

Procedural guide:
Negotiated procedure with prior call for competition
pursuant to § 13 (1), 15 (1) SektVO



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1. PRELIMINARY NOTES

1.1 EU-wide procurement notice

TenneT, hereinafter also referred to as the "Contracting Entity" (the company issuing the call to tender in the specific procurement procedure can be found in the specifications of the EU notice) has announced its intention to contract the services in question throughout the EU. On the basis of this procurement notice, all interested economic operators (interested parties) are invited to submit a request to participate in accordance with § 15 (1) of SektVO [German Regulation on the award of contracts in the field of transport, drinking water supply and energy].

1.2 Procurement procedure

The purpose of the procurement procedure is to award the contract to the most suitable economic operator which, on the basis of the published award criteria, submits the most economically advantageous tender.

The procurement procedure takes the form of a negotiated procedure with prior call for competition (see §§ 119 (5) of the German Competition Act [GWB: *Gesetz gegen Wettbewerbsbeschränkungen*], 13 (1), 15 SektVO).

The call for competition serves to identify suitable economic participants. Only suitable economic operators will be invited to submit tenders.

The Contracting Entity reserves the right to award the contract to the initial tenders without negotiations (§ 15 (4) SektVO).

1.3 Questions concerning the procurement procedure and bidding documents / obligation to inquire

The Contracting Entity shall make the bidding documents (together with the relevant forms) available via the online awarding platform Negometrix (www.negometrix.com; hereinafter "Negometrix"). The data areas there are separated according to the procedural phases.

Interested economic operators are obliged to register on Negometrix in order to be regularly informed of new applicant questions answered (in the "Questions and Answers" section) and notifications from Contracting Entities.

1.4 Bidding documents

The bidding documents include all documents prepared by the Contracting Entity or to which it makes reference in order to define parts of the procurement procedure. They include all information required to enable interested companies to make a decision to participate in the procurement procedure and to define the services to be tendered for and the general conditions for the performance of the contract.

Individual bidding documents are each provided with a consecutive page number and the total page number. Interested parties must verify the completeness of the documents provided to them immediately upon receipt. If the documents are incomplete, they must notify via the platform Negometrix.

If, in the opinion of interested parties, the notice or the bidding documents contain ambiguities or contradictions or, in the opinion of an interested party, they violate applicable law, the Contracting Entity must be informed of this without delay. Reference is made to § 160 (3) GWB (Act against Restraints of Competition (Competition Act – GWB))

1.5 Guarantee, representation, warranty

The Contracting Entity makes no guarantees, representations or warranties with regard to the information contained in the bidding documents. The scope of guarantees, representations and warranties as well as the other rights and obligations with regard to the object of the project and any legal consequences resulting from the violation of such guarantees, representations and warranties, are exclusively determined by the draft contracts submitted as a component of the bidding documents. The Contracting Entity shall not incur any obligations whatsoever resulting from the submission of a tender to the said Contracting Entity.

1.6 Information

The information provided by the Contracting Entity has been compiled to the best of its knowledge and belief. However, the information on the project is not intended to completely replace the interested party's own checks on the economic, technical and legal circumstances. The interested parties are therefore expressly requested to carry out their own more extensive investigations and checks of the economic, technical, financial and legal situation and requirements for the services to be awarded, to the extent possible, before submitting a tender.

1.7 Lot allocation

The EU announcement shall specify how the object of the call to tender is to be subdivided into lots or how different lots may be combined. In the request to participate, the applicant must clearly indicate which lots it is applying for.

1.8 Language

The language of the proceedings is English. All correspondence from the Contracting Entity will be in English

All documents of the applicant or tenderer must be drawn up in English. The comments on the contract must be made in English as well. For information and evidence that is not in English (e.g. certificates from foreign authorities), certified translations in English must be enclosed in addition to copies of the foreign-language originals.

The language of negotiation is English. However, the Contracting Entity reserves the right to make declarations in German if required.

