

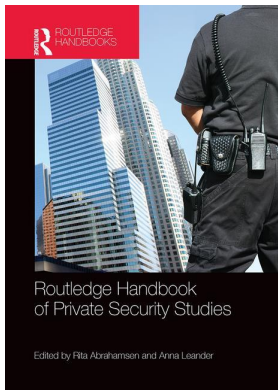
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REGULATION THROUGH PROCUREMENT POLICIES

Elke Krahmman

Procurement decisions and policies have the potential to play a significant role in the regulation of private military and security companies (PMSCs). This is highlighted in the Montreux Document which points to the international legal responsibilities of contracting states for ensuring that their suppliers respect international humanitarian law and to take ‘measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel’ (Montreux Document 2009: 11; see also DeWinter-Schmitt 2013). The Montreux Document further includes an extensive list of 23 recommendations for contracting states, outlining in detail good practices regarding the selection, contracting and monitoring of PMSCs. Procurement decisions and practices are also critical for the effectiveness of industry self-regulation and certification schemes such as the International Code of Conduct for Private Security Service Providers (ICoC) or the management standards for Private Security Companies developed by the American National Standards Institute (ANSI) and ASIS, a US-based security industry organization. Only if the consumers of private military and security services preferentially contract certified PMSCs, will companies have a financial incentive to sign up to these schemes. Finally, the procurement policies of leading states and international organizations can set international examples of best practice, thus promoting professional standards in the absence of a global agreement on a binding regulation of the industry.

Nevertheless, the regulation of PMSCs through procurement decisions and policies has received little attention in academic research. Most studies of the potentials and pitfalls of procurement in the security and defence sectors have been confined to the specialized practitioner literature (GAO 2006, 2012). Few scholars within the political and legal sciences have considered the possible contribution of or impediments to procurement policies facilitating higher professional standards among PMSCs or the security industry as a whole. A rare exception is Laura Dickinson who has investigated possible objections to expanding contractual tools for regulatory oversight. Dickinson (2007) identifies six arguments against changing contracts to improve the regulation of PMSCs:

- 1 existing contracts work well;
- 2 it would be too costly;
- 3 neither governments nor industry would agree to it;
- 4 the structure of the market undermines contractual regulation;

- 5 reforms such as giving third parties rights to file grievances would be impractical; and
- 6 contractual terms are difficult to enforce.

Another exception is Steven Schooner (2005) who examines how US contracting enabled the contractor atrocities in Abu Ghraib. He concludes, in concurrence with many Government Accountability Office (GAO) reports, that the US government lacks the administrative capabilities to draft and oversee contracts that would enable the effective control of PMSCs in deployed operations (*ibid.*: 557).

Building on the above, this chapter provides an overview of the potential and impediments to regulation through procurement, focussing on the US as the largest and most sophisticated consumer of military and security services worldwide. The chapter is structured into four sections. The first identifies three procurement mechanisms theoretically available to consumers: selection, contracts and penalties/incentives. The following three sections discuss the availability and use of these mechanisms in US procurement for military and security services. The chapter observes that the potential of regulating PMSCs through procurement is considerable. However, in practice the US has failed to fully exploit this potential, despite formal policies aimed at facilitating professional standards and conduct of PMSCs. The chapter concludes that the regulation of PMSCs is likely to remain weak as long as major clients are unwilling or unable to pay more than lip service to professional standards in their actual procurement decisions.

Regulation through procurement

Procurement policies can contribute to shaping PMSC industry standards and behaviour through three sets of mechanisms. The first pertains to the selection of contractors, such as free and open competition or the specification of eligibility criteria for companies seeking a contract. These mechanisms aim to force companies that fail to meet the expected standards out of the market. The second set of mechanism includes contractual requirements, compliance monitoring and contract management. Contractual mechanisms play a major role in demanding and monitoring standards of operation among the PMSCs employed by a client. The third range of mechanisms concerns rewards or penalties, from incentive fees to contract termination and debarment from future awards. It serves to enforce standards among contractors and signals to other companies the value placed by clients in professional operations.

