

# County Council of Cuyahoga County, Ohio

## Ordinance No. O2012-0026

Sponsored by: <b>County Executive FitzGerald and Councilmembers Jones, Germana, Miller, Brady, Gallagher, Simon, Rogers and Connally</b>	<b>An Ordinance</b> establishing the Cuyahoga County Debarment Law, Procedures and Review Board; and declaring the necessity that this Ordinance become immediately effective.
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WHEREAS, Article 3, Section 9, Subsections 4 and 9 of the Cuyahoga County Charter empowers the Cuyahoga County Council to establish procedures governing the making of County contracts and to establish the procedures for making public improvements; and,

WHEREAS, Article 3, Section 9, Subsection 3 of the Cuyahoga County Charter empowers the Cuyahoga County Council to establish boards and commissions as the Council determines to be necessary for the efficient administration of the County; and,

WHEREAS, it is necessary for Cuyahoga County to establish its debarment procedures to ensure fairness and good government in the County's contracting.

**NOW, THEREFORE, BE IT ENACTED BY THE COUNTY COUNCIL OF CUYAHOGA COUNTY, OHIO THAT:**

### **SECTION 1. HOME RULE POWERS ASSERTED.**

Notwithstanding any requirements or conflicting provisions of any other law or regulation, Cuyahoga County hereby exercises its home rule powers to establish its own Debarment Law and empowers the Cuyahoga County Inspector General and the Cuyahoga County Debarment Review Board to administer the Debarment Law in accordance with this Ordinance.

### **SECTION 2. SCOPE OF DEBARMENT.**

#### **(A) Prohibitions on Debarred Contractors.**

- (1) **No Submission of Offers.** A contractor debarred under this Ordinance may not submit any bids, proposals, statements of qualifications, or any other offers to contract with, enter into an agreement with, or to in any other way do business with Cuyahoga County for the duration of the debarment period regardless of

whether the work under the proposed contract or agreement will take place after expiration of the debarment period.

- (2) **No Contracting with the County.** A contractor debarred under this Ordinance may not enter into any contract or agreement with the County for the duration of the debarment period.
- (3) **No Subcontracting on County Contracts.** A contractor debarred under this Ordinance may not serve as a subcontractor on any county contract or agreement for the duration of the debarment period.

**(B) Prohibitions on County Contractors.**

No contractor may subcontract any work on a county project to a debarred contractor. A contractor who knowingly subcontracts work to a debarred contractor shall be subject to automatic debarment for a period of three years.

**(C) Prohibitions on County.**

- (1) The County may not contract with, enter into an agreement with, or otherwise do business with a debarred contractor.
- (2) The County may not allow any of its contractors to subcontract with any debarred contractor on a county project.
- (3) The County shall automatically disqualify any and all bids, proposals, statements of qualifications, or any other offers received from a debarred contractor during the period of debarment.

**SECTION 3. GROUNDS FOR DEBARMENT.**

**(A) Five-Year Debarment.** ~~From the effective date of this Ordinance through December 31, 2014, t~~The Cuyahoga County Inspector General may debar, for a period of five years, a contractor for a conviction of or a civil judgment within the preceding five years anywhere in the United States, its territories, or outlying areas, for any of the following:

- (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract;
- (2) Violation of any federal, state, or local ethics laws, regulations, or policies;

- (3) Violation of any federal or state antitrust statutes, regulations, or policies;
- (4) Violation of any federal, state, or local laws, regulations, or policies relating to the submission of bids, proposals, statements of qualifications, or any other type of offers;
- (5) Collusion to restrain competition by any means;
- (6) Embezzlement;
- (7) Theft;
- (8) Forgery;
- (9) Bribery;
- (10) Falsification;
- (11) Destruction of records;
- (12) Making false statements;
- (13) Tax evasion;
- (14) Criminal violation of any federal, state, or local tax laws;
- (15) Violation of any federal, state, or local laws intended to protect against abusive debt collection practices, such as the federal Fair Debt Collection Practices Act;
- (16) Receiving stolen property;
- (17) Intentionally affixing a label indicating that a product was made in a jurisdiction when the product was not made in that jurisdiction;
- (18) Any other cause listed in Section 3(B) or Section 3(C) of this Ordinance; or
- (19) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a contractor.

