

CONSTRUCTION SECTOR CODE RULES OF ENGAGEMENT

FOR EXEMPTED MIRCO ENTERPRISES &
QUALIFYING SMALL ENTERPRISES WITH AT LEAST 51% 'BLACK' OWNERSHIP

The Construction Sector's performance directly affects manufacturing, mining, transportation, real estate and business services; thus, it significantly contributes to GDP and job creation. Since publishing the Amended Construction Sector Codes of Good Practice (CSC) on 1st December 2017, there has been a negative downturn in public and private investment in the sector. Adding to the sector's plight were the Covid-19 restrictions that had a devastating impact, resulting in 2020 being one of its worst-performing years.

Recognising the sector's plight, Finance Minister Enoch Godongwana, in his budget speech in February 2022, announced that the Government would accelerate its investment in infrastructure with a provisional allocation of R17.5b.

According to the B-BBEE Commission's annual National State of Transformation and Trend Analysis Sectorial Report, the construction sector performed consistently. It fared well in meeting its transformation goals, despite unprecedented challenges.

STATS SA revealed that between 2016 and 2020, there was a steady decline in South Africa's public sector capital expenditure. Although local government capital recovered briefly during 2019, there was an average decrease over the same period. During this period, municipalities had less capital expenditure, mainly due to the completion of large-scale projects in 2019. By the same token, for many municipalities, there was a decrease in capital expenditure due to delays in procurement, Covid-19 restrictions and protest action.

According to STATS SA, the sector's annual growth in industry value and GDP revealed a negative percentage growth year-on-year from 2017. Due to the impact of COVID-19 restrictions, 2020 declined by 19.8%. The sector fared better in 2021, with a negative growth of 1.9%.

Although total employment in South Africa decreased by 409,000 between the third quarter of 2020 and 2021, STATS SA revealed an increase of 78,000 jobs in the sector. According to the 2022 Construction Industry Outlook survey conducted by RIB CCS in Africa and the Middle East, the forecast for the sector is optimistic. Results confirm that in the final quarter of 2021, 68% of respondents expect an increase in project revenue. STATS SA for the same period revealed that the value of recorded building plans passed - at current prices - increased by 44,5%, that is R2 479,8m. Comparing January 2022 to the previous year, the selected building statistics of the private sector, as reported by local government institutions, shows that there was a consecutive 12-month growth.

The CSC aligns with the Amended Generic Codes of Good Practice (Generic Codes); however, it holds additional requirements to address the identified challenges in the sector. The objective is to enhance the capacity of 'Black' Contractors, 'Black' Built Environment Professionals, 'Black' Material Suppliers, Industry Workers and the community at large to transform and increase productivity and transformation in the sector.

The Construction Sector Charter Council (CSCC) was established in 2009 with the mandate to oversee and monitor the implementation of the CSC. Annually it provides a report highlighting the progress of transformation in the sector.

The CSC is comprehensive; however, the requirements are more complex than its sector-specific counterparts. Although published four years ago, misinterpretation of many aspects of the provisions remains a challenge. The consequence is that organisations do not adequately plan their strategy in accordance with the requirements, resulting in a shortfall in evidence at the time of their B-BBEE Verification.

The CSC is a complex document due to the categories, financial thresholds and manner in which those in the ambit of the CSC present their B-BBEE Credentials. Unique to the CSC is that it does not incorporate the traditional Enterprise Development element. Being the first in a series of three, this article addresses how the CSC impacts all EMEs and QSEs with at least 51% ‘Black’ Ownership (BO QSEs).

Scope of Application

An organisation qualifies for measurement on a specific code; therefore, choosing a more convenient one to be measured on is not an option. The criteria as to what code an organisation must be measured on depends from which sector it derives the majority of its income, however, some organisations represent two sectors. Nonetheless, an organisation must measure against the code that generates the most of its Annual Revenue in a specific financial period. Therefore, if a gazetted sector code in line with section 21 of the B-BBEE Act represents an organisation’s core business, that is the code it must be measured on; however, with no sector code in place, measurement reverts to the Generic Codes.

