

PROCUREMENT REFORM (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these Revised Explanatory Notes are published to accompany the Procurement Reform (Scotland) Bill (introduced in the Scottish Parliament on 3 October 2013) as amended at stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Procurement Reform (Scotland) Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. In broad terms, the Bill introduces a degree of regulation for procurements concerning the tranche of contracts above certain financial thresholds specified in the Bill and below the financial thresholds contained in the Public Contracts (Scotland) Regulations 2012 (S.S.I. 2012/88)¹. It also makes provision in relation to a wider range of procurements, most notably creating obligations concerning advertising, community benefits and procurement strategies.

5. The Bill will establish a national legislative framework for sustainable public procurement. It places a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement. The Bill also places some administrative requirements on larger spending contracting authorities to publish procurement strategies and annual reports, which will aid visibility of the purchasing activities of these bodies and how they will meet their procurement obligations.

¹ http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi_20120088_en.pdf

6. The Bill is in five parts and these are described below:

- Part 1: Key concepts and application of the Bill: These provisions determine the contracting authorities who are covered by the obligations under the Bill and the procurements to which the provisions of the Bill apply.
- Part 2: General duties and procurement strategies: This imposes general duties of equal treatment, non-discrimination, transparency and proportionality. Provision is also made for a sustainable procurement duty imposed upon contracting authorities. This part also makes provision for the preparation and publication of procurement strategies and annual reports by certain contracting authorities.
- Part 3: Specific duties: This imposes a range of specific duties including duties relating to advertising of contract opportunities and consideration of community benefit requirements. These duties also include measures concerning the conduct of the procurement processes.
- Part 4: Remedies: This part makes provision for remedies available to certain economic operators in relation to breach by a contracting authority of its procurement obligations.
- Part 5: General provisions: This contains general interpretative and other miscellaneous provisions.

COMMENTARY ON SECTIONS

PART 1: KEY CONCEPTS AND APPLICATION

Contracting authorities

Section 1 – Contracting authorities

7. Section 1(1) of the Bill describes those bodies to whom the provisions of this Bill will apply, by providing a definition of a “contracting authority”. This includes the bodies, office-holders and persons listed in the schedule, and contracting authorities as defined in the Public Contracts (Scotland) Regulations 2012 whose functions are exercisable in or as regards Scotland and do not relate to reserved matters. Broadly this includes all Scottish bodies that are subject to procurement obligations under the Regulations.

8. Section 1(2) gives power to the Scottish Ministers to modify the meaning of “contracting authority” by order, including the power to amend the definition and the list in the schedule. By virtue of section 38(2) such an order is subject to the affirmative procedure.

Regulated procurements

Section 2 – Regulated procurements

9. Section 2 defines what is meant by a “regulated procurement”. A regulated procurement describes only those parts of the procurement process starting with the point at which a contracting authority seeks offers (when a contract notice is published) through to the award of the contract. It does not include any pre-market engagement or similar activity undertaken by a

contracting authority before it seeks offers under a procurement process, nor does it include any activity after the contract is awarded.

Regulated contracts

Section 3 – Regulated contracts

10. This section defines what is meant by a “regulated contract”. A regulated contract is a contract which is a “public contract” (defined in section 36 as having the same meaning as in Directive 2004/18/EC²) under which the contracting authority expects to pay £50,000 or more. If the contract is a “public works contract” (also defined in section 36 as having the same meaning as in Directive 2004/18/EC), the threshold value is £2,000,000 or more. Section 5 provides further detail on the estimated values of contracts, for the purpose of these thresholds. Public contracts meeting these thresholds will be subject to the provisions of this Bill unless they are explicitly excluded (see section 4).

11. Section 3(3) enables the Scottish Ministers by order to amend the thresholds for application of this Bill. By virtue of section 38(2) such regulations are subject to the affirmative procedure.

Section 4 – Excluded contracts

12. Section 4(1), by reference to regulations 6(1) and 6(2) of the Public Contracts (Scotland) Regulations 2012, excludes certain specific types of contracts from the scope of the Bill. Where contracts are for the purpose of acquiring goods, works or services in order to sell, hire or provide them to other persons, the contracting authority will not have an exclusive right to sell, hire or provide the goods, works or services, and the conditions on which the contracting authority intends to sell, hire or provide them are the same as or similar to the conditions on which another person could sell, hire or provide the same or similar goods, works or services as a reseller, they will be exempt from the Bill. Contracts that are for the principal purpose of undertaking research and development activity will also be exempt from the Bill.

13. Section 4(2) enables the Scottish Ministers to amend, by regulations, the types of contracts which are excluded from the scope of this Bill. By virtue of section 38(2) such regulations are subject to the affirmative procedure.

Section 5 – Estimated value of contract

14. Section 5 provides that, for the purposes of calculating contract values, the relevant amount is the sum that a contracting authority expects to pay under a public contract (see section 3). It is an estimate of the amount, as opposed to the actual sum, excluding any VAT that may be payable, that the contracting authority expects to pay.

15. Section 5(2) enables the Scottish Ministers to make further provision regarding the method used to calculate the value of the contract by regulations subject to the negative procedure (see section 38(3)).

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF>

Framework agreements and dynamic purchasing systems

Section 6 – Framework agreements and call-off contracts

16. This section provides a definition of framework agreement and call-off contract and clarifies that for the purposes of the Bill they are to be regarded as a “public contract” (see section 3) and therefore the provisions of the Bill apply to them. However, some sections will not apply to a regulated procurement in so far as it relates to a call-off contract, being a contract entered into pursuant to a framework agreement. These are the sections on general duties (section 8(2)), supported businesses (section 10) and exclusion of economic operators (section 22). Additionally, the obligation on a contracting authority to publish its intention to seek offers on the Public Contracts website (section 18(1)) will not apply in respect of call-off contracts (section 6(2)(b)(iii)).

Section 7 – Dynamic purchasing systems

17. A dynamic purchasing system is a procedure through which a contracting authority may buy goods, services or works (construction). Section 7(1) gives power to the Scottish Ministers to make provision in regulations about the application of the provisions of the Bill to dynamic purchasing systems and contracts awarded under them. These regulations are subject to affirmative procedure (see section 38(2)).

18. Section 7(2) defines dynamic purchasing systems for the purposes of this section.

PART 2: GENERAL DUTIES AND PROCUREMENT STRATEGIES

General duties

Section 8 – General duties

19. Section 8(1) introduces a requirement on contracting authorities, when undertaking regulated procurement, to treat all “relevant economic operators” equally and without discrimination (although see section 10 on supported businesses), and to act transparently in terms of their procurement activities and to ensure that any actions and decisions a contracting authority takes are proportionate in relation to the contract(s) in question.

20. Section 8(2) places a requirement on a contracting authority to comply also with the sustainable procurement duty (see section 9). However section 8(3) states that in complying with the sustainable procurement duty, a contracting authority may not act in a way which conflicts with its duty under section 8(1). Section 8(4) defines “relevant economic operator”.

Section 9 – Sustainable procurement duty

21. Section 9(1) sets out the specific requirements of the sustainable procurement duty on a contracting authority. This duty includes considering, before starting a procurement competition, how, by the way in which it conducts the procurement process, it might improve the economic, social and environmental well-being of the authority’s area. This section also requires a contracting authority to consider how, by the way in which it conducts the procurement process, it might facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses, and also to consider how it can promote innovation.

22. Section 9(2) makes clear that the improvement activity considered must only extend to those matters which are relevant to what is being procured and to the extent that such matters are proportionate to the procurement.

Section 9A – Guidance on sustainable procurement duty

23. Section 9A permits the Scottish Ministers to publish guidance on the sustainable procurement duty. Contracting authorities must have regard to any such guidance. The Scottish Ministers must lay a copy of any such guidance before the Scottish Parliament.

Section 10 – Supported businesses

24. As an exception to the requirement to treat all bidders equally and without discrimination (section 8(1)), section 10 permits a contracting authority to seek offers from supported businesses only. This means that if a bidder does not meet the definition of a supported business, it can be precluded from participating in a competition on that basis alone. This does not mean that a contract can be awarded directly to a supported business (i.e. without competition), but rather that the competition will be amongst supported businesses only.

