

## **Essex Waste Inter Authority Agreement Briefing Note to WCAs**

Note: This is a summary based on the SP Mark-up of 11<sup>th</sup> February. Readers should note that this summary is necessarily brief and should not replace a reading of the complete text. Further, not all the positions set out here are agreed (it remains a work in progress). However we are not expecting substantial changes of position

### **Overview of the IAA**

#### Part I) Essex Waste Partnership

- Parties agree to act in good faith in an effort to achieve statutory targets
- WCAs and WDAs have appropriate reporting/recording obligations
- Parties set up IAA Management Board, the forum (but not decision-making body) for formal review of the IAA.

#### Part II) Review of IAA

##### Initial Review:

- Takes place at preferred bidder stage of PPP procurement process, prior to Financial Close
- The 'Relevant Issues' being reviewed all relate to the PPP and include:
  - o Minimum Tonnages under PPP contract
  - o Delivery Points/Delivery Point Standards; Contingency Delivery Points
  - o Waste Composition
  - o Contamination Protocol
  - o Charges/costs being passed onto WCAs
  - o [Tipping Away Payments]
  - o [Deduction regime for performance failures]
  - o [Loss of Third Party Income liability accepted by the WDA]
  - o [Base Case of the PPP contractor]
- Following Initial Review, WCA has option to exercise break clause in respect of entire IAA or PPP part only of IAA. At WCA discretion but if for any reason other than the PPP is off-market, triggers a funding review.
- Revised and Confirmed IAA is agreed following Initial Review.

##### Annual Review:

- Initiated by WDA issuing notice inviting all WCAs to include items for agenda
- Conducted at meeting of IAA Management Board, around the anniversary of Financial Close of PPP contract
- Items to be reviewed include:
  - o Key Waste Delivery Parameters
  - o Service Delivery Plans (SDPs)
  - o WCA Baselines
  - o Capital and revenue funding to WCAs
- Where as a result of Annual Review process WCAs require change to Baselines, WDA to report on whether changes can be accommodatedW:\cor waste strategy\ws 09 03 09 briefing.doc at no additional cost to Relevant Contractor (ie

PPP or Organic Waste contractor) and passed through to WDA. If not, WCAs may be required to pay for change.

- Changes which are agreed between Parties will be implemented through a timetable for delivery agreed between the Parties
- Changes in SDPs entitle WDA to review funding if the changes are not agreed by WDA

#### Ad Hoc Review:

- Initiated by any Party issuing notice to all (or affected) Parties.
- Notice must include nature of and reasons for the review; the proposed action/solution and how it could be implemented; the Party/Parties likely to be affected.
- Meeting to take place at IAA Management Board within 2 months of notice, and sooner if review is marked as urgent.
- Items which may be reviewed include:
  - o SDPs and WCA Baselines
  - o Key Waste Delivery Parameters
  - o Variations to IAA
  - o Improvements in services delivered by Essex Waste Partnership and Relevant Contractors
- Where WCAs require change to Baselines, WDA to report on whether changes can be accommodated at no additional cost to Relevant Contractor (ie PPP or Organic Waste contractor) and passed through to WDA. If not, WCAs may be required to pay for change.
- Changes which are agreed between Parties will be implemented through a timetable for delivery agreed between the Parties
- Changes in SDPs entitle WDA to review funding if the changes are not agreed by WDA
- Changes which are agreed between Parties will be implemented through a timetable for delivery agreed between the Parties

#### Part III) PPP

- WCA Baselines specify the level of service to be delivered by each WCA
- Breach of WCA Baseline likely to result in WCA having to indemnify WDA for its liabilities to PPP contractor as a result of WCA's breach. Does not apply to changes in tonnages as these are a WDA function

#### Part IV) Service Delivery Plan (SDP)

- WCAs are to carry out services (including where agreed, organic waste services) as set out in SDPs and in return receive capital/revenue funding from WDA (Schedule 6)

#### Part V) Joint Municipal Waste Management Strategy

- Parties agree to act in good faith to implement the strategy

#### Part VI) Indemnities and Conduct of Claims

- No liability between WCAs
- Liability of WCA to WDA can only be to the extent of the liability of WDA to PPP / relevant contractor
- Sets out procedure for WDA to make claim against WCA and vice versa

#### Part VII) Dispute Resolution

- Procedure requires referral to Chief Executives and median followed by adjudication if unresolved. Decision binding unless and until subsequently litigated.
- Dispute Resolution Procedure only to be used for disputes in relation to:
  - o WCA liability to indemnify WDA for WCA Baseline changes
  - o Liability of the parties in relation to death / personal injury / loss or damage to property
  - o Termination
  - o Invoicing
  - o Compensation Payments to be paid by WCAs
  - o Any payments to be made by WDA under Schedule 6
  - o Contamination protocol

The Dispute procedure does not relate to matters which are at the parties' discretion (eg whether to change an SDP).

