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June 6, 2007

**VIA ELECTRONIC MAIL**
**AND U.S. MAIL**

Ms. Rose Mary McGregory
South Carolina Procurement Review Panel
Solomon Blatt Building
1105 Pendleton Street, Suite 203
Columbia, SC 29201

**Re: Appeal of Protest of Affiliated Computer Services, Inc. and Protech Solutions, Inc.**
**Solicitation No. 07-S7279**
**South Carolina Child Support Enforcement System and Facility Court Case Management System**
**Memorandum in Opposition to Saber's and Using Governmental Units' Motion to Dismiss**

Dear Ms. McGregor:

Enclosed herewith please find the original and two copies of the Petitioner Protech Solutions, Inc.'s Memorandum in Opposition to Saber's and Using Governmental Units' Motion to Dismiss. Please file the original and return the two stamped copies in the pre-paid, self addressed envelope provided. If you have any questions please do not hesitate to contact me.

With my kindest regards, I am

Very truly yours,

E. Wade Mullins, III

EWM/rdd
Enclosures
cc: Keith McCook, Esquire
Mark Manos, Esquire
Elizabeth Crum, Esquire
Virginia Williamson, Esquire

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| **STATE OF SOUTH CAROLINA )** | **BEFORE THE SOUTH CAROLINA** |
| **)** | **PROCUREMENT REVIEW PANEL** |
| **COUNTY OF RICHLAND )** | |
| | **Case No.: 2007-5** |
| **IN RE: Appeal of Protest of Affiliated Computer Services, Inc. and Protech Solutions, Inc.** | **MEMORANDUM IN OPPOSITION TO SABER'S and USING GOVERNMENTAL UNITS' MOTION TO DISMISS** |
| **Solicitation No. 07-S7279 South Carolina Child Support Enforcement System and Family Court Case Management System** | |

**FACTS**

On July 18, 2006, the Office of Information Management Technology ("ITMO") issued specifications for Solicitation 07-S7279. The solicitation sought proposals on behalf of the South Carolina Department of Social Services ("DSS") for the South Carolina Child Support Enforcement System ("CSES") and Family Court Case Management System ("FCCMS"). The scope of work for this solicitation would required the Prime Contractor to develop, implement, maintain and obtain federal certification of a South Carolina CSES and to develop, implement and maintain a FCCMS. The proposed contract provides that the fundamental obligation of the Contractor is to deliver a federally certified CSEC and fully implemented FCCMS. The contract is intended to provide the State with a comprehensive and fully integrated CSEC and FCCMS throughout the entire state.

The solicitation required prospective vendors to submit an initial technical proposal and a separate business proposal. The RFP provided that the business proposals would be scored based on the total cost of ownership to the State in addition to the vendor's ability to meet or exceed the State's needs with respect to risk analysis, risk mitigation, and risk sharing. The RFP also provided that the State would evaluate Offerors based on their qualifications which included

financial responsibility and financial strength, experience and references, evidence of successful past performance as a prime contractor and resumes for key personnel. From the technical and business standpoint, the State incorporated several requirements which would ensure that the certification and implementation of the CSES was completed in a timely fashion, as continued delays with regard to a federally certified CSES would result in continued loss of federal funding and the continued imposition and collection of penalties in the millions of dollars by the US Department of Health and Human Services. For this reason, the RFP required significant risk analysis and solutions regarding risk mitigation as part of the evaluation criteria.

ACS emerged from the technical, business and qualifications evaluation with the highest score. As such, in accordance with S.C. Code Ann. 11-35-1530, ACS was deemed the most advantageous to the State by the evaluation panel. The impartial evaluation panel reached the proper consensus that ACS presented the most favorable proposal and should be given first and exclusive priority for contract negotiations with the State. While the evaluators reached different individual conclusions for the first two award criteria, the evaluators were nearly unanimous on the question of which vendor was the most qualified candidate for the job. Six of seven evaluators found that ACS was clearly the most qualified firm from a business risk standpoint. As a result, the State began negotiations with ACS pursuant to S.C. Code Ann. §11-35-1530(8). Unbeknownst to ACS, Protech or presumably anyone outside of the State, the ultimate decision on who would be awarded the Contract was left to the discretion of an ad hoc committee of state leaders from various organizations known as the Project Executive Committee ("PEC"). While the PEC does have some member representation from the Department of Social Services, it is not referenced in any way in the Solicitation nor designated as the Using Governmental Unit. Sometime between the conclusion of the evaluation and scoring and the beginning of negotiations with ACS, representatives from the PEC, including the Governor's Chief of Staff,

