

NEGOTIATED CONTRACTS

AN OPPORTUNITY NOT TO BE MISSED

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SABOA Conference
15 August 2024



THE STATE OF BUS CONTRACTS

STATUS OF PTOG CONTRACTS IN SOUTH AFRICA

as at 1 July 2024

NUMBER OF CONTRACTS				
Province	Interim Contract	Tendered Contracts	Negotiated Contacts	Total
Eastern Cape	1			1
Free State		7	2	9
Gauteng		1	15	16
KwaZulu Natal	2	34	1	37
Limpopo	9		2	11
Mpumalanga	7			7
Northern Cape	1	5		6
North West		2	4	6
Western Cape	1			1
TOTAL	21	49	24	94
	22%	52%	26%	100%

Source NDOT –July 2024

STATUS OF PTOG CONTRACTS IN SOUTH AFRICA

as at 1 July 2024

NUMBER OF BUSES				
	Interim Contract	Tendered Contracts	Negotiated Contacts	All Contracts
Number of buses per type contract	2 517	1 377	2 417	6 311
	40%	22%	38%	100%
Average buses per contract	120	28	100	67

Source NDOT –July 2024

STATUS OF PTOG CONTRACTS IN SOUTH AFRICA

as at 1 July 2024

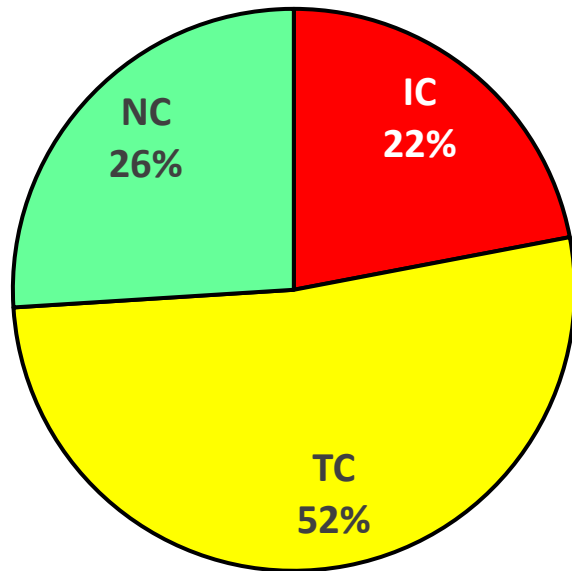
PTOG SUBSIDY ALLOCATION				
	Interim Contract	Tendered Contracts	Negotiated Contacts	All Contracts
PTOG Subsidy Allocation	R2 799 596 905	R1 555 558 779	R3 379 770 126	R7 734 925 810
	36%	20%	44%	100%

Source NDOT –July 2024

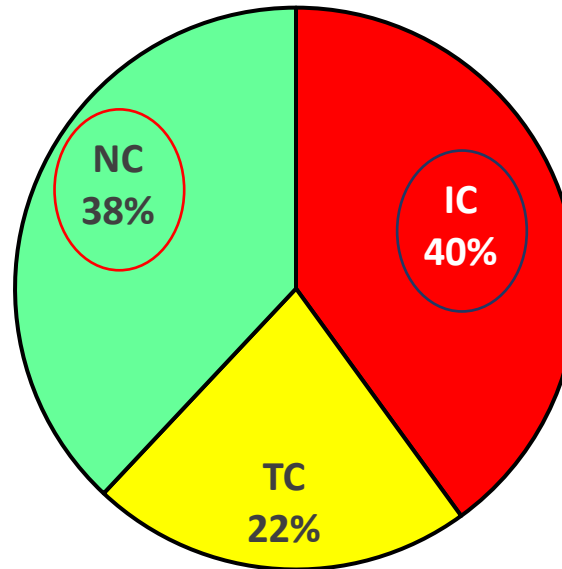
STATUS OF PTOG CONTRACTS IN SOUTH AFRICA

