

Public Procurement 2019

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Public Procurement 2019

Contributing editor**Totis Kotsonis**

Eversheds Sutherland

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.

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.



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LEGISLATIVE FRAMEWORK

Relevant legislation

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

Act No. 19,886 of 30 July 2003 about the Administrative Contracts Bases for Supply and Provision of Services (Act No. 19,886/2003) (the Act), and its regulation, Decree No. 250 of 24 September 2004, set the basic rules for the procurement of goods and services by public entities.

The Act establishes, as a general procurement rule, the public bidding system, but in exceptional cases a public entity may contract through a private bidding process or through a direct deal.

Sector-specific legislation

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

In the construction field, Decree No. 75 dated 1 December 2004 (Decree No. 75/2004) and Decree No. 48 dated 9 September 1994 (Decree No. 48/1994), both issued by the Ministry of Public Works, establish special procurement rules that apply to the construction of public works and public works advisories.

The energy supply services executed by the public distribution service's concession companies are also governed by a specific statute, regulated in the General Act for Electric Services (Force of Law Decree No. 4, dated 5 February 2007) and its regulation, approved through Supreme Decree No. 106 of 2005.

Additionally, the assignment of concessions by public bodies is subject to special statutes, regulated among others by the following acts:

- concession for use of exclusive ways to perform public transport (Act No. 18,696, dated 31 March 1988);
- public works concession (Decree No. 900, dated 18 December 1996 and Decree No. 956, dated 20 March 1999);
- concession for the use of municipal property (Force of law Decree No. 1, dated 26 July 2006); and
- concession for the establishment, construction and exploitation of sanitary services (Force of Law Decree No. 382, dated June 21 1989).

International legislation

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

Chilean public procurement legislation shares principles similar to those governing the public procurement system of the European Union (EU), and which are advocated by the World Trade Organization.

The public procurement system establishes that, as a general rule, state entities shall purchase goods and contract services through public bidding processes, in which all natural and legal persons, local or

foreign, that are interested may participate. The procurement through private biddings or direct deals is allowed only exceptionally.

Also, this regulation prevents any type of arbitrary discrimination between providers, so request-for-bids documents must establish impartial participation conditions and objective evaluation criteria, which may not give any advantage to certain competitors.

Additionally, the technical description of the goods and services to be contracted cannot refer to specific brands nor to requirements that exclude certain competitors.

To promote the transparency of these processes, all requests for bids and the resolution of the procurement processes are published on the website Mercado Público.

Proposed amendments

4 | Are there proposals to change the legislation?

Currently, some amendments to the Act are being processed, which, among other things, aim to promote the participation of small and medium-sized enterprises (SMEs); encourage sustainable public purchases, strengthen the prohibition on dividing contracts in order to qualify for the procurement procedure; introduce improvements to the procurement system through framework agreements; establish additional prohibitions to contract with the state administration; and ensure that companies that contract with the state comply with labour obligations to workers.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

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

The Act expressly excludes purchases made by the Army and the Forces of Order and Public Security from this procurement system, including war material, military and police vehicles, equipment and advanced information technology systems.

Finally, state-owned companies, which are created by law, are not subject to this system.

Contract value

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

The procurement of goods or services the value of which is less than three monthly tax units (UTM) – approximately US\$215 – are excluded from the public procurement system, and can be directly contracted by public bodies.

Amendment of concluded contracts

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

Public procurement regulations, as a general rule, allow the amendments of contracts, especially when this modification is based on the well-founded public interest, in which case they must be justified.

Thus, the Act expressly recognises the power to modify a contract based on certain causes that may be set in the request-for-bids documents and in the contract signed between the parties.

For its part, on infrastructure matters, Decree No. 75/2004 establishes that contracts for public works construction may be modified, providing an increase or decrease of works, if it respects certain limits. The same applies to public works concessions, which recognise the power of the Ministry of Public Works to require the modification of the characteristics of the works and services contracted. In both cases the public body must pay the respective compensation.

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

The General Comptroller of the Republic, with respect to the contracts governed by the Act, has declared that the modification of a contract cannot include new goods and services, except those necessary to fulfil the original agreement. Doing otherwise requires a new deal (Opinion No. 12,473/2009).

