TUPE: Key Issues on Second Generation Outsourcings

We are just waiting on everyone joining and will be starting the session shortly at 1.15pm
CIPS Series
TUPE: Key Issues on Second Generation Outsourcings

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When is TUPE triggered?

Two scenarios:

1. ‘transfer of an undertaking’
   i.e. a stable economic entity which retains its identity

2. ‘service provision change’
   i.e. an organised group of employees and activities must be carried out before and after
TUPE can affect any "services" deal / contract you do
- Not just relevant for big "outsourcings"
- Not just relevant for 1st generation outsourcings
  - any services contract award, termination or even "change"

Can **significantly** affect:
- deal pricing / overall business case
- timescales (due to consultation periods)
- industrial relations / staff morale

Protection for Customer is by way of contract indemnities
Example Scenario: Change in Service Provider
Service Provision Change

No work | Work | Work | No work

Change in Supplier

Project Starts | Project Ends
Staff will transfer under TUPE
New Supplier will need to employ these people on the same terms
What if they do not want some or all of the staff?
  - Someone has to pay to get rid of them
  - New Supplier will seek indemnities from Customer in respect of staff transferring from Former Supplier
  - Add those costs to Customer pricing
What should you do?

- Think about TUPE risk every time you enter into, terminate or change a services contract

- Ensure your contract has the appropriate TUPE indemnities in it
  - Often "No TUPE Out" indemnity on termination
  - Is that the best position for the deal?

- When issuing Tenders consider TUPE issues
  - Ask for pricing without TUPE (level playing field? Pricing granularity?)
  - Ask for pricing on assumption all staff transferring?
    - Detail where you can to allow them to do so
Service Provision Change:

What happens when a service is taken over by multiple suppliers?

In some situations TUPE will not apply if the service has become too fragmented.
Service Provision Change:

What happens when there are changes to a service after a re-tendering exercise?

- TUPE will still apply if the service is fundamentally and essentially the same.
- TUPE will not apply if the service is materially different.
Commercially, customers & suppliers need to consider the following both at the outset and upon exit in an outsourcing:

- Are the services to be split among more than one supplier?
  - If so, TUPE may still apply but consider if the services will be so fragmented that it will be impossible to identify the destination of the services or if there are clearly defined aspects of the services transferring to particular providers?

- What differences are there in the services performed before and after the change in supplier? Are the new services fundamentally or essentially the same?

- If there are differences, are these significant?
Which employees transfer under TUPE:

The assignment question

- “Assigned other than on a temporary basis”

- Factors to consider:
  - amount of time spent on the services (rule of thumb 50%)
  - the amount of value given to those services by the employee
  - the contract of employment
  - how the cost of the employee's services is allocated internally

- Only employees transfer – agency workers, workers, contractors, etc. are not affected if they genuinely do not have employment status
Contact

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Questions & Discussion
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