The CSC scope of application has three categories for an organisation within its ambit, namely Contractors, Built Environment Professionals (BEPs) and Construction Material Suppliers;

Contractors conduct construction project activities that include civil engineering, electrical engineering, power transmission, general building and specialist construction work as per the CIBD grading tables below:

| | |
|----|--|
| CE | Construction work is primarily concerned with materials such as steel, concrete, earth and rock that incorporates water, sewerage, roads, railways, bridges, dams, cooling towers and grandstands. |
| EB | Electrical engineering works, all electrical work forming an integral part of the building including any wiring, for example, installations in buildings, reticulations within a plot of land (erf) or building sites. |
| EP | Electrical power generation transmission, control and distribution of equipment and systems like power generation, street and area lighting, substations and protection systems. |
| GB | Building and ancillary works other than civil, electrical and mechanical engineering, including specialist works like air conditioning, boiler installation and steam distribution and central heating. |
| SB | Asphalts or any other related business. |
| SC | Building excavations, shaft sinking and lateral earth support. |
| SG | Glazing, curtain walls and shop fronts. |
| SH | Landscaping, irrigation and horticultural works. |
| SI | Escalators, travellers and hoisting machinery. |
| SJ | Specialised foundations for buildings and structures. |
| SL | Structural steelwork and scaffolding. |
| SN | Waterproofing of basements, roofs and walls using specialist systems. |



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Construction Material Suppliers are measured against the same scorecard as Contractors. The measurement for both is against given thresholds, targets, weighting points and methodology. However, an organisation can only measure Construction Material Suppliers and Contractors against one another where it can prove that there is compulsory legislative compliance and/or a licensing requirement linked to that specific sector.

| Construction Material Suppliers & Contractors | | | |
|---|---|--|--|
| Classification | BO QSE ≥ 51% | | Larger EME |
| B-BBEE Certificate/Affidavit | B-BBEE Certificate | | B-BBEE Certificate |
| Financial Threshold | > R10m but < R50m | | ≥ R3m but ≤ R10m |
| Automatic Levels Awarded / Enhanced Recognition | 100% BO = Level 1 | | 100% BO = Level 1 |
| | ≥ 51% BO but < 100% = Level 2 | | ≥ 51% BO but < 100% = Level 2 |
| | ≥ 30% BO but < 51% = Level 4 | | ≥ 30% BO but < 51% = Level 4 |
| | < 30% BO = Level 5 | | < 30% BO = Level 5 |
| Scorecard Elements Applicable | Ownership Skills Development Preferential Procurement & Supplier Development > Preferential Procurement > Supplier Development | | Ownership Skills Development Preferential Procurement & Supplier Development > Supplier Development |
| Minimum requirements | Must achieve 40% sub-minimum requirements for Skills Development on the QSE Scorecard to avoid the application of the Discounting Principle. Enhancement opportunity of up to two Status Levels. | | Discounting Principle not applicable |
| Nominal Verification Fees apply to Contractors as prescribed by the CSCC. | Cost for those opting not to enhance R850 until Nov 2022 R900 Dec 2022 until Nov 2023 | | No cost for an Affidavit |
| | Cost of a B-BBEE Verification in order to enhance R4,000 until Nov 2022 R4,300 Dec 2022 until Nov 2023 | | R850 until Nov 2022 R900 Dec 2022 until Nov 2023 |
| <div>* Recommended fees include all related costs, including travel.</div> <div>* Reasonable fees are justifiable for complicated Ownership structures.</div> <div>* Costs exclude VAT.</div> | | | |

- Built Environment Professionals** activities include, but are not limited to:
- > Planning, designing and costing out of construction projects in a built environment;
 - > Project management and configuration of a construction value chain including the environment;
 - > Energy, industrial, property, transport and infrastructure; and
 - > Consulting engineering practices, architects, quantity surveyors and town planners.

