Newsletter

BURGES SALMON

Quaystone

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Further information

For further details on the issues raised in this bulletin or generally on the services we offer please email **marcus.harling@burges-salmon.com**, **william.gard@burges-salmon.com**, **steven.james@burges-salmon.com** or **lloyd.james@burges-salmon.com** or your usual Construction and Engineering Team contact.

Following the summer break, this edition of Quaystone focuses on employment and social issues. Our employment colleagues look at managing TUPE risks and a recent European case which considers the treatment of employees' travel time. Both have significant implications for sectors of the construction industry. We also take a look at the opportunities to consider "social criteria" in public procurement.

Employee Protection: TUPE matters

Businesses can be subject to significant employment related liabilities and obligations as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE, for short). In the construction industry this is most likely to occur when services are outsourced or insourced, or when business operations are transferred from one provider to another. Obvious examples include where a service provider is changed in a long term O&M arrangement or a long term framework agreement is re-let.

Under TUPE, certain employees will automatically transfer from one company (normally the customer, incumbent service provider or seller) to another (normally the new service provider or buyer).

Key aspects of TUPE include:

- The new employer will inherit all of the rights, obligations and liabilities of the old employer in relation to the transferring employees;
- Obligations are imposed on both employers to inform and consult with affected employees. Notably, liability for failure to inform and consult can be up to 13 weeks' uncapped pay per employee, so can be very substantial;
- Restrictions are placed on what changes the new employer can make to employees' terms and conditions of employment;
- Restrictions are also placed on whether the new employer can dismiss the transferring employees;
- Employers can become bound by trade union recognition and/or collective agreements which it was not party to and which might conflict with existing employee relations;
- Requirements for the new employer to ensure it has or obtains an appropriate sponsor's licence for all incoming employees within specified time limits (with fines of up to £20,000 per employee for failing to do so); and
- The new employer can, in certain circumstances, become lumbered with onerous and expensive obligations in relation to pension liabilities.

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All of these factors can, in one way or another, influence the bottom line. In a best case scenario, getting TUPE wrong could erode profit margins. In a worst case scenario, it could destroy those margins altogether. There could be unexpected redundancy costs or claims for unfair dismissal.

Not only that, TUPE can have a major effect on a business by undermining business plans or service delivery. For example, if a service delivery plan relies on being able to change employees' working patterns, the restrictions on changing employees' terms and conditions under TUPE might prevent this from being a viable option. TUPE litigation tends to be complex too, meaning it can absorb significant amounts of management time and legal budgets.

TUPE doesn't have to be burdensome. While you cannot contract out of TUPE (a common mistake is to think you can), it is something that can be effectively managed by considering it early and factoring it into business plans. It is also sensible to address TUPE in your commercial contracts, so that if necessary, any risks can be appropriately allocated.

There are many options for managing and allocating risks associated with TUPE. These range from:

- structuring the workforce or transaction in such a way as to influence the likelihood of TUPE applying;
- factoring TUPE costs into pricing assumptions or utilising price adjustment mechanisms;
- allocating risk by way of warranties and indemnities;
- managing the employee relations environment through careful planning and consultation.

The earlier TUPE issues are identified, the greater the range of tools available.

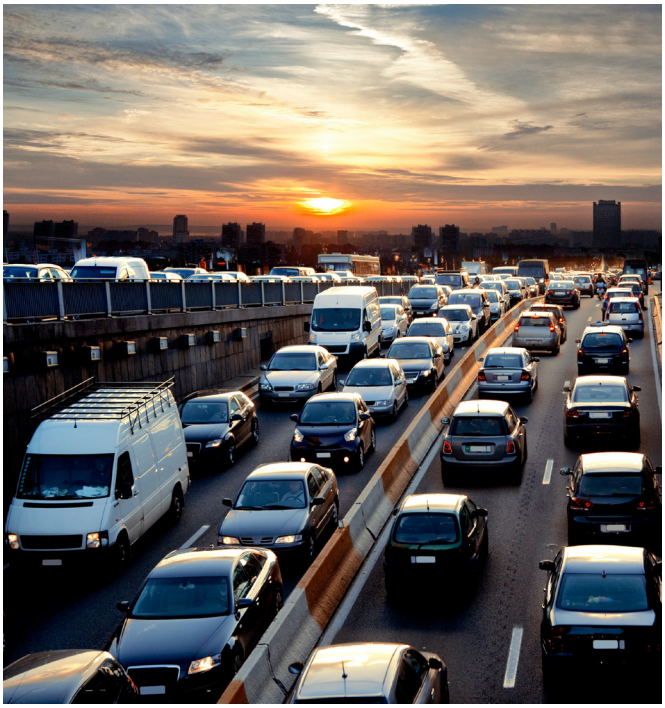
Does travel time count as "working time"?

