense Production Act's definition of national defense have been added over time to expand the definition from military, energy, and space activities, to include emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (42 U.S.C. 5121 *et seq.*) and the protection and restoration of critical infrastructure.

Section 101(a) of title I of the Defense Production Act (50 U.S.C. App. § 2071) authorizes the President:

> (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, 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.

Executive Order 13603, National Defense Resources Preparedness (March 16, 2012),[1] delegates the President's authority under section 101 of the Defense Production Act to the heads of several departments and agencies. The President has delegated this authority to the Secretary of Transportation with respect to all forms of civil transportation.[2]

[1] Executive Order 13603 replaced Executive Order 12919, National Defense Industrial Resource Preparedness, June 3, 1994. In addition to the noted definition modifications for which DOT is seeking comment, the issuance of Executive Order 13603 resulted in editorial changes that are reflected in this final rule.

[2] Section 201 of Executive Order 13603 also delegates Defense Production Act section 101 authority to:

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources and the domestic distribution of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Defense with respect to water resources; and

Section 202 of Executive Order 13603 provides that this delegated authority may only be used to support programs that have been determined in writing as necessary or appropriate to promote the national defense by the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense, space, and directly related activities; the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; or the Secretary of Homeland Security with respect to all other national defense programs, including civil defense and continuity of Government.

The Defense Production Act Reauthorization of 2009 (Pub. L. 111–67, September 30, 2009) requires each Federal agency with delegated authority under section 101 of the Defense Production Act to issue final rules establishing standards and procedures by which the priorities and allocations authority is used to promote the national defense, under both emergency and non-emergency conditions. Congress further directed that, to the extent practicable, the Federal agencies should work together to develop a consistent and unified Federal priorities and allocations system.

In order to meet this mandate, DOT worked in conjunction with USDA, DOC, DoD, DOE, HHS, and DHS to develop common provisions that can be used by each Department in its own regulation. The six regulations to be promulgated by each Department with delegated Defense Production Act title I authority comprise the FPAS rules.

DOT's regulation is known as TPAS.[3] DOT published an NPRM establishing the proposed structure for TPAS on February 15, 2011 (76 FR 8675). DOT solicited comments on the proposed rule, but not did receive any comments. However, DOT determined that two non-significant changes, discussed below, were necessary for additional clarity. In addition, Executive Order 13603 updated certain definitions that are applicable to this rule and DOT has included those modifications, also discussed below, in this final rule. Therefore, subject to any comments on the revised definitions, DOT adopts the proposed rule with changes discussed below.

III. Section-by-Section Analysis

Subpart A—General

Section 33.1 Purpose of this part. This section explains that the purpose of this rule is to provide guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to civil transportation, in accordance with the delegation of authority provided in section 201 of Executive Order 13603. This section also lists other agency regulations that, along with this regulation, form FPAS.

Section 33.2 Priorities and allocations authority. This section summarizes the delegations of priorities and allocations authority in section 201 of Executive Order 13603 and explains that these delegated authorities may only be used to support programs that have been determined in writing as necessary or appropriate to promote the national defense by the Secretaries of Defense, Energy, or Homeland Security in their respective areas of jurisdiction, as specified in section 202 of Executive Order 13603.

Section 33.3 Program eligibility. This section lists the categories of programs eligible for priorities and allocations support, in accordance with the definition of ''national defense'' in section 702 of the Defense Production Act (50 U.S.C. App. § 2152).

Subpart B—Definitions

Section 33.20 Definitions. This section contains definitions used in this part. Some definitions are drawn from other sources, as follows:

- Section 702 of the Defense Production Act (50 U.S.C. App. § 2152)—''critical infrastructure,'' ''facilities,'' ''homeland security,'' ''materials,'' ''national defense,'' ''person,'' and ''services.''
- Section 801 of Executive Order 13603—''civil transportation,'' ''energy,'' ''farm equipment,'' ''fertilizer,'' ''food resources,'' ''food resource facilities,'' ''health resources,'' and ''water resources.''
- The current Defense Priorities and Allocations System (DPAS) regulation—''allotment'' (with technical modifications), ''approved program'' (with technical modifications), ''construction,'' ''delegate agency,'' ''directive,'' ''item,'' ''maintenance and repair and operating supplies'' or ''MRO,'' ''official action'' (with technical modifications), ''rated order,'' and ''set-aside'' (with technical modifications).
- Section 602 of the Stafford Act (42 U.S.C. 5195a)—''emergency preparedness'' and ''hazard.''
- Section 18.3 of 49 Code of Federal Regulations—''local government'' and ''state.''

The definitions of ''allocation,'' ''allocation authority,'' and ''allocation order'' are based on language in section 101 of the Defense Production Act that describes the allocation authority of the President.

''Defense Production Act'' means the Defense Production Act of 1950, as amended (50 U.S.C. App. § 2061 *et seq.*).

''Planning order'' defines an administrative tool used by DOT's Maritime Administration.

''Resource agency'' refers to one of the six Federal departments that has been delegated Defense Production Act priorities and allocations authority under section 201 of Executive Order 13603.

''Secretary'' refers to the Secretary of Transportation.

''Selective Service Act'' refers to Section 18 of the Selective Service Act of 1948 (50 U.S.C. App. § 468).

''Stafford Act'' refers to title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195–5197g).

Executive Order 13603 contains modifications to the following definitions: ''civil transportation,'' ''energy,'' ''food resources,'' ''food resource facilities,'' ''health resources,'' and ''water resources.'' The most significant change is the movement of potable water packaged in commercially marketable containers from the jurisdiction of the DoD to the jurisdiction of the USDA. All other modifications are intended to modernize or clarify existing definitions.

Subpart C—Placement of Rated Orders

Section 33.30 Delegation of authority. This section describes the delegation of priorities and allocations authority from the President to the Secretary of Transportation for all forms of civil transportation.

Section 33.31 Priority ratings. This section explains the following: ''DO'' and ''DX'' rating symbols; program identification symbols; order of precedence for directives and ratings;

(5) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

[3] The other parts that will make up FPAS are:

(1) Agricultural Priorities and Allocations System to be promulgated by the Department of Agriculture;

(2) Defense Priorities and Allocations System promulgated by the Department of Commerce;

(3) Energy Priorities and Allocations System to be promulgated by the Department of Energy;

(4) Health Resources Priorities and Allocations System to be promulgated by the Department of Health and Human Service; and

(5) Water Resources Priorities and Allocations System to be promulgated by the Department of Defense.

and priority ratings that consist of a rating symbol and a program identification symbol.

A ''DX'' rating is reserved for those services or items that are determined to support programs that are of the highest national defense urgency based on the requesting entity's mission objectives. A ''DX'' rating takes precedence over a ''DO'' rating. The Secretary of Transportation must approve all requests for a ''DX'' rating pertaining to civil transportation resources.

Program Identification Symbols (PIS) are used to identify approved programs, meaning a program that has been determined by the Secretaries of DoD, DHS, or DOE, as appropriate, as necessary to promote the national defense. DOT currently has no approved programs, but anticipates working with DOC, DHS, DoD or DOE, as appropriate, in the near future to develop approved programs and will update Schedule I to TPAS as necessary.

In the NPRM, DOT proposed a PIS for DOT-approved programs that would contain the letter ''T'' followed by a letter and a number; for example, T–L1. DOT solicited comments on this proposed PIS structure, but did not receive any comments. All other agencies issuing FPAS rules currently use or are proposing to use a four-digit symbol, consisting of a letter and number for the approved program, such as A1, that is preceded by the priority rating code, for example DO–A1 or DX–A1. In order to ensure consistency among the regulations and to reduce the likelihood of confusion on industry and stakeholders receiving rated orders under other FPAS regulations, DOT is adopting a four-digit symbol as well. DOT's PIS for approved programs will contain the letter ''T'' followed by a number, for example, T1. All approved programs will have equal status. The PIS will be combined with the appropriate priority rating authority, either DX or DO, to form the priority rating, for example DO–T1 or DX–T1.

Section 33.32 Elements of a rated order. This section describes the four elements that must be included in a contract or order to make it a ''rated order,'' in accordance with the standards and procedures provided in this part. The four elements are: (1) A priority rating; (2) specific delivery date(s) for materials or services covered in the rated order; (3) the signature of an individual authorized to place the rated order; and (4) a statement describing what is required of the rated order recipient, in accordance with procedures provided in this part.

This section includes a provision for an additional statement to be included in a rated order involving emergency preparedness, which will require quicker action by the recipient to accept or reject the order. The justification for the expedited timeframes is explained below in the section 33.33 discussion.

Section 33.33 Acceptance and rejection of rated orders. This section describes mandatory and optional conditions for acceptance or rejection of rated orders, as well as customer notification timeframes pertaining to acceptance or rejection. In general, a person is required to accept a rated order if the person normally supplies the materials or services covered by the rated order and must do so regardless of any other orders on hand. Persons are prohibited from charging higher prices, imposing different terms, or any other discriminatory practices for the rated order that are different from a comparable unrated order.

A person is required to reject a rated order if unable to fill the order by the specified delivery date(s) or if the order will interfere with delivery under another rated order with a comparable or higher priority rating. In addition, a person is required to reject a rated order if the person is prohibited by law from meeting the terms of the order; for example, the provider of the services contemplated in the order does not have current operating authority to perform the service. A person has the option of rejecting a rated order if any one of a number of other conditions set forth in the regulation exists.

In the NPRM, DOT proposed that under non-emergency conditions, the recipient of a rated order be required to accept or reject the rated order within fifteen calendar days for a ''DO''-rated order or ten working days for a ''DX''-rated order. (See § 33.33(d)). DOT proposed calendar days instead of working days in order to provide greater specificity for deadlines and sought public comment on the matter. DOT did not receive any comments. However, because of the potential for interaction and overlap with priority orders issued under other FPAS regulatory schemes, DOT believes that the timeframes should be consistent among the FPAS rules; therefore, DOT is adopting working days instead of calendar days to conform to the timeframes in the other FPAS rules. For purposes of this regulation, a working day is a day that the recipient of a rated order is open for business. Thus, if a recipient of a rated order normally closes its operations the week between Christmas and New Year's, that time would not be considered as working days and would not be counted against the rated order timeframe.

While the deadlines discussed above are appropriate for non-emergency circumstances, they are too long for emergency conditions when quick procurement actions may be needed to help save lives, protect property, or restore services. Transportation services are unique in that they are often the first services needed to move people out of harm's way and to move rescue and response personnel and supplies into a disaster area; thus, transportation services often must be marshaled on very short notice. Under TPAS, orders placed for the purpose of emergency preparedness must be accepted or rejected within 6 hours from receipt of the order if the order is issued in response to a hazard that has occurred and within 12 hours from receipt of the order if the order is issued to prepare for an imminent hazard.

As explained in the NPRM, prior to 2008, DOT was the lead Federal agency responsible for providing and managing emergency transportation services, including those necessary for mass evacuations.[4] Our experiences while carrying out this mission, which included managing the massive transportation needs for the evacuation of persons and the movement of supplies, equipment and teams in response to Hurricanes Katrina and Rita, confirm that transportation providers can respond within these expedited timeframes. Specifically, the contract that DOT had in place for transportation services required the contractor to acknowledge an order for service within one hour of receiving the order and to make transportation equipment available at the shipment place of origin to begin moving cargo and passengers within four hours from receipt of the order for service.[5]

[4] In 2007 DOT and DHS entered into a Memorandum of Understanding transferring the responsibility for evacuations and commodity and equipment movements to the Federal Emergency Management Agency (FEMA). New authority given to FEMA in the Post-Katrina Emergency Management Reform Act of 2006 necessitated redefining DOT's role for providing emergency transportation services and for designating the Federal lead for planning, coordinating and conducting evacuations of the general population.