Privatisation

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

Privatisations will generally be preceded by a public tender procedure if there are two or more interested persons involved in the service that will be privatised. A technical evaluation of the submitted projects is carried out in order to verify that they fulfil the minimum required conditions. The adjudication shall be based on different factors depending on the service (eg, lower rates for users, better technical conditions and higher offer prices).

Public-private partnership

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

As a general rule, projects subject to the PPP system are awarded through a public tender procedure. One of the most successful systems in this area corresponds to the public works concessions system, governed by Decree No. 900/1996, which states that procurements shall be regularly subject to a local or international public bidding process, in which natural or legal persons, local or foreign, may participate.

ADVERTISEMENT AND SELECTION

Publications

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

The calls for public bids governed by the Act are published in the Public Market Portal, which can be accessed through the Mercado Público website.

In addition, there are other web portals where calls for bids are published, such as the Licitación Eléctricas, for contracting electricity supply services from energy distribution concessionaires, and Transantiago, for public transport concessions.

Without prejudice to the existence of websites, calls for bidding processes must be published in newspapers of national circulation.

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?

As a general rule, there are no limitations in this matter. However, some procurement systems include the possibility of prequalifying bidders, especially in the infrastructure field, when the size and complexity of the works make necessary to ensure the technical and financial capacity of the bidders.

For example, Decree No. 900/1996, on public works concessions, establishes a prequalification process, to which all interested persons are subject. Only the bidders that have approved this stage may be able to apply for the public bidding process.

On the other hand, Decree No. 75/2004, issued by the Ministry of Public Works, on public works' construction, includes a pre-selection process, according to which only providers who are registered in the Contractor's Registry (administered by the Ministry) may be able to participate in the biddings called.

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

In Chile, public procurement systems do not include the possibility of establishing a maximum or minimum numbers of providers for the purposes of awarding a contract through a public bidding process.

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?

As a general rule, interested people who are prohibited from participating in bidding processes may do so once the legal terms of the prohibition elapse. There are several public entities that administer the records of prohibited providers, which must prove they meet the requirements to be reintegrated into the system.

If the registration of a provider has been suspended due to minor offenses, it will be automatically activated when the suspension term has elapsed.

In serious and exceptional cases related to fraud in procurement processes, Law No. 19,886/2003 establishes that the Director of Purchasing and Public Procurement may permanently remove registered providers from the registry.

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?

The public procurement legislation expressly establishes that bidding processes shall be based on the principles of free competition among bidders, equal treatment and non-arbitrary discrimination, strict adherence to request-for-bids documents and transparency, among other principles.

Independence and impartiality

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

Chile does not have a centralised public procurement body, so each public entity conducts its own contracting. Regarding these, the Act provides that public officials who, for any reason, do not have sufficient impartiality must abstain from intervening in the procurement processes.

Also, to safeguard the impartiality during the offers' evaluation stage, all procurements exceeding 1,000 UTM (approximately US\$72,305), are evaluated by a commission of at least three members.

Conflicts of interest

17 | How are conflicts of interest dealt with?

As indicated above, the Act establishes that public officials of bidding entities are subject to conditions that reduce their impartiality, must abstain from participating in procurement processes. Additionally, this regulation states that the evaluation commission's members cannot have any conflict of interest with bidders at the time of the evaluation. Their appointment is published in the Mercado Público system, for purposes of transparency.

The above-mentioned norm is complemented by Public Procurement Directive No. 14, on recommendations for the functioning of the Evaluation Commissions, in which it is suggested that all of a commission's members shall be requested to make affidavits in which they express that they have no conflicts of interest with bidders. It also indicates that, in the case of a conflict of interest arising after the commission's members' appointment, the member involved must refrain from participating in the evaluation, and shall inform his or her superior in this circumstance, so that he or she can be replaced.

Bidder involvement in preparation

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

The Act considers the possibility that, prior to the elaboration of request-for-bids documents, bidding entities may carry out formal consultation procedures with suppliers, in order to obtain information on the prices, characteristics of goods and services, and an offer's preparation time. These consultation processes are convened through public and open calls via Mercado Público and newspapers of national circulation.