as at 1 July 2024

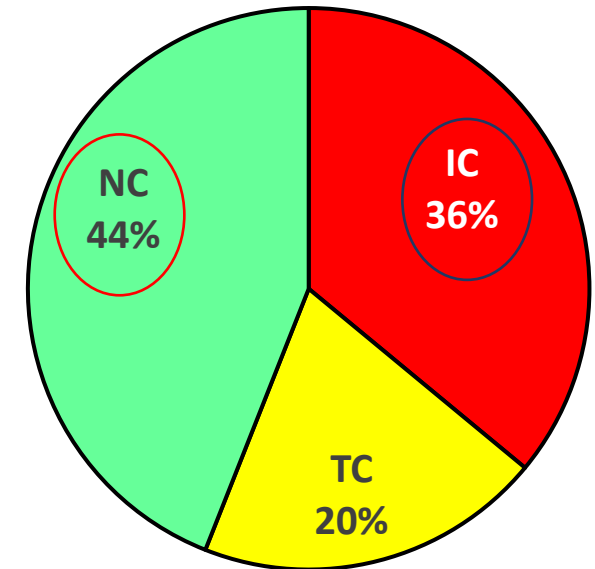
Contracts



Buses



Subsidy



STATUS OF PTOG CONTRACTS IN SOUTH AFRICA

Comparison 2017 vs 2024

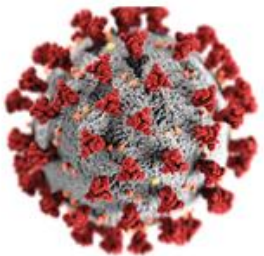
Province	Interim Contract	Tendered Contracts	Negotiated Contacts	Total
2017	39	66	10	115
%	68%	28%	4%	100%
Sources: SABOA – Prof Walters 2017				
2024	21	49	24	94
%	22%	52%	26%	100%
Change	-18	-17	+14	-21

Sources: NDOT –July 2024

IMPACT OF COVID 19 ON BUS OPERATORS

	End of 2019	COVID	End of 2022	Reduction	% Reduction
Bus companies registered with SARPBAC	109		74	-34	-31.2%
Employees employed by SARPBAC member companies	22 218		15 434	-6 784	-30.5%

