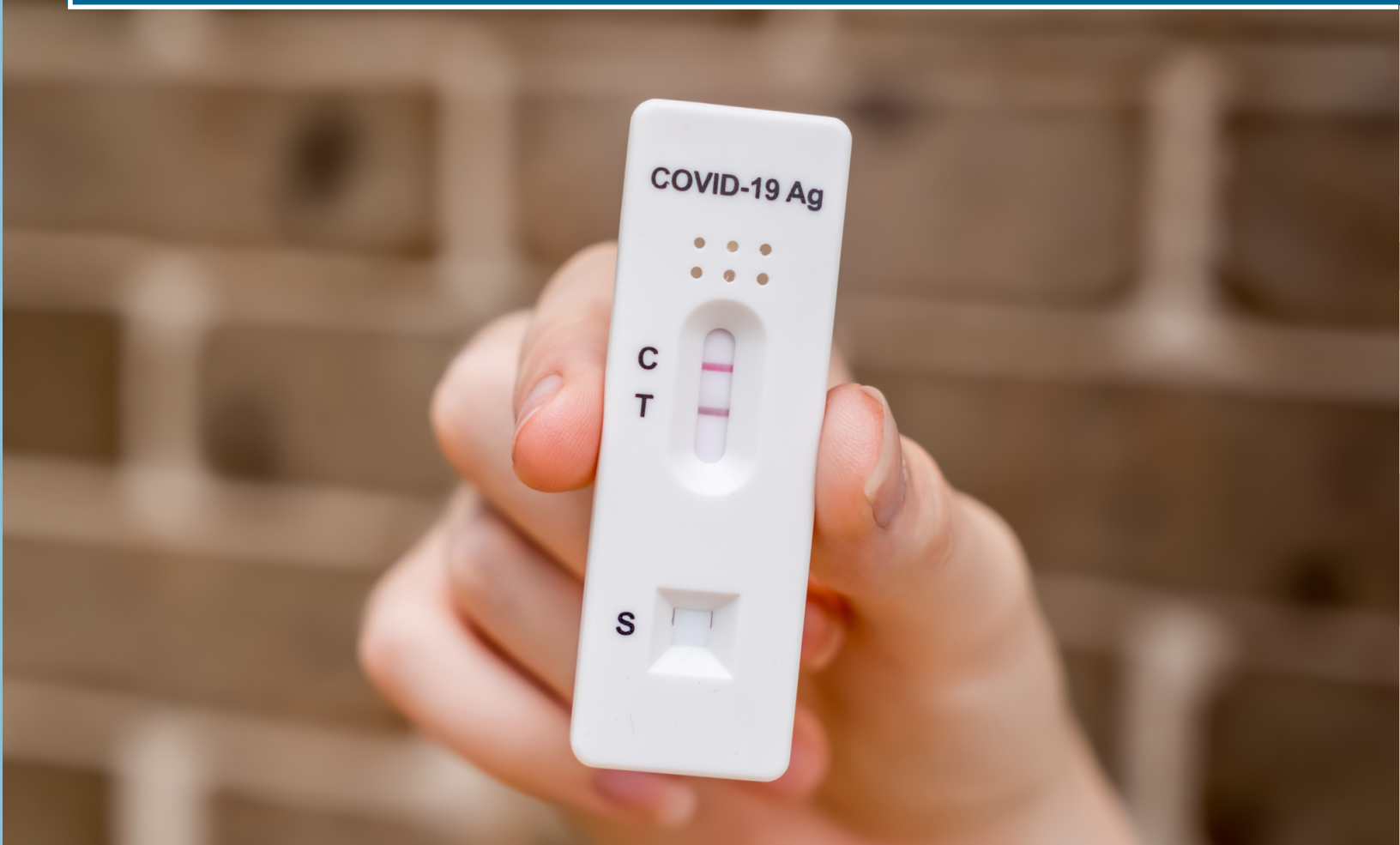


## REVIEW OF THE PROCUREMENT OF THE LATERAL FLOW TESTS



MARCH 2022





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# INTRODUCTION

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## BACKGROUND TO THE COMMISSION AND PURPOSE OF THIS REPORT

1. In October 2021, the Cayman Islands Government established policies for using Lateral Flow Tests (LFTs) in their fight against the COVID-19 pandemic and consequently it was determined to procure a significant quantity of LFTs to enable the roll out of this new policy. Complications arose in the course of the procurement process and concerns have been expressed about the application of the *Procurement Act* and the role of Cabinet and the Civil Service with regard to this Act, and in particular when the “emergency” provision in the Act is triggered.
2. Consequently, on 26<sup>th</sup> November 2021, I was asked, by the Cabinet (including H.E the Governor and the Hon. Deputy Governor), and agreed to establish the relevant facts and answer the following two questions which were provided to me in a Terms of Reference document:
  - *To review the steps taken by Cabinet, the Civil Service and the Governor’s Office in the recent exercise to procure LFTs to determine if best practice and relevant legislation was followed in that procurement exercise; and*
  - *To make recommendations to ensure that, if appropriate, lessons are learned so that all entities involved fully understand their role in procurement and adhere to best practice and the law.*
3. As an independent officer of Parliament, I agreed to undertake this piece of work to help assist the political and official arms of government in clarifying their roles in emergency procurement matters. I believe it is universally understood and accepted by both the Cabinet and the Civil Service that the political arm of any government should, for its own protection, keep away from the operational aspects of any procurement exercise. This is also the general thrust given through the *Procurement Act*.

# FINDINGS

## REVIEW OF CABINET PAPERS AND OTHER DOCUMENTATION

4. Cabinet minutes should record all political decisions. Discussions in Caucus or through informal Cabinet meetings cannot result in decisions being taken unless ratified through a formal Cabinet discussion and recorded decision. Chief Officers and other senior civil servants also need to know and be able to see the decisions taken by Cabinet that are relevant to their work, in order to fulfill their duties effectively. During the review of emails between Chief Officers and other civil servants, it appears that they were, at times, acting on verbal briefings given by their respective Minister rather than any formal documented decision being issued to them.
5. I do not have access to Cabinet Papers or Minutes and so I asked the Clerk of the Cabinet to provide me with all relevant Cabinet Papers and Minute extracts that related to the procurement of LFTs. I was provided with the following and summarise the content below:

Extract from Minutes of the Cabinet – Item Number 479 from 6<sup>th</sup> October 2021:

No decision and nothing directly relevant to the procurement.

Extract from Minutes of the Cabinet – Item Number 500 from 12<sup>th</sup> October 2021:

Decision taken for purchase of 2 million LFTs through the Hon. DG. There is no mention in the Minute about using the “emergency” provision of the *Procurement Act* just that it be undertaken quickly and single source considered.

*“Cabinet agreed that the Hon Deputy Governor is to proceed with the purchasing of the revised order of 2 million lateral flow tests and to ascertain whether a single source provider can be pursued for this purchase.”*

Extract from Minutes of the Cabinet – Item Number 552 from 26<sup>th</sup> October 2021:

No decision and nothing directly relevant to the procurement.



Extract from Minutes of the Cabinet – Item Number 555 from 26<sup>th</sup> October 2021:

No decision but the Governor offered the support of his office with the order of LFTs, which had been placed with Crown Agents Limited on Saturday 23<sup>rd</sup> October 2021 to ensure quick delivery.

(Note, the Cabinet extract refers to an order being placed on 23<sup>rd</sup> October 2021 but, although negotiations were well advanced with Crown Agents Limited, no formal purchase order was placed).

Cabinet Paper Number 279/21 & related Extract from Minutes of the Cabinet – Item Number 576 from 2<sup>nd</sup> November 2021:

Paper to seek Cabinet agreement to acquire an additional 1 million LFTs by the Ministry of Education and Ministry of District Administration and Lands (references that it is in addition to the ½ million LFTs procured by the Ministry of Health from Bluewater Medical Supplies Limited) using the “emergency” provision to source from Crown Agents Limited. The Paper also seeks Cabinet approval for a Cl\$3 million increase to OE140 by section 11(5) of the Public Management & Finance Act.

Paragraph 10 of the Cabinet Paper references using the “emergency” provision of the Act (which Act is not specified here but taken to be the *Procurement Act*). Paragraphs 20 to 22 of the Paper clarify under the “legal implications”, the use of the “emergency powers” under the *Procurement Act* and that it means the “Act would not be applicable in this circumstance”. Paragraph 27 gives further legal input via the Attorney General’s Chambers, whereby they state that Cabinet approving the purchase of LFTs is not consistent with the framework under the *Procurement Act*, as Cabinet is not a recognized entity and so it should be the Chief Officer(s) who need to be satisfied of the circumstances giving rise to the ‘emergency’ (paragraph 29) and seeking Cabinet support.

The Extract of the Minutes supported the recommendations made in the Cabinet Paper including the procurement of 1 million LFTs from Crown Agents Limited. However, the Extract also noted that the Hon. DG advised that he was of the view that the Cabinet does not have the authority to dictate the outcome of any procurement.

Extract from Minutes of the Cabinet – Item Number 607 from 9<sup>th</sup> November 2021:

This details the discussion held at that Cabinet meeting on the issues and concerns relating to the LFT procurement.

