



Australian Government

Department of Defence  
Security and Estate Group

# Defence Infrastructure Panel 2022-27 Project Management and Contract Administration (PMCA) Training

**Directorate of Quality, Assurance and Compliance**

Capital Facilities and Infrastructure

14 August 2024



# Agenda for today...

## **Lisa Drummond, Director Quality Assurance & Compliance**

- Completing the DIP PMCA Streamlined Approach - Master DCAP Request for Proposal (RFP)
- Managing a procurement under the Panel

## **Graham Read, Partner, Clayton Utz**

- Promoting effective PMCA performance

# Completing the DIP Request for Proposal (RFP)\*

\*Based on the DIP PMCA Streamlined Approach - Master DCAP RFP

# Engagement Process

- Optional: Expression of interest letter
- **Step 1:** Commonwealth issues an RFP (using the Streamlined Approach - Master DCAP RFP)
  - Master DCAP approach exists for PMCA and CFISS service categories only
  - All other service categories use the standard (General/Simple) RFP
- **Step 2:** Panel Consultants provide a conforming proposal
- **Step 3:** Evaluation is conducted
- **Step 4:** Negotiations if required
- **Step 5:** Official Order is issued to successful Panel Consultant
- **Step 6:** Unsuccessful Panel Consultants notified in writing and debriefs offered

**All of these steps are supported by template documents**



## Expression of Interest Letter

- This is optional and can be used to inform your procurement strategy.
- Used to ask which Consultants are interested in or available to perform the services.
- No obligation for the Commonwealth to proceed and no commitment by issuing.
- Template is available on the Panel webpage.

# Request for Proposal Template

## RFP Table

These are your conditions of tender and care must be taken in completing these.

Some points to remember

- Closing Date and Time
- Proposal Lodgement Process
- Evaluation Criteria (Mandatory)
- Conforming Proposal Requirements
- Security Clearances Required
- Contact Officer / Commonwealth Representative
- Key Personnel Interviews

Do not include information / directions in your covering email that contradicts these.

# Request for Proposal Template

## **Annexure A - Brief**

To be completed by the Commonwealth and includes:

### **Part 1 - The Project**

This is where you need to identify all you can on the project - everything that is relevant needs to be here. This will inform the issues and risks that the Panellist will provide in their submission.

### **Part 2 - Scope of Services (This is the basis for the contractual promises)**

This is where you define the scope of services you wish for the Panellist to deliver in support of the defined Project. You should copy and paste the PMCA Scope of Services found on the Panel page as a starting point. This then must be tailored for the specific needs of your project.

### **Part 3 - Project Specific Special Conditions (if any)**

This is where you draft any special conditions of contract additional to those within the Terms of Engagement.

## What is the Master DCAP?

- The Master DCAP provided by each Consultant in its tender for appointment to the Panel
- Obligations in respect of the Master DCAP in the Panel Conditions
- Not required to be evaluated with proposals in response to an RFP
- The Master DCAP and the DCAP supplement (being the document submitted in response to the RFP) comprise the 'Project DCAP'
- Obligations in respect of the Project DCAP in the Terms of Engagement

# Request for Proposal (RFP) Template

## **Annexure B - DCAP Supplement**

To be tailored to the specific requirements of the Project by the Commonwealth:

- Think about what you want to see in the response and what is important for your project; and
- Reflect that importance where you are asked to insert key issues and risks in the table.

The Annexure seeks:

- Approach to key issues and risks of the Project and Services;
- Approach to programming the Services;
- Minimum Resource Schedule;
- Key people and sub-consultants; and
- Joint bid arrangements.

**Why is the quality and accuracy of Annexure B critical for the success of your project?**

- **Annexure C - Fee Schedule**
  - Tailored for the Project by the Commonwealth.
  
- **Annexure D - Contract Particulars**
  - Defence partially completes and the Tenderer completes remaining information. Refer to Terms of Engagement
  
- **Annexure E - Alternative Proposals**
  - Tenderers must submit a conforming proposal before an alternative will be considered.
  - Commonwealth has the discretion whether to accept or not.

