Contractor Performance Management

CM-PR-017/2.0

Commercial : Procedure

TCA Corporate Management System

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1. **Purpose and scope**

1.1. **Purpose of the Procedure**

TCA’s Contractor Performance Management Procedure has been established to:

- provide management a tool to enhance the management of construction contractors and Professional Service Contractors (PSC) (together called “contractor” or “contractors” in this procedure)
- enhance contractor performance via a continuous improvement process
- provide records of performance that will contribute to the ROI and tender assessment processes
- define TCA’s processes for managing poor performance
- develop a system that is generally consistent with the NSW Government Guidelines for “Contractor Performance Reporting and Exchange of Reports between Government Agencies”.

The procedure is to apply to all contractor and PSC contracts valued at more than $150,000 and its use is encouraged on contracts of lesser value.

1.2. **The Vision**

The NSW Government’s vision is to bring about sustained improvement in productivity and quality across the construction industry to deliver best value for money outcomes. This vision is being realised by the industry advancing in terms of its capability to deliver comprehensive solutions; developing an efficient and profitable industry through improved business management and the associated lifting of skills; an innovative culture with its associated contribution from information technology; and an environmentally responsible approach to changes in the built environment.

In support of this vision, a key procurement strategy is to facilitate ongoing improvement in industry performance and to encourage and reward better performance by contractors on government contracts. This is accomplished by offering more opportunities to do business together with the offer of longer-term relationships.

TCA has developed and implemented an integrated systems approach to performance management within the context of the New South Wales Government Procurement Policy. A strong focus on comprehensive contractor performance and feedback on performance is the centrepiece of the integrated approach to construction professional services procurement. TCA’s Contractor Performance Management Procedure supports this vision.

1.3. **Integrated Performance Management**

TCA’s integrated performance management system incorporates:

- this Contractor Performance Management Procedure
- Guideline for Contractor Performance Reporting.

These are supplemented through information provided by:

- project Audits
- OHS Management System Audits
- the Performance and Compliance Incentive Payment Plan.
1.4. Technical Process Documents
Related documents in TCA’s Contract Management System are:

<table>
<thead>
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<tr>
<td><strong>Procedures</strong></td>
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<tr>
<td>Contractor Performance Management - CM-PR-017 (this document)</td>
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<tr>
<td><strong>Forms</strong></td>
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<tr>
<td>Contractor Performance Report - CM-FO-057</td>
</tr>
<tr>
<td>Contractor Review List (Confidential – held by GM Commercial) – Ds#379321</td>
</tr>
<tr>
<td><strong>Other References</strong></td>
</tr>
<tr>
<td>Guideline for Contractor Performance Reporting - CS-PR-047</td>
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</table>

2. Definitions
All terminology in this Procedure is taken to mean the generally accepted or dictionary definition.

3. Accountabilities
The General Manager Commercial is accountable for this Procedure. Accountability includes authorising the document, monitoring its effectiveness and performing a formal document review.

Direct reports to the Chief Executive are accountable for ensuring the requirements of this document are implemented within their area of responsibility.

The direct reports to the Chief Executive who are accountable for specific projects/programs are accountable for ensuring associated contractors comply with the requirements of this document.

4. Related Documents and References

4.1. Role of Performance Reporting in Procurement
The successful implementation by TCA of its procurement process depends on the preparation of timely and accurate performance reports for:

- contractor and PSC prequalification (including evaluation of expressions of interest)
- tenderer selection
- tender evaluation
- contractor performance management.

4.2. Objectives of Performance Reporting
The objectives of performance reporting are to:

- encourage contractors and PSC to implement a business culture of continuous improvement to benefit themselves and their clients
- provide TCA with performance data from past and current contracts to identify the best performing contractors and PSC
- ensure that the best performing prequalified contractors and PSC are offered more tendering opportunities than other contractors
• share information with other NSW Government agencies on contractor and PSC performance on current and past contracts.

4.3. Benefits of Performance Reporting

Benefits to contractors and PSC:

• contractors and PSC may secure more business opportunities by achieving favourable performance results. Past and current performance is:
  o A consideration whenever tenderer panels are chosen; and
  o Taken into account when tenders are evaluated;
• concerns about performance are raised at the earliest opportunity, when there is the greatest scope for improvement
• participation in regular performance monitoring and formal performance reporting encourages a cooperative relationship through proactive and constructive discussion at the project level
• performance reporting helps contractors and PSC demonstrate their commitment to continuous improvement
• performance reporting will particularly benefit those contractors and PSC already committed to continuous improvement and client satisfaction as it assists them to identify those aspects of their performance requiring improvement
• maintaining records of performance will assist contractors and PSC to monitor their own performance trends over the longer term, to set targets for corporate performance improvement and to identify and correct adverse trends at the earliest opportunity
• performance reports and Contractor Performance Reports provide the basis for contractors and PSC to periodically discuss their performance and business relationships with TCA at a senior management level.

