Outsourcing

Managing the legal risks involved in the outsourcing of FM

Richard Barratt, Partner who heads the European Outsourcing Practice at the London office of international law firm Morgan Lewis examines the legal risks in FM outsourcing.

The business process outsourcing (BPO) market continues to flourish, albeit that customers are looking more at shorter term agreements and multi-vendor solutions. Outsourcing agreements are becoming more complex, as they have to deal with interfaces and allocation of responsibility between suppliers, and anticipate likely exit requirements in greater detail.

The significant issues in FM outsourcing deals are in common with those in other types of BPO, but the major difference is that the majority of FM services are provided on site, and can potentially have a more direct impact on the day to day operations of the customer.

The service provider may be occupying dedicated areas of customer sites. The contract must therefore make clear that no business tenancy or other legal title/rights of occupancy arise in favour of the provider. Presence on site raises issues in relation to physical and system security. Detailed security policies should be imposed on the provider and flowed down to any subcontractor.

In most FM deals the majority of the employees are transferred to the service provider. Even if not intended, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) will almost certainly apply to transfer employment contracts to the provider. The outsourcing contract should:

a) Identify the transferring employees, and detail their employment terms, supported by appropriate warranties.

b) Provide for those employees who would otherwise transfer to the provider under TUPE, but who are being retained or made redundant by the customer. Be aware that employees who aren't fully occupied in the outsourced service, but who spend a substantial amount of their time in that activity may still be transferred under TUPE.

c) Reflect any statutory obligations to consult with unions or employee representatives.

d) Allocate responsibility for salary and other benefits pre and post transfer.

e) Make appropriate provision for the transfer of pensions (particularly important in the public sector where a Government Actuaries Department certificate will be required to demonstrate comparability between the provider's and customer's respective pension plans.)

f) Provide for all of the above on handback of service to the customer or a replacement provider at the end of the contract.

Assuming responsibility for pre-transfer employment terms can be quite taxing for the provider. Some of the benefits available e.g. in the public sector will be hard(or expensive) to replicate. They may include subsidized or free accommodation, travel, or concessions to use public leisure or other facilities. Benefit related issues need to be identified early and handled sensitively.

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The IT angle

It is often forgotten that IT can play a major role in FM outsourcing, and that significant data may be handled or processed by the service provider. If the provider is taking over existing business management and control systems (BMS) e.g. environment, fire or security, consents to sublicense or assign software licences may have to be obtained from third party software providers. If the provider proposes any remote monitoring the outsourcing contract should allocate responsibilities between customer, provider and third parties as regards the development, implementation and maintenance of any IT interfaces, oblige the provider to take industry standard steps to prevent the introduction of viruses into customer systems, and impose user ID/access restrictions on the provider, including physical access. Often the BMS will be located in the same room as the customer's communications or other central systems so access should be supervised.

The service provider may need to use and process data relating to individuals. In addition to the provider's own workforce, it may also be necessary for the provider to handle personal data relating to employees of the customer, or third party contractors. The EU Data Protection Directive and domestic laws in Europe provide a comprehensive regime to protect security and prevent abuse of personal data. The provider should be obliged to take "appropriate technical and organisational measures" in relation to its processing activity, to prevent the loss or misuse of the customer's personal data. The transfer of personal data outside the EEA is extremely restricted. FM providers may propose using an office outside the EEA to play a managing or reporting role in relation to the outsourced service. If there is a need to transfer personal data outside the EEA, then in the absence of informed consent from the individuals concerned (usually not a practical option), an outsourcing customer will normally have to require the provider to sign one of the EU model contracts, which impose security and other obligations on the provider in relation to its data processing activities. But ultimate legal responsibility to safeguard data remains with the customer, so evaluation and ongoing monitoring of provider's systems is a must.

The ownership of, and rights to use data and copyright materials created in the course of the outsourcing relationship are important. The service provider may be documenting for the first time operating procedures and processes not previously captured by the customer. Ideally the customer should obtain ownership of all operational manuals and materials created by the provider. To the extent that these contain background proprietary materials of the provider, customer should be licensed to use, and potentially allow replacement providers to use them in relation to the outsourced service.

Finally, a couple of tips for the uninitiated customer: assemble a quality project and deal team (the provider usually starts at an advantage as it has been through the process before); undertake internal due diligence to understand your processes before you give their stewardship away; and establish robust contract governance procedures with the service provider.

The nature of an outsourcing deal is such that, other than in extreme circumstances, it is unlikely that either party will wish to resolve differences through the courts. The outsourcing contract should therefore provide for constructive and cooperative problem solving mechanisms. ■