



Australian
Competition &
Consumer
Commission

Determination

Application for revocation of authorisation A91019
and the substitution of authorisation A91530

lodged by

Georges River Council and Rockdale City Council

to

continue to jointly contract
for the provision of
waste and recycling collection services

Date: 14 September 2016

Authorisation number: A91530

Commissioners:

Sims
Rickard
Schaper
Court

Summary

The ACCC has decided to authorise Georges River Council¹ and Rockdale City Council (the Councils) to continue to jointly contract for the provision of waste and recycling collection services in their respective local government areas.

The ACCC grants authorisation until 2 February 2023.

Under an existing authorisation, the Councils jointly tendered for the provision of waste and recycling collection services in 2007 and entered into contracts with SUEZ Recycling & Recovery Pty Ltd (SUEZ) with an initial term of 10 years.

The contracts between the Councils and SUEZ included clauses that enable the contracts to be extended by five years. The Councils are seeking re-authorisation to enable them to invoke the contract extension clauses as it will deliver cost savings compared to conducting another joint tender process.

The application for authorisation

1. On 2 March 2016 Georges River Council and Rockdale City Council (the **Applicants**²) applied for the revocation of authorisation A91019, and the substitution of authorisation A91530.
2. Authorisation A91019 was granted on 21 March 2007 for the Applicants to jointly tender and contract for the provision of all waste and recycling collection services in their respective local government areas. Authorisation A91019 was granted until 30 June 2018 (the **existing authorisation**).
3. The Applicants wish to invoke clauses in their waste and recycling collection contracts with the successful tenderer (SUEZ Recycling & Recovery Pty Ltd (**SUEZ**)) to extend those contracts by five years. In order to facilitate this, the Applicants seek authorisation to continue to jointly contract for the provision of all waste and recycling services in their respective local government areas until 2 February 2023 (the **Conduct**).
4. The Applicants have not sought authorisation for any further joint tendering processes.

Background

5. The Applicants are both councils for the purposes of the *Local Government Act 1993* (NSW). The local government areas administered by the Applicants are located in inner Sydney, south of the central business district, and have a combined area of approximately 74 square kilometres.³
6. The Applicants submit that the NSW Waste Avoidance and Resource Recovery Strategy 2014-21 (NSW EPA, 2014) has a strong emphasis on using regional

¹ On 12 May 2016, Hurstville City Council and Kogarah City Councils were amalgamated and replaced with the Georges River Council. The ACCC understands that a proposed merger of Rockdale City Council with the City of Botany Bay is pending – see <https://www.strongercouncils.nsw.gov.au/>

² Also referred to as the St George Region of Councils or SGROC.

³ Further background and demographic information about the council areas was presented in the ACCC's final determination regarding authorisation A91019, 21 March 2007, section 2.

solutions to achieve waste management objectives and resource recovery targets. They also note that the NSW State Government's current amalgamation proposal indicates strong support for regional solutions.⁴

Similar authorisations

7. The ACCC has authorised a number of other groups of councils to jointly tender and contract for waste management services in Sydney, NSW and around Australia. However, the ACCC notes that the Applicants are currently the only group which is authorised to jointly tender and contract for waste and recycling collection services in the Sydney metropolitan area.⁵
8. The ACCC also notes that a number of these authorisations have included an option for the councils to extend their contracts by between one and five years.⁶

Draft determination

9. On 1 June 2016, the ACCC issued a draft determination proposing to authorise the Applicants to jointly contract for the provision of waste and recycling collection services in their respective local government areas until 2 February 2023.

Consultation

10. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. The ACCC invited submissions from a wide range of potentially interested parties seeking comment on the application for authorisation.
11. Prior to the draft determination, one submission was received from JJ Richards & Sons Pty Ltd (JJ Richards).
12. JJ Richards did not comment specifically on whether the contract extensions were likely to result in public benefits or detriments in this instance, but expressed concern about the growing number of applications from local government authorities for joint waste collection tender processes. JJ Richards submits that a reduction in the number of waste tender processes will also reduce competition, stifle innovation and the introduction of new technology which would otherwise result in improved efficiency, reduced cost, better quality of service and a positive impact on the environment.
13. Two submissions were received in response to the draft determination.
14. The Waste Contractors & Recyclers Association of NSW (**WCRA**) conditionally supports the application for authorisation.

⁴ Applicant submission, Attachment C, p.3.

⁵ Four separate groups of councils in regional NSW are currently authorised by the ACCC to jointly tender and contract for waste and recycling collection services (authorisations A91483, A91387, A91361 and A91289). Seven separate groups of councils in the Sydney metropolitan area are currently authorised by the ACCC to jointly tender and contract for waste management services other than waste collection (authorisations A91409, A91401, A9135, A91180, A91143/A91167, A91096 and A90988).

