

NIH POLICY MANUAL

6019-2 - SPECIAL CONTRACTING AUTHORITIES UNDER THE SBA/NIH MEMORANDUM OF UNDERSTANDING AND THE HOMELAND SECURITY ACT (P.L. 107-296)

Issuing Office: OA/OAMP/DAPE 301-496-6014
Release Date: 06/04/03

1. **Explanation of Material Transmitted:** The purpose of this Manual Chapter is to set forth internal procedures to comply with the requirements of the Small Business Administration (SBA)/NIH Memorandum of Understanding (see Appendix 1) for an Administrative waiver of the requirements at the Federal Acquisition Regulation (FAR) 19.805-1 to compete 8(a) acquisitions over \$5,000,000 for acquisitions assigned manufacturing North American Industry Classification System (NAICS) Codes or over \$3,000,000 for all other acquisitions. This Manual Chapter also sets forth procedures to be used when acquiring supplies and services on a sole source 8(a) basis when the acquisition is over the competitive threshold under FAR 19.805-1, by using the authority of the Homeland Security Act (Public Law (P.L.)107-296).
2. **Filing Instructions:**

Remove:	None
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PLEASE NOTE: For information on:

- **content of this chapter**, contact the **Division of Acquisition Policy and Evaluation, OAMP, OA, at 301-496-6014.**
- **NIH Manual System**, contact the **Division of Management Support, Office of Management Assessment**, on **496-2832.**
- **on-line information** use:
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**SPECIAL CONTRACTING AUTHORITIES UNDER THE SBA/NIH
MEMORANDUM OF UNDERSTANDING AND THE HOMELAND SECURITY
ACT (P.L. 107-296)**

A. PURPOSE

The purpose of this Manual Chapter is to set forth internal procedures to comply with the requirements of the SBA/NIH Memorandum of Understanding (see Appendix 1) for an Administrative waiver of the requirements at FAR 19.805-1 to compete 8(a) acquisitions over \$5,000,000 for Acquisitions assigned manufacturing NAICS Codes or over \$3,000,000 for all other acquisitions. This memorandum was signed February 19, 2003, and will be effective for three years through February 19, 2006. This Manual Chapter also sets forth procedures to be used when acquiring supplies and services on a sole source 8(a) basis when the acquisition is over the competitive threshold under FAR 19.805-1, by using the authority of the Homeland Security Act (Public Law (P.L.) 107-296).

B. BACKGROUND

President Bush has made the defense of the Nation against bioterrorism a national priority. On June 12, 2002, he signed an amendment to the Public Health Service Act to add Title XXVII, National Preparedness for Bioterrorism and Other Public Health Emergencies (P.L. 107-188). On October 26, 2002, he signed the Homeland Security Act (P.L.107-296). The authorities legislated by the Act were incorporated into the FAR on January 24, 2003. It is expected that counter-bioterrorism acquisitions will be an increasingly important facet of the contracts awarded by the NIH over the foreseeable future.

FAR 19.805-1 requires that an acquisition offered to the SBA under the 8(a) Program be awarded on the basis of competition limited to eligible 8(a) firms if:

- (1) there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and that award can be made at a fair market price; and
- (2) the anticipated total value of the contract, including options, will exceed \$5,000,000 for acquisitions assigned manufacturing NAICS Codes and \$3,000,000 for all other acquisitions.

Exceptions to this requirement include:

- (1) if there is no reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price; or

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- (2) if the SBA accepts the requirement on behalf of a concern owned by an Indian Tribe or an Alaska Native Corporation; or
- (3) if the acquisition is conducted under the authority of the Homeland Security Act (P.L.107-296); and
 - (i) the acquisition is for supplies or services that, as determined by the Head of the Agency (see NIH Delegation of Authority, Acquisition, No. 26 <http://www3.od.nih.gov/oma/manualchapters/delegations/acquisition/acq26/>, which delegates this authority to the Head of the Contracting Activity), are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack;
 - (ii) the solicitation is issued during the period of January 24, 2003, through November 24, 2003; and
 - (iii) there is either an approved justification for sole source acquisition under FAR 13.501, or an approved Justification for Other than Full and Open Competition (JOFOC) under the authority of FAR 6.302-1, 6.302-2, 6.302-6, or 6.302-7.

