

Corrections, supplements, or changes to the conditions of tender for Værøy–Bodø

Q&A

Question 1:

With reference to “Invitation to Tender Procedure - Operation of scheduled regional air services (helicopter) Værøy–Bodø v.v. 1 August 2024 – 31 October 2028” Appendix 2. Contract for scheduled air services sections 6.3 and 6.7.

In section 6.3 it is stated that “If the operator participates in legal cooperation with other companies regarding (...) overall fares, passenger transit times or through check-in of tickets and luggage, the operator is obliged to do what is practically and legally possible to offer similar terms to passengers on routes covered by the contract that have transition to or from other routes that are not initially covered by such schemes.

The same applies if the operator unilaterally offers such terms, without being part of a collaboration with other companies” (our underlining).

In section 6.7 it is stated that “The Operator shall offer passengers interline services (tickets and luggage) to natural domestic connections.” (our underlining).

1. The use of the word “if” in section 6.3 and the word “shall” in section 6.7, appear as a contradiction in the contract. Can the Ministry of Transport elaborate on how these two sections are to be understood and the connection between them?
2. Provided that there is an obligatory requirement to offer interline services cf. section 6.7 - can the Ministry of Transport elaborate on which domestic connections are considered “natural” in this context?
3. Assuming that there is an obligatory requirement to offer interline services cf. section 6.7 - should this section be understood to establish an obligation for the operator to enter into an agreement with other airlines?
4. Provided that there is an obligatory requirement to enter into an agreement with other airlines on interline services cf. section 6.7 - The consequence of such cooperation is that the operator must have a booking and ticketing system that interacts with the major operators' ticketing system - where the Amadeus system is in practice preminent. Furthermore, the operator must rent check-in systems and a baggage tag machine from Amadeus. These systems are very expensive both to rent and to operate. Can the Ministry of Transport confirm that this is the intention of the clause?

Answer:

Due to an error, section 6.7 has been included in the tender documents for the helicopter route Værøy–Bodø. This requirement is reserved for the routes operated with fixed wing aircraft. The same applies to section 6.8 that the operator must ensure that children over the

age of 5 can travel alone. The Ministry of Transport asks the tenderers of the Værøy–Bodø helicopter route to disregard sections 6.7 and 6.8 in Annex 2.

Question 2:

How does the Ministry of Transport respond to the question of the transfer of undertaking of employees, regarding the ongoing tender process for the Bodø–Værøy route? In recent years, it has been decided by the court that the air ambulance service is subject to transfer of undertaking. In the NAWSAR-tender in Svalbard, transfer of undertaking of employees was a requirement in the tender.

Answer:

Section 8 of the Professional Transport Act and Section 8d of the Railways Act have special regulations according to the transfer of undertaking when changing the provider of passenger transport following a public procurement. The Aviation Act does not have a corresponding regulation, and this is based on a conscious assessment of differences between the sectors and in particular the special practice of company-wise collective agreements in aviation.

The judgment from the court on the case with Lufttransport FW and Babcock shows that a change of provider of air transport services after public procurement can be considered a transfer of undertaking according to Chapter 16 of the Working Environment Act, even though the business in question had some special circumstances. In addition to this, the Ministry of Transport is not entitled to have a binding opinion on what is the correct understanding of the regulation in the Working Environment Act applied to a possible change of provider on the Værøy-route, as this is a responsibility of the courts.

Question 3:

How are we supposed to interpret adjustments to the compensation for changes in fuel cost (section 9.4 of the contract)?

- a) How is “fuel costs” defined? Is it strictly the cost of Jet a-1 or is obligatory carbon offsets and delivery surcharge included?
- b) What will be the baseline for evaluating changes? The cost entered by the operator in the tender, spot price at the time of tender submission, the forward curve or something else?

Answer:

- a) The Ministry of Transport asks that the providers look to the market price for jet fuel, excluding quotas and delivery surcharges, and make an independent assessment of the expected price development.
- b) The baseline for the assessment will be the assumptions made by the operator in the submitted tender. When processing a potential demand for renegotiation in accordance with section 9.4, the Ministry of Transport will assess if these are considered reasonable.

Question 4:

With the new maximum rates we expect a rise in customers buying tickets and later cancel the tickets and have them refunded. An increase in no-shows can lead to empty seats not being occupied. We want to know what kind of leeway there is on the fully flexible tickets. Shall the tickets be fully flexible also after departure, such as today (giving the customer the

opportunity to not show up for boarding and then send a claim), or is there an opportunity to for instance set the day before as the last deadline for cancelling the ticket?

Answer:

The maximum rates apply to the fully flexible one-way tickets. The Ministry has not defined the terms for this category in detail, but has taken the industry standard as a basis. The providers themselves must estimate if and how the changes in maximum rates will affect income in this regard.