apparently learned of a 30 million dollar difference in the initial pricing proposals between ACS and the second rated vendor. Representatives from the PEC, and possibly third persons outside of the PEC, apparently pressed the Procurement Officer to insist upon an immediate price reduction from ACS. Accordingly, prior to the initial negotiation session, the Procurement Officer raised the question with ACS as to its flexibility on price. The Procurement Officer insinuated that if price concessions were not to be forthcoming, future negotiations with ACS may be futile. ACS responded without providing any specific or immediate price concessions but welcomed future discussion about their pricing proposal during the negotiation sessions.

The State and ACS conducted initial negotiations on December 12 and 13, 2006. The negotiations were conduct with members of DSS and its counsel.[1] During the negotiations, the negotiating team asked ACS to meet certain price concessions and discussed other changes to the terms and conditions, including the provision of two interfaces without charge. During the end of Day 2 of negotiations, State negotiators suggested that a 10% price concession or discount would be considered reasonable. ACS did not immediately respond to the suggested price reduction as it was not prepared to discuss a change of that magnitude without due consideration. At the end of the negotiation session, the Procurement Officer advised ACS that it had the option to continue negotiations with ACS or move on to the second-ranked vendor. ACS was under the clear impression that it would be given an opportunity to address the two key issues which were identified during the negotiation session. ACS did not perceive that negotiations had reached an impasse or were otherwise closed. ACS was not given a deadline to respond to the two outstanding issues. Indeed, the State never conveyed that if ACS did not provide a price concession the State would not be able to reach an acceptable contract. ACS was not informed

that the Procurement Officer intended to terminate the negotiations and commence negotiations with Saber immediately.

On Friday, December 14, 2006, ACS advised the State that it would provide the two requested interfaces without charge. ACS was not advised at that time that the State had closed its negotiations with ACS. After the holidays, on January 16, 2006, ACS provided the State with the requested 10% discount of twelve million dollars. ACS was not advised at that time that the State had closed its negotiations with ACS. Upon information and belief, the concessions outlined in the ACS letter of January 16 were never considered. As of January 16, 2006, ACS believed it was continuing to negotiate in good faith with the State. On more than one occasion, ACS contacted the Procurement Officer during this negotiation period and was advised that the State had not yet made a decision. ACS was never advised that negotiations between it and the State were closed nor were they ever notified at any point in the negotiations that the State had determined that a satisfactory contract could not be negotiated. However, unbeknownst to ACS, the State had already unilaterally ended negotiations with ACS and commenced negotiations with Saber. The negotiations with Saber were commenced at the direction of the PEC and possibly, third persons outside of the PEC.

The Procurement Officer's written determination that the State should negotiate with Saber does not clearly indicate that she believed negotiations with ACS were at impasse or that a satisfactory contract could not be negotiated. As set forth in the Written Determination, four reasons were advanced: (1) ACS's alleged refusal to reduce its cost; (2) the small gross difference in scores between the highest and second highest scoring proposals when viewed against the total number of points involved in the evaluation; (3) the close average technical

[1] The negotiating team for the State did not have final authority to determine if a contract acceptable to the State could be reached during negotiations. Indeed, the PEC had conferred upon itself the ultimate decision-making

scores which showed that either technical solution should meet the State's needs; and (4) the significantly lower price of the second highest scoring proposal.