**(Panel Consultant is to lodge Fee Schedule and Alternative Proposals in separate files to the rest of the proposal)**

## Annexure C - Fee Schedule

Option 1

Lump Sum  
(no phase or two phase)

Option 2

Schedule of Rates

Milestone Fee Payment Schedule (Optional)

Reimbursable Costs

Proposal for submission of payment claims (Optional)

# Lump Sum v Schedule of Rates

## Lump Sum Engagements

- No entitlement to reimbursement of any disbursements (including travel costs, car hire etc.) unless otherwise explicitly stated by the Commonwealth in the Official Order.
- No entitlement to reimbursement of any additional costs/ disbursements connected with:
  - A change in the location of the Consultant's business;
  - A change in the location of the Consultant's personnel; and
  - Internal promotion for personnel.

## Schedule of Rates

- All disbursements are deemed included in the Schedule of Rates except for:
  - Travel Costs;
  - Car hire and taxi fares;
  - Other disbursements specified in an Official Order;
  - Panel Consultant must have prior written consent of the Commonwealth before incurring these costs; and
- Items which are not reimbursable costs include: telephone calls, printing, email or internet charges, royalties, taxes (excluding GST) and employment related levies.

## Escalation of Rates



## Issuing the RFP

- You do not have to send the RFP to all members of the Panel.
- Your procurement strategy is as per the PDDP Part 1.
- If you elect to sole source the opportunity you need to defend this decision to your Delegate and for sourcing two or less now the DEPSEC (refer to next slide).
- You must tailor the RFP documentation to the requirements of your project.
- The RFP is to be issued by email and you are to ensure Panel Consultant acknowledges receipt of the request. If not acknowledged follow up.

## Sourcing under the Panel...

*When implementing a new contract through the Panel arrangements or through the use of a Limited Tender procurement the following is to apply:*

*b. Two or less quotations. When seeking two or less quotations, personnel are to ensure that prior to approaching the market, a Decision Brief is prepared for the relevant Group Head, that clearly documents:*

- i. the decision to seek two or less quotes, and details of discounts to be sought;*
- ii. justifies the reason for sole sourcing and the impact of not conducting a competitive procurement if the request was denied; and*
- iii. demonstrates that there will be a reasonable undertaking to negotiate, where possible, at least a 25 per cent discount off relevant panel rates for the entire provision of services (including future variations).*

## Receiving the RFP

- You will receive from the Tenderer
  - Completed DCAP Supplement (Annexure B)
  - Completed Fee Schedule (Annexure C)
  - Completed Contract Particulars (Annexure D)
  - Alternative Proposals (Annexure E) OPTIONAL

## What documents form a DIP contract

- The terms of the **Official Order** (including all of the documents listed in the Official Order, such as the Contract Particulars and attachments to the Contract Particulars, the DCAP, the Brief, the Fee Schedule etc....).
- The **Terms of Engagement** – specific contractual promises in respect to the delivery of the Project. These are defined as Section 4B of the Panel Agreement.
- The **Panel Agreement** – Higher level contractual promises that relate to the Panellists' membership on the Panel and can only be enacted by the Panel Manager.

**The fully completed Official Order is issued to the successful Panellist.**

## Executing the Official Order

When issuing the RFP a **draft** Official Order is also provided in order to provide the indicative contractual terms for the Engagement.

This draft Official Order should then be finalised once a successful Panel Consultant has been selected and issued to the successful Panel Consultant to constitute acceptance of its proposal for the Services.

The completed Contract Particulars **must** be attached to the Official Order. It is also strongly suggested that the following documents are also attached so that the terms of the Engagement are clear:

- ANNEXURE A - Brief
- ANNEXURE B - DCAP Supplement
- ANNEXURE C - Fee Schedule

## I have a particular requirement for the Contract. How do I approach that?

- Project-specific Special Conditions are now to be written into Part 3 of the Brief.
- Legal review must be applied for complex procurements to ensure that wording in the Brief (including any Special Conditions) does not contradict the Panel terms and conditions.

# Insurances

- I want to identify the insurance requirements for my project, but I don't know what Panellists already have. What can I do?
  - Conduct your own risk assessment.
  - All Panellists have insurances suitable for Panel membership.
  - If you want to discuss the amount, ask the Panel Manager.
  - If you request an amount that is greater than their existing coverage, this may be reflected in pricing.