[5] DOT's contract with Landstar Express America, Inc. contained the following requirements for Rapid Response Capability:

Within one (1) hour of receiving the initial Order for Service (OFS) from the Contracting Officer, the Contractor (Landstar) shall acknowledge receipt of the OFS by electronic commerce or fax.

Within four (4) hours of receipt of an OFS, the Contractor shall make transportation equipment available at the shipment place of origin to commence movement of cargo and passengers, using air and surface modes of transportation. The Contractor shall meet all pickup and transit deadlines.

Note that DOT is only requiring acceptance or rejection of a rated order within an expedited timeframe and not the actual fulfillment of the order within that timeframe. The expedited response periods are necessary in order for DOT to rapidly identify and obtain sufficient transportation resources to meet emergency response needs.

DOT is mindful, however, that some circumstances may necessitate closer coordination between DOT and the potential recipient of a rated order. For example, if a rated order is placed in preparation for an imminent hazard, such as a hurricane that is projected to make landfall in 13 hours, DOT obviously does not wish to learn at the end of the 12-hour window that the proposed supplier is unable to accept the rated order. In these situations, DOT will work closely with industry to identify and resolve any potential issues in order to meet the transportation requirements.

Not all regulations promulgated under FPAS will contain such expedited notification requirements because, unlike transportation resources, those resources normally are not required immediately for emergency response. However, for any orders issued under TPAS that ''flow down'' from the prime contractor to a subcontracted supplier of a necessary service, component, or part, the requirements of TPAS will apply to all subcontractors in the procurement or distribution chain. Therefore, transportation service providers should work with their suppliers to ensure they are aware that they may be asked to provide necessary services, parts, or components on an expedited basis.

Section 33.34 Preferential scheduling. This section describes: (1) When a recipient of a rated order must modify production or delivery schedules to satisfy the delivery requirements of a rated order; (2) the order of precedence for rated, unrated, and conflicting orders; and (3) the use of inventoried production items when needed to fill a rated order.

Section 33.35 Extension of priority ratings. This section requires that the recipient of a rated order must, in turn, use rated orders with suppliers to obtain items or services needed to fill a rated order. The requirement applies to all contractors and subcontractors throughout the procurement chain necessary to fill the rated order.

Section 33.36 Changes or cancellations of priority ratings and rated orders. This section describes the procedures for changing or cancelling a priority rating or the provisions of a rated order. In addition, this section lists types of modifications that do not constitute a new rated order.

Section 33.37 Use of rated orders. This section describes the process and procedures for when the recipient of a rated order: (1) Must use rated orders to obtain items and services needed to fulfill the rated order; (2) may use a rated order to replace inventoried items that were used to fulfill the order; (3) may combine orders with different priority ratings or with unrated orders; and (4) may forgo use of rated orders for orders below certain thresholds.

In the NPRM, DOT proposed to use the letter ''E'' for combined programs, resulting in a PIS of DO–T–E plus the number. As previously mentioned, DOT is mindful of the need for consistency among the FPAS regulations, which will all use a four-digit symbol for combined programs. Therefore, although DOT did not receive any comments on its proposed PIS for combined programs, we are adopting ''T9'' as the PIS for combined programs. The ''T9'' will be combined with the appropriate priority rating resulting in a DO–T9 or a DX–T9 PIS for any combined program.

Section 33.38 Limitations on placing rated orders. This section describes specific circumstances when the use of rated orders is prohibited. This section also prohibits the use of TPAS to obtain rated orders for a resource under the resource jurisdiction of other agencies with delegated Defense Production Act priorities and allocations authority, unless specifically authorized by the resource agency.

Subpart D—Special Priorities Assistance

Section 33.40 General provisions. This section explains the circumstances and procedures under which DOT will provide assistance in resolving problems related to priority rated contracts and orders. This section also lists the DOT points of contact and the form to be used to request assistance.

Section 33.41 Requests for priority rating authority. This section establishes the procedures to request rating authority under special circumstances. DOT may grant priority ratings for items and services not normally rated under the regulation in order to prevent a delay of a rated order. This section also specifies that rating authority for production or construction equipment must come from the Department of Commerce. Finally, this section explains when DOT may authorize the use of a priority rating on an order to a supplier in advance of the issuance of a rated prime contract, and the factors DOT will consider in deciding whether to grant such a request.

Section 33.42 Examples of assistance. This section lists examples of when special priority assistance may be provided.

Section 33.43 Criteria for assistance. This section requires that a request for special priorities assistance be timely, that there be an urgent procurement need for the item, and that the applicant make a reasonable effort to resolve the problem for which assistance is needed.

Section 33.44 Instances where assistance may not be provided. This section lists examples of when special priority assistance will not be provided.

Section 33.45 Assistance programs with other nations. Reserved.

Subpart E—Allocation Actions

Section 33.50 Policy. This section explains the policy of the Federal Government regarding use of the allocations authority, which is based on the statutory language in section 101 of the Defense Production Act and the legislative history of section 101.[6] Specifically, allocation authority will be used only when priority authority is unable to provide a sufficient supply of a material, service, or facility to meet the national defense, or when the use of priority authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities.

Allocation authority will not be used to ration materials or services at the retail level. In other words, allocation authority will not be used to control how much of a product or service a person may have for personal use. For example, DOT could use allocation authority to require the nation's bus companies to dedicate 40% of their bus fleet to a designated emergency, but DOT not could use allocation authority to tell a bus company how to distribute its buses to serve its commercial customers or to tell a bus company how many tickets it could sell to persons in a given month.

Allocation orders will be distributed equitably among similarly situated suppliers of the resources being allocated and will not require any person to relinquish a disproportionate share of the civilian market. Allocation authority will not apply to resources owned by the Federal Government, as

[6] Legislative history indicates that Congress was concerned that national defense requirements, during times of emergency, could consume much of the output of key industrial sectors and selected producers within some sectors. Allocations authority was viewed as a means to ensure an equitable distribution of national defense demand among potential suppliers to avoid disproportionate impacts on each supplier's share of the civilian market.

those resources may be used by the controlling Federal entity in accordance with other governing laws. Nor, generally speaking, will allocation authority apply to resources owned by States, local governments or Native American tribes, as that could potentially undermine other Federal laws. For example, the Stafford Act is designed ''to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate the suffering and damage which results from * * * disasters * * *.'' 42 U.S.C. 5121(b). Thus, it would be counterproductive for the Federal Government to consider allocating for its own use the very resources the State, local or tribal government could be counting on as part of its response efforts.

The Civil Reserve Air Fleet (CRAF) and the Voluntary Intermodal Sealift Agreement (VISA) are two examples of DOT's use of its allocation authority.[7] Concerning CRAF, under the terms of a Memorandum of Understanding, DOT develops plans and allocates aircraft to the CRAF program based on DoD requirements. DOT advises DoD if it intends to allocate fewer aircraft than requested by DoD, notifies DoD if a particular level of CRAF activation will have a serious adverse impact on the civil air carrier's ability to provide essential service, and works with DoD to identify alternatives or determine ways to minimize the impact. DOT publishes a periodic allocation of aircraft, by registration or ''N'' number, of each airline participating in the CRAF program.

The VISA program is a preparedness program designed to make intermodal shipping services and systems available to DoD as required to support the emergency deployment and sustainment of U.S. military forces. This is done through cooperation among the maritime industry, DOT and DoD pursuant to a voluntary agreement entered into in accordance with Section 708 of the Defense Product Act (50 U.S.C. App. § 2158). During a Stage III activation, the Secretary of DoD will request the Secretary of DOT to allocate sealift capacity based on DoD requirements.

Section 33.51 General procedures. The procedures set out in this section and in section 33.52 are intended to provide a reasonable assurance that allocation authority will be used only in situations where such authority is justified. Section 33.51 sets out the specific requirements and findings that DOT must meet before it can use its allocation authority.

One requirement is for DOT to obtain a written determination from either DoD, DHS or DOE, as appropriate, that the program DOT intends to support through its allocation authority is necessary or appropriate to support the national defense. As previously mentioned, section 202 of Executive Order 13603 requires such a finding before DOT can take an allocation action. Additionally, DOT is required to provide a detailed description of the situation creating the need for allocation and the specific objectives to be obtained through the allocation action; a list of the materials, services, or facilities to be allocated, and of the sources that will be subject to the allocation action; a detailed description of the requirements to be contained in the allocation action, to include the percentage or quantity of capacity to be allocated and the duration of the allocation action; and an evaluation of the potential impact on the civilian market and proposed actions to mitigate any disruption of the civilian market.

Section 33.52 Controlling the general distribution of a material in the civilian market. This section provides procedures for making the findings required by section 101(b) of the Defense Production Act and section 201(e) of Executive Order 13603. Defense Production Act section 101(b) states that the priorities and allocations authority shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship. Section 201(e) of Executive Order 13603 directs each Secretary with delegated authority under section 101 of the Defense Production Act to make the finding required by section 101(b) and submit the finding for the President's approval through the Assistant to the President and National Security Advisor and the Assistant to the President for Homeland Security and Counterterrorism. By definition under the Defense Production Act, services, including transportation services, are not considered a ''material'' as contemplated in section 101(b) of the Defense Production Act or section 201(e) of Executive Order 13603.

Section 33.53 Types of allocation orders. This section describes the three types of allocation orders DOT will issue: A set-aside; an allocation directive; or an allotment. A *set-aside* is an official action that requires a person to reserve a resource capacity in anticipation of receipt of rated orders. An *allocation directive* is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. For example, an allocation directive could require a person to stop or reduce production of an item or service; prohibit the use of selected materials, services or facilities; divert supply of one type of material, service or facility to another; or supply a specific quantity, size, shape, and type of an item or service within a specific time period. An *allotment* is an official action that specifies the maximum quantity of a material, service, or facility authorized for use in a specific program or application.

Section 33.54 Elements of an allocation order. This section describes the minimum elements of an allocation order. These elements are: (1) A detailed description of the required allocation action(s); (2) specific start and end calendar dates for each required allocation action; (3) the written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary of DOT, which will certify that the order is authorized under this regulation and that the requirements of this part are being followed; (4) a statement that the order is certified for national defense use and that recipients are required to comply with the order; and (5) a copy of the TPAS regulation.

Section 33.55 Mandatory acceptance of an allocation order. This section requires a person to accept and comply with allocation orders if the person is capable of complying. If a person is unable to comply fully with the required actions specified in an allocation order, the person is required to notify DOT immediately, explain the extent to which compliance is possible, and give reasons why full compliance is not possible. Furthermore, notifying DOT of possible non-compliance does not release the person from complying with the allocation order to the extent possible.

[7] CRAF was formed through a joint agreement between DoD and the Department of Commerce. Executive Order 10999 placed responsibility for administration of the CRAF program in the Department of Commerce as a function of the Office of Emergency Transportation. In 1967, the Office of Emergency Transportation transferred in its entirety with its mission, functions and staff into the new Department of Transportation. Responsibility for carrying out the Secretary's role with respect to the CRAF program now resides with the Office of Intelligence, Security and Emergency Response.

