

DFS response to CAP1226

Introduction

DFS have been active in the UK market for some time but, until now, considered attempts at market penetration to be a convenience to customers in pressurising the incumbent rather than a serious attempt to test alternative supply. Transition risk, and therefore continuity of service risk, particularly given the Trust of a Promise complications lead airports to seek a price comparison without any real intent to change. The recent opportunity at Gatwick was clearly different although initially (and at times throughout the process) doubts as to whether a change of provider would seriously be considered still lingered.

As perhaps the most credible emerging competitor to the incumbent supply options in the UK TANS market we understood that our market entry could be met with fierce opposition from those threatened with real competition for the first time. Some of the behaviors and actions have, however, been surprising and it is clear to us that the CAA will be required to play an active part going forward in ensuring fair conditions exist for competition to flourish and for customers to be given a real choice without continued fear of not achieving continuity of supply or costly legal challenge.

Call for Evidence

The CAP 1226 (Call for Evidence) asks for submissions in 4 general areas as detailed below.

Particular issues of interest to the CAA at this stage are the following.

- 1. Events, such as those outlined above, that have taken place in the TANS market since the publication of CAP 1004 and how these events affect the presence or not of market conditions in the UK.*
- 2. Any additional evidence that affects the findings of CAP 1004, including the barriers to entry.*
- 3. How should we deal with the remaining issues identified in CAP 1004?*
- 4. Any other representations relating to the competitiveness of the TANS provision in the UK.*

1. Clearly the most significant event since publication of CAP 1004 has been the Gatwick tower contract tender and award. The CAP1004 reported respondents declaring misgivings in relation to the credibility of the competitors to NSL in the UK TANS market. The Gatwick tender has provided evidence of at least one other highly credible competitor willing to invest capital and expertise in an effort to win market share, namely DFS including subsidiaries The Tower Company GmbH and Air Navigation Solutions Ltd.

Despite a lengthy tender process, started over a year ago, and substantial bidding and set-up costs the contract has only just been signed. Many potential suppliers would be unable to sustain such fiscal pressure particularly as new challengers are unlikely to have an established UK operation (by the every nature of the current market) to rely on to fund the combined cost of bidding and any subsequent challenge.

It is a significant market development that Gatwick Airport considered the benefits of change to outweigh the risk. The decision suggests that, at least some, customers are determined to understand the supply dynamics of ATC and ATE in the TANS market in order to weigh up risk based on evidence and understanding rather than anecdote, and assumption.

Another development has been the “in-housing” of the TANS contract at Birmingham.. Many airports, in our experience, view “in-housing” as a last resort when the “open” market has failed them. The emergence of strong and credible alternatives may lead to more outsourcing with customers clear about the value gained for shareholders through innovation opportunity and risk transfer in what, for most, is a non-core activity.

2. A number of contracts have been extended or renewed recently without any recourse to the market through any kind of tender process. This could be viewed as NSL using its dominant position in the market place unfairly in offering new commercial terms, in some cases well in advance of contract expiry, to secure long-term contracts that effectively stifles and locks out emerging competition. These actions may well be deemed acceptable in mature markets but we believe it to be improper in a clearly immature competitive market where credible alternatives need the necessary pre-conditions to emerge.

The DFS business, as with any new venture, bases its investment decisions in relation to the UK market on a number of assumptions including market size, contract availability and achievable market share. It is reasonable to expect that contracts will be tendered competitively on expiry and we determined that the scale of expected future opportunity made the timing of Gatwick ideal for a sustained and serious market penetration investment. Through recent contract signings this assumption appears to be no longer valid jeopardising the business plan as a whole, and by default the emergence of customer choice.

We also remain skeptical with regard to any incumbent claiming proprietary rights over documents such as the MATS part 2, training manuals and other documents. Attaching a punitive financial value to such documents is a further barrier to fair and equal competition and merely serves to inflate transition costs and hinder new market entrants. It could be argued that these documents (certainly in the case of MATS part 2) are actually a collection of Letters of agreement and procedures that the air traffic provider has been the custodian of on behalf of the airport itself.

3. We consider transition and set up costs to remain one of the biggest barriers to a fair and equitable market place. ToaP skews the TUPE process and new market entrants are forced to price in this uncertainty, which in turn creates a larger entry barrier than should be the case. It is grossly unfair that challengers be penalised for an agreement they were not party to and have no control over. In effect ToaP strengthens NSLs dominant market position by creating unease and uncertainty amongst potential competitors and customers.