While these mechanisms theoretically provide clients with considerable leverage over the standards and behaviour of PMSCs, regulation through procurement faces several obstacles. The ability of consumers to choose among alternative suppliers depends on the size of the industry and the client's assessment capabilities. Competition among PMSCs can be inhibited by collusive behaviour among firms and monopolistic or oligopolistic market structures. The termination of contracts or punishment of companies that fail to meet their contractual obligations can be hindered by consumers' lack of information and expertise, the expense of changing suppliers and loyalty towards a particular supplier. The impact of contractual stipulations on professional standards relies on influential and active consumers as well as businesses that are able and willing to process and react to consumer complaints. Moreover, it requires important clients or large numbers of consumers to use procurement in order to make an impression on a particular company.

In short, the regulation of the PMSC industry standards through procurement policies and decisions depends on the structure of the market, external circumstances and client behaviour. The next sections examine how the US, which is the largest consumer of private military and

security services worldwide, has utilized selection, contracts and penalties to encourage higher standards among its contractors.

Selection of companies

Due to growing international competition among PMSCs the conditions for selecting only companies with the highest professional standards for contract awards are very good. The size of the global military and security industry has expanded exponentially in only twenty years. Between 1990 and 2004, about 210 PMSCs were estimated to operate in the sector (De Nevers 2009: 485). By September 2013, already 708 international PSCs had signed up to the ICoC. However, this figure represents only a small proportion of the contemporary global PMSC industry since the ICoC excludes military support firms and is disproportionately made up of British companies. Not included are many local military and security firms such as those employed during international military operations. Over 300 local security companies were counted during the Iraq intervention and about 90 in Afghanistan (*ibid.*: 485). Even in non-conflict regions national private security industries have grown significantly. According to the Confederation of European Security Services there were over 52,000 private security firms in Europe in 2011 (CoESS 2011: 143). Consumers thus have a broad choice of alternative suppliers in terms of service specialization, geographical location and professional standards.

Nevertheless, the empirical practice highlights several constraints to the ability and willingness of clients to influence PMSC industry standards through selective procurement policies. Limitations to this mechanism include conditions imposed by consumers, restrictions set by countries of operation, and the influence of PMSCs on the choices of potential and existing clients. The US government's selection among competing commercial security suppliers is limited specifically with regard to company age, size and location. PMSC age and size are important concerns due to the use of open-ended and long-term contracts as means for ensuring the continuity and flexibility of military and security service provision across multiple operations (Schooner 2005: 564). In the US these awards take the form of large Indefinite Delivery, Indefinite Quantity (IDIQ) contracts, such as the Logistic Civil Augmentation Programs (LOGCAP) I–IV, the Global Contingency Services Multiple Award Contract, and the Counter-narcoterrorism Global Support contract. Size matters in IDIQ awards because contractors are required to supply a broad range of services in unspecified quantities and multiple locations worldwide. A company must be able to provide large numbers of service personnel within a short period of time either directly or by subcontracting and managing other firms. Due to the importance and duration of major IDIQ contracts, company age also plays a role. Governments want to be assured that a contractor has the experience and staying power to carry out services until the end of the award or longer (e.g. for additional 'option years').

The top US Department of Defense (DoD) contractors have thus remained stable for many years: Lockheed Martin, Boeing, Raytheon, General Dynamics, Northrop Grumman, United Technologies, L-3 Communications, SAIC, BAE Systems and KBR (FPDS 2013). The American LOGCAP contract has circulated among KBR (LOGCAP I, III, IV), DynCorp (LOGCAP II, IV) and Fluor (LOGCAP IV). The Counter-Narcoterrorism Global Support contract and the Global Contingency Services Multiple Award contract are led, respectively, by Northrop Grumman and URS. Mergers and buy-outs have contributed to reducing the choice among the largest PMSCs that are capable of managing IDIQ contracts. L-3, for instance, bought MPRI in 2000 and Titan in 2005. CSC, another top 100 DoD defence contractor, owned DynCorp between 2004 and 2005; and DynCorp merged with Cerberus Capital Management in 2010.

Other factors that induce governments to restrict their choice to the same few PMSCs include efforts to cut transaction costs, such as the expense and time for advertising and selecting among competing bidders, and a political preference for national providers. Moreover, Dickinson (2007: 231) contends that ‘corruption and cronyism are rampant in the initial *award* of government contracts’. Only ten PMSCs – Blackwater, Aegis, DynCorp, Triple Canopy, EOD, Sabre, SOC-SMG, Agility Logistics, Unity Resources Group, ArmorGroup and Erinys – received 75 per cent of the US government’s payments for security services in Iraq between 2003 and 2008 (SIGIR 2008: 16). Most of these companies were registered in the US, indicating a preference for national companies.

