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TUPE & Procurement: Double Trouble

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What's On The Agenda?


1. Why Double Trouble?
2. Case Study
 - a) Procurement options
 - b) TUPE application
 - c) Any Ways Round TUPE?
3. Contractor Failure
 - Procurement responses & TUPE implications
4. The Future



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Why Double Trouble?


- Procurement is governed by the Public Contracts Regulations (and Public Sector Social Value Act 2012) and more
- The TUPE Regulations apply whenever there is a *relevant transfer*
- Procurement creates relevant transfers through *service provision changes* at the start and end of contracts
- Applies to public bodies and charities



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Why Double Trouble?

- More on TUPE in procurement
 - What's an undertaking?
 - What's a transfer?
 - Who transfers?
 - What transfers (and what might not)?
 - Obligations across the transfer
 - Information
 - "Measures"
 - Unfair dismissal



The Case Study

- Exempla Housing is in year 3 of a 5-year kitchen maintenance contract
- Contract spend is approx £200,000 pa
- There is one incumbent provider (Kitchens R Us)
 - Employing 40 staff
 - Taking 75% of its turnover from the Exempla Housing contract



Procurement: when?

- About 4 years ago (in an ideal world)
- Now!
- What are the options?
 - Extend the current contract with KRU
 - Tender a replacement contract
 - Form a joint venture with KRU
 - Take the kitchen maintenance service completely in-house (solo or shared)



Procurement: which?

- Extend the current contract with KRU
 - **Presstext** – treat as direct award
- Tender a replacement contract
 - Probably PCR apply
- Form a joint venture with KRU
 - Might still be procurement: **Mehilainen**
- Take the kitchen maintenance service completely in-house
 - Not procurement: **Teckal** etc.



Procurement: TUPE?


- Extend the current contract with KRU
 - Not a transfer (but also not legal)
- Tender a replacement contract
 - TUPE Applies (probably)
- Form a joint venture with KRU
 - TUPE Applies (probably)
- Take the kitchen maintenance service completely in-house
 - TUPE Applies (probably)



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Procurement: Addressing TUPE


- TUPE in and TUPE out
 - Same staff keep moving around
 - Cover both ends of the contract
 - It could be you on the receiving end
 - Or a contractor expecting you to protect it from passing liabilities
 - Clarifies the position against which tenderers should bid prices
 - Makes TUPE compliance a contract performance point



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Procurement: Addressing TUPE


- At the start of the contract
 - Reference TUPE in Contract Notice and ITT
 - Require TUPE compliance in activation period as a contractual obligation
 - Match to obligations at end of existing contract (if there are any)
 - Allows enforcement by you even if re-contracting



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Procurement: Addressing TUPE

- At the end of the contract
 - Make information provision contractual
 - Tie that to timetable for next procurement
 - Include indemnities for employment liabilities caused and passed
 - Make it applicable to a new provider as well as to you (if going in-house)
 - Hold up your end of TUPE if transferee



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Contractor Default


- Insolvency or breach of contract
- Procurement responses
 - Allow sale or assignment in insolvency?
 - Reallocate within a framework or by variations?
 - Re-tender
 - Emergency measures and short cuts
- TUPE application
 - Still a service provision change to retender or reallocate
 - TUPE out of administration or liquidation?



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Procurement Without TUPE?

- Very hard to achieve
- What could you try?
 - Competitive dialogue for different delivery solutions?
 - Meter U: Franchises
 - From single provider to framework?
 - Few undertakings are totally disposable
- Is it worth it?
 - Tribunals often find a TUPE transfer
 - What actually works best for you?



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The Future?

- Is procurement getting any simpler?
 - New Directive expected 2013 with 18 months to implement new UK Regulations
 - Shorter timescales and more scope to negotiate
 - Part B to be covered (light touch regulation)
 - Innovation Partnerships?
- Is TUPE going to go away?
 - Unlikely
 - Goldplating? Could SPC be diminished?



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Questions

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