



U.S. Department of Energy
Office of Inspector General
Office of Audits and Inspections

AUDIT REPORT

Followup Audit of the Department of Energy's
Management of Contractor Fines, Penalties,
and Legal Costs

DOE-OIG-16-06

February 2016



Department of Energy
Washington, DC 20585

February 5, 2016

MEMORANDUM FOR THE SECRETARY

A handwritten signature in black ink, appearing to read "Rickey R. Hass".

FROM: Rickey R. Hass
Acting Inspector General

SUBJECT: INFORMATION: Audit Report on the "Followup Audit of the Department of Energy's Management of Contractor Fines, Penalties, and Legal Costs"

BACKGROUND

The Department of Energy expends approximately 90 percent of its budget through a variety of contracts and financial assistance agreements. The majority of these funds are spent through management and operating and environmental cleanup contracts. As part of these costs, the Department reimburses contractors for millions of dollars in settlement costs and for fees paid to outside law firms. From fiscal years 2009 through 2013, the Department reimbursed contractors more than \$84 million in legal costs.

Our September 2009 report on *The Department of Energy's Management of Contractor Fines, Penalties, and Legal Costs* (DOE/IG-0825) revealed the Department had reimbursed contractors for legal costs that were questionable because of their association with an underlying fine or penalty, permitted contractors to incur costs for outside counsel that should not have been paid based on the terms of the engagement letter, and authorized settlement payments without performing required postsettlement reviews. These problems occurred because Department field offices were not conducting sufficient legal invoice reviews to ensure potentially unallowable costs were discovered. Further, field offices did not always conduct reviews of cases, as required by Department regulations, to ensure the actions surrounding a settlement did not stem from misconduct on the part of the contractor. We initiated this audit to determine whether weaknesses identified in our prior audit had been corrected and whether the Department was effectively managing contractor fines, penalties, and legal costs.

RESULTS OF AUDIT

Although the Department's management of contractor fines, penalties, and legal costs had improved since our 2009 report, we found that problems with the management of these costs continue to exist. Specifically, our testing revealed that the Department was still authorizing settlement payments without documented evidence of settlement reviews to determine the allowability of costs. Furthermore, the Department had not always determined when postsettlement reviews were warranted. Our detailed review of 46 settlement agreements at

6 site contractors found 36 settlements (78 percent) valued at more than \$62 million in which there was no documented evidence a settlement review had been performed. Of these 36 settlements, we found the following:

- Seven settlements involved allegations of discrimination by the contractor. Discrimination is a violation of Federal and State law, Department policy, and the terms of the contract. Unless the contractor can establish during the settlement review process that the plaintiff had little chance of success on the complaint, settlement and outside legal costs associated with allegations of discrimination, where such actions are specifically prohibited by the terms of the contract, are not allowable. Of the cases in which there was no evidence a review was performed, we discovered that several involved acknowledged improper conduct on the part of the contractor and/or its employees.
- Three settlements involved whistleblower complaints against the contractor. Department regulations require the Department to specifically determine the allowability of defense, settlement, and award costs for each whistleblower case. Further, the Department must consider the relevant facts and circumstances available at the conclusion of the employee whistleblower action when making this determination. In these cases, as well as those related to discrimination, the Department permitted contractors to be reimbursed for settlement claims and outside counsel costs even though there was no evidence the required settlement reviews were completed.
- Twenty-six other settlements involved various legal matters. Settlement and outside legal costs for these cases amounted to almost \$59 million. While the Department required contractors to seek permission to settle when costs were projected to exceed \$25,000, it had not developed guidance for determining when it would be appropriate to perform a settlement review in these matters.

As we observed during our review, postsettlement reviews can yield positive results. In the 10 cases in which a review was performed and documented, we found that the Department avoided more than \$1 million in costs associated with the settlements. Five of the 10 reviews were performed postsettlement and resulted in \$278,000 in unallowable costs.

