

25 April 2018

Ms Tessa Cramond
Analyst, Adjudication, Mergers and Authorisation Review Division
Australian Competition and Consumer Commission
Level 17/2 Lonsdale Street
Melbourne VIC 3000

By email: adjudication@accc.gov.au
Cc: Tessa.cramond@accc.gov.au

Dear Ms Cramond,

Re: AA1000414 – Council Solutions & Ors

The Waste & Recycling Industry Association of South Australia (WRISA) is the peak body representing the waste and resource recover industry in the state. Our members include waste and recycling companies and related support businesses of all sizes, coming together to advocate for a strong and profitable waste and recycling sector.

Joint procurement of waste and recycling services by local governments provides an opportunity for councils to generate cost savings and efficiencies. However, procurements of this nature can be poorly structured and have a material impact on competition, often to the point where any claimed benefits fail to outweigh the real costs and public detriment.

We applaud the ACCC's decision to deny authorisation to Council Solutions under their original application (ACCC Authorisation A91520), based on the likelihood of reduced competition and the lack of clear public benefit.

It is our strong belief that the amended application provides no further evidence that would suggest the public benefit outweighs any public detriment. The claims made with regard to public benefit within the application are overstated and in most cases are never likely to be realised through a collaborative procurement of this nature.

WRISA has canvassed the views of its members with regard to the application and we present the attached submission which reflects the concerns raised.

Ultimately, the reduction of competition presents a significant risk to the sector which is not offset by any genuine benefits.

If further information is required, please do not hesitate to contact me by email, [REDACTED] or mobile [REDACTED].

Yours Faithfully

Chris Brideson
Executive Officer

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) ON COUNCIL SOLUTIONS & ORS AA1000414

We note the ACCC has not provided specific questions for consultation and as such we have structured our response in the following way:

- Overarching comments related to the submission
- Specific comments tabulated in line with relevant sections of the application document.

Overarching Comments

The role of the applicant in this process is to provide suitable evidence that the proposed conduct does not breach or impede Australian competition law. Specifically, that the conduct does not substantially lessen competition and enable cartel type behaviour. In making its determination the ACCC must consider the degree to which any potential detriments are outweighed by the purported benefits. WRISA members participate in this market every day. We understand every facet of the commercial and social imperatives that drive the market, and WRISA feels strongly that the submission has failed to provide suitable evidence that the benefits would outweigh the significant impacts on competition in the Greater Adelaide Region waste collections market.

We note the following:

- This is a tender of significant size, greater than the market share quoted by the Applicants which does not take into account the share of the market that is not available through public tender. In reality, the Application would see as much as a third of the market locked away in the one tender. By the Applicant's own admission, a number of other tenders are likely to follow immediately after, further reducing competition for services.
- The Applicant suggests that bargaining power in the current market is skewed in favour of waste service providers and that a joint procurement would rebalance that disparity. In reality, individual tendering of waste services by Councils of this size already occurs through a competitive tender where each Council sets the parameters under which the market must respond, and as such there is no bargaining involved with the price that has been submitted.
- The potential for environmental benefits and alignment with SA waste policy settings are also overstated. Waste collections are not likely to be a conduit for greater waste diversion and reduced dependence on landfill, this would more reasonably be attributed to new processing infrastructure to recover resources from residual waste, which is not part of the proposed conduct.
- Perhaps most importantly, claims made by the Applicant with regard to potential service efficiencies, bargaining power and competition are vastly overstated and lack any supporting evidence. WRISA notes the following key points regarding competition and efficiency:
 - A tender of this size will significantly limit competition and exclude a number of market players who would likely bid for waste from Participating Councils if offered through individual tenders. Given these contracts are highly capital intensive and require significant upfront investment, the business risk alone will further exclude potential contractors from the process.

- Efficiency gains related to reduced contract administration are unlikely to be realised as each of the Participating Councils would be required to enter its own contract with the service provider. In addition, the role of Council Solutions as a “middle man” would add further complexity and may indeed increase the administrative burden.
- Service efficiency through an increased number of Councils is likely to be minimal as collection routes are dependent on the number of tenements being serviced which is a fixed parameter. In addition, cross border efficiencies cannot be realised where the Participating Councils do not share a border.
- Reduced competition in the market would likely increase commercial and industrial waste service provision as contractors not awarded a municipal contract may retreat entirely from the area.
- Claims regarding improved purchasing power are overstated as the economies of scale that apply to the waste collection services are already realised by large Councils.

