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Department of Defense General Services Administration National Aeronautics and Space Administration

48 CFR Parts 2, 3, 12, et al.
Federal Acquisition Regulation;
Commercially Available Off-the-Shelf
(COTS) Items; Proposed Rule

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 3, 12, 22, 23, 25, 27,
44, 47, and 52**

[FAR Case 2000–305]

RIN 9000–AJ55

**Federal Acquisition Regulation;
Commercially Available Off-the-Shelf
(COTS) Items****AGENCIES:** Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).**ACTION:** Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are soliciting comments regarding the implementation of section 4203 of the Clinger-Cohen Act of 1996, 41 U.S.C. 431 (the Act) with respect to Commercially Available Off-the-Shelf Item acquisitions. The Act requires the Federal Acquisition Regulation (FAR) list certain provisions of law that are inapplicable to contracts for acquisitions of commercially available off-the-shelf items. The Act excludes section 15 of the Small Business Act and bid protest procedures from the list. The list of inapplicable statutes cannot include a provision of law that provides for criminal or civil penalties.

DATES: Interested parties should submit comments in writing on or before March 15, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—farcase.2000-305@gsa.gov.

Please submit comments only and cite FAR case 2000–305 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208–6091. Please cite FAR case 2000–305.

SUPPLEMENTARY INFORMATION:**A. Background**

Certain laws have already been determined to be inapplicable to all

commercial items as a result of the implementation of the Federal Acquisition Streamlining Act of 1994 (see FAR 12.503). On January 30, 2003, the FAR Secretariat issued an Advanced Notice of Proposed Rulemaking in the **Federal Register** (68 FR 4874) that lists the additional provisions of law that could be determined inapplicable to commercially available off-the-shelf (COTS) items. Seven public comments were received. The Commercial Products and Practices Committee reviewed the public comments; identified potential changes to the FAR; and submitted a report, including a draft proposed rule for consideration by the Councils.

The Councils recognize the concerns raised by the U.S. Trade Representative, the Department of Labor, and other agencies regarding the listing of certain laws. The proposed rule does not represent a final decision on any of those laws. Rather, the proposed rule lists the universe of laws that could be determined inapplicable to COTS. The Council is seeking public comments that the Administrator for Federal Procurement Policy will use in making the statutory determination that it would be in the best interest of the Government to maintain certain of those proposed laws.

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.

B. Regulatory Flexibility Act

The changes may have a significant, but beneficial, economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule exempts the application of a number of laws to businesses, large and small, offering commercially available off-the-shelf items to the Federal Government. An Initial Regulatory Flexibility Act Analysis (IRFA) has been prepared and is summarized as follows:

The objective and legal basis of this rule is to implement the requirements of section 4203 of the Clinger-Cohen Act (Public Law 104–106). Available data indicates that many commercial sales to the Government will come from small businesses. The rule does not impose new reporting or record keeping requirements and does not duplicate, overlap, or conflict with any other Federal rules. The rule is expected to have a beneficial impact on industry because it proposes to exempt purchases of commercially available off-the-shelf items from many Government-unique

requirements. Although the rule does not specifically propose different procedures for small versus large entities, existing preferences for small businesses, contained in FAR Part 19, remain unchanged. We believe that the relief from administrative burdens proposed by this rule may serve to motivate more small entities to do business with the Government.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. The Councils will consider comments from small entities concerning the affected FAR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2000–305), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies. It is anticipated that the rule will reduce annual information collection burdens. An estimate of the burden reduction is undetermined at this time. The reduction will be dependant on the estimated burden reductions taken for each provision of law that will be excluded from the final rule. Accordingly, a Paperwork Reduction Act Change to pertinent existing burdens will be submitted to the Office of Management and Budget under 44 U.S.C. 2502, *et seq.*

**List of Subjects in 48 CFR Parts 2, 3, 12,
22, 23, 25, 27, 44, 47, and 52**

Government procurement.

Dated: January 9, 2004.

Ralph De Stefano,*Deputy Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 2—DEFINITIONS OF WORDS
AND TERMS**

2. Amend section 2.101 in paragraph (b) by adding, in alphabetical order, the definition “Commercially available off-the-shelf item (COTS)” to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Commercially available off-the-shelf item (COTS)—(1) Is a subset of a

commercial item and means any item of supply that is—

(i) A commercial item (as defined in this section);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Revise section 3.503–2 to read as follows:

3.503–2 Contract clause.

The contracting officer shall insert the clause at 52.203–6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold, except when contracts are for the acquisition of commercially available off-the-shelf items. For the acquisition of commercial items, other than COTS, the contracting officer shall use the clause with its Alternate I.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

4. Amend section 12.102 by adding a sentence to the end of paragraph (a) to read as follows:

12.102 Applicability.

(a) * * * Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS items defined in 2.101.