The Concessions Act, for its part, provides that if the prequalification bases requires, prequalified bidders may propose improvements, additions or adjustments to the definitive project's design to the Ministry of Public Works, through filings that will be public. The Ministry, after requesting additional necessary studies from independent entities, shall communicate the additional contents and adjustments that will be incorporated in the request-for-bids documents.

In both cases, potential bidders do not directly participate in the preparation of the request-for-bids documents nor do they make decisions in relation to their content; they provide information that could be relevant to define certain conditions of a proposal.

Procedure

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

The general procedure of contracting is public bidding. In the event that no bidders are interested in the public bidding process (or the private bidding process if the type of procurement makes using it advisable), it may be contracted by direct deal if is appropriate, in which case the decision must be duly justified.

Separate bids in one procedure

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

The public procurement regulations do not expressly prohibit the filing of offers by related proponents or by those who belong to the same business group. However, the request-for-bids documents may establish restrictions in this regard, which is something that happens in practice. Also, certain publicity measures are established that allow the participation of related proponents to be transparent.

Negotiations with bidders

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

The procedures in which negotiation with bidders occurs correspond to the mechanism of private bidding and direct contracting, whose use is subject to certain conditions. In the first place, these are procurement mechanisms that can be exceptionally used, and their use shall be duly founded.

Causes and facts argued to access to this procurement mechanism shall be included in a duly founded resolution issued by the contracting entity and published through the Mercado Público system, as well as the administrative acts where the purchase appears.

The occasions where this mechanism may be used include:

- when there are no bidders in a public bidding process;
- in case of emergency, urgency or unforeseen circumstances;
- when there is only a single supplier of a good or service;
- when the service to be contracted has a confidential nature or if its diffusion affects national security or national interests; and
- when the purchases made are less than 3 UTM.

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?

Except for the cases mentioned in question 21, where a negotiation with bidders is carried out owing to the nature of the contracting that is being performed, our legislation does not expressly consider other negotiation mechanisms, such as the competitive dialogue system established by the EU.

Notwithstanding the foregoing, a similar system can be found in Decree No. 900/1996 on public works concessions, which establishes that the Ministry of Public Works may receive, from prequalified bidders, suggestions and filings for complementing or adjusting the request-for-bids documents that will be published later.

Framework agreements

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

According to the Act, the framework agreements are preceded by public bidding processes required by the Director of Purchasing and Public Procurement.

Bidding entities are obliged to contract through framework agreements if the required good or service is available through such a system, unless they are able to obtain more advantageous conditions on their own, which shall be objective and demonstrable, and in which case they may contract outside the framework agreement.

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

Framework agreements are generally awarded to various suppliers, which are classified by categories of goods and services in a public catalogue.

Public entities can directly contract with any supplier that is in the catalogue through the issuance of a purchase order, unless it concerns contracts of more than 1,000 UTM (approximately US\$72,305), in which case the bidding entity shall communicate its intention to purchase to all the suppliers awarded in the appropriate category of goods or services required. In this case, as general rule, the public bid is awarded to the tenderer offering the best conditions at the lowest price.

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?

As a general rule, suppliers' temporary unions or consortia may make changes in their composition when one of their members is affected or is unable to participate in the procurement processes. In this case, consortia are allowed to exclude the affected member or to withdraw their offer.

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?

In recent times, measures to encourage the participation of SMEs in the procurements governed by the Act have been adopted. One of the most important is the possibility of applying through a 'suppliers temporary union', which allows these companies access to procurement processes that, due to their size and guarantee requirements, were previously reserved for larger companies.

Likewise, bidding entities were granted greater flexibility to require guarantees of the seriousness of the offers in processes with amounts less than 2,000 UTM, depending on the risk involved in the operation.

Additionally, this regulation allows a contract to be awarded to various bidders.

Variant bids

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

The Act does not prevent the filing of more than one offer per bidder. However, in accordance to the principle of equal treatment, this possibility shall be expressly included in the request-for-bids documents, which occurs in practice. If the filing of multiple offers is prevented, as general rule it is established that the first offer entered into the system will be accepted, and the rest of them will be excluded.