Benefits to TCA:

• contractor Performance Reports substantially assist TCA to identify the best performing contractors and PSC
• contractor Performance Reports are used to support the NSW Government’s approach to encourage continuous improvement in performance by contractors and PSC
• contractor Performance Reports are available as reference documents for TCA when:
  o Tenderer panels are selected;
  o Expressions of interest are evaluated;
  o Tenders are evaluated;
  o Due to unsatisfactory performance a decision needs to be made on the prequalification status of a contractor or PSC; or

When, due to a contractor’s or PSC’s unsatisfactory performance, default or insolvency, Review List action may be required to be taken by TCA.

5. Superseded Documents

5.1. Contractor Performance Reporting (CPR)

TCA undertakes contractor performance reporting in accordance with Management System Guideline CG035 “Guideline for Contractor Performance Reporting”.

•
Contractor Performance Reports are required to be prepared during contracts and PSC engagements, including:

- at regular intervals during a contract
- upon completion of a contract

thus producing a range of project level reports.

It is a requirement of the guideline that a copy of all Contractor Performance Reports be issued to the Director, Procurement who will ensure that the performance results are captured in the CPR Register.

5.2. Performance Reporting

TCA’s Commercial Group is responsible for the monitoring of contractor’s and PSC’s performance, benchmarking and trends analysis. It will analyse the performance results within the CPR Register to produce performance reports including the following:

- performance on a contractor basis at a particular point in time
- trends in performance
- comparison of like contractors’ performance.

Performance reports will be prepared every six months and, once approved by TCA’s Panel of Assessors, issued to TCA’s executive team members on a regular basis.

6. Legal Aspects of Performance Reporting

In the course of their duties, TCA’s project staff and private sector project managers involved in the administration of TCA contracts will be required to report on the performance of contractors and PSC. The following sections outline the legal position of those persons in regard to action that may be taken by a contractor, PSC or other entity over statements made in Contractor Performance Reports.

6.1. What Action Can a Contractor or PSC Take Against the Writer of a CPR?

A contractor or PSC may take action against the writer of the report, or any part of the report, if the statements in that report generally “impugn” or call into question the firm in the method of conducting its affairs, for example, by accusing it of fraud or mismanagement. Action may include defamation proceedings.

6.2. What is Defamation?

A defamatory statement is a statement which is likely to lead ordinary reasonable people to think less of the person about whom, or the firm about which, it is made.

Defamation involves the seeing of the report by someone other than the contractor or PSC that is the subject of the report.

6.3. Protection of the Writer of a CPR.

A person is not liable for a defamatory publication if “qualified privilege” applies (i.e. if it is made by a person in the discharge of a public or private duty), the recipient of the publication has an interest in having the information, and the person's conduct is reasonable in the circumstances.

If the statement is fairly warranted and honestly made such communications are protected.

The “qualified privilege” protection will not apply if:
• the maker of the statement knew it was false
• the statement was actuated by spite or ill will
• extraneous material was used in the statement, or
• the statement was published to an excessive range of people.

Make sure that the report goes to the right person.

The report should be marked “Confidential” and should not be widely circulated.

For TCA employees, under Section 3 of the Employees Liability Act 1991 (NSW), TCA, as the employer, is liable to indemnify its employees against liabilities, losses and expenses incurred by its employees as a result of their conduct in the course of their employment.

Provided the writer of a report was acting lawfully (without serious misconduct) and within the scope of his or her authority, TCA’s employees are entitled to an indemnity from TCA in respect of any claim that may be commenced against them personally. The TCA employee may be required to appear in court but TCA will assist with the defence of the action and will meet liabilities, losses and expenses incurred.

6.4. Defences and Justifications Against Defamation

A defamatory statement must be “published” (i.e. be communicated to someone other than the “subject” of the statement) for it to be actionable. For the purposes of Contractor Performance Reports “publication” arises when a report is prepared and forwarded to its recipient. For other general purposes, defamatory matter is “published” when the maker directs it to be copied by an employee of the maker, when a memorandum is circulated within an organisation or when a staff bulletin is distributed within an organisation.

It is irrelevant that the defendant did not intend to injure the plaintiff’s reputation, or that they failed to take reasonable care in what was published. All that is relevant is the way in which the ordinary reasonable person would understand the words that were used by the defendant.

