

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 4, 13, 14, 15, and 19**

[FAC 2005–76; FAR Case 2012–014; Item II; Docket 2012–0014, Sequence 1]

RIN 9000–AM46

Federal Acquisition Regulation; Small Business Protests and Appeals

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement the Small Business Administration's revision of the small business size and small business status protest and appeal procedures.

DATES: *Effective:* August 25, 2014.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at 202–501–2364, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–76, FAR Case 2012–014.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 78 FR 14746 on March 7, 2013, to update the small business size and small business status protest and appeal procedures, protest and appeal timeframes, and to address the application of the Small Business Administration's (SBA) decisions on a protested concern's size and other small business status determinations. These changes are consistent with SBA's final rule published in the **Federal Register** at 76 FR 5680 on February 2, 2011, that amended SBA's regulations to clarify the effect, across all small business programs, of initial and appeal eligibility decisions; and SBA's interim final rule, published in the **Federal Register** at 77 FR 1857 on January 12, 2012, that amended its regulations pertaining to the Women-Owned Small Business Federal Contract Program so that its protest and appeal procedures would be consistent with all other small business programs.

In addition, this rule restructures sections of the FAR that address small business status protest and appeal procedures. This restructuring of the FAR text provides uniformity to the protest and appeals guidance provided at FAR 19.306, Protesting a firm's status as a HUBZone small business concern, FAR 19.307, Protesting a firm's status as a service-disabled veteran-owned small business concern, and FAR 19.308, Protesting a firm's status as an economically disadvantaged women-owned small business (EDWOSB) concern or women-owned small business (WOSB) concern eligible under the WOSB Program. This rule also updates the protest and appeals guidance found at FAR 19.302, Protesting a small business representation or rerepresentation.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. Two respondents submitted comments. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

The revisions made at FAR 19.001 and FAR 19.102(f) pertaining to the nonmanufacturer rule as identified in the proposed rule published in the **Federal Register** at 78 FR 14746 on March 7, 2013, have been removed. Based on the public comments received, it was determined that greater clarification regarding changes to the nonmanufacturer rule is warranted. However, a non-manufacturer must still meet the requirements of 13 CFR 121.406.

B. Analysis of Public Comments**1. Clarity in the Definition and Application of the Nonmanufacturer Rule**

Comment: Two respondents expressed concern with the definition and application of the nonmanufacturer rule. One respondent suggested the need for greater clarity in the application of the nonmanufacturer rule. A second respondent suggested that the language pertaining to the nonmanufacturing rule be republished to allow the entire range of interested parties to review and submit comments.

Response: Based on the public comments received, it was determined that greater clarification regarding changes to the nonmanufacturer rule is

warranted. Therefore, the proposed changes to the nonmanufacturer rule definition at FAR 19.001 and the nonmanufacturer rule at FAR 19.102(f) have not been incorporated into this final rule.

2. Wholesale Trade or Retail Trade North American Industry Classification System (NAICS) Codes

Comment: One respondent commented that changes to FAR 19.303, Determining North American Industry Classification System codes and size standards, more specifically the wholesale trade or retail trade NAICS code revision, should have been prominently highlighted in the proposed rule.

Response: SBA's regulations provide that acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a wholesale trade NAICS code. SBA size regulations provide that acquisitions for supplies also cannot be classified under a retail trade NAICS code. SBA provided further clarification in its final rule, published in the **Federal Register** at 76 FR 8222 on February 11, 2011, that retail trade NAICS codes are appropriate for financial assistance (e.g., loans), but not for the procurement of specified supply items. Although this has been long standing in SBA regulations, based on the public comments received, and data from the Federal Procurement Data System regarding the use of Wholesale Trade or Retail Trade NAICS for the procurement of specified supply items, it was determined that further analysis is needed to determine the impact this change will have on small businesses. Therefore, the respondent's proposed changes to FAR 19.303(a)(2) have not been incorporated into this final rule.

3. Recommend SBA Change Its Certification Process From "Self" to SBA Certification

Comment: One respondent recommended SBA change its certification process from "self" to SBA certification. The respondent commented that increasing the amount of time for the SBA to work a size status protest does not fix the cause of a protest. According to the respondent, if the SBA would change the certification process from self to SBA-certification, we could eliminate the majority, if not all, of the "nearly 500 size protests each fiscal year."

Response: This comment is outside the scope of this case. The authority to change the certification process is within the purview of SBA, not the FAR Council.

4. Addition of the Phrase “Whether Timely or Not” at FAR 19.302(c)(1)

Comment: One respondent wrote approvingly of the addition of the phrase “whether timely or not” to FAR 19.302(c)(1) and suggested the text of FAR 19.302(j) be appended to the end of FAR 19.302(c)(1) to make it clear that untimely protests will not be considered on the instant acquisition.

Response: The phrase “whether timely or not” in FAR 19.302(c)(1) predates this proposed rule. Furthermore, FAR 19.302(j) already clearly and effectively provides that an untimely protest cannot be considered on the instant acquisition. It is unnecessary to reiterate this in the text of FAR 19.302(c)(1).

5. Limitations on SBA’s Ability To File a Protest Before or After Award

Comment: One respondent suggested that SBA does not have the entire facts of an acquisition, and is not in a position to file a bona fide protest before or after award (unlike the PCO). The respondent further commented that, as written, any SBA employee could file a protest throughout the entire program performance period.

