

DEFENCE INFRASTRUCTURE PANEL 2022-27 - PMCA - BRANCH TRAINING

CLAYTON UTZ

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TODAY

- ▶ Defining the Services
- ▶ What standard of service do you expect from your PMCA?
- ▶ How can you manage poor performance?
- ▶ What role do you as the Contract Manager play in securing good performance?

Promoting effective PMCA performance

DEFINING THE SERVICES

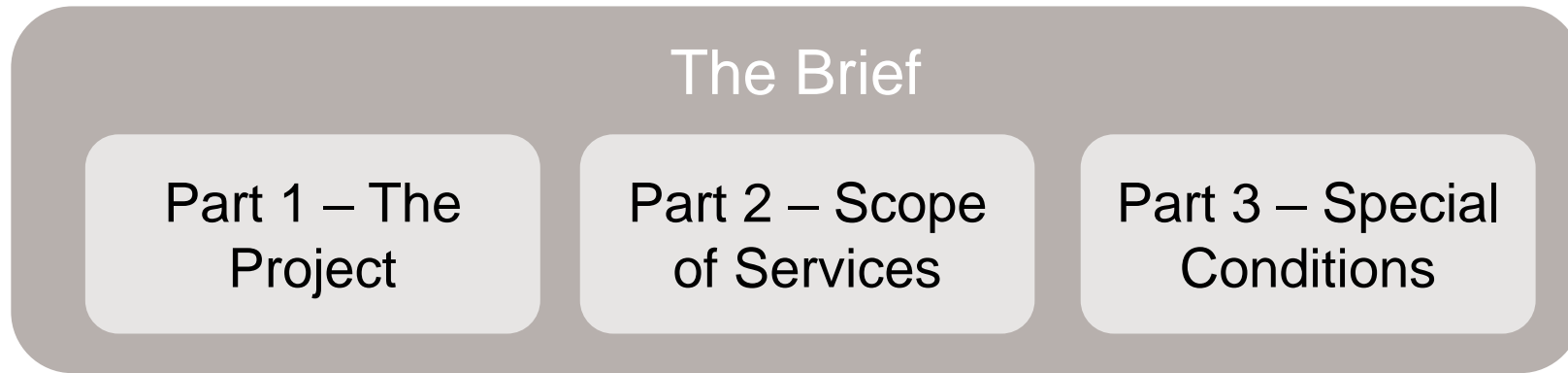
WHAT ARE THE SERVICES?

Means:

- a) the services **outlined in, or reasonably to be inferred from, the Brief**, and
- b) all other services, of a type generally consistent with the services referred to in paragraph (a), which may be required by the Commonwealth in connection with the relevant Engagement

(Clause 1.1 of the Terms of Engagement)

DEVELOPING THE RFP - SCOPE DOCUMENTATION



Can you amend the template Scope of Services for specific engagements?

DEVELOPING THE RFP - SCOPE DOCUMENTATION

The proforma Scope of Services:

- ▶ represents minimum and general requirements only for the relevant Services and does not limit the Panel Consultant's obligations under any Engagement
- ▶ is intended to provide a basis for tailoring to the requirements of individual Engagements, by the Commonwealth making such additions, deletions or other changes to the Scope of Services in preparing the relevant Brief for a specific Engagement as are necessary to reflect the requirements of the relevant Engagement, and
- ▶ may be amended by the Commonwealth from time to time in order to reflect changes in Statutory Requirements

(Panel Agreement, Engagement Process, clause 4)

SCOPE OF SERVICES

Core Services fall into three broad categories

Project management
generally

Specific project
management and other
tasks

Contract administration

SCOPE OF SERVICES - PROJECT MANAGEMENT

In addition to the role of Contractor Administrator, the Consultant has **project management responsibility** for achieving the objectives, budget, risk profile and program for the Project, including:

Managing the planning and delivery of the Project so as to maximise achievement of VFM for the Commonwealth

Providing considered and proactive advice and recommendations to the Commonwealth

Developing and refining the Project scope, cost and program and analysing, monitoring and mitigating Project risks and issues

Co-ordinating and managing stakeholder consultation, Approvals and compliance with Defence Requirements

Developing the proposed procurement and contracting strategy for the Project

Managing the procurement of each Project Contractor and administering each Project Contract in accordance with its terms

(Paragraph 1.1 of the Scope of Services)

SCOPE OF SERVICES – SPECIFIC TASKS

These include:

Site selection

5% MPFR

Market Sounding

Business Cases

Assistance with
Government
Approvals

ICT and other
investigations

Design review

Risk management
/ value
management

Cost planning and
financial
forecasting

Environment and
heritage

Project Contract
procurement

Contract
administration

SCOPE OF SERVICES - CONTRACT ADMINISTRATION

The Consultant must perform and discharge the functions imposed upon the party defined as the '**Contract Administrator**' or similar under the Project Contracts

This Scope of Services is not intended to be a summary of the role of the Contract Administrator or the Services required in respect of such role and the Consultant is directed to the Project Contracts for a comprehensive understanding of the scope of the role of the Contract Administrator

(Paragraphs 44.2 and 44.3 of the Scope of Services)

