

RCSA Response to the Digital Transformation Agency's (DTA) consultation on the Digital Seller Underperformance Policy (DSUP)

RCSA welcomes the opportunity to respond to the Digital Transformation Agency's (DTA) consultation on the draft Digital Seller Underperformance Policy (DSUP). RCSA strongly supports constructive dialogue between buyers and sellers and agrees that there should be greater accountability for genuinely poor or unethical market behaviour. We agree with the principles underpinning the policy, particularly its emphasis on remediation through collaboration between buyers and sellers, however we have several substantive concerns regarding clarity, scope and application as they intersect with the staffing and recruitment industry.

The staffing and recruitment sector plays a critical role in ensuring continuity of the supply of labour across government, including for digitally enabled projects. RCSA members are sophisticated, professional operators who manage workforce risk, compliance and screening on behalf of government agencies at scale. Policy settings must therefore accurately reflect the nature of labour supply arrangements and ensure liability is appropriately allocated between all engaging parties.

Given the DSUP is intended to be implemented at scale and applied across a wide range of sellers with materially different service delivery models it is essential that the scope and breadth of the policy's application are articulated with precision. Clear delineation of how the policy applies in practice is necessary to ensure sellers can understand their obligations, assess their exposure, and comply with the requirements with confidence and certainty. Without this clarity, there is a heightened risk of inconsistent interpretation and application, which would undermine both the effectiveness of the policy and seller confidence in its fair and predictable operation.

Are the criteria for 'serious underperformance' clear and reasonable?

While the intent is understood, RCSA considers that the criteria remain too broad and, in places, vague. This creates uncertainty for sellers and increases the risk of inconsistent interpretation across agencies. With relation to certain clauses, there needs to be explicit consideration of labour supply models, where the seller's core function is the provision of labour, while day to day supervision and performance management sit within the remit of the host agency.

Without this clarity, there is a real risk that staffing firms are held accountable for outcomes that arise from host agency decisions, supervision practices, role design or project scoping. This would create unintended consequences by effectively transferring responsibility for operational performance to sellers who do not control the work environment, the supervision of personnel, or the manner in which work is delivered.

The drafting of clause 21(f) *failure to provide properly qualified and experienced personnel or the required number of personnel*; gives rise to a risk of unintended application for sellers whose business model is the supply of labour rather than the delivery of managed services. In these

arrangements, performance and suitability are directed by the host entity, yet the clause could be used in a way that attributes those outcomes to the supplier, thereby conflating responsibility and mischaracterising the role of labour hire providers.

Once a worker has been supplied in accordance with the agreed role requirements, the recruitment service has been fulfilled. Ongoing performance, productivity, or suitability in practice is heavily influenced by the accuracy of role scoping by the buyer, onboarding and supervision by the host agency; and changes to project requirements over time.

To avoid misallocation of responsibility, RCSA recommends that clause (f) be amended to clearly apply only to directly employed personnel assigned to a project by the seller, and not to on-hire workers supplied to and managed by a host agency.

Proposed amendment to clause (f):

f. failure to provide properly qualified and experienced personnel, or the required number of personnel, *where those personnel are directly employed by, under the operational direction of, and supervised by the Seller.*

This clarification would appropriately distinguish labour hire and on-hire arrangements where the seller's obligation is to supply workers meeting agreed criteria from project delivery or advisory services where the seller retains operational control.

RCSA notes that in the context of labour hire and on-hire arrangements, services rendered by a labour hire agency are already appropriately captured under clause (a) *being a failure to meet contractual requirements*, where a seller has not delivered workers in accordance with the agreed role specifications, qualifications, numbers, or other express contractual obligations. In RCSA's view, this provides a sufficient and proportionate mechanism for addressing genuine performance issues arising from the supply of labour, without extending responsibility beyond the scope of the agency's contractual control.

To the extent that the Department has specific or recurring concerns relating to the supply of labour by agencies that are not adequately addressed through existing contractual performance provisions, RCSA is open to constructive engagement on how those concerns might be more clearly and appropriately reflected within the DSUP. Any such refinement should ensure that obligations are clearly defined, aligned with contractual control, and do not conflate labour supply models with project delivery or managed service arrangements.

RCSA would welcome further dialogue with the Department to explore whether additional clarification or guidance is required to achieve this outcome, while preserving the policy's fairness and consistency across different contracting models.

If you're a seller, is the right of reply for sellers sufficient to ensure you are able to respond to and that your perspective is taken into account by the decision maker?

RCSA considers that the proposed right of reply mechanisms and timeframes are sufficient and appropriate to ensure that sellers are able to respond meaningfully where applicable. We support a framework that provides sellers with a clear opportunity to address concerns, provide additional context, and respond to issues before any formal determination is made.

RCSA particularly supports the policy's emphasis on timely and efficient processes. Protracted or overly adversarial dispute mechanisms would not serve the interests of either buyers or sellers and

risk diverting focus away from remediation and performance improvement. A clearly defined right of reply period strikes an appropriate balance between procedural fairness and the need for prompt resolution.

Timely resolution of performance concerns supports continuity of service delivery, preserves constructive commercial relationships, and enables issues to be addressed before they escalate. From an industry perspective, the ability to respond within a clear and reasonable timeframe provides sellers with confidence in the integrity of the process, while ensuring buyers are able to act decisively where necessary. RCSA therefore supports the proposed approach as an appropriate and proportionate safeguard within the DSUP framework.