* * * * *

5. Amend section 12.301 by—

a. Revising the section heading;

b. Adding a sentence to the end of paragraph (b)(3);

c. Revising the paragraph heading and the first sentence of paragraph (b)(4); and

d. Adding paragraph (b)(5) to read as follows:

12.301 Solicitation provisions and contract clauses.

* * * * *

(b) * * *

(3) * * * When acquiring a COTS item, contracting officers may include Alternate I of the clause when it is in the best interests of the Government.

(4) *The clause at 52.212–5, Contract Terms and Conditions Required to*

Implement Statutes or Executive Orders—Commercial Items (Other than COTS). This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items, other than COTS items. * * *

(5) *The clause at 52.212–XX, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercially Available Off-the-Shelf (COTS) Items.* This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of COTS items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212–XX (b) or (c) are applicable to the specific acquisition. This clause may not be tailored.

* * * * *

Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-the-Shelf Items

6. Revise the heading of Subpart 12.5 to read as set forth above.

7. Revise section 12.500 to read as follows:

12.500 Scope of subpart.

(a) As required by sections 34 and 35 of the Office of Federal Procurement Policy Act (41 U.S.C. 401, *et seq.*), this subpart lists provisions of law that are not applicable to—

- (1) Contracts for commercial items;
- (2) Subcontracts, at any tier, for the acquisition of commercial items; and
- (3) Contracts and subcontracts, at any tier, for the acquisition of COTS items.

(b) This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

8. Amend section 12.502 by adding paragraph (c) to read as follows:

12.502 Procedures.

* * * * *

(c) The FAR prescription for the provision or clause for each of the laws listed in 12.505 has been revised in the appropriate part to reflect its proper application to prime contracts for the acquisition of COTS items. For subcontracts for the acquisition of COTS items or COTS components, the clauses at 52.212–XX, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—

Commercially Available Off-the-Shelf (COTS) Items, and 52.244–6, Subcontracts for Commercial Items and Commercial Components, reflect the applicability of the laws listed in 12.505 by identifying the only provisions and clauses that are required to be included in a subcontract at any tier for the acquisition of COTS items or COTS components.

12.504 [Amended]

9. Amend section 12.504 in paragraph (a) by removing paragraph (a)(2) and redesignating paragraphs (a)(3) through (a)(12) as (a)(2) through (a)(11), respectively.

10. Add section 12.505 to read as follows:

12.505 Applicability of certain laws to contracts and subcontracts for the acquisition of COTS items.

(a) The following laws are not applicable to contracts or subcontracts, at any tier, for the acquisition of COTS items:

(1) 10 U.S.C. 2631, Transportation of Supplies by Sea (*see* 52.247–64).

(2) 19 U.S.C. 2501, *et seq.*, Trade Agreements Act (*see* 52.225–5).

(3) 19 U.S.C. 2512, *et seq.*, Trade Agreements Act (*see* 52.225–5).

(4) 29 U.S.C. 793, Affirmative Action for Handicapped Workers (*see* 52.222–36).

(5) 31 U.S.C. 3324, Restrictions on Advance Payments (*see* Alternate I to 52.212–4 which permits payment upon notice of shipping).

(6) 31 U.S.C. 1352, Limitation on Payments to Influence Certain Federal Transactions (*see* Subpart 3.8).

(7) 31 U.S.C. 1354(a), Limitation on use of appropriated funds for contracts with entities not meeting veteran's employment reporting requirements (*see* 22.1302).

(8) 38 U.S.C. 4212, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (*see* 52.222–35).

(9) 38 U.S.C. 4212(d)(1), Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (*see* 52.222–37).

(10) 41 U.S.C. 10a, *et seq.*, Buy American Act—Supplies (*see* 52.225–1 and 52.225–3).

(11) 41 U.S.C. 43, Walsh-Healey Act (*see* Subpart 22.6).

(12) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (*see* Subpart 5.2).

(13) 41 U.S.C. 418a, Rights in Technical Data (*see* sections 12.211 and 27.409).

(14) 41 U.S.C. 253d, Validation of Proprietary Data Restrictions (*see* sections 12.211 and 27.409).

(15) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition of Limiting Subcontractor Direct Sales to the United States (*see* 52.203–6).

(16) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (*see* Subpart 3.4).

(17) 41 U.S.C. 254d(c) and 10 U.S.C. 2513(c), Examination of Records of Contractor (*see* 52.215–2).

(18) 41 U.S.C. 701, *et seq.*, Drug-Free Workplace Act of 1988 (*see* Subpart 23.5).

