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COUNCIL RESOLUTION ON 23 SEPTEMBER 2021**



CONFIDENTIAL REPORT

14.1 RESOURCE RECOVERY FACILITY, RED HILL – TENDER PROCESS

REFERENCE: COMMITTEES-16044

PURPOSE OF REPORT

To advise Council of the options available for the tender process for the Resource Recovery Facility (RRF).

The information contained in this report is strictly confidential and legally privileged. It contains reference to legal advice obtained by the EMRC. The EMRC retains and maintains its claim of legal professional privilege over the report and the information contained in it. Use can only be made of the report for the purposes of the deliberations concerning the tender process for the RRF.

KEY ISSUES AND RECOMMENDATION(S)

- With the conclusion of the environmental approval process for the proposed RRF, the next significant step in the project is the call for tenders.
- Options available include inviting the five remaining acceptable tenderers to submit proposals under the existing tender process or recommencing the tender process to allow other parties to bid.
- The project probity advisor has recommended terminating the current tender process.
- Legal opinion has been sought on the risks involved in issuing a new request for tender (RFT) compared to continuing with the current Expression of Interest (EOI)/tender process.

Recommendation(s)

That:

1. The current Expression of Interest/tender process for the EMRC Resource Recovery Facility (EOI 2009-10) be cancelled and acceptable tenderers advised accordingly.
2. Council continue with the Resource Recovery Project implementation.
3. The report remains confidential and is certified by the Chairman and CEO.

SOURCE OF REPORT

Director Waste Services



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BACKGROUND

In May 2009, the EMRC issued an EOI for the "Establishment of a Resource Recovery Facility for the Eastern Metropolitan Regional Council". The results of the EOI were reported to Council in August 2009 (Ref: Committees-9574) and it was resolved that:

- "1. THE FOLLOWING RESPONDENTS TO THE EXPRESSION OF INTEREST ARE LISTED AS ACCEPTABLE TENDERERS:
 - A. ENERGOS AS;*
 - B. EVERGREEN ENERGY CORPORATION PTY LTD;*
 - C. GRD MINPROC LIMITED;*
 - D. MOLTONI ENERGY PTY LTD;*
 - E. SITA ENVIRONMENTAL SOLUTIONS;*
 - F. TRANSPACIFIC CLEANAWAY LIMITED; AND*
 - G. WSN ENVIRONMENTAL SOLUTIONS.**
- 2. THE FOLLOWING RESPONDENTS TO THE EXPRESSION OF INTEREST ARE NOT LISTED AS ACCEPTABLE TENDERERS:
 - A. ANAECO LIMITED; AND*
 - B. THIESS SERVICES PTY LTD.**
- 3. THE RESPONDENTS TO EXPRESSION OF INTEREST 2009-10 BE ADVISED OF THE OUTCOME OF THE ASSESSMENT.*
- 4. THE ATTACHMENT REMAINS CONFIDENTIAL AND BE CERTIFIED BY THE ACTING CHIEF EXECUTIVE OFFICER AND THE EMRC CHAIRMAN.*
- 5. THE TENDER EVALUATION COMMITTEE BE ACKNOWLEDGED FOR THE SIGNIFICANT EFFORT PUT INTO EVALUATING THE EOI SUBMISSIONS."*

Subsequent to this, Sita Environmental Solutions and WSN Environmental Solutions withdrew as acceptable tenderers.

REPORT

It has been four years since the conclusion of the EOI process, during which time the acceptable tenderer list has reduced from seven to five, as referred to above. Other changes that have occurred in this period are:

- Addition of the Design, Build, Operate and Maintain (DBOM) contract ownership model to the preferred options for the Resource Recovery Facility;
 - As a result of the environmental approval process, the technology options have been reduced to gasification and anaerobic digestion;
 - The local government reform process commenced;
 - The City of Swan resolved not to provide a guarantee for their share of any borrowings for the RRF until the local government reform process was resolved; and
 - The Robson report on the local government reform process raised uncertainty about the future role of regional councils and their role in waste management.
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Having almost completed the environmental approval process for the RRF at Red Hill Waste Management Facility, the next significant stage in the implementation of the RRF is the request for tender (RFT) process.