⁶ A91500 Redland City Council & Brisbane City Council, A91401 Northern Sydney Regional Organisation of Councils, A91361 Wollongong City Council & Shellharbour City Council, A91289 Hunter Resource Recovery, A91180 Hurstville City Council & Ors and A91143 & A91167 Southern Sydney Regional Organisation of Councils.

15. Cleanaway Waste Management Ltd (**Cleanaway**) opposes the application for authorisation and considers that the net public benefit test is not satisfied.
16. More detail on interested parties' submissions and the Applicants' responses are set out in the assessment of the Conduct below.
17. Further information in relation to the application for authorisation, including any public submissions received by the ACCC, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

ACCC assessment

18. The ACCC's assessment of the Conduct is in accordance with the relevant net public benefits tests⁷ contained in the *Competition and Consumer Act 2010* (the **CCA**). In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the Conduct would outweigh the likely detriment to the public, including from any lessening of competition.

Relevant areas of competition

19. The ACCC considers that the relevant areas of competition likely to be affected by the Conduct are the supply of the following waste collection services in the Sydney metropolitan area:
 - kerbside collection of domestic waste, recyclables, organics and hard waste;
 - collection of commercial waste, recyclables and organics;
 - collection of public place waste and litter bin waste;
 - collection of special event waste and recyclables; and
 - collection of illegal dumped waste.

Future with and without

20. To assist in its assessment of the Conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.
21. The ACCC considers that in the likely future without the Conduct:
 - the contracts which are subject of the existing authorisation would continue to run until 2018;
 - at this time the Applicants would be likely seek a new authorisation to conduct a joint tender for the provision of waste and recycling collection services (given that they consider the current arrangement has delivered a net public benefit to the Applicants)

⁷ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.

- subject to the grant of any authorisation, the Applicants would be likely to enter into waste and recycling collection contracts with the successful tenderer for a period of 8 to 12 years (reflecting the economic life of collection vehicles).

Public benefits

The Applicants' original submission

22. The Applicants consider that the arrangements currently authorised have resulted in public benefits which will continue if the existing collection contracts are extended. In support of this, they submit the following:
- cost savings of around \$46 million have been made over the initial term of the contracts based on the difference between the current collection contract prices and the prices in the previous contracts.⁸ These cost savings have been passed on to rate payers through various means including subsidising the increasing cost of waste disposal and processing; direct rebates to rate payers; and reduction in rates;⁹
 - cost savings for rate payers will result from granting a five year contract extension. The Applicants provided the ACCC with confidential information estimating these likely future cost savings;
 - the cost of preparing tender documents, inclusive of initial investigations, writing tender documents, administering the tendering process and evaluating tenders is significant. The Applicants also submit that allowing the costs of the tender process to be amortised over 15 years rather than 10 years would provide even more benefit to the Applicants and their communities. The Applicants provided the ACCC with confidential information estimating these costs and the cost savings from a joint tender process;
 - the existing authorisation has led to the establishment of a year-round electronic waste (e-waste) drop off¹⁰ and recycling service – located in Hurstville but available to residents in both council areas;¹¹
 - the Applicants have worked cooperatively to reduce illegal dumping through the “Dumping. It’s Dumb” campaign as well as setting up the Regional Illegal Dumping Squad;¹²
 - the Applicants share ideas and knowledge in order to provide the best education solutions for the community by using consistent educational material through both municipalities.¹³ Also, several joint education programs have also resulted since the commencement of the contracts;
 - the existing authorisation has contributed to reducing the use of landfill in a variety of ways including using the cost savings to invest in alternative waste processing technologies to divert residual waste from landfill:

⁸ Applicant submission, Attachment C, p.4.

⁹ Applicant submission, Attachment C, p.6.

¹⁰ Recycling of e-waste includes items such as televisions, computers, faxes, photocopiers, scanners, DVD players, electronic games, mobile phones, small household appliances and power tools.

¹¹ Applicant submission, Attachment C, p.5.

¹² Applicant submission, Attachment C, p.5.

¹³ Applicant submission, Attachment C, p.5.

