

# **CONFLICT WAIVER INSTRUCTIONS AND FORM**

SDCL 5-18A-17 to 5-18A-17.6

## **INTRODUCTION**

Generally, absent a waiver, current and certain former state officers and employees are prohibited from contracting with state agencies and from deriving benefits from contracts with outside entities when the state officer or employee had substantial involvement in recommending, awarding or administering the contract. These prohibitions also apply to persons who supervise state officers or employees who award and administer contracts. These laws however, will not affect all state officials and employees. These laws affect those state officers and employees who are involved with state contracts, which will be discussed later in this document.

The prohibition on conflicts of interest applies to persons currently serving as state officers and employees. A state officer is a person who is elected or appointed to serve a state agency. The prohibition on conflicts of interest in certain situations can also apply to persons who previously served as state officers and employees. The rules as they apply to former state officers and employees are described later in this document.

These instructions will assist the current and former executive branch state officer and employee with determining whether a prohibited conflict exists or might exist. These instructions will guide the current or former state officer and employee through the process established for requesting a waiver. These instructions will also guide the state officer acting on the waiver request.

The law applies to ALL state officers and employees. Employees of agencies and instrumentalities other than executive branch agencies under the control of the Governor should contact their supervisor for information about processes and procedures for waivers established for their agency.

## **SUMMARY OF THE LAW**

### Who the law applies to:

Generally speaking, the prohibitions apply to officers and employees who

- a. approve, award or administer a contract;
- b. recommend the approval or award of a contract; and
- c. supervise persons who approve, award or administer a contract.

“Administer a contract” means decision-making or substantive influence on decision-making concerning the manner, method or means of a contract’s performance or enforcement. “Administer a contract” does not include performing mere clerical tasks such as posting payments or communicating decisions made by others.

The prohibitions in the law also follow a former state officer or employee for a period of one year after they leave state employment.

What the law does:

1. A state officer or employee who recommends the award of a contract, or who approves, awards or administers a contract, can’t be interested in, or benefit from, a contract that is within the scope of his/her duties while in office. This means a state officer or employee can't be a party to a contract with a state agency while he or she is in office if the contract is within the scope of the officer's or employee's state government job duties. Nor can a state officer or employee derive a benefit, as discussed later in this document, from contracts awarded to parties outside state government if the state officer recommends, approves, awards or administers the contract. This prohibition also applies to the supervisors or persons who approve, award or administer contracts.

2. A state officer or employee who recommends, approves, awards or administers a contract can’t derive a benefit from a contract for a period of one year after they leave office. This prohibition also applies to the supervisors of persons who approve, award or administer contracts.

3. A state officer or employee who recommends, approves, awards or administers contracts can’t enter into a contract with any state agency – except an employment contract – for a period of one year after they leave office. This prohibition also applies to the supervisors of persons who approve, award or administer a contract.

What does “derive a benefit” from a contract mean?

The state officer or employee and/or his or her spouse or any other person with whom the officer or employee lives and commingles, or combines assets cannot:

1. Have more than a five percent ownership or other interest in the contracting party;
2. Take a salary, commission or other compensation directly from the contract or from the contracting entity;
3. Acquire property under the contract; or
4. Serve on the board of a for-profit entity that derives income from the contract or acquires property under the contract.

### How does the law affect former state officers and employees?

A state officer or employee who recommends, approves, awards or administers a contract can't derive a benefit from a contract for a period of one year after they leave their office or position. This prohibition also applies to the supervisors of persons who approve, award or administer contracts.

A state officer or employee who recommends, approves, awards or administers contracts can't enter into a contract with any state agency – except an employment contract – for a period of one year after they leave their office or position. This prohibition also applies to the supervisors of persons who approve, award or administer a contract.

### **EXAMPLES OF TRANSACTIONS PROHIBITED ABSENT A WAIVER**

1. A current state employee with authority relating to Game, Fish and Parks contracts enters into a seasonal contract to mow Game, Fish and Parks properties. This is a prohibited direct contract with the state for which a waiver must be requested.

2. Governor's Office of Economic Development (afterwards referred to as "GOED") finance employee reviews SD Works loan application and recommends approval. GOED Commissioner approves and the loan is made. The following persons are prohibited from having an interest in or benefiting from the loan: The recommending loan officer, persons on GOED staff who evaluate the borrower's performance (for example, maintaining the necessary debt coverage ratios), Deputy Commissioner (supervises GOED staff who evaluate the borrower's performance), GOED Commissioner (supervisor of GOED staff who evaluate borrower's performance and awarded the loan), the Governor and all their spouses and other persons with whom they live and commingle assets.

Examples of prohibited benefits: (i) a prohibited person may not work for the borrower while the officer or employee is in office or within one year thereafter; (ii) a prohibited person may not sit on the board of directors of a for-profit entity, such as a corporation or limited liability company that benefits from the loan.

