



August 8, 2019

Congressional Committees

Nuclear Supply Chain: NNSA Should Notify Congress of Its Recommendations to Improve the Enhanced Procurement Authority

The continued globalization of the nation’s supply chains—including the trend toward using a non-domestic supply chain for some nonnuclear components of nuclear weapons and related systems—has led to heightened risks of potential supply chain exploitation.¹ According to the Department of Energy’s (DOE) National Nuclear Security Administration (NNSA), malevolent exploitation of NNSA supply chain vulnerabilities could affect weapon functionality. For example, according to DOE and NNSA documents, a counterfeit or sabotaged component could cause a nuclear weapon to malfunction. Moreover, some reports have suggested that as components of nuclear weapons or delivery systems are being assembled, an adversary could introduce into the components malicious code or malware that could be activated at any time, thereby undermining confidence in the nuclear weapons systems and their operational effectiveness.²

The National Defense Authorization Act for Fiscal Year 2014 provides the Secretary of Energy with an enhanced procurement authority.³ The authority allows the Secretary, in the interest of national security, to exclude a supplier that may present a significant supply chain risk from procurements of covered systems.⁴ The Secretary is not required to provide the supplier with a reason for exclusion or withholding of consent, and the decision is not subject to review in federal court.

Moreover, under the enhanced procurement authority, the Secretary may exclude suppliers from a procurement made directly by DOE or NNSA, or indirectly by one of the department’s management and operating (M&O) contractors,⁵ either by withholding consent to use a

¹According to a document from the Defense Security Service and the National Counterintelligence and Security Center, some examples of supply chain exploitation may include, but are not limited to, the introduction of counterfeit or malicious products or materials into the supply chain to gain unauthorized access to protected data, alter data, disrupt operations, interrupt communication, reverse engineer, or otherwise cause disruption to the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of an equity.

²For example, see Nuclear Threat Initiative, *Nuclear Weapons in the New Cyber Age: Report of the Cyber-Nuclear Weapons Study Group* (Washington, D.C.: September 2018), and Chatham House, The Royal Institute of International Affairs, *Cybersecurity of Nuclear Weapons Systems: Threats, Vulnerabilities, and Consequences* (London: January 2018).

³Pub. L. No. 113-66, § 3113(a), 127 Stat. 672, 1053 (2013) (codified as amended at 50 U.S.C. § 2786).

⁴Covered systems are primarily nuclear weapons, components, and items associated with the design, production, and maintenance of such weapons; items associated with the design and development of nonproliferation and counterproliferation systems; and certain information technology systems.

⁵M&O contracts are agreements under which the government contracts for the operation, maintenance, or support, on its behalf, of a government-owned or government-controlled research, development, special production, or testing

particular supplier or by directing that the supplier be excluded from the procurement. According to NNSA officials, DOE does not typically make direct procurements of systems that the enhanced procurement authority covers, and the Secretary of Energy previously delegated responsibility for assessing the potential use of this authority to the Administrator of NNSA. In circumstances in which DOE or NNSA would use the enhanced procurement authority, the Secretary must notify appropriate parties of the action and the basis for the action only to the extent necessary to carry it out. The Secretary must also notify other federal agencies responsible for a procurement that may be subject to the same or similar supply chain risk in a manner and to the extent consistent with the requirements of national security.

Before exercising the enhanced procurement authority, the Secretary of Energy must fulfill several requirements as described in the act:

- obtain a risk assessment demonstrating that there is a significant supply chain risk to a covered system;⁶
- make a determination in writing, in unclassified or classified form, that the use of the authority is necessary to protect national security by reducing supply chain risk, if less restrictive measures are not reasonably available to reduce the risk, and in a case in which the Secretary plans to limit disclosure of information, the risk to national security of the disclosure of information outweighs the risk of not disclosing the information; and
- submit to appropriate congressional committees, not later than 7 days after the date on which the Secretary makes the determination, a notice of such determination, in unclassified or classified form, which includes a description of the agency's needs, a summary of the risk assessment, and the basis for the determination.

