



Draft Determination and interim authorisation

Application for authorisation AA1000659

lodged by

Shellharbour City Council and Wollongong City Council

in respect of

joint procurement for waste collection services

Authorisation number: AA1000659

14 May 2024

Commissioners: Keogh
Carver

Summary

The ACCC proposes to grant authorisation to enable the Shellharbour City Council and Wollongong City Council (the Applicants) to jointly tender and contract for waste collection services for their respective areas.

The ACCC proposes to grant authorisation for a total period of 11 years.

The ACCC has also decided to grant interim authorisation to enable the Applicants to commence the joint procurement conduct, but not enter into and give effect to any contracts, while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 28 May 2024 before making its final decision.

The application for authorisation

- 1.1. On 21 December 2023, Shellharbour City Council and Wollongong City Council (the **Applicants**) lodged application for authorisation AA1000659 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for the joint procurement of waste collection services for their respective communities. The Applicants seek authorisation for a total period of 12 years.¹
- 1.2. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions of the Act in respect of the specified conduct. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the Proposed Conduct would or is likely to result in benefit to the public that would outweigh the likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).
- 1.3. The Applicants also requested interim authorisation to enable them to engage in the Proposed Conduct, but not enter into and give effect to any contracts, while the ACCC is considering the substantive application. On 14 May 2024, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act. The request for interim authorisation is discussed in section 6 of this draft determination.

The Applicants

- 1.4. The Applicants are:
 - Shellharbour City Council, and
 - Wollongong City Council.
- 1.5. The Applicants are local councils in New South Wales (**NSW**), with Wollongong City being situated approximately 80 km south of Sydney and Shellharbour situated approximately 100 km south of Sydney. Both Councils are located in the Illawarra region of NSW.
- 1.6. Wollongong City is the third largest city in NSW with a population of 214,564, whilst Shellharbour City has a population of 76,271. The combined population of the

¹ Applicants, [Amendment to period of authorisation sought](#), 18 April 2024.

Applicants is approximately 290,835 which makes up approximately 3.51% of NSW's population. The combined number of households is approximately 119,191.

- 1.7. The Applicants have previously successfully tendered for similar services in 2013 under authorisation A91361.²

The Proposed Conduct

- 1.8. The Applicants are seeking authorisation to:³

- (a) jointly tender, and evaluate proposals for, the provision of waste collection services, and
- (b) enter into and give effect to contracts with the preferred tenderer.

- 1.9. The services in the tender include:

- Garbage Collection Services (residential and commercial properties⁴)
 - Recyclables Collection Services (residential and commercial properties)
 - Food Organics and Garden Organics Collection Services (residential and commercial properties)
 - Bulky Waste Collection Services
 - Public Place Waste and Litter Bins Services (Shellharbour City Council only)
 - Mobile Bin Wheel-out Wheel-back Collection Services
 - Supply, Repair and Removal of Mobile Bins
 - Waste Education and Customer Service
- (the **waste collection services**).

- 1.10. Together, paragraphs 1.8 and 1.9 constitute the **Proposed Conduct**.

- 1.11. Under the Joint Procurement Agreement the Applicants have entered, either council has the option to exit the tendering process if the outcome of the process does not benefit the community or council.

- 1.12. The Applicants will jointly advertise a Request for Tender; however, each participating council will enter into an individual contract with the preferred tenderer following the provision of an independent report to their respective council. The evaluation of all responses to the Request for Tender will be undertaken by a Tender Evaluation Panel, established with key representatives and leaders from both councils.

- 1.13. The Applicants are not bound by the recommendations provided by the Tender Evaluation Panel and may choose to request additional information from the tenderers, reject all tenders or accept a tender.

- 1.14. The Request for Tender will require the tenderers to submit the prices for both Applicants.

² See Wollongong City Council & Shellharbour City Council, [Application for authorisation A91361](#).

³ See Wollongong City Council & Shellharbour City Council, [Clarification of Conduct](#), 20 February 2024.

⁴ The Applicants submit that the commercial services constitute a small part of the contract. As an example, the Applicants cite the terms of their current contract, which services 1,174 commercial properties across both councils, out of a total 19,311 businesses across both councils.

1.15. A conforming tender will be required to include the servicing of both councils as well as all the waste collection services.