Response: This comment is outside the scope of this case. The regulatory authority for SBA to file a protest “before or after” award is found at 13 CFR 121.1004(b).

6. Clarify How a Contracting Officer Determines the Principal Purpose of an Acquisition

Comment: One respondent commented that the addition of new language in FAR 19.303(a)(2) too narrowly describes how the procuring contracting officer determines the “principal purpose of the acquisition.” The respondent further commented that 13 CFR 121.402 includes other considerations given to the industry descriptions in the NAICS United States Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being produced, and the function of the goods or services being purchased.

Response: Additional language has been added to FAR 19.303 to further clarify how to select a NAICS code that best describes the principal purpose of the product or service being acquired.

7. Delete the Word “Affecting” and Use “Changing” in Its Place at FAR 19.303

Comment: One respondent recommended that FAR 19.303 be revised to remove the word “affecting” and in its place add the word

“changing”. The respondent stated that affecting is too difficult a term to define whereas changing is a known term.

Response: The language as written is consistent with SBA regulations at 13 CFR 134.302.

8. Delete the Words “Any Person” and Use “Any Offeror” at 19.303(c)(2)(i)

Comment: One respondent recommended that the FAR Council remove the phrase “Any person” and replace with the term “Any offeror”. The respondent commented that the use of any person was too broad.

Response: The language as written is consistent with SBA regulations at 13 CFR 134.302.

9. SBA Authority To File a NAICS Appeal at Any Time Before Offers Are Due

Comment: One respondent commented that the language at FAR 19.303 regarding SBA’s authority to file a NAICS appeal at any time before offers are due should be deleted as 13 CFR 134.302 does not give the SBA broad authority to file a NAICS appeal at any time before offers are due.

Response: The language as written is consistent with SBA regulations at 13 CFR 134.304.

10. Notice of NAICS Code Appeals

Comment: One respondent suggested that the instruction to withhold contract award upon receipt of notification of a NAICS code challenge be removed from FAR 19.303(c)(8) as the respondent believes SBA has no authority to require a contracting officer to withhold a contract award under these circumstances.

Response: SBA regulations at 13 CFR 121.1103(c)(1)(i) require a contracting officer to stay contract award when notice of a NAICS code appeal is received. However, language was added to provide contracting officers some flexibility to address situations where withholding award is not in the best interests of the Government.

C. Other Changes

The final rule provides additional guidance in FAR 19.306, 19.307, and 19.308 regarding protests of small business program status. This guidance further clarifies that the contracting officer is required to prepare a written determination(s) documenting the decision to (1) proceed with a contract award when the apparent successful offeror’s program eligibility has been protested; and (2) not terminate a contract when award has been made to the protested contractor and SBA subsequently issues a negative program

eligibility decision, or SBA’s decision of negative program eligibility is upheld on appeal.

This final rule also includes a revision to FAR 4.604 requiring contracting officers to update the Federal Procurement Data System (FPDS) to reflect the final decision of the SBA regarding a small business size determination in accordance with SBA regulations at 13 CFR 121.1009.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule amends the FAR to provide revised regulatory coverage for small business size and small business status protest and appeal procedures and to ensure that the FAR contains consistent and coherent protest and appeal procedures that are congruent with SBA regulations.

The objective of this final rule is to provide FAR procedures to ensure that contracts set aside for small businesses are awarded to eligible small business concerns. Under the Small Business Act, the SBA is authorized to establish the size of a business entity (15 U.S.C. 632), make small business size and status determinations, and rule on small business size and status appeals. Revisions to the FAR are necessary to be harmonious with SBA regulations on formal size determinations and small business status protest and appeals procedures. There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

This final rule will have no direct negative impact on any small business concern, since it is aimed at preventing other than small

business concerns from receiving or performing contracts set aside for small business concerns. This rule will indirectly benefit small business concerns by preventing awards to ineligible concerns, or shortening the length of time other than small business concerns perform small business set-aside contracts.

SBA processes nearly 500 size protests each fiscal year, resulting in 41 percent being determined to be small and 26 percent determined to be other than small. The rest are dismissed on procedural grounds. Thus, the number of concerns that could be affected by this rule, regardless of size, is approximately 335 per year (67 percent of 500).

This final rule will not impose any new information collection requirement on small businesses. This rule will require contracting officers to update Federal procurement databases to reflect final agency status decisions. Contracting officers should currently be updating these databases. This rule clarifies that this must be accomplished.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There were no alternatives considered because there is no other means to accomplish the stated objectives of the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 4, 13, 14, 15, and 19

Government procurement.

Dated: July 18, 2014.

William F. Clark,

Acting Director, Office of Government-Wide Acquisition Policy, Office of Acquisition Policy, Office of Government-Wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 13, 14, 15, and 19 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 13, 14, 15, and 19 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 4—ADMINISTRATIVE MATTERS

■ 2. Amend section 4.604 by revising paragraph (b)(4) and adding paragraph (b)(5) to read as follows:

4.604 Responsibilities.

* * * * *

(b) * * *

(4) When the contracting office receives written notification that a contractor has changed its size status in accordance with the clause at 52.219–28, Post-Award Small Business Program Rerepresentation, the contracting officer shall update the size status in FPDS within 30 days after receipt of contractor’s notification of rerepresentation.

