

TUPE: Hazards in procurement

Published 1 November 2015

In this briefing we look at the various issues which you may encounter (whether as a commissioner or provider) when services are outsourced, tendered or re-tendered and which may involve a transfer of employees under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Sounds familiar...?

The costs of staff are often a very significant factor in services contracts. In order to price their bids appropriately, bidders will need to have access to the relevant TUPE information. If this information is not available then the risk is that they won't price their bids appropriately potentially resulting in a number of undesirable outcomes - a flawed selection process (i.e. the wrong bidder going through) and/or increased procurement risks for the commissioner (by increasing the contract price post-tender to include TUPE costs which were not originally foreseen) and/or the preferred bidder taking the risk of TUPE applying.

This much may be well understood but it also ought to beg some pertinent questions: What if the relevant TUPE information hasn't been provided in sufficient time to include in the invitation to tender? What if the services have been reconfigured by the commissioner so that TUPE no longer applies and the incumbent is left with the resulting liabilities? What if the current services have been reconfigured by the incumbent (possibly for the very best of intentions) not realising that TUPE will now no longer apply and it is now left with the resulting liabilities? What if the procurement documentation stated that TUPE would not apply and it turns out it does? If you are a participant in this kind of procurement (or re-procurement) exercise, where does this leave you?!

Key principles of TUPE

To recap:

- TUPE is legislation that protects the rights of employees when there is either a business transfer or a service provision change. This would apply for instance in circumstances where the services are outsourced/insourced or there is a change in the provider carrying out the services;
- Whether or not TUPE applies is a matter of law and not an issue for the parties to agree. Attempts to contract out of TUPE are void;
- Employees transfer to the new employer with the same terms and conditions of employment and continuity of service is preserved. The dismissal of an employee or any purported variation of contractual terms will be void if the sole or principal reason for change is the transfer itself unless either the reason for the variation or dismissal is an economic, technical or organisational reason or, in cases of variation, the terms of the contract permit the changes but the reason is the transfer;
- All rights, powers, liabilities and duties relating to transferring employees will transfer excluding certain pension rights i.e anything done by the outgoing employer will be deemed to have been done by the new employer;
- The transferor is required to provide information to the transferee about the transferring employees and both parties have specific obligations to inform and consult with representatives of employees affected by the transfer.

Common Issues

For Commissioners

Other than in an outsourcing situation, the commissioner is not itself a party to the TUPE transfer, which will be between the incumbent and the new provider. In the absence of anything contrary in the contracts, the commissioner will have no legal responsibility for the employment rights of the employees who are providing it. On the face of it, TUPE should not be the commissioner's concern.

However, two significant problems frequently arise:

1. The new providers may ask for indemnities in respect of the staff they are about to inherit, and that request will be made of the commissioners. If this is agreed to, then de facto the commissioner becomes an interested party in the

- TUPE and will want to pass as much of that liability back to the incumbent provider as possible; and
2. The commissioner will want both the tender and the transfer to run as smoothly as possible, both with early and accurate provision of information and co-operation between the parties. The incumbent provider (who may well be

losing the contract and have no warm feelings to either the commissioner or the new provider!) may not be keen to engage in either. The statutory regime does not put any legal obligations on the incumbent provider to engage, save for staff consultation and the provision of some information no later than 28 days before transfer (which is far too late to assist bidders in any tender process). There is also no protection against a disgruntled incumbent changing the workforce to cherry-pick staff or to sabotage the new provider.

The key for commissioners is to look ahead and build provisions into their contracts with providers which cover the 'exit' from the contract. The strength of a commissioner's position when approaching a tender will depend on what exit provisions it already has in place with the incumbent provider. If it has no exit provisions, then it has no legal means to force the incumbent to meaningfully engage.

If a contract includes sensibly drafted exit provisions, then the commissioner should be able to ensure a smooth tender and transfer or hold the incumbent accountable if not. The incumbent can be required to provide detailed (but anonymised) information for the purposes of the tender process as well as fuller and earlier information on transfer to the new provider. Don't forget to also include a warranty from the incumbent provider as to the accuracy of this information. The incumbent can also be required to collaborate on staff consultation and not to make changes to the workforce pre-transfer.

Sensibly drafted exit provisions should also require some indemnities from the incumbent in relation to the staff transferring when the contract ends. Then, if the new providers demand indemnities from the commissioner to take on the staff, the commissioner can effectively pass on the benefits of the indemnities it has from the incumbent. The net effect of properly backed-off contracts should be that the commissioner itself retains no risk in relation to the staff.

The best time at which exit provisions should be agreed will almost always be at the start of the contract, alongside any provisions relating to the current proposed transfer ('entry provisions'). That is when the commissioner will have the best negotiating position. Entry and exit TUPE provisions will often mirror each other, although that is a matter of negotiation.

