

Council Reference: 59608E (D23/221305)

Your Reference:

30/06/2023

██████████
Director, Sector Performance and Intervention
NSW Office of Local Government
Locked Bag 3015
NOWRA NSW 2541

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

Attention: ██████████

Dear ██████████,

Bioelektra Australia Pty Ltd

We refer to your letter dated 2 June 2023 received on 5 June 2023.

Your letter dated 2 June 2023 commences with the statement that OLG, *“has recently become aware of some additional information regarding the authenticity of Bioelektra Australia which has raised additional serious concerns”*.

It is not clear to Council what is meant by the *“authenticity”* of Bioelektra Australia. Council does not agree with this characterisation of Bioelektra Australia Pty Limited (**Bioelektra Australia**) and prior to responding to the specific information requested in your letter, it is necessary to address this characterisation. Council apprehends that this description has arisen following public statements made by Bioelektra Group SA (based in Poland) that it has *“no formal ties”* to Bioelektra Australia. Council's view is that these statements made by Bioelektra Group SA are misleading and it is appropriate to address this matter in this letter given the description in the OLG letter dated 2 June 2023.

In response to Council's call for tenders in August 2017 for the West Nowra Waste Processing Facility (**Facility**), tenders were received from Bioelektra Australia, ██████████.

Bioelektra Australia was the successful tenderer following a detailed tender process and entered into the contract with Council.

Bioelektra Group SA did not submit a tender for the Facility in response to the invitation to tender.

The Contract between Council and Bioelektra Australia (which was the subject of a tender process described further below) allocated the risk of designing, constructing, financing and operating the Facility to Bioelektra Australia. As part of the risk allocation model adopted by Council in the Contract with which it went to market, the commercial and contractual risk of the technology adopted, and the procurement of it, was the successful tenderer's risk. That is, the contractual risk allocation model adopted by Council was that it was a matter for Bioelektra Australia to ensure that it had procured the appropriate technology solution [REDACTED] (and any other necessary contractors and suppliers) so as to be able to satisfy its contractual obligations to Council (and as part of the Contract, required Bioelektra Australia to ensure that Council had the benefit of the right to use the technology solution adopted by Bioelektra Australia). The risk allocation model in the Contract transferred the risk of designing, building, procuring and funding the Facility to the successful tenderer, with Council's primary obligations being to provide access rights to the site, make a contribution to the capital costs [REDACTED] and to pay the successful a tenderer a fee in the Operations Phase for processing Council's waste. The Term for the Operating Phase was 20 years. The Facility was to be built on land owned by Council and leased to Bioelektra Australia for the duration of the Term. As set out in the Contract, not only did all right, title and interest in the Land remain with Council during the Term, ownership of, and all right, title and interest in, the Facility, the Operation Plant, the Operation Equipment and any goods, materials, plant or equipment incorporated into the Facility were to pass to the Council at the expiry of the Term.

Bioelektra Australia evidently consulted with (and sought the input of) [REDACTED] in preparing its tender. As with other tenders submitted (and as is common for any project), each tender which is submitted assumes that the tenderer will subcontract and procure equipment and technology from third parties in order to be able to fulfil its contractual obligations. The risk of doing so was the tenderer's risk under the delivery model which Council went to market with.

Council has been provided with the following further information:

- The liquidator of Bioelektra Australia [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[Redacted]

- [Redacted]
- [Redacted]

[Redacted]

[Redacted]

[Redacted] Council is seeking further clarification in relation to this. If OLG requires a further update, please let Council know.

Bioelektra Australia is not a wholly-owned subsidiary of Bioelektra Group SA. It did not state in its tender that it was. [Redacted]

[Redacted]

[Redacted]

In response to your specific queries, Council responds as follows.

1. Details of the due diligence conducted by Council prior to the award of the Contract, including any financial and other associated assessments.

Council undertook a number of steps that one would expect of a procurement of this nature. The due diligence conducted by Council prior to the award of the Contract to Bioelektra Australia included:

- (a) [REDACTED] the procurement strategy available to Council under the *Local Government Act 1993* ('LG Act') for a proposed contract to construct, operate and transfer to Council a domestic waste processing facility. [REDACTED] it was open to Council to choose to either follow the tendering provision or the PPP provisions of the *Local Government Act* in respect of the proposed Contract.
- (b) Resolving on 28 February 2017 (MIN17.173C) to invite open tenders for the construction, operation and transfer to Council of a Waste Processing Facility.
- (c) Engaging a reputable law firm to assist with the drafting of the tender documentation, including the proposed contract which allocated the risks of the project in a manner which sought to best protect Council's interests. The proposed contract drafted by the law firm was included in the open tender and was the basis upon which tenderers were required to bid.
- (d) Preparing a Tender Evaluation Plan, Probity Plan and nominating a Tender Evaluation Team with representatives of Council staff in finance, waste and project management.
- (e) Undertaking reference checks from referees nominated by the Tenderers. In relation to Bioelektra, three written references were obtained [REDACTED] [REDACTED] whom Bioelektra Australia represented would provide the key technology for the project.
- (f) The Tender Evaluation Plan set non-price and price criteria. "Resources and financial risk" were evaluated as part of the process including credit checks. All tenderers were evaluated on these criteria. The financing for the project was the tenderer's risk under the contract model and as outlined above Council's position was to be secured by bank guarantees and a milestone payment regime included in the contract whereby Council was making a contribution towards the capital costs.
- (g) Attending site visits, including travel to Poland and Germany, to satisfy itself of the adequacy, quality and suitability of the proposed technology.
- (h) Entering into further contract negotiations to ensure Council's risk exposure was minimised and ensuring that there were contract conditions design to secure Council's commercial interests in the event of default by Bioelektra Australia. The relevant Contract provisions included:
 - i. The provision by the contractor of a \$2 million Delivery Phase Bank Guarantee (see clause 52.1);

- ii. Milestone payment regime (to a maximum payment by Council of \$10 million) that ensured that the majority of Council's financial contribution to the project was made at practical completion and operational readiness of the project.