Built Environment Professionals

| | | | | |
|---|---|--------------------------------|---|--------------------------------------|
| Classification | BO QSE > 51% | | Larger EME | EME |
| B-BBEE Certificate/Affidavit | B-BBEE Certificate | | B-BBEE Certificate | Affidavit |
| Financial Threshold | > R6m but < R25m | | ≥ R1.8m but ≤ R6m | <R1.8m |
| Automatic Levels Awarded/ Enhanced Recognition | 100% BO = Level 1 | | 100% BO = Level 1 | 100% BO = Level 1 |
| | ≥ 51% BO but < 100% = Level 2 | | ≥ 51% BO but < 100% = Level 2 | ≥ 51% BO but < 100% = Level 2 |
| | | | ≥ 30% BO but < 51% = Level 4 | ≥ 30% BO but < 51% = Level 4 |
| | | | < 30% BO = Level 5 | < 30% BO = Level 5 |
| Scorecard Elements Applicable | Ownership Skills Development Preferential Procurement & Supplier Development > Preferential Procurement > Supplier Development | | Ownership Skills Development Preferential Procurement & Supplier Development > Supplier Development | Ownership |
| Minimum requirements | Must achieve 40% Sub-minimum requirements for Skills Development on the QSE Scorecard to avoid the application of the Discounting Principle. | | | Discounting Principle not applicable |
| | Enhancement opportunity of up to two Status Levels. | | | |
| Nominal Verification Fees for relevant Construction enterprises as prescribed by the CSCC | Cost for those opting not to enhance | | | No cost for an Affidavit |
| | R850 until Nov 2022 | R850 until Nov 2022 | | |
| | R900 Dec 2022 until Nov 2023 | R900 Dec 2022 until Nov 2023 | | |
| * Recommended fees include all related costs, including travel. | Cost of a B-BBEE Verification for Skills Development and/or enhancement | | | |
| * Reasonable fees are justifiable for complicated Ownership structures. | R4,000 until Nov 2022 | R1,400 until Nov 2022 | | R850 until Nov 2022 |
| * Costs exclude VAT. | R4,300 Dec 2022 until Nov 2023 | R1,470 Dec 2022 until Nov 2023 | | R900 Dec 2022 until Nov 2023 |

Start-up Enterprises

Applicable to Contractors, Material Build Suppliers and BEPs. Any organisation operating for less than one-year, thus not completing a Financial Year, is classified as an EME. However, as per section 10 of the B-BBEE Act, if a Start-up Enterprise tenders for a contract or seeks economic activity that exceeds the financial threshold, an EME or BO QSE must measure them on a QSE or Large Enterprise Scorecard, depending on the value.

What is the applicable Measurement Period the CSC mandates?

The measurement period is a financial period of 12 consecutive months based on an organisation’s financial reporting period as registered with the Companies Intellectual and Property Commission and South African Revenue Services. Completing such a B-BBEE Verification must occur within the 12 calendar months that immediately follow the last day of the most recently completed financial period.

Suppose an organisation amends its financial reporting period from one year to another, then the financial period may be more or less than 12-months. In such cases, an organisation may elect to be measured for the number of months of the amended financial period or 12-months preceding the last day of the amended financial period.

To determine whether an organisation qualifies as an EME or BO QSE, it must use the 12-months preceding the last day of the amended financial period.

Critical is that recognising of Skills Development, Preferential Procurement and Supplier Development contributions only applies if the spend was payable within an organisation’s said Measurement Period.

Do Priority Elements apply to the CSC? Ownership and Skills Development are identified as Priority Elements, of which Ownership is compulsory; thus it determines Enhanced Recognition accordingly. Skills Development is mandatory for EMEs with a turnover higher than R3mil and BO QSEs.

Does the Discounting Principle apply to the CSC?

The Discounting Principle is triggered if an organisation does not meet the 40% sub-minimum requirements for identified Priority Elements. The application of the Discounting Principle means an organisation loses one Status Level on its overall Scorecard. If the Discounting Principle is applied, it must reflect on an organisation’s B-BBEE Certificate.

The Discounting Principle does not apply to EMEs with a turnover of less than R3m eligible to present its B-BBEE Credentials on a prescribed Affidavit as outlined in the CSC.

Does enhancement of a Status Level apply to the CSC?

All EMEs and BO QSEs may choose to be measured on a complete QSE Scorecard to increase their Status Level and Preferential Procurement Recognition. Alternatively, achieving enhancement of up to two Status Levels can be done by opting for one or both of the following methods:

Enhanced Recognition all EMEs

The CSC affords enhancement to a more favourable Status Level for all EMEs measured against the QSE Scorecard and meeting the requirements. Alternatively, it may choose one or both of the following avenues:

- > One Status Level enhancement for achieving total points, excluding Bonus Points for Skills Development expenditure. The criteria for recognition appears as indicator 1.1. in the QSE Skills Development Scorecard.
- > One Status Level enhancements for achieving total points for the Supplier Development Expenditure - indicator 2.1 - of the QSE Preferential Procurement and Supplier Development Scorecard.

