

## PUBLIC PROCUREMENT AND ILLEGAL SETTLEMENTS

### Purpose

1. The purpose of this Scottish Procurement Policy Note (“SPPN”) is to provide purchasers with advice on the options available to them when dealing with companies active in illegal settlements.

### Key points

2. The key points are as follows:

- The Scottish Government expects companies that are awarded public contracts to maintain high standards of business and professional conduct;
- The Scottish Government strongly discourages trade and investment from illegal settlements. A decision to exclude a company from a public procurement exercise on the basis of its involvement in such a settlement has, however, to be taken in compliance with procurement legislation;
- For a company to be excluded from competition it will have had to have been convicted of a specific offence and/or committed an act of grave misconduct in the course of its business;
- Exploitation of assets in illegal settlements is likely to be regarded as constituting “grave professional misconduct” for the purposes of procurement law;
- Decisions should be taken on a case by case basis and appropriate legal advice should be sought.

### Background

3. Recent events in Israel and the Gaza Strip have led to calls for companies active in illegal settlements to be excluded from competition for public contracts. This

note seeks to provide advice to purchasers on the options open to them in relation to such companies.

4. Israel is an associate member of the EU and is a signatory to the World Trade Organisation's ("WTO") Government Procurement Agreement. The WTO agreement contains obligations that ensure that companies from signatory countries have equivalent rights of access to bid for public contracts in the EU as EU-registered companies, as well as equivalent rights of redress to the courts in the event of discriminatory treatment or another breach of these rights (reg 47(1) & (2) Public Contracts (Scotland) Regulations 2012 – "the 2012 Regulations"). Signatory countries to this Agreement as at the time of the publication of the Policy Note can be found as an Annex.

5. On 1 June 2014, the Foreign and Commonwealth Office ("FCO") published an Overseas Business Risk report providing information on key security and political risks which UK businesses may face when operating in Israel<sup>1</sup>. On 22 July 2014, the FCO published an Overseas Business Risk report on key security and political risks which UK businesses may face when operating in the Occupied Palestinian Territories<sup>2</sup>. Both these Reports set out the Scottish and UK Governments' clear position on Israeli settlements; the West Bank, including East Jerusalem, Gaza and the Golan Heights are territories which have been occupied by Israel since 1967 and are illegal under international law. In addition the Scottish and UK Governments do not recognise any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties.

### **Dealing with companies which are active in illegal settlements**

6. With respect to public procurement, the Scottish Government expects companies that are awarded public contracts in Scotland maintain high standards of business and professional conduct. Exploitation of assets in illegal settlements by a company (irrespective of where that company is registered) is likely to be regarded as constituting "grave professional misconduct" for the purposes of procurement law and where evidence of this exists, a purchaser may be able to exclude the company from a public tendering exercise by virtue of reg 23(4)(e) of the 2012 Regulations.

7. Purchasers considering an exclusion on such grounds should satisfy themselves that the decision is proportionate in relation to the nature and scale of

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<sup>1</sup> <https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel>

<sup>2</sup> <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-palestinian-territories>

the offence. This means that decisions need to be taken on a case by case basis, and where doubt exists, legal advice should be sought.

8. As a matter of practice, as opposed to procurement legislation or policy, any public body which is considering entering into contract with an Israeli based company may wish to seek appropriate assurances that the company is not actively involved in illegal settlements as defined in the FCO guidance referenced above. Furthermore, if a contracting authority is considering purchasing goods or produce originating in Israel, it may wish to seek assurances that they have not been produced in illegal settlements.

9. In the absence of such assurances, and where a purchaser has a well-founded concern that goods or produce it is procuring have been produced in illegal Israeli settlements, legal advice should be sought to determine whether grounds exist which would warrant exclusion from a competition of that bidder. Purchasers may find guidance on the European Commission's website<sup>3</sup> and a paper produced by the Department for Environment, Food and Rural Affairs in 2009<sup>4</sup> useful to assist in identifying the location of origin of imports from Israel into the Union.

### **Action required**

10. Public bodies are asked to note the advice provided in this SPPN.

### **Dissemination**

11. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

### **Contact**

12. If you have any enquiries about this SPPN or would like to discuss the issues it raised, please contact Scottish Procurement: [scottishprocurement@scotland.gsi.gov.uk](mailto:scottishprocurement@scotland.gsi.gov.uk).

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<sup>3</sup>

[http://ec.europa.eu/taxation\\_customs/customs/customs\\_duties/rules\\_origin/preferential/israel\\_ta\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/israel_ta_en.htm)

<sup>4</sup> <http://archive.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf>

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## Parties to the World Trade Organisation's Government Procurement Agreement

<u>Parties</u>	<u>Date of entry into force/accession</u>	
	<u>GPA 1994</u>	<u>Revised GPA</u>
Armenia	15 Sep 2011	Pending
Canada	1 Jan 1996	6 Apr 2014
European Union with regard to its 28 member states:		
Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom	1 Jan 1996	6 Apr 2014
Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia	1 May 2004	
Bulgaria and Romania	1 Jan 2007	
Croatia	1 Jul 2013	
Hong Kong , China	19 Jun 1997	6 Apr 2014
Iceland	28 Apr 2001	6 Apr 2014
Israel	1 Jan 1996	6 Apr 2014
Japan	1 Jan 1996	16 Apr 2014
Korea, Republic of	1 Jan 1997	Pending
Liechtenstein	18 Sep 1997	6 Apr 2014
Netherlands with respect to Aruba	25 Oct 1996	4 July 2014
Norway	1 Jan 1996	6 Apr 2014
Singapore	20 Oct 1997	6 Apr 2014
Switzerland	1 Jan 1996	Pending
Chinese Taipei	15 Jul 2009	6 Apr 2014
United States	1 Jan 1996	6 Apr 2014