ROLE OF THE CONTRACT ADMINISTRATOR UNDER THE SUITE

- ▶ The Contract Administrator will give directions and carry out all of the other functions of the Contract Administrator under the Contract as the **agent** of the Commonwealth (and not as an independent certifier, assessor or valuer)

(Clause 3.1 of the HC-1)

SCOPE OF SERVICES - CONTRACT ADMINISTRATION

The Consultant, in discharging this role:

- ▶ must actively review and assess all notices and "claims" (including those seeking additional time or cost) submitted by the Project Contractor for compliance with the Project Contract, validity, rationale, time and cost implications, and impact on the Commonwealth
- ▶ must not approve, issue any notice or communicate (orally or in writing) any additional time or cost (or other amount) under a Project Contract without seeking the prior approval of the Commonwealth's Representative

(Paragraphs 44.4(e) and (h) of the Scope of Services)

DEVELOPING THE RFP - SCOPE DOCUMENTATION

You should tailor the Project description and Scope of Services as required to suit the individual requirements of your Project, including:

Background, aims,
objectives

Stakeholder /
sponsor
consultation

Meetings and
reporting
requirements

Legislative and
policy
considerations

Deliverables and
Milestones

Delivery
methodology /
Project Contracts

Specialist services
e.g. independent
cost planning

Phasing (if any)

Interaction with
other Projects

Others?

BEST PRACTICE: RFP AND SCOPE DOCUMENTATION

Ensure that:



the scope documentation clearly and consistently sets out the scope of the Services



carefully consider and include project-specific requirements and deliverables



the deliverables and the Commonwealth's expectations in respect of them are clearly and consistently articulated e.g. timeframes, content, format, policy considerations



the scope documentation does not include (or cut across) contractual terms or special conditions

**WHAT STANDARD OF SERVICE DO YOU
EXPECT FROM YOUR PMCA?**

QUALITY – PANEL LEVEL

The Consultant must implement the quality assurance process, system or framework in its submission for inclusion on the Panel

The Consultant must allow the Commonwealth's Panel Manager (or anyone else acting on behalf of the Commonwealth) access to the assurance process, system or framework of the Consultant and its subconsultants so as to enable auditing or other monitoring

(Clause 8 of the Panel Conditions)

OBLIGATION TO PERFORM

The Consultant must carry out the Services in accordance with:

- a) the Contract, and
- b) the Project Contracts

(Clauses 1.1 and 2.1 of the Terms of Engagement)

EXERCISE OF GOOD FAITH

The Consultant must exercise the **utmost good faith** in the **best interests** of the Commonwealth and keep the Commonwealth **fully and regularly informed** as to all matters affecting or relating to the scope or cost of the Services and the Project or otherwise

What does acting in good faith mean?

(Clause 2.2(f) of the Terms of Engagement)

STANDARD OF PERFORMANCE

Without limiting the Consultant's obligations under this Panel Agreement, under an Engagement or otherwise, the Consultant must:

- ▶ ensure it maintains a consistently high standard of performance...
- ▶ ensure that it will otherwise meet the Commonwealth's requirements and best practice,

under this Panel Agreement and in respect of each Engagement

(Clause 9(c)(i) and (iv) of the Panel Conditions)

STANDARD OF PERFORMANCE

The Consultant must exercise the standard of skill, care and diligence in the performance of the Services that would be expected of an expert professional provider of the Services

(Clause 2.2(a) of the Terms of Engagement)