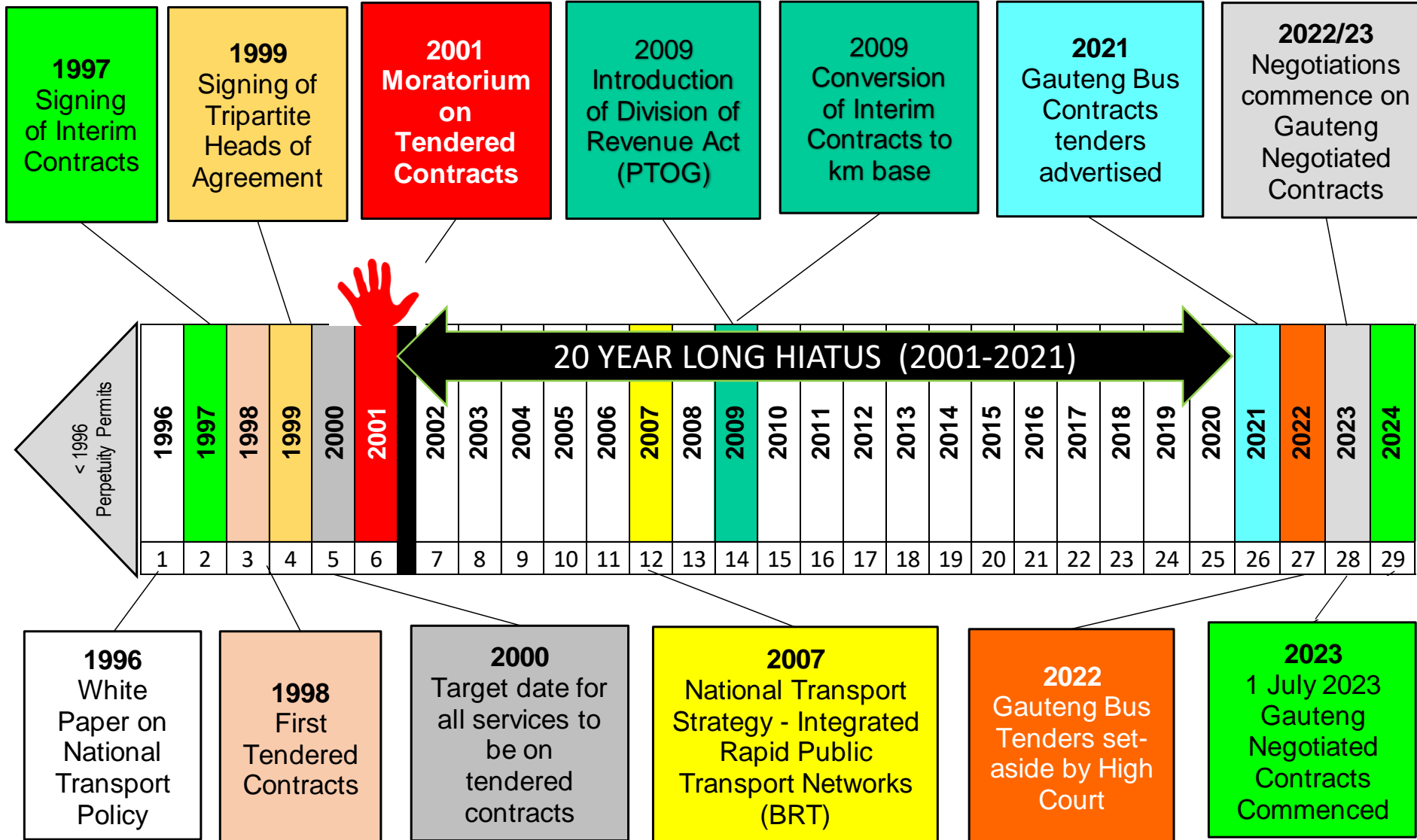
Source: South African Road Passenger Bargaining Council (SARPBAC) 2023



COVID-19

A BRIEF HISTORY OF PUBLIC TRANSPORT POLICY IN SOUTH AFRICA

Last 29 Years (1996-2024)





NATIONAL LAND TRANSPORT ACT PROVISIONS ON NEGOTIATED CONTRACTS

WHAT ARE THE LTA PROVISIONS ON NEGOTIATED CONTRACTS?

NATIONAL LAND TRANSPORT ACT - S41

Negotiated contracts

41. (1) 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.

(2) The negotiations envisaged by subsections (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 unscheduled services and non-contracted services.

(3) A negotiated contract contemplated in subsection (1) or (2) shall be for a period of not longer than 12 years.

(4) The contracts contemplated in subsection (1) shall not preclude a contracting authority from inviting tenders for services forming part of the relevant network.

(5) Contracting authorities must take appropriate steps on a timeous basis before expiry of such negotiated contract to ensure that the services are put out to tender in terms of section 42 in such a way as to ensure unbroken service delivery to passengers.

- A negotiated contract is a special mechanism provided for in the NLTA that is available to contracting authorities to facilitate the transition from old order contracts to a new order bus contracts.
- It is a unique, once-off mechanism with a specific purpose and specific benefits for all stakeholders.
- It supports integration of services by including operators in an operational area and promotes economic empowerment of small operators.
- A negotiated contract shall be for a period not longer than 12 years (Usually 7 +5 years)
- At the end of a negotiated contract, services must be put out on competitive tender.



