

# ARTICLE 9. INDIANA VETERAN OWNED SMALL BUSINESSES

## Rule 1. Policy

### 25 IAC 9-1-1 Policy statement; procurement and contracting

Authority: IC 4-13; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6

Sec. 1. (a) It is the policy of the state to provide an equal opportunity for Indiana veteran owned small business enterprises (IVBE) to participate in the state's procurement and contracting processes. The commissioner shall be the final authority on all matters pertaining to the maintenance and administration of the program and compliance thereto.

(b) Under IC 4-13-1.3-3, the department may delegate its authority to a state agency. (*Indiana Department of Administration; 25 IAC 9-1-1; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA*)

### 25 IAC 9-1-2 IVBE procurement goal

Authority: IC 4-13; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6

Sec. 2. (a) Under IC 5-22-14-11, the state's IVBE goal is established.

(b) The IVBE goal shall apply to procurements and contracts, as awarded by the department and its designees, change orders, amendments, and other modifications that affect contract value. (*Indiana Department of Administration; 25 IAC 9-1-2; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA*)

## Rule 2. Definitions

### 25 IAC 9-2-1 Definitions

Authority: IC 4-13; IC 5-22-14-11

Affected: IC 4-13-1-2; IC 4-13.6; IC 5-22-2-13; IC 5-22-14-3.5

Sec. 1. The following definitions apply throughout this article:

(1) "Award" means the written determination made by the department, or its designee, of the lowest responsible and responsive bidder; or the responsible offeror whose proposal is determined in writing to be the most advantageous to the governmental body, as defined by IC 5-22-2-13.

(2) "Bidder" means a person who responds to a solicitation.

(3) "Commissioner" means the commissioner of the department.

(4) "Contract" means any contract awarded by the department, or its designee, for the procurement of goods, supplies, or services, including professional services.

(5) "Contract goal" means a targeted amount of IVOSB participation contractually established between the department, or its designee, and the prime.

(6) "Contractor" means a person who contracts with a state agency to provide goods or services.

(7) "Customary discretion" means usual decisions associated with the certain area of business or profession.

(8) "Customary industry practice" mean practices inherited from the past that are accepted and respected by the members of that same business community or industry.

(9) "Department" means the Indiana department of administration, as created by IC 4-13-1-2.

(10) "IVOSB" means an Indiana veteran owned small business enterprise, as described by IC 5-22-14-3.5.

(11) "IVOSB credit" means points received during the solicitation evaluation. Each solicitation shall enumerate the IVOSB credit to be utilized.

(12) "Owned and controlled" means the following:

(A) Ownership of at least fifty-one percent (51%) of the enterprise. If the enterprise is a corporation, this includes owning fifty-one percent (51%) of both the corporate voting stock and fifty-one percent (51%) of all outstanding stock.

(B) Control over the management of and active in the day-to-day operations of the business.

(C) An interest in the capital, assets, and profits and losses of the business proportionate to the percentage of ownership.

(13) "Prime" means any person who enters into a contract with a governmental body.

(14) "Principal place of business" means the entity:

(A) is paying the majority of its payroll (in dollar volume) to residents of Indiana;

(B) is employing Indiana residents as a majority of its employees;

(C) is making a significant capital investment in Indiana; or

(D) has its headquarters in the state of Indiana.

(15) "Solicitation" means an invitation to submit an offer to enter into a contract with a governmental body.

(16) "State program" means the IVOSB program, as maintained and administered by the department.

(17) "Subcontractor" means any person entering into a contract with a prime.

A reference to a federal statute or regulation is a reference to the statute or regulation in effect January 1, 2013. (*Indiana Department of Administration; 25 IAC 9-2-1; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

### **Rule 3. Scope of Activities**

#### **25 IAC 9-3-1 Activities to achieve participation; education**

Authority: IC 4-13; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6

Sec. 1. The department, in cooperation with the Indiana economic development corporation, as well as the commission on military and veterans affairs and all procuring agencies, shall perform activities and provide educational information to afford IVBE the opportunity to participate in the state's procurement and contracting processes. The department shall determine where and when the programs are most valuable to IVBE. (*Indiana Department of Administration; 25 IAC 9-3-1; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA*)

### **Rule 4. IVBE Participation in Procurement and Subcontracting**

#### **25 IAC 9-4-1 Monitoring IVBE participation**

Authority: IC 4-13; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6

Sec. 1. (a) The department may conduct preproposal meetings with prime and subcontractors. The department shall determine which projects will require a preproposal meeting. Items of discussion at the meetings may include, but are not limited to, the following:

(1) A review of program requirements.