25. Section 10(3) provides the definition of a supported business, for the purposes of this Bill. A supported business is an economic operator who operates a supported business, supported employment programme or supported factory within the meaning of regulation 7 of the Public Contracts (Scotland) Regulations 2012³.

Section 10A – Contracts for health or social care services

26. As an exception to the requirement to treat all bidders equally and without discrimination (section 8(1)), section 10A(1) permits a contracting authority to award a contract for health or social care services without seeking offers in relation to the proposed contract.

27. In the case of direct award under section 10A(1), the contracting authority is exempted from the requirement to publicise its intention to seek offers set out in section 18(1).

28. Section 10A(3) gives the Scottish Ministers a power to make regulations to specify what is a health or social care service for the purposes of the Bill. The power is subject to the negative procedure (see section 38(3)).

Section 10B – Guidance on procurements for health or social care services

29. Section 10B obliges the Scottish Ministers to publish guidance on the carrying out of regulated procurements relating to contracts for health or social care services. Contracting authorities must have regard to such guidance. The Scottish Ministers must lay a copy of such guidance before the Scottish Parliament.

³ http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi_20120088_en.pdf

Section 10C – Other circumstances in which contract can be awarded without competition

30. Section 10C gives the Scottish Ministers a regulation-making power to specify circumstances in which a contracting authority may, as an exception to the requirement to treat all bidders equally and without discrimination (section 8(1)), award a regulated contract without seeking offers in relation to the proposed contract. The power is subject to the affirmative procedure.

31. In the case of direct award outlined in section 10C(1), the contracting authority is exempted from the requirement to publicise its intention to seek offers set out in section 18(1).

Procurement strategy and annual report

Section 11 – Procurement strategy

32. This section describes the circumstances in which a contracting authority is required to prepare a procurement strategy and what, as a minimum, it must contain.

33. Before the start of any financial year in which a contracting authority considers that it may have a total expenditure on regulated procurements (see section 2) exceeding £5,000,000 (excluding VAT) it is required to prepare a procurement strategy or review an existing procurement strategy and make any necessary changes before the start of the next financial year.

34. Subsection (3) applies if, before the start of its financial year, a contracting authority did not prepare a procurement strategy but after the start of that financial year it becomes apparent to a contracting authority that its total expenditure on public contracts for that financial year is likely to be greater than £5,000,000. It is required to, as soon as practicable, prepare a procurement strategy or review and revise its existing strategy as necessary, as soon as reasonably practicable after it becomes aware of the likelihood of the spend over £5,000,000. However, there is nothing to preclude a contracting authority from reviewing and making revisions to its procurement strategy at any additional interval as it considers appropriate.

35. Section 11(5) describes what a procurement strategy must include as a minimum and provides a power for the Scottish Ministers to make an order subject to the negative procedure specifying other matters that a procurement strategy should address (see section 38(3)).

36. Section 11(6) provides an order-making power for the Scottish Ministers to amend the threshold value at which a procurement strategy is required to be prepared or reviewed. By virtue of section 38(2) such an order is subject to the affirmative procedure.

Section 12 – Joint strategies

37. This section allows two or more contracting authorities who are required to prepare a procurement strategy to have a joint procurement strategy which covers their collective interest.

Section 13 – Compliance with strategy

38. This section places a requirement on a contracting authority obliged to have a procurement strategy to ensure, as far as is reasonably practicable, that its regulated procurement exercises are carried out in accordance with its procurement strategy.

Section 14 – Annual procurement reports

39. This section requires a contracting authority that is obliged to prepare or revise a procurement strategy to prepare, as soon as reasonably practicable after the end of its financial year, prepare an annual procurement report on its regulated procurement activities.

40. Section 14(2) provides details of the minimum content that a report should contain.

41. A significant requirement of subsection (2) is that the contracting authority includes a summary of the regulated procurements that have been completed in the financial year. In relation to this, subsection (3) explains when a regulated procurement is completed, that is when the award notice is published or when it otherwise comes to an end.

