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## GOVERNMENT NOTICE

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### DEPARTMENT OF TRANSPORT

No. R. 877

31 August 2009

#### NATIONAL LAND TRANSPORT ACT, 2009 (ACT NO. 5 OF 2009)

#### NATIONAL LAND TRANSPORT REGULATIONS ON CONTRACTING FOR PUBLIC TRANSPORT SERVICES

I, Sibusiso Joel Ndebele, Minister of Transport, hereby make the regulations in the Schedule in terms of section 8 read with section 46(3) of the National Land Transport Act, 2009 (Act No. 5 of 2009).

**S J Ndebele****Minister of Transport**

#### SCHEDULE

##### Contents

1. Definitions
2. Negotiated contracts
3. Operating licences and permits in relation to contracts
4. Arrangements for subsidised service contracts
5. Qualifications of tenderers
6. Resolving disputes
7. Mediation
8. Arbitration in urgent matters
9. General matters regarding disputes
10. Short title and commencement

## Definitions

1. In these regulations, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in the Act or the Transition Act, has that meaning, and the following words and expressions have the meanings assigned to them:

**“BRT”** means bus rapid transit;

**“IPTN”** means an integrated public transport network;

**“ITP”** means an integrated transport plan;

**“the Act”** means the National Land Transport Act, 2009 (Act No. 5 of 2009); and

**“Transition Act”** means the National Land Transport Transition Act, 2000 (Act No. 22 of 2000).

## Negotiated contracts

2. (1) Where a contracting authority has concluded—
- (a) a subsidised service contract, interim contract, current tendered contract or negotiated contract in terms of the Transition Act, such contract shall remain in force until it expires or is terminated, but the contracting authority will not thereby be precluded from concluding negotiated contracts under section 41 of the Act in the same area or on the same routes; and
  - (b) a negotiated contract in terms of section 41 of the Act or section 47(3) of the Transition Act, this will not preclude it from—
    - (i) concluding other such contracts with different operators or on different routes, even if such routes are in the same area; or
    - (ii) providing in such contract for the services to be provided under the contract to be increased or amended in a phased manner during the period of the contract, provided that the total duration of the contract shall not exceed 12 years.
- (2) Where there is a subsidised service contract, interim contract, current tendered contract or negotiated contract as contemplated in the Transition Act, or a contract contemplated in section 46(1) of the Act involving services on BRT routes as part of an IPTN, and such contract has more than three months still to run—
- (a) the municipality establishing the IPTN must enter into negotiations with the relevant provincial department and the operator with a view to involving the operator in the operating agreements for the proposed IPTN; and
  - (b) the funds previously allocated for the routes or areas forming part of the services provided in terms of that contract that will be covered by the BRT services must be allocated to the municipality for funding the network contract, subject to the relevant Division of Revenue Act; and

- (c) the province or municipality, as agreed between them and the Department, may conclude a contract in terms of the Act with the existing operator, either by amending the contract or concluding a new contract, or failing agreement with that operator, with another operator or operators, for the remainder of the services, subject to section 11(2) and (3) of the Act; or
- (d) the contract may be allowed to run its course; or
- (e) the contracting authority may make an offer to the operator in terms of section 46(1)(c) of the Act.

(3) Sub-regulation (2) shall not prevent the contracting authority from negotiating with the operator as contemplated in that sub-regulation where such a contract has three months or less still to run, or, alternatively the contracting authority may allow the contract to run its course in terms of section 46(1)(a) of the Act.

(4) Where a municipality is establishing an IPTN contemplated in section 40 or 41 of the Act, it must make reasonable efforts to involve existing scheduled bus and unscheduled minibuss taxi operators on the relevant routes in the proposed negotiated contracts, but where the municipality has made an offer in writing, either individually or by notice in the press to such operators and some of the operators have rejected the offer or failed to respond within 21 days, the municipality may conclude—

- (a) one or more negotiated contracts with other operators in terms of section 41(1) of the Act; or
- (b) subsidised service contracts or commercial service contracts for the services.

(5) Any dispute with regard to the matters contemplated in this regulation must be resolved in terms of the procedures set out in regulations 6 to 9.

(6) The fact that mediation or arbitration is in progress will not prevent or delay a contracting authority from continuing with its activities to rationalize services or to establish IPTNs and conclude contracts with other operators for this purpose, in the interests of improving public transport in the relevant area.

### **Operating licences and permits in relation to contracts**

3. (1) An application for an operating licence based on a contract contemplated in section 56 of the Act—

- (a) must be lodged with the relevant board as required by the Transition Act for an application contemplated in section 40 of the Transition Act;
- (b) shall for procedural purposes be deemed to be a contract contemplated in section 40 of the Transition Act, and that section applies with the necessary changes; and
- (c) need not be published in terms of section 37 of the Transition Act where the relevant service is provided for in the ITP of the contracting authority.