STANDARD OF PERFORMANCE

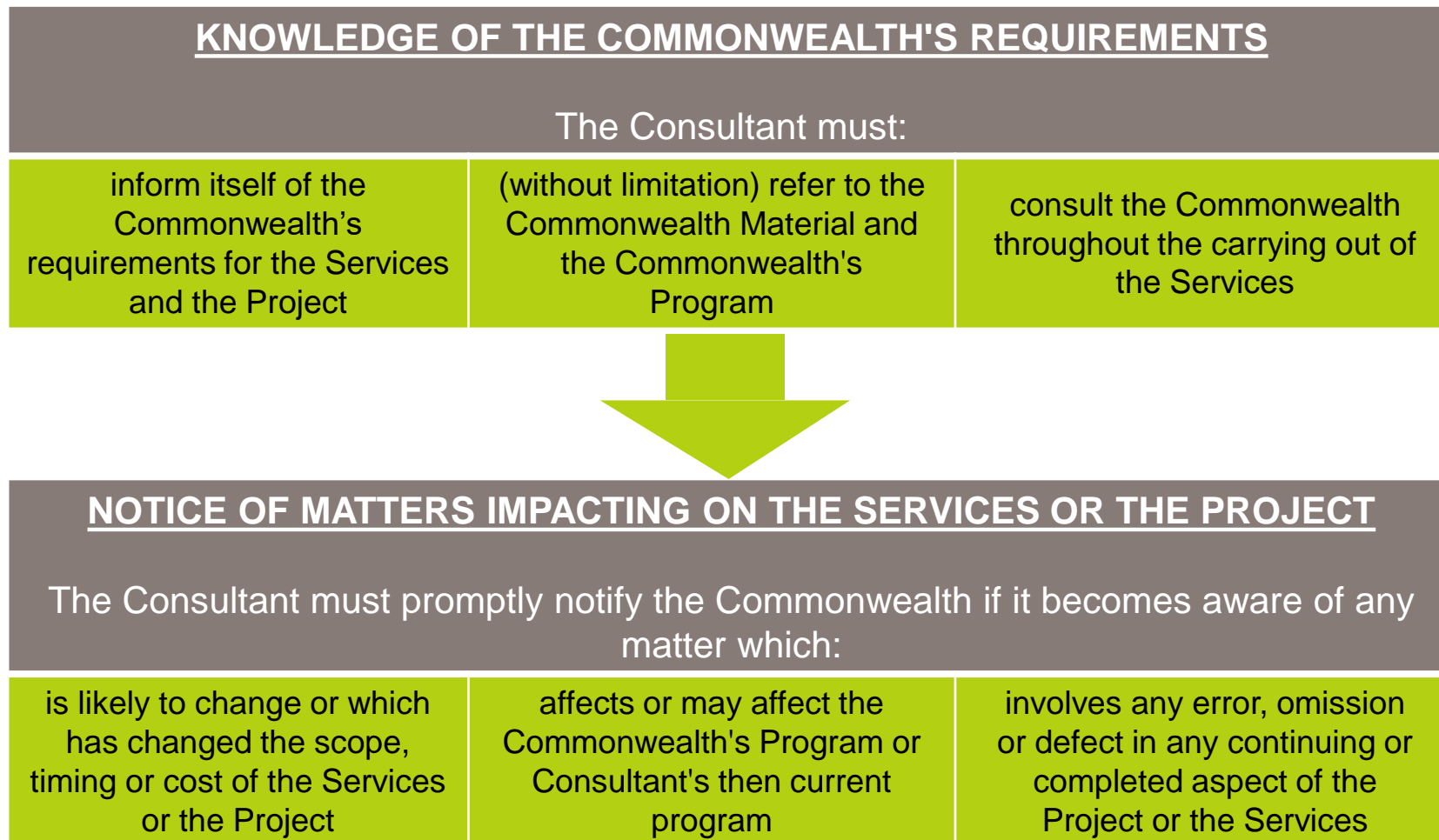
The Consultant must:

- ▶ use its best endeavours to ensure that the Consultant Material will be fit for the purposes as set out in, or reasonably to be inferred from, the Brief
- ▶ ensure that the Consultant Material complies with the requirements of the Contract

(Clauses 1.1 and 2.2 of the Terms of Engagement)

Note: Commonwealth's Representative's right of review and rejection of Consultant Material under clause 5.2 of the Terms of Engagement

STANDARD OF PERFORMANCE



(Clauses 2.4 and 2.5 of the Terms of Engagement)

PROJECT DCAP - MASTER DCAP AND DCAP SUPPLEMENT

The Project DCAP means the:

- ▶ Master DCAP applicable as at the closing date and time of the request for proposal for the relevant Engagement, and
- ▶ the additional document(s) as specified in the Contract Particulars, which may include details of the Consultant's approach to key issues and risks, a minimum resources schedule, the Consultant's key people and proposed subconsultants, each in respect of the relevant Engagement,

amended in accordance with option 2 of clause 5.8 from time to time

(Clause 5.8 (Option 2) of the Terms of Engagement)

PROJECT DCAP - CORE OBLIGATION

The Consultant must, without limiting its other Contract obligations and to the extent not inconsistent with the Contract, at all times in the performance of the Services comply with the Project DCAP

(Clause 5.8 of the Terms of Engagement)

PROJECT DCAP - QUALITY

The Consultant must implement the quality assurance process, system or framework specified in the Project DCAP

The Consultant must allow the Commonwealth's Representative access to the quality assurance process, system or framework of the Consultant so as to enable monitoring and quality auditing

(Clause 6.1 of the Terms of Engagement)

PROJECT DCAP - DCAP WORKSHOP

Following the Award Date, the Consultant must prepare for, attend and participate in a DCAP Workshop.

The Project DCAP must be refined by the Consultant within 7 days of the DCAP Workshop or such other later date as directed by the Commonwealth's Representative in writing, including any amendments required to ensure consistency with the Contract and the requirements for the Services set out in the Brief

(Clause 5.8 (Option 2) of the Terms of Engagement)

PROJECT DCAP - UPDATES

The Consultant:

- ▶ acknowledges that the Project DCAP may require updating and refining throughout the performance of the Services to the extent that it does not reflect the tasks or other things to be done or provided to perform the Services in accordance with the Contract (including for Variations)
- ▶ must update and refine the Project DCAP accordingly with the written approval of the Commonwealth's Representative

At the commencement of each of the Development Phase and Delivery Phase (as applicable) the Consultant must prepare for and participate in any refinement of the Project DCAP, as directed by the Commonwealth's Representative and (if required) provide a revised Project DCAP

(Clause 5.8(e) of the Terms of Engagement; paragraphs 3.1(d) and (e) and 3.2(c) and (d) of the Scope of Services)

PROJECT PLANS

The Consultant must carry out the Services in accordance with, and otherwise implement, the Project Plans (as set out in the Contract Particulars) which may include the Environmental Management Plan, the Site Management Plan and/or the Work Health and Safety Plan