Any statement should be phrased in such a way that it can be understood to be one of opinion and not of fact. It must, in other words, fairly appear to the reasonable reader to be a deduction, inference, conclusion, criticism, judgment, remark or observation, as distinct from a direct statement concerning a matter of public interest. It matters not how a defendant intended his words to be taken. The test is the way in which a recipient would understand them.
Provided that a defendant has succeeded in showing that his or her words are to be regarded as an opinion, he or she must further show that the facts on which those opinions are based are true. An opinion that a defendant states must be one that is honestly held by that defendant. A defendant does not have to show that his or her opinion is one that would be held by any fair minded and reasonable person, but merely that he or she, with all his or her possible biases and prejudices, honestly took the view that he or she expressed.

6.5. Does the CPR Writer have to be an “Expert” in all Topics Reported On?

It is clearly beneficial that a person stating an honest opinion based on proven facts should be an expert. It is not, however, essential that the writer of a report need be an expert in all matters reported upon. It is essential that any words used may fairly be regarded as a statement of opinion and not one of fact and that such an opinion is based on facts that are proved to be true. A statement of opinion in this context means an opinion “honestly held” by the writer.

6.6. Reporting on Performance

The following guidelines are intended to ensure that a performance report does not give rise to a claim for defamation:

- Never report on a contractor, PSC or others where you are affected by malice.
- Any report must represent your honest opinion.
- In the report, state the facts (which must be true) on which your honest opinion is based.
- Always report in the form “In my opinion.....”. (To assist persons preparing Contractor Performance Reports, the report has the words “In my opinion” at the start of the spaces for the comments.) Then, provided that the statement does represent your opinion, it must be true. An untrue statement can be defamatory, so it is vital to make sure that the truth of the statement can be proven. You can prove that you believed that, for example, the contractor was inefficient and lacking in management skills, but it is very difficult to prove that the contractor was in fact inefficient and lacking in management skills.
- Therefore, never say in a report that “the Contractor was ‘X’ “. Always say that: “in my opinion, the Contractor was ‘X’ “. It will be difficult, if not impossible, for the contractor to prove that the statement was not your opinion.
- Do not use superlatives. For example, do not say “In my opinion the Contractor was completely inefficient”. That opinion may be challenged. No doubt there were some areas, no matter how small, where you did not have the opportunity to observe whether or not the contractor was inefficient. “Very inefficient” is a safer expression.

7. Contractor & PSC Performance Management – Review List

7.1. Introduction

TCA’s procedures for reviewing contractor and PSC performance are implemented in accordance with the principles of procedural fairness to ensure that:

- timely and effective action is taken in response to reports of unsatisfactory performance or the development of an unsatisfactory business relationship with a contractor or PSC
• contractors and PSC are given the opportunity to comment on reported performance and TCA’s concerns regarding the performance, financial capacity or business relationship with TCA, prior to any action TCA may choose to take to restrict the contractor’s or PSC’s future business opportunities
• contractors and PSC that are subject to a restriction on future business opportunities with TCA are informed of the reasons for the restriction and have the opportunity to request a review by TCA.

The procedure for the review of performance depends on the completion of Contractor Performance Reports and may be initiated whenever the contractor’s or PSC’s performance is considered to be generally unsatisfactory and one or more of the Performance Evaluation Criteria in a Contractor Performance Report are rated as unsatisfactory.

TCA’s Commercial Group is responsible for the strategic performance management of contractor’s and PSC’s performance including the application of sanctions when necessary.

In this role TCA’s Commercial Group reviews the corporate performance of a contractor or PSC on:
• the contract for which the Contractor Performance Report was prepared indicating critical aspects of performance as unsatisfactory
• all other current and recently completed contracts arranged under TCA’s procurement systems
• tenders arranged by TCA in recent years
• if relevant, on current and recently completed contracts being undertaken by the contractor or PSC for other NSW Government agencies.

Additionally, when unsatisfactory performance is reported, TCA’s Commercial Group will check and assess whether the contractor’s or PSC’s performance reflects adversely on their corporate status with TCA as a prequalified contractor or PSC.

7.2. Contractor Review List
TCA’s Commercial Group maintains a Contractor Review List (Review List) to record the names of construction contractors and PSC that require special consideration and/or further investigation before being considered eligible for any of the following:
• short listing as a tenderer following the calling of registration of interest for a contract
• prequalification as potential tenderer for a program of works
• inclusion as a selective tenderer on a tender panel
• invitation to tender as a single or one of a number of invited tenderers for a contract
• recommended as a tenderer in contention for contract award.

Contractors included on the Review List should not be short listed, prequalified, selected, invited or recommended as a tenderer or for a contract or engagement without prior consultation with the General Manager Commercial.

