TO NAME A FEW

Examining Liability and Risk in the SBCC 2016 Named Specialist Provision

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SBCC ESSAY COMPETITION 2020

“To Name A Few”

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1.0 Introduction

The ability of a contract administrator to deliver a project which is on time, on budget and to the correct specification relies heavily on the suitability of the clauses within the chosen contract. As a result, ineffectual contract provisions can lead to a difficult and laboursome administration process. This essay briefly examines the effectiveness of the Named Specialist provision included in the SBC 2016 contract suite.

For as long as nomination has been an option within building contracts, it has divided opinion and generated controversy. However, despite its often reported lack of use, it still remains an option that Employers choose to explore. Accordingly, in 2012 the SBCC created the Named Specialist provision in an attempt to address these concerns. A critical analysis of the provision, including comparisons to alternative contracts, highlights the improvements and shortcomings of Named Specialists. The research focuses on three key aspects of nomination: procurement, risk of delay and design responsibility.

Abbreviated Terms

M/C	= Main Contractor
NAM/S	= Named Specialist
NOM/S	= Nominated Sub-Contractor

Relatively speaking, nomination has a long history within the JCT suite, dating back to the JCT 1963[1]. Since the notable rise of sub-contracting in the 1960's[2], increasing portions of building contracts are delivered by individual trades employed by the Main Contractor. Furthermore, increasingly diverse and complex structural and mechanical systems make it unfeasible for Contractors to be able to provide all the required services in-house.

It is precisely the diversity and complexity of technological advances that gave rise to nomination within sub-contracting. In short, nomination allows the Employer to identify and oblige the M/C to adopt a particular firm as a sub-contractor. The risk distribution varies depending on the nuances of the contractual clauses, however, a common view is that nomination generally favours the Employer. An anecdotal definition of nomination was provided by Lord Reid in Bickerton & Son v. North West Metropolitan Regional Hospital Board (1970);

"An ingenious method of achieving two objects which at first sight might seem incompatible. The Employer wants to choose who is to do the prime cost work and settle the terms on which it is to be done, and at the same time to avoid the hazards and difficulties which might arise if he entered into a contract with the person whom he has chosen to do the work".[3]

Nomination remained a part of the JCT contracts until eventually being omitted in 2005. Ultimately, nomination was a controversial and laborious practice which often resulted in disputes within projects. Due to the "inherent pitfalls of this type of sub-contracting, and the complexity of the provisions, nomination was hardly used".[4]

Recently however, RIAS noted that they have consistently received "queries from Contract Administrators whose clients wish to appoint a specific supplier/ sub-contractor" [5]. In response to this, the SBCC updated the contract suite in 2012 to allow for the provision of "Named Specialists". The following sections will examine issues of procurement, liability for delay and design responsibility.

1 Jenkins, The Architect's Legal Handbook, p.217
2 RICS, "Subcontracting Guidance Note", (Online)
3 Ndekugri & Rycroft, JCT '98 Building Contract, p.186).
4 Ndekugri & Rycroft, JCT '05 Building Contract, p.240)
5 RIAS, Practice Information 2017, p.16, (Online)

3.0 Procurement

Perhaps the most significant difference between the NAM/S clause and the previous forms of nomination is the procurement process.

A common criticism of nomination was the lengthy and complex process, including numerous forms and procedural steps. Fig 01 lays out the nomination procurement procedure, and allows for an appreciation of why the provision was often avoided. The most common contention in the nomination process was the inability of the NOM/S and M/C to agree on the particulars of their sub-contract[6]. As the clause required the use of the customisable NSC/T Part 3 form, disagreements on bespoke clauses proposed by either side often lead to delays, for which the M/C would be entitled to an extension of time.[7]

In response to this, the current NAM/S provision makes great strides in simplifying the procurement process (Fig 02). This greatly improves efficiency and will likely lead to fewer claims being made for delay due to the naming procedure. Most importantly, in contrast to nomination, the SBC 2016 compels the M/C to engage the NAM/S using a standard Sub-Contract from the SBCC suite[8] . The RIAS recommends using the ShortSub/Scot (2016)[9]. By standardising the terms of the sub-contract, less negotiation should be involved, hopefully leading to more successful and timely agreements. For all its improved efficiencies, however, there is a potentially problematic aspect of the NAM/S procurement method relating to the extent of reasonable objection afforded to the M/C.

