

§ 32.635

§ 32.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 32.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

- (1) All direct charge employees;
- (2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 32.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 32.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

49 CFR Subtitle A (10–1–24 Edition)

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 32.655 Individual.

Individual means a natural person.

§ 32.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 32.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 32.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered non-procurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Non-procurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

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.

Office of the Secretary of Transportation

§ 33.2

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).

SOURCE: 77 FR 59801, Oct. 1, 2012, unless otherwise noted.

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

§ 33.3

(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

49 CFR Subtitle A (10–1–24 Edition)

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).

§ 33.20

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, clean-

49 CFR Subtitle A (10–1–24 Edition)

ers, 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

§ 33.33

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.

49 CFR Subtitle A (10–1–24 Edition)

(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

§ 33.35

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

49 CFR Subtitle A (10-1-24 Edition)

(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:

§ 33.40

(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

49 CFR Subtitle A (10–1–24 Edition)

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

§ 33.44

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 dis-

49 CFR Subtitle A (10–1–24 Edition)

proportionate 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.

§ 33.60

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

49 CFR Subtitle A (10–1–24 Edition)

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 Depart-

ment 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

§ 33.72

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

49 CFR Subtitle A (10–1–24 Edition)

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

§ 33.90

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.

49 CFR Subtitle A (10–1–24 Edition)

(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

Office of the Secretary of Transportation

Pt. 33, App. 1

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.

APPENDIX I TO PART 33—SAMPLE FORM
OST F 1254

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
<p>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.</p> <p>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).</p> <p style="text-align: center;">PUBLIC BURDEN STATEMENT</p> <p>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.</p>		
1. APPLICANT INFORMATION		
<p>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.</p> <p>Applicant Name: _____</p> <p>Address: _____</p> <p>City: _____ State: _____ Zip: _____</p> <p>Contact's name: _____</p> <p>Title: _____</p> <p>Telephone: _____ Fax: _____</p> <p>E-mail address: _____</p>	<p>b. If Applicant is not end-user, give name and complete address of the end-user.</p> <p>Customer Name: _____</p> <p>Address: _____</p> <p>City: _____ State: _____ Zip: _____</p> <p>Contact's name: _____</p> <p>Title: _____</p> <p>Telephone: _____ Fax: _____</p> <p>E-mail address: _____</p> <p>Existing contract/purchase order #: _____</p> <p>Dated: _____ Priority Rating: _____</p>	
<p>2. APPLICANT SERVICE(S) OR ITEM(S). If Applicant is not end-user, describe service(s) or item(s) to be delivered by Applicant under its customer's contract or purchase order through the use of service(s) or item(s) listed in Section 3. If known, identify the Government program and service or end-item for which these service(s) or item(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.</p>		

U.S. DEPARTMENT OF TRANSPORTATION REQUEST FOR SPECIAL PRIORITIES ASSISTANCE READ INSTRUCTIONS FOLLOWING FORM		FOR DOT USE OMB Control Number: 2105-XXXXX 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.		

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				
<p>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).</p> <table style="width: 100%; border: none;"><tr><td style="width: 50%; border-bottom: 1px solid black; text-align: center;">Signature of Applicant's authorized official</td><td style="width: 50%; border-bottom: 1px solid black; text-align: center;">Title</td></tr><tr><td style="border-bottom: 1px solid black; text-align: center;">Print or type Name of Applicant's authorized official</td><td style="border-bottom: 1px solid black; text-align: center;">Date</td></tr></table>		Signature of Applicant's authorized official	Title	Print or type Name of Applicant's authorized official	Date
Signature of Applicant's authorized official	Title				
Print or type Name of Applicant's authorized official	Date				
CONTINUATION SECTION <i>Identify each statement with appropriate Section number</i>					

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.

Pt. 33, App. 1

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

Form OST F 1254
Page 5 of 6

49 CFR Subtitle A (10-1-24 Edition)

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

OPI: Office of Intelligence, Security, and Emergency Response

Office of the Secretary of Transportation

Pt. 33, Sched. 1

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.

Form OST F 1254
Page 6 of 6

OPI: Office of Intelligence, Security, and Emergency Response

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]