## DIP - Do not's:

- Do not source a proposal from a DIP Consultant and a non DIP Consultant in the same procurement.
- Do not delete “bits” from the RFP documents and Contract Particulars. Use the language of “Not Applicable, Nil Additional or none stated” where required and seek advice from your Legal Advisor or DQAC.
- Do not include terms and conditions in the Brief that will negate or conflict with the Panel Conditions or Terms of Engagement or impose new contractual obligations. Legal advisors should be checking this before RFP release.
- Do not relax your probity framework because it is a Panel sourcing.
- Whilst not subject to a JR Complaint the procurement can be subject to a general procurement complaint.
- **No construction or design activities.**



## DIP - Do's:

- Ensure you seek a legal review of the RFP before release
- Ensure you seek a probity review of the RFP before release
- Allow a reasonable and fair time for the Panellists to respond to the RFP

## What Should I Do About Poor Performance?

- Address the poor performance immediately and ensure you document the issues via an email, meeting minutes or formal correspondence.
- Do not pay for services not received or services you have to re-work.
- Know and understand the Project DCAP, Official Order and Terms of Engagement.
- Document the occurrences.
- Raise with the Panellist's Consultant's Representative if no resolution is seen at the Project level. At this point also notify the Defence Panel Manager.
- Agree remedial action.
- Track progress.
- Advise continued poor performance to Panel Manager.

# Managing a procurement under the Panel

# Procurement Policy Framework

- **Commonwealth Procurement Rules (CPRs)**

- Sets out the **rules** that we must comply with when we undertake procurement. They also indicate good practice.
- Value for money is one of the core rules of the CPRs. This requires consideration of the financial and non-financial costs and benefits.

(Judicial Review Act - will look at a breach against the CPRs)

- **PGPA Act**

- **Endorsement to Proceed** - Policy states a formal Endorsement to Proceed must be obtained for all procurements with an estimated value of \$200,000 and above. Best practice dictates that this should be done regardless of the value. In addition the CPRs (para 7.2) require that procuring officials maintain records for each procurement and this includes – the requirement, the process, how V4\$ was considered and achieved, approvals and relevant decisions and the basis for each.
- **Sect 23(3)** (Required before entering into arrangements that commit money)
  - To approve the commitment of relevant money (Commitment Approval)
- **Sect 23(1)**
  - To enter into, vary and administer arrangements

## Procurement Complaint Process

- JR Complaint - *Government Procurement (Judicial Review) Act 2018* (Cth) allows tenderers to lodge a complaint if they believe a procurement process has not complied with the principles of the CPRs. Not applicable to Panel procurements.
- General Procurement Complaints - tenderers can lodge a complaint to the Defence Procurement complaints area. Complaints under DIP engagements will come under a general procurement complaint.

## Tender Document Preparation - RFP

- Align with the Procurement and Evaluation Plan (Probity Risk - CPR Requirement).
- Ensure the content reflects accuracy and quality.

### The Brief/Scope of Services

- Has sufficient time been dedicated to its development?
- Have stakeholders had the opportunity to review and comment?
- Cutting corners now will cost you more later.
- Do you reference Policy or other sources? If so, are these accessible?
- Do not include content that contradicts contract or tender condition terms.
- Listen to the questions from Panel Consultants - we may have it wrong.

## General considerations in preparing your Request for Proposal

- RFP conditions - These are important.
- Has the RFP been completed correctly?
- Tender closing details - check they are correct.
- Industry Briefing details.
- Security levels of personnel.
- Process for asking and responding to questions.
- Timeline for stopping questions.
- Confidentiality Agreements - use and benefit.
- Tender restrictions/conditions in the covering email narrative used to release the tender and **not** in the tender conditions.

# Tender Period Management

Throughout the entire tender period ensure that you...

- Act ethically.
- Act fairly.
- Treat all tenderers the same and provide all the same opportunity.
- Respond in a timely manner to all questions.
- Isolate immediately any potential probity issues to be resolved and act on the required action ASAP.



# Tender Period Management

- **Contact with Tenderers**

- Controlled process.
- Your actions and behaviour could form the basis of the legal promise/relationship with the tenderer.
- Avoid any verbal communication - refer the Panel Consultant to the process within the RFP.
- Fairness and treating all tenderers equally.
- Importance of Probity.

- **Responding to queries during this period**

- Responses must be timely - do not stockpile them.
- Responses to questions should be provided to all tenderers unless they can demonstrate a reason for them not to be. As such inform them of this as soon as you receive the question and give an option to withdraw.
- Process and records management.

- **Addendum/Documents for Information**

- Difference between the two.
- Process for promulgation - must be issued in writing and in line with process in RFP conditions.