Under the 1998 JCT PWQ, the M/C was given the chance to raise reasonable grounds of objection to a NOM/S, regardless of whether they were included in the main contract tender documents or included in an instruction after the main contract had been awarded (Fig 01). However, this is not the case for NAM/S. Under Schedule 8: 9.4.1 of the SBC 2016, the M/C is able to raise reasonable grounds of objection to "Post-Named Specialist Work". Unlike nomination, however, the M/C does not have the contractual ability to reasonably object to "Pre-Named Specialist Work", which has been included in the original Tender package.

6 Ndekugri & Rycrof, JCT '98 Building Contract, pg.193
7 JCT, 1998 Private with Quantities, Cl. 25.4.6
8 Lupton, Guide to JCT Standard Building Contract, pg.89
9 RIAS, Practice Information 2017, p.16 (Online)

Presumably, this right has been removed because tendering for the main contract could be viewed as an acceptance of the pre-named specialist. That aside, it is not difficult to see the complications of obliging the M/C to assume responsibility for a sub-contractor that they contractually cannot object to. An even greater disadvantage to the M/C is that a strong argument can be made that 'reasonable grounds' for objection is purely theoretical within the contract:

"unrealistic time limits aside.. the Contractor hardly possesses sufficient knowledge of the nominee or of the nature of the specialist work to support any objections".[10]

Generally speaking, the NAM/S procurement appears to be an improvement upon the previous nomination process due to the simplified procedure. However, there is concern regarding the potential 'loophole' within Pre-Named Specialist Work, where an Employer can with one hand compel the M/C to appoint a certain firm, whilst removing any grounds for objection with the other.

