



Australian
Competition &
Consumer
Commission

Application for Minor Variation of Authorisation A91483

lodged by
Cessnock City Council
Maitland City Council
Singleton Council

in respect of

joint procurement of waste
collection and processing services

Date: 2 December 2015

Authorisation number: A91483

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston

Summary

The ACCC has decided to vary the authorisation granted to Cessnock City Council, Maitland City Council and Singleton Council to jointly procure services for collection and processing services of organic waste, and also at the discretion of each council, the collection and delivery of bulky waste services.

The variation allows the Applicants to jointly run a number of further tender processes; for the provision of organics processing services and separately for the provision of organics collection services. The initial authorisation applied to a joint tender process for the combined collection and processing of organic waste.

The application for minor variation

1. On 16 October 2015, Cessnock City Council, Maitland City Council and Singleton Council (the **Applicants**) applied for minor variation to authorisation A91483¹ under section 91A of the *Competition and Consumer Act 2010* (the **CCA**).² Authorisation A91483 was granted by the ACCC on 9 July 2015 and came into effect on 31 July 2015.
2. Authorisation A91483 was granted to enable the Applicants to:
 - conduct a joint tender process for organics collection and processing services, and at the discretion of each of one or more of the Applicants, the collection and delivery of bulky waste services;
 - enter into a contract on the same general terms and conditions for those services; and
 - consult with each other and make joint decisions regarding service-related, operational and ongoing administrative matters.
3. Without the successful appointment of a contractor under the initial joint tendering process, the Applicants are seeking to undertake further joint tendering processes and contract arrangements for the tendered services.
4. The Applicants are proposing to conduct the same joint tendering processes and contract arrangements but instead of inviting tenders for organics collection and organics processing services as initially proposed and authorised by the ACCC, the Applicants now propose separate tenders with:
 - one joint tendering process for the organics processing services
 - another subsequent joint tendering process for organics collection services for a seven year term

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at www.accc.gov.au/publications/authorisation-guidelines-2013

² The application for minor variation was lodged by Maitland City Council on behalf of the Applicants. A person to whom an authorisation was granted, or another person on behalf of such a person, may apply for a minor variation of an authorisation – subsection 91A(1) of the CCA

- another subsequent joint tendering process for organics collection services for a further seven year term.

Consultation

5. The ACCC established that the proposed amendment was consistent with the definition of a minor variation in the CCA. The ACCC also invited submissions from interested parties. No submissions were received.
6. The Applicants' submission in support of the minor variation is considered as part of the ACCC's assessment.

ACCC assessment

7. The ACCC has assessed the application for a minor variation to authorisation A91483 in accordance with the tests in section 91A of the Act.
8. Broadly, the ACCC may vary an authorisation if it is satisfied that:
 - the proposed variation is minor, and
 - the variation would not result or would not be likely to result in a reduction in the net public benefit that arises from the authorisation.

The proposed variation is minor

9. Section 87ZP of the CCA defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.
10. The ACCC notes that the authorisation originally granted was for the Applicants to run a single joint tender. The variation seeks to allow further joint tendering processes, including separate organics collection and processing tenders.
11. The ACCC considers that the variation sought is consistent with the intent of the original authorisation granted. The outcome of the three new tenders is likely to be substantially the same as the intended outcome of the single original tender (if that tender had been successful).
12. For this reason, the ACCC is satisfied that the proposed variation is minor.

No reduction in the net public benefit of the arrangements

13. The assessment of the effect of the variation on the net public benefit takes account of the likely benefits and detriments of the arrangements as reflected in the ACCC's determination of 9 July 2015. The ACCC was 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 and granted authorisation until 31 January 2031.

ACCC's determination to grant authorisation – 9 July 2015

14. In its determination the ACCC considered that the proposed conduct was likely to result in public benefits, including:
 - **Transaction cost savings:** The combined tendering and contracting process is likely to lead to some efficiency savings (including the removal of

some duplicated administrative costs) for the Applicants relative to the scenario where each council engages separately with potential suppliers.

- **Potential for improved economies of scale:** The aggregation of a larger volume of organic waste is likely to result in some public benefits by enabling the service provider to achieve improved economies of scale. These efficiencies could be achieved if the processing costs per tonne of organic material falls as the volume of processed organics increases.
- **Potential for increased competition:** The combined organic waste volumes of the councils are likely to encourage increased competition for the tender, and is likely to underwrite the investment needed to encourage a new supplier to enter the market. The ACCC understands that a number of the potential tenderers do not currently operate organic waste processing facilities in the Hunter region, and may construct a new facility in the case of their bid being successful.
- **Environmental benefits:** By facilitating investment in increased capacity for organic waste processing, the proposed conduct may result in some environmental benefits by reducing the amount of organic waste diverted to landfill, thereby reducing environmental externalities.

15. The ACCC considered that the proposed conduct was likely to result in limited public detriment for the following reasons:

- although organic waste collection and processing services for the Applicants will not be contestable for the duration of the final contract period, the tender process will ensure that there will be competition between suppliers to win the contract; and
- the proposed conduct involves a relatively small proportion of the Hunter region. As such, a significant volume of organic waste collected and processed by other local councils is not subject to the conduct and may remain available to alternative suppliers who are not successful tenderers for the contract.

Effect of the proposed variation on the net public benefit of the authorisation

16. The Applicants submit that the proposed change to the joint tender and contract process does not reduce the public benefits that are likely to result from the conduct. The Applicants expect that the separation of the tender processes will attract more competitive bids and allow service providers to bid for those tender services in which they have experience and expertise.

17. The Applicants submit that there remains minimal or no public detriment from the joint tendering and contract arrangements proposed under the variation.

18. The ACCC considers that the proposed variation is minor in its operation and will not involve a material change in the effect of the authorisation or result in any additional public detriment. In particular, the parties to the conduct will remain unchanged and the ACCC does not consider that the variation will change the nature or scope of the authorised conduct in any meaningful way. In particular, the scope of the three new tenders combined will be the same as the single original tender.

19. The ACCC considers that the variation would not result or would not be likely to result in a reduction in the net public benefit that arises from the authorisation.

Determination

20. The ACCC is satisfied that the variation is minor.
21. The ACCC is also satisfied that the public benefit test under section 91A(4) of the CCA is met – that is, the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.
22. Pursuant to section 91A(3) of the CCA the ACCC makes this determination varying authorisation A91483 to enable the Applicants to conduct separate tenders with:
 - one joint tendering process for the organics processing services
 - another subsequent joint tendering process for organics collection services for a seven year term
 - another subsequent joint tendering process for organics collection services for a further seven year term.
23. This determination is made on 2 December 2015. If no application for a review of the determination is made with the Australian Competition Tribunal, the determination will come into force on 24 December 2015.