Extract from Minutes of the Cabinet – Item Number 624 from 16<sup>th</sup> November 2021:

Cabinet agreement for supplementary funding under S11(5) of the Public Management & Finance Act to enable the procurement of ½ million LFTs from Blue Water Medical Supplies Limited.

Extract from Minutes of the Cabinet – Item Number 638 from 16<sup>th</sup> November 2021:

No decision and nothing directly relevant to the procurement.

6. In the course of this work, I have also reviewed advice given by the Attorney General and Chief Procurement Officer and various other supporting documents and have taken my own independent legal advice on the interpretation of the Procurement Act.

#### FACTUAL CHRONOLOGY OF EVENTS

7. The key events and dates have been fact-checked and are summarised in Exhibit 1 below.

##### Exhibit 1 – Key events and dates in relation to the procurement of LFTs

<u>Event</u>	<u>Date</u>
Ministry of Health & Wellness confirm with Ministry of Finance & Economic Development that funds are available to procure LFTs.	<b>10 Oct 2021</b>
Cabinet decision to procure 2 million LFTs.	<b>12 Oct 2021</b>
At the request of the Deputy Governor, the Ministry of Health & Wellness undertakes a procurement exercise using the restricted tendering process.	<b>12 to 21 Oct 2021</b>
Public Procurement Committee consider the bids for the procurement of ½ million LFT kits and agree award to Crown Agents Limited as the cheapest bidder.	<b>21 Oct 2021</b>
Chief Procurement Officer informs Chief Officer Ministry of Health & Wellness to award contract to Crown Agents Limited.	<b>22 Oct 2021</b>
Negotiations begin with Crown Agents Limited to procure ½ million LFT kits. Although Cabinet Minute 555 states an order was placed with Crown Agents Limited, there is no documentary evidence to support this assertion and the relevant civil servants state no order was placed.	<b>23 Oct 2021</b>

The negotiations with Crown Agents Limited over procuring ½ million LFTs kits cease due to an increase in costs and the Ministry of Health & Wellness then place an order (Purchase Order 31178) with Bluewater Medical Supplies Limited for ½ million LFTs instead.	<b>27 Oct 2021</b>
Ministry of Finance & Economic Development advise Ministry of Health & Wellness that funding is now withdrawn as contract not placed with Crown Agents Limited.	<b>29 Oct 2021</b>
CFO Ministry of Health & Wellness writes to the Public Procurement Committee to inform them of the change in contract award from Crown Agents Limited to Bluewater Medical Supplies Limited.	<b>1 Nov 2021</b>
Caucus discussion on LFT procurement. The Chief Officer Ministry of Health & Wellness informs them that the order has been placed with Bluewater Medical Supplies Limited.	<b>1 Nov 2021</b>
Telephone call from Deputy Premier to Randy Merren cancelling order with Bluewater Medical Supplies Limited (as per Jordan Stubblefield, Director of Bluewater).	<b>By inference on late 1 Nov or early 2 Nov 2021</b>
Cabinet Paper from Minister of Education, District Administration & Lands requesting the procurement of 1 million LFTs from Crown Agents Limited by direct award using the “emergency” provision.	<b>2 Nov 2021</b>
Approval of the above and a \$3 million appropriation and supplementary estimate under S11(6) of PMFA.	<b>2 Nov 2021</b>
Ministry of Health & Wellness receives legal notice from Bluewater Medical Supplies Limited.	<b>5 Nov 2021</b>
Cabinet discuss the issues arising from the procurement of LFTs.	<b>9 Nov 2021</b>
Cabinet agree the funding to enable the completion of the purchase of ½ million LFTs from Bluewater Medical Supplies Limited.	<b>16 Nov 2021</b>