~~(B) Effective January 1, 2015, and thereafter, the Cuyahoga County Inspector General may debar, for a period of five years, a contractor for a conviction of or a civil judgment within the preceding five years anywhere in the United States;~~

~~its territories, or outlying areas, for any cause listed in Section 3(A) or Section 3(B) provided that the conviction or civil judgment took place on or after the effective date of this Ordinance.~~

**(C) Three-Year Debarment.** The Cuyahoga County Inspector General may debar, for a period three years, a contractor, based upon a reasonable belief, for any of the following within the preceding three years:

- (1) Violation of the terms of a public contract or subcontract in a serious manner, such as:
  - (a) Willful or reckless failure to perform in accordance with the terms of one or more contracts; or
  - (b) A history of failure to perform, or of unsatisfactory performance of, one or more contracts;
- (2) Violation of the terms, conditions, or requirements of a Small Business Enterprise program, a Disadvantaged Business program, a Minority and Female Business Enterprise program, or any other similar program, including, but not limited to, acting as a front company by purporting to be a Small Business Enterprise, a Disadvantaged Business, a Minority or Female Business, a Veteran owned business, or any other such type of business when not in fact;
- (3) Violation of prevailing wage laws;
- (4) Submission of false information in connection with any bids, proposals, statements of qualifications, or any other offers to the County or any other public or private entity;
- (5) Abuse of the selection process by repeatedly withdrawing bids or proposals before purchase orders or contracts are issued or failing to accept orders based upon firm bids;
- (6) Attempting to influence a public employee to breach ethical conduct standards or to influence contract award;
- (7) Commission of an unfair trade practice under any federal, state, or local laws;
- (8) Failure to cooperate in monitoring contract performance by refusing to provide information or documents required in a contract or failing to respond to complaints;

- (9) Failure to cooperate with a Cuyahoga County or any other public investigation or audit;
- (10) Filing a lawsuit against Cuyahoga County that a court finds to be frivolous or filed in bad faith;
- (11) Provided that the tax or court-cost liability is determined to finality and the contractor is delinquent in making payment, delinquent taxes or court costs as follows:
  - (a) Delinquent federal or state taxes in an amount that exceeds \$3,000; or
  - (b) Any delinquent Cuyahoga County taxes or court costs in any amount;
- (12) Any other cause listed in Section 3(A) ~~or Section 3(B)~~ of this Ordinance without regard to whether there is a conviction or civil judgment against the contractor for such cause;
- (13) Violation of any other responsible business practice; or
- (14) Any other cause determined by the Inspector General to be sufficiently serious and compelling so as to represent lack of good faith or responsibility by the contractor.

**(D) 18- Month Debarment.** The Cuyahoga County Inspector General may debar, for a period of 18 months, a contractor, based upon a reasonable belief, for any of the following within the preceding 18 months:

- (1) Breach or violation of any contract or agreement with the County; or
- (2) Commission of an act of moral turpitude in its business practices not provided for in Section 3, subsections A and B herein.

**(E) Single Debarment Per Incident.**

The Inspector General may not debar a contractor under this Ordinance more than once for the same incident. However, if a contractor is debarred under Section 3(~~E~~) or Section 3(~~D~~) and the contractor is later convicted or subjected to a civil judgment for the same incident for which the contractor was debarred, the Inspector General may automatically extend the duration of the debarment to five years. If the Inspector General extends the duration of any debarment under this provision, the contractor may appeal the extension to the Debarment Review Board and from there to the Cuyahoga County Court of Common Pleas under Ohio Revised Code

Chapter 2506 in the same manner as it has the right to appeal the initial debarment under Section 7 of this Ordinance.

**(FE) Term of Debarment if Extenuating Circumstances Exist.**

If the Inspector General is satisfied that extenuating circumstances warrant a reduction in the duration of a debarment, the Inspector General may reduce the duration of a debarment as follows:

- (1) The Inspector General may reduce the duration of a five-year debarment under Section 3(A) ~~or Section 3(B)~~ to a three-year debarment;
- (2) The Inspector General may reduce the duration of a three-year debarment under Section 3(~~E~~**B**) to an 18-month debarment; or
- (3) The Inspector General may reduce the duration of an 18-month debarment under Section 3(~~D~~**C**) to a one-year debarment.