- i. introduction of new collection systems to divert garden organics from landfill;
 - ii. education initiatives to increase recycling; and
 - iii. joint recovery initiatives such as the e-waste drop off; and¹⁴
- the joint collection arrangement has resulted in the revision of collection routes so that collections are only performed in Rockdale two days a week, in Hurstville two days a week and in Kogarah once a week¹⁵. The Applicants submit that by concentrating the vehicles in one local government area each day, traffic disruptions and traffic related noise have been reduced.¹⁶

Interested party views

23. WCRA supports the application for authorisation provided that a number of conditions are met, including that the proposal does not include any add-on services such as processing, landfilling or disposal.
24. Cleanaway accepts that tendering costs would be deferred by extending the contracts. However, it queries the extent of likely public benefits from the Conduct, noting that:
- it does not know to what extent transaction cost savings associated with deferring the tender process are offset by any increase in contract administration expenses during the life of the contract;
 - it is possible that a competing tenderer would, in 2018 be able to offer a service which delivers greater benefits than the existing contract and provide savings which exceed the transaction costs associated with conducting a tender;
 - a tender process is the only means of determining whether SUEZ would provide savings relative to alternative bidders, or a service which delivers greater benefits for ratepayers during the period 2018 to 2023;
 - the extension of the contracts and their current pricing mechanisms without testing the market deprives the Applicants and their rate-payers the opportunity to benefit from cost reductions since 2007;
 - other benefits identified by the Applicants such as reducing the use of landfill through the application of new technologies, joint education programs and public campaigns and environmental benefits are not unique to the current contracts. Many of these benefits could be delivered by the Applicants without authorisation; and
 - the amalgamation of Hurstville City Council and Kogarah City Council and the proposed amalgamation of Rockdale City Council creates uncertainty about the public benefits that might arise from the Conduct. Specifically, it is unclear whether the services to be provided to the post-amalgamation

¹⁴ Applicant submission, Attachment C, p.6.

¹⁵ Since the application for authorisation was lodged, Hurstville City Council and Kogarah City Council have been amalgamated and replaced with Georges River Council.

¹⁶ Applicant submission, Attachment C, p.7.

councils, and the cost of those services, will change as a result of the amalgamations; and whether the area over which joint services ought to be provided would expand or change. Conversely, there will be greater clarity about the status of the councils and the most beneficial structure of their collection service in or around 2018, when the existing authorisation is due to expire.

The Applicants' response to interested party views

25. The Applicants welcome WCRA's support for the application for authorisation. In response to the conditions outlined by WCRA as the basis for its support, the Applicants confirm that the services requested are the current services within the current contracts and do not involve a tender process.
26. In response to Cleanaway's opposing submission the Applicants state:
 - based on current industry rates, entering into new contracts in 2018 would likely result in an increase in the cost of services and therefore to deny the authorisation would result in increased costs to the community. This is supported by the confidential information provided to the ACCC;
 - contract administration costs will remain steady irrespective of whether the existing contracts are extended or new contracts are formed;
 - without authorisation, there is the possibility that the Applicants will not jointly tender for services (with shared resources) and therefore the benefits of joint education may not be practical to obtain;
 - based on already amalgamated councils including the Georges River Council, there has been no suggestion by the Applicants, the NSW state government or the current service provider, that there will be any compulsory change in the service or costs as a result of the council amalgamations. Amalgamated councils can opt to run their current contracts unchanged, which includes the current areas serviced;
 - if authorisation to extend the existing contracts is not granted, the Applicants would need to jointly or separately tender for new waste contracts early in the 2016/17 financial year because of the significant time required for tendering and acquiring resources for the new contract start date in February 2018. Under this tight timeframe, it would be difficult for any council amalgamating with Rockdale City Council to participate in the tender if they currently provide waste services in house, since local government legislation and union negotiations will prohibit any forced redundancy of council staff for a minimum period of three years from proclamation of any new amalgamated council. Given that collection contracts traditionally run for 10 years, this means that a new contract could exclude any amalgamated councils until 2028; and
 - if authorisation to extend the existing contracts is not granted and the Applicants need to tender for new waste contracts in 2016/17, there will be potential confusion and inefficiencies caused by misalignment between amalgamated council collection services. The Applicants (especially Rockdale City Council) will be in a better position to specify their future collection services (potentially inclusive of any amalgamated councils) in 2023.

