

Specific Instructions to Tenderers for Contracted-Out Services relating to “Transfer of Undertakings”

1. Your attention is drawn to **SI 131 of 2003** entitled **European Communities (Protection of Employees on Transfer of Undertakings) Regulations**¹ commonly referred to as TUPE (refer to **Annex B** for summary). The aim of the regulations is to protect the contractual rights of employees in respect of their employment in the event of a transfer to another employer of the business or part of the business in which they are employed.
2. **Tenderers should anticipate service transfer implications:**

In the context of a potential change of service provider as a consequence of a tender competition, it is the responsibility of tenders to consider in advance whether or not TUPE applies to the contract re-let and tender accordingly. All personnel assigned to the contract are third party contractor employees and HSE would be neither transferor nor transferee of the employees in the circumstances².
3. **HSE Policy Objectives:**

Notwithstanding this, the HSE seeks to:

 - ensure that tenderers’ proposals are responsibly based and take full account of any regulatory obligations
 - ensure a level playing field for contractors bidding for service contracts³
 - provide certainty and confidence and reduce the risk of unnecessary disputes and litigation
4. The position of HSE regarding transfer of undertakings is as follows:

In the event of a change of service provider; and prior to the change, there are contractor employees assigned as an organised group whose principal purpose is to carry out the service activities in question e.g. contract

¹ This statutory instrument derives from EU Council Directive 2001/23/EC (March 2001) on the approximation of laws of Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, business or parts of undertakings or businesses.

² The assumption is that the services concerned are 2nd generation i.e. previously contracted-out.

³ The intention is that tendering decisions should be taken on commercial merit rather than on differing views as to the employment rights of employees

cleaning, security, then the employees so assigned should be treated as if TUPE Regulations apply; the outgoing service provider will be regarded as the transferor and the incoming contractor regarded as the transferee.

5. **Information Requirements:**

In the event that a “transfer of undertakings” applies, specific information is required from the outgoing contractor (transferor) relating to the employees who would be transferred. Please refer to **Annex B**.

6. Information in respect of the current employees should be sought from the contractor currently undertaking this task. It remains the tenderer’s responsibility to ensure that their tender takes full account of all the relevant circumstances of this contract re-let and tender accordingly.

7. By regulation both the original employer (transferor) and the new employer (transferee) must consult employees and provide specific information to employees relating to the transfer at least 30 days before it occurs. Please refer to **Annex A**.

8. **Special Conditions relating to Expiry Of Contract:**

During the three months period preceding the expiry of the contract or after notice has been given to terminate, the Contractor shall:

- a) On request, provide the information listed in **Annex A** relating to employees assigned in providing the services under the Contract
- b) Permit the HSE to use the information for informing tenderers for services which are substantially the same type of services as provided pursuant to this contract and
- c) Enable and assist communications with and meet those employees, employees trade union or employee representatives.
- d) Permit the HSE to use the information for informing any prospective employer of the Contractor's employees.

9. In the event that the information provided by the Contractor in accordance with above becomes inaccurate, whether due to changes to the employment and personnel details of the affected employees made subsequent to the original provision of such information or by reason of the Contractor becoming aware that the information originally given was inaccurate, the Contractor shall notify the HSE of the inaccuracies and provide the amended information.

10. **Indemnity:** The Contractor agrees to indemnify and keep the HSE indemnified fully in respect of any claims, losses, costs, expenses, demands and liabilities arising from the provision of information or his failure to provide information under conditions hereof.
11. **Post Transfer Reporting:** The Contractor shall provide the HSE with the following information as part of the normal reporting regime of the contract.
 - a) Proposed, agreed or imposed changes to terms and conditions of service in respect of employees transferred to the contractor.
 - b) Disputes, court action and/or out of court settlements relating to compliance with transfer Regulations.
12. The information referred to may also be used in considering the Contractor's tender at re-let, or in considering the Contractor's tender(s) for other contracts let by the HSE.
13. On expiry or termination of the Contract, payments of any appropriate redundancy and relocation compensation are the responsibility of the Contractor.