1.9 Clarification of the concept of economic operators in the context of the procurement procedure

- **Economic operator:** An enterprise or a consortium formed by several enterprises
- **Interested party:** An economic operator that has indicated to the Contracting Entity an interest in participating in the call to tender.
- **Applicant:** An interested party who participates in / submits a request to participate in the call to tender within the deadline.
- **Tenderer:** An applicant who has proved to be suitable in the course of the call for competition and receives an invitation to submit a tender.
- **Contractor:** The tenderer/s that, by submitting the most economically advantageous tender, have prevailed over their competitors, and have been awarded the contract in this procurement procedure.
- **Consortium:** A consortium is an association of multiple enterprises. A consortium is treated as a single competitor (§ 50 (2) SektVO). If applicants are addressed in the bidding documents, this also refers to the joint participation of a consortium.

Regulations that specifically concern a consortium shall in this respect exclusively use the terms "Group of applicants or tenderers" or "Consortium".

- **Consortium leader:** The sole legal representative of the consortium. The consortium must appoint an authorized representative (consortium leader) for the conclusion and implementation of the contract. The authorized representative shall be available to the Contracting Entity in this procurement procedure and after any award of contract as a contact person for the group of applicants and shall be the sole representative of the consortium. It is only permitted to change the consortium leader under exceptional circumstances.
- **Group of applicants:** See Consortium
- **Group of tenderers:** See Consortium
- **Representatives of the group of applicants/ tenderers:** See Consortium leader

1.10 Annulment of the procedure

Tenderers will be informed immediately in writing of any cancellation (in whole or in part [per lot]) of the call to tender pursuant to § 57 SektVO.

1.11 Eligibility criteria

The criteria for participation in the tender which must be satisfied within the the call for competition are specified in paragraphs III.1.1 to III.1.3 of the EU announcement or are being linked to directly with the corresponding document in Negometrix.

1.12 Group of applicants/ tenderers

The formation of groups of applicants / tenderers is permitted. In the call for competition, groups of applicants must indicate which member is entitled to represent them, including the right to submit an application to participate that is binding for all members and a tender that is binding for all members (see the contract notice). The members of the group of applicants / tenderers are jointly and severally liable for the assumption of contractual obligations.

The ability and permission to exercise the profession / the non-existence of the grounds for exclusion under § 123 and § 124 GWB must be proven individually for each member of a group of applicants. For the other eligibility criteria, the decisive factor is the group of applicants as a whole. In this respect, each member shall fill in

the relevant forms only insofar as applicable to them. Where reference is made to the eligibility of a third party, an additional form must be submitted.

The Contracting Entity must be notified in advance of any changes in the membership of a group of applicants / tenderers, and their written consent is required. At the request of the Contracting Entity, the group of applicants / tenderers must prove that the group of applicants / tenderers still has the necessary eligibility as defined in the contract notice even after the change.

1.13 Use of subcontractors

The use of subcontractors is permitted.

Insofar as the applicant relies on the capacities of third party companies for the eligibility test, it will be verified whether the third party company whose capacities the applicant plans to use fulfils the relevant suitability criteria and whether there are grounds for disqualification. If the third-party enterprise does not fully meet the relevant eligibility criteria or if there are compelling grounds for disqualification, the applicant will need to replace this enterprise. The Contracting Entity reserves the right to demand the replacement of the third-party company if there are grounds for disqualification. The applicant will be given a reasonable period of time to do so. It is required that the applicant and the third party company must be jointly liable for the execution of the contract in accordance with the scope of the use of third party eligibility [*Eignungsleihe*] pursuant to § 47 (3) SektVO.

In its tender, the tenderer must name the subcontractors known at the time of submission of the tender and clearly state the nature and scope of the services that will be awarded to said subcontractors. Before the contract is awarded, the tenderer must also provide suitable evidence (subcontractor's declaration of commitment as per the form) that the designated subcontractors and/or third parties are in fact available to the tenderer for the purpose of providing the services in question.

The aforementioned obligations to provide evidence also apply to the new subcontractor in the event of a subsequent nomination or replacement of the subcontractor during the procurement procedure.

1.14 Award criteria

The award criteria are published either in paragraph II.2.5 of the EU announcement or directly linked in Negometrix.

2. COMMUNICATION WITH THE CONTRACTING ENTITY

2.1 General rules of communication

The Contracting Entity announced its intention to award the services in question throughout the EU and published the call to tender in the TED (*Tenders Electronic Daily*), the online version of the "Supplement to the Official Journal of the European Union" for European public procurement, and on the Negometrix tender platform.

