



Agenda

Special Council Meeting

9 November 2020

Shire of Victoria Plains
Council Chambers, Calingiri

Commencing – 3.30pm

DISCLAIMER:

The recommendations contained in this document are officers' recommendations only and should not be acted upon until Council has resolved to adopt those recommendations.

The resolutions of Council should be confirmed by perusing the minutes of the Council meeting at which these recommendations were considered. Resolutions are not considered final until the minutes of the meeting are confirmed or advised in writing by the CEO or authorised person.

Members of the public should also note that they act at their own risk if they enact any resolution prior to receiving official written notification of Council's decision.

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You are not permitted to record this meeting with any recording device, unless you have the express authorisation of the Council of the Shire of Victoria Plains.

Commonly-used abbreviations

| | |
|------------|--|
| AAS / AASB | Australian Accounting Standard / Australian Accounting Standards Board |
| BF Act | Bush Fire Act 1954 |
| BFB | Bush fire brigade |
| CEO | Chief Executive Officer |
| CDO | Community Development Officer |
| DBCA | Dept of Biodiversity, Conservation and Attractions |
| DFES | Dept of Fire and Emergency Services |
| DPLH | Dept of Planning, Lands and Heritage |
| DWER | Dept of Water and Environmental Regulation |
| EHO | Environmental Health Officer |
| EFT | Electronic Funds Transfer |
| FAM | Finance and Administration Manager |
| JSCDL | Parliamentary Joint Standing Committee on Delegated Legislation |
| LEMA | Local Emergency Management Arrangements |
| LEMC | Local Emergency Management Committee |
| LG Act | Local Government Act 1995 |
| LGGC | WA Local Government Grant Commission |
| LPP | Local Planning Policy |
| LPS | Local Planning Scheme |
| MOU | Memorandum of Understanding |
| MRWA | Main Roads WA |
| NNTT | National Native Title Tribunal |
| OAG | Office of Auditor General |
| OCM | Ordinary Council Meeting |
| PTA | Public Transport Authority |
| RRG | Regional Roads Group |
| RTR | Roads to Recovery |
| SAT | State Administrative Tribunal |
| SEMC | State Emergency Management Committee |
| SGC | Superannuation Guarantee Contribution |
| SJAA | St John Ambulance Association |
| SWALSC | South West Aboriginal Land and Sea Council |
| WAEC | WA Electoral Commission |
| WALGA | WA Local Government Association |
| WSM | Works and Services Manager |

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Agenda

Special Meeting of the Victoria Plains Shire Council

Held in the Calingiri Shire Chambers,
on Monday 9 November 2020 commencing at 3.30pm

1. DECLARATION OF OPENING

1.1 Opening

Meeting declared open at

1.2 Announcements by Shire President

The Presiding Member stated the declaration of the State Emergency and State Health Emergency and the means of conducting meetings under the E-meeting platform, advising Elected Members that the meeting was being recorded for the purposes of Minute Taking and uploading of the recording to the Shire Website for public viewing

2. RECORD OF ATTENDANCE

| | |
|---------------------------|---|
| Members present | Cr P Bantock Cr N Clarke Cr J King Cr D Lovelock Cr J Kelly – via teleconference (until 10.15am). |
| Staff attending | CEO – Ms G Teede Governance Officer – Mr S Fletcher Executive Assistant – Mrs J Klobas |
| Apologies | Nil |
| Approved leave of absence | Nil |
| Visitors | Core Business Australia – Mr B Mortimer |

Members of the public

N/A

3. DISCLOSURES OF INTEREST

Refer – Local Government Act, Regulations, Code of Conduct, and Declaration Forms in Councillor folders.

| | <i>Type</i> | <i>Item</i> | <i>Person / Details</i> |
|-----|--------------|-------------|--|
| 3.1 | Financial | | 8.2 – Cr P Bantock |
| 3.2 | Proximity | | 11.1 – Cr P Bantock |
| 3.3 | Impartiality | | 11.1 – Cr Lovelock 11.1 – Cr N Clarke |

4. PUBLIC QUESTION TIME

Refer – Local Government Act, Regulations, Local Law and Submission Form & Guidelines circulated.

N/A

4.2 Public Questions Without Notice

Where written questions are not submitted, a summary of the questions and responses are given, as per the Local Government (Administration) Regulations 1996 r. 11(e).

N/A

5. PRESENTATIONS AND DEPUTATIONS

5.1 Presentations

5.2 Deputations

6. APPLICATIONS FOR LEAVE OF ABSENCE

7. MINUTES OF MEETINGS

7.1 Confirmation of Council Meeting minutes

NA

8. REPORTS REQUIRING DECISION

8.1 Applications for Development Approval & Extractive Industry License – Existing Extractive Industry (Gravel Quarry) on Lot 127 (No.668) Mogumber-Yarrowindah Road, Mogumber

| | |
|---------------------------------------|---|
| File reference | Lot 127 (STP) |
| Report date | 21 October 2020 |
| Applicant/Proponent | Menzies Quarries Pty Ltd under the authority of Mr M.D. Driessen (Landowner) |
| Officer disclosure of interest | Nil |
| Previous meeting references | Item 12.1 – December 2016 Ordinary Meeting Item 7.0 – June 2017 Ordinary Meeting Item 10.9 – February 2019 Ordinary Meeting Item 11.1 – November 2019 Ordinary Meeting Item 11.1 – December 2019 Ordinary Meeting |
| Prepared by | Mr Joe Douglas – Town Planning Consultant |
| Authorised by | Ms Glenda Teede - CEO |
| Attachments | Attachment 1 – Application Documentation Attachment 2 – Road Maintenance Cost Contribution Report by Roadswest Engineering Group Pty Ltd Attachment 3 – Road Intersection Assessment and Deficiency Report by Roadswest Engineering Group Pty Ltd |

