U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: American Eagle Protection Services Corporation

File: B-422346

Date: May 7, 2024

Adam K. Lasky, Esq., Bret C. Marfut, Esq., and Stephanie B. Magnell, Esq., Seyfarth Shaw LLP, for the protester.
Michael Kiffney, Esq., Department of Homeland Security, for the agency.
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DIGEST

1. Protest that the solicitation imposed excessive risk is denied where the solicitation contained sufficient information for offerors to compete intelligently and evenly.

2. Protest that the agency unreasonably selected a fixed-price contract type is denied where the solicitation contained discrete parameters and historical data that provide adequate predictors of the amount of labor to be provided.

3. Protest that the solicitation contained minimum labor rates tables that were inconsistent with an applicable statute is denied where the record did not substantiate the alleged inconsistency.

4. Protest that the minimum labor rates tables were inconsistent with the option to extend services clause is denied where the agency explained that the alleged inconsistency is simply the result of the unique requirements of this acquisition.

DECISION

American Eagle Protection Services Corporation (AEPS), of Leander, Texas, protests the terms of task order request for proposals (RFP) No. 70T05024R5900N002, issued by the Department of Homeland Security, Transportation Security Administration (TSA), for airport screening services. AEPS argues that certain of the RFP's terms are unreasonable.

We deny the protest.

BACKGROUND

TSA may contract with qualified companies as part of the Screening Partnership Program (SPP) to provide security screening services at commercial airports. 49 U.S.C. § 44920. As part of this program, TSA awards indefinite-delivery, indefinite-quantity (IDIQ) contracts to eligible firms. Screening Partnership Program, www.tsa.gov/for-industry/screening-partnerships (last visited, Apr. 24, 2024). A private company is qualified, in part, based on whether the company will provide its employees with compensation and other benefits that are no less than the level of compensation and benefits that would be provided to federal employees. 49 U.S.C. § 44920(c). Also, TSA may only enter a contract for security screening services when the price is equal to or less than the cost to the agency. 49 U.S.C. § 44920(d)(2)(C).

On January 19, 2024, the agency issued the RFP to holders of an SPP IDIQ contract to provide screening services at the Orlando Sanford international Airport (SFB) in Orlando, Florida. Agency Report (AR), Tab 1, RFP at 1, 12; Contracting Officer's Statement at 2.[1] The contractor will be expected to provide screening services at passenger, baggage, and aviation direct access checkpoints. AR, Tab 5, Conformed IDIQ at 167; RFP at 12. The RFP contemplates the issuance of a single task order to be performed on a fixed-price plus award fee basis over a 4-month transition period, an 8-month base period, four 1-year option periods, and one 6-month extension period. RFP at 3-11, 68.

When screening passengers, the contractor is required to operate at least one security lane unless passenger wait times exceed 10 minutes. AR, Tab 5, Conformed IDIQ at 168. If passenger wait times exceed 10 minutes, the contractor must operate one additional lane. *Id.* If the contractor operates every lane available and passenger wait times still exceed 20 minutes, then the contractor must report the instance to the airport technical monitor. *Id.* The SFB has eight security lanes available. RFP at 13.

When screening baggage, the contractor is required to operate all screening locations to ensure that all bags are timely screened. RFP at 169. The contractor must also ensure that checked baggage can be visibly and readily identified as being screened, and that the contractor's approach will not damage the baggage. *Id.*

The RFP includes historical passenger screening data for the period lasting from 2019 through 2023. AR, Tab 2, RFP, amend. 1 at 137. For instance, the RFP provides SFB had 104,891 screened passengers during January 2019, and 1,699,982 during that entire year. *Id.* at 137-138. Similarly, the RFP includes historical baggage screening data for this period, explaining that SFB had 46,916 screened baggage items during January 2019, and 807,263 screened baggage items during that entire year. *Id.* at 138.

Additionally, the RFP provides a federal cost estimate (FCE) of $62,895,271. AR, Tab 3, RFP, amend. 2 at 144. In formulating the FCE, the RFP provides estimated

[1] Citations to the record use the BATES page numbers provided by the agency.

labor, which includes 100 full-time employees and 21 part-time employees. AR, Tab 2, RFP, amend. 1 at 139. The RFP also provides SFB's hours of operation, cautions offerors that the airline business model includes frequent delays, and that weather delays and seasonal shifts in passenger loads may impact security screening operations. *Id.* at 137, 139.

Prior to the February 9, 2024, close of the solicitation period, AEPS filed this protest.[2]

DISCUSSION

AEPS raises multiple allegations challenging the terms of the solicitation. Principally, the protester argues that the RFP imposes excessive risk on the selected contractor. Protest at 14-21. AEPS also objects to the use of a fixed-price contract. *Id.* at 22. AEPS also argues that the RFP's minimum compensation requirements are unreasonable. *Id.* at 22-27. The agency responds that the RFP's terms are reasonable.

We address the allegations in turn.

Excessive Risk

AEPS contends that the RFP imposes excessive risk on the contractor. First, AEPS argues that the RFP does not reasonably limit the amount of work that the contractor may be expected to perform at a fixed price. Protest at 15. Second, AEPS argues that the RFP does not provide adequate and meaningful historical data that allows offerors to factor risk into their proposed pricing. *Id.* at 18-19. Third, AEPS argues that the FCE operates as a price ceiling, which prevents offerors from effectively capturing risk as part of their proposed pricing. *Id.* at 19-20. Finally, AEPS argues that the cumulative impact of these factors creates an unreasonable risk for offerors. *See* Comments at 2-3.

The agency responds that the RFP does not impose excessive risk. Instead, the agency explains that the RFP contains discrete parameters defining the scope of work, including extensive information concerning the airport operations and layout, the screening lanes, and the estimated staffing figures. Memorandum of Law (MOL) at 3-4.

As a general rule, a solicitation must be drafted so that offerors may intelligently prepare their proposals and must be sufficiently free from ambiguities so that offerors may compete on a common basis. *NOVAD Mgmt. Consulting, LLC*, B-419194.5, July 1, 2021, 2021 CPD ¶ 267 at 8. However, there is no requirement that a competition be based on specifications drafted in such detail as to completely eliminate all risk or

[2] Our Office has jurisdiction to review the protest of this task order pursuant to our authority to hear protests related to task and delivery orders placed under civilian agency multiple-award IDIQ contracts valued in excess of $10 million. 41 U.S.C. § 4106(f)(1)(B).

remove every uncertainty from the mind of every prospective offeror; to the contrary, an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency, provided the solicitation contains sufficient information for offerors to compete intelligently and on equal terms. *Id.*

On this record, we do not find any basis to sustain the protester's objection because we agree with TSA that the RFP provides sufficient information. First, we disagree with AEPS that the RFP does not limit the amount of work that the contractor may be expected to perform. Instead, as the agency points out, the RFP contains discrete parameters that limit the scope of work. *See* MOL at 4. To illustrate, the RFP provides the total number of security lanes that the contractor may operate, the requirements when such lanes must be opened, and the airport's hours of operation. By providing this information, the RFP provides an upper and lower bound to the amount of labor that must be provided.

Second, we disagree with AEPS that the RFP does not provide passenger data from which an offeror may reasonably predict how much labor needs to be provided. As referenced earlier, the RFP provides the historical monthly and annual passenger volume for 2019 through 2023 (*i.e.*, the last five-year period). While AEPS may complain that daily passenger volume data and flight density may be more helpful, we disagree that the monthly and annual historical passenger volume data is useless; rather, this data provides sufficient information for offerors to glean meaningful trends in passenger volume. *See* MOL at 3-4. For instance, offerors can determine that March and July typically experience higher passenger volume, while August and September experience lower passenger volume. *See* RFP, amend. 1 at 138. Additionally, the data shows that March passenger volume was 64,833 in March 2022 and 65,821 in March 2023, which provides solid evidence of how many passengers should be expected in that month going forward. *Id.* Further, the agency points out that offerors need only develop an overall staffing plan that should follow the trends present in the monthly and annual data. *Id.* at 4.

Third, we disagree with AEPS that the FCE imposes unreasonable risk because it precludes offerors from incorporating a risk premium into their price proposals to guard against higher estimated labor costs.[3] Protest at 19-21; Comments at 2. While we recognize that the FCE imposes a cap on all costs, including the ability of offerors to factor in risk of unanticipated labor costs, we do not think this creates an unreasonable risk for offerors. Instead, as the agency points out, the FCE effectively disqualifies offerors if their risk tolerance indicates that the proposed price should be higher than the government's cost of providing the services through federal employees. *See* MOL at 9. Although the protester may complain that this position is harsh, it is well settled that there is no right to a government contract. *Pegasus Alarm Assocs., Inc.*, B-225597.2, May 12, 1987, 87-1 CPD ¶ 499 at 3.

[3] As referenced earlier, TSA may only enter an SPP contract when the contract price is equal to or less than the agency's cost of providing the services (*i.e.*, the FCE). 49 U.S.C. § 44920; *accord* MOL at 8.

Based on the RFP's provided information, we conclude that the solicitation does not impose unreasonable risk on offerors because the information, particularly when viewed collectively, allows offerors to compete intelligently and evenly. Indeed, we agree with TSA that the RFP's requirements and provided historical data provide a reasonable amount of detail regarding what, when, and how much performance is required for the upcoming 5-year period. Further, insofar as the amount or cost of labor cannot be perfectly predicted because flight density, airline operations, or consumer preferences may change in the next five years, such uncertainty affects all competitors equally and does not preclude a fair competition.

Additionally, to the extent AEPS complains that the risk exposure for the contractor is simply too great, we are unpersuaded. As noted above, an agency has the administrative discretion to provide a competition that imposes maximum risks on the selected contractor. *See NOVAD Mgmt. Consulting, LLC*, *supra*. Further, a solicitation is not improper because it imposes a risk that a contractor will not be able to recover all costs. *See Steel Circle Bldg. Co.*, B-233055, B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139 at 5. Accordingly, we deny the protest allegation.

Fixed-Price Contract Type

AEPS argues that this task order does not meet the criteria for using a fixed-price contract because the RFP does not articulate definite labor specifications from which an offeror can quantity the amount of labor likely to be required. Protest at 21-22; *see also* Comments at 17. TSA responds that it reasonably selected a fixed-price contract type for this acquisition. MOL at 10.

Contracting agencies have broad discretion to determine their needs and the best method of accommodating them. *General Dynamics Info. Tech., Inc.*, B-421525, May 26, 2023, 2023 CPD ¶ 131 at 5. The selection of a contract type is the responsibility of the contracting agency, and our role is not to substitute our judgement for the contracting agency's, but instead review whether the agency's exercise of discretion was reasonable and consistent with applicable statutes and regulations. *Id.* As relevant, the FAR advises that a fixed-price contract shall be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty. FAR 16.103(b).

On this record, we do not find any basis to object to the agency's determination that a fixed-price contract was appropriate. The protester's challenge wholly relies on arguments supporting its prior allegation that the RFP imposes excessive risk (*i.e.*, the RFP does not permit an offeror to quantify the amount of labor likely to be required). *See* Comments at 17. Contrary to the protester's position, and as discussed above, the agency demonstrates that the RFP contains discrete parameters and historical data, which we agree collectively provides adequate predictors of the amount of labor likely required. *See* MOL at 10. Thus, we conclude that the predictors provide a reasonable basis to develop pricing for this contract, and that using a fixed-price contract was

reasonable for this acquisition. *See* FAR 16.103(b); *see also* MOL at 10. Accordingly, we deny the allegation.

Minimum Labor Rates Tables

Next, AEPS objects to the RFP's minimum labor rates tables as unreasonable because they are inconsistent with 49 U.S.C. § 44920(c). Protest at 22-26. The agency counters that the tables are reasonable. *See* MOL at 12.

As background, 49 U.S.C. § 44920 provides the following:

> A private screening company is qualified to provide screening services at an airport under this section if the company will only employ individuals to provide such services who meet all the requirements of this chapter applicable to Federal Government personnel who perform screening services at airports under this chapter *and will provide compensation and other benefits to such individuals that are not less than the level of compensation and other benefits provided to such Federal Government personnel in accordance with this chapter*.