The issues we identified occurred because the Department had not (1) developed and implemented guidance in a timely manner concerning the application of a 2009 legal decision that established a legal precedent related to the settlement of cases involving discrimination, (2) ensured current policy requiring settlement reviews for discrimination and whistleblower cases was implemented, or (3) developed guidance for conducting settlement reviews for other types of cases. Furthermore, the Department had not developed guidance indicating when conducting a postsettlement review would be warranted. Although similar issues were noted in our 2009 report, the Department had not established adequate policy or guidance in these important areas to assist field offices in determining the cost allowability of settlements. To its credit, one field office had developed a process to determine the reasonableness of settlement

costs for cases involving allegations of discrimination, according to an official at the site. While the field office had begun performing postsettlement reviews, it had not always determined when reviews were warranted.

Excluding settlement agreements from reviews prevented the Department from considering the matters that gave rise to the settlements and determining whether the costs involved were a prudent expenditure of public funds. When such reviews were performed, we found that they yielded positive results. As previously mentioned, we noted 10 instances in which a settlement review had been performed, all by the same field office, resulting in more than \$1 million in savings to the Department. Given the positive results, we made recommendations designed to improve the Department's oversight of contractor settlement agreements.

MANAGEMENT RESPONSE

Management concurred with the report's recommendations and indicated that corrective actions were planned to address the issues identified in this report. Management also provided technical comments, and we modified the report, where appropriate. Management's comments and our responses are summarized in the body of the report. Management's formal comments are included in Appendix 3.

cc: Deputy Secretary
Administrator, National Nuclear Security Administration
Deputy Under Secretary for Management and Performance
Chief of Staff

**AUDIT REPORT: THE FOLLOWUP AUDIT OF THE
DEPARTMENT OF ENERGY’S MANAGEMENT OF
CONTRACTOR FINES, PENALTIES, AND LEGAL COSTS**

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FOLLOWUP AUDIT OF THE DEPARTMENT OF ENERGY'S MANAGEMENT OF CONTRACTOR FINES, PENALTIES, AND LEGAL COSTS

DETAILS OF FINDING

The Office of Inspector General (OIG) previously reviewed the processes used by the Department of Energy (Department) for managing contractor fines, penalties, and other legal costs. In our prior audit *The Department of Energy's Management of Contractor Fines, Penalties, and Legal Costs* (DOE/IG-0825, September 2009), we reported that facility contractors were being reimbursed for legal costs that were potentially unallowable and that the Department had reimbursed contractors for settlements that were either not approved or had not been reviewed to determine whether allegations of contractor management misconduct had merit.

Since the conclusion of our prior audit, the Department had taken steps to ensure that contractors established legal management plans that identified how the contractor planned to manage their legal costs. It had also taken action to ensure that contractors were no longer being reimbursed for legal costs associated with an underlying fine or penalty or because they were outside the terms of the engagement letter that defined the types of costs that could be reimbursed. However, our current review noted that the Department continued to reimburse contractors for settlement costs without conducting a documented settlement review to determine whether, in fact, those costs were reasonable, allocable, and complied with the terms of the contract. Furthermore, postsettlement reviews were not being conducted when warranted.

Settlement Costs

Despite the insight gained from our September 2009 report, the Department continued to reimburse contractors for settlement costs absent a documented settlement review. Furthermore, postsettlement reviews were not conducted, when warranted.¹ The Department's review of a contractor's proposal to settle gives the Department the opportunity to approve the settlement amount. The contracting officer, in consultation with field office counsel, can ensure appropriate consideration is given to the contractor's exercise of prudent business judgment when determining cost allowability for settlements. Furthermore, a settlement review affords the Department the opportunity to consider the matters that gave rise to the settlement and to make a determination as to whether the costs were a prudent expenditure of public funds. A postsettlement review enables the Department to consider additional facts that may not have been known at the time the settlement was approved but not yet executed.

Our review of 46 settlements at 6 site contractors revealed 36 cases (78 percent) that were settled without evidence of a settlement review. Of the 36 cases, 7 involved allegations of discrimination, 3 involved whistleblower complaints, and 26 involved other legal matters. The Department reimbursed contractors more than \$62 million in costs associated with settling these

¹ The OIG defines a postsettlement review as field office counsel reviewing the executed settlement agreement, including the underlying nature of the case, and making a recommendation to the contracting officer, who then makes a final determination as to whether the settlement costs and associated legal costs are allowable.

cases. Furthermore, in the 10 cases in which a review was performed and documented, we found that the Department avoided more than \$1 million in costs associated with the settlements. Five of the 10 reviews were performed postsettlement and resulted in \$278,000 in unallowable costs.