PURPOSE

Consideration and final determination of development and extractive industry licence applications received in respect of an existing extractive industry (i.e. gravel quarry) on Lot 127 (No.668) Mogumber-Yarrowindah Road, Mogumber.

BACKGROUND

The applicant has submitted development and extractive industry licence applications in respect of an existing, previously approved extractive industry (i.e. gravel quarry) on Lot 127 (No.668) Mogumber-Yarrowindah Road, Mogumber for the following purposes:

- i) To amend Conditions 3 and 17 of the original development approval issued by the Victoria Plains Shire Council at its Ordinary Meeting held on 14 June 2017 to address concerns raised by the applicant regarding the validity and enforceability of these conditions; and
- ii) To formalise the current use of the land for extractive industry purposes under the *Shire of Victoria Plains Extractive Industries Local Law 2018* which is a specific requirement that has not been addressed since the use was first established.

Council's formal consideration and final determination of these applications will help resolve the longstanding dispute with Menzies Quarries Pty Ltd regarding its existing operations on the land.

It should be noted the recommendations contained in this report are based on discussions, negotiations and agreements with Menzies Quarries Pty Ltd and its legal representatives over recent months as well as advice received from Roadswest Engineering Group Pty Ltd regarding road maintenance levy contributions to the Shire and the suitability of the existing

heavy vehicle access arrangements to / from the existing extractive industry operations on the subject land.

COMMENT

Development Application

Conditions 3 and 17 of the original development approval issued by the Victoria Plains Shire Council at its Ordinary Meeting held on 14 June 2017 read as follows:

- ***Condition 3 – A levy of 0.25 cents per tonne of material is to be paid on an annual basis to Council to assist in the upgrade and maintenance of gazetted roads used for access to the pit; and***
- ***Condition 17 – Satisfactory arrangements being made with the local government for full cost of upgrading and/or construction of the access and egress to/from the site from Mogumber-Yarrowindah Road to the satisfaction of the Shire and Main Roads specifications.***

Menzies Quarries legal representatives Civil Technology have challenged Conditions 3 and 17 on the basis they are unclear, uncertain, excessive and therefore legally invalid and unenforceable. This view is supported by the Shire's solicitors Civic Legal who have advised both conditions are poorly worded, unclear and uncertain and may therefore be deemed invalid and unenforceable if tested legally.

In order to resolve the issues and concerns regarding the validity of Conditions 3 and 17 the Shire appointed civil engineering firm Roadswest Engineering Group Pty Ltd to:

- a) investigate and prepare a report regarding the most appropriate method for calculating a reasonable road maintenance levy per tonne of material extracted by Menzies Quarries from the subject land; and
- b) assess and prepare a report regarding the suitability of and any modifications or upgrades that may be required to the existing access arrangements to / from the existing gravel quarry on the subject land.

A full copy of the final reports prepared by Roadswest Engineering Group Pty Ltd is provided in Attachments 2 and 3.

In relation to Condition 3, the first report prepared by Roadswest Engineering Group Pty Ltd recommends, based on established principles and guidelines, that a road maintenance contribution \$0.125 per tonne of gravel extracted from the land should be payable to the Shire (see Attachment 2). When considering this recommendation Council should note the following key points:

- i) The revised contribution amount recommended accounts for inflation since 2015 based on the Australian Bureau of Statistics Producer Price Index Catalogue No.6427.0 as it applies to road and bridge construction works;
- ii) The revised contribution amount represents a 50% reduction to the amount payable by Menzies Quarries pursuant to the current requirements of Condition 3;
- iii) If Council supports this recommendation, a credit of \$9,585.62 excluding GST will be provided to Menzies Quarries when calculating road maintenance contributions payable for the period 1 January 2019 to 31 December 2020 (i.e. the last 2 calendar

years) which are yet to be charged due to the need to resolve the current dispute with the applicant; and

- iv) Menzies Quarries has confirmed its agreement to and acceptance of this revised contribution amount given it is soundly based and more reasonable and equitable for both parties.

In relation to Condition 17, it is understood Council's original intention and preference in relation to this condition was the construction of a new slip lane along the edge of Mogumber-Yarrowindah Road adjacent to the main gravel pit entry to provide for the safe and convenient movement of all westward-bound heavy vehicles attending the site.

