

# Public Procurement 2019

Contributing editor  
Totis Kotsonis



**Publisher**

Tom Barnes

tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall

claire.bagnall@lbresearch.com

**Senior business development managers**

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

**Published by**

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

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First published 2005

Fifteenth edition

ISBN 978-1-83862-117-9

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Public Procurement 2019

**Contributing editor****Totis Kotsonis**

Eversheds Sutherland

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Public Procurement*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Italy.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Totis Kotsonis of Eversheds Sutherland, for his continued assistance with this volume.

 **LEXOLOGY**  
Getting The Deal Through

London  
April 2019

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This article was first published in June 2019  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

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# Mozambique

Ana Marta Castro and Raul Mota Cerveira

Vieira de Almeida

## LEGISLATIVE FRAMEWORK

### Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The law on the procedures for the award of public works contracts, supply of goods contracts and provision of services contracts (the Regulation on the Award of Public Contracts (RPC)), approved by Decree 5/2016 of 8 March, is considered the key legislation regulating the award of public contracts. It sets out the rules for the award of public works contracts, supply of goods contracts and provision of services contracts in Mozambique. The RPC is also applicable to the award of public lease contracts, consulting services contracts and granting of concessions.

Furthermore, Law 15/2011 of 10 August and Decree 16/2012 of 4 June establish, respectively, the legal framework for public-private partnerships (PPPs) and the applicable rules to procurement processes, implementation and monitoring of PPPs.

### Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Depending on the sectors, there are different public procurement laws supplementing the general regime.

Law 21/97 of 1 October, establishes the use of public tender for the award of concessions in the electricity sector, and Decree 31/96 of 16 July provides for a special legal framework applicable to the award of toll roads and bridge concessions. Decree 38/97 of 4 November allows for the inclusion of specific contractual clauses whenever toll roads and bridge concessions imply the involvement and intervention of other states and governments.

Ministerial Order 14/2019 of 22 January has come into force very recently, approving administrative procedures and complementary guidelines regarding the implementation of tenders according to segments for the award of supply of goods contracts and provision of services contracts.

### International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Mozambique is not a European Union (EU) member. However, Mozambique has been a member of the World Trade Organization since 26 August 1995, but is not a signatory of its Agreement on Government Procurement (GPA), the fundamental aim of which is to mutually open government procurement markets among its parties.

Nevertheless, the Portuguese legal framework has a major influence on the RPC, as well as on the other relevant legislation regarding

the award of public contracts and, for that reason, the RPC follows a framework like the EU's.

### Proposed amendments

4 | Are there proposals to change the legislation?

The RPC was approved in 2016 in order to ensure greater transparency and the effective implementation of public procurement procedures. To our knowledge, no proposals to change the legislation are envisaged.

## APPLICABILITY OF PROCUREMENT LAW

### Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Contracting authorities under the RPC are the following, in accordance with its article 2:

- the Mozambican state and services of the direct and indirect administration, including embassies and missions abroad;
- municipalities and other public legal entities; and
- public companies and companies where the government has a shareholding.

The RPC is not applicable to contracts entered into between state organisms and institutes. However, the official formal drafts of public contracts are still applicable.

### Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The RPC provides for three distinct legal regimes:

- the general regime;
- the special regime; and
- the exceptional regime.

The general regime is applicable to the award of all public works contracts, supply of goods contracts and provision of services contracts that do not fall within the special regime or the exceptional regime. In the general regime, contracts are awarded by means of a public tender, a procedure in which any interested party may participate, provided it complies with the requirements established in the tender documents.

The special regime is applicable to the award of contracts in the following situations: contracts arising from any international treaty, or any other type of international agreement, and signed between Mozambique and any other state or international organisation, whenever its conclusion requires the adoption of a specific legal regime; and contracts concluded in the scope of public financed projects with

resources originating from an official foreign cooperation agency or a multilateral financial body, whenever the adoption of a specific regime is a condition of the respective agreement or contract.

The specific rules to be applicable in procurement procedures launched under the special regime shall be previously approved by the Minister of Finance and must be stated in the contract notice and in the tender documents.

