

# Council Meeting

to be held remotely  
and live streamed  
via Council's website

Tuesday  
15 February 2022  
at 6:30pm



# Late Agenda



**Late Items**

10. Reports by the Organisation

- 10.13 Pre-tender commitment to procurement of South East Metropolitan Advanced Waste Processing (SEMAWP)..... 3

## 10. Reports by the Organisation

### 10.13 PRE-TENDER COMMITMENT TO PROCUREMENT OF SOUTH EAST METROPOLITAN ADVANCED WASTE PROCESSING (SEMAWP)

Environment, Recreation and Infrastructure - Climate, Waste and Integrated Transport  
File No: PSF/22/26 – Doc No: DOC/22/17748

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#### Executive summary

##### **Purpose and background**

The purpose of this report is to seek Council resolution to commit to participation in the procurement, and subsequent contract, for alternative waste processing services subject to a range of parameters.

It is recommended that Bayside City Council commits to enter a Contract with a successful tenderer if the tender conforms to all of the predetermined conditions as outlined in this report.

##### **Key issues**

Council's adopted Recycling and Waste Management Strategy 2018–27 includes an objective of evaluating and adopting alternative waste treatment technologies to divert residual domestic garbage from landfill. The key drivers for this objective include:

- increasing cost of landfilling: the Victorian State government's approach of approving less airspace for new landfills, charging a levy on all disposed material and ever-increasing landfill regulations have increased the cost of landfilling, a cost which is borne directly by the community through the municipal waste charge
- inefficient use of resources: waste materials that could be recovered for re-use, recycling or conversion to energy
- potential environmental impacts: the decomposition of organic matter in landfills produces methane, a potent greenhouse gas. Landfills have also been known to contaminate land, groundwater and freshwater streams when liners and caps fail. Ongoing monitoring and management of closed landfills at significant cost is required to manage residual risks.

Council currently transports and disposes of its residual waste to Cleanaway's Melbourne Regional Landfill in Ravenhall through a collaborative landfill disposal contract administered by Metropolitan Waste and Resource Recovery Group.

To manage the risks associated with continuing to dispose of residual waste to landfill, Council partnered with 15 other South East Metropolitan Councils (Councils) and the Metropolitan Waste and Resource Recovery Group (MWRRG) to undertake procurement for alternative waste processing services.

As part of the phased procurement approach, MWRRG administered an extensive Expression of Interest (EOI) process to identify suitable technology providers that could adequately respond. 30 respondents submitted to the EOI and were assessed against the following criteria:

1. Security of service provision for residual waste
2. Environmental performance and sustainability
3. Value for money
4. Compliance with all applicable laws and regulations
5. Location and logistics
6. Onward movement of recovered resources to market
7. Flexibility of service to changes over time
8. Contingency

Three respondents received top scores and have been progressed to the next phase of procurement. These tenderers have advised that they are unwilling to continue to prepare and submit a tender unless a number of matters are resolved, including:

- Councils make a commitment to participate in the ultimate Contract awarded by the Company if certain conditions are met.
- Minimum tonnage to be delivered under the Contract is guaranteed
- The Company is guaranteed by councils.
- Reimbursement of Contractor bid costs is provided if certain conditions are met.

In 2021, Bayside City Council became a shareholder of the Special Purpose Vehicle (SPV), South East Melbourne Advanced Waste Project Pty Ltd for the purposes of formalising collaboration with councils and developing a joint entity to procure and subsequently enter contracts for service.

As part of the Victorian Government's circular economy policy, Recycling Victoria, a waste to energy framework places a one million tonne cap on the amount of waste that can be heat treated to make energy and outlines how the cap is to be implemented. Many advanced waste processing technologies include waste to energy which involves turning waste material into heat or electricity. The Project specification is not specific on the technology and may include waste to energy technology which would be subject to the conditions of the Cap.

