



Expert Opinion

Encouraging Local Procurement Under Existing Law

SUMMARY

Local Public Procurement

Report

Editor: Att. Lana Warwar
Advisor: Prof. Barak Medina

This Expert opinion was written with the assistance of: Ishay Ganin, Alon Karook, Ben Meiri, Hagar Segev and Roy Yosef



האוניברסיטה העברית בירושלים
THE HEBREW UNIVERSITY OF JERUSALEM



שטייל
Shatil
The New Israel Fund
Initiative for Social Change

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This report was written by Shatil – the New Israel Fund initiative for social change. Its contents are based on data from various sources, some of which were developed by the report's authors. This report is a “work in progress” in the sense that the knowledge within it is in continual development. To contact us and learn more, write to Asaf Raz at asafr@shatil.nif.org.il.

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Public Procurement, Local Businesses and Local Sustainable Economic Development

The discussion on local procurement as a lever for economic development grew out of the local sustainable economic development (LSED) approach, which maintains that economic development in peripheral regions is contingent on strengthening local economy, based on local assets, for the benefit of all local residents. The term “public procurement” refers to all of the State’s procurement activity, and that of its various branches, and includes the procurement of work, services and goods required for its ongoing operation.

Local procurement policy usually refers to procurement from locally owned small and medium enterprises (SMEs) who often have limited access to the public procurement arena, with a special attention to businesses owned by marginalized groups.

Policies of public local procurement can promote various social, economic and environmental objectives. Studies conducted mainly in England and the United States have shown that a shift in procurement policy can significantly improve the state and functioning of local businesses, and thus contribute to the community’s development and economic resilience. For example, local small and medium businesses that participate in tenders may subsequently improve performance, and increase their own income as well as that of the local authority.

In addition, procurement policies can serve as a means for shaping and influencing the labor market by encouraging fair employment and occupational diversity, for example, by favoring the employment of people with disabilities, or by giving proper incentives to promote employment of members of excluded social groups. Finally, a change in procurement policy might be instrumental in the promoting eco-friendly services and procedures.

The use of local public procurement policy has stirred up controversy amongst legal experts. Some have argued that giving preferred access to local suppliers could violate certain principles, such as equality between bidders, and harms efficiency and competition. Also, questions arose as to the suitability of local public procurement policy aimed at small and local businesses, to domestic laws in various countries.

The legal opinion presented below focuses on this issue in the Israeli context, and addresses the following questions: which LPP policies can be implemented within the existing legal framework? Which are prohibited, or alternatively require the adoption of new legislation? What are the allowable limits of LPP policies under existing law?

This expert opinion was written following a long process of general and practical learning facilitated by Project Wealth that took place between 2012 and 2015. Around 25 participants, from government officials, civil society organizations, academia and representative organizations of the business sector. The outcomes of this process are available for review at www.kamam.org.il. They serve as a source of inspiration and guidance for current initiatives in several of local authorities in Israel.

We would like to express our sincere gratitude to three experts who read drafts of the paper and provided valuable feedback: Keren Berko from Yahav Anchor Institutions (a joint initiative of the Negev Development Authority and AJEEC-NISPED), Irit Porat, a policy expert, and Elad Peretz, Procurement Department Manager at the Sha'ar Hanegev Regional Council.

This paper was written following a research process led by the Social and Communal Economy Legal Clinique of the Clinical Legal Education Center, Faculty of Law, Hebrew University in Jerusalem. It consists of general information on legal matters. However, it is not a legal advice and should not be construed or relied upon as such. A local authority that chooses to adopt the principles and processes recommended hereby, should consult its legal advisor and act in view of the case studies specified bellow.

We wish readers of this expert opinion success in adopting policies that encourage procurement by local authorities from small and local businesses in order to benefit the local economy's development.

Dr. Gili Baruch, Project Wealth, Shatil, Be'er Sheva

Expert Opinion

Encouraging Local Procurement Under Existing Law

SUMMARY

This paper focuses on encouraging local procurement by means of local authority tenders. It aims to identify policies and actions destined to encourage local procurement that can be implemented under existing Israeli domestic law.

1. The importance of small and medium sized businesses and the contribution of local procurement policy

Promoting small businesses (the term includes both medium and micro businesses), is a central method for developing employment opportunities, encouraging business growth and protecting the local capital cycle. In 2010, Israel had 478,000 such businesses. Small and medium sized businesses accounted for more than ninety-nine percent of all businesses and forty-seven percent of private sector jobs in the country.

