

Evolving Standards for Prequalification: Public Contracts and Procurement Regulations

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EVOLVING STANDARDS FOR PREQUALIFICATION

The term “responsible,” as applied to bidders, is defined in Public Contract Code section 1103, which defines a “Responsible Bidder” as “a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.” This conforms to the definition adopted by California case decisions.²⁴⁵

Stated differently, a “responsible” bidder is one who is able to satisfactorily perform the work. A contract does not have to be awarded to the lowest bidder if that bidder is not responsible, as determined by the public entity.

A. Mandatory Subcontractor And Qualifications Based Prequalification

Prequalification procedures first appeared in 2000 with Public Contracting Code section 20101 providing a standardized questionnaire and financial statement that public entities could use for prequalification programs. The form was intended for a broad cross-section of public entities, was not mandatory, and did not prevent public entities from fashioning their own systems.²⁴⁶ Forms and methods for pre-qualification can be found on the websites of the major public entities, school districts and community college districts.

1. Bond Funded Schools Project Over \$1 Million (Public Contract Code Section 20111.6)

Under Public Contract Code section 20111.6, school districts that use funds from the Leroy F. Greene School Facilities Act of 1998 (or any future state school bonds) involving a project in excess of \$1 million must prequalify prospective bidders. Contractors who must prequalify for such projects include general contractors, and if the project includes the scope, then mechanical, electrical, and plumbing (MEP) subcontractors. A list of its prequalified general contractors and electrical, mechanical and plumbing subcontractors must be available to all bidders at least five business days before the date fixed for public opening of sealed bids.

2. Mandatory “Qualifications Based” Prequalification Under the Design-Build Statute

As discussed above, when a local agency employs a design-build approach under Public Contract Code section 22164, it must prepare and issue a request for qualifications in order to prequalify or short-list the design-build entities whose proposals shall be evaluated for final

²⁴⁵ *Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County* (1972) 7 Cal.3d 861, 867.

²⁴⁶ Under Public Contract Code sections 20101, if the agency chooses to employ the prequalification process, standard form questionnaires are issued and must be submitted by each bidder along with financial statements, both of which must be verified under oath. Not surprisingly, if an agency chooses to use the prequalification process for a particular contract, it must require all bidders to comply with the prequalification submission requirements. Questionnaires and financial statements submitted by prospective bidders are confidential and are not considered public records, nor open for public inspection. In evaluating whether or not a prospective bidder is sufficiently qualified to bid for a particular contract, each agency must adopt and apply a uniform system of rating bidders, on the basis of the standard questionnaires and financial statements. Then, bidders who have been prequalified are eligible to obtain and submit the standard proposal forms for the subject contract.

selection. The required request for qualifications tracks the requirements of the procurement and the short-listing process resembles a Qualifications Based Selection.

B. The Berkeley Balcony Tragedy And Resulting Legislation (Senate Bill 465) – Strong Legislative Recognition Of The Quality Issue. A New Statutory Factor For Prequalification Of Contractors?

Senate Bill 465, as signed by Governor Jerry Brown, became law in response to the June 2015 apartment balcony collapse in Berkeley, California, that killed six students and injured seven. The law’s purpose and its immediate and long-term impacts on the construction industry can best be understood in the context of the press release issued by its co-author, State Senator Jerry Hill. The release states that the new law “ensures that state agencies tasked with overseeing the construction industry are taking appropriate steps to identify bad actors and improve building standards.” There are, currently, working group studies that the law mandates be completed by January 1, 2018. The purpose of these working group studies is to assess: (1) potential changes in related building codes and (2) possible self-reporting of judgments, arbitration awards and settlement payments of negligent construction claims and other issues.

Beginning January 1, 2017, licensed contractors must self-report, in writing and within 90 days of their first knowledge, to the Contractors’ State License Board (CSLB) any conviction of the licensee for any felony or any other crime that is “substantially related to the qualifications, functions, and duties of a licensed contractor.”²⁴⁷ However, instead of stopping with this new reporting obligation, SB 465 further expanded this enforcement information tool in two important ways.