3. Bureau of Administration (afterwards referred to as "BOA") advertises for bids for a new equipment storage shed. A staff engineer at Office of State Engineer (afterwards referred to as "OSE") reviews the bids, recommends an award and supervises construction. The BOA commissioner awards the contract. The following persons are prohibited from benefiting from the contract: the recommending staff engineer, the state engineer (supervises a person involved in administering the contract), the BOA commissioner (supervisor and awarded the contract), the Governor's Office of Economic Development member responsible for BOA (supervisor), the Governor (supervisor) and their spouses and other persons with whom they live and commingle assets.

Example of prohibited benefits: a prohibited person works for the construction company.

4. Department of Social Services (afterwards “DSS”) forms a committee to review proposals and recommend the award of a contract. The committee is made up of persons from divisions of DSS other than the one that will enter into the contract. The committee makes a proposal and the contract is awarded. The following persons are prohibited from benefiting from the contract: committee members (recommended the award), the division director who awarded the contract, the division director’s supervisor, the cabinet secretary, the GECO member responsible for DSS (supervisor), the Governor (supervisor) AND all their spouses and other persons with whom they live and commingle assets. NOTE that in this example the supervisors of the persons who sat on the committee making the recommendation are not covered because the law doesn’t include supervisors of persons who merely make recommendations.

Example of prohibited benefits: a member of the committee making the recommendation owns more than five percent of the stock of the contracting entity; the spouse of the cabinet secretary is a commissioned sales person for the contracting entity.

5. On June 15, 2015, a Department of Transportation (afterwards “DOT”) employee, acting within the scope of the employee’s duties, recommends the award of a signage contract. The employee then retires. Six months after retirement, the employee decides he or she would like some seasonal work and takes a job with the signage contractor. Before taking the job, the former DOT employee must apply for a waiver because the DOT employee would be taking a salary from the contractor within one year after recommending the award of a contract to that contractor.

### **SMALL TRANSACTIONS**

Effective July 1, 2015, the Governor granted a blanket waiver, for all transactions of \$200.00 or less. Therefore, it is not necessary to seek a waiver for otherwise covered transactions, as long as the amount is \$200.00 or less. Please be aware, however, that purchasing card and other small transactions are reviewed from time to time and a series or pattern of transactions that would otherwise be covered by the law may result in further inquiry and possible disciplinary action if found to be inappropriate.

### **CONTRACTS AWARDED PRIOR TO JULY 1, 2015**

Persons who on and after July 1, 2015, derive a benefit from a state contract in which they played a role prior to July 1, 2015, should go through the waiver process. Similarly, the law applies to those who administrator contracts on and after July 1, 2015 even if the contract was awarded prior to July 1, 2015.

### **AGENCY-SPECIFIC CONFLICTS STATUTES**

There may be more specific conflict of interest statutes relating to your agency. You are encouraged to ask your supervisor as to the existence of any such regulations. In the event the

general law described in these instructions and the regulations specific to your agency are different, the more restrictive laws will be applied.

### **PENALTIES FOR NON-COMPLIANCE**

If a waiver is necessary but isn't sought or granted, the contract that was involved may be voided and the state officer or employee may be subject to disciplinary action. If the contract was the result of a quid pro quo, or a promise for something, such as a cash payment or promise of future employment, the current or former officer or employee may be removed from office and/or be subject to criminal prosecution. If the current or former state officer or employee failed to seek and obtain a waiver knowing one was likely required, the person could be removed from their office or position, and/or be subject to criminal prosecution.

### **WAIVERS**

A waiver authorizing the state officer or employee to contract with state government or benefit from a contract may be granted if:

1. A waiver is requested in writing;
2. The relevant terms of the contract or transaction are provided in writing;
3. The officer reviewing the waiver has reviewed the essential terms of the contract or transaction;
4. The officer reviewing the waiver has reviewed the requesting party's role in the contract or transaction; and
5. The terms of the contract are fair, reasonable and not contrary to the public interest.

### **PROCESS TO OBTAIN A WAIVER**

State officers and employees seeking a waiver must submit a request in writing. The form to be used to request a waiver titled "Request for Waiver" is provided with these instructions.

The Governor has given the authority to decide on waiver requests to cabinet secretaries and commissioners, subject to the right to appeal an adverse decision to the Office of the Governor. The written request for a waiver must be submitted to the cabinet secretary or commissioner with responsibility for your agency (or your former agency for former officers and employees). The secretary or commissioner will arrange a time to ask questions about the contract and why a waiver would not be contrary to the public interest. The secretary or commissioner will act on your request within five working days of receipt. If there is no action on your request within five working days, contact Bureau of Human Resources at 605.773.3148 or Mallori.Barnett@state.sd.us.

If the state officer or employee is not happy with the decision of the secretary or commissioner, the state officer or employee may submit a written appeal to the Office of the Governor by hand delivering or emailing the request form, the secretary's or commissioner's decision and a short statement of your reasons for disagreeing with the decision to Mallori Barnett, Bureau of Human Resources, 500 East Capitol Avenue, Pierre, SD 57501-5070, Mallori.Barnett@state.sd.us. The Governor will act on all appeals within five working days of receipt.

