



Southern African Bus Operators Association

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SABOA

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Our Ref: B10/5/1

Mr M I Rayi
Chairperson
Select Committee on Economic and Business Development
Parliament of South Africa
P O Box 15
CAPE TOWN
8000

Dear Mr Rayi

NATIONAL LAND TRANSPORT AMENDMENT BILL (B 78-2016): CALL FOR SUBMISSIONS

In response to the "call for submissions" published in the media, SABOA wishes to comment as follows:

1. Amendment of section 11 of Act 5 of 2009

- It is not clear why the National Department of Transport (NDOT) must now become responsible for concluding subsidised service contracts, negotiated contracts, and stopgap contracts contemplated in section 41A, with operators. This function has been devolved to provinces and the NDOT is no longer viewed as a contracting authority.

This clause in the current NLTA provides only for the NDOT as contracting authority in terms of old contracts concluded in terms of the Transition Act, as follows:

(a) The national sphere of government is responsible for—

Acting as contracting authority for subsidised service contracts, interim contracts, current tendered contracts and negotiated contracts concluded in terms of the Transition Act.

The wording in the Amendment Bill seems to suggest that the NDOT can now act as contracting authority for **NEW** contracts. This responsibility of a contracting authority is now given to national and provincial and local government, which seems to be a duplication. This may lead to all three spheres of government being responsible for the same thing. This will lead to confusion and a lack of accountability.

The next sub-section (1b) which deals with the conditions or circumstances under which a Province can be a contracting authority, contains certain pre-conditions and

procedures. None of these are mentioned when the NDOT is responsible to be a contracting authority.

2. Amendment of section 41 of Act 5 of 2009

- The term **"affected operators"** should be defined more clearly. The absence of a definition may lead to confusion and misunderstanding. In, for instance, the Rea Vaya BRT negotiations this term was also used but **"affected operator"** was defined as "a public transport operator that operates on an affected route" and an **"affected route"** was defined as "a route that is likely to lose passengers as a result of the introduction of the negotiated contract."
- The proposed substitution of the phrase **"in the area"** in section 41 (c) with the phrase **"on the relevant route or routes"** has serious implications for the empowerment of SMME bus operators. SABOA has been in discussion with the Department of Transport for the past three years to facilitate the inclusion of SMME bus operators in BRT services as they have been excluded from participating in BRT services due to circumstances beyond their control. The Department of Transport acknowledged and agreed that SMME bus operators should not be excluded from participating in BRT services and undertook to raise the matter with Cities. The Department of Transport requested SABOA to compile a memorandum on the matter which they could discuss with Cities. A copy of the memorandum to the Department of Transport is attached for your information.

It is not clear why this fundamental change to section 41 (c) is being proposed whilst negotiations with the Department of Transport are still ongoing. SABOA wishes to object in the strongest possible terms to this proposed amendment for the reasons above as well as for the reasons outlined in the attached memorandum to the Department of Transport.

- In section 41 (c) (2) (b) of the Amendment Bill, provision is made for the exclusion of operators, by the contracting authority, where the contracting authority has made an offer in writing to an individual operator and they have rejected the offer in writing within 42 days or have failed to respond to the offer within that time.

This is very one-sided and may result in abuse. The offer must be **reasonable**. One cannot have a situation where a contracting authority makes any unreasonable offer to operators and then proceeds to exclude them because they have not accepted the offer.

In addition, where an operator is excluded in terms of this clause, there should be a dispute mechanism that operators can follow if they are unfairly excluded because an unreasonable offer has not been accepted.

3. Insertion of new section 41A in Act 5 of 2009

"Stopgap contracts" is a new type of contract proposed by the Amendment Bill and it raises certain concerns. An existing operator with interim or tendered contracts has certain rights under these contracts such as the Right to First Refusal, and the right that existing contracts

must be extended under existing terms and conditions until the contracting authority places those services on tender or concludes a negotiated contract. These rights are important and are retained by operators for as long as existing contracts are extended while a contracting authority is in the process of deciding whether to negotiate or tender new contracts or while public transport plans or networks are being developed.