First, the new law requires California’s Department of Industrial Relations’ Division of Occupational Safety and Health (Cal/OSHA) to transmit to CSLB (and potentially other agencies) copies of any citations or other actions taken against any persons, licensed or not, working in the capacity of a contractor as defined in the Contractors’ State License Law. Prior to the new law, Cal/OSHA was only required to transmit to CSLB copies of “reports made in any investigation” involving a licensed contractor. Under the new law, Cal/OSHA will do more than transmit investigation reports. Cal/OSHA will also transmit to CSLB citations, regardless of whether the contractor is guilty of a violation, and other actions taken by Cal/OSHA against a contractor.

Second, the law reaches out to other agencies by authorizing CSLB to enter into interagency agreements with other state or local agencies to receive “any information relevant to its priority to protect the public.” The new law is designed to provide CSLB with a comprehensive collection of data about contractors’ work in general as well as specific regulatory and legal actions taken against contractors by other agencies.

VII. CONFIRMING THAT PROCUREMENT PROCEDURES COMPLY WITH CURRENT LEGAL STANDARDS

247. Business and Professions Code section 7071.18(a)(2).

The competitive bidding process usually involves public advertisement for the submission of sealed bids, the public opening of bids, and the award of contracts to the lowest responsible bidder that is responsive to the solicitation for bids. This process is almost exclusively governed by statute. The Public Contract Code applies in one respect or another to virtually all public entities in California.

A. Distinguish: Bidding Requirements And Contract Terms

The requirements for competitive bidding are generally well known and are listed below. This section distinguishes between requirements for bidding and requirements for the actual contract. The Public Contract Code intermingles the two concepts. Many public entities provide that their instructions to bidders and other bid requirements become part of the contract. This section, however, treats them separately.

B. The Uniform Public Construction Cost Accounting Act

If the public entity has elected or “opted in” to the Uniform Public Construction Cost Accounting Act (UPCCA),²⁴⁸ then alternative bidding requirements may apply to construction work; higher thresholds apply for bidding and informal bidding procedures apply in a tiered fashion.²⁴⁹

The UPCCA has grown in popularity over the last ten years. A Report of the California Uniform Construction Cost Accounting Commission in 2015 reported 928 participating member agencies, including 40 counties, 41 community college districts, 214 cities, 343 school districts and 290 special districts. Once adopted, the UPCCA has a preemptive effect on provisions in the Public Contract Code otherwise applicable to public entities regarding their bidding requirements and bidding procedures. The UPCCA preemption, however, is limited to bidding procedures.²⁵⁰

C. Bidding: Statutory Minimums

1. Detailed Plans and Specifications

Absent authority for design-build or construction manager at-risk procurement, the long-established requirement is for detailed plans and specifications that all bidders bid upon. This requirement is stated expressly in some statutes, such as Public Contract Code section 20124 for counties, or is required by long standing state law as in Government Code sections 4000 – 4007.

248. Public Contract Code sections 22000 et seq.

249. Generally, if the agencies elect to follow the cost accounting procedures set forth in the Cost Accounting Policies and Procedures Manual of the California Uniform Construction Cost Accounting Commission, the Act allows local agencies to perform public project work of up to \$45,000 with their own workforces (force account); public projects of \$45,000 or less may be performed by negotiated contract, or by purchase order; public projects between \$45,000 and \$175,000 may be let to contract by informal procedures as set forth in the Act and public projects of more than \$175,000 shall, except as otherwise provided in the Act, be let to contract by formal bidding procedure. PCC § 22032. These amounts adjust yearly. The \$45,000 is the published amount as of 2015.

250. The UPCCA states: “In the event of a conflict with any other provision of law relative to bidding procedures, this article shall apply . . . “ The informational “FREQUENTLY ASKED QUESTIONS (FAQs)” available on the website of the California Uniform Construction Cost Accounting Commission (Commission) explains: “The Act only supersedes the bidding procedures used once a public agency has adopted a resolution and notified the Controller. All other contracting requirements are applicable whether or not a public entity opts into the Act.”