The claims made in regard to improved service efficiency are unsubstantiated and do not align with our real-life knowledge of the market. For these reasons we consider that the provision of mere supposition should not replace the need for the Applicant to provide substantive evidence that the benefits would be realised and as such, the prima facie position that competition will be adversely affected should be applied.

Specific Comments

Section	Comments
Proposed Conduct	
Clause 4.3.2	<p>Centroid locations for delivery of waste</p> <p>We recognise the intent of what has been done here, however it will be difficult for the market to price appropriately with the destination being unknown (for example, potential infrastructure for bulk haulage etc).</p>
Clause 4.3.3	<p>Customer interface</p> <p>We note the comment that council is responsible for “providing the customer interface to their communities”</p> <p>We note that in general, this customer service interface is a contractor responsibility so shifting it back to Councils will incur an additional cost to Councils.</p>
Clause 4.5.1	<p>Policy context</p> <p>We note the policy context speaks in detail about SA Government targets related to waste reduction and diversion. It is extremely unlikely that a procurement for waste collection services will have any impact on waste reduction and diversion. These targets are more closely linked to recycling activity, processing options for</p>

residual waste and state-wide community engagement, none of which is relevant to this procurement.

Market Information and Concentration

Clause 5.3

Market Share

The submission references the participating councils' share of the market as 26.23%, representing its percentage of rateable properties. However, when taking into account the share of market that is not available through public tender, the participating councils' share of available market is 34.07%. This is a significant oversight, with the proposed activity covering more than one third of the available market.

Clause 5.4.1

Existing or Potential Competitors

We note the reference to "16 other Greater Adelaide Region Councils who provide the market with opportunities to tender for their Waste Collection Services".

It is our contention that this is not accurate. By our calculation there are likely to only be 8 other Greater Adelaide Region Councils:

Greater Adelaide Region Councils	27	as defined
Council Solutions	-4	as defined
East Waste	-7	as defined
FRWA (excl Kangaroo Island)	-3	as defined
NAWMA	-3	as defined
BRPG (excl Gawler)	-2	as defined
Remaining 'Unaligned Councils'	8	

Of these 8 Councils, Onkaparinga and Tea Tree Gully are constituent Councils of Council Solutions, so if they decide at a later date to have their waste collection services provided by Council Solutions (see Clause 3.1) that would leave only 6 Councils offering services to the market place in the Greater Adelaide Region.

Clause 5.4.3

Countervailing Power of Customers and / or Suppliers

(para 1) We note the claim that potential suppliers have significant bargaining power and are able to exert strong influence over the market. We contest that there is not currently an imbalance of power in the market and over the course of the last 10-15 years, competition in the market has continued to **increase**. Whilst some potential contractors would not tender for all available opportunities in the market, tenders in the Greater Adelaide Region Councils attract significant competition. The concentration of market share is not a representation of competitiveness in this market.

For all such tenders, each organisation is required to price sharply and improve service provision in order to remain competitive with other market players. The submission suggests that Councils have little bargaining power in the current process and that is not the case. The fact is that the process is a tender process and as such

there is no bargaining involved with the price that has been submitted. With the reduction of potential tenderers, the reality is that Councils will have reduced competition which will reflect in potentially higher price to Council.

(para 3) We note the commentary regarding the exiting of contracts. The ability or otherwise for a Council to exit a contract is based on the terms of the contract entered into by both parties, not a reflection of the balance of power within the market. All current contracts (including the LGA Model Contract being proposed in the submission) have provision for the Contractor to provide a Security Guarantee to Council to cover circumstances of default by the Contractor, and necessity for Council to step in and provide services / re-tender. This already limits the risk to Councils.

If the LGA Model Contract is to be used (as stated), the ability for a Council to exit a contract would be consistent with the current conditions. Furthermore, under the proposed conduct, the size of the contract and resulting lessening of competition within the market means that the ability for a Council to procure a replacement Contractor would be a difficult task. To illustrate, it would be a far easier task for an affected Council to find a replacement supplier for one of the Participant Council areas than all four (4) of those because not as many potential suppliers have the resources to provide these services at short notice to a larger geographical area.

