

PRACTICE NOTE FM NUMBER 4  
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# Considering the necessary employment protection clauses in the NEC4 Facilities Management Contract (FMC) – the adoption of TUPE

## OVERVIEW

This practice note is written as an introduction to the issue of employment protection rights in term service contracts, and particularly to demonstrate how this would be managed in the NEC4 Facilities Management Contract (FMC).

This practice note does not attempt to write or detail the clauses. Clauses to include the Transfer of Undertakings (Protection of Employment) Regulations 2006, commonly called TUPE, require very careful attention, and the client almost certainly will obtain legal advice. Considerable risk may pass to service providers through these clauses, and they will also consider these clauses very carefully. This note only attempts to identify the issues that need consideration, and indicates where these clauses would be included in the contract.

Where terms used refer directly to the terminology in the FMC, the NEC approach to the use of capitals and italicisation is adopted. While this practice note describes the requirements in relation to a NEC4 FMC, the principles will be applicable to other NEC4 term contracts such as the Term Service Contract and the respective short forms. It is far less likely that TUPE would apply at the end of a project contract such as the Engineering and Construction Contract. However, it is important to recognise that it is the legislation that determines whether or not TUPE applies, not any agreement by the Parties through a contract.

## ISSUES TO BE CONSIDERED

In the United Kingdom, employment rights of staff and operatives employed by a client or service provider are protected by legislation, and impact on any following contract in that those staff and operatives may have the right to be transferred to the new service provider to continue their employment and retain their employment rights. The legislation in the UK is known as the Transfer of Undertakings (Protection of Employment) Regulations 2006, or TUPE.

Other countries have similar legislation and, if the FMC is being used in other countries and legal jurisdictions, the relevant legislation needs to be considered. This practice note is principally concerned with the UK position.

The consequences of employment protection rights for the incumbent facilities management (FM) work force therefore must be considered should the provision of an existing service move to another organisation as a result of a new procurement exercise.

The broad effect of these rights in the UK is to preserve the continuity of employment and the terms and conditions (including pension liabilities and associated costs) of those employees who are transferred to a new employer. The TUPE legislation also contains a number of obligations upon the transferring incumbent employer (the transferor) and the receiving new employer (the transferee) to inform and consult with affected employees.

Generally, employment regulations will apply in the following situations:

- a service provider takes over activities from a client (known as outsourcing).
- a new service provider takes over activities from the previous service provider (known as re-tendering).
- a client takes over activities from the previous service provider (known as in-sourcing). They may also apply to the employees of the previous service provider's subcontractors.

Clients should take the following points into account when considering the employment protection issues, recognising that staff transfer often presents significant uncertainties.

- Ensure appropriate due diligence (both legal and HR) is undertaken with appropriate advisory support and that indemnities as felt necessary are secured in order to protect legal and contractual positions in the event of any claim.
- As part of the procurement exercise, tenderers should be asked to confirm their compliance with all relevant in country employment rights requirements of the incumbent work force and identify any commercial impact that may impact on their tender price.
- Often upon the appointment of a new service provider, time constraints will prevail. At contract transition, commercial and operational mobilisation due diligence exercises must work in synergy with the employment due diligence process to discharge legal duties, protecting contractual terms by way of obtaining the right employee information, identifying risks and liabilities early on.
- More often than not, clients and service providers will supplement the fundamental position under TUPE by agreeing warranties and indemnities that go to (among other things) the conduct of the parties and the apportioning of liability, both on entry and exit. It is not a case of leaving the due diligence process solely for the parties' employment (HR) teams to sort out on their own; the client needs to initiate early discussion between all parties involved so as to identify the commercial/monetary impact of TUPE on their organisation.
- Employee liability information (ELI) Data of the incumbent work force (ensuring anonymity provisions) should therefore be made available to tenderers by the incumbent supplier of the service (the client or service provider) and the provision and liability of this data should also rest with the incumbent supplier of the service.
- The client should seek warranties when it wants the other party to confirm that certain information it is providing is correct. For example, assurances must be made that the information about the pay and benefits of transferring employees is accurate. If it turns out that it was inaccurate, there is a risk that a claim for damages against the client may occur.
- Indemnities should allow for a guaranteed remedy of reimbursement in respect of a particular liability, for example, if an employee has a claim that arose prior to their transfer. In such instance and under the indemnity, the client will reimburse the service provider's costs of dealing with this claim and any compensation it has to pay.

