

BUSINESS UNITY SOUTH AFRICA (BUSA) SUBMISSION ON THE DRAFT SETA GRANT REGULATIONS REGARDING MONIES RECEIVED BY A SETA AND RELATED MATTERS AND PROPOSED SERVICE LEVEL AGREEMENT REGULATIONS

1. Introduction

The prime purpose of a levy / grant scheme is to encourage companies to offer quality training and to incentivise training and best practice. It is, therefore, important to implement grant / funding regulations that are sensible, understandable to employers and capable of being implemented with a minimum of bureaucracy.

The introduction of complex and ambiguous regulations with no sectoral flexibility would be counter productive and cause companies – both large and small - to withdraw from accessing grants. This would lead to a subsequent decline in training with profoundly negative social and economic implications for South Africa.

BUSA has already conveyed to the Honourable Minister of Labour and Director-General of Labour its serious concerns with the flawed process that has taken place in the National Skills Authority (NSA) regarding the draft regulations. While not wanting to dwell at length on this subject in this document, BUSA must stress that it still remains for the NSA to conclude its discussions on the substance of the draft regulations. We trust that the Department will ensure that the NSA is given sufficient time to conduct a thorough assessment of the draft regulations, together with the comments submitted during the public comment period. It is critical that the draft regulations be subject to serious scrutiny in the NSA prior to their being finalised and implemented.

2. Legality of Certain Provisions in the SETA Grant Regulations

It is BUSA's considered view that certain of the regulations do not meet the requirements of legality. Specifically, the provisions of the proposed regulation 6(3)(a) read with annexure 2B are ultra vires the Skills Development Act.

A legal opinion from Andre van Niekerk of Perrott Van Niekerk Woodhouse Inc is attached. Also attached is a further opinion from Barry Shipman, Legal Counsellor for the Chamber of Mines. Both these legal opinions very clearly indicate that certain of the regulations are ultra vires the Skills Development Act.

It is essential that the relevant provisions be amended or else the Department will not be able to obtain the necessary certification from the State Legal Advisors with resulting delays in the processes to finalise the regulations. Aside from the legality of 6(3)(a), there are also other compelling reasons why this particular provision should be amended. These are discussed more fully below.

3. General Comments

The regulations, published for comment, place onerous reporting burdens on the SETAs, with no concomitant obligation on the Department.

The review of the previous five years has demonstrated the uneven performance amongst SETAs. The regulations increase the intervention by Government presumably in an attempt to manage the poor performing SETAs. The SETAs that performed well thus have no incentive to continue performing well through their own efforts. The degree to which Government intervenes should thus be performance dependent.

Business has taken the call by Government to strengthen its participation in SETAs seriously, but will not be able further to strengthen participation unless the Department is prepared to review its current bureaucratic processes in favour of monitoring processes more in line with other PFMA entities. For example, quarterly reporting is extremely onerous and distracts SETA staff from their core tasks.

4. Specific Comments on the SETA Grant Regulations

Regulation 3(1)

An increase in the maximum allocation to administration is not supported. The increase means that the amount of money due to employers is proportionately reduced. In the past it has been suggested that if these costs (justifiably) need to be increased this should be dealt with by reducing the amount of money collected by the National Skills Fund. An employer who is in a position to claim the full 70% of levies paid over in the past should still be able to do this in the future.

Regulation 4(3)

There seems to be an implication in this regulation that certain SETAs will amalgamate. Clarity on this provision is required since the Minister has not made any formal announcements regarding the future SETA landscape.

Regulation 4(4)(c)

SETAs should not be permitted to build up large reserves of funds. Their income should be spent to incentivise training and support quality training initiatives relevant to the sector.

Regulation 4(5)

Research should be added to the list of legitimate administrative costs.

Regulations 6(1) and 6(2)

Employers should have a choice on the option they claim i.e. 6(1)(a) or (b) or (c) **OR** (d). Option 6(1)(c) however does not have an **OR** at the end of the criteria.