According to the National Defense Authorization Act for Fiscal Year 2019, the authority shall terminate on June 30, 2023.⁷

The National Defense Authorization Act for Fiscal Year 2014 includes a provision for us to report on DOE's use of the enhanced procurement authority and on the status of any previous recommendations we made in this area. We have issued two reports in response to this provision. In August 2016, we found that DOE and NNSA had not used the authority and had not fully assessed either the circumstances under which the authority might be useful or whether adequate resources were in place for its use.⁸ We recommended that DOE direct NNSA to assess the circumstances that might warrant using the enhanced procurement authority and take additional actions, based on the results, such as developing processes to use the authority and examining whether the agency had adequate resources for doing so. DOE and NNSA agreed with our recommendation. In August 2018, we found that the Secretary of Energy had not used the enhanced procurement authority and that NNSA had taken actions to assess

establishment wholly or principally devoted to one or more of the major programs of the contracting federal agency. 48 C.F.R. § 17.601.

⁶According to the enhanced procurement authority provision, "supply chain risk" is defined as the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of a covered system or covered item of supply so as to surveil, deny, disrupt, or otherwise degrade the function, use, or operation of the system or item of supply. The provision does not define "significant" risk.

⁷Pub. L. No. 115-232, § 3117(a), 132 Stat. 2292 (2018) (codified at 50 U.S.C. § 2786(g)).

⁸GAO, *Nuclear Supply Chain: DOE Should Assess Circumstances for Using Enhanced Procurement Authority to Manage Risk*, [GAO-16-710](#) (Washington, D.C.: Aug. 11, 2016).

circumstances that may warrant using the authority.⁹ This report updates our previous work by examining the extent to which DOE used its enhanced procurement authority to manage supply chain risks and assessed the circumstances and factors that officials reported as affecting its use since August 2018.

To conduct this work, we reviewed the conditions for using the enhanced procurement authority as described in the act. We reviewed our August 2018 and August 2016 reports and their supporting documentation, which included DOE and NNSA documents detailing their efforts to address our August 2016 recommendation. We also reviewed relevant information from the Federal Acquisition Regulation (FAR).¹⁰ We interviewed NNSA officials involved with any decision to use the authority and with developing the agency's assessment of the circumstances and factors that could affect using the enhanced procurement authority. Specifically, we spoke with officials from NNSA's Office of Acquisition and Project Management responsible for leading the development of the agency's assessment of the circumstances and factors that could affect using the enhanced procurement authority. We also spoke with officials from NNSA's Office of the Chief Information Officer. We interviewed these officials to determine the extent to which DOE has used the authority, including whether any additional circumstances in which to use the authority may have been identified since August 2018. We also interviewed the NNSA officials to determine the status of the agency's actions taken in response to our August 2016 recommendation and, where applicable, to ascertain the status of NNSA's assessment of the circumstances and factors that could affect DOE's and NNSA's use of the authority. We compared NNSA's actions to federal internal control standards related to communicating with external parties.¹¹

We conducted this performance audit from January 2019 to August 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

NNSA—a separately organized agency within DOE—is responsible for, among other things, enhancing national security through the military application of nuclear energy, maintaining and modernizing infrastructure for the U.S. nuclear weapons stockpile, and supporting the nation's nuclear nonproliferation efforts. To execute its missions, NNSA relies on M&O contractors to manage and operate its eight laboratory, production plant, and testing sites, collectively known as the nuclear security enterprise.¹² In addition to the enhanced procurement authority, DOE, NNSA, and the M&O contractors carrying out the various production and procurement activities

⁹GAO, *Nuclear Supply Chain: DOE Has Not Used Its Enhanced Procurement Authority but Is Assessing Potential Use*, [GAO-18-572R](#) (Washington, D.C.: Aug. 2, 2018).

¹⁰The FAR is the primary regulation that all federal executive branch agencies use to acquire supplies and services with appropriated funds.

¹¹GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

¹²Specifically, the nuclear security enterprise includes eight government-owned, contractor-operated sites, of which one is a test site, three are national nuclear weapons design laboratories, and four are nuclear weapons production plants. Seven M&O contractors manage and operate these sites.

at these sites have several other tools available for managing supply chain risks, as shown in table 1.

