



OFFICE OF THE PUBLIC AUDITOR

February 10, 2009

**Attorney for Appellant: Island Business Systems and Supplies**

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**Purchasing Agency - General Services Agency (GSA)**

Claudia S. Acfalle

Chief Procurement Officer

General Services Agency

Department of Administration

148 Route 1 Marine Drive

Piti, Guam 96915

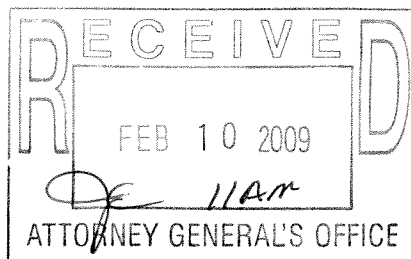
Transmitted herewith is a copy of the Decision and Findings and Recommendations on appeal OPA-PA-08-012 in the appeal of Town House Department Stores Inc. dba Island Business Systems & Supplies regarding GSA's Request for Quotation Nos. 08002241, 08002249, 08002251, 08002252, 08002255, and 08002256 for multi-function copiers.

A complete copy of the Decision and Findings will be posted on our website within the next day and available for public view at [www.guamopa.org](http://www.guamopa.org).

Senseramente,

Doris Flores Brooks, CPA, CGFM

Public Auditor





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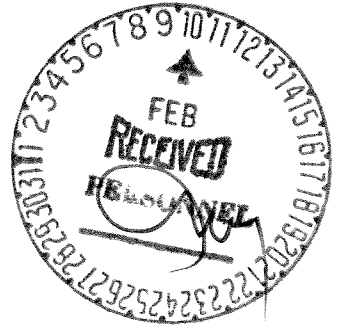
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**PROCUREMENT APPEALS**

IN THE APPEAL OF,  
TOWN HOUSE DEPARTMENT STORES,  
INC., dba ISLAND BUSINESS SYSTEMS &  
SUPPLIES,  
  
Appellant

**APPEAL NO: OPA-PA-08-012**

**DECISION**

**I. INTRODUCTION**

This is the Decision of the Public Auditor for an appeal filed on September 12, 2008, by TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, (Hereafter "IBSS") regarding the GENERAL SERVICES AGENCY, Government of Guam's (Hereafter "GSA") September 9, 2008, denial of IBSS' May 20, 2008, protest concerning GSA's Request for Quotation Nos. 08002241, 08002249, 08002251, 08002252, 08002255, and 08002256. The Public Auditor holds that this matter is not moot and that the procedures GSA used to solicit the copier equipment and ancillary services sought by the RFQs was not in accordance with Guam Procurement Laws and Regulations. Accordingly, IBSS' appeal is sustained.

**II. FINDINGS OF FACT**

The Public Auditor in reaching this Decision has considered and incorporates herein the Findings of the Hearing Officer issued on February 10, 2009. In addition, this Decision is based on the Procurement Record and all documents submitted by the parties, as well as all testimony and arguments presented at the January 7, 2009, Hearing in this matter.

As a preliminary matter, the Public Auditor will consider IBSS's request that notice be

1 taken of the Federal Acquisition Regulations (FARs).<sup>1</sup> IBSS argues that the purpose of  
2 examining these federal regulations is to illustrate that the RFQ procedures adopted by GSA do  
3 not comply with the FARs.<sup>2</sup> The Public Auditor finds that whether GSA's purchasing activity  
4 complies with the FARs is not relevant to the main issue here. The main issue here is whether the  
5 RFQs in this matter comply with Guam's Procurement Laws and Regulations. Therefore, IBSS'  
6 request that notice be taken of the FARs is hereby denied and shall not be considered in this  
7 matter.  
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9  
10 Based on the aforementioned record in this matter the Public Auditor makes the  
11 following findings of fact:

12 1. On May 15, 2008, GSA issued six RFQs for multi-function copiers to include:

- 13 a) RFQ No. 08002241 for the lease of one (1) Xerox Model 4127 Copier or equivalent
- 14 b) RFQ No. 08002249 for the lease of one (1) Xerox Model Workcentre 5687 or equivalent
- 15 c) RFQ No. 08002251 for the lease of one (1) Xerox Model W5050PHGC Copier or equivalent
- 16 d) RFQ No. 08002252 for the lease of one (1) Xerox Model W5030PG Copier or equivalent<sup>3</sup>
- 17 e) RFQ No. 08002255 for the lease of one (1) Xerox Model W7675PGC Copier or equivalent and
- 18 f) RFQ No. 08002256 for the lease of one (1) Xerox Model W5030PG Copier or equivalent,

19 GSA sent all six RFQs to Docu Center, IBSS, Quality Business Systems, and Xerox Corporation.<sup>4</sup>

20 2. On May 16, 2008, IBSS requested for an extension of time to respond to RFQ Nos.  
21 08002241, 08002249, 08002251, 08002252, 08002255, and 08002256, on the grounds that more  
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25 <sup>1</sup> Appellant's Request for Notice to be Taken Re Federal Acquisition Regulations, dated December 29, 2008.

26 <sup>2</sup> Id., Page 1.

27 <sup>3</sup> RFQ No. 08002252, GSA Procurement Record, Tab 9.

28 <sup>4</sup> RFQ Nos. 08002241, 08002249, 08002251, 08002255, and 08002256, Id.

1 time was needed due to the quantity GSA was requiring.<sup>5</sup> GSA responded that same day by  
2 extending the deadline to respond to the RFQs to May 27, 2008.<sup>6</sup>

3 3. On May 20, 2008, IBSS protested RFQ Nos. 08002241, 08002249, 08002251,  
4 08002252, 08002255, and 08002256 alleging violations of Guam's Procurement Laws and  
5 Regulations because: (1) The RFQ procedure used by GSA is not an appropriate method of  
6 source selection; and (2) The specifications used in the RFQs were overly restrictive; and (3) The  
7 RFQs' requirement that the suppliers must provide federal GSA pricing and terms and  
8 conditions.<sup>7</sup>

9 4. On May 21, 2008, Xerox Corporation responded to five of the six RFQs to include:

- 10 a) RFQ No. 08002241 by submitting a quote for \$1,378.64 per month for a total of \$5,514.56 for the  
11 first four (4) lease months  
12 b) RFQ No. 08002249 by submitting a quote for \$621.09 per month for a total of \$2,484.36 for the  
13 first four (4) lease months  
14 c) RFQ No. 08002252 by submitting a quote for \$173.99 per month for a total of \$695.96 for the  
15 first four (4) lease months  
16 d) RFQ No. 08002251 by submitting a quote for \$363.87 per month for a total of \$1,455.48 for the  
17 first four (4) lease months, and  
18 e) RFQ No. 08002255 by submitting a quote for \$611.87 per month for a total of \$2,447.48 for the  
19 first four (4) lease months.<sup>8</sup>

20 5. On May 22, 2008, Xerox Corporation responded to RFQ No. 08002256 by submitting  
21 a quote for \$167.84 per month for a total of \$671.36 for the first four (4) months of the lease.<sup>9</sup>

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<sup>5</sup> IBSS Letter to GSA dated May 16, 2008, Tab 7, Id.

25 <sup>6</sup> GSA Letter dated May 16, 2008, Tab 6, Id.

26 <sup>7</sup> IBSS Protest dated May 20, 2008, Tab 5, Id.

27 <sup>8</sup> Xerox Corporation Quotes for RFQ Nos. 08002241, 08002249, 08002251, 08002252, and 08002255, Tab 8, Id.

28 <sup>9</sup> Xerox Corporation Quote for RFQ No. 08002256, Tab 8, Id.