The Procurement Officer proceeded with negotiations with Saber. The negotiations with Saber resulted in numerous unfavorable contract concessions from the State. The Record of Negotiations reflect significant limitations on Saber's potential contractual liability to the State. The changes to the terms and conditions of the contract include, but are not limited to:

(1) A limitation of Saber's liability for any consequential or incidental damages except federal funding penalties;

(2) A modification to the liquidated damages provision which limits Saber's liability to the State to only those circumstances within Saber's or its Subcontractor's control;

(3) A reduction in the prescribed warranty period for products provided to the State from two (2) years to one (1) year;

(4) The elimination of the payment hold back or "retainage" for hardware or commercial off the shelf software products or taxes;

(5) The creation of a new liability to the State for delay damages;

(6) The elimination of the requirement to post a performance bond by an independent surety company licensed to do business in the State of South Carolina, or valuable security and/or cash collateral to be replaced by a corporate guarantee from a non-signatory third party;

(7) A reduction in the warranty period for the CSES and FCCMS from two (2) years to one (1) year; and

(8) The conveyance of a license to Saber to use the software created at State expense for future commercial purposes unrelated to the State's contract with Saber.

In addition to concessions that shifted or relaxed liability for Saber, the concessions also eliminated or reduced certain significant quality assurance protections including requirements

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authority on the Contract. This was never disclosed to ACS at any point during its negotiations.

that deliverables meet certain industry standards. In return for these concessions, the State received a discount of approximately 4 percent from Saber's initial price proposal. The Procurement Officer never addressed ACS's ten percent price reduction and never offered similar limitations on liability and requirements concessions to ACS. No contract was ever tendered or offered to ACS and the State has posted a notice of intent to award the contract to Saber based upon the negotiated terms.

## A. THE PROCUREMENT OFFICER DID NOT PROPERLY NEGOTIATE TO CONCLUSION WITH ACS, DID NOT ACT INDEPENDENTLY AND MISAPPLIED THE AWARD CRITERIA STATED IN THE RFP DUE TO EXTERNAL PRESSURE.

The proposed award to Saber based upon the revised contract terms is improper and contrary to the Procurement Code for the following reasons: (1) the Procurement Officer did not comply with the requirements of S.C. Code Ann. § 11-35-1530(8) in its negotiations with ACS and Saber and the award to Saber ; (2) the Procurement Officer did not comply with S.C. Code Ann. § 11-35-30 in its negotiations with ACS and Saber and the award to Saber; (3) the Procurement Officer did not comply with S.C. Code Ann. § 11-35-20(f) in its negotiations with ACS and Saber and the award to Saber; and (4) the duties of the Procurement Officer are non-delegable and representatives of the PEC and third parties outside the PEC impermissibly interjected and applied alternate award criteria and otherwise directed the negotiations, which resulted in the premature and improper negotiation of a contract with Saber.

Saber and the Using Governmental Units ("UGU") argue that the procurement officer's decision to negotiate and all actions and determinations of the procurement officer are not subject to review by this Panel. This interpretation that the procurement officer's decision and actions taken pursuant to 1530(8) are somehow bulletproof undermines the entire purpose and protection of the Procurement Code. The discretion provided to the procurement officer is not

unfettered. Section 1530 sets specific parameters for conducting negotiations; and, clearly, the procurement officer's compliance with these parameters are subject to review.

S.C. Code Ann. §11-35-1530(8) plainly requires the State to negotiate with the highest ranking vendor in good faith until negotiations reach a clear impasse: "If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second and then the third and so on ranked offerors..." S.C. Code Ann. § 1530(8)(b) provides that if the procurement officer is unsuccessful in his first round of negotiations he may reopen negotiations with any offeror. This language necessarily contemplates that the negotiations should be closed prior to the commencement or reopening of negotiations.

The critical question for this Panel is what must occur before a procurement officer determines that "a satisfactory contract cannot be negotiated." It is important to note in this case that going into the negotiations ACS was deemed the highest ranked offeror; and by definition, its proposal was determined to be the most advantageous to the State. For this reason, there is a statutory obligation to reasonably conclude that a satisfactory contract could not be reached with ACS before the State moved to the second ranked offeror, Saber. In order to do so, there has to have been sufficient communication or negotiation to support the decision. Such simply does not exist here.

