



Navigating the FAR/DFARS

The Most Confusing and Little Known Clauses

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Prior to joining PilieroMazza, Ms. Rouleau was an associate with Nuzzo & Roberts, LLC where she assisted with motor vehicle accident, premises liability, employment discrimination, and municipal liability cases on behalf of insurance companies and their insureds in state and federal court. She also represented healthcare providers in subpoena matters to ensure HIPAA compliance.

Overview

- M&A Clauses
- Allowable and Unallowable Costs
- Data Rights
- Contractor Team Arrangements and Subcontractor Sales to the Government
- SBA's Mentor-Protégé Program
- Post-Employment Restrictions
- Nonmanufacturer Rule
- IDIQ Ordering Procedures
- Mandatory Disclosure Rule
- Employee Compensation Reporting and Performance of Work Requirements
- Organizational Conflicts of Interest
- Debriefing Requirements

M&A Clauses

- FAR 5252.219-28, Post-Award Small Business Program Rerepresentation
 - (1) Within 30 days after execution of a novation agreement or within 30 days after modification of the contract to include this clause, if the novation agreement was executed prior to inclusion of this clause in the contract.
 - (2) Within 30 days after a merger or acquisition that does not require a novation or within 30 days after modification of the contract to include this clause, if the merger or acquisition occurred prior to inclusion of this clause in the contract.
 - (3) For long-term contracts—
 - (i) Within 60 to 120 days prior to the end of the fifth year of the contract; and
 - (ii) Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter.

- FAR 19.301-2, Gov't Cannot Continue to take Credit if Large

M&A Clauses

- 13 CFR 121.404(g), When is the size status of a business concern determined?
 - (1) Within 30 days of an approved contract novation, a contractor must recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.
 - (2)(i) In the case of a merger or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.
 - (ii) Recertification is required:
 - (A) When a concern acquires or is acquired by another concern;
 - (B) From both the acquired concern and the acquiring concern if each has been awarded a contract as a small business; and
 - (C) From a joint venture when an acquired concern, acquiring concern, or merged concern is a participant in a joint venture that has been awarded a contract or order as a small business.
 - (D) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award.

M&A Clauses

- Former Affiliate Rule - 13 CFR 121.104; 121.106
 - What is a Former Affiliate?
 - Can a division count?
- Once Affiliate Ceased, immediately stop counting revenues and employees
- If Former Affiliate, exclude revenues and employees retroactively for the full period of measurement

Allowable Costs

- Determining Allowability – FAR 31.201-2
 - Reasonable
 - Allocable to the Contract
 - CAS or GAAP
 - Terms of the Contract

Allowable Costs

- Determining Reasonableness – FAR 31.201-3
 - (A) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
 - (B) The restraints or requirements imposed by such factors as generally accepted sound business practices, arms-length bargaining, Federal and State laws and regulations, and contract terms and specifications;
 - (C) The action that a prudent business person, considering responsibilities to the owners of the business, employees, customers, the Government, and the public at large, would take under the circumstances; and
 - (D) Any significant deviations from the established practices of the contractor that may unjustifiably increase the contract costs.

Allowable Costs

- Determining Allocability – FAR 31.201-4
 - A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it-
 - (A) Is incurred specifically for the contract;
 - (B) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
 - (C) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

Unallowable Costs

- Accounting for Unallowable Costs – FAR 31.201-6
 - A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it-
 - Examples:
 - Public Relations and Advertising Costs
 - Lobbying and Political Activity
 - Donations
 - Costs of Amusement and Social Activities
 - Labor Negotiation Costs
 - Losses on Contracts
 - Post-Termination Costs
 - Attorney’s Fees After Litigation Initiated (EAJA Exemption)

Data Rights

- Civilian Agency Contracts
 - FAR 52.227-14, Rights in Data – General
 - Unlimited Rights – Default Rule
 - Limited Rights – Must Expressly Limit
 - Restricted Rights – Computer Software
 - To limit rights must use specific license language in FAR

Data Rights

- Defense Contracts
 - DFARS 52.227-7013 - Rights in Technical Data – Noncommercial Items
 - DFARS 52.227-7014 - Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation
 - Rights Granted to Government
 - Unlimited Rights
 - Government Purpose Rights
 - Limited Rights (Restricted Rights if Noncommercial Computer Software)

Data Rights

- Allowable Restrictions Determined at time of Development

Developed means that an item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered “developed,” the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

Data Rights

- Developed for Computer Programs
 - (1) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;
 - (2) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or
 - (3) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

Data Rights

- DFARS 52.227-7015 – Technical Data – Commercial Items
 - Unrestricted Rights
 - Form, Fit, and Function Data - technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.
 - Necessary for Operation, Maintenance, Installation, or Training
 - Proposed: “segregation and reintegration” data = ““necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes” – more detailed than FFF
 - Restriction
 - Government may not use information to manufacture additional quantities of commercial items

FAR Subpart 9.6 – Contractor Team Arrangements

- What does it mean to be in a “CTA,” i.e., a contractor team arrangement? FAR 9.601 defines a CTA as one of the two following scenarios:
 - (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
 - (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.
- Subsection (2) is easy – this is the traditional prime/sub relationship. However, the implications for subsection (1) are murky. Do CTAs formed for the purpose of pursuing GSA schedule task orders count under subsection (1)? Are JVs/partnerships the preferred method of forming a CTA under subsection (1)? What are the minimum requirements to be in a subsection (1) CTA? If you’re in a subsection (1) CTA and the CTA goes after a contract, who is awarded the contract if there is no JV or separate partnership formed

FAR 52.203-6, Restrictions on Subcontractor Sales to the Government

- When are non-compete provisions contained in teaming agreements enforceable? How do you craft your subcontracts so your teaming partners cannot directly compete against you for the same work?

SBA's Mentor-Protégé Program

- Available to all small businesses
- Key Mentor-Protégé Rules
 - Small businesses can form a joint venture (only unpopulated) with its large business mentor or obtain capital from the mentor in exchange for a 40 percent interest in the protégé
 - Anyone can be a Mentor. Limited to 3 protégés. Must only show that you can meet obligations
 - Protégés must be small under a primary NAICS Code or specify that assistance is for a specific secondary NAICS Code – must have prior experience. Limited to 2 mentors but must show that they are for unrelated NAICS code or that the first mentor lacks certain expertise.

Post-Employment Restrictions

General Overview

- 18 U.S.C. § 207 prohibits certain acts by former employees (including current employees who formerly served in “senior” or “very senior” employee positions) which involve, or may appear to involve, the unfair use of prior Government employment. 5 C.F.R. § 2641.101.
- None of the restrictions of 18 U.S.C. § 207 prohibits any former employee, regardless of Government rank or position, from accepting employment with any particular private or public employer. Rather, the statute prohibits a former employee from providing certain services to or on behalf of non-Federal employers or other persons, whether or not done for compensation. 5 C.F.R. § 2641.101.
- In June 2008, the Office of Government Ethics issued a final rule providing guidance concerning the post-employment restrictions for employees terminating service in the executive branch or in an independent agency (or terminating service from certain high-level Government positions). The final rule, 73 FR 36168-01, removed the provisions located at 5 C.F.R. § 2637 and revised the regulations at 5 C.F.R. § 2641 *et seq.*

Post-Employment Restrictions

Applicability and Types of Restrictions

- 5 C.F.R. § 2641.201 *et seq.* contain permanent and temporary restrictions on a former employee's representations made to the U.S. or to the former employee's former agency.
- 5 C.F.R. § 2641.104 defines "employee" as any officer or employee of the executive branch or any independent agency that is not a part of the legislative or judicial branches.
- Permanent Restriction, 5 C.F.R. § 2641.201(a)
 - No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

Post-Employment Restrictions

Applicability and Types of Restrictions

- Temporary Restrictions
 - For two years after his Government service terminates, no former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his Government service. 5 C.F.R. § 2641.202(a).
 - For one year after his service in a senior position terminates, no former senior employee may knowingly, with the intent to influence, make any communication to or appearance before an employee of an agency in which he served in any capacity within the one-year period prior to his termination from a senior position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former senior employee seeks official action by any employee of such agency. 5 C.F.R. § 2641.204(a).
 - There are other temporary restrictions that concern treaties, foreign entities, and participants in the Information Technology Exchange Program.

Post-Employment Restrictions

Applicability and Types of Restrictions

- Restrictions imposed by the FAR
 - Any person who (i) is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and (ii) by virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information, cannot knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. FAR 3.104-3(a).
 - Any person who (i) is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and (ii) by virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. FAR 3.104-3(b).
 - FAR 3.104-3(d) also restricts a former official from a Federal agency from accepting compensation from a contractor in certain circumstances.

Nonmanufacturer Rule

- For Multiple Item Procurements - If 50% or more of the estimated contract value is composed of items manufactured by small businesses then a waiver is not required. So other 49% can come from large businesses.
- Waiver of the nonmanufacturer rule does not exempt other requirements pertaining to the supplied item, such as the Buy American Act and the Trade Agreements Act

IDIQ Ordering Procedures

- Indefinite-delivery indefinite-quantity contracts are used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award.
- Three types of IDIQ contracts:
 - Definite Quantity
 - Requirements*
 - Indefinite-Quantity*
- Note that you cannot protest an order under a task-order or deliver-order contract, except for:
 - A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or
 - Protests of orders in excess of \$10 million, which may only be filed with GAO.

* Also known as delivery order or task-order contracts

IDIQ Ordering Procedures

- **Ordering, generally –**

- Individual orders should clearly describe all services to be performed or supplies to be ordered so the full cost or price for the work can be established when the order is placed.
- Orders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract. FAR 16.505(a)(2).

- **FAR 16.505 also sets competition requirements for task orders under IDIQ's:**

- If the order is for services, performance-based acquisition methods must be used to the maximum extent practicable. FAR 16.505(a)(3).
- If the order is for items particular to one manufacturer, the contracting officer must justify restricting consideration to an item peculiar to one manufacturer (e.g., a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). FAR 16.505(a)(4).

IDIQ Ordering Procedures

- **FAR 16.505 competition requirements, continued:**

- Orders placed under indefinite-delivery contracts must contain the following information:
 - Date of order.
 - Contract number and order number.
 - For supplies and services, line item number, subline item number (if applicable), description, quantity, and unit price or estimated cost and fee (as applicable). The corresponding line item number and subline item number from the base contract shall also be included.
 - Delivery or performance schedule.
 - Place of delivery or performance (including consignee).
 - Any packaging, packing, and shipping instructions.
 - Accounting and appropriation data.
 - Method of payment and payment office, if not specified in the contract (see 32.1110(e)).

IDIQ Ordering Procedures

■ FAR 16.505 competition requirements, continued:

- For orders under multiple-award contracts, the contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$3,500 issued under multiple delivery-order contracts or multiple task-order contracts. FAR 16.505(b)(1).
- Each order exceeding the simplified acquisition threshold shall be placed on a competitive basis. FAR 16.505(b)(1)(iii)(A).
- For task or delivery orders in excess of \$5.5 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include—
 - A notice of the task or delivery order with a clear statement of the agency's requirements;
 - A reasonable response period;
 - Disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance;
 - Where award is made on a best value basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and
 - An opportunity for a postaward debriefing.

Mandatory Disclosure Rule

- Contractor Code of Business Ethics - FAR 52.203-13
 - The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—
 1. A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
 2. A violation of the civil False Claims Act (31 U.S.C. 3729–3733).

Mandatory Disclosure Rule

- **KNOWING failure**

- Must be actual knowledge, not recklessness or indifference
- FAR Council explicitly rejected “or should have known”
- FAR recognizes that “until the contractor has determined the evidence to be credible, there is no “knowledge.”

- **by a PRINCIPAL**

- officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity (e.g., general manager; head of a subsidiary, division or business segment; and similar positions).
- “principal” will be broadly construed.

Mandatory Disclosure Rule

- **to TIMELY disclose**
 - FAR Council rejected suggestions of 30, 60, and 90 days, but the government will most likely interpret “timely” differently.
 - Commentary makes it clear that the rule contemplates some delay in disclosure to allow companies time to conduct an investigation.
 - Timeliness is measured from the date when it is determined that the evidence is credible

Mandatory Disclosure

■ CREDIBLE EVIDENCE of -

- Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the U.S. Code
 - Failure to disclose other crimes does not fall within the scope of the rule
- Violation of the civil False Claims Act
 - Raises problems with “backdoor” violations
 - Disclosure could be an admission of liability, thus, disclosures must be carefully worded, perhaps with an eye towards defending litigation
 - Employees with access to evidence must be trustworthy as they could become “relators” in a Qui Tam action against the company
- Significant overpayment(s) on a contract other than overpayments resulting from contract finance payments as defined in FAR 32.001
 - “Significant” is not defined but the Commentary states that the term “implies more than just dollar value and depends on the circumstances of the overpayment as well as the amount.”
 - The rule is not meant to cover routine contract payment issues.

Employee Compensation Reporting

- Reporting Executive Compensation – FAR 52.204-10
 - Report top 5 executives (officers, managing partners, other employees in management positions)
 - Total Compensation:
 1. Salary and bonus.
 2. Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Financial Accounting Standards Board's Accounting Standards Codification (FASB ASC) 718, Compensation-Stock Compensation.
 3. Earnings for services under non-equity incentive plans. This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.
 4. Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
 5. Above-market earnings on deferred compensation which is not tax-qualified.
 6. Other compensation, if the aggregate value of all such other compensation (e.g., severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds \$10,000.