1 6. On September 9, 2008, GSA denied IBSS' protest due to GSA's belief that it had the  
2 authority to purchase supplies from the Federal Supply Schedule Program (FSSP) pursuant to 5  
3 G.C.A. §5122 using the RFQ method. In their denial letter, GSA stated that the RFQ method was  
4 developed by GSA pursuant to 5 G.C.A. §5113 and its practice was affirmed by an opinion from  
5 the Attorney General of Guam dated June 16, 2008, through a separate procurement, GSA-07-  
6 1084.<sup>10</sup>

7 7. Three (3) days later, on September 12, 2008, IBSS appealed GSA's denial of IBSS'  
8 protest to the Office of Public Auditor.

9 8. On December 19, 2008, GSA issued Invitation for Bid (Multi-Step) No. GSA-010-09  
10 (60 Month Lease Agreement Inclusive of Equipments, Services, Related Consumables, and  
11 Software Solutions for Digital Multifunctional Systems) seeking 60 month lease agreements on  
12 numerous copiers with various specifications.<sup>11</sup> Multi-Step Bid No. GSA-010-09 contained, in  
13 part, solicitations for the same copier equipment and supplies it was soliciting in the RFQs.  
14

### 15 III. ANALYSIS

16 IBSS appeals GSA's denial of IBSS' May 20, 2008 protest. IBSS argues that GSA's  
17 denial of their protest is without merit because: (1) 5 G.C.A. §5122 does not create an exception  
18 to the source selection methods specified in Guam Procurement Laws and Regulations; and (2)  
19 5 G.C.A. §5113 does not give GSA the authority to create alternative methods of source  
20 selection such as the RFQ procedure developed by GSA to purchase supplies from the FSSP; and  
21 (3) The GSA RFQs at issue in this matter violate Guam's Procurement Laws and Regulations.<sup>12</sup>  
22 GSA responded by agreeing that the acquisition of the six (6) copiers should be made using  
23 competitive sealed bidding method of source selection, and by agreeing that non-proprietary  
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25 <sup>10</sup> GSA Letter to IBSS dated September 9, 2008, Tab 1, Id.

26 <sup>11</sup> Respondent's Hearing Materials, Exhibits A and B, dated December 29, 2008.

27 <sup>12</sup> IBSS Notice of Appeal, Pages 8, 11, and 16.  
28

1 commercial specifications should be used in the solicitation of the copiers.<sup>13</sup> Further, GSA  
2 argued that this matter should be dismissed as moot because IBSS obtained the relief that it was  
3 seeking.<sup>14</sup> The issue of whether this matter is moot is a threshold issue that the Public Auditor  
4 will examine first.

5 **A. This matter is not moot.**

6 GSA argues that this matter is moot because IBSS has been accorded every remedy it has  
7 requested in its Notice of Appeal and there are no longer any adverse interests between IBSS and  
8 GSA.<sup>15</sup> In addition, GSA argues that there are no questions of fact or law left to be determined.<sup>16</sup>  
9 It is a well-settled general rule that the existence of an actual controversy is an essential requisite  
10 to appellate jurisdiction and that a claim becomes moot only when the issues are no longer live  
11 or the parties lack a cognizable interest in the outcome. *Tumon Partners, LLC and Hee K. Cho v.*  
12 *Kevin Shin*, 2008 Guam 15 ¶37 (Supreme Court of Guam, 2008). The test for mootness is  
13 whether the issues no longer exist because intervening events have rendered it impossible for the  
14 reviewing court to grant the complaining party effectual relief. *Id.* An appeal is considered moot  
15 when it presents or involves no actual controversy, interests or rights of the parties, or where the  
16 issues have ceased to exist. *Id.* Thus, an appeal is dismissed as moot when by virtue of an  
17 intervening event, the appellate court cannot grant effectual relief whatever in favor of the  
18 appellant. *Id.* Here, the issue of whether the specifications used in the RFQs violate Guam's  
19 Procurement Laws and Regulations is moot because of GSA's admissions. GSA admitted that  
20 the specifications used in all the RFQs were proprietary and violate Guam's Procurement Laws  
21 and Regulations. Thus, there is no actual controversy between the parties concerning the RFQ  
22 specifications for the Public Auditor to decide. Therefore, the Public Auditor finds that the issue  
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26 <sup>13</sup> Agency Report, Page 2, Lines 20 and 25.

