

**GENERAL GUIDANCE PERTAINING TO THE CONFLICT OF INTEREST
PROHIBITIONS CONTAINED IN
SDCL 5-18A-17 to 5-18A-17.6**

INTRODUCTION

The following is intended to provide additional guidance with respect to the ramifications of the passage of HB1064 during the 2015 Legislative Session, which is now codified in SDCL 5-18A-17 to 5-18A-17.6. The requirements contained herein are in addition to, and do not supersede or alleviate more stringent or specific requirements set forth in policy or regulation.

Generally speaking, absent a waiver, current and certain former state officers and employees (which includes employees of the Board of Regents and its institutions) are prohibited from contracting with state agencies (which includes the Board of Regents and its institutions) 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.

Please note that the prohibition on conflicts of interest applies not only to persons currently serving as state officers and employees; in certain instances, it also applies to persons previously serving as state officers and employees. The rules as they apply to former state officers and employees are described below.

These instructions will assist current and former state employees or officers (which includes the Board of Regents and its institutions) with determining whether a prohibited conflict exists or might exist, and will guide the current or former state officer and employee through the simple and expedient process that has been 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.

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; it does not include persons who perform 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 state government while he or she is in office, nor can they derive a benefit (defined below) 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 a contract of employment – 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 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 office. 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 a contract of employment – 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.

EXAMPLES OF TRANSACTIONS PROHIBITED ABSENT A WAIVER.

1. BHSU employee has a lawn care business on the side and enters into a seasonal contract (not hired as an employee) to mow Board of Regent properties. This is a prohibited contract with the state unless an authorization/waiver is requested and approved.

2. SDSU Tech Transfer Officer negotiates a license agreement with Startup Company A and recommends approval. SDSU VP for Research approves and signs the license agreement. The following persons are prohibited from having an interest in or benefiting from the license agreement with Startup Company Y: The recommending Tech Transfer Officer (negotiated and recommended approval), VP for Research (approved the license agreement), the President of SDSU (supervisor) and all their spouses and other persons with whom they live and commingle assets. Examples of prohibited benefits under the foregoing scenario (i.e. would require a waiver before proceeding): the VP for Research's spouse is the creator of the technology being licensed, the Tech Transfer Officer moonlights in the evenings for Startup Company Y or the President of SDSU has a 10% ownership interest in Startup Company Y.

3. USD advertises for bids for a new equipment storage shed. An employee at USD reviews the bids and recommends awarding the contract to Construction Company X. The VP for Finance at USD, operating under the authority delegated by the president, awards the contract. The following persons are prohibited from benefiting from the contract: the recommending USD employee (recommended the award), the VP for Finance at USD (approved the contract), the President of USD (supervisor) and their spouses and other persons with whom they live and commingle assets. Examples of prohibited benefits under the foregoing scenario: The VP for Finance's spouse works at Construction Company X or the President of USD has a 10% ownership interest in Construction Company X.

4. The SDSM&T President sits on the Board of Directors for Company Y, a for-profit company. Company Y wishes to enter into a sponsored research agreement with SDSM&T, which would be approved and signed by the SDSM&T VP for Research. The SDSM&T President would need to request a waiver from the Executive Director prior to the VP for Research entering into the sponsored research agreement with Company Y because the President, who supervises the VP for Research, sits on the Board of Directors for Company Y.

5. On June 15, 2015, a DSU employee, acting within the scope of the employee's duties, recommends the award of an IT contract to Company Z. The DSU employee then retires. Six months after retirement, the employee decides he or she would like some seasonal work and takes a job with Company Z. Before taking the job, the former DSU employee must apply for a waiver because the DSU employee would be taking a salary from Company Z within one year after recommending the award of a contract to that company.

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.

ADDITIONAL CONFLICTS AUTHORITY

There may be more specific conflict of interest prohibitions relating to your specific situation, either the Board Policy, Institutional Policy or Federal Regulation. You are encouraged to inquire of your supervisor as to the existence of any such regulations or policies. In the event the general law described in these instructions and the regulations specific to your situation are different, the more restrictive will govern.

PENALTIES FOR NON-COMPLIANCE

If a waiver is necessary but isn't sought or granted, the transaction 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, 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 office 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 a waiver is requested in writing, the relevant terms are disclosed in writing, the officer reviewing the waiver has reviewed the essential terms of the contract and the requesting party's role in the contract, and the terms of the contract are fair, reasonable and not contrary to the public interest. The waiver process is handled in accordance with your institutions specific process for requesting and approving the same. If the president of the institution is requesting a waiver, the same shall be requested from the Executive Director.