Is the scope of the policy clear, including which contracts will be covered and how the threshold will be applied?

RCSA considers that the scope requires further clarification to enable sellers to understand with certainty when and how the DSUP applies to their contracts. In particular, greater clarity is needed in relation to which contracts are captured, how any relevant thresholds are intended to operate, and how sellers will be notified that a contract has become subject to the DSUP. Given the potentially serious consequences associated with a finding of serious underperformance under clause 21, clarity at the outset is essential.

RCSA is concerned that the DSUP does not clearly articulate how sellers will be informed when a contract becomes captured during its lifecycle. Where a contract may cross a threshold through extension, variation, aggregation with other contracts, or reclassification by an agency, there should be a clear and formal mechanism for advising the seller. Absent such a mechanism, sellers may only become aware that a contract is within scope after an issue has arisen, which would undermine procedural fairness and create avoidable uncertainty in contract governance and performance management.

Uncertainty as to scope has practical implications for how sellers manage risk and compliance under the DSUP. Sellers must be able to identify at an early stage whether enhanced scrutiny or consequences may apply so that appropriate governance, escalation, and performance management arrangements can be put in place. The absence of clear parameters risks retrospective application of the DSUP in a manner that does not support its stated objective of improving performance outcomes and enhanced dialogue between buyers and sellers.

Additional clarity is also required in relation to contracts which may be deemed 'strategically important'. The DSUP does not define what characteristics would give rise to this designation, nor how sellers are expected to anticipate or identify it. If the policy intent is that contracts falling below the \$4 million threshold may nevertheless be captured through aggregation, for example where a seller holds multiple contracts that collectively exceed said threshold, RCSA understands the rationale for such an approach. However, if this is intended, it should be clearly and expressly set out in the policy. If aggregation is not an intended lever of this tenant further guidance is required on the types of projects, functions, or delivery contexts that would be considered 'strategically important' by the DTA. Without clarification, there is a risk of inconsistent or retrospective application across agencies and may erode overall confidence in the framework.

More broadly, if the DSUP is intended to apply only once a specified threshold is reached, it is not currently clear how that threshold is to be determined or applied in practice. Sellers must be able to determine with confidence whether a contract is in scope at the time of tender or contract execution, or whether it may later fall within scope as a result of changes in value, duration, classification, or strategic status. Without clear parameters, sellers may be exposed to the consequences of the DSUP without a reasonable opportunity to understand or manage that exposure.

Many sellers participate in government procurement through master agreements or head contracts, including as subcontractors who support service delivery through the provision of labour. Where the DSUP applies at the master contract level, subcontractors may have limited visibility of whether and when their engagement is captured. Clear guidance is therefore required to ensure master contract holders are responsible for advising suppliers where the DSUP applies, including where coverage arises through aggregation or strategic designation. Without this clarity, agencies risk being exposed to the consequences of the DSUP without timely notice or a reasonable opportunity to understand and manage their obligations.

RCSA supports the Government's objective of strengthening accountability and consistency in supplier performance. Achieving that objective requires a framework that is clearly defined and capable of consistent application. RCSA would welcome further engagement with the Department to support the development of guidance or examples that provide greater certainty around scope, thresholds, and application of the DSUP.

Interaction with the Performance Management Framework (PMF) for Digital Marketplace Panel 2 (DMP2).

RCSA also seeks clarity on how the DSUP is intended to interact with the proposed Performance Management Framework (PMF) under Digital Marketplace Panel 2 (DMP2).

Given that many sellers will be subject to both regimes, clarity on their respective roles, thresholds, and sequencing is important to avoid duplication, inconsistency, or unintended compounding of consequences. In particular, sellers need certainty as to whether performance issues addressed through the DMP2 performance management processes could subsequently be relied upon for the purposes of the DSUP, and how remediation undertaken under one framework will be recognised under the other.

RCSA supports the development of coherent and aligned performance management settings across government digital sourcing arrangements. Clear guidance on how the DSUP and the PMF are intended to operate together would support consistency, reduce administrative burden, and provide sellers with greater confidence in how performance concerns are assessed and managed in practice.

Conclusion

RCSA supports the government's objective of strengthening accountability and performance across government purchasing and contracting frameworks, and acknowledges the importance of having robust mechanisms to address genuine underperformance and unethical conduct. We support the principles underpinning the DSUP, particularly its focus on early engagement, remediation, and collaborative resolution between buyers and sellers.

To ensure the DSUP operates effectively in practice it is critical that the framework clearly reflects the diversity of service delivery models operating in the market, including labour supply and on-hire arrangements. Clear delineation of responsibility, well-defined scope and thresholds, and transparent notification mechanisms are essential to ensure accountability is appropriately allocated and that compliant sellers are not exposed to unintended or disproportionate consequences.

RCSA considers that greater clarity around the application of the DSUP, its interaction with existing contractual performance mechanisms, and its alignment with other performance frameworks such as the PMF under DMP2 will support consistency, reduce uncertainty, and enhance confidence for both sellers and buyers. Achieving this clarity will strengthen the integrity and effectiveness of the framework while preserving its intended focus on remediation and performance improvement.

RCSA welcomes continued engagement with the Department to refine the DSUP and develop supporting guidance that ensures the policy is applied consistently and in a manner that reflects the realities of the staffing and recruitment sector. We look forward to working constructively with Government to support a framework that promotes strong performance outcomes without unintended consequences for compliant and professional market participants.