CHAPTER ES.
Executive Summary

The San Diego Association of Governments (SANDAG) must implement the Federal Disadvantaged Business Enterprise (DBE) Program to receive U.S. Department of Transportation (USDOT) funds. Recent court decisions and guidance from USDOT have led SANDAG to reexamine how it implements the Program. On May 1, 2006, SANDAG discontinued the use of DBE contract goals/good faith efforts for contracts funded by the Federal Transit Administration (FTA).

BBC Research & Consulting conducted this disparity study to assist SANDAG in making decisions concerning compliance with the Federal DBE Program:

1. Setting an overall annual aspirational goal for DBE participation in FTA-funded contracts;
2. Determining achievement of the annual aspirational goal through neutral means;
3. Identifying specific measures to be used in implementing the Federal DBE Program; and
4. Considering initiatives applicable to its locally-funded contracts (contracts for which the Federal DBE Program does not apply).

1. Overall Annual Aspirational DBE Goal

SANDAG must develop an overall annual aspirational goal for DBE participation in FTA-funded contracts. The Federal DBE Program requires a “base figure analysis” and consideration of any “step 2” adjustments in deriving this annual goal.

Base figure analysis. SANDAG should consider 16.2 percent as the base figure for its overall annual aspirational goal for DBE participation, which exceeds SANDAG’s 6 percent overall annual aspirational DBE goal for FFY 2009. SANDAG included certified DBEs in its calculations (a USDOT-approved approach). BBC also counted in the base figure minority- and women-owned firms that possibly could be certified as DBEs but are not currently certified, which is recommended by USDOT if such information can be developed. (Using the same approach to the availability analysis, but only counting certified DBEs, the base figure would be 9.4%).

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1 SANDAG joined four Southern California public transportation agencies in this joint study (the Los Angeles County Metropolitan Transportation Authority, Southern California Regional Rail Authority, Orange County Transportation Authority, and San Diego Metropolitan Transit System). The study began in December 2007 and will be completed in late 2009 once public transportation agencies and the public have the opportunity to review and comment on the draft report.

2 Note that the annual aspirational goal differs from the process SANDAG might use to set any individual contract-specific goals, which would consider the unique aspects of that contract and the availability of DBEs for potential subcontracted work.

3 Minority- and women-owned firms comprise 38 percent of the 2,480 businesses BBC examined as available for specific types of Consortium agency transportation prime contracts and subcontracts. Because BBC performed the availability analysis on a dollar-weighted basis given the sizes, types and other characteristics of individual contracts, calculation of MBE/WBE availability differs from a simple counting of firms.

4 Based on information on race/ethnicity/gender ownership and the annual revenue of the firms. The base figure does not include firms that have graduated from the DBE Program or have otherwise had recent certification denials.
Note that the annual aspirational goal could change based on changes in the actual contract opportunities that are available in any given year. Section III of the report describes the base figure analysis.

**Consideration of possible step 2 adjustments.** SANDAG must consider specific types of information regarding the relative availability of DBEs before finalizing its overall annual aspirational DBE goal. This process is referred to as consideration of a “step 2” adjustment. The adjustment can be downward or upward. BBC’s in-depth analysis of each factor outlined in the Federal DBE Program suggests that SANDAG consider one of the following options concerning a step 2 adjustment.

**Option 1 – making an upward adjustment at this time.** Over the long-term, there are reasons that SANDAG might consider a higher overall annual aspirational goal than the 16.2 percent base figure.

- If SANDAG were to make an upward adjustment, it could consider the 21.9 percent figure for DBE participation after adjusting for disparities in business ownership rates for women and certain minority groups in the Southern California construction and engineering industries (discussed in Section VI of the report).
- Evidence of disparities in access to capital and other factors also supports an overall annual aspirational goal higher than 16.2 percent.