Enhanced Recognition BO QSEs

Automatic enhancement is due to BO QSEs if they are measured on the complete QSE scorecard and meet the requirements. Alternatively, they can choose one or both of the following avenues:

- > One Status Level enhancement for achieving total points, excluding Bonus Points against the Skills Development indicators 1.1, 1.2, and 1.3 of the QSE Skills Development Scorecard.
- > One Status Level enhancements for achieving total points against the complete QSE Preferential Procurement and Supplier Development indicators 1.1, 1.2, 1.3, and 2.1.

Ownership

The Ownership element is measured on the date of an organisation’s B-BBEE Verification. The CSC awards all EMEs and BO QSEs automatic Enhanced Recognition. The calculation of ‘Black’ Ownership, in this case, must be through the application of the Flow-Through Principle (FTP).

The CSC identifies African, Coloured and Indian People for redress, collectively defined as ‘Black’ People’, a generic term for those:

- > Who are citizens of the Republic of South Africa by birth or descent; or
- > Who became citizens of the Republic of South Africa by naturalisation -
 - i. Before 27th April 1994; or
 - ii. On or after 27th April 1994 and who should have been entitled to acquire citizenship by naturalisation prior to the date.

The CSC takes the Rights of Ownership held by ‘Black’ People in South Africa.

The calculation for multinationals is the value of an organisation’s South African operations only.

An additional requirement for BEPs is that their total shareholding includes individuals that are both:

- ① Professionally registered with any of the statutory professional councils in the BEP environment in South Africa, and
- ② Form part of an organisation’s Executive Management held within the ‘Top Management’ definition. In the context of the CSC, Executive Management includes ‘Top Management’ as outlined in the Employment Equity Regulations, which provide for ‘Executive Directors’ and ‘Other Executive Management’.

If a holding company has 50% ownership in a BEP, the Ownership scorecard will only recognise the ‘Black’ Ownership that meets the requirements in the aforementioned points 1 and 2. In not meeting these requirements, a BEP will not qualify for Enhanced Recognition or to earn Bonus Points.

Skills Development

The QSE Skills Development Scorecard requirements apply to Larger EMEs and BO QSEs.

| Category | Skills Development | Weighting Points | Target |
|---|--|------------------|--------|
| 1. Skills Development Expenditure on any programme specified in the Learning Programme Matrix | | | |
| 1.1 <i>*Larger EMEs/BO QSEs</i> | Skills Development Expenditure on Learning Programmes specified in the Learning Programme Matrix for ‘Black’ People as a percentage of Leviable Amount. | 14 | 1.5% |
| 1.2 <i>*BO QSEs</i> | Skills Development Expenditure on Learning Programmes specified in the Learning Programme Matrix for ‘Black’ Management - executive, senior and middle management - as a percentage of total Skills Development expenditure for ‘Black’ People | 7 | 25% |
| 1.3 <i>*BO QSEs</i> | Skills Development Expenditure on Learning Programmes specified in the Learning Programme Matrix for ‘Black’ People with disabilities as a percentage of total Skills Development expenditure for ‘Black’ People | 3 | 3% |
| Total | | 24 | |

Key Measurement Principles

Qualifying EMEs or BO QSEs must comply with the Skills Development Act. Therefore, organisations must achieve the following in exchange for points on the Skills Development Scorecard:

- > All plans and implementation of skills interventions must align with the CSC Learning Matrix.
- > Submitting a SETA approved Workplace Skills Plan, an Annual Training Report and a Pivotal Report.
- > Implementing a general Priority Skills Programme incorporating ‘Black’ People as defined.

Targets for Skills Development Expenditure can include external training expenditure for ‘Black’ People who are not employees. However, when claiming spend for Skills Development, an organisation may not repeat that claim under any other element.

Mandatory Sectoral Training does not qualify under Skills Development Expenditure, which is limited to the following:

- > Site, project or safety inductions;
- > Toolbox talks; and
- > Operators’ re-certification.