49 U.S.C. § 44920(c) (emphasis added).

Additionally, the RFP provides that TSA interprets 49 U.S.C. § 44920(c) as requiring any screening company to provide compensation (*i.e.*, direct wages and other benefits) to all private security screeners that is not less than the compensation afforded to federal security screeners. RFP at 59. The RFP also provides minimum labor rates to serve as a "compliance benchmark." *Id.*

The minimum labor rates are expressed in two tables. One table provides the minimum rates for employees based on their years of experience. RFP at 59-60. For example, the table provides that a transportation security officer with one year of experience must receive a labor rate of at least $34.67. *Id.* at 60. The other table provides that the years of experience is determined based on the years of experience an employee has serving on this task order. *Id.* at 59. For example, the table provides that an employee with at least one year but less than two years of experience on this task order must receive at least the minimum labor rate applicable to an employee with one of year of experience. *Id.* at 59.

AEPS contends that the minimum labor rates tables are unreasonably included in the solicitation because the benchmark is inconsistent with 49 U.S.C. § 44920(c). *See* Comments at 19. AEPS argues that the statute requires a contractor to compensate its screeners based on total years of experience similar to how the federal government compensates its employees. *Id.* at 19-24. In this regard, AEPS argues that the minimum labor rates tables are unreasonable because they permit a contractor to compensate its screeners based on years of experience serving under this task order, as opposed to total years of experience providing screening services. *Id.*

TSA responds that the statute does not require private screeners to be compensated identically to their federal counterparts based on seniority; rather, TSA explains that the statute only requires that private screeners be compensated at a level not less than the minimum level provided to federal screeners. MOL at 11-12. Phrased differently, TSA explains that the statute only requires a contractor to compensate its screeners at a rate not less than the rate provided to entry-level federal screeners. *See id.* at 12 ("TSA set minimum compensation rates in RFP Section H.5 based on the minimum pay rates of TSA screeners, accounting for seniority on the current task order."). As a result, TSA argues that the minimum labor rates tables are reasonable because they meet the statute's requirement. *Id.*

To resolve this dispute, we must examine the statutory language. We interpret a statute's text consistent with the ordinary meanings of the words contained therein. *Oracle America, Inc.*, B-416061, May 31, 2018, 2018 CPD ¶ 180 at 16. Further, where the language is clear on its face, its plain meaning will be given effect; that is, if the intent of Congress is clear, that is the end of the matter. *Eastern Med. Equip., Inc., et al.*, B-311423 *et al.*, May 1, 2008, 2008 CPD ¶ 82 at 2; *accord J.Caye Premier Dining, Inc.*, B-421890, Nov. 2, 2023, 2023 CPD ¶ 244 at 5. Additionally, our Office gives deference to the interpretation given a statutory provision by an agency charged with the administration of the statute. *HAP Constr., Inc.*, B-280044.2, Sept. 21, 1998, 98-2 CPD ¶ 76 at 5; *accord Sun Shipbuilding & Dry Dock Co.*, B-150655, Mar. 7, 1963, CPD ¶ 11 (stating "It is a well-established rule of statutory construction that when a statute is fairly susceptible of different constructions, the construction given it by those charged with its administration is always entitled to the highest respect[.]")

On this record, we do not find the RFP's minimum labor rate tables to be objectionable. First, we agree with the agency's interpretation of the statute because we think that interpretation is consistent with the plain meaning of the text. To illustrate, the statute requires a contractor to employ eligible "individuals," and provides that compensation offered to "individuals" must not be less than the "level of compensation" provided to TSA screeners. In this way, the statute collectively references the contractor's employees, while simultaneously describing a singular "level of compensation" that must be satisfied. Given this structure, we interpret the statute as requiring that all employees must be compensated at or above a single, minimum level.

Also, we do not think the statute contains any text which meaningfully supports the protester's interpretation. The statute simply does not provide that each screener must be compensated at levels equivalent to similarly situated agency personnel. Indeed, to arrive at the protester's interpretation, we would need to read qualifying language into the statute, which would be inconsistent with our principles for statutory interpretation.[4] *See Oracle America, Inc.*, *supra*.