**Option 2 – making no step 2 adjustment.** SANDAG might adopt the 16.2 percent base figure for its overall annual aspirational goal for DBE participation without making a step 2 adjustment. The Federal DBE Program does not require agencies to make a step 2 adjustment in the goal-setting process as long as the agency can explain this decision.

**Option 3 – making a downward adjustment at this time.** There are also reasons for a downward step 2 adjustment from the 16.2 percent base figure:

- BBC’s estimate of certified DBE participation on FTA-funded contracts for 2003 through 2007 was 12.2 percent (see Section VI of the report). This level of participation may represent a minimum demonstration of “current capacity of DBEs to perform work.”

SANDAG might conclude that the 16.2 percent base figure for DBE participation is much higher than the current annual aspirational goal of 6 percent and DBE participation of 12.2 percent and that it should make a downward adjustment from the base figure. One approach would be to calculate an average of the 16.2 percent base figure and 12.2 percent past DBE participation, which is 14.2 percent. This methodology is consistent with some other Consortium agencies’ past approaches to step 2 adjustments that were approved by FTA.

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5 See 49 CFR Section 26.45 (d) and Section VI of the disparity study report for a discussion of each factor.

6 Per 49 CFR Section 26.45 (d)(1)(i).
2. Percentage of the Annual Goal to be Achieved through Neutral Means

USDOT requires agencies to meet the maximum feasible portion of the overall annual goal using race-neutral means. Agencies should examine questions listed below when projecting the portion of their overall annual goal to be met through race- and gender-neutral means:

a. What is the participation of DBEs in the recipient’s contracts that do not have contract goals?

b. There may be information about state, local, or private contracting in analogous areas where contract goals are not used (e.g., in situations where a prior state/local affirmative action program was ended). What is the extent of participation of minority- or women-owned businesses in programs without goals?

c. What is the extent of race-neutral efforts that the recipient will have in place for the next fiscal year?

d. Are there firm, written, detailed commitments in place from contractors to take concrete steps sufficient to generate a certain amount of DBE participation through race-neutral means?

e. To what extent have DBE primes participated in the recipient’s programs in the past?

f. To what extent has the recipient oversubscribed its DBE goals in the past?

The following summarizes BBC’s analysis of each question (see Section VI for more details.)

a. Participation on SANDAG contracts without goals/good faith efforts program.

SANDAG discontinued its use of a DBE contract goals/good faith efforts program on May 1, 2006. After May 1, 2006, SANDAG set “advisory goals” for DBE participation on FTA-funded contracts, but did not require bidders to meet those goals or show good faith efforts. In early 2007, SANDAG discontinued setting “advisory goals” on contracts.

There were 30 FTA-funded contracts from May 2006 through December 2007 within the procurement areas BBC examined in the SANDAG disparity study. Including subcontracts, BBC analyzed 77 FTA-funded contract elements during this time period.

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8 BBC identified 434 SANDAG procurements that were FTA-funded within the study period. These procurements represented $180 million. Only a portion of these procurements were suitable for analysis in the disparity study, as described in Section III of the report. BBC also analyzed 333 SANDAG procurements totaling $113 million that were locally-funded, of which a portion were suitable for further examination in the study. Race/ethnicity/gender ownership of utilized firms was determined through multiple sources in addition to certification records, including telephone interviews with individual firms. Section II and Appendix C of the report discuss the methodology for the utilization analysis. Appendix E of the report provides a detailed breakdown of utilization by group for specific types and time periods of SANDAG contracts and subcontracts.
Overall utilization of minority- and women-owned firms. Minority- and women-owned firms (MBE/WBEs) obtained 21 percent of the FTA-funded contract dollars for May 2006 through December 2007, about the same as MBE/WBE utilization for FTA-funded contracts from 2003 to April 2006 when the DBE contract goals/good faith efforts program was in place. As shown in Figure ES-1, nearly all of the FTA-funded contract dollars that MBE/WBEs received for May 2006–December 2007 went to firms that were certified as DBEs. Asian-Pacific American-owned firms accounted for most of the MBE/WBE utilization on FTA-funded contracts.