Finally, there is the exceptional regime, applicable to the award of contracts that, for reasons relating to the public interest, cannot fall within the general or special regimes. In this exceptional regime, contracting authorities can select any of the following pre-contractual procedures:

- tender with prior qualification;
- limited tender;
- tender with two stages;
- tender according to segments;
- small-scale tender;
- tender according to quotes; and
- direct award.

All procurement procedures foreseen under the exceptional regime have specific rules, but are regulated on a subsidiary basis in accordance with the public tender rules.

Regarding to thresholds, article 69 of the RPC establishes that a limited tender may be launched whenever the estimated value for public work contracts and supply of goods contracts or provision of services contracts does not exceed, respectively, 5 million meticaïs or 3.5 million meticaïs.

The tender according to quotes has a threshold equivalent to 10 per cent of the threshold applicable to the limited tender, meaning that this specific procedure may be applicable whenever the estimated value for public work contracts, and for supply of goods contracts or provision of services contracts does not exceed, respectively, 500,000 meticaïs or 350,000 meticaïs.

Lastly, the small-scale tender, exclusively available for the award of contracts to individual people and micro or small companies has a threshold equivalent to 15 per cent of the threshold applicable to the limited tender, meaning that this specific procedure may be applicable whenever the estimated value for public work contracts, supply of goods contracts or provision of services contracts does not exceed, respectively, 750,000 meticaïs or 525,000 meticaïs.

### Amendment of concluded contracts

#### 7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

It is possible to amend concluded contracts, provided the amendments have the appropriate grounds.

Public contracts may exclusively be amended whenever there is the need to alter:

- the ongoing project or its specifications to improve its adequacy to the contract's main object;
- the value of the contract, owing to the increase or decrease of the quantities required for the contract's main object and aim;
- the implementation scheme of the public works or the provision of services or the supply of goods, owing to the unenforceability of the original contracting terms; or
- the payment conditions, owing to supervening circumstances.

#### 8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

No, there has been no case law clarifying the application of the legislation in relation to amendments to concluded contracts.

### Privatisation

#### 9 | In which circumstances do privatisations require a procurement procedure?

Under the Mozambican legal framework, privatisation processes do not fall within the scope of the RPC and are regulated by specific legislation – Law 15/91 of 3 August, amended by the Resolution 11/92 of 5 October – which provides for the general principles, criteria, methods and procedures applicable to privatisation processes.

The general rule is for privatisation processes to be held through a public tender or a public offering. Nonetheless, privatisation processes can also be held through a limited procedure or a direct sale if certain specific conditions are fulfilled.

### Public-private partnership

#### 10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Law 15/2011 of 10 August and Decree 16/2012 of 4 June govern the procedure and awarding of PPPs.

The main issues surrounding PPPs are financial impact and risk-sharing between public and private parties.

Law 15/2011 of 10 August establishes the guidelines of the awarding process, implementation and monitoring of the three modalities of involvement of the private sector in the promotion of development: public-private partnerships (PPPs), large-scale projects (LSPs) and business concessions (BCs).

On the other hand, Decree 16/2012 of 4 June defines in greater detail the rules laid down in the aforementioned law and establishes the procedures applicable to the contracting implementation and monitoring of PPPs, LSPs and BCs, namely referring to:

- the powers of the sectoral and financial supervisor, the regulatory authority and the implementing entity;
- the precontractual stages of the projects;
- the types of public contracting procedures;
- the financial guarantees and incentives to investment;
- the contracts and respective revisions or amendments;
- the execution of contracts, redemption, causes of termination, among other thing;
- the prevention and mitigation of risks in PPP; and
- the sharing of benefits.

In accordance with Law 15/2011 of 10 August, the setting up of a PPP usually follows the public tender regime and the RPC is applicable on a subsidiary basis.