ANNEX A

Contractor Personnel Information to be released at Invitation to Tender Stage

1. During the period of three months preceding the expiry of Contract or after notice to terminate or the Contractor stops trading, and within 20 working days of being so requested by the HSE, the sitting Contractor shall fully and accurately disclose information relating to its employees engaged in providing Services under the Contract in particular, but not necessarily restricted to, that listed below. The information provided by the sitting contractor, will be made available to all tenderers to enable them to take full account of the regulatory and economic implications in relation to transfer of undertakings .
2. The following information will be provided:
 - a) The total number of staff that currently undertake the work and who may therefore be transferred Alternatively the contractor should provide information why any of their staff or those of their subcontractors will not transfer.
 - b) The total number of posts or proportion of posts expressed as a full-time equivalent value that currently undertakes the work that is to transfer.
 - c) The preceding 12 months total pay costs
 - d) Total redundancy liability.
3. In respect of those members of staff included in the total at 2a) above:
 - a) Age (not date of Birth)
 - b) Employment Status (i.e. Fixed Term, Casual, Permanent)
 - c) Length of current period of continuous employment (in years, months)
 - d) Weekly conditioned hours of attendance (gross)
 - e) Standard annual holiday entitlement (not "in year" holiday entitlement that may contain carry over or deficit from previous leave years.)
 - g) Redundancy liability information
 - h) Annual Salary
 - i) Details of any regular overtime commitments (These may be weekly, monthly or annual commitments for which staff may receive an overtime payment)
 - j) Details of attendance patterns that attract enhanced rates of pay or allowances

k) Regular/recurring allowances

4. Additional information about factors that may influence staffing levels and costs.
5. The information to be provided at paragraphs 2, 3 and 4 should not identify an individual member of staff by name or other unique personal identifier.
6. Access by tenderers to the contractor's general employment terms and conditions applicable to those members of staff identified at 2a).

Contractor Personnel Information to be released to successful tenderer after Award Of Contract

1. Personal and Employment information

- a) Employee's full name
- b) Date of birth
- c) Home address
- e) Job title
- f) Work location
- g) Conditioned hours of work
- h) Employment Status
- i) Details of training for Statutory and Health and Safety reasons
- j) Details of training or sponsorship commitments
- k) Standard Annual leave entitlement and current leave year entitlement and record
- l) Annual leave reckonable service date
- q) Date from which the latest period of continuous employment began.

3. Superannuation and Pay

- a) Maternity leave or other long-term leave of absence
- b) Annual salary and rates of pay band/grade
- c) Shifts, unsociable hours or other premium rates of pay
- d) Overtime history for the preceding 12-month period
- e) Allowances and bonuses for the preceding 12-month period
- f) Details of outstanding loan, advances on salary or debts
- g) Bank/building society account details for payroll purposes Tax Code
- h) Cumulative pay for tax purposes
- i) Cumulative tax paid
- j) RSI Number
- k) RSI contribution rate
- l) Other payments or deductions being made for statutory reasons
- m) Any other voluntary deductions from pay

4. **Medical**

- a) Sickness and absence records for the immediately preceding four-year period

ANNEX B

European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003⁴

This is a summary interpretation⁵ of the above regulations, the purpose of which is to alert tenderers to the need to fully consider the legal and economic implications of a relevant transfer under the regulations

Implications regarding Protection of Employment

All the rights and obligations of an employer under a contract of employment (including terms inserted by collective agreements) other than pension rights existing on the date of transfer, are transferred to the new employer on the transfer of the business or part thereof.

The new employer must continue to observe the terms and conditions of the collective agreement until it expires or is replaced.

An employee may not be dismissed solely by reason of the transfer. However, dismissals may take place for economic, technical or organisational reasons involving changes in the work-force.

If an employment is terminated because a transfer involves a substantial deterioration in the working conditions of the employee, the employer concerned is regarded as having been responsible for the termination.

Statutory obligations for Employers:

In a transfer situation, both the original employer (transferor) and the new employer (transferee) must inform the representatives of their employees affected by the transfer, of -

- (i) the date or proposed date of the transfer
- (ii) the reasons for the transfer
- (iii) the legal implications of the transfer for the employees and
- (iv) a summary of any relevant economic and social implications of the transfer for them and any measures envisaged in relation to the employees.

If either employer (transferor or transferee) envisage measures in relation to their employees, the employees' representatives must be consulted about such measures and provided with the above information. This must occur, where reasonably practicable, not later than *30 days before the transfer* occurs and in any event in good time before the transfer or before the employees conditions of work and employment are directly affected by the transfer, with a view to reaching agreement.

Where there are no employee representatives, the employers must arrange for the employees to choose/elect representatives. Even if there are still no employees' representatives, the employees concerned

⁴ SI No 131 of 2003

⁵ This is not a legal interpretation and not intended to be a complete or authoritative statement of the law.

must ultimately be similarly notified in writing, within the 30 day period prior to the transfer.

These obligations apply whether the decision resulting in the transfer is taken by the employer or another undertaking controlling the employer e.g. in a transfer of a service contract. The fact that the information concerned was not provided to the employer by the controlling undertaking will not release the employer from those obligations.