Pursuant to § 9 (3) clause 2 SektVO, registration is not required for access to the EU notice and the associated bidding documents.

However, the Contracting Entity may make use of the right conferred by § 9 (3), clause 1 SektVO and oblige interested economic operators to register with the contracting entity by e-mail, after consulting the contract notice, in order to obtain a counter-signed non-disclosure agreement (*NDA*). After presentation of the signed non-disclosure agreement and a plausibility assessment by the Contracting Entity, the access will be activated. For this purpose, the interested party sends, by e-mail, the *NDA* provided by the Contracting Entity in Negometrix and filled out/signed by the interested party to the contact point named in Negometrix.

After receipt of the *NDA* and registration in Negometrix, all further communication during the call to tender between the applicant or tenderer will take place exclusively via Negometrix.

2.2 Further inquiries

(a) Time limit for further inquiries and requests for information

Any queries or requests for additional information must be submitted **exclusively** via Negometrix in the "Question and Answer" section (contact by telephone, fax and e-mail is not permitted, will not be answered and may result in disqualification). The latest date for receipt of these queries or requests for further information is published in Negometrix under "Schedule".

(b) Replies to applicant questions and other communications from the Contracting Entity

Both questions and answers, insofar as they contain information that is important from the Contracting Entity's point of view, that is of interest to all applicants, are simultaneously made available to all applicants in anonymous form via Negometrix.

3. CALL FOR COMPETITION

3.1 Procedure of the call for competition

The call for competition is structured as follows:

(a) Preparation and submission of request to participate

Interested parties are asked to draw up a request to participate on the basis of the information made available to them, in particular the participation criteria, and to submit it to the Contracting Entity via the Negometrix platform within the specified form and time limit. Submissions by mail or e-mail are not permitted and may result in exclusion from the tendering procedure. The request to participate must be accompanied by the information required by the Contracting Entity for the purpose of assessing its eligibility.

(b) Opening of requests to participate

The opening of all applicants' requests to participate shall take place after the deadline for submission of requests to participate has expired. Applicants are not admitted to attend the opening of requests to participate.

3.2 Deadline and time frame of the call for competition

The deadlines are those given in the EU announcement. Otherwise, reference is made to the schedule published in Negometrix.

The Contracting Entity reserves the right to change this schedule in the course of the proceedings, in particular to extend the scheduled deadlines, insofar as this proves necessary for the proper conduct of the proceedings.

The request to participate must be received by Negometrix in due time (**deadline for request to participate**). Individual extensions of deadlines shall not be granted.

Requests to participate that are received late shall be disqualified from the rest of the procedure, unless the late receipt is due to circumstances beyond the control of the applicant. Such reasons must be substantiated by the applicant. In case of technical problems, the applicant may consult the Negometrix helpdesk.

3.3 Form of the request to participate

The request to participate must be submitted in electronic form via Negometrix in the "Call for competition" questionnaire, together with all the required information and evidence.

3.4 Procedure of the eligibility test

The eligibility test of the applicants takes place in a two-stage procedure:

(i) Formal examination of requests to participate

The Contracting Entity shall first check that the requests to participate have been submitted within the time limit, and that they are complete and correct.

(1) Disqualification of requests to participate

Applicants' requests to participate will be disqualified if:

- they are not received in due form or before the deadline (except in cases where the applicant bears no responsibility for this),
- they do not contain the required or requested documents.

(2) Reservation of the right to make additional requests at a later stage

The Contracting Entity may, in compliance with the principles of transparency and equal treatment, request that the applicants submit, complete or correct missing, incomplete or incorrect business-related documents, in particular self-declarations, statements, certificates or other evidence (§ 51 (2) SektVO).

The applicant must submit the documents within a reasonable period of time to be determined upon request by the Contracting Entity.

Applicants are not entitled to request additional documents at a later stage. Requests to participate that do not contain the required

documents, or the documents requested at a later stage (if the above option is exercised), will be disqualified.

(ii) Examination of content of requests to participate

After the formal examination of the requests to participate, the Contracting Entity verifies the eligibility of the applicants for the services put out to tender, §§ 142, 122 GWB in connection with § 46 (2) SektVO. On the basis of the submitted proof of eligibility, the Contracting Entity assesses whether the applicant is likely to be able to provide the services put out to tender. Reference to previous applications will not be accepted. The verification of eligibility will take into account all the documents submitted by the applicant. Applicants that are considered unreliable or that do not meet the eligibility requirements will be disqualified from the rest of the procedure.