**CAUTION:** The failure to act on a request for a waiver does not mean the waiver will be allowed. The state officer or employee must be diligent to request and follow through on waiver requests as necessary.

The request for waiver form will be filed with the Bureau of Human Resources and is a public record. Once a year, the Bureau of Human Resources (afterwards "BHR") will put together all of the waivers granted in the previous year and provide them to the Legislature's Government Operations and Audit Committee.

State officers and employees are encouraged to contact BHR at 605.773.3148 or Mallori.Barnett@state.sd.us with questions about the applicability of the law and the process for requesting a waiver.

### **USEFUL LINKS**

The law governing unlawful self-dealing, conflicts of interest and waivers will be found in South Dakota Codified Law (afterwards "SDCL") Section 5-18A-17 to SDCL 5-18A-17.6. Beginning July 1, 2015, they will be able to viewed at the South Dakota Legislative Research Council website (direct link the statutes will be available at this link:

[http://legis.sd.gov/Statutes/Codified\\_Laws/default.aspx](http://legis.sd.gov/Statutes/Codified_Laws/default.aspx)

### **INSTRUCTIONS FOR STATE OFFICERS AND EMPLOYEES SEEKING WAIVER**

If the potential for a conflict exists, you should immediately prepare and submit the form Request for Waiver.

Briefly describe your relationship to the contract in question and why you believe it may be covered by the law, including how you, your spouse or anyone with whom you live and commingle, or combine assets (for example, a girlfriend or boyfriend, roommate or adult child) might benefit from the contract.

Also briefly describe why you believe a waiver would not be contrary to the public interest. For example, was the contract part of a competitive bidding process? Were others involved in the decision-making process? Are the terms consistent with other, similar contracts?

**THE FORM IS A PUBLIC DOCUMENT THAT WILL BE OPEN TO PUBLIC INSPECTION.**

Your supervisor will ask follow-up questions as necessary to help determine if there was any quid pro quo, or a promise for something for the contract, if the officer or employee is a covered person and/or might derive a benefit, and if a waiver would be contrary to the public interest. Some of these questions might include important details about the contract, including compensation received by the state officer or employee or his or her spouse.

### **INSTRUCTIONS FOR OFFICIAL ACTING ON REQUEST**

Upon receipt of a written request for a waiver, you must promptly review it and if you deem it necessary, schedule an interview with the employee. Interviews are encouraged for anything other than the most basic waiver requests.

In the interest of fairness to officers and employees requesting waivers and persons with whom they may be dealing, and as directed by the Governor, all requests for waivers must be acted on by you within five (5) business days of receipt of the written request form. If you deem the form incomplete, you must address any questions during the interview; you may not use an incomplete request form as a reason to extend the review time.

You may delegate the responsibility to act on waiver requests in your absence to a deputy secretary or commissioner.

Employees have been instructed to contact BHR if action is not taken within five working days.

Anything other than the most basic request for a waiver will require probing questions from you concerning the requesting party's relationship to the contract (for example, why did you recommend approval; what was the process for determining the award of the contract); the requesting party's relationship to the outside contracting party (for example, what is your relationship with the principals of the company; have you or any family members worked for this company in the past; do you or any of your family members plan to work for them in the future; are the terms of this contract consistent with other, similar contracts with other parties); whether the contract terms are reasonable and in the public interest (for example, price, the contractor's experience, the process used to award the contract); and any other questions you believe will help establish the true facts and circumstances surrounding the award of the contract and the request for waiver.

Facts and circumstances that should raise red flags, lead to further questions and possibly result in the denial of a waiver include the lack of any meaningful competitive process before the

award of the contract, price or other terms that seem unusual, and a job or employment terms offered to someone leaving state government by the contractor that are not generally consistent with the person's prior experience and pay.

Any notes you take during the interview and as a part of your deliberative process should be on a separate sheet of paper and maintained in your files; they should not be attached to the Request for Waiver form.

Your decision on the request should be noted on the form and signed. If the officer or employee appeals to the Office of the Governor, you will be contacted for an explanation of your reason for denying the request.

REQUEST FOR WAIVER

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**THIS IS A PUBLIC DOCUMENT**

Date: \_\_\_\_\_

Employee Name: \_\_\_\_\_

Employee Signature: \_\_\_\_\_

Agency: \_\_\_\_\_

Position No: \_\_\_\_\_

Title: \_\_\_\_\_

Brief explanation of your potential conflict of interest:

Brief explanation of your role in the award, administration or supervision of a contract with an outside party or your current or anticipated business transaction with a state agency (other than a contract of employment):

Brief explanation of why you believe a waiver should be granted:

**FOR AGENCY/BHR USE ONLY:**

Date received by official acting on request:

Signature of Official acting on request: \_\_\_\_\_

Name of Official acting on request (Please Print): \_\_\_\_\_

Date of interview:

Date acted upon:

Waiver granted? Y/N

If waiver is conditional, so note here (Y/N), list conditions on separate sheet and attach to this document.

Appeal requested? Y/N

Appeal received in Governor's Office:

Date appeal acted upon:

Waiver granted on appeal? Y/N

Received by BHR: