



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Bankstown City Council
Fairfield City Council
Parramatta City Council
Liverpool City Council

in respect of

collective tendering for processing services
for household clean up waste

Date: 2 April 2014

Authorisation number: A91409

Commissioners: Sims
Schaper
Rickard
Cifuentes
Court
Walker

The ACCC proposes to grant authorisation to Bankstown City Council, Fairfield City Council, Parramatta City Council and Liverpool City Council for 6 years to enable them to jointly tender for processing services for household clean up waste and enter into related contracts.

The ACCC has also decided to grant interim authorisation to allow the councils to commence the tender, but not enter into contracts. This will remain in place until either the date the ACCC's final determination comes into effect, or until the ACCC decides to revoke interim authorisation.

Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The Applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 5 February 2014, Bankstown City Council, Fairfield City Council, Parramatta City Council and Liverpool City Council (the Applicants) lodged application A91408 with the ACCC seeking authorisation for the conduct described below. The Applicants also requested interim authorisation to enable them to engage in the proposed conduct while the ACCC considers the substantive application.
2. The Applicants are local government authorities and bodies corporate incorporated under the *Local Government Act 1993* (NSW), located in Western Sydney.
3. The Applicants are seeking authorisation to:
 - a. jointly tender for the receipt and processing of "household clean up" waste (e.g. kerb-side collection of household waste that is not included in the weekly household waste collection for example items such as mattresses, white goods, hot water systems, bulky garden waste) (the Services); and
 - b. enter into individual contracts with successful tenderer/s for those Services.
4. Under the arrangements:
 - a. all councils may enter into a separate contract with the same service provider;
 - b. some councils may enter into a contract with the one service provider and other councils may enter into a contract with another service provider; or
 - c. each council may enter into a contract with a separate service provider.
5. The proposed contract term is three years, with the option of two further extensions of one year in duration each.
6. Authorisation has been sought for 6 years to cover the tender period and the maximum possible contract term of 5 years.

Similar authorisations

7. The ACCC has previously considered a number of similar authorisation applications for joint tendering and contracting for various waste management services which include the collection and processing of dry recyclable materials, organics and household waste. These applications have generally been made by groups of councils in Sydney (such as the Southern Sydney Regional Organisation of Councils, and the Northern Sydney Regional Organisation of Councils), and groups of councils in regional NSW and Queensland.
8. The ACCC has granted authorisation to each of these applications with terms ranging from 7 to 20 years.

ACCC evaluation

9. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC sought submissions from 16 interested parties potentially affected by this application, including waste-services providers, local councils, industry associations and government authorities.
10. The ACCC received one submission from the Waste Contractors & Recyclers Association of NSW in relation to this matter, who submitted that:
 - a. the scope of the tender and subsequent contracts should strictly conform to the scope of services outlined in the application for authorisation; and
 - b. the tender process and documentation should comply with the NSW Environmental Protection Authority (EPA) service timelines, the NSW Domestic Waste Code of Practice) and the NSW EPA Better Practice Guide for Waste Management in Multi-Unit Dwellings.
11. Copies of the public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.
12. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests¹ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.

The relevant area of competition

13. The Applicants submit that the relevant market is that for "the safe and hygienic disposal of household type waste".² This waste is to be recycled (if possible) or alternatively placed into landfill.

¹ Subsections 90(5A), 90(5B), 90(6) and 90(7). The relevant tests are set out in Attachment A.

² Applicants, Supporting Submission, 5 February 2014.

14. The Applicants also submit that the market is limited geographically, as facilities for the deposit of the waste need to be located within 25 – 30 km from the council area, as it is inefficient for collection trucks to drive further than this distance. Where a processing facility is beyond this distance, transfer stations (where the waste is dropped at a location other than the major processing facilities) may be used.
15. The ACCC does not consider that it is necessary to precisely identify the relevant areas of competition in assessing the likely public benefits and detriments. However, for the purpose of assessing this application the ACCC considers that the relevant areas of competition likely to be affected are the provision of household rubbish processing services in, or otherwise able to service, the Sydney metropolitan area.

