



Australian
Competition &
Consumer
Commission

Draft Determination and interim authorisation

Application for authorisation

lodged by

Council Solutions
Adelaide City Council
City of Charles Sturt
City of Marion
City of Tea Tree Gully
City of Port Adelaide Enfield

in respect of

collective tendering for waste, recyclables and
organics collection and processing services

Date: 11 February 2016

Authorisation number: A91520

Commissioners: Rickard
Cifuentes
Court
Featherston

Summary

The ACCC proposes to grant authorisation to Council Solutions, on behalf of itself and Adelaide City Council and the Cities of Charles Sturt, Marion, Tea Tree Gully and Port Adelaide Enfield, for 17 years to enable them to jointly tender for the supply of waste, recyclables and organics collection and processing services. The ACCC also grants interim authorisation to the proposed conduct.

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 30 November 2015 Council Solutions, on behalf of itself and Adelaide City Council and the Cities of Charles Sturt, Marion, Tea Tree Gully and Port Adelaide Enfield (the Participating Councils) (together, the Applicants) lodged application A91520 with the ACCC seeking authorisation for the conduct described below.
2. 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 Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.¹
3. The Applicants also requested interim authorisation to enable them to commence with the tender and contract negotiation process while the ACCC is considering the substantive application.

The proposed conduct

4. Council Solutions, on behalf of itself and the Participating Councils, proposes to jointly tender, negotiate and contract for the supply of:
 - waste collection services²
 - receiving and processing of recyclables³

¹ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

² Waste collection services may involve kerbside, bulk bin, hard waste and parks and footpath collections and associated ancillary services. Each of the Participating Councils may require some or all of these services.

- receiving and processing of organics⁴
 - waste disposal services⁵
- (together, the Service Streams).
5. In particular, the Applicants seek authorisation for:
- Council Solutions, on behalf of the Participating Councils, to conduct collaborative competitive tender processes for services within the Service Streams (including the sharing of information), to evaluate the responses in collaboration with the Participating Councils and to negotiate on behalf of the Participating Councils the contractual framework
 - the Participating Councils to individually enter into separate contracts on identical or near identical terms with each supplier/operator (the contracts for all services within the Service Streams will be on the same general terms and conditions)
 - certain decisions regarding the ongoing administration and management of the resultant contracts to be made jointly by Council Solutions and/or particular Participating Councils
- (Proposed Conduct).
6. The Applicants seek authorisation for a total period of 17 years, comprising:
- a three year period for the joint procurement process, including investigation, market approach, negotiation, execution and mobilisation of the contracts
 - a standard market operating term
 - the capacity to accept a longer than standard market operating term of up to 14 years where the proposal is linked with infrastructure investment, environmental initiatives or economic development.

³ Recyclables include paper and cardboard, glass, plastics, aluminium and steel. Recyclables will be delivered to a materials recovery facility. The receiving and processing of recyclables requires a single or multiple facilities to receive, screen and sort the recyclables according to material.

⁴ Organics comprise of two main forms of organic waste: garden waste, such as grass clippings, prunings, weeds and leaves, and food waste and scraps. Under a waste collection contract, organics will be delivered to a transfer or receiving facility. The receiving and processing of organics service requires a single or multiple transfer or receiving facilities to sort the organics to remove contaminants, compost to produce an end product (such as renewable energy, organic fertilizers, soil conditioners and mulches), and then market and sell the end product.

⁵ This may include receiving, processing and/or disposal of residual kerbside waste, bulk bin waste, hard waste, waste from park and footpath collections, contaminated recyclables, contaminated organics, and organic waste delivered by residents under bulk drop off arrangements.

Joint tenders

7. Council Solutions intends to undertake a number of competitive tender processes for the services within the Service Streams. For each competitive tender process:
 - The process will be open to all suitably qualified operators and/or suppliers to bid for the contracts.
 - The process will be run in accordance with Council Solutions' Probity Plan, incorporating the Evaluation Plan which provides the framework and guidance for the tender evaluation process.
 - All tenders will be evaluated by Council Solutions, a working group consisting of representatives from each of the Participating Councils and other expert advisors as required. Council Solutions, on behalf of the working group, will recommend one or more operators or suppliers to the Participating Councils for their consideration and independent decision.
 - A probity advisor will be engaged to attend all industry engagement meetings, briefings and presentations if required, major tender evaluation meetings, any negotiations and all other relevant meetings and will advise on probity matters for the duration of the tender processes.
8. For each tender process, a sole operator or supplier may be awarded contracts to service all Participating Councils on an exclusive basis, or two or more operators or suppliers may be awarded contracts to exclusively supply groups of Participating Councils. These contracts may be individual contracts between each Participating Council and the successful operator or supplier, but on identical or near identical terms.
9. Council Solutions intends to publish the first tender in the first half of 2016 with a market and evaluation period of eight months. Subsequent tenders are expected to be published in early 2017 with similar market and evaluation periods. Contract commencement is expected from April 2018, with a rolling start across the Service Streams and the Participating Councils.