7.3. Placement of a Contractor on the Review List
The table of Performance Management Actions in Appendix 1 summarises the aspects of contractor corporate status, business relationship and performance that may lead to the application of TCA’s Review List procedures.

The table refers to the following sample letters:
• **Sample Letter A** – Contractor’s performance may warrant the application of a sanction;

• **Sample Letter B** – Contractor’s business relationship with TCA may warrant the application of a sanction;

• **Sample Letter C** – Decision by Panel of Assessors to apply a sanction to restrict future tendering opportunities to a contractor; and

• **Sample Letter D** – Informing Liquidator / Receiver Manager/ Administrator of the placement of the contractor on the Review List.

TCA’s Review List process may also be applied to contractors or PSC:

• whose Drug and Alcohol positive test outcomes reach certain thresholds as advised by TCA’s Chief Executive

• that have been adversely named following an investigation by an investigatory or Law Enforcement Agency

• where public admissions of corrupt conduct are made.

As a general guide, contractors in the following situations are not likely to be included on the Review List because of the remoteness of their relationship to TCA:

• never tendered for a TCA contract

• failed to gain prequalification with TCA

• failed to become short listed as a tenderer with TCA following a call for registration of interest for a particular contract, or

• related via a common parent company to a subsidiary company included on the Review List.

### 7.4. Management of the Review List

The names of contractors and PSC which have not met TCA’s requirements for corporate status, business relationship, financial capacity or performance will be included on the Review List.

Generally, the decision to place a contractor or PSC on the Review List or remove a contractor or PSC from the Review List is made by TCA’s Panel of Assessors. However, when a contractor or PSC is placed under external administration, the General Manager Commercial may, at his discretion, decide to place such a contractor or PSC on the Review List without reference to a Panel of Assessors.

Every six months the General Manager Commercial systematically checks all entries on the Review List to determine whether contractors and PSC included on the Review List should remain or be placed under another more appropriate CRL Reference Code (see 6.2 below).

Contractors and PSC that have remained on the Review List for more than two (2) years will be reminded by the General Manager Commercial by letter of:

• their continued inclusion on the Review List

• the action to be taken by the contractor for removal from the Review List.

Following receipt of a contractor’s response, if any, to a reminder letter, the General Manager Commercial will prepare a recommendation to the Panel of Assessors to determine whether the contractor or PSC should continue to be included on the Review List.

The General Manager Commercial may also take account of other evidence when determining whether the contractor or PSC should continue to be included on the Review List including:
business process audits that include assessment of:
  o Has the company implemented a Business Ethics Policy that has been approved by the Finance and Audit committee of the Chief Executive
  o Has the policy been integrated into company operations and do benefits accrue to customers and staff?

• has the company developed and implemented an effective Audit Plan?

• financial reviews from organisations such as Kingsway;

The table in Performance Management Actions summarises the actions to be taken when it is necessary to:

• remove the name of a contractor or PSC from the Review List; or
• amend the CRL Reference Code for a contractor or PSC included on the Review List.

Whenever the Review List is amended it is re-issued on a confidential basis to TCA Executives directly involved in construction and professional services procurement.

8. Contractor Review List Data Management

8.1. Access to CRL Reports and Data

The Review List managed and operated by TCA’s Commercial Group contains confidential information regarding the performance of contractors and PSC.

Access to Contractor Performance Reports and associated CRL performance analysis reports is restricted to:

• TCA’s General Manager Commercial
• TCA’s Panel of Assessors
• TCA Executive Managers engaged in procurement activities
• TCA’s staff and private sector project managers when engaged to procure a construction related project
• TCA’s Director Procurement and Director Commercial.

TCA’s staff and private sector project managers must:

• not release information to any external organisation
• only check the performance of contractors and PSC relevant to their duties
• not generate reports not relevant to their duties
• ensure the secure storage of any reports generated in hard copy form
• ensure the destruction of hard copy reports which have been generated in error or which are no longer required.

All users must respect the confidentiality of the data maintained within the CRL.

Warning
Unauthorised access to or misuse of data may lead to disciplinary proceedings and/or civil action.

Prior to responding to requests from external organisations for contractor or PSC performance information, TCA staff and private sector project managers must check and follow the procedures detailed in Section 6.3.

