
Coates' Canons Blog: Iran Divestment Act Changes – No Certification Required Anymore!

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Article: <https://canons.sog.unc.edu/iran-divestment-act-changes-no-certification-required-anymore/>

This entry was posted on August 16, 2017 and is filed under Contract Requirements, Legislation, Purchasing / Purchase Contracts / Purchase Orders, Purchasing, Construction, Property Transactions

In 2015, the General Assembly enacted the **Iran Divestment Act** (IDA) which prohibits state agencies and local governments from contracting with a company that the NC State Treasurer has determined invests more than \$20 million dollars in the Iranian energy sector (for more information on the IDA, see this **blog post**). The Treasurer is required to publish a list of such companies on its website (commonly known as the **Treasurer's IDA list**) and to update the list every six months. Two provisions of the IDA created challenges and confusion for local governments right from the start. First, the IDA required contractors to certify at the time of submitting a bid or entering into a contract that they were not included on the Treasurer's IDA list, but did not specify how or in what form the contractor was to make this certification. Second, the definition of a "person" on the Treasurer's IDA list with which state agencies and local governments could not contract included a reference to governmental entities that some interpreted to include state and local governments themselves. Under this interpretation (which was not rendered by this author), state and local governments were required to certify that they were not investing at least \$20 million dollars in the Iranian energy sector when entering into a contract with another governmental entity, such as an interlocal agreement or an award of grant funds. Fortunately, the General Assembly enacted legislation during this year's session that eliminated the certification requirement and put to rest the "person" confusion.

S.L. 2017-193 (H161) "Divestment from Companies that Boycott Israel," (a future post will discuss the Israel boycott contracting prohibition enacted in H161) amends the IDA in two significant ways. First, the legislation repeals **GS 147-86.59** thereby ***eliminating the certification requirement***. As discussed above, the IDA previously required contractors to certify either at the time a bid was submitted or at the time a contract was entered into that the contractor was not included on the Treasurer's IDA list. The IDA was silent, however, on how or in what form the contractor was to make this certification. As a result, local governments and contractors alike struggled with additional paperwork added to the bidding process and varying methods of compliance ranging from boilerplate contract provisions to separate certification documents in bid packets to affidavits. With the certification requirement repealed, contractors no longer need to provide this certification and local governments no longer have to require it.

The certification statute, GS 147-86.59, also included a prohibition against a contractor using a subcontractor that was included on the Treasurer's IDA list. With the repeal of this statute, this subcontractor prohibition is also repealed.

Despite the repeal of the certification requirement, local governments should be mindful that they are ***still prohibited*** from contracting with a company included on the Treasurer's IDA list, and that doing so renders the contract void by operation of the statute. Local governments should monitor the Treasurer's IDA list to ensure that they do not inadvertently contract with a company on that list. Many local governments already include a standard provision in all contracts stating that, by agreeing to the terms and conditions of the contract, the contractor certifies that it is not on the Treasurer's IDA list and will not use subcontractors on the list (some local governments used this contract provision to comply with the certification requirement in lieu of obtaining a separate certification document or affidavit from the contractor). There is no harm in continuing to include this provision, especially if the local government wishes to prohibit companies from using subcontractors that are included on the Treasurer's IDA list. However, some companies may insist on removing this provision from their contracts now that the certification requirement and the subcontractor prohibition have been repealed.

The second change to the IDA included in H161 is to substitute the word "company" for the word "person" in defining what entities state agencies and local governments are prohibited from contracting with. The legislation defines "company" in a new GS 147-86.57(1) as "any sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company, or other entity or business association, including all wholly owned subsidiaries, majority-owned subsidiaries, parent companies, or affiliates of those entities or business associations." The bill then applies this new definition throughout the IDA to clarify that it is a "*company*" and not a "*person*".

” that is prohibited from contracting with state agencies and local governments if the company is on the Treasurer’s IDA list. This change removes confusion over whether the IDA certification requirement (now repealed) and contracting prohibition (still in effect) applies to inter-governmental contracts. With the use of the term “company” as it is now defined, it is clear that the IDA contracting prohibition **does not** apply to governmental contracts with other governmental agencies.

A final change to the IDA included in H161 is to require the Treasurer to update the IDA list annually, not every six months as was required under the original version of the IDA. The current IDA list is effective as of May 16, 2017. When the Treasurer next publishes the updated list, it will be in effect for a year, not six months.

These changes to the IDA take effect on October 1, 2017. Technically speaking, the certification requirement remains in effect until this date, so local governments should continue to comply with it until September 30th. On October 1st, local governments and state agencies can discontinue the certification compliance measures they have been using for the past two years, but still must be mindful not to contract with a company on the Treasurer’s IDA list.

Links

- www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_147/Article_6E.pdf
- www.nctreasurer.com/inside-the-department/OpenGovernment/Pages/Divestment-Acts-Resources.aspx
- www.ncleg.net/Sessions/2017/Bills/House/PDF/H161v5.pdf
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=147-86.59