The second report prepared by Roadswest Engineering Group Pty Ltd (i.e. Attachment 3) has confirmed Council's preferred option of a new slip lane along the edge of Mogumber-Yarrowindah Road is unnecessary and that the following alternative works should be undertaken to provide for the safe and convenient movement of all heavy vehicles associated with the existing extractive industry operations on the land:

- i) Widen the existing pavement on the southern verge where the Mogumber-Yarrowindah Road carriageway and the main gravel pit entry road intersect to accommodate the full extent of turning vehicles correctly, particularly the left-out from the pit entry road;
- ii) Remove undergrowth and lop trees as required on the northern and southern road verges for a minimum distance of 300 metres each way along Mogumber-Yarrowindah Road to ensure road signs are not obscured and trucks leaving the main gravel pit entry road can be seen;
- iii) Improve the road side drainage along the main gravel pit entry road so that surface runoff is diverted into the existing table drains along the edge of Mogumber-Yarrowindah Road;
- iv) Construct a two (2) coat bitumen chip seal on the main gravel pit entry road for its full width and for a minimum distance of 100 metres from the edge of the Mogumber-Yarrowindah Road carriageway;
- v) Install distance drop tags at the bottom of the existing advance warning heavy vehicle (Road Train) road signs on Mogumber-Yarrowindah Road for both the eastern and western approaches to ensure compliance with the relevant Australian Standards;
- vi) Install an advance warning sign on the main gravel pit entry road on approach to Mogumber-Yarrowindah Road; and
- vii) Install a guide sign (finger board) and a Hazard Marker sign No MR-HM-2 on the northern verge of Mogumber-Yarrowindah Road immediately opposite the main gravel pit entry road.

Details of the alternative works recommended above by Roadswest Engineering Group Pty Ltd were presented to Menzies Quarries for its consideration and comment. Menzies Quarries has advised it is willing to undertake the required roadworks and reimburse the Shire for the cost of supplying and installing the required road signage in accordance with the relevant Australian Standards which is considered to be the most expedient and practical option.

A recommendation with details of the suggested revised wording for Conditions 3 and 17 to

be applied to the current development approval for the existing extractive industry operations on the land is provided below for Council's formal consideration and final determination. Council should note the revised wording for Conditions 3 and 17 has been carefully formulated to ensure these conditions are relevant, valid and enforceable and reflect the outcomes from recent discussions and negotiations with Menzies Quarries. Should Council not support the revised wording for whatever reason, there is a significant risk the matter will be referred to the State Administrative Tribunal by the applicant for review and reconsideration which could prove to be expensive and time consuming.

Extractive Industry Licence Application

The applicant has also prepared and submitted an extractive industries licence application to formalise the current use of the land for extractive industry purposes under the *Shire of Victoria Plains Extractive Industries Local Law 2018* which is a specific requirement that has not been addressed since the use was first established. Notwithstanding this fact, the applicant has a current public liability insurance policy naming the Shire of Victoria Plains and indemnifying the licensee and the Shire for a sum of not less than \$20,000,000 in respect of any one claim relating to any of the excavation operations on the land as per the specific requirements of clause 7.1 of the Shire's Extractive Industries Local Law. This insurance policy has provided the protection required to enable the use to continue whilst the applicant made arrangements to formalise the required extractive industry licence application.

The application received is based on the documentation and plans prepared in 2017 which formed the basis for the original development approval issued by Council in June of that same year (see Attachment 1).

Under the terms of the application received Council's approval is sought for a twenty (20) year licence term which must be renewed annually in accordance with the provisions of the Shire's Extractive Industries Local Law.

The application has been assessed with due regard for all relevant elements of the Shire's Extractive Industries Local Law as well as the specific requirements of the original development approval issued by Council in June 2017. It is concluded from this assessment that:

- i) the conditions imposed on the original development approval encompass all relevant standards and requirements of the Shire's Extractive Industries Local Law with the exception of a few administrative obligations which can be addressed through the imposition of suitable conditions on any licence approval that may ultimately be issued by Council;
- ii) the Shire's Extractive Industries Local Law contains a number of general provisions that apply automatically to any approved extractive industry operation which provide a number of additional safeguards to ensure all development of this type is undertaken in a proper and orderly manner; and
- iii) the term of any licence approval that may be issued by Council should match the term of the development approval issued for the land (i.e. until 14 June 2022) and not twenty (20) years as the applicant has requested. If Council grants approval to extend the term of the original development approval for a further ten (10) year period as indicated in Condition 1 of the development approval, the applicant can seek to extend the term of

the extractive industry licence approval to match any new or amended development approval at that time.

CONCLUSION

The proposed amendments to Conditions 3 and 17 of the original development approval issued for the existing extractive industry development on the subject land are well founded, relevant, valid and enforceable and reflect the outcomes from recent discussions and negotiations with Menzies Quarries. It is therefore recommended Council approve the development application pursuant to the powers afforded by clause 77(1)(b) of the Deemed Provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015*.

It is also recommended that Council exercise its discretion and grant conditional approval to the extractive industry licence application to ensure the development is undertaken in accordance with the specific requirements of the *Shire of Victoria Plains Extractive Industries Local Law 2018* and the term of the licence approval is consistent with the term of the development approval originally issued for the land (i.e. until 14 June 2022).

CONSULTATION

Public advertising of the development and extractive industry licence applications was not required or deemed necessary given the development proposal for the land was the subject of a detailed community consultation campaign in 2017 and has remain unchanged.