(5) If after award of a contract, the contracting officer receives written notification of SBA’s final decision on a protest concerning a size determination, the contracting officer shall update FPDS to reflect the final decision.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.102 [Amended]

■ 3. Amend section 13.102 by removing from the end of paragraph (a)(3) “Woman-owned” and adding “Women-owned” in its place.

PART 14—SEALED BIDDING

14.502 [Amended]

■ 4. Amend section 14.502 by removing from paragraph (b)(7) “woman-owned” and “Woman-Owned” and adding “women-owned” and “Women-Owned” in their places, respectively.

PART 15—CONTRACTING BY NEGOTIATION

15.503 [Amended]

■ 5. Amend section 15.503 by removing from paragraph (a)(2)(i)(E) “Woman-Owned” and adding “Women-Owned” in its place.

PART 19—SMALL BUSINESS PROGRAMS

■ 6. Amend section 19.102 by—

- a. Revising the last sentence in paragraph (f)(1);
- b. Removing from paragraph (f)(2) “is accounted” and adding “are accounted” in its place; and
- c. Revising paragraph (f)(4) to read as follows:

19.102 Size standards.

* * * * *

(f) * * *

(1) * * * However, see the limitations on subcontracting at 52.219–14 that apply to any small business offeror other than a nonmanufacturer for purposes of set-asides and 8(a) awards, 52.219–3 for HUBZone set-asides and HUBZone sole source awards, 52.219–27 for SDVOSB set-asides and SDVOSB sole source awards, 52.219–29 for economically disadvantaged women-

owned small business set-asides, and 52.219–30 for set-asides for women-owned small business concerns eligible under the women-owned small business program.

* * * * *

(4) In the case of acquisitions set aside for small business or awarded under section 8(a) of the Small Business Act, when the acquisition is for a specific product (or a product in a class of products) for which the SBA has determined that there are no small business manufacturers or processors in the Federal market, then the SBA may grant a class waiver so that a nonmanufacturer does not have to furnish the product of a small business. For the most current listing of classes for which SBA has granted a waiver, contact an SBA Office of Government Contracting. A listing is also available on SBA’s Internet Homepage at <http://www.sba.gov/content/class-waivers>. Contracting officers may request that the SBA waive the nonmanufacturer rule for a particular class of products. For procedures in requesting a waiver see 13 CFR 121.1204.

* * * * *

- 7. Amend section 19.302 by—
- a. Revising paragraphs (a) and (c)(1);
- b. Adding paragraph (c)(3);
- c. Removing from the introductory text of paragraph (d)(1) introductory text “the 5th” and adding “the fifth” in its place;
- d. Revising paragraphs (d)(1)(i), (d)(1)(ii), and (d)(2);
- e. Adding paragraph (d)(4);
- f. Removing paragraph (f);
- g. Redesignating paragraphs (g) through (k) as paragraphs (f) through (j), respectively; and
- h. Revising the newly designated paragraphs (f) through (i).

The revisions and additions read as follows:

19.302 Protesting a small business representation or rerepresentation.

(a)(1) The Small Business Administration (SBA) regulations on small business size and size protests are found at 13 CFR part 121.

(2) An offeror, the SBA, or another interested party may protest the small business representation of an offeror in a specific offer. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or the SBA.

* * * * *

(c)(1) Any contracting officer who receives a protest, whether timely or not, or who, as the contracting officer, wishes to protest the small business representation of an offeror, or

rerepresentation of a contractor, shall promptly forward the protest to the SBA Government Contracting Area Director at the Government Contracting Area Office serving the area in which the headquarters of the offeror is located.

* * * * *

(3) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The protest and any accompanying materials.

(ii) A copy of the size self-certification.

(iii) Identification of the applicable size standard.

(iv) A copy or an electronic link to the solicitation and any amendments.

(v) The name, address, telephone number, email address, and fax number of the contracting officer.

(vi) Identification of the bid opening date or the date of notification provided to unsuccessful offerors.

(vii) The date the contracting officer received the protest.

(viii) A complete address and point of contact for the protested concern.

(d) * * *

(1) * * *

(i) A protest may be made orally if it is confirmed in writing and received by the contracting officer within the 5-day period or by letter postmarked no later than 1 business day after the oral protest.

(ii) A protest may be made in writing if it is delivered to the contracting officer by hand, telegram, mail, facsimile, email, express or overnight delivery service.

(2) Except as provided in paragraph (d)(4) of this section, a protest filed by the contracting officer or SBA is always considered timely whether filed before or after award.

* * * * *

(4) A protest filed before bid opening, or notification to offerors of the selection of the apparent successful offeror, will be dismissed as premature by SBA.

* * * * *

(f)(1) Within 15 business days after receipt of a protest or request for a formal size determination or within any extension of time granted by the contracting officer the SBA Area Office will determine the size status of the challenged concern. The SBA Area Office will notify the contracting officer, the protester, and the challenged concern of its decision by a verifiable means, which may include facsimile,

electronic mail, or overnight delivery service.

(2) Award may be made to a protested concern after the SBA Area Office has determined that either the protested concern is an eligible small business or has dismissed all protests against it.

