

09/06/2023

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

By email only: [REDACTED]@olg.nsw.gov.au

Attention: [REDACTED]

Dear [REDACTED]

Bioelektra Australia Pty Ltd

We refer to your letter of 16 May 2023 received on 17 May 2023.

In response to your queries, Council responds as follows.

1. Project Agreement between Council and Bioelektra Australia Pty Ltd (**Bioelektra**) executed on 23 December 2020 ('the Contract') (copy **enclosed**).
2. Status of the work that has been conducted at the resource recovery site:

The Project Agreement contemplates Bioelektra undertaking the 'Activities', which comprise both the 'Delivery Activities' and the 'Operation Activities'. The 'Delivery Activities' are all of the design, construction, supply, installation and commissioning of the Facility which is required during the 'Construction Phase'. The 'Operation Activities' follow thereafter and include the 'Services' to be carried out by Bioelektra (namely the Processing of Principal Delivered Material and Additional Material). At the time Bioelektra was placed in voluntary administration, it had not completed the construction of the Facility. That is, the Delivery Activities had commenced, but had not yet been completed and the Operation Activities had not commenced.

The following components of the Delivery Activities have been completed:

- (a) demolition of the existing buildings and structures on the Site including the existing animal shelter;
- (b) clearing and grading the Site to create a working platform for the new buildings, structures and hard landscaped areas.

Some design work has been completed, namely:

- (a) design of new entry/exit (sufficient for permanent use by heavy vehicles);
- (b) design of detention and sedimentation dams/basins;
- (c) design of car parking, office building and weighbridge for the Facility for use in connection with the Operation Activities;
- (d) design of installation and connection of an onsite sewage treatment system.

The construction work has not yet commenced.

The Development Consent has been obtained incorporating design and procurement work for the Facility Building Structure including the Operation Plant and the Operation Equipment.

3. The amount of funds to date that has been provided by Council to Bioelektra:

Under the Contract, Council was to provide a financial contribution to design and construction of the Facility by reference to a number of defined Payment Milestones (which are set out in Items 30, 31 and 32 of Schedule 1 of the Contract).

Prior to Bioelektra being placed in voluntary administration Council has paid:

- (a) Payment Milestone 1 -- \$1,000,000.
- (b) Payment Milestone 2 -- \$1,000,000.

All sums are excluding GST.

Council is presently undertaking further internal investigation in relation to the payment of these Milestone Payments as against the provisions of the Contract. If there is further information which is relevant to the past payment of the Payment Milestones after this investigation is completed, a supplementary response will be issued.

Under clause 52.1.1(a) of the Contract, Bioelektra Australia was required to provide an unconditional undertaking for the amount of \$2,000,000 (defined in the Contract as the Delivery Phase Bank Guarantee) within 5 Business Days of all necessary Authorisations (necessary for the commencement of any part of the Activities on Site). As the Activities were commenced on Site, the Delivery Phase Bank Guarantee should have been provided to Council. The Delivery Phase Bank Guarantee has not been provided to Council. The circumstances in relation to this are also being investigated and will be the subject of a supplementary response once the investigation is completed.

4. Any financial obligations that Council has in connection to the project

There are 7 Payment Milestones. Council is not obliged to make any further payment of any of the presently incomplete Payment Milestones unless Bioelektra completes those Milestones. Under the Contract, Council's total payment obligation in respect of Payment Milestones is \$10,000,000 subject to the Milestones being completed by

Bioelektra. If Bioelektra does not complete any further Milestones, Council will have no obligation to pay any further amounts.

Construction has not yet commenced. If Bioelektra is wound up, Council will have no further financial obligation in connection to the project other than costs that may be incurred in relation to making and keeping the site safe and protecting the environment, including insurance costs. If the Project is completed and enters into the Operation Phase, Council would be required to pay a Fee for Services rendered by Bioelektra as detailed in the Contract.

5. What are the sources for funding and the impact, if any, on those funding arrangements? Is there any grant funding attached to the project?

There is no grant funding to Council that is attached to the project.

Funding for the total project was planned to be sourced from Council's waste reserve fund and loan funding. [REDACTED]

Payments to Bioelektra to date, that is the \$2,000,000 for milestones 1 and 2, has been paid partly from Council's Waste Reserve fund and loan funding.

The impacts on funding arrangements is minimal. Council has an obligation to repay the loan with interest.

6. What alternate plans, if any, does Council have to continue the project?

Bioelektra is currently in voluntary administration. The administration process is taking place with the second creditor's meeting due to be held no later than 15 June.

