

07/07/2023

[REDACTED]
Director, Sector Performance and Intervention
NSW Office of Local Government - Nowra
Locked Bag 3015
NOWRA NSW 2541

By email only: olg@olg.nsw.gov.au

Attention: [REDACTED]

Dear M [REDACTED]

Bioelektra Australia Pty Ltd

1. We refer to your letter of 16 May 2023 received on 17 May 2023. We also refer to our letter to you dated 9 June 2023 (**9 June Letter**).

2. [REDACTED]

Background

3. As set out in the 9 June Letter, Council was to provide a financial contribution to the design and construction of the Facility by reference to a number of defined Payment Milestones as set out in the Contract. Set out below is a table which sets out the defined Milestones and the associated payments attached to each Milestone:

Payment Milestone	Payment by Council
Milestone 1- (a) Final Design Documentation has been achieved; and (b) Principal Representative has received from the Contractor a copy of the Development Consent (Stage 2 Activities)	\$1,000,000
Milestone 2 - Ancillary Activities Completion	\$1,000,000

Milestone 3 - Practical Completion	\$5,000,000
Milestone 4 - Operation Readiness	\$2,000,000
Milestone 5 - The first occurrence of the Contractor achieving a Quarterly Diversion Level equal to or greater than the Quarterly Diversion Target averaged across any two Quarters in any Operating Year.	\$400,000
Milestone 6 - The first occurrence of the Contractor achieving a Yearly Diversion Level equal to or greater than the Yearly Diversion Target in any Operating Year.	\$300,000
Milestone 7 - The first occurrence of the Contractor achieving a Yearly Diversion Level equal to or greater than the Yearly Diversion Target averaged across any 2 Operating Years.	\$300,000

4. Prior to the voluntary administration and subsequent liquidation of Bioelektra Australia Pty Ltd (Bioelektra), Council had paid the following amounts to Bioelektra:
 - a. Payment Milestone 1 — \$1,000,000.
 - b. Payment Milestone 2 — \$1,000,000.
5. In total, Council has paid Bioelektra the amount of \$2,200,000 inclusive of GST against Milestone 1 and Milestone 2.

Payment Milestone 1

6. Pursuant to the Contract, Payment Milestone 1 was achieved when:
 - a. Final Design Documentation has been achieved; and
 - b. Principal's Representative has received from the Contractor a copy of the Development Consent (Stage 2 Activities).
7. On 23 December 2022, the Development Application for the facility was approved and as such, Bioelektra had satisfied the requirements for Payment Milestone 1.
8. On or about 10 January 2023, an invoice was provided to Council by Bioelektra for the amount of \$1,000,000 plus GST. At the time, and given the scope of the works that were required to be completed for Payment Milestone 1, Council was satisfied that the Payment Milestone 1 should be paid.
9. On 3 February 2023, Council paid Payment Milestone 1 to Bioelektra.
10. Council remains satisfied that Bioelektra completed the works required for Payment Milestone 1 and therefore Council was contractually obliged to pay Payment Milestone 1.

Payment Milestone 2

11. Pursuant to the Contract, Payment Milestone 2 was achieved when Bioelektra had achieved Ancillary Activities Completion.


12. Ancillary Activities is defined in the Contract as:
 - a. *“The Stage 1 Activities; and*
 - b. *The following components of the Stage 2 Activities:*
 - i. *Design and construction of car parking for the Facility for use in connection with the Operation Activities;*
 - ii. *Design, construction and fitout of the office building with amenity facilities;*
 - iii. *Design, construction and fitout of the Weighbridge;*
 - iv. *Design, supply, installation and connection of all Utilities on the Site for the Facility, including all connections to the existing or new supply points that form part of the Stage 1 Activities; and*
 - v. *Design, supply, installation and connection of an onsite sewage treatment system to meet the needs of the Facility.”*

13. Ancillary Activities Completion is defined in the Contract as follows:

... that stage in the performance of the Ancillary Activities when those parts of the Facility to which the Ancillary Activities relate have been completed in accordance with this Agreement, except for minor Defects:..

