



MINUTE TO THE SECRETARY

To: Dr Brendan Murphy

Through: Caroline Edwards *CZ 19/8 supported*

SUBJECT Approval to apply the human health protection exemption of the Commonwealth Procurement Rules as they may relate to the procurement and sourcing of a vaccines for COVID-19

Purpose

To seek that you determine, as the Accountable Authority, that Divisions 1 and 2 of the Commonwealth Procurement Rules (CPRs) do not apply to the procurement of COVID 19 vaccines, and COVID 19 treatments, and related goods and services (including delivery mechanisms) (the **Procurements**) on the basis that it is necessary to protect human health.

Issues/Sensitivities

In the context of the ongoing COVID-19 pandemic, the Department is engaging in initial discussions with potential suppliers to accelerate access to successful COVID 19 vaccines, COVID-19 treatments and related goods and services.

Given the rapidly evolving COVID-19 vaccine and treatment landscape and the likelihood that global demand for successful vaccines and treatments (and related goods and services) will outweigh supply, early access to vaccines and treatments for Australians is likely to only be achieved if the Department can quickly respond to the emergence of any promising vaccine and/or treatment candidates (and related goods and services) and secure contractual arrangements.

The Department will need to:

- obtain critical information about the candidates (and related goods and services) to be able to assess them in order to understand the market, using all available communication channels to ensure it has access to the critical information, and
- respond within the commercial negotiation windows and parameters, which, in these extraordinary times, are determined by the rapidly changing global market.

In this context, we seek your approval to exempt the Procurements from needing to comply with Divisions 1 and 2 of the CPRs, noting the exemption will not be applied for any procurements of services for example consultancy or legal services, which can be procured through panel or WoAG arrangements.

CPR paragraph 2.6 provisions

CPR paragraph 2.6 provides a range of broad exemptions from the CPRs. It states:

These CPRs do not apply to the extent that an *official* applies measures determined by their *Accountable Authority* to be necessary... to protect human health...

The scope of the 2.6 exemption in the context of the COVID 19, allows for the whole of the CPRs or only part of the CPRs to be determined to not apply.

- Division 1 of the CPRs (Rules for all procurements) requires officials to determine a range of matters, which if they are required to do these things for the Procurements may constrain the Department's ability to enter into contracts with suppliers in the manner and timeframe required for these Procurements. For example,

- all potential suppliers must be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location or the origin of their goods and services, and
- officials are required to include drafting for procurement connected policies, such as providing statements from the ATO to show the suppliers have a satisfactory tax record.
- Division 2 of the CPRs (Additional rules for procurements, relevantly, at or above \$80,000) would, without a 2.6 exemption, require a competitive process be followed. In the current COVID-19 environment, this is not practicable, and would likely delay and fetter the ability of the Department to effectively negotiate with the potential supplier as they trial and develop new vaccines and treatments.

Request to make a determination

It is requested that you determine that CPR paragraph 2.6 removes the application of both Division 1 and Division 2 of the CPRs for the Procurements, until the date on which the Secretary revokes the exemption (on the basis that it is no longer needed to protect human health, or any other basis). This would ensure that the Commonwealth can act effectively and efficiently in the interests of Australia's public health.

Other information

PGPA Act and other reporting obligations

Where you choose to determine that CPR paragraph 2.6 should apply, departmental officials who undertake exempt procurement activities will continue to meet *Public Governance Performance and Accountability Act 2013* (PGPA Act) obligations to document the process, obtain the necessary financial approvals, and meet reporting obligations outside the CPRs such as Annual Reporting or relevant Senate Orders (e.g. Senate Order 13, also known as the "Murray Motion" – i.e. the requirement to publish details of contracts valued at \$100,000 or more).

AusTender

AusTender, the Australian Government's procurement information system, is a centralised web-based facility that publishes a range of information, including key details of contracts awarded.

Should you determine that a CPR paragraph 2.6 exemption removes the application of Division 1 and Division 2 in respect of the Procurements, the AusTender requirement as set out in the CPRs will not apply (but Senate Order 13 will).

The Department will continue to maintain appropriate records as is appropriate for each procurement at a level of documentation commensurate with the scale, scope and risk of the procurement.

Judicial Review (Procurement) Act

This Act provides suppliers (including potential suppliers) with the ability to halt procurement processes being undertaken by Commonwealth agencies in certain situations, including where an agency is proposing to engage in conduct in contravention of the CPRs.

If a 2.6 exemption operates to exclude the Division 1 and 2 of the CPRs in respect of the Procurements, they will not be 'covered procurements' under the Act and the remedies in the Act (including the ability to halt the process) will not apply.

Consultation

The Department's Chief Financial Officer, and the Department of Finance (Finance) have previously been consulted on the application of CPR paragraph 2.6 of the CPRs. Finance advised there is no specific notification requirement to them. Finance recommended the Department maintain clear documentation around the exemption process and procurements relying on exemptions.

Financial Management Division (FMD) has been monitoring the use of this exemption through SAP reporting functionality. This ensures officials are relying on this CPR exemption only when appropriate.

Recommendations

R1. Financial Management Division seeks your determination under paragraph 2.6 of the Commonwealth Procurement Rules (CPRs) to exempt procurements of COVID-19 vaccines, COVID-19 treatments, and related goods and services, including delivery mechanisms, from the application of both Division 1 and Division 2 of the CPRs, in order to protect human health in the context of the COVID-19 global pandemic.

R1. Approved / Not Approved / Please Discuss



Brendan Murphy

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Copy to:

Charles Wann
Penny Shakespeare
Tania Rishniw
John Skeritt
Paul Kelly

Contact officer:

Nikolai Tsyganov

Phone:

s 22

Cleared by:

Lisa Schofield

Phone:

02 6289 7480

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