8.2. CRL Reference Codes

If, following the implementation of the CRL procedures, a restriction is placed on a contractor’s or PSC’s future business opportunities for work arranged by TCA and/or under the NSW Government Procurement System for Construction, the type of restriction will be recorded under the following CRL Reference Codes:

A Administrator Appointed;
B Unsatisfactory Business Relationship;
C Referred by NSW Construction Agency Consultative Committee (CACC);
F Unsatisfactory Financial Situation;
I Under Investigation by investigatory or Law Enforcement Agency;
L Liquidator Appointed;
P Unsatisfactory Performance;
R Receiver Manager Appointed;
S Suspension under Contractor Prequalification Schemes;
X Non compliance with the NSW Government Code of Practice for Procurement;
D&A Drug and Alcohol positive test outcomes have reached TCA’s threshold.

8.3. Release of Performance Information to Outside Organisations

TCA’s standard contracts warn contractors and PSC that performance information may be released to external organisations such as other NSW Government departments and agencies.

As a part of the tender probity process, TCA’s staff and private sector project managers involved in tenderer selection and tender evaluation must sign TCA’s Confidentiality Deed Poll and Statement of Association prior to gaining access to contractor performance information relevant to the projects they are engaged on.

Section 6.1 Access to CRL Reports and Data includes guidance on appropriately managing and limiting access to performance information.

Warnings

TCA’s officers and agents are not permitted to provide outside organisations (other than NSW Government departments and agencies) with verbal or written personal endorsements or comments regarding the performance of contractors or PSC on current or past contracts arranged by TCA and/or under the NSW Government Procurement System for Construction.

Except as detailed in this Procedure and any relevant condition of contract, TCA’s officers and agents are not permitted to provide outside organisations with Contractor Performance Reports or any related information.
Contractors and PSC are entitled to a copy of reports on their performance held by TCA. If a contractor or PSC requests information on past or current performance, the request should be forwarded to the General Manager Commercial.

All requests from external organisations for information regarding a contractor’s or PSC’s past or current performance must also be referred to the General Manager Commercial.

9. **TCA’s Panel of Assessors**

9.1. **Function**

TCA’s Panel of Assessors has three main functions:

(a) It reviews adverse contractor and PSC Contractor Performance Reports or other reports and decides on further action. This may include written and oral assessments (e.g., consideration of a written response from the contractor followed by an interview with the contractor) and may result in a decision by the Panel of Assessors that TCA shall apply a sanction.

(b) It may also refer to and seek advice from specialists for technical, financial or quality assessments of applicants, prequalified contractors or PSC or other suppliers under performance review.

(c) It reviews the performance reports prepared in accordance with section 3.2 and approves these for issue to TCA’s executive team.

9.2. **Composition**

A Quorum consists of the Chairperson and two Members:

<table>
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<th>Title</th>
<th>Description</th>
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<tbody>
<tr>
<td>Chairperson:</td>
<td>• General Manager Commercial or nominated representative</td>
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<tr>
<td>Members:</td>
<td>• Chief Executive; and</td>
</tr>
<tr>
<td></td>
<td>• Group General Manager Corporate.</td>
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9.3. **Meeting Frequency**

The Panel of Assessors will meet quarterly.

9.4. **Reporting**

The Chairperson is responsible for informing contractors, PSC and individuals of their status on the Review List.

The Chairperson is also responsible for providing details of the Review List to TCA’s Chief Executive at three monthly intervals.

The Chairperson is also responsible for providing details of the Review List to TCA’s Chief Executive at three monthly intervals.

10. **Related documents and references**

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<tr>
<td>Contractor Performance Management - CM-PR-017</td>
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<tr>
<td>Contractor Performance Report - CM-FO-057</td>
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<tr>
<td>Guideline for Contractor Performance Reporting - CS-PR-047</td>
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11. Superseded documents

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<td>There are no documents superseded as a result of this document.</td>
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Appendix 1 – Performance Management Actions

Note: In this schedule the word “Contractor” means Contractor or Professional Services Contractor.