#### Council commitment

Currently the Project has the potential for Councils to exit at any point prior to Contract award. This creates a number of issues for the viability of the tender process, including:

- (a) the potential need for tenderers to redesign proposed facilities following tender submissions because of one or more Councils deciding to no longer participate in the Project (which would result in material delays to the Project, increased costs to respondents and potentially increase the gate fee payable by remaining councils)
- (b) the ability of the SPV to determine the minimum tonnage guarantee for the purposes of the tender process given these volumes are dependent upon councils participating in the Project
- (c) the ability for tenderers to engage with the broader market in the absence of a firm commitment from participating councils
- (d) the ability of MWRRG to engage with DELWP regarding allocation under the pending waste to energy cap, given this engagement requires a clear understanding of the waste that needs to be accommodated by the Project.

The SPV Board has recommended that participating Councils execute a commitment letter which would provide that each council would not exercise its right to exit from the SEMAWP Project subject to the tender responses from the three respondents falling within certain fundamental parameters.

Councils have the option to not sign the commitment letter and remain a shareholder to the SPV. However, those councils which do not sign the commitment letter would:

- (a) not be ensured that their waste would be accommodated by the AWP facility (either at the commencement or over the term of the Project) and therefore may not end up being a participant in the Project
- (b) in instances where waste is accommodated by the AWP facility, may result in a higher gate fee compared to those councils that do sign the commitment letter.

The SPV is governed by the terms of its Constitution. The Constitution is subject to the terms of the Shareholders' Agreement entered into by each participating council as a shareholder in the Company.

The Constitution and the Shareholders' Agreement do not place any limits on a shareholder determining to no longer be involved in the Project and exercising its rights for a share buy back in accordance with the terms of the Shareholders' Agreement. This approach has been deliberately adopted to ensure participating Councils had flexibility regarding the tender process and ultimate award of any Contract in respect of the Project.

This position has created theoretical risks for the SPV, tenderers, and the broader tender process.

All tenderers have raised concerns regarding the potential for Councils to exit the Project prior to Contract award. The uncertain nature of Council participation means that sizing the facility (which is a fundamental aspect of the tender process from a design and cost perspective), will be subject to change should one or more councils subsequently decide to not participate in the final contract.

Consequently, any facility sized and designed by the tenderers as part of the tender process is potentially at risk of needing to be redesigned should one or more Councils decide to no longer participate in the Project prior to Contract award. Any redesign of the facility would have significant cost and time implications for the respondents as well as the remaining participating councils. This could include delaying contract award (and the operational commencement date) by a minimum of 12 months as well as materially increasing gate fees for the remaining participating councils.

The substantial cost and timing impacts of such redesign raises material issues of the viability of the tender process with a significant risk of the Project not proceeding should this risk materialise. Tenderers have noted that this risk has created difficulties in meaningfully engaging with the market (including subcontractors and financiers).

Without firm commitments from participating Councils, it is not possible to set the level of the minimum tonnage commitment by the SPV (discussed further below).

Finally, it is necessary for MWRRG to have further engagement with DELWP during the first half of 2022 to ensure an appropriate allocation is provided to the Project in relation to the pending waste to energy cap (which is scheduled to be implemented by 1 July 2022). The engagement with DELWP will require a clear understanding of the waste that needs to be accommodated by the Project, which is not possible without understanding the level of commitment from participating councils.

The only viable option which adequately addresses the issues created is for the participating councils to execute a commitment letter, under which the relevant Councils would undertake to not exercise its right to exit from the Project should the tender response be within certain fundamental parameters. It is proposed that these parameters are:

- the tender is conforming and complies with the requirements of the Specification, or such other form of specification approved by the SPV
- the project being located at the agreed Site
- has the terms of any Waste Supply Deed in the form of the draft waste supply deed contained in the Request for Tender, or such other form of waste supply deed approved by the SPV
- the gate fee is within an agreed limit for the South East Metropolitan Advanced Waste Processing Project.

Councils which commit to the Project would be classified as 'Lead Councils'.

It is open to a council not to commit but to remain a shareholder to the SPV. These councils would be classified as 'Optional Councils'.

The tenderers would be requested to size and design a facility as part of their tender response on the basis that:

- the Lead Councils will be a party to the Project provided the tender proposal is compliant with the agreed parameters
- the Optional Councils are uncertain regarding their participation and therefore it would be at the discretion of tenderers as to whether they are accommodated in any sizing and design of the facility.