This section also states that a person may not discriminate against an allocation order in any manner, such as by charging higher prices or imposing terms and conditions on allocation orders that are different from what the person imposed on contracts or orders for the same resource prior to receiving the allocation order.

Section 33.56 Changes or cancellations of an allocation order. This section states that DOT may modify or cancel an allocation order.

Subpart F—Official Actions

Section 33.60 General provisions. This section sets out the specific official actions that DOT may take to implement the provisions of this regulation. These official actions include Rating Authorizations, Directives, Planning Orders, and Memoranda of Understanding.

Section 33.61 Rating authorizations. This section defines a rating authorization as an official action granting priority rating authority.

Section 33.62 Directives. This section defines a directive as an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. A priority directive takes precedence over rated orders, and allocation directives take precedence over a priority directive.

Section 33.63 Memoranda of Understanding. This section explains that a Memorandum of Understanding is an official action that may be issued to reflect an agreement resolving a request for special priorities assistance. A Memorandum of Understanding may not be used to alter scheduling between rated orders, authorize the use of priority ratings, impose restrictions under this regulation, or take other official actions.

Subpart G—Compliance

Section 33.70 General provisions. This section clarifies that DOT has the authority to enforce or administer the Defense Production Act, this regulation, or an official action. Additionally, this section states that willful violations of title I or section 705 of the Defense Production Act, this regulation, or an official DOT action, are criminal acts, punishable as provided in the Defense Production Act, and as set forth in § 33.74 below.

Section 33.71 Audits and investigations. This section provides the procedures for conducting audits and investigations to ensure that the provisions of the Defense Production Act and other applicable statutes, this regulation, and official actions have been properly followed. This provision is limited to activities conducted under DPA authorities and does not limit the authority of DOT elements to initiate and conduct audits, investigations, or other inquiries under their specific statutes or authorities, nor does it affect the process for such audits, investigations or inquiries.

Section 33.72 Compulsory process. This section explains the procedures DOT may use to seek a compulsory process if a person refuses to permit a duly authorized DOT representative to have access to any premises or any necessary information. For purposes of this regulation, compulsory process means the institution of appropriate legal action, including ex parte application for an inspection warrant or its equivalent in any forum of appropriate jurisdiction. Furthermore, compulsory process under this regulation may be sought in advance of an audit or investigation if DOT believes a person will refuse to comply with the audit or investigation.

Section 33.73 Notification of failure to comply. This section provides procedures for notification of failure to comply with the Defense Production Act, other applicable statutes, this regulation, or an official DOT action.

Section 33.74 Violations, penalties, and remedies. This section sets out the penalties and related actions the Government may take for violations of the provisions of title I or sections 705 or 707 of the Defense Production Act, the priorities provisions of the Selective Service Act, when applicable, this regulation, or an official DOT action.

Section 33.75 Compliance conflicts. This section require persons to immediately notify DOT if compliance with any provision of the Defense Production Act, other applicable statutes, this part, or an official action will prevent a person from filling a rated order or from complying with another provision of the Defense Production Act, other applicable statutes, this regulation, or an official action.

Subpart H—Adjustments, Exceptions, and Appeals

Section 33.80 Adjustments or exceptions. This section describe the procedures necessary to request an adjustment or exception to a provision of this regulation or an official action on the grounds that it will create an undue or exceptional hardship or compliance is contrary to the intent of the Defense Production Act or this regulation. Such requests must be submitted in writing and the submission of a request for adjustment or exception does not relieve the requester from compliance while the request is being considered by DOT.

Section 33.81 Appeals. This section provides procedures and timeframes for appealing a decision denying relief from a request for an adjustment or exception under this regulation. This section provides for an expedited procedure for appeals involving a rated order placed for the purpose of emergency preparedness.

Subpart I—Miscellaneous Provisions

Section 33.90 Protection against claims. This section provides that a person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this regulation or an official action. This ''hold harmless'' provision applies even if any provision of this regulation or action is subsequently declared to be invalid by judicial or other competent authority.

Section 33.91 Records and reports. This section requires persons to create and preserve for at least three years accurate and complete records of any transaction covered by this regulation or an official action. This section also details the various requirements pertaining to the required records and reports. In addition, this section describes the confidentiality provision of the Defense Production Act pertaining to information submitted under the Defense Production Act or this regulation.

Section 33.92 Applicability of this part and official actions. This section establishes the jurisdictional applicability of this regulation.

Section 33.93 Communications. This section provides DOT contact information for communications concerning this regulation.

IV. Public Comments Received

DOT received no comments on these proposed regulations or on the proposed Form OST F 1254. With the exceptions discussed above, DOT finalizes the rule without change.

V. Regulatory Analyses and Notices

A. Executive Orders 12866 and 13563—Regulatory Planning and Review

This final rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review that were established in Executive Order 12866. In addition, Executive Order 13563 specifically requires agencies to:

(1) Involve the public in the regulatory process; (2) promote simplification and harmonization through interagency coordination; (3) identify and consider regulatory approaches that reduce burden and maintain flexibility; (4) ensure the objectivity of any scientific or technological information used to support regulatory action; consider how to best promote retrospective analysis to modify, streamline, expand, or repeal existing rules that are outmoded, ineffective, insufficient or excessively burdensome. While the requirements under title I of the Defense Production Act have been in existence for years, these regulations are new to the transportation industry and could be considered to raise novel legal or policy issues under section 3(f)(4) of Executive Order 12866. The rule is not economically significant, however, as it would not have an annual economic impact of over $100 million.

B. Executive Order 13132—Federalism

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, Federalism. This final rule will not have a substantial direct effect on, or sufficient federalism implications for, the States, nor will it limit the policymaking discretion of the States. Therefore, the consultation requirements of Executive Order 13132 do not apply.

C. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Because this final rule does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have significant impact on a substantial number of small entities.

Potentially Affected Small Entities

Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impacts of this final rule on small entities, a small business, as described in the Small Business Administration's Table of Small Business Size Standards Matched to North American Industry Classification System Codes (August 2008 Edition), has a maximum annual revenue of $33.5 million and a maximum of 1,500 employees (for some business categories, these number are lower). A small governmental jurisdiction is a government of a city, town, school district or special district with a population of less than 50,000. A small organization is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

This regulation sets criteria under which DOT, or agencies to which DOT delegates authority, will authorize prioritization of certain orders or contracts, as well as criteria under which DOT will issue orders allocating materials, services, or facilities. Because the rule mainly affects larger commercial transportation operations, DOT believes that small organizations and small governmental jurisdictions are unlikely to be affected by this rule. To date, DOT has not exercised its existing priorities authority and has only exercised its existing allocations authority for one aviation program and one sealift program, both of which rely on voluntary engagement by industry. Therefore, DOT has no basis on which to estimate the number of small businesses that might be affected by promulgation of this rule.

Impacts

Although DOT cannot determine precisely the number of small entities that are affected by this rule, DOT believes that the overall impact on such entities is not significant. There are two components in the rule: prioritization and allocation. Under prioritization, DOT or its Delegate Agency designates certain orders as one of two possible rating levels. Once designated, the order is considered a ''rated order.'' A recipient of a rated order must give it priority over an unrated order or an order with a lower priority rating. A recipient of a rated order may place orders at the same priority level with suppliers and subcontractors for supplies and services necessary to fulfill the recipient's rated order and the suppliers and subcontractors must treat the request from the rated order recipient as a rated order with the same priority level as the original rated order. This rule does not require recipients to fulfill rated orders if the price or terms of sale are not consistent with the price or terms of sale of similar non-rated orders. In addition, the rule provides a defense from liability for damage or penalties for actions taken in, or inactions required for, compliance with the rule.

Although rated orders could require a company to fill one order prior to filling another, this would not necessarily require a reduction in the total volume or orders filled. In fact, in most instances rated orders will be fulfilled in addition to other (unrated) contracts and this could actually increase the total amount of business for a firm that receives a rated contract. Additionally, this rule does not require the recipient of a rated order to reduce prices or provide a rated order with more favorable terms than a similar non-rated order. Thus, the economic effects on the rated order recipient of having to substitute a rated order for a non-rated order are likely to be mutually offsetting, resulting in no net economic impact.

Allocations could be used to control the general distribution of materials or services in the civilian market. Specific allocation actions that DOT might take are as follows:

Set-aside: an official action that requires a person to reserve resource capacity in anticipation of receipt of rated orders.

Allocations directive: an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. An allocation directive can require a person to stop or reduce production of an item, prohibit the use of selected items, or divert supply of one type of product to another, or to supply a specific quantity, size, shape, and type of an item within a specific time period.

Allotment: an official action that specifies the maximum quantity of an item authorized for use in a specific program or application.

Allocations will be ordered only in extraordinary circumstances, other than in the two well-established, voluntary programs discussed above. Furthermore, DOT believes that the provisions of section 701(e) of the Defense Production Act, which requires that small businesses be considered in allocations, indicate that any impact on small business will not be significant and may, in fact, provide an economic benefit to small businesses.

Conclusion

Although DOT cannot precisely determine the number of small entities that would be affected by this rule, DOT believes that the overall impact on such entities will not be significant and, therefore, for the reasons set forth above, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

E. Paperwork Reduction Act

This rule contains an information collection requirement that is subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The Office of Management and Budget (OMB) is reviewing the information collection requirement and will provide an OMB control number upon completion. DOT will publish a separate notice in the **Federal Register** once the collection is approved and a control number is assigned. The public reporting burden for submission of Form OST F 1254 is an average of 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Send comments on this burden estimate or any other aspect of the collection of information to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20505. Comments should also be sent to the Department of Transportation, Attn: Defense Production Act Activities Coordinator, Office of Intelligence, Security, and Emergency Response, 1200 New Jersey Avenue SE., Washington DC 20590.

No person is required to respond to or shall be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 49 CFR Part 33

Administrative practice and procedure, Business and industry, Government contracts, National Defense, Reporting and recordkeeping requirements, Strategic and critical materials, Transportation.

Issued in Washington, DC on September 20, 2012.

Ray LaHood,

Secretary of Transportation.

In consideration of the foregoing, the Department is adding Part 33 of Title 49, Code of Federal Regulations, to read as follows:

PART 33—TRANSPORTATION PRIORITIES AND ALLOCATION SYSTEM

Subpart A—General

Sec.
33.1 Purpose of this part.
33.2 Priorities and allocations authority.
33.3 Program eligibility.

Subpart B—Definitions

33.20 Definitions.

Subpart C—Placement of Rated Orders

33.30 Delegation of authority.
33.31 Priority ratings.
33.32 Elements of a rated order.
33.33 Acceptance and rejection of rated orders.
33.34 Preferential scheduling.
33.35 Extension of priority ratings.
33.36 Changes or cancellations of priority ratings and rated orders.
33.37 Use of rated orders.
33.38 Limitations on placing rated orders.