2. Content and Advertisement of the Request For Bids

Advertisement is a requirement stated expressly in nearly all of the statutes.²⁵¹ The required contents of the advertisement for bids are covered in the Government Code and in the Public Contract Code. The advertisement must include the time and place for the receiving and opening of sealed bids and must describe in general terms the work to be done.²⁵² Any bids received after the time specified must be returned unopened.²⁵³

“The request for public bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free of any restrictions tending to stifle competition.”²⁵⁴

3. License Requirement

The contractor’s licensing requirements must “be included in any plans prepared for a public project and in any notice inviting bids required pursuant to” the Public Contract Code.²⁵⁵ Bidders must hold valid licenses when submitting bids,²⁵⁶ except that a joint venture may comprised of licensed contractors on bid day may secure a joint venture license thereafter but prior to award. On contracts involving Federal funds, the public entity cannot invalidate bids of unlicensed contractors. It cannot award the construction contract to the low bidder, however, until the contractor secures its license.²⁵⁷ Prior to awarding a contract, the public entity must verify that the bidder is appropriately licensed to perform the work designated in the prime contract.²⁵⁸

4. Site Visits and Prebid Conference

A public agency may hold a mandatory prebid conference with prospective bidders and/or require prospective bidders to visit the project site. If the public entity chooses to include such requirements, the notice soliciting bids must include information regarding “the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available.”²⁵⁹ A prebid mandatory site visit, conference or meeting cannot take place until at least five calendar days after the publication of the initial notice.²⁶⁰

251. See, e.g., Public Contract Code sections 20164, 20125.

252. Public Contract Code section 4104.5; Government Code section 53068.

253. *Id.*

254. *Konica Business Machines v. Regents of University of California*, 206 Cal.App.3d 449, 456 (1988)(quoting *Baldwin- Lima-Hamilton Corp. v. Superior Court*, 208 Cal.App.2d 803, 821 (1962)).

255. Public Contract Code section 3300 (emphasis added).

256. Business & Professions Code section 7028.15.

257. Public Contract Code Section 20103.5.

258. Public Contract Code section 6100. The public entity may verify the license status by either verifying through the Contractors’ State License Board that the person seeking the contract is appropriately licensed, or by requiring “the person seeking the contract to present his or her pocket license or certificate of licensure and provide a signed statement which swears, under penalty of perjury, that the pocket license or certificate of licensure presented is his or hers, is current and valid, and is in a classification appropriate to the work to be undertaken.” *Id.*

259. Public Contract Code section 6610.

260. *Id.*

5. Required Site, Existing Conditions Investigations and Drawings Review

The public entity may require a thorough site investigation and disclaim warranties for supplied information showing existing above-ground conditions, as-built conditions, or other actual conditions verifiable by independent investigation.²⁶¹ Despite its broad pronouncements, Public Contract Code Section 7104 probably does not prohibit the public entity from requiring contractors to perform their own independent investigation of above-ground information and rely on that independent investigation in submitting their bids.

(a) Site Investigations

Public entities commonly require extensive site investigations as a condition to submitting bids, thus narrowing the potential categories of “unanticipated or latent” conditions subject to mandatory change order. There are various form contracts and accepted bidding forms regarding site investigations. Generally they require bidders to:

- Attend a pre-job site visit and conduct a thorough site investigation, what one of the forms calls an “alert, heads up, eyes open” examination of the area;
- Review and consider any cores, borings, geotechnical reports and related site information;
- Familiarize themselves with the general, local and site conditions, as well as applicable federal, state and local laws and regulations that may affect the work; and
- Secure such additional or supplementary examinations, investigations, tests, studies and data concerning surface or subsurface conditions that may affect the work.

The required pre-bid site investigation and its scope will vary from contract to contract, depending upon the work involved and the anticipated degree of uncharted or unknown underground obstructions. For example, a project constructed on landfill might require a more thorough site investigation than a project constructed on newly cleared land that has not been subjected to previous development.