If the Inspector General reduces the duration of a debarment as provided herein, the Inspector General must expressly identify the extenuating circumstances in the Notice of Debarment.

**SECTION 4. ACTIONS OF ASSOCIATED PERSONS OR ENTITIES GIVING RISE TO DEBARMENT OR SUSPENSION OF CONTRACTORS.**

If a contractor is an entity, it shall be subject to debarment under this Ordinance if the actions or inactions giving rise to debarment are of a person or entity (hereinafter “associated person” or “associated entity”) that has a substantial interest in the contractor entity or whose actions should be attributed to the contractor. The Inspector General shall consider the actions of an associated person or associated entity in determining whether the contractor shall be debarred. The Inspector General may determine that the associated person or entity has a substantial interest in the contractor entity or that its actions should be attributed to the contractor entity, and may thus debar the contractor entity, if any of the following exists:

- (A) The associated person or associated entity has either a direct or beneficial ownership or control of five percent or more of the contractor entity;
- (B) The associated person or associated entity is an officer, director, or otherwise involved in the management of the contractor entity;
- (C) The associated person or associated entity has participated in contract negotiations, is a signatory to a contract, or has the authority to establish, control, or manage the contract performance or labor practices of the contractor;

- (D) The associated person or associated entity is a parent, subsidiary, or other affiliate of the contractor entity;
- (E) The associated person or associated entity provided any seed money or other monetary support within the last five years to the contractor entity;
- (F) The associated person or associated entity provided any loans, except for loans provided by federally chartered banks and credit unions, (whether paid or unpaid) within the last five years to the contractor entity; or
- (G) Any other action of an associated person or associated entity demonstrating that the associated person or entity has a substantial interest in the contractor entity or that their actions should be attributed to the contractor entity.

**SECTION 5. DEBARMENT WEB SITE.**

The County shall give notice of debarment under this Ordinance on the County's web site as follows:

- (A) The Agency of Inspector General shall maintain a listing on its web site of all debarred contractors. The listing shall include the date of the issuance of the debarment and the expiration thereof.
- (B) The Cuyahoga County Office of Procurement and Diversity shall provide a link on its web site to the Agency of Inspector General's list of debarred contractors.
- (C) The Agency of Inspector General shall exercise good faith efforts to expeditiously remove contractors from the list of debarred contractors upon the expiration of the debarment period or reversal of the Agency's debarment of a contractor.

**SECTION 6. THE CUYAHOGA COUNTY DEBARMENT REVIEW BOARD.**

**(A) Establishment.** There is hereby established the Cuyahoga County Debarment Review Board. It shall consist of the following five members:

- (1) The Cuyahoga County Fiscal Officer;
- (2) A member of the Cuyahoga County Council appointed by the Council President as soon as practicable after the enactment of this Ordinance and immediately following each organizational meeting of the Cuyahoga County Council, who shall serve until his or her successor is appointed; and

- (3) Three residents of Cuyahoga County appointed by the County Executive and confirmed by the Cuyahoga County Council. None of these members may be an employee of Cuyahoga County while serving on the Board. Members shall have appropriate experience and qualifications to serve on this Board, such as, but not limited to, experience in contracting, law, arbitration, or prior service on public boards. Subject to Council's approval, the County Executive may remove any of these three members for inefficiency, neglect of duty, malfeasance, or if they no longer qualify to serve on the Board. The term of each member shall be five years, and the terms shall be staggered so that no term expires less than one year of the expiration of any other term. No member shall serve more than two consecutive terms. Of the terms for the initial appointees, one shall be appointed for a term of five years commencing on February 1, 2013, and expiring on January 31, 2018, one shall be appointed for a term of four years commencing on February 1, 2013, and expiring on January 31, 2017, and one shall be appointed for a term of three years commencing on February 1, 2013, and expiring on January 31, 2016. All subsequent terms shall commence on February 1<sup>st</sup> of the year in which the term expires. If a vacancy occurs for any unexpired term, the vacancy shall be filled in the same manner as a regular appointment through appointment by the County Executive subject to Council's confirmation, and the new member's term shall last through the end of the unexpired term for which he or she is appointed.

