



DUBBO REGIONAL
COUNCIL

ADMINISTRATOR MINUTE: Acceptance of NetWaste Waste Services Tenders

AUTHOR: Administrator
REPORT DATE: 21 July 2017
TRIM REFERENCE: ID17/1266

To the Council
Ladies and Gentlemen

Office of the Administrator
Civic Administration Building
Church Street, Dubbo

Council is in receipt of the attached letter dated 19 July 2017 from Mr Ben Shields relating to the NetWaste Regional Waste Services Tenders that is currently before Council. It is recommended for acceptance as per the report of Council's Works and Services Committee meeting of 17 July 2017 being Clause WSC17/55 – Tender for NetWaste Regional Waste Service Tenders.

In his letter, Mr Shields proposes the insertion of a three month 'cooling off' clause in the waste services contract for the purpose of allowing councillors (as elected following the Council elections in September 2017) to *"have the option of having a review into the tender without potentially costing ratepayers a huge amount of money."*

On receipt of such correspondence, legal advice was sought as to the legal and commercial implications of such a proposal.

Such advice notes that whilst there are legislative provisions in the Local Government (General) Regulation 2005 which enable the issuing of addenda, which a "cooling off" provision would be given that it was not included in the original tender document, the proposed "cooling off" proposal is viewed in the advice as a material change to the proposed contract.

The advice provides that *"nothing in the legislative provisions identified above (ie Local Government (General) Regulation 2005) permit Council to unilaterally make material changes to the contract terms proposed in a tender. A council can include this right to make unilaterally right in the tender documents. It is understood that no such right has been provided for in this case. Consequently the proposed change would require the concurrence of the contracting party for it to be included."*

The advice continues, *"procurement laws and good governance in procurement require that material changes to proposed contracts be notified to all respondents and for them to be given an opportunity to respond accordingly. If Council is minded to introduce a "cooling off" provision, we would recommend that Council alert all respondents and allow them a reasonable period to revise their tender responses and extend the periods set out in the tender documents for:*

- (a) *Tender evaluation; and*
- (b) *Tender acceptance.”*

Accordingly from the above there are a number of reasons why, from a governance and commercial perspective, the contemplation of Mr Shields changes to the procurement process at this late stage would be unwise.

The critical point that makes the insertion of a “cooling off” clause unacceptable at this point is that this action would represent a material change to the original terms of tender at a very late stage of a procurement process which has been framed around principles of certainty in service delivery requirements and a fixed timeframe for the delivery of services and the construction of capital infrastructure.

The timeframes are restricted by the need to provide continuity in the current level of waste services and the need to complete capital works within the timeframes of existing grant funding agreements.

The timing implications of delaying the implementation of the proposal, the time needed to negotiate with respondents (assuming they are willing) and to reconsider any amendments to the terms of their offer and the need to renegotiate funding agreements in place, are all factors why the proposed contract should not be altered, and certainly not altered unilaterally without following process. Any prospect of seeking an early agreement to the contract change would be further delayed by Council entering the pre-election caretaker period which commences on Monday, 14 August 2017 and then being unlikely to be in a position to make a formal decision until, at the earliest, late October 2017.

The other main reason against proceeding down a path of renegotiation of the terms of contract is that it risks undoing a lengthy and rigorous procurement process, which included the engagement of a Probity Advisor whose role was to oversee the procurement process in terms of accountability, transparency, conflict of interest management and confidentiality management, that has just been completed to tender evaluation stage involving joint participation with Narromine Shire and Mid-Western Regional Councils.

Notwithstanding the tripartite basis under which the procurement process has been undertaken, in summary the Local Government Tendering Regulations do not permit Council to unilaterally make material changes to the contract terms proposed in a tender without following process. Any such change to the contract would require a process to be followed and in doing so in this matter would adversely impact Council’s ability to meet agreed timelines. This would inevitably risk a higher cost being incurred in the delivery of services and therefore risk a cost imposition on ratepayers receiving the services.

Accordingly, having regard to the above mentioned likely time and cost implications of following process to include a “cooling off” clause , I do not support the requested proposal and therefore advise that I will be recommending that the procurement process for the supply of Regional Waste Services under Contract T16-036 proceed in its current form and that Council proceed to determine that matter.

RECOMMENDATION

- 1. That the letter dated 19 July, 2017 from Mr Ben Shields be noted.**
- 2. That Council not accede to the proposal that the terms of the contract T16-036 incorporate a 'cooling off' period of three months.**
- 3. That Council proceed to determine item WSC17/55 - Tender for NetWaste Regional Waste Services as recommended in the report of the Works and Services Committee meeting held on 17 July 2017.**

Michael Kneipp
Administrator

Appendices:

- 1 Letter from Ben Shields - Third Bin Compromise Proposal**

Ben Shields

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The Administrator
Dubbo Regional Council
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Dear Michael

Third Bin and Service Reduction

Members of the Dubbo Ratepayers and Residents Association, various council candidates and myself have had a meeting to formulate a compromise that they want me to present to you.

The compromise is simple yet legal and would solve both our problems – that is to simply include a clause in the contract you are about to sign adding a three month cooling off period.

This small addition is not something unusual that council can do. Over the past 17 years when I was a councillor there were numerous times councillors would add a section to a tender contract before signing.

There is no doubt that this is the best of both worlds. On one hand you can go about implementing the preliminary logistical and regulatory paperwork and on the other hand councillors will have the option of having a review into the tender without potentially costing ratepayers a huge amount of money. Indeed it's a win-win for both sides of the argument.

While I can totally understand the pressure you are under, especially from our local member of parliament Troy Grant, that this be implemented as soon as possible, I still maintain that democratic scrutiny is vital.

I look forward to your urgent reply.



Ben Shields
Wednesday, 19 July 2017