(b) Document Review

The public entity can reasonably require bidders to examine thoroughly the contract documents and other related data supplied for bidding (e.g., geotechnical data, existing conditions or as-built conditions), and to promptly notify it of all conflicts, errors, ambiguities or discrepancies that they discover. This requirement benefits the public entity by granting it a

²⁶¹. Public Contract Code section 7104.

defense from change orders based on patently obvious inconsistencies within the contract documents or existing conditions.

Previously, some public entities went a step further and required bidders to warrant the constructability of supplied plans and specifications. Public Contract Code section 1104, however, prohibits public entities from requiring contractors to assume responsibility for the completeness and accuracy of plans and specifications, except on design-build projects.²⁶² Otherwise, public entities are held to the common law doctrine of an “implied warranty” of the correctness or constructability of the plans and specifications issued for bidding.²⁶³

6. Bid Addenda

Resolution of many construction claims turns, in part, on pre-bid modifications and clarifications of construction documents. The public entity often finds it beneficial to define procedures and limits on issuing interpretations of documents, and limit them to written addenda issued prior to the opening of bids. In the event of any addenda, the public entity often will require that the bidder acknowledge it has reviewed and considered the addenda in formulating its bid.

Addenda involving a material change should not be issued less than seventy-two (72) hours prior to opening bids. In the event the public entity issues material changes, additions, or deletions to the invitation for bids near the date and time initially set for bid opening, the public entity must extend the date and time for bid opening. If the agency makes any such changes, additions, or deletions within the final 72 hours prior to bid opening, the date and time for bid opening must be extended by no less than 72 hours.²⁶⁴

7. Specification of Brands and Proprietary Specifications

The law generally prohibits public construction specifications from limiting bidding to any one specific concern, or calling for a designated material or project by a specific brand or trade name, unless the specification lists at least two brands or trade names and is followed by the words “or equal.”²⁶⁵

Under the statute, a contractor has the right to propose substitutions or “or equal” items, and the contract specifications “shall provide a period of time prior to the award of the contract for submission of data substantiating a request for substitution of ‘an equal’ item.”

Under the statute, the invitation for bids must identify when a bidder can request the substitution and submit data supporting its assertion that the alternate product is “equal” – either before the bid, after the bid, or both. If the agency does not specify a time, the request and supporting data may be submitted at any time in the first 35 days after the contract is awarded. Anticipating these requests, bid specifications should contain standards and forms to assess if a

262. Public Contract Code section 1104.

263. *Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1999) 71 Cal.App.4th 38.

264. Public Contract Code section 4104.5.

265. Public Contract Code section 3400.

proposed “equal” product is a true equal.²⁶⁶

Finally, if a public entity intends to sole source specify a particular material, equipment or service by a brand name then it should set forth specific findings in the instructions to bidders. The statute specifies the required and permissible findings.²⁶⁷

8. Bid Alternates

Public Contract Code sections 10126, 10780.5, and 20103.8 govern bid alternates. Generally, a local agency may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, however, the bid solicitation must specify which one of four methods will be used to determine the lowest bid. In the absence of such a specification, the lowest bid shall be determined on the basis of the lowest bid price on the base contract without consideration of the prices on the additive or deductive items. The four methods of selecting bid alternates, under the statute, are as follows:

- The lowest bid shall be the lowest bid on the base contract without consideration of the prices on the additive or deductive items.
- The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.
- The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items, depending upon available funds as identified in the solicitation.
- The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

The statute requires that the responsible bidder that submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. The statute also states that it does not preclude a local agency from adding to or deducting from the contract any of the additive deductive items after the lowest responsible bidder has been determined. The use of bid

266. A proposed substitution should have the approval of the project designer based on the following criteria: if it truly meets or exceeds the specified product; if it comes with the same or better warranty; if it requires extra coordination or installation; if it involves other, ancillary additional costs, such as higher maintenance, license or royalty fees; if it will involve any, additional redesign costs; if it will adversely impact progress or otherwise result in schedule slippage; and if evaluating the substitution request will result in schedule delay due to late ordering of available specified products, where the public entity subsequently rejects the substitution request.

