

14 October 2019

Ms Hayley Munro-Smith  
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Dear Ms Munro-Smith

**Application for Authorisation no. AA1000448 by Metropolitan Waste and Resource Recovery Group for Advanced Waste Processing**

Metropolitan Waste and Resource Recovery Group (**MWRRG**) notes the submission (**Submission**) of the Australian Industry Group on behalf of the Waste Industry Alliance Victoria (**WIA**) dated 2 September 2019 (but added to the public register on 23 September 2019) in relation to the above application, and respectfully provides the following comments.

The core purposes of the WIA are noted, and MWRRG believes that the intended outcomes of the project to which this Application relates are consistent with the matters listed at the end of the first page of the Submission. The project is not seeking to achieve outcomes which are unsustainable for private operators in the waste and resource recovery sector. And, as set out in the Application, if there is to be a move away from landfill as the default method of dealing with residual waste, it is inherently necessary for there to be some aggregation of waste to make investments in innovation by the private sector viable.

It is also noted that the intention of the procurement is to seek responses from a broad spectrum of participants in the waste and resource recovery sector. A number of these businesses are not members of WIA. Accordingly, it is believed that the issues raised by WIA do not necessarily represent the views of all potential suppliers that may respond to the project.

**1. Involvement of Councils**

In respect of the WIA's comments regarding the capacity for Councils involved in the procurement process to opt out of the process prior to contract execution, MWRRG makes the following points.

The procurement here involves a multi-stage process, starting with a request for an Expression of Interest, followed by a request for an Outline Solution. It is not commercially realistic for Councils to pre-commit to a submitted solution at such early stages, before the commercial details of the supplier's

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offer are resolved. Accordingly, an opt-out mechanism is included in the arrangement between Councils. In practice, at the later stage of entering into contracts, Councils will need to have committed to the chosen supplier(s) and agreed to make their quantities of waste available in return for particular pricing. There will therefore be certainty of the Councils involved by the time a supplier contractually commits to provide services.

The issue of confidential information being given to the Councils is raised at this point, as well as at point 3 below. By way of preliminary response here, Councils will be subject to confidentiality obligations (both during and after the completion of the procurement), including ones restricting their use of the information obtained whilst participating in the process. This, combined with protocols for managing of information within Councils as set out in the probity arrangements, will provide protection against the concern raised.

It is also submitted that allowing Councils to opt out of the procurement process will in fact increase competition in the market and ensure that competitive pricing and service levels are offered by potential tenderers. As each Council's participation in the project is voluntary, any offer must therefore provide incentive for them to participate in the joint arrangement. If Councils were unable to withdraw their participation in the project, this would likely result in tenderers offering less competitive terms, certain in the scale of council participation and the consequent minimum commercial value of the contract.

## **2. Changes to tender variables**

In respect of WIA's comments regarding changes to tender variables in the event a Council opts out of the project, MWRRG notes that any **final** offer put forward by a tenderer would be on the basis of an agreed and certain number of Councils participating.

It is recognised that the scale of the service and pricing ultimately offered by a service provider will be contingent on the quantity of waste to be processed, and indeed, the early stages of the procurement are intentionally flexible, to allow tenderers to submit alternative solutions. It is hoped that this will lead to a better alignment of Councils' requirements and suppliers' solutions than has been the case with traditional council by council procurements. It is likely that certain solutions, such as a new facility, may require some minimum aggregated quantity of waste, but MWRRG is open to a range of solutions that tenderers may propose, and expects that pricing may vary for different scenarios of waste volume. It is hoped that the procurement will elicit innovative solutions from suppliers. Nevertheless, certainly by the time that final contracts are being resolved, the tenderer will have certainty as to the number of Councils participating and the related quantities of waste.

## **3. Use of confidential information**

WIA's separately expressed concern regarding the disclosure of confidential information throughout the procurement process appears to be a re-statement of the issue raised at point 1 above. In any event, MWRRG's intention is that any information of this nature that is disclosed to a participating council during this period will be on the basis that the Council can only use such information for the purposes of participating in the joint procurement. Each Council has signed a Management Deed with MWRRG which covers the conduct of the procurement. The procurement will also be subject to the normal probity arrangements that apply to local and Victorian government procurements. This means that a

Council cannot utilise the same information if they withdraw their involvement in the joint arrangement and seek to negotiate an individual contract with service providers on the same terms.

Finally, the commercial reality is that no individual Council would expect to receive the same pricing for its waste in isolation, particularly in the context of a project which clearly requires aggregated quantities to trigger investment in a new facility.

Therefore, the provision of information will not set a new 'price ceiling' in the market, as any offer made by tenderers throughout the procurement phase is made on the understanding that multiple councils will be participating in the project and would not be offered in respect of an individual contract.

### **Post tender review**

In relation to the suggestion of a post tender review by the Commission of each contract's terms, it is submitted that such a proposal is unnecessary in the circumstances here.

MWRRG does not, as asserted, have a monopoly in offering waste tender opportunities; councils can, and do, tender for waste and resource recovery contracts on an independent basis. Further, MWRRG is established under s49C(1) of the *Environment Protection Act 1970* (Vic), and has obligations under that legislation to facilitate efficient procurement of waste and resource recovery infrastructure, and to collaborate with industry and business in achieving these objectives. Further, as a public body, it is bound by various government regulations and policies to act transparently, fairly and with integrity.

Similarly, each Council has obligations under the *Local Government Act 1989* (Vic) to endeavour to procure outcomes for the local community having regard to the long term and cumulative effects of decisions in a fair, accountable and transparent manner.

Further, as mentioned in the Application, an expert probity adviser will be engaged to act on the procurement, and further ensure that it is conducted fairly and transparently.

It is also likely that the tenderers for this project will be well-resourced and well-advised businesses, entirely capable of ensuring that final contracted terms are ones with which they are satisfied. No such operator is likely to commit its own resources, or obtain external financing, other than on terms which make financial sense over the term of the contract.

Finally, we do not see how the proposed approach of WIA would, in any event, safeguard any of the public benefits, or avoid any possible public detriment, arising from the conduct for which authorisation is sought.

We hope that the comments above are self-explanatory, but please contact Dan Pearce of this firm if you require any clarification or if further information is required.

Yours sincerely



**Holding Redlich**