

**ESSEX WASTE INTER AUTHORITY AGREEMENT
BRIEFING NOTE TO MEMBERS**

1. INTRODUCTION

- 1.1. We are delighted to be working with the Waste Collection Authorities (the District and Borough Councils, “the WCAs”) in connection with the implementation and successful delivery of Essex County Council’s (“ECC”) waste disposal strategy.
- 1.2. We have had a very successful initial briefing meeting at which all the WCAs were represented, in almost all cases by both legal and waste officers. The main agenda of that meeting was to discuss what an Inter Authority Agreement (“IAA”) is and why it is needed. We were also able to go through the first draft of the IAA and pick out key issues for discussion.
- 1.3. ECC is asking WCAs to sign up to the IAA by March 2009 to tie in with DEFRA requirements for the PFI process. Subject to Officers being satisfied with the final IAA and prepared to recommend it for agreement, Members’ approval will be sought, taking into account the relevant political cycles for each Council.
- 1.4. The main purpose of this briefing note is to cover: what an IAA is, the scope it ought to cover, and why it is beneficial to or indeed needed by the various parties in this partnership. As we have had the benefit of reviewing an early draft of the IAA provided by the Council’s legal advisers, we will also refer to the issues relating to this particular IAA.

2. THE LAW

- 2.1. First, it is probably helpful to set out the legal context within which we are working. The Environmental Protection Act 1990 (“the EPA”), the Waste Emissions and Trading Act 2005 (“the WET Act”) and their associated regulations set out the statutory relationship between a WCA and Waste Disposal Authority (“WDA”).

WCA obligations and rights

- 2.2. The EPA places an obligation on a WCA to collect household waste (free of charge in most cases) and commercial waste where asked to do so (for a charge).
- 2.3. Other collections (such as industrial waste) are optional but WCAs have the power to collect such waste.
- 2.4. The WCA has the power to dictate the type and number of receptacles for the collection of household waste, whether at the WCA’s or householder’s cost.

- 2.5. The WCA *must* deliver waste collected to the place where the WDA directs (the power of Direction).
- 2.6. A WCA may retain waste for recycling provided it notifies the WDA and has reference to its recycling plan. It also has power to own equipment for use in recycling. The WDA may object to the WCA retaining waste for recycling if it has already made disposal arrangements for that waste.

WDA obligations and rights

- 2.7. The WDA has a duty to make delivery points available. There are however no provisions in the EPA setting out the location or opening hours of disposal points, or any other specification in terms of mess facilities, vehicle turnaround times, or vehicle washing. There are no statutory tipping away payments.
- 2.8. A WDA has the power to require WCAs to separate waste if necessary (i.e. where not separating impedes the WDA), subject to consultation. If separation is required, then the WDA must ensure that the WCA is not in a worse off position as a result of having to separate the waste collected, by paying a separation fee to the WCA.

Recycling Credits

- 2.9. Section 52 of the EPA and the Guidance of Recycling Credit Scheme (statutory guidance issued in April 2006) requires the WDA to pay “recycling credits” - ie the avoided costs of the WDA by the WCA retaining waste for recycling rather than passing it on to the WDA for disposal. These avoided costs are limited and it is open to Councils to agree more specific or augmented payments instead of the statutory scheme.

3. WHY IS AN IAA NECESSARY?

- 3.1. An IAA is necessary for ECC to satisfy DEFRA that, if it is awarded PFI credits, ECC will be able to deliver the project and secure necessary support from the WCAs.
- 3.2. Further, the IAA will demonstrate to the industry that the WCAs will deliver sufficient and suitable waste to feed the multi-million pound facility being procured.

4. HOW IS AN IAA BENEFICIAL?

- 4.1. For all parties, the IAA helps to capture their obligations and rights agreed beyond the statutory ones and to share the benefits and risks of the PFI project. The IAA could, for example, provide that:-
 - 4.1.1. ECC will provide suitable delivery points and to a specified level, e.g. opening hours, vehicle waiting times and associated facilities;
 - 4.1.2. ECC will pay enhanced recycling credits/roll-out costs and tipping away payments if the WCAs commit to continuing/rolling out their planned schemes.

