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Our ref LXX:1040945



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20 November 2020

Gavin Jones
Director, Adjudication
Australian Competition and Consumer Commission
By email: gavin.jones@acc.gov.au

Copy to: Miriam Kolacz; Tanya Hobbs

Public register version– restriction of publication claimed in relation to part

Dear Gavin

Boral fly ash offtake agreement at Tarong Power Station – response to further third-party submissions

We refer to the Application (AA1000517-1) made by Boral Cement Limited (**Boral**) for the authorisation of its offtake, operation and maintenance agreement (**OOMA** and the **Agreement**) with Stanwell Corporation Limited (**Stanwell**). We also refer to Boral's previous submissions in relation to this matter and the ACCC's Draft Determination dated 22 October 2020.

In response to the Draft Determination, two submissions were received:

- A submission from the Queensland Department of State Development, Tourism and Innovation which had no issues with the Draft Determination and the proposal to grant conditional authorisation; and
- A submission from Independent Flyash Brokers Pty Ltd (**IFB**), an existing supplier of fly ash in South East Queensland (**SEQ**) which:
 - operates out of the Millmerran Power Station as the primary off-taker, owning the plant and having the first right to take fly ash;
 - currently supplies significant quantities of fly ash to Boral;
 - has cement and concrete producer shareholders¹, including an almost 60% holding by Wagners Flyash Pty Ltd, a wholly owned subsidiary of Wagners Holding Company Limited;
 - also lodged an EOI under Stanwell's tender for the offtake of fly ash from Tarong Power Station (**Tarong PS**); and
 - would have to compete against Boral in the supply of fly ash to third parties once the offtake facility was operational.

The purpose of this letter is to address the issues raised by IFB in its submission dated 11 November 2020.

Information highlighted green has been identified as confidential by Boral. Boral requests that this information be withheld from the public register as it is competitively and commercially sensitive, non-public information and its disclosure would unduly prejudice Boral in the conduct of its lawful business.

¹ IFB's shareholders are a number of Queensland based cement and concrete producers, including Sunmix Concrete Pty Ltd (5.94%), Ailort Pty Ltd (6.93%), Neilsen's Concrete Pty Ltd (26.73%) and Wagners Flyash Pty Ltd (59.41%).

1 Overview

All of the key issues raised in IFB's submission have been previously addressed by Boral in various responses to the ACCC and were factored into the ACCC's consideration in the Draft Determination.

IFB's submissions do not raise any new material issues or concerns and are based on:

- a mischaracterisation of the views expressed by the ACCC in the Draft Determination. For example, IFB's submission refers to the "Commission's conclusion that there are no public benefits" – a conclusion which was never in fact made;
- a counterfactual that is not credible or supported by evidence; and
- a belief that the term should be three years instead of the 10 years sought (or the 5 years proposed by the ACCC) purely on the basis that the Commission has the ability to grant authorisations of short duration.

2 Counterfactual

IFB's submissions and assessment of the OOMA's competitive impact are founded on a counterfactual in which Stanwell enters into a non-exclusive agreement with Boral, or a non-exclusive agreement with a third-party (or multiple third-parties, including Boral). Further, at paragraph 10 of IFB's submission it states that the counterfactual involves an agreement between Stanwell and a third party "with no interest in any other SEQ source of similar quality fly ash, no exclusivity at Tarong PS, and no downstream interests".

These counterfactuals are not realistic and have been addressed in Boral's previous submissions dated 2 October 2020 and 8 October 2020 which were factored into the ACCC's consideration of the Draft Determination.

As submitted by Boral on 2 October 2020, the OOMA resulted from a competitive expression of interest process – Boral was the best option for the offtake of fly ash at Tarong PS, and of the bidders, most closely aligned with Stanwell's strategy.

3 Supply of fly ash to third parties

Boral has fully addressed the issue of incentives and on-supply of fly ash to third parties in several submissions and responses to the ACCC.

4 Conditions on the authorisation

In its Draft Determination, the ACCC considered, on balance, that the likelihood of a substantial lessening of competition is limited by alternative sources of supply and is otherwise addressed by the condition to comply with clause 9.1 of the OOMA.² Boral submits that no such condition is necessary but understands that it may form part of the ACCC's decision.

IFB is now suggesting additional conditions, including requiring the funding of independent auditors, to assess and challenge compliance with the condition to comply with a contractual obligation. Compliance with the contractual obligation is what the ACCC required to address its residual concerns and satisfy the legal test without feeling the need to form conclusions on the net public benefits analysis. Contractual obligations have their own consequences and having seen the contracts and

² ACCC, Draft Determination, [4.60].

considering the broader context of the authorisation, the ACCC did not feel the need to impose such additional conditions.

5 Length of authorisation

Boral sought authorisation for a period of 10 years commencing from the Offtake Commencement Date (anticipated to be 15 March 2021). The term of the OOMA is made up of an initial 5-year period with an option to extend the Agreement for a further five years.

The OOMA and the right to acquire fly ash from the precipitator hoppers of Tarong PS is conditional on Boral meeting the design and construction obligations under the Design and Construct Contract, and is underscored by a substantial contribution from Boral to the construction of the offtake facility at Tarong PS and the establishment of a significant fly ash supply business in SEQ. As a result of this commercial context, a minimum authorisation period of 10 years was requested.

IFB raised concerns with the 10-year authorisation term in its first submission dated 31 August 2020. The ACCC referred to IFB's submission on the length of the authorisation, and in its Draft Determination, ultimately concluded that it would be appropriate to grant authorisation for a period of five years. It came to this conclusion having had regard to the initial term of the OOMA, and the preference to review Boral's provision of third-party access to Tarong PS fly ash prior to the end of the ten-year period.

IFB now submits that a three-year authorisation of the OOMA is appropriate rather than the five-year authorisation proposed by the ACCC. This submission does not raise any further competition arguments as to why the term should be reduced to three years beyond the fact that short duration authorisations are possible. In noting that short duration authorisation is possible, IFB provides three examples. In each of these examples the period of authorisation granted is either the same as that sought by the applicants or only one year less. The fact that a 2-year authorisation was granted when sought has no persuasive value in suggesting this authorisation should have a shorter term. The duration of the authorisation granted is reflective of the particular commercial arrangements and context for which authorisation is sought, the level of concern and the ACCC's view on market dynamics.

While Boral requested authorisation for a 10-year period, a minimum of five years is essential. The initial commercial term of the OOMA is five years, which is commensurate with and inextricably linked with the broader parameters of the deal (including Boral's investment in the offtake facility and take-or-pay requirements under the OOMA). Boral would not have agreed to a shorter term without also changing those broader parameters, **[Confidential - restriction of publication claimed]**. There is no valid basis to reduce the term below the ACCC's proposed 5 years.

Boral would be happy to discuss any of its responses and to provide further information as needed by the ACCC. We would also welcome the opportunity to discuss with the ACCC any concerns or questions they may have in relation to the application for authorisation.

Yours faithfully
Gilbert + Tobin


Rebecca Dollisson
Lawyer