

1 matter, the Public Auditor makes the following findings of fact:

2 1. On or about November 6, 2014, GPA issued the IFB.¹

3 2. The IFB stated, in relevant part:

4 a. That the Contractor shall furnish GPA with two (2) copies of a Certificate of
5 Insurance evidencing policies for Workmen's Statutory Compensation Insurance and
6 Employer's Liability Insurance, Commercial General Liability, Automobile Liability Insurance,
7 Pollution Liability Insurance, and Excess Liability Insurance, and that such certificates shall
8 specifically indicate the Commercial General Liability Insurance includes all extensions of
9 coverage as specified by the IFB, and that the insurance certificate state that the insurance
10 company or companies issuing the insurance policies shall give GPA at least thirty (30) days
11 written notice in the event of cancellation of or material change in any of the policies, and that if
12 coverage on the certificate or certificates is shown to expire prior to the completion of all terms
13 of the Contract, the Contractor shall furnish Certificates of Insurance evidencing renewal of
14 such coverage to GPA and that the Certificates of Insurance shall show the IFB's Contract
15 number.²

16 b. That the Contractor shall provide a copy of their Insurance Policy to GPA as part
17 of the bid requirements. All updates or revisions after contract commencement shall also be
18 forwarded to GPA.³

19 c. That any explanation desired by a bidder regarding the meaning or interpretation
20 of the IFB must be submitted in writing and with sufficient time allowed for a written reply to
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27 ¹ IFB Advertisement, page 35, Pacific Daily News dated November 6, 2014, Tab
28 2, Procurement Record filed on May 7, 2015

² Section 3.13.G Insurance, page 872, IFB, Tab 3, Id.

³ Id.

1 reach all bidders before submission of their bids.⁴

2 d. That the IFB's bid opening was at 2:00 p.m. on December 4, 2014, and that all
3 bids submitted in response to the IFB must be submitted prior to that date and time.⁵

4 3. On November 6, 2014, IPE picked up a copy of GPA's Bid Package.⁶

5 4. On December 1, 2014, IPE sent a written request to GPA to answer the following
6 questions, in relevant part:
7

8 a. Concerning IFB Part II, Fuel Supply Contract, Section 3.13.F. Excess
9 Liability's requirement that the Contractor must carry Excess Liability Insurance for \$5,000,000,
10 IPE inquired whether GPA would accept increasing General Liability Insurance from \$2,000,000
11 to \$7,000,000 in lieu of the Excess Liability Insurance requirement.
12

13 b. Concerning, Part II, Fuel Supply Contract, Section 3.13.G. Certificate of
14 Insurance's requirement that the Contractor provide two (2) copies of a Certificate of Insurance
15 in GPA's favor, and GPA's request for the bidder's Insurance Policies as part of the bid
16 requirements, IPE inquired whether a certificate of insurance in GPA's favor with maximum
17 insurance limits for items in paragraphs B (Workmen's Statutory Compensation Insurance and
18 Employer's Liability Insurance), C (Commercial General Liability Insurance), D (Automobile
19 Liability Insurance), & E (Pollution Liability Insurance), would suffice in lieu of insurance
20 policies.⁷
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22 4. On December 3, 2014 GPA issued IFB Amendment No. I, which extended the bid
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26 ⁴ Paragraph 3, Explanation to Bidders, Sealed Bid Solicitation Instructions,
27 page 897, Id.

28 ⁵ Page 832, Id.

⁶ Bidder's Register, page 812, Tab 4, Id.

⁷ IFB Amendment No. II dated December 12, 2014, page 829, Tab 3, Id.