BBC also examined MBE/WBE participation as prime contractors and subcontractors on locally-funded contracts for 2003 through 2007 (SANDAG has not applied subcontracting goals to these contracts). MBE/WBE utilization was about 13 percent, substantially below MBE/WBE utilization on FTA-funded contracts. (Sections IV and V of the report discuss results in more detail.)

Figure ES-1.
MBE/WBE share of prime/subcontract dollars for FTA-funded transportation contracts, before and after May 1, 2006, and for locally-funded contracts, 2003–2007

Note:
Certified DBE utilization.
For more detail and results by group, see Figures E-2, E-3 and E-4 in Appendix E.

Source:
BBC Research & Consulting from data on SANDAG contracts.

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9 This analysis counts firms as MBE/WBEs if they are certified as MBE/WBEs and/or as DBEs and when they indicate minority or female ownership and are not certified (because they are too large to meet certification criteria, have let certification lapse, have chosen not to be certified, or for other reasons).
Figure ES-2 provides utilization results for MBE/WBEs, and separately for certified DBEs, for the 330 SANDAG FTA- and locally-funded contracts and subcontracts examined in the study.

**Figure ES-2.**
DBE and MBE/WBE share of prime/subcontract dollars for transportation contracts, by race/ethnicity/gender

<table>
<thead>
<tr>
<th></th>
<th>Federally-funded contracts</th>
<th>Locally-funded contracts</th>
<th>Total 2003-2007</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MBE/WBEs</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American-owned</td>
<td>0.8%</td>
<td>2.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>12.9</td>
<td>17.2</td>
<td>9.6</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>2.6</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>4.4</td>
<td>1.0</td>
<td>2.1</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Total MBE</strong></td>
<td>20.7%</td>
<td>20.2%</td>
<td>11.7%</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>1.0</td>
<td>0.6</td>
<td>1.2</td>
</tr>
<tr>
<td><strong>Total MBE/WBE</strong></td>
<td>21.6%</td>
<td>20.8%</td>
<td>12.9%</td>
</tr>
<tr>
<td><strong>DBEs</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American-owned</td>
<td>0.1%</td>
<td>2.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>3.0</td>
<td>17.2</td>
<td>3.2</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>2.6</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>2.0</td>
<td>0.9</td>
<td>1.6</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Total MBE</strong></td>
<td>7.6%</td>
<td>20.2%</td>
<td>4.8%</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>0.3</td>
<td>0.4</td>
<td>1.0</td>
</tr>
<tr>
<td>White male-owned DBE</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Total DBE</strong></td>
<td>7.9%</td>
<td>20.6%</td>
<td>5.9%</td>
</tr>
</tbody>
</table>

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.
For more detail, see Figures E-2, E-3, E-4 and E-38 in Appendix E.
Source: BBC Research & Consulting from data on SANDAG contracts.
Participation of minority- and women-owned firms as subcontractors. Figure ES-3 examines the share of subcontract dollars going to MBE/WBEs and certified DBEs on FTA-funded contracts before and after the change in implementation of the program, and for subcontracts on locally-funded contracts for 2003 through 2007. For FTA-funded contracts, the percentage of subcontract dollars going to MBE/WBEs dropped considerably for May 2006 through December 2007. About 37 percent of subcontract dollars on FTA-funded contracts went to MBE/WBEs prior to the change in program. After the change, 10 percent of the subcontract dollars went to MBE/WBEs.

Figure ES-3.
MBE/WBE share of subcontract dollars for FTA-funded transportation contracts, before and after May 1, 2006, and for locally-funded contracts, 2003-2007

Discontinuing the DBE contract goals/good faith efforts program may have also resulted in a smaller share of contract dollars being subcontracted out (and more retained by the prime).