Settlements Involving Allegations of Discrimination

Department contracting officers had not always performed documented settlement reviews for cases involving allegations of discrimination by the contractor. The Department's guidance on the allowability of contractor litigation defense and settlement costs is contained within Acquisition Letter 2014-03, *Allowability of Contractor Litigation Defense and Settlement Costs*, and applies to legal costs related to allegations of discrimination where the discrimination is prohibited by the terms of the contract. In our view, to satisfy the requirements of Acquisition Letter 2014-03, a contracting officer should analyze the facts of the plaintiff's claim once the settlement agreement is finalized to make a determination on the allowability of legal costs associated with the settlement. According to FAR 31.201-2, *Determining Allowability*, a cost is allowable only when the cost is reasonable, allocable, and complies with the terms of the contract. All of the contracts for each of the contractors we visited also contained explicit terms prohibiting the contractor from discriminating against their employees. Further, the Department's policy on discrimination, DEAR 970.2201-1-2, *Policies*, specifically states that management and operating contractor personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, age, disability, or national origin.

We identified seven settlements totaling more than \$600,000 in costs reimbursed by the Department that involved allegations of discrimination by a contractor where no documented settlement review had been performed by the Department's contracting officer at the time of our audit. In addition, contractors were reimbursed for legal costs of more than \$572,000 related to these settlements. In several of these cases, there were indications of improper conduct. For example, in one instance a contractor employee was disciplined for discriminatory behavior towards the plaintiff. In fact, the contractor acknowledged that its employee's behavior was a violation of its policy on Equal Employment Opportunity, Affirmative Action, and Diversity, and reprimanded the employee in writing. We also noted a separate instance in which a plaintiff filed a charge of discrimination against a contractor. A subsequent investigation resulted in a determination of probable cause on the plaintiff's discrimination claim. Finally, another plaintiff filed a claim of discrimination against a contractor, and an offending contractor employee was demoted based partly on actions taken towards the plaintiff.

Settlements Involving Whistleblower Complaints

Our review also found that Department contracting officers were not always performing documented settlement reviews for cases involving whistleblower complaints. According to DEAR 931.205-47, *Costs Related to Legal and Other Proceedings*, the contracting officer must determine allowability of defense, settlement, and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including Federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower action. We identified three

settlements totaling more than \$1.8 million in costs reimbursed by the Department that involved allegations of whistleblower complaints against the contractor that were settled without evidence the required cost allowability review had been performed. In at least one of these cases, there was an indication of improper conduct on the part of the contractor. Specifically, a plaintiff filed a retaliation complaint against a contractor and was granted a hearing based on the merits of the complaint. The resulting judgment found in favor of the plaintiff, and a damage award was issued against the contractor. Subsequently, the plaintiff was denied a new employment position at a Department site based in part on the plaintiff's past complaint. We also noted that two cases had been settled as far back as 2010, yet at the time of our audit, a settlement review had not been performed.

Settlements Involving All Other Legal Matters

We identified 26 cases involving other legal matters that were settled without a settlement review. For cases in this category, the Department had not established a requirement for such reviews. We noted, however, as evidenced with other types of cases, settlement reviews can provide the Department an opportunity to fully evaluate the allowability of such settlements. In the cases we reviewed, the Department reimbursed contractors more than \$39 million for settlements involving legal matters related to intellectual property, union grievances, and contract law. Additionally, Department contractors were reimbursed almost \$20 million in legal costs for those same cases. Even though the Department required contractors to seek permission to settle when costs were projected to exceed \$25,000, it had not developed guidance for determining when it would be cost beneficial to perform a settlement cost review in these matters. In these as well as other types of cases, we noted that when officials chose to do so, settlement reviews yielded good results in that they produced substantial savings.