1 opening date from 2:00 p.m. on December 4, 2014 to 2:00 p.m. on December 23, 2014.⁸

2 5. On December 12, 2014, GPA issued IFB Amendment No. II, which, in relevant part:

3 a. Answered IPE's inquiry concerning whether GPA would accept increasing
4 General Liability Insurance from \$2,000,000 to \$7,000,000 in lieu of the Excess Liability
5 Insurance requirement by stating: "Please submit a copy of the insurance coverage for GPA's
6 review."
7

8 b. Answered IPE inquiry concerning whether a certificate of insurance in GPA's
9 favor with maximum insurance limits for items in paragraphs B (Workmen's Statutory
10 Compensation Insurance and Employer's Liability Insurance), C (Commercial General Liability
11 Insurance), D (Automobile Liability Insurance), & E (Pollution Liability Insurance), would
12 suffice in lieu of insurance policies by stating: "No. GPA requires a copy of the insurance
13 policy(ies)."⁹
14

15 6. On December 22, 2014, GPA issued IFB Amendment No. III which extended the bid
16 opening date from 2:00 p.m. on December 23, 2014 to 2:00 p.m. on January 6, 2015.¹⁰
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18 7. On January 5, 2015, GPA issued IFB Amendment No. V which extended the bid
19 opening date from 2:00 p.m. on January 6, 2015 to 2:00 p.m. on January 13, 2015.¹¹
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21 8. On January 13, 2015, prior to bid opening, GPA received bids in response to the IFB
22 from IPE, MOBIL OIL GUAM, INC. (hereafter referred to as "MOBIL") and SOUTH PACIFIC
23 PETROLEUM CORPORATION (hereafter referred to as "SPPC").¹²
24

25 9. GPA opened the bids at 2:00 p.m. on January 13, 2015, and determined, in relevant
26 part, that IPE and SPPC included copies of their insurance policies with their bids and MOBIL

27 ⁸ IFB Amendment No. I dated December 3, 2014, page 795, Tab 7, Id.

28 ⁹ IFB Amendment No. II dated December 12, 2014, page 829, Tab 3, Id.

¹⁰ IFB Amendment No. III dated December 22, 2014, page 823, Id.

¹¹ IFB Amendment No. V dated January 5, 2015, page 815, Id.

¹² Bidder's Register, TAB 4, Id.

1 did not include a copy of its insurance policy with its bid.¹³

2 10. On January 29, 2015, GPA's Bid Evaluation Committee requested that GPA's
3 Supply Management Administrator inquire from the three (3) bidders that upon award their
4 insurance provider will comply with the insurance requirements as stated in the IFB.¹⁴

5 11. On January 29, 2015, Jamie L.C. Pangelinan, GPA's Supply Management
6 Administrator sent a letter to IPE, MOBIL, and SPPC requesting that they confirm that if
7 awarded the IFB contract, each of them would respectively comply with the insurance
8 requirements as stated in IFB, Part B, Section 3.13, Insurance of the IFB and she required the
9 bidders to submit their responses no later than February 2, 2015.¹⁵

10 12. On January 29, 2015, SPPC responded to GPA's request for confirmation by stating
11 that if awarded, SPPC will comply with the insurance requirements stated in Part B, Section
12 3.13, Insurance of the IFB.¹⁶

13 13. On January 30, 2015, IPE responded to GPA's request for confirmation with a letter
14 confirming their ability to comply with the IFB's insurance requirements and IPE attached
15 copies of the insurance policies it provided to GPA with IPE's bid and IPE stated that these
16 documents were required by Part B, Section 3.13, Subpart G, Certificate of Insurance and that
17 this requirement was further clarified by answer to Question 14, in IFB Amendment No. II.¹⁷

18 14. On February 2, 2015, MOBIL responded to GPA's request for confirmation by
19 stating that MOBIL would comply with the insurance requirements upon receiving the formal
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25 ¹³ Abstract of Bids dated January 13, 2015, TAB 22, Id.

26 ¹⁴ GPA Memorandum dated January 29, 2015 from Evaluation Committee to Supply
27 Management Administrator, TAB 28, Id.

28 ¹⁵ See Letter from Jamie Pangelinan dated January 29, 2015 to SPPC, to IPE,
and to MOBIL, located respectively at page 231 (SPPC), and at page 234
(IPE) TAB 29, and page 225 (MOBIL), TAB 30, Id.