Disparity analysis. Report sections IV and V and supporting appendices explain disparity analyses in considerable detail. Key results include the following:

- MBE/WBE utilization for FTA-funded contracts from May 2006 through December 2007 of 21 percent was slightly less than what would be expected given MBE/WBE availability for these contracts (24%). There was no evidence of substantial disparities, overall, on FTA-funded contracts after the change in program.

- Because much of the overall MBE/WBE utilization for May 2006–December 2007 FTA-funded contracts only involved Asian-Pacific American-owned firms, analysis of utilization and availability by group showed evidence of substantial disparities for each other MBE/WBE group.

- A similar pattern of disparities was found for FTA-funded contracts from 2003 through April 2006 when DBE subcontracting goals/good faith efforts were in place.

- MBE/WBE utilization on locally-funded contracts (13%) was about one-half of what would be expected based on MBE/WBE availability for these contracts. There were disparities for each MBE/WBE group for locally-funded contracts except for Asian-Pacific American-owned firms.
b. Information about state, local, or private contracting in analogous areas where contract goals are not used. What is the extent of participation of minority or women-owned businesses in programs without goals? The five Consortium agencies participating in the Southern California Regional Disparity Study make purchases within the same local transportation contracting market, and operated and then discontinued DBE contract goals/good faith efforts programs. A combined utilization and disparity analysis from BBC’s studies for the five non-SANDAG Consortium agencies (LACMTA, OCTA, SCRRRA, SANDAG and MTS) is presented here. (SANDAG comprises a very small portion of the total Consortium dollars examined.)

Overall utilization of minority- and women-owned firms. Figure ES-4 combines utilization from each of the five Consortium agencies.

- Minority- and women-owned firms obtained 16.7 percent of Consortium agency FTA-funded contract dollars from 2003 through the time that agencies discontinued use of DBE contract goals/good faith efforts programs (which varied from March/April to September 2006).
- After the change in the program, MBE/WBE utilization on FTA-funded contracts was 29.7 percent.
- MBE/WBE utilization for 2003–2007 locally-funded Consortium contracts was 15.4 percent.

Figure ES-4.
MBE/WBE share of Consortium agency prime/subcontract dollars for FTA-funded transportation contracts, before and after change in DBE contract goals, and for locally-funded contracts, 2003–2007

Disparity analysis. BBC compared combined MBE/WBE utilization for Consortium agencies (by group) with the level of utilization expected based on a combined availability analysis for Consortium contracts (see Section VI). There was no disparity in Consortium utilization of MBE/WBEs, overall, for FTA-funded contracts during the time when the DBE contract goals/good faith efforts program was in place at each agency. However, there were disparities for WBEs and African American- and Subcontinent Asian American-owned firms.
When examining FTA-funded contracts from the period in 2006 when agencies discontinued DBE contract goals/good faith efforts to the end of 2007, there were no overall disparities for MBE/WBEs but substantial disparities for WBEs and African American- and Native American-owned firms.

For locally-funded Consortium contracts, utilization of MBE/WBEs was about 60 percent of what would be expected based on MBE/WBE availability for these contracts. Disparities were identified for each MBE/WBE group except for African American-owned firms.

c. Race- and gender-neutral remedies available to SANDAG. SANDAG has implemented a number of race- and gender-neutral remedies and partners with other organizations serving small businesses in Southern California. BBC suggests that SANDAG continue ongoing activities and consider additional race- and gender-neutral remedies (see Section VI), four of which are highlighted below.

Subcontracting minimum. Compared with its experience for FTA-funded contracts for 2003–April 2006, subcontracting accounted for a somewhat smaller percentage of total SANDAG FTA-funded contract dollars after May 1, 2006 (20%). After SANDAG’s change in program, prime contractors may have retained somewhat more of the contract amount and reduced their overall use of subcontractors.10

SANDAG could consider an initiative similar to the Mandatory Subcontracting Minimum (MSM) program operated by the City of Los Angeles:

- For each contract above a certain dollar amount, SANDAG would set a percentage to be subcontracted based on analysis of the work to be performed and experience from similar contracts (different types of projects involve relatively greater or smaller amounts of subcontracting). For some contracts, SANDAG would set a 0 percent MSM (or just no MSM).