<table>
<thead>
<tr>
<th>Aspect of Corporate Status or Performance</th>
<th>CRL Ref Code</th>
<th>Initial Action</th>
<th>Subsequent Action</th>
<th>Panel of Assessors (PoA) rejects submission</th>
<th>Panel of Assessors (PoA) accepts submission</th>
<th>Opportunity to Request Review by GM Commercial</th>
<th>Action Subsequent to the Review</th>
<th>Removal of contractor from Review List</th>
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<tbody>
<tr>
<td>Administrator Appointed (eg: By decision of contractor’s directors)</td>
<td>A</td>
<td>Commercial Group confirms status with ASIC and drafts submission to PoA</td>
<td>Commercial Group monitors status, including ASIC alerts about the firm</td>
<td>NA</td>
<td>NA</td>
<td>No opportunity applies</td>
<td>If Administrator hands over control to:</td>
<td>If ASIC reports contractor is again trading as a registered company without an Administrator, GM Commercial writes to the firm</td>
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<tr>
<td></td>
<td></td>
<td>GM Commercial approves to place contractor on Review List and writes to Administrator</td>
<td>Sample Letter D</td>
<td></td>
<td></td>
<td></td>
<td>Directors: company trades normally</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Liquidator: take action as for CRL Code L</td>
<td></td>
</tr>
<tr>
<td>Unsatisfactory Business Relationship</td>
<td>B</td>
<td>Commercial Group checks status and drafts submission to PoA</td>
<td>Commercial Group evaluates reply, if any, and drafts submission to PoA</td>
<td>GM Commercial informs contractor by letter of PoA decision</td>
<td>Contractor placed on Review List</td>
<td>Opportunity applies</td>
<td>If GM Commercial decides:</td>
<td>If PoA accepts:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>GM Commercial writes to contractor who may reply within 14 days</td>
<td>Sample Letter B</td>
<td>Sample Letter C</td>
<td>GM Commercial informs contractor by letter of PoA decision</td>
<td>Sample Letter C</td>
<td>business relationship concerns proven then contractor may re-apply for prequalification when it can show satisfactory business relations with other clients</td>
<td>business relationship concerns not proven</td>
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<td>• contractor has demonstrated satisfactory business relationships with other clients</td>
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</tr>
</tbody>
</table>
### Contractor Performance Management

**Commercial : Procedure**

**CM-PR-017/2.0**

<table>
<thead>
<tr>
<th>Aspect of Corporate Status or Performance</th>
<th>CRL Ref Code</th>
<th>Initial Action</th>
<th>Subsequent Action</th>
<th>Panel of Assessors (PoA) rejects submission</th>
<th>Panel of Assessors (PoA) accepts submission</th>
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<th>Removal of contractor from Review List</th>
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<tr>
<td>Referred by Construction Agency Consultative Committee (CACC)</td>
<td>C</td>
<td>Commercial Group confirms circumstances with agency</td>
<td>Commercial Group drafts submission to PoA</td>
<td>GM Commercial writes to CACC agency about PoA not supporting the reference</td>
<td>GM Commercial writes to CACC agency about PoA supporting the reference</td>
<td>Contractor placed on Review List</td>
<td>Commercial Group to check periodically with referencing agency regarding status of contractor if contractor was placed on the Review List</td>
<td>PoA informed by referencing agency that circumstances causing inclusion on Review List are now satisfactorily resolved</td>
</tr>
</tbody>
</table>
| Unsatisfactory Financial Situation | F | Commercial Group reviews financial checks (eg, Kingsway) and drafts submission | GM Commercial informs contractor by letter of PoA decision | Contractor placed on Review List | GM Commercial informs contractor by letter of PoA decision | Action may be required to be taken to place contractor on Review List under CRL Code A, E or L | If GM Commercial decides:  
- concerns are proven contractor may re-apply for removal from the Review List when contractor can show satisfactory financial capacity and/or performance  
- concerns are not proven contractor is immediately removed from Review List | PoA accepts that unsatisfactory financial situation is now satisfactorily resolved |
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<tr>
<td>Under Investigation (ICAC, Police) contractor is <strong>NOT</strong> to be informed without ICAC agreement</td>
<td>I</td>
<td>Commercial Group checks papers and confirms matter with eg ICAC</td>
<td>Commercial Group drafts submission to PoA</td>
<td>PoA notes ICAC investigation Contractor is placed on Review List until completion of investigation</td>
<td>No opportunity applies</td>
<td>GM Commercial monitors matter with eg ICAC Commercial Group drafts submission to PoA on completion of investigation GM Commercial writes to contractor re PoA decision (except where ICAC indicates contractor is not to be informed, eg covert investigation)</td>
<td>GM Commercial monitors matter with eg ICAC Commercial Group drafts submission to PoA on completion of investigation GM Commercial writes to contractor re PoA decision (except where ICAC indicates contractor is not to be informed, eg covert investigation)</td>
<td>If PoA accepts that the matter is satisfactorily resolved, no restriction on business through TCA systems should apply</td>
</tr>
<tr>
<td>Liquidator Appointed</td>
<td>L</td>
<td>Commercial Group confirms status with ASIC and drafts submission to GM Commercial</td>
<td>GM Commercial approves to place contractor on Review List and informs Liquidator by letter</td>
<td>Not referred to PoA</td>
<td>Not referred to PoA</td>
<td>No opportunity applies</td>
<td>Commercial Group monitors matter with ASIC Remove contractor from Review List when contractor’s company is deregistered Action as for CRL Code R if matter referred to Receiver &amp; Manager</td>
<td>If ASIC reports contractor is deregistered as a company If Liquidator hands over to Receiver &amp; Manager, PoA to approve change of Review List status</td>
</tr>
<tr>
<td>Unsatisfactory Performance</td>
<td>P</td>
<td>Commercial Group reviews CPR, checks all of contractor’s current and recent performance and drafts submission GM Commercial writes to contractor (reply in 14 days) <strong>Sample Letter A</strong></td>
<td>Commercial Group evaluates reply, if any, and drafts submission to PoA</td>
<td>GM Commercial writes to Contractor re PoA decision</td>
<td>General Manager Commercial writes to Contractor re PoA decision <strong>Sample Letter C</strong> Contractor has 10 days to request a review</td>
<td>If contractor requests review GM Commercial arranges review, makes decision and writes to contractor</td>
<td>Contractor may apply for removal from the Review List when contractor can show satisfactory performance on comparable works for other clients If the contractor is prequalified/accredited, follow the relevant prequalification scheme procedures</td>
<td>If PoA accepts contractor has demonstrated satisfactory performance for other clients on comparable contracts</td>
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<td>Receiver Manager Appointed</td>
<td>R</td>
<td>Actions as for Administrator Appointed (See CRL Code A)</td>
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<tr>
<td>Contractor Prequalification Scheme</td>
<td>S</td>
<td>Commercial Group reviews CPR and other relevant papers Submission drafted in accordance with the respective Performance Management section for contractor suspension in Contractor Prequalification Scheme</td>
<td>GM Commercial determines whether to apply a suspension GM Commercial informs contractor of suspension and conditions for removal of the suspension Suspension noted in CRL to stop future tendering opportunities</td>
<td>Matter is not referred to PoA</td>
<td>Matter is not referred to PoA</td>
<td>No opportunity applies</td>
<td>Contractor may apply for removal of prequalification or accreditation suspension when contractor can show that specified conditions for removal have been met At end of nominated suspension period (usually 3 months maximum) contractor’s status is reviewed and a recommendation prepared to the PoA, if lifting of suspension is not recommended</td>
<td>Not applicable as contractor is not placed on the Review List</td>
</tr>
<tr>
<td>Non compliance with the NSW Government Code of Practice for Procurement</td>
<td>X</td>
<td>Actions as for Unsatisfactory Business Relationship. (see CRL Code B)</td>
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<td>Drug and Alcohol positive test outcomes have reached TCA’s threshold</td>
<td>D&amp;A</td>
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<td>Actions as for Unsatisfactory Performance (see CRL Code P)</td>
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Appendix 2 – Sample Letters