[4] As an aside, the protester argues that 49 U.S.C. § 44935(a) and a statutory note thereto should bear on our interpretation of 49 U.S.C. § 44920. Section 44935(a)

(continued...)

In any event, even if we found both the protester's and TSA's interpretations to be reasonable, our jurisprudence requires that we defer to TSA's interpretation. *See* MOL at 12-13, n.16. In this regard, while the protester advances its interpretation, AEPS does not demonstrate that TSA's interpretation is unreasonable because AEPS does not convincingly explain how compensating private screeners at a minimum level is somehow irreconcilable with the plain text of the statute.[5] *See* Comments at 19-25. For instance, AEPS argues that its interpretation is the only obvious reading of the statute because it is consistent with the directive that private screeners must be compensated at "no less than the level" paid to agency personnel. *Id.* at 20. Nevertheless, we fail to understand, and the protester does not explain, how the agency's position is inconsistent with that directive. *See id.* at 20-25. Accordingly, we deny the protest allegation.

Extension Period

As a final allegation, AEPS argues that the minimum labor rates tables conflict with an advisement that prices paid for the 6-month extension period will be set at the rates specified in the preceding option period. Protest at 26-27. AEPS explains that the minimum labor rates tables require annual increases, and that therefore the selected contractor's employees must be compensated higher during the final 6-month extension period than in the fourth 1-year option period. *Id.* Despite this requirement, AEPS explains that the RFP confusingly instructs offerors that the price paid to the contractor will be the at the rates specified in the preceding period of performance (*i.e.*, the fourth 1-year option period). Comments at 26.

TSA responds that this allegation lacks merit because the RFP does not contain any inconsistency. Instead, TSA explains that the SPP program's minimum compensation

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provides, in relevant part, "[t]he [TSA] Administrator shall prescribe standards for the employment and continued employment of, and contracting for, air carrier personnel and, as appropriate, airport security personnel." The statutory note provides that the TSA Administrator shall "establish levels of compensation and other benefits" for federal employees providing airport security services. The protester's argument that the statute and note should be read to support its interpretation of the statute lacks merit. In this regard, neither the provision nor the note explains that private screeners must be individually compensated as if they were employed by the agency.

[5] AEPS argues that the "[a]gency presents no alternative interpretation of the statute." Comments at 20 (emphasis omitted). While the agency may not have directly stated its interpretation, we think its position is relatively clear based on the RFP and the MOL. For example, the agency's memorandum of law explains that it interprets the statute as meaning that "each employee would merely be required to be provided the same minimum compensation[.]." MOL at 12 (emphasis omitted). Additionally, the agency's interpretation is plainly reflected in the RFP's minimum labor rate tables. *See* RFP at 58-60.

requirement creates a unique situation where "unlike under a typical government contract, an SPP contractor may have to perform an additional six months at the prior year's contract price while also having to raise their employees' pay for that period." Agency Resp. to GAO Req. for Additional Briefing at 2. TSA also explains that the protester's allegation relies on false premises--that is, that the agency will exercise the extension option or will exercise the extension option at the conclusion of the fourth 1-year option period. *Id.* at 3-4.

Moreover, TSA responds that the allegation does not demonstrate any competitive prejudice because the agency will evaluate all offerors' proposed pricing for the extension period in the same manner (*i.e.*, by adding six months of the offeror's final 1-year option period price to the offeror's total price). MOL at 13. TSA also argues that the terms of payment for the extension period are an issue of contract administration. *Id.* at 13-14.

As noted earlier, the RFP provides minimum labor rates for the contractor's employees. RFP at 59. The RFP advises that the pay structure allows for annual pay increases. *Id.* The minimum labor rates tables include wages for employees with more than five years of experience on this task order. *Id.* The labor rates for employees with more than five years of experience is higher than the labor rates for employees with four years of experience. *Id.* at 59-60.

The RFP also incorporates FAR clause 52.217-8, Option to Extend Services. This clause provides as follows:

> The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within 5 days.

RFP at 68.

