

21 October 2019

By email: [REDACTED]

**Contact**

Alistair Newton [REDACTED]

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Ms Kaitlin Hanrahan  
Senior Analyst, Adjudication – Merger and Authorisation Review  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
CANBERRA ACT 2601

Dear Ms Hanrahan

## **Metropolitan Waste and Resource Recovery Group – application for authorisation AA1000449 – response to interested party submissions**

### **1 Introduction**

As you know, we act for Metropolitan Waste and Resource Recovery Group (**MWRRG**) in respect of the above application for authorisation dated 2 August 2019 (the **Landfill Application**) made on behalf of MWRRG and 31 local councils located in metropolitan Melbourne (the **Participating Councils**) in respect of the joint procurement of residual waste and ancillary services (**Landfill Services**).

We refer to the interested party submission received by the ACCC from the Australian Industry Group on behalf of the Waste Industry Alliance Victoria (**WIA**) dated 2 September 2019 in relation to the Landfill Application.

This letter should be read in conjunction with the **attached** letters from MWRRG to the ACCC in relation to MWRRG's concurrent application for authorisation in respect of advanced waste processing services (the **AWP Application**) and recycling sorting services (the **Recycling Application**). Broadly, the points made in the attached letters in respect of the AWP Application and Recycling Application apply equally in relation to the Landfill Application.

Capitalised terms in this letter have the same meanings as in the Landfill Application.

### **2 Overview**

WIA's submission is focused on concerns that Participating Councils are free to withdraw from the proposed joint procurement process at any stage, generating uncertainty for Service Providers in respect of tender variables, and also potentially giving Participating Councils the opportunity to misuse confidential information gained in the process in later bi-lateral negotiations with Service Providers.

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As explained in the Landfill Application, the Tender will be structured to enable responses from a wide range of Service Providers (e.g., potentially in relation to the establishment of new transfer stations for consolidating and bulk hauling residual waste). As is the case for the AWP Application and the Recycling Application, a number of those potential Service Providers would not be members of WIA and, for that reason, the issues raised in WIA's submission are not necessarily representative of the views of all potential Service Providers that may respond to the Landfill Services Tender.

### **3 Involvement of councils**

In respect of WIA's concerns regarding Participating Councils' ability to withdraw from the joint procurement process at any stage, MWRRG notes the following.

As set out in section 2.1 of the Landfill Application, it is proposed that the joint procurement process will involve a number of stages (being the entry into MOUs between MWRRG and each Participating Council, the competitive Tender, the negotiation of supply terms, and the final execution of contracts). It would not be reasonable nor commercially viable for Participating Councils to pre-commit to the joint procurement process at its initial stages, as potential Service Providers would not have confirmed the commercial terms to be offered to Participating Councils. Also, in the case of the Landfill Application, Participating Councils will to a large extent be selecting from Service Providers' existing facilities – and in that context it is not necessary for there to be any pre-commitment of Participating Council volumes to conduct an effective Tender.

Given that Participating Councils would generally have an incentive to use as their primary landfill facility the facility that is geographically closest, and given that each existing major Service Provider (i.e., the operators of the small number of landfills servicing the metropolitan Melbourne region) already services one or more of the Participating Councils, Service Providers would have some sense of which Participating Councils they will ultimately contract with. In any event, Service Providers will have certainty as to council participation by the time they are required to contractually commit to providing their services (i.e., at the contract execution stage).

### **4 Changes to tender variables**

In respect of WIA's concerns regarding the potential for changes to be made to tender variables throughout the joint procurement process, MWRRG acknowledges that the terms and conditions offered by potential Service Providers will depend on the number of Participating Councils to be contracted and the volumes of waste to be offered, and that those variables may change throughout the joint procurement process. However, any final contracts – and indeed any final offers from potential Service Providers – will be based on the confirmed involvement of particular Participating Councils.

### **5 Use of confidential information**

In respect of WIA's concerns that Participating Councils may potentially gain access to highly confidential and commercially sensitive information, MWRRG notes the following.

It is clearly necessary for Participating Councils to have access to all relevant information to inform their decisions, including information which may be confidential and commercially sensitive.

It is MWRRG's intention that all confidential and commercially sensitive information (including pricing) disclosed to a Participating Council in the context of the joint procurement process will be disclosed on the basis that it must only be used for the purposes of participating in the joint procurement, and for no other purpose (such as seeking to negotiate individual agreements with Service Providers on the same terms).

Further, the provision of such information will not set a new "price ceiling" in the market, as no Participating Council would receive (or would reasonably expect to receive) the same terms offered in the context of the joint procurement individually.

Finally, MWRRG notes that the joint procurement will be competitive and transparent, and subject to an independent audit procedure and oversight by a Probity Advisor.

## **6 Post-tender review**

MWRRG submits that a "post-tender review" by the ACCC of the terms of each contract entered into as a result of the joint procurement is unnecessary in the circumstances, for the following reasons.

- MWRRG does not 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 Participating 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.
- 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 Landfill Services will be well-resourced and well-advised businesses, entirely capable of ensuring that final contracted terms are ones with which they are satisfied.
- Finally, the proposed approach of WIA would not, in any event, safeguard any of the public benefits, or avoid any possible public detriment, arising from the conduct for which authorisation is sought.

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CORRS  
CHAMBERS  
WESTGARTH

Should the ACCC have any questions or require any further information in relation to this letter, please do not hesitate to contact us.

Yours faithfully

**Corrs Chambers Westgarth**



**Alistair Newton**  
Partner

**attachments**