## ADVERTISEMENT AND SELECTION

### Publications

#### 11 | In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the National Gazette and in other media.

## Participation criteria

### 12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

All interested parties, from Mozambique or abroad, are eligible to participate in a tender procedure, provided the parties comply with the tender's obligations relating to the payment of taxes and can demonstrate their legal, economic/financial and technical qualifications. Articles 23, 24, 25 and 26 of the RPC establish how bidders may demonstrate they meet those requirements. The public procurement legislation does not allow for a shortlisting of bidders in the general regime.

However, contracting authorities may assess whether an interested party shall be qualified to submit a bid in a tender procedure whenever they launch a tender with prior qualification.

In the first phase of the tender with prior qualification, bidders are invited to submit the documents that demonstrate their compliance with the technical and financial qualification requirements referred to above.

Subsequently, qualified bidders are short-listed and invited to participate in the second phase of the procedure and to submit a bid. In this phase, the procurement process follows the public tender rules.

Finally, in the specific tender launched for the award of consulting services contracts, contracting authorities may select a minimum of three and a maximum of six consultants to participate in the competitive selection procedure.

### 13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

There are two ways to limit the number of bidders that can participate in a tender procedure:

On the one hand, as referred to in question 12, it is possible for such a limitation to occur in the tender with prior qualification and in the specific tender launched for the award of consulting services contracts.

On the other hand, whenever a contracting authority launches a direct award for the award of a specific contract, the selection of bidders that will participate in the procedure depends on a discretionary decision of said authority.

## Regaining status following exclusion

### 14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is not established under the Mozambican legal framework.

Economic operators that fall within any of the exclusion situations foreseen in the RPC must wait for the lifting of the respective sanctions. They cannot participate in tender procedures until then.

The RPC expressly provides a list of situations on which bidders are restrained to participate in procurement procedures, such as:

- a private person convicted of an offence concerning his professional conduct, as long as the penalty lasts;
- a private person punished for serious misconduct regarding professional matters, as long as the sanction lasts;
- a private or legal person sanctioned by any body or institution of the Mozambican state, with the prohibition to participate in procedures, due to the practice of unlawful acts in a procurement procedure, as long as the sanction lasts;

- a private person who controls, directly or indirectly, legal persons within the situations mentioned in the previous bullet;
- a representative of the contracting authority responsible for the decision to be rendered;
- a legal person controlled, directly or indirectly, by a person within the situation referred in the previous bullet;
- a private or legal person who has defrauded the Mozambican state or who has been involved in fraudulent enterprises bankruptcies; and
- a private or legal person whose capital has a proven illegal provenance.

## THE PROCUREMENT PROCEDURES

### Fundamental principles

#### 15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. The RPC states that the fundamental principles for tender procedures are the principles of legality, purpose, reasonableness, proportionality, pursuit of public interests, transparency, publicity, equal treatment, competition, impartiality, good faith, stability, motivation, responsibility, sound financial management and celerity, among other applicable public law principles.

### Independence and impartiality

#### 16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes. The relevant legislation demands that contracting authorities defend public interests throughout the procurement procedure. In addition, contracting authorities must provide equal conditions to all interested parties, treating all bidders according to the same criteria and ensuring that the most advantageous tender is carefully selected by providing equal opportunity to interested parties and fair competition among tenderers.

Also, the evaluation team (the jury), which is composed by, at least, three members, must act in accordance with the principles of independence, impartiality and exemption.

The RPC also provides rules regarding the selection of contracting authorities' representatives, to prevent conflicts of interest, such as the following:

- if the representative has an interest in the contract, on its own or as the representative or manager of someone else's businesses;
- if the representative's spouse, or a member of its family, or a person with whom the representative lives, has an interest in the contract;
- if the representative, or the people referred to in the previous bullet, is a shareholder of a company that is interested in the contract; and
- if the representative owns a bond of any nature with the bidder, or has maintained a bond in any matter related to the procurement procedure, or its object.

In the above-mentioned situations, the contracting authority's representative is forced to declare and argue its impediment, excuse or suspicion, under the Operating Rules of Public Administration Services.

The above-referred impediments also apply to the jury, its members being equally restrained from taking position in that body in any of the above situations.