Subpart D—Special Priorities Assistance

33.40 General provisions.
33.41 Requests for priority rating authority.
33.42 Examples of assistance.
33.43 Criteria for assistance.
33.44 Instances where assistance may not be provided.
33.45 Assistance programs with other nations. [Reserved]

Subpart E—Allocation Actions

33.50 Policy.
33.51 General procedures.
33.52 Controlling the general distribution of a material in the civilian market.
33.53 Types of allocation orders.
33.54 Elements of an allocation order.
33.55 Mandatory acceptance of an allocation order.
33.56 Changes or cancellations of an allocation order.

Subpart F—Official Actions

33.60 General provisions.
33.61 Rating Authorizations.
33.62 Directives.
33.63 Memoranda of Understanding.

Subpart G—Compliance

33.70 General provisions.
33.71 Audits and investigations.
33.72 Compulsory process.
33.73 Notification of failure to comply.
33.74 Violations, penalties, and remedies.
33.75 Compliance conflicts.

Subpart H—Adjustments, Exceptions, and Appeals

33.80 Adjustments or exceptions.
33.81 Appeals.

Subpart I—Miscellaneous Provisions

33.90 Protection against claims.
33.91 Records and reports.
33.92 Applicability of this part and official actions.
33.93 Communications.
Appendix I to Part 33—Sample Form OST F 1254
Schedule 1 to Part 33—Approved Programs

Authority: Defense Production Act of 1950, as amended, 50 U.S.C. 82; 50 U.S.C. App. §§ 2061–2171; 50 U.S.C. App § 468; Executive Order 12742, (56 FR 1079, January 8, 1991); Executive Order 13603, (77 FR 16651, March 16, 2012).

Subpart A—General

§ 33.1 Purpose of this part.

This part provides guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to all forms of civil transportation. The guidance and procedures in this part are generally consistent with the guidance and procedures provided in other regulations issued under EO 13603 authority.

§ 33.2 Priorities and allocations authority.

(a) Section 201 of Executive Order 13603 (77 FR 16651, March 16, 2012) delegates the President's authority under section 101 of the Defense Production Act to require acceptance and priority performance of contracts and orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense to:

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Transportation with respect to all forms of civil transportation;

(5) The Secretary of Defense with respect to water resources; and

(6) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

(b) Section 202 of Executive Order 13603 states that the priorities and allocations authority delegated in section 201 of the order may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense:

(1) By the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles, managed by the Department of Defense, space, and directly related activities;

(2) By the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; and

(3) By the Secretary of Homeland Security with respect to all other national defense programs, including civil defense and continuity of Government.

§ 33.3 Program eligibility.

Certain programs to promote the national defense are eligible for priorities and allocations support. These include programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Other eligible programs include emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration.

Subpart B—Definitions

§ 33.20 Definitions.

The following definitions pertain to all sections of this part:

Allocation means the control of the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

Allocation authority means the authority of the Department of Transportation, pursuant to section 101 of the Defense Production Act, to allocate materials, services, and facilities for use in approved programs.

Allocation order means an official action to control the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

Allotment means an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.

Approved program means a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, in accordance with section 202 of Executive Order 13603.

Civil transportation includes movement of persons and property by all modes of transportation in interstate, intrastate, or foreign commerce within the United States, its territories and possessions, and the District of Columbia, and related public storage and warehousing, ports, services, equipment and facilities, such as transportation carrier shop and repair facilities. ''Civil transportation'' also shall include direction, control, and coordination of civil transportation capacity regardless of ownership. ''Civil transportation'' shall not include transportation owned or controlled by the Department of Defense, use of petroleum and gas pipelines, and coal slurry pipelines used only to supply energy production facilities directly.

Construction means the erection, addition, extension, or alteration of any building, structure, or project, using materials or products which are to be an integral and permanent part of the building, structure, or project. Construction does not include maintenance and repair.

Critical infrastructure means any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.

Defense Production Act means the Defense Production Act of 1950, as amended (50 U.S.C. App. § 2061 *et seq.*).

Delegate Agency means a government agency authorized by delegation from the Department of Transportation to place priority ratings on contracts or orders needed to support approved programs.

Directive means an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

Emergency preparedness means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. Such term includes the following:

(1) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stockpiling of necessary materials and supplies, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the non-military evacuation of the civilian population).

(2) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications).

(3) Measures to be undertaken following a hazard (including activities for fire fighting, rescue, emergency medical, health and sanitation services, monitoring for specific dangers of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities).

Energy means all forms of energy including petroleum, gas (both natural and manufactured), electricity, solid fuels (including all forms of coal, coke, coal chemicals, coal liquification, and coal gasification), solar, wind, other types of renewable energy, atomic energy, and the production, conservation, use, control, and distribution (including pipelines) of all of these forms of energy.

Facilities includes all types of buildings, structures, or other improvements to real property (but excluding farms, churches or other places of worship, and private dwelling houses), and services relating to the use of any such building, structure, or other improvement.

Farm equipment means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of food resources.

Fertilizer means any product or combination of products that contain one or more of the elements nitrogen, phosphorus, and potassium for use as a plant nutrient.

Food resources means all commodities and products, (simple, mixed, or compound), or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products thereof in vendible form for human or animal consumption. ''Food resources'' also means potable water packaged in commercially marketable containers, all starches, sugars, vegetable and animal or marine fats and oils, seed, cotton, hemp, and flax fiber, but does not mean any such material after it loses its identity as an

agricultural commodity or agricultural product.

Food resource facilities means plants, machinery, vehicles (including on farm), and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources, and for the domestic distribution of farm equipment and fertilizer (excluding transportation thereof).

Hazard means an emergency or disaster resulting from—

(1) A natural disaster; or

(2) An accidental or man-caused event.

Health resources means drugs, biological products, medical devices, materials, facilities, health supplies, services and equipment required to diagnose, mitigate or prevent the impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.

Homeland security includes efforts—

(1) To prevent terrorist attacks within the United States;

(2) To reduce the vulnerability of the United States to terrorism;

(3) To minimize damage from a terrorist attack in the United States; and

(4) To recover from a terrorist attack in the United States.

Item means any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Maintenance and repair and operating supplies or *MRO*—

(1) ''Maintenance'' is the upkeep necessary to continue any plant, facility, or equipment in working condition.

(2) ''Repair'' is the restoration of any plant, facility, or equipment to working condition when it has been rendered unsafe or unfit for service by wear and tear, damage, or failure of parts.

(3) ''Operating supplies'' are any resources carried as operating supplies according to a person's established accounting practice. Operating supplies may include hand tools and expendable tools, jigs, dies, fixtures used on production equipment, lubricants, cleaners, chemicals and other expendable items.

(4) MRO does not include items produced or obtained for sale to other persons or for installation upon or attachment to the property of another person, or items required for the production of such items; items needed for the replacement of any plant, facility, or equipment; or items for the improvement of any plant, facility, or equipment by replacing items which are still in working condition with items of a new or different kind, quality, or design.

Materials includes—

(1) Any raw materials (including minerals, metals, and advanced processed materials), commodities, articles, components (including critical components), products, and items of supply; and

(2) Any technical information or services ancillary to the use of any such materials, commodities, articles, components, products, or items.

National defense means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act and critical infrastructure protection and restoration.

Official action means an action taken by the Department of Transportation or another resource agency under the authority of the Defense Production Act, Executive Order 13603, and this part. Such actions include, but are not limited to, the issuance of Rating Authorizations, Directives, Set-Asides, Allotments, Planning Orders, Memoranda of Understanding, Demands for Information, Inspection Authorizations, and Administrative Subpoenas.

Person includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof.

Planning order means notification of tentative arrangements to meet national defense requirements issued in priority order or allocation order format, for planning purposes only.

Rated order means a prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of this part.

Resource agency means any agency delegated priorities and allocations authority as specified in § 33.2.

Secretary means the Secretary of Transportation.

Selective Service Act refers to Section 18 of the Selective Service Act of 1948 (50 U.S.C. App. § 468).

Services includes any effort that is needed for or incidental to—

(1) The development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item;

(2) The construction of facilities;

(3) The movement of individuals and property by all modes of civil transportation; or

(4) Other national defense programs and activities.

Set-aside means an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

Stafford Act means title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195–5197g).

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Water resources means all usable water, from all sources, within the jurisdiction of the United States, that can be managed, controlled, and allocated to meet emergency requirements, except ''water resources'' does not include usable water that qualifies as ''food resources.''

Subpart C—Placement of Rated Orders

§ 33.30 Delegation of authority.

The priorities and allocations authorities of the President under title I of the Defense Production Act with respect to all forms of civil transportation have been delegated to the Secretary of Transportation under section 201(a)(4) of Executive Order 13603 of March 16, 2012 (77 FR 16651).

§ 33.31 Priority ratings.

(a) *Levels of priority.* (1) There are two levels of priority established by the Transportation Priorities and Allocations System regulations, identified by the rating symbols ''DO'' and ''DX''.

(2) All DO-rated orders have equal priority with each other and take

precedence over unrated orders. All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders. (For resolution of conflicts among rated orders of equal priority, see § 33.34(c).)

(3) In addition, a Directive regarding priority treatment for a given item issued by the resource agency with priorities jurisdiction for that item takes precedence over any DX-rated order, DO-rated order, or unrated order, as stipulated in the Directive. (For a full discussion of Directives, see § 33.62.)

(b) *Program identification symbols.* Program identification symbols indicate which approved program is being supported by a rated order. DOT will use the letter ''T'' followed by a number for all transportation-related approved programs. Programs may be approved under the procedures of Executive Order 13603 at any time. Program identification symbols, in themselves, do not connote any priority.

(c) *Priority ratings.* A priority rating consists of the rating symbol—DO and DX—and the program identification symbol, such as DO–T1 or DX–T1 for a priority rating under TPAS.

§ 33.32 Elements of a rated order.

Each rated order must include:

(a) The appropriate priority rating (*e.g.* DO–T1 or DX–T1);

(b) A required delivery date or dates. The words ''immediately'' or ''as soon as possible'' do not constitute a delivery date. A ''requirements contract,'' ''basic ordering agreement,'' ''prime vendor contract,'' or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items or service from time-to-time or within a stated period against specific purchase orders, such as ''calls,'' ''requisitions,'' and ''delivery orders.'' These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order. The signature or use of the name certifies that the rated order is authorized under this part and that the requirements of this part are being followed; and

(d)(1) A statement that reads in substance:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Transportation Priorities and Allocations System regulation at 49 CFR Part 33.

(2) If the rated order is placed in support of emergency preparedness requirements and expedited action is necessary and appropriate to meet these requirements, the following sentences should be added following the statement set forth in paragraph (d)(1) above:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within *[INSERT NUMBER OF HOURS REQUIRED IN § 33.33]* hours from receipt of the order, in accordance with § 33.33(e) of the Transportation Priorities and Allocations System regulation at 49 CFR Part 33.

§ 33.33 Acceptance and rejection of rated orders.

(a) *Mandatory acceptance.* (1) Except as otherwise specified in this section, a person shall accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted.

(2) A person shall not discriminate against rated orders in any manner such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.

(b) *Mandatory rejection.* Unless otherwise directed by the Department of Transportation for a rated order involving all forms of civil transportation:

(1) A person shall not accept a rated order for delivery on a specific date if unable to fill the order by that date. However, the person must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection under this section.

(2) A person shall not accept a DO-rated order for delivery on a date which would interfere with delivery of any previously accepted DO- or DX-rated orders. However, the person must offer to accept the order based on the earliest delivery date otherwise possible.