STATUTORY CONTEXT

- *Planning and Development (Local Planning Schemes) Regulations 2015*
 - Schedule 2, Part 9, Clause 77 – ‘Amending or cancelling development approval’
 - Schedule 2, Part 9, Clause 67 – ‘Matters to be considered by local government’
- *Shire of Victoria Plains Local Planning Scheme No.5*
 - Clause 3.2 – ‘Objectives of the zones’
 - Clause 3.3 – ‘Zoning Table’
 - Clause 4.7 – ‘Site and Development Requirements’
- *State Planning Policy 2.5 - ‘Rural Planning’*
 - Clause 5.9 – ‘Basic raw materials outside the Perth and Peel planning regions’
 - Clause 5.12 – ‘Preventing and managing impacts in land use planning’
- *Shire of Victoria Plains Extractive Industries Local Law 2018*

CORPORATE CONTEXT

- Works & Services Policy No.13.1 – *Road Reserves – Crossovers*
- Unclassified Policy No.16.1 – *Restricted Access Vehicles on Shire Roads*

FINANCIAL IMPLICATIONS

Should Council approve the development application to amend Conditions 3 and 17 of the original development approval issued in June 2017 as recommended, a credit of \$9,585.62 excluding GST will be provided to Menzies Quarries when calculating road maintenance contributions payable for the period 1 January 2019 to 31 December 2020 (i.e. the last 2 calendar years) which are yet to be charged for the reason stated previously above.

In addition to the administrative costs associated with processing the applications which are provided for in Council’s annual budget, the Shire will need to fund the works required to

ensure the existing table drains along the edge of Mogumber-Yarawindah Road are of a suitable standard and can manage all stormwater flows from the existing driveway access to the extractive industry use on Lot 127 which has been in place for many years and will be upgraded by the applicant to satisfy the requirements of Condition 17 of the original development approval as amended.

Aside from the above, there are no other immediate financial implications for the Shire. All costs associated with the development will be met by the applicant with the Shire's financial interests protected by the annual public liability insurance policy required pursuant to clause 7.1 of the Shire's Extractive Industries Local Law.

Should the applicant/landowner be aggrieved by Council's final decision in this matter, they have the right seek a formal review of that decision by the State Administrative Tribunal. Should this occur for whatever reason, which is considered unlikely in this particular instance, the Shire would need to respond. The cost to respond to an appeal cannot be determined at this preliminary stage but could be expected, based on the recent experience of other local government authorities in Western Australia, to range anywhere from \$5,000 to \$60,000 excluding GST depending upon how far the matter proceeds through the review process.

VOTING REQUIREMENTS

Absolute majority required: No

| |
|--|
| Officer Recommendation / Council Resolution |
|--|

Moved Cr _____

Seconded Cr _____

That Council resolve to:

- 1. APPROVE** the **development application** submitted by Menzies Quarries Pty Ltd under the authority of Mr M.D. Driessen (Landowner) to amend Conditions 3 and 17 only of the original development approval issued by Council at its Ordinary Meeting held on 14 June 2017 to establish and operate an extractive industry (i.e. gravel quarry) on Lot 127 (No.668) Mogumber-Yarrawindah Road, Mogumber so the conditions read as follows:

Condition 3 – Road Maintenance Contribution

A levy of \$0.125 per tonne of material extracted from the land shall be paid by Menzies Quarries Pty Ltd to the local government for the ongoing maintenance of Mogumber-Yarawindah Road. The levy is payable to the local government on 31 March each year with the final payment due on 14 July 2022 being one month after the expiry date of the current development approval for the extractive industry use. If the local government grants development approval for a further term, the levy payable each year thereafter shall be adjusted on an annual basis to account for inflation based on the Australian Bureau of Statistics Producer Price Index Catalogue No.6427.0 as it applies to road and bridge construction works.

Condition 17 – Road & Driveway Access Upgrade Works

Menzies Quarries Pty Ltd shall undertake the following to ensure the safe and convenient movement of heavy vehicles to/from the subject land by no later than Friday 26 February 2021 unless otherwise agreed by the Shire's Chief Executive Officer:

- i) Widen and seal the pavement on the southern verge where the Mogumber-Yarawindah Road intersects with the crossover and driveway access to the extractive industry use on Lot 127 to accommodate the full extent of turning heavy vehicles correctly, particularly the left-out from the main driveway access and crossover to Mogumber-Yarawindah Road which is currently deficient;*
- ii) Trim all undergrowth and trees as required on both the northern and southern road verges of Mogumber-Yarawindah Road for a minimum distance of 300 metres each way to ensure road signs are not obscured and heavy vehicles exiting Lot 127 can be seen;*
- iii) Seal the full width of the crossover as well as the driveway access to the extractive industry use on Lot 127 to a width of 6 metres for a minimum distance of 100 metres from the edge of the Mogumber-Yarawindah Road road carriageway using a two-coat bitumen chip seal and maintain the sealed crossover and driveway thereafter to ensure they remain in good, safe trafficable condition at all times for the life of the development; and*
- iv) Reimburse the local government for the cost of supplying and installing the following road signage in accordance with the relevant Australian Standards:*
 - a) distance drop tags on the bottom of the existing advance heavy vehicle (Road Train) warning signs on Mogumber-Yarrawindah Road on both the eastern and western approaches to the crossover and driveway access to the extractive industry use on Lot 127;*
 - b) an advance intersection warning sign on the driveway access to the extractive industry use on Lot 127 at the point where the sealing works required by sub-condition iii) above commences within the subject land;*
 - c) a T-junction sight board as per Main Roads WA sign No.MR-HM-2 as shown on Main Roads WA (MRWA) Drawing No.9531-1002-5 on the northern verge of Mogumber-Yarrawindah Road opposite the crossover and driveway access to the subject land; and*
 - d) a guide sign (i.e. finger board) on the northern road verge of Mogumber-Yarrawindah Road opposite the crossover and driveway access to clearly identify the main entry point to the subject land.*