If the creditors and administrator resolve not to wind up Bioelektra, it would be Council's intention to continue with the project with Bioelektra, however Council will only consider continuing the project based on evidence that the continuing entity will, among other things:

- (a) have a secure financing arrangement,
- (b) have an agreement in place that the Bioelektra Group SA autoclave and process technology will be delivered in accordance with the requirements of the Development Consent (Stage 2 Activities) obtained by Bioelektra, and
- (c) provide the Delivery Phase Bank Guarantee.

If Bioelektra is wound up, Council will need to consider all alternative options as it will still have a need for a facility to be built and operated to substantially divert waste from landfill. It will endeavour to undertake a new procurement process to deliver such a facility. To that end, Council is making itself aware of and acquainted with other entities utilising similar technology around the world.

7. What impact this may have on Council's ongoing provision of waste services to the community?

There will be no immediate impacts to Council's provision of waste services to the community.

The life of the landfill at the current West Nowra recycling and waste facility, including the approved state significant development extension, without the implementation of the project, is approximately 12 years (ie. until 2035).

For each year that the project is not complete, the life of the landfill is being shortened by about 4 years based on the 92% guaranteed diversion of Principal Delivered Material associated with the project. For example, if the project were to reach successful operation status by early 2026, the life of the landfill could extend to 2060.

8. A general summary of the exposure that Council believes it has with Bioelektra

The Contract was structured so that Bioelektra had the responsibility to fund the design, construction and commissioning of the Facility (with a contribution from Council towards those costs referable to Milestone Payments) and Bioelektra being entitled to payment of a Fee for Services during the Operations Phase. Other than the sums already paid to Bioelektra, Council has no other exposure to Bioelektra,

Council had no direct contractual relationship with Bioelektra's contractors and therefore has no liability for any outstanding contractor payments. These are liabilities of Bioelektra, not Council.

9. Are there any key risks identified by Council following this development and what mitigation measures are being implemented to address them?

A delay in delivering a resource recovery facility to process the city's red-lid bin waste, and potentially that of its neighbouring councils, as a solution for increasing landfill life expectancy and for potentially allowing our region to meet state resource recovery targets, will put added pressure on Council to deliver.

A failure to implement a solution incorporating the Polish, Bioelektra Group SA technology, may force Council to reconsider its stance on the NSW government mandate for implementation of the separate collection and processing of household food organics and garden organics (FOGO) by 2030, while also considering how it can extend landfill life by reducing red-lid bin waste going to landfill.

The Resource Recovery facility allowed Council to accept FOGO into our red-lid bins as this material would now be processed and diverted from landfill. Thus, FOGO could be collected and processed without the need to provide an additional bin service.

FOGO is a direction Council has consistently opposed, mainly in the quest for achieve higher landfill diversion rates and lower overall costs to ratepayers. FOGO is also considered by Council to be a risk due to the limited value in product for downstream markets and contamination risks as experienced by other councils, which could, in effect, result in a similar ban to the application to land as that imposed on mixed waste organic outputs from alternative waste treatment plants in 2018. Having a prior contract in place helps Council qualify for an exemption to the FOGO mandate. This

may not be the case if the contract is terminated, despite having state planning approval.

There is a risk that a whole new planning approval process may be required if the contract is terminated. It should still be possible to only undertake the new approval process for Stage 2 if the technology is not too dissimilar and is consistent with the Overarching Development Consent. As previously mentioned, Council is making itself aware of and acquainted with other entities utilising similar technology around the world.

10. Any other information that could assist OLG in its assessment.

Council still has a healthy Waste Reserve [REDACTED]
[REDACTED] The potential impact on Council's finances will not be an immediate one. The potential future impact will draw nearer as the delay in implementing a landfill diversion solution extends and is associated with the costs required to find and develop a suitable location for Council's next landfill.

Council is being legally represented on the legal and contractual issues relating to the Project and the voluntary administration process by Maddocks Lawyers.

Finally, I would like to confirm that I am aware of my obligations under section 11 of the *Independent Commission Against Corruption Act 1988 (ICAC Act)*, I am currently considering whether in these circumstances I have an obligation to make such a report and will, of course, comply with that obligation.

If you need further information about this matter, please contact [REDACTED] City Performance on (02) 4429 3268. Please quote Council's reference 74054E (D23/233156).

Yours faithfully

[REDACTED]

[REDACTED]

Chief Executive Officer