2. Consultation

2.1. The ACCC has considered, and granted, many applications for authorisation involving local councils jointly procuring and contracting for waste services. In the ACCC's experience, a streamlined process is appropriate if the following features are in place:

- the parties to the proposed conduct include only local councils
- the participating councils propose to jointly tender for and procure services from an unrelated commercial entity
- the joint tender and procurement will be the result of a competitive process
- participation by service providers is voluntary and no collective boycott activity is involved
- the participating councils are free to choose to negotiate outside the joint procurement process
- contracts are entered voluntarily and participating councils may jointly enter into contracts, but remain free to enter into their own contracts, and
- length is appropriate.

2.2. Where proposed conduct has the above features, the ACCC considers it appropriate to proceed directly to a draft determination, without an initial consultation phase. Interested parties with concerns about the proposed conduct are able to make submissions on the draft determination.

2.3. The ACCC considers that in these circumstances, the Proposed Conduct does have the above features and it has therefore decided to issue a draft determination without initial consultation. Interested parties are now invited to make submissions in response.

3. ACCC assessment

3.1. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.

3.2. In applying the authorisation test, the ACCC compares the likely future with the proposed conduct that is the subject of the authorisation to the likely future in which the proposed conduct does not occur. The ACCC considers that the likely future without the Proposed Conduct would involve each Applicant carrying out a separate tender process for the waste collection services.

3.3. To assist with the assessment of the Proposed Conduct, the ACCC also considers the relevant areas of competition likely to be affected by the Proposed Conduct.

3.4. The ACCC considers that the relevant areas of competition are likely to be the supply and acquisition of the waste collection services.

3.5. The ACCC considers that there are national and state-based service providers of the waste collection services which are positioned to provide their services to local councils. Consequently, while the Applicants are both councils in the Illawarra region

of NSW, the ACCC considers that the relevant area within which to consider effects on competition is the state of NSW.

Public benefits

3.6. The Applicants submit that the Proposed Conduct would result in the following public benefits:

- improved efficiency
- economic benefits
- improved cost savings
- reduced environmental impact
- enhanced community outreach.

3.7. The ACCC has assessed the above under the following headings:

- environmental benefits
- improved efficiencies and economic benefits
- transaction cost savings.

Environmental benefits

3.8. The Applicants submit that the Proposed Conduct can help to reduce the environmental impact of waste by reducing the number of waste collection vehicles on the road, reducing emissions and fuel consumption, and minimising the amount of waste that is disposed of in landfills.

3.9. The ACCC considers that the Proposed Conduct is likely to result in some environmental benefits through the more efficient aggregation of materials reducing greenhouse gas emissions (for example, through more efficient transport between retrieval and processing sites).

3.10. The Applicants submit that the size of the current contract has allowed the contractor to invest in Australia's first zero-emission, hydrogen-powered waste collection vehicle. In the initial application, in which authorisation was sought for a 14-year contract, the Applicants submitted that this term would allow for the adequate return on investment for an initial diesel-power vehicle fleet, but also offer options to transition to low emission vehicles within the contract term when they are expected to become economically viable (expected to occur within the next 5 to 10 years).

3.11. The ACCC acknowledges that the use of zero-emission vehicles would result in environmental benefits. However, as the Applicants subsequently revised their request for authorisation for a 7-year contract (with 3-year extension option), it is less likely that there would be a transition to low emission vehicles as a result of the Proposed Conduct. Further, the Proposed Conduct does not require the successful service provider to use this type of vehicle.

3.12. It is also unclear to the ACCC how the Proposed Conduct would minimise the amount of waste disposed of in landfills as the Applicants have not provided information to support this claim.

3.13. Therefore, the ACCC considers that the Proposed Conduct is likely to result in some environmental benefits through the more efficient aggregation of materials reducing greenhouse gas emissions. However, it is uncertain whether the Proposed Conduct would be likely to result in public benefits in the form of reducing emissions and fuel

consumption or minimising the amount of waste disposed of in landfill; and if it did result, the extent or significance of those benefits. The ACCC has therefore given little weight to this claimed public benefit.