- 2. APPROVE the extractive industry licence** application submitted by Menzies Quarries Pty Ltd under the authority of Mr M.D. Driessen (Landowner) to establish and operate an extractive industry (i.e. gravel quarry) on Lot 127 (No.668) Mogumber-Yarrawindah Road, Mogumber subject to the following conditions and advice notes:

Conditions

1. This extractive industry licence is issued to Menzies Quarries Pty Ltd (i.e. the licensee) and shall remain valid until 14 June 2022 to coincide with the expiry date of the current development approval for the land unless otherwise approved by Council.

2. An annual licence fee of \$300.00 is payable to the local government by the licensee in advance by no later than 30 June each year for the term of the extractive industry licence approval.
3. The licensee shall at all times have and maintain a current public liability insurance policy naming the local government and indemnifying the licensee and the local government for a sum of not less than \$20,000,000 in respect of any one claim relating to the extractive industry operations on the subject land.
4. In accordance with the specific requirements of the *Shire of Victoria Plains Extractive Industries Local Law 2018*, the licensee shall provide the local government with a copy of the public liability insurance policy taken out pursuant to the requirements of Condition 3 of this approval, within 14 days of issuance of that policy and shall provide to the local government evidence of policy renewal within fourteen (14) days of each policy renewal date.
5. In accordance with the specific requirements of the *Shire of Victoria Plains Extractive Industries Local Law 2018*, a datum peg shall be established on the subject land by a licensed surveyor related to a point approved by the local government on the surface of a constructed public thoroughfare or other suitable land in the vicinity by no later than 31 December 2020. A certificate from the licensed surveyor certifying the correctness of the datum peg and related reference point required by this condition shall be submitted to the Shire within fourteen (14) days of establishment of the datum peg.
6. By no later than 31 January of each year this licence remains valid, the licensee shall provide the local government with information confirming the quantity of material extracted from the land in the preceding calendar year. If there is any uncertainty or doubt as to the accuracy of the information provided, the licensee shall at its own cost provide the local government with a surveyor's certificate confirming the quantity of material extracted from the land for the relevant period. The surveyor's certificate required by this condition shall be provided within 28 days of receipt of the local government's written request to provide a certificate.

Advice Notes

1. The licensee is reminded of their obligation to ensure compliance with the specific requirements of the *Shire of Victoria Plains Extractive Industries Local Law 2018* as it applies, but not limited to, license renewals, variations and transfers, prohibitions, blasting and cessation of operations.
2. A copy of the *Shire of Victoria Plains Extractive Industries Local Law 2018*, including any approved amendments, is available for inspection on the Shire's website (www.victoriaplains.wa.gov.au). An electronic or hard copy of this local law, as amended, is also available from the Shire on request.
3. Authorise the Shire's Works & Services Manager to undertake the works required to ensure the existing table drains along the southern edge of Mogumber-Yarawindah Road are of a suitable standard and can manage all stormwater flows from the existing driveway access to the extractive industry use on Lot 127.

For _____ / Against _____

9. MEMBER MOTIONS OF WHICH PREVIOUS NOTICE HAS BEEN GIVEN

Nil

10. NEW BUSINESS OF AN URGENT NATURE REQUIRING DECISION

Admitted by resolution of Council

Nil

11. MEETING CLOSED TO PUBLIC – CONFIDENTIAL ITEMS

Council Resolution

Moved: Cr

Seconded: Cr

That Item 11.1 be moved into camera.

11.1 Tender RFT 02 – 2020/21 Provision of Roadworks Contractor Services for the FY 2020/21 and FY2021/22 and consideration of the review of the tender process undertaken by Core Business Australia

| | | | |
|---------------------------------------|------|--|--|
| File reference | | | |
| Report date | | | November 8 2020 |
| Applicant/proponent | | | Shire of Victoria Plains |
| Officer disclosure of interest | | | Core Business Australia is a WALGA Preferred Supplier and has the potential to be further engaged by the Shire to assist the Shire with this project, as such has a financial interest in this matter. |
| Previous meeting references | | | 1909 – 17 & 2004-13 |
| Prepared by | | | Bruce Lorimer, Managing Director, Core Business Australia for the Chief Executive Officer |
| Authorised by | | | |
| Attachments | | | |
| Attachment 1 | Page | | Confidential Tender Assessment Report prepared by Brett Howson - RFT 02-2020/21 Provision of Roadworks Contractor Services for the FY 2020/21 and FY2021/22 |

PURPOSE

This report has been prepared for Council to consider received tenders associated with RFT 02 – 2020/21 Provision of Roadworks Contractor Services for the FY 2020/21 and FY2021/22 which was called to secure road construction resources to supplement the Shire's work crew and allow the Shire to continue works on projects allocated under the Wheatbelt Secondary Freight Network (WSFN) Project.