Because of the need to award large dollar acquisitions (both contracts and purchase orders) for biodefense swiftly, competition, particularly in the 8(a) arena, may not provide the quick results necessary to carry out President Bush's goals for preparedness against bioterrorism. The SBA/NIH Memorandum of Understanding dated February 19, 2003, (see Appendix 1), provides the flexibility necessary to carry out the President's initiatives in the most effective, efficient manner, and affords the NIH the opportunity to support the 8(a) Contract Program and benefit from the robust capability in the 8(a) portfolio to meet mission objectives. The Homeland Security Act (P.L. 107-296) also provides the flexibility to quickly acquire the necessary supplies/services using the sole source methods of the 8(a) Program.

C. PROCEDURES (Please note that there is no preference about using Methods 1 or 2; both are acceptable as long as the rationale is defensible and has been approved by the appropriate parties.)

1. USING THE AUTHORITY OF THE SBA/NIH MEMORANDUM OF UNDERSTANDING

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If the contracting officer elects to use the authority of the SBA/NIH Memorandum of Understanding (see Appendix 1), rather than using the authority under FAR 19.805-1(b)(3), the following procedures must be followed when awarding sole source 8(a) acquisitions (both purchase orders and contracts) that exceed the applicable 8(a) competitive threshold amounts:

- a. The IC must determine that circumstances exist that would warrant the use of other than full and open competition. These circumstances may include the need for biodefense-related supplies or services when circumstances will not permit the lead-time necessary for an 8(a) competitive action (in spite of the fact that the FAR would normally require such an action due to the dollar amount of the acquisition).
- b. The Acquisition Plan/Request for Contract must include a statement that the funds being obligated for the requirement are specifically earmarked by Congress, HHS, or the NIH for biodefense-related activities.
- c. The acquisition file must contain a JOFOC that states that the funds being used are earmarked by either Congress, HHS, or the NIH for purposes of biodefense-related activities, and that justifies the sole source nature of the requirement. The authority to be cited is FAR 6.302-6, National Security. Because this acquisition will be awarded under the 8(a) Program as a sole source acquisition, there is no requirement to synopsise the acquisition in the FedBizOpps.
- d. The JOFOC Form to be used is the NIH 1757-7, Justification for Other than Full and Open Competition, 8(a) Sole Source for Biodefense, which is available as a Filemaker Pro 5 Form at http://forms.nih.gov/fmpro/procurement/NH1757_7.FP5. It is also available as an Adobe Acrobat Form at http://forms.nih.gov/adobe/procurement/NH1757_7.PDF. The Form is required to be signed by the IC Budget Officer, who certifies that the funds being used are specifically earmarked for biodefense-related activities. The Chief, NIH Small Business Office (SBO), (within the Office of Acquisition Management and Policy [OAMP], NIH), must also sign the Form. The JOFOC must be approved at the appropriate level. See the JOFOC Desk Guide for the established dollar approval levels. The JOFOC Desk Guide may be found at http://www3.od.nih.gov/ocm/contracts/PDF/JDG2_99.pdf