The Contracting Entity may ask applicants to explain the documents that they have submitted.

Applicants' entries must be clear and unambiguous. The applicant assumes the risk of unclear and ambiguous entries. The applicant is not entitled to demand that unclear or ambiguous entries be clarified by the Contracting Entity. Changes made by the applicant to its entries must be unambiguous.

(iii) Invitation to submit a tender

The Contracting Entity will then invite suitable applicants to submit an initial tender.

The Contracting Entity is entitled to limit the number of applicants invited to submit a tender. In this case, the Contracting Entity shall specify, in the contract notice or the call for expressions of interest, the objective and non-discriminatory eligibility criteria that it intends to apply to limit the number, the minimum number envisaged and, where appropriate, the maximum number of applicants to be invited.

4. NEGOTIATED PROCEDURE

4.1 Invitation to submit a tender

The invitation to submit a tender shall be sent to all suitable applicants who have successfully qualified to take part in the call to tender, unless the Contracting Entity imposes a restriction under paragraph 3.4 (iii) of these Procedure Guidelines.

Within the scope of this call to tender, tenderers will receive a non-binding proposal for a possible contract (including annexes and / or appendices, if applicable). The tenderers are requested to comprehensively revise this draft with track changes with regard to all points relevant to them - in particular with regard to liability and indemnity clauses in the broadest sense (including provisions on contractual penalties and lump-sum compensation for damages), on the provision of guarantees as well as all other main or essential contractual obligations - and in particular to insert all of its own (alternative) text proposals that are desired or deemed necessary (*mark ups*). All tenderers have the opportunity to negotiate their own text proposals as an alternative to the attached draft contract and all its provisions.

Even if, on the above basis, the Contracting Entity is of the opinion that the attached draft contract a priori cannot contain any general terms and conditions within the meaning of § 305 (1) clause 1 of the German Civil Code (BGB: *Bürgerliches Gesetzbuch*), it is noted by way of precaution that it is possible that all contractual provisions being placed at the tenderers' disposal herein are incompatible with the provisions of law. Tenderers are thus given the freedom to shape the contract in their own interests, with the real possibility of influencing the content of the contractual terms.

The contract negotiations are also being conducted in such a way that the tenderers are still faced with provisions that are potentially incompatible with the law. The tenderers can (and should) also exercise their freedom of legal arrangement during the contract negotiations in order to protect their own interests and to influence the content of all tender terms of the attached proposal for a project contract (and, if applicable, a maintenance agreement).

In this context, the Contracting Entity makes reference to the decision of the Higher Regional Court of Celle [OLG Celle] (judgment of 18.1.2018 - 11 U 121/17). According to this decision, a tenderer may not invoke the general terms and conditions and any associated invalidity of contractual clauses in a possible - subsequent - civil lawsuit if the alleged invalidity of the individual clauses was not already objected to in the

procurement procedure. For reasons of transparency and equal treatment, the Contracting Entity reserves the right in this respect to conduct a price-related tender clarification prior to the award of the contract in order to ensure that all tenderers consider themselves bound by the negotiation results and that the respective tender prices are thus comparable in competition.

4.2 Information and clarification discussions before the deadline for submission of tenders

In the context of complex tendering projects, the Contracting Entity may invite tenderers separately to clarification discussions or on-site visits prior to the submission of tenders in order to improve the quality of the tenders and to explain the required contents in more detail.

4.3 Formal examination of tenders

The tender must meet all the minimum requirements in terms of form and content, and will then be evaluated on the basis of the published award criteria.

In particular, the formal evaluation will disqualify:

- tenders that have not been received in due form or before the deadline (except in cases where the Tenderer bears no responsibility for this),
- tenders that do not contain the declarations and proofs requested or subsequently requested
- Tenders that do not contain the required price information, except where these are only insignificant individual items whose individual prices do not change the overall price or do not affect the evaluation sequence and competition,
- Tenders in which changes made by the tenderer to its entries are not beyond reasonable doubt,
- Tenders in which changes or additions have been made to the bidding documents, unless these are expressly permitted,
- Tenders that do not represent authorized secondary tender offers.

