

REFLECTIONS AND INFERENCES ON PROCESSES AND CHALLENGES IN PROCURING NEW SUBSIDISED SERVICE CONTRACTS IN SOUTH AFRICA

R LUNGILE MABECE*, RISENGA CHAUKE and MATHETHA MOKONYAMA****

*Bulumko Corporate Law Advisers and Consultants, 1 Bosbok Street, West Park, Pretoria

Tel. No.: 012 386 1211; E-mail : lmabece@bulumkoclac.co.za

**CSIR, Meiring Naude Road, Brummeria, Pretoria, 0184

**Tel. No.: 012 841 2911; Email: rchauke@csir.co.za; mmokonyama@csir.co.za

ABSTRACT

Subsidised public transport contracts for road-based public transport services have been operating in the form of ever-green contracts for many years. Majority of the contracts stem as far back as 1997 and keep being extended without going out to a new procurement process as envisaged in the Constitution. Some provinces have started to try and change the trajectory through tendered and negotiated contracts approaches as provided for in terms of sections 41 and 42 of the National Land Transport Act No. 5 of 2009 (NLTA), and others have tried to issue new tenders without following the provisions of the NLTA. Through a techno-legal review, interpretation and analysis of primary and secondary sources the paper provides a critical exposition of the regulatory framework and practices regarding contracting for subsidised public transport service contracts. The paper is necessary to address some of the in-session questions raised previously by delegates of the Southern African Transport Conference. The paper is also necessary to guide practitioners engaged in the procurement of these services. It also reflects on practical challenges in applying both processes and make recommendations on future public procurement processes considering the current applicable legal framework informed by the NLTA as amended by the National Land Transport Amendment Act No. 23 of 2023 and new contracting regulations. Specific practical recommendations are made pursuant of alignment with the Constitution and improved public transport service delivery.

1. INTRODUCTION

The aim of this paper is to reflect and provide a considered treatise on the processes that need to be followed in terms of the NLTA for transitioning to both tendered and negotiated subsidised service contracts. It also reflects on practical challenges in applying both processes and makes recommendations for contracting authorities to consider on future procurement processes. The paper is necessary to address some of the critical in-session questions that have been raised by delegates of the Southern African Transport Conference.

1.1 Problem Statement

The NLTA provides for two processes that may be followed in the procurement of subsidised public transport services. There is a section 41 process for negotiated contracts and section 42 process for tendered service contracts. Since the coming into effect of the NLTA in 2009 there has been a challenge for contracting authorities in introducing new subsidised service contracts. Both the tendered and negotiated contracts have struggled to replace the old order contracts that were concluded in terms of the now repealed National Land Transport Transition Act 22 of 2000. Where new contracts processes have been initiated, there have been some challenges and successes. It is important that critical problems be addressed and solutions be provided in order to enable the country to move with confidence to Constitutionally compliant subsidised service contracts that could also benefit others beyond the historical beneficiaries, both as targeted areas to be served as well as service providers across the value chain. This paper aims to provide a reflection and treatise on the processes that need to be followed in terms of the NLTA and Regulations, as well as to provide clarity on how the relevant stakeholders may successfully introduce the new contracts, whether as negotiated or as tendered contracts, in full compliance with the law.

1.2 Methodology

The methodology comprises mainly a techno-legal review, interpretation and analysis of primary and secondary sources relating to subsidised service contracts in South Africa. The paper provides exposition of the regulatory framework with regards to

contracting for subsidised contracts for public transport services, and critically analyses the applicable provisions of the NLTA, the relevant regulations, and other applicable documents. The various processes that are available in the public domain in the form of bid invitations for tenders as well as the court decisions related to the procurement processes undertaken by various contracting authorities are also reviewed and analysed. Where necessary, the authors' tacit knowledge is used supplementarily.

1.3 The scope of this paper

The paper covers topics associated with the regulatory framework, contracting authority and capacity of municipalities, pre-conditions for new subsidised contracts, capacity to undertake procurement process as negotiated or tendered, challenges of the procurement processes as well as recommendations.