# Industry Briefings

- The purpose of an industry briefing is to provide tenderers with information in relation to the RFP and should cover the RFP process and the project scope complexities, issues and risks.
- They are for the purposes of proving background information only.
- The industry briefing involves Defence interacting with tenderers so that they can better understand and respond to Defence's requirement for a project.
- Should always be considered for large, complex and difficult Engagements and if applicable a site tour should be provided.
- Ensure you record any questions or any issues raised that may amend or alter your scope.
- Think about logistics and agenda:
  - briefing venue, base access, probity risks; and
  - Speakers and the probity framework for them.
- Probity has a role on the day.

# Tender Lodgement

- Compliance with the tender lodgement process is a CPR requirement in respect to a conforming proposal.
  - Late is late!!!!
- Consistent with paragraph 10.32 of the CPRs, receipting must demonstrate fairness.
- If you are unsure on the conformance of a submission refer to your probity advisor and Director Quality Assurance and Compliance.
- Record any issues or non compliances and ensure they are also reflected in the evaluation board report for the Delegate's awareness/consideration.

# Tender Evaluation

As an evaluator ensure you know the approved Procurement Strategy. Refer to the Chairperson or probity advisor at any stage if you are unsure...

## **Broadly 4 Stages of Evaluation**

- Conformance check.
- Detailed individual assessment of submissions (no consideration of \$\$).
- Detailed Board and Comparative Assessments (no consideration of \$\$).
- Value for Money/recommendation.

**Negotiations happen after Delegate approval. There is no authority to enter into negotiations prior to Delegate approval.**

## **Stage 1 - Conformance check**

Typically comprises of...

- Tender validity period - non compliant or unintentional error??
- Any project specific Legislation/Policy Compliance.
- Tenderer's acceptance (without departure, qualification, amendment, limitation or exclusion) of the Contract except to the extent provided for in Annexure E (Alternative Proposals). Be on the look out for exclusionary, qualifying, limiting and departing language when you read submissions:
  - *Our fee excludes any subconsultants that we consider should be appointed - these will be reimbursable;*
  - *We have not allowed for any site investigations in the Fee - This will be a variation;*
  - *We reserve the right to re-negotiate our fee if Services take longer than currently programmed; and*
  - *Our tender remains open for acceptance for 60 days.*

## **Stage 2 - Detailed Individual Assessment**

- Individual assessment with no consultation and discussion with other board members.
- No consideration of price at this stage.

## **Stage 3A - Detailed Preliminary Board Assessment**

- Board discusses each Board members' view on the strength, weakness and risks as evaluated during the individual detailed assessment. Board should then decide upon a preliminary agreed score.
- At the conclusion of this the Board should then agree if any **Key Personnel Interviews** are needed, if any **Clarifications** are needed and/or if any **Referee Reports** need to be obtained. The Board must agree on the content of each.
- The Board must consider the outcome of any Clarification/Referee Reports and decide if the results require adjustment of the preliminary Board score.
- The Board must not accept **new** information that is submitted under the guise of a clarification response. Clarification should be targeted to resolving ambiguities not giving a second chance to provide information.
- If unsure, always have clarifications checked by a Probity Advisor.

## Clarifications

- Need to have a basis for seeking the clarification.
- Be careful to manage attempts to improve the bid.
- Should be targeted to resolving ambiguities not giving second chance to provide information.
- If appropriate, seek advice on clarifications from a probity perspective.
- Think about how to ask the question so as to not lead the tenderer too much and result in Defence feeding the answer.

## Referee Reports

- Ensure these are sought in line with your Tender Evaluation Plan principles.
- Ensure you apply a structured process.
- Should be used to verify information.
- Must demonstrate fairness.
- Board members cannot be sought as a referee whilst the Board is evaluating.
- Record the outcome of the Referee report.
- Record the Boards considerations of these, in particular if they change scores.
- Include the received reports as an attachment to the Report.



## **Stage 3B - Comparative Board Assessment**

- The **Comparative Board Assessment** then occurs post this process which will then result on **Final Board Agreed** scores.
- The comparative assessment seeks to remove any imbalance arising from the preliminary assessment.
- This assessment must be done criterion by criterion and be done relevant tenderer by tenderer.
- The result of this will provide you the final Board Agreed Scores.
- The Tender Evaluation Board Report must detail if this assessment stage changed the preliminary Board agreed score.