27 <sup>14</sup> *Id.*, Page 4, Line 3, and GSA Rebuttal to Comment on Agency Report, Page 4, Line 19.

28 <sup>15</sup> GSA's Hearing Brief, Page 2, Line 23.

<sup>16</sup> Respondent's Hearing Materials, Page 3, Line 12.



1 of whether the specifications used in the RFQ's complied with Guam's Procurement Laws and  
2 Regulations is moot and that matter will not be considered in this Decision.

3           However, other issues remain for the Public Auditor to review to include the issue of  
4 whether GSA's RFQ procedure complies with Guam Procurement Laws and Regulations. This  
5 issue is of far greater significance than the underlying requisitions at issue here. Despite GSA's  
6 admission that it should and would use the competitive sealed bidding process to solicit the  
7 copiers and ancillary services it was soliciting in the RFQs, this issue is capable of repetition  
8 because nothing prevents GSA from using the RFQ procedure again. Further, GSA's use of the  
9 RFQ method to purchase from the FSSP without true competition or use of the source selection  
10 methods authorized by Guam's Procurement Laws and Regulations has been questioned by  
11 independent auditors.<sup>17</sup> Thus, GSA's admissions do not resolve the underlying issue of whether  
12 GSA's use of the RFQ procedure it developed to solicit supplies from the FSSP pursuant to 5  
13 G.C.A. §5122 complies with Guam's Procurement Laws and Regulations. The Public Auditor  
14 finds that despite GSA's admissions, this issue is not moot because it remains an actual  
15 controversy existing between the parties. The Public Auditor will now examine whether GSA's  
16 RFQ procedure complies with Guam Procurement Laws and Regulations.

17 **B. GSA's RFQ Procedure is not a valid method source selection.**

18           As stated above, GSA denied IBSS's protest arguing that the RFQ procedures it used to  
19 solicit the copiers was valid. IBSS argues that 5 G.C.A. §5122 does not create an exception to  
20 the source selection methods specified in Guam Procurement Laws and Regulations. GSA now  
21 only admits that the copiers at issue here should be solicited using the competitive sealed bid  
22 method of source selection, and has stated that it will not use the RFQ procedure it developed to  
23 purchase supplies from the FSSP again.<sup>18</sup>

24           GSA's RFQ procedure states, in relevant part, that GSA buyers can purchase supplies,  
25 services, or equipment through federal contracts without the bidding procedure by: (1)

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27 <sup>17</sup> Purchasing From GSA Federal Supply Contract Procedure, Attachment A, Attorney General's Legal  
28 Memorandum dated June 16, 2008, Ref: GSA 07-1084, as attached to GSA Letter to IBSS dated September 9, 2008,  
Tab 1, Procurement Record.

<sup>18</sup> Statements by Assistant Attorney General John Weisenberger, Hearing on the Merits for OPA-PA-08-012,  
January 7, 2009.

1 Inquiring whether the Federal GSA has contracted for the type of supply, service, or equipment  
2 Guam GSA is seeking; and (2) If the Federal GSA has it, then the Guam GSA buyer will issue  
3 an RFQ to at least three local vendors in order to calculate the 10% differential required by 5  
4 G.C.A. §5122; and (3) If the local vendors provide a quote exceeding the 10% differential, a  
5 purchase order will be prepared to obtain the requested supplies, services, or equipment from the  
6 federal contract.<sup>19</sup> Generally, GSA shall procure supplies from the United States when the cost  
7 to GSA is less by 10% than from other contractors. 5 G.C.A. §5122. However, this statute  
8 merely authorizes GSA to purchase supplies, services, or equipment from the Federal  
9 Government and does not create an alternative method of source selection. This is evidenced by  
10 the fact that said statute does not create any method or procedure by which GSA can determine  
11 whether the cost to GSA is less by 10% than from other contractors. Therefore, the Public  
12 Auditor finds that although GSA is authorized to purchase supplies, services, or equipment from  
13 the United States Government when the cost is less by 10% than from other contractors, GSA is  
14 still required to use a method of source selection authorized by Guam's Procurement Laws or  
15 Regulations, such as the competitive sealed bid procedure GSA subsequently agreed to use to  
16 solicit the copiers at issue in this matter.

