

2023 South Dakota Legislature

Senate Bill 189**AMENDMENT 189C
FOR THE INTRODUCED BILL**

1 **An Act to prohibit state purchasing agencies from contracting with companies**
2 **owned or controlled by certain foreign entities or governments.**

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 **~~Section 1. That chapter 5-18A be amended with a NEW SECTION:~~**

5 ~~Terms used in sections 2 to 8, inclusive, of this Act mean:~~

6 ~~(1) "Contract," an agreement, entered into by or on behalf of this state, for the~~
7 ~~purchase or lease of goods by the state, or for the provision of services, professional~~
8 ~~services, construction, or public improvements to the state, in return for compensation;~~

9 ~~(2) "Contractor," a vendor, supplier, or subcontractor that has submitted a bid,~~
10 ~~proposal, or offer for, or has been selected to engage in, providing goods or services to~~
11 ~~this state, provided the term does not include a sole proprietorship or individual United~~
12 ~~States citizen;~~

13 ~~(3) "Executive branch agency," an agency, authority, board, bureau, commission,~~
14 ~~department, or institution of this state, under the control of the Governor;~~

15 ~~(4) "Prohibited entity," an organization, association, corporation, partnership, joint~~
16 ~~venture, limited partnership, limited liability partnership, limited liability company, or~~
17 ~~other entity or business association, including all wholly owned subsidiaries, majority-~~
18 ~~owned subsidiaries, parent companies, or affiliates, of those entities or business~~
19 ~~associations, regardless of their principal place of business, which is ultimately owned or~~
20 ~~controlled, directly or indirectly, by:~~

21 ~~(a) A foreign national or a foreign parent entity from the People's Republic of China,~~
22 ~~the Republic of Cuba, the Islamic Republic of Iran, the Democratic People's Republic of~~
23 ~~Korea, the Russian Federation, or the Bolivarian Republic of Venezuela; or~~

24 ~~(b) The government of the People's Republic of China, the Republic of Cuba, the~~
25 ~~Islamic Republic of Iran, the Democratic People's Republic of Korea, the Russian~~
26 ~~Federation, or the Bolivarian Republic of Venezuela.~~

1 **Section 1. That § 5-18A-1 be AMENDED:**

2 **5-18A-1.** Terms used in this chapter and chapters 5-18B, 5-18C, and 5-18D mean:

- 3 (1) "Acceptance," the formal resolution of a purchasing agency authorizing the
4 execution of a design-build contract;
- 5 (2) "Biobased," any materials composed wholly or in a significant part of biological
6 products including renewable agricultural materials or forestry materials;
- 7 (3) "Contract," any type of agreement, regardless of what the agreement may be
8 called, for the procurement of supplies, services, or construction;
- 9 (4) "Construction," and "constructed," in addition to their ordinary meaning, repair,
10 demolition, and alteration;
- 11 (5) "Construction management," any project delivery system based on an agreement
12 whereby a construction manager provides leadership to the construction process
13 through a series of services to the purchasing agency;
- 14 (6) "Construction manager," any person or entity that provides construction
15 management services for a purchasing agency, and is either a construction
16 manager-agent or construction manager-at-risk;
- 17 (7) "Construction manager-agent," any construction manager that provides
18 construction management services to a purchasing agency in a fiduciary capacity;
- 19 (8) "Construction manager-at-risk," any construction manager that assumes the risk
20 for construction, rehabilitation, alteration, or repair of a public improvement and
21 that provides construction management services to the purchasing agency;
- 22 (9) "Design-build contract," any contract between a purchasing agency and a design-
23 builder to furnish the architecture, engineering, and related services as required,
24 and the labor, materials, and other construction services for a public improvement.
25 A design-build contract may be conditioned upon future refinements in scope and
26 price, and may permit the purchasing agency to make changes in the scope of the
27 project without invalidating the design-build contract;
- 28 (10) "Design-build proposal," an offer to enter into a design-build contract;
- 29 (11) "Design-build request for proposals," any document or publication whereby a
30 purchasing agency solicits proposals for a design-build contract;
- 31 (12) "Design-builder," any person that proposes to design and construct a public
32 improvement covered by the procedures of this chapter and chapters 5-18B, 5-
33 18C, and 5-18D;
- 34 (13) "Environmentally preferable product," any cleaning or maintenance product having
35 properties that minimize potential impacts to human health and the environment,

