

**“EVERYTHING YOU NEED TO KNOW
ABOUT CONSTRUCTING PROJECTS
UNDER GEORGIA’S NEW PROCUREMENT
LAW”**

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Daniel M. McRae
Partner
Seyfarth Shaw, LLP

404.888.1883
fax 404.892.7056

dmcrae@seyfarth.com
dan@danmcrae.info

7th Floor
1545 Peachtree St. NE
Atlanta, GA 30309

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How A “Public Works” Law Impacts Private Projects

When a development authority or another public body is involved in the construction related to a project, a recent Georgia law can have unexpected implications for the project. HB 513’s version of the Georgia Local Government Public Works Construction Law¹ became effective on July 1, 2001². Actually, the basic law has existed since Governor Barnes signed the HB 1079 version of this law on April 20, 2000.

Some cities and counties are aware of the law, and are already taking advantage of it. After all, if followed properly it lets them use design/build and other construction delivery methods that were inaccessible to them previously. Under prior law, they were required to use competitive bidding, based on completed design documents.

Not only are local building authorities, for example, subject to the law. Moreover, the law reads that development authorities are, as well. This includes both “statutory” and “Constitutional” development authorities.

The Georgia Local Government Public Works Construction Law. applies to “governmental entities”, meaning “a county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission.” The law carves out from this definition the state and state instrumentalities, as well as specified public transportation agencies. Thus, development authorities are subject to the law. If you are a development authority, how does this impact the bond deal you just promised you would do for a new industry, if you are using a sale-leaseback structure for ad valorem property tax abatement purposes? And what if state or local cash or in-kind incentives are being invested in such a project?

If the law applies to a particular development authority project, the development authority has to go through a process involving competitive sealed bidding or competitive sealed proposals. The procurement has to be advertised, and the advertising process will take a minimum of four weeks. (Think of the complications that this poses for your project, if this period hasn’t been included in the schedule).

The law applies to “public works construction”, defined as “building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property.” State, county and municipal street, road and highway projects are excluded.

¹ O.C.G.A. § 36-91-1, *et seq.*

² The law was amended in 2007 by S.B. 146 and H.B. 134 (collectively, the “2007 Amendments”).

Unfortunately, “public structure”, “public improvements” and “public real property” are not defined. Neither is “public works construction contract”, a critical phrase that also appears in the law.

Assume that improved real estate, leased by a development authority to a private industry, is public property such that the county, for example, can provide the in-kind grading of the site. If so, is this property also “public real property” for purposes of this law? If it is, then competitive sealed bidding/competitive sealed proposals, advertising, bid, payment and performance bonds, and all the other requirements of the law will apply, to the surprise of an industry that thought it would be controlling the building process, including selecting its own contractor.

The advertising requirements were changed by the 2007 Amendments, including provisions to the effect that:

1. The Georgia Procurement Registry³ is now one of the authorized means for electronic advertising.
2. Contract opportunities that are advertised solely on the Internet must be posted continuously for at least four weeks prior to the opening of sealed bids or proposals. However, inadvertent or unintentional loss of Internet service during the advertisement period does not require the contract award or bid or proposal opening to be delayed.
3. Contract opportunities that will be awarded by competitive sealed bids must have plans and specifications available on the first day of the advertisement and shall be open to inspection by the public. The plans and specifications must indicate if the project will be awarded by base bid or base bid plus selected alternates and:
 - (A) A statement listing whether all anticipated federal, state, or local permits required for the project have been obtained or an indication of the status of the application for each such permit including when it is expected to be obtained; and
 - (B) A statement listing whether all anticipated rights of way and easements required for the project have been obtained or an indication of the status as to when each such rights of way or easements are expected to be obtained.
4. Contract opportunities that will be awarded by competitive sealed proposals must be publicly advertised with a request for proposals which request shall include conceptual program information in the request for proposals describing the requested services in a level of detail appropriate to the project delivery method selected for the project.

The law doesn't apply to the normal work of an architect or engineer, so the design work can proceed as planned in any event. Specifically, the competitive sealed bidding/competitive sealed proposals requirement applies to public works construction contracts that:

³ See O.C.G.A. Sec. 50-5-69.