17 The methods of source selection are governed by a statute which states that unless  
18 otherwise authorized by law, all Government of Guam contracts shall be awarded by competitive  
19 sealed bidding except for the procurement of professional services, and except for small  
20 purchases, sole source procurement, emergency procurement, competitive selection procedures  
21 for services specified in 5 G.C.A. §5121, and procurement from non-profit corporations. 5  
22 G.C.A. §5210(a) and 2 G.A.R., Div. 4, Chap. 3, §3108. Here, GSA's RFQ procedure does not  
23 comply with any of the aforementioned methods of source selection. Thus, the Public Auditor  
24 finds that GSA's RFQ Procedure is not a method of source selection authorized by Guam's  
25 Procurement Laws and Regulations. The Public Auditor must now determine whether GSA was  
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28 <sup>19</sup> Purchasing From GSA Federal Supply Contract Procedure, Attachment A, Attorney General's Legal  
Memorandum dated June 16, 2008, Ref: GSA 07-1084, as attached to GSA Letter to IBSS dated September 9, 2008,  
Tab 1, Procurement Record.

1 authorized to adopt an alternative method of source selection to specifically procure supplies,  
2 services, and equipment from the FSSP.

3 **C. GSA does not have the authority to create alternative methods of source selection.**

4 IBSS argues that 5 G.C.A. §5113 does not give GSA the authority to create alternative  
5 methods of source selection such as the RFQ procedure developed by GSA to purchase supplies  
6 from the FSSP. At Hearing, GSA did state that it will not use the RFQ procedure again.  
7 However, in its initial denial of IBSS' protest, GSA did assert that it had the legal authority to  
8 develop the RFQ procedure to purchase supplies, services, and equipment from the FSSP using  
9 its authority to adopt operational procedures governing the internal functions of GSA's  
10 procurement operations.<sup>20</sup> The Public Auditor must determine whether this legal opinion is  
11 correct. Generally, consistent with the provisions of Guam's Procurement Laws and  
12 Regulations, the Chief Procurement Officer of GSA may adopt operational procedures governing  
13 the internal functions of GSA. 5 G.C.A. §5113(b) and 2 G.A.R. Div. 4, Chap. 2, §2104(b).  
14 Here, as stated above, the RFQ procedure does not comply with any of the methods of source  
15 selection authorized by Guam's Procurement Laws and Regulations and can be distinguished  
16 from "operational procedures" GSA has the authority to create and adopt. Thus, Public Auditor  
17 finds that the legal opinion GSA relied upon in denying IBSS' Protest is incorrect because  
18 GSA's Chief Procurement Officer does not have the authority to develop alternative methods of  
19 source selection that are contrary to the methods of source selection authorized by Guam's  
20 Procurement Law and Regulations.

21 **D. The RFQs must be cancelled because they violate Guam Procurement Law.**

22 The Public Auditor finds that the RFQs at issue here must be cancelled. If prior to award  
23 it is determined that a solicitation of a contract is in violation of law, then the solicitation shall be  
24 cancelled or revised to comply with the law. 5 G.C.A. §5451 and 2 G.A.R., Div. 4, Chap. 9,  
25 §9104(2) and §9105. Here, there is no evidence in the record in this matter that the RFQs have  
26 resulted in an award and the Public Auditor finds that the RFQs were in the pre-award stage of  
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28 <sup>20</sup> Attorney General's Legal Memorandum dated June 16, 2008, Ref: GSA 07-1084, page 7, as attached to GSA  
Letter to IBSS dated September 9, 2008, Tab 1, Procurement Record.