- 1 any product designed to conserve energy and water, any biobased product, and
2 any product containing recycled materials or recovered materials;
- 3 (14) "Internet," the international computer network of both federal and nonfederal
4 interoperable packet switched data networks, including the graphical subnetwork
5 called the world wide web;
- 6 (15) "Invitation for bids," any document, whether attached or incorporated by
7 reference, used for soliciting bids;
- 8 (16) "Officer," any elected official or administrative officer appointed to that position by
9 the governing body;
- 10 (17) "Performance criteria," requirements for the public improvement, including as
11 appropriate, capacity, durability, production standards, ingress and egress
12 requirements, building code requirements, or other criteria for the intended use of
13 the public improvement, expressed in performance-oriented specifications or
14 drawings suitable to allow the design-builder to make a proposal;
- 15 (18) "Performance criteria developer," any person and the person's subcontractors
16 retained by the purchasing agency to develop performance criteria;
- 17 (19) "Professional services," services arising out of a vocation, calling, occupation, or
18 employment involving specialized knowledge, labor, or skill, and the labor or skill
19 involved is predominantly mental or intellectual, rather than physical or manual;
- 20 (19A) "Prohibited entity," an organization, association, corporation, partnership, joint
21 venture, limited partnership, limited liability partnership, limited liability company,
22 or other entity or business association, including all wholly owned subsidiaries,
23 majority-owned subsidiaries, parent companies, or affiliates, of those entities or
24 business associations, regardless of their principal place of business, which is
25 ultimately owned or controlled by:
- 26 (a) A foreign parent entity from the People's Republic of China, the Republic of
27 Cuba, the Islamic Republic of Iran, the Democratic People's Republic of
28 Korea, the Russian Federation, or the Bolivarian Republic of Venezuela; or
- 29 (b) The government of the People's Republic of China, the Republic of Cuba,
30 the Islamic Republic of Iran, the Democratic People's Republic of Korea, the
31 Russian Federation, or the Bolivarian Republic of Venezuela.
- 32 A prohibited entity does not include a citizen or legal permanent resident of the
33 United States, or an individual foreign national;
- 34 (20) "Proposal," any offer to enter into contract in response to a request for proposals;

- 1 (21) "Purchasing agency," any governmental body or officer authorized by law,
2 administrative rule, or delegated authority, to enter into contracts;
- 3 (22) "Public improvement," the process of building, altering, repairing, improving, or
4 demolishing any public infrastructure facility, including any structure, building, or
5 other improvements of any kind to real property, the cost of which is payable from
6 taxes or other funds under the control of the purchasing agency, and includes any
7 local improvement for which a special assessment is to be levied;
- 8 (23) "Qualified agency," any public or private nonprofit corporation geographically
9 located in the State of South Dakota that provides services for persons with
10 disabilities and is certified by the Department of Human Services;
- 11 (24) "Request for proposals," any document, whether attached or incorporated by
12 reference, utilized by a purchasing agency when soliciting proposals for contracts
13 for the procurement of supplies, services, or construction;
- 14 (25) "Request for qualifications," the document or publication whereby a purchasing
15 agency solicits interested design-builders to pre-qualify for a design-build contract;
- 16 (26) "Resident," any person, partnership, association, limited liability company, foreign
17 limited liability company, corporation, or foreign corporation licensed to do
18 business within this state that has maintained a substantial and bona fide place of
19 business and has conducted business from within this state for at least one year
20 prior to the date on which a contract was awarded. The members of the partnership
21 or association shall have been bona fide residents of the state for one year or more
22 immediately prior to bidding upon the contract. A foreign corporation licensed
23 pursuant to §§ 47-1A-1501 to 47-1A-1532, inclusive, is not a resident as defined
24 by this section if the state or country in which it is organized enforces or has a
25 preference for resident bidders;
- 26 (26A) "Reverse auction," a purchasing process in which bidders submit bids in competing
27 to sell supplies or nonprofessional services in an open environment via the internet;
- 28 (27) "Sealed bid or proposal," a response to an invitation for bids or request for
29 proposals submitted in a manner where the contents of the bid or proposal cannot
30 be opened or viewed before the date and time of the formal opening without leaving
31 evidence that the bid or proposal has been opened or viewed;
- 32 (28) "Services," furnishing of labor, time, or effort by a contractor not involving the
33 delivery of a specific end product other than reports which are merely incidental to
34 the required performance;
- 35 (29) "Supplies," any property, including equipment, materials, and printing;

1 (30) "Surety," a bond or undertaking executed by a surety company authorized to do
 2 business in the State of South Dakota and countersigned by an agent of the
 3 company resident in the State of South Dakota. However, nothing in this
 4 subdivision requires countersignature of a bid bond.

5 **Section 2. That chapter 5-18A be amended with a NEW SECTION:**

6 ~~An executive branch~~A purchasing agency may not execute a contract that is subject
 7 to § 5-18A-14, 5-18A-40, 5-18B-29, 5-18B-44, or 5-18D-17 with a prohibited entity. ~~An~~
 8 ~~executive branch~~A purchasing agency may rely on a contractor's certification, made
 9 pursuant to section 3 of this Act, without conducting any further investigative research or
 10 inquiry. ~~Each executive branch agency shall reserve the right to terminate a contract with~~
 11 ~~a contractor that submits a false certification.~~

12 **Section 3. That chapter 5-18A be amended with a NEW SECTION:**

13 A request for proposal, an invitation to bid, or any other document issued by ~~an~~
 14 ~~executive branch~~ a purchasing agency, with the intent of soliciting responses for the
 15 potential award of a contract, must include notice of the certification requirement of this
 16 section.