Table 1: Examples of Tools That the Department of Energy (DOE), National Nuclear Security Administration (NNSA), and Management and Operating (M&O) Contractors Can Use to Manage Supply Chain Risks

Tool	Description
Intelligence evaluations	DOE’s Office of Intelligence and Counterintelligence, which supports the department by conducting intelligence and counterintelligence activities, can provide information to M&O contractors when there are potential issues of concern related to a “foreign nexus” of a supplier or potential supplier. ^a If a foreign nexus is identified, the office can perform an in-depth evaluation to determine whether the supplier poses a risk to the supply chain.
M&O-approved supplier lists	As nonfederal entities, M&O contractors are not subject to the same procurement restrictions as federal entities and may develop lists of approved suppliers of nuclear weapons components and certain information technology systems. M&O contractors may add suppliers to an approved supplier list after an evaluation of their ownership or management based on publicly available data and a review of their ability to meet technical and quality assurance requirements. M&O contractors also take steps to periodically update their approved supplier lists, including by conducting evaluations and audits of the suppliers.
Responsible supplier requirement	Under the Federal Acquisition Regulation (FAR), a federal entity can contract only with a “responsible” supplier. ^b According to DOE officials, a supplier that presents a supply chain risk may not be considered a responsible supplier and may be excluded from a federal contract for a covered system. NNSA officials stated that if they excluded a supplier for not meeting the responsible supplier requirements, NNSA would likely have to disclose the reasons for not considering a supplier to be responsible and the decision may be challenged in a bid protest.
Suspension and debarment procedures ^c	A suspension is a temporary exclusion pending the completion of an investigation or legal proceeding that generally may not last longer than 18 months. A debarment is exclusion for a reasonable, specified period depending on the seriousness of the cause, but which generally should not exceed 3 years. Typically, according to NNSA officials we interviewed, suspension and debarment occur as a result of publicly known facts that may be disclosed in public indictments and convictions rather than from intelligence information, and suspensions and debarments may be challenged in federal court.

Source: GAO analysis of prior GAO reports, the FAR, and documents from DOE that also apply to NNSA. | GAO-19-606R

^aAccording to DOE regulations, a foreign nexus means “specific indications that a covered person is or may be engaged in clandestine or unreported relationships with foreign powers, organizations or persons, or international terrorists; contacts with foreign intelligence services; or other hostile activities directed against DOE facilities, property, personnel, programs or contractors by or on behalf of foreign powers, organizations or persons, or international terrorists,” 10 C.F.R. § 709.2. See also DOE Order 475.1, which establishes Counterintelligence Program requirements and responsibilities for DOE, including NNSA.

^bThe FAR provides that “[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.” 48 C.F.R. §9.103(b). Additionally, under the Competition in Contracting Act, federal agencies may award procurement contracts only to “responsible bidders” or “responsible sources.” 10 U.S.C. § 2305(b)(3); 41 U.S.C. § 3702(b) (“responsible bidders” in sealed bidding); 10 U.S.C. § 2305(b)(4)(C); 41 U.S.C. § 3703(c) (“responsible sources” in negotiated procurements).

^cThese are tools that agencies may use to protect the government’s interests from suppliers that are not responsible by excluding individuals, companies, and grantees from receiving federal contracts, grants, and other forms of financial assistance based on various types of misconduct, such as fraud, bribery, tax evasion, and any other offense indicating a lack of business integrity.

DOE Has Not Used the Enhanced Procurement Authority Because of Several Concerns, and NNSA Is Drafting a Report That Recommends Ways to Improve Its Usability

NNSA Has Identified Circumstances That Could Warrant Using the Enhanced Procurement Authority but Is Unlikely to Use It Because of Several Concerns

NNSA officials stated that DOE has not used its enhanced procurement authority since it was authorized in December 2013.¹³ Since our August 2018 report, NNSA officials identified additional circumstances that could warrant using the enhanced procurement authority if the circumstances could not be addressed through another means.¹⁴ Specifically, these officials told us that the identified circumstances relate to certain software companies that have ties to foreign countries of concern. According to the NNSA officials, the software that these companies develop could present potential security vulnerabilities that could allow for unauthorized access to sensitive information.