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

The bidding entity shall take variant proposals into account unless the possibility of filing multiple offers has been expressly prohibited in the request-for-bids documents.

Changes to tender specifications

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

Bidders that do not comply with the specification of the bidding basis will be disqualified from the tendering process. Additionally, offerors that change the proposed conditions after filing their offers, or who withdraw from the contract after being awarded, may be sanctioned by the execution of the guarantee of seriousness of the offer if it was required at the time of application.

Award criteria

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

Public procurement legislation establishes that the request-for-bids documents shall consider objective technical and economic evaluation criteria. These can include:

- the price;
- experience;
- technical quality and after-sales support;
- delivery time;
- environmental considerations;
- previous contractual compliance; and
- any factors that are relevant to the characteristics of the goods or services tendered.

The criteria must be defined by the bidding entity, considering the characteristics of the acquisition required. Cost can never be the only criterion.

It is important to note that when the contracting customary services, such as a cleaning service, are tendered, the request-for-bids documents shall include the employment and remuneration conditions as a technical criterion.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The Act considers an abnormally low offer as one that is 50 per cent lower than the price offered by the precedent offerer, if the costs of the offer are economically inconsistent.

In turn, Decree No. 75/2004 on public works contracts establishes that an abnormally low offer will be more than a 15 per cent lower than the official budget of the project, or more than 20 per cent lower than a variant offer, unless the request-for-bids documents establish a different percentage for this purpose.

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

The aforementioned offers can be awarded by the bidding entities through the issuance of a founded resolution, and requesting an increase in the amount of the guarantee of faithful compliance, for the price difference.

Also, according to Decree No. 75/2004, if the price of the accepted offer is low in the ranges set, an additional guarantee for faithful compliance of the contract will be required. Its amount shall be the price difference reduced by 15 per cent or 20 per cent, depending on the cause invoked, or by the percentage indicated in the request-for-bids documents.

REVIEW PROCEEDINGS

Relevant authorities

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

In general, the same contracting entity decides on the review applications. In the event that the interested party is not satisfied with the administrative decision, it may appeal before the Ordinary Courts or the Public Procurement Court (a specialised body in procurement matters), depending on what stage the procurement process is at. In both cases, the first-instance decision can be reviewed by a court of appeal.

Also, aside from the judicial system, the General Comptroller of the Republic may be required to review the decisions adopted by the bidding entity, in its role of supervisor of public bodies.

It is important to note that there are special dispute resolution systems, such as the Technical Concessions Panel, which must decide in a non-binding manner on any discrepancies that may arise between the parties during the execution of a concession contract. The Panel's decision may be submitted to arbitration review.

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

The recourses filed before the mentioned authorities are different, and each one is processed based on a special procedure that includes various stages.

Timeframe and admissibility requirements

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

In general, these procedures are meant to be brief, due to the nature of the disputes. According to the legislation on the matter, procedures before the public entities shall take a maximum of six months to be resolved; however, in practice, they commonly take longer.

In turn, before the Public Procurement Court, the term between the filing of the lawsuit and the issuance of the judgment may be approximately one year. If appeals are filed against the first-instance judgment, it may take approximately another six months until the judgment of the Court of Appeals.

36 | What are the admissibility requirements?

Various administrative recourses may be filed before the bidding entities, which must be done within terms of five days, one year or up to two years. The first recourse only requires demonstrating that the administrative decision affects a right or legitimate interest of the claimant. In turn, recourses that must be filed within one or two years require the concurrence of additional elements, mainly related to certain administrative irregularities that must be proven when filing the claim.

Chilean legislation contemplates a broad definition of 'interested party', so claiming legitimacy to a claim is not a problem.

The filing of administrative recourses does not suspend the term in which to file judicial appeals. This may cause a problem if the administrative recourses are not solved before the expiration of the judicial term. Also, the cases under review before administrative authorities cannot in turn be filed before tribunals.

A problem in relation to administrative and judicial recourses is that their filing does not suspend the contested administrative act, so this action could have produced all its effects at the time of solving the claim ordering the cease of effects.