After the Project Plans have been finalised, the Consultant must regularly review its Project Plans, including in accordance with any obligations imposed by the definition of each Project Plan and to correct any defects or omissions (whether identified by the Commonwealth's Representative or the Consultant) and submit an amended draft of the Project Plan to the Commonwealth's Representative for review

(Clause 5.13 of the Terms of Engagement)

KEY PEOPLE

The Consultant must:

- a) employ those people specified in the Project DCAP or elsewhere in the Contract, including the Consultant's Representative, in the jobs specified in the Project DCAP or elsewhere in the Contract;
- b) subject to paragraph (c), not replace the people referred to in paragraph (a) without the Commonwealth's Representative's prior written approval;
- c) if any of the people referred to in paragraph (a) die, become seriously ill or resign from the employment of the Consultant, replace them with persons approved by the Commonwealth's Representative of at least equivalent experience, ability and expertise;
- d) put in place sufficient succession planning and training, to the satisfaction of the Commonwealth, to ensure that the Consultant is able to replace key people under paragraph (c) without any disruption to the Services or the Project; and
- e) pending any approval of the Commonwealth's Representative under paragraph (c), take all possible steps to ensure the timely and compliant performance of the Services in accordance with the Contract

(Clause 4.5 of the Terms of Engagement)

CONSULTANT'S TIME OBLIGATIONS

Performance of Services

The Consultant must perform the Services in a timely manner

Milestones

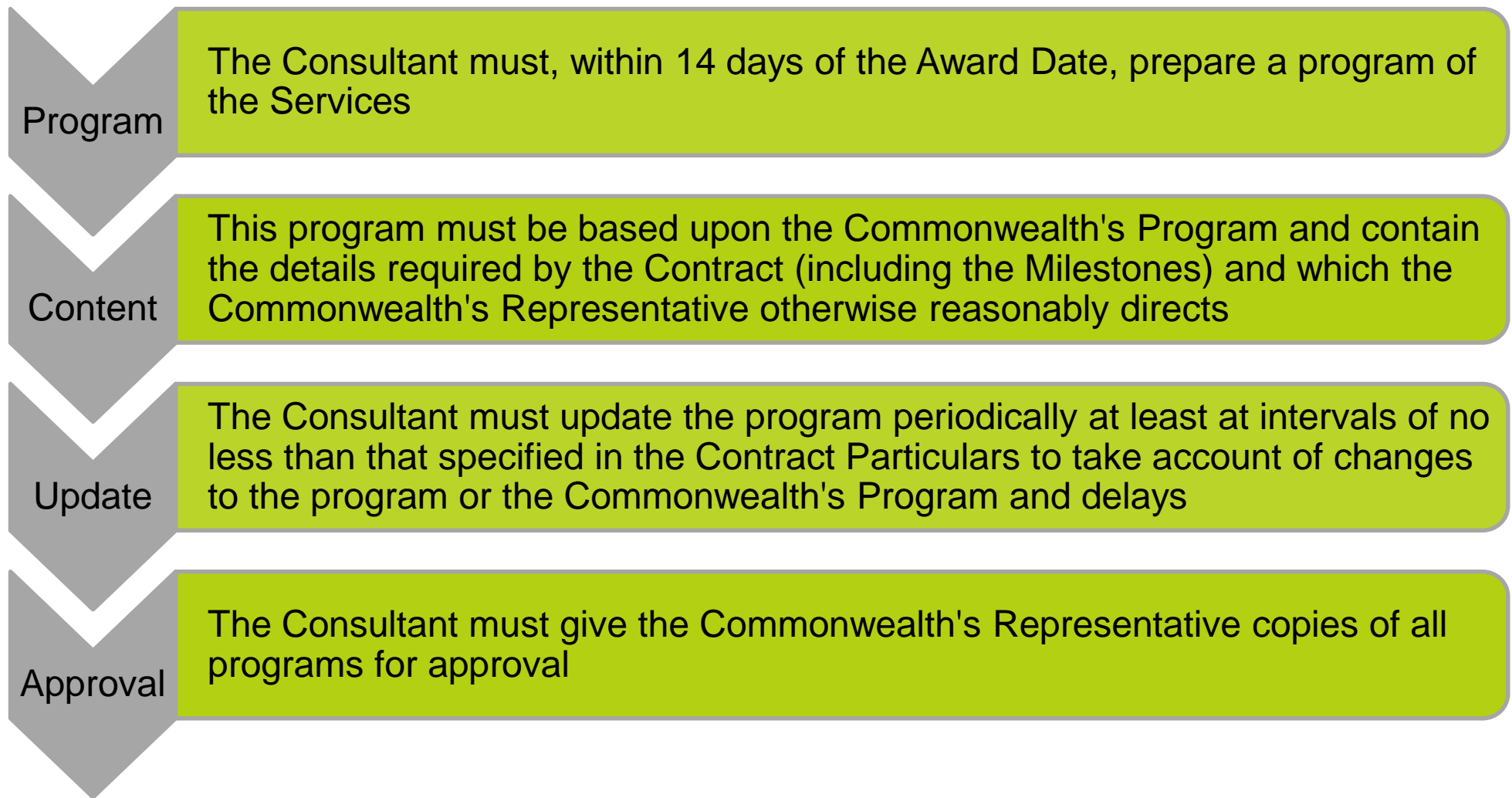
The Consultant must use its best endeavours to achieve Completion of each Milestone within the time set out in the approved program