Management of Settlement Costs

The issues we identified occurred due to weaknesses in the Department's process for performing a settlement review. Specifically, the Department had not established guidance in a timely manner concerning the application of a 2009 legal decision involving cases of discrimination that established a legal precedent. Furthermore, the Department had not ensured current policy requiring settlement reviews for discrimination and whistleblower cases, and had not developed guidance for conducting settlement reviews for other types of legal cases. In addition, the Department had not developed guidance for when a postsettlement cost review should be conducted.

2009 Tecom Decision

The Department had not established adequate policy or guidance in a timely manner to assist field offices in settlement reviews in light of a 2009 legal decision. The United States Court of Appeals for the Federal Circuit in *Secretary of the Army v. Tecom, Inc.* 566 F.3d 1037 (Fed. Cir. 2009) (Tecom) held that if a contractor settles a claim alleging actions that violate antidiscrimination prohibitions in the contract before judgment is reached, the costs of defending the claim and settlement costs are only allowable where the contracting officer determines the plaintiff's claim had very little likelihood of success. As a result, the Department's Office of the

General Counsel (General Counsel) began exploring whether guidance was needed regarding this holding as early as 2010. General Counsel stated that management and operating contractors had taken the position that the interpretation of the cost principles in Tecom did not apply to them. Thus, General Counsel indicated that it had a series of substantial interactions with its contractors to understand their views on Tecom. Ultimately, General Counsel stated that a legal opinion was issued in February 2012 that concluded Tecom applies to the Department's contractors. Despite this, General Counsel indicated that some management and operating contractors have indicated that they do not agree with General Counsel's conclusion that Tecom applies to their contracts. Subsequently, General Counsel indicated that it spent a significant amount of time determining the scope of Tecom and what types of discrimination were affected by the Tecom holding, and acknowledged that the issuance of guidance took longer than it should have. Ultimately, in January 2014, the Department issued Acquisition Letter 2014-03 that addressed the allowability of costs associated with Tecom-implicated contractor cases. It should be noted that the Acquisition Letter applies only to settlements involving allegations of discrimination by the contractor where the discrimination is prohibited by the terms of the contract.

Policy Implementation and Guidance

The Department did not ensure current policy requiring settlement reviews for discrimination and whistleblower cases was implemented. As noted above, the Tecom ruling held that the costs of defending discrimination claims and settlement costs are only allowable when the contracting officer has determined the plaintiff's claim had very little likelihood of success. As a result, the Department issued Acquisition Letter 2014-03 in January 2014. Acquisition Letter 2014-03 states a contracting officer should analyze the facts of the plaintiff's claim and determine whether the plaintiff's claim had more than a very little likelihood of success on the merits, in which case, the defense and settlement costs related to the claim would not be allowable. DEAR 931.205-47 similarly requires the contracting officer to determine the allowability of defense, settlement, and award costs on a case-by-case basis for costs associated with employee whistleblower actions where a retaliatory act is alleged. The contracting officer is to consider the relevant cost regulations, as well as the facts and circumstances of the case available at the conclusion of the action.

In addition, policy and guidance had not been developed for when a documented settlement review should be conducted for settlements relating to matters other than discrimination and whistleblowers. Similar to our 2009 report, we continued to find that the Department had allowed contractors to incur costs for cases that were settled without a documented determination of the appropriateness of the expenditures. While the Department had issued guidance indicating how settlement and legal costs associated with discrimination and whistleblower cases should be treated, no such guidance had been issued for these other types of legal matters.

Finally, the Department had not developed guidance indicating when a postsettlement review would be warranted. In commenting on our draft report, both field office counsel and Department General Counsel officials stated that field office counsel coordinate with the contracting officer, who determines the reasonableness of the settlement costs prior to final settlement. Thus, the field office counsel believed that the allowable cost determination of the

settlement had already been performed even though it was not done postsettlement. Department General Counsel commented that potential reimbursement of costs is sometimes considered during settlement so the contractor has an understanding of what the Department will reimburse before there is a binding settlement agreement. They stated that doing a review of the same costs again after the settlement is duplicative.