### Conflicts of interest

17 | How are conflicts of interest dealt with?

See question 16.

### Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The involvement of a bidder, directly or indirectly, in the preparation of a tender procedure constitutes an immediate ground for exclusion.

### Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of procurement procedure used by contracting authorities is the public tender, which is the procedure to be followed under the general regime.

The public tender procedure is divided into the following phases:

- preparation and launching;
- submission of bids and qualification documents;
- evaluation of bids and qualification documents;
- evaluation, classification and recommendations of the jury;
- announcement of the ranked tenderers;
- award, cancellation or invalidation;
- notification to tenderers;
- complaints and appeals, if applicable; and
- contract's signature.

On the other hand, the direct award is only applicable when contracting by means of any other procurement procedure is unfeasible or inconvenient, and when very specific circumstances defined in the RPC, such as in situations of extreme urgency, occur.

The direct award procedure involves the following phases:

- solicitation of proposals;
- receipt of proposals;
- acceptance of proposals;
- verification of the qualification's adequacy to fulfil the procedure object;
- award, cancellation or invalidation; and
- contract's signature.

### Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

No. Bidders may participate in procurement procedures as a consortium or association, but individual members of a consortium or association cannot bid separately, or as part of another consortium or association, in the same tender.

For purposes of participation in tenders, the documents constituting a consortium must state:

- the name and qualification of each member of the consortium and the indication of the participation of each one;
- the nomination of the representative member of the consortium before the contracting authority, with powers to assume obligations and to receive notifications on behalf of all the consortium members; and
- the assumption of joint and several liability of the members of the consortium for all its obligations and acts.

### Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The only procedure that may involve negotiations between contracting authorities and bidders is that for the award of consulting services contracts. The establishment of a negotiation phase is not mandatory and takes place before the award of the contract to the selected bidder. Nonetheless, only the first ranked bidder is invited to participate in the negotiation phase. Negotiations cover discussions on the terms of reference, methodology, personnel, expenses and contractual conditions. All negotiations must be noted in minutes and signed by both parties.

In case negotiations are not satisfactory, the contracting authority may terminate the negotiations and invite the following ranked bidder to negotiate.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See question 21.

### Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

There are no specific rules regarding the conclusion of framework agreements.

24 | May a framework agreement with several suppliers be concluded?

See question 23.

### Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The RPC states that consortia must be composed by the same entities in the course of a procurement procedure. However, it would be difficult not to accept a change in the members in case of a merger or a spin-off of one of the members of the consortium.

### Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Yes. The RPC establishes that only individuals and small and medium-sized enterprises (SMEs) are allowed to participate in small-scale tenders and limited tenders.

The RPC does not have any specific provision that regulates the division of contracts into lots.



### Variant bids

27 | What are the requirements for the admissibility of variant bids?

The RPC admits the submission of variant bids. In procurement procedures in which the submission of variants bids is admitted, the tender documents and the evaluation criteria must be adapted for that purpose.

28 | Must a contracting authority take variant bids into account?

See question 27.

### Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders are not allowed to change the tender specifications. The RPC establishes that bids that do not comply with the tender specifications, or that contain unenforceable or abusive conditions, shall be disqualified.

### Award criteria

30 | What are the award criteria provided for in the relevant legislation?

According to the RPC, the award of public works contracts, supply of goods contracts and provision of services contracts shall be decided based on the lowest price criterion. Exceptionally, whenever a decision based on the lowest-price criterion is not viable, the RPC allows the contracting authority to use a combined criterion, under which the evaluation of bids is based on the technical evaluation of the bid submitted and on the price offered, provided that the decision to choose this combined criterion results from a well-founded assessment.

Decisions based on the lowest price criterion must always ensure that the selected bid has the necessary level of quality to pursue the public interest goals, in accordance with the tender documents.

In the event of a tie arising from the adoption of the lowest-price criterion, the final selection is determined by a sweepstake during a public session.