In terms of the proposed amendment, a contracting authority can now circumvent these rights by concluding a new stopgap contract (a new contract as opposed to the extension of an existing contract) with operators while they are busy negotiating or developing ITP's or IPTN's. The stopgap contracts have a maximum duration, but no minimum duration. It is therefore possible for a contracting authority to, for example, conclude a three-month stopgap contract with an existing interim contract holder, and in doing so the operator loses all the rights he had under the interim/tendered contract.

There is no need for this new type of contract, as long as existing contracts are extended for reasonable time periods (e.g. three years) while contracting authorities negotiate contracts or place them on tender or develop ITP's or IPTN's. The solution is not the introduction of a new type of (stopgap) contract, but rather decisive action by contracting authorities to advance the bus contracting system to deal with the 20-year old, outdated and under-funded bus contracts.

4. **Repeal of section 45 of Act 5 of 2009**

In terms of section 45 of the NLTA, municipal operators who wish to tender for bus contract must be financially ring-fenced. If this section is repealed it will allow municipal or provincial bus operators to tender for contracts without being financially ring-fenced. This will lead to unfair competition which will result in legal challenges. **Section 45 should not be repealed.**

5. **Amendment of section 46 of Act 5 of 2009**

Section 46 of the NLTA provides for a mediation or arbitration process if parties cannot agree on the amendment of an existing contract or the inclusion of an operator in a network. It is counterproductive to remove a dispute procedure on such an important matter and it can again only lead to unnecessary legal disputes. **Section 46 should not be repealed.**

Kind regards



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SABOA

MEMORANDUM BY SABOA ON THE EXCLUSION OF SMME BUS OPERATORS FROM BUS RAPID TRANSIT (BRT) SYSTEMS

1. PURPOSE OF THIS MEMORANDUM

The purpose of this memorandum is to address the exclusion of SMME bus operators from becoming part of BRT services as they have up to now not been recognised by Cities as an affected party. This anomaly is not in line with the Constitution, the White Paper on National Transport Policy or the National Land Transport Act and needs to be corrected.

2. BACKGROUND

SMME bus operators have been in existence ever since public transport started in South Africa. Over the years, they played an important role in providing mobility to commuters, scholars, people seeking employment, people travelling to hospitals and clinics as well as transporting groups of people to various destinations.

Due to the policies of the previous government, SMME bus operators were largely excluded from participating in the Department of Transport's subsidy system which came into effect in the 1950's. In fact, it was government policy at the time to form large corporations which participated in the Department of Transport's subsidy system and which made it virtually impossible for SMME bus operators to become part of the main stream of public transport in South Africa. Some of the corporations that were formed were, inter alia, KwaZulu Transport which was part of the KwaZulu Development Corporation, Lebowa Transport which was part of the Lebowa Development Corporation, Bophuthatswana Transport which was part of the Economic Development Corporation etc. A few smaller operators became part of the subsidy system in the 1980's e.g. Risaba Bus Service, Phadziri Bus Service, Mabirimisa Bus Service and Maphumulo Mail Bus Service but these were isolated cases.

The lack of involving more SMME bus operators in the subsidised bus industry continued after the democratic government was elected in 1994. This is in spite of a legal framework that has been created for the empowerment of SMME's. The following legal framework provides for the empowerment of SMME bus operators:

(a) Constitution of the Republic of South Africa

In terms of clause 9(2) of the Bill of Rights "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken."

Clause 9(3) of the Bill of Rights states that "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

(b) White Paper on National Transport Policy

In terms of the Policy Statements in the White Paper on National Transport Policy, the "Integration of SMME'S into the formal public transport system should be addressed proactively and in a structured manner by all levels of government and will be a priority in the transitional restructuring of the passenger transport industry."

One of the strategic objectives for land passenger transport as outlined in the White Paper on National Transport Policy is as follows:

"To empower and assist disadvantaged operators to participate meaningfully in the land passenger transport system."