¹⁶ Letter from Anna Van Seters to Jamie Pangelinan dated January 29, 2015,
page 227, TAB 29, Id.

¹⁷ Letter dated January 30, 2015 from Fred Keller to Jamie L.C. Pangelinan,
page 152, TAB 31.

1 award notice and executed supply contract and MOBIL attached its existing Certificates of
2 Insurance. MOBIL further stated that it would include the IFB Contract in its insurance policies,
3 add GPA as an additional insured, and grant a waiver of subrogation in favor of GPA.¹⁸
4

5 15. On February 5, 2015, GPA's Bid Evaluation Committee determined that IPE,
6 MOBIL, and SPPC bids met the IFB's specifications and they recommended awarding the IFB
7 Contract to MOBIL because it was the overall lowest, and most responsive and responsible
8 bidder. GPA's General Manager approved the Bid Evaluation Committee's recommendation
9 that same day.¹⁹
10

11 16. On February 6, 2015, GPA issued a Notice of Intent of Possible Award of the IFB
12 Contract to MOBIL, which gave MOBIL fourteen (14) days to submit their performance bond to
13 GPA.²⁰
14

15 17. On that same day, GPA issued a Bid Status to IPE and SPPC informing them that
16 their respective bids were rejected due to high price and notifying them that the IFB Contract
17 was being recommended for award to MOBIL.²¹
18

19 18. On February 13, 2015, seven (7) days after being notified that its bid was rejected
20 due to high price and that GPA was considering awarding the IFB Contract to MOBIL, IPE
21 protested GPA's acceptance and consideration of MOBIL's bid because it did not include the
22 insurance documents required by IFB Section 3.13, Insurance, Item G.²²
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25 ¹⁸ Email dated February 2, 2015 from Tom Anitok to Stephanie Taijeron, page
26 140, TAB 32, Id.

27 ¹⁹ GPA Memorandum dated February 5, 2015 from Bid Evaluation Committee to
28 Supply Management Administrator, page 135, TAB 34, Id.

²⁰ Letter dated February 6, 2015 from John M. Benavente to Charles Ewart, page
123, TAB 35, Id.

²¹ See BID Status dated February 6, 2015 for IPE and SPPC, page 132 (IPE), and
page 127 (SPPC), Id.

²² IPE's Protest dated February 13, 2015, page 107, TAB 36.

1 19. That same day, GPA issued a stay of procurement as a result of IPE's protest.²³

2 20. On April 17, 2015, GPA denied IPE's February 13, 2015 protest on the grounds that
3 the IFB did not require the bidders to submit insurance certificates and policies and that Section
4 3.13 of the Supply Contract form states that: "the contractor shall not commence work under this
5 contract until he has obtained all insurance required under this section and such insurance has
6 been approved by GPA," and GPA only required the winning bidder to submit the insurance
7 policies in Section 3.13 because such policies could not be provided until after the contract is
8 awarded.²⁴
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11 21. On April 29, 2015, twelve (12) days after GPA denied its protest on April 17, 2015,
12 IPE filed this appeal.

13 III. ANALYSIS

14 Pursuant to 5 G.C.A. §5703, the Public Auditor shall review GPA's April 17, 2015
15 decision denying IPE's February 13, 2015 protest *de novo*. The issue in this matter is whether
16 MOBIL's bid was responsive and this issue is dependent on whether Part B, Section 3.13.G of
17 the IFB required the bidders to submit copies of their policies for Workmen's Statutory
18 Compensation Insurance and Employer's Liability Insurance, Commercial General Liability
19 Insurance, Automobile Liability Insurance, Pollution Liability Insurance, and Excess Liability
20 Insurance with their bids.
21

22 **A. The IFB required copies of insurance policies to be submitted with the bids.**

23
24 The IFB required the bidders to submit copies of their insurance policies with their bids. A
25 plain reading of the IFB's language indicates that it clearly and unambiguously required the
26

27 ²³ Letter dated February 13, 2015 from John M. Benavente, page 102 (To SPPC),
28 page 104 (To MOBIL), TAB 37, Id.