Question 5:

In recent years, the airlines have registered a stricter case law in regard to EU-261. There are now Air Passenger Complaint Handling Body decisions from Norway which state that the airlines must also be held accountable for delays and cancellations due to weather, as bad weather is a normal part of winter operations in Norway, and therefore not can be considered to be force majeure. There are no court decisions on this, and thus it is currently unclear how the airlines should interpret or relate to such decisions. When EU-261 was incorporated, technical cancellations were not interpreted as being covered by the regulation, but the premise has changed in the direction of the operators having increased responsibility. For each cancellation on the PSO routes, there is an average cost of compensation in accordance with EU-261 of approximately NOK 63,000–64,000. On the PSO routes, approx. 2% of all departures were cancelled due to weather in 2022, and this amounts to approximately 1,300 cancellations, which could result in an additional cost on the entire PSO network of up to NOK 83 million in annual increased costs. In addition, there are significant additional costs linked to delays due to weather. Will any change in case law related to delays/cancellations due to weather provide a basis for renegotiating the contract?

Answer:

Much can be said about what content passenger rights should have, and actually have. The ministry continuously monitors the cases dealt with by the European Court of Justice. Eventually, a practice for Norwegian courts also begins to develop. This practice shows that the concept of extraordinary circumstances as a criterion for when the operator is or is not responsible to the passengers is relevant in many different cases, and that the assessments are often distinctly concrete and case-dependent. We understand that this can be challenging for an operator who needs to calculate their financial risk.

At the same time, there is little doubt that the operators are significantly better suited to understand and calculate this risk than the State. Therefore, among other reasons, the clear starting point in the PSO contract is that the operators have the risk of how the laws and regulations, which regulate the content of contractual relationships they have with third parties (here the passengers), are. For the same reason, this should also be the operator's risk in relation to the State as counterparty to the contract. If the State took over this risk, this would weaken the PSO operators' incentive to seek to clarify where the legal boundary is, to explain to passengers, appeals boards and courts why the specific case actually constitutes an extraordinary situation (which in practice is impossible to prevent the consequences of) and perhaps also to develop the operational procedures further – so that weather even less often affects the flow of traffic. Such a weakened incentive would be unfortunate.

If the operators want greater clarity, efforts should instead be made to clarify the content of the regulation, including regulatory work that specifies Regulation (EC) No. 261/2004. The Ministry of Transport would like to be informed if the operators would like the authorities to be more involved in what is the correct understanding of the regulation, or what content the regulation should be given on this point in a future revision.

Question 6:

With reference to "RULES FOR THE TENDER PROCEDURE" in the tender documents section 6 Requirements for tenders, including section 6.2 Deadline for submission of tenders.

We have registered with the Ministry of Transport and have been sent the tender documents for this obligation (helicopter route Værøy–Bodø).

(...)

We are applying for an extended deadline for the submission of tender until 4 July 2023 at 16:00. We hope this postponement can be granted.

With reference to section 8 Deciding the outcome of the tender procedure, including section 8.3 Recommendation concerning award of contract and reversion. Can the Ministry indicate when such a decision will be made?

Answer:

The request has been accepted and the submission deadline in the tender procedure for operation of scheduled regional air services (helicopter) Værøy–Bodø v.v. 1 August 2024 – 31 October 2028 is extended and set to 4 July 2023 at 16:00 local time. The submission deadline for operating scheduled air services in Norway 1 April 2024 – 31 October 2027/2028 (fixed wing air services) remains unchanged.

The award of contract depends on a number of circumstances, and the ministry cannot, at the present time, say anything more than that we are aiming to award and sign the contracts during the autumn.

Question 7:

With reference to the competition for "Operation of scheduled air services (helicopter) Værøy – Bodø v.v. 1 August 2024 – 31 October 2028", including the tender documents section 2.3.2 Supplementary information - we have the following clarification questions for the ministry:

We are aware that in the current contract there is a backup helicopter of the type AW139 - can the Client explain whether the helicopter in question satisfies the requirements in the current tender documents section 6.5.1.2?

If so, can this helicopter be used as a backup helicopter in the tender for the period 1 August 2024 – 31 October 2028?

Answer:

It is up to the tenderers to assess and document that they, and the helicopter they wish to use, meet all requirements in the tender documents and the obligations in the contract, including potential backup solutions to ensure continuity and regularity in the route operation. For any further questions about the technical and operational requirements, the Norwegian Civil Aviation Authority can be contacted, cf. section 4.2 of the tender documents.

Question 8:

Can the ministry confirm that there will be a blending requirement of 2% sustainable fuel from 2024, and that this will also apply to the PSO routes?

Answer:

In processing the revised national budget, the Storting has, cf. Innst. 490 S (2022-2023), made the following decision: "The Storting asks the Government to propose measures to increase the turnover requirement for biofuel in the aviation industry to 2 percent, effective from 1 January 2024. At the same time, the state budget for 2024 shall announce a future escalation."

The tenderers can therefore assume an increase in the blending requirement as in accordance with the guidelines from the Storting. This will also apply to the PSO routes, in accordance with the same principle as for the current blending requirement.

Question 9:

We refer to section 11.4 in the tender document, where it is stated that if the authorities close an airfield on less than one years notice, the Operator is entitled to be restored to the financial situation it would have been in as if operations had continued. Does this also apply in cases where an airfield is closed for a few weeks for planned maintenance?

Answer:

Contract point 11.4 is meant for a situation with permanent closure of an airfield, with a subsequent termination of the contractual relationship with the PSO operator. We therefore do not consider this point of the contract to be relevant in the event of temporary closure.