Recognition of Skills Development Expenditure includes any Legitimate Training Expenses incurred by any Learning Programme offered to ‘Black’ People. Such expenses include, but are not limited to:

- > Costs of training materials;
- > Costs of trainers;
- > Costs of training facilities including costs of catering;
- > Scholarships and bursaries;
- > Course fees;
- > Accommodation and travel;

- > Administration costs; and
- > Funding and support of research at tertiary institutions to improve the sector’s performance.

Skills Development Expenditure arising from informal training - categories F and G - under the Learning Programme Matrix may accumulate more than 35% of the total value.

Salaries or wages paid to an employee as a Learner in categories B, C or D programmes are allowed as Skills Development Expenditure. However, claiming is only applicable to the period the employee participated in a particular learning programme during the applicable Measurement Period. The calculation is over five years from the date of registration as indicated in the Learner’s acceptance letter or certificate of completion. The maximum period an employee is eligible for Professional Registration learning programmes - category C - is five years.

- Skills Development Expenditure does not constitute a claim:
- > If any portion of the expenditure is derived through a grant or any other such avenue; otherwise
 - > If there are any conditions attached to a Bursary or Scholarship;

However, if the right of recovery or the condition involves the following employee obligations, it does constitute a claim:

- > Completing studies within an agreed time frame; and
- > Continued employment for a period that does not exceed the period of their studies.

Providing training that aligns with the Learning Programme Matrix, typically held outside South Africa, done locally with foreign service providers, meets the requirements. However, such training must align with the Skills Matrix for a ‘professional registration body’ and be accredited or registered with a formal learning institution. All such foreign service providers must be accredited, registered or formally approved as a statutory occupational or professional body in South Africa or abroad.

Preferential Procurement and Supplier Development

The QSE Preferential Procurement and Supplier Development Scorecards apply to Larger EMEs and BO QSEs:

| Category | Preferential Procurement | Weighting Points | Target |
|---------------------------------------|--|------------------|------------|
| 1. Preferential Procurement | | | |
| 1.1 <i>*BO QSEs</i> | B-BBEE Procurement Spend from all empowering suppliers based on the B-BBEE procurement recognition levels as a percentage of the total measured procurement spend. | 13 | 60% |
| 1.2 <i>*BO QSEs</i> | B-BBEE Procurement Spend from empowering suppliers that are at least 51% ‘Black’-owned based on the B-BBEE procurement recognition levels as a percentage of the total measured procurement spend. | 5 | 17.5% |
| 1.3 <i>*BO QSEs</i> | B-BBEE Procurement Spend from empowering suppliers at least 35% ‘Black’ Woman-owned based on the B-BBEE procurement recognition levels as a percentage of the total measured procurement spend. | 4 | 7.5% |
| 2. Supplier Development Contributions | | | |
| 2.1 <i>*Larger EMEs/ BO QSEs</i> | Annual value of all qualifying Supplier Development Contributions made as a percentage of the target. | 7 | 1% of NPAT |
| Total | | 29 | |

Preferential Procurement

Like all other sets of Codes, the CSC approach to Preferential Procurement is Total Measured Procurement Spend (TMPS) driven. It relates to a total procurement spend during a Measurement Period, whereby spend is either included or excluded based on the nature of the procurement. This element applies to BO QSEs when they opt for enhancement.

- Spend which constitutes TMPS:
- > Cost of Sales;
 - > Operational Expenditure;
 - > Capital Expenditure;
 - > Public Sector Procurement;
 - > Monopolistic Procurement;
 - > Third-Party Procurement;
 - > Labour brokers and independent contractors;
 - > Pension and medical aid contributions;
 - > Trade commissions;
 - > Empowerment related expenditure;
 - > Imports;
 - > Intra-group procurement; and
 - > All salaries, wages and allowances paid to non-South African employees.

The Preferential Procurement Scorecard aims to support and strengthen the localisation of the Preferential Procurement Scorecard. Thus the following are exclusions allowed from an organisation’s TMPS:

- > Taxation;
- > Salaries, wages, remunerations and emoluments;
- > Pass-through third-party procurement;
- > Empowerment related procurement;
- > Imports of specific goods and services;
- > Intra-group procurement;
- > Non-discretionary procurement, whereby the requirement is a pre-requisite to the contractual obligation. Procurement from ‘Black’-owned and ‘Black’ Woman-owned EMEs and BO QSEs is encouraged by the requirements of the Preferential Procurement Scorecard. The objective is to support job creation and participation.