10 Ndekugri & Rycrof, JCT '98 Building Contract, pg.193

3.0 Procurement

Fig 01 - Nominated Sub-Contractor Procurement

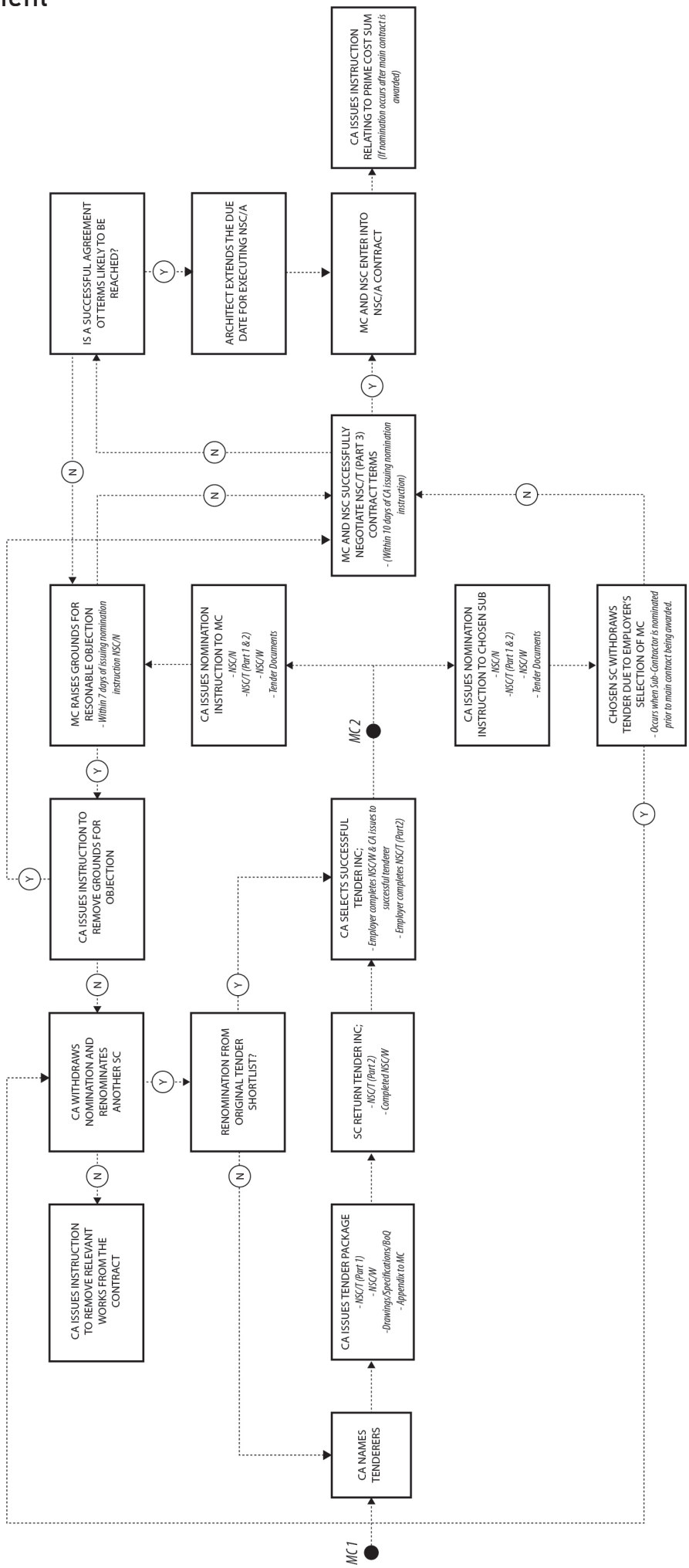
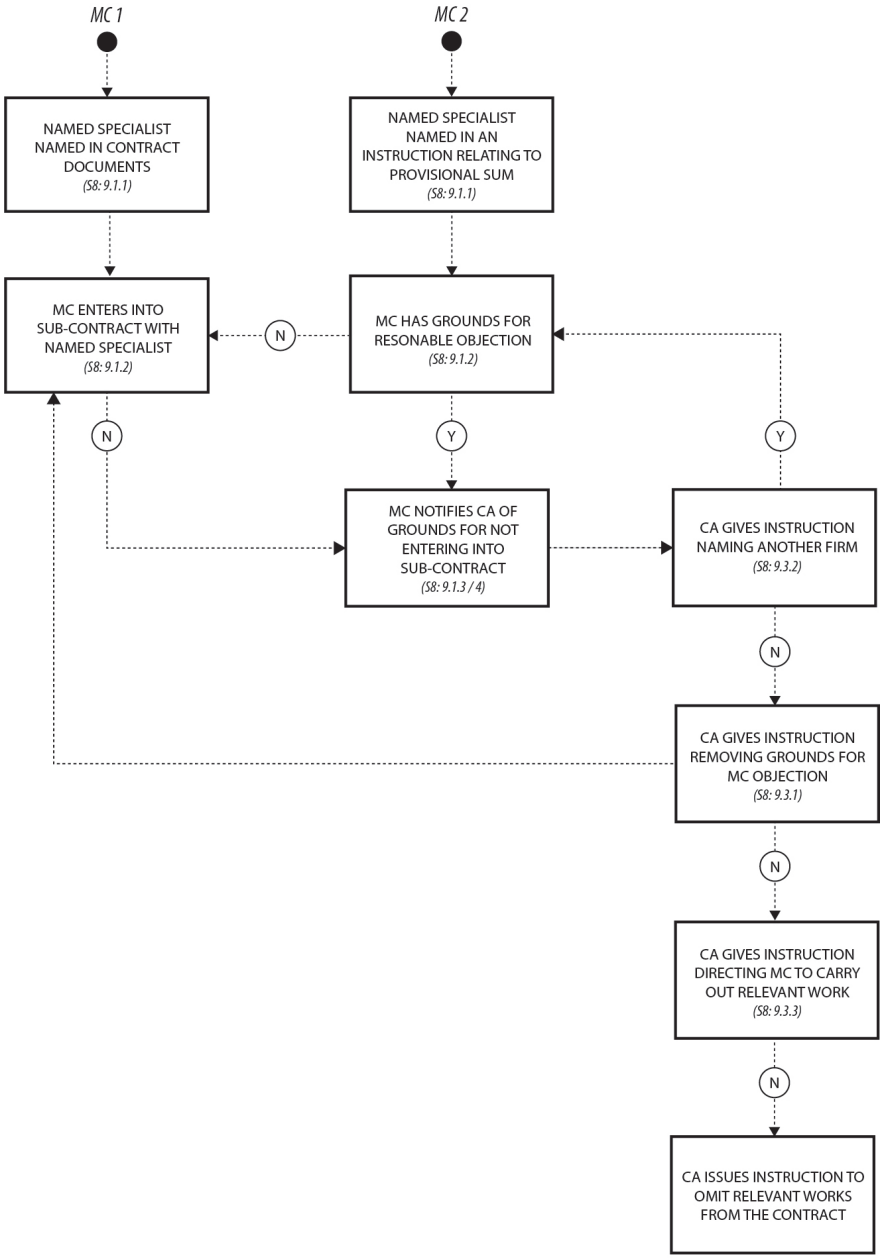