#### Part VIII) Termination

- WDA Default:
  - o WCA may serve termination notice on WDA (copied to all other WCAs)
  - o IAA shall terminate if default not rectified within 30 days of notice
  - o WDA liable for reasonable and proper costs of each WCA for dismantling the services supported to some extent by funding from WDA and reverting to collection service in place prior to IAA
  - o Where WCA continues the services under the SDP, then WDA liable to continue funding for remainder of 5 year period
- WCA Default:
  - o WDA may serve termination notice on WCA (copied to all other WCAs)
  - o IAA shall terminate if default not rectified within 30 days of notice
  - o WCA liability limited to withdrawal of funding from WDA for carrying out SDP
- Voluntary Termination:
  - o A WCA may give 12 months' written notice to all other Parties to terminate
  - o The exiting WCA is liable for any direct, unavoidable, unmitigated, reasonable, demonstrable and proper additional costs incurred by WDA as a result of WCA exiting the IAA (this does not apply to the exercise of the break clause following Initial Review)
- Post-termination:
  - o WCAs who have exited IAA are to enter into a legally binding agreement with WDA within 6 months of termination of IAA to cover the issues dealt with in IAA
  - o If not, revert to statutory position, and WDA to issue direction to WCA regarding delivery of waste and recycling etc.

#### Part IX) General

- Boilerplate clauses
- WCAs have no joint liability

### **WDA obligations**

- To undertake PPP procurement and to consult with WCAs on certain matters
- Before the commencement of the PPP contract, to provide Delivery Points and Facilities (and contingency points/facilities) with Tipping Away Payments payable to WCAs if the delivery points/facilities are more than 5 miles away from the WCA.
- After the commencement of the PPP contract, to provide Delivery Points and Facilities (and contingency points/facilities) with Mileage Payments payable to WCAs if delivery points/facilities locations are outside agreed parameters.
- To take on the risk of waste volumes and waste composition being outside the parameters agreed with the PPP contractor, as long as WCAs comply with WCA Baselines.
- To pay Recycling Credits to WCAs. WCAs are to provide weighbridge data for waste sent for recycling, and once information is audited by WDA then WCA can raise invoice for payment of credits.
- To take on the risk of a failure in the recyclates market provided WCAs have sued reasonable endeavours – to be responsible for disposing and for costs of disposing waste (or recyclables) collected by WCA in such circumstances, but with no obligation to pay recycling credits
- To provide additional non-statutory funding to WCAs as agreed and in accordance with Schedule 6:
  - Compost Credits: for Green Waste sent to WDA composting facility
  - Avoided Disposal Costs: for recycling retained by WCA in excess of its targets in the Local Area Agreement.
  - Organic Waste capital and revenue funding
  - Haulage costs for delivery of Organic Waste to a facility/point outside the agreed parameters
- To pay to relevant WCAs the equivalent amount of any deductions made by the PPP/organic waste contractor to the amounts payable by the WDA as a result of delivery facility/points standards not being met by the contractor.