In Protest of Anderson Consulting, 1994-1, the Procurement Review Panel addressed the requirements of good faith negotiation to impasse with the highest ranked vendor and the meaning of an opportunity to negotiate a contract with the State. The Panel noted that the following actions of a Procurement Officer were adequate to discharge this obligation: 1) the contractor was given an opportunity to negotiate the meaning of the terms and conditions of a contract, 2) when initial negotiations did not result in and agreement the contractor was tendered

a contract with acceptable conditions for the State, 3) the State went beyond tendering a contract and even considered alternate proposals, 4) the State clearly "broke off" negotiations after the contractor issued a written refusal to the tendered contract, 5) the State gave the contractor additional time to reconsider, 6) the State proposed further alternatives, and 7) the State clearly warned the contractor that they would begin negotiations with another contractor if the alternatives were not accepted. The Panel found, and properly so, that the State properly negotiated in good faith in those circumstances. None of those circumstances exist in this case. ACS was never advised that negotiations had been terminated or closed. Indeed, ACS clearly felt that negotiations were still open subsequent to the face to face meeting. ACS was not even given an opportunity to discuss its revised final proposal which it believed met the State's requirements and expectations. The protocol in *Anderson Consulting* which would have allowed the State to ensure that a satisfactory contract could not be met was simply not employed.

Saber and the UGU suggest that there was no obligation on the procurement officer to advise ACS that negotiations had been closed. They suggest it is incumbent upon the State to leave the highest ranked offeror wondering of the status of the negotiations. They assert that there are business justifications for leaving the highest ranked offeror in the dark to protect some sort of negotiating leverage should they be required to cycle through the negotiations with all of the responsive offerors and reopen negotiations with the highest ranking offeror. Saber and UGU assert that the language of Sec.1530(8) makes no mention of notifying ACS that negotiations are closed or terminated. However, this argument fails to address how the State can determine whether a "satisfactory contract cannot be negotiated with the highest ranking offeror" if the negotiations have not been exhausted or an impasse declared. Such an interpretation of Sec. 1530(8) is erroneous and completely undermines the evaluation process and gives unfettered discretion to the Procurement Officer to award the contract to whomever he/she pleases.

The UGU states their position simply – "You do not want to tell one offeror that negotiations are closed..." However, it is difficult to imagine how the procurement officer can know that it has procured the best offer from the offeror if that offeror does not know that negotiation are being terminated or closed. Effective communication as to the status is required as a matter of good faith and as a matter of providing the procurement officer an opportunity to reach a reasonable conclusion that a satisfactory contract can or cannot be reached. The notion that there is some competitive advantage gained by the offeror by virtue of providing that offeror with notice that negotiations are going to reach impasse is speculative.

Saber and the UGU cite another provision of the Code to reinforce the argument that the State is not required to notify the highest ranked offeror that negotiations are closed before moving to the next highest ranked offeror. See Section 11-35-3220(7). That particular provision governs the negotiation of contracts for architectural, engineering and other services. Saber and UGU argue that this particular provision provides for "formal termination" if a satisfactory contract cannot be negotiated. Furthermore, they argue because Section 1530 does not specifically use the term "formal termination," the procurement officer in this case was not required to notify ACS that negotiations were closed before moving on to Saber.

The reliance on Section 3220(7) is misplaced for several reasons. First, as was pointed out by the Chief Procurement Officer in his Decision:

> The work negotiated involves only the design professional's work on a construction project. Most of the project's work is bid on a low bid basis. The project's scope of work has yet to be designed, and the vast majority of design contracts are successfully negotiated with the highest qualified firm.

See Decision, P. 4 fn.1. Because most design contracts are negotiated with the highest qualified firm, the statute provides that in those limited cases where a satisfactory contract cannot be

negotiated with the highest qualified firm, all ties are cut with that firm and the State moves on to the next firm. There is no provision for returning to the highest qualified firm to negotiate so the highest qualified firm's participation in the procurement process is formally terminated. Under Section 1530, the process contemplates a potential scenario where either the State may return to "reopen negotiations" with the highest ranked offeror or request Best and Final Offers from the responsive offerors. Again, the question is under what circumstances may the State determine that a satisfactory contract cannot be negotiated before moving on. The only reasonable interpretation is a bright line indication that negotiations have been exhausted and the negotiations have closed. That was not done in this case.