Improved efficiencies and economic benefits

- 3.14. The Applicants submit that contractors can realise efficiency gains from joint procurement through pooling resources, such as vehicles and personnel. The ACCC accepts that there is likely to be efficiency in combining operations over the 2 councils. These efficiencies include, maintenance staff, land taken as a depot and the number of staff in management positions.
- 3.15. The Applicants also submit that joint tenders can help to improve community outreach and education about waste management, noting that the Applicants work together to deliver these education messages when appropriate. However, it is not clear to the ACCC how these initiatives are an outcome of joint procurement for waste services (that is, why they would not also occur without the Proposed Conduct). Therefore, the ACCC does not consider this to be a public benefit resulting from the Proposed Conduct and has consequently given no weight to this efficiency.
- 3.16. However, the ACCC considers that the Proposed Conduct is likely to result in a public benefit by improving economic efficiency in the form of economies of scale arising from a greater volume of waste services. To the extent the Proposed Conduct is also likely to enable service providers to achieve economies of scope by sharing fixed and variable costs between waste streams and economies of density, this would also constitute a public benefit. Economies of scale, scope and density can produce lower average costs for the Applicants, which can lead to lower costs for rate payers.

Transaction cost savings

- 3.17. The Applicants submit that a joint tender for waste collection can also result in cost savings for the councils and therefore residents, as economies of scale can be achieved through shared resources and coordinated efforts. The councils would share the legal, procurement and technical advice costs of the tendering process. The Proposed Conduct would also help avoid duplication of capital expense, land use, infrastructure and administrative resources, such as operation of a joint vehicle depot and a joint customer service centre. The Applicants submit that the current estimated cost of the joint tendering process is \$122,000, which will be equally divided between both councils. They submit that the total cost would be incurred by each council, individually, absent the joint procurement. The Applicants further submit that the last joint procurement of a waste collection services saved the councils \$120,000 over the life of the contract.
- 3.18. The ACCC considers that the Proposed Conduct is likely to result in public benefits to the councils and service providers in the form of reduced administrative and legal costs relative to each council conducting, and each service provider responding to, separate tender processes. However, to the extent that the Proposed Conduct covers a greater number of waste streams, the ACCC considers that the transaction costs savings may be partially offset by additional costs associated with coordinating and administering their service agreements. Similarly, in the context of differing specific council requirements, transaction costs savings may be partially offset by any additional transaction costs incurred by service providers.

Public detriments

- 3.19. The Applicants submit that the proposed joint procurement may result in the following public detriments:

- lack of competition
- inequitable dealing in the market, and
- framing of the conduct forecloses competition.

3.20. However, the Applicants submit that all service providers will be able to respond to the public tender, thus promoting competition. The tendering process will also be conducted in accordance with both the *Local Government (General) Regulation 2021 (NSW)*, Part 7 Tendering and Shellharbour City Council's Procurement Policy. Therefore, the tender process will provide opportunity for the maximum number of service providers to compete.

ACCC views on public detriment

3.21. The ACCC notes that the Proposed Conduct will effectively foreclose competition for waste collection services in the area of the participating councils for a period of at least 7 years.

3.22. The ACCC considers that longer contracts carry an increased risk of a foreclosing effect on rivals by reducing the size of the contestable market available at any particular point in time. The end result could be a reduction in the number of waste service providers competing to provide such services when contracts eventually expire. While the ACCC recognises that there are likely efficiencies associated with a contract of a certain length, these are finely balanced against the noted longer-term competitiveness of the market.

3.23. The ACCC considers that any public detriment likely to result from the Proposed Conduct will be mitigated by the following factors:

- although the Proposed Conduct covers a number of different waste streams, it is limited to 2 councils. The participating councils make up only 3.51% (approximate) of NSW's population
- participation is voluntary for the Applicants, and the councils have the option to exit the tendering process if the outcome of the process does not benefit the community or council
- each council will enter into an individual contract with the preferred tenderer following the evaluation of all responses to the Request for Tender by the Tender Evaluation Panel. However, the councils are not bound by the recommendations provided by the Tender Evaluation Panel and may request to reject all tenders or accept a tender
- no collective boycott is proposed.

Balance of public benefit and detriment

3.24. The ACCC considers that the Proposed Conduct is likely to result in some public benefits in the form of environmental benefits, improved efficiencies and economic benefits, and transaction cost savings.