However, NNSA officials said that because of concerns about the enhanced procurement authority, the agency is unlikely to use the authority as part of its efforts to manage the risk of procuring software products from these companies. In particular, the officials told us that NNSA views the following factors as affecting the agency's potential use of the authority:

- **Time-consuming process.** NNSA officials stated that it could take a significant amount of time to be able to eliminate a supplier from the competitive pool—possibly 6 months or longer, according to one NNSA senior procurement official—by using the enhanced procurement authority. This, they said, is because the statute authorizes the Secretary of Energy specifically to grant approval to use the authority, and presenting information to the Secretary of Energy requires a lengthy internal process. The officials told us that such a time-consuming process could delay ongoing procurement actions. NNSA officials also stated that while DOE and NNSA may be able to take steps to expedite the department's internal review process, the process would likely still be time-consuming because of the number of senior officials within DOE and NNSA that would need to review the information before it is sent to the Secretary of Energy.
- **Singular use authority.** According to NNSA officials we interviewed, the authority is applicable on a case-by-case basis when a specific supply chain risk has been identified for a specific procurement action. That is, if a specific risk is identified related to a specific supplier, then use of the enhanced procurement authority would be applicable only to that particular procurement and not to any existing or yet-to-be awarded contracts that also include that supplier. Therefore, the NNSA officials stated that while the agency could eliminate the supplier from the competitive pool for one particular procurement, such action would not allow NNSA to remove the supplier from existing contracts and subcontracts or prevent the supplier from being considered in the future.

As a result of such concerns, NNSA officials stated that they were continuing to examine whether other existing tools or authorities could be used to manage the supply chain risks associated with the specific circumstances that have recently been identified as creating potential security vulnerabilities. According to NNSA officials, the agency could apply certain

¹³Pub. L. No. 113-66, § 3113(a), 127 Stat. 672, 1053 (2013) (codified as amended at 50 U.S.C. § 2786).

¹⁴In August 2018, we found that NNSA identified one circumstance that may have warranted using the enhanced procurement authority. However, DOE and NNSA ultimately did not need to use the authority because a Department of Homeland Security action addressed the concern. [GAO-18-572R](#).

statutory exceptions that permit the awarding of contracts without providing for full and open competition in certain circumstances.¹⁵ For example, the officials stated that in addition to applying the FAR's responsible supplier requirement to exclude a supplier that may pose a supply chain risk from a federal contract, NNSA could pursue use of the following exceptions to the general requirement to obtain full and open competition:

- **Unusual and compelling urgency.** As described in the FAR, this exception can be used in circumstances when an agency's need for supplies or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.¹⁶
- **National security.** As described in the FAR, full and open competition need not be provided for when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.¹⁷

According to NNSA officials, another way in which the identified circumstances could be resolved is through other actions carried out across the federal government, such as through the enactment of federal law prohibiting federal government entities from procuring supplies or services from suppliers of concern.¹⁸ Similarly, the officials said that if the circumstances warranted such an action, the Department of Homeland Security has authority to issue a directive for all federal executive branch departments to discontinue using services or products from the suppliers of concern.¹⁹ For example, as we found in August 2018, such action by the Department of Homeland Security resolved a circumstance for which NNSA was considering use of the enhanced procurement authority.²⁰

NNSA officials stated that the agency finds the enhanced procurement authority useful as a tool when no other alternatives are suitable. The officials added that unless changes are made to the enhanced procurement authority, such as the level of approval—which is currently the Secretary of Energy—and flexibility to apply the authority across multiple contract actions, it is likely that NNSA will continue to use other tools and authorities to address the identified circumstances and manage other supply chain risks.

¹⁵See 48 C.F.R. § 6.301(a). Although agencies are still required to request offers from as many potential sources as practicable, noncompetitive contracts may present additional risk to the government. 48 C.F.R. § 6.301(d).

¹⁶48 C.F.R. § 6.302-2(a)(2).

¹⁷48 C.F.R. § 6.302-6(a)(2).

¹⁸For example, see the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1634 (2017).

¹⁹In particular, such circumstances would pertain to ensuring the safeguarding of federal information and information systems from a known or reasonably suspected information security threat, vulnerability, or risk, for which the Department of Homeland Security could issue a binding operational direction to all federal agencies. 44 U.S.C. §§ 3552(b)(1), 3553(b)(2), 3554(a)(1)(B)(ii).

²⁰The Department of Homeland Security undertook this type of action when it issued a directive in September 2017 for all federal executive branch departments and agencies to discontinue any use of and remove certain information security products from a specific supplier from all federal information systems. See Department of Homeland Security, *Binding Operational Directive BOD-17-01* (Washington, D.C.: Sept. 13, 2017).

NNSA Is Drafting a Report That Recommends Changes to the Authority to Improve Its Usability, but Has Not Formally Communicated the Results to Congress

NNSA officials we interviewed told us that they are continuing to work on a draft report in response to our August 2016 recommendation that the agency assess circumstances that may warrant using the enhanced procurement authority and establish processes for using it.²¹ According to the officials, the draft report is undergoing further internal review and will ultimately be reviewed and approved by the Secretary of Energy. NNSA officials previously told us that they planned to finalize the draft report in October 2018; however, in May 2019, NNSA officials estimated that the report would be finalized by the end of the calendar year.

According to NNSA officials, the draft report includes suggestions for amending the authority to address NNSA's concerns by (1) delegating approval authority to a lower level than the Secretary of Energy to reduce the amount of time it may take to get approval to use the enhanced procurement authority and (2) allowing NNSA to apply the enhanced procurement authority across multiple contract actions that include the same supplier of concern. DOE officials told us that they agree with NNSA's suggestion that the enhanced procurement authority be delegated to a lower level and also suggested that among other things the authority be broadened to include more than covered systems.²² The DOE and NNSA officials further stated that if it is amended to address these concerns, the enhanced procurement authority could provide DOE and NNSA with a powerful tool to manage supply chain risks in ways that other tools and authorities cannot.

However, as of July 2019, because NNSA had not yet finalized its report, the agency has not yet formally communicated its recommendations for amending the enhanced procurement authority to relevant congressional committees. Under federal internal control standards, management should communicate the necessary quality information externally to achieve the entity's objectives, such as communication with the oversight body, so that body can have information on significant matters relating to risks, changes, or issues that impact the entity's internal control system.²³ An element of quality information is that it should be communicated on a timely basis.

The report NNSA is drafting in response to our August 2016 recommendation may be communicating information about the agency's concerns and suggested changes to Congress. However, NNSA's planned time frame for completing the report has continued to slip, which delays Congress from receiving the information and considering whether to act on it. Over the past decade, the National Defense Authorization Act—legislation that Congress could use to amend the authority—has typically been enacted by the end of the calendar year. As such, if NNSA does not complete the report until the end of the calendar year, it may be too late for congressional decision-making to include any changes to the authority in the National Defense

²¹As we found in August 2018, NNSA officials previously explained to us that DOE delegated the assessment to NNSA because DOE does not typically directly procure systems covered by the enhanced procurement authority. [GAO-18-572R](#).

²²Specifically, the DOE officials suggested that the authority's definition of a covered system be broadened to include information technology systems that are not directly part of a national security system, in part to make the authority useful to other entities within the department, such as the Power Marketing Administrations, which have responsibility for the electrical grid. DOE officials did not discuss issues related to applying the authority across multiple contract actions.

²³[GAO-14-704G](#).

Authorization Act for Fiscal Year 2020, which could further delay Congress's consideration of the information until fiscal year 2021. By formally communicating the agency's concerns about, and suggested changes to, the enhanced procurement authority in a timely manner, NNSA would provide Congress with the relevant information to support congressional decision-making about how best to amend the authority and make it more useful to DOE and NNSA for managing supply chain risks.