Fig 02 - Named Specialist Procurement



3.1 Risk in Delay

Another important complication often associated with nomination is the risk distribution in terms of delay. Delay is a common aspect of building contracts, however, is often dealt with differently when regarding nomination.

For better or worse, the risk distribution for delay caused by a NAM/S is simple and clear. If a NAM/S defaults during construction, the M/C is wholly responsible for their performance and therefore liable to the Employer. In this case, the M/C would not be entitled to any Extension of Time or Loss and/or Expense claims. On the contrary, if the works are not complete by the Completion Date due to delays caused by a NAM/S, the Employer would be able to claim for liquidated and ascertained damages. The only relief the M/C enjoys is from delays incurred during the initial naming process, or insolvency of the NAM/S[11].

In contrast, under the JCT 1998 PWQ, M/Cs were awarded more protection with regards to NOM/S performance. In the event of a delay caused by a NOM/S, the M/C was entitled to submit an Extension of Time claim, and would not be liable for any associated liquidated and ascertained damages. Instead, through the main contract provisions of the JCT 1998 PWQ, the Employer carried the majority of the risk of nomination. This could be deemed appropriate considering the M/C had "less control over the sub-contractor's selection and therefore performance" [12]. To mitigate this risk to the Employer, the provision specifically included a warranty from the NOM/S (NSC/W) which included provisions for recourse against the NOM/S in the event of their delay.

The determining difference in risk between the two contracts is a combination of the defined Relevant Events and the form of sub-contract employed. For example, one reason why the M/C is wholly liable for NAM/S performance under the SBC 2016 is the fact that NAM/S delay is not classed as a Relevant Event (Cl. 2.29). The type of sub-contract reinforces this too, with the main contract mandating that a standard JCT Sub-Contract form be used. In essence, the NAM/S becomes a domestic sub-contractor under the same contractual obligations as any other sub-contractor employed by the M/C.