The report also considers issues identified by Core Business Australia's review of the tender process and recommends solutions to address these issues.

BACKGROUND

The Shire of Victoria Plains (SoVP) has been allocated several projects under the WSFN Project Scheme, the first of which was a pilot project commences in 2019/20. Unfortunately work stopped on the project on March 20 2020 due to uncertainty in relation to the availability of resources associated with the Covid-19 pandemic. This was reported to Council under 2004-13 at the April 2020 Ordinary Meeting of Council.

As the threat of Covid-19 subsided and to address the lack of resources, Council called a state-wide tender (RFT 02 – 2020/21) on September 9 2020. The Tender was closed on September 24 2020 with 15 tender received.

This tender was separated into five separable portions being;

1. Wet Hire Grader and Final Trim Operator
2. Wet Hire Road Construction Plant
3. Stabilisation & Wetmixing Services
4. Traffic Management Services

5. Work Supervision Services

The tender document advised that the Shire intended to appoint a primary contractor and a secondary contractor to each of the five separable portions.

The tender document was prepared by the Acting Works Manager, Brett Howson.

The received tenders were assessed by a Tender Assessment Panel comprising;

1. Glenda Teede, Chief Executive Officer
2. Bret Howson, Acting Works Manager

A draft Confidential Tender Assessment Report (Attachment 1) was prepared by the Acting Works Manager, Brett Howson and provided to the Shire at the end of October 2020. It must be noted that Officer's advise that this Tender Assessment Panel did not convene and did not assess the tenders.

The CEO holds some concern regarding the tender and has requested Core Business Australia (CORE) to undertake a review of the tender and tender process. CORE was engaged on Thursday, November 5 2020 and due to the short lead time to the Special Council Meeting called to consider this issue, only a high level, limited review was able to be carried out in order to identify (where possible) any critical issues. The review therefore is by no means exhaustive.

COMMENT

Assessment of the Tender Process

As noted above, a high level, limited review of the tender and tender process was undertaken in order to identify (where possible) any critical issues. The review is separated into the key areas as follows;

Tender Advert and Advertising Period– The tender was advertised State-wide in the West Australian newspaper on Wednesday, September 9 and Saturday September 12 2020. The Tender was closed at 2pm on September 24 2020. This meets the minimum advertising period of 14 days required by the Local Government (Functions and General) Regulations 1996 (Tender Regs) Regulation 15 (1).

The Tender advert appears to comply with all other provision of the Tender Regs except for Regulation 15 (4) (d) which requires the local government to include in the tender advertisement whether the local government has decided to submit a tender. This is an issue often overlooked by a number of local governments, nonetheless, it represents a breach of the regulations.

The Department of Local Government and Communities (DLGC) will sometimes ask this question in its Annual Compliance Audit to prompt local governments to review whether their tender adverts are compliant or not. If a local government identifies that a tender advert is not compliant, the DLGC wants to know what the local government will do to correct this issue which is usually to ensure it is included in future adverts, hence while it represents a breach of the regulations, it may not be significant given the DLGC's approach to this in the past and hence may not be detrimental to the tender process, however CORE cannot give definitive legal advice on this matter and if Council has concern about this issue, CORE's recommendation is to either seek legal advice on the matter or recommence the tender process.

Tender Document – The tender specification appears to be sound from a technical point of view. The main issue identified with the tender is the way it has been set up with the 5 separable portions and the intended to award a primary and a secondary contractor to each

portion. This in effect create a panel contract which is considered to be outside the intent of the Local Government (Functions and General) Regulations 1996. This is because the wording in Regulation 18 (4) reads as follows;

- (4) *Tenders that have not been rejected under subregulation (1), (2), or (3) are to be assessed by the local government by means of a written evaluation of the extent to which each tender satisfies the criteria for deciding which tender to accept and it is to decide which of them (if any) it thinks it would be most advantageous to the local government to accept.*

If the Tender Regs envisaged a panel arrangement formed from a tender, the wording in this regulation would be plural and say "which tenders to accept". Hence, when calling tenders, a local government is only entitled to appoint one tenderer, not many.

It is often convenient (and often prudent) to form a panel and have a pool of prequalified suppliers to choose from and many local governments like to do that. Therefore, the DLGC amended the Tender Regs in 2015 to create Division 3, "Panels of pre-qualified suppliers" which requires a local government to prepare and advertise a policy setting out how the panel will work. Once a local government has complied with Division 3, provided the process is correctly followed in accordance with Division 3 and the local government's adopted policy, awarding work to a panel member is exempt from the requirements to call tenders by Regulation 11 (2) (k).

Received Tender – Received Tenders were not reviewed as part of CORE's review. A quick glance at the contractors who tendered and all appear to be reasonable companies that should be capable of undertaking the work tendered for.