267. Public Contract Code section 3400(c) specifies the required, permissible findings. Section 3400(c) requires a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for any of the following purposes: (1) in order that a field test or experiment may be made to determine the product’s suitability for future use, (2) in order to match other products in use on a particular public improvement either completed or in the course of completion, (3) in order to obtain a necessary item that is only available from one source, or (4) in order to respond to an emergency [if specified conditions are met].

alternates will “be closely scrutinized” by the courts.²⁶⁸

9. Form of Bids and Securities

Generally, contractors must present bids on local agency construction under sealed cover and accompanied by bidder’s security in the form of cash, a cashier’s check, a certified check or a bidder’s bond.²⁶⁹ Most agencies require that a check or bidder’s bond accompany the sealed bid. Under the statute, agencies must accept cash; although unlikely to occur, bidding documents should provide for this option. Typically, bidders choose to submit a bid bond. The same statutes require the agency to return the unsuccessful bidder’s security “in a reasonable period of time,” but in no event “beyond 60 days from the time the award is made.”

In the event a bidder fails to execute a contract in accordance with its bid, the amount of the bidder’s security is forfeited to the public entity.²⁷⁰ In such cases, the public entity may award the contract to the second lowest bidder and the amount of the security forfeited will be applied to the difference between the two contract prices. *See, e.g.,* Public Contract Code section 20174 (any surplus will be refunded to the low bidder).

10. Listing of Subcontractors

Public Contract Code sections 4100 through 4114 is known as the Subletting and Subcontracting Fair Practices Act. Generally, the Act requires that:

- Each bidder for a public works contract identify each subcontractor who will perform contract work valued in excess of one-half of one percent of the prime contractor’s total bid by (1) portion of the work, (2) name of the subcontractor, (3) city of subcontractor’s business location, (4) California contractor’s license number, and (5) DIR registration number.²⁷¹
- Only one subcontractor may be listed to perform each “portion” of the prime contractor’s work on the project.²⁷²
- A prime contractor may not circumvent the statute by listing another general contractor who, in turn, intends to subcontract to others portions of the work constituting the majority of the work covered by the prime contract.²⁷³
- After bid acceptance, a prime contractor also may not permit a subcontract to be voluntarily assigned or transferred to another subcontractor.²⁷⁴

268. *Schram Construction, Inc. v. Regents of University of California* (2010)187 Cal. App. 4th 1040, 1061.

269. *See, e.g.,* Public Contract Code sections 20111, 20128, 20192 (municipal utility districts), section 20564.5 (irrigation districts), and section 20642.5 (municipal water districts), 20651 (community college districts).

270. Public Contract Code sections 20129, 20172.

271. Public Contract Code section 4104(a)(1).

272. Public Contract Code section 4104(b) (A “portion” of the work means the type or scope of work contemplated, e.g., electrical, drywall, or plumbing, as defined by prime contractor in its bid.)

273. Public Contract Code section 4105.

274. Public Contract Code section 4105.

- Any such attempt to circumvent the statute is considered a violation and subjects the prime contractor to the potential penalties of either 10% of the value of the subcontract in question, or the public entity may cancel the contract.²⁷⁵ In this context, the word “cancel” appears to mean terminate for default.

11. “Bid Compliance” Forms

Procurements often require forms often termed “bid compliance” forms and certifications. They include: DVBE forms (Mil. & Vet. Code §§ 999 et seq.); Drug Free Work Place Certification (Gov. Code § 8355); Workers’ Comp. Certification (Labor Code section 1861); Assignment of Antitrust Claims (PCC § 7103.5); misc. certifications, such as certifications as to recycled content or certifications that the contractor does not do business in disfavored regions. e.g., Iran (PCC § 2202); Non-collusion Affidavit (PCC § 7106), and “Responsibility” certifications, such as those requiring a bidder to certify that it has not been debarred or suspended or terminated for cause.