Public Benefit

Clause 6.1.1

Tender process cost savings and efficiencies

We note the commentary regarding cost savings and efficiencies made by the applicant. We believe these claims are overstated and are unlikely to eventuate as follows:

- The Applicant identifies that the likely contract to be utilised is the LGA Model Contract (Clause 4.3.2). Given this contract has already been developed and used for commercial contracting, the need for complex legal advice will be minimal.
- The Applicant acknowledges that there will be differences in the service requirements for each Participant Council (Clause 4.3.2), therefore it is unlikely that the Participant Councils will benefit from any cost savings for “technical advice” which will be issued in relation to any nuances specific to a Participant Council. Indeed, it is not unlikely that some Participant Councils will be disadvantaged by the need of an individual Participant Council to obtain detailed technical advice in connection with said nuances.
- The work involved in considering the tenders will be the same as it otherwise would have been had the Participant Councils tendered on their own. While resources of each Participant Council may be reduced for this purpose, the work is merely being transferred to Council Solutions and the Waste

Management Services Project team (comprised of representatives of Participant Councils anyway); and

- Council Solutions will in many ways act as just a coordinator, adding a third party to the tender process that would normally be conducted direct by the Participant Council and the tenderer. All correspondence and submissions relating to a Participant Council will need to be considered by it regardless of the role of the Applicant. The addition of a further party, from our experience, increases the potential for confusion in relayed messages and by necessity, will result in double handling and a significant increase in time to assess the tenders as a larger group of people is required to be brought together to facilitate this process and therein increased costs. These negative effects on cost extend to the purported role Council Solutions would play in administration of any contract awarded as a result of approval of the Application.
- The structuring of the ongoing administration of the contract is such that the only benefit received is at the tender evaluation stage and it is our contention that there is no cost benefit there. After award of the contract the administration will fall back to the individual councils and as such there are no available savings.

(para 6) “Alignment of specification

We note that the claim that a single contract will lead to consistencies in areas such as bin types and service standards is questionable. Councils all adopted 140ltr MGB for garbage, 240ltr MGB for recyclables and 240ltr MGB for organics, consistent with Zero Waste SA (now Green Industries SA) “best practice” recommendations, but if for some reason a Council has moved from these sizes (e.g. 360ltr MGB for recyclables or 80ltr MGB for garbage due to provision of specific options to residents), it is unlikely the Council will abandon these changes.

Clause 6.1.2

Environmental benefits

(para 2) “Combined educational materials to manage contamination”

We note the claim in the submission that a “consistent message can help reduce contamination and increase diversion of waste”.

With regard to contamination (which refers to incorrect or non-recyclable materials being put into the recycling bin, which then subsequently contaminate the recycle stream), individual councils have the ability to tailor education programs to the unique requirements of their municipality, whereas consistent messages are achieved through programs developed in line with the state government objectives in consultation with other Councils. It is this more targeted approach to waste education (sitting beneath the state-wide framework) that has the potential to reduce contamination.

The claims made regarding waste diversion (which refers to material that is recycled rather than sent to landfill) are not relevant to a procurement of this nature (i.e. waste collection only). It must be noted that South Australia already has one of the highest waste diversion rates nationally. Additional waste diversion is likely to be generated by investment in new processing infrastructure for residual waste which is not covered in this tender.

We find that the likely public benefit of combined education programs will be very minimal and will not outweigh concerns about reduced competition.

We also note that education is but one facet that will assist Participant Councils to achieve their waste diversion goals. If the Participant Councils consider that a consistent message would assist this cause, this could be achieved through other joint initiatives that do not impact on competition. For example, groups of councils commonly work together to develop and delivery shared waste education resources for the community.

(para 10) “Contributing to state government targets...”

As noted above, a procurement for waste collection services will not have a notable impact on state targets for waste diversion. Claims regarding a reduction in waste to landfill that would be directly attributed to a procurement of this nature are entirely unfounded. A reduction in waste to landfill will require new processing infrastructure and significant structural change at state level.

Clause 6.2.1

Lower costs through improved purchasing power

With regard to the potential for improved purchasing power or buying power, we note that beyond a certain point the aggregation of waste volumes does not have a substantial impact on price and the approach of Contractors applying for a tender. The economies of scale that apply to the services involved are already realised by large Councils. Fixed cost benefits may be relevant to disposal services but not to collection services, particularly for established players in the market.

Whilst it's acknowledged that the fundamental tenets of collaborative procurement or 'bulk buying' listed (i.e. standardised approach, multi-year contracts, and assurance of business) may be desirable for a commercial contractor, these benefits are not unique to this process and are made available by Council through individual tender processes.

It is unlikely that the purchasing power of Contractors would be positively affected as the purchasing power of most Contractors exceeds what is available through this contract.

Clause 6.2.2

Increased competition

We note the commentary that is provided regarding increased competition is flawed in a number of areas. Our members suggest that the proposed conduct is likely to significantly reduce and impact competition in the Adelaide region.

Clause 6.2.2 notes;

“the opportunity presented by the Participating Council’s under the Proposed Conduct will encourage all potential suppliers capable of providing Waste Collection Services to compete and submit tenders”.