ACCC assessment

27. After considering the further information provided by interested parties and the Applicants, the ACCC remains of the view in the draft determination that the Conduct is likely to result in public benefit in the form of transaction cost savings compared to the likely future without the Conduct. In particular, extending the existing contracts by five years will defer the expense associated with an additional tender process (or processes if the Applicants were to run them individually). The Applicants provided the ACCC with confidential information estimating these costs savings.
28. The ACCC notes the Applicants' submission (in response to Cleanaway's query) that contract administration expenses during the life of the contract are likely to remain steady irrespective of whether the existing contracts are extended or new contracts are entered into.
29. The ACCC also remains of the view that the Conduct is likely to result in public benefit in the form of a continuation of cost savings which have been achieved under the existing collection contracts. The Applicants provided the ACCC with confidential information to support this claim, and based on this information, the ACCC is satisfied that the Conduct is likely to result in cost savings.
30. The ACCC considers that these likely public benefits are not materially affected by any pending amalgamation involving Rockdale City Council, noting the Applicants' submission that the current contracts can run their course unchanged, irrespective of any council amalgamations.
31. The ACCC notes the concerns raised by interested parties that the Applicants are not conducting a new competitive tender process. However, the ACCC considers that the contract extension clause is the result of a previous competitive tender process and the clause exists for this exact situation, that is, the Applicants determining whether they are better off extending the existing contract than conducting another tender.
32. The ACCC considers that participants in the previous tender had the opportunity to submit bids that contemplated prices for an extension period. WSN (which was acquired by SUEZ in 2011) was the successful tenderer in that competitive process, including the prices offered for the extension period. While it is possible that another tender process conducted now may reveal different pricing options available to the Applicants that were not contemplated at the time of the previous tender, the ACCC considers that it is in the interests of the Applicants to undertake reasonable enquiries to determine whether they are better off under the extension of the existing contract or, alternatively, conducting another tender. Based on market inquiries undertaken by the ACCC and further information provided by the Applicants, the ACCC is satisfied that the Applicants have undertaken such enquiries and reached the view it has on the basis that prices will be lower under a contract extension.

Public detriments

The Applicants' original submission

33. The Applicants consider that authorisation of the Conduct will not deliver any anti-competitive detriments and note the following.

- Since the Applicants conducted their joint tender process in 2007, the ACCC has authorised at least two joint council waste collection arrangements involving contract periods of 15 years or more, and at least three joint council waste processing arrangements involving contract periods of 15 years.
- Contract extension terms are common practice in waste collection contracts and allow councils to maximise the length and value of a contract that has proven to be successful and beneficial, as is the case with the current collection contracts.
- The ACCC granted authorisation A91019 for 10 years but took the view that 'authorisation for longer than 10 years will not necessarily enhance efficiency gains, as the need to replace expensive equipment will eventually arise'. In response to this, the Applicants state that the equipment to be provided as part of the waste collection contract includes collection vehicles and bins. The Applicants submit that tenderers take into account the potential costs and benefits of contract extensions and will have made provisions to ensure that collection vehicles and bins are maintained in good working condition, not only for the original contract term, but also any optional extension periods,¹⁷
- In authorisation A91019, the ACCC also noted in relation to the length of authorisation that 'NSW councils have been encouraged to limit the terms of their waste contracts in order to maintain maximum flexibility in responding to new and emerging technologies'. In response to this, the Applicants submit that most of the changes in technology over the contract term relate to waste processing and technologies relating to waste collection have not changed since the commencement of the existing waste collection contracts.¹⁸ Furthermore, the Applicants submit that they have included a clause in their contracts for 'variations and better performance.' Under this clause, the contractor is encouraged to propose innovative arrangements for the provision of services, which then may be included as a variation to the contract.¹⁹

Interested party views

34. Cleanaway submits that the Conduct is likely to result in substantial public detriment because the Conduct will remove the opportunity for waste collection service providers to compete to provide waste collection services in the Applicants' local government areas for a further five years.
35. Cleanaway makes a number of observations, including:
 - competition in the waste management industry, including for municipal waste and recycling collection contracts, is vigorous;
 - the contract for municipal collections in the St George region is substantial and Cleanaway expects that it would attract interest from a number of potential bidders;

¹⁷ Applicant submission, Attachment C, p.7.

¹⁸ Applicant submission, Attachment C, p.8.

¹⁹ Applicant submission, Attachment C, p.8.

- an extension of the contracts until 2023 locks out competing providers for a period which is inefficient and detrimental to the public. The service to ratepayers will be adversely affected by the need to repair or replace collection vehicles; and
 - the extension of the existing collection contract without a tender process is likely to reduce the incentive which SUEZ would otherwise have to seek, propose and adopt new technologies or methods to improve collection services.
36. Cleanaway also submits that little weight should be placed on the mitigating factors identified by the ACCC in its draft determination because:
- the number of councils in the Sydney metropolitan area is now lower than 38 – amalgamations to date have reduced this figure to no more than 30;
 - the collection services acquired by the Applicants represents a material proportion of contestable work available for tender in the Sydney metropolitan area. Cleanaway estimates that collection services for the Applicants accounts for approximately 10% of all contestable work in metropolitan Sydney and approximately 85% of the contestable work pursuant to waste and recycling collection contracts that will expire in 2018; and
 - in practice, opportunities to bid for municipal collection contracts in the Sydney metropolitan area occur infrequently, partly as a result of the typical duration of the relevant contracts.