- (1) Place the bidder or offeror at risk for construction; and
- (2) Require labor or building materials in the execution of the contract.

Both Good And Bad Come From The New Law

This construction procurement law benefits local governments that can now use construction delivery methods other than hard bidding. However, this benefit may be offset by the detriment to authorities, particularly development authorities, that now have to structure projects to comply, or so that compliance isn't necessary. So how did this law come to pass, and, overall- is it bad, or is it good?

In response to a perceived need for a uniform public works law, a number of stakeholders (ACCG, GMA, the Georgia School Board Association, the Georgia Utility Contractors Association, and the Associated General Contractors) formed a task force to work on the legislative project that led to the passage in 2002, of HB 1079. This bill was the predecessor to HB 513 that now forms the new Georgia law. State Representative Tom Shanahan and State Senator Billy Ray led this legislative effort.

In an ACCG report, the following was given as the logic behind this law: "Prior to the passage of HB 1079 [the predecessor to HB 513] there was little or no consistency with regard to regulations controlling the various local governments procuring construction services. In addition, the laws that were applicable to all local governments were very antiquated and spread throughout various sections of the Georgia Code. This has made it very difficult for contractors to know and understand the requirements in order to offer construction services from one governmental entity to another."

In the General Assembly, the result was cut and paste drafting that drew on definitions already contained in the Georgia Code, on similar laws in our sister states, and on the American Bar Association Model Procurement Code. As you might expect, this has created the potential for confusion and ambiguities. For example, certain ad separation is specified in terms of number of weeks, but does "week" mean a period of seven consecutive calendar days or a calendar week? Also, if a public body drafted a Georgia RFP so that it specifies a definite number of proposals that will be short-listed, the draftsman may have tracked the ABA Model Procurement Code or another state's law, but not the Georgia law, which has its own requirements.

So what's good about the new Georgia law? It only requires competitive sealed bidding/competitive sealed proposals for public works construction contracts subject to its provisions that: (1) place the bidder or offeror at risk for construction; and (2) require labor or building materials in the execution of the contract. Among other things, this means that normal contracts with construction managers who are not at risk, architects/engineers, program managers, developers, consultants, etc, are not covered.

At the cost of compliance with the new law's requirements, it allows local governments to use the design/build method of project delivery, which the private sector has long enjoyed (one estimate is that 30%-50% of new private sector projects are carried out using that method). This

allows for “fast track” projects, which often can be as important in the public sector as in the private sector. “Cost-plus with a guaranteed maximum” contracts (that can incorporate construction incentives through savings-sharing arrangements) are also now possible under the new law. And some public owners might prefer to use a construction manager who is “at-risk” (i.e., who will actually issue subcontracts and purchase orders), in an effort to align the construction manager’s interests with their own.

Finally, in a competitive sealed proposals procurement, price may be a factor, but it does not have to be the only factor. The local government can use evaluation factors weighted to reflect their true relative importance to the government, as part of the process of selecting the contractor whose proposal it deems “most advantageous” to the government.

So, there is some good, and there is some bad. The bad falls mainly on the project where the economic interest really lies in the private sector.

How Can A Private Company Stay Outside The Law’s Requirements?

Competitive sealed proposals and competitive sealed bidding are now available to public bodies under the new Georgia Local Government Public Works Construction Law. To a local government that can now use construction delivery methods other than hard bidding, this law is a benefit.

Now, suppose that you are a private sector company with a project that qualifies for tax-exempt financing with low interest rates, and that the community is also offering such incentives as *ad valorem* property tax abatement⁴, and cash and in-kind incentives. A bond-financed sale-leaseback structure is a must. This means that the development authority will hold title to your facility. However does this mean that you, the private sector company, have now lost the right to choose your architect and builder?

The answer to that question lies in discerning what the new law does, and does not, require.

First of all, a normal owner-architect arrangement would not be subject to the competitive sealed proposals/competitive sealed bidding requirement. The law only applies to “public works construction contracts.”

For the next leg of the analysis, let’s start by remembering that, traditionally, when a development authority has used a sale-leaseback structure in connection with a financing for a private sector company, it, as the owner, has entered into an agency agreement with the company, as agent. This enabled the company to do such things as let a construction contract in the development authority’s name, as agent for the development authority.