There are two options available to the EMRC, namely:

1. Proceed to the calling of a restricted RFT from the remaining acceptable tenderers from the EOI process; or
2. Terminate the current EOI process and commence a new RFT process.

If the EMRC were to proceed with option 1, there are five acceptable tenderers who would be invited to submit a tender:

1. AMEC Limited (formerly GRD Minproc Limited) – offering their own UR3R anaerobic digestion technology, two reference facilities in Lancashire, UK, one at Eastern Creek, NSW.
2. Energos AS – gasification technology, eight reference plants in Europe.
3. Evergreen Energy Corporation Pty Ltd – Kompogas anaerobic digestion technology, 67 reference plants world-wide.
4. Phoenix Energy Australia Pty Ltd (formerly Moltoni Energy Pty Ltd) – offered Martin Grate combustion technology at EOI stage which has subsequently been eliminated as a technology; and
5. Transpacific Cleanaway Limited (TPI) – Bekon anaerobic digestion technology, 24 reference plants in Germany, France and Switzerland.

There are relationship issues between Evergreen Energy Corporation and their technology provider Kompogas such that Kompogas has not granted Evergreen a licence for the technology in Australia.

Evergreen, on its own, have never delivered a project of this nature.

There are also potential relationship issues between TPI and their technology provider Bekon. Informal advice from Bekon is that they may not proceed with TPI, which means that TPI does not have a technology provider.

Finally Phoenix Energy are in the process of establishing a private waste to energy (combustion) plant at Kwinana if they can secure environmental approval and waste contracts. Phoenix have advised that they are a project delivery company and can deliver either of the two acceptable technology options. Phoenix have not delivered projects of this nature but may be able to secure relationships with technology suppliers for the Kwinana plant, although these are currently unknown.

Under the current acceptable tenderer list, it is considered that there is a risk that a request for tenders may only attract a bid from Energos (gasification), AMEC (anaerobic digestion technology) and Phoenix Energy (anaerobic digestion or gasification). The Phoenix proposal would be using a technology that has not been considered in the evaluation of the submissions in response to the EOI.

Pursuing option 1 would exclude new technology options including the New Energy Corporation gasification technology recently approved for their Port Hedland facility and other AD and gasification options, although this is viewed as a secondary issue.



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The EMRC's probity advisor has raised concerns about the integrity of the current tender process for the following reasons:

1. Changes have occurred within the industry and in technology, or the rights to those technologies, that suggest that circumstances which existed some two to three years ago have changed and that to remain committed to those decisions could deny Council the opportunity to source enhanced funding and delivery proposals that would be excluded from the current process.
2. Decisions that were made some three years ago in relation to short listing would almost certainly not be the same were they to be made today, in view of the changes that have taken place over that period of time.
3. The issue of council boundaries remains unresolved and although a state election has now been decided and some clarity relating to this issue may start to emerge soon, the situation is not clear and does not provide justification for continuing with the current process.
4. It would be inappropriate to go back to the current short-listed proponents with an RFT and request them to participate in a process where the outcome could not be guaranteed.

Subsequent to this advice, there is also the uncertainty related to the future of regional councils and waste management in the metropolitan area.

The probity advisor recommends terminating the current tender process and that steps be taken to go back to the market again calling for public tenders.

The project team has given consideration to the probity advisor's recommendations. An implication arising from this option is the obligation that the EMRC has to the current acceptable tenderers. In relation to the provision of technical information about their technologies in the development of the environmental impact assessment report, the acceptable tenderers were not equally willing to assist in providing this information.

It is considered that there is a low risk that one of the acceptable tenderers may challenge the procurement process if it was terminated in its current form and a new tender process is commenced that new bidders may respond to. Council could consider making a payment to the acceptable tenderers as final settlement of the EMRC's obligations under the current tender process and in consideration of the effort that was provided to assist in obtaining the environmental approval. The project team is of the view that the risk of a challenge is so low, that a payment is unwarranted. Despite the length of time since the calling of EOIs, the commitment required of the acceptable tenderers has not been significant.