(3) If SBA's Office of Hearings and Appeals (OHA) subsequently overturns the Area Office's determination of eligibility or dismissal, and contract award has not been made, the contracting officer may apply the OHA decision to the procurement in question.

(g)(1) After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until the SBA has made a size determination or 15 business days have expired since SBA's receipt of a protest, whichever occurs first; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest.

(2) If SBA has not made a determination within 15 business days, or within any extension of time granted by the contracting officer, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government.

(3) SBA may, at its sole discretion, reopen a formal size determination to correct an error or mistake, if it is within the appeal period and no appeal has been filed with OHA or, a final decision has not been rendered by the SBA Area Office or OHA.

(4) If a protest is received that challenges the small business status of an offeror not being considered for award, the contracting officer is not required to suspend contract action. The contracting officer shall forward the protest to the SBA (see paragraph (c)(1) of this section) with a notation that the concern is not being considered for award, and shall notify the protester of this action.

(h) An appeal from an SBA size determination may be filed by any concern or other interested party whose protest of the small business representation of another concern has been denied by an SBA Government Contracting Area Director, any concern or other interested party that has been adversely affected by an SBA Government Contracting Area Director's decision, or the SBA Associate Administrator for the SBA program involved. The appeal must be filed with the Office of Hearings and Appeals, Small Business Administration, Suite

5900, 409 3rd Street, SW., Washington, DC 20416, within the time limits and in strict accordance with the procedures contained in Subpart C of 13 CFR part 134. It is within the discretion of the SBA Judge whether to accept an appeal from a size determination. If a post-award appeal is submitted to OHA within the time limits specified in Subpart C of 13 CFR part 134, the contracting officer shall consider suspending contract performance until an SBA Judge decides the appeal. SBA will inform the contracting officer of its ruling on the appeal. SBA's decision, if received before award, will apply to the pending acquisition. If the contracting officer has made a written determination in accordance with (g)(1) or (2) of this section, the contract has been awarded, the SBA rulings is received after award, and OHA finds the protested concern to be ineligible for award, the contracting officer shall terminate the contract unless termination is not in the best interests of the Government, in keeping with the circumstances described in the written determination. However, the contracting officer shall not exercise any options or award further task or delivery orders.

(i) SBA will dismiss untimely protests. A protest that is not timely, even though received before award, shall be forwarded to the SBA Government Contracting Area Office (see paragraph (c)(1) of this section), with a notation on it that the protest is not timely. A protest received by a contracting officer after award of a contract shall be forwarded to the SBA Government Contracting Area Office with a notation that award has been made.

* * * * *

■ 8. Amend section 19.303 by revising the section heading and paragraphs (a) and (c) and adding paragraph (d) to read as follows:

19.303 Determining North American Industry Classification System codes and size standards.

(a)(1) The contracting officer shall determine the appropriate North American Industry Classification System (NAICS) code and related small business size standard and include them in solicitations above the micro-purchase threshold. For information on size standards matched to industry NAICS codes, including the use of new NAICS codes, see also 19.102(a).

(2) The contracting officer shall select the NAICS code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the U.S. NAICS Manual,

the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value. A concern that submits an offer or quote for a contract where the NAICS code assigned to the contract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it meets the requirements of 19.102(f).

* * * * *

(c) The contracting officer's determination is final unless appealed as follows:

(1) An appeal from a contracting officer's NAICS code designation and the applicable size standard must be served and filed within 10 calendar days after the issuance of the initial solicitation or any amendment affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers are due.

(2) Appeals from a contracting officer's NAICS code designation or applicable size standard may be filed with SBA's Office of Hearings and Appeals by—

(i) Any person adversely affected by a NAICS code designation or applicable size standard. However, with respect to a particular sole source 8(a) contract, only the SBA Associate Administrator for Business Development may appeal a NAICS code designation; or

(ii) The Associate or Assistant Director for the SBA program involved, through SBA's Office of General Counsel.

(3) Contracting officers shall advise the public, by amendment to the solicitation, of the existence of a NAICS code appeal (see 5.102(a)(1)). Such notices shall include the procedures and the deadline for interested parties to file and serve arguments concerning the appeal.

(4) SBA's Office of Hearings and Appeals (OHA) will dismiss summarily an untimely NAICS code appeal.

(5)(i) The appeal petition must be in writing and must be addressed to the Office of Hearings and Appeals, Small Business Administration, Suite 5900, 409 3rd Street SW., Washington, DC 20416.

(ii) There is no required format for the appeal; however, the appeal must include—

(A) The solicitation or contract number and the name, address, email

address, and telephone number of the contracting officer;

(B) A full and specific statement as to why the NAICS code designation is allegedly erroneous and argument supporting the allegation; and

(C) The name, address, telephone number, and signature of the appellant or its attorney.

(6) The appellant must serve the appeal petition upon—

(i) The contracting officer who assigned the NAICS code to the acquisition; and

(ii) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 Third Street SW., Washington, DC 20416, facsimile 202-205-6873, or email at OPLService@sba.gov.