Host nation regulations and policies are other, if comparatively rare, elements which restrict consumer choice among PMSCs. Between 2010 and 2014, the Afghan President Karzai attempted to disband all armed private security companies in Afghanistan in favour of a government-controlled Afghan Public Protection Force. Although the programme was abandoned after a few years, it significantly reduced the choice among armed private security firms in the country and led to a decline in DoD security contractors from 28,686 to 5,591 armed guards (CENTCOM 2014).

Finally, PMSCs can contribute to narrowing the choice among competing suppliers through recommendations, risk advice and package deals. The influence of contractors on clients’ choices of security service and suppliers has been widely noted (Leander 2005; Spearin 2003). When the US government contracted Brown & Root Services (now KBR) in 1992 to develop a worldwide plan for the provision of logistic services under LOGCAP I, the company was simultaneously asked to take over the supply if asked (GAO 1997: 2). Once Brown & Root had established itself as the DoD’s prime supplier of global military logistics, it was hired again for successive contracts, including LOGCAP III and IV. Package deals are another way of committing a consumer to the same company for a range of services over many years. Today most military aircraft, unmanned aerial vehicles and ground machinery are bought with full-life cycle support, including in deployed operations. With the integration of armaments production and operations support in sole-source package deals, it is little surprising that defence manufacturers like Lockheed Martin, Boeing, Raytheon, General Dynamics and Northrop Grumman lead the DoD’s top military service suppliers list.

In short, for various reasons such as path dependency, political circumstances and economic imperatives, the ability and willingness of the US to choose between alternative service suppliers has been limited, despite its privileged position as the largest global consumer of military and security services and the growing number of PMSCs. The US government has instead focussed on contracts to improve PMSC standards and operations.

Contract design and management

Following several high-profile incidents involving security contractors in Iraq, the US government has taken multiple steps to facilitate higher professional standards through new regulations, including contractual stipulations. The basis is the 2008 National Defense Authorization Act which demanded a revision of the Federal Acquisition Regulation, including ‘the insertion into each covered contract (or, in the case of a task order, the contract under which the task order is issued) of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions’ (Congress 2008: Sec. 862). Today, contractual requirements are very extensive, including prescribed standards for the vetting and training of security guards. A Statement of Work for Private Security Contractors at Camp Delaram in Afghanistan, for example, specifies the following:

Contractor shall provide individual weapons familiarization training for all personnel who shall carry weapons under this contract to include sighting on each individual's weapons. Training shall be accomplished to Army weapons qualification standards. This training shall be specified and the standard monitored by the COR [Contracting Officer Representative].

(CJSTOF 2012)

In addition, the National Defense Authorization Act of 2011 stipulated that the DoD should issue policy guidance making it a condition for contracts involving private security functions that 'each contractor receive certification from a third party that the contractor adheres to specified operational and business practice standards' (Congress 2011: Sec. 324). As part of the guidance, the DoD was asked to (1) establish criteria for defining standard practices for the performance of private security functions, (2) establish minimum requirements for weapons training and qualification of instructors, and (3) identify organizations that could carry out the certification (*ibid.*: Sec. 324). Presumably in order to comply with these directives, the DoD funded the development of four management standards for Private Security Companies (PSCs) by ANSI and ASIS. The PSC.1–4 Standards pertain exclusively to the management of PSCs, but they also refer to the good practices outlined in the Montreux Document and the ICoC. Since 2013, the US Defense Federal Acquisition Regulation Supplement (DFARS 2013) demands that all contracts for security services in combat, contingency or military operations must comply with the new ANSI/ASIS management standard PSC.1. Furthermore, ANSI/ASIS submitted their standards to the International Standards Organizations (ISO) as the basis for the development of a globally recognized management system standard for private security operations (ISO/DIS 18788).