Other country, International or cross border contracts will provide additional complexity. If dealing with such contracts, the client must take jurisdictional advice on the nuances of local equivalents of TUPE (if any) as the details will differ from country to country.

## WHAT IF THERE ARE NO EMPLOYMENT PROTECTION CLAUSES?

While some jurisdictions in which the FMC could be used may not have legislation protecting employment rights of people delivering services as TUPE does, it may be advantageous for parties involved, both purchasing and service delivery organisation, to consider stipulating terms to include the retention of any existing work force where this is possible. This should

improve service continuity through the transition period and ensure that valuable local knowledge is not suddenly lost at the start of the new contract.

## INCORPORATING EMPLOYMENT PROTECTION CLAUSES INTO THE FMC

The FMC is written, like all NEC contracts, to be used in any country, including the United Kingdom. It is therefore written as a legally independent contract – that is, it is written with no particular legal framework to dictate its terms. The issue of which legal framework is imposed on the contract therefore has to be made clear within the contract or extra information contained within the contract<sup>1</sup>. Employment protection rights as has been explained above are legal rights, and are country specific. The standard FMC cannot therefore provide UK TUPE clauses in its core clauses.

The NEC uses “Y” secondary option clauses to allow the adoption of certain country specific legal requirements where the contract would not work, or would be rendered ambiguous, without them. While TUPE requirements are applicable to almost any term contract where the contract is to continue a service that has been provided by others before it, the clauses are not necessary to make the FMC work.

It therefore follows that the FMC will incorporate the TUPE requirements through additional clauses to the contract, which in the FMC are referred to as *additional conditions to the contract*, or Z clauses. Similarly, in any other country or for cross border contracts, the relevant employment protection clauses will be within the Z clauses.

The clauses to manage the TUPE requirements (and perhaps additional pension requirements) need to be drafted carefully to ensure they achieve the necessary expectations. They will probably be drawn up by the *Client’s* legal team, and need to be provided to the tendering service providers with the tender documentation. Very considerable risk and cost can be transferred through these clauses, and they therefore need to be clear and unambiguous.

They also should be drafted adopting the NEC drafting principles. The clauses should be written in the present tense, with no cross referencing, and with short sentences. Where actions fall to the *Service Manager* rather than the *Client* these should be clear, though there will not be many. These are legal agreements between the *Client* and the *Service Provider*.

The NEC has not drafted sample TUPE clauses. *Clients* can accept or transfer the costs of TUPE in different ways, and they should take their own legal advice to draft these clauses.

Where the TUPE clauses require actions by the Parties, particularly the outgoing and incoming *Service Providers*, these actions should form part of the demobilisation and mobilisation plans. The details of these will be stated in the Scope of the respective *Service Providers*.

## CONCLUSION

Employment protection rights is a complex issue and differs across different countries and legal jurisdictions. In the UK, the TUPE regulations apply, and clients need to incorporate these regulations, and the way they need and give information and warranties, into the contract.

The NEC Facilities Management Contract does not have specific clauses within it to manage this process, but such clauses can be easily added through the “*additional conditions*” included within the Contract Data part 1. These clauses need to be written with care to ensure they place the risks and costs of TUPE where the *Client* wants, and the *Service Provider* accepts.

<sup>1</sup> The Facilities Management Practice Note 3 gives more information about how the FMC can be used internationally or across borders.

### **Acknowledgements**

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