(7) Upon receipt of a NAICS code appeal, OHA will notify the contracting officer by a notice and order of the date OHA received the appeal, the docket number, and Judge assigned to the case. The contracting officer's response to the appeal, if any, must include argument and evidence (see 13 CFR Part 134), and must be received by OHA within 15 calendar days from the date of the docketing notice and order, unless otherwise specified by the Administrative Judge. Upon receipt of OHA's docketing notice and order, the contracting officer must withhold award, unless withholding award is not in the best interests of the Government, and immediately send to OHA an electronic link to or a paper copy of both the original solicitation and all amendments relating to the NAICS code appeal. The contracting officer will inform OHA of any amendments, actions, or developments concerning the procurement in question.

(8) After close of record, OHA will issue a decision and inform the contracting officer. If OHA's decision is received by the contracting officer before the date the offers are due, the decision shall be final and the solicitation must be amended to reflect the decision, if appropriate. OHA's decision received after the due date of the initial offers shall not apply to the pending solicitation but shall apply to future solicitations of the same products or services.

(d) SBA's regulations concerning appeals of NAICS code designations are found at 13 CFR 121.1101 to 121.1103 and 13 CFR part 134.

■ 9. Amend section 19.306 by revising paragraphs (b) through (m) to read as follows:

19.306 Protesting a firm's status as a HUBZone small business concern.

* * * * *

(b)(1) An offeror that is an interested party, the contracting officer, or the SBA may protest the apparently successful offeror's status as a qualified historically underutilized business zone (HUBZone) small business concern (see 13 CFR 126.800).

(2) SBA's protest regulations are found in subpart H "Protests" at 13 CFR 126.800 through 126.805.

(c) Protests relating to small business size status are subject to the procedures of 19.302. An interested party seeking to protest both the small business size and HUBZone status of an apparent successful offeror shall file two separate protests. Protests relating to small business size status for the acquisition and the HUBZone qualifying requirements will be processed concurrently by SBA.

(d) All protests must be in writing and must state all specific grounds for the protest.

(1) SBA will consider protests challenging the status of a concern if the protest presents evidence that—

(i) The concern is not a qualified HUBZone small business concern as described at 13 CFR 126.103 and 13 CFR 126.200;

(ii) The principal office is not located in a HUBZone; or

(iii) At least 35 percent of the employees do not reside in a HUBZone.

(2) Assertions that a protested concern is not a qualified HUBZone small business concern, without setting forth specific facts or allegations, will not be considered by SBA (see 13 CFR 126.801(b)).

(e) *Protest by an interested party.* (1) An interested party shall submit its protest to the contracting officer—

(i) For sealed bids—

(A) By the close of business on the fifth business day after bid opening; or

(B) By the close of business on the fifth business day from the date of identification of the apparent successful offeror, if the price evaluation preference was not applied at the time of bid opening; or

(ii) For negotiated acquisitions, by the close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror.

(2) Any protest received after the designated time limits is untimely, unless it is from the contracting officer or SBA.

(f)(1) The contracting officer shall forward all protests to SBA. The protests are to be submitted to the Director, HUBZone Program, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to 202-

205–7167, Attn: HUBZone Small Business Status Protest.

(2) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

- (i) The solicitation number (or an electronic link to or a paper copy of the solicitation).
- (ii) The name, address, telephone number, fax number, and email address, of the contracting officer.
- (iii) The type of HUBZone contract.
- (iv) Whether the procurement was conducted using full and open competition with a HUBZone price evaluation preference, and whether the protester's opportunity for award was affected by the preference.
- (v) If a HUBZone set-aside, whether the protester submitted an offer.
- (vi) Whether the protested concern was the apparent successful offeror.
- (vii) Whether the procurement was conducted using sealed bid or negotiated procedures.
- (viii) The bid opening date, if applicable. If a price evaluation preference was applied after the bid opening date, also provide the date of identification of the apparent successful offeror.
- (ix) The date the contracting officer received the protest.
- (x) Whether a contract has been awarded.
- (g) SBA will notify the protester and the contracting officer of the date SBA received the protest.
- (h) *Before SBA decision.* (1) After receiving a protest involving the apparent successful offeror's status as a HUBZone small business concern, the contracting officer shall either—
 - (i) Withhold award of the contract until SBA determines the status of the protested concern; or
 - (ii) Award the contract after receipt of the protest but before SBA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest.
- (2) SBA will determine the merits of the status protest within 15 business days after receipt of a protest, or within any extension of time granted by the contracting officer.
- (3) If SBA does not issue its determination within 15 business days, or within any extension of time granted, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will

be disadvantageous to the Government. This determination shall be provided to the SBA's HUBZone Program Director.

(i) *After SBA decision.* The HUBZone Program Director will notify the contracting officer, the protester, and the protested concern of the SBA determination. The determination is effective immediately and is final unless overturned on appeal by SBA's Associate Administrator, Office of Government Contracting and Business Development (AA/GCBD).

(1) If the contracting officer has withheld contract award and SBA has determined that the protested concern is an eligible HUBZone or dismissed all protests against the protested concern, the contracting officer may award the contract to the protested concern. If AA/GCBD subsequently overturns the decision of the HUBZone Program Director, the contracting officer may apply the AA/GCBD decision to the procurement in question.