Section 1530(8) provides negotiations are to be at the sole discretion of the Procurement Officer. This is a non-delegable governmental function. However, the record clearly shows that the negotiation and evaluation process was affected by external factors in violation of the Code. Indeed, it was the Project Executive Committee who made the ultimate decision to negotiate with Saber and award the Contract to Saber. The Governor's office was forwarded copies of the scoring sheets and references as well as identities of the evaluation panel. While a member of the Governor's staff was a member of the PEC, the evidence suggests that the Procurement Officer was awaiting direction from the Governor's Office on when, whether and how to negotiate with ACS. With attention from the Governors office, ITMO decided to raise price reduction as a possibility to ACS prior to actual negotiation. The Procurement Officer began negotiations with Saber based on the directive from the PEC and other outside influences. The hard work and proper evaluation of the evaluation panel became merely advisory. The contract was steered to the lowest priced vendor based upon outside influence and in utter disregard for the stated and articulated award criteria in the RFP. Cost became the most important award criteria.

Saber and the UGU argue that it is appropriate for the procurement officer to seek input from the using agency and that the Project Executive Committee served as the using agency in this procurement. The protest does not challenge the procurement officer's consultation with the using agency. Indeed Section 1010 does contemplate participation by using agencies in a procurement matter. However, the Code does not sanction ad hoc committees, who are not identified in the RFP as the Using Governmental Unit, conferring authority upon itself to serve as the ultimate decision maker on negotiations and contract awards conducted under the Code. It is inconceivable how the Project Executive Committee can make such a determination without any meaningful expertise on the content of the proposals being considered. While the Project Charter, which identifies the Project Executive Committee, was referenced in the RFP, it is an operational document that does not address how the Contract will be procured.

Saber and the UGU argue that the protest fails to allege specific examples of behavior that violate the good faith requirements of S.C. Code Ann. §§ 11-35-20(f) and 11-35-30. The protest and appeal allege numerous factual circumstances during the negotiation and proposed award of this Contract that reflect non-compliance with these statutory requirements. The non-compliance with the good faith requirements permeates the entire negotiation and award stage of this procurement. The Code does not require a protestant to provide a string cite to the good faith requirements of S.C. Code Ann. §§ 11-35-20(f) and 11-35-30 every time it alleges a fact.

## B. THE TERMS AND CONDITIONS OF THE NEGOTIATED PROPOSED SABER CONTRACT IMPERMISSIBLY LIMIT SABER'S LIABILITY TO THE STATE OF SOUTH CAROLINA

The negotiated Saber Contract proposed for award contains terms that dramatically limit Saber's liability in violation of Section 11-35-1530(8). The proposed terms of the contract to Saber clearly violate Regulation 19.445.2070. Although a Procurement Officer is given wide discretion during negotiations, there are certain non-negotiable terms in any state procurement

which by regulation the Procurement Officer has no authority to waive. The regulation, which is plainly applicable to competitive sealed proposals (by virtue of Regulation 19-445.2095), states:

> D. Modification of Requirements by Bidder.
> Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State, since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids should be rejected in which the bidder: ... (6) limits the rights of the State under any contract clause. Bidders may be requested to delete objectionable conditions from their bid provided that these conditions do not go to the substance, as distinguished from the form, of the bid or work an injustice on other bidders. (emphasis added).

The Saber proposal as revised by negotiation limits Saber's liability to the State for breach of warranty, breach of contract, and the State's alternative remedies under the required performance bond. The Saber proposal as revised by negotiation also unlawfully and improperly expands and waives the State's immunity for delay damages which is embedded in the State's standard terms. By regulation these terms are material, go to the very substance of the contract, and work an injustice to other vendors. These proposed changes are clearly ultra vires and non-enforceable. The proposed contract terms with Saber are illegal and unenforceable per se. Saber and the UGU argue that Reg. 19-445.2070 does not apply to the negotiation process. Indeed, the State, in *Anderson Consulting*, which involved the attempted procurement of the very same contract at issue in this case, adopted the application of Reg. 19-445.2070 to a negotiation under Section 1530(8) and refused to negotiate such terms.