(19) 46 U.S.C. Appx 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (*see* 52.247–64).

(20) 49 U.S.C. 40118, Fly American provisions (*see* Subpart 47.4).

(b) The requirement for a clause and certain other requirements related to 40 U.S.C. 327, *et seq.*, Requirements for a Certificate and Clause under the Contract Work Hours and Safety Standards Act (*see* Subpart 22.3), 41 U.S.C. 57(a) and (b), and 41 U.S.C. 58, the Anti-Kickback Act of 1986, and 42 U.S.C. 6962(c)(3)(A), Estimate of Percentage of Recovered Material EPA-Designated Product (limited to the certification and estimate requirements) (*see* 52.223–9) have been eliminated for contracts and subcontracts at any tier for the acquisition of COTS items (*see* 3.502).

(c) The applicability of 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (*see* Subpart 15.4) and 41 U.S.C. 422, Cost Accounting Standards (*see* section 12.214) have been modified in regards to contracts or subcontracts at any tier for the acquisition of COTS items.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1310 [Amended]

11. Amend section 22.1310 by removing the word “Insert” from the introductory text of paragraph (a)(1) and adding “Except for the acquisition of commercially available off-the-shelf items, insert” in its place.

22.1408 [Amended]

12. Amend section 22.1408 in the introductory text of paragraph (a) by removing the comma after “\$10,000” and adding “and are not for the acquisition of commercially available off-the-shelf items,” in its place.

PART 23—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

23.406 [Amended]

13. Amend section 23.406 by removing the word “Insert” from paragraphs (a) and (b) and adding “Except for the acquisition of commercially available off-the-shelf items, insert” in its place.

PART 25—FOREIGN ACQUISITION

14. Amend section 25.401 by—
 a. Removing the word “and” from the end of paragraph (a)(4);
 b. Removing the period at the end of paragraph (a)(5) and adding “; and” in its place; and
 c. Adding paragraph (a)(6) to read as follows:

25.401 Exceptions.

(a) * * *
 (6) Acquisitions for commercially available off-the-shelf items.
 * * * * *

15. Amend section 25.1101 by—
 a. Removing from the introductory text of paragraph (a)(1) “or \$15,000 for acquisitions as described in 13.201(g)(1)(ii)”;
 b. Removing the word “or” from the end of paragraph (a)(1)(ii);
 c. Removing the period from the end of paragraph (a)(1)(iii) and adding “; or” in its place;
 d. Adding paragraph (a)(1)(iv); and
 e. Removing the word “Insert” from the introductory text of paragraph (b)(1)(i) and adding “Except for the acquisition of commercially available off-the-shelf items, insert” in its place. The added text reads as follows:

25.1101 Acquisition of supplies.

* * * * *
 (a)(1) * * *
 (iv) The acquisition is for commercially available off-the-shelf items.
 * * * * *

PART 27—PATENTS, DATA, AND COPYRIGHTS

16. Amend section 27.409 by—
 a. Removing the word “or” from the end of paragraph (a)(1)(vi);
 b. Removing “. (See 27.408.)” from the end of paragraph (a)(1)(vii) and adding “(see 27.408); or” in its place; and
 c. Adding paragraph (a)(1)(viii) to read as follows:

27.409 Solicitation provisions and contract clauses.

(a)(1) * * *

(viii) An acquisition for commercially available off-the-shelf items.

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.400 [Amended]

17. Amend section 44.400 by removing the period at the end of the sentence and adding “and section 4203 (Pub. L. 104–106).” in its place.

PART 47—TRANSPORTATION

47.507 [Amended]

18. Amend section 47.507 in paragraph (a)(1) by removing “Insert” and adding “Except for the acquisition of commercially available off-the-shelf items, insert” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–3 [Amended]

19. Amend section 52.212–3 by revising the date of the provision to read “(Date)”; and in paragraph (e) of the clause by removing the period after “\$100,000” and adding “, except for the acquisition of commercially available off-the-shelf items.” in its place.

20. Amend section 52.212–4 by adding Alternate I to read as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

(Alternate I (XX/XX)). As prescribed in 12.301(b)(3), substitute the following paragraph (i)(1) for paragraph (i)(1) in the basic clause:

(i)(1) *Items accepted.* Payment shall be made based upon the Contractor’s submission of an invoice that is supported by evidence the Contractor has delivered the supplies to a post office, common carrier, or point of first receipt by the Government. Payment prior to acceptance shall not abrogate the Contractor’s responsibilities to replace, repair, or correct—
 (i) Supplies not received at destination;
 (ii) Supplies damaged in transit; or
 (iii) Supplies that do not conform to the contract.

21. Add section 52.212–XX to read as follows:

52.212–XX Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercially Available Off-the-Shelf (COTS) Items.