(2) If the contracting officer has withheld award and the HUBZone Program Director has determined that the protested concern is ineligible, and a timely AA/GCBD appeal has not been filed, then the contracting officer shall not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, awarded the contract, and the HUBZone Program Director's ruling sustaining the protest is received after award—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders under the contract;

(ii) The contracting officer shall update the Federal Procurement Data System to reflect the final decision of the HUBZone Program Director if no appeal is filed; and

(iii) The concern's designation as a certified HUBZone small business concern will be removed by SBA from the Dynamic Small Business Database. The concern shall not submit an offer as a HUBZone small business concern, until SBA issues a decision that the ineligibility is resolved.

(4) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, awarded the contract, SBA has sustained the protest and determined that the concern is not a HUBZone small business, and a timely AA/GCBD appeal has been filed, then the contracting

officer shall consider whether performance can be suspended until an AA/GCBD decision is rendered.

(5) If AA/GCBD affirms the decision of the HUBZone Program Director, finding the protested concern is ineligible, and contract award has occurred—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interest of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders.

(ii) The contracting officer shall update the FPDS to reflect the AA/GCBD decision; and

(iii) The SBA will remove the concern's designation as a certified HUBZone small business concern. The concern shall not submit an offer as a HUBZone small business concern until SBA issues a decision that the ineligibility is resolved or AA/GCBD finds the concern is eligible on appeal.

(6) A concern found to be ineligible during a HUBZone status protest is precluded from applying for HUBZone certification for 90 calendar days from the date of the SBA final decision.

(j) *Appeals of HUBZone status determinations.* The protested HUBZone small business concern, the protester, or the contracting officer may file appeals of protest determinations with SBA's AA/GC&BD. The AA/GC&BD must receive the appeal no later than 5 business days after the date of receipt of the protest determination. SBA will dismiss any untimely appeal.

(k) *The appeal must be in writing.* The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the decision is erroneous or what significant fact the HUBZone Program Director failed to consider.

(l)(1) The party appealing the decision must provide notice of the appeal to—

- (i) The contracting officer;
- (ii) HUBZone Program Director, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to 202–205–7167; and
- (iii) The protested HUBZone small business concern or the original protester, as appropriate.

(2) SBA will not consider additional information or changed circumstances that were not disclosed at the time of the Director/HUB's decision or that are based on disagreement with the findings and conclusions contained in the determination.

(m) The AA/GCBD will make its decision within 5 business days of the receipt of the appeal, if practicable, and

will base its decision only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested HUBZone small business concern. The SBA decision, if received before award, will apply to the pending acquisition. The AA/GCBD's decision is the final decision.

■ 10. Revise section 19.307 to read as follows:

19.307 Protecting a firm's status as a service-disabled veteran-owned small business concern.

(a) *Definition.* *Interested party*, as used in this section, has the meaning given in 13 CFR 125.8(b).

(b)(1) An offeror that is an interested party, the contracting officer, or the SBA may protest the apparently successful offeror's status as a service-disabled veteran-owned small business (SDVOSB) concern (see 13 CFR 125.24).

(2) SBA's protest regulations are found in subpart D "Protests" at 13 CFR 125.24 through 125.28.

(c) Protests relating to small business size status are subject to the procedures of 19.302. An interested party seeking to protest both the small business size and service-disabled veteran-owned small business status of an apparent successful offeror shall file two separate protests.

(d) All protests must be in writing and must state all specific grounds for the protest.

(1) SBA will consider protests challenging the service disabled veteran-owned status or the ownership and control of a concern if—

(i) For status protests, the protester presents evidence supporting the contention that the owner(s) cannot provide documentation from the Department of Veterans Affairs, Department of Defense determinations, or the U.S. National Archives and Records Administration to show that they meet the definition of "service-disabled veteran" or "service disabled veteran with a permanent and severe disability" as set forth in 13 CFR 125.8; or

(ii) For ownership and control protests, the protester presents evidence that the concern is not 51 percent owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protester presents evidence that the concern is not controlled by the veteran, spouse, or permanent caregiver of such veteran.

(2) Assertions that a protested concern is not a service-disabled veteran-owned

small business concern, without setting forth specific facts or allegations, will not be considered by SBA (see 13 CFR 125.25(b)).

(e) *Protest by an interested party.* (1) An offeror shall submit its protest to the contracting officer—

(i) To be received by close of business on the fifth business day after bid opening (in sealed bid acquisitions); or

(ii) To be received by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror for negotiated acquisitions).

(2) Any protest received after the designated time limits is untimely, unless it is from the contracting officer or SBA.

(f)(1) The contracting officer shall forward all protests to SBA. The protests are to be submitted to SBA's Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to 202-205-6390, Attn: Service-Disabled Veteran Status Protest.

(2) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The solicitation number (or an electronic link to or a paper copy of the solicitation).

(ii) The name, address, telephone number, fax number, and email address of the contracting officer.

(iii) Whether the contract was sole-source or set-aside.

(iv) Whether the protestor submitted an offer.

(v) Whether the protested concern was the apparent successful offeror.

(vi) When the protested concern submitted its offer.

(vii) Whether the acquisition was conducted using sealed bid or negotiated procedures.

(viii) The bid opening date, if applicable.

(ix) The date the contracting officer received the protest.

(x) The date the protestor received notification about the apparent successful offeror, if applicable.

(xi) Whether a contract has been awarded.

(g) SBA will notify the protester and the contracting officer of the date SBA received the protest.