(2) Where a contracting authority has already lodged an application for operating licences for such a contracted service, or for an uncontracted service in terms of the Transition Act, and such service will be provided in terms of a contract as defined in the Act—

- (a) the application shall be regarded as an application in terms of sub-regulation (1), the provisions of which shall apply; and
- (b) it shall not be necessary for the contracting authority to re-submit an additional application in terms of the Act.

(3) Operators who enter into contracts, or who become shareholders or are subsidiaries of companies formed in order to enter into contracts, with contracting authorities in terms of section 41 of the Act must surrender to the appropriate operating licensing board, or once established, to the relevant regulatory entity, for amendment or cancellation, as the case may be, all permits and operating licences held by them that will be replaced by services to be rendered in terms of the new contract.

(4) Where a contracting authority has concluded a contract with an operator as part of an IPTN, and that contract is terminated before its expiry date or that operator is unable or unwilling to operate the contracted services during the period of the contract, the contracting authority shall be deemed to be the holder of the relevant operating licences and may operate the services itself for the period that the firstmentioned operator fails or refuses to operate, or while arrangements are being made to procure another operator, but not for more than 180 days or such longer period as approved by the Minister: provided that this period shall be extended for the duration of any litigation relating to the termination of the contract or the procurement of a new operator.

(5) In a situation contemplated in sub-regulation (4), the contracting authority may, instead of operating the service itself, contract the services to another operator to operate the services for the interim period in which case the new contractor must be issued forthwith with operating licences for the vehicles being used for those services for the period deemed fit by the regulatory entity, but not for more than 180 days or such longer period as approved by the Minister: provided that this period shall be extended for the duration of any litigation relating to the termination of the contract or the procurement of a new operator.

### **Arrangements for subsidised service contracts**

4. Not later than one year before the anticipated expiry of a contract contemplated in section 42(2) of the Act, the contracting authority must commence arrangements for inviting tenders for subsidised service contracts or commercial service contracts which must, among other things, involve evaluating the services for compliance with the relevant ITP and redesigning them if necessary.

### **Qualifications of tenderers**

5. (1) To qualify as a tenderer for a commercial service contract or a subsidised service contract, an operator and, where appropriate, any person or entity exercising ownership control over an operator, or performing services on behalf of, or in the capacity as agent of, an operator must comply with the following requirements:

- (a) The operator must conduct public transport operations according to business principles with financial ring fencing, or, in the case of a new operator, must have undertaken in writing to do so; and
- (b) must have his, her or its tax affairs in order and be able to furnish a valid tax clearance certificate issued by the South African Revenue Services.

(2) For the purposes of sub-regulation (1)(a), an operator is financially ring fenced if—

- (a) the business of the operator's undertaking is conducted separately from that of another entity or undertaking or any other organisation;
- (b) the operator keeps separate accounting records, in accordance with generally recognised accounting practice and procedures, of its assets, liabilities, income, expenditure, profits and losses;
- (c) the operator's undertaking is financially sustainable in terms of its financial statements; and
- (d) the operator has no unfair advantage as regards access to financial or other support or resources from any organ of state, unless such advantage is part of a scheme which applies generally, approved by the contracting authority, to protect or advance public transport operators disadvantaged by unfair discrimination.

(3) For the duration of a commercial service contract or subsidised service contract, an operator and, where appropriate, any person or entity exercising ownership control over an operator, or performing services on behalf of or in the capacity as agent of, an operator, must—

- (a) keep separate records, in accordance with generally recognised accounting practices and procedures, of his, her or its financial position, performance, flow of funds and change in financial position;
- (b) undergo an annual audit by a person registered in terms of the Auditing Profession Act, 2005 (Act No. 26 of 2005);
- (c) comply with the requirements of sub-regulation (1);
- (d) not enjoy an unfair advantage emanating from an organ of state, but any advantage emanating from a subsidised service contract is not deemed to be an unfair advantage for the purposes of this section.

(4) For the purpose of this regulation—

- (a) "ownership control" means the ability to exercise or to influence substantially the exercise, of any of the financial and operating policies of an operator so as to obtain a benefit from its activities; and
- (b) "unfair advantage" means, but is not limited to—
  - (i) the receipt by an operator of any direct or indirect benefit, including funds, resources, donations, grants, consideration or other advantage, whether financial or otherwise, which is not available on the same terms and conditions to all other potential operators;
  - (ii) the direct or indirect guarantee or honouring of any of the obligations of the operator, including the arrangement or facilitation of the granting of any such loan;
  - (iii) the direct or indirect provision of a loan bearing no interest, or interest at a substantially lower rate than would be available commercially to a similar operator under similar conditions, or a loan in respect of which interest payments are deferred for a period of more than six months, including the arrangement or facilitation of the granting of any such loan;
  - (iv) allowing an operator to make use, or failing to prevent an operator from making use, of any public resources, including infrastructure, property, facilities, assets, human resources, systems, expertise or intellectual property, or facilitating such action, which would not be available to another similar operator on the same terms and conditions.