We agree that the Department should avoid duplicative processes and also agree that separate reviews may not be necessary when all facts can be known during initial coordination. However, our testing revealed that circumstances and information can change from the time initial decisions are made, which may require additional rigor in the review process and in some cases warrant a postsettlement review. For example, we noted that in the 10 instances where settlement reviews were conducted, additional facts came to light that resulted in the Department declaring over \$1 million in costs related to the settlements to be unallowable. In 5 of these 10 instances, the settlement reviews were performed postsettlement. Furthermore, we found that cost allowability decisions were not always made when permission to settle was granted. Consistent with our findings in this area, we noted that contracting officers frequently informed contractors that field office approval to settle a case did not constitute a determination that the costs associated with the case were allowable. In these cases, the contracting officers' determination is also consistent with 10 CFR 719.33, *In What Circumstances Must the Contractor Seek Permission From the Department To Enter a Settlement Agreement?*, which indicates that the Department's approval of a settlement is not a determination that the settlement amount and the legal costs incurred in connection with the underlying legal matter are allowable costs. Appendix A, *Guidance for Legal Resource Management*, to 10 CFR 719, *Contractor Legal Management Requirements*, states that the reason for the contractor incurring costs may affect the allowability of the contractor's legal costs and that, in some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved.

Opportunities for Improvement

Without guidance and sufficient oversight in place to ensure that field offices are performing documented settlement reviews, including postsettlement reviews when warranted, the Department is unable to determine whether the settlements were a prudent expenditure of public funds. As a result, the Department may be reimbursing contractors for settlement and legal costs that resulted from misconduct on the part of the contractor. In the 10 documented instances in which a settlement review had been performed, field office counsel prepared a cost allowability analysis and made recommendations to the contracting officer to either allow or disallow certain settlement costs, resulting in over \$1 million in savings to the Department. Furthermore, in the interest of protecting taxpayer funds, it is imperative the Department perform postsettlement reviews, when warranted, to determine cost allowability, thus ensuring the funds used to pay for contractor settlements and legal costs are effectively managed.

RECOMMENDATIONS

To strengthen controls of the Department's management of contractor settlement agreements and to ensure that the Department does not reimburse contractors for unallowable legal and settlement costs, we recommend that the Department's Office of the General Counsel, and the National Nuclear Security Administration's Office of General Counsel, in conjunction with the Senior Procurement Executives for the Department of Energy and the National Nuclear Security Administration:

1. Develop procedures for performing settlement reviews for settlements related to matters other than discrimination and whistleblowers, to include thresholds and expected timeframes for recommending the reviews to the contracting officer;
2. Develop procedures for performing postsettlement reviews, as warranted, to include expected timeframes for recommending the reviews to the contracting officer; and
3. Ensure contracting officers and legal contracting officer representatives coordinate and appropriately document the cost allowability determination for settlement costs submitted to the Department for reimbursement.

MANAGEMENT RESPONSE

Management concurred with each of the report's recommendations and indicated that corrective actions were planned to address the identified issues. In particular, management indicated that procedures for performing reviews for settlements related to matters other than discrimination and whistleblowers would be developed. Additionally, management stated that procedures would be developed for when a postsettlement review should be performed.

AUDITOR COMMENTS

Management's comments and the planned corrective actions were responsive to our recommendations. Management also provided technical comments to our report. As such, we made changes to the report to address the technical comments, where appropriate. Management's official comments are included in Appendix 3.

OBJECTIVE, SCOPE, AND METHODOLOGY

Objective

The objective of the audit was to determine whether weaknesses identified in our prior audit had been corrected and whether the Department of Energy (Department) was effectively managing contractor fines, penalties, and legal costs.

Scope

This audit was conducted between December 2013 and February 2016 at Department Headquarters and National Nuclear Security Administration (NNSA) offices in Washington, DC, and at Department field offices that had oversight authority over the six site contractors we selected for review. We did not disclose the identity of the contractors chosen because of confidentiality requirements regarding legal settlements and details of ongoing legal cases. In addition, we analyzed information from the Department's Legal Management Tracking System to determine the total amount of fines, penalties, and outside legal costs. Our review included fines, penalties, and legal costs, including settlements, incurred during fiscal years 2009 through 2013. This audit was conducted under the Office of Inspector General project number A14GT014.

