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## Coates' Canons Blog: Companies that Boycott Israel – New Contracting Limitation But No Action Required Yet!

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During the final week of the recently adjourned 2017 legislative session, the General Assembly enacted **S.L. 2017-193 (H161)**, “Divestment from Companies that Boycott Israel.” This legislation created a new Article 6G of Chapter 147 prohibiting the investment of state funds in or governmental contracting with any company that boycotts or is involved in a boycott of the State of Israel. The prohibition is similar to the **Iran Divestment Act** in that state agencies and local governments are prohibited from contracting with companies identified by the State Treasurer as engaging in certain activities determined by Congress and our state legislature to be against the interests of our country and state (see **this post** for recent legislative changes to the Iran Divestment Act). This post discusses the new Israel boycott contracting prohibition which went into effect when the legislation became law on July 27, 2017. Although the new law is in effect now, local governments should not worry about complying with it just yet – it will be several months before compliance requirements are triggered.

The Divestment From Companies Boycotting Israel Act (the Act) imposes two prohibitions. First, the Treasurer is prohibited from investing any state funds in any company that boycotts the State of Israel. Second, state agencies and local governments cannot contract with a company that boycotts the State of Israel. This post answers questions raised by the contracting prohibition.

### ***Which companies are covered under the Act and how will local governments know?***

The State Treasurer has the responsibility under the Act to determine which companies boycott or are involved in the boycott of Israel. The term “company” is broadly defined to include business and commercial enterprises as well as associations and other organizations. To boycott or be involved in the boycott of Israel means “engaging in refusals to deal, terminating business activities, or taking actions that are intended to penalize, inflict economic harm, or otherwise limit commercial relations specifically with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories” (GS 147-86.80(2)). Excluded from this definition are ordinary business decisions or actions with an economic impact of less than twenty million dollars (\$20,000,000) in a 12-month period.

The State Treasurer is charged with the responsibility of developing and publishing a list of companies that meet this definition (GS 147-86.80(a)(1)). The Treasurer’s Office publishes the list on its website as it does with **companies it has identified under the Iran Divestment Act**. Only companies included on the Treasurer’s Israel boycott list are considered “restricted companies” under the Act and thus are subject to the contracting prohibition.

It is clear from the Act that state agencies and local governments are not responsible for and have no role in determining whether particular contractors are within the prohibition. Simply put, if a company is on the Treasurer’s Israel boycott list, a state agency or local government cannot contract with that company. If the company is not on the Treasurer’s list, the prohibition does not apply. It is the Treasurer’s list – and **only** this list – that determines which companies fall within the scope of the prohibition.

### ***What units of government are subject to the contracting prohibition?***

Like the Iran Divestment Act, State agencies and all political subdivisions of the State are subject to the Israel boycott

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contracting prohibition. For local governments this includes cities, counties, school districts, water and sewer authorities, public works commissions, transit authorities, public housing authorities, public hospitals, sanitary districts, airport authorities, and tourism development authorities (TDA) as well as departments, offices, and other subunits of political subdivisions.

### ***What types of contracts are covered?***

The prohibition applies to all types of governmental contracts costing more than \$1,000. The Act uses the term “contract” and does not limit this term in any way, such as “contracts for goods and services.” Because there is no limiting language in the Act, it applies to *all* contracts entered into by units of local government costing over \$1,000. This includes contracts drawn formally as well as invoices, P-card purchases, credit card purchases, and any other form a contract may take. The Act does not specifically state that the prohibition applies to contract renewals and assignments; however, because these are, in essence, still a contract, it is safe to assume that the prohibition applies.

Examples of contracts subject to the Act include:

- Purchase and construction or repair in the informal bidding ranges
- Purchase and construction or repair in the formal bidding ranges
- Purchase and construction or repair below the informal bid threshold
- Contracts subject to the Mini-Brooks Act (architectural, engineering, surveying, and alternative construction delivery methods)
- Leases (both as lessor and as lessee)
- Service contracts, including all general services, audit, and legal contracts
- Real property acquisition and sale
- Surplus personal property disposal
- Grants awarded to and received from nongovernmental entities
- Contracts with non-profits
- Bond issuances, borrowing contracts, and other financing agreements with private financial institutions

### ***Are contracts with other units of government covered?***

**Probably not.** Although broad, the definition of a “company” (147?86.80(2)) clearly suggests nongovernmental entities, especially when read in conjunction with the definition of boycott which specifically references business activities, economic harm, and commercial relations, all of which are activities that local governments lack the legal authority to engage in. In addition, the Act also specifically defines a “state agency” (which includes local governments), and yet the General Assembly chose not to include the term state agency in the definition of “company.” Thus, it is reasonable to interpret the statute to not include intergovernmental contracts and agreements within the scope of the prohibition.