BENEFITS OF NEGOTIATED CONTRACTS

① GOVERNMENT

- Control procurement process
- Value for money
- Quality service – high performance standards
- Transformation
- Empowerment
- Strict monitoring and enforcement ability

Benefits of negotiated contracts

② PUBLIC TRANSPORT USERS

- High quality service
- New bus fleet
- Affordable service
- Reliable & punctual service
- Modern ticketing systems
- High safety standards
- Modern communication & information systems

⑤ LABOUR

- Avoid employment minefield of tender process (HOA)
- Peaceful and non-disruptive transition from old order contracts
- Can negotiate employment issues with role players
- Avoid large scale job losses & retrenchments

④ SMALL OPERATORS

- Become part of formal bus industry.
- Mentorship & skills transfer
- Build capacity to tender competitively at end of the negotiated contract
- Can grow business
- Serve as an 'apprenticeship'

③ EXISTING OPERATORS

- Based on existing contracts
- Negotiated process
- Longer term contracts
- Proper funding model
- Incentive for good performance
- Profitable business
- Can attract new users & grow passenger numbers



MODEL NEGOTIATED CONTRACT

GENERAL NOTICE

NOTICE 568 OF 2013

DEPARTMENT OF TRANSPORT

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

MODEL TENDER AND CONTRACT DOCUMENTS FOR PUBLIC TRANSPORT SERVICES

I, Dikobe Ben Martins, the Minister of Transport, acting under sections 8(1)(u) and 42 (6) of the National Land Transport Act, 2009 (Act No. 5 of 2009) after consultation with the MECs, do hereby make the Regulations in the Schedule. The Model Contract Documents will be used for subsidised services contracts put out on tender by contracting authorities in terms of the Act. The documents will comprise of 4 Schedules as follows:

SCHEDULE

1. Model Contract Documents for Negotiated Contracts (Gross-Based)
2. Model Tender and Contract Documents (Gross-Based)
3. Model Contract Documents for Negotiated Contracts (Net-Based)
4. Model Tender and Contract Documents (Net-Based).



MR DIKOBÉ B. MARTINS
MINISTER OF TRANSPORT

DATE: 08 May 2013

- In 2013 four model contracts documents were published in the Government Gazette.
- One of these is the **Model Contract Document for Negotiated Contracts (net-based)**.
- The model contract document serve as a **template or blue print** to be used by contracting authorities when concluding negotiated contracts, with minimal deviations.
- In 2011 and 2012 **SABOA submitted extensive comments on the model contract documents**, especially given that they are very one sided agreements, but unfortunately most of SABOA's comments were not taken on-board.

Explanatory note: This document is published as a guideline for contracting authorities. It is based on a net-based contracting model, i.e. the contracting authority will plan and manage the services and set fares, specifications etc. but the operator will keep the fares. The document includes some elements of the previously published net-based Model Contract Documents. The document is also published along with other documents to provide for tendering situations and to include a gross-based model as an alternative option. Contracting authorities may decide to use the gross- or net-based model according to which is more appropriate for the relevant situation.

MODEL NEGOTIATED CONTRACT

PERFORMANCE BENCHMARKS

- The Model Negotiated Contract is a comprehensive 150 page performance based contract, which places extremely high minimum performance benchmarks on operators.
- Failure to meet these minimum operational standards (KPI) results in heavy financial penalties and eventual contract termination.
- The model negotiated contract contains detailed minimum specifications, including:-
 - Minimum vehicle age
 - Accessibility requirements for the bus fleet
 - Depot requirements
 - Electronic ticketing systems
 - Electronic vehicle monitoring
 - Image and marketing provisions.
 - Staff training & remuneration
 - Fares

1. KPI Performance Benchmarks and score values

- 1.1 The KPI benchmark values (standards) that will be applicable during the contract period as well as the values in terms of which scores will be allocated to the Operator for the purposes of monthly performance evaluations are summarised in Table 1 below.