The future with and without

16. To assist in its assessment of the conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
17. The ACCC considers that without the proposed conduct, each council would conduct a tender for a provider of the Services independently, as they have done previously. Currently, the councils are serviced by two separate providers.

Public benefit

18. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.³

Applicants' submission

19. The Applicants submit that the arrangements will deliver public benefits, including:⁴
 - a. Environmental benefits, as more kerbside waste will be able to be recovered due to the economies of scale created by the aggregated volumes under the contract and greater access to kerbside waste, which will avoid illegal dumping or the inappropriate placement of this waste in other facilities (like regular garbage bins). This may also translate into a

³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

⁴ Applicants, Supporting Submission, 5 February 2014.

cost saving as the costs associated with remedying these problems may be reduced.

- b. More efficient contracts, due to the economies of scale, which will be passed onto the 720,000 residents of the relevant council areas.
 - c. Transaction cost savings are likely to be achieved through the joint tendering arrangements as the councils will save administrative, legal and other staffing costs by not each completing a separate tender and contracting process. The Applicants submit that these cost savings will be passed onto their local communities.
20. The Applicants also submit that if these arrangements are authorised, this may encourage the Applicants to form better working relationships to share additional functions and services, which could lead to “future cost efficiencies and innovations”.

ACCC consideration

21. The ACCC considers that the proposed conduct is likely to result in some public benefits, including:
- a. **Transaction cost savings:** The combined tendering and contracting process is likely to lead to some efficiency savings for the councils, relative to the scenario where each council conducts its own individual tender process. The ACCC considers that transaction costs are lower where a single process is employed, relative to a situation where each Council conducts its own individual tender process. A single process where costs are shared between parties can also facilitate more efficient outcomes. This is particularly the case where the Applicants select a common provider.

To the extent that the Applicants select a common provider, the proposed conduct may generate the following public benefit:

- b. **Potential for increased competition:** The aggregated tonnage of recyclable materials from the four councils may encourage increased competition for the tender, as the potential for the aggregated volume and certainty of the contract term may be more attractive to processors than if the councils were to tender individually. Processors who are able to achieve improved economies of scale and scope (as described in (c) below) may be able to offer increased service quality or lower prices.
- c. **Potential for improved economies of scale and scope for processors:** The aggregation of a larger volume of household clean-up waste may enable the service provider to achieve improved economies of scale. These efficiencies could be achieved if the processing costs per tonne of materials decrease the higher the volume processed, or if it is more efficient for the different types of waste to be processed at the one facility.⁵ Further, higher volumes may allow processes to invest in new, more efficient processing technologies. However, it is unclear whether the expected volume of recyclable materials from the Applicants will be sufficient for these benefits to be realised.

⁵ The Applicants submit that the predominate type of waste collected through the household clean-up waste collection differs between councils. For example, some councils predominately collect mattresses, others whitegoods.

22. The other public benefits submitted by the Applicants, including the environmental benefits from a reduction in illegal dumping, are only likely to arise if the joint tender enables the parties to provide enhanced services to residents, such as more frequent collection. The ACCC understands that this will not be the case as collection services will not form a part of this particular tender and will remain a matter for each council to determine.

Public detriment

23. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁶

Applicants' submission

24. The Applicants submit that the possible public detriments from the joint tender process could include “the reduction of competition in the event that all four Councils enter into contracts with the same contractor”.⁷ The Applicants further submit that another potential public detriment is the “domination of the market whereby exertion of undue pressure on contractors is available” and “may create a situation where undue exertion on contractors to reduce their prices is applied”.⁸
25. The Applicants submit that these public detriments are unlikely to arise due to:
- the small size of the tender, which makes it likely that even without the joint tender process, that a single contractor will secure most of the contracts (which is the current situation);
 - the limited scope of the Services included in the tender;
 - the ability for service providers to tender to provide Services to all or some of the councils, and the ability for the councils to each contract separately with different service providers; and
 - the oversight of the tender by a probity advisor and its compliance with the *Local Government Act 1993*, the *Local Government (General) Regulation 2005* and the *Tendering Guidelines for NSW Local Government (DLG) October 2009*.