The White Paper on National Transport Policy also provides a framework for the provision of services. In this regard, the following statements are made:

"All transport operators will be encouraged and empowered to bid for contracts and concessions. The entry of smaller operators will be facilitated by various means, which may include partitioning contracts into parcels of differing size, encouraging bids by co-operatives comprising small, medium and micro enterprises (SMME's), encouraging or requiring big operators to bid in association with smaller operators, or making provision for subcontracting or franchising."

(c) National Land Transport Act (NLTA)

The NLTA provides for Negotiated contracts in section 41. In terms of section 41(1) the "contracting authorities may enter into negotiated contracts with operators in their areas, once only, with a view to –

- (a) Integrating services forming part of integrated public transport networks in terms of their integrated transport plans;

- (b) Promoting the economic empowerment of small business or of persons previously disadvantaged by unfair discrimination; or
- (c) Facilitating the restructuring of a parastatal or municipal transport operator to discourage monopolies.”

In subsection (2) “the negotiations envisaged by subsection (1) and (2) must where appropriate include operators in the area subject to interim contracts, subsidised service contracts, commercial service contracts, existing negotiated contracts and operators of unsubsidised services and non-contracted services.”

Over and above the legal framework that enables the empowerment of SMME bus operators, cognizance should also be taken of the following:

- Due to the policies of the past, SMME bus operators were largely deprived of the opportunity to render subsidised bus services (contract services).
- Bus operators are not granted permits to operate on the route network of existing contract bus operators. This does however not apply to the taxi industry and new taxi operators enter this market on a continuous basis and compete with contract bus operators on their subsidised route network. This provides them with an unfair advantage as they become part of the negotiations once routes have been identified for BRT services whilst SMME bus operators are excluded.
- Due to a moratorium on the tender system which has been in place since 2001 there have been no opportunities for SMME bus operators to compete on a fair and transparent basis for the awarding of contracts.
- In terms of section 41 of the National Land Transport Act, the contracting authority is obliged to promote the empowerment of small businesses or of persons previously disadvantaged by unfair discrimination and this includes SMME bus operators and not only taxi operators.
- Section 41 of the National Land Transport Act does not prescribe that only operators that have route-based permits should be taken into account for BRT services. In fact, reference is made to “operators in their area” in section 41(1) and in section 41(2) which implies that the only requirement is that operators must operate in the area under the jurisdiction of the contracting authority. The interpretation that only route-based operators should become part of BRT services is therefore not in line with section 41 of the National Land Transport Act.
- Due to the fact that SMME bus operators have been deprived of the opportunity of operating route-based commuter services, they are mostly operating scholar transport services on a contractual basis for either the Department of Education or Department of Transport whilst others operate long-distance services and charter services.

- If SMME bus operators are continued to be excluded from participation in BRT systems, they will have to wait for a period of 12 years and longer before they will have another opportunity to become involved in the process.
- SMME bus operators have not enjoyed any support from government over the years to improve their operating conditions such as has been the case in allowing the taxi industry to convert from sedan motor cars to mini-buses and later to midi-buses, the recapitalisation programme which has been introduced for the taxi industry and recently the involvement of the taxi industry in BRT systems.

From the above, it is evident that SMME bus operators have been unfairly discriminated against for many years. It is crucial that this practice be reviewed and that level playing fields are established for SMME bus operators. This will be an important step in ensuring that SMME bus operators that have been deprived of meaningful empowerment for many years will have the opportunity of becoming part of the mainstream of public transport in South Africa.

Cognizance should also be taken of the fact that SMME bus operators fall within the definition of "small business" and it is evident from the establishment of the Department of Small Business Development after the last general elections that the development of small business is a high priority for government. SMME bus operators should therefore receive equal treatment as taxi operators in the development of BRT services in the country.

3. PROPOSAL

In order to ensure equal treatment for SMME bus operators it is proposed that the policy to exclude SMME bus operators from participating in BRT services on the grounds that they do not have route-based permits/operating licenses be amended to ensure that they become part of the main stream of public transport.