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- e. After approval of the JOFOC, the contracting officer must submit an offering letter for a sole source requirement to the SBA's District Office responsible for servicing the selected 8(a) firm, and to Mr. Martin Gold, Deputy Associate Administrator for Business Development, SBA, 409 3rd St., SW, Suite 8800, Washington, DC 20416. The offering letter must state that the authority for entering into a sole source 8(a) acquisition above the competitive threshold is the SBA/NIH Memorandum of Understanding dated February 19, 2003.
- f. If an 8(a) firm has not been specifically identified, the contracting officer will submit an open offering letter for a sole source requirement to the SBA's District Office that services the geographical area where the NIH contracting activity is located (<http://www.sba.gov/regions/states/>), and to Mr. Martin Gold, Deputy Associate Administrator for Business Development, SBA, 409 3rd St., SW, Suite 8800, Washington, DC 20416.
- g. In either Items 1.e. or 1.f. above, the offering letter must contain as an attachment, the approved JOFOC. Also, the offering letter, prepared in accordance with guidance posted at either <http://www.sba.gov/library/cfrs/13cfr124.html> or <http://sbo.od.nih.gov/>, must cite the SBA/NIH Memorandum of Understanding dated February 19, 2003, (see Appendix 1), as the mechanism by which to make an award to an 8(a) firm on a sole source basis where the requirement exceeds the applicable competitive threshold. The offering letter must contain an affirmative statement that a sole source award is appropriate. A copy of the offering letter and backup documentation must be provided to the NIH SBO.
- h. NIH will use 8(a) competitive procedures where it is deemed appropriate and will not impede the acquisition of crucial biodefense supplies or services. In using competitive procedures, the NIH Contracting Officers will follow procedures set forth in the FAR, HHSAR, and in the NIH policy, as well as the Partnership Agreement between the SBA and the HHS ([http://sbo.od.nih.gov/ProgramNotes/8\(a\)ContractingProgram/Sample8\(a\)DocumentsFolder/PA_transmittal_letter.pdf](http://sbo.od.nih.gov/ProgramNotes/8(a)ContractingProgram/Sample8(a)DocumentsFolder/PA_transmittal_letter.pdf)).
- i. Within 3 working days of receipt of the offering letter accompanied by the approved JOFOC, the SBA will either issue an acceptance, or it will notify the NIH Contracting Officer that it does not agree that the circumstances warrant a sole source 8(a) award in excess of the applicable competitive threshold

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amount. If the SBA accepts NIH's offering letter, its acceptance will include a size verification and determination with respect to all elements of eligibility. If the SBA rejects the NIH's offering letter, it may request that the NIH offer the requirement as a competitive 8(a) procurement.

- j. If the NIH submits an open offering letter, the SBA will select an appropriate 8(a) firm.
- k. Upon award, the contracting officer must send the cognizant SBA District Office a copy of each contract/purchase order issued under the Memorandum of Understanding.
- l. As the authority for making the award, the contracting officer shall cite on the face page of the contract, the 8(a) Program (FAR 6.30205(b)(4)) as well as the citation for using other than full and open competition (FAR 6.302-6). The title of contract must include the word "Biodefense" so that any required reports on the acquisition of supplies/services using the SBA/NIH Memorandum of Understanding dated February 19, 2003, can be generated as necessary. The contract is to be reported in the Departmental Contract Information System (DCIS) as a 8(a) contract.
- m. The SBA/NIH Memorandum of Understanding is effective for three years, from February 19, 2003, through February 19, 2006.

2. USING FAR AUTHORITY AT 19.805-1(b)(3):

Follow all steps in C.1. above, except:

- a. The required determination set forth at FAR 19.805-1(b)(3) is to be signed by the Head of the Contracting Activity (HCA) (see NIH Delegation of Authority, Acquisition No. 26 at <http://www3.od.nih.gov/oma/manualchapters/delegations/acquisition/acq26/>). The determination must be routed via memorandum signed by the Chief of the Contracting Office through the Division of Acquisition Policy and Evaluation, Office of Acquisition Management and Policy (DAPE/OAMP), for review and approval by the HCA.
- b. A JOFOC must be approved by the appropriate Competition Advocate (see JOFOC Desk Guide and FAR 6.304 for approval levels). The authority to be

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cited in the JOFOC may be 6.302-1, 6.302-2, 6.302-6 or 6.302-7. The determination in 2.a. above, must accompany the JOFOC to the Competition Advocate.

- c. The JOFOC NIH Form 1757-7 shall be used to provide a record of reviewers and the approving official (see Filemaker Pro 5 version at http://forms.nih.gov/fmpro/procurement/NH1757_7.FP5.. or Adobe Acrobat Form at http://forms.nih.gov/adobe/procurement/NH1757_7.PDF.)
- d. The SBA offering letter shall cite the P.L.107-296, Homeland Security Act, as the authority by which to make a sole source award to an 8(a) firm where the requirement exceeds the applicable competitive threshold.