Employee Compensation Reporting

- Prime Contractor Reporting
 - In the Contractor's preceding fiscal year, the Contractor received—
 1. 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), cooperative agreements, and other forms of Federal financial assistance; and
 2. \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), cooperative agreements, and other forms of Federal financial assistance; and
 - The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.
- Exemption – Total Income Less Than \$300K

Employee Compensation Reporting

- Subcontractor Reporting
 - In the Subcontractor's preceding fiscal year, the Subcontractor received—
 1. 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), cooperative agreements, and other forms of Federal financial assistance; and
 2. \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), cooperative agreements, and other forms of Federal financial assistance; and
 - The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.
- Exemption – Total Subcontractor Income Less Than \$300K

Performance of Work Requirements

- Limitation on Subcontracting - 13 CFR 125.6
 - Services – Total Cost of the Contract (Including Materials)
 - Supplies – Total Cost of the Contract (Excluding Materials)
 - Construction – Total Cost of the Contract
 - 15% Standard Construction (Excluding Materials)
 - 25% Specialty Construction (Excluding Materials)

- Similarly Situated Contractors
 - Allows for small business to team together to meet performance of work requirements – previously only allowed via Joint Venture
 - Ostensible Subcontractor Rule waived

Organizational Conflicts of Interest

- “An OCI arises when, because of **other relationships or circumstances**, a contractor may be unable, or potentially unable, to render **impartial advice or assistance to the government**, the contractor’s **objectivity in performing the contract work is or might be impaired**, and/or the contractor would have an **unfair competitive advantage**” – FAR 2.101

Organizational Conflicts of Interest

- 3 Types of OCIs:
 - Unequal access to information
 - Biased ground rules
 - Impaired objectivity
- Complex Analysis
 - COs are required to identify and investigate OCIs as early as possible
 - Assessing a potential OCI is a fact-specific inquiry
 - OCIs are dynamic
 - Many OCIs can be mitigated, neutralized, or avoided

Organizational Conflicts of Interest

UNEQUAL ACCESS TO INFORMATION – FAR 9.505-4

- Easiest type of OCI to mitigate (usually no need to have government involvement)
- Focus on limiting access to competitively-useful information
- Proactive and forward-looking
- Techniques & Tools: Firewalls
 - Non-disclosure agreement
 - Locating personnel in separate spaces/facilities
 - Document control
 - Employee training
 - Release of information to all competitors

Organizational Conflicts of Interest

BIASED GROUND RULES – FAR 9.505-2

- Difficult to mitigate Conflict based on affiliation with organization and economic interest
- Firewalls are ineffective
- Use of a separate division/entity is insufficient
- Likely requires government participation in mitigation efforts
- Techniques & Tools
 - Recusal (mostly effective/possible in MAC scenarios) after working with government to pre-identify possible efforts creating an OCI
 - Use of subcontractor combined with employee firewalls and NDAs, with cooperation from the government

Organizational Conflicts of Interest

IMPAIRED OBJECTIVITY – FAR 9.505-3

- Extremely difficult to mitigate
 - Conflict based on affiliation with organization and economic interest
 - Firewalls are ineffective
 - Use of a separate division/entity insufficient
 - Any knowledge or potential knowledge of entity being evaluated likely to trigger immitigability
- Techniques & Tools Use of subcontractor or neutral third party
 - Reliance on objective criteria
 - Government supervision and control necessary to obscure identity of evaluated entity and elimination of identifying information (reason why more procurements limit contractor identifiable information)

Debriefing Requirements

- Debriefings for civilian agencies are governed by FAR 15.506. The DoD implemented enhanced post-award debriefings, which apply to DoD agencies only.
- When is a debriefing required?
 - Pre-award notifications
 - Exclusion from the competitive range
 - Procurements that are set aside
 - Post-award notifications
 - FAR part 15 procurement
 - FAR part 16 procurement (multiple-award contracts) - A debriefing is required when the total price of a task order issued under FAR Part 16 exceeds \$5.5 million.
 - FAR part 8 procurement (GSA Schedule) – No debriefing is required, but an unsuccessful offeror can request that the agency provide a brief explanation of award.
 - FAR part 12 procurement (commercial items)

Debriefing Requirements

- How do you request a debriefing?
 - Pre-award
 - You must request one within 3 days after notice of exclusion from the competition
 - The debriefing will happen “as soon as practicable”
 - The debriefing can occur post-award
 - Post-award
 - You must request one within 3 days after notice of contract award
 - The debriefing should occur within 5 days of the request, but only to the “maximum extent practicable”
- Note that a debriefing can affect the timing of protests.

Debriefing Requirements

- What must the agency tell you in a debriefing?
 - Pre-award
 - The agency's evaluation of significant elements in your proposal
 - A summary of the rationale for eliminating you from the competition
 - Reasonable responses to relevant questions
 - Post-award
 - Significant weaknesses or deficiencies in your proposal
 - Overall evaluated cost and technical rating of you and the awardee
 - Your past performance information
 - Overall ranking of offerors (if developed)
 - Summary of rationale for award
 - Reasonable responses to relevant questions

Questions?



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