Conclusions

The trend in recent years toward using a non-domestic supply chain for some nonnuclear components of nuclear weapons and related systems has increased the risks of potential supply chain exploitation. NNSA has identified circumstances that could warrant using the enhanced procurement authority to manage supply chain risks, but neither DOE nor NNSA has used the authority since it was enacted in December 2013. NNSA is drafting a report that suggests ways in which the authority could be amended to address NNSA's concerns about the authority and improve its usability. However, because NNSA has not finalized its draft report and that report has been delayed by over a year, NNSA has not yet formally communicated its concerns about, and suggested changes to, the enhanced procurement authority to relevant congressional committees. NNSA now plans to complete its report by the end of 2019, which may be too late for Congress to consider during this legislative cycle or the next. By communicating the agency's concerns about, and suggested changes to, the enhanced procurement authority in a timely manner, NNSA would provide Congress with relevant information to support congressional decision-making about how best to amend the authority and make it more useful to DOE and NNSA for managing supply chain risks.

Recommendation for Executive Action

The Secretary of Energy, in coordination with the Administrator of NNSA, should formally communicate to the relevant congressional committees concerns about, and suggested changes to, the enhanced procurement authority in a timely manner. (Recommendation 1)

Agency Comments

We provided a draft of this report to DOE and NNSA for review and comment. In its comments reproduced in the enclosure, NNSA concurred with our recommendation. NNSA stated that actions the agency is already pursuing are consistent with our recommendation. NNSA also indicated that an effort would be made to finalize the report by September 30, 2019.

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We are sending copies of this report to the appropriate congressional committees, the Secretary of Energy, the Administrator of the National Nuclear Security Administration, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff members have any questions concerning this report, please contact me at (202) 512-3841 or bawdena@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff members who made key contributions to this report include Hilary Benedict (Assistant Director), Kevin

Remondini (Analyst in Charge), Kevin Bray, Pamela Davidson, Gwen Kirby, Thomas Twambly, Eric Winter, and William Woods.

A handwritten signature in black ink, appearing to read "Allison Bawden". The signature is fluid and cursive, with the first name "Allison" written in a larger, more prominent script than the last name "Bawden".

Allison Bawden
Director, Natural Resources and Environment

Enclosure

List of Committees

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House of Representatives

Enclosure: Comments from the National Nuclear Security Administration



Department of Energy
Under Secretary for Nuclear Security
Administrator, National Nuclear Security Administration
Washington, DC 20585



July 22, 2019

Ms. Allison B. Bawden
Director, Natural Resources
and Environment
U.S. Government Accountability Office
Washington, DC 20548

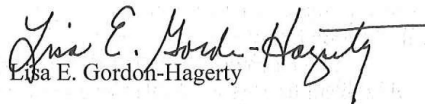
Dear Ms. Bawden:

Thank you for the opportunity to review the Government Accountability Office (GAO) draft report, *Nuclear Supply Chain: NNSA Should Notify Congress of Its Recommendations to Improve the Enhanced Procurement Authority* (GAO-19-606R). GAO's recommendation to communicate any concerns or suggested changes regarding the use of enhanced procurement authority to relevant congressional committees is consistent with the actions that the Department of Energy's National Nuclear Security Administration (DOE/NNSA) is already pursuing.

As committed in response to GAO's prior report, *Nuclear Supply Chain: DOE Should Assess Circumstances for Using Enhanced Procurement Authority to Manage Risk* (GAO-16-710, August 2016), DOE/NNSA has evaluated potential situations that might warrant the use of enhanced procurement authority and has drafted an evaluation report with suggestions for making the procurement authority easier to use. The report is going through management review and, once completed, will facilitate conveyance of DOE/NNSA's recommendations to relevant committees. DOE/NNSA will make every effort to finalize the report by September 30, 2019, to address GAO's timing observation.

If you have any questions about this response, please contact Dean Childs, Director, Audits and Internal Affairs, at (301) 903-1341.

Sincerely,


Lisa E. Gordon-Hagerty



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