- 4.2. Without an IAA in place, the relationship between the WDA and WCAs is as set out in the statutory guidance – in summary, the WDA has the power to direct WCAs to deliver waste to delivery points which it specifies, and can also direct the WCAs to deliver separated waste collections.
- 4.3. However, the rights and obligations covered by statute are quite narrow. They do not contain much detail, and statutory recycling credits are fairly low.
- 4.4. Commonly, therefore, WDAs and WCAs choose to augment their obligations and rights in a contractually binding way via an IAA.
- 4.5. By signing up to an IAA, WCAs are able to specify their requirements for waste collection and negotiate payments from the WDA beyond the statutory amounts.
- 4.6. The disadvantages of signing up to an IAA is that it is a long-term commitment and to a certain degree creates a lack of flexibility. We recognise these concerns and therefore are working towards opening up reasonable ‘exit routes’ out of the IAA for the WCAs should they face changes in circumstances along the way which deem the IAA unfeasible for them.

5. THE ESSEX IAA

- 5.1. It is proposed that the IAA will covers three distinct issues:-
 - 5.1.1. Commitment to working in partnership and in accordance with the Joint Municipal Waste Strategy
 - 5.1.2. Commitment by the WCAs to provide separate collection of kitchen waste and in return a commitment by the WDA to provide funding for this
 - 5.1.3. Commitment by the WCAs to set out in an SDP and thereafter adhere to the recycling and collection arrangements that each WCA currently envisages (or specifically anticipates). This will give sufficient certainty for the PFI provider to design and build a suitably sized and calibrated main treatment facility.
- 5.2. ECC have agreed that the IAA should be structured so as to clearly reflect these three distinct areas. We understand Essex have agreed to this and the next draft of the IAA will reflect this. We think this will help to clarify the agreement and also to facilitate, if necessary, some WCAs signing up to one or two parts only without having to give up being party to the IAA in its entirety.
- 5.3. It is important to recognise also the fact that different levels of commitment are required at different stages for those three parts. For example, the commitment by a WCA to collect kitchen waste is one that needs to be and can be confirmed early on, whereas the commitment to carry out residual waste collection at a specified frequency will need to be reviewed at a later stage in the PFI procurement when solutions for the waste facility have been produced by bidders and all parties have a clearer understanding of the type and location of the facility.

- 5.4. It is most likely that there will be 12 different IAAs or the same IAA with 12 different schedules, because exact details will vary between WCAs, especially in relation to funding schedules and Service Delivery Plans.
- 5.5. **Partnership working**
- 5.5.1. Agreeing to work in partnership with ECC and the other authorities, or agreeing to adopt the joint waste strategy, should be commitments to the underlying ethos of the County's waste strategy and aspirational recycling targets.
- 5.5.2. Nevertheless, agreement by the WCAs to these 'soft' issues is something that Defra apparently wants to see at this stage of the PFI application.
- 5.5.3. We are in discussion with the County over the extent to which this is imperative for the PFI process itself.
- 5.6. **Kitchen waste**
- 5.6.1. Each WCA will need to decide at the point of signing the IAA whether or not it wants to introduce or continue a kitchen waste collection service, separate from the normal household waste collection.
- 5.6.2. A separate collection of kitchen waste will have a significant impact on the composition, bio-content and volume of the residual waste stream, thereby determining the size and technology of the main Mechanical Biological Treatment waste facility which ECC will need to procure and specify to bidders. Accordingly, an early commitment is critical to the commencement of the PFI procurement.
- 5.6.3. ECC also requires the WCAs commitment in this respect in order to procure a suitable Anaerobic Digestion or In-Vessel Composting facility to process and treat separated kitchen waste. The kitchen waste treatment facility will be procured outside the main PFI but as explained above, the removal of this waste stream will impact on the PFI.
- 5.6.4. This therefore, is a crucial early decision, and WCAs will be asked to make binding decisions on this issue at the point of signing the IAA.
- 5.7. **Commitment to waste collection (the PFI issues)**
- 5.7.1. The IAA will include Service Delivery Plans ("SDPs") unique to each WCA, laying down the levels of service they will each commit to for the duration of the PFI contract. We have asked that this commitment should be subject to a break clause and voluntary termination provisions which we understand will be agreed in the next draft. The difference between a break clause and voluntary termination is:
- 5.7.1.1. break clause: exercisable without "penalty" provided it is operated within certain conditions and at a specific time (ie when the details of the PFI are known)