EMRC also sought legal opinion from Herbert Smith Freehills (HSF) on the RFT options and the risks involved in issuing a new RFT. HSF advised as follows:

Option 1 - given that the EMRC would be seeking tenders from entities who would not have been shortlisted on the basis of the information currently before Council if the evaluation was to occur today and the uncertainty as to whether a tenderer would be selected as part of the existing tender process, it may be unfair and unreasonable to put the acceptable tenderers to the expense of preparing a tender as a continuation of the current process. However, the risk of the tender process being successfully challenged is minimal.

Option 2 – the risk of respondents successfully challenging a new RFT process is low, but needs to be considered given that there is a possibility that one of the acceptable tenderers may object to losing its preferred position as a shortlisted tenderer. There is a risk that a court will find that the new RFT process was issued to circumvent the requirements of the tender regulations so as to open up the tender process to the market generally. If this is the case the EMRC will be obliged to only accept tenders from the respondents who made EOI submissions and been designated as acceptable tenderers.



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The suggested mitigation strategies from HSF for option 2 are about taking steps to position the new RFT process as separate to and different from the existing EOI, as well as clearly documenting the reasons that Council pursues option 2, if that is the selected option. These include:

1. A delay in commencing the tender process would significantly strengthen EMRC's argument that a new RFT is distinct from the current EOI, particularly if the intervening time is used to address the uncertainties identified by the probity auditor.
2. Differences in the substantive content of the new RFT from the current EOI such as acceptance of new contract delivery models, amendments to the project specification as a result of the environmental approval and references to new or different technologies.

Conclusions

It will be another six to eight months before the Strategic Waste Infrastructure Planning Working Group has finalised its report on the future of waste management in the metropolitan area and the role for Regional Councils and two years before the local government amalgamations are finalised.

In relation to the tender process for the RRF, the concern is the length of time since the calling of EOI's and the subsequent loss of acceptable tenderers and relationship issues in the remaining acceptable tenderers.

On this basis and noting the advice of the probity advisor and legal advice, it is recommended to cancel the current EOI/tender process. It is also recommended that the EMRC continue with the project implementation and when there is certainty about the ability of the member Councils to provide guarantees for potential borrowings to start the tender process again.

STRATEGIC/POLICY IMPLICATIONS

Key Result Area 1 – Environmental Sustainability

- 1.3 To provide resource recovery and recycling solutions in partnership with member Councils.

FINANCIAL IMPLICATIONS

All costs covered within this report are accounted for in the annual budget approved by Council.

SUSTAINABILITY IMPLICATIONS

The Resource Recovery Facility and/or Resource Recovery Park will contribute toward minimising the environmental impact of waste by facilitating the sustainable use and development of resources.

MEMBER COUNCIL IMPLICATIONS

Member Council	Implication Details
Town of Bassendean	} Nil
City of Bayswater	
City of Belmont	
Shire of Kalamunda	
Shire of Mundaring	
City of Swan	



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CONFIDENTIAL ATTACHMENT(S)

Nil

VOTING REQUIREMENT

Simple Majority

RECOMMENDATION(S)

That:

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2. Council continue with the Resource Recovery Project implementation.
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Discussion ensued

The Director Waste Services provided a brief overview of the report.

Cr Färdig enquired the value of the remaining consultant costs and who would be doing this work. The Director Waste Services advised that Cardno would continue as per their contract and most of the tasks had been completed, except for the tender process.

Cr Färdig requested that a final figure of the project costs would be provided to all members of the Resource Recovery Committee.

Post Meeting Note

The current value of Cardno's remaining contract tasks related to the tender process is approximately \$270,000 (ex. GST).

The contract administration task for the RRF is estimated at \$1.06m and is yet to be awarded.



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RRC RECOMMENDATION(S)

MOVED CR FÄRDIG

SECONDED CR LINDSEY

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CARRIED UNANIMOUSLY

RRC Chairman

Chief Executive Officer