(3) A person shall not accept a DX-rated order for delivery on a date which would interfere with delivery of any previously accepted DX-rated orders, but must offer to accept the order based on the earliest delivery date otherwise possible.

(4) If a person is unable to fill all of the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders which can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

(5) A person shall not accept a rated order if the person is prohibited by Federal law from meeting the terms of the order.

(c) *Optional rejection.* Unless otherwise directed by the Department of Transportation for a rated order involving all forms of civil transportation, rated orders may be rejected in any of the following cases as long as a supplier does not discriminate among customers:

(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;

(2) If the order is for an item not supplied or for a service not capable of being performed;

(3) If the order is for an item or service produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order. If, however, a supplier has sold some of these items or provided similar services, the supplier is obligated to accept rated orders up to that quantity or portion of production or service, whichever is greater, sold or provided within the past two years;

(4) If the person placing the rated order, other than the U.S. Government, makes the item or performs the service being ordered;

(5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of the Department of Transportation, issued under the authority of the Defense Production Act or another relevant statute.

(d) *Customer notification requirements.* (1) Except as provided in paragraph (e) of this section, a person must accept or reject a rated order in writing or electronically within fifteen (15) working days after receipt of a DO rated order and within ten (10) working days after receipt of a DX rated order. If the order is rejected, the person must give reasons in writing or electronically for the rejection.

(2) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date. If notification is given verbally, written or

electronic confirmation must be provided within five (5) working days.

(e) *Exception for emergency preparedness conditions.* If a rated order is placed for the purpose of emergency preparedness and includes the additional statement set forth in § 33.32(d)(2), a person must accept or reject the rated order and transmit the acceptance or rejection in writing or in an electronic format:

(1) Within six (6) hours after receipt of the order if the order is issued in response to a hazard that has occurred; or

(2) Within the greater of twelve (12) hours from receipt of the order or the time specified in the order, if the order is issued to prepare for an imminent hazard.

§ 33.34 Preferential scheduling.

(a) A person must schedule operations, including the acquisition of all needed production items or services, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO-rated orders must be given production or performance preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery or services being performed against unrated orders. Similarly, DX-rated orders must be given preference over DO-rated orders and unrated orders. (Examples: If a person receives a DO-rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX-rated order is received calling for delivery on July 15 and a person has a DO-rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX-rated order.)

(c) *Conflicting rated orders.* (1) If a person finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, the person shall give precedence to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting orders are scheduled to be delivered or performed on the same day, the person shall give precedence to those orders that have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts under this section, the person should promptly seek special priorities assistance as provided in §§ 33.40 through 33.44. If the person's customer objects to the rescheduling of delivery or performance of a rated order, the customer should promptly seek special priorities assistance as provided in §§ 33.40 through 33.44. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in § 33.33.

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in § 33.37(b).

§ 33.35 Extension of priority ratings.

(a) A person must use rated orders with suppliers to obtain items or services needed to fill a rated order. The person must use the priority rating indicated on the customer's rated order, except as otherwise provided in this part or as directed by the Department of Transportation. For example, if a person is in receipt of a DO–T1 priority rating for a bus and has several buses in inventory that are in need of repair, that person must use a DO–T1 rated order to obtain the needed bus repairs.

(b) The priority rating must be included on each successive order placed to obtain items or services needed to fill a customer's rated order. This continues from contractor to subcontractor to supplier throughout the entire procurement chain.

§ 33.36 Changes or cancellations of priority ratings and rated orders.

(a) The priority rating on a rated order may be changed or canceled by:

(1) An official action of the Department of Transportation; or

(2) Written notification from the person who placed the rated order.

(b) If an unrated order is amended so as to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

(c) An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 33.33.

(d) The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

(e) If a person no longer needs items or services to fill a rated order, any rated orders placed with suppliers for the items or services, or the priority rating on those orders, must be canceled.

(f) When a priority rating is added to an unrated order, or is changed or canceled, all suppliers must be promptly notified in writing.

§ 33.37 Use of rated orders.

(a) A person must use rated orders to obtain:

(1) Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed or converted into scrap or by-products in the course of processing;

(2) Containers or other packaging materials required to make delivery of the finished items against rated orders;

(3) Services, other than contracts of employment, needed to fill rated orders; and

(4) MRO needed to produce the finished items to fill rated orders.

(b) A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:

(1) The order must be placed within 90 days of the date of use of the inventory.

(2) A DO rating and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating may not be used even if the inventory was used to fill a DX-rated order.

(3) If the priority ratings on rated orders from one customer or several customers contain different program identification symbols, the rated orders may be combined. In this case, the program identification symbol ''T9'' must be used (*i.e.,* DO–T9).

(c) A person may combine DX- and DO-rated orders from one customer or several customers if the items or services covered by each level of priority are identified separately and clearly. If different program identification symbols are indicated on those rated orders of equal priority, the person must use the program identification symbol ''T9'' (*i.e.,* DO–T9 or DX–T9).

(d) Combining rated and unrated orders.

(1) A person may combine rated and unrated order quantities on one purchase order provided that:

(i) The rated quantities are separately and clearly identified; and

(ii) The four elements of a rated order, as required by § 33.32, are included on the order with the statement required in § 33.32(d) modified to read in substance:

This purchase order contains rated order quantities certified for national defense use, and you are required to follow all the provisions of the Transportation Priorities and Allocations System regulations at 49 CFR Part 33 only as it pertains to the rated quantities.

(2) A supplier must accept or reject the rated portion of the purchase order as provided in § 33.33 and give preferential treatment only to the rated quantities as required by this part. This part may not be used to require preferential treatment for the unrated portion of the order.

(3) Any supplier who believes that rated and unrated orders are being combined in a manner contrary to the intent of this part or in a fashion that causes undue or exceptional hardship may submit a request for adjustment or exception under § 33.80.

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person must combine rated orders as provided in paragraph (c) of this section, if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than $75,000, or one-half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulations (FAR) (see FAR section 2.101) or in other authorized acquisition regulatory or management systems), whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

§ 33.38 Limitations on placing rated orders.

(a) *General limitations.* (1) A person may not place a DO- or DX-rated order unless entitled to do so under this part.

(2) Rated orders may not be used to obtain:

(i) Delivery or performance on a date earlier than needed;

(ii) A greater quantity of the item or services than needed, except to obtain a minimum procurable quantity. Separate rated orders may not be placed solely for the purpose of obtaining minimum procurable quantities on each order;

(iii) Items or services in advance of the receipt of a rated order, except as specifically authorized by the Department of Transportation (see § 33.41(c) for information on obtaining authorization for a priority rating in advance of a rated order);

(iv) Items that are not needed to fill a rated order, except as specifically authorized by the Department of Transportation, or as otherwise permitted by this part;

(v) Any of the following items unless specific priority rating authority has been obtained from the Department of Transportation, a Delegate Agency, or the Department of Commerce, as appropriate:

(A) Items for plant improvement, expansion, or construction, unless they will be physically incorporated into a construction project covered by a rated order; and

(B) Production or construction equipment or items to be used for the manufacture of production equipment (For information on requesting priority rating authority, see § 33.41); or

(vi) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense.

(b) *Jurisdictional limitations.* (1) Unless authorized by the resource agency with jurisdiction, the provisions of this part are not applicable to the following resources:

(i) Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer (Resource agency with jurisdiction—Department of Agriculture);

(ii) All forms of energy (Resource agency with jurisdiction—Department of Energy);

(iii) Health resources (Resource agency with jurisdiction—Department of Health and Human Services);

(iv) Water resources (Resource agency with jurisdiction—Department of Defense/U.S. Army Corps of Engineers); and

(v) All materials, services, and facilities, including construction materials the authority for which has not been delegated to other agencies under Executive Order 13603. (Resource Agency with jurisdiction—Department of Commerce);

(vi) Communications services (Resource agency with jurisdiction—National Communications System under Executive Order 12472 of April 3, 1984).

(2) [Reserved]

Subpart D—Special Priorities Assistance

§ 33.40 General provisions.

(a) TPAS is designed to be largely self-executing. However, from time-to-time production or delivery problems will arise. In this event, a person should immediately contact DOT's Defense Production Act Activities Coordinator, Office of Intelligence, Security, and Emergency Response, 1200 New Jersey Avenue SE., Washington, DC 20590, for guidance or assistance. If the problem(s) cannot otherwise be resolved, special priorities assistance should be sought from the Department of Transportation through the Director, Office of Intelligence, Security, and Emergency Response, 1200 New Jersey Avenue SE., Washington, DC 20590. If the Department of Transportation is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, the Department of Transportation may forward the request to another resource agency, as appropriate, for action. Special priorities assistance is a service provided to alleviate problems that do arise.

(b) Special priorities assistance is available for any reason consistent with this part. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or to verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items that are not normally eligible for priority treatment.

(c) A request for special priorities assistance or priority rating authority must be submitted on Form OST F 1254 (OMB control number to be inserted in the subsequent final rule) to the Defense Production Act Activities Coordinator, Office of Intelligence, Security, and Emergency Response, 1200 New Jersey Avenue SE., Washington, DC 20590. Form OST F 1254 may be obtained from the Department of Transportation or a Delegate Agency. A sample Form OST F 1254 is attached at Appendix I to this part.

§ 33.41 Requests for priority rating authority.

(a) If a rated order is likely to be delayed because a person is unable to obtain items or services not normally rated under this part, the person may request the authority to use a priority

rating in ordering the needed items or services.

(b) *Rating authority for production or construction equipment.* (1) A request for priority rating authority for production or construction equipment must be submitted to the U.S. Department of Commerce on FORM BIS–999. (See 15 CFR 700.51).

(2) When the use of a priority rating is authorized for the procurement of production or construction equipment, a rated order may be used either to purchase or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment or from a person willing to lease rather than sell.

(c) *Rating authority in advance of a rated prime contract.* (1) In certain cases and upon specific request, the Department of Transportation, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract. In these instances, the person requesting advance rating authority must obtain sponsorship of the request from the Department of Transportation or the appropriate Delegate Agency. The person shall also assume any business risk associated with the placing of rated orders if these orders have to be cancelled in the event the rated prime contract is not issued.

(2) The person must state the following in the request:

It is understood that the authorization of a priority rating in advance of our receiving a rated prime contract from the Department of Transportation and our use of that priority rating with our suppliers in no way commits the Department of Transportation or any other government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government shall not be liable for any cancellation charges, termination costs, or other damages that may accrue if a rated prime contract is not eventually placed and, as a result, we must subsequently cancel orders placed with the use of the priority rating authorized as a result of this request.

(3) In reviewing requests for rating authority in advance of a rated prime contract, the Department of Transportation will consider, among other things, the following criteria:

(i) The probability that the prime contract will be awarded;

(ii) The impact of the resulting rated orders on suppliers and on other authorized programs;

(iii) Whether the contractor is the sole source;

(iv) Whether the item being produced has a long lead time; and

(v) The time period for which the rating is being requested.

(4) The Department of Transportation may require periodic reports on the use of the rating authority granted under paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person shall promptly notify all suppliers who have received rated orders pursuant to the advanced rating authority that the priority rating on those orders is cancelled.

§ 33.42 Examples of assistance.

