

# The defining moment

Agreement on the definition of Contract Waste continues to require technical and legal advice, as Amelia Whittaker, Solicitor at Trowers & Hamblins LLP, explains...

It seems to be a key feature of PFI/PPP waste projects that too much time is expended in the negotiation and agreement of a suitable definition for Contract Waste. Although Defra's Waste Infrastructure Delivery Programme (WIDP) has attempted to deal with this in the draft residual waste contract (which is understood to be programmed for release for formal consultation later this year), and in the payment mechanism and output specifications formally released in 2008, the specialised nature of each waste treatment solution on offer in the UK market generally means that there is no 'one size fits all' definition that can be applied.

The preference of authorities for the broadest possible range of waste arisings to be included within the definition, whilst maintaining flexibility for waste reduction activities, generally means engaging in an uneasy balancing act as the parties desperately try to limit their risk exposure, but can be fundamental for delivering efficiency savings to the authority.

Where a procuring authority successfully agrees a broad definition of Contract Waste, the costs that would otherwise be associated with separating the waste that cannot be processed or alternative disposal arrangements for excluded waste, are generally lower. It also provides a greater opportunity for earlier scrutiny of costs associated with the treatment process, providing further cost-efficiencies.

However, before authorities and bidders commence the debate over how big an animal carcass must be before it can't be processed, is there a better way of dealing with the definition?

## The standard form definition

As a part of its guidance agenda and move towards standardised documentation, WIDP has taken the first step towards trying to develop a standard form definition of Contract Waste in its standardised documentation. The definition is proposed on the basis of a guaranteed minimum tonnage, incorporating all municipal waste arisings (which is effectively defined as everything the authority has a duty or power to collect) delivered to the contractor, whilst carving out specific waste types and/or waste that cannot be processed in a proposed facility (for example, abandoned cars or gully waste).

Defra, it therefore seems, has been content to link the definition of Contract Waste to the duty to collect and



dispose of waste in accordance with the Environmental Protection Act 1990 (the EPA). This approach clearly has merit, particularly as it provides a broad scope for the authority to deliver waste, whilst allowing bidders to specify types of waste that it cannot process either legally or physically within the facilities being proposed.

The difficulty in linking any Contract Waste definition with the provisions of the EPA is that there is no clear description of the types of waste that are the duty of an authority to collect and dispose of – and therefore there is no convenient list of waste types or further guidance within a contract entered into by the parties. What this generally means is that, as with the WIDP definition referred to above, a generic reference to the authority's duties with regard to collection and/or disposal will be made, rather than trying to identify types of waste to be delivered.

## Exclusivity

Although the concept of exclusivity, and whether or not it offers better value for money and, indeed, efficiency savings is a separate debate, the use of exclusivity within waste contracts gives rise to additional issues in defining Contract Waste.

Primarily, the concern will be to ensure that the definition developed describes the waste to be delivered, without restricting the authority's ability to engage in waste reduction activities. This will, of course, be especially important when the EU Waste Framework is formally adopted in the UK, and it provides added impetus on authorities to reduce their levels of residual waste.

As already noted, the standard definition developed by WIDP refers to the waste delivered by the authority to the facility. By adopting the reference to delivery and using a guaranteed minimum tonnage model, WIDP specifically avoided the difficulties raised by separating the action of collecting municipal waste from the treatment of residual waste. Where exclusivity to municipal waste is provided, however, defining Contract Waste by reference to the waste delivered to the facility is no longer appropriate.

The challenge for procuring authorities is to ensure that the exclusivity rights under the contract are granted in respect of residual waste only – or in other words, that the exclusive right of the contractor to receive waste is granted solely in respect of waste collected by an authority that is not subject to re-use, recycling or reduction. Given that definition by use of national indicators may be considered to be too narrow for the purposes of a waste treatment facility, procuring authorities may increasingly look to WIDP to provide guidance on residual waste definitions.

**Identifying ‘excluded waste’**

Inevitably, in any Contract Waste definition, there is a requirement to carve out certain waste types in order to ensure that Contract Waste is limited to those types of waste that can be reasonably processed in the facility being proposed. This is usually an agreed list, detailing the types and/or weights of waste types that cannot be accepted due to various reasons, including calorific value, size, or ability of the solution to process that waste. Where waste is deemed to be an excluded waste type, these typically attract separate treatment under the payment mechanism and performance frameworks.

Often the initial lists proposed by contractors are lengthy, including such items as exceptionally dusty material, domestic batteries, and dead domestic pets. The key element of these negotiations for procuring authorities will be to limit the extent of the exclusions. Whilst recognising that negotiations on this issue tend to become protracted, an early agreement of the list of excluded waste will ensure that risk associated pricing is kept to a minimum, and that the procuring authority will have a greater degree of scrutiny as to the way in which savings are affected – giving greater overall flexibility.

**The way forward?**

The way in which Contract Waste is defined will always be, to a greater or lesser extent, based on the solution that is being offered by the contractor. WIDP’s attempts to define



Contract Waste, although providing a helpful framework at this time, are based solely on a guaranteed minimum tonnage approach, which lends itself to substantial carve-out of excluded waste types.

Whilst we note that the use of the exclusivity model is not the model preferred by Defra and WIDP, many procuring authorities continue to believe that it does offer them better value for money, with increased efficiency savings due to its simplicity. Although the guaranteed minimum tonnage versus exclusivity models are for a different debate, its continuing use suggests that WIDP may wish to look to developing a separate set of provisions to cover exclusivity – particularly as a basic definition framework will be crucial to reducing the level of negotiation required to develop an agreed base position.

The early agreement definition of Contract Waste used in waste projects will continue to require ongoing technical and legal advice to ensure that the needs of both procuring authorities and contractors are met, but will render substantial time and cost savings if a reasonable list is agreed early in the procurement.

**Contact:**



Amelia Whittaker  
Solicitor  
Trowers & Hamlins LLP  
Tel: +44 (0)20 7423 8000  
awhittaker@trowers.com  
www.trowers.com