Supplier Development Contributions

The Construction Sector Charter Council encourages organisations to align with Supplier Development initiatives to promote Government’s localisation vision, including value-adding programmes within an organisation’s supply chain.

The recognition of these qualifying contributions is a percentage of an organisation’s annual Net Profit After Tax (NPAT).

Beneficiaries of Qualifying Supplier Development Contributions are suppliers:

- > Who are at least 51% 'Black'-owned; and
- > Whose last financial period had a total annual revenue that did not exceed 30% of an organisation's total annual revenue during that period.

A recipient of qualifying Supplier Development Contributions must have a minimum three-year contract with an organisation. The Supplier Development spend then multiplies by a factor of 1.2, providing that:

- > Procurement with an EME or BO QSE who is not a Supplier Development Beneficiary but has a minimum three-year contract. The spend is then multiplied by a factor of 1.2.
- > Procurement spend from a first-time qualifying supplier. This spend is multiplied by a factor of 1.2.

Beneficiaries of qualifying Supplier Development Contributions are:

- > At least 51% 'Black'-owned;
- > Where the latest financial period totals an annual revenue that does not exceed 30% of an organisation's total annual revenue during that Measurement Period.

Measuring loans and other related contributions is done against the total outstanding loan on the measurement date.

Only contributions payable within an organisation's Measurement Period are recognised as Supplier Development Contributions. The following is a non-exhaustive list of typical Supplier Development Contributions against the Supplier Development Benefit Factor Matrix:

- > Investments.
- > Loans.
- > Providing financial guarantees or security.
- > Making credit facilities available.
- > Grant contributions.
- > Direct costs incurred when providing assistance or accelerating development.
- > Overhead costs.
- > Preferential credit terms granted.
- > Preferential terms granted in respect of supplying goods or services.
- > Contributions made towards the settlement of the cost of services relating to operational or financial capacity or efficiency levels, not limited to:
 - o Professional and consulting fees;
 - o Statutory licensing and/or registration fees;
 - o Industry-specific levies and/or other such fees;
 - o IT services; and
 - o Payment towards B-BBEE Verification for an EME by a SANAS accredited B-BBEE Rating Agency.
- > Discounts allowed for acquisition or maintenance costs associated with a franchise grant, license, agency, distribution, or similar business rights.

- > Creating or developing the capacity and expertise to manufacture or produce goods or services previously not manufactured, produced or provided in the Republic of South Africa.
The Government's economic growth and local supplier development policies and initiatives guide this process.
- > Creating or developing new projects promoting beneficiation.
- > Facilitating access to credit.
- > Affording preferential credit facilities.
- > Providing seed or development capital.
- > Suitable training or mentorship interventions to increase operational or financial capacity. Note that such intervention may not be double-counted under the Skills Development scorecard.
- > Providing direct training or mentoring to qualifying Beneficiaries. This training may not be double-counted under the Skills Development scorecard.
- > Maintaining a Supplier Development unit to focus exclusively on support is capped to a proportion of relevant overhead costs.
- > Paying suitably qualified and experienced third parties to implement Supplier Development interventions on behalf of an organisation.

Unincorporated Joint Ventures

The CSC specifically addresses measuring Joint Ventures (JVs) in line with all EMEs and BO QSEs. Unincorporated JVs must present a consolidated verification certificate whereby the scorecard points scored by each JV partner are consolidated as if they were a single entity. B-BBEE Certificates in this circumstance are only for a specific tender and/or project.

A consolidated score for a JV weighs against their proportionate Economic Interest Rights outlined in the JV contract.

All EMEs and BO QSEs qualify for automatic Status Levels. The Enhanced Recognition automatically awards the following Status Levels and Weighting Points.

| Automatic Status Level | Weighting Points |
|------------------------|------------------|
| Level 1 | 105 points |
| Level 2 | 97.5 points |
| Level 3 | 92.5 points |
| Level 4 | 85 points |
| Level 5 | 77.5 points |
| Level 6 | 72.5 points |

If the incorporated JV was formed after the commencement of a contract, the subsequent JV scorecard will only apply for the first year of the contract. After that, a JV must conduct a B-BBEE Verification, which will provide it with an incorporated B-BBEE Certificate.

This article is the first in a series of three delving into the Construction Sector Code.

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