This approach will mean that Lead Councils will definitively be accommodated by respondents in any tender response. Further, the SPV would set any minimum tonnage guarantee, at the aggregate minimum commitment of the Lead Councils.

By contrast, in the case of Optional Councils:

- There is a real possibility that Optional Councils will not be accommodated in the sizing of the facility (as tenderers are likely to only include the Optional Councils to the extent it has an immaterial impact on redesign time and cost should these councils subsequently decide not to participate).
- Even if the sizing of the facility can accommodate the waste of Optional Councils at the commencement of the Project, this accommodation is unlikely to extend to the 25-year terms as Lead Council's waste, which is expected to increase over the term, will be given priority over Optional Councils.
- Where Optional Councils are accommodated by the facility, there is a real possibility that this would be at a different (and less favourable) gate fee to the Lead Councils.

If a majority of Councils choose to not commit to the Project it is unlikely to proceed. The tenderers have all provided advice that they are not prepared to proceed based on no Council commitment. The tenderers have advised that unless a known number of Councils have committed to the Contract, finance to fund the facility will not be available.

#### Minimum Tonnage Guarantee

Minimum tonnage guarantees are standard operating practice when managing traditional waste to landfill contracts. These allows facility operators to appropriately plan and resource for those anticipated tonnes and ensure the facility has adequate capacity. Without these the facility operators cannot ensure they can accommodate tonnages as needed and ensure their business remains viable. Currently as part of the current MWRRG landfill contract Council is required to forecast and advise MWRRG, so it can provide a collective guarantee of the minimum tonnages the facility is expected to receive for the year ahead.

A conservative tonnage commitment is provided to ensure Council can comfortably meet the minimum guarantee.

The SPV has endorsed the principle to provide a guarantee regarding the minimum tonnage to be supplied under a Waste Supply Deed.

The SPV has recommended that, following finalisation of each participating Council's contribution to the minimum tonnage guarantee, the Councils will endorse the proposed pass-through arrangements for any liability incurred by the SPV to the relevant Councils under the minimum tonnage guarantee regime.

This decision was based on numerous factors, including:

- the anticipated impact the minimum tonnage guarantee would have on minimising gate fees payable under the Waste Supply Deed
- the increased assistance the minimum tonnage guarantee would have on obtaining financing for the Project for tenderers
- that the successful Contractor will be required to prioritise waste from the SPV over any other sources of waste.

MWRRG has engaged with each participating Council to understand the levels of waste that each individual Council believes it would be comfortable with setting as that Council's contribution to a collective minimum tonnage guarantee. It is proposed that the minimum tonnage guarantee provided by the SPV to the tenderers would be set at the aggregate of each Council's proposed contribution to the minimum tonnage guarantee. This minimum tonnage guarantee would be assessed annually under the Waste Supply Deed between the SPV and the Contractor, similarly to the current practice under the existing MWRRG landfill contract.

It is proposed that, where the Company does incur liability under the minimum tonnage guarantee, then this liability would be passed onto a Council proportionately to the extent that Council failed to achieve its own contribution. A failure by a council to achieve its own contribution to the minimum tonnage guarantee would not automatically trigger liability for that Council, as this shortfall may be covered by waste produced by other participating councils or alternative waste streams secured by the Contractor. Rather, an obligation to contribute proportionately to a liability of the SPV under the minimum tonnage guarantee would only be triggered where the aggregate waste provided by the SPV did not achieve the requisite aggregated minimum tonnage guarantee.

If a minimum tonnage guarantee is not provided, the Project is unlikely to proceed. The tenderers have all provided advice that they are not prepared to proceed without a minimum tonnage commitment. The tenderers have advised that unless a minimum processing tonnage is provided under the contract then finance to fund the facility will not be available.

#### Council Security

The proposed contracting structure between the successful respondent and the SPV creates certain theoretical risks, including the ability of participating Councils to not fund the SPV or to wind up the SPV, to avoid liability under the Waste Supply Deed.