(h) *Before SBA decision.* (1) After receiving a protest involving the apparent successful offeror's status as a service-disabled veteran-owned small business concern, the contracting officer shall either—

(i) Withhold award of the contract until SBA determines the status of the protested concern; or

(ii) Award the contract after receipt of the protest but before SBA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest.

(2) SBA will determine the merits of the status protest within 15 business days after receipt of a protest, or within any extension of time granted by the contracting officer.

(3) If SBA does not issue its determination within 15 business days, or within any extension of time that is granted, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the government. This determination shall be provided to the SBA's Director, Office of Government Contracting and a copy shall be included in the contract file.

(i) *After SBA decision.* SBA will notify the contracting officer, the protester, and the protested concern of its determination. The determination is effective immediately and is final unless overturned on appeal by SBA's Office of Hearings and Appeals (OHA) pursuant to 13 CFR part 134.

(1) If the contracting officer has withheld contract award and SBA has determined that the protested concern is an eligible SDVOSB or dismissed all protests against the protested concern, the contracting officer may award the contract to the protested concern. If OHA subsequently overturns the SBA Director for Government Contracting's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) If the contracting officer has withheld contract award, SBA has sustained the protest and determined that the concern is not an SDVOSB, and no OHA appeal has been filed, then the contracting officer shall not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, the contract has been awarded, and SBA's ruling sustaining the protest is received after award—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update the FPDS to reflect the final SBA decision; and

(iii) The concern must remove its designation in the System for Award Management (SAM) as a SDVOSB concern, and shall not submit an offer as a SDVOSB concern, until SBA issues a decision that the ineligibility is resolved.

(4) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section and awarded the contract to the protested firm, SBA has sustained the protest and determined that the concern is not a SDVOSB, and a timely OHA appeal has been filed, then the contracting officer shall consider whether performance can be suspended until an OHA decision is rendered.

(5) If OHA affirms the SBA Director for Government Contracting's determination finding the protested concern is ineligible—

(i) The contracting officer shall terminate the contract unless the contracting officer has made a written determination that it is not in the best interest of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update the FPDS to reflect OHA's decision; and

(iii) The concern shall remove its designation in SAM as a SDVOSB concern, until SBA issues a decision that the ineligibility is resolved or OHA finds the concern is eligible on appeal.

(6) A concern found to be ineligible may not submit future offers as an SDVOSB concern until the concern demonstrates to SBA's satisfaction that it has overcome the reason for the protest and SBA issues a decision to this effect.

(j) *Appeals of SDVOSB status determinations.* The protested SDVOSB small business concern, the protester, or the contracting officer may file appeals of protest determinations to OHA. OHA must receive the appeal no later than 10 business days after the date of receipt of the protest determination. SBA will dismiss an untimely appeal. See Subpart E "Rules of Practice for Appeals From Service-Disabled Veteran Owned Small Business Concerns Protests" at 13 CFR 134.501 through 134.515 for SBA's appeals regulations.

(k) *The appeal must be in writing.* The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the SDVOSB protest determination is alleged to be based on

a clear error of fact or law, together with an argument supporting such allegation.

(l) The party appealing the decision must provide notice of the appeal to—

(1) The contracting officer;

(2) Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, facsimile 202-205-6390;

(3) The protested SDVOSB concern or the original protester, as appropriate; and

(4) Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, facsimile 202-205-6873, or email at OPLService@sba.gov.

(m) OHA will make its decision within 15 business days of the receipt of the appeal, if practicable. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested SDVOSB small business concern. The OHA decision regarding the status of the concern is final and is binding on the parties.

■ 11. Revise section 19.308 to read as follows:

19.308 Protesting a firm's status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the WOSB Program.

(a) *Definition. Interested party,* as used in this section, has the meaning given in 13 CFR 127.102.

(b)(1) An offeror that is an interested party, the contracting officer, or the SBA may protest the apparent successful offeror's status as an economically disadvantaged women-owned small business (EDWOSB) concern or women-owned small business (WOSB) concern eligible under the WOSB Program.

(2) SBA's protest regulations are found in subpart F "Protests" at 13 CFR 127.600 through 127.605.

(c) Protests relating to small business size status are subject to the procedures of 19.302. An interested party seeking to protest both the small business size and WOSB or EDWOSB status of an apparent successful offeror shall file two separate protests.

(d) All protests shall be in writing and must state all specific grounds for the protest.

(1) SBA will consider protests challenging the status of a concern if—

(i) The protest presents evidence that the concern is not at least 51 percent owned and controlled by one or more women who are United States citizens; or

(ii) The protest presents evidence that the concern is not at least 51 percent

owned and controlled by one or more economically disadvantaged women, when it is in connection with an EDWOSB contract.

(2) SBA shall consider protests by a contracting officer when the apparent successful offeror has failed to provide all of the required documents, as set forth in 19.1503(c).

(3) Assertions that a protested concern is not a EDWOSB or WOSB concern eligible under the WOSB Program, without setting forth specific facts or allegations, will not be considered by SBA (see 13 CFR 127.603(a)).

(e) *Protest by an interested party.* (1) An offeror shall submit its protest to the contracting officer—

(i) To be received by the close of business by the fifth business day after bid opening (in sealed bid acquisitions); or

(ii) To be received by the close of business by the fifth business day after notification by the contracting officer of the apparent successful offeror (in negotiated acquisitions).