(a) While special priorities assistance may be provided for any reason in support of this part, it is usually provided in situations where:

(1) A person is experiencing difficulty in obtaining delivery against a rated order by the required delivery date; or

(2) A person cannot locate a supplier for an item or service needed to fill a rated order.

(b) Other examples of special priorities assistance include:

(1) Ensuring that rated orders receive preferential treatment by suppliers;

(2) Resolving production or delivery conflicts between various rated orders;

(3) Assisting in placing rated orders with suppliers;

(4) Verifying the urgency of rated orders; and

(5) Determining the validity of rated orders.

§ 33.43 Criteria for assistance.

Requests for special priorities assistance should be timely, *e.g.,* the request has been submitted promptly and enough time exists for the Department of Transportation or the Delegate Agency to effect a meaningful resolution to the problem, and must establish that:

(a) There is an urgent need for the item; and

(b) The applicant has made a reasonable effort to resolve the problem.

§ 33.44 Instances where assistance may not be provided.

Special priorities assistance is provided at the discretion of the Department of Transportation or the Delegate Agencies, when it is determined that such assistance is warranted to meet the objectives of this part. Examples where assistance may not be provided include situations when a person is attempting to:

(a) Secure a price advantage;

(b) Obtain delivery prior to the time required to fill a rated order;

(c) Gain competitive advantage;

(d) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or

(e) Overcome a supplier's regularly established terms of sale or conditions of doing business.

§ 33.45 Assistance programs with other nations. [Reserved]

Subpart E—Allocation Actions

§ 33.50 Policy.

(a) It is the policy of the Federal Government that the allocations authority under title I of the Defense Production Act may:

(1) Only be used when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities; and

(2) Not be used to ration materials or services at the retail level.

(b) Allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

§ 33.51 General procedures.

When the Department of Transportation plans to execute its allocations authority to address a supply problem within its resource jurisdiction, the Department shall develop a plan that includes the following information:

(a) A copy of the written determination made in accordance with section 202 of Executive Order 13603, that the program or programs that would be supported by the allocation action are necessary or appropriate to promote the national defense;

(b) A detailed description of the situation to include any unusual events or circumstances that have created the requirement for an allocation action;

(c) A statement of the specific objective(s) of the allocation action;

(d) A list of the materials, services, or facilities to be allocated;

(e) A list of the sources of the materials, services, or facilities that will be subject to the allocation action;

(f) A detailed description of the provisions that will be included in the allocation orders, including the type(s) of allocation orders, the percentages or quantity of capacity or output to be allocated for each purpose, and the duration of the allocation action (*e.g.,* anticipated start and end dates);

(g) An evaluation of the impact of the proposed allocation action on the civilian market; and

(h) Proposed actions, if any, to mitigate disruptions to civilian market operations.

§ 33.52 Controlling the general distribution of a material in the civilian market.

No allocation action by the Department of Transportation may be used to control the general distribution of a material in the civilian market, unless the Secretary of the Department of Transportation has:

(a) Made a written finding that:

(1) Such material is a scarce and critical material essential to the national defense, and

(2) The requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship;

(b) Submitted the finding for the President's approval through the Assistant to the President and National Security Advisor and the Assistant to the President for Homeland Security and Counterterrorism; and

(c) The President has approved the finding.

§ 33.53 Types of allocation orders.

There are three types of allocation orders available for communicating allocation actions. These are:

(a) Set-aside: An official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders;

(b) Directive: 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; and

(c) Allotment: An official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use.

§ 33.54 Elements of an allocation order.

Each allocation order must include:

(a) A detailed description of the required allocation action(s);

(b) Specific start and end calendar dates for each required allocation action;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary. The signature or use of the name certifies that the order is authorized under this part and that the requirements of this part are being followed;

(d) A statement that reads in substance: ''This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Transportation Priorities and Allocations System regulation (49 CFR Part 33)''; and

(e) A current copy of the Transportation Priorities and Allocations System regulation (49 CFR Part 33) as of the date of the allocation order.

§ 33.55 Mandatory acceptance of an allocation order.

(a) Except as otherwise specified in this section, a person shall accept and comply with every allocation order received.

(b) A person shall not discriminate against an allocation order in any manner such as by charging higher prices for materials, services, or facilities covered by the order or by imposing terms and conditions for contracts and orders involving allocated materials, services, or facilities that differ from the person's terms and conditions for contracts and orders for the materials, services, or facilities prior to receiving the allocation order.

(c) If a person is unable to comply fully with the required action(s) specified in an allocation order, the person must notify the Department of Transportation immediately, explain the extent to which compliance is possible, and give the reasons why full compliance is not possible. If notification is given verbally, written or electronic confirmation must be provided within five (5) working days. Such notification does not release the person from complying with the order to the fullest extent possible, until the person is notified by the Department of Transportation that the order has been changed or cancelled.

§ 33.56 Changes or cancellations of an allocation order.

An allocation order may be changed or canceled by an official action of the Department of Transportation.

Subpart F—Official Actions

§ 33.60 General provisions.

(a) The Department of Transportation may take specific official actions to implement the provisions of this part.

(b) These official actions include, but are not limited to, Rating Authorizations, Directives, Planning Orders, and Memoranda of Understanding.

§ 33.61 Rating authorizations.

(a) A Rating Authorization is an official action granting specific priority rating authority that:

(1) Permits a person to place a priority rating on an order for an item or service not normally ratable under this part; or

(2) Authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

(b) To request priority rating authority, see § 33.41.

§ 33.62 Directives.

(a) A Directive is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

(b) A person must comply with each Directive issued. However, a person may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

(c) A Priorities Directive takes precedence over all DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

(d) An Allocations Directive takes precedence over all Priorities Directives, DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

§ 33.63 Memoranda of Understanding.

(a) A Memorandum of Understanding is an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (the Department of Transportation, the Department of Commerce (if applicable), a Delegate Agency (if applicable), the supplier, and the customer).

(b) A Memorandum of Understanding is not used to alter scheduling between rated orders, authorize the use of priority ratings, impose restrictions under this part, or take other official actions. Rather, Memoranda of Understanding are used to confirm production or shipping schedules that do not require modifications to other rated orders.

Subpart G—Compliance

§ 33.70 General provisions.

(a) The Department of Transportation may take specific official actions for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act and other

applicable statutes or this part. Such actions include Administrative Subpoenas, Demands for Information, and Inspection Authorizations.

(b) Any person who places or receives a rated order or an allocation order must comply with the provisions of this part.

(c) Willful violation of the provisions of title I or Section 705 of the Defense Production Act and other applicable statutes, this part, or an official action of the Department of Transportation, is a criminal act, punishable as provided in the Defense Production Act and other applicable statutes, and as set forth in section 33.74 of this part.

§ 33.71 Audits and investigations.

(a) Audits and investigations are official actions involving the examination of books, records, documents, other writings and information to ensure that the provisions of the Defense Production Act and other applicable statutes, this part, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this part.

(b) When undertaking an audit, investigation, or other inquiry, the Department of Transportation shall:

(1) Define the scope and purpose in the official action given to the person under investigation; and

(2) Have ascertained that the information sought or other adequate and authoritative data are not available from any Federal or other responsible agency.

(c) In administering this part, the Department of Transportation may issue the following documents that constitute official actions:

(1) *Administrative Subpoenas.* An Administrative Subpoena requires a person to appear as a witness before an official designated by the Department of Transportation to testify under oath on matters of which that person has knowledge relating to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions. An Administrative Subpoena may also require the production of books, papers, records, documents and physical objects or property.

(2) *Demands for Information.* A Demand for Information requires a person to furnish to a duly authorized representative of the Department of Transportation any information necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions.

(3) *Inspection Authorizations.* An Inspection Authorization requires a person to permit a duly authorized representative of the Department of Transportation to interview the person's employees or agents, to inspect books, records, documents, other writings, and information, including electronically-stored information, in the person's possession or control at the place where that person usually keeps them or otherwise, and to inspect a person's property when such interviews and inspections are necessary or appropriate to the enforcement or the administration of the Defense Production Act and related statutes, this part, or official actions.

(d) The production of books, records, documents, other writings, and information will not be required at any place other than where they are usually kept if, prior to the return date specified in the Administrative Subpoena or Demand for Information, a duly authorized official of the Department of Transportation is furnished with copies of such material that are certified under oath to be true copies. As an alternative, a person may enter into a stipulation with a duly authorized official of the Department of Transportation as to the content of the material.

(e) An Administrative Subpoena, Demand for Information, or Inspection Authorization, shall include the name, title, or official position of the person issuing the document and of the person to be served, the evidence sought to be adduced, and its general relevance to the scope and purpose of the audit, investigation, or other inquiry. If employees or agents are to be interviewed; if books, records, documents, other writings, or information are to be produced; or if property is to be inspected; the Administrative Subpoena, Demand for Information, or Inspection Authorization will describe them with particularity.

(f) Service of documents shall be made in the following manner:

(1) Service of a Demand for Information or Inspection Authorization shall be made personally, or by Certified Mail-Return Receipt Requested at the person's last known address. Service of an Administrative Subpoena shall be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years old at the person's last known dwelling or place of business.

(2) Service upon other than an individual may be made by serving a partner, corporate officer, or a managing or general agent authorized by appointment or by law to accept service of process. If an agent is served, a copy of the document shall be mailed to the person named in the document.

(3) Any individual 18 years of age or over may serve an Administrative Subpoena, Demand for Information, or Inspection Authorization. When personal service is made, the individual making the service shall prepare an affidavit as to the manner in which service was made and the identity of the person served, and return the affidavit, and in the case of subpoenas, the original document, to the issuing officer. In case of failure to make service, the reasons for the failure shall be stated on the original document.

(g) This section is neither intended to limit the authority of the Inspector General of the Department of Transportation to initiate and conduct audits and investigations nor confer additional authority beyond that provided by the Inspector General Act.

§ 33.72 Compulsory process.

(a) If a person refuses to permit a duly authorized representative of the Department of Transportation to have access to any premises or source of information necessary to the administration or the enforcement of the Defense Production Act and other applicable statutes, or this part, the Department of Transportation representative may seek compulsory process. Compulsory process means the institution of appropriate legal action, including *ex parte* application for an inspection warrant or its equivalent, in any forum of appropriate jurisdiction.

(b) Compulsory process may be sought in advance of an audit, investigation, or other inquiry, if, in the judgment of the Department of Transportation there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist which make such process desirable or necessary.

§ 33.73 Notification of failure to comply.

(a) At the conclusion of an audit, investigation, or other inquiry, or at any other time, the Department of Transportation may inform the person in writing where compliance with the requirements of the Defense Production Act and other applicable statutes, this part, or an official action were not met.

(b) In cases where the Department of Transportation determines that failure to comply with the provisions of the Defense Production Act and other applicable statutes, this part, or an official action was inadvertent, the

person may be informed in writing of the particulars involved and the corrective action to be taken. Failure to take corrective action may then be construed as a willful violation of the Defense Production Act and other applicable statutes, this part, or an official action.

§ 33.74 Violations, penalties, and remedies.

(a) Willful violation of the provisions of title 1 or section 705 or 707 of the Defense Production Act, the priorities provisions of the Selective Service Act, this part, or an official action, is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty currently provided by the Defense Production Act is a $10,000 fine, or one year in prison, or both. The maximum penalty currently provided by the Selective Service Act is a $50,000 fine, or three years in prison, or both.