It has been encouraging to see recent statements by NSL leadership recommitting to ensuring staff secondments, where required, will be made available to other ANSPs who win business that NSL currently provides. Less encouraging is the ambiguity surrounding the cost of such an arrangement. We can see no reason why the exact arrangements cannot be fixed for say a 5-year period and made public to all bidders, rather than through individual contract by contract negotiations. Furthermore we strongly advocate that challengers to NSL in the market place be able to operate as if ToaP was not a factor and in full compliance to normal TUPE rules. Any issues arising from ToaP (staff incentives to transfer / ToaP buy out) should be solely the responsibility of NATS and the DfT.

There also still appears to be the opportunity for NERL activities to adversely effect the operations of Airports (particularly those in the London TMA). There should be no valid reason for any deterioration in approach performance or any other service provided by NERL based on whether the tower provider is a NATS company or not. NERL should provide clear and unambiguous measurements of approach performance on an ongoing basis to ensure a

consistency of service. Whether this risk is real or perceived it can still colour a customer's perception of risk and therefore ultimately affect the competitiveness of the market.

4. The CAA should clarify for all market participants the legal requirements on Airports to tender (or otherwise) air traffic services. There appears confusion in the market place as to whether a tender process is a requirement for Airports in general and for which in particular and what process should be followed. We would like to see the tendering of ALL air traffic contracts mandated at airports >50,000 ATMs. We feel this would ensure new market entrants be allowed to make the case for change and that the choice of provider be judged fairly and equitably.

New market entrants may not hold a UK certificate for the provision of air traffic services, but may hold an existing EU certificate issued by another European regulatory authority. Although theoretically valid it appears expedient, due to additional national regulatory requirements, to certify again in the UK rather than have one certificate maintained in two separate European jurisdictions. A further streamlining of the national and pan European regulatory system is essential in ensuring a level playing field

As mentioned previously in this report set up costs for a new ANSP are substantial. To ensure these costs can be diffused scale is important. This scale can either come in the form of a large airport or a grouped number of smaller airports. Unless scale is present and available to new entrants the dominant incumbent will always have a cost advantage through an ability to spread support costs (such as insurance etc.) amongst a large number of airports or even to attach different overhead amounts to different contracts dependent on the competitive imperative. Given the financial risk new entrants are already taking, waiting for the scale to materialize naturally is neither assured nor practical. Therefore initially new entrants in the current market place are at a disadvantage.

Conclusion

We conclude that there is now an emerging credible competitor in the UK TANS market and others could be encouraged to participate but we consider it necessary for the CAA, and if necessary other agencies, to actively intervene to ensure that competition is allowed to develop. There is evidence that NSL as the dominant player in the market is using its position with customers (which is not open to others) to agree long-term contracts, in some cases ahead of scheduled contract renewal dates, which will effectively lock out competition.

We would suggest the following actions to ensure a fair and equitable playing field:

- Clarity is required with immediate effect in relation to an Airport's obligation to tender ATC and ATE service provision contracts in the UK TANS market. Failure to do so will discourage airports from tendering for fear of legal challenge.

For clarity it would be preferable that all contracts at Airports >50,000 ATMs be required to tender Air Traffic Services.

- The CAA should play an active and visible role in any and all market transition exercises ensuring reasonable behavior by all parties throughout the process, taking action where necessary.
- The CAA must ensure NATS provides more clarity around ToaP and agrees exactly what will happen (including the commercial arrangements) with regard to secondments and transfers in the event of NSL losing a contract (The CAA committed

to work with NATS after the last call for evidence to provide this clarity but seems content to allow NATS to determine unilaterally what they are prepared to offer).

- The CAA should mandate all general documentation associated with Air Traffic Services (specifically MATS part 2 and Training Plans) as non-proprietary or the property of the airport.
- The CAA provides airport customers where services provided by NERL are crucial to overall system delivery (London approach or “delegated” services) a mechanism through the NERL license to ensure equal non-discriminatory treatment of all TANS-providers (NSL and non-NSL).
- A review of the European regulatory landscape should be undertaken to ensure a true pan European certification process exists in practice.
- The CAA should examine practical measures to make sufficient contractual scale available to new entrants in order to level the playing field in relation to diffused costs and overheads.

Should these actions not be taken in a timely manner many entrants and potential entrants will be reluctant to make significant investment in the UK TANS market and the stated aim of conditions for a competitive TANS market being present will not be recognised.