(2) Subcontractor services.

(b) All change orders, amendments, and other modifications to the contract that affect value must include an explanation of the following:

(1) How IVBE will be utilized.

(2) Any IVBE percentage changes to the original contract amount.

(c) IVBE primes shall receive credit toward the contract goal for the use of its own workforce. (*Indiana Department of Administration; 25 IAC 9-4-1; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA*)

#### **25 IAC 9-4-2 Procedure for solicitation submission**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 5-22-14-3.5

Sec. 2. (a) A prime IVOSB bidder must submit the following to the department, or its designee, for solicitation submission:

- (1) The name of the IVOSB enterprise.
- (2) The phone number of the IVOSB.
- (3) The name of a contact person from the IVOSB.
- (4) Work the enterprise will perform and the approximate date when the IVOSB's work will commence.
- (5) The contract amount for services that will be performed.
- (6) Proof of principal place of business in Indiana.
- (7) A copy of the IVOSB's eligibility verification approval letter received from the Center of Veterans Enterprise of the United States Department of Veterans Affairs, as provided by IC 5-22-14-3.5(a)(1), or an approval letter from the state program.

(b) The prime bidder must submit the following to the department, or its designee, on behalf of its IVOSB subcontractors:

- (1) The name of the IVOSB.
- (2) The phone number of the IVOSB.
- (3) The name of a contact person for the IVOSB.
- (4) Work the IVOSB will perform and the approximate date when the IVOSB's work will commence.
- (5) The contract amount for services that will be performed.
- (6) Proof of principal place of business in Indiana.
- (7) The percentage commitment form.
- (8) A copy of the IVOSB eligibility verification approval letter, as referenced in subsection (a)(7).

(c) The department reserves the right to request additional documentation for purposes of authenticating an IVOSB's eligibility and participation.

(d) Purchases from IVOSB suppliers are allowed IVOSB credit. The maximum allowable credit will be limited to sixty percent (60%) of the total contract goal. (*Indiana Department of Administration; 25 IAC 9-4-2; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

**25 IAC 9-4-3 Review by the department of solicitation submissions**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 5-22-14-3.5

Sec. 3. (a) Upon receipt of the solicitation documents, the department shall verify the IVOSB's status on the Vendor Information Page, the federal database of businesses eligible to participate in the Center of Veterans Enterprise of the United States Department of Veterans Affairs' Veteran-Owned Small Business Program or the state program database maintained by the department.

(b) IVOSB contractors and suppliers must perform a commercially useful function. A commercially useful function is generally deemed to be when an IVOSB contractor or supplier is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, an IVOSB contractor or supplier must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. An IVOSB contractor or supplier does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of IVOSB participation. (*Indiana Department of Administration; 25 IAC 9-4-3; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

**25 IAC 9-4-4 Rules affecting an enterprise's responsibility after solicitation submission**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 5-22-14-3.5

Sec. 4. (a) The prime and subcontractors shall report all IVOSB participation in the state's standard subcontractor compliance tool, commonly known as the state pay audit system, on at least a monthly basis.

(b) IVOSB must notify the department, in writing, within thirty (30) days of any change affecting its qualifying membership, ownership, or control requirements, and of any other material change to the information provided in the application to either the Center of Veterans Enterprise of the United States Department of Veterans Affairs or the state program.

(c) On the two (2) year renewal for eligibility, the IVOSB must provide the department a copy of the Center of Veterans Enterprise of the United States Department of Veterans Affairs' renewal letter. If certified through the state program, the IVOSB must provide a letter verifying continued eligibility from the state program.

(d) The responsibility to acquire and supply the information to the department required in this section remains with the prime.

(e) Failure to comply with the provisions of this section may result in noncompliance or removal from the program. (*Indiana Department of Administration; 25 IAC 9-4-4; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

## Rule 5. Compliance

### 25 IAC 9-5-1 Compliance monitoring

Authority: IC 4-13; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6

Sec. 1. (a) In the management of this program, the department shall exercise its rights to employ all available administrative actions and remedies to ensure that the IVBE procurement goal and intent are successfully met. Therefore, the commissioner shall serve as the final authority for IVBE participation in the program.