⁴ As used in this White Paper, “abatement” is used informally, to refer to *ad valorem* property tax savings that might, in fact, result from a proper bond-financed sale-leaseback transaction.

Is the traditional agency agreement a problem, if the sale-leaseback is also traditional? That is, nothing is involved but a financing based on the company's credit. In other words, no free land, no cash invested in costs of the project, no credit enhancement through an intergovernmental contract- just a traditional financing.

If the language of the new law were taken literally, it would apply to even a traditional sale-leaseback. The hospital authority lobby has taken this issue so seriously that it got the law amended in 2001 so that in general it would not apply to hospital authorities. However, the law still applies to a public works construction contract entered into by a hospital authority if, in connection with such contract, the hospital authority either: (1) incurs indebtedness and secures such indebtedness by pledging amounts to be received by such authority from one or more counties or municipalities through an intergovernmental contract under Code Section 31-7-85; or (2) receives funds from the state or one or more counties or municipalities for the purpose of financing a public works construction project, which moneys are not for reimbursement of health services provided.

This amendment signals, at least in the case of hospital authorities, when construction is deemed "public" for purposes of the law. The few cases that have addressed this topic seem to have used policy to reach results consistent with the treatment given hospital authorities in the Georgia statute. For example, in *Hughes v. Schafer*, 294 Md. 653, 452 A.2d 428 (1982), the Court of Appeals of Maryland held that: [C]ity financing of construction to be let by the borrower, and not by the City, on the borrower's own land and for the borrower's own use is not a "public work" under [the competitive bidding requirements of the city's charter]." 294 Md. at 665⁵. In contrast, while holding that a prevailing wage requirement did not apply to the typical industrial development revenue bond financed project, a New York Supreme Court decision in *Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 532, 465 N.Y.S.2d 301 (1983), seemed to

⁵ The Court distinguished *Grinnell Co. v. City of Crisfield*, 264 Md. 552, 287 A.2d 486 (1972) (which had held that "Financing land acquisition and construction under the authority of the industrial revenue bond statute "served a valid purpose, and consequently [was] a 'public work or improvement,' " 287 A.2d at 489), on the ground that *Grinnell* "did not involve a competitive bidding statute." 294 Md. at 665. The Court in *Hughes* discussed, in footnote 12, other cases supporting its position: "Decisions in other states, that have addressed claims that certain aspects of municipal transactions, financed by industrial development revenue bonds, violated competitive bidding statutes, have held that the bidding requirements did not apply. See *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 131 N.W.2d 5 (1964); *Gregory v. City of Lewisport*, 369 S.W.2d 133 (Ky.1963); *Bennett v. City of Mayfield*, 323 S.W.2d 573 (Ky.1959); *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331 (Minn.1978) ("tax-increment" financing of general obligation bonds); *Wring v. City of Jefferson*, 413 S.W.2d 292 (Mo.1967); *Clem v. City of Yankton*, 83 S.D. 386, 160 N.W.2d 125 (1968); *Uhls v. State ex rel. City of Cheyenne*, 429 P.2d 74 (Wyo.1967). Justice (later Chief Justice) Rabinowitz of the Supreme Court of Alaska, concurring in *Libby v. City of Dillingham*, 612 P.2d 33, 46 (1980) has presented the following rationale for the result of these cases: In most cases municipalities must negotiate agreements for establishing a new industry in a community on an individual basis with a prospective industry; it is simply unrealistic to require a municipality to issue a general invitation to bid as a means of attracting such potential industrial developers. For that reason, agreements between municipalities and industries for new development, which may include construction of plants financed by municipal bonds, property leasing or sale arrangements, and tax benefits tailored to the specific needs of the industrial developer, have been widely exempted from general competitive bidding requirements." 294 Md. at 665.

view projects with incentives as non-typical, implying⁶ that such projects might then constitute “public works.”

The scope of the Georgia law has not been tested in the context discussed above. A literal application of the Georgia Local Government Public Works Construction Law could well bring even typical development authority projects within the ambit of the law. In other situations, the policy cues in the cases discussed above indicate that such a law would be applied if the development authority had an economic interest in the project, if grant funds were involved, or in similar cases.