Project Contracts

The Consultant must perform the Services within any time limits specified in the Project Contracts

(Clause 7.1 of the Terms of Engagement)

PROGRAM



(Clause 7.2 of the Terms of Engagement)

MASTER PROGRAM

- ▶ The Consultant must prepare and maintain as a separate document an overall "Master Program" for the Project by which the Consultant's performance of the Services and the overall status of the Project will be benchmarked
- ▶ The Master Program may only be updated by the Consultant with the approval of the Commonwealth's Representative

(Paragraph 24 of the Scope of Services)

NOTICE OF CLAIMS

Additional notice requirements for all Claims other than:

Claims for payment
under clause 10 on
account of the
unadjusted Fee

Claims for a Variation
instructed in
accordance with
clause 9.2 or to which
clause 14.1 applies

Claims for contribution
or indemnity for loss
or damage caused or
contributed to by the
negligence of the
Commonwealth,
where a third party
makes a claim against
the Consultant

Nothing in clauses 14.1 - 14.5 will limit the operation or effect of any other provision of the Contract which requires the Consultant to give notice to the Commonwealth's Representative in order to preserve an entitlement to make a Claim against the Commonwealth

(Clause 14.1 - 14.4 and 14.6 of the Terms of Engagement)

DRAWING THE THREADS TOGETHER – THE ESSENCE OF THE ROLE OF A PMCA: LESSONS FROM THE CASES

ROYAL BROMPTON HOSPITAL



THE KEY ISSUE

"8.3.5 RBH/PMI thus placed the construction contract for the new hospital before all construction information was sufficiently complete and available in final form. Considerable design work was still in hand, and still more needed, much more than was sensible and prudent for the administration of a fixed price, lump sum, JCT80 contract. Substantial claims for disruption and delay were almost bound to follow."

*Royal Brompton Hospital National Health Service Trust v
Hammond & Ors [2002] EWHC 2037 (TCC)*

THE BLUE LAND

"...PMI and WGI failed to ensure that a contract drawing (P185) correctly showed the extent of the land available to TW for its site offices and other temporary purposes. Some 18 months after the contract was made and work began TW complained that it did not have the area to which it was contractually entitled (the blue land) ...

Had PMI exercised reasonable skill and care the error would have been detected and the contract would either have been concluded on the correct basis or it would have been varied by agreement. TW's claim against RBH was therefore a direct result of PMI's breach of duty."

*Royal Brompton Hospital National Health Service Trust v
Hammond & Ors [2002] EWHC 2037 (TCC)*

THE VARIATION

"RBH relied on clause 11(k) of PMI's retainer. That required PMI to:

"Examine and advise on all variation orders proposed by the Architect and advise on the effect on programme and cost. Recommend implementation either at the time, at a defined time or on completion of the project and agree action with the General Manager."

PMI accepted that this obligation required PMI to consider whether there might be such an effect and, if so, to collate the relevant information for the client. Equally, in my view, the obligation to "recommend implementation" follows the general obligation to advise on all variation orders so PMI was obliged to tell RBH if it thought that a proposal from the Architect should not be implemented, either at all or until further information was available."

*Royal Brompton Hospital National Health Service Trust v
Hammond & Ors [2002] EWHC 2037 (TCC)*

ASK MORE QUESTIONS, ADD MORE VALUE

"[The Expert] made it clear that, since "adequate performance would have been one which fulfilled the obligations of the retainer to a minimum level we would expect from a competent project manager" with the inadequate falling below that level, the opinion would be whether the terms of the retainer had been met..."My experience, and that of many of my contemporaries, is that the project manager is expected to ask more questions, add more value....". This neatly encapsulates a central part of the role of the project manager as co-ordinator and guardian of the client's interests."

*Royal Brompton Hospital National Health Service Trust v
Hammond & Ors [2002] EWHC 2037 (TCC)*

THE COLLAPSING DOME



SCOPE OF RETAINER

"The case raises questions as to the scope of the duty owed by projects managers to their clients to ensure that suitable insurance arrangements are put in place by contractors...

'(l) Compile all contract documents....Establish the clients' requirements on such matters as...insurance requirements...

(o)....Ensure the contractor has complied with insurance and bonding requirements...'

... in general, and subject to any special arrangements made between client and project manager, I accept this as a good working rule as to the scope of the duties to be undertaken by a project manager in relation to insurance."

Pozzolanic Lytag Ltd v Bryan Hobson Associates [1998] EWHC Technology 285

IN PRACTICAL TERMS...

"If a project manager does not have the expertise to advise his client as to the adequacy of the insurance arrangements proposed by the contractor, he has a choice. He may obtain expert advice from an insurance broker or lawyer. Alternatively he may inform the client that expert advice is required, and seek to persuade the client to obtain it. What he cannot do is simply act as a "post box" and send the evidence of the proposed arrangements to his client without comment."