(b) Because the attainment of the contract goal has been established through contractual provisions with the prime, the department shall consider the prime to be the sole source of responsibility for contract goal attainment and may be held accountable for the actions (or inaction) of its subcontractors. (*Indiana Department of Administration; 25 IAC 9-5-1; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA*)

### 25 IAC 9-5-2 Noncompliance

Authority: IC 4-13; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6

Sec. 2. (a) The department shall notify the prime of program noncompliance by either the prime or subcontractor, or both, and will seek corrective action including the imposition of a material breach of contract, if any of the following are determined:

(1) The prime or subcontractor failed to:

(A) timely meet the affirmative obligations of this article;

(B) demonstrate a good faith effort to comply with this article; or

(C) cooperate in providing information necessary to comply with this article.

(2) The prime or subcontractor provided false or misleading information concerning IVBE contracting activity, ownership, or status as a bona fide entity, as required by IC 5-22-14 et seq. and this article.

(3) The prime engaged in discriminatory conduct.

(4) The prime failed to make prompt payment to a subcontractor for services, materials, or labor unless the prime, in good faith, contests the payment or any portion of an invoice or request for payment from the subcontractor.

(b) If the commissioner determines that a prime or subcontractor fails to comply with any of this article, the department (or state agency) may elect to do one (1) or more of the following:

(1) Withhold payments on the specific contract in which the deficiency is known to exist until such time that satisfactory corrective measures are made.

(2) Adjust payments due or the permanent withholding of retainages of the specific contract in which the deficiency is known to exist.

(3) Suspend or terminate the contract in the event corrective action is not completed within a reasonable time.

(4) Suspend the prime or subcontractor from doing business with the state for a period not to exceed two (2) years.

(5) Suspend the IVBE from the program for a period not to exceed three (3) years.

(6) Any combination of the sanctions described in this subsection.

(c) In the event that the contractor provides false or misleading information, the department may provide the information to the Center of Veterans Enterprise of the United States Department of Veterans Affairs, another state agency, or any local, state, or federal law enforcement agency for investigation and enforcement purposes.

(d) In the event a remedy is required, the remedy is in the sole discretion of the commissioner. (*Indiana Department of Administration; 25 IAC 9-5-2; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA*)

### **25 IAC 9-5-3 Review process for noncompliance**

Authority: IC 4-13; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6

Sec. 3. (a) Upon the notification of the determination of noncompliance, the prime or subcontractor may submit a written letter of protest on the grounds that such findings are:

(1) arbitrary, capricious, or an abuse of discretion;

(2) conducted contrary to a constitutional, statutory, or regulatory provision;

(3) made without observance of a procedure required by law;

(4) in error or based on mistake; or

(5) not objectively formulated, may have been collusive, or may have been submitted in bad faith.

(b) The burden of challenging the findings of the department under section 2 of this rule remains with the petitioner.

(c) The letter of protest must be received by the department not more than ten (10) business days (as defined by the state work calendar) from the notification of findings.

(d) Letters of protest must state, with specificity, all grounds for relief. Protest letters that do not allege a ground for relief as described in subsection (a) may be rejected by written notification from the department. All letters of protest must be submitted to the IVBE protest coordinator via electronic mail or to:

Indiana Department of Administration

Procurement Division

Indiana Government Center South

402 West Washington Street, Room W478

Indianapolis, IN 46204

The department will respond in writing to a letter of protest in a timely manner.

(e) Within five (5) days of receiving the department's written response to a letter of protest, the petitioner may submit a request for appeal to the commissioner's designee. The request for appeal must be in writing and may not state grounds for relief that were not raised in the original letter of protest. (*Indiana Department of Administration; 25 IAC 9-5-3; filed Feb 28, 2014, 8:05 a.m.: 20140326-IR-025130402FRA*)

## **Rule 6. Application Process; Requirements**

### **25 IAC 9-6-1 Application for certification as an IVOSB through the state program**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 5-14-3; IC 5-22-14-3.5

Sec. 1. (a) The enterprise seeking certification shall submit its application on the form or forms approved by the department, accompanied by all requested documentation. The application must be signed and sworn under the penalty of perjury by the applicant.