(5) The contracting authority must consider the fitness of the tenderer as an operator in terms of such contracts based, among other things, on the latter's record of convictions for the following offences:

- (a) An offence created by the Act, the National Road Traffic Act or a provincial road traffic act;
- (b) an offence listed in Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
- (c) possession of an unlicensed firearm, explosives or a dangerous weapon; and
- (d) any other offence considered relevant by that authority.

### **Resolving disputes**

6. Where a contracting authority and an operator cannot reach agreement under section 46(1) of the Act, the matter must be referred to mediation under regulation 7 if not urgent, or to arbitration under regulation 8 where the contracting authority has at any time decided that the matter is urgent.

### **Mediation**

7. (1) Either party may start the mediation proceedings by giving the other party not less than seven days' written notice that the matter must proceed to mediation.

(2) The parties must each in writing nominate a mediator for not less than ten years, within 14 days after receipt of the notice to proceed to mediation, and if the parties cannot agree on one mediator within a further seven days, the Association of Law Societies of the Republic of South Africa shall be requested to nominate a mediator within fourteen (14) days after the request.

(3) The Parties must commit themselves in every respect to the speedy finalisation and solution of the mediation proceedings.

(4) Either party may furnish the mediator in advance with written documentation and information and must make the same available to the other party.

(5) The mediator must establish and regulate procedures for the mediation so long as the parties continue to agree to participate in the mediation process.

(6) Mediation is a voluntary process, and may be terminated at any time by a party on written notice to the other.

(7) The mediator must give each party the opportunity to present its case by means of written or oral representations and to submit settlement alternatives, and the mediator must aid the parties in reaching a mutually acceptable agreement.

(8) The mediator must record the settlement reached by the parties, if any, and request them to sign the draft settlement within three days after a settlement has been reached and give a copy thereof to each party.

(9) The Parties must pay the costs of the mediator in equal shares, unless the mediator orders one party to pay a larger share or the full amount.

(10) The signed settlement shall be final and binding on both parties.

(11) The mediator shall not have the power to render a binding decision or award in the dispute other than the order contemplated in sub-regulation (9), nor will he or she be empowered to force any party to settle the dispute.

(12) Any information, documentation and material disclosed or made available to the mediator privately or in caucus will remain confidential and will not be disclosed by the mediator or any party without the prior consent of the party who made available such information, documentation or material.

(13) Mediation will take place on a confidential and "without prejudice" basis, and the parties—

(a) may never subpoena any person who is a party to or who is involved in the mediation, including the mediator, for the purpose of giving evidence as to what took place during mediation; and

(b) must ensure that the confidentiality of the mediation process is assured.

(14) Notwithstanding sub-regulations (12) and (13), any person may be called to testify—

(a) as to the existence or not of a written agreement between the parties concluded during the mediation;

(b) whether a party had signed such agreement; or

(c) regarding the cost ruling of the mediator contemplated in sub-regulation (9) or the facts relied upon by the mediator in this regard.

(15) If the parties are unable to reach a settlement within 60 days the mediator must certify this in writing and either party may institute proceedings in the appropriate court for settlement of the dispute or the matter must proceed to arbitration if the contracting authority decides that the matter is urgent, in terms of regulation 8.

### **Arbitration in urgent matters**

8. (1) Where a matter must be referred to arbitration under section 46(2) of the Act and the contracting authority notifies the operator in writing that the matter is urgent, the matter must proceed to urgent arbitration in terms of this regulation.

(2) Except as otherwise provided in these regulations, the arbitration proceedings shall be conducted in accordance with the arbitration laws of the Republic and in English.

(3) The arbitration proceedings must be conducted on an informal basis, it being the intention that a decision should be reached as expeditiously and inexpensively as possible, but in any event within 30 days of the arbitrator being appointed, subject only to the due observance of the principles of justice.

(4) The parties must each nominate an arbitrator in writing within four days after the operator receives the notification referred to in sub-regulation (1), and if they fail to agree on an arbitrator within three days thereafter, or a party fails to nominate an arbitrator, the Bar Council of the area in which the contract was executed must be asked by either party to nominate an arbitrator on an urgent basis, who must be a retired judge or an advocate with at least ten years' experience in practice at the bar and will be appointed in writing by the contracting authority.

(5) Within 10 days after the arbitrator is appointed, or within such further period that the arbitrator may approve on good cause shown, each party must submit to the arbitrator a full written statement of his, her or its case which must set out all the evidence, sworn statements, facts, submissions and expert opinion as such party

deems necessary to support its contentions in regard to the matters in dispute and simultaneously serve a copy thereof on the other party.