The public bidding/competitive proposal provisions of the Georgia Local Government Public Works Construction Law apply only to contracts entered into by a “governmental entity,” and appear not to apply to contracts between a private entity lessee of property from a governmental entity and a private construction contractor. See O.C.G.A. § 36-91-20, which requires “all public works construction contracts subject to this chapter *entered into by a governmental entity with private persons or entities*” [emphasis supplied] to be in writing and provides for competitive

⁶ “Under this analysis the typically financed IDB project, such as the Quo Vadis construction project, cannot be considered a public works project. The private developer involved here initiated the project and retains the risks and benefits associated with ownership. The project’s objective is the establishment of a private manufacturing plant which will produce private goods for sale in the marketplace. The plant will function as a private production facility operated by a private corporation for the sole benefit of its shareholders and will not be for public use. Its construction is being financed, in part, by private money borrowed by a private corporation on its own behalf on the basis of its own credit and the security of its own property. This corporation negotiated the economic terms of the loan and reserves complete control over the project subject only to the security interest required by virtue of the financing arrangement. No public funds are involved and no costs will be reimbursed by the government (see *Matter of Long Is. Light. Co. v. Industrial Comr. of N.Y. State*, supra). Although the agency performs a governmental function and operates as a governmental agency and instrumentality, its involvement is limited to providing tax exempt bonds as an investment incentive to the private investors who finance the project. The conveyance of legal title to the agency with the simultaneous lease back to the company is structured merely as a mechanism to facilitate financing and is not a genuine allocation of ownership in the agency. The economic benefits and burdens of ownership are reserved to the company and the agency serves only as a conduit for the tax benefits provided by such an arrangement. The agency has no formal interest in the venture; it has expended no public funds, either by grant or loan; it has made no guarantees; and it has not extended or committed the State’s credit. The bond which it issued is not an obligation of the State, either directly or indirectly (General Municipal Law, § 870). The agency’s role is strictly that of an intermediary to insure that private parties qualify for tax exemptions; it assumes no risk of loss and has no opportunity to gain. Since the function of the Quo Vadis plant is private and the economic attributes of ownership are vested in Quo Vadis, and not the agency, the Quo Vadis project is not a public works. Neither the fact that the agency holds formal title to the project, nor the fact that certain tax exemptions are accorded to the project, transform that which is, in essence, a private venture into something that may be deemed public. Any tax benefits afforded the private lenders for the project do not translate into subsidies, and thereupon into public funds. Nor can foregone tax revenues convert the project into a public works. The public purpose of the financing scheme must not be confused with the purely private purpose of the venture itself, its structure and its operation. The public involvement concerns only the creation of the economic conditions and incentives which will encourage and foster this type of private development. The promotion of economic development is an incidental benefit which is distinct from the primary objective and function of this project as a private business. This same analysis applies to other typical IDB projects of the Erie County Industrial Development Agency. 94 A.D.2d 540-541. (emphasis added) See *Fred Geller Electrical, Inc. v. Battery Park City Authority, et al.*, 2002 WL 167 7667 (N.Y. Sup.), holding: “However, to fall within the ambit of a public improvement project as contemplated by State Finance Law § 137, the improvement itself must be for the public benefit; it is not enough that the land be owned by a governmental entity.”

bids or proposals. If the participants in a Georgia development authority project don't want the public bidding/competitive proposal provisions of the law to apply, it is important to have the private company sign the construction contract. If this is done, the private company should do so as a principal and not as the agent of the development authority. The provisions in the bond lease and other bond documents, such as the inducement resolution, and any agency agreement, should make it clear that the private company is not acting as an agent of the development authority in connection with any construction activities.

Moreover, the law contains two bonding provisions of concern.⁷ O.C.G.A. § 36-91-70 requires a performance bond on any public works construction contract with an estimated amount greater than \$100,000 and O.C.G.A. § 36-91-90 requires a payment bond for any public works construction contract with an estimated amount greater than \$100,000.