14. It is apparent that Milestone 2 has not been completed because Ancillary Activities Completion has not occurred. Among other things, Milestone 2 has not been completed because:
 - a. The car park has not been designed and constructed;
 - b. The office building with amenity facilities has not been designed, constructed and fitout;
 - c. The weighbridge has not been designed, constructed and fitout;
 - d. All Utilities on the Site for the Facility, have not been designed, supplied, installed or connected;
 - e. An onsite sewage treatment system to meet the needs of the Facility has not been designed, supplied, installed or connected.

15. The consequence of the above is that it is now apparent to Council that:
 - a. The Contract payment terms in respect of Payment Milestone 2 were not met as defined in the Contract and therefore Payment Milestone 2 should not have been paid by Council to Bioelektra.
 - b. The terms of the Contract in respect of Payment Milestone 2 were not administered correctly by Council.

16. 

17. [REDACTED]
18. On 21 October 2022, Bioelektra issued Council with an invoice seeking payment for Payment Milestone 2. The invoice was issued by Bioelektra by email to Council employee [REDACTED]. A copy of this invoice and the accompanying email is at **Attachments 1 and 3**. [REDACTED] is Council's Waste Services Manager. [REDACTED] was appointed by [REDACTED] (Council's Director of City Services) as the Principal's Representative under the Contract on 7 March 2022. A copy of the letter appointing [REDACTED] as the Principal's Representative under the Contract and authorising [REDACTED] to make payments under the Purchase Order is at **Attachment 2**.
19. On 21 October 2022, [REDACTED] requested further information from Bioelektra regarding the completion of works and sought *"some clarifications (and an assurance) before I can assure our Director that the claim is valid."* A copy of this correspondence is at **Attachment 3**.
20. On 24 October 2022, Bioelektra sent an email to [REDACTED] enclosing a letter in response to his email of 21 October 2022, as well as details of costs incurred by Bioelektra. A copy of this correspondence and the attachments is at **Attachments 3, 3a and 3b**. The letter from Bioelektra stated:
- "This letter is to certify that our Builder EQ Constructions (EQC) has assured us that they will return to site and finish up the works for Stage 1 once we provide them with the following:*
- An undertaking by Bioelektra Australia to make payment on 21-day payment terms and;*
 - the current outstanding payment claims are settled.*
- Bioelektra would like to assure Council that the milestone payment being claimed will go towards paying the outstanding claims from EQ and confirms that payment would be made to EQC within 21 days of the approval of their Progress Claim from the Superintendent and the issue of their Tax Invoice in accordance with this assessment."*
21. Bioelektra's contractor, EQ Constructions was placed in voluntary administration on 3 February 2023 [REDACTED]
22. On 25 October 2022, [REDACTED] directed an administrative assistant within the Waste team at Council to pay Milestone Payment 2 to Bioelektra. [REDACTED] had sufficient delegation and authority to authorise the Milestone payments for the Contract on behalf of the Council. [REDACTED]
23. [REDACTED] Further document searches are also being undertaken.

Delivery Phase Bank Guarantee

- 24. As set out in the 9 June Letter, Bioelektra was required to provide an unconditional undertaking for the amount of \$2,000,000 (being the Delivery Phase Bank Guarantee) within 5 Business Days of all necessary Authorisations, and prior to the commencement of any part of the Activities on Site.
- 25. On the foregoing basis, the Delivery Phase Bank Guarantee should have been delivered to Council by 5 January 2022.
- 26. On 17 January 2022, an employee of Council, [REDACTED] sent an email to Bioelektra reminding Bioelektra to deliver the Delivery Phase Bank Guarantee as required under the Contract.
- 27. The Delivery Phase Bank Guarantee has, notwithstanding the request made by Council on 17 January 2022, not been provided to Council.

28. [REDACTED]

29. Council’s commercial interests in the event of default of Bioelektra were appropriately protected via mechanisms in the Contract. Two of these contractual provisions (the provision of the Delivery Phase Bank Guarantee and the payment of Payment Milestone 2) were not administered post-contract as required under the Contract. [REDACTED]

[REDACTED]

If you need further information about this matter, please contact [REDACTED], City Performance on 02) 4429 [REDACTED]

Yours faithfully

[REDACTED]

Chief Executive Officer