(6) If a party fails to submit a statement of case within the period specified in sub-regulation (5), the arbitrator may proceed to make an award without it.

(7) Within seven days after receipt of the copy of the other party's statement of case, or within such further period that the arbitrator may approve on good cause shown, either party may submit a further supplementary statement to the arbitrator, and must serve a copy thereof on the other party.

(8) If the arbitrator considers that the matter cannot be decided on the papers before him or her, the arbitrator may call for other evidence or for witnesses to testify at a place determined by the arbitrator.

(9) Witnesses must testify in the presence of both parties unless the arbitrator rules differently.

(10) The parties, who may question such witnesses, and the arbitrator may appoint a commissioner to take evidence of any person within or outside the Republic and forward it to the arbitrator as if he or she were a commissioner appointed by the court.

(11) Subject to these regulations, the arbitrator shall have discretion and all powers allowed by law to ensure the just, expeditious, economic and final determination of the dispute, including the matter of costs, and without derogating from the generality of the foregoing, shall also have the power—

- (a) to order any party to cover the cost of an interpreter;
- (b) to determine the time, place and venue of the hearing and the hours during which it will take place;
- (c) to strike out or dismiss a claim or defence on grounds of failure by a party to comply timeously with any ruling or interim award by the arbitrator, or on grounds of delaying conduct by a party which is likely to cause substantial prejudice to the other party;
- (d) to proceed with the arbitration in the absence of or without hearing a party who is in default or fails to appear or to comply with any ruling or interim award of the arbitrator;
- (e) to make any ruling or give any direction necessary or advisable for the just, expeditious, economic and final determination of all disputed matters raised in the statements of case, including the matter of costs;
- (f) to determine the validity of the contract and the value of the unexpired portion thereof, if any;
- (g) to permit the amendment of a party's statement of case (but not affidavits submitted therewith) and require a party to amend its statement of case so that it is not evasive and, on application of a party, to strike out from the other party's statement averments which are vague, scandalous, vexatious or irrelevant;
- (h) to make rulings or give interim awards on matters of onus, admissibility of evidence and procedure, including ones of an interlocutory or interim nature, and rulings or interim awards relating to costs and the implementation of interim or final awards;

- (i) to make such findings of fact and law as may be required for purposes of the proceedings and the award, including an order as to costs, and including an award whereby a party is restrained from any conduct, either on an interim or final basis;
- (j) before making a final award and on the application of a party, to state any question of law arising in the course of the proceedings as a special case for the opinion of senior counsel, which opinion shall be final and binding on the arbitrator and the parties, and not subject to appeal;
- (k) in determining the procedure for the arbitration, and after hearing the parties, to direct—
  - (i) that the dispute must be determined summarily at an informal hearing attended by both parties;
  - (ii) the summary trial of an issue to decide whether any issue or point has no reasonable prospect of success and should be dismissed or struck out, or as to whether an interim award should be made for a sum indisputably due;
  - (iii) that a party should furnish more particulars or details on any issue;
  - (iv) that a party must produce or make available for inspection to the other party and to the arbitrator any document, property or thing under the control of the first party;
  - (v) that there shall be one or more inspections in loco;
  - (vi) that there should be discovery on oath or otherwise of documents and recordings (subject to valid legal objection), either in regard to all relevant matters or in regard to issues determined by the arbitrator;
  - (vii) that parties must provide each other with a list of names of witnesses to be called, with a statement of the substance of their evidence and that, save with the leave of the arbitrator, no witness shall be called in respect of whom such name and summary has not been provided;
  - (viii) that the hearing should proceed on documents (including written submissions), only, without the presentation of other evidence.
- (12) The arbitrator must do all in his or her power make an award within 30 days after he or she was appointed, or as soon as possible thereafter.
- (13) Any award made by the arbitrator—
  - (a) shall be final and binding on the parties;
  - (b) shall be carried into effect forthwith by the parties;
  - (c) may be made an order of court by a party only if the other party fails to heed the terms of the award, and
  - (d) may include an order directing the unsuccessful party to pay the costs of the arbitrator and the expenditure incurred by the successful party.
- (14) Neither party may withdraw from such arbitration once the contracting authority has certified that the matter is urgent under this regulation, and if a party purports to withdraw the arbitrator shall continue to determine the matter as set out in this regulation, whether the party is present or not.

**General matters regarding disputes**

**9.** (1) Nothing in these regulations will prevent a party from approaching a court for urgent relief.

(2) Where applicable, the operator must, notwithstanding any dispute, mediation or arbitration, continue to provide the services in accordance with the contract.

**Short title and commencement**

**10.** These regulations are called the National Land Transport Regulations on Contracting for Public Transport Services, 2009, and come into operation on the date of their publication in the *Gazette*.

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