

Our reference
AN/MWVG14315-9152864-01

Your reference
AA1000503

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Ms Tanya Hobbs
Assistant Director, Merger & Authorisation Review Division
Australian Competition and Consumer Commission
23 Marcus Clarke St
CANBERRA ACT 2601

Dear Ms Hobbs

MWRRG – application for revocation and substitution AA1000503

As you know, we act for the Metropolitan Waste and Resource Recovery Group (**MWRRG**) in respect of the above application for revocation and substitution dated 21 April 2020 (the **application**), made on behalf of MWRRG and certain local councils including the City of Melbourne, City of Port Philip, City of Whittlesea and City of Yarra (the **additional councils**).

We refer to the Australian Competition and Consumer Commission's (**ACCC**) letter dated 20 November 2020 setting out a summary of the points raised during the ACCC's market inquiries. This letter sets out MWRRG's response to those points.

Capitalised terms in this letter have the same meaning as in the application.

1 Public benefits

1.1 Transaction cost savings and improved contract management

Paragraph 3 of the ACCC's letter refers to market feedback that *“due to overlaps in oversight roles between councils and MWRRG and delays in decision making, in practice, joint contract management and administration by MWRRG is not an improvement or cost saving compared to a situation without involvement by MWRRG”*.

MWRRG considers that, notwithstanding any continued limited overlap in oversight roles, the involvement of MWRRG clearly achieves transaction cost savings relative to a situation in which each individual council acts entirely alone and has sole responsibility for contract management and administration. As previously advised, these transaction cost savings include MWRRG-borne, or shared, costs in relation to:

- direct management of organic materials to be received at service providers' facilities (i.e., ensuring that facilities have the ongoing capacity and capability to receive councils' waste volumes and distributing volumes amongst service providers to ensure the best financial outcomes for councils during the term of a contract);
- service provider KPI monitoring;
- service provider compliance monitoring (i.e., ensuring that service providers' facilities continue to meet all regulatory, operational and OH&S compliance requirements by way of site visits, reviews, annual administrative verifications, and conducting management meetings with service providers to review and discuss issues identified);
- incident management;
- liaising with service providers and other governmental departments (e.g., the EPA) on behalf of councils;
- seeking legal and other specialist advice on behalf of, and in respect of issues raised by, councils; and
- co-ordinating dispute resolution, including management and resolution of cost claims between councils and service providers.

By way of illustration, in the context of the South Eastern Organics Group (**SEOG**), Eastern Organics Group and the North Western Organics Group, day-to-day administrative and contract management duties are performed by a single MWRRG officer without reference to participating council staff. Further, in many cases, the costs incurred by MWRRG on behalf of councils are not passed on to those councils. For example, in the context of the landfill services tender, MWRRG did not seek reimbursement from the relevant councils for costs expended by MWRRG for legal fees and the salaries of two full-time officers responsible for contract management and administrative duties over the period of a year. In addition, during the recent recycling crisis, significant time and professional co-ordination was expended by MWRRG staff to support contracted councils to ensure that contractual issues were managed, bank guarantees accessed, and associated legal matters resolved to the extent they could be. Issues of this kind will inevitably arise, to a greater or lesser degree, in relation to the ongoing management and administration of any joint contractual arrangement.

MWRRG considers that, in the above context, there can be no question of councils not achieving transaction costs savings in relation to contract management and administration, which as previously noted can be expected to directly benefit ratepayers by reducing rates and/or freeing up resources to be applied to other local government activities.

Finally, it is also important to recognise that a joint approach to contract management and administration also delivers transaction cost savings to service providers, including by reducing or eliminating the administrative burden of dealing with multiple councils' procurement processes and contract types.

1.2 Economic efficiencies

MWRRG considers that the market feedback reproduced in paragraphs 6 and 7 of the ACCC’s letter does not reflect the nature of the proposed arrangements or the additional information provided by MWRRG to the ACCC.

First, paragraph 6 of the ACCC’s letter sets out market feedback that *“any further gain of scale within the SEOG and any resulting benefits to the processors which service SEOG will be counterbalanced by the loss of scale by the Additional Councils’ existing organics processor”*. However, given that the proposed arrangements are contingent in nature, the only circumstances in which it would be necessary for the additional councils to engage SEOG service providers are those in which existing service providers are no longer able to service them. In that context, it is illogical to attribute any loss of scale to the conduct proposed to be authorised.

Second, paragraph 7 of the ACCC’s letter states that *“there is the potential for ongoing efficiency losses since the aggregation of the Additional Councils within SEOG until 2032 will preclude any open tenders by the Additional Councils either individually or within a fourth council joint tendering group. Market inquiries indicate this will significantly raise barriers to entry for smaller and more localised potential waste processors”*. However, as MWRRG has confirmed, if the application is granted then the additional councils will not immediately enter into long-term contracts (e.g., to 2032) with service providers in the SEOG, but rather would access the SEOG arrangements on an “as needs” basis until a further competitive tender process can be conducted. Under that competitive tender process, service providers will have the opportunity to tender for the entirety of the additional councils’ organic waste volumes (or, if not under that tender, then any independent tender run by an individual council should they choose to do so). For that reason, MWRRG is open to a condition of authorisation that limits the maximum length of any contingency contracts entered into by the additional councils through the SEOG.

2 Public detriments

In relation to public detriments, MWRRG notes at the outset that most of the issues raised by interested parties and reproduced in paragraphs 9 to 11 of the ACCC’s letter are not issues that arise from the conduct proposed to be authorised.

