

15 June 2018

Ms Tessa Cramond
Analyst, Adjudication, Mergers and Authorisation Review Division
Australian Competition and Consumer Commission
Level 17/2 Lonsdale Street
Melbourne VIC 3000

By email: adjudication@accc.gov.au
Cc: tessa.cramond@accc.gov.au

Dear Ms Cramond,

Re: AA1000419 – Council Solutions & Ors

The Waste & Recycling Industry Association of South Australia (WRISA) is the peak body representing the waste and resource recover industry in the state. Our members include waste and recycling companies and related support businesses of all sizes, coming together to advocate for a strong and profitable waste and recycling sector.

Joint procurement of waste and recycling services by local governments provides an opportunity for councils to generate cost savings and efficiencies. However, procurements of this nature can be poorly structured and have a material impact on competition, often to the point where any claimed benefits fail to outweigh the real costs and public detriment.

We applaud the ACCC's decision to deny authorisation to Council Solutions under their original application (ACCC Authorisation A91520), based on the likelihood of reduced competition and the lack of clear public benefit.

It is our strong belief that the amended application provides no further evidence that would suggest the public benefit outweighs any public detriment. The claims made with regard to public benefit within the Application are overstated and in most cases are never likely to be realised through a collaborative procurement of this nature.

WRISA has canvassed the views of its members with regard to the Application and we present the attached submission which reflects the concerns raised.

Ultimately, the reduction of competition presents a significant risk to the sector which is not offset by any genuine benefits.

If further information is required, please do not hesitate to contact me by email, chris@wrisa.com.au or mobile 0407 604 330.

Yours Faithfully

Chris Brideson
Executive Officer

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) ON COUNCIL SOLUTIONS & ORS AA1000419

We note the ACCC has not provided specific questions for consultation and as such we have structured our response in the following way:

- Overarching comments related to the Application
- Specific comments tabulated in line with relevant sections of the application document.

Overarching Comments

The role of the Applicant in this process is to provide suitable evidence that the proposed conduct does not breach or impede Australian competition law. Specifically, that the conduct does not substantially lessen competition and enable cartel type behaviour. In making its determination the ACCC must consider the degree to which any potential detriments are outweighed by the purported benefits. WRISA members participate in this market every day. We understand every facet of the commercial and social imperatives that drive the market, and WRISA feels strongly that the Application has failed to provide suitable evidence that the benefits would outweigh the significant impacts on competition in the Greater Adelaide Region waste processing market.

We note the following:

- This is a tender of significant size, greater than the market share quoted by the Applicants which does not take into account the share of the market that is not available through public tender. In reality, the Application would see as much as a third of the market locked away in the one tender. As noted by the Applicant, this is the second of three related tenders in immediate succession, further reducing competition for services.
- The Applicant suggests that bargaining power in the current market is skewed in favour of waste service providers and that a joint procurement would rebalance that disparity. In reality, individual tendering of waste services by Councils of this size already occurs through a competitive tender where each Council sets the parameters under which the market must respond, and as such there is no bargaining involved with the price that has been submitted.
- The potential for environmental benefits and alignment with SA waste policy settings are also overstated. Waste, recyclables and organics processing alone are not likely to be a conduit for greater waste diversion and reduced dependence on landfill unless such outcomes are a stated tender requirement, which is not the case.
- Perhaps most importantly, claims made by the Applicant with regard to bargaining power and competition are vastly overstated and lack any supporting evidence. WRISA notes the following key points regarding competition and efficiency:
 - A tender of this size will significantly limit future competition and exclude market players who would likely bid for processing services from Participating Councils if offered through individual tenders. Given these contracts are highly capital intensive and require significant upfront investment, the business risk alone will further exclude potential contractors from the process.
 - Efficiency gains related to reduced contract administration are unlikely to be realised as each of the Participating Councils would be required to enter its own contract

- with the service provider. In addition, the role of Council Solutions as a “middle man” would add further complexity and may indeed increase the administrative burden.
- Claims regarding improved purchasing power are overstated as the economies of scale that apply to the waste, recycling and organics processing services are already realised by large Councils.

The claims made in regard to competition and efficiency are unsubstantiated and do not align with our real-life knowledge of the market. For these reasons we consider that the provision of mere supposition should not replace the need for the Applicant to provide substantive evidence that the benefits would be realised and as such, the prima facie position that competition will be adversely affected should be applied.