11 Lupton, Guide to JCT Standard Building Contract, pg.89
12 CMS, "Nominated Sub-Contracting", (Online)

On the other hand, the Relevant Events clause of the 1998 JCT PWQ include for "delay on the part of a Nominated Sub-Contractor or Nominated Suppliers which the Contractor has taken all practicable steps to avoid or reduce" [13]. Through this, the M/C can "gain relief from the imposition of liquidated and ascertained damages"[14] otherwise due to the Employer. The M/C was also able to recover any Loss and/or Expense from the NOM/S by a "set-off" under Clause 1.10.2 of NSC/C [15]. In order for the Employer to recover the costs of this risk, the JCT Standard Form of Employer/Nominated Sub-Contractor Agreement (NSC/W) stated:

"The Sub-Contractor shall so perform the Sub-Contract that the Main Contractor will not become entitled to an extension of time for completion of the Main Contract Works by reason the Relevant Event in clause 25.4.7 of the Main Contract Conditions".[16]

As such, any delay that leads to an extension of time granted to the M/C would have been a breach of NSC/W Contract, entitling the Employer to recourse against the NOM/S.

Overall, NAM/S enjoy far more protection than the previous NOM/S. Furthermore, the new provisions transfer a significantly greater deal of risk to the M/C, whereas the Employer now benefits from a greater level of contractual protection. The simplification of the clause has resulted in a simplification of risk distribution, with the M/C now carrying the lion's share.

13 JCT, 1998 Private with Quantities, Cl. 25.4.
14 Trickey & Hackett, The Presentation and Settlement of Contractors' Claims, p.222
15 Ibid.
16 JCT, 1998 NSC/W Agreement, Cl. 3.3.2

3.2 Design Liability

Finally, the aspect of the NAM/S clause that appears to host the most opportunity for conflict is design liability.

Generally speaking, the M/C has no design responsibility unless this requirement is clearly detailed in the Contract documents[17] . Where design work is required, clause 2.2 of the SBC 2016 (Contractor's Designed Portion) can be utilised, which requires the M/C to design and become responsible for a specified part of the proposed works. Who then becomes liable if sub-contracted works require a design element but cannot not be included within the Contractor's Designed Portion?

The NAM/S Supplemental Provision 9.1 expressly states that the relevant work should not be included within the CDP. Given this, it would be reasonable to think that the M/C cannot be liable, especially given the specialist nature of the works giving rise to the sub-contract. Unfortunately, however, the clause does not offer any specific guidance regarding design liability for any NAM/S work other than stating that the M/C's responsibility "shall not be affected in any manner by the naming of any person for any work" [18]. This implies that the M/C is in fact responsible for the design work of the NAM/S, or at least can be reasonably found to be.

The only option to avoid this complication is to produce bespoke amendments to the Contract that carefully clarify the extent of liability on all parties. These should be produced prior to entering into the Contract, and would be prudent to include design responsibility, level of liability for defects, the requirement for professional indemnity insurance and any collateral warranties[19]. This would also avoid a potential situation where the Employer attempts to seek recourse from the Contract Administrator as they have no contractual link to the NAM/S, and the M/C could argue they are not liable for any design work outside of the CDP[20]. It should be noted, however, that a comprehensive contractual clause should not require such bespoke and fundamental amendments.

In comparison, the pre-2005 NOM/S, and Named Sub-Contractor clause in

17 JCT, "Deciding on the appropriate JCT contract 2016", pg.2
18 SBCC SBC/Q/Scot 2016, pg.117
19 Lupton, Guide to JCT Standard Building Contract 2016. P.89
20 Chappell, "Understanding Standard Building Contracts" pg.15

the Intermediate Building Contract, are far more comprehensive with regard to design responsibility. Both contracts place more liability with the Sub-Contractor themselves, and expressly offer more protection for the Employer and M/C. For example, the JCT PWQ 1998 made clear that:

"nomination relieves the Contractor of liability for design, compliance with performance specifications … and selection of kinds of goods and materials."[21]

Simply put, the Employer had no right against the M/C in the event of defective design by the NOM/S[22]. This is also the case in the current JCT IC 2016 contracts.