Table 1: KPI Benchmark and score values

KPI	Benchmark value (Standard)	Score Values
Reliability	98%	<98% = 0; ≥98% = 1
Punctuality		
• On-time departures at terminals & intermediate points	95%	<95% = 0; ≥95% = 1
• On-time arrivals at terminals & intermediate points	90%	<90% = 0; ≥90% = 1
Driver quality		
• Passenger complaints	2%	≤2% = 1; >2% = 0
• Surveys	2%	≤2% = 1; >2% = 0
Bus availability	98%	<98% = 0; ≥98% = 1
Vehicle quality		
• General vehicle condition	2%	≤2% = 1; >2% = 0
• Technical vehicle condition:		
(i) breakdowns	2%	≤2% = 1; >2% = 0
(ii) technical bus inspections	0 serious defects/bus 1 other defect/bus	0 = 1; >0 = 0
(iii) maintenance procedures	100%	≤ 1 = 1; >1 = 0
(iv) Roadworthy certificate pass rate	98%	<98% = 0; ≥98% = 1
Safety	1%	≤1% = 1; >1% = 0
Passenger satisfaction	95%	<95% = 0; ≥95% = 1
Contract compliance		
(i) information & reports	100%	<100% = 0; 100% = 1
(ii) adherence to CA & SMF instructions	100%	<100% = 0; 100% = 1
(iii) staff training	100%	<100% = 0; 100% = 1
(iv) fit and maintain ticketing equipment	100%	<100% = 0; 100% = 1

MODEL NEGOTIATED CONTRACT

OTHER TERMS & CONDITIONS

- The Model Negotiated Contract further provides for a **fixed subsidy rate per bus** and a **variable subsidy rate per kilometre**.
- A **escalation formula** is provided for a **monthly escalation** in each of these rates.
- The Contracting Authority is given **far reaching rights** in terms of **determination of the timetables, information and reporting requirements**.
- **Very strict BBBEE qualification criteria** and **reporting requirements** are also contained in the Model Negotiated Contract.
- The Gauteng Negotiated Contracts concluded in 2023, contains a **minimum subcontracting provision of 30% of the value of the contract**.

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FUNDING CONSTRAINTS



A DYSFUNCTIONAL FUNDING MODEL

THE ALBATROS AROUND THE NECK OF THE BUS INDUSTRY

- One of the problems that has been plaguing the bus industry since 2009, is a **dysfunctional funding model** that resulted in severe underfunding of bus contracts.

Q: What is the funding model envisaged in the Constitution and in the NLTA and in the Division of Revenue Act and why is it dysfunctional?

- The funding model as set-out in statutes should be as follows:-
- The **primary source** of funding for bus contracts should be from the budget of the contracting authority (province or municipality).
- The **supplementary source** of funding for bus contracts should be from the Public Transport Operations Grant in the Division of Revenue Act.
- The funding model that should be used, is **crystal clear in law**.
- Sadly, since 2009 the **primary source of funding** for bus contracts has been absent.



The phrase “an albatross around my neck” originates from a poem called *The Rime of the Ancient Mariner*.

THE FUNDING MODEL FOR BUS CONTRACTS ENVISAGED IN THE STATUTES



THE PUBLIC TRANSPORT OPERATIONS GRANT (PTOG) & THE DIVISION OF REVENUE ACT (DORA)

Public Transport Operations Grant	
Transferring department	<ul style="list-style-type: none"> • Transport (Vote 40)
Grant schedule	<ul style="list-style-type: none"> • Schedule 4, Part A
Strategic goal	<ul style="list-style-type: none"> • Subsidised road based public transport services
Grant purpose	<ul style="list-style-type: none"> • To provide <u>supplementary funding</u> towards public transport services provided by provincial departments of transport
Outcome statements	<ul style="list-style-type: none"> • The provision of public transport services in terms of contracts which are kilometre based and affordable to the users of the services • Improved efficiencies in public transport spending

Extract from 2024 Division of Revenue Act

- The **PTOG** is plainly **not intended to be the sole source of funding** for public transport services provided by a contracting authority (e.g. a Provincial Department of Transport)
- The **Division of Revenue Act** describes the PTOG as supplementary funding to assist the provincial departments in **meeting their general funding obligation**.
- There is thus a **funding obligation independent of PTOG** and its source lies outside of DORA.
- By its very nature, the **PTOG cannot be used**, and is **not intended to be used**, as the benchmark for a **contracting authority's obligations** to bus contracts.