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

Administrative recourses must be filed within a period of five days, one year and up to two years, from the notification of the administrative act. Lawsuits before the Tribunal of Public Procurement must be filed within 10 business days. The time limit for making a claim before Ordinary Tribunals is five years.

Also, there is a special Protection Action, which can be filed before the Court of Appeals within 20 business days.

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?

No, it does not, but when filing the application for review the claimant may expressly request the suspension of the procurement process. Furthermore, before ordering the suspension, the relevant entity hears both parties involved, owing to the principle of impartiality.

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

See question 38.

Notification of unsuccessful bidders

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

Given that the procurement processes are public, all information regarding them is available on the Mercado Público website for all offerors and interested parties.

Access to procurement file

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

The bidding processes governed by the Act are published in the Mercado Público online portal, where request-for-bids documents and all the resolutions issued in the process can be found.

For its part, the special procurement processes (ie, those for construction and public works concessions and energy supply) are published in specific web portals where the relevant information about them can be found. In these processes, as a general rule, only the bidders that have formally received request-for-bids documents may submit offers.

Disadvantaged bidders

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

It is common, in procurement processes that involve large amounts of money, for bidders that are not awarded a contract to file applications for review. There is no official data on the recourses filed before the public administration; however, during 2018 more than 300 lawsuits were filed before the Public Procurement Court.

Violations of procurement law

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

Disadvantaged bidders can claim compensation for damages before Ordinary Courts by filing a civil lawsuit within five years after the event claimed.

Such filings are not subject to greater requirements, apart from having to be submitted within the legal term and having to specify the claimed damage.

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?

It is possible for a contract to be terminated after a review is requested by an interested person if irregularities in the award are detected. The imposition of this penalty is not common, but it has occurred when manifest and serious irregularities have been detected.

Legal protection

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

Interested parties who contract with the public administration through direct deals can file the same administrative recourses as those that have contracted through a public bidding process. Additionally, they may file recourses before Ordinary Courts and the Court of Appeals, and before the General Comptroller of the Republic.

The only difference in this matter with respect to public bidding is that parties that have contracted through a direct deal cannot file lawsuits before the Public Procurement Court, as this entity has no competence to review procurements of that nature.

Typical costs

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

The affected persons can file administrative recourses without needing to be represented by an attorney. In this sense, the cost will be associated with the time invested in the preparation and processing of the recourse. The same occurs in the case of filing recourses before the General Comptroller of the Republic.

The filing of the Protection Action before the Court of Appeals can also be made directly by the affected person, but usually an attorney is hired for that purpose. Additionally, certain procedural expenses must be assumed.

For its part, lawsuits filed before the Public Procurement Court require the representation of attorney, and procedural expenses must also be assumed. The same happens for recourses filed before ordinary courts.



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UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

Fifteen years after the entry into force of the Act, it is possible to clearly identify some areas that need improvement, one of which is the dispute resolution system. Currently there is a group of experts studying possible modification to the organisation, procedure and competence of the Public Procurement Court.

Regarding the Public Procurement Court, it has been proposed to increase the number of sessions for reviewing the cases in order to improve resolution times. This modification is extremely important for the decisions of the Court to be effective.

The possibility is being considered that the Public Procurement Court will be able to carry out the compensation procedure once the final decision is issued. At present, once the plaintiff has obtained a favourable decision, it must file a lawsuit before an Ordinary Court to obtain compensation for damages.

Regarding the last aspect, there is a proposal to extend the competence of the Public Procurement Court to allow it to consider illegal acts or omissions that have occurred during the execution of an agreement. Currently, the competence of this court is limited to the illegal acts or omissions that have occurred between the approval of the bidding basis and the award.

It is also proposed to implement a contract management system that allows monitoring of the evolution of the contracts, payments, penalties, modifications and guarantees, among other matters.

Finally, there is a worrying trend to submit draft laws in the Congress that create more difficulties in participating in public procurement. Although such measures could be an effective mechanism for avoiding some types of conduct, the basic principle of free competition between the interested parties is also to be considered.

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