Section 15 – Publication etc.

42. Section 15 requires a contracting authority to publish any procurement strategy (section 11), any revised strategy and any annual procurement report (section 14) it has prepared. Publication can take any form the authority deems appropriate, but must as a minimum include publication on the internet. Once publication has occurred, the authority is required to notify the Scottish Ministers accordingly (section 15(3)).

Section 16 – Guidance

43. This section requires the Scottish Ministers to publish guidance on the preparation and publication of procurement strategies (section 11) and annual procurement reports (section 14). It provides details of what the guidance may cover, including the possibility of it setting out a model procurement strategy and a model annual report. It requires a contracting authority to have regard to the guidance, and that the Scottish Ministers must lay a copy of the guidance before the Scottish Parliament.

PART 3: SPECIFIC DUTIES

Publication of notices on Public Contracts website

Section 17 – Public Contracts website

44. Section 17 places a requirement on the Scottish Ministers to establish and maintain a website (the “Public Contracts website”), which is to be used by contracting authorities to publicise the seeking of offers and the award of a contract (which, by virtue of section 6(2)(a), includes a framework agreement).

Section 18 – Publication of contract notices and award notices

45. Section 18(1) and (2) requires all contracting authorities to publicise their intention to seek offers (contract notice) and the award of a contract or framework agreement (award notice) on the Public Contracts website.

46. Section 18(3) enables the Scottish Ministers to include in regulations, made by negative procedure (see section 38(3)), provisions about publication of this information. Subsection (4) details a list of particular, but not exhaustive, provisions that can be included in regulations in respect of publication of contract notices and award notices.

Community benefit requirements

Section 19 – Community benefit requirements

47. This section introduces a definition of community benefit requirement for the purpose of the Bill. This is relevant to a contracting authority's procurement strategy (see section 11(5)(b)) and also to the duty on a contracting authority in section 20 to consider imposing such requirements in certain procurements.

Section 20 – Community benefit requirements in major contracts

48. Section 20 applies where a contracting authority proposes to carry out a regulated procurement equal to or greater than £4,000,000. In doing so, a contracting authority must consider whether to impose community benefit requirements as part of the contract delivery before carrying out the procurement. The contracting authority must include in the contract notice a summary of the community benefit requirements it intends to impose or the reasons for not including any requirement.

49. Section 20(4) states that where community benefits requirements are to be included in the contract, the contracting authority must state in the award notice the details of the benefits it considers will be derived.

50. The threshold for community benefit requirements can be amended by the Scottish Ministers, by order, subject to the affirmative procedure (see section 38(2)).

Section 21 – Guidance on community benefit requirements

51. Section 21 gives the Scottish Ministers power to publish statutory guidance in relation to the use of community benefit requirements and makes provision regarding the content of that guidance. Section 21(3) requires a contracting authority to have regard to any guidance published under this section. Section 21(4) obliges the Scottish Ministers to lay a copy of the guidance before the Scottish Parliament.

Selection of tenderers

Section 22 – Exclusion of economic operators on grounds of criminal activity

52. The section applies only to regulated procurements which are not also EU-regulated procurements, that is procurements covered by regulation 5(1) of the Public Contracts (Scotland)

Regulations 2012. These are a proposed public supply contract, public works contract, Part A services contract, framework agreement or dynamic purchasing system, save certain exclusions. Subsection (1) enables the Scottish Ministers to make regulations, subject to the negative procedure, requiring contracting authorities to exclude an economic operator where the operator or certain people connected with the operator have been convicted of an offence specified in the regulations.

53. The regulations made by Ministers may explain how contracting authorities are to determine whether or not a bidder has been convicted of an offence.

54. The regulations may also set out the specific circumstances under which a contracting authority may award a contract to a bidder despite the fact that the bidder meets the criteria which requires its exclusion.