THE PUBLIC TRANSPORT OPERATIONS GRANT (PTOG) & THE DIVISION OF REVENUE ACT (DORA)

Conditions	<ul style="list-style-type: none">This <u>conditional grant</u> provides <u>supplementary funding</u> to subsidise service contracts entered into between the provincial departments of transport and public transport operators for the provision of affordable subsidised transport services
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Extract from 2024 Division of Revenue Act –
Public Transport Operations Grant

- The **conditions upon which the PTOG is paid** to contracting authorities states clearly that it is a conditional grant (i.e. it can only be used for the purpose intended and subject to the conditions in DORA) and it is a supplementary grant for bus services entered into by provinces and bus operators.
- The express language of the Division of Revenue Act stipulates that PTOG constitutes “supplementary funding towards” the public transport services provided **by provincial departments of transport**.
- The term **“supplementary”** means **something that is added to something else**, in order to **improve it or complete it** – something **extra or additional**.
- The very nature of a **supplement** is that it **presupposes that there is something primary in place** to be supplemented.
- Supplementary funding** is only intended to **add to other funding**.

supplement

noun [C]

UK  /ˈsʌ.p.lɪ.mənt/ US  /ˈsʌ.p.lə.mənt/

Add to word list 

C2

something that is added to something else in order to improve it or complete it; something extra:

<https://dictionary.cambridge.org/dictionary/english/supplement>

THE PUBLIC TRANSPORT OPERATIONS GRANT (PTOG) & THE DIVISION OF REVENUE ACT (DORA)

Allocation criteria	<ul style="list-style-type: none">• Allocations are based on 2009 Division of Revenue Act allocation baseline, weighted for the average shares of historical contributions that supplement the grant. <u>Provinces/contracting authorities should determine individual operator's budgets and ensure that the operation stays within the allocation or provide supplementary funds from their provincial budget</u>
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- The Allocation Criteria for the PTOG in the DORA emphasizes this point that provinces must determine individual operator's budgets and provide funding allocations in the provincial budget where its exceeds the PTOG allocation.

Responsibilities of provincial departments
<ul style="list-style-type: none">• <u>Any contractual agreement entered into in relation to this grant will be the responsibility of the contracting authority</u>• <u>Provincial departments remain responsible for funding any shortfall experienced on this grant from their provincial equitable share</u>

Extract from 2024 Division of Revenue Act –
Public Transport Operations Grant

- To remove any doubt, the DORA spells out the responsibilities of provincial departments.
- The Province is responsible to fund any shortfall from the PTOG grant for bus contracts.

THE NATIONAL LAND TRANSPORT ACT

Functions of Minister

- (4) The Minister must—
- (a) monitor the implementation of national land transport policy and any investigations conducted into matters arising from its implementation, and cause the necessary adjustments, if any, to be made to that policy;
 - (b) facilitate the increased use of public transport;
 - (c) ensure that the money available for land transport matters is applied in an efficient, economic, equitable and transparent manner;
 - (d) assist provincial departments that lack the necessary staff or resources in meeting their responsibilities and performing their functions and duties with regard to land transport;

Extract from National Land Transport Act

- Section 4(d) of the NLTA provides that the Minister (as the representative of the national government) must “assist provincial departments that lack the necessary staff or resources in meeting their responsibilities and performing their functions and duties with regard to land transport”.
- This makes it clear that the primary responsibilities for providing transport funding lie with the provincial departments and that the national government is to “assist” in the provincial departments in fulfilling them.
- Importantly, the obligation to “assist” under section 4(d) is only triggered when a provincial department lacks the necessary resources.
- The provision plainly envisages that the provincial department must, already, have (i) created a budget for the cost of appropriate transport services; and (ii) set out the provincial department’s available staff and financial resources for performing those functions.