Tender Assessment – A Tender Assessment Report was prepared by Brett Howson. According to the report, tenders were assessed by an assessment panel comprising;

3. Glenda Teede, Chief Executive Officer
4. Bret Howson, Acting Works Manager

As per Regulation 18 (4) a local government is to assess tenders "by means of a written evaluation of the extent to which each tender satisfies the criteria for deciding which tender to accept". The tender assessment report satisfies this criterion and appears to be thorough, reasonable and in a format generally used by a number of local governments.

However, Shire Officers advise that although the report sets out that they were involved in the Tender Assessment Panel, they were not involved, hence the tenders have only been assessed by the Acting Works Manager. One of the Officer's advised that they were of the understanding that it was Acting Works Manager's intention to provide the Tender Assessment Report to the Tender Assessment Panel members as a draft and then meet to discuss before formalising however the Acting Works Manager resigned before doing that. Hence the Tender Assessment Report should only be considered a draft. It is good practice to get all members of a Tender Assessment Panel to sign the final report so that Council can be sure it represents the view of all panel members.

The Tender Assessment Report references the Shire's Regional Price Preference Policy. The policy appears to be non-compliant with the Tender Regulations and to the extent that it is compliant, does not appear to have been applied correctly in the tender document or in the evaluation.

General Comments

As can be seen from the above assessment, there are several identified non-compliance issues, some minor, some major with the major issue being the intent to form a panel

through a tender process. Setting aside the issue of non-compliance, if Council were to appoint the tenders recommended by the Tender Assessment Report it is our view that this potentially represents a significant risk to Council is the way it is proposed to be managed. We understand that a new Works Manager will be shortly joining the Shire and it will be up to that Officer to co-ordinate the individual contractors under to deliver this project.

CORE is familiar with the new Works Manager's abilities as he has previously worked as a contractor to CORE in the past. While we believe he is more than capable of running a project such as this, it is a significant commitment on top of becoming familiar with a new local government, delivering the Shire's usual works program plus delivering and co-ordinating the activities of a number of contractors that may not necessarily be experienced at working together plus the need to build in the use of Shire day labour as part of the project.

To make the process easier on the new Works Manager and of less and potentially less risk to the Shire and given that the tender process contains a number of non-compliance issues, we believe that Council would be better to reject all tenders and recommence the process.

In recommencing the process, we believe it would be a better option, to, rather than award all of the works to a conglomerate team of several contractors, it would be better to separate the works into discrete work packages and call tenders for each package on a fixed price, lump sum basis with the aim of awarding each work package to one contractor.

We understand that time is of the essence with this project and the Shire has lost significant time as a result of the Covid-19 Emergency and dealing with this Tender Process and the fact that we understand from the CEO that Mr Howson has made himself unavailable. To get the process back on track, we would recommend recalling tenders as soon as possible with the aim of closing and awarding tenders prior to Christmas. As individual tender packages will be awarded to separate contractors, they can then run in parallel and run at the same time, significantly cutting down the delivery timeframe.

The technical aspects (Scope of Work etc) of the existing tender process appears to be sound, therefore, it would be a simple exercise to reformat the tender document into the individual work packages. Each work package would have one lead contractor who would then be responsible for delivery of the entire work package including all sub-components.

We understand that the Shire needs to build in the use of three-day labour staff. We would recommend that this be done by including the requirement that each contract requires the secondment of a Shire employee to each of the successful contractors. That person will then be under the Contractors control (and not the Shire's control) for the period of the works. The Shire would still pay each employee however the Shire would bill the Contractor for the use of that employee (similar to a labour hire arrangement) at a rate set out in the contract. The contractor would then recover that cost through the overall contract charge to the Shire.

An advantage of this approach is that Council will have better control of costs and deliverables associated with each project and the timeframe in which each project will be delivered. A disadvantage will be the requirement to manage cashflow as there will be several projects being worked on at the same time resulting in the need for higher cashflow demand each month.

Alternative Recommendation Option

As discussed in the report, CORE believes that Council has run a non-compliant tender as the form of tender is essentially a panel as it seeks to appoint more than one tenderer. We appreciate that this often occurs in local government as understand around the difference between a panel and a tender is not well understood.

If Council considers the identified non-compliance issues to be minor and wishes to proceed with the tender anyway, it is recommended that rather than appointing a Primary and a Secondary contractor to each separable portion, it would be better to appoint one contractor to each separable portion, this way it looks less like a panel contract. However, the risk associated with this is that if the contractor appointed is not available the Shire doesn't then have an alternative. Therefore, if this option is implemented by Council, it is considered important to confirm supply by the appointed contractor in the due diligence process before the contract is executed.

If Council wishes to follow this approach, the following wording could be moved as an alternative to the Officer recommendation however it must be stressed that this is not CORE's recommendation.

Suggested Wording for Alternative to the Officer's Recommendation;

Alternative Motion 1 to the Officer's Recommendation

The for Tender RFT 02 – 2020/21 Provision of Roadworks Contractor Services for the FY 2020/21 and FY2021/22, Council accept the following Tenders for each separable portion;

5. *Wet Hire Grader and Final Trim Operator – Muchea Grading*
6. *Wet Hire Road Construction Plant – Ringa Civil*
7. *Stabilisation & Wetmixing Services – Western Stabilisers*
8. *Traffic Management Services – ATM Traffic*
9. *Work Supervision Services – Nil*

Tenders to only be awarded for the 2020/21 Financial Year with the option to extend to the 2021/22 Financial Year in the event that WSFN funding is allocated to Council in the 2021/22 Financial Year.

