Corrections, supplements, or changes to the conditions of tender

Q&A

Question 1:
It is stated in the invitation to tender procedure that *"A new, larger airport at Mo i Rana, which replaces today's short runway airport Mo i Rana airport (Røssvoll), is planned to open in the spring of 2027. This could have consequences for the travel patterns in Helgeland, primarily Mo i Rana, Mosjøen and Sandnessjøen."*

We would like to know how we are supposed to interpret this information, as a new airport can affect demand in the mentioned places, dependent on the routes being offered from the new airport.

Will the opening of a new airport trigger a possible renegotiation in accordance with section 9.1 of the contract given that commercial flights from the new airport reduces demand on the PSO routes in Helgeland?

Answer:
The information about the planned construction of a new airport at Mo i Rana is included in part 4 *Matters which tenderers are obliged to familiarise themselves with* in the rules for the tender procedure. The Ministry of Transport therefore assumes that the providers make an independent assessment of how this could affect demand on the affected route areas.

As stated in Annex 5 *Traffic information*, the providers themselves are responsible for calculating the income for the routes covered by public service obligations. The Ministry also refers here to the assessments by Oslo Economics in the report made on behalf of the Ministry of Transport, which also examine possible effects of a new airport, see Forslag til offentlig kjøp av regionale flyruter | Oslo Economics.

As there is still considerable uncertainty associated with the effects to demand on the PSO-routes, the Ministry of Transport cannot rule out that there will be grounds for renegotiations in line with section 9.1 if the effects deviate significantly from what is reasonable to expect at the time of submitting the tender. However, the Ministry of Transport does not have the opportunity to determine in advance which conditions may provide a basis for renegotiation in accordance with the contracts section 9.1. The Ministry will assess this once a specific request for renegotiations is put forward.

Question 2:
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 3:

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 4:

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 5:
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 6:
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.