When preparing price proposals, the RFP instructs offerors to use a pricing template. RFP at 83. The pricing template included a tab, titled "52.217-8," that included proposed unit pricing for the 6-month extension period. RFP at 123. This tab instructed offerors not to enter any proposed pricing information because "the Government will evaluate the option to extend services by adding six months of the offeror's final option period price to the offeror's total price." *Id.* The pricing template also instructed that price for base and option periods (including the extension period) would be evaluated to determine whether the proposed prices are fair and reasonable. *Id.* The pricing template also included the following instruction:

> The price for the effort associated with FAR 52.217-8 will not be included in the total awarded value at contract award. If, at the end of the contract's/order's period of performance (the end of the base period or any option period) and within the time period established in the clause, the Government chooses to exercise this option, the pricing will be pursuant to the rates specified in the contract for the preceding performance period.

Id.

Additionally, the RFP's price evaluation criteria referenced the extension period. RFP at 94. In this regard, the RFP specifically advised that the evaluated price would include the extension period, and that the price of the extension period would be determined by using one-half of the proposed price for the final 1-year option period. *Id.* The evaluation criteria also included the same advisement as the pricing template--that is, the price for the extension period would not be included in the awarded value of the contract, and that, if TSA elects to exercise the extension period, then pricing will be pursuant to the rates specified in the contract for the preceding performance period. *Id.*

On this record, we do not find the RFP's terms objectionable. We are persuaded by the agency's explanation that the alleged conflict is simply a result of the unique interaction between the requirements of the SPP program and FAR clause 52.217-8. Agency Resp. to GAO Req. for Additional Briefing at 2. Phrased differently, the agency explains that this acquisition simply requires any contractor to increase its minimum compensation rates to comply with 49 U.S.C. § 44920(c), even though the contract price for any extension period will remain the same as the preceding option year pursuant to FAR clause 52.217-8. *Id.* Thus, the agency explains, and we find that explanation to be reasonable, that the RFP does not contain conflicting provisions but rather simply accommodates the unique requirements of this acquisition.

In this regard, AEPS argues that the agency could have drafted the solicitation to avoid the alleged inconsistency. *See* Resp. to GAO Req. for Additional Briefing at 2-3. For instance, AEPS argues that the agency could have omitted FAR clause 52.217-8 from the solicitation or allowed offerors to propose a separate price for the 6-month extension. *Id.* While we acknowledge that the solicitation could have been drafted differently, we think the protester's suggestions for how the RFP could be written simply reflects disagreement with the best method of acquiring the services; as a result, we do not find such argument persuasive because TSA has the discretion to determine its own needs and the best method of accommodating them. *See Analytical Graphics, Inc.*, B-413385, Oct. 17, 2016, 2016 CPD ¶ 293 at 5 ("A contracting agency has the discretion to determine its needs and the best method to accommodate them.").

Moreover, we also disagree with the protester that the alleged inconsistency causes competitive prejudice. *See Daekee Global Co.*, B-414899, B-414899.2, Oct. 10, 2017, 2017 CPD ¶ 314 at 4 ("In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affects the protester's ability to compete.").

Here, we agree with the agency that the alleged inconsistency neither places AEPS at a competitive disadvantage nor affects the firm's ability to compete.

First, our review of the solicitation confirms that all offerors will be evaluated identically. Indeed, the agency explains that "[a]ll offerors are treated the same in this case, and will have their extension of services price calculated by TSA for evaluation purposes in the same [manner]--by extrapolating from their final option period price." MOL at 13.

Second, we are unpersuaded by AEPS's argument that it will need to change its pricing strategy. The agency explains that any pricing strategy that increases the fourth 1-year option period pricing to accommodate receiving higher contract pricing for the extension period is "based on [a] flawed view of the FAR clause and [the offeror's] assumption that the agency will exercise that [extension] clause--which is a mere possibility, at best." Agency Resp. to GAO Req. for Additional Briefing at 4. In this regard, we agree that any change to an offeror's proposed pricing is simply a matter of an offeror exercising its business judgment, and we do not think that the extension clause impacts an offeror's ability to compete intelligently or evenly as all offerors face this predicament. Accordingly, we deny the protest allegation.

The protest is denied.

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