12. Bonds

(a) Sufficiency of Sureties

In 2000, a California court of appeal found a public entity liable for failure to investigate the sufficiency of a surety before approving a surety bond.²⁷⁶ In response to this case, the requirements for bonds required on a public works contract are now stated in the California Code of Civil Procedure: “(a) Notwithstanding any other provision of law, any bond required on a public works contract [] shall be executed by an admitted surety insurer.”²⁷⁷

An “admitted surety insurer” is a surety admitted by the California State Department of Insurance to issue surety bonds in California, subject to state financial audits and specific reserve requirements. The statute lists acceptable proof, then defines the required surety qualifications directly in the statute: “If the admitted surety insurer complies with subdivision (a), and if it appears that the bond was duly executed, that the insurer is authorized to transact surety insurance in the state, and that its assets exceed its liabilities in an amount equal to or in excess of the amount of the bond, the insurer is sufficient and shall be accepted or approved as surety on the bond, subject to Section 12090 of the Insurance Code.”²⁷⁸

The statute also provides: “No public agency shall require an admitted surety insurer to comply with any requirements other than those in Section 995.660 *whenever an objection is made to the sufficiency of the admitted surety insurer* on the bond or if the bond is required to be approved.”²⁷⁹ While the statute is commonly characterized as precluding the common public entity practice of including requirements in bid documents that bidders submit bonds written by sureties meeting standards of various rating agencies, it stops short of doing so.

275. Public Contract Code section 4110.

276. *Walt Rankin & Associates, Inc. v. City of Marrieta* (2000) 84 Cal.App.4th 605.

277. Code Civ. Proc. section 995.660.

278. Code Civ. Proc. section 995.660.

279. Code Civ. Proc. section 995.670 (emphasis added).

(b) Payment Bonds

The governing statutes are fairly straightforward about payment bonds. Three points that bear on the bid documents:

- Payment bonds are mandatory. “A public entity shall state in its call for bids for any such contract that a payment bond is required”.²⁸⁰ In fact, case law indicates that the public entity may have direct liability to subcontractors and suppliers on a failure to require a public works payment bond.²⁸¹
- Failure to provide a payment bond is grounds for nonpayment to the contractor. The public entity’s failure to require a public works payment bond entitles subcontractors to demand the public entity withhold payment to the general contractor until the general contractor obtains the bond.²⁸²
- The payment bond shall be 100% of the contract price and shall provide that the surety pays unpaid subcontractors, suppliers and other claimants.²⁸³

Similar requirements apply to contracts of state entities, except a bond is required if the expenditure exceeds \$5,000.²⁸⁴

(c) Performance Bonds

A performance bond is one provided by the contractor to guarantee the complete and faithful performance of the construction contract by the contractor. Thus, “it is generally recognized that a primary purpose of a performance bond is to protect the obligee against the risk of the principal’s default on the construction contract.”²⁸⁵ Typically, a public entity requires a performance bond equal to the amount of the contract price.

280. “A public entity shall state in its call for bids that a payment bond is required for a public works contract involving an expenditure in excess of twenty-five thousand dollars (\$25,000).” Civil Code Section 9550(b).

281. See also, *C.A. Magistretti v. Merced Irr. Dist.* (1972) 27 Cal.App.3d 270, 274.

282. “If a payment bond is not given and approved as required . . . (a) Neither the public entity awarding the public works contract nor any officer of the public entity shall audit, allow, or pay a claim of the direct contractor pursuant to the contract.” Civil Code Section 9551.

283. The “payment bond shall be in an amount not less than 100 percent of the total amount payable pursuant to the public works contract. The bond shall be in the form of a bond and not a deposit in lieu of a bond. The bond shall be executed by an admitted surety insurer. (b) The payment bond shall provide that if the direct contractor or a subcontractor fails to pay [claimants providing labor, materials or services, or unemployment amounts], the surety will pay the obligation and, if an action is brought to enforce the liability on the bond, a reasonable attorney’s fee, to be fixed by the court”. Civil Code Section 9554(a)(b).

284. Public Contract Code Section 7103.

285. See *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28, 39-41 (performance bonds usually incorporate the contract to which they relate and are construed in conjunction with the contract - permitting recovery of damages for delay in this case).

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