The law provides that no public works construction contract requiring a payment bond shall be valid for any purpose, unless the contractor shall give such payment bond; provided, however, that, in lieu of such payment bond, the governmental entity, in its discretion, may accept a cashier's check, certified check, or cash for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of work provided in the contract. The payment bond or other security accepted in lieu of a payment bond shall be in the amount of at least the total amount payable by the terms of the initial contract and shall be increased if requested by the governmental entity as the contract amount is increased.

Under certain circumstances, and to a specified extent, the law allows a bank or S&L letter of credit to be provided in lieu of a traditional surety bond in the case of the required bid bond or performance bond.. The 2007 `Amendments increased the maximum amount permitted for this from \$300,000 to \$750,000.

The bonding requirements discussed above are substantially the same as the bonding provisions of the old Little Miller Act.⁸ O.C.G.A. § 36-91-91 provides: "If a payment bond or security deposit is not taken in the manner and form required in this article, the corporation or body for which work is done under the contract shall be liable to all subcontractors and to all persons furnishing labor, skill, tools, machinery, or materials to the contractor or subcontractor thereunder for any loss resulting to them from such failure."

⁷ There is also a bid bond requirement in certain cases. O.C.G.A. § 36-91-50.

⁸ Georgia's Little Miller Act" was previously contained in O.C.G.A. § 36-82-100 *et seq.*. Those sections have been repealed, but their provisions relating to performance and payment bonds have been moved to other code sections. Old O.C.G.A. § 36-82-101 provided that: "No contract with this state or with a county, municipal corporation, or any other public board or body thereof for the doing of any public work shall be valid for any purpose unless the contractor shall comply with Code Section 13-10-1." O.C.G.A. § 13-10-1, as it existed prior to its amendment in 2001, required the posting of performance and payment bonds, and it tracked the language of O.C.G.A. § 36-82-101 as to the entities that were required to obtain such bonds and the nature of the projects contemplated by the statute. The repealed O.C.G.A. § 36-82-100, *et seq.* and pre-amendment O.C.G.A. § 13-10-1 applied to public works contracts of both state and local entities.

Neither O.C.G.A. § 36-91-70, requiring a performance bond, nor O.C.G.A. § 36-91-91, requiring a payment bond on public works construction contracts of \$100,000 or more, expressly limit the bonding requirements to contracts to which a governmental entity is a party. *But see*, O.C.G.A. § 36-91-21(g), which provides:

(g) No public works construction contract *with a governing authority* [emphasis supplied] shall be valid for any purpose unless the contractor shall comply with all bonding requirements of this chapter. No such contract shall be valid if *any governmental entity* [emphasis supplied] lets out any public works construction contract subject to the requirements of this chapter without complying with the requirements of this chapter.”⁹

In light of these issues, if a development authority project involves a lease of the land and/or building to a private company, a development authority should give consideration to requiring payment and performance bonds, even if the construction contract is between the private company and the contractor.

In any event, the development authority should always be mindful of compliance issues in this area, particularly if the transaction involves incentives or a economic interest in the project on the part of the development authority or another public body. In that case, additional structuring might be needed. In some cases, for example, it might be possible to structure the transaction as the financing of the purchase by the development authority of a completed facility.

The “Do’s” and “Don’t s”

As discussed above, there are circumstances in which the new procurement law will not apply. Then, a private company that will be the beneficial owner of the project can choose its contractor, without the necessity of competitive sealed bidding or competitive sealed proposals.

Structuring can play an important role in determining whether compliance with the new law is necessary. But there are some “bright line” rules that project participants can always cling to for guidance.

Here are the basic “Do’s” and “Don’t s” under the Georgia Local Government Public Works Construction Law.

“Do’s”

In its report to the counties on the new legislation, ACCG focused on the benefits of providing uniformity and consistency, but touted that the new law: “recognizes current industry practices that provide flexibility for the governmental entity while insuring that public works contracts are awarded in an open and competitive manner.”