Pozzolanic Lytag Ltd v Bryan Hobson Associates [1998] EWHC Technology 285

AMPLEFORTH ABBEY



THE ENGAGEMENT

“In the present case, there is no dispute of substance between the parties as to the activities encompassed by TTPM’s contract with the trust in respect of the H5 works. TTPM was engaged to perform the full range of duties of a project manager, and these included facilitating, assisting and being involved in the procurement of the building contractor and the building contract.”

The Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Limited [2012] EWHC 2137 (TCC)

WHAT SHOULD THEY HAVE DONE?

"TTPM had put together the contractual documents and the letters of intent. If it was not competent to understand the letters of intent, even with the assistance of its in-house lawyers, it should have advised the trust of the need to obtain professional legal advice. What it could not do, in my judgment, was proceed on the basis of a particular legal understanding and then say that it was no lawyer and could not be expected to bring a lawyer's understanding to bear."

The Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Limited [2012] EWHC 2137 (TCC)

THE KEY REQUIREMENTS



Advise



Check



Administer

HOW CAN YOU MANAGE POOR PERFORMANCE?

- ▶ **IDENTIFYING AND MANAGING POOR PERFORMANCE AT AN ENGAGEMENT LEVEL**
- ▶ **HOW AS THE CLIENT CAN YOU PROMOTE EFFECTIVE PERFORMANCE?**
- ▶ **THE ROLE OF THE PANEL MANAGER**

PERFORMANCE MANAGEMENT

What is poor performance?

INDICATORS OF POOR PERFORMANCE

- ▶ Quality
- ▶ Timeliness
- ▶ Incompetence
- ▶ Failure to report (or delays in reporting)
- ▶ Changing key personnel
- ▶ Poor administration of Project Contracts
- ▶ Others?

Is the Project on time and on budget?

OBJECTIVE MEASURES OF POOR PERFORMANCE

- ▶ Contractual standards
- ▶ Brief (i.e. Scope of Services)
- ▶ Project DCAP
- ▶ Changes in key personnel
- ▶ Timely achievement of Milestones
- ▶ Master Program
- ▶ Others?

PERFORMANCE MANAGEMENT

What steps can you take as manager of the Engagement?

MANAGING POOR PERFORMANCE – WHERE DO YOU START?

- ▶ Early intervention/informal discussions and keeping notes
- ▶ Project meetings
- ▶ Email correspondence
- ▶ Training
- ▶ Providing context to the consequences of poor performance
- ▶ Focus on effective contract administration

A collaborative relationship is not an excuse for avoiding issues of poor performance

PERFORMANCE MANAGEMENT

"Contract Managers must take action to resolve performance issues directly with a consultant before escalating or enacting relevant aspects of the Terms of Engagement.

Performance feedback should be given in a **timely and regular manner** during the course of a project, allowing for the remedy of issues before any formal action is needed. Issues can be raised during project status meetings, via email when the issue occurs or through conversations.

If an issue cannot be resolved informally it **must be raised formally**:

- ▶ in a meeting with the consultant that is formally minuted and the record is issued to all attendees
- ▶ **in writing**, requiring a response from the consultant on their proposed resolution.

The [Panel templates page](#) contains proforma notices for use in the instances a written notice is issued.

In all instances of performance communication, **documentation and records** of the discussions and any rectification actions agreed must be retained by the Project Officer.

Contact the Panel Manager if the issue:

- ▶ is not resolved
- ▶ is panel wide
- ▶ is of a serious nature and termination is being considered."

From the Defence website: <https://www.defence.gov.au/business-industry/procurement/panel-arrangements/dip/performance-management>

IS IT TIME TO ESCALATE THE ISSUE?

- ▶ Formal written notice of concerns and a request for solutions
- ▶ Escalation to Panel Manager
- ▶ Implementation and documentation of agreed performance improvement initiatives
- ▶ Contractual mechanisms:
 - » Non-complying Services
 - » Notices of default
- ▶ Other contractual triggers and rights
- ▶ Formal dispute resolution
- ▶ Others?

NON-COMPLYING SERVICES

The Commonwealth's Representative may, if they discover or believe that any Services have not been performed in accordance with the Contract, give the Consultant a direction specifying the non-complying Services and requiring the Consultant to:

- ▶ re-perform the non-complying Services and specifying the time within which this must occur, and
- ▶ take all such steps as are reasonably necessary to:
 - » mitigate the effect on the Commonwealth of the failure to carry out the Services in accordance with the Contract, and
 - » put the Commonwealth (as closely as possible) in the position in which it would have been if the Consultant had carried out the Services in accordance with the Contract

(Clause 6.2 of the Terms of Engagement)

RE-PERFORMANCE OF NON-COMPLYING SERVICES

If a direction is given under clause 6.2, the Consultant must re-perform the non-complying Services:

within the time
specified in the
Commonwealth's
Representative's
instruction

so as to minimise any
delay and disruption
to the Services and
the Project

(Clause 6.3 of the Terms of Engagement; See also clause 8(a) of the Panel Conditions)

Note: The Commonwealth may advise the Consultant that the Commonwealth will not require re-performance of the non-complying Services, despite the non-compliance (Clause 6.2(a)(ii) of the Terms of Engagement)

CONSULTANT DEFAULT

A notice of default under clause 12.3 must state:

- ▶ that it is a notice under clause 12.3
- ▶ the failure or breach relied upon, and
- ▶ that the Commonwealth requires the Consultant to remedy the failure or breach within the number of days set out in the Contract Particulars of receiving the notice



If the Consultant does not remedy the failure or breach the subject of that notice within the number of days set out in the Contract Particulars, then the Commonwealth may terminate the Contract

(Clauses 12.3 and 12.4 of the Terms of Engagement)

Note: Proceed with caution and seek advice from the Project's legal adviser and the Panel Manager

PAYMENT

Do you have to pay the invoice?