Furthermore, this has support in case law, demonstrated by the ruling of Norta Wallpapers V Sisk Ltd. The ruling found that as NOM/S are selected by the Employer and imposed onto the M/C, the M/C could not be found to be liable for the resulting design defects:

"the contractor does not give the employer any warranty in respect of work done by the sub-contractor when the defects in that work are caused by errors or omissions in the design".[23]

Whilst the M/C was protected from design liability under these main contract clauses, the Employer was not. As such, specific warranties were provided that allowed the Employer to place the responsibility for the achievement of performance specifications and the liability for defects (due to inadequate design) on the Sub-Contractors. Unlike the current NAM/S, it was not necessary to augment the clause with additional collateral warranties. For example, the JCT IDC expressly includes and recommends a dedicated warranty for this purpose:

"Employers should…not include any Named Sub-Contractors (in a collateral warranty) since such matters are intended to be dealt with by the Intermediate Named Sub-Contractor/Employer Agreement ICSub/NAME/E"[24].

21 JCT, 1998 Private with Quantities, Cl. 25.4.6
22 Price, "Sub-Contracting Under the JCT Standard Forms of Building Contract", p.40-41)
23 Justis, "Norta Wallpapers V Sisk Lt, 1987", (Online)
24 JCT, Intermediate Building Contract 2016, pg.17

3.2 Design Liability

Furthermore, the pre-2005 JCT NSC/W Employer/Nominated Sub-Contractor Agreement expressly stated that:

"the design of the Sub-Contract Works, the selection of materials and goods and the satisfaction of performance specifications are all stated as responsibility of the Nominated Sub-Contractor as liable to the Employer"[25].

It is clear that alternative building contracts to the SBC/Scot 2016, both historic and current, have more robust and comprehensive inclusions for design liability of NOM/S.

In short, future amendments to the NAM/S provision should integrate clear positions on design responsibility, and should place more liability for design on the NAM/S. A dedicated warranty between the Employer and the NAM/S (similar to JCT 1998 NSC/W or IC 2016 ICSub/NAME/E) would serve to protect the Employer whilst justifiably relieving the M/C of responsibility.

25 JCT, 1998 NSC/W, Cl 2.1

The Named Specialist provision is undoubtedly more accessible than its Nominated Sub-Contractor predecessor. The provision reduces the complex process of nomination to a simple and achievable procedure. The dense and cumbersome nature of the previous nomination process, coupled with the propensity for dispute, required a contemporary update.

The simplicity of the provision allows for a significantly improved procurement process. However, this 'stripped back' approach is missing the granular detail necessary to administer such a complicated procurement method. The provision would benefit from a reconsideration of the risk distribution, which currently finds the Main Contractor assuming the majority of the risk whilst the Employer and Named Specialist are relatively indemnified. This feels unjust and dispute-prone in a mechanism where the Main Contractor is compelled to adopt a particular Sub-Contractor. More detailed contract provisions would allow for a more nuanced approach to distributing risk. As such, this brief investigation makes the following recommendations:

1. Consider allowing reasonable grounds of objection to Pre-Named Specialists to encourage Contractors to tender for projects with the protection of being able to reasonably object.

2. Consider including a dedicated Employer/Named Specialist Warranty. Learning from the 1998 JCT, a dedicated Named Specialist warranty (similar to the JCT 1998 NSC/W) between the Named Specialist and the Employer could relieve the Main Contractor of the appropriate risks, and allow the Employer to transfer risk back to the Named Specialist. This should expressly include clauses regarding design responsibility and liability for delay. Through this, risk can be expressly transferred to achieve a fairer distribution.

It is possible that nomination is a flawed concept, with opportunity for dispute inherently built into the very idea of it. However, for as long as it exists, we should continually work towards contract provisions which ensure a fair distribution of risk, protecting all parties whilst acknowledging the privilege of the Employer to select and compel the use of specialist firms.

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