If you are a commissioner with existing contracts, it may be worth auditing what exit provisions you already have in place. If there are contracts where there are no protections, considering negotiating them now: whilst it will never be comfortable getting agreement from the provider to manage their own exit, the bargaining position is likely to be stronger now while there is an existing relationship than when the writing is on the wall. Contract extensions are also a good opportunity to introduce or strengthen exit provisions.

For the incumbent provider

If you are the incumbent provider and are likely to lose the services to a new provider, one of your likely concerns may be that TUPE won't apply, leaving you with a load of stranded costs. This could particularly be the case where (i) the commissioner has decided to reconfigure the services to such a degree that the application of TUPE is called into question, or (ii) (even worse), you have reconfigured the services yourself!

TUPE will only apply to an employee if:

- You can identify an organised grouping of resources (i.e. team) whose principal purposes is to carry out the services and;
- The employee is assigned to that organised grouping;
- The services being carried out by the incumbent are fundamentally the same as the services which will be carried out by the new provider;
- The new services are not being fragmented amongst a significant number of new providers.

That is to say, if your staff are providing services which, under the new procurement, are now going to be split between different providers under new contracts and you are not able to identify a team for each of these services (i.e. staff are working flexibly across all services), TUPE may not apply.

What can I do?

As incumbent, you cannot control how the service will be provided post-transfer (i.e. whether it's fundamentally the same or has been fragmented). However, you are likely to have a good degree of control over how the service is managed pre-transfer and that gives you scope to improve the chances TUPE will apply. Incumbents who wish staff to transfer at the end of the contract would be well-advised to manage the employees wherever possible into organised groupings dedicated to each contract. Case law in recent years has made clear that this is primarily judged by how the employees are internally managed by the incumbent (and so is largely within the incumbent's own control): if a group of staff are said to be primarily focussed on serving a particular service, that will likely be sufficient. It does not mean the staff cannot work on other contracts. Clearly there will be cases where this type of internal organisation is not possible, but many more where it is.

As the incumbent provider, you may also be subject to exit provisions imposing restrictions and obligations. You should always check your contract with the commissioner to assess what liabilities you have.

In the absence of any provisions, you have a relatively free hand. In such circumstances, you would not ordinarily want to enter into any contract with the commissioner, or new provider governing the transfer (any indemnities you are offered are likely to be of lesser value than the indemnities/obligations you'll be asked for) - or if you do, they can be on your terms.

The duty to consult staff falls on the incumbent provider. Consultation must take place 'in good time' before the transfer. In practice, you will need to have received the 'measures letter' (which sets out what measures are intended for the staff post-transfer) from the new provider before you can meaningfully consult. Although the new provider is legally obliged to provide this measures letter within good time, if they don't and meaningful consultation does not take place, both incumbent and new providers are jointly liable, so you could end up liable for another's failing. This risk can be avoided or mitigated by indemnities in your services contract.

For new providers

As a new provider, you could be in the most precarious position of all as you will need to assess what your risks and liabilities will be so as to (a) assess whether it is even worth bidding for the contract(s), and (b) how to price your bid accordingly. Of course, you will always factor in some element of risk contingency, but this becomes a really serious problem if you haven't been given anywhere near sufficient or accurate information to make any kind of sensible assessment.

Bidding on the basis of an unknown level of risks and liabilities will inevitably result in an increase to your pricing but the downside of doing that may be that you severely limit your chance of winning the contract(s).

What can I do?

Ideally you will want indemnities from the commissioner covering any hidden employment liabilities. That may or may not be realistic commercially. If the commissioner is not able to get the incumbent provider to engage with providing information, they may not have any exit provisions and may have no indemnities from the incumbent. Is the commissioner going to give you indemnities which it cannot pass on to the incumbent? This will always be a commercial point but should always be pursued where bargaining position allows.

If indemnities are not possible and no information is provided, unfortunately there is not much you can do in relation to TUPE other than relying on your own experience of the type of deal on offer and guessing as to the incumbent's most likely staffing profile and operating model plus associated costs and liabilities when bidding for the contract(s).

The commissioner may seek to impose exit provisions on you governing how staff are managed at the end of the contract. The obvious quid pro quo would be to request similar indemnities from the commissioner/incumbent governing the staff you are inheriting now. Standard indemnities (if you can get them!) would generally split liabilities to those arising pre-transfer (not the new provider's) and those arising afterwards (the new provider's) - but they are always a matter of negotiation.

As the new provider, bear in mind that you will become responsible for almost all employment liabilities related to the staff, including claims they might have against the outgoing incumbent, even if they are no fault of yours.

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