²⁴ GPA's Denial of Procurement Protest dated April 17, 2015, page 72, TAB 41,
Id.

1 Contractor to provide GPA copies of its policies for Workmen’s Statutory Compensation
2 Insurance and Employer’s Liability Insurance, Commercial General Liability Insurance,
3 Automobile Liability Insurance, Pollution Liability Insurance, and Excess Liability Insurance.²⁵
4
5 Further, the IFB clearly and unambiguously states that the Contractor shall provide a copy of
6 their Insurance Policy to GPA as part of the bid requirements.²⁶ The term “contractor” as used in
7 the IFB likely means a person having a contract with GPA. 5 G.C.A. §5030(f) and 2 G.A.R.,
8 Div. 4, Chap. 1, §1106(6). The IFB language, read as a whole, would require such person to
9 submit a bid to get awarded the IFB Contract and the aforementioned IFB language requiring the
10 insurance policies be submitted as part of the bid clearly indicates that copies of the insurance
11 policies must be submitted with the bid. If the use of the word “contractor” created an
12 ambiguity, such ambiguity was cleared up when GPA issued IFB Amendment No. II. As stated
13 above, GPA answered both of IPE’s inquiries concerning Part B, Section 3.13.G of the IFB by
14 requiring the submission of insurance coverage for GPA’s review and by stating that GPA
15 required the insurance policies, not just the certificates of insurance.²⁷ Two (2) of the three (3)
16 bidders submitted copies of their respective policies to GPA. Based on the foregoing, the Public
17 Auditor finds that Part B, Section 3.13.G of the IFB and GPA’s responses to IPE’s inquiries
18 concerning the need for insurance policies required the bidders to submit the insurance policies
19 with their bids to comply with Part B, Section 3.13 of the IFB.
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23 GPA and MOBIL argue that Part B of the IFB only concern the draft contract and its
24 requirements, including Section 3.13.G of the IFB and need only be performed by the bidder
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27 ²⁵ Section 3.13.G Insurance, page 872, IFB, Tab 3, Id.

28 ²⁶ Id.

²⁷ IFB Amendment No. II dated December 12, 2014, page 829, Tab 3, Id.

1 who is awarded the IFB contract.²⁸ Generally, for multi-year contracts only the term of the
2 contract and conditions for renewal and extension must be included in the solicitation. 5 G.C.A.
3 §5237(a). In addition to the term and renewal provisions, the solicitation must also state: (1) The
4 amount of supplies or services for the proposed contract period; (2) That a unit price shall be
5 given for each supply and service that is uniform throughout the contract; (3) That the contract
6 will be cancelled only if funds are not appropriated or otherwise made available to support
7 continuation of performance in any fiscal period succeeding the first; (4) That the procurement
8 officer must notify the contractor on a timely basis as to whether funds are or are not available
9 for the fiscal years succeeding the first; (5) Whether the bidders had to submit prices for the first
10 fiscal period only, the entire period only, or both the first fiscal period and the entire time of
11 performance; (6) How the award will be determined; and (7) That in the event of cancellation,
12 the contractor will be reimbursed the unamortized, reasonably incurred, non-recurring costs. 2
13 G.A.R., Div. 4, Chap. 3, §3121(e)(1). Had GPA taken the approach of only including these
14 required provisions in the IFB, or had it edited the draft contract to remove any and all language
15 stating the contractor had to provide information as part of its bid submission, or had the IFB
16 specifically stated that the provisions of Part B of the IFB would only have to be performed by
17 the winning bidder, perhaps its argument would have more merit. Instead, GPA went beyond
18 these requirements by including the entire draft contract in the IFB and by adding the language
19 requiring the contractor to submit a copy of their Insurance Policy to GPA as part of the bid
20 requirements in Part B, Section 3.13.G of the IFB. Further, GPA specifically required the
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27 ²⁸ Page 3, GPA's Statement Answering Allegations of Appeal filed on May 14,
28 2015, and page 2, MOBIL's Hearing Brief filed on August 11, 2015.

1 bidders to fill out the draft contract and return it to GPA as part of their responses to the IFB.²⁹

2 Therefore, the Public Auditor finds no merit in GPA and MOBIL's argument that only the
3 winning bidder had to submit their insurance policies to GPA in accordance with the
4 requirements of Part B, Section 3.13.G of the IFB.
5

6 The Public Auditor must now closely analyze whether any of the bidders could comply
7 with the IFB's requirement for the bidders to submit insurance policies with their bids.

8 **B. The IFB violates the procurement policy favoring broad-based competition.**

9
10 GPA and MOBIL argue that none of the bidders could have submitted a valid insurance
11 policy with their bids because they would not have an insurable interest until one of them was
12 awarded the contract.³⁰ Every interest in property, or any relation thereto, or any liability in
13 respect thereto, of such nature that a contemplated peril might directly damnify the insured, is an
14 insurable interest. A mere contingent or expectant interest in anything, not founded upon an
15 actual right to or in the thing, nor upon any valid contract for it, is not insurable. 22 G.C.A.
16 §18204(a). Here, the bidders were to submit their Workmen's Statutory Compensation
17 Insurance and Employer's Liability Insurance providing a waiver of subrogation in favor of
18 GPA.³¹ GPA was required to be an additional insured and the bidders were to include a waiver
19 of subrogation in favor of GPA for their Commercial General Liability, Automobile Liability,
20 Pollution Liability, and Excess Liability Insurance Policies.³² Here, the insurance policies
21 submitted by IPE with their bid indicate that GPA contracts are in fact listed in their schedule of
22 insured contracts, however, they are for GPA Diesel Fuel Supply Contract awarded to IPE in
23 GPA-049-09 and GPA-050-09 and neither of these contracts concern the IFB at issue in this
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27 ²⁹ Notice, page 24, IFB, ID.

28 ³⁰ Page 3, GPA's Statement Answering Allegations of Appeal filed on May 14, 2015, and Page 3, MOBIL's Hearing Brief filed on August 11, 2015.

³¹ Part B, Section 3.13.B, page 870, Procurement Record filed on May 7, 2015.

³² Part B, Section 3.13.C, D, E, and F, pages 870-872, Id.

1 matter.³³ GPA is also listed as an additional insured in IPE's Insurance Policies.³⁴ So how could
2 IPE readily comply with Part B, Section 3.13.G of the IFB without being awarded the contract?
3 IPE admits that it submitted its existing insurance policies covering its existing Diesel Fuel
4 Supply Contracts for GPA's Fast Track Generators with its bid.³⁵ This means that the IFB's
5 requirement for bidders to submit insurance policies set forth in Part B, Section 3.13.G of the
6 IFB highly favors bidders with existing contracts with GPA by requiring the same types of
7 insurance, and highly prejudices bidders without those same contracts. One of the underlying
8 purposes and policies of Guam's Procurement Laws and Regulations is to foster effective broad-
9 based competition within the free-enterprise system. 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4,
10 Chap. 1, §1102(5). The Public Auditor finds that the IFB's requirement that the bidders submit
11 insurance policies with their bids violates 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4, Chap. 1,
12 §1102(5) because of the aforementioned favoritism to bidders with existing GPA contracts and
13 its prejudice to bidders without them.
14
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16

17 Accordingly, the issue of whether MOBIL's bid was responsive to the IFB is moot
18 because the questions concerning its responsiveness raised in this matter concerned the IFB's
19 unlawful requirement that the bidders submit insurance policies with their bids.
20

21 **C. The IFB must be revised to comply with Guam's Procurement Laws and Regulations.**

22 As stated above, the Public Auditor finds that Part B, Section 3.13.G violates 5 G.C.A.
23 §5001(b)(6) and 2 G.A.R., Div. 4, Chap. 1, §1102(5). If prior to award it is determined that a
24 solicitation is in violation of law, then the solicitation shall be cancelled or revised to comply
25

26 ³³ Contractual Liability, Schedule of Insured Contracts, page 211, attached to
27 IPE's January 30, 2015 response to GPA's Request for Confirmation, TAB 31,
Procurement Record filed on May 7, 2015.

28 ³⁴ Additional Insured, page 213, Id.

³⁵ Statement of Steven Carrara, Esq., August 18, 2015 Hearing Re Appellant's Appeal.

1 with the law. 5 G.C.A. §5451 and 2 G.A.R., Div. 4, Chap. 9, §9105. Thus, GPA must either
2 cancel the IFB or revise it to comply with 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4, Chap. 1.
3 §1102(5) by deleting the language in Part B, Section 3.13.G of the IFB and IFB Amendment No.
4 II which require the bidders to submit insurance policies with their bids.
5

6 **IV. CONCLUSION**

7 Based on the foregoing the Public Auditor hereby determines the following:

8 1. Part B, Section 3.13.G of the IFB and GPA's responses to IPE's inquiries concerning
9 the need for insurance policies required the bidders to submit the insurance policies to comply
10 with Part B, Section 3.13 of the IFB with their bids.
11

12 2. The Public Auditor finds that the aforementioned IFB's requirement that the bidders
13 submit insurance policies with their bids violates 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4,
14 Chap. 1, §1102(5) because the requirement highly favors bidders with existing GPA contracts
15 and it prejudices bidders who do not have them.
16

17 3. IPE's Appeal is hereby GRANTED in part and DENIED in part.

18 4. No later than thirty (30) days after this Decision is issued, GPA must either cancel
19 the IFB or revise it to comply with 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4, Chap. 1,
20 §1102(5) by deleting the language in Part B, Section 3.13.G of the IFB and IFB Amendment No.
21 II, which requires the bidders to submit insurance policies with their bids.
22

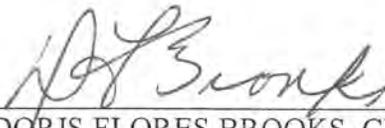
23 5. The Public Auditor finds that IPE is entitled to its reasonable costs incurred
24 in connection with the IFB's solicitation and IPE's protest, excluding attorney's fees, pursuant to
25 5 G.C.A. §5425(h), because there was a reasonable likelihood that IPE may have been awarded
26 the contract because it had the second lowest bid but for GPA's violations of Guam Procurement
27 Law and Regulations as set forth herein. GPA may object to IPE's cost demand by filing the
28

1 appropriate motion with the Public Auditor no later than fifteen (15) days after IPE submits such
2 cost demand to GPA.

3
4 This is a Final Administrative Decision. The Parties are hereby informed of their right to
5 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
6 Article D of Chapter 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final
7 Administrative Decision. 5 G.C.A. §5481(a).

8
9 A copy of this Decision shall be provided to the parties and their respective attorneys, in
10 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
11 www.opaguam.org.

12
13 **DATED** this day 18th of September, 2015.

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16
17 

18
19 DORIS FLORES BROOKS, CPA, CGFM
20 PUBLIC AUDITOR

Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	D. Graham Botha, Esq. GPA Legal Counsel Guam Power Authority	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
	Phone: (671) 648-3203/3002 Fax: (671) 648-3290	Pages:	14 (including cover page)
CC:	Steven Carrara, Esq. Attorney for IP&E Holdings, LLC Phone: (671) 646-1222 Fax: (671) 646-4723	Date:	September 18, 2015
	R. Marsil Johnson, Esq. Attorney for Interested Party Mobil Oil Guam Inc. Phone: (671) 477-7857 Fax: (671) 472-4290	Phone: Fax:	475-0390 x. 218 472-7951

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