## **What CANNOT be considered in your evaluation**

- Lack of Defence experience.
- Lack of experience on a Defence base or Defence environment.
- Lack of experience in a specific form of contract.
- Key personnel that have no Defence experience.
- Proposal font too small.
- Asked too many questions during tendering period.
- Information not contained in the Panel Consultant's RFP response.
- Personnel views and opinions.

## Non Weighted Schedules

- These are typically assessed as yes/no.
- Must be reviewed/assessed with the observations detailed in the board report.
- Some may affect the commercial capacity of the entity and as such should be considered.
- Some may impact on legislative/policy compliance and may affect the validity of the tender submission.

## **Stage 4 - Value for Money**

- The value for money assessment evaluates the relative price offered by each tenderer in relation to the technical merit and risk profile.
- It should not be the lowest prices.
- The objective of this stage is to determine the best value for money solution for Defence and to reach a preferred tenderer recommendation.
- Not cost divided by score, not cost divided by days.....value for money determination must align with the agreed procurement strategy.
- Watch the Ese Rainey video regarding value for money and tender evaluation available on CRC.

# Tender Evaluation Board Reports

- **Objective** - To detail the deliberations of the Board and to justify the value for money recommendation to the Delegate. They must be:
  - Defendable;
  - Auditable;
  - Accurate;
  - Stand on their own merit in describing the process; and
  - Represent an official document.

# Tender Evaluation Board Reports

- They should be succinct, accurate and reflect the board's deliberations.
- Must align with the allocated score.
- Will form the basis of the debriefs.
- Can be sought under FOI.

## Managing a Procurement under the Panel Things to Remember

- Narrative must justify the score.
- Balance in the narrative the strengths and weaknesses to ensure alignment with the score.
- Narrative will form the agenda and content for the Debriefing.
- Finish Statements.
  - “The tenderer provided a Plan detailing their traffic management plan”*
  - “The tenderer provided a quality management approach”*

## Things to Remember

- Ensure that any weaknesses that have impacted on the Board's score are reflected in detail but are also in line with the requirements as defined within the scope of work.
- You can reference page numbers and serials in the Board Report for future reference and to assist during debriefs.
- Remember that your agreed Board narrative is what you will base your debrief on for unsuccessful Panel Consultants.
  - be prepared to defend your narrative;
  - be succinct; and
  - comments must be evidence based.



## Things to Remember

- Do not record knowledge that is not provided within the submission or sourced through referees. Comments like this are a risk:

*“The Chairperson was aware that they had a significant OH&S incident on work undertaken at another site and as a result the Chairperson felt that the score should be amended to reflect this incident”*

*“We googled the company to validate their capability and the results indicated a weakness”*

*“I spoke to the relevant Director who confirmed that the tenderer's role on a past project was restricted to only elements of the scope”*

## Board Report Approval

- You cannot communicate the outcome to any of the tenderers until the Board report has Delegate approval.
- Must be approved before any negotiations or discussion can occur.
- You cannot execute the Official Order before the Board Report has Delegate approval.
  - No letters of intent.
  - No *“heads up get yourself ready”* discussions.

## Contract execution (Official Order)

- Legal role.
- Reflection of any negotiation outcomes.

## AusTender notification of contracts awarded

- Ensure correct title is used.
- Mandatory that this is done within 42 days.

# Panel Consultant Debriefs

## Debriefs

- For the development of long term relationships with Industry and for maintaining tenderer confidence in the conduct and outcomes of Defence tender processes.
- Can assist unsuccessful tenderers to further improve their services which could:
  - improve their competitiveness;
  - enhance future value for money outcomes for Defence; and
  - enhance their performance rather than be content with their current level.
- MUST focus on the strengths and weakness of the proposal – no comparative.

## Things to Remember

- Attendees/Structure of debriefing.
- You cannot refer to another Panel Consultant's proposal. Must also address only that Panel Consultant's strengths and weaknesses.
- Debrief content and alignment with approved Evaluation Board Report.
- Statements that align with evidence in the submission and Board Report.
- Recording debrief outcome.
- Administrative feedback should clearly be given but not as scored assessment.