The SPV has recommended that participating Councils endorse the provision of a financial guarantee, under which the councils guarantee that the SPV will remain solvent and will not be wound up during the term of the Contract.

As currently structured, the participating Councils would not have any direct contractual agreement with the Contractor, rather the Contractor's contractual counterparty would be the SPV. This approach creates challenges for the tenderers and their financiers. In particular,

the SPV will have certain obligations and liabilities to the Contractor (for example, gate fee payments). The SPV is not an entity of substance (that is, it does not have a financial standing in its own right). Theoretically, the Councils could decide to not fund the SPV (let the Company become insolvent) or decide to wind up the SPV, so as avoid liability or even to avoid ongoing contractual obligations under the Waste Supply Deed.

To overcome this theoretical risk the proponents have sought some form of security from the participating Councils. This security could take various forms, including:

- a bank guarantee in favour of the Contractor from the SPV (which would need to be funded by the councils)
- a guarantee in favour of the Contractor, under which each Council guaranteed the performance of its obligations under the Waste Supply Deed; or
- a financial guarantee, under which the councils guarantee to the Contractor that the SPV will remain solvent and not be wound up during the term of the Contract (which would be very similar in effect to a general guarantee referred to above but is limited in its operation to ensuring that the SPV remains capable of paying its debts as and when they become due and payable).

#### Bid Reimbursement Costs

The participating Councils' Chief Executive Officers have considered, and the SPV have determined, that partial bid reimbursement costs should be payable for unsuccessful tenderers who submit a compliant bid. In addition, the SPV has recommended that councils endorse covering bid reimbursement costs in circumstances where the Councils cancel the tender for the Project.

It is recommended that partial bid reimbursement costs would be payable to unsuccessful tenderers who submit a compliant tender to recognise their level of engagement, the time and cost required to develop tenders, the more meaningful engagement that will be received from the market and as this is universal market/industry practice for projects of this scope and scale.

It is proposed that this partial bid reimbursement will be:

- payable to each unsuccessful respondent up to 50% of the external costs incurred in preparing the tender response
- subject to reimbursable costs being verifiable and reasonable and a respondent submitting a conforming bid which is ultimately unsuccessful (requirements for a conforming bid may include satisfying all or some of the agreed parameters set out in the council commitment letter outlined above).

This partial bid cost reimbursement will be payable by the successful Contractor and embedded in the gate fees payable under the Waste Supply Deed. These amounts will be payable over the life of the Waste Supply Deed and not paid by Councils prior to contract close.

Tenderers have raised concerns that market participants have remained less willing to engage on the Project if bid reimbursement is not offered and given the existing Project risks that could materialise which are outside of their control.

Bid reimbursement for unsuccessful tenderers who submit compliant tender responses as well as reimbursement for cancelled tenders is common practice for infrastructure projects of this nature conducted by the Victorian State Government.

Most councils are in favour of applying partial bid reimbursement arrangement to cover circumstances where the Project tender is cancelled by the councils.

Having the partial bid reimbursement arrangement to cover circumstances where the Project tender is cancelled by the councils would mean that these costs would be a cost covered by councils. This cost could be up to \$430,000.

It is expected that the risk of cancellation of the Project tender is significantly reduced given the lack of an alternative solution for councils and provided the councils commit to the Project as outlined above.

## Recommendation

That Council:

1. authorises the Chief Executive Officer to execute and send a commitment letter to South East Metropolitan Advanced Waste Processing Pty Ltd (ACN 654 660 438) confirming that Council will not exercise any right to request a buy-back of its shares under the Shareholders Agreement for the duration of the contract and would not exercise its right to exit from the SEMAWP Project subject to the tender responses falling within the following fundamental parameters:
  - is a conforming Tender and complies with the requirements of the Specification, or such other form of specification approved by the SPV
  - the project being located at the agreed Site
  - has the terms of any Waste Supply Deed in the form of the draft waste supply deed contained in the Request for Tender, or such other form of waste supply deed approved by the SPV
  - the gate fee is within an agreed limit for the South East Metropolitan Advanced Waste Processing Project
2. endorses the pass-through arrangements for any liability incurred by the SPV to Council under the minimum tonnage guarantee regime on the basis that:
  - Council will only be liable to provide waste to the minimum tonnage as agreed through the Working Group
  - the minimum tonnage guarantee from the SPV to the AWP provider would be assessed annually under the Waste Supply Deed between the SPV and the AWP Provider
  - any liability of the SPV incurred under the minimum tonnage guarantee (which could not be covered by waste produced by other participating councils or alternative waste streams secured by the AWP Provider) would be passed through to Council if the minimum tonnage commitment was not achieved
3. endorses the provision of a financial guarantee, under which the councils guarantee that South East Metropolitan Advanced Waste Processing Pty Ltd will remain solvent and will not be wound up during the term of the Contract
4. endorses the partial bid reimbursement arrangement for unsuccessful tenderers who submit compliant tender responses and to cover circumstances where the SEMAWP tender is cancelled by the SPV or councils

5. authorises the Chief Executive Officer to take any further actions necessary to facilitate Council's participation in the South East Metropolitan Advanced Waste Processing Project.

## **Support Attachments**

1. Attachment 1 – Draft Commitment Letter (separately enclosed) (confidential)

## **Considerations and implications of recommendation**

### **Liveable community**

#### **Social**

Residential waste management services help residents to keep their property safe and hygienic through regular removal of waste. Greater efficiencies and cost savings generated by increased resource recovery from the municipal waste stream can be invested into other services for the community.

#### **Natural Environment**

Appropriate recovery of resources and disposal of waste assists to keep the natural environment, including our beaches and waterways, free of litter and waste. The Environmental Sustainability Framework sets waste diversion targets to 2025.

#### **Climate Emergency**

Theme 7 of the Climate Emergency Action Plan is: *'Transition to a Circular Economy to avoid waste: Drive the move away from the 'take, make, dispose' economy, towards one where all materials are treated as precious resources, with little thrown away'*.

The commissioning of an Alternative Waste Processing facility will transform waste formerly sent to landfill into a useful local energy supply. In doing so, this will reduce the greenhouse gas emissions from waste disposal and transport, particularly methane emissions which are a potent greenhouse gas.

The Business Case for the project prepared by the Metropolitan Waste Management and Resource Recovery Group (a State Government agency) indicated that the this project would reduce greenhouse gas emissions of around 3 million tonnes compared with the continuation of landfill.

#### **Built Environment**

Appropriate waste management services contribute to the amenity of urban streetscapes by ensuring they remain free of waste, safe and tidy for the community.

The built environment impacts of a new AWP facility will be required to address the relevant planning scheme requirements of the municipality where it is sited.

#### **Customer Service and Community Engagement**

The disposal of garbage as part of Council's regular kerbside waste collection service to the community is a core service and any disruption would be undesirable.

MWRRG is currently finalising the development of a Community engagement framework to guide Council on a recommended approach to deliver meaningful and successful community

and stakeholder engagement programs that build community trust, acceptance, and a social licence to operate for the SEMAWP procurement.

At their meeting on 27 October 2021, participating council CEOs agreed that the SPV should engage an appropriately qualified public affairs agency to lead the community engagement of the SEMAWP procurement from site selection to awarding of the contract.

## Human Rights

The implications of the report have been assessed and are not considered likely to breach or infringe upon, the human rights contained in the *Victorian Charter of Human Rights and Responsibilities Act 2006*.

## Governance

Mick Cummins, Bayside City Council CEO is an interim member of the Board of the Company, along with senior members of staff from five other participating councils and the Chief Executive Officer of the MWRRG. He has no conflict of interest in the matter as the objectives of the Company are aligned with the objectives of Council and the Company has been established to fulfil the objectives of Council. The interim Board will be replaced by an independent skills-based Board at the time the Company awards a Contract.

## Legal

Extensive and specialised legal advice has been commissioned by MWRRG to form the recommendations made in this report.