The Applicants' response to interested party views

37. In relation to Cleanaway's opposing submission the Applicants state:
- provided the vehicles used under the contract are maintained (or replaced) as required, the service will continue with no impact on quality of service;
 - an extension of the current contracts does not prevent the adoption of more advanced technologies or practices if they become available and are seen as value for money;
 - the Applicant's collection services would not form part of 'the contestable work due to be tendered in 2018.' This is because in order to commence a new contract on 3 February 2018, the collection services would need to be tendered in the 2016/17 financial year. This is because of the time required to prepare for the contract and the time taken for tenders to respond to the tender and the Applicants to evaluate the responses.
 - the Applicants refute Cleanaway's assertion that there is no evidence that the Applicants have undertaken a cost benefit analysis and note that some of this analysis was provided in the confidential information provided to the ACCC.

ACCC assessment

38. After considering the further information provided by interested parties and the Applicants, the ACCC remains of the view expressed in the draft determination that the Conduct is likely to result in minimal public detriment.
39. The ACCC acknowledges that, under the Conduct, service providers (other than SUEZ) are prevented from competing to provide waste and recycling collection services in the Applicants' respective local government areas for five years from the expiry of the existing contracts in 2018. However, the ACCC notes that:
- the opportunity to compete for the Applicants' contracts (including the extension period) existed in 2007. Therefore to the extent that other service providers are precluded from the extension period, this is because the successful tenderer was able to offer a more competitive offer than other bidders at that time; and
 - in the likely future without the Conduct, service providers who are unsuccessful in any tender process would also be prevented from competing to provide waste and recycling collection services in the Applicants' respective local government areas for the duration of any new contracts awarded after the expiry of the existing contracts in 2018.
40. Importantly, while amalgamations have reduced the number of councils in metropolitan Sydney from 38 to 30, the ACCC notes that the Applicants' contracts represent only around 10% of all contestable work in metropolitan Sydney for waste and recycling collection services. In light of this, the ACCC considers that the Conduct does not remove a significant number of opportunities for waste collection service providers to bid for other waste and recycling collection contracts.
41. In relation to authorising the Conduct for longer than 10 years, the ACCC accepts the Applicants' submission that:
- the age of bins is not relevant to the length of the contracts as there will be a variety of bin ages at the end of the initial contract term and the contractor is required to repair and replace bins as required, at their cost, for the duration of the contracts and extension of the contract term;
 - the contractor is required to maintain (or replace) collection vehicles to carry out the services for the contract term (including any extension period) at their cost, and would have allowed for the potential five year extension when planning their vehicle provision throughout the contracts and incorporated this into their contract prices; and
 - the Conduct is unlikely to limit flexibility in responding to new technologies in waste collection given the inclusion of a clause in the contracts allowing for variations to accommodate new or innovative arrangements.
42. The ACCC acknowledges the submission by JJ Richards and notes that there are a number of groups of councils around Australia which have been authorised to jointly tender and contract for waste management services. In assessing the public benefits and detriments of joint arrangements between local government authorities, the ACCC will have regard to any existing authorisations in the

relevant areas of competition, as well as factors including the effect of the arrangements on competition, innovation and the introduction of new technology.

43. Taking all of these factors into account, the ACCC considers that the Conduct is likely to result in minimal public detriment.

Balance of public benefit and detriment

44. The ACCC considers that the Conduct is likely to result in public benefit in the form of transaction cost savings, including deferring the expense associated with an additional tender process and the continuation of cost savings which have been achieved under the existing collection contracts. The ACCC considers that the Conduct is likely to result in minimal public detriment.
45. For the reasons outlined in this determination, the ACCC is satisfied that the Conduct is likely result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
46. Accordingly, the ACCC grants authorisation for the Conduct.

Determination

The application

47. Application A91530 was made using a Form FC, under subsection 91C(1) of the CCA. Authorisation is sought for the Applicants to continue to jointly contract for the provision of waste and recycling collection services in their respective local government areas until 2 February 2023.
48. Authorisation is sought as the Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

The net public benefit test

49. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the Conduct.

Conduct which the ACCC authorises

50. The ACCC revokes authorisation A91019 and grants authorisation A91530 in substitution. The substitute authorisation is to Georges River Council and Rockdale City Council to continue to jointly contract for the provision of waste and recycling collection services in their respective local government areas until 2 February 2023.
51. This determination is made on 14 September 2016.