Section 23 – Selection of tenderers

55. Section 23 enables the Scottish Ministers to make regulations, subject to the negative procedure, about the selection of economic operators in regulated procurements which are not EU-regulated procurements. The regulations may include provision about the use of minimum standard criteria which are designed to identify the suitability of a potential bidder to be invited to submit a bid in a regulated procurement. A minimum standard criterion is one which relates to the financial health of the potential bidder, its technical ability or any other characteristic referred to in the regulations that this section empowers Ministers to make.

56. The regulations may also specify how a contracting authority determines whether a potential bidder meets the specified minimum standard or not, and section 23(3) sets out criteria which may be specified in the regulations.

Section 24 – Guidance on selection of tenderers

57. Section 24(1) provides the Scottish Ministers with the power to publish guidance for contracting authorities on the selection of economic operators in relation to a regulated procurement.

58. By virtue of section 24(2), the guidance may cover the use of questionnaires and matters relating to the recruitment and terms of engagement of those persons who will be involved in producing, providing or constructing the subject matter of the regulated procurement.

59. Section 24(3) requires a contracting authority to have regard to this guidance when assessing the suitability of tenderers.

60. Section 24(4) obliges the Scottish Ministers to lay a copy of the guidance before the Scottish Parliament.

Technical specifications

Section 25 – Technical specifications

61. Section 25 applies only to regulated procurements which are not also EU-regulated procurements.

62. Section 25(1) enables the Scottish Ministers to make regulations, subject to the negative procedure (see section 38(3)), regarding the use of technical specifications in regulated procurements (other than EU-regulated procurements). Technical specifications referred to are those used in invitation to tender documentation to describe goods, services or works to be provided pursuant to the procurement or the way in which the goods, services, materials or works are to be produced or provided.

63. This section also details a non-exhaustive list of particular provisions that may be included in regulations in respect of the use of technical specifications.

Charges for participation in procurement process

Section 26 – Charges for participation in procurement process

64. Section 26 prohibits a contracting authority charging a supplier any sort of fee for participation in the procurement process. This includes a fee to provide any document required to participate in that process.

Giving of reasons

Section 27 – Giving of reasons to unsuccessful participants

65. The section applies only to regulated procurements which are not also EU-regulated procurements. It imposes an obligation on contracting authorities to notify any supplier that submitted a pre-qualification questionnaire of the contracting authorities decision at pre-qualification stage (section 27(2)). Section 27(4) imposes an obligation on contracting authorities to notify all unsuccessful tenderers of its contract award decision as soon as reasonably practicable after awarding the contract or the framework agreement.

66. An economic operator who was excluded from participating in the procurement before submitting a tender must receive a notice with the information set out in section 27(3). An economic operator who was an unsuccessful tenderer must receive a notice of the decision with the information set out in section 27(5).

Section 28 – Request for further information

67. Section 28 sets out that an economic operator who was excluded from participating in the procurement before submitting a tender, an unsuccessful tenderer and the successful tenderer can ask for further detail over and above any information that may already have been provided by the contracting authority. The request must be made in writing and no later than 30 days after receiving the notification. Section 28(4) details the relevant further information which must be provided by the contracting authority and to whom.

Section 29 – Withholding information

68. Section 29 provides the circumstances in which a contracting authority would be justified in withholding information about the contract award decision from those who would otherwise be entitled to receive it under sections 27 and 28.

Contracts register

Section 30 – Contracts register

69. Section 30 requires a contracting authority to keep and maintain a register of current contracts and make it publicly available, as a minimum on the internet. The register must include those contracts which have been awarded as a result of a regulated procurement. An entry can only be deleted after the relevant contract has expired or been terminated.

70. Section 30(6) gives details of the circumstances in which a contracting authority is able to decide not to include a particular contract in the register.

Procurement of recyclable and reusable materials

Section 31 – Amendment of Climate Change (Scotland) Act 2009

71. Section 31 creates a new section 82A in the Climate Change (Scotland) Act 2009. That new section provides a power for the Scottish Ministers, by regulations, to require specified contracting authorities to ensure that a certain proportion of things procured comprise of or include recycled material or material that is designed to be recycled. Subsection (3) sets out the kind of provisions that can be made. Subsection (4) provides for guidance to be given to enforcement authorities by the Scottish Ministers.

