



The Australian Industry Group
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2 September 2019

Mr Gavin Jones
Director
Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

via email: adjudication@acc.gov.au

Dear Mr Jones

Metropolitan Waste and Resource Recovery Group application for authorisation AA1000448

The Waste Industry Alliance Victoria (WIA), which is a part of the Australian Industry Group, provides this submission to consultation undertaken by the ACCC in relation to the above listed applications by the Metropolitan Waste and Resource Recovery Group (MWRRG) and Victorian Municipal Councils (together, the applicants) for procurement of landfill, sorting and recycling, and advanced waste technology services.

The WIA represents many of Victoria's waste management companies.

These companies are diverse businesses that work across the complete waste and resource recovery sector. They have interests in waste collection and transport; transfer stations and waste separation operations; waste recovery, reuse and composting facilities; landfill and disposal sites; and waste to energy projects.

The core purpose of the WIA is to advocate to the State Government of Victoria, the benefits to the economy and the community of a high performing waste industry through:

- promoting increased private sector investment in the waste and resource recovery industry
- appropriate and consistent regulation and enforcement
- support for increased growth and jobs in the waste and resource recovery industry
- collaboration on improved environmental and community outcomes associated with the waste and resource recovery industry; and
- a commitment to best practice.

WIA issues for which it seeks the ACCC's consideration are as follows:

1. Involvement of Councils

This issue addresses the involvement of councils in the tender assessment phase, which WIA believes is resulting in creating a significant disadvantage for all waste management service providers which tender.

- (a) Through the procurement process, councils may be provided with access to highly confidential, commercially sensitive information including pricing and the terms and conditions of all tenderers.
- (b) We understand that under the current procurement process, Councils are able to opt in or out of the process *at any time* prior to contract completion.
- (c) The Councils are made aware of the tender submissions in order to decide whether they wish to be a part of the *joint* arrangement as proposed by the MWRRG tender.
- (d) As the Councils have an opt in / out option, they become by virtue of engagement in the tender process, potentially appraised of this confidential data as provided to MWRRG which can be used by the Councils to independently negotiate with service providers.
- (e) Put simply, the tenderers have no certainty as to which Councils they may ultimately contract with.

2. Changes to Tender Variables

- (f) As the pricing set out in the tender is predicated on numerous variables for the joint arrangement, the company's submitting provide the details in good faith and calculated according to the variables of a *joint* arrangement.
- (g) As a result of the uncertainty with individual council engagement, the amount of waste described within the tender may not reflect the actual tonnage in the ultimate contract.
- (h) This will obviously therefore impact the winning tenderer's ability to provide the service at the cost, or under the conditions, submitted in the original tender.
- (i) The current opt in/ out system for Councils when combined with the changes to the tender variables referred to above, undermines the competitive tender process because those tendering have no certainty that the work they are tendering for will correspond with the contract that may be ultimately awarded

3. Use of Confidential Information

- (j) Through the tender process as currently constructed, tenderers are concerned that councils are permitted to obtain otherwise confidential and highly sensitive commercial information.

Tenderers are vulnerable given have provided information in the tender process which should be strictly confidential.

- (k) This process in effect permits the use of that confidential information by individual councils to use the tender pricing as a ceiling price which were based on the joint variables from which to negotiate. Put simply, in this process the Councils are delivered an unfair advantage. Ultimately that will be to the detriment of the industry and its ability to provide the essential services for Victoria's Councils.

WIA has highlighted this concern to the State Government of Victoria for a number of years and believes the ability for councils to opt in or out of the tender process at any time prior to the signing of the contract, has had a negative impact on the waste industry.

In particular, the WIA is concerned that the potential disclosure of the tenderers confidential information could have the effect of lessening competition in that it may discourage parties from participating in the tender process for fear of having their information disclosed.

WIA asks that the ACCC consider the impact of Councils being able to:

- (a) opt in or opt out of the tender process ad hoc; and
- (b) the disclosure and use of the confidential information provided as part of the tender process.

In the WIA's view, the ACCC could consider the equity of ensuring that Councils are committed to the proposed contract from the inception of the process.

We ask that the ACCC consider a 'post tender review' of the contract/tender, irrespective of the successful bidder. Experience has demonstrated to WIA members that terms and conditions suggested during the tender may be dramatically altered in the lead up to the signing of the contract.

We suggest that particular focus on the terms and conditions associated with *each* contract would be beneficial to all parties.

A review of the 'final, executable contract' by the ACCC, would help ensure proper and equitable negotiations between the 'winning tenderer' and the MWRRG.

Given that the MWRRG has a monopoly in offering waste tender opportunities, it is important to ensure that the tendering and contracting arrangements are fair and as transparent as possible.

In addition, it is entirely reasonable that for parties submitting confidential information as part of the tender process, that the information contained in the tender remain in a strictly confidential form, and that undertakings are provided to that effect.

The WIA has no objection to the grouping of councils for the tendering of waste management services, nor to the interim authorisation relevant to the tender preparation for landfill services.

The WIA would welcome the ACCC's careful consideration of:

- the impact on industry of individual councils' ability to opt in or opt out of the tendering process and to potentially utilise information provided in the tender process to conduct further, unconnected negotiations with the tenderer; and
- an ACCC post tender review of final contracts.

We look forward to hearing from you.

Yours sincerely,



Timothy Piper

Head – Waste Industry Alliance Victoria
Australian Industry Group

cc: Mr Darrell Channing Adjudication, ACCC