The Local Government Act (LGA) 2020 and the *Climate Change Act 2017* require Council to consider climate change. Part 2, Section 9 of the LGA 2020 requires that the following are the overarching governance principles—

- (a) *Council decisions are to be made and actions taken in accordance with the relevant law;*
- (b) *priority is to be given to achieving the best outcomes for the municipal community, including future generations;*
- (c) *the economic, social and environmental sustainability of the municipal district, including mitigation and planning for climate change risks, is to be promoted;*

The landfilling of waste is a contributor to greenhouse gas emissions and this Project is aimed at providing a facility as an alternative to landfill. The Project seeks to convert waste to a resource by using it to generate energy.

The *Circular Economy (Waste Reduction and Recycling) Act 2021* (CE Act) provides for stronger regulation of the state's waste and recycling sector for more and better recycling, less waste and landfill. The CE Act provides the foundation for Victoria's transition to a circular economy, including enabling laws for the new container deposit scheme and new state-wide four-stream household waste and recycling system. Both systems will significantly increase recycling of discarded, but valuable, materials that would otherwise end up in landfill.

The CE Act will see the establishment on 1 July 2022 of Recycling Victoria, a dedicated government business unit to oversee and provide strategic leadership for the waste and recycling sector, including Local Government. The CE Act and Recycling Victoria are key commitments of the Victorian Government's circular economy plan, Recycling Victoria: a new economy, to reduce waste and landfill, and provide for more and better recycling and a sustainable and thriving circular economy.

The aggregating of waste through multi-Council contracts and reducing reliance on landfill disposal also aligns with various Council and Victorian Government policies and strategies. These include the State Waste and Resource Recovery Infrastructure Plan, the Metropolitan Waste and Resource Recovery Implementation Plan, and the recent Recycling Victoria Policy – circular economy plan that includes a target to divert 80% of household waste away from landfill by 2030.

## Finance

Current garbage collection and transport and landfill disposal costs are factored into the preparation of the recycling and waste management operational budget, which in turn sets the residential waste charge. Landfill costs are increasing and Council currently transports waste to the western suburbs. The 2021–22 budget allocation for recycling and waste management services is \$12.2 million.

Bayside's involvement in a collective procurement process to develop and utilise the services of an AWP facility is on the basis that the costs of AWP processing are in the order of landfill gate fees and levy at the time of commencement of the contract and designed to mitigate future cost increases in landfill and transport costs.

The proposed reimbursement arrangement for up to 50% of the cost of unsuccessful tenderers as an addition to the gate fee over the life of the contract will add approximately \$1.20 per tonne to the AWP gate fee. Having the partial bid reimbursement arrangement to cover circumstances where the Project tender is cancelled by the Councils would mean that these costs would be a cost covered by Councils. This cost could be up to \$430,000.

A future AWP facility located in the south-east suburbs of Melbourne would provide a shorter delivery route for Bayside's waste collection vehicles and is expected to reduce transport costs.

## Links to Council policy and strategy

The Council Plan 2021–25, Goal 1 Our Planet

*1.3. Improve environmental sustainability through a circular economy approach to waste management, recycling and energy use.*

*1.3.2. Continue to promote and explore waste to energy projects and alternative energy sources and use.*

Recycling and Waste Management Strategy 2018–27

*Objective 2.7 - Evaluate and adopt alternate waste treatment technologies to divert residual domestic garbage from landfill on the basis that this treatment is cost competitive with current landfilling costs. This will be conducted as per a regional approach with the Metropolitan Waste and Resource Recovery Group (MWRRG).*

Environmental Sustainability Framework 2016–25

The ESF has an objective to 'Increase diversion of waste from landfill to 60% by 2020, and to 75% by 2025 (from 2014–15 baseline)'. To achieve this objective, the Environmental Sustainability Framework Action Plan 2019–23 has an action to: *'Investigate and assess opportunities for advanced waste resource recovery treatment and processing'*.

Climate Emergency Action Plan 2020–25

Theme 7 - *'Transition to a Circular Economy to avoid waste: Drive the move away from the 'take, make, dispose' economy, towards one where all materials are treated as precious resources, with little thrown away'.*