What if you have paid the invoice?

Any payment of moneys under clause 10.5 is not approval by the Commonwealth or the Commonwealth's Representative of the Consultant's performance or compliance with the Contract but is only to be taken as payment on account

(Clauses 10.2, 10A.2, 10.6 and 10A.5 of the Terms of Engagement)

TIMING FOR PAYMENT

The Consultant will be entitled to submit payment claims at the times stated in the Contract Particulars - generally, Completion of Milestones in accordance with the Milestone Fee Payment Schedule

"Completion" is defined as the point in time when, in respect of a Milestone, everything required to have been completed as a condition precedent to Completion of the Milestone has been completed in accordance with the Contract or the Project Contract

The Milestone Fee Payment Schedule often provides, in the Delivery Phase, for a combination of payment on a Milestone basis and monthly (up to the amount of the Milestone)

(Clauses 1.1, 10.2 and 10A.2 of the Terms of Engagement)

THE IMPORTANCE OF WELL DEFINED MILESTONES

Detailed Business Case (DBC)	The Consultant has prepared and submitted the DBC	50% completion - \$50,000 100% completion - \$50,000
Draft Detailed Business Case (DBC)	A draft of the DBC, substantially in accordance with the requirements of the Contract, has been prepared and submitted to the Commonwealth's Representative	\$50,000
Completion and approval of DBC	The DBC has been prepared by the Consultant in accordance with the Contract and has been submitted to, and not rejected by, the Commonwealth's Representative in accordance with clause 5.2 of the Terms of Engagement, and the DBC has been endorsed and approved	\$50,000

MOVING TO THE DELIVERY PHASE

The Services are divided into two distinct phases, being the Development Phase and the Delivery Phase

The Consultant acknowledges and agrees that the purpose of this division is to ... give the Commonwealth an opportunity to establish whether it is satisfied (in its absolute discretion) with the performance of the Consultant before proceeding from the Development Phase to the Delivery Phase

(Clause 8.1(a) and (b)(iii) of the Terms of Engagement)

OTHER RIGHTS?

<i>Removal of Persons</i>	<ul style="list-style-type: none"> ▶ The Commonwealth's Representative may by written notice instruct the Consultant to remove any person from the performance of the Services who in the reasonable opinion of the Commonwealth's Representative is guilty of misconduct or is incompetent or negligent
<i>Suspension</i>	<ul style="list-style-type: none"> ▶ The Commonwealth's Representative may instruct the Consultant to suspend (and, after a suspension has been instructed, to re-commence) the carrying out of all or a part of the Services ▶ The Consultant will not be entitled to make any Claim against the Commonwealth where the suspension arises from the Consultant's failure to carry out its obligations in accordance with the Contract
<i>Variations</i>	<ul style="list-style-type: none"> ▶ Includes any decrease, omission or deletion from the Services
<i>Formal Dispute Resolution</i>	<ul style="list-style-type: none"> ▶ Use of the formal dispute resolution process under clause 13 of the Terms of Engagement
<i>Set-off</i>	<ul style="list-style-type: none"> ▶ The Commonwealth may deduct from moneys otherwise due to the Consultant any debt or other moneys due from the Consultant to the Commonwealth and any claim to money which the Commonwealth may have against the Consultant whether for damages or otherwise

(Clauses 4.6, 7.4, 9, 10.11, 10A.8 and 13 of the Terms of Engagement)

HOW AS THE CONTRACT MANAGER CAN YOU PROMOTE EFFECTIVE PERFORMANCE?

- ▶ Provision of information
- ▶ Availability to instruct and decide
- ▶ Balancing competing requirements
- ▶ Reliance on advice? What if you disagree?

ESTOPPEL

- ▶ Words and conduct between the parties can alter their rights and obligations under the contract
- ▶ Under the principles of estoppel a party may be prevented by conduct from asserting a contractual right
- ▶ The object of an estoppel is to prevent an unjust departure by one person from an assumption or expectation adopted by another as a basis for some act or omission
- ▶ The key is detrimental reliance

THE FLAMMABLE FACTORY



CARE AND SKILL

"It is accepted that Halls were under a duty to exercise care and skill in carrying out their duties as project managers who had agreed to achieve through successful management from inception, through design, construction, commissioning and hand-over, a building which was delivered within the agreed time, cost and quality parameters.

The duties included specifically a duty to prepare a schedule of requirements in phase 1 for the construction of a bakery including the selection of appropriate materials.

In providing the outline specification and in selecting the materials Halls would need to have well in mind that the materials were being placed in a building that was to be used as a bakery."

