

Thorny TUPE issues in procurement

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Overview

- TUPE – a refresher
 - When does TUPE apply?
 - Who does TUPE apply to?
 - TUPE information and consultation obligations
 - TUPE liabilities
 - Commercial challenges and Top Tips

Is it a relevant transfer?

- Transfer of an Undertaking
 - An economic entity that retains its identity
- Service Provision Change
 - Transfer of services which are fundamentally or essentially the same
 - Where an organised grouping of employees, has as its principal purpose, the carrying out of those services on behalf of the client
 - Insourcing, outsourcing, re-procurement
- *Challenge – client doesn't give a view on TUPE, or you disagree with their view.*

Trying to avoid TUPE?

- Fragmentation
 - Is there a transfer of part?
- Changes to the service
 - Price, scope, volume, requirements, geography
 - Are they fundamental or essential?
- New Frameworks / different frameworks
- Gap in service

- *Challenge – what are the commercial / pricing implications?*

Who transfers?

- Employees and workers
 - Casual workers, individual consultants / contractors, agency staff
- Assignment
 - Time
 - Budget
 - Job descriptions / contracts
 - Importance of work
- ***Challenge – employees working across services / lots / contracts***

TUPE information and consultation

Information / employee data

- Transferor
 - TUPE - Provide Employee Liability Information – 28 days before transfer
 - Contract – Provide TUPE data to client for procurement
- Client
 - Procurement – Provide TUPE data to bidders
- Penalty - £500+ per employee
- Warranties?

TUPE information and consultation

Consultation

- Transferor
 - Inform representatives about the fact and implications of the transfer
 - Inform representatives about any measures proposed by transferee
 - Consult about any measures it proposes
- Transferee
 - Inform Transferor of any measures
 - Consult about any measures it proposes
 - NB – timing
- Penalties – up to 13 weeks' gross pay per employee

TUPE information challenges

- Interrogating the TUPE data
- Warranties for TUPE info?
- Uninterested client?
- Do you bid for what you're getting or what you need?

TUPE protection / liabilities

- Dismissal because of the transfer – automatically unfair
- Dismissal for ETO reason, or reason other than transfer – potentially fair
 - Economic, technical or organisational reason
 - Entailing changes in number, function or location of workforce
 - Subject to fair consultation process
 - NB – pre-transfer consultation process
- Changes to terms and conditions
 - Unrelated to transfer
 - ETO reason, plus agreement
 - Variation permitted by contract
 - Collective agreement – 1 year post transfer – overall no less favourable
 - Relevant insolvency proceedings
- ***Challenge - harmonisation***

TUPE and pensions

- Beckman and Martin liabilities
 - Early retirement, enhanced redundancy (NB SHPS and LGPS)
 - Death benefits
- Minimum provision
 - DB benefits protected (but not scheme)
 - DC scheme matching contributions up to 6% (or those paid by employer)
- Contractual enhancements?

- *NB – different consultation obligations if proposing a listed change*

What are the procurement issues arising?

- Contract Notice: special conditions should be noted
- Selection Questionnaire: questions around experience with TUPE and what type of employer you are?
- Invitation to Tender: broadly see two approaches:
 - Assume TUPE does not apply and price ex-TUPE (even if it is likely to apply)
 - Assume TUPE does apply and the tender price should be inc all associated TUPE costs
- Incumbent bidder advantage
- Client unlikely to assume responsibility for the TUPE list
- Where the TUPE Costs sit in the pricing mechanism?
- Raise clarifications and use the procurement process to your advantage
- How the delivery contract can help during procurement

Trowers TUPE Top Tips

- Don't take the client's position at face value
- Interrogate the TUPE data
- Think about what you want TUPE to achieve
- Don't leave it too late
- Do talk to your favourite employment and procurement lawyers!

TOP TOP TIP – call Martin McFall!



Martin McFall

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