THE REAL PROBLEM WITH FUNDING FOR BUS CONTRACTS

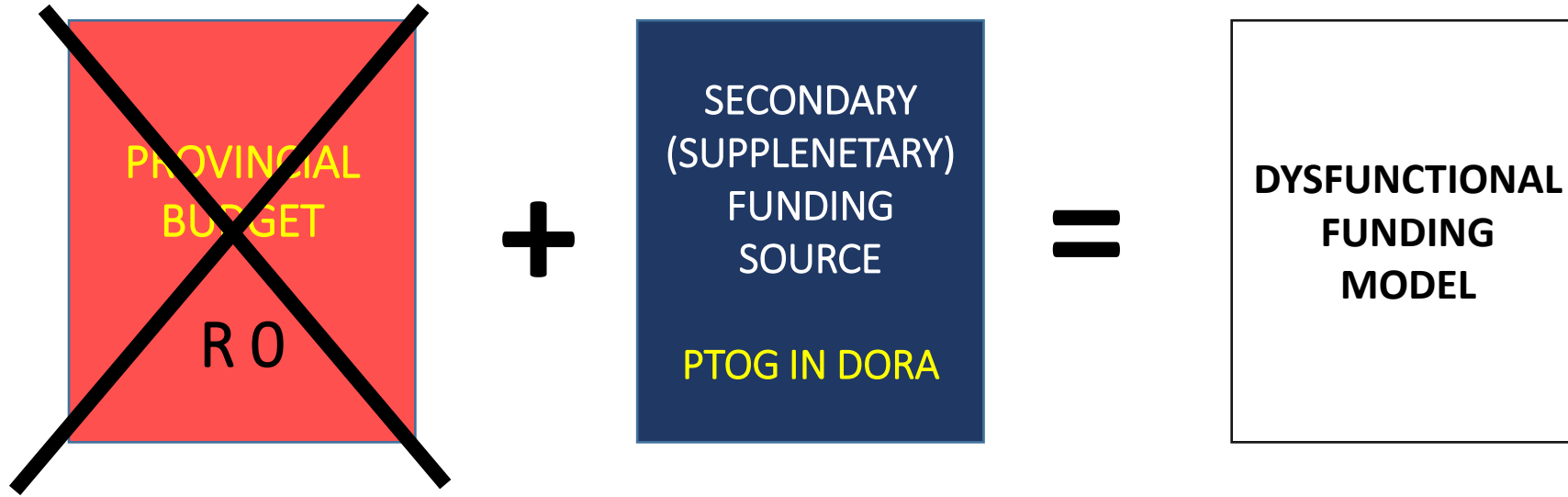
- The inescapable conclusion is that the funding problem of bus contracts is not that the PTOG allocations or annual increases are inadequate.
- Rather, the real problem is the continued failure and refusal of provinces to fulfill their statutory duty to budget for and fund any shortfalls in the funding of their bus contracts.



The Problem

- Instead, provinces hide behind the PTOG as inadequate and they limit the annual subsidy escalations and subsidy allocations to the PTOG.
- In meetings between SABOA and National Treasury in the past, this obligation has been admitted and confirmed.
- National Treasury has always linked any additional funding to the 'regularization' of the old order contracts.
- Now that we have new negotiated contracts, this obligation must be fulfilled by relevant provinces.

A DYSFUNCTIONAL FUNDING MODEL FOR BUS CONTRACTS



This dysfunctional funding model means that bus operators can be compared to the following:-



THE CONSEQUENCES OF THIS PROBLEM

- The ongoing failure of provinces (and other local authorities) to fulfil their statutory duty in this regard, has caused untold damage to the bus industry since 2009.
- While one appreciates the many demands of the fiscus, this dysfunctional funding model is affecting the public and users of the service and the poorest of the poor and their constitutional rights.
- It is one of the main reasons for the 20 year long stalemate in bus contracts.
- It bedevils the contracting system and blocks the move to negotiated and tendered contracts.
- It places a superficial and unnecessary cap on the growth of bus public transport.
- It keeps bus companies struggling for survival.
- We call on the new Minister of Transport, Ms Barbara Creecy, Premiers and Transport MEC's , to recognise and address this problem urgently.
- If this is not addressed, it may become necessary for the bus sector to take this matter to the courts for a declaratory order, to force provinces to comply with the laws governing their funding obligations.