Whether Reg. 19-445.2070 specifically applies or not, the prohibition set forth in the regulation reflect that limiting the liability terms of the Contract reflect changes outside the general scope of the RFP in violation of Section 1530(8). Saber and UGU state that the allegations that limiting the liability terms of the Contract violated Section 1530(8) was not raised prior to the April 18, 2007 Appeal Letter. That is simply not the case. The initial protest specifically addressed the allegations relating to limitation of liability, stating that such a

limitation works "an injustice to other vendors and the State itself because the terms are dramatically different from the stated terms of the RFP." These allegations were specifically litigated before the Chief Procurement Officer and Protech has argued from the outset that the State's permitting the limitation of liability significantly changed the scope and terms of the Contract. The Panel has long held that so long as Protestant raises the general nature of its grounds, the Panel believes that it is proper that the specifics of such grounds be developed before the CPO and that whether a protest is specific enough is not to be judged on highly technical or formal standards. *See* Protest of MEGG Corporation of Greenville, Case No. 1992-9; Protest of PS Energy, Case No. 2002-9. This issue has been raised and preserved for consideration by the Panel.

### C. SABER'S REVISED PROPOSAL DID NOT RESULT IN ANY BETTERMENT TO THE STATE AS COMPARED WITH ACS'S ORIGINAL PROPOSAL.

Regardless of whether the State decided to negotiate under Sec. 1530(8)(b) or not, it still has an obligation to make an award to the offeror whose proposal is most advantageous to the State pursuant to Sec. 1530(9). At the conclusion of the original evaluation process, Saber's proposal as revised as opposed to ACS's proposal, as submitted, was deemed most advantageous to the State. In order for the State to properly determine that the Saber proposal, as negotiated, was more advantageous to the State, at the very least it should be able to show that the changes to Saber's proposal *in toto*, through negotiation, benefited the State (See Anderson Consulting). However, the Saber contract, considered as a whole, is less advantageous to the State than either ACS's or Saber's original proposals because under either of the original proposals the State is protected with a full warranty, an appropriate performance bond, and the contractor's liability and responsibility to the State is assured in the event of non-performance. While the State may have saved a small percent of the Contract in the revised agreement with Saber, the state has

effectively "given away the store" to Saber. Any effective and objective comparison of the contract terms leads to the inescapable conclusion that the Procurement Officer's negotiations with Saber resulted in a far less advantageous proposed contract with the State. The Procurement Officer's determination that Saber's revised contract was "most advantageous" to the State is clearly erroneous, arbitrary and capricious. Saber and UGU argue that ACS is suggesting that is requesting a reevaluation and determination that its proposal was better than Saber's. This argument simply misses the point. The analysis is simply whether the Saber proposal as negotiated can reasonably be determined to be more advantageous to the State than the ACS proposal as submitted, since the ACS proposal was deemed most advantageous to the State after the scoring of the evaluation panel. In order for the State to properly award the Contract to Saber, this determination must be made pursuant to Section 1530(9).

## CONCLUSION

For the foregoing reasons, Protech requests that the Panel deny Saber's and the UGU's Motions to Dismiss and issue an Order that notice of award to Saber be cancelled and that the Procurement Officer be directed to continue negotiations with ACS until a contract is negotiated or the parties are at impasse or in the alternative the project should be re-solicited based upon revised terms and conditions which have been negotiated in the proposed Saber contract.

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| **STATE OF SOUTH CAROLINA )** | **BEFORE THE SOUTH CAROLINA** |
| **)** | **PROCUREMENT REVIEW PANEL** |
| **COUNTY OF RICHLAND )** | |
| | **Case No.: 2007-5** |
| **IN RE: Appeal of Protest of Affiliated )** | |
| **Computer Services, Inc. and )** | |
| **Protech Solutions, Inc. )** | |
| **)** | |
| **Solicitation No. 07-S7279 )** | **CERTIFICATE OF SERVICE** |
| **South Carolina Child Support Enforcement )** | |
| **System and Family Court Case Management )** | |
| **System )** | |
| **)** | |

I, Rita D. DeCarlis, a legal assistant with the firm Bruner Powell Robbins Wall & Mullins, LLC, attorneys for Petitioner Protech Solutions, Inc., do hereby certify that on this 6th day of June 2007, I served *the Memorandum in Opposition to Saber's and Using Governmental Units' Motion to Dismiss* upon all counsel of record listed below by U.S. mail, postage prepaid and addressed as follows:

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