


21 October 2016

Ms Lyn Camilleri
Director Adjudication
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By email: adjudication@accc.gov.au
lyn.camilleri@accc.gov.au



Dear Ms Camilleri,

A91520 – COUNCIL SOLUTIONS & ORS – SUPPLEMENTARY SUBMISSION

I am writing to you again with regards to the South Australian Council Solutions' Application for Authorisation of a Combined Waste Tender Process (A91520).

I have been advised that Council Solutions has submitted a 'Written submission after Draft Determination' outlining a number of items in support of its application. I reiterate my strong support of concerns raised by the South Australian Small Business Commissioner in his submissions on 1 March 2016 and subsequent submission on 18 July 2016.

I would like to emphasise my concern regarding the application's potential to seriously impact the ability of small business to compete for future council work in this area. In response to Council Solution's further submission on 30 June 2016 I would seek to raise concerns regarding two aspects of that submission.

Small Business Impacts

My concern relates to the lack of detail regarding Council Solution's assertion that small businesses impacts will be materially the same both with and without the proposed conduct. Council Solution's further submission states that small business concerns around specific elements, such as hard waste or footpath collection, will likely be separable portions of the RFP or may be subject to separate tender processes and outlines that the services could possibly work under sub-contracting, similar to existing arrangements.

I am concerned that Council Solutions has not provided certainty around the detail of whether these elements will be separable portions of the RFP. Council Solutions could easily have noted that their request for proposal (RFP) would outline specific criteria which would seek to



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identify these services as elements being required to be separable in a respondent's response. This would clearly provide all potential and existing service providers an understanding of whether or not they could participate in a response, either individually or as a partner with another party. The lack of detail is further complicated by Council Solutions suggesting the potential for these elements being a separate tender process. Clarity regarding whether a potential separate tender is part of the broader application process would be useful.

It is not unreasonable to understand the concerns of small business and family enterprise, currently providing these services which are generated by the lack of detail and uncertainty in Council Solutions submission. In addition, the suggestion by Council Solutions of further tender processes appears to undermine a key assertion that there will be transaction cost savings from the proposed conduct.

Sub-Contracting under the Proposed Arrangement

With regards to sub-contracting, we recognise that subcontracting presents many small businesses and family enterprises with opportunities to participate in procurements which they ordinarily wouldn't be able to pursue. Sub-contracting also provides small businesses the opportunity to deliver work that reflects their business skills and capabilities.

A key risk with any sub-contracting arrangement between businesses relies on the health of the business relationship. On a government procurement, as is being considered under this application, the government contracting authority generally has no contractual relationship with a sub-contractor. Consequently the contractual relationship between the prime contractor (who has the contract with the government contracting authority) and the sub-contractor may not reflect the same contractual conditions the prime contractor enjoys with the government contractual authority.

A prime contractor can exercise a large degree of power over any sub-contractor and there are several instances which have been brought to my attention where poor behaviour by a prime contractor has severely impacted on sub-contracted small businesses. At the forefront of these instances are circumstances where a prime contractor expands their service offering to exclude a sub-contractor from future work.

I am comfortable that Council Solution's recognises the value of sub-contracting and seeks to clarify that the proposed conduct does not seek to limit small businesses from sub-contracting. I would also note that these sub-contracting behaviours are likely even without the proposed conduct. However, the proposed length of the contractual term (17 years) would create an environment where such behaviours and practices could flourish and any sub-contractor who initially participates in a RFP process may be excluded in the future by their prime contractor partner.

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Lastly, there is no suggestion that an approved application for this conduct wouldn't lead to a subsequent application in future seeking to expand the range of council participants.

I will continue to follow the progress of these matters and hope that these comments assist with your work.

Yours sincerely,



Kate Carnell AO
Australian Small Business and Family Enterprise Ombudsman