LESSONS LEARNED FROM THE GAUTENG NEGOTIATED CONTRACT PROCESS

SOME TAKE-AWAYS FROM THE GAUTENG NEGOTIATED CONTRACT PROCESS FOR CONTRACTING AUTHORITIES

- For negotiated contracts to be successfully implemented, you need a Transport MEC with the will and drive to make it happen.
- **Appointing an experienced negotiation team and selecting the right negotiation leader (with commercial background and experience) is key.**
- The Province must get the support of municipalities (designated future contracting authorities) for negotiated contracts (intergovernmental agreements)
- **Get the operators to form a joint negotiation team – you cannot negotiate with multiple operators at the same time.**
- Use a 2 phased approach – Phase 1: Generic contract negotiations – Phase 2: Operator specific negotiations.
- **Remember it is a negotiated contract – it is not a process where the Contracting Authority can prescribe everything. Both parties must compromise in order to find each other.**
- Consider the input and the rationale behind the proposals from the operators carefully – operators know their operations.
- **Ensure that the Department's negotiating team gets first class legal and financial advice and support.**
- Allow enough time for the negotiations to take place and for parties to find each other – avoid a last minute rush!
- **Do your homework thoroughly – get funding approvals and other authorisations up front.**
- Work with the bus operators in terms of service redesign or changes to timetables – they know the service the best!
- **Remember where the bus operators are presently - allow a period of adjustment or phasing-in.**
- Do not set the bus operators up for failure – make it possible for them to succeed. Their success is your success!

SOME TAKE-AWAYS FROM THE GAUTENG NEGOTIATED CONTRACT PROCESS FOR BUS OPERATORS

- Join forces with other operators in the negotiations – you are stronger together.
- Appointing an experienced negotiation team with strong legal advice and financial and operational support.
- Study the model contract document in great detail – Be really well prepared!
- Put all your proposals in writing to the Department and number your proposals so that they do not get lost in the heat of negotiation.
- Manage the different versions of the contract carefully – track changes and number different versions with date footnote.
- Be prepared for a rigid approach from the Contract Authority because they follow a model negotiated contract document.
- Ensure that your legal team is present in all negotiations.
- Be clear on your mandates and negotiation strategy
- Insist on a phasing-in period (12 to 18 months) during which you can prepare your fleet, train your staff and prepare for the financial and operational demands of the contract.
- Pick your battles – Be clear on *'must-gets'* and *'nice-to gets'*.
- Select sub-contractors with whom you can work and can trust. Their performance will affect your performance.
- Use a 2 phased approach – Phase 1: Generic contract negotiations – Phase 2: Operator specific negotiations.
- Pay extra attention to your fleet planning and fleet replacement strategy to ensure you can meet the fleet age requirements at the start and during the contract.
- Do not lose sight of the benefits of long term contract that is funded correctly – you can deal with a lot of pain and hassle for that benefit.

CONCLUSION

The 2023 amendments to the NLTA (Section 11 (g) (8)) now requires contracting authorities to engage with bus operators to ensure that appropriate new contracts are concluded to replace all old order contracts.

These contracts must be succeeded by either a tendered contract or a negotiated contract.

Negotiated contracts represent an unique, once off contracting mechanism that is available in law to contracting authorities to facilitate the transition from old order bus contracts to new order bus contracts and to deal with some of the decade old problems plaguing the bus industry.

It holds notable benefits for all stakeholders without some of the minefields of a competitive tender process.

Let us not miss this opportunity!



THE END.

THANK YOU.

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