**(B) Jurisdiction.** The Cuyahoga County Debarment Review Board shall review and determine—including the powers to affirm, reverse, modify, and remand—any matters that are submitted for its consideration pursuant to the Cuyahoga County Code of Ordinances.

**(C) Alternates.** The County officials serving on the Cuyahoga County Debarment Review Board shall have alternates appointed as follows:

- (1) The County Executive shall appoint two alternates to act in the place of the Cuyahoga County Fiscal Officer on the Debarment Review Board and attend meetings, with full voting rights, if the Fiscal Officer is unavailable or has a conflict of interest on a matter pending before the Board.
- (2) The Council President shall appoint two Council members to serve as a pool of alternates to act in the place of the appointed Council member on the Debarment Review Board and attend meetings, with full voting rights, if the appointed Council member is unavailable or has a conflict of interest on a matter pending before the Board.



**(D) Officers.** The Fiscal Officer shall serve as Chairperson of the Debarment Review Board. If the Fiscal Officer is absent from any meeting, the Board shall choose one of its members to chair that meeting. For purposes of this section, the Fiscal Officer shall include his or her alternates.

**(E) Compensation.** The members of the Debarment Review Board shall not receive compensation for their service on the Board. Members of the Debarment Review Board shall be entitled to reimbursement of reasonable and necessary expenses incurred by them in the exercise of their duties.

**(F) Clerk of the Debarment Review Board.** The County Executive shall designate a staff person to serve as the Clerk of Debarment Review Board. The Clerk shall be responsible for publishing the agendas and meeting notices and shall record and publish the minutes.

**(G) Agendas and Meeting Notices.** The Clerk of the Debarment Review Board shall publish the notice and agenda for each Board meeting on the County's web site no later than 6:00 p.m. on the second business day before the Board meeting. The Board may amend the agenda and may also consider items not on the agenda by a vote of a majority of the members present either personally or through their alternates.

**(H) Regular Meetings.** The Debarment Review Board shall schedule regular meetings to take place at least once every two months at a determined time by the Board. If no business is pending before the Board, the Clerk of the Board may cancel any regular meeting for lack of sufficient business pending before the Board by publishing the cancellation notice on the County's web site.

**(I) Special Meetings.** The Debarment Review Board may conduct special meetings at a time other than its regularly scheduled meeting times. In the event of an emergency as determined by the Fiscal Officer, the Board may conduct a meeting with less notice than that required under Section 6(G) herein. For any special or emergency meeting, in addition to the notice requirements of Section 6(G), the Clerk of the Board shall also send notice to all news media organizations that request to be notified of such meetings.

**(J) Public Meetings.** The meetings of the Debarment Review Board shall be open to the public. The Board shall also provide an opportunity for public comment on matters before the Board toward the beginning of the meeting. The Board may require presenters to register with the Board before speaking and may set time limits on presentations, which may be extended at the discretion of the Chairperson.

**(K) Executive Sessions.** The Debarment Review Board may go into executive session to discuss and consider matters permitted to be discussed or

considered in executive sessions under the Ohio Open Meetings Act. A motion to go into executive session must state the topic(s) of the executive session and approved by a majority of the members present through a roll call vote.

**(L) Minutes.** The Clerk of the Debarment Review Board shall prepare and publish the minutes of each Board meeting on the County's web site within a week of their approval.

**(M) Journal.** The Clerk of the Debarment Review Board shall maintain a Journal of the Board, containing the notices, agendas, and minutes of all Board meetings. The journal may be maintained electronically through an electronic system.

**(N) Quorum.** A quorum of the Debarment Review Board shall consist of three members attending personally or through their alternates.

**(O) Vote Required for Board Actions.** Board action shall require the affirmative vote of any three members attending personally or through their alternates. Amendments to items before the Board and parliamentary motions may be adopted by a majority of those present, provided that a quorum is present.