Despite these developments there remain several impediments to the effectiveness of US contractual obligations for PMSC regulation. The first concerns the quality and detail of the contractual requirements for professional standards (Dickinson 2007). The second problem regards the monitoring of contractor performance and compliance (*ibid.*; Schooner 2005). While industry has hailed the ANSI/ASIS Standards as 'the world's first standards designed to manage risks related to security services', a closer examination reveals that they do little to raise operational standards in zones of conflict (ASIS 2013). For one, the scope of the standards is limited in two main respects. The ANSI/ASIS Standards explicitly concern only PSCs, i.e. companies which provide 'guarding; close protection; physical protection measures; security awareness; risk, security, and threat assessment; the provision of protective and defensive measures for compounds, diplomatic, and residential perimeters; escort of transport; and policy analysis' (PSC.1 2012: 86). Firms engaged in military support, military and security training, and intelligence are not included.

Second, the ANSI/ASIS Standards regard the development of a 'management system' by which PSCs can facilitate professionalism. They do not specify personnel and service standards related to training or operations for the industry. Compliance with the ANSI/ASIS Standards is achieved by companies which can demonstrate that they have put in place management processes which help them develop, implement and revise largely company specific and self-defined standards. The ANSI/ASIS Standard for the selection and vetting of personnel thus states that 'the organization shall establish, document, implement and maintain procedures for background screening and vetting of all persons working on its behalf to ensure that they are fit and proper for the tasks they will conduct' (*ibid.*: 19). Standard PSC.1 then proceeds to recommend that 'wherever possible' the screening shall include a number of checks such as education and employment history review, military and security services records check and

evaluation for suitability to carry weapons (*ibid.*: 19). While Annex A of the Standard states that these management systems ‘should’ comply with the Montreux Document, the ICoC and international human rights law, it makes clear that the Standard merely ‘provides guidance or recommendations for any PSC to identify and develop best practices’ (*ibid.*: 33). The final pages summarize the main weakness of the Standard:

This Standard does not establish absolute requirements for quality assurance performance beyond commitments in the organization’s policy to: a) Comply with applicable legal requirements and with other requirements to which the organization subscribes, b) Support prevention of undesirable and disruptive events and risk minimization; and c) Promote continual improvement.

(PSC.1 2012: 91)

Standard PSC.2 stipulates that there are three ways in which compliance with the ANSI/ASIS Standards can be certified:

- self-assessment and self-declaration;
- customer assessment; and
- independent third-party certification.

While the US government and ASIS would prefer third-party certification, a company can thus claim compliance with the ANSI/ASIS Standard purely by self-declaration.

The second problem for the regulation of PMSCs through contracts is the need to monitor whether and how contractors implement contractual requirements. Innumerable reports by the GAO, the Special Inspector General for Iraq Reconstruction (SIGIR) and the Commission on Wartime Contracting (CWC) have identified contractor monitoring in international operations as a significant and long-standing problem (GAO 2006; SIGIR 2008; CWC 2011). Already during the peacekeeping mission in Bosnia, GAO (1997: 9, 20–22) reported that weaknesses in the DoD’s monitoring of Brown & Root’s LOGCAP I contract contributed to cost increases in the region of \$100 million, or 32 per cent. Insufficient DoD contract management in Iraq allowed contractor ‘fraud, waste and abuse’ (GAO 2007: 2). As late as 2012, GAO noted that further improvements were needed in contract oversight in Afghanistan. For example, not all DoD contracting officer’s representatives in the operation had the necessary training to write contract statements of work or the area-specific technical expertise to evaluate contractor performance (GAO 2012: summary). DoD still lacks sufficient numbers of contracting management personnel to cope with a contractor workforce now equal in size to its military contingents in deployed operations (*ibid.*: 1).

In sum, although the US has significantly expanded its formal contractual requirements for PMSCs, the scope and monitoring of these requirements need strengthening. Contractor performance surveys illustrate that more effective oversight is essential as PMSC malpractices occur regularly. The next section examines how the US government deals with contractors that fail to meet the required contractual obligations and standards.