Methodology

To accomplish our audit objective, we:

- Reviewed applicable laws and regulations pertaining to the management of contractor fines, penalties, and legal costs.
- Reviewed policies and procedures for administration of engagement letters, legal management plans, and other requirements for outside legal costs.
- Reviewed prior reports issued by the Office of Inspector General.
- Interviewed Department, NNSA, and facility contractor officials to gain an understanding of their roles and responsibilities, as well as procedures for managing fines, penalties, and other legal costs.
- Judgmentally selected a sample of two sites based on information obtained from the Department's Office of General Counsel's Legal Management Tracking System. Because a judgmental sample of sites was used, results are limited to the sites selected.
- Obtained information on all fines, penalties, and outside legal costs for each of the selected Department's facility contractors.
- Identified all fines and penalties incurred by each of the six selected facility contractors for the period audited.

- Reviewed selected invoices from legal firms at each of the six site contractors we visited to identify whether costs were in accordance with engagement letters.
- Examined all legal settlements at selected facility contractors to determine whether the Department had authorized facility contractors to settle and incur costs that may be unallowable under Federal regulations and Department policies.

We conducted this performance audit in accordance with generally accepted Government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. Accordingly, we assessed significant internal controls and compliance with laws and regulations necessary to satisfy the audit objective. In particular, we assessed compliance with the *GPRA Modernization Act of 2010* and found that performance measures had not been established for contractor fines, penalties, and legal costs. Because our review was limited, it would not necessarily have disclosed all internal control deficiencies that may have existed at the time of our audit. Finally, we conducted an assessment of computer-processed data relevant to our audit objective, and we determined that the data is sufficiently reliable for the purposes of our report by comparing a judgmental sample of the automated data to source documents.

We held an exit conference with Department officials on December 21, 2015.

PRIOR REPORT

Audit report on [*The Department of Energy's Management of Contractor Fines, Penalties, and Legal Costs*](#) (DOE/IG-0825, September 2009). The audit found that the Department of Energy (Department) did not fully implement processes for managing the cost of legal services and settlements. The audit identified instances where payments were made for costs that, in certain cases, were potentially unallowable. The audit also identified instances where facility contractors incurred questionable costs paid to outside legal firms and instances in which the Department had allowed payment to contractors for settlements that were made without a review of the facts and circumstances surrounding alleged contractor “managerial personnel” misconduct.

MANAGEMENT COMMENTS

MEMORANDUM FOR RICKY HASS
ACTING INSPECTOR GENERAL

FROM: GENA E. CADIEUX *GC* *11/3/15*
DEPUTY GENERAL COUNSEL
FOR TRANSACTIONS, TECHNOLOGY, &
CONTRACTOR HUMAN RESOURCES

SUBJECT: Departmental Technical Comments and Management
Response to Inspector General Draft Audit Report:
"Follow-up Audit of the Department of Energy's
Management of Contractor Fines, Penalties, and Legal
Costs"

Thank you for the opportunity to review the Inspector General (IG) Draft Audit Report entitled, "Follow-up Audit of the Department of Energy's Management of Contractor Fines, Penalties, and Legal Costs." Please find the attached Management Response and Technical Comments in response to the subject draft Audit Report. If you have any questions, please contact me at 202 586-3426 or Joseph Lenhard at 202 586-0321.

Cc:
Godard Gozum, Office of the Chief Financial Officer
Therese Keokuk, Office of the General Counsel
Donna Moore, National Nuclear Security Administration
Donna Chapman-Turner, Office of Management
Janet Venneri, Office of Science
Leslie Thomas, Office of Environmental Management

Management Response and Technical Comments

Recommendation 1: Management Concur. In light of the time to needed to draft the procedures, socialize and receive input for DOE offices and then implement the procedures agency-wide, DOE expects to fully satisfy this recommendation by the end of Fiscal Year 2016.

Recommendation 2: Management Concur. In light of the time to needed to draft the procedures, socialize and receive input for DOE offices and then implement the procedures agency-wide, DOE expects to fully satisfy this recommendation by the end of Fiscal Year 2016.

Recommendation 3: Management Concur. DOE expects to fully satisfy this recommendation by the end of Fiscal Year 2016.

FEEDBACK

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Office of Inspector General (IG-12)
Department of Energy
Washington, DC 20585

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