- Prime contractors bidding on the contract would need to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be deemed responsive.

- If an MSM program is adopted, SANDAG should include flexibility in the program, including the opportunity for the prime contractor to request a waiver (preferably before time of bid so that the waiver would apply to each prime).

Availability of minority- and women-owned firms is relatively high for small to medium subcontracts. A subcontracting minimum program corresponds to a neutral remedy listed in the Federal DBE Program (“requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces”).11

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10 From interviews with business owners and others in the local industry, the economic downturn in 2008 and 2009 may have further reduced the amount of contracts that are subcontracted out.

11 49 CFR Section 26.51 (b)(1).
**Small business subcontracting program.** SANDAG could consider expanding its small business program to include subcontracting goals for certified small businesses. SANDAG might set goals and evaluate contractor compliance using the same processes provided for in the Federal DBE Program. SANDAG might consider a number of options for determining eligibility of small businesses for the program, including:

- Use of the same eligibility criteria for certification as found in the Federal DBE Program except that race/ethnicity/gender ownership would not be considered (this approach is currently used by LACMTA). SANDAG could partner with other agencies in Southern California to certify small businesses.

- Application of the same eligibility criteria as the State of California small business program, except that SANDAG would not limit the program to California-based firms because the program applied to FTA-funded contracts.

**Small business prime contractor program.** SANDAG might also evaluate whether its small business program could include measures to assist certified small businesses obtain prime contracts. Similar to the State of California’s program, SANDAG might be able to award small business preferences for certain types of contracts. For example, when evaluating proposals for professional services contracts, SANDAG might include 5 evaluation points out of 100 to be awarded based on the certified small business status of a proposer. In addition to the State of California program, the City of Los Angeles operates a small business programs that SANDAG could evaluate.

**Review and possible improvement of certain contracting procedures.** If allowable by the FTA, SANDAG may wish to review the frequency of its use of sole source procurement methods and whether or not it can further open opportunities for small prime contractors including MBE/WBEs on its construction contracts, as explained in Section VI of the report.

d. **Are there firm, written, detailed commitments in place from contractors to take concrete steps sufficient to generate a certain amount of DBE participation through race-neutral means?** When SANDAG changed its implementation of the goals program, it no longer required contractors to commit to a certain amount of DBE participation.

e. **To what extent have DBE primes participated in the recipient’s programs in the past?** MBE/WBEs accounted for 19 percent of prime contract dollars on the 94 FTA-funded contracts examined from 2003 through 2007. Participation of certified DBEs was 12 percent of FTA-funded prime contract dollars.

f. **To what extent has the recipient oversubscribed its DBE goals in the past?** BBC independently examined contract and subcontract awards for SANDAG’s FTA-funded contractors for the period from May 2006 through December 2007. DBEs received 21 percent of contract dollars, substantially more than the 5.3 percent annual aspirational DBE goal SANDAG set for FFY 2007.
Overall percentage to be achieved through neutral means. For October 2006 through December 2007, SANDAG’s overall utilization of minority- and women-owned firms for FTA-funded contracts was 92 percent of what it would be expected given MBE/WBE availability for these contracts. With additional neutral efforts, SANDAG may be able to meet its annual aspirational DBE goal solely through neutral efforts.