Note that the position in relation to the Delivery Phase Bank Guarantee and milestone payments after the execution of the Contract designed to secure Council's position will be addressed in separate correspondence.

- (i) Obtaining its own principal arranged contract works and liability insurance for the construction phase of the Contract.
- (j) Obtaining an independent probity and governance audit of the tender process.
- (k) The preparation of a Tender Evaluation Report by the Tender Evaluation Team (which set out detailed analysis of each tender).

2. The procurement strategy and plans used to award the Contract, including whether it was an open market competitive process, select tender (if so, the basis for short listing tenders), direct engagement or any other process followed.

██ on 28 February 2017, Council resolved to 'invite open tenders for the construction, operation and transfer to Council of a Waste Processing Facility' (the Tender). The full resolution is at **Attachment 4**

Tenders were called on 19 August 2017. Tenders closed on 14 February 2018. Tenders were received from 3 tenderers.

On 24 June 2018, Council resolved to reject all tenders and entered into parallel negotiations with tenderers Bioelektra Australia and ██████████ Council's Procurement Plan was updated to incorporate the negotiation phase of the procurement (**Attachment 5**).

The Contract between Council and Bioelektra Australia was entered into on 23 December 2020. ██████████

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████████████████████

3. A copy of tender documents from the expression of interest and request for tender stage, through to the award of contract.

The Tender opened on TenderLink on 19 August 2017. The tender package that was uploaded to TenderLink is attached at **Attachment 7** and included:

- (a) Section A – Information for Tenderers
- (b) Section B – Conditions of Tendering
- (c) Section C – Draft Contract – Attachment 1 Lease
- (d) Section D – Specification

(e) Section E – Returnable Schedules.

Tender submissions received included submissions from the following:

(a) Bioelektra Australia Pty Ltd;

(b) [REDACTED] and

(c) [REDACTED].

[REDACTED]

4. Details around the visit of Shoalhaven Council to Bioelektra’s facility in Poland in 2018, including the names and positions of the delegation members, the purpose of the visit, why Bioelektra was selected for the visit and the cost and source of the funding for the visit.

Council resolved on 24 June 2018 (MIN18.480C):

3. Interrogate, scrutinise and validate the claims of the two preferred tenderers more closely.

6. Site visits to be carried out to facilities with relevant technologies including but not limited to Eastern Creek and Poland (including Germany if required), by at least 2 members of the tender evaluation panel and 2 Councillors (Clr Wells and Clr Pakes with an alternate being Clr White) and this be deemed as Council business.

A copy of the full resolution may be found at **Attachment 9**.

The delegation members included:

(a) Councillor John Wells;

(b) Councillor Mitchell Pakes;

(c) Director Assets and Works, [REDACTED];

(d) Unit Manager Waste Services, [REDACTED].

The purpose of the travel was site visits was to ‘*interrogate, scrutinise and validate the claims of the two preferred tenderers more closely*’. The delegates were tasked with inspecting the facilities operation and the technology proposed by the proponents Bioelektra Australia and [REDACTED].

Both Bioelektra Australia and [REDACTED] were selected for the site visits as the two preferred proponents.

On 25 July 2018, the delegates attended a site visit at [REDACTED] facility in Eastern Creek. From 6 August 2018 to 14 August 2018 the delegates travelled to Poland and Germany where they inspected Bioelektra Group SA facilities and a facility associated with [REDACTED]. The delegates also met personally with [REDACTED] CEO of Bioelektra Group SA and with one of the Bioelektra Australia referees [REDACTED].

Pursuant to s 217(1)(a) of the *Local Government (General) Regulation 2005* Council reported the details of the overseas visit in its 2018/2019 Annual Report (**Attachment 10**). The total expenses incurred by Council for the four delegates was \$22,353. This cost was funded by Council.

5. Details of correspondence and other engagements between Council, Bioelektra Group S.A (Poland) and Bioelektra Australia in the period between the visit in 2018 and the tendering, selection and awarding of the Contract to Bioelektra Australia.

The delegates returned from the site visits on 14 August 2018. The award of the Contract to Bioelektra Australia was made by resolution of 30 October 2018 (MIN18.888C).

[REDACTED]

Given the nature and volume of the requests for information and the complexity of the contractual arrangements, I would be pleased to meet with you along with our legal advisers to answer any further requests for information or clarification which OLG may require.

If you need further information about this matter, please contact [REDACTED], City Performance on 02) 4429 3268.

Yours faithfully

[REDACTED]

[REDACTED]

Chief Executive Officer