Paragraph 9 of the ACCC’s letter states that *“[m]arket feedback suggests that the factors identified in previous authorisations of the SEOG as mitigating public detriments do not apply in the current matter”*. MWRRG notes the following in response.

- In response to paragraph 9(a) (which states that there will be *“no further tender process here”*), MWRRG reiterates that it proposes a further metropolitan Melbourne-wide competitive tender process in which the entirety of the additional councils’ organics volumes would be

contestable (or, if not contestable in that process, contestable in processes conducted by the additional councils independently).

- In response to paragraph 9(b) (which notes the percentage of organic waste volume in metropolitan Melbourne that is subject to contracts involving MWRRG), MWRRG considers that the apparent concern is not meaningful given that: (i) the current application relates only to contingency arrangements that may or may not be required to be utilised; and (ii) there will be a further competitive tender process.
- In relation to paragraph 9(c), it is important to remember that the submissions previously made by MWRRG regarding the allocation of volumes have been to clarify that any technical boycott conduct occurs only in the context of the contractual framework agreed to by service providers in respect of a particular cluster. For instance, in the context of the current application the additional councils are not seeking to agree not to deal with any service provider(s) other than through the SEOG.
- In response to paragraph 9(d), it is irrelevant that there are “*significant constraints on member councils leaving the contracts they have entered into as part of the SEOG once those contracts have been entered*”. As is the case for all MWRRG-coordinated procurements, council participation in any tendering process is entirely voluntary, and councils retain a choice about whether to enter into contracts following any tendering process. More broadly, it is clearly not a public detriment that councils and service providers are able voluntarily to bind themselves to each other under legally enforceable contracts.

Paragraph 10 of the ACCC’s letter notes that “*the addition of Mornington Peninsula Shire Council to the SEOG, the location of that particular council area in relation to the remainder of metropolitan Melbourne and the available modern metropolitan Melbourne processing facilities raised special circumstances that do not appear to apply in the case of the Additional Councils*”. However, as noted in paragraph 1 of MWRRG’s letter to the ACCC of 29 June 2020, to the extent that location should be an overriding consideration for local councils when deciding whether to participate in a particular joint procurement, there are various reasons why a council may seek to join a cluster that is not the most geographically proximate – including, most obviously, for contingency reasons.

Paragraph 11(a) of the ACCC’s letter seeks MWRRG’s views on whether the proposed conduct is likely to result in reduced competition between the three current service providers for the SEOG in their dealings with the additional councils. MWRRG notes the following in response.

- In respect of paragraph 11(a)(i), reductions in competition between the three current service providers for the SEOG do not arise from the entry into the proposed contingency arrangements. There will be the same number of councils and service providers with or without the proposed conduct. In circumstances where the additional councils participate in

the SEOG, they will retain the same level of choice as to which SEOG service provider to contract with. The additional councils' entry into the proposed contingency arrangements does no more than allow them to take advantage of the particular terms offered by the relevant service providers within the context of the SEOG. If various capacity constraints or bottlenecks arise, such that there may be little competition between the SEOG service providers, they would exist with or without the proposed conduct. In any event, MWRRG considers that capacity constraints and bottlenecks are unlikely to arise given that SEOG service providers currently have significant capacity to receive the additional councils' organic waste volumes should that be necessary.

- In respect of paragraph 11(a)(ii), as described in paragraph 1 above, the proposed conduct involves the entry into contingency arrangements that, if required to be used, would only continue until replacement arrangements are in place pursuant to the proposed further competitive tender process.
- In respect of paragraph 11(a)(iii), the ACCC notes that market inquiries cite *"effective constraints on a council's ability to seek an alternative processor once the council has joined SEOG contracts"*. As noted above, MWRRG does not consider that the entry into legally enforceable contracts can be conceptualised as a public detriment – particularly in circumstances where that is entirely voluntary and each council has the option to avoid any MWRRG-coordinated process and conclude separate, bi-lateral arrangements with service providers if it wishes to do so.

Paragraph 11(b) of the ACCC's letter seeks MWRRG's view on whether the proposed conduct is likely to reduce competition to acquire and supply organics processing services across metropolitan Melbourne. MWRRG notes the following in response.

- In respect of paragraph 11(b)(i), as explained in response to paragraph 9(b) of the ACCC's letter, *"the already exceedingly high volume of organic waste subject to contracts controlled by MWRRG"* is not meaningful to the ACCC's assessment of public benefits and detriments in the current application.
- In respect of paragraph 11(b)(iii), the further competitive tender process foreshadowed by MWRRG will enable all service providers (including potential entry by small processors and new innovators and re-entry by existing processors) to tender for the additional councils' organics volumes.
- In respect of paragraph 11(b)(iv), MWRRG considers that the noted importance of municipal organics contracts to *"guarantee organics processors a steady and substantial volume of higher value inputs"* (which suggests that long-term contractual commitments are beneficial

for service providers) is inconsistent with market feedback indicating that there are *“effective constraints on a council’s ability to seek an alternative processor once the council has joined SEOG contracts”* (which suggests that long-term contractual commitments are inherently detrimental) – see response to paragraph 11(a)(iii) above.

- In respect of paragraph 11(b)(v), there is no *“potential for reduced number of processors (compared to the situation without the Conduct) in the long term given the loss of organics waste volumes represented by the Additional Councils”* for the same reasons provided in response to paragraphs 9(b) and 11(b)(i) above.

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

Yours sincerely



Alistair Newton
Partner