"Local Procurement" is the public procurement of jobs, services and goods by the State and its various entities from suppliers located within the vicinity of those entities. Literature emphasizes local procurement carried out by local authorities¹. The local authority plays a major role in the local economy, and local procurement policy is designed to ensure local economic development by promoting local employment opportunities, improving the quality of businesses participating in tenders, providing incentives for local supply chains and promoting additional public benefits. This policy contributes to the resilience of local communities and empowers local authorities.

Many barriers make it difficult for small businesses to participate in tenders carried out by local authorities. These barriers include a lack of awareness of the existence of such tenders, a lack in the necessary skills for submitting tenders, uncertainty with respect to the payment rules and timetables, and burdensome thresholds such as submission fees, higher collateral requirements or stringent quality standards.

¹ Local Public Procurement for Local Authorities. Basic Steps Manual. Gili Baruch and Irit Porat. Edited by Asaf Raz. 2015.

2. Existing Policy

The government has taken several actions in an effort to promote small businesses. Two examples are the establishment of a Small Business Authority, and the establishment of non-bank funds. The Accountant General at the Ministry of Finance published guidelines regarding the integration of small and medium sized businesses in government procurement. The guidelines stipulate, among other orders, a requirement to examine granting priority to small businesses before tenders are made public, and to give due consideration to measures for the removal of barriers to the submission of tenders. The Knesset debated a government draft law aimed at “promoting small and medium sized enterprises”, but it seems that the bill will not achieve its purpose.

3. Legal Aspects of Preference to Small and Local Businesses in Tenders

Many of the transactions carried out by local authorities are implemented via public tenders. The Authority utilizes public funds and is therefore required to provide equal opportunities to all citizens, to avoid discrimination and to ensure efficiency². Principles of equality and economic efficiency are at the base of each tender, but they are not absolute³, and the local authority is entitled to promote additional purposes through the tenders. For example, certain sectors may be favored for various reasons, so long as the preference is reasonable and meets the requirements of administrative law.

Studies show that giving priority to Israeli over foreign manufacturers has a positive impact on the economy⁴, which leads us to infer the same with giving priority to local manufacturers over those from outside the local authority. Giving priority to small and local businesses can be justified on various grounds. For example, when it is intended to give preference to sectors that suffer from discrimination, as an amendment to that discrimination, or when it is intended to the promote socio-economic objectives and interests of the local authority, as mentioned above.

Today, there are few legal provisions that favor certain groups in tenders. For example, article §2B(b) of the Mandatory Tenders Law favors a bid made by a female-owned business if it is one of two or more bids that received an identical weighted result that is also the highest result.

2 Omer Dekel, The Tender Duty of Public Authorities.(Hebrew). Chap.2. pp. 35-36.

3 Deckel, *ibid*, pp. 238.

4 For preference given to Israeli products see Dekel *ibid*. pp. 240-243.

The Courts and Priority in Tenders: The Supreme Court rarely deliberated preference gave priority to a local bidder was disqualified, but a clarification was made that had a condition stipulating the priority been included within the tender guidelines, the local authority could have legitimately included it along with other criteria⁵. Rulings of the Administrative Court indicate a trend in recognition of priority, provided that it is anchored in a fixed condition of the tender. See **Shushan**⁶ and **Fahed Sachs**.⁷

In the matter of **A.M.T.**⁸, the court ruled that the promotion of employment for residents is included among the functions of a local authority. Therefore, preference will not only be judged by tender laws, but also in light of the authority's obligation to ensure the welfare of its residents and wellbeing of their economy⁹. The court emphasized that in matters regarding specific conditions of priority, each case will be examined on its merits¹⁰.

a. Public Tender and Framework Tender: A **public tender** is the default option for contracting when tenders are required, and provision of priority within it is carried out through the inclusion of qualifications and criteria that are suitable for small and local businesses. Criteria need to be formulated clearly and transparently and the local authority is required to make sure that they are relevant and do not constitute unjustified discrimination. The authority is also required to provide clear explanations of the point system for qualifying. A **framework tender** is a type of public tender for a selected number of suppliers, for a period that does not exceed five years¹¹. Under section §9 of the Local Authorities Law (Joint Tenders), 1972, authorities may come into contract without a tender, with suppliers that won a framework tender. Section §9 leaves an opening for evading the tender process, and the courts treat it with suspicion¹². It is recommended to avoid, as much as possible, contracts based on framework tenders, despite their clear advantages in efficiency. Public tenders may increase the possibility of submissions from small and local businesses.

b. Closed Tender – This refers to tenders with proposed contracts in the amount of 26,000 NIS to 127,000 NIS. For this type of tender, the local authority approaches

5 HCJ 1148/64 Katsif vs. The Municipality of Eilat (published by Nevo); HCJ 119/63 Sharbiv vs. The Municipality of Ashkelon (published by Nevo).