ACCC consideration

26. The ACCC considers that the proposed joint tender process is likely to result in limited public detriment for the following reasons:
- While the receipt and processing of household clean-up waste for the Applicants will not be contestable for the duration of the relevant contract periods, the tender process will ensure that there will be competition for

⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

⁷ Applicants, Supporting Submission, 5 February 2014.

⁸ Applicants, Supporting Submission, 5 February 2014.

the market' (e.g. competition to win the contract).⁹ Other local government authorities will continue to acquire these Services separately from the potential tenderers.

- b. Each council may choose which tender they select for their Services, there is no requirement that a common provider be chosen.

Balance of public benefit and detriment

27. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
28. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
29. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Length of authorisation

30. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁰ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
31. In this instance, the Applicants seek authorisation for a period of 6 years.
32. The ACCC proposes to grant authorisation for a period of 6 years to enable the Applicants to complete the tender process and enter into the proposed contracts with a maximum term of up to 5 years.

Draft determination

The application

33. On 5 February 2014 the Applicants lodged application for authorisation A91409 with the ACCC. Application A91409 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88 (1 and 1A) of the Act for authorisation to enable the Applicants to:

⁹ This is in contrast to ongoing competition 'in the market'.

¹⁰ Subsection 91(1).

- a. jointly tender for the Services; and
 - b. enter into individual contracts with successful tenderer/s for the provision of the Services.
34. The Applicants seek authorisation of these arrangements as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
35. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

36. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

Conduct for which the ACCC proposes to grant authorisation

37. The ACCC proposes to grant authorisation to the Applicants for 6 years to:
- a. jointly tender for the Services; and
 - b. enter into individual contracts with successful tenderer/s for the provision of the Services.
38. This draft determination is made on 2 April 2014.

Interim authorisation

39. At the time of lodging the application, the Applicants requested interim authorisation to enable the tender process to commence while the ACCC considers the merits of the application for authorisation.
40. The Applicants submit that interim authorisation is required as:
- a. Fairfield City Council's existing contract expires in June 2014;
 - b. tenderers require time to prepare and submit their tenders, and the successful contractor/s require sufficient time to ready themselves for the commencement of the contracts; and
 - c. the Councils are required to undertake a number of steps in order to complete the tender process, evaluate those tenders and enter into the related contracts.
41. When considering interim authorisation, the ACCC considers a range of factors, including harm to the applicant and other parties if interim authorisation is, or is not, granted, possible benefit and detriment to the public, the urgency

of the matter and whether the market would be able to return to substantially its pre-interim state if the ACCC should later deny authorisation.

42. The ACCC **grants** interim authorisation under section 91(2) of the Act to enable the Applicants to:
 - a. finalise and advertise the tender and contract documentation to jointly tender for the Services; and
 - b. receive and evaluate any tender responses and prepare a recommendation for senior management and for the respective councils tender panel for approval.
43. This interim authorisation does not provide the Applicants with authorisation to enter into contracts with the successful tenderer/s.
44. The ACCC considers that it is appropriate to grant interim authorisation at this time as:
 - a. Interim authorisation is limited to commencing and conducting the tender process. The Applicants will not enter into contracts until after the ACCC issues a final determination granting authorisation.
 - b. Interested parties did not raise any objections with the ACCC.
45. Interim authorisation will commence immediately and remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

46. The ACCC will now seek further submissions from the Applicants and interested parties. In addition, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Section 91 allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.