

Chapter 18
(Senate Bill 189)

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

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

Section 1. That § 5-18A-1 be AMENDED:

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

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

- (13) "Environmentally preferable product," any cleaning or maintenance product having properties that minimize potential impacts to human health and the environment, any product designed to conserve energy and water, any biobased product, and any product containing recycled materials or recovered materials;
- (14) "Internet," the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork called the world wide web;
- (15) "Invitation for bids," any document, whether attached or incorporated by reference, used for soliciting bids;
- (16) "Officer," any elected official or administrative officer appointed to that position by the governing body;
- (17) "Performance criteria," requirements for the public improvement, including as appropriate, capacity, durability, production standards, ingress and egress requirements, building code requirements, or other criteria for the intended use of the public improvement, expressed in performance-oriented specifications or drawings suitable to allow the design-builder to make a proposal;
- (18) "Performance criteria developer," any person and the person's subcontractors retained by the purchasing agency to develop performance criteria;
- (19) "Professional services," services arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual;
- (19A) "Prohibited entity," an organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company, or other entity or business association, including all wholly owned subsidiaries, majority-owned subsidiaries, parent companies, or affiliates, of those entities or business associations, regardless of their principal place of business, which is ultimately owned or controlled by:
 - (a) A foreign parent entity from the People's Republic of China, the Republic of Cuba, the Islamic Republic of Iran, the Democratic People's Republic of Korea, the Russian Federation, or the Bolivarian Republic of Venezuela; or
 - (b) The government of the People's Republic of China, the Republic of Cuba, the Islamic Republic of Iran, the Democratic People's Republic of Korea, the Russian Federation, or the Bolivarian Republic of Venezuela.

A prohibited entity does not include a citizen or legal permanent resident of the United States, or an individual foreign