It is often convenient and efficient for mobile workers to travel directly from home to their first customer each day, return directly home from their last customer, and not to be assigned to a fixed or habitual place of work. Examples in the construction sector include workers who provide O&M services on a number of sites or consultants or specialist subcontractors who may be working on more than one job at a time.

A recent European case has looked at whether the time spent by these "peripatetic workers" travelling to and from their first and last jobs of the day should count as "working time" under the EU Working Time Directive *(Federación de Servicios Privados del Sindicato Comisiones Obreras v Tyco Integrated Security SL and another)*. The Advocate General (AG) at the European Court of Justice (ECJ) has given his Opinion that this time does constitute working time.

An Opinion from the AG is not, in itself, binding. It acts as guidance to the ECJ, who will proceed to issue a judgment. Usually, the ECJ follows the AG's Opinion.

> *"The AG's reasoning is based on the travel in question forming an integral part of the work and being a necessary means of providing services to customers".*



The AG's reasoning is based on the travel in question forming an integral part of the work and being a necessary means of providing services to customers. It should therefore be regarded as forming part of the workers' activities.

The AG did acknowledge the employer's concern that workers would take advantage of the journeys at the beginning and end of their day to carry out their personal business, but made it clear that this does not affect the nature of the journey time. It is therefore up to individual employers to put in place appropriate monitoring procedures and policies to prevent any

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such abuse. While this might increase the administrative burden on employers, this will simply be something businesses need to weigh into the equation when deciding to have or maintain no fixed place of work in the first place. Employers with a mobile workforce who travel between sites or customers during the course of their working day ought to consider the potential for abuse when workers are travelling in between sites or appointments in any event.

Perhaps more significantly, the AG's Opinion may have a knock on effect on a business' compliance with its obligations under the Working Time Regulations 1998 (the Regulations). For example, it could increase an employee's total average working time each week, resulting in the employee exceeding the 48 hour limit imposed by the Regulations (unless the employee has opted out of this limit) as well as any time restrictions contained in the employee's contract of employment. In addition, employers need to consider whether employees are able to take the daily and weekly rest periods to which they are entitled under the Regulations.

In the event that the ECJ follows the AG's Opinion, employers will need to check their compliance with the Regulations and review their employment contracts. However, given the underlying rationale for the Regulations and the duty of care otherwise placed on employers, businesses should ensure that they take into account the time spent driving by their employees from a health and safety perspective, regardless of this decision.

If you would like any employment related advice or information, please contact Roger Bull or Akshay Choudhry in our **Employment Team**.

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Social change through public procurement

It is not only price and technical matters that can be used to decide who to award public contracts to. So called "social criteria" can also be taken into account. These can include steps to address long-term unemployment, provide training or encourage the participation of SMEs. This has not always been recognised, especially in the UK. This point was re-emphasised in the 2015 update of the UK public procurement **Regulations** and in the accompanying **guidance**.

The reasons behind the historic reluctance of UK authorities (and particularly those in England) to use procurement law to effect social change include:

- **A risk averse approach:** Authorities think that deviating from economic and technical criteria will breach procurement law, exposing them to claims from losing bidders.
- **Policy or political doctrine:** An emphasis on getting "value for money" means that only economic criteria are used.
- **Maintaining the *status quo*:** Getting public procurement right is complex and time consuming, which encourages procurers to use tried and tested methods.
- **Blaming Europe:** It is often expedient to blame the perceived restrictions of underlying EU law rather than acknowledge our own failure of will or imagination.

"This has generally resulted in authorities taking a conservative approach and awarding public contracts on price and technical merit only."

This has generally resulted in authorities taking a conservative approach and awarding public contracts on price and technical merit only. However, there is scope for imaginative authorities to try to engineer social change through procurement. There is language in the Regulations (as well as the EU Directive on which they are based) to encourage authorities to embrace social criteria.