With regard to the award of public work concessions or services concessions, the RPC stipulates that the contracting authorities may evaluate proposals based, individually or jointly, on the following criteria:

- the highest price offered for the concession;
- the lowest tariff or price to be charged to users;
- the best quality of services or goods available to the public;
- the best service and clients' satisfaction; and
- the bidder holding a valid certificate with the stamp '*Orgulho Moçambicano. Made in Mozambique*'.

### Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The RPC does not contain any specific provision regarding abnormally low bids.

32 | What is the required process for dealing with abnormally low bids?

See question 31.

## REVIEW PROCEEDINGS

### Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

According to the Mozambican legal framework, it is possible to challenge qualification and disqualification decisions, as well as award decisions through administrative review proceedings.

Complaints must be filed within five business days of the notification of the challenged decision. This administrative review proceeding is assessed by the contracting authorities, that must decide whether to accept or reject such complaint within 10 business days of receipt. The filing of a complaint does not require the payment of any fees.

Until the final day to file a complaint, all tenderers have free access to the tender's administrative documents.

Furthermore, it is also possible to challenge the above referred decisions through a hierarchical appeal. The hierarchical appeal must be filed within three business days of the notification of the challenged decision. The hierarchical appeal is assessed by the minister supervising the contracting authority, the provincial governor or the district administrator. Regardless of the entity at stake, a decision whether to accept or reject such hierarchical appeal must be taken within 30 business days of the filing date.

Filing a hierarchical appeal requires the payment of a fee. The tenderer must submit a guarantee that does not exceed 0.25 per cent of the estimated contract's value (up to a maximum of 125,000 meticaes), which may be financially updated by the Minister of Finance. This guarantee is reimbursed if the appeal is accepted, otherwise, it reverts to the state.

Finally, the decision rendered under the hierarchical appeal may be judicially reviewed in accordance with the procedures regulated under Law 7/2014 of 28 February.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

See question 33.

### Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Regarding administrative proceeding, see question 33.

In relation to judicial proceedings, there are no provisions that require judges to render decisions within a determined time frame.

36 | What are the admissibility requirements?

All procurement procedures decisions may be challenged through complaints and appeals. According to the RPC, it is possible to challenge qualification and disqualification decisions, as well as award decisions (see question 33).

A hierarchical appeal can be filed on the following grounds:

- a violation of the RPC;
- a violation of the tender rules; or
- a breach of procedure, including for lack of or inadequate reasoning, which affects the legality of contracting authorities' decisions.

37 | What are the time limits in which applications for review of a procurement decision must be made?

See question 33.

#### Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Yes. Both mechanisms of complaint and hierarchical appeal suspend the tender's course. All tenderers are notified of such suspension.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

The RPC does not provide for the possibility to lift an automatic suspension.

#### Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

All bidders are simultaneously notified of the award decision.

#### Access to procurement file

41 | Is access to the procurement file granted to an applicant?

All documents related to the procurement procedure can be publicly accessible and analysed, free of charge, from the date of publication of the tender announcement until 60 days after the procurement procedure's conclusion.

#### Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Although there are cases of disadvantaged bidders filing review applications, especially in the cases in which the value of the contract or its strategic relevance is high, most disadvantaged bidders abstain from such practice.

#### Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes, disadvantaged bidders can claim for damages.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A concluded contract may be cancelled or terminated following a review application of an unsuccessful bidder. Nonetheless, those situations are not very common.

In cases where judicial decisions determine the cancellation of an executed contract, contracting authorities usually appeal such decisions, and when final and non-appealable decisions are finally issued, contracts are almost completed.



**Ana Marta Castro**

cma@vda.pt

**Raul Mota Cerveira**

rmc@vda.pt

Rua Dom Luís I, 28  
1200-151 Lisbon  
Portugal  
Tel: +351 21 311 3400  
Fax: +351 21 311 3406  
www.vda.pt

#### Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Legal protection is still available in these situations.

#### Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

Filing a complaint does not require the payment of any fees. Nevertheless, the filing of a hierarchical appeal requires the tenderer to provide a guarantee as security, the amount of which cannot exceed 0.25 per cent of the contract's estimated value, up to a limit of 125,000 meticais.

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