6 831/92 Shushan Company for Asphalt Works Ltd. Vs. Michael Swisa (published by Nevo).

7 OM 30344/94 Fahed Sachs Ltd. vs. the Local Council of Hurfesh (published by Nevo).

8 AP (Nazareth) 1254-02-12 Arutzei Medida Vetashtiyot Ltd. vs. The Regional Council of Emek Hamaayanot (published by Nevo).

9 *ibid.* paragraphs 43-44.

10 *ibid.* paragraphs 55 and 57 of the ruling.

11 Regulations 17-g, Mandatory Tenders Regulations, 1987.

12 HCJ 649/89 United Steel Factories Ltd. et. al. vs. Ministry of Economy and Planning et. al., Court Rulings 45 (1) 485.

several suppliers that are included in a list that they compile specifically for this purpose¹³. The authority is obligated to create a pool of suppliers in accordance with clear criteria and without discrimination¹⁴. It is recommended that the local authority actively seek and approach small and local suppliers while compiling this list.

C. Priority for Small and Local Businesses in Tender-Exempt Cases: Article 3 of the Municipal Regulations (Tenders), lists a series of transactions exempt from tenders, including contracts worth less than 26,000 NIS, and contracts for scientific, artistic and literary work¹⁵. We recommend that in tender-exempt cases, priority be given to small and local businesses. Article 3 allows a waiver of tender requirements. Decisions of the authority in tender-exempt cases will be reviewed according to rules of proper administration, to which the authority must adhere.

Conclusion

Local procurement policy can be implemented under existing law in order to realize various objectives. For contracts that require a public tender, the local authority may set relevant criteria that give priority to small and local businesses. For contracts that are exempt from tenders, the authority may favor small and local businesses, as long as it meets the requirements of proper administration. As to closed tenders, they can be utilized to integrate small and local businesses into the supplier database.

The authority needs to ensure three important requirements are met at all times. First, full transparency of the priority criteria and conditions. Second, in order to prevent conflict of interest, careful consideration should be given to the composition and functioning of all bodies with decision-making powers within tender committees and committees for exemption of tenders. Third, ensuring punitive policy for those who deviate from the rules of proper administration.

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13 Ibid. regulation 8 (b).

14 Ibid. regulation 8 (c).

15 See regulation 3 of the Cities Regulations (tenders) 1987.

About Project Wealth

Project WEALTH: Promoting Local Sustainable Economic Development (LSED), is implemented with the support of the European Union's ENPI CBC-MED Program. By fostering an alternative economic paradigm whereby wealth is defined by the well-being of people and the planet, the project encourages new approaches of local and regional sustainable economic development. The project collaboration that includes partners from Israel, Italy, Portugal and the Palestinian Authority facilitates a range of knowledge exchange and networking platforms, that enable the sharing of best practices, as well as the development of local initiatives

For more details and updates about Project Wealth:

Project Wealth Website: www.lsed-wealth.org

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Statement about the Programme

The Project Wealth: Promoting Local Sustainable Economic Development is implemented under the 2007-2013 ENPI CBC Mediterranean Sea Basin Programme is a multilateral Cross-Border Cooperation initiative funded by the European Neighbourhood and Partnership Instrument (ENPI). The Programme objective is to promote the sustainable and harmonious cooperation process at the Mediterranean Basin level by dealing with the common challenges and enhancing its endogenous potential. It finances cooperation projects as a contribution to the economic, social, environmental and cultural development of the Mediterranean region. The following 14 countries participate in the Programme: Cyprus, Egypt, France, Greece, Israel, Italy, Jordan, Lebanon, Malta, Palestine, Portugal, Spain, Syria (participation currently suspended) and Tunisia. The Joint Managing Authority (JMA) is the Autonomous Region of Sardinia (Italy). Official Programme languages are Arabic, English and French (www.enpicbcmed.eu).