2. TOPICAL REVIEW OF CRITICAL ISSUES

2.1 The regulatory framework governing the procurement of subsidised public transport services

The National Land Transport Act (South Africa, National Land Transport Act, 2009) is the principal legislation governing the procurement of subsidised public transport services. Section 41 and section 42 of the Act provides for the procurement of the subsidised public transport services. Section 41(1) relates to the negotiated contracts and provide for three circumstances under which it may be used and these being:

- (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.

Section 42 relates to the tendered process that involves competitive bidding.

There are regulations (South Africa, Second National Land Transport Regulations, 2025) that inform how the two sections are to be applied. The regulations streamline the interpretation and application of the Act in as far as subsidised services are

concerned. They also address confusion that appeared to prevail in terms of how section 41 contracts are dealt with, including negotiating contracts once only.

Regulation 3 of the Second National Land Transport Regulations, 2025 constitute a list of requirements for contracting. The detail is almost a “dummy guide” to contracting, whether one intends to invoke section 41 or section 42. These new regulations have addressed a number of gaps and ambiguities that allowed certain conduct in contracting that was not necessarily intended by the National Land Transport Act, 2009 (South Africa, National Land Transport Act, 2009). The regulations make it clear that compliance with section 36 of the NLTA read with Minimum Requirements for the Preparation of Integrated Transport Plans, 2016 is necessary before considering contracting. The requirements include the incorporation of the requirements and conditions promulgated in the grant framework or frameworks provided for the funding of the proposed services published in terms of the relevant Division of Revenue Act. Regulation 6 provides for general requirements that a contracting authority must consider. These general requirements appear peremptory by virtue of the language used. However, since the Model Tender and Contracting Documents published in June 2013 have not been revised to align with the new regulations, it is important for the contracting authority to make sure that the model documents it intends to use are revised in compliance with the regulations, and are approved in writing by the Minister in accordance with section 42(6) of the NLTA.

The regulatory framework for procurement of subsidised public transport services includes the Public Finance Management Act, 1999 (PFMA) (South Africa, Public Finance Management Act, 1999) read with the Treasury Regulations, 2005 and National Treasury Instructions. The National Treasury Instructions issued in terms of section 76 of the PFMA have the same effect as regulations and therefore cannot just be ignored. Since the PFMA SCM Instruction No. 3 of 2021/22 Public Finance Management Act (Act 1 of 1999) provides for a number of compliance requirements regarding supply chain management, it is important for the contracting authority to ensure that it complies with the instruction note. In complying with the instruction note, it needs to ensure that its supply chain management policy acknowledges the procurement processes provided for in section 41 and 42 of the NLTA. Section 41 is a deviation from the normal bidding process in a number of respects, including retention of current operators as well as extra-ordinary contracting period. Section 42 also

needs to be clearly accommodated as its procurement process is in accordance with the NLTA including the procurement documentation that is not the standard procurement documents issued by the National Treasury.

Where a province is assuming the powers and functions of a municipality as a contracting authority (CA) for new subsidised contracts, it must ensure that it is appropriately empowered to do so in terms of section 12(1) of the NLTA read with regulation 8 of the Second National Land Transport Regulations, 2025. Regulation 8(5) specifically provides that the municipality must obtain a resolution from its municipal council approving the proposed contract before signature where assistance by the province is being agreed.

2.2 Contracting authority

The definition of contracting authority has been substantially revised in terms of the National Land Transport Amendment Act, 2023 (South Africa, The National Land Transport Amendment Act, 2023). Consistent with section 11(1)(c)(xxvi) of the NLTA, the municipality has the original responsibilities of a contracting authority for new contracts. The province has been given a responsibility under the circumstances indicated in section 11(8). Section 11(8) provides that where a subsidised service contract, interim contract, current tendered contract or negotiated contract was concluded in terms of the Transition Act, in this subsection called an old order contract, and is still in force, and a municipality has not yet concluded one or more contracts to replace the old order contract or is not in the process of negotiating with operators to do so, the relevant province must engage with the operator concerned and the municipality or municipalities in whose areas the services are provided and ensure that either the province or the municipality concludes appropriate new contracts to replace all old order contracts and where appropriate, the Minister must intervene or issue a directive to the province or municipality under section 5(6).