3.25. The ACCC also considers that the Proposed Conduct is likely to result in some public detriments in the form of a reduction in competition between service providers due to potentially reducing the number of service providers competing over the longer term.

3.26. Whilst finely balanced, the ACCC considers that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit and that this public benefit

would outweigh any likely detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.

4. Length of authorisation

4.1. In this instance, the Applicants seek authorisation for 12 years. This is comprised of:

- 1 year for the procurement conduct
- a 7-year initial term for the contract entered into between councils and service providers and an extension period of up to 3 years (for a maximum 10-year operating term)
- an additional 1 year to allow for potential slippage in the procurement process or contract negotiations.

4.2. The Applicants submit a 12-year period is appropriate because:

- The Applicants' previous waste collection services contract had a 7-year initial term and if the term was reduced, the increase to the capital recovery rate would need to be passed onto the community. Based on the Applicants' submission, a 7-year term would allow the contractor to recoup the capital costs at a lower yearly rate. These capital costs include purchasing up to 30 collection vehicles (which are designed to have a long operational life of at least 10 years) and establishing a depot and office space. Reducing the term to an initial 5 years would mean that the costs to the councils and community would be 40% more expensive on a yearly basis (although the total absolute level of costs would remain the same). The Applicants estimate that a 7-year term would require each household to pay \$31.06 per annum; whereas a 5-year term would require a \$43.38 per annum fee.
- A long-term contract will allow the selected operator to offer stable, and reliable services to the community. It is also likely to increase competition for the services offered because where the capital costs, such as establishing a depot or office, are considered over a short term, tenderers may consider that they cannot offer a competitive tender price compared to the incumbent contractor.
- The tender process for this type of service can take several years and involve specialist consultants. Increasing the frequency of tendering will increase the time the Applicants are required to be engaged in tendering and increase cost to the community and tenderers.

4.3. The ACCC considers that contracts of this length may be required so that the successful tenderer can earn a normal commercial return while recovering the cost of the capital investment without unreasonably high yearly outlays. Noting that the collection vehicles have an operational life of at least 10 years, it is possible that both incumbent and other service providers would have to make some capital investments to service the Applicants' contract. Moreover, the ACCC further considers that if contract terms are too short, this may deter service providers from bidding against the incumbent due to the possible additional start-up costs and need to establish a depot or office. The ACCC also considers that the tendering process is lengthy and that requiring more frequent tendering may increase costs to the councils, and ultimately, to ratepayers.

4.4. As such, the ACCC considers that the period of authorisation sought is appropriate, noting that the contract term will be limited to a maximum of 7 years, with an optional 3-year extension period.

- 4.5. However, it is unclear to the ACCC why it is necessary to grant the additional 1 year sought for 'potential slippage in the procurement process or contract negotiations'. The ACCC therefore proposes to grant authorisation for 11 years, but it invites submissions from the Applicants in this regard.

5. Draft determination

- 5.1. For the reasons outlined in this draft determination, the ACCC considers that the authorisation test is met. Accordingly, the ACCC proposes to grant authorisation AA1000659 in relation to Division 1 of Part IV of the Act, and section 45 of the Act, for 11 years to enable the Applicants to engage in the Proposed Conduct (as defined at paragraphs 1.8 to 1.9).
- 5.2. This draft determination is made on 14 May 2024.

6. Interim authorisation

- 6.1. The Applicants requested interim authorisation to jointly tender and evaluate proposals for the provision of waste collection services, but not to enter into and give effect to contracts (the **Interim Conduct**).
- 6.2. The ACCC has decided to grant interim authorisation to the Applicants for the Interim Conduct. The ACCC considers that because the Interim Conduct was requested on the basis that no contracts will be entered into until the final ACCC determination is made, that interim authorisation is unlikely to permanently alter the competitive dynamics of the market. Therefore, the ACCC considers that the market will be able to return to substantially its current state if final authorisation is later denied.
- 6.3. The ACCC also recognises that if interim authorisation is denied, this could result in the councils not having sufficient time to secure a successful tender. The Applicants submit that they need to provide sufficient time for the successful tenderer to prepare for the start of the new services by July 2026, including the purchase of collection vehicles that currently have an approximately 18-month lead-time.
- 6.4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for re-authorisation is withdrawn.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by 28 May 2024. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.