The right is reserved to make an additional request at a later stage in accordance with § 51 SektVO.

4.4 Binding period

If the EU announcement specifies a period of validity for the tenders, this period is decisive. Otherwise, the period of validity is announced in the invitation to submit a tender.

Insofar as neither the EU announcement nor the invitation to tender indicates a specific period of validity, tenderers must commit themselves to the tender for at least three months after submitting it.

4.5 Direct award of contracts

The Contracting Entity reserves the right to award the contract to the initial tenderers on the basis of the published evaluation procedure without negotiations (§ 15 (4) SektVO).

4.6 Conduct of the negotiated procedure

The Contracting Entity reserves the right to select three to five tenders (per lot, if applicable) from among the tenderers who have submitted tenders via Negometrix in due form and time and whose tenders have not been disqualified for other reasons, to be negotiated on the basis of the published evaluation procedure. The unsuccessful tenderers will be informed in writing that they have not, at least for the time being, reached the next stage of the procedure. In any case, the Contracting Entity reserves the right at any time to enter into negotiations with the tenderers that were not initially considered, provided that there are objective reasons for doing so.

Discussions will be held with the selected negotiating parties, in which the Contracting Entity will individually discuss the content of their tenders with each of them, as to how the needs of the Contracting Entity can best be met. The content of the contract and the terms and conditions of the contract will be discussed until it is clear how the service is to be provided in concrete terms and under what conditions the tenderer will supply it. If necessary, the Contracting Entity will conduct several rounds of negotiations. Against this background, the Contracting Entity reserves the right to further develop the bidding documents and to declare certain (originally negotiable) contents as a non-negotiable minimum condition for all tenderers.

There is no entitlement to negotiations. The Contracting Entity reserves the right to accept an initial tender even without entering into negotiations (see paragraph 4.5). If the Contracting Entity makes an invitation to negotiations the following applies: A successive reduction in the number of tenders to be negotiated may occur during the

negotiation phase and also after the submission of further tenders. A reduction in the number of tenders to be negotiated is always made on the basis of an evaluation according to the published award criteria. In the final phase of the procedure, sufficient competition remains ensured, provided that a sufficient number of tenders was initially submitted. The reduction will also take the form of a postponement, subject to the condition that the company will be reinstated in the circle of negotiating partners.

Following the conclusion of the negotiation phase, the Contracting Entity shall evaluate the tenders on the basis of the published award criteria and select the most economically advantageous tender (per lot, if applicable).

After completion of the evaluation of the tenders, the Contracting Entity shall notify all tenderers not taken into consideration pursuant to § 134 GWB of the award decision and the name of the Contractor selected. In addition, the Contracting Entity shall indicate the earliest date of conclusion of the contract. The contract shall be concluded at the earliest 15 calendar days after the sending of this notification. If the notification is made by fax or electronic means, the contract shall be concluded no earlier than 10 calendar days after the sending of the notification. The time period begins the day after the notification is sent; the date of receipt by the corresponding tenderer is not relevant.

4.7 Deadline for submission of the tender and time frame of the negotiated procedure

In principle, the planning published in Negometrix is applicable.

Further deadlines and dates may also be specified in the invitation to tender or in the negotiations. Tenders that are submitted too late will be disqualified from participating in the rest of the procurement procedure. The tenderer may only amend or withdraw its tender up to the expiry of the stipulated deadline.

4.8 Secondary tender offers

If permitted in the EU announcement, secondary tender offers are strongly encouraged, provided that they describe innovative concepts that offer the Contracting Authority both technical and economic benefits. Secondary tender offers are to be prepared and submitted in the same way as the main offer. The requirements for secondary tender offers correspond to the same requirements that apply to the main tender offers. Any additional minimum requirements for secondary tender offers are set out in the specifications of services. If secondary tender offers can be considered, they will also be evaluated according to the published award criteria.

5. NOTES ON THE PROCUREMENT PROCEDURE

5.1 No reimbursement of expenses

There shall be no remuneration or reimbursement of costs for participation in the procurement procedure or for preparation of the request to participate and tender.

5.2 Ensuring competition

Agreements between enterprises, decisions by associations of enterprises and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, are prohibited under § 1 GWB. This conduct can lead to exclusion from the procurement procedure pursuant to § 124 (1) No. 4 GWB.