The province needs to engage municipalities for intergovernmental authorisation agreements (IGAA) for the province to act as a contracting authority where the municipality does not have the capacity to act as such. The assistance by the province is as fully detailed in regulation 8 mentioned above. The agreement between the municipality and the province is best structured not only for the province to take over

the function but to involve the municipality in a skills transfer and eventual capacitation to take over the function in line with the NLTA and the Constitution.

2.3 Pre-conditions for new subsidised contracts

Regulation 3 of Second National Land Transport Regulations, 2025 provides a list of what the contracting authority needs to do before entering a contract in terms of section 41 or 42 of the NLTA. What the operational and business plans need to cover at a minimum is outlined in regulation 4. The matters listed in regulation 6 must also be considered and acted upon before a contracting authority can claim to be ready for negotiated contracts or going out to tender.

Regulation 6(7) stands out in clarifying how section 41(1)(c) of the NLTA must be applied. Section 41(1)(c) cannot just be invoked by a contracting authority just because there is public entity that is an operator, section 54(2) of the PFMA in case of national and provincial entities must be complied with, read with the Practice Note on Applications Under Section 54 Applications of the PFMA, 2006. The executive authority of the public entity must therefore approve the restructuring, and the National Treasury must be notified about the transaction as well.

2.4 Capacity to undertake procurement process for negotiated or tendered process

The capacity to undertake procurement process for negotiated or tendered process in terms of the NLTA involves a series of considerations. As indicated above, the process must start with the appreciation of what is required before the procurement is undertaken. The state of transport planning by the municipality within which the contemplated subsidised contract falls is critical. There must be a valid integrated transport plan (ITP), that provides for, amongst others the necessity for the subsidised public transport services. The regulations provide for alternative options in the event the municipality does not have an ITP. The invocation of section 93(4) is seen as a last resort to avoid the collapsing of subsidised services in the area. Section 11(8) has also been introduced by the NLT Amendment Act to enable the province to take action in consultation with the operator and the municipality. The municipality must understand the requirements of the Act and the regulations to determine whether it actually has the capacity to procure. The municipality and the province must agree on who is going to lead the process of procuring the services, and an agreement must be reached

approved by the municipal council, on the part of the municipality. Where the province is to take the lead, then the province must have the appropriate capacity starting with the understanding of applicable legislation, amendment of the supply chain management policy to align with both the PFMA and the NLTA. The procurement documents must be appropriately updated so as to align with both the NLT Amendment Act and the Second National Land Transport Regulations, 2025. Of necessity, the contracting authority must seek written approval for all the proposed changes from the Minister in line with section 42(6) of the NLTA. It must be borne in mind now that the NLT Amendment Act empowers the Minister to develop Model Tender and Contracting Documents for negotiated contracts, of which any proposed changes to such documents must be approved by the Minister in writing.

2.5 Challenges experienced with the procurement process

The challenges experienced are many and this paper can only highlight the critical ones without being exhaustive. The NLTA requires the procurement of subsidised public transport services to be based on the Integrated Transport Plan of the municipality. Many municipalities do not have valid ITPs and as such do not even have most up to date alternative data upon which the procurement process may be based. The provinces and the national department of transport must assist the municipalities to develop these ITPs.

One of the reasons why many municipalities do not have ITPs is because they do not have internal capacity to even procure service providers to develop the ITPs, and secondly, there is a challenge of funding that many municipalities do not have for such plans.

Many municipalities do not have a functional transportation capacity that enables them to carry out their transport functions in terms of the NLTA. Besides the functional transportation capacity, there are challenges not only with procurement of subsidised public transport services but the challenge extends to the management of the procured services.

There is also limited capacity at the provincial sphere. The fact that the province has been managing subsidised services as legacy contracts does not mean that they know how to deal with the new contracts in terms of the NLTA. KZN Department of Transport has shown serious lack of capacity to procure subsidised service contracts in terms of

the NLTA (Invitation to Tender- ZNB02278/00000/00/HOD/GEN/24/T) is an example of non-compliance with the NLTA. The compulsory Model Tender and Contracting Documents published in June 2013 were practically overlooked. The supply chain management policy of the KZN Department of Transport does not even acknowledge NLTA as a procurement legislation and no provision is made for deviation when procuring following section 41 of the NLTA as such procurement constitute a deviation to the normal PFMA procurement process in a number of respects. KZN is probably not the only province that appears to lack that capacity but is just used as factual example.