**(P) Rules of Procedure.** The Debarment Review Board may adopt its own Rules of Procedure.

## **SECTION 7. DEBARMENT PROCEDURES.**

The following procedures shall govern the debarment process:

### **(A) Debarment by the Inspector General:**

#### **(1) Notice of Potential Debarment and Opportunity for Contractor to Respond.**

- (a) Prior to debarment, the Inspector General shall provide a written "Notice of Potential Debarment" to the contractor. The Notice of Potential Debarment shall include all of the following:
  - (i) A notice that the Inspector General is considering debarring the contractor;
  - (ii) A notice that if the contractor is debarred, the contractor will not be able to enter into any contracts or agreements with the County and that it will not be able to submit any

bids, proposals, statements of qualifications, or any other offers to the County;

- (iii) A notice that if the contractor is debarred, the contractor will be barred from doing any work as a subcontractor on a county contract or agreement;
- (iv) A notice that if the contractor is debarred, the County will automatically disqualify any bids, proposals, statements of qualifications, or any other offers from the contractor;
- (v) A notice of the grounds for the potential debarment;
- (vi) A notice of the duration of the potential debarment;
- (vii) A notice that the contractor has the right to submit written materials and evidence to the Inspector General to explain why the contractor should not be debarred;
- (viii) A notice of the due date and time by which any written materials and evidence submitted by the contractor must be received by the Inspector General. The due date and time may not be less than 14 calendar days and no more than 60 calendar days from the Inspector General's mailing or other means of transmitting the notice to the contractor; and
- (ix) A notice that the contractor has the right to request a meeting with the Inspector General or his or her representative to explain the contractor's evidence and why the contractor should not be debarred. The Notice shall specify the location and two dates on which the meeting may take place if the contractor were to request a meeting. The Notice shall also specify the means and deadline by which the contractor may request the meeting and choose one of the two dates provided by the Inspector General in the Notice. The Notice shall also provide that if the contractor does not request the meeting by the deadline and in the manner provided for in the Notice, the contractor shall be deemed to have waived its right to the meeting.

**(2) Inspector General's Decision on Debarment.**

- (a) After expiration of the time period provided in the Notice of Potential Debarment in which the contractor may respond to

the Notice of Potential Debarment, the Inspector General shall render a decision on the potential debarment within a reasonable time period under the circumstances.

- (b) If the Inspector General determines not to debar the contractor, the Inspector General shall issue a written notice of his/her determination to the contractor.
- (c) If the Inspector General determines to debar the contractor, the Inspector General shall do all of the following:
  - (i) The Inspector General shall add the contractor on the listing of debarred contractors on its web site and shall issue a written “Notice of Debarment” to the Contractor.
  - (ii) The Notice of Debarment shall include all of the following:
    - a. A notice that the contractor has been debarred;
    - b. A notice that the debarred contractor may not submit any bids, proposals, statements of qualifications, or any other such offers to the County or otherwise enter into any contract or agreement with the County;
    - c. A notice that the debarred contractor may not do any work as a subcontractor on any county contract or agreement;
    - d. A notice that the County will automatically disqualify any bids, proposals, statements of qualifications, or any other contractual offers to the County from the debarred contractor;
    - e. A notice of the duration of the debarment, including the starting and expiration dates of the debarment;
    - f. A notice that the debarred contractor may appeal the debarment to the Debarment Review Board within 30 days by filing the original copy of its Notice of Appeal with the Inspector General and a copy with the Clerk of the Debarment Review Board;
    - g. A notice of the exact due date on which the 30<sup>th</sup> day falls and by which the Notice of Appeal must be

received by the Inspector General and the Clerk of the Debarment Review Board;

- h. A notice that the Notice of Appeal must include, with sufficient detail and factual background, the specific assignments of error upon which the debarred contractor seeks to rely in its appeal before the Debarment Review Board;
- i. A notice that the debarred contractor bears the burden of proof before the Debarment Review Board;
- j. A notice that the debarred contractor has the right to introduce testimony and to cross-examine witnesses at the hearing before the Debarment Review Board;
- k. A notice that if the debarred contractor intends to introduce evidence before the Debarment Review Board that was not submitted to the Inspector General, the debarred contractor must identify all such evidence with specificity and include copies of any written evidence in its Notice of Appeal;
- l. A notice that the debarred contractor may not introduce any evidence at the hearing before the Debarment Review Board that was not submitted to the Inspector General in response to the Notice of Potential Debarment or included with its Notice of Appeal as provided in subsection ~~xi~~ **k** herein; and
- m. A notice that a debarred contractor's failure to file its Notice of Appeal as provided herein within the 30-day time period as provided in the Notice of Debarment is a jurisdictional failure that may not be otherwise remedied.

**(3) Appeal to the Debarment Review Board.**

- (a) A contractor may appeal the Inspector General's decision to affirm the debarment to the Cuyahoga County Debarment Review Board within 30 days of the Inspector General's issuance of the decision.
- (b) The Debarment Review Board shall set the appeal for a hearing in an open meeting within a reasonable time period.

- (c) The debarred contractor shall bear the burden of proof before the Debarment Review Board.
- (d) The debarred contractor shall have the right to introduce testimony and to cross-examine witnesses at the hearing.
- (e) The Debarment Review Board shall render its decision on the appeal within a reasonable time period.

**(4) Appeal to the Cuyahoga County Court of Common Pleas.**

- (a) If the Debarment Review Board affirms the Inspector General’s debarment, the debarred contractor may appeal the Board’s decision to the Cuyahoga County Court of Common Pleas within 30 days of the Board’s issuance of its decision.
- (b) The appeal to the Court of Common Pleas shall be governed by Revised Code Chapter 2506.

**(B) Suspensions of Contractors.** The Inspector General may suspend, without additional review, for a period not to exceed one year, a contractor currently suspended or debarred by any of the following, provided that such suspension may not last longer than the underlying suspension or debarment:

- (1) The United States Government or any board, commission, committee, department, agency, or other authority thereof;
- (2) The District of Columbia, Puerto Rico or any of the 50 States or any board, commission, committee, department, agency, or other authority thereof;
- (3) Any quasi-governmental entity, including, but not limited to, non-profit, private corporations, such as JobsOhio or the Indiana Economic Development Corporation, established by any of the 50 States, the District of Columbia, or Puerto Rico; ~~or~~
- (4) Any political subdivision or other governmental or quasi-governmental board, commission, committee, corporation, or other such entity in the United States, including, but not limited to, counties, municipalities, villages, townships, school districts, housing authorities, solid waste districts, sewer districts, port authorities, boards of developmental disabilities, boards of health, boards of alcohol, drug and mental health services, land banks, and community development corporations; **or**

(5) Any public or private educational institutions.

**(C) Debarment Duration to Include Suspension.**

If a contractor suspended by the Inspector General is later debarred by the Inspector General for the same incident, the duration of the suspension shall count toward the duration of the debarment so that the total combined duration of the debarment and suspension for the same incident does not exceed the total duration of debarment allowed for the same incident.

**SECTION 8. PROSPECTIVE APPLICATION.**

Any debarment under this Ordinance shall not act to invalidate otherwise properly authorized county contracts entered before the enactment of this Ordinance.

**SECTION 9. GOOD FAITH IN EXERCISING DISCRETION.**

The Cuyahoga County Inspector General and Debarment Review Board shall exercise their discretion under this Ordinance in good faith to ensure consistent application among similarly situated contractors.

**SECTION 10. IMPACT OF REVERSAL OR EXPIRATION OF DEBARMENT.**

A debarment under this Ordinance that is either expired or reversed by the Debarment Review Board or a court under R.C. Chapter 2506 may no longer be used for any purposes against the debarred contractor.

**SECTION 11. EXCEPTIONS AND EXEMPTIONS.**

**(A) Emergency Contracts and Purchases.**

The prohibitions outlined in this Ordinance shall not apply to any contracts made for any emergency events pursuant to Section 3.16 of the Cuyahoga County Contracting and Purchasing Procedures Ordinance.

**(B) Sole Source Contracts.**

If a County contracting authority is unable to identify more than one source through which a purchase or contract may be made, and the sole source is on the Debarred Contractors' List, the contracting authority may apply to the Cuyahoga County Council for an exemption from the requirements of this Ordinance. If Council is satisfied with the sole-source status of the contractor and the need for the proposed contract or purchase, it may grant the exemption by adopting a resolution.





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Clerk of Council

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Date

First Reading/Referred to Committee: August 28, 2012

Committee(s) Assigned: Public Works, Procurement & Contracting

Additional Sponsorship Requested: October 18, 2012

Committee Report/Second Reading: November 27, 2012

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