Sample Letter A

Contractor's or PSC's performance may warrant the application of a sanction

1. Issue of Letter - The General Manager Commercial issues this letter.

2. Sample Text – for letters to the Contractor or PSC

   * [insert the date]
   The Director,
   [insert the name of the Contractor or PSC]
   ABN [insert the Contractor’s ABN]
   [insert the Contractor’s address]
   Attention: [insert the persons name]

   Dear [insert the appropriate salutation]

   [insert the Contract name]
   Contract No. [insert the Contract No.]

   Contractor Performance Report
   Adverse report regarding your company's performance
   TCA has received an adverse report regarding your company's performance on this Contract. In particular, the following aspects of performance have caused concern:
   * [Insert Details]
   Should your company wish to make any comment on the above matters, kindly do so in writing to me by [insert the date when the details are required (allow 14 calendar days for reply)].
   After that time, TCA will consider those matters, together with any written response received from your company and will determine whether a sanction, such as a limitation on future tendering opportunities, should apply to your company.

   Yours faithfully

   General Manager Commercial

3. Guide Notes

   Separately, detail one or more grounds which have been well documented in the CPR. Preference is to be given to grounds which have been objectively measured or assessed.
Sample Letter B

Contractor’s or PSC’s business relationship with TCA may warrant the application of a sanction.

1. Issue of letter - the General Manager Commercial issues this letter.

2. Sample Text – for letters to the Contractor or PSC

   + [insert the date]
   
   The Director,
   
   + [insert the name of the Contractor or PSC]
   ABN + [insert the Contractor’s ABN]
   + [insert the Contractor’s address]
   Attention: + [insert the persons name]

   Dear + [insert the appropriate salutation] + [insert the Contract name]

   Contract No. + [insert the Contract No.]

   Contractor Performance Report

   + [insert the subject of the letter]

   TCA considers that your company's actions in + [insert areas of concern] have seriously affected the trust and cooperation necessary for smooth running of contracts.

   TCA is considering what action it may take as a result of those actions by your company.

   Should your company wish to make any comment on the above matters, kindly do so in writing to me by + [insert the date when the details are required (allow 14 calendar days for reply).]