72. The new provision complements the existing powers in section 82 of the 2009 Act.

PART 4: REMEDIES

Section 32 – Actionable duties

73. Section 32 applies only to regulated procurements which are not also EU-regulated procurements. This section describes the circumstance in which a “relevant person” can bring legal proceedings against a contracting authority which may not have complied or be complying with its duties under particular sections of this Bill. In order to bring proceedings a relevant person must have sought to be awarded the contract and, as a result of the alleged breach, have suffered or is placed at risk of suffering a loss or damage.

Section 33 – Procedure and time limits

74. Prior to a supplier bringing proceedings under section 33, which may be brought in the sheriff court or Court of Session, the supplier must notify the contracting authority of its intention to bring proceedings and the failure to comply with the duties referred to above. The time limit for bringing proceedings under section 32 is 30 days from the day on which the supplier knew or ought to have known that grounds for starting the proceedings had arisen, or

such longer period of up to three months as the court considers appropriate. Extension of the period may be permitted by the court only if it considers that there is good reason for doing so.

Section 34 – Determination by the court

75. Section 34 gives the court power to suspend the procedure leading to the award of a contract, and to suspend the implementation of any decision or action taken by a contracting authority in relation to that procedure. This section further details the considerations to be taken into account by the court in considering whether to make such a suspension and lists the remedies available to the court where a contracting authority is found to be in breach of its duties. The court must review the decisions taken by a contracting authority and must consider the balance of negative consequences against the benefits of its decision having regard to specified matters including public interest.

76. Where the breach of duty is in respect of a regulated contract which has already been entered into the only remedy available to the court is the award of damages. Section 34(6) specifies that nothing in section 34 affects any power that the court may have as a result of any other rule of law.

Section 34A – Transfer of forum to First-tier Tribunal

77. Section 34A provides the Scottish Ministers with a power to make regulations to amend the forum for dispute resolution to the First-tier Tribunal for Scotland instead of the sheriff court or Court of Session. The power is subject to the affirmative procedure (see section 38(2)).

PART 5: GENERAL

Section 35 – The Directive, Public Contracts Regulations and EU-regulated procurements

78. This section provides definitions of these terms as used in the Bill. Section 35(2) gives the Scottish Ministers the power to amend the definition of “the Directive” in the Bill to take account of any new or subsequent EU directive relevant to this Bill. It also gives the Scottish Ministers the power to amend the definition of “Public Contracts Regulations” in the Bill to give the flexibility to take account of any relevant changes - for example to refer to an instrument that implements a new EU public procurement directive.

79. Section 35(3) provides that an order amending the definition of “the Directive” or of “the Public Contracts Regulations” may make appropriate consequential modifications to the Bill.

Section 36 – General interpretation

80. Section 36(1) and (2) provide definitions of terms used in the Bill.

Section 37 – Ancillary provision

81. Section 37 provides the Scottish Ministers with the power to make an order making such supplementary, incidental, consequential, transitional or transitory provision or savings as they consider appropriate. Any such order will be subject to the affirmative procedure if the order adds to, replaces or omits any part of the text of an Act (see section 38(2)), otherwise it will be subject to the negative procedure.

Section 38 – Subordinate legislation

82. Section 38(1) provides that any power of the Scottish Ministers to make an order or regulations under the Bill includes powers to make different provision for different purposes and such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate.

83. Section 38(4) provides that this section does not apply to commencement orders.

Section 39 – Commencement

84. Section 39 provides for sections 35, 36, 37, 38, 39 and 40 of the Bill to come into force on the day of Royal Assent. Section 39(2) provides for the other provisions of the Act to be commenced by order made by the Scottish Ministers. Such an order may include transitional, transitory or savings provision.

Section 40 – Short title

85. This section states the short title of the Act as being the Procurement Reform (Scotland) Act 2014.

This document relates to the Procurement Reform (Scotland) Bill as amended at Stage 2 (SP Bill 38A)

PROCUREMENT REFORM (SCOTLAND) BILL [AS AMENDED AT STAGE 2]

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