1 the procurement process. Further, as set forth above, the Public Auditor finds that the RFQs  
2 violate Guam's Procurement Law because GSA's RFQ Procedure is not a method of source  
3 selection authorized by Guam's Procurement Laws and Regulations, and GSA's Chief  
4 Procurement Officer does not have the authority to develop alternative methods of source  
5 selection that are contrary to the methods of source selection authorized by Guam's Procurement  
6 Law and Regulations. Also, the Public Auditor finds that the RFQs cannot be revised to comply  
7 with the law because the RFQ procedures developed by GSA and used for the RFQs at issue here  
8 do not comply with the methods of source selection authorized by Guam's Procurement Laws  
9 and Regulations. Therefore, the RFQs must be cancelled.

10 **E. GSA's Violations of the Automatic Stay.**

11 The Public Auditor must address GSA's continued efforts to procure the copiers and  
12 ancillary services it was soliciting in the RFQs after IBSS' Protest. GSA admitted that GSA  
13 Multi-Step Bid Invitation No. GSA-010-09 (Hereafter "IFB"), issued on December 19, 2008,  
14 contained, in part, solicitations for the same copier equipment and supplies it was soliciting in  
15 the RFQs.<sup>21</sup> At issue here is whether the automatic stay provisions were triggered by IBSS's  
16 protest and subsequent appeal. Generally, in the event of a timely protest, the government shall  
17 not proceed further with the solicitation or award of the contract prior to the final resolution of  
18 such protest and any such further action is void. 5 G.C.A. §5425(g) and 2 G.A.R., Div. 4, Chap.  
19 9, §9101(e). These automatic stay provisions are triggered when a protest is timely and the  
20 protest is filed before the award was made. *Guam Imaging Consultants, Inc. v. GMHA*, 2004  
21 Guam 15, ¶24 (Supreme Court of Guam, August 12, 2004). As stated above, IBSS filed its  
22 protest on May 20, 2008, and the appeal in this matter on September 12, 2008 prior to an award  
23 being made in any of the RFQs. Thus, the Public Auditor finds that the automatic stay  
24 provisions apply to the copiers and ancillary services solicited by the RFQs and that the portions  
25 of the IFB soliciting for the same copiers and ancillary services violate the automatic stay and are  
26 void.

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<sup>21</sup> Respondent's Hearing Materials, Page 3, Line 8, Exhibits A and B, December 29, 2008, and Statements by  
Assistant Attorney General John Weisenberger, Hearing on the Merits for OPA-PA-08-012, January 7, 2009.

1  
2 **IV. CONCLUSION**

3 Based on the foregoing, the Public Auditor hereby determines the following:

4 1. This matter is not moot because GSA's admissions do not resolve all the issues in this  
5 matter and actual controversies between the parties still exist.

6 2. GSA's RFQ Procedure is not a method of source selection authorized by Guam's  
7 Procurement Laws and Regulations. Further, GSA's longstanding use of the RFQ Procedure to  
8 procure from the FSSP is a serious impairment to the integrity of the procurement system which  
9 has stifled broad-based competition for government supplies and services.

10 3. GSA's Chief Procurement Officer does not have the authority to develop alternative  
11 methods of source selection that are contrary to the methods of source selection authorized by  
12 Guam's Procurement Law and Regulations.

13 4. GSA shall cancel the RFQs, in accordance with Guam Procurement Laws and  
14 Regulations, no later than five (5) working days after GSA receives this decision.

15 5. IBSS' appeal is sustained.

16 6. GSA shall cancel, in accordance with Guam Procurement Laws and Regulations, GSA  
17 Multi-Step Bid Invitation No. GSA-010-09, no later than five (5) working days after GSA  
18 receives this decision.

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

23 A copy of this Decision shall be provided to the parties and their respective attorneys, in

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1 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
2 [www.guamopa.org](http://www.guamopa.org).

3  
4 **DATED** this 10<sup>th</sup> day of February, 2009.

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9 DORIS FLORES BROOKS, CPA, CGFM  
10 PUBLIC AUDITOR  
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