Regulation 6(1)(d)

Acknowledgement of the achievement of the national standard through an automatic payment of the mandatory grant is supported. The regulations need to be clear on how the SETAs will collect information on those companies that have achieved a national standard.

A clear definition and description on what is a national standard of good practice in skills development is needed.

Regulation 6(3)(a) and Annexure 2B

BUSA objects in the strongest terms to the conditions prescribed in this regulation, together with Annexure 2B, for the payment of mandatory grants. As indicated above, BUSA believes that the regulation is ultra vires.

In the opinion provided by Perrott Van Niekerk & Woodhouse Inc, the authors cite a number of reasons in support of their conclusion that “the draft regulation 6(3), if it were promulgated in its existing form, would be held by a Court to be invalid and of no force and effect”. The Legal Counsellor to the Chamber of Mines, in his legal opinion, clearly states “I consider therefore the provisions of the proposed regulation 6(3)(a) read with annexure 2B would be ultra vires the SDA.

In addition to its illegality, BUSA believes that this provision will have severely negative implications for skills development in South Africa. BUSA fully supports the principles of employment equity and broad based Black Economic Empowerment, however, the arbitrary application of these criteria across all sectors of industry and organisations without consideration to individual industries, organisations and their specific context is unrealistic.

While the promotion of synergy between the national imperatives of employment equity and skills development is supported, the penalty approach envisaged in these regulations is not. In addition to the fact that the Act does not allow this approach, the principle of one-size-fits-all is patently not applicable here.

This regulation, together with annexure 2B, must be deleted.

Regulation 6(3)(b)

6(3) (b) ends with an “.....; and”. It appears as if some text has been omitted.

Regulation 6(4)

What is defined as a newly registered employer? Is this an employer newly registered to the skills development system with SARS, or a new employer to the Seta (which may occur via an Inter-Seta Transfer)?

Regulation 6(5)

There should be criteria for late submissions in exceptional circumstances.

Regulation 7(1)

It should be stated that employers will be able to claim discretionary grants for any of the initiatives under section 7(1). Further, an additional clause should be added at the end of the list that reads: “and any other training initiative approved by the SETA Board that supports the Sector Skills Plan and / or agreed sectoral training initiatives”.

Managing and monitoring the discretionary grant system in the suggested format will require a high level of both strategic and operational competence that most SETAs have not been able to demonstrate in the past with a less complex set of criteria than those anticipated in this draft.

Regulation 7(1)(a)

It should be noted that most SETAs have already conducted research to determine critical skills required in their sectors, including the projected numbers required. Such research currently informs each SETA on the skills gaps and number of people who need training. This information should inform any sector target setting processes, rather than the imposition of unrealistic and arbitrary targets by the Department.

Regulation 7(1)(c)

This is too broad and does not limit the application in any way. On what basis would a SETA judge the application? In addition, there should be some link by the applicant to the sector.

Regulation 7(1)(e)

Learnership programmes may not necessarily be limited to those that are focused on scarce skills. This clause could be interpreted to mean that no discretionary grants should be allocated to other learnerships. This is clearly not the intention and the wording should be amended to make the real intention clear.

Regulations 7(1) (g) and (j)

There is already provision for a new venture creation grant in the NSF funding windows. New venture creation projects should not be the responsibility of SETAs. SETAs must limit themselves to supporting skills development initiatives. This grant should be limited to skills development programmes that enhance new venture creation projects.

Regulation 8

The word "Board" has been omitted after the word "SETA".

Regulation 9(2) (i) & (ii)

This planning cycle continues to be problematic. To have a submission deadline 3-6 months after the commencement of a cycle does not support a realistic business process. Often this cycle is reinforced by the publishing of new regulations/criteria by the Department and SETAs a month or less before the commencement of the cycle when strategic plans and budgets have already finalised by participating employers. Planning dates should be set prior to the commencement of a cycle.