(b) An enterprise seeking certification has the burden of demonstrating that it meets the requirements of this rule concerning ownership and control by qualifying members or members.

(c) An enterprise seeking certification shall cooperate fully with the department's requests for information and documentation relevant to the certification process. Failure to cooperate fully may result in denial of certification.

(d) An enterprise seeking certification has an affirmative obligation to disclose all material and relevant information affecting that enterprise's eligibility for certification. Any material misrepresentation or omission may be grounds for denial of certification.

(e) All documents submitted in connection with an application for certification are subject to the Indiana Access to Public Records Act, IC 5-14-3. The department will maintain as confidential:

- (1) any tax returns;
- (2) any financial information;
- (3) any trade secret information; and
- (4) all documents listed in IC 5-22-14-3.5;

as authorized under IC 5-14-3-4(a).

(f) If the department is not able to make a determination based on the application and documentation presented, the department may elect to conduct on-site visits during normal business hours. The site visit will be at the headquarters, if located in Indiana. If the headquarters are not in Indiana, then a location that the department deems to be the best representation of the work done by the IVOSB will be the location of the on-site visit.

(g) The department will make a determination on applications for certification within ninety (90) days of the receipt of the completed application, including all relevant documentation. (*Indiana Department of Administration; 25 IAC 9-6-1; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

#### **25 IAC 9-6-2 Ownership determinations**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 5-22-14-3.5

Sec. 2. In determining whether a qualifying member owns an enterprise, the department shall consider all the facts in the record, viewed as a whole to determine if the qualifying member owns the enterprise as defined by 25 IAC 9-2-1(12). (*Indiana Department of Administration; 25 IAC 9-6-2; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

#### **25 IAC 9-6-3 Control determinations**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 5-22-14-3.5

Sec. 3. (a) In determining whether qualifying members control an enterprise, the department will consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified. An independent business is one, the viability of which does not depend on its relationship with another enterprise or enterprises.

(c) An IVOSB must not be subject to any formal restrictions, including, but not limited to, corporate charters, bylaws, or contracts; or informal restrictions that limit the customary discretion of the qualifying members.

(d) The qualifying members must possess the power to direct or cause the direction of the management and policies of the enterprise and possess the power to make day-to-day as well as long term decisions on matters of management, policy, and operations.

(e) The qualifying members of the enterprise may delegate various areas of the management, policymaking, or daily operations to other participants in the enterprise, regardless of whether these participants are qualifying members. Such delegations of authority must be revocable, and the qualifying members must retain the power to hire and terminate any person to whom the authority is delegated. The managerial role of the qualifying members in the enterprise's overall affairs must be such that the department can reasonably conclude that the qualifying members actually exercise control over the enterprise's operations, management, and policy. (*Indiana Department of Administration; 25 IAC 9-6-3; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

#### **25 IAC 9-6-4 Another factor considered for certification**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 5-22-14-3.5

Sec. 4. Only enterprises that perform a commercially useful function, as set forth in 25 IAC 9-4-3(b), will be considered for certification. (*Indiana Department of Administration; 25 IAC 9-6-4; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

## **Rule 7. Responsibilities; Certification**

### **25 IAC 9-7-1 Enterprise's responsibility after being certified as an IVOSB**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 5-22-14-3.5

Sec. 1. (a) Each certified enterprise must notify the department in writing within thirty (30) days of any change affecting the certified enterprise's qualifying membership, ownership, or control requirements, and of any other material change to the information provided in the application form such as the following:

(1) Changes in contact information including address, telephone number, and personnel.

(2) Changes to management responsibility among members of a limited liability company.

The notice must be given by completing and signing the state form "Notice of Material Change to a Certified IVOSB". All relevant supporting documentation must be attached. Failure to do so could lead to revocation of the certification.

(b) Annually, on the anniversary of the date of its certification, an IVOSB certified enterprise must complete and submit the state form "Affidavit of Continued Eligibility". Failure to do so could lead to revocation of the certification.