⁹ Compare *City of Atlanta v. United Elec. Co. Inc.*, 202 Ga. App 239, 414 S.E.2d 251 (Ga. App. 1991)

So these are the first “do’s”, for such owners as a city or county-

- Do take advantage when appropriate of such construction delivery methods as design/build contracts that allow for fast track projects.
- At the same time, do be sure to insure to comply with the law’s requirements for openness and competitiveness.
- When the beneficial owner of the project is a private company (for example, in a sale-leaseback structure involving a development authority), do be aware of the structuring opportunities that are available, so that the new law does not frustrate the expectations of the company.
- In a bidding situation, do realize that the contract must be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. Also realize that there is an exception- if the bid from the lowest responsible and responsive bidder exceeds the funds budgeted for the contract, the governmental entity may negotiate with such apparent low bidder to obtain a contract price within the budgeted amount. Such negotiations may include changes in the scope of work and other bid requirements.
- Competitive sealed proposals in many cases will be the procurement method of choice. In that case, do realize that the purpose is to make an award to the offeror whose proposal the governmental entity determines to be most advantageous to it, taking into consideration the evaluation factors set forth in the request for proposals.
- Particularly in the case of public-private projects, typically those that involve development authorities, do be aware of the new exemption that the procurement law added to the Georgia laws governing open records. The exemption applies to engineers' cost estimates and pending, rejected, or deferred bids or proposals until such time as the final award of the contract is made, or the project is terminated or abandoned.

“Don’t s”

With all these good “do’s”, there have to be some bad “don’t s”. There are, particularly these-

- If you are the governmental entity, don’t think that you can use change orders to circumvent or manipulate legal requirements. The new procurement law specifically states that change orders cannot be used to evade its purposes.
- In the same vein, don’t think, if you are the public owner, that prior “bad blood” between your governmental entity and a would-be bidder or offeror, alone, can be used as a basis to disqualify the bidder or offeror in the course of a mandatory pre-qualification process. According to the new law, criteria for prequalification must be reasonably related to the project or the quality of the work. The 2007 Amendments provide that a prequalified bidder or offeror cannot be later disqualified without cause.
- Don’t think, if you are the governmental entity, that the law’s prohibition of preventing, or attempts to prevent, competition in bids or proposals applies just to

third parties- it applies to the governmental entity, as well. In fact, it applies to all persons.

- Don't think that the drafters of the new law overlooked members of the governmental entity. A member of the governmental entity is guilty of a misdemeanor if the member takes, or contracts to receive or take, either directly or indirectly, any part of the pay or profit arising out of a contract subject to the new procurement law.
- Don't think, if you are a member of the governmental entity, that there is any new exemption under the procurement law for your participation in the decision-making process. A new exemption was added for open records, not for open meetings.

In addition, a number of "don't s" are aimed directly at the contractor, including these-

- If you are the contractor and knew that the construction contract was let out without compliance with the notice and competitive award requirements of the new law, don't think you are going to get paid. The new law specifically states that a contractor under those circumstances shall not be entitled to receive any payment for such work.
- Don't think, if you are a contractor, that you were overlooked in the new law's "anti-circumvention" provisions. Under the new law, no person who desires to procure such work for himself or herself or for another shall prevent or endeavor to prevent anyone from making a bid or proposal therefor by any means whatever, nor shall such person so desiring the work cause or induce another to withdraw a bid or proposal for the work. In fact, before commencing the work, any person who procures such public work by bidding or proposal has to give an affidavit that such person has not violated these provisions.

Conclusion

Life is what you make it, and so is the Georgia Local Government Public Works Construction Law. The new law can be an impediment to certain projects unless the project participants recognize and take advantage of its structuring possibilities. On the other hand, to a governmental entity that previously could only use hard bidding for its construction projects, the new law opens up a whole new world previously reserved for the private sector. Used wisely, time and budget savings can be the result.

More Information

This White Paper is a quick-reference guide for company executives and managers, participants in the real estate and financial industries, economic developers, and their advisors. The information in this White Paper is general in nature. Various points which could be important in a particular case have been condensed or omitted in the interest of readability. Specific professional advice should be obtained before this information is applied to any particular case.

If you have any questions or comments, we would be pleased to provide more information. Please contact:

Daniel M. McRae, Partner

Seyfarth Shaw, LLP
1545 Peachtree Street, N.E., 7th Floor
Atlanta, Georgia 30309
Telephone: 404/888-1883
Facsimile: 404/892-7056
dmcrae@seyfarth.com
dan@danmrae.info

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