Administration of contracts

10. The daily administration of the contracts may be performed by the Participating Councils individually. However, Council Solutions will also establish working groups made up of representatives from each Participating Council and Council Solutions. The working groups will participate in joint activities (including the sharing of information) and decisions which may include, but are not limited to, assessment of supplier performance, pricing reviews, exercising contract options, contamination management, customer service and community education.

Background⁶

Council Solutions

11. Council Solutions is a Regional Subsidiary established under s43 of the *Local Government Act 1999* (SA) by the Corporation of the City of Adelaide and the Cities of Charles Sturt, Marion, Onkaparinga, Salisbury and Tea Tree Gully in December 2012. Council Solutions' primary purpose is to improve the financial sustainability of these councils through collaborative strategic procurement, contract negotiation and management. This service can also be provided to other councils within South Australia under the Council Solutions Charter and Council Solutions has fostered a relationship with other councils to this end. Council Solutions is funded by councils using an administration fee on contracts.

Participating Councils

12. The Participating Councils are all local government authorities and bodies corporate incorporated under the provisions of the *Local Government Act 1999* (SA) and provide the services outlined in section 7 of that Act.
13. The Participating Councils are situated within the Metropolitan Adelaide area with most sharing one or more geographic boundaries with another Participating Council.
14. The five Participating Councils jointly represent 35.3 per cent of the population and 37 per cent of the rateable properties in the Metropolitan Adelaide area. Adelaide City Council has the smallest population (22,690), while the other four councils have populations of between 88,000 and 123,000.

Similar authorisations

15. The ACCC has previously authorised joint tendering and contracting for various waste management services. Previous waste authorisations have tended to involve both the collection and processing of waste, recyclable materials, and/or organics, and have involved more than two councils. These applications have been made by groups of councils in Sydney, Melbourne, regional NSW and Queensland.

Submissions

16. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
17. The ACCC sought submissions from interested parties potentially affected by this application, including waste and recycling service providers, industry associations and neighbouring councils. The ACCC received a submission from

⁶ Information in this section is taken from the Applicants' submission in support of the application.

the South Australian Waste Industry Network (SAWIN) opposing the Proposed Conduct.

18. A summary of the public submissions received from the Applicants and interested parties is included in the *ACCC evaluation* below.

ACCC evaluation

19. The ACCC's evaluation of the Proposed Conduct is in accordance with the relevant net public benefit tests⁷ 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.

20. In its evaluation the ACCC has taken into account:

- the application and submissions received from the Applicants and interested parties;
- information available to the ACCC from consideration of previous matters;
- the likely future without the Proposed Conduct for which authorisation is sought. The ACCC considers the most likely outcome without the Proposed Conduct is that each of the Participating Councils will issue individual tenders for each of the Service Streams and individually evaluate and negotiate the resulting contracts, as has been the case previously;
- the relevant areas of competition likely to be affected by the Proposed Conduct. The Applicants submit that the relevant area of competition likely to be affected is that for the collection of waste, disposal of waste and receiving and processing of recyclables and organics within the Adelaide Metropolitan area. The Applicants note that the Service Streams comprised in the tender/s have different characteristics and are not substitutable for one another, such that they may represent different areas of competition. The ACCC does not consider that it is necessary to precisely identify the relevant areas of competition in assessing the application. The ACCC considers that the relevant areas of competition likely to be affected are those for the provision of the Service Streams in the Adelaide Metropolitan region in South Australia; and
- the period for which authorisation has been sought.

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

Public benefit

21. 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 principal elements ... the achievement of the economic goals of efficiency and progress.⁸

22. The Applicants submit that the arrangements will deliver public benefits, including:

- transaction cost savings for the Participating Councils and suppliers/operators
- improved purchasing power, leading to lower costs for Participating Councils
- greater economies of scale and efficiency, underwriting investment in infrastructure
- environmental benefits from the increased efficient diversion of waste from landfill
- improved incentive for new market entrants or expansion (to the extent that the joint tender results in a common provider being selected).