## WCA obligations and risks

WCA obligation under IAA	Risks
Parties to agree a Revised and Confirmed IAA following Initial Review	<p><u>WDA proposes a PPP, revised IAA or and/or any changes to WCA Baseline which are unacceptable to WCA.</u></p> <p>WCA may exercise break clause in relation to entire IAA or part.</p> <p>WCA may exercise break clause in relation to Part III (PPP) of IAA only, and:</p> <ul style="list-style-type: none"> <li>a) Where the proposed position under any of the Relevant Issues are not Market Practice, then non-statutory additional funding under IAA (Schedule 6) continues to be paid to WCA;</li> <li>b) Where the proposed Relevant Issues are Market Practice, the WDA may review/terminate funding to the WCA.</li> </ul> <p>In either case, the WCA is not liable for any costs/losses incurred by WDA/PPP contractor.</p>
Comply with WCA Baseline (i.e. PPP elements)	<p><u>Scenario: WCA proposes change in its services which is a change to WCA Baseline</u></p> <p>[Note: this has been flagged up by Nabarro for discussion – can ECC refuse any change? If not, can it require WCA to cover <b>any</b> of its costs for accommodating change?]</p> <p>WDA may agree to change; or may agree to change subject to WCA covering additional costs for which the WDA is liable to PPP/relevant contractor as a result of change.</p> <p>WDA may reasonably review/terminate the additional non-statutory funding under Schedule 6 if the change:</p> <ul style="list-style-type: none"> <li>i) materially and detrimentally impacts ability of WDA to achieve its Statutory Targets;</li> <li>ii) is in breach of JMWS or materially jeopardises LAA targets</li> <li>iii) is material and made without the matter having been discussed first at Ad hoc/Annual Review</li> <li>iv) would create material liability of WDA to Relevant Contractor which is not otherwise compensated for by Compensation Payments under the IAA.</li> </ul> <p><u>Scenario: WCA acts in breach of WCA Baseline and,</u></p>

	<p><u>whether as a result of an individual WCA's action or the cumulative effect of a number of WCAs, the WDA becomes liable to PPP Contractor under the Minimum Tonnage or UCAP provisions in the PPP contract;</u></p> <p>Risk: The WCA (or the WCAs whose breaches have caused the WDA's liability) may be liable to pay WDA Compensation Payments (equivalent to what the WDA has to pay the PPP Contractor) but <b>not</b> where:</p> <ul style="list-style-type: none"> <li>- the WCA's breach is as a direct result of a fall in tonnages or change in composition; or</li> <li>- the breach causes a increase or decrease in tonnages (unless it causes tonnages to fall below the Minimum Tonnages under the PPP contract)</li> </ul> <p>In any case, a WCA is not liable to pay any WDA costs (other than Compensation Payments) even if as a result of WCA breach.</p>
<p>Comply with Service Delivery Plan</p>	<p><u>Scenario: WCA wishes to change its SDP and it is not agreed by WDA, or it fails to carry out SDP as agreed.</u></p> <p>Risk: Except where the change is also a WCA Baseline change (see section above), the WDA's sole remedy against a WCA is the review and withdrawal of additional non-statutory funding under Schedule 6 if the change:</p> <ul style="list-style-type: none"> <li>i) materially and detrimentally impacts ability of WDA to achieve its Statutory Targets;</li> <li>ii) is in breach of JMWS or materially jeopardises LAA targets</li> <li>iii) is material and made without the matter having been discussed first at Ad hoc/Annual Review</li> <li>iv) would create material liability of WDA to Relevant Contractor which is not otherwise compensated for by Compensation Payments under the IAA.</li> </ul>
<p>Comply with Organic Waste Service levels in SDP (where applicable)</p>	<p><u>Scenario: WCA fails to carry out Organic Waste Service as agreed in SDP.</u></p> <p>Risks:</p> <ol style="list-style-type: none"> <li>1) Same as for non-compliance with SDP generally, i.e. possible review/withdrawal of funding (see above); <b>and</b></li> <li>2) WCA may be liable to pay the WDA Compensation Payments (equivalent to what the WDA has to pay the PPP contractor) if the breach directly results in the WDA not being able to achieve its Minimum Tonnages under the</li> </ol>

	PPP contract
Comply with Contamination provisions	<p><u>Scenario: WCA delivers Contract Waste or Organic Waste containing Contamination.</u></p> <p>Risks:</p> <ol style="list-style-type: none"> <li>1) WCA may be liable to pay the WDA Compensation Payments if WDA and Relevant Contractor have followed Contamination Protocol, and the WCA could have avoided such Contamination, and the Contamination causes WDA costs of disposal to exceed the norm; and</li> <li>2) Where WCA's Contamination causes the delivery point/facility to be closed by law, WDA may require WCA to pay WDA costs incurred as a result of the Contamination.</li> </ol>
Comply with notice from WDA to redress WCA substantial and material or persistent and material breach	Failure to comply with such notice could lead to the WDA exercising its right to terminate the IAA in relation to the offending WCA, and withdrawing funding under Schedule 6 (SDP).
Work together to implement Joint Municipal Waste Strategy and attain targets	No direct consequence for failure to comply with JMWS or to attain targets, as long as WCA is not in so doing also in breach of the WCA Baseline.