(b) The Government may also seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act, this part, or an official action.

(c) In order to secure the effective enforcement of the Defense Production Act and other applicable statutes, this part, and official actions, the following are prohibited:

(1) No person may solicit, influence or permit another person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(2) No person may conspire or act in concert with any other person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(3) No person shall deliver any item or perform any service if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act and other applicable statutes, this part, or an official action. In such instances, the person must immediately notify the Department of Transportation that, in accordance with this provision, delivery of the item or performance of the service has not been made.

§ 33.75 Compliance conflicts.

If compliance with any provision of the Defense Production Act and other applicable statutes, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act and other applicable statutes, this part, or an official action, the person must immediately notify the Department of Transportation for resolution of the conflict.

Subpart H—Adjustments, Exceptions, and Appeals

§ 33.80 Adjustments or exceptions.

(a) A person may submit a request to the Defense Production Act Activities Coordinator, Office of Intelligence Security, and Emergency Response, 1200 New Jersey Avenue SE., Washington, DC 20590, for an adjustment or exception on the ground that:

(1) A provision of this part or an official action results in an undue or exceptional hardship on that person not suffered generally by others in similar situations and circumstances; or

(2) The consequences of following a provision of this part or an official action are contrary to the intent of the Defense Production Act and other applicable statutes, or this part.

(b) Each request for adjustment or exception must be in writing and contain a complete statement of all the facts and circumstances related to the provision of this part or official action from which adjustment or exception is sought and a full and precise statement of the reasons why relief should be provided.

(c) The submission of a request for adjustment or exception shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the request is being considered unless such interim relief is granted in writing by the Office of Intelligence, Security, and Emergency Response.

(d) A decision of the Defense Production Act Activities Coordinator under this section may be appealed to the Assistant Secretary for Administration. (For information on the appeal procedure, see § 33.81.)

§ 33.81 Appeals.

(a) Any person who has had a request for adjustment or exception denied by the Defense Production Act Activities Coordinator under § 33.80, may appeal to the Department of Transportation's Assistant Secretary for Administration, who shall review and reconsider the denial.

(b)(1) Except as provided in paragraph (b)(2) of this section, an appeal must be received by the Assistant Secretary for Administration no later than 45 days after receipt of a written notice of denial from the Defense Production Act Activities Coordinator. After this 45-day period, an appeal may be accepted at the discretion of the Assistant Secretary for Administration for good cause shown.

(2) For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness, an appeal must be received by the Assistant Secretary for Administration, no later than five (5) days after receipt of a written notice of denial from the Defense Production Act Activities Coordinator. Contract performance under the order shall not be stayed pending resolution of the appeal.

(c) Each appeal must be in writing and contain a complete statement of all the facts and circumstances related to the action appealed from, all necessary documents, and a full and precise statement of the reasons the decision should be modified or reversed.

(d) In addition to the written materials submitted in support of an appeal, an appellant may request, in writing, an opportunity for an informal hearing. This request may be granted or denied at the discretion of the Assistant Secretary for Administration.

(e) When a hearing is granted, the Assistant Secretary for Administration may designate an employee of the Office of the Senior Procurement Executive to conduct the hearing and to prepare a report. The hearing officer shall determine all procedural questions and impose such time or other limitations deemed reasonable. In the event that the hearing officer decides that a printed transcript is necessary, all expenses shall be borne by the appellant.

(f) When determining an appeal, the Assistant Secretary for Administration may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to the Department of Transportation, or consult with any other persons or groups.

(g) The submission of an appeal under this section shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the appeal is being considered unless such relief is granted in writing by the Assistant Secretary for Administration.

(h) The decision of the Assistant Secretary for Administration shall be made within five (5) working days after receipt of the appeal, or within one (1) working day for appeals pertaining to emergency preparedness and shall be the final administrative action. It shall be issued to the appellant in writing

with a statement of the reasons for the decision.

Subpart I—Miscellaneous Provisions

§ 33.90 Protection against claims.

A person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.

§ 33.91 Records and reports.

(a) Persons are required to make and preserve for at least three years, accurate and complete records of any transaction covered by this part or an official action.

(b) Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action. However, this part does not specify any particular method or system to be used.

(c) Records required to be maintained by this part must be made available for examination on demand by duly authorized representatives of the Department of Transportation as provided in § 33.71.

(d) In addition, persons must develop, maintain, and submit any other records and reports to the Department of Transportation that may be required for the administration of the Defense Production Act and other applicable statutes, and this part.

(e) Section 705(d) of the Defense Production Act, as implemented by Executive Order 13603, provides that information obtained under this section which the Secretary deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall not be published or disclosed unless the Secretary determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to the Department of Transportation in connection with the enforcement or administration of the Defense Production Act, this part, or an official action, is deemed to be confidential under section 705(d) of the Defense Production Act and shall be handled in accordance with applicable Federal law.

§ 33.92 Applicability of this part and official actions.

(a) This part and all official actions, unless specifically stated otherwise, apply to transactions in any State, territory, or possession of the United States and the District of Columbia.

(b) This part and all official actions apply not only to deliveries to other persons but also include deliveries to affiliates and subsidiaries of a person and deliveries from one branch, division, or section of a single entity to another branch, division, or section under common ownership or control.

(c) This part and its schedules shall not be construed to affect any administrative actions taken by the Department of Transportation, or any outstanding contracts or orders placed pursuant to any of the parts, orders, schedules or delegations of authority previously issued by the Department of Transportation pursuant to authority granted by the President to the Department under in the Defense Production Act. Such actions, contracts, or orders shall continue in full force and effect under this part unless modified or terminated by proper authority.

§ 33.93 Communications.

All communications concerning this part, including requests for copies of the part and explanatory information, requests for guidance or clarification, and requests for adjustment or exception shall be addressed to the Defense Production Act Activities Coordinator, Office of Intelligence, Security and Emergency Response, 1200 New Jersey Avenue SE., Washington, DC 20590.

BILLING CODE 4910–9X–P

Appendix I to Part 33 – Sample Form OST F 1254

U.S. DEPARTMENT OF TRANSPORTATION
REQUEST FOR SPECIAL PRIORITIES ASSISTANCE
READ INSTRUCTIONS FOLLOWING FORM

FOR DOT USE
OMB Control Number: 2105-XXXX
Expiration Date: mm/dd/yyyy

You must submit a completed application in order to request Special Priorities Assistance (SPA). See sections 33.40-33.44 of the Transportation Priorities and Allocations System (TPAS) regulation (49 CFR 33). It is a criminal offense under 18 U.S.C. 1001 to make a willfully false statement or representation to any U.S. Government agency as to any matter within its jurisdiction. All company information furnished related to this application will be deemed BUSINESS CONFIDENTIAL under Sec. 705(d) of the Defense Production Act of 1950 [50 U.S.C. App. 2155(d)] which prohibits publication or disclosure of this information unless the President determines that withholding it is contrary to the interest of the national defense. The Department of Transportation will assert the appropriate Freedom of Information Act (FOIA) exemptions if such information is the subject of FOIA requests. The unauthorized publication or disclosure of such information by Government personnel is prohibited by law. Violators are subject to fine and/or imprisonment.

The U.S. Department of Transportation reserves the right to request more detailed information from Applicant(s) on any responses given in the completed application for the purpose of making determinations for Special Priorities Assistance to Applicant(s).

PUBLIC BURDEN STATEMENT

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2105-XXXX. Public reporting for this collection of information is estimated to be approximately 30 minutes per response, including the time for reviewing instructions, gathering the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Defense Production Act Activities Coordinator, U.S. Department of Transportation, Office of Intelligence, Security and Emergency Response, W56-306, 1200 New Jersey Avenue, SE, Washington, DC 20590.

1. APPLICANT INFORMATION

a. Name and complete address of Applicant. Applicant can be any person needing assistance – a government agency, a private company, a contractor, or service supplier. See definition of "Applicant" in the Instructions for this form.

Applicant Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Contact's name: _____

Title: _____

Telephone: _____ Fax: _____

E-mail address: _____

b. If Applicant is not end-user, give name and complete address of the end-user.

Customer Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Contact's name: _____

Title: _____

Telephone: _____ Fax: _____

E-mail address: _____

Existing contract/purchase order #: _____

Dated: _____ Priority Rating: _____

2. APPLICANT SERVICE(S) OR ITEM(S). If Applicant is not end-user, describe service(s) or items(s) to be delivered by Applicant under its customer's contract or purchase order through the use of service(s) or items(s) listed in Section 3. If known, identify the Government program and service or end-item for which these service(s) or items(s) are required. If Applicant is end-user Government agency and Section 3 service(s) or item(s) are not end-items, identify the end-service or end-item for which the Section 3 service(s) or item(s) are required. See definition of "service" and "item" in the Footnotes section of the Instructions for this form.

OPI: Office of Intelligence, Security, and Emergency Response

U.S. DEPARTMENT OF TRANSPORTATION
REQUEST FOR SPECIAL PRIORITIES ASSISTANCE
READ INSTRUCTIONS FOLLOWING FORM

FOR DOT USE
OMB Control Number: 2105-XXXX
Expiration Date: mm/dd/yyyy

3. SERVICES OR ITEMS FOR WHICH APPLICANT REQUESTS ASSISTANCE

Name and Quantity	Description	Estimated Dollar Value

4. SUPPLIER OF ITEM OR SERVICE PROVIDER INFORMATION

a. Name and complete address of Applicant's Supplier/Provider.

Supplier/Provider Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Contact Name: _____

Title: _____

Telephone: _____ Fax: _____

E-mail address: _____

b. Applicant's contract or purchase order to Supplier/Provider.

Number: _____

Dated: _____

Priority rating:
(If none, so state)

5. BRIEF JUSTIFICATION STATEMENT OF NEED FOR SPECIAL ASSISTANCE. Please provide a brief justification for this request for Special Priorities Assistance. The justification should begin with the reason you are seeking Special Priorities Assistance in support of the TPAS; e.g.: when its regular provisions are not sufficient to obtain delivery of service(s) or items(s) in time to meet urgent customer or program requirements; or help in locating a supplier or placing a rated order; to ensure that rated orders are receiving necessary preferential treatment by suppliers; to resolve production or delivery conflicts between or among rated orders; to verify the urgency or determine the validity of rated orders; or to request authority to use a priority rating. If Applicant(s) are requesting authority to use a priority rating, please explain the necessity of the requested items and/or services. As applicable, also explain the potential effects of delay in receipt of Section 3 items or services. Describe attempts to procure items/services in normal market conditions and give specific reasons why special priority assistance is required. If DX priority rating authority is requested, please explain the necessity over a DO priority rating.

OPI: Office of Intelligence, Security, and Emergency Response

U.S. DEPARTMENT OF TRANSPORTATION
REQUEST FOR SPECIAL PRIORITIES ASSISTANCE
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FOR DOT USE
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6. CERTIFICATION: I certify that the information contained in Sections 1 – 5 of this form, and all other information attached, is correct and complete to the best of my knowledge and belief (omit signature if this form is electronically generated and transmitted - use of name is deemed certification).

Signature of Applicant's authorized official	Title
Print or type Name of Applicant's authorized official	Date

CONTINUATION SECTION
Identify each statement with appropriate Section number

OPI: Office of Intelligence, Security, and Emergency Response

Instructions for Using OMB Form 2105-XXXX

REQUEST FOR SPECIAL PRIORITIES ASSISTANCE

WHO DO I CONTACT FOR FURTHER INFORMATION?