The Regulations provide that a winning tender *"may include the best price quality ratio, which shall be assessed on the basis of criteria, such as… **social aspects** linked to the subject-matter of the public contract in question."*

The Directive reinforces the point and also explains that the conditions of contract on which the successful bidder is appointed

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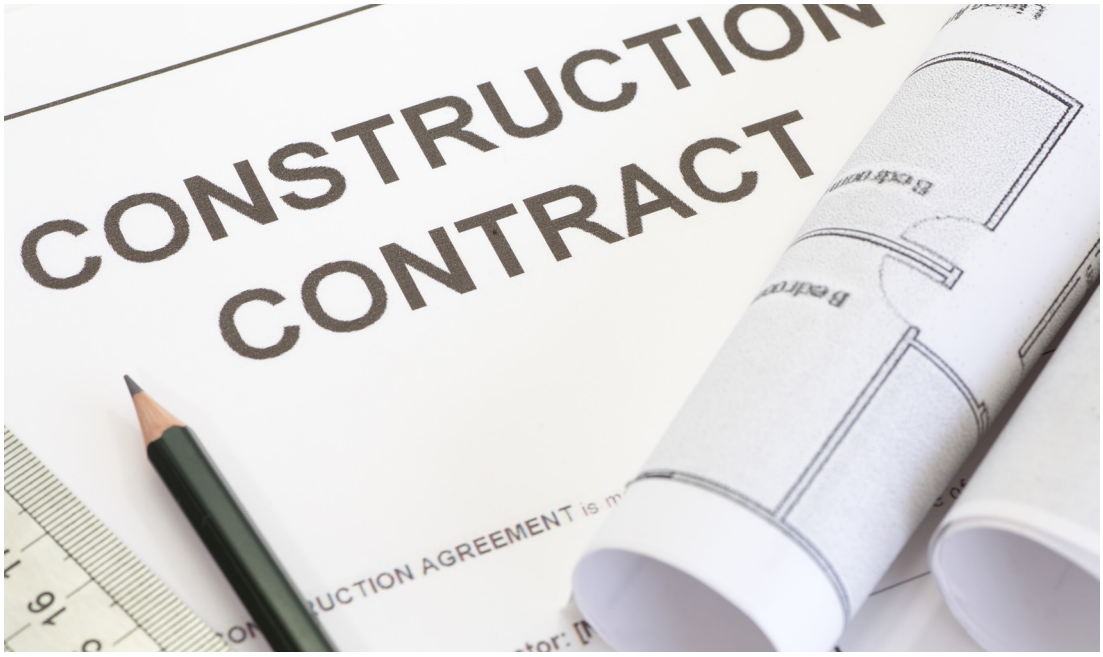

represent an opportunity to include social criteria:

"Measures aiming at … the favouring of ***social integration of disadvantaged persons*** *… amongst the persons assigned to performing the contract* ***or training in the skills needed*** *for the contract in question can also be the subject of award criteria or contract performance conditions … such criteria or conditions might refer… to the* ***employment of long-term job-seekers****, the implementation of* ***training measures for the unemployed or young persons*** *in the course of the performance of the contract to be awarded."*

There is further EU guidance on how SME participation can be encouraged including:

- reducing the cost of bidding
- reducing the size of contracts or dividing large contracts into smaller lots
- avoiding unnecessarily high limits on the financial size of companies qualified to bid
- encouraging SMEs to establish consortia to bid for contracts.

There are many European and domestic examples of the successful use of social criteria when procuring public works. There is, however, a body of European case law that warns of the pitfalls if social criteria are not used properly or at the right time.

The main pitfalls are:

- Failing to introduce and apply social criteria at the appropriate stage of the procurement process.
- Using social criteria in such a way as to directly or indirectly discriminate against bidders from other EU member states.

Public authorities need to be careful to structure their procurement strategies to comply with the Regulations and underlying EU law. There are, however, genuine opportunities for the boldest and most imaginative authorities to conduct procurement in a way which brings real social benefits to their regions.

Team news

We are pleased to welcome Holly Yeo to the team. Holly joins us from TLT and specialises in contentious and non-contentious construction law.

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