In 1. and 2. above, all documentation becomes a part of the official contract file.

D. RECORDS RETENTION AND DISPOSAL

All records (e-mail and non-e-mail) pertaining to this Chapter must be retained and disposed of under the authority of the NIH Manual Chapter 1743, Keeping and Destroying Records, Appendix 1, NIH Records Control Schedule, Items 2600A, "Procurement" and 6000, "Research Contracts."

NIH E-Mail Messages: NIH e-mail messages (messages, including attachments that are created on the NIH computer systems or transmitted over the NIH networks) that are evidence of the activities of the agency or have informational value are considered Federal records. These records must be maintained in accordance with the current NIH Records Management Guidelines. Contact your IC Records Officer for additional information.

All e-mail messages are considered Government property, and if requested for a legitimate Government purpose, must be provided to the requester. Employees' supervisors, the NIH staff conducting official reviews or investigations, and the Office of the Inspector General may request access to or copies of the e-mail messages. E-mail messages must also be provided to the Congressional Oversight Committees if requested and are subject to the Freedom of Information Act requests. Since most e-mail systems have back-up files that are retained for significant periods of time, e-mail messages and attachments are likely to be retrievable from a back-up file after they have been deleted from an individual's computer. The back-up files are subject to the same requests as the original message.

DATE: 06/04/03**REPLACES: NONE****ISSUING OFFICE: OA/OAMP/DAPE 301-496-6014**

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E. MANAGEMENT CONTROLS

The purpose of this Manual Issuance is to establish procedures for implementation of the Memorandum of Understanding between the SBA and the NIH and the authority under the Homeland Security Act (P.L. 107-296), implemented in FAR 19.805-1(b)(3), regarding the use of sole source procedures for 8(a) acquisitions that exceed the applicable threshold for competition.

1. The Office Responsible for Reviewing Management Controls Relative to this Chapter: OAMP.
2. Frequency of Review (in years): OAMP will review all determinations for using sole source 8(a) acquisitions above the competitive threshold and the Head of the Contracting Activity (HCA) will approve all such determinations, regardless of the dollar value of the acquisition. OAMP reviews all JOFOCs over \$500,000 submitted by each contracting office. The Chief of the Contracting Office (or designee) reviews all JOFOCs in his/her IC that fall below that threshold, and approves/disapproves the JOFOC as delegated by the NIH Competition Advocates. The NIH Competition Advocates for Research and Development or for Station Support must approve these JOFOCs through \$50,000,000. If the requirement is over \$50,000,000, the approving official is the Assistant Secretary for Administration and Management, HHS. The NIH Board of Contract Awards shall review a random number of these acquisitions as a part of its oversight role during the preaward phase. The FAR 19.805-1(b)(3) permits the use of sole source 8(a) acquisitions over the competitive threshold for biodefense-related activities. The SBA/NIH Memorandum of Understanding also permits the use of sole source 8(a) acquisitions under these circumstances. The OAMP will review these JOFOCs and a sampling of the acquisitions as a part of its continuing oversight role.
3. Method of Review: Review of all determinations in this Manual Chapter will be accomplished by OAMP prior to recommending approval or disapproval. The HCA will have the final authority to approve or disapprove the determinations. JOFOC reviews are conducted by OAMP, and are concurred with by the NIH HCA (above the \$500,000 level) to determine if the rationale for the sole source acquisition is proper and in compliance with the law, regulations and NIH policies and guidance. Below the \$500,000 level, the Chief of the Contracting Office (or

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designee) conducts the review for compliance with applicable law, regulations and policies and guidance.

4. Review Reports: When OAMP has concerns about the legitimacy of the sole source rationale or the determination for use of a sole source acquisition above, the applicable competitive threshold, the determination and JOFOC are discussed with the IC Contracting Officer or the Chief of the Contracting Office, as appropriate. Each FY Quarter, a report of approved JOFOC actions is prepared for the HCA. Reports are made available to the NIH Deputy Director for Management, as needed.