(c) Once the department has certified the enterprise, it shall remain certified for a period of two (2) years unless its certification has been revoked. The department may not require firms to reapply for certification as a condition of continuing to participate in the program during this two (2) year period unless the factual basis on which the certification was made changes. (*Indiana Department of Administration; 25 IAC 9-7-1; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

## **Rule 8. Complaints; Revocation**

### **25 IAC 9-8-1 Complaints and revocation of an enterprise's certification**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 4-21.5-3-8; IC 5-22-14-3.5

Sec. 1. (a) Requirements for ineligibility complaints are as follows:

(1) Any person may file with the department a written complaint:

(A) alleging that a currently certified enterprise is ineligible; and

(B) specifying the alleged reasons why the enterprise is ineligible.

(2) The department is not required to accept a general allegation that an enterprise is ineligible or an anonymous complaint.

(3) Upon receiving a complaint that fits the criteria in subdivisions (1) and (2), the department must review the complaint and the department's file of the entity listed in the complaint. The department may request additional information from the enterprise or conduct any other investigation deemed necessary.

(b) If the department determines, based on this review, that there is reasonable cause to believe that the enterprise is ineligible, IC 4-21.5-3-8 controls. (*Indiana Department of Administration; 25 IAC 9-8-1; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

### **25 IAC 9-8-2 Revocation not due to a complaint**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 4-21.5-3-8; IC 5-22-14-3.5

Sec. 2. (a) Revocation of certification can occur if, based on notification by the enterprise of a change in its circumstances, or other information that comes to the attention of the department, there is reasonable cause to believe that a currently certified enterprise is ineligible.

(b) The department may base a decision to revoke certification, on one (1) or more of the following and by adhering to IC

4-21.5-3-8:

- (1) Changes in the enterprise's circumstances since the certification of the enterprise by the department that render the enterprise unable to meet the eligibility standards of this rule.
  - (2) Information or evidence not available to the department at the time the enterprise was certified.
  - (3) Information that was concealed or misrepresented by the enterprise in previous certification actions by the department.
  - (4) A change in the certification standards or requirements since the enterprise was certified.
  - (5) A documented finding that the department's initial determination to certify the enterprise was clearly erroneous.
  - (6) Noncompliance with 25 IAC 9-4-4(e), 25 IAC 9-7-1(a), or 25 IAC 9-7-1(b).
- (c) During the pendency of a proceeding to determine if an enterprise's IVOSB should be revoked the enterprise shall retain its certification until a final determination is issued.
- (d) When an enterprise's certification as an IVOSB has been revoked and is no longer subject to judicial review, the department will take the following action relative to prime contractors who have relied in good faith upon the certification of the disqualified entity:
- (1) When a prime contractor has made a commitment to use the disqualified enterprise, or there has been a commitment to use the enterprise as a prime contractor, but a subcontract or contract has not been executed before the order to show cause provided for in subsection (a) has been issued, the ineligible enterprise does not count toward the contract goal or overall goal. The prime contractor must:
    - (A) meet the contract goal with an eligible enterprise; or
    - (B) demonstrate that it has made a good faith effort to do so.
  - (2) If a prime contractor has executed a subcontract with the enterprise before the department has issued a notice to show cause, the prime contractor may continue to:
    - (A) use the enterprise on the contract; and
    - (B) receive credit toward its goal for the enterprise's work.
- (e) The remaining portion of the decertified enterprise's performance of the contract shall not count toward the state of Indiana's overall annual goal of IVOSB participation. (*Indiana Department of Administration; 25 IAC 9-8-2; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

## **Rule 9. Review; Certification as an IVOSB**

### **25 IAC 9-9-1 Review of determinations by the department regarding certification as an IVOSB**

Authority: IC 4-13; IC 5-22-14-3.5; IC 5-22-14-11

Affected: IC 4-13-1; IC 4-13.6; IC 4-21.5; IC 5-22-14-3.5

Sec. 1. (a) An enterprise whose application for certification has been denied shall be given notice of such action and shall be entitled to petition for review under the Indiana Administrative Orders and Procedures Act, IC 4-21.5, et seq.

(b) The administrative law judge or judges appointed to hear any matter arising under this rule shall have had no prior involvement in the review or preliminary determination of the matter heard.

(c) The ultimate authority under this article is the commissioner of the Indiana department of administration. (*Indiana Department of Administration; 25 IAC 9-9-1; filed Jun 6, 2017, 12:34 p.m.: 20170705-IR-025160265FRA*)

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