### ***Are contracts exempt from competitive bidding requirements covered?***

**Some are and some are not.** If the contract is with a nongovernmental entity, it is subject to the prohibition even if it is exempt from competitive bidding requirements, such as sole source or group purchasing contracts. However, if the contract is with a governmental entity, such as a piggy back contract, that contract is not subject to the prohibition. The process under which the contract is entered (bid or not bid) is not relevant to determining whether the contract is subject to the prohibition. What is relevant is the party with whom the local government is contracting. If that party is a nongovernmental entity (business, non-profit, corporation, firm, vendor, etc.), and the contract costs more than \$1,000, it is subject to the prohibition.

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***Are there any exceptions?***

**There is only one exception** – contracts costing \$1,000 or less are exempt from the prohibition. In determining the contract cost, local governments must include sale tax and any other applicable taxes or fees required under the contract.

***Does the prohibition apply to subcontractors?***

**No.** Unlike the E-Verify contracting prohibition (GS 143-133.3), the Israel boycott contracting prohibition does not extend to subcontractors. The Act only applies to the entity that contracts directly with a state agency or local government. The definition of a restricted company, however, includes wholly owned subsidiaries, majority-owned subsidiaries, parent companies, or affiliates of those entities or business associations. So, the prohibition applies to these affiliated entities in addition to the parent company. This definition is similar to that of a company covered under the Iran Divestment Act, and the Treasurer's list of restricted companies will include affiliates and subsidiaries for Israel boycott restricted companies just as it does for Iran Divestment Act restricted companies.

***Must a local government require a contractor to certify or provide an affidavit stating that it is not a prohibited contractor under the Act?***

**No.** The Israel boycott contracting prohibition does *not* include a requirement that the contractor certify that it is not on the Treasurer's list of restricted companies. Nor does the act impose any verification or certification requirement on the local government. Thus, no separate certification document or affidavit is legally required.

Despite the lack of certification requirement, local governments should be mindful of the contracting prohibition and monitor the Treasurer's list of restricted companies to ensure that they do not inadvertently contract with a company on that list. Local governments may wish to consider including a standard provision in all contracts similar to that which many already include for Iran Divestment Act and E-Verify compliance. Such a provision could simply state that the vendor or contractor certifies that it has not been designated by the North Carolina State Treasurer as a company engaged in the boycott of Israel pursuant to N.C.G.S. 147-86.81. While there is no harm in including such a provision, a company may not agree to it because certification is not required under the statute.

***What are the consequences for violating the Act?***

As with the Iran Divestment Act, a contract with an Israel boycott restricted company is void by operation of the statute (GS 147-86.82). In addition to a void contract being unenforceable, the local government has no legal authority to make payments under a void contract. A contract in effect with a restricted company when the Act becomes law and compliance requirements are triggered (i.e., when the Treasurer publishes the list of restricted companies) may remain in effect until the contract expires under the terms and conditions of the contract.

***When does the Act become effective and when must local governments begin complying with its prohibitions?***



The Act became effective on July 27, 2017. This does **not** mean that local governments are immediately subject to the Israel boycott contracting prohibition. The Act requires the State Treasurer to first adopt a policy by November 1, 2017 to implement the Act, and then **publish the list of restricted companies** within 120 days (four months) after adopting the policy. Thus, it will be several months before the list of restricted companies is published. Local governments need **not** worry about violating the prohibition against contracting with a restricted company before the Treasurer publishes its list because it is the inclusion of a company on that list which triggers the contracting prohibition. Local governments should simply be aware of the new law and stay tuned for information from the State Treasurer's Office when it has adopted the policy and published the list of restricted companies.

## Links

- [www.ncleg.net/Sessions/2017/Bills/House/PDF/H161v5.pdf](http://www.ncleg.net/Sessions/2017/Bills/House/PDF/H161v5.pdf)
- [www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter\\_147/Article\\_6E.pdf](http://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_147/Article_6E.pdf)
- [www.nctreasurer.com/inside-the-department/OpenGovernment/Pages/Divestment-Acts-Resources.aspx](http://www.nctreasurer.com/inside-the-department/OpenGovernment/Pages/Divestment-Acts-Resources.aspx)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-133.3](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-133.3)