



Department of Finance Procurement Policy Note – Ethical Conduct of Tenderers and Suppliers

The new 'PwC rule': Firms now forced to confess their sins

On 19 May 2023 the Department of Finance released a Procurement Policy Note, now dubbed the 'PwC rule'¹ for the 'Ethical conduct of tenderers and suppliers' ('the Note'). The Note is a reminder to entities that the Commonwealth Procurement Rules (CPRs) states that officials must consider a potential supplier's... performance history when assessing value for money, which includes:

...consideration of any unethical behaviour and/or deficiencies in performance under prior contracts (including failure of the tenderer to abide by substantive requirements such as confidentiality provisions).

The Note goes on to provide that procurement officials must factor these matters into the evaluation of tenderers, ensuring any decisions are documented as appropriate. Likely this may involve the desktop research (or Googling) of the Tenderer's name, and a list of prior underperformance events (from an ethical standard).

Reference: Procurement Policy Note - Ethical conduct of tenderers and suppliers:
<https://www.finance.gov.au/government/procurement/procurement-policy-note>

In addition, the Note provides that relevant Officials should monitor the ethical behaviour of suppliers throughout the term of the contract, with a recommendation that contract provisions that allow for the termination of a contract for a material breach, including breaches of confidentiality and security requirements, should be included in all Commonwealth contracts.

Some of the most important points from the Note are below:

- Officials must consider, among other things, a potential supplier's relevant experience and performance history when assessing value for money.
- Entities can exclude a tenderer on grounds such as... false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior contract (refer CPR paragraph 10.18).
- Procuring entities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.
- The Commonwealth Contracting Suite and ClauseBank have been updated to include Notification of Significant Event Clauses. The new clauses require a service provider to notify the entity managing the contract immediately upon becoming aware of any adverse findings made by a court, commission, tribunal or other statutory or professional body regarding the conduct of the service provider or its capacity to deliver the agreed services.

¹ By the AFR, located at <https://www.afr.com/companies/professional-services/finance-introduces-new-pwc-rule-to-force-firms-to-confess-sins-20230522-p5dabx>.



It is clear that a Supplier's history of ethical conduct will now play a more important role in the value for money assessment of their tenders. The element of ethical-risk, brought to light by recent events, must now be consciously assessed by Procurement Officers, which is now resulting in more onerous contract management requirements for all of industry.

C.C.22 Notification of Significant Events

The 'Commonwealth Contracting Suite (CCS): Change Record – May 2023' (Annexure A) sets out the clauses to be included in the CCS. The clause provides that a 'Supplier must immediately issue the Customer a Notice on becoming aware of a Significant Event'.

A 'Significant Event' is defined as:

- a) any adverse comments or finding made by a court, commission, tribunal or other statutory or professional body regarding the conduct or performance of the Supplier or its officers, employees, agents or Subcontractors that impacts or could be reasonably perceived to impact on their professional capacity, capability, fitness or reputation, or
- b) any other significant matters, including the commencement of legal, regulatory or disciplinary action involving the Supplier or its officers, employees, agents or Subcontractors, that may adversely impact on compliance with Commonwealth policy and legislation of the Commonwealth's reputation.

When a Significant Event occurs, the Supplier must also provide a summary of the Significant Event. The Commonwealth may notify a Supplier itself if it determines an event is deemed a Significant Event. The Commonwealth can request from the Supplier: 1) additional information (as long as it is a reasonable request), and 2) a draft remediation plan.

There are timeframes set out in the new rule. A failure by the Supplier to abide by the timelines will result in a material breach of the Contract.

Issues with 'Significant Event'

It appears that small companies, bound by audit / legal regulatory-bodies, may be subject to more frequent self-reporting, than larger consulting firms who may not be subject to these panels at all, which seems counter-intuitive. Perhaps a consulting self-regulating body may be on the cards in the near future, given the heinous breach of trust recently committed by PwC.

Further, there does not appear to be a jurisdictional requirement for a Significant Event. Does this mean that EY will be required to notify of Significant Events in all 700 Offices in over 150 countries? We hope not, as it does not appear that Departments are even remotely equipped to handle, process, and respond to this kind of information. Amendments to the rules should be considered for restricting what constitutes a Significant Event, and for where a Significant Event occurs.

With the new obligations, it is important that your contract management plan is updated to reflect this requirement. It is unclear what effect a failure by the Commonwealth to comply with timelines will have on the process. However, as a matter of fairness to Suppliers, and to



abide by the various duties of a Commonwealth Official, it is important to ensure strict adherence to the new rules.

EMA Advisory Tips

- When approaching the market your procurement officials should seek declarations from all tenderers confirming that they have no such unsettled orders against them (refer CPR paragraph 6.7).
- You should either set formal or informal periodic performance reporting under new contracts to help you monitor the ethical behaviour of your suppliers. This can help you to manage ongoing risks and that may occur over the lifecycle of a contract.
- You should check your current procurement contracts, to ensure that these new 'Notification of Significant Event Clauses' have been incorporated.
- You should undertake periodic reviews of the ClauseBank is helpful to ensure your Procurement Contracts are up to date with new policies or follow us to stay in the loop with the latest developments in Commonwealth Procurement and Contract Management.
- When utilising the new clauses, use a group mailbox to ensure notifications from a Supplier are not missed.

Annexure A

<https://www.finance.gov.au/sites/default/files/2023-05/Change%20Record%20May%202023.pdf>

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