Regulation 9(3)

Some employers experience difficulties in obtaining mandatory grants from SETAs. There is a danger that employers will be denied mandatory grants simply because a SETA has delayed making payment until after the expiration of the deadline. This is clearly unintended and should be corrected.

Criteria for late submissions beyond employee/employer control should be included. The inclusion of this clause does not address the inter-SETA transfer process that can take up to 9 months. If this clause is implemented, no transfer of funds between SETAs will be possible after the 6-month period and employees could be disadvantaged. Consideration needs to be given to including an exclusionary clause in 9(3) for inter-SETA transfer in process.

Regulation 10(2)(d)

The requirement that these applications be approved by relevant stakeholders is contrary to the principles of consultation and the ability of a business to implement strategies that it believes are relevant to the business. Any stakeholder who does not fully agree with the content of a plan/report where their approval is required may withhold this to obtain concessions on unrelated issues.

The primary objective of the skills plan is to ensure that the workforce is trained. While the imperative to address past legacies is understood and clearly requires special measures, failure to maintain an adequately trained workforce undermines the viability of the enterprise.

The implementation date is inconsistent with the promulgation date of the regulations. It can only be implemented in 2006 / 2007 once the regulations have been brought into effect.

Annexure 2C – Training plan

More detail than is needed in terms of the Workplace Skills Plan is required. BUSA does not believe that the increased bureaucratic burden will add concomitant value. This places a significant additional burden on companies and should be deleted. There are other mechanisms to monitor employment levels.

The occupational categories have been reduced to eight (8) from the original nine (9). The rationale for this reduction is not clear and this reduction has negative consequences. Employers are likely to have difficulty integrating two systems of reporting to the Department of Labour. The first system will be in terms of the 8 levels for the Skills Development Act and the 9 levels in terms of reporting requirements to the Employment Equity directorate. If the draft regulations are to be passed with the 8 code system, employers will need two separate data collection strategies for employment equity and skills development. This would be costly and uncoordinated.

SETAs will be unable to align the 9 level data collected in the past with the 8 level data proposed in the draft funding regulations without clear guidelines from the Department of Labour as to how to align the different levels. It is commonly accepted that when one system of coding converts into a new system of coding, the old codes are aligned to the new ones. Guidelines, or the promise thereof, for this are absent in these funding regulations.

Column 2 of this table has line items that refer to “Potential external new recruits (including 18 (2) learners at level 6 and above)”. This is another example of the imposition of the Employment Equity Act through the Skills Development regulations. Does this mean that companies are going to be penalized for not achieving this target? What will happen if a company’s economic circumstances do not allow for recruitment of new employees? It is proposed that this row be completely withdrawn as it is against the spirit of incentivising training in general.

The Labourers occupational category does not include “learners at level 6 and above”. This should be removed.

5. Specific Comments on the Service Level Agreement (SLA) Regulations

The SLA Regulations are welcome, as they will assist the Director-General and the SETAs to focus on specific deliverables expected from the SETAs. However, whilst the concept of a SLA is welcome, it must be noted that performance outputs of stakeholder driven bodies are a result of negotiated compromise between the various stakeholders.

Regulation 2

The assumption that levy income is directly proportional to capacity to meet the NSDS targets is without foundation and fails to take into account the extensive work undertaken by SETAs in the development of a sector skills plan. Achievement of the different targets by different sectors is dependent on the current status of the sector and cannot be ignored in the setting of “negotiated” targets.

The regulations provide for the SLA to be negotiated, which implies an engagement between equal parties to achieve a mutually satisfactory outcome. The conclusion of a SLA between two parties implies a mutual willingness to conclude the agreement. This is only possible when both parties are able to approach the negotiation from an equal position. The imposition of statutory targets by one party, namely government, completely undermines the spirit of co-operation implicit in the Act. Unilateral prescription by one party in a process, adversely affects the enthusiasm of the other party to conclude an agreement.