As prescribed in 12.301(b)(5), insert the following clause:

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercially Available Off-the-Shelf (COTS) Items (Date)

(a) The Contractor shall comply with the following Federal Acquisition Regulation (FAR) clause, which is incorporated in this

contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of COTS items: 52.233-3, Protest After Award (Aug 1996) (31 U.S.C. 3553).

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of COTS items: [Contracting Officer check as appropriate.]

____ (1) 52.219-3, Notice of Total HUBZone Set-Aside (Jan 1999) (15 U.S.C. 657a).

____ (2) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Jan 1999) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

____ (3)(i) 52.219-5, Very Small Business Set-Aside (June 2003) (Pub. L. 103-403, section 304, Small Business Reauthorization and Amendments Act of 1994).

____ (ii) Alternate I (Mar 1999) of 52.219-5.
____ (iii) Alternate II (June 2003) of 52.219-5.

____ (4)(i) 52.219-6, Notice of Total Small Business Set-Aside (June 2003) (15 U.S.C. 644).

____ (ii) Alternate I (Oct 1995) of 52.219-6.

____ (5)(i) 52.219-7, Notice of Partial Small Business Set-Aside (June 2003) (15 U.S.C. 644).

____ (ii) Alternate I (Oct 1995) of 52.219-7.

____ (6) 52.219-8, Utilization of Small Business Concerns (Oct 2000) (15 U.S.C. 637(d)(2) and (3)).

____ (7)(i) 52.219-9, Small Business Subcontracting Plan (Jan 2002) (15 U.S.C. 637(d)(4)).

____ (ii) Alternate I (Oct 2001) of 52.219-9.

____ (iii) Alternate II (Oct 2001) of 52.219-9.

____ (8) 52.219-14, Limitations on Subcontracting (Dec 1996) (15 U.S.C. 637(a)(14)).

____ (9)(i) 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (June 2003) (Pub. L. 103-355, section 7102, and 10

U.S.C. 2323). (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

____ (ii) Alternate I (June 2003) of 52.219-23.

____ (10) 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (Oct 1999) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

____ (11) 52.219-26, Small Disadvantaged Business Participation Program—Incentive Subcontracting (Oct 2000) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

____ (12) 52.222-3, Convict Labor (June 2003) (E.O. 11755).

____ (13) 52.222-19, Child Labor—Cooperation with Authorities and Remedies (Sep 2002) (E.O. 13126).

____ (14) 52.222-21, Prohibition of Segregated Facilities (Feb 1999).

____ (15) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

____ (16) 52.225-13, Restrictions on Certain Foreign Purchases (Dec 2003) (E.O.'s proclamations, and statutes administered by the Office of Foreign Assets Control of the Department of the Treasury).

____ (17) 52.225-15, Sanctioned European Union Country End Products (Feb 2000) (E.O. 12849).

____ (18) 52.232-29, Terms for Financing of Purchases of Commercial Items (Feb 2002) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

____ (19) 52.232-30, Installment Payments for Commercial Items (Oct 1995) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

____ (20) 52.232-33, Payment by Electronic Funds Transfer—Central Contractor Registration (Oct 2003) (31 U.S.C. 3332).

____ (21) 52.232-34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration (May 1999) (31 U.S.C. 3332).

____ (22) 52.232-36, Payment by Third Party (May 1999) (31 U.S.C. 3332).

(c)(1) Notwithstanding the requirements of the clauses in paragraphs (a) and (b) of this clause, the Contractor is not required to flow down any FAR clause, other than those in paragraphs (i) through (ii) of this paragraph in a subcontract for COTS items. Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—

(i) 52.219-8, Utilization of Small Business Concerns (Oct 2000) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$500,000 (\$1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(ii) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

(2) While not required, the Contractor may include in its subcontracts for COTS items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(End of clause)

22. Amend section 52.244-6 by—

a. Revising the date of the clause to read “(Date)”;

b. In paragraph (a) of the clause by adding, in alphabetical order, the definition “Commercially available off-the-shelf item”;

c. In paragraph (c)(1)(iii) of the clause by removing the semicolon at the end of the paragraph and adding “. (This clause does not apply to subcontracts for commercially available off-the-shelf items.)” in its place; and

d. Adding “(This clause does not apply to subcontracts for commercially available off-the-shelf items.)” to the end of paragraphs (c)(1)(iv) and (c)(1)(v) of the clause. The added definition reads as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Date)

(a) * * *

Commercially available off-the-shelf item has the meaning contained in the clause at 52.202-1, Definitions.

* * * * *

[FR Doc. 04-852 Filed 1-14-04; 8:45 am]

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