Specific Comments

Section	Comments
Proposed Conduct	
Clause 4.3.3	<p>Centroid locations for delivery of waste</p> <p>We recognise the intent of what has been done here, however it will be difficult for the market to price appropriately with the actual tonnage being variable (for example, potential infrastructure investment etc).</p>
Clause 4.3.4	<p>Customer interface</p> <p>We note the comment that council is responsible for “providing the initial customer interface to their communities”</p> <p>We note that in general this customer service interface is a contractor responsibility, so shifting it back to Councils as a first point of contact will incur an additional cost to Councils.</p>
Clause 6.1	<p>Policy context</p> <p>We note the policy context speaks in detail about SA Government targets related to waste reduction and diversion. It is extremely unlikely that a procurement for processing services will alone have an impact on waste reduction and diversion. These targets are more closely linked to recycling activity, processing options for residual waste and state-wide community engagement, none of which is relevant to this procurement.</p>
Market Information and Concentration	
Clause 10.3	<p>Market Share</p> <p>The Application references the participating councils’ share of the available market as Recyclables 1.8%, Organics 8%, and Residual Waste 7.5% representing its percentage of reported waste tonnes.</p> <p>However, it should be noted that not all Processing Service Streams other than those required by the participating councils are available</p>

through public tender. Several councils having an alignment with a particular service provider, generally through membership of a Local Government Subsidiary as below:

- Northern Adelaide Waste Management Authority - NAWMA (Gawler, Playford and Salisbury Councils) own and operate a MRF that provides recyclables processing to member councils.
- Southern Region Waste Resource Authority – SRWRA (Marion, Onkaparinga, and Holdfast Bay Councils) own and operate a landfill and recycling operation that as a minimum provides residual waste disposal services to member councils.
- Adelaide Hills Region Waste Management Authority – AHRWMA (Adelaide Hills, Mount Barker, Murray Bridge, and Alexandrina Councils) operate the Brinkley Landfill providing residual waste disposal services to member councils.

Of concern also in the market share discussion is the inclusion of large C&I and C&D tonnages, which are not part of the tender process quantities, and significantly distort the above market share numbers.

If market share of the participating councils was determined based on available market in the Greater Adelaide Region Councils excluding these C&I and C&D tonnages, their share would be Recyclables 23.8%, Organics 28.9% and Residual Waste 17.3%

Clause 10.4.3

Countervailing Power of Customers and / or Suppliers

(para 1) We note the claim that potential suppliers have significant bargaining power and are able to exert strong influence over the market. We contest that there is not currently an imbalance of power in the market and over the course of the last 10-15 years, competition in the market has continued to **increase**. Whilst some potential contractors would not tender for all available opportunities in the market, tenders in the Greater Adelaide Region Councils attract significant competition. The concentration of market share is not a representation of competitiveness in this market.

For all such tenders, each organisation is required to price sharply and improve service provision in order to remain competitive with other market players. The Application suggests that Councils have little bargaining power in the current process but that is not the case.

The fact is that the process is a tender process and as such there is no bargaining involved with the price that has been submitted. With the reduction of potential tenderers, the reality is that Councils will have reduced competition which will reflect in a potentially higher price to Council.

(para 3) We note the commentary regarding the exiting of contracts. The ability or otherwise for a Council to exit a contract is based on the terms of the contract entered into by both parties, not a reflection of the balance of power within the market. All current contracts (including the LGA Model Contract being proposed in the Application) have provision for the Contractor to provide a Security Guarantee to Council to cover circumstances of default by the Contractor and necessity for Council to step in and provide services / re-tender. This already limits the risk to Councils.

If the LGA Model Contract is to be used (as stated), the ability for a Council to exit a contract would be consistent with the current conditions. Furthermore, under the proposed conduct, the size of the contract and resulting lessening of competition within the market means that the ability for a Council to procure a replacement Contractor would be a difficult task. To illustrate, it would be a far easier task for an affected Council to find a replacement supplier for one of the Participant Council areas than all four (4) of those because not as many potential suppliers have the resources to provide these services at short notice to a larger geographical area.

Public Benefit

Clause 11.1.1

Tender process cost savings and efficiencies

We note the commentary regarding cost savings and efficiencies made by the applicant. We believe these claims are overstated and are unlikely to eventuate as follows:

- The Applicant identifies that the likely contract to be utilised is the LGA Model Contract (Clause 4.3.3). Given this contract has already been developed and used for commercial contracting, the need for complex legal advice will be minimal.
- The Applicant acknowledges that there will be differences in the service requirements for each Participant Council (Clause 4.3.1), therefore it is unlikely that the Participant Councils will benefit from any cost savings for “technical advice” which will be issued in relation to any nuances specific to a Participant Council. Indeed, it is not unlikely that some Participant Councils will be disadvantaged by the need of an individual Participant Council to obtain detailed technical advice in connection with said nuances.
- The work involved in considering the tenders will be the same as it otherwise would have been had the Participant Councils tendered on their own. While resources of each Participant Council may be reduced for this purpose, the work is merely being transferred to Council Solutions and the Waste Management Services Project team (comprised of representatives of Participant Councils anyway); and
- Council Solutions will in many ways act as just a coordinator, adding a third party to the tender process that would normally be

conducted direct by the Participant Council and the tenderer. All correspondence and submissions relating to a Participant Council will need to be considered by it regardless of the role of the Applicant. The addition of a further party, from our experience, increases the potential for confusion in relayed messages and by necessity, will result in double handling and a significant increase in time to assess the tenders as a larger group of people is required to be brought together to facilitate this process and therein increased costs. These negative effects on cost extend to the purported role Council Solutions would play in administration of any contract awarded as a result of approval of the Application.

- The structuring of the ongoing administration of the contract is such that the only benefit received is at the tender evaluation stage and it is our contention that there is no cost benefit there. After award of the contract the administration will fall back to the individual councils and as such there are no available savings.

Clause 11.1.2

Environmental benefits

“Combined educational materials to manage contamination”

We note the claim in the Application that a “consistent message can help reduce contamination and increase diversion of waste”.

With regard to contamination (which refers to incorrect or non-recyclable materials being put into the recycling bin, which then subsequently contaminate the recycle stream), individual councils have the ability to tailor education programs to the unique requirements of their municipality, whereas consistent messages are achieved through programs developed in line with the state government objectives in consultation with other Councils. It is this more targeted approach to waste education (sitting beneath the state-wide framework) that has the potential to reduce contamination.

It must be noted that South Australia already has one of the highest waste diversion rates nationally. Additional waste diversion is likely to be generated by community recycling activity, and investment in processing options and infrastructure for residual waste and recyclables, which is not covered in this tender.

We find that the likely public benefit of combined education programs will be very minimal and will not outweigh concerns about reduced competition.

We also note that education is but one facet that will assist Participant Councils to achieve their waste diversion goals. If the Participant Councils consider that a consistent message would assist this cause, this could be achieved through other joint initiatives that do not impact on competition. For example, groups of

councils commonly work together to develop and deliver shared waste education resources for the community or use the currently available “*Recycle Right*” programme as developed by Green Industries SA.

“Contributing to the achievement of State government waste...”

As noted above, a procurement for waste processing services will not have a notable impact on state targets for waste diversion. Claims regarding a reduction in waste to landfill that would be directly attributed to a procurement of this nature are entirely unfounded. A reduction in waste to landfill will require new processing infrastructure and significant structural change at state level.

Clause 11.2.1

Lower costs through improved purchasing power

With regard to the potential for improved purchasing power or buying power, we note that beyond a certain point the aggregation of waste volumes does not have a substantial impact on price and the approach of Contractors applying for a tender. The economies of scale that apply to the services involved are already realised by large Councils.

Whilst it’s acknowledged that the fundamental tenets of collaborative procurement or ‘bulk buying’ listed (i.e. multi-year contracts, and assurance of business over time) may be desirable for a commercial contractor, these benefits are not unique to this collaborative tender process and are made available by Council through individual tender processes.

It is unlikely that the purchasing power of Contractors would be positively affected as the purchasing power of most Contractors exceeds what is available through this contract.

Clause 11.2.2

Maximised competition

We note the commentary that is provided regarding increased competition is flawed in a number of areas. Our members suggest that the proposed conduct is likely to significantly reduce and impact competition in the Adelaide region.

Clause 11.2.2 notes;

“the opportunity presented by the Participating Council’s under the Proposed Conduct will encourage all potential suppliers capable of providing any or all of the Processing Service Streams to compete and submit tenders”.

To the contrary, our members are more likely to submit a response to an RFT if the work is **not** jointly tendered and this process is likely to reduce the number of submissions.

While a supplier may be capable of performing services to one of the Participant Councils, it may not be in a position to service all the Participant Councils, so while they may tender for one or more separate RFTs they may not submit if they are required to provide services to all Participant Councils.

The greatest stimulation of a market occurs when there is a dynamic market with a consistent pipeline of opportunities available to all or most contractors. This process contradicts this point as it is more likely that there will be **fewer** suppliers that are capable of participating in the joint RFT process if the Application is approved. This of course would have a detriment on the Participant Councils and their constituents from a cost and service perspective and genuinely reduce market competition in Adelaide.

Conversely, individual council tenders would continue to provide each contractor, large and small, with multiple opportunities to secure a share in the market.

Proposal is not attractive to potential service providers

The Adelaide market is smaller than Melbourne and Sydney and the tendering of such a large percentage of the available waste, recyclables and organics for processing would significantly limit the competitiveness of other parties. Essentially, the winning provider would have an almost unassailable lead in capturing market share. Our members have made it clear that the lessening of competition to this degree would lead to other providers divesting their interests and searching for new opportunities and new investments in other states or territories, thus further reducing competition into the future.

Clause 11.2.3

Increased Resource Recovery Rates

We note the comments regarding China's ban on importing contaminated recyclable waste, and the challenges it presents the Australian recyclables market. Nevertheless, we contend that increased volumes of material available under a single contract will not necessarily encourage investment in upgraded or alternative technologies to address the impacts of China's National Policy.

Such investment is part of a "package" of measures that include public education, risk sharing between local government and industry, and establishment of end use markets for recovered resources.

End of Submission