A DUTY TO ADVISE OF RISKS

"If the employer wanted to specify materials which Halls did know constituted an unacceptable fire risk they were under a duty to warn the employer of the risk which they thought that the employer was undertaking...

I find on the balance of probabilities that Halls did not give the advice that they say they gave. They did not give a warning to Mr Rezaei of the risks of fire which were commensurate with the dangers which they knew to exist. Had they given the advice in the form in which they say they did both in witness statements and in evidence and had that advice not been accepted by Mr Rezaei, I have no doubt that they would, as a competent and prudent firm of Quantity Surveyors and Project Managers, have given that advice in writing. If the advice had been given in the terms in which they say they gave the advice I have no doubt that there would have been a record."

BUT WOULD THE ADVICE HAVE BEEN ACCEPTED?

"Mr Rezaei says that if the advice had been given in clear terms he would have accepted it even if it meant that the cost of the building was substantially increased....

...I do not find that he would have done so. I have come to the conclusion that Mr Rezaei would have rejected Halls' advice unless it was supported by a requirement from the Planning or Fire Authorities and/or was required by his insurers.."

Pride Valley Foods Ltd v Hall & Partners
[2000] EWHC Technology 106

BUT WHAT ABOUT PRICE? DOES THIS AFFECT CONSULTANTS' BEHAVIOUR?

"Mr Hall says that he had the initial impression that Mr Rezaei was reluctant to use "Halls" services but that after hearing the details of the services which Halls could provide, Mr Rezaei recognized the advantages of retaining their services...

The letter of appointment and the fee agreement...provided that in consideration for the services detailed in Appendix 1, Pride Valley would pay Halls a fixed fee of £20,000."

BEST PRACTICE: CONDUCT



Ensure all notices are issued formally in accordance with the contract and follow up informal communications with written notices



Ensure the Consultant has established an entitlement before you pay any claim



Ensure all communications, records and other documents are "on message" as these can be used in the event of a dispute



Be timely, accurate and conscientious in record keeping e.g. file notes, records of conversations, meetings, decisions, variations, claims, correspondence, registers, notices



Address contracting and relationship issues early



Co-operate and be as collaborative as possible *within the contractual framework*

PANEL MANAGER'S ROLE

FORMAL PERFORMANCE REVIEW

The Consultant's Panel Manager must participate in performance management discussions with the Commonwealth as required by the Commonwealth's Panel Manager, which will:

- ▶ be conducted at not less than 12 monthly intervals (at a time and location required by the Commonwealth's Panel Manager)
- ▶ consider the Consultant's:
 - » Panel-wide performance; and
 - » individual Engagement level performance

No later than 4 weeks prior to this discussion the Consultant must submit such information as the Commonwealth's Panel Manager requires

NOTIFICATION OF PERFORMANCE ISSUES BY THE CONSULTANT

In the event of any significant issue with respect to the performance of the Consultant (at Panel-wide or individual Engagement level), the Consultant must immediately notify the Commonwealth's Panel Manager in writing providing full details of:

- ▶ the significant performance issue, and
- ▶ the steps which the Consultant has taken (or will take) to prevent, end, avoid, mitigate, resolve or otherwise manage the risk of the significant performance issue

(Clause 9(b)(ii) of the Panel Conditions)

FUTURE ENGAGEMENTS FOLLOWING POOR PERFORMANCE

The Commonwealth does not guarantee a volume of work to the Consultant under the Panel Agreement. The level of work awarded to the Consultant will depend substantially upon (among other matters):

- ▶ its general performance at a Panel level and Engagement level as assessed by the Commonwealth
- ▶ its demonstrated expertise and experience in the type of services required by the Commonwealth, and
- ▶ how it responds to the evaluation criteria for each request for proposal

(Clause 2.5 of the Panel Conditions)

UNSATISFACTORY PERFORMANCE

If the Consultant's performance under the Panel or any Engagement is assessed as unsatisfactory in any respect, the Commonwealth may elect to (in its absolute discretion):


- ▶ require the Consultant's Panel Manager to meet with the Commonwealth's Panel Manager at a time and location notified by the Commonwealth's Panel Manager to discuss the Consultant's unsatisfactory performance (and any steps that the Consultant is taking or proposes to take to address its unsatisfactory performance), or
- ▶ suspend or discontinue seeking proposals from the Consultant for future work


(Clause 2.6(a) of the Panel Conditions)


Note: Reserved Panel Condition


END OF SESSION AND WRAP UP

BEST PRACTICE: MANAGING PERFORMANCE


-  Set up for success – RFP preparation, proposal evaluation and negotiations


-  Ensure that the contractual requirements and expectations are clearly and consistently articulated on and from the time of Award


-  Ensure that promises in the Project Plans, DCAP and proposal are being implemented


-  Establish a continual improvement culture. Keep records of lessons learned and performance issues

BEST PRACTICE: MANAGING PERFORMANCE

-  Regularly review deliverables and address non-compliances and poor performance when it occurs

-  Use formal contractual mechanisms when needed

-  Provide performance feedback to the Commonwealth's Panel Manager

-  Consider your contribution to promoting good performance

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