The other challenge is the invocation of Heads of Agreement of 1999 signed between the Minister of Transport, some labour unions and South African Bus Operators Association (SABOA). This agreement got invoked by SABOA, PUTCO and Trustees for the Time Being of the Bus Industry Restructuring Fund (PUTCO(Pty) Ltd v MEC for Roads and Transport, Gauteng and Others; Trustees for the Time Being of the Bus Industry Restructuring Fund and Another v Gauteng Department of Roads and Transport and Others), presided by Fisher J, where the Applicants wanted the department to incorporate provisions of the Heads of Agreement into the tender documents terms and conditions. This situation remains unresolved as the judgement of Fisher J did not deal with legal arguments of Constitutional nature raised by the parties, and instead relied upon a letter written by the then Minister of Transport to delay the resolution of the matter. Until the legality of the Heads of Agreement have been ventilated in a court of law, it will remain one of the challenges for provinces seeking to go out to tender for new subsidised service contracts.

The legacy contracts in some provinces are characterised by small disjointed contracts where many operators are contracted for what could be consolidated as fewer contracts to ensure value for money and operational efficiencies. Where this process follows a negotiated contract approach the current operators would need to be consolidated and form Special Purpose Vehicles (SPVs) that could then contract with the contracting authority for an area. This consolidation is practical but the actual implementation may be a challenge in light of the professional guidance that may be required from both the contracting authority part as well as that of the operators. The process requires experienced practitioners in mergers and acquisitions to ensure that the solvency, liquidity and sustainability of the contracted operator is professionally

considered. The process may also lead to the application of sections 89, 89A and 197 of the Labour Relations Act, 1995 due to possible overlaps in various areas of current operators (South Africa: Labour Relations Act, 1995).

The other critical challenge is funding. The inability of the municipalities to perform their transport functions has been blamed on funding challenges. The funding challenges may partly be linked to the capacity of the municipalities to leverage applicable legislation, including the Constitution for their budgeting purposes. Section 214 of the Constitution is the relevant provision relating to equitable shares and allocations of revenue (South Africa: Constitution, 1996). Section 214(2)(h) provides that obligations of provinces and municipalities in terms of national legislation must be taken into account when Financial and Fiscal Commission makes its recommendations on budget allocations. These considerations may only be taken into account if the municipalities understand the applicable legislation, appropriately extract and package the provisions and present them in an appropriate way. Where the ITPs do not exist or are not incorporated as a chapter in the Integrated Development Plan, same should be difficult to convince the budgeting structures that a municipality needs to get such monies. In addition to the above, the NLTA has a number of provisions that enable the municipality to access funding from provincial and national government. If the municipality does not have the capacity to understand and apply the relevant provisions it will miss the necessary funding despite legislation having been structured to empower the municipality. Counter arguments on the practicality of this approach underplay the Constitutionality of these legislative provisions.

Another point to highlight for the purposes of this paper is that of the readiness of municipalities for capacitation and functions transfer. This point requires the municipalities to establish a proper transport function that is appropriately capacitated within the municipality. The transport function must then be capacitated in such a manner that a programme or plan can be developed with the province to capacitate the warm bodies constituting the municipal transport function. Through the intergovernmental authorisation agreement contemplated in section 12(1) of the NLTA, the municipal employees may be allowed to work with the relevant officials of the province for the functions aimed to be transferred to the municipality at a later date. The people employed by the municipality for the development of transport function

need to be employed with a view to capacitate them through the assistance by the province, amongst others. The most critical aspects of the transport function for prioritisation includes transport planning, transport operations, procurement and contracting authority.

2.6 Under-representation of the voice of end-users

Delays in the implementation of Constitutionally compliant subsidised public transport service contracts has the most detrimental impact on passengers and communities who rely completely on these services. A review of court proceedings shows little to no representation of the voice of these affected parties. This may be resulting from a poor culture of consequences associated with delictual claims, especially in poorer communities. Penalties should reflect consequences associated with poor operator performance. Equally, consequences associated with poor enforcement by contracting authorities must be prosecuted.