- 5.7.1.2. voluntary termination : exercisable at any time but on payment of losses or additional costs for Essex.
- 5.7.2. The issues that would be captured in the SDPs include, for example: the frequency of waste collection (e.g. weekly or bi-weekly) and type of commodities collected (e.g. is glass collected or separated and retained for recycling by the WCA). The SDPs should not, in our view, set out targets for recycling or tonnages as these risks ought to be passed to the PFI provider as long as the WCAs comply with the rest of the SDP.
- 5.7.3. ECC will, rightly, want to be compensated for any changes in the SDP which increase the instalments (the “unitary charge”) payable by ECC to the contractor during the course of the PFI contract. However, it is important for the WCAs that any such provision in the IAA is not triggered by minor changes, and that there is a sufficiently stringent obligation on ECC to review and consider carefully whether any increase in unitary charge claimed by the contractor is proper and reasonable.
- 5.7.4. This section of the IAA deals with various issues that cannot be confirmed until much later on in the PFI procurement process when all parties including ECC have a clearer idea of the technology and type of plant that will be constructed. Therefore it is important that at a specified stage during the PFI procurement process, a ‘break clause’ can be exercised allowing any WCA to terminate its obligations/rights in relation to the PFI section of the IAA, should the procurement process show that the specified assumptions made by the WCA (for example, about the location of delivery points) when signing up to the IAA initially can no longer be met.
- 5.7.5. Those assumptions will most likely need to be defined as a set of parameters, so that if in reality the situation (eg distance of delivery point from WCA collection point) falls outside of the parameters, the break clause becomes exercisable by the WCA.
- 5.8. **Commitment to the IAA**
 - 5.8.1. If at any time after signing up, but other than at a point where it can exercise the ‘break clause’ explained in 5.7.4 above, a WCA decides that it wishes to terminate its obligations under the IAA, the Voluntary Termination clause in the IAA will allow it to do so, subject to compensation provisions. What next?
- 5.9. December 2008: Funding offers sent from WDA to WCAs
- 5.10. Mid January 2009: WCA officers are being asked to agree to make a recommendation to Members
- 5.11. Around March 2009: Members sign off IAA

Sharpe Pritchard - December 2008

Appendix: Terminology

OBC	Outline business case
OJEU	The first notice and invitation to express interest issued pursuant to the Public Contracts Regulations 2006
DEFRA/WIDP	Sponsoring Department and Waste Infrastructure delivery programme.
PRG	HM Treasury's project review group (who will determine whether credits are available)
PUK	Partnerships UK : quango set up to scrutinise and advise on PFI contracts
CD	Competitive Dialogue
MBT	Mechanical biological treatment (waste is sorted and shredded mechanically then composted to produce a compost like output or fuel with a low bio-content)
Off Take/PPA	Off takers are those who buy products post treatment (eg buy metals for recycling) PPA is a power purchase agreement from an electricity or power company
CHP	Combined heat and power
AD/IVC	Anaerobic digestion/ in-vessel composting - ways in which kitchen waste can be treated
Recycling Credits	Payments from a WDA to a WCA in return for the WCA recycling waste through the WCAs own arrangements and therefore saving the cost of the WDA disposal
Tipping away	Compensation paid to a WCA if they are required to deliver to points other than those agreed and outside their areas.
PA	Project Agreement
PayMech	Payment Mechanism
Cover ratios/key ratios	Key aspects of the financial model/base case needed to secure project finance: ie how much fat there is there the contractor's cash flow to service bank debt
Project Finance	Funding from a senior lender (bank) secured on the project rather than an asset