23. SAWIN disputes the claimed public benefits, submitting:

- in its experience, the purported cost savings from joint tendering have not been realised as individual councils have left the group
- tenders are already highly competitive between service providers
- there is already an incentive for investment/innovation under the status quo
- economies of scale will not be realised if the Participating Councils do not proceed with the same service provider.

ACCC view

24. In summary, the ACCC considers that the Proposed Conduct is 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 eliminating bilateral contracting between parties and reduction in duplication of administration costs) for the Applicants and potential service providers relative to the scenario where each Participating Council conducts separate tender processes. The Proposed Conduct could also result in

⁸ *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.

centralisation of call centres, improved flexibility and higher quality of source separation.

- **Potential for improved efficiencies:** The aggregation of the Applicants' waste, organics and recyclables is likely to result in some public benefits by enabling the service provider to achieve economies of scale. A successful supplier will have a greater area to service, a greater number of residences and consolidation of waste, resulting in efficiencies in the delivery of the services and a lower cost per tonne of waste. In addition, the Participating Councils share some common borders and it is likely that there are also potential efficiencies to be gained by sharing resources (e.g. trucks and employees) located within the different council regions. These benefits depend on the Applicants appointing a common operator.
- **Potential for increased competition:** The potential to win a larger, regional contract is likely to stimulate competition between suppliers and operators vying for the combined volume of services for each Service Stream. This may result in more competitive bids, benefitting smaller councils in particular. The volume of recyclables supplied by the Participating Councils may also underpin the investment in the establishment of new processing facilities by an operator or new entry
- **Environmental benefits:** To the extent the Proposed Conduct contributes to achieving the targets for diverting and recycling waste materials by increasing competition for the contracts, this represents a public benefit.

Public detriment

25. 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.⁹

26. The Applicants submit that the Proposed Conduct would not result in significant public detriment and the extensive public benefits of the Proposed Conduct will significantly outweigh any public detriment and that any public detriment will be mitigated by the following factors:

- The tender process will be public and conducted according to local government procurement standards. The process will allow for the maximum number of suppliers and operators to compete to provide the services. A probity advisor will also be engaged to advise on all probity matters for the duration of the tender process.
- The structure of the tender/s is such that more than one supplier and/or operator may be successful in each of the four Service Streams. The Participating Councils retain the right to accept or reject tenders. If the

⁹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

individual terms offered to a Participating Council are more favourable than those offered on a collective basis, the Participating Council can choose to accept the individual proposal.

- Council Solutions has conducted a pre-tender briefing with potential tenderers in order to consider any supplier or operator's concerns and barriers presented by the intended structure of the services offered by the Applicants in the tender.
- The suppliers will be free to compete for contracts with other consortia of Adelaide metropolitan councils and the operators will be able to offer services to customers other than the Participating Councils, including industry clients and other South Australian councils.
- The joint tender is not limited to suppliers or operators who can service all five Participating Councils, given the tender process will allow for suppliers or operators to provide services to individual Participating Councils as well as to all Participating Councils or groups of Participating Councils (e.g. on a regional basis) and therefore the Proposed Conduct will not result in fewer organisations having the capability to participate.
- The combined recyclables volume of the Applicants is 13 per cent of all tonnes of municipal recyclable material offered by all Adelaide metropolitan councils. Their combined volume of kerbside green organics is approximately 30 per cent of the total tonnes for metropolitan Adelaide.

27. SAWIN submits that the Proposed Conduct would substantially lessen competition in the relevant market(s) and this would not be outweighed by any public benefit:

- Only Visy and SMK have facilities for and compete for the receipt and processing of recyclables in the region. If all recyclable volumes were to be awarded to SKM, there is a risk that Visy would have insufficient volumes to maintain its facility. This could result in a monopoly supplier in the recyclables market, which is unlikely to be in the public benefit.
- The three main players in metro kerbside green organics (Jeffries, Peats Soils and IWS) compete for council tenders. If the organics of all of the Applicants were awarded to one organics service provider for a long term, this would do significant damage to the ability of the other service providers to offer this service and/or to invest in the necessary technology. Over time, this will result in less competitive pressure being exerted on the successful tenderer, causing a substantial lessening of competition.

28. The ACCC notes that the Participating Councils encompass approximately 35 per cent of the population of Metropolitan Adelaide. While this is a sizable portion of metropolitan Adelaide, there are numerous other councils in Metropolitan Adelaide and other regions.