3. RECOMMENDATIONS

Based on the foregoing treatise, several recommendations are made:

- (a) The municipalities and the provinces must co-operate as contemplated in section 154 of the Constitution for the municipalities to have up-to-date ITPs and a capacitated transport function.
- (b) Where the municipality does not have the capacity to develop its ITP, whether based on funding required or warm bodies with qualifications and skills for the job, the municipality must approach the province citing the relevant provisions of the NLTA for such capacitation and assistance.
- (c) The province must capacitate itself on matters of Chapter 5 of the NLTA and thereafter approach the municipalities in the province for capacitation and agreements in line with section 12(1) to ensure that the municipalities and the province do not lack.
- (d) In entering into intergovernmental authorisation agreements between the province and the municipalities, the municipality must follow all its applicable laws to ensure that there are no issues of non-compliance that may lead to botched transactions.
- (e) The intergovernmental authorisation agreements must include the continued involvement of the municipalities even where the province is taking the lead.

This approach will ensure that the municipalities are involved in every step of the authorised process and there are skills transfer in real time.

- (f) Both the municipality and the province need to review their supply chain management policies so as to accommodate the processes and requirements of the NLTA.
- (g) The province needs to capacitate and assist the municipalities to ultimately enable them to be sufficiently independent on all matters of the municipal transport function.
- (h) Organised civil society should be empowered to better represent the interests of public transport users, for example through resourcing of law clinics on matters relating to class action and strategic litigation.

4. REFERENCES

Department of Transport. 2016. Minimum Requirements for the Preparation of Integrated Transport Plans. Available online:

https://www.gov.za/sites/default/files/gcis_document/201607/40174gon881.pdf

Accessed: 22 October 2025

Republic of South Africa. 1999. Heads of Agreement entered into between the National Minister of Transport on behalf of the nine provinces, labour unions and employers regarding the restructuring of the bus industry, 10 September 1999.

http://www.kzntransport.gov.za/tenders_bids/2024/Invitation%20to%20Tender%20ZN B02278-00000-00-HOD-GEN-24-T.pdf Accessed: 22 October 2025

Republic of South Africa. 2006. Practice Note on Applications under Section 54 of the Public Finance Management Act No.1 of 1999 (As Amended) ("PFMA") by Public Entities, 17 /07/2006. Available online:

<https://tresury.gov.za/legislation/pfma/practice%20Note%on%20Applications%20Under%20Section%2054%20the%20PFMA%20by%20Public%20Entities.pdf>, Accessed :

22 October 2025

Republic of South Africa. 2009. National Land Transport Act (No. 5 of 2009).

Available online:

https://www.gov.za/sites/default/files/gcis_document/201409/32110413.pdf,

Accessed: 17 October 2025

Republic of South Africa. 2009. National Land Transport Regulations, December 2009
Available online:

https://www.gov.za/sites/default/files/gcis_document/201409/328211208.pdf

Accessed: 17 October 2025

Republic of South Africa. 2022. Public Finance Management Act Supply Chain
Management Instruction No. 03 of 2021/22. Available online:

[https://static.pmg.org.za/PFMA_SCM_Instruction_No_03_Of_2021_22_Enhancing
Compliance_Transparency_and_Accountability_In_SCM.pdf](https://static.pmg.org.za/PFMA_SCM_Instruction_No_03_Of_2021_22_Enhancing_Compliance_Transparency_and_Accountability_In_SCM.pdf), Accessed: 26 October

2025

Republic of South Africa. 2023. National Land Transport Amendment Act (No. 23 of
2023) Available online:

[https://www.gov.za/sites/default/files/gcis_document/202406/50800nationallandtrans
portamendmentact232023.pdf](https://www.gov.za/sites/default/files/gcis_document/202406/50800nationallandtransportamendmentact232023.pdf), Accessed: 25 September 2025

Republic of South Africa. 2025. Second National Land Transport Regulations, 2025
Available online:

https://www.gov.za/sites/default/files/gcis_document/202509/53335gen3487.pdf,

Accessed: 25 September 2025

Trustees for the Time being: The Bus Industry Restructuring Fund & Southern African
Bus Operators Association vs Gauteng Department of Roads and Transport, National
Department of Transport, Minister of Transport & South African Transport & Allied
(unreported) case number 49674/2021 of 4 November 2022