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

FEB 19 2003

Ms. Diana V. Mukitarian
Chief, Small Business Office
National Institutes of Health
6100 Executive Blvd.
Room 6-DO5
Rockville, MD 20852

Dear Ms. Mukitarian:

The Memorandum of Understanding (MOU) between the National Institutes of Health and the U.S. Small Business Administration (SBA) regarding biodefense related requirements to be procured under the authority of the 8(a) Program has been fully executed. A copy is attached for your records. SBA's field offices will be informed about the MOU soon.

Thank you for your cooperation and continued support of the agency's programs.

Sincerely,

Mary E. Harris
Senior Procurement Analyst.

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MEMORANDUM OF UNDERSTANDING
Between
The U.S. Small Business Administration
And
The National Institutes of Health

I. PURPOSE

The purpose of this Memorandum of Understanding (MOU) between the U.S. Small Business Administration (SBA) and the National Institutes of Health (NIH) is to establish procedures for permitting the award of sole source contracts and purchase orders under section 8(a) of the Small Business Act (15 U.S.C. 637(a)) (the Act) for Biodefense related requirements above the competitive threshold amounts established by the Act where NIH demonstrates that circumstances exist which would warrant the use of other than full and open competition.

II. BACKGROUND

President Bush has made the defense of the Nation against bioterrorism a national priority. A cornerstone in this strategy to defend the United States homeland is the rapid expansion and development of a national research and development program aimed at rapidly developing vaccines, therapeutic drugs, and diagnostic tools to combat and detect bioterrorism agents.

Part of the President's plan to defend against future bioterrorism is reflected in the FY 2003 budget that proposes to double the appropriation for one of the NIH institutes, the National Institute for Allergy and Infectious Diseases (NIAID), from \$2 billion per year in September 2001 to \$4 billion per year on October 1, 2002. The Biodefense Program within NIAID has become a focal point at NIH counter-bioterrorism research. NIH anticipates that other institutes will have similar biodefense related requirements.

Section 8(a)(1)(D) of the Small Business Act, 15 U.S.C. 637(a)(1)(D), requires contract opportunities offered to the 8(a) program to be awarded on the basis of competition restricted to eligible Program Participants if the anticipated award price of the contract will exceed \$5 million for acquisitions assigned manufacturing NAICS codes and \$3 million for all other acquisitions.

The Federal Acquisition Regulation (FAR) authorizes sole source contracts in a number of circumstances, including where a procuring activity can demonstrate unusual and compelling urgency (48 C.F.R. § 6.302-2) and when disclosure of the agency's needs would compromise the national security (48 C.F.R. § 6.302-6). SBA recognizes that NIH may use one of these exceptions to full and open competition in order to procure needed counter-bioterrorism research or to fulfill other biodefense related requirements on a sole

source basis. SBA believes that these exceptions may be applied equally to the competition requirements of the 8(a) program.

This MOU provides the procedures for NIH to offer and SBA to accept sole source 8(a) requirements above the applicable competitive threshold amounts where NIH has made a determination of unusual and compelling urgency, a national security sole source justification, or another appropriate sole source justification under the FAR.

III. SCOPE

This MOU provides for the award of both contracts and purchase orders that exceed the applicable competitive threshold amounts where NIH demonstrates that circumstances exist which would warrant the use of other than full and open competition.

This MOU applies to all SBA offices and all NIH offices deemed appropriate by the Deputy Assistant Secretary of the U. S. Department of Health & Human Services (HHS), Office of Grants and Acquisitions.