To the contrary, our members are more likely to submit a response to an RFT if the work is **not** jointly tendered and this process is likely to reduce the number of submissions.

While a supplier may be capable of performing services to one of the Participant Councils, it may not be in a position to service all the Participant Councils, so while they may tender for one or more separate RFTs they may not submit if they are required to provide services to all Participant Councils.

As the pricing for each Participant Council will be different, the work load involved in this task is not reduced, therefore a smaller potential supplier with limited resources, simply may not be able to respond to the RFT within the short 6-8 weeks proposed response timeframe.

The cost of supplying the equipment, manpower and administration for a larger service offering becomes prohibitive to a smaller contractor as the risk of getting the pricing wrong puts the contractor’s business at risk.

Collection service contracts are highly capital intensive and require a significant up-front investment from the contractor. Whilst attractive in size, the opportunity presented may in fact pose significant challenges to business from a capital access and risk perspective, and may even exclude potential contractors from the process.

The greatest stimulation of a market occurs when there is a dynamic market with a consistent pipeline of opportunities available to all or most contractors. This process contradicts this point as it is more likely that there will be **fewer** suppliers that are capable of participating in the joint RFT process if the Application is approved. This of course would have a detriment on the Participant Councils and their constituents from a cost and service perspective and genuinely reduce market competition in Adelaide.

Conversely, individual council tenders would continue to provide each contractor, large and small, with multiple opportunities to secure a share in the market.

Reduced access for the market

Clause 5.4.3 purports that the potential suppliers of Waste Collection Services have access to a “significant pipeline of Council opportunities”. However, at Clause 1 the Applicant foreshadows that it will be making further and similar applications. It is very clear that if the Application is approved, that the opportunities for potential suppliers to tender for similar contracts will be even further reduced.

This is a significant application that is likely to consolidate circa 34% of the available market and the impact of this from a competition perspective cannot be underestimated.

Negative impacts on commercial and industrial waste services

We note that the reduction in competition in the market for municipal waste collection services could be further impacted by a restriction in commercial and industrial waste providers. Typically, contractors awarded tenders for Council waste would also look to provide the same services to commercial and industrial customers, stimulating greater competition in the trade waste market.

If the opportunity to tender for this work with individual local governments is reduced or less attractive (because there is reduced opportunity to tender for these services in the future), this reduces the incentive for other competitors to enter into the local trade waste market. This has not been considered by Applicant.

Proposal is not attractive to potential service providers

The Adelaide market is smaller than Melbourne and Sydney and the tendering of such a large percentage of the available waste would significantly limit the competitiveness of other parties. Essentially, the winning provider would have an almost unassailable lead in capturing market share. Our members have made it clear that the lessening of competition to this degree would lead to other providers divesting their interests and searching for new opportunities and new investments in other states or territories, thus further reducing competition into the future.

Clause 6.2.3

Improved Service Efficiency

We acknowledge that there would be a minor benefit in the reduction of spare vehicles required to service the contracts, however the improved efficiencies mentioned in the Application are overstated. The ability to service more than one participating council would not have a material impact on a contractor’s ability to maximise efficiency.

Municipal collection routes are optimised on a per contract basis and the efficiencies available would be available whether the Council areas were grouped or not.

We further note that having regard to the information supplied at Table 2, each Participant Council is large enough in its own right to

maximise and take advantage of any economies of scale. In our opinion, there will be limited cost saving from efficiencies for any Participant Council.

With regard to Participating Council boundaries, claims about increased efficiencies from collecting across borders are not applicable as by the Applicant's own admission (in Map 1), the Participating Councils do not necessarily share borders.

WRISA further notes that the claims made by the Applicant that the proposed conduct would reduce the number of trucks on the road is erroneous and misconceived. Having regard to the information supplied at Table 2, no fewer trucks would be required if the Application was approved. There is a directly proportionate relationship between the number of tenements serviced and the number of trucks required, and this is not changed by the size of the contract.

Clause 6.2.3 claims that *"new, safer technology on vehicles should deliver improved public safety"*. We note that the LGA Model Contract has specified particular in-vehicle data management systems to allow tracking of vehicles, monitoring of bin conditions, presentation problems etc. Contractors currently achieve this by a Council decision to fit RFID tags to MGBs or via appropriate GPS equipment fitted to the collection vehicle. The benefit claimed by this arrangement has therefore already been in place for many years.

The claims made in regard to improved service efficiency are unsubstantiated and do not align with our real-life knowledge of the market. For these reasons we consider that the provision of mere supposition should not replace the need for the Applicant to provide substantive evidence that the benefits would be realised and as such, the prima facie position that competition will be adversely affected should be applied.