This regulation makes no provision for the situation where a SLA is not concluded in the timeframes envisaged. Further, no provision is made for a process to overcome deadlocks in the negotiation process.

It is extremely time consuming to negotiate such an agreement. In view of the fact that the regulations recognise the Sector Skills Plan as the basis of the agreement, it is proposed that the SLA be concluded for a period of five years and that the Sector Skills Plan form the basis of the requirements.

It is of great concern that the SLA is silent on the obligations and responsibilities of the Department of Labour. These should be included in the regulations.

Regulation 2.1

This clause is in contradiction with No. 2. If the Director-General has to negotiate the SLA, then this clause suggests that the SETA income can be used as a basis for negotiation.

BUSA cannot under any circumstances support a proposal that links national targets to SETA income. This clause must be deleted.

Regulation 2.2

The idea of using SETA income to determine the targets of a SETA is flawed. SETAs with high incomes cannot be forced to carry a high proportion of the national targets simply because they have funds. SETAs have conducted independent research that must be used to determine sector specific targets that must contribute towards national targets. This regulation should be deleted.

Regulation 2.4.1

SETAs currently produce Business Plans annually and not a Strategic Plan. It is proposed that SETAs should submit 5 year Strategic Plans and then annual Business Plans that will be measured and evaluated annually.

Annexure A

Item 4.1 The scope of the Department's intention needs to be clarified. This cannot be seen as a way for the Department to place unreasonable demands on a SETA.

Item 5 Experience has demonstrated that despite the timeframes specified in this agreement, the Department is not always able to respond within the timeframes. The regulation should provide for assumed approval in the absence of a response from the Department within the specified timeframe.

While the attempts by the Department to keep contact with the SETAs is appreciated and might have been required in the first five years, it is no longer considered necessary, particularly in the SETAs that are performing. A SETA's performance in terms of these regulations and the SLA can be monitored on the basis of annual reports. Operational issues are internal governance matters for the SETAs. A collective approach to operational issues reduces the performance of all SETAs to the same scrutiny, which may not be necessary. The Department should use the reports from SETAs to support SETAs that are having difficulty achieving the objectives and in such cases quarterly reports may be useful.

Item 6 A performance assessment scale of five ratings that includes two ratings above 100% is not conducive to a rational approach to performance measurement. Performance measurement is a tool to identify challenges some SETAs may be experiencing in meeting targets. A competition amongst SETAs to achieve an excellent performance rating, which is more than 50% higher than the target only encourages the setting of easily achievable targets. Excellent ratings should be allocated to 100% and higher and the remainder should be divided amongst 0- 100%.

The weighting factors for each element should form part of this regulation.

Although the regulations refer to SLAs between the department of Labour and the SETAs, BUSA is of the view that government departments obliged to commit 1% of their budgets to training should also be obliged to enter into SLAs with the Department of Labour and measured by the same performance measurement tools as are proposed for the SETAs.

Item 7 It is not clear how cancellation of the agreement for minor procedural infringements will promote the objective of improving skills. Other remedies should be considered.

6. Conclusion

BUSA regards skills development as a national priority in South Africa. We are aware of the importance of skills development as a critical facilitator of economic growth and development.

The regulations currently under discussion, we believe, will serve only further to entrench an already cumbersome system with too many procedural requirements. While we understand the Department's desire to force non-performing SETAs to fulfil their obligations, we do not consider the one-size-fits-all punitive approach adopted in the regulations as being the best way to achieve this end. Enthusiastic compliance with the Skills Development legislation is far more likely to be achieved by means of incentives and rewards for positive actions than by adopting a retributive stance.

It is crucial that the NSA be afforded the opportunity thoroughly to consider the substance of the draft regulations. To implement flawed and unhelpful regulations in a rush so as to meet tight deadlines will not ultimately serve the cause of skills development in our country. Careful consideration needs to be given to creating the best environment in which to advance skills development. The current regulations will not achieve this without considerable revisions. BUSA appeals for such a process to be undertaken.