17 Each ~~contractor bidder or offeror~~ shall, at the time a bid or offer is submitted, or
 18 at the time a contract that is subject to § 5-18A-14, 5-18A-40, 5-18B-29, 5-18B-44, or
 19 5-18D-17 is awarded or renewed, certify, in writing, that the ~~contractor bidder or offeror~~
 20 is not a prohibited entity.

21 If at any time thereafter, ~~the contractor~~ any party to a contract subject to § 5-18A-
 22 14, 5-18A-40, 5-18B-29, 5-18B-44, or 5-18D-17 becomes a prohibited entity, ~~the~~
 23 ~~contractor that party~~ must provide written notification to the ~~contracting executive branch~~
 24 ~~purchasing~~ agency. Upon receiving the notification, the agency may terminate the
 25 contract.

26 **Section 4. That chapter 5-18A be amended with a NEW SECTION:**

27 The commissioner of the Bureau of Administration, or the commissioner's designee,
 28 or the governing board of a unit of local government, as applicable, may waive the
 29 prohibition set forth in section 2 of this Act ~~with respect to and~~ the certification required
 30 in section 3 of this Act, except as prohibited by federal law, if:

- 31 (1) ~~The commissioner determines that compliance~~Compliance is not possible;

- 1 (2) The ~~goods supplies~~ or services subject to the contract are unique or would be
2 otherwise unavailable; or
3 (3) There is no other market participant.

4 **Section 5. That chapter 5-18A be amended with a NEW SECTION:**

5 ~~Each executive branch agency shall implement the requirements of section 2 of~~
6 ~~this Act in accordance with all applicable state laws and rules, and all federal laws and~~
7 ~~regulations. Nothing in section 2 of this Act may affect the state's receipt of federal funds.~~

8 ~~Any certification that falsely indicates a person is not a prohibited entity at the time~~
9 ~~of certification, and any failure to provide written notification to the purchasing agency~~
10 ~~that a person has become a prohibited entity as required by section 3 of this Act, is cause~~
11 ~~to suspend or debar a business under § 5-18D-12.~~

12 ~~**Section 6. That chapter 5-18A be amended with a NEW SECTION:**~~

13 ~~The commissioner of the Bureau of Administration may impose a civil penalty, in~~
14 ~~an amount not to exceed one thousand dollars, against any person for violating section 3~~
15 ~~of this Act. Any civil penalty collected pursuant to this section must be deposited into the~~
16 ~~state general fund.~~

17 ~~**Section 6. That chapter 5-18A be amended with a NEW SECTION:**~~

18 ~~A contractor who, pursuant to section 3 of this Act, submits a certification and~~
19 ~~falsely indicates the contractor is not a prohibited entity at the time of certification, or who~~
20 ~~becomes a prohibited entity after certification and fails to provide written notification to~~
21 ~~the contracting executive branch agency, is liable for a civil penalty in the greater of:~~

- 22 ~~(1) Two hundred and fifty thousand dollars; or~~
23 ~~(2) Two times the amount of the contract for which a bid or proposal was~~
24 ~~submitted, regardless of whether the bid or proposal was actually accepted by this state.~~

25 ~~If this section is violated, the executive branch agency shall terminate the contract~~
26 ~~with the contractor.~~

27 ~~A contractor upon whom a penalty is imposed under this section may not bid on~~
28 ~~any state contract for a period of three years from the date of the penalty.~~

29 ~~**Section 6. That chapter 5-18A be amended with a NEW SECTION:**~~

30 ~~An executive branch agency may not:~~

1 ~~(1) Procure or utilize any information or communication technologies, including~~
2 ~~devices, services, components, networks, and systems created, owned, or controlled by a~~
3 ~~prohibited entity, or by any other means made unsafe for this state's cybersecurity by any~~
4 ~~connection to a prohibited entity;~~

5 ~~(2) Procure or utilize any information or communication technologies, including~~
6 ~~devices, services, components, networks, and systems, if any federal agency has~~
7 ~~prohibited the sale of, restricted the licensing of, or otherwise limited the dissemination~~
8 ~~of, information or communication technologies on the basis that the entity selling, leasing,~~
9 ~~or otherwise distributing the technology or service poses a risk to national or state~~
10 ~~security;~~

11 ~~(3) Procure or utilize any information or communication technologies, including~~
12 ~~devices, services, components, networks, and systems that are designed, developed, or~~
13 ~~manufactured, or that are supplied by any affiliate, agent, or other actor working on behalf~~
14 ~~of, or for the benefit of, a prohibited entity, as determined by any federal or state~~
15 ~~governmental agency; or~~

16 ~~(4) Expose existing government information or communication technologies,~~
17 ~~services, equipment, components, networks, systems, or records to any prohibited entity,~~
18 ~~or any company, firm, individual, affiliate, agent, or any other entity or actor made unsafe~~
19 ~~for this state's cybersecurity by means of the entity's or the actor's connection to a~~
20 ~~prohibited entity.~~

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