*Source: OAG analysis of documents*

## CONCLUSIONS ON THE QUESTIONS SET

8. The decision taken by Cabinet on 12<sup>th</sup> October 2021 is very clear and it was taken without the use of the “emergency” provision in the Procurement Act: “Cabinet agreed that the Hon Deputy Governor is to proceed with the purchasing of the revised order of 2 million lateral flow tests and to ascertain whether a single source provider can be pursued for this purchase.”
9. On this basis there is no doubt that the procurement exercise then put in place by the Deputy Governor, through the Chief Officer in the Ministry of Health & Wellness, and taking relevant professional advice from both the Attorney General and the Central Procurement Office, was entirely appropriate.
10. However, the Cabinet decision was for 2 million LFTs to be procured and, in the end, an order was placed for only ½ million. This does not seem to be a point of any contention with anyone and the Civil Service felt that sourcing only this number initially was best given it provided an immediate three month supply while a full open procurement process was considered for the remainder of the LFTs should it prove necessary.
11. As the initial procurement decision taken by Cabinet clearly actioned the Deputy Governor to proceed, and the Deputy Governor had engaged the Ministry of Health and Wellness to take this forward, there should have been no further no political involvement in this procurement process and all communications with tenderers should only have been made through civil servants.
12. If there were concerns with any aspect of the procurement process by any member of Cabinet then those concerns should have been raised with relevant officials.
13. The second procurement was undertaken by the Ministry of Education and the Ministry of District Administration and Lands in order to acquire LFTs primarily for use in schools. This second procurement of 1 million LFTs could have proceeded under the policy direction given on 12<sup>th</sup> October 2021 for the procurement of 2 million LFTs. However, the Minister of Education, District Administration and Lands determined to go to Cabinet and ask to proceed on a different basis. In the Cabinet paper, the Minister appears to have made four key determinations; firstly, that an emergency situation did exist, secondly that this should be affirmed by Cabinet, thirdly that a direct award to Crown Agents Limited was appropriate, and fourthly that additional funding was required.
14. Given the importance of getting LFTs quickly for the schools, and that any delays could be being perilous, the approach they have taken using the “emergency” provision also seems reasonable.
15. The two LFT procurements were therefore approached differently; the first procurement was taken forward by officers under a restricted tendering process allowed in the Procurement Act and the second procurement was made under the “emergency” provision and the decision was taken by

Cabinet. My legal advice suggests this was acceptable under the Procurement Act but that this situation does give rise to several important questions regarding the operation of the Procurement Act and exactly what was intended by that Act.

16. At the forefront of these questions is whether the Cabinet falls within the definition of an “entity” under the Procurement Act and whether Cabinet may make a direct award in an emergency situation. Both the advice received from the Attorney General’s Chambers and my independent legal advice concur in that the Procurement Act is not entirely clear in these regards. There seems to be at least an arguable case that Cabinet could fall within the definition of “entity” and that if so, then Cabinet could potentially become more directly involved in a procurement decision in an emergency situation.
17. However, the advice from the Attorney General’s Chambers and my independent legal advice both also caution that any such decision would need clear justification, which in the case of a direct award should entail a business case demonstrating that this course of action represents the most advantageous combination of cost and quality in the circumstances.
18. Finally, there is no evidence that I came across of any inappropriate actions by the Civil Service at any stage in the procurement of LFTs.

## RECOMMENDATIONS FOR THE FUTURE

### **1: Ministers should not be involved in the implementation of any procurement decision.**

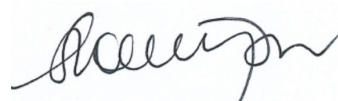
It is best practice for the Civil Service to deliver a procurement process without any political input once the decision to procure is made. This segregation of responsibilities is predicated on the Civil Service having the specialist skills (e.g. procurement, legal, business and market knowledge) to make the most informed process decisions and being the delivery vehicle for government. Most importantly, this separation exists to protect the political arm of government from any procurement related risks (i.e. allegations of unfair tenderer selection, nepotism, cronyism etc.). Once a procurement process is delegated to the civil service to implement, Ministers must not intervene in that process. The Cabinet and Ministers can, of course ask questions and even make suggestions to understand and hold the Civil Service to account but individually or collectively they should not directly participate in or influence any procurement exercise undertaken by the Civil Service on their behalf.

### **2: Clarity in the Procurement Act on Procurement Decisions in Emergency Situations**

The Procurement Act should be updated to make it clear on the factors that would trigger the “emergency” provision and the role of Cabinet, as a collective body, in such circumstances. Consequently, the Procurement Act could benefit from a review of its provisions to provide greater clarity on the following: (i) when, if at all, Cabinet should be able to determine if an emergency situation exists for the purposes of the Procurement Act; (ii) if Cabinet is permitted to have the final decision on making a direct contract award, what factors should be expressly evidenced to support any such decisions.

### **3: The full nature of decisions must be captured in Cabinet minutes and Cabinet decisions must be made available to relevant officials in a timely way.**

Finally, it appears that some members of Cabinet believed the emergency provision in the Procurement Act was triggered when the first procurement exercise commenced, and that a direct award was to be made. This is not the case as this was not reflected in the relevant Cabinet Minute. It is worth remembering that the Cabinet Minutes act as the formal record of decisions made and so it is only discussions and decisions taken in that formal forum that count and not discussions or decisions made at Caucus or between Cabinet members elsewhere. Cabinet Papers and especially Cabinet Minutes must include all relevant detail around decisions taken to minimize the chances of misunderstandings occurring and senior officials should be enabled access to relevant Cabinet documents, especially minutes, in a timely way in order to fulfill their duties effectively.



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Auditor General, Cayman Islands

21<sup>st</sup> March 2022

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