   After that time, TCA will consider those matters, together with any written response received from your company and will determine whether a sanction, such as a limitation on tendering opportunities, should apply to your company.

   Yours faithfully

   General Manager Commercial
Sample Letter C

Decision by Panel of Assessors to apply a sanction to restrict future tendering opportunities to a Contractor or PSC

1. Issue of letter - the General Manager Commercial issues this letter.
2. Sample text for letters

Below are two options which may apply:

Use Option 1 when the Panel of Assessors accepts the explanation offered;
Use Option 2 when the Panel of Assessors applies a sanction

Option 1 – when the Panel of Assessors accepts the explanation offered

* [insert the date]

The Director,
* [insert the name of the Contractor or PSC]
ABN * [insert the Contractor’s ABN]
* [insert the Contractor’s address]
Attention: * [insert the persons name]

Dear * [insert the appropriate salutation]

* [insert the Contract name]

Decision by the Panel of Assessors
TCA’s letter of * [insert the date] invited a response by * [insert the date] regarding your company’s performance on this contract.
Your company’s response of * [insert the date] has been considered.
TCA accepts your company’s explanation regarding aspects of performance on this contract.

Yours faithfully

General Manager Commercial
Option 2 – When the Panel of Assessors Applies a Sanction

[insert the date]

The Director,

[insert the name of the Contractor or PSC]
ABN [insert the Contractor’s ABN]
[insert the Contractor’s address]
Attention: [insert the persons name]

Dear [insert the appropriate salutation]

[insert the Contract name]
Contract No. [insert the Contract No.]

Decision by the Panel of Assessors
TCA’s letter of [insert the date] invited a response by [insert the date] regarding your company’s performance on this contract.

Note: Two options are included below. Use the option that applies and delete this note and the option that does not apply.

No response was received by the due date from your company.
Your company’s response of [insert the date] has been considered.
End of options
TCA has now considered the nominated aspects of your company’s performance on this contract and has decided that the overall standard of performance is unacceptable. Consequently, your company cannot be recommended for award of contracts in future.
Subject to your company furnishing evidence of satisfactory (financial status/performance on comparable contracts for other clients) in the future, TCA would be prepared to consider that your company again tender for TCA contracts.
However, should you believe that your company has grounds to request a review of the above decision you may request such a review within 30 calendar days of the date of this letter. The request for review should be addressed to the General Manager Commercial, Transport Construction Authority, Locked Bag 6501, St Leonards NSW 2065. Your request must detail the grounds for review and give reasons why your request should be granted. Submissions in support of your grounds for review should be accompanied by supporting documentation.

Yours faithfully

General Manager Commercial
Sample Letter D

Informing Liquidator / Receiver Manager/ Administrator of the placement of the Contractor or PSC on the Review List

1. Issue of letter - The General Manager Commercial issues this letter.

2. Sample text for letters

- [insert the date]
- [insert the name of the person this letter is going to]
- [insert either The Liquidator / Receiver Manager / Administrator (as appropriate)]
- [insert the name of the Contractor or PSC ABN]
- [insert the Contractor’s or PSC’s ABN]
- [insert the address of the Liquidator/Receiver Manager/Administrator]

Dear [insert the appropriate salutation]

[insert the Contract name]
Contract No. [insert the Contract No.]

[insert the Contractor’s name] ABN [insert the ABN No]

TCA has received advice that on [insert the date], you were appointed [insert either Liquidator / Receiver Manager / Administrator (as appropriate)] of [insert the name of the Contractor or PSC].

You may be aware that [insert the name of the Contractor or PSC] undertook contract work for TCA. For the purpose of managing TCA’s business relationship with contractors and PSC, TCA maintains a Contractor Performance Review system. Should a contractor or PSC experience problems that are considered likely to impact on their performance of their work or with their business relationship with TCA, the contractor or PSC is placed on TCA’s Review List. In view of your appointment as [insert either in liquidation / under receiver management / under external administration (as appropriate)] of [insert the name of the Contractor or PSC], and the associated implications of your appointment, TCA has placed the company on the Review List.

Enclosed for your information is a copy of TCA’s Contractor Performance Management Procedure. The procedure provides an explanation of TCA’s Contractor Performance Review system, including the operation of the Review List. Should our information about [insert the name of the Contractor or PSC] be incorrect or if you wish to make any comment on the above, please respond to me in writing within fourteen (14) days of the date of this letter.

You might also please note that, as a general rule, TCA does not accept tenders from companies [insert either in liquidation / under receiver management / under external administration (as appropriate)].

Yours faithfully

General Manager Commercial

Encl (1)