(2) Any protest received after the designated time limit is untimely, unless it is from the contracting officer or SBA.

(f)(1) The contracting officer shall forward all protests to SBA. The protests are to be submitted to SBA's Director for Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to 202-205-6390, Attn: Women-owned Small Business Status Protest.

(2) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The solicitation number or electronic link to or a paper copy of the solicitation.

(ii) The name, address, telephone number, email address, and facsimile number of the contracting officer.

(iii) Whether the protester submitted an offer.

(iv) Whether the protested concern was the apparent successful offeror.

(v) When the protested concern submitted its offer.

(vi) Whether the acquisition was conducted using sealed bid or negotiated procedures.

(vii) The bid opening date, if applicable.

(viii) The date the contracting officer received the protest.

(ix) The date the protestor received notification about the apparent successful offeror, if applicable.

(x) Whether a contract has been awarded.

(g) SBA will notify the protester and the contracting officer of the date SBA received the protest.

(h) *Before SBA decision.* (1) After receiving a protest involving the apparent successful offeror's status as an EDWOSB or WOSB concern eligible under the WOSB Program, the contracting officer shall either—

(i) Withhold award of the contract until SBA determines the status of the protested concern; or

(ii) Award the contract after receipt of the protest but before SBA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest.

(2) SBA will determine the merits of the status protest within 15 business days after receipt of a protest, or within any extension of that time granted by the contracting officer.

(3) If SBA does not issue its determination within 15 business days, or within any extension of time granted, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. This determination shall be provided to the SBA Director for Government Contracting and a copy shall be included in the contract file.

(i) *After SBA decision.* SBA will notify the contracting officer, the protester, and the protested concern of its determination. The determination is effective immediately and is final unless overturned on appeal by SBA's Office of Hearings and Appeals (OHA) pursuant to 13 CFR part 134.

(1) If the contracting officer has withheld contract award and SBA has denied or dismissed the protest, the contracting officer may award the contract to the protested concern. If OHA subsequently overturns the SBA Director for Government Contracting's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) If the contracting officer has withheld contract award, SBA has sustained the protest and determined that the concern is not eligible under the WOSB Program, and no OHA appeal has been filed, then the contracting officer shall not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, awarded the contract, and SBA's ruling is received after award, and no OHA appeal has been filed, then—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update the FPDS to reflect the final SBA decision; and

(iii) The concern must remove its designation in the System for Award Management (SAM) as an EDWOSB or WOSB concern eligible under the WOSB Program, and shall not submit an offer as an EDWOSB concern or WOSB concern eligible under the WOSB Program, until SBA issues a decision that the ineligibility is resolved.

(4) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, contract award has occurred, SBA has sustained the protest and determined that the concern is not eligible under the WOSB Program, and a timely OHA appeal has been filed, then the contracting officer shall consider whether performance can be suspended until an OHA decision is rendered.

(5) If OHA affirms the SBA Director for Government Contracting's determination finding the protested concern is ineligible, then—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update the FPDS to reflect OHA's decision; and

(iii) The concern must remove its designation in SAM as an EDWOSB or WOSB concern eligible under the WOSB Program, and shall not submit an offer as an EDWOSB concern or WOSB concern eligible under the WOSB Program, until SBA issues a decision that the ineligibility is resolved or OHA finds the concern is eligible on appeal.

(j) *Appeals of EDWOSB or WOSB concerns eligible under the WOSB Program status determinations.* (1) The protested EDWOSB concern or WOSB concern eligible under the WOSB program, the protester, or the contracting officer may file an appeal of a WOSB or EDWOSB status protest determination with OHA.

(2) OHA must receive the appeal no later than 10 business days after the date of receipt of the protest determination. SBA will dismiss an untimely appeal.

(3) See subpart G "Rules of Practice for Appeals From Women-Owned Small Business Concerns (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests" at 13 CFR 134.701 through 134.715 for SBA's appeals regulations.

(k) *The appeal must be in writing.* The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the EDWOSB concern or WOSB concern eligible under the WOSB program protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation.

(1) The party appealing the decision must provide notice of the appeal to—

(1) The contracting officer;

(2) Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, facsimile 202–205–6390;

(3) The protested EDWOSB concern or WOSB concern eligible under the WOSB program, or the original protester, as appropriate; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, facsimile 202–205–6873, or email at OPLService@sba.gov.

(m) OHA will make its decision within 15 business days of the receipt of the appeal, if practicable. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested EDWOSB concern or WOSB concern eligible under the WOSB program. The OHA decision is the final agency decision and is binding on the parties.

19.402 [Amended]

■ 12. Amend section 19.402 by removing from paragraph (c)(1)(ii) "Woman-Owned" and adding "Women-Owned" in its place.

19.703 [Amended]

■ 13. Amend section 19.703 by—

■ a. Removing from the introductory text of paragraph (a) "of this section" and "woman-owned" and adding "of this section," and "women-owned" in its place, respectively;

■ b. Removing from paragraph (a)(1) "woman-owned" and adding "women-owned" in its place; and

■ c. Removing from paragraph (b) "woman-owned" and adding "women-owned" in its place.

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