Sanctions and contract termination

Only when PMSCs can expect to be held accountable for unsatisfactory services or low standards can clients hope to influence contractor standards and operations. The US Federal Acquisition Regulation (FAR), the 2008 National Defense Authorization Act, the Defense Acquisitions

Regulation System have clear provisions for penalizing contractors, such as the removal or replacement of contractor personnel after gross violations, the withholding of a percentage of payments for services or the termination of contracts in extreme cases (Congress 2008: Sec. 862). Long term effects on the standards and operations of US military and security contractors can be achieved primarily through more drastic measures such as the temporary suspension (up to 18 months) or debarment (up to 3 years, in exceptional circumstances indefinitely) of PMSCs from future government contracts (FAR 2013: 2.101). Causes for suspension are, among others, suspicion of fraud, criminal offences and unfair trade practices. However, suspensions never exceed 18 months if no legal proceedings are entered (*ibid.*: 9.407–2,4). Debarment can be imposed for a conviction or civil judgement related to the above offences (*ibid.*: 9.406–2).

While existing regulations suggest that the US government takes a strict view on contractor mal-performance, the empirical evidence presents a different picture. In particular, contract termination and permanent debarments are rare, although they are the main means that could force PMSCs with low standards out of the market (Dickinson 2007). Many of the DoD top ten security contractors have been implicated in scandals during the military interventions in Iraq and Afghanistan. Nevertheless, they continue to be employed by the US government. Blackwater, later renamed Xe and then Academi, became infamous for its involvement in the shooting of 17 civilians in Baghdad in 2007 (Risen 2011). Regardless, Blackwater/Xe/Academi continues to work as DoD contractor, including the provision of ‘security services in support of Forward Operating Base (FOB) Dwyer, and an option for FOB Delaram II’ in Afghanistan until 2016 (DoD 2012). Aegis was implicated in drive-by shootings in Iraq. Yet, between 2004 and 2011, Aegis won ten US government contracts in Iraq, amounting to \$1 billion (SIGIR 2011). DynCorp gained a negative image for sex-trafficking carried out during their support for the US peacekeeping operation in Bosnia in the 1990s. Irrespective of these and other incidents, DynCorp has been the third largest DoD contractor in Iraq and Afghanistan with awards totalling \$7.4 billion between 2002 and 2011 (CWC 2011: 25).

The list of PMSCs that have been re-awarded US government contracts despite previous misconduct also includes many of its top defence manufacturers and support service suppliers. A DoD Report to Congress on Contracting Fraud (DoD 2011: 4) noted that, between 2006 and 2009, no less than 30 companies had been criminally convicted of fraud over \$1 million, 91 had been fined in civil judgements and 120 had entered into settlement agreements. Within the same timeframe, 43 contractors had been suspended and 164 debarred from further government contracts (*ibid.*: 4–5). Among the 207 companies who had been suspended or debarred only 12 were excluded ‘indefinitely’ from future government contracts (*ibid.*: tables 4A, 5A). The companies implicated for fraud within the three year period included Lockheed Martin, Boeing, Raytheon, General Dynamics, Northrop Grumman, L-3 and Brown & Root/KBR (*ibid.*: appendix). Nevertheless, these companies continue to lead the DoD Top 100 Contractors list.

Three factors account for the US government’s limited use of suspensions and debarments. The first factor has been lack of information and coordination. Until 2011 there existed no central repository for data concerning contractors which had defrauded the government, making it difficult for contracting officials to implement suspensions and debarments (*ibid.*: 2). Indeed, the DoD Report to Congress observed that ‘in some instances, the Military Departments and the Defense Logistics Agency obligated funds to various contractors during the suspension period’ and ‘A similar situation was noted with regard to continued obligations to contractors who had been debarred’ (*ibid.*: 4–5). Although the US government has made efforts to address this problem, other factors suggest that these changes may not be sufficient to exclude contractors for poor performance.