Applicants must note in particular that multiple participation in this call to tender (e.g. as an individual applicant or as a member of a group of applicants) is only permissible if the principles of secret competition are duly observed by the applicant by appropriate means. The applicant must inform the Contracting Entity of the multiple participation in advance and obtain its consent. Compliance with the principles of secret competition must be proven to the Contracting Entity on request.

6. CONFIDENTIALITY

6.1 Confidentiality obligation of Applicants / Tenderers

The Applicants / Tenderers are obliged to treat all information obtained in the procurement procedure as confidential. These bidding documents and their annexes, as well as the information contained therein and all other information provided by the Contracting Entity must be treated confidentially by the tenderers even after completion of the procedure, unless they are already publicly accessible or known, or if they become known without the cooperation of the tenderers. The tender documents remain the property of the Contracting Entity. They may be used exclusively for the purposes of this procurement procedure.

The bidding documents may not be disclosed by the tenderers to third parties without authorization. Only consultants and subcontractors of the tenderers are exempt from the prohibition against disclosure, provided that they have demonstrably been obliged to maintain confidentiality in the same manner and to the same extent.

If an interested party does not submit a tender, it must destroy or delete the bidding documents received without delay.

Any confidentiality agreement (NDA) signed by the applicant / tenderer shall remain unaffected by the provisions of this paragraph.

6.2 Obligation of Confidentiality of the Contracting Entity

The Contracting Entity shall not pass on confidential documents submitted by the applicants / tenderers to third parties without authorization (see § 5 (1) SektVO).

6.3 Copyright and marking of secrets

The tenderers' copyright in the submitted documents will be respected. The submitted tenders shall remain with the Contracting Entity. If the tenderer intends to use information from its tender for the application for an industrial property right, it must indicate this in the tender. The same shall apply if there are existing industrial property rights in its tender or if industrial property rights of third parties were used in the preparation or use of the tender. The Contracting Entity is not authorized to publish tenders, in whole or in part, without the consent of the tenderer, or to pass on information concerning their contents to third parties that are not involved in the evaluation and selection.

Tenderers are requested to clearly mark as confidential, on each respective page, those parts of their tenders that contain manufacturing, business or trade secrets.

6.4 Storage and processing of personal data

Personal data requested in the course of the procurement procedure will be stored and processed for the purpose of carrying out the procurement procedure. For this reason, if necessary, service data processing contracts must be concluded between the parties. Unless this is expressly contradicted, the contact data will also be stored and processed for the purpose of future business negotiations.

7. PROVISOS

In order to protect the confidentiality of information of the Contracting Entity in the bidding documents, a non-disclosure agreement shall be entered into (see paragraph 2.1 – NDA). In this context, the Contracting Entity reserves the right to examine the applicants to determine whether they can demonstrate a legitimate interest in the performance of the contract.

For the Contracting Entity, the award of the contract is subject to the condition that equity and debt capital financing is available or secured internally. The Contracting Entity reserves the right to use various options for financing the contract.

The award of the contract is subject to the condition that the investment measures are necessary from a legal / regulatory or technical point of view, and thus they will be subject to a change in the legal / regulatory or technical framework conditions applicable to the object of the service at the time of notice.

The final decision in favor of the completion of the contract to be awarded is subject to the approval of the Contracting Entity's executive body until the conclusion of the contract negotiations.

8. OBLIGATION TO GIVE NOTICE OF COMPLAINTS AND REVIEW PROCEDURES

8.1 Obligation to give notice of complaints and time limit for lodging a review procedure

Complaints regarding identified violations of public procurement provisions must be lodged with the contact point mentioned in paragraph 2 within a period of ten calendar days (see § 160 (3) clause 1 no. 1 GWB).

Violations of public procurement provisions which are identifiable on the basis of the notice must be reported to the Contracting Entity before the expiry of the deadline for applications stated in the notice, via the contact point mentioned in paragraph 2, §160 (3) clause 1 no. 2 GWB.

In addition, reference is made to § 160 (3) clause 1 No. 4 GWB. According to this provision, a request for review is inadmissible if more than 15 calendar days have elapsed after receipt of the Contracting Entity's notification that it is unwilling to redress a complaint.

8.2 Competent body for review procedures

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