



Expansion Trend in Case Law - Encouraging Preference for Israeli Produce in Tenders

Under the Mandatory Tenders Regulations (Preference For Israel Products And Mandatory Business Cooperation), 1995 ("**the Preference Regulations**"), tender documents published by the State and Government Corporations must include a relative preference for bids which include purchasing Israeli goods rather than imported goods, according to the rate and conditions specified below.

Under the Preference Regulations, the preference rate is determined according to the identity of the entity publishing the tender:

- a. Tenders published by Government Ministries - a bid that includes goods produced in Israel will be preferred, if the offered price is not more than 15% higher than the imported goods bid (or 20% for goods produced in the area surrounding the Gaza Strip).
- b. Tenders published by Government Corporations or Government Agencies which export at least 30% of their produce - an offered price for goods produced in Israel will be preferred as long as it is not more than 10% higher than the imported goods bid.

The preference applies only to **tenders for the supply of goods**, not to **service provision tenders**. This creates an inherent tension in tenders that combine the supply of goods and provision of services, interrelated, which arguably cannot apply the Preference Regulations, as the different components may not be separated.

Moreover, in recent years the economic effectiveness of implementing the mandatory preference was criticized. Even so, over the past few months we have witnessed an expansion trend in case law, applying preference for Israeli products in tenders combining supply of goods and provision of services. Following are a few examples:

- The Jerusalem District Court recently accepted an administrative appeal filed by **Taldor** against a combined tender published by the Finance Ministry for the purchase and installation of communication equipment. Taldor appealed the tenderers' decision not to include a preference for Israeli products in the tender. The court overturned the Tender Committee's decision, stating that the preference must be included in the tender.
- This past July, the court accepted an appeal filed by **Ha'argaz Group** against a competitive proceeding published by an inter-ministerial Tender Committee of the Finance and Transportation ministries for public transportation licenses. Ha'argaz argued that the committee didn't grant sufficient preference to the acquisition of buses made in Israel.
- Last December, the Tel Aviv District Court ruled regarding a tender published by **Netivei Israel** for the supply and installation of road safety railings. Following prolonged legal deliberations, Netivei Israel's Tender Committee accepted the court's recommendation and adapted the position of the Attorney General, deciding to include a preference for Israeli products in the tender, even though it was a tender combining supply of goods and provision of services and work.

It is evident that the courts have recently not been inclined to accept the tenderers' argument that the Preference Regulations cannot be applied in tenders that combine goods procurement together with service and work components. In such integrated tenders, the court directs the Tender Committee to strive to separate the pricing of the tender components in a way that will allow the application of the Preference Regulations and preference for Israeli produce. However, in special circumstances, when the good of the tender warrants it, the Tender Committee may decide not to separate the various components, and as a result, not to give preference to Israeli produce.

It is possible that in the near future we will see a continuation of this trend in rulings, incorporating provisions that give preference to Israeli produce in additional tenders. On the other hand, it can be estimated that the application of the Preference Regulations by government agencies will raise the cost of goods purchased by them, and it appears that we have not yet heard the final word in the matter.

The content in this Memo is provided for informational purposes only, and does not serve to replace professional legal advice required on a case by case basis. The Firm does not undertake to update the information in this Memo, or its recipients, about any normative, legal, or other changes that may impact the subject matter of this Memo.

Should you have any questions or need additional information regarding this matter, please feel free to contact Adv. Rami Sofer, Head of the Corporate, Finance and Infrastructure Department: rami.sofer@goldfarb.com; Adv. Roy Aga, Partner, Corporate, Finance and Infrastructure Department: Roy.Aga@goldfarb.com; Adv. Gilad Kessler, Corporate, Finance and Infrastructure Department: gilad.kessler@goldfarb.com; or at: +972-6089369.