Council will need to provide a reason for going against the Officer's recommendation.

In discussion with the CEO, it's the CEO's preference that the same contractor is used for as as many parts of the contract as possible in order to keep the complexity of logistics to a minimum. This approach is supported. In which case it would be better that Council move the following as an alternative to the Officer recommendation and the above Alternative Motion 1.

Muchea Gradings price for a grader under Portion 1 is the same as Ringa Civil's price, therefore there should be no financial difference.

Alternative Motion 2 to the Officer's Recommendation

The for Tender RFT 02 – 2020/21 Provision of Roadworks Contractor Services for the FY 2020/21 and FY2021/22, Council accept the following Tenders for each separable portion;

10. *Wet Hire Grader and Final Trim Operator – Ringa Civil*
11. *Wet Hire Road Construction Plant – Ringa Civil*
12. *Stabilisation & Wetmixing Services – Western Stabilisers*
13. *Traffic Management Services – ATM Traffic*
14. *Work Supervision Services – Nil*

Tenders to only be awarded for the 2020/21 Financial Year with the option to extend to the 2021/22 Financial Year in the event that WSFN funding is allocated to Council in the 2021/22 Financial Year.

In relation to Portion 5 of the Tender, as advised by the Acting Works Manager in the Tender Assessment Report, *“During interviews of the proposed Works Supervisors, AK Evans and Goodwork Holdings both have submitted people who manage other projects within their companies and will need to “come and go” from this RFT. Remote Roads have notified the Shire that the person nominated is no longer available. Given the above issues, it is recommended not to award Portion 5 Work Supervisor Services from RFT02-2020/21.”*

If Council decides to adopt one of the above two alternatives to the Officer Recommendation, it is recommended that Council use WALGA’s Civil Engineering Preferred Supplier panel to seek quotes for Portion 5, in which case CORE would be happy to respond if invited, hence as noted in the report header, CORE potentially has a Financial Interest in this issue and must be disclosed in accordance with the provisions of Section 5.70 of the Local Government Act 1995.

CONSULTATION

CORE discussed the WSNF project with Garrick Yandle, CEO of the Shire of Kulin who we understand is the project co-ordinator. From this we understand that one of the key risks to the overall project is individual Shire’s abilities to manage and deliver the project within budget and the tight timeframe. We believe that our recommended approach maximises the Shire’s opportunity to do that.

STATUTORY CONTEXT

Part 4 Provision of Goods and Services, of the Local Government (Functions and General) Regulation 1996. Individual regulations are referenced in the body of this report above.

CORPORATE CONTEXT

FINANCIAL IMPLICATIONS

There should be no costs associated with rejecting tenders as the Tender Regs, Regulation 18 (5) allows a local government to decline to accept any tender.

There will likely be external costs associated with running a new tender process if this work can’t be done internally by Officers.

VOTING REQUIREMENTS

Absolute majority required: No

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| Officer Recommendation |
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That Council reject all tenders associated with RFT 02 – 2020/21 and request the CEO to prepare and call tenders for individual work packages associated with the WSNF Project Works.

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| Alternative Recommendation 1 |
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The for Tender RFT 02 – 2020/21 Provision of Roadworks Contractor Services for the FY 2020/21 and FY2021/22, Council ACCEP the following Tenders for each separable portion:

1. Wet Hire Grader and Final Trim Operator – Muchea Grading
2. Wet Hire Road Construction Plant – Ringa Civil
3. Stabilisation & Wetmixing Services – Western Stabilisers
4. Traffic Management Services – ATM Traffic

5. Work Supervision Services – Nil

Tenders to only be awarded for the 2020/21 Financial Year with the option to extend to the 2021/22 Financial Year in the event that WSFN funding is allocated to Council in the 2021/22 Financial Year.

Reason for Variation

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| Alternative Recommendation 2 |
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The for Tender RFT 02 – 2020/21 Provision of Roadworks Contractor Services for the FY 2020/21 and FY2021/22, Council accept the following Tenders for each separable portion:

1. Wet Hire Grader and Final Trim Operator – Ringa Civil
2. Wet Hire Road Construction Plant – Ringa Civil
3. Stabilisation & Wetmixing Services – Western Stabilisers
4. Traffic Management Services – ATM Traffic
5. Work Supervision Services – Nil

Tenders to only be awarded for the 2020/21 Financial Year with the option to extend to the 2021/22 Financial Year in the event that WSFN funding is allocated to Council in the 2021/22 Financial Year.

Reason for Variation

12. CLOSURE OF MEETING

There being no further business, the Presiding Member declared the meeting closed at _____ pm.

CERTIFICATION

These minutes were confirmed at the Ordinary Council Meeting held on _____ 2020.

Signed _____ Date _____
(Presiding member at the meeting which confirmed the minutes)

Council Minutes are unconfirmed until they have been adopted at the following meeting of Council.