## **Bad Debrief Narrative**

- Your response represented less risk than the winning tenderer.
- Your font size was too small.
- You did not have CFI Experience.
- You did not have major projects experience.
- You do not have PWC experience.
- You submitted too many requests for information during the tender period and were deemed as not having a sufficient understanding of the scope.
- We could not find your approach to a core part of the scope in your tender response.
- We could not read your submitted program as the font was too small.
- The winning tenderer had a better approach to management of the risks.



Australian Government

Department of Defence  
Security and Estate Group

# DEFENCE INFRASTRUCTURE PANEL 2022-27 - PMCA - BRANCH TRAINING

14 August 2024

CLAYTON UTZ



## 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

## Developing the RFP - Scope Documentation

### The Brief

Part 1 - The  
Project

Part 2 - Scope of  
Services

Part 3 - Special  
Conditions

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

# 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

## 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

## 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)



## 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

## 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

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carefully consider and include project-specific requirements and deliverables

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

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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

# Obligation to Perform

The Consultant must carry out the Services in accordance with:

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

## 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?

## 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



## 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

## 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

*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

## KNOWLEDGE OF THE COMMONWEALTH'S REQUIREMENTS

The Consultant must:

inform itself of the Commonwealth's requirements for the Services and the Project

(without limitation) refer to the Commonwealth Material and the Commonwealth's Program

consult the Commonwealth throughout the carrying out of the Services



## NOTICE OF MATTERS IMPACTING ON THE SERVICES OR THE PROJECT

The Consultant must promptly notify the Commonwealth if it becomes aware of any matter which:

is likely to change or which has changed the scope, timing or cost of the Services or the Project

affects or may affect the Commonwealth's Program or Consultant's then current program

involves any error, omission or defect in any continuing or completed aspect of the Project or the Services

## 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

## 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

## 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

## 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

## 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



## 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

## 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

## 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

# Program

## Program

The Consultant must, within 14 days of the Award Date, prepare a program of the Services

## Content

This program must be based upon the Commonwealth's Program and contain the details required by the Contract (including the Milestones) and which the Commonwealth's Representative otherwise reasonably directs

## Update

The Consultant must update the program periodically at least at intervals of no less than that specified in the Contract Particulars to take account of changes to the program or the Commonwealth's Program and delays

## Approval

The Consultant must give the Commonwealth's Representative copies of all programs for approval

## 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

## **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



**Source:** <https://www.standard.co.uk/news/health/leading-surgeons-urge-ministers-not-to-close-specialist-heart-disease-services-royal-brompton-a3701986.html>



## 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."

## 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."

## 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."

## 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 coordinator and guardian of the client's interests."

# The Collapsing Dome



Source: <https://www.bbc.com/news/uk-england-merseyside-52100822>

CLAYTON UTZ

## 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."



## 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."

# 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.”

## 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 Key Requirements



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Advise

---



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Check

---



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Administer

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## 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."

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## 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

## 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

*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

***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

## 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)



## The importance of well defined milestones

<b>Detailed Business Case (DBC)</b>	The Consultant has prepared and submitted the DBC	50% completion - \$50,000 100% completion - \$50,000
<b>Draft Detailed Business Case (DBC)</b>	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
<b>Completion and approval of DBC</b>	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

## Other rights?

<b><i>Removal of Persons</i></b>	<ul style="list-style-type: none"> <li>▪ 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</li> </ul>
<b><i>Suspension</i></b>	<ul style="list-style-type: none"> <li>▪ 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</li> <li>▪ 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</li> </ul>
<b><i>Variations</i></b>	<ul style="list-style-type: none"> <li>▪ Includes any decrease, omission or deletion from the Services</li> </ul>
<b><i>Formal Dispute Resolution</i></b>	<ul style="list-style-type: none"> <li>▪ Use of the formal dispute resolution process under clause 13 of the Terms of Engagement</li> </ul>
<b><i>Set-off</i></b>	<ul style="list-style-type: none"> <li>▪ 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</li> </ul>

## 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 Rezeai 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 was 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.."

## 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

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

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

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

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- ✓ Address contracting and relationship issues early

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- ✓ 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

*Note: Reserved Panel Condition*

## **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

## 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

## 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

*Note: Reserved Panel Condition*



# End of session and wrap up

## **Best Practice: Managing Performance**



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

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

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

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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

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- ☒ Use formal contractual mechanisms when needed

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- ☒ Provide performance feedback to the Commonwealth's Panel Manager

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- ☒ Consider your contribution to promoting good performance

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