IV. RESPONSIBILITIES

a. The NIH:

1. must have internal procedures in place to ensure that only funds earmarked for biodefense related activities are used for the procurement of products and services under this MOU;
2. must make a determination under the FAR that the use of a sole source award is appropriate, and include that determination in its offering letter to SBA;
3. must submit the offering letter for a sole source requirement to the SBA's district office responsible for servicing the selected 8(a) Participant, when an 8(a) firm has been identified, and to Martin Gold, Deputy Associate Administrator for Business Development;
4. must submit an open offering letter for a sole source requirement to the SBA district office that services the geographical area where the NIH contracting activity is located, when the NIH has not identified a specific 8(a) Participant for a requirement, and to Martin Gold, Deputy Associate Administrator for Business Development;
5. shall retain the option to use competitive 8(a) procedures, where the head of the contracting activity deems appropriate; in such case, NIH will use normal 8(a) competitive procedures, including the procedures set forth in the Partnership Agreement between SBA and HHS regarding the delegation of 8(a) contract execution functions;

6. shall cite the 8(a) program, along with the specific CICA exception authority (e.g., national security), to ensure proper reporting in the FPDS as an 8(a) award;

7. shall forward a copy of the executed contractual action to the SBA district office servicing the 8(a) awardee; and

8. shall submit a quarterly report to SBA's Associate Administrator for 8(a) Business Development (AA/8(a) BD) detailing the statistical information concerning awards made under this MOU, including NIH's assigned contract number, execution date and dollar amount.

b. The SBA:

1. will implement its responsibilities under this MOU through uniform procedures for use by all SBA offices;

2. will issue an acceptance letter or notification of rejection within 3 working days of receipt of an offering letter. Acceptance shall include a size verification and determinations with respect to all elements of eligibility (e.g., determinations of adverse impact, North American Industry Classification System (NAICS) code appropriateness and program eligibility);

3. will notify NIH within 3 working days of receipt of an offering letter if it does not agree that the circumstances warrant a sole source award in excess of the applicable competitive threshold amount, and may request NIH to offer the requirement as a competitive 8(a) procurement; and

4. will select an appropriate 8(a) Participant when the NIH submits an open offering letter.

V. TERM

This MOU will take effect as soon as both the SBA Associate Deputy Administrator for Government Contracting and Business Development and the HHS Deputy Assistant Secretary for the Office of Grants and Acquisitions have signed it. It will remain in effect for a period of three years from such date.

VI. AMENDMENT

This MOU may be amended, in writing, at any time by mutual agreement of the SBA's AA/8(a) BD and the NIH's senior procurement executive.

VII. TERMINATION

This MOU may be terminated by either SBA or the NIH upon 30 days advance, written notice to the other party.

VIII. ADMINISTRATION

For the NIH:

Head of the Contracting Activity.

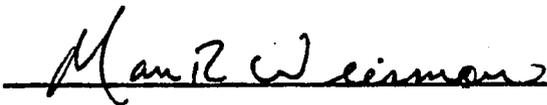
For the SBA:

Associate Administrator for
8(a) Business Development
409 3rd Street, SW
Washington, DC 20416
(202) 205-7340

Deputy Associate Administrator for
8(a) Business Development
409 3rd Street, SW
Washington, DC 20416
(202) 205-6471

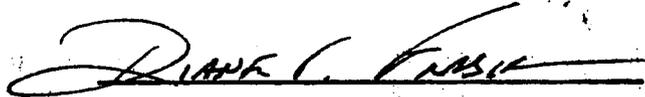
XI. ACCEPTANCE

As provided under the authority of the Memorandum of Understanding, the undersigned parties hereby accept the terms and conditions of this amendment.

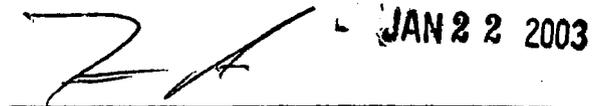


Marc Weisman
Acting Deputy Assistant Secretary for
Grants and Acquisitions
U.S. Department of Health & Human
Services

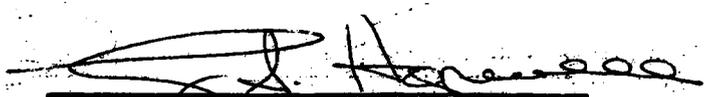
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Diane Frasier
Head of Contracting Activity
National Institutes of Health

 JAN 22 2003

Fred C. Armendariz
Associate Deputy Administrator for
Government Contracting & Business
Development
U.S. Small Business Administration



Luz A. Hopewell
Associate Administrator for Business
Development
U.S. Small Business Administration