



Wrangling with TUPE in procurement documents

A bid team treads a delicate line when it seeks to present a confident and apparently certain solution to a purchaser's needs if that solution will involve changes for employees. A bidder should therefore have regard to the potential employment law ramifications of what it says in its bid document.

In particular, the bidder should consider whether a successful tender is likely to trigger information and consultation requirements under TUPE and, if so, to what extent it is prepared to share information relating to its bid with its workforce - or prospective workforce - during any such consultation.

Purchasers should also be wary. The content of a successful bid document could influence the purchaser's information and consultation obligations and liability under TUPE too.

Falling foul of TUPE can be costly – with possible penalties of up to 13 weeks' pay per employee, the potential liability is significant. With employees and trade unions increasingly prepared to challenge deficient TUPE consultations, it is something which businesses can ill afford to ignore.

We discuss the implications for both bidders and purchasers below.

Bidders

The problem, in short, is this:

- the bidder will be under an obligation to provide information about any measures which it proposes to take in relation to affected employees in connection with the transfer (normally, this is done by providing the information in a measures letter to the purchaser or incumbent contractor who, in turn, shares it with the affected employees);
- measures is widely defined – as well as significant changes such as prospective redundancies or changes to pay, it could include relatively minor changes to job roles (which may, in order to up-sell the offering, have been made to sound more important or impressive in the bid);
- if the bidder has referred to any such measures in the tender, it can be faced with a difficulty. It may not want such proposals to be shared with the workforce yet - perhaps for reasons of commercial sensitivity, or for operational reasons, or potentially to avoid employee unrest.

One option is to withhold the information from employees. This could be a high risk strategy, though. Employees may – and, increasingly, probably will – find out, particularly in a unionised workforce and/or when the measures are implemented suspiciously soon after the transfer. Employees' representatives may then bring claims for failure to inform and consult under TUPE. The potential liability is up to 13 weeks' gross pay for each employee, and a deliberate breach will be particularly frowned upon by a Tribunal.

It will be no defence to argue that the bid documentation is commercially sensitive – you will be legally obliged to disclose such documents notwithstanding their confidential content and, as tribunal hearings are public, that confidential information could soon be in the hands of your competitors and/or clients.

It is an equally unattractive argument to say that, despite what your tender contained, there were no measures envisaged since, in reality, you did not really know how you were going to run certain aspects of the contract. In other words, you didn't really mean what you have said in your bid – hardly the message you want to send to prospective clients.

Far better, then, to have considered these issues when crafting your bid. You might, for example:

- consider couching your tender in more guarded terms, accepting that this might take a slight shine off your bid;
- ensure that your internal document trails clearly demonstrate that, while your bid is based on certain assumptions, those assumptions are subject to change and are not so concrete as to amount to proposed measures; or
- if you do make commitments in your tender which you do not want to impart during consultation, you can manage your risk by hinting at the possible measures during consultation without revealing details.

Whichever option you chose, advanced planning, careful wording and the involvement of your HR team is key.

Purchasers

Purchasers need to be conscious of the risks set out above too - not least because liability for failure to inform and consult about TUPE is joint and several, meaning a customer could be held liable for a contractor's failings (unless appropriately indemnified in the contract itself).

In addition, purchasers may have good commercial reasons for wanting an incoming contractor to avoid sharing too much information about its plans for the workforce. For example, purchasers will have a vested interest not to destabilise the employees currently delivering services to it.

For both of these reasons, a purchaser might consider limiting the level of detail it requires or encourages bidders to provide in their tender documents, so that any subsequent TUPE consultation is not unduly undermined by the information in that bid.

In addition, while a purchaser has limited control over the content of the measures letter it receives from an incoming contractor, it is important to remember that responsibility for providing the information required by TUPE to transferring employees lies primarily with the purchaser. More specifically, the purchaser must inform the transferring employees of any measures which it envisages the incoming contractor will take.

Therefore, even if a certain change is not included in the measures letter, if it is apparent from the bid documentation then the purchaser may nonetheless be under an obligation to share that information with the transferring employees. As a result, over-reliance on the measures letter alone can be a hazardous approach.

When it comes to managing the TUPE pitfalls in tender documents, much of the strategic control undoubtedly lies with the bidders. However, it is clear that purchasers have a part to play in managing their own risk and liability through careful planning and attention to detail too.

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