

BIDDING FOR A NEW CONTRACT?

Since April 2006, companies taking on new contracts to provide services face substantial new obligations and risks under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”)

What are the risks?

Any company taking on a new contract providing services may have the previous contractor’s workforce automatically transferred to them, making them responsible for redundancy payments and potentially for unfair dismissal claims. There are also substantial penalties for failure to consult employees in advance of the change of contractor. The rules apply whether or not the company has any contact with or knowledge of the previous contractor, or intends to take on the staff.

Where do the new rules apply?

They cover “Service Provision Changes” which as defined include outsourcing, insourcing, and (the most common situation) changes of contractor, if the following conditions are met:-

- before the change there is a group of employees wholly or mainly dedicated to servicing the client and;
- the client intends that the service will be provided by the new contractor other than on a one-off or short term basis; and
- the supply is principally of services rather than goods.

Key points are:-

- it doesn’t matter how the new contractor organises the service; what matters is whether the **previous** contractor has a group of employees dedicated mainly to the contract;
- the rules apply whether or not the previous and new contractors have agreed anything between themselves and even if they are not even aware of each other’s identities;
- the rules still apply where there is a gap between contracts or the change is done in stages.

What obligations do the new rules impose?

These include the following:-

- Except for those who object, all employees of the previous contractor in the group performing the contract automatically have their employment and accrued service transferred to the new contractor.
- The new contractor takes over the existing terms and conditions (except for pensions, although a contributory pension scheme has to be offered) and any liabilities of the previous contractor.

- The new contractor cannot dismiss any of the transferred employees for a reason connected with the transfer (unless there is an “economic, technical or organisational reason requiring changes in the workforce”). Any such dismissals are automatically unfair.
- Where a Union is recognised in respect of the employees transferred, or there is a collective agreement in force, these arrangements bind the new contractor.
- The previous contractor has to provide the new contractor with all the relevant information relating to the employees being transferred.
- Both the previous and the new contractors are required to inform and consult properly in advance with representatives of any employees affected by the change. The rules are strict and failure to comply can result in a fine of up to 13 weeks’ wages for each affected employee. The previous and new contractors are each liable for any default by the other and so it is crucial for both contractors to know that the other has fully complied.

What do you need to do?

If you are the new contractor:-

- Find out how the job has been done and whether the previous contractor has had a group dedicated to the contract. If so, it is likely that the employees in it and liabilities relating to them will be transferred to you. It does not matter whether or not **you** propose to have a dedicated team. This is a crucial judgement with expensive consequences if wrong, so you need expert legal advice.
- if the rules do apply, find out early on about the numbers of employees and their terms of employment
- make sure both you and the previous contractor consult with employee representatives in good time
- ensure your pricing reflects the potential costs; try to get an indemnity from the client against any liabilities you take on (eg, redundancy costs)
- plan how to accommodate the transferred employees (their contractual workplace may be some distance away from your premises, with logistical implications for those who continue to work for you, and redundancy implications for those who don’t)
- if redundancies are needed, the candidates may have to be drawn from your existing employees as well as the transferred employees. Take expert advice because a dismissal may be automatically unfair
- even more care is needed when the previous contractor has gone bust.
- For holders of commercial vehicle operators licenses, obtaining extra drivers may be welcome but their compliance records will come with them, and you may also get non-driver employees, eg warehouse staff, traffic planners and even accounts personnel

If you are the contractor who is losing or giving up the contract:-

- decide whether the rules will apply. Do you have a group mainly dedicated to the client's contract, and is the new contractor going to be involved for more than the short term or a single event?
- if they do, liaise with the new contractor to find out what changes he is going to make and ensure that you and he consult in good time with the representatives of any affected employees;
- if you do **not** want your employees on the contract to transfer to the new contractor, then make specific arrangements with them to remain in your employment
- provide the required up to date employment information to the transferee
- if the rules do apply to transfer the workforce, any liability to pay redundancy money will fall to the new contractor.

If you are the Client-:

- Ensure you start the process for awarding a new contract sufficiently in advance and then manage the timetable.
- You need to collect information as you go along on how the existing contract is run so that you can provide a proper briefing on potential exposure (or available resource) to the prospective new contractor.
- Be prepared to respond to a request by a new contractor for an indemnity against employment costs.

Whatever your position, plan carefully!

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