Another factor is the ability of PMSCs to change and hide their identities through mergers, name changes and the registration of companies under several Data Universal Numbering System (DUNS) identifiers in the US Federal Procurement Data System (*ibid.*: 2, 3). These strategies make it nearly impossible for government agents to determine whether it is the same company or another (*ibid.*: 2). Examples are widespread in the industry. Aegis became the successor of Sandline International, at least in terms of its leadership, after Sandline had been implicated in the 'Arms for Africa' scandal involving breaches of the United Nations arms embargo during the company's participation in the civil war in Sierra Leone in the early 1990s. MPRI was acquired by L-3 in 2000 and, together with other L-3 segments, relaunched as Engility in 2012. The most famous example of changing identities and names is indubitably Blackwater. Founded in 1997 as Blackwater USA, the company changed its name to Blackwater Worldwide in 2007. Following the shooting of 17 Iraqi civilians by some of its employees and the Iraqi government's refusal to extend the company's operating licence, Blackwater re-registered as Xe Services in 2009. After the resignation of its founder, CEO and chairman Erik Prince, Xe Services was bought by an investor group and relaunched under the name Academi. In 2014, finally, Academi, Triple Canopy and several other PMSCs were brought together as Constellis Holdings. Blackwater/Xe/Academi's acquisition of new US government awards for security services despite being charged for repeatedly and systematically violating the US Arms Export Control Act and International Trafficking in Arms Regulations has caused consternation. The US government has justified its decision to let off Blackwater/Xe/Academi with a \$42 million settlement and \$7.5 fine with 'the company's efforts to reform its conduct' (FBI 2012). The sale and relaunch of Blackwater/Xe as Academi had effectively and successfully wiped clear its history of misconduct.

The most important impediment to the suspension or debarment of PMSCs known for misconduct and poor performance is the dependency of the DoD on select companies in areas such as logistics, catering, maintenance and security (Schooner 2005). Without these companies US interventions have become impossible. The DoD (2011: 5) has admitted that some contracts are continued 'to ensure mission accomplishment and for safety and mission requirements' despite fraudulent behaviour. The Commission on Wartime Contracting confirms that in particular PMSCs who have won large or security relevant contracts can get away with settlements or fines. KBR, the single largest DoD contractor in Iraq and Afghanistan with awards totalling \$41 billion (CWC 2011: 25), was already during the operation implicated for 'a total of 32 cases of suspected overbilling, bribery and other violations' (Nakashima 2009). Other charges against KBR included the acceptance of bribes from subcontractors, known exposure of US troops in Iraq to contaminated water, sexual harassment of employees and faulty electric work contributing to the deaths of up to 18 US soldiers (Krahmann 2010: 208; Risen 2008). Since KBR was sole provider of logistic services under LOGCAP III, it was impossible to suspend the company during the Iraq and Afghanistan interventions. When LOGCAP IV went again to KBR, although this time together with DynCorp and Fluor, it raised serious questions about the DoD's dependency on the former. 'In terms of lessons learned, how did KBR become one of the contractors on Logcap 4?' asked CWC member Linda J. Gustitus (Nakashima 2009). Even when in 2010 the Department of Justice filed a civil law suit against KBR for providing false statements to justify its unauthorized use of private security guards between 2003 and 2006, KBR was, again, not suspended from LOGCAP IV, although there were now two other companies bidding for LOGCAP task orders (Pincus 2010).

Altogether the punishment of PMSCs that have been convicted of fraud, waste and abuse

has often been weak. Although the US has strict regulations for dealing with such contractors, the many instances in which they have been let off lightly signals to these firms as well as the industry as a whole that procurement decisions are usually taken on the basis of other concerns than the promotion of high professional standards.

Conclusion

Contracting states have a major responsibility for the regulation and control of PMSCs. This chapter has examined whether major clients can facilitate and enforce higher industry standards through procurement mechanisms such as selection, contracts and penalties. Focusing on the US government, it has observed that the potential for regulation through procurement is considerable. Increased competition among PMSCs, stricter procurement rules and contractual regulations, international certification and licensing schemes all support the promotion of professional standards within the PMSC industry. Nevertheless, even the largest consumer of commercial military and security services worldwide is often unable or unwilling to use procurement policies to regulate its contractors. While the global military and security service market has grown, the US government continues to contract the same few, largely national companies. Also contractual requirements for higher standards and certification are hardly effective in practice, either because they lack specificity or because of inadequate monitoring. Moreover, contractual regulation can only hope to shape industry standards in the long term if failure to comply leads to major sanctions such as suspensions or debarments from future contracts. Past experience from the interventions in Iraq and Afghanistan, however, illustrates that the US government's willingness to end established relations with its military and security contractors is very small. The repeated failure of the DoD to penalize PMSCs for non-performance and misconduct has assured the industry that it is 'business as usual' despite new demands for professionalism. In conclusion, the findings suggest that procurement policies will have little effect on the actual performance and operations of PMSCs as long as clients fail to strictly enforce them.

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