Email: S60.Policy@dot.gov

Mail: Defense Production Act Activities Coordinator, U.S. Department of Transportation, Office of Intelligence, Security and Emergency Response, W56-306, 1200 New Jersey Avenue, SE, Washington, DC 20590

Phone: 202-366-1863

Fax: 202-366-4902

HOW DO I SUBMIT THIS FORM?

Email. Please fill out form electronically using Adobe Acrobat Reader and send by email, if possible. Otherwise, print and scan your signed evaluation to a pdf document and email to S60.Policy@dot.gov.

Fax. Fax your signed evaluation to (202) 366-4902.You will receive an email confirmation.

DOT may contact you for additional clarifying information, and will respond to you in a timely manner with a decision regarding your request.

WHEN SHOULD THIS FORM BE USED?

Requests for Special Priorities Assistance (SPA) may be filed with the U.S. Department of Transportation (DOT) for any reason in support of the Transportation Priorities and Allocations System (TPAS); e.g.: when its regular provisions are not sufficient to obtain delivery of service(s) or items(s) in time to meet urgent customer or program requirements; or help in locating a supplier or placing a rated order; to ensure that rated orders are receiving necessary preferential treatment by suppliers; to resolve production or delivery conflicts between or among rated orders; to verify the urgency or determine the validity of rated orders; or to request authority to use a priority rating.

Requests for SPA must be sponsored by the U.S. Government agency responsible for the program or project supported by the Applicant's contract or purchase order.

Generally, one form should be completed for each contract or purchase order number. However, if SPA is requested for multiple contracts or purchase orders placed with a supplier for the same or similar services or items, information from all contracts or purchase orders may be included in one application. However, each contract or purchase order number must be identified and shown separately.

WHO SHOULD COMPLETE THE FORM?

Private sector applicants should file with their respective customers as follows: **lower-tier suppliers** file with customer/subcontractor for forwarding to subcontractor/prime contractor; **subcontractors/suppliers** file with prime contractor for forwarding to DOT or the sponsoring U.S. Government Agency, as applicable; **prime contractors** file directly with DOT or the sponsoring U.S. Government Agency, as applicable. If for any reason the applicant is unable to file this form as specified above, see section below on "Who do I contact for further information?"

DEFINITIONS:

Applicant as used in this form refers to any person requiring Special Priorities Assistance, and eligible for such assistance under TPAS.

Item is defined in TPAS as any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

Person is defined in TPAS to include any individual, corporation, partnership, association, any other organized group of persons, a U.S. Government agency, or any other government.

Service is defined in TPAS to include any effort that is needed for or incidental to (1) the development, production, processing, distribution, deliver, or use of an industrial resource or a critical technology item; (2) the construction of facilities; (3) the movement of individuals and property by all modes of civil transportation; or (4) other national defense programs and activities

SPECIFIC INSTRUCTIONS

Section 1:

a. Information about the applicant should go here. An "applicant" refers to any person requiring Special priorities Assistance and eligible for such assistance under the TPAS. A "person" in this context is any individual, corporation, partnership, association, or other organized group of persons, a US Government agency or any other government.
b. Information about the end-user or ultimate customer for the item or service goes here.

Section 2:

Recognizing that many requests for special priorities may involve interim services or items, please complete this section describing the "end product" that will be improved through providing the priority listed. An example would be providing freight rail transportation for a subcomponent of a major item that is direly needed for the national defense by the Government. Explain how the transportation of the subcomponent will fulfill the Government's need.

Section 3:

Here you provide information on the item or service you provide and seek special priority assistance with. What is it called, how many or how much, what is the description and also the estimated dollar value of the item/service itself. This helps DOT understand the scope of your request.

Section 4:

This section helps DOT understand who your supplier or service provider is. These are the people who need to move faster to accomplish your priority objective.

Section 5:

Please provide enough information so DOT understands the need for and urgency of your request.

Section 6:

This section certifies that the information is correct, to the best knowledge of the person whose name and/or signature is shown (depending on format of form used). It is a criminal offense under 18 U.S.C. 1011 to make a willfully false statement or representation to any U.S. Government agency as to any matter within its jurisdiction.

Continuation Section

Understanding that situations requiring requests for special priorities assistance may be complex and information required not easily confined to sections on a form, you are provided this opportunity to provide any additional information that will assist DOT in making a determination on your request.

SPECIAL INSTRUCTIONS:

- If the space in any block is insufficient to provide a clear and complete statement of the information requested, use a separate sheet to be attached to this form.
- If disclosure of certain information on this form is prohibited by security regulations or other security considerations, enter "classified" or "confidential" in the appropriate block in lieu of the restricted information.
- The U.S. Department of Transportation

reserves the right to request more detailed information from Applicant(s) on any responses given in the completed application for the purpose of making determinations for Special Priorities Assistance to Applicant(s).

PRIVACY ACT STATEMENT

This notice is provided pursuant to the Privacy Act, 5, U.S.C. 552a(e)(3): The Information on this application is solicited under the authority of Title 50 U.S.C. App. § 2061 et seq., the Defense Production Act of 1950. The principal purpose for which the information is to be used is to determine your eligibility for Special Priorities Assistance under the Transportation Priorities and Allocations System program. Contact information will be used to notify you if Special Priorities Assistance has been granted, and to provide any other notifications required by the program. Other possible uses of information are published in the Federal Register at 75 FR 82133 (December 29, 2010) under "Prefatory Statement of General Routine Uses". Furnishing the information on this form is voluntary, but failure to provide all or part of the information may delay or prevent the processing of your application.

Schedule 1 to Part 33—Approved Programs

The programs listed in this schedule have been approved for priorities and allocations support under this part by DoD, DOE, or DHS, in accordance with section 203 of Executive Order 13603. They have equal preferential status.

Approved Program—[Reserved]

Program Identification Symbol—[Reserved]

[FR Doc. 2012–23789 Filed 9–28–12; 8:45 am]

BILLING CODE 4910–9X–C

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 303, 325, 350, 355, 356, 360, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 395, 396, 397, 398, and 399, and Appendices B and G of Subchapter B of Chapter III

[Docket No. FMCSA–2012–0274]

RIN 2126–AB54

Technical, Organizational, and Conforming Amendments to the Federal Motor Carrier Safety Regulations

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: This final rule makes technical corrections throughout title 49 CFR subtitle B, chapter III. The Agency is making minor editorial changes to add revised delegations of authority from the Secretary of Transportation (Secretary), correct errors and omissions, and improve clarity. This rule does not make any substantive changes to the affected parts of the Federal Motor Carrier Safety Regulations (FMCSRs).

DATES: Effective October 1, 2012. The incorporation by reference of a certain publication listed in the rule is approved by the Director of the **Federal Register** as of October 1, 2012.

FOR FURTHER INFORMATION CONTACT: Andrea Manka or Elaine Walls, Federal Motor Carrier Safety Administration, Office of the Chief Counsel, Regulatory Affairs Division, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, by telephone, for Ms. Manka at (202) 366–0975 or via email at *andrea.manka@dot.gov;* and for Ms. Walls at (202) 366–1394 or via email at *elaine.walls@dot.gov.* Office hours are from 9 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

I. Legal Basis for the Rulemaking

Congress delegated certain powers to regulate interstate commerce to the United States Department of Transportation (DOT) in numerous pieces of legislation, most notably in section 6 of the Department of Transportation Act (DOT Act) (Pub. L. 85–670, 80 Stat. 931 (1966)). Section 55 of the DOT Act transferred to DOT the authority of the former Interstate Commerce Commission (ICC) to regulate the qualifications and maximum hours-of-service of employees, the safety of operations, and the equipment of motor carriers in interstate commerce. *See* 49 U.S.C. 104. This authority, first granted to the ICC in the Motor Carrier Act of 1935 (Pub. L. 74–255, 49 Stat. 543, Aug. 9, 1935), now appears in chapter 315 of title 49 of the U.S. Code. The regulations issued under this authority became known as the FMCSRs, appearing generally at 49 CFR parts 350–399. The administrative powers to enforce chapter 315 were also transferred from the ICC to the DOT in 1966 and appear in chapter 5 of title 49 of the U.S. Code. The Secretary of DOT delegated oversight of these provisions to the Federal Highway Administration (FHWA), a predecessor agency of FMCSA.

Between 1984 and 1999, a number of statutes added to FHWA's authority. Various statutes authorize the enforcement of the FMCSRs, the Hazardous Materials Regulations (HMRs), and the Commercial Regulations, and provide both civil and criminal penalties for violations. These statutes include the Motor Carrier Safety Act of 1984 (Pub. L. 98–554, 98 Stat. 2832, Oct. 30, 1984), codified at 49 U.S.C. chapter 311, subchapter III; the Commercial Motor Vehicle Safety Act of 1986 (Pub. L. 99–570, 100 Stat. 3207–170, Oct. 27, 1986), codified at 49 U.S.C. chapter 313; the Hazardous Materials Transportation Uniform Safety Act of 1990, as amended (Pub. L. 101–615, 104 Stat. 3244, Nov. 16, 1990), codified at 49 U.S.C. chapter 51; and the ICC Termination Act of 1995 (Pub. L. 104–88, 109 Stat. 803, Dec. 29, 1995), codified at 49 U.S.C. chapters 131–149.

The Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106–159, 113 Stat. 1748, Dec. 9, 1999) established FMCSA as a new operating administration within the DOT, effective January 1, 2000. The motor carrier safety staff and responsibilities previously assigned to FHWA are now assigned to FMCSA. Congress expanded, modified, and amended FMCSA's authority in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Pub. L. 107–56, 115 Stat. 272, Oct. 26, 2001), the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144, Aug. 10, 2005), the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572, June 6, 2008), and the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141, July 6, 2012).

Most of the provisions of the FMCSRs amended by this rule are based on the statutes detailed above. The legal authority for each of those provisions was explained when the requirement was originally adopted and is summarized at the beginning of each part in title 49 of the Code of Federal Regulations (CFR). No further analysis is required here. Title 49 CFR subtitle B, chapter III, contains all of the FMCSRs.

On August 17, 2012, the Secretary issued a final rule (77 FR 49964) to update the CFR sections that set forth the organizational structure of the Department and delegations of authority from the Secretary to other modal administrations—including the FMCSA. Because the Secretary revised part 1 of subtitle A of title 49, CFR, by moving FMCSA delegations from 49 CFR 1.73 to 49 CFR 1.87, FMCSA must also revise all of its delegations of authority citations in chapter III of subtitle B of title 49, CFR, to accommodate this change.

The Administrative Procedure Act (APA) (5 U.S.C. 553) specifically provides that exceptions to its notice and public comment rulemaking procedures are not required where the Agency finds there is good cause (and incorporates the finding and a brief statement of reasons therefor in the rules issued) to dispense with them. Generally, good cause exists where the Agency determines that notice and public procedures are impractical, unnecessary, or contrary to the public interest. (see 5 U.S.C. 553(b). The amendments made in this final rule merely correct inadvertent errors and omissions, remove obsolete references, and make minor editorial changes to improve clarity and consistency. The technical amendments do not impose any new requirements, nor do they make any substantive changes to the CFR. For these reasons, the FMCSA finds good cause that notice and public