29. With respect to the term of the contracts, in the likely future without the Proposed Conduct, the Participating Councils would conduct their own tenders and would be free to offer contracts of 14 years to the successful bidders. This would similarly have the effect of precluding unsuccessful bidders from

providing services to each of the Participating Councils for 14 years (albeit for a potentially smaller population).

30. The ACCC also considers that the Proposed Conduct is likely to result in limited public detriment, if any, for the following reasons:

- Although waste collection services for the Applicants will not be contestable for the duration of the contract period, the tender process will ensure that there will be competition between suppliers to win the contract. The ACCC considers that the Proposed Conduct potentially enables the smaller councils to benefit from a greater degree of competition in the supply of collection services through the joint tender with larger councils.
- The ACCC considers that it is likely that there will be future opportunities for unsuccessful bidders to bid for contracts with other councils in the region. The Applicants collectively do not represent the majority share of Adelaide Metropolitan municipal waste in tonnes (e.g. 28 per cent of residual waste, 13 per cent of recyclables, 36 per cent of organics).
- To the extent that allowing potential service providers to bid for separable portions gives smaller providers the option to enter bids for the work of an individual Participating Council, this will permit a large number and range of competing service providers to participate in the tendering process. If bids to individual councils are more attractive, then the Participating Councils are free to contract for these services individually.

Balance of public benefit and detriment

31. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

32. 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, if any, constituted by any lessening of competition.

33. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Length of authorisation

34. 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.

35. In this instance, the Applicants seek authorisation for a period of 17 years.

¹⁰ Subsection 91(1).

36. While the contract terms would typically be for five to 10 years, the Applicants anticipate a joint tender by the Participating Councils may attract alternative proposals that incorporate significant infrastructure investment, economic development, new environmentally positive technology and/or a new market entrant to establish within South Australia. It is expected any such proposal by a supplier or operator will require a longer contract term over which to amortise their capital expenditure to secure the substantial investment and for the Participating Councils to realise the full benefits. The Applicants consider that 14 years is the timeframe required for a supplier or operator to have sufficient supply certainty to justify the investment to be made (plus three years for the joint procurement process).
37. The ACCC proposes to grant authorisation for 17 years.

Draft determination

The application

38. On 30 November 2015 Council Solutions lodged application for authorisation A91520 with the ACCC. Application A91520 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 to enable Council Solutions and the Participating Councils to jointly tender for the supply of waste, recyclables and organics collection and processing services.
39. The Applicants seek authorisation of the Proposed Conduct as it may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
40. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

41. For the reasons outlined in this draft determination, the ACCC is satisfied that in all the circumstances the Proposed Conduct for which authorisation is sought is 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

42. The ACCC proposes to grant authorisation to the Applicants for the Proposed Conduct as outlined in paragraphs 4 to 6 for 17 years.
43. This draft determination is made on 11 February 2016.

Interim authorisation

44. At the time of lodging the application, the Applicants requested interim authorisation for the Proposed Conduct in order to approach the market by March 2016.
45. The Applicants submit that a delay in publishing the first tender will impact on the project timelines and will have a negative impact on the time allowed for the market to respond, the tenders to be evaluated and contracts to be negotiated, potentially reducing the value of the collaboration.
46. The Participating Councils will not enter into contracts for any Service Streams before the ACCC issues a final determination in relation to this application. The Applicants submit that consequently, granting interim authorisation will not affect current arrangements in place with each Participating Council in relation to the Service Streams and interim authorisation will not affect competition in any relevant market.
47. The Applicants submit that allowing them to proceed in a timely manner and ensure the potential suppliers and/or operators have the greatest opportunity to respond to and participate in the tender could have the effect of increasing competition.
48. The ACCC accepts that:
 - the tender process will take some time. The Applicants wish to approach the market in March 2016 with an evaluation period of eight months and subsequent tenders to be published in early 2017 with similar market and evaluation periods. Contract commencement is expected from April 2018 on a rolling basis. Final authorisation will not have been granted by March 2016
 - the market would be able to return to substantially its pre-interim state, noting that the Applicants will not enter into contracts under the interim authorisation. Suppliers/operators and the public are therefore unlikely to be harmed as a result of interim authorisation if the Proposed Conduct is not ultimately authorised.
49. The ACCC grants interim authorisation for the Proposed Conduct, noting however that the Applicants will not enter into contracts for any Service Streams before the ACCC issues a final determination.
50. Interim authorisation will 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

51. The ACCC will now seek further submissions from 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.