However, much of this MBE utilization was one group — Asian-Pacific American-owned firms — and substantial disparities persisted for other MBE/WBEs. SANDAG should consider how it might meet more (or all) of its annual aspirational goal through neutral means, in accordance with federal regulations in 49 CFR Section 26.51, and also address disparities for non-Asian-Pacific American-owned firms. Additional neutral efforts include:

- **Subcontracting programs.** A minimum subcontracting program might have a small positive impact on overall participation of minority- and women-owned firms in SANDAG’s FTA-funded contracts. A small business subcontracting goals program could also have an impact — there was little utilization of MBE/WBE subcontractors among May 2006–December 2007 FTA-funded contracts, which might improve with a program encouraging use of certified small businesses as subcontractors.

- **Other programs.** SANDAG could consider implementing a small business program for prime contracts. A pilot implementation of the program could provide SANDAG more information to gauge its effectiveness.

3. Implementation of the Federal DBE Program

The Federal DBE Program requires SANDAG to meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. In making any policy decision to engage in a remedy that targets DBEs, if it determines such a remedy is needed, SANDAG should consider this disparity study and additional pertinent information per 49 CFR Part 26.

Additional neutral efforts. Additional race- and gender-neutral efforts are discussed above and in Section VI of the report.

DBE goals/good faith efforts. If after tracking the effectiveness of neutral remedies SANDAG considers reinstating DBE contract goals/good faith efforts, it will want to carefully examine which groups exhibit disparities in contracts without the DBE subcontracting goals/good faith efforts program (for example, all groups of DBEs except for Asian-Pacific American-owned firms showed disparities for both FTA-funded and locally-funded contracts for 2003 through 2007).

Guidance from the FTA indicates how local transportation agencies would operate any future DBE contract goals program in which eligibility is limited to certain race/ethnic/gender DBE groups. Only DBEs owned by those groups would count toward meeting a DBE contract goal. Other DBEs would still participate in SANDAG contracting in other ways (e.g., meeting a mandatory subcontracting minimum or potentially participating in a small business prime contractor program). SANDAG would include all DBE groups when preparing DBE participation reports to FTA. If SANDAG were to adopt an approach similar to the above example, it would need to request a waiver from USDOT to limit participation in this program component to certain groups.

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SANDAG needs metrics to track success in addition to those suggested in the Federal DBE Program, including careful tracking of MBE/WBEs (by group) as well as DBE participation in both FTA-funded and locally-funded contracts.

If SANDAG chooses to pursue a solely race- and gender-neutral implementation of the Federal DBE Program for the immediate future, it should monitor utilization and availability of minority- and women-owned firms, by group. SANDAG may need to consider adding certain race- and gender-conscious remedies if a solely neutral program is not effective in addressing any disparities in its utilization of minority- and women-owned firms on FTA-funded contracts.

4. Programs Applicable to Locally-funded Contracts

Neutral remedies. SANDAG could consider applying the neutral remedies explored here to its locally-funded contracts as well as FTA-funded contracts. For example, small business subcontracting and prime contractor programs might be applied, as needed, across areas of SANDAG contracts.

Race- and gender-based remedies. At present, Proposition 209 (Article I, Section 31 of the California Constitution) prohibits SANDAG from implementing programs including race, ethnic or gender preferences related to its locally-funded contracts. However, SANDAG should monitor developments in a case involving San Francisco’s implementation of a race- and gender-conscious program for its locally-funded contracts.

Summary

SANDAG maintained relatively high overall levels of minority and female business participation in its FTA-funded contracts after it discontinued use of a DBE contract goals/good faith efforts program — about 21 percent of contract dollars. However, this participation primarily involved one MBE group with large disparities persisting for WBEs and firms owned by other minority groups.

Because the Federal DBE Program requires agencies to meet the maximum feasible portion of the overall annual goal using race-neutral means, one course of action for SANDAG to consider is (a) immediately implementing new small business programs for its subcontracts and prime contracts, (b) reviewing success of new programs in addressing disparities for currently underutilized DBE groups, and (c) evaluating whether DBE contract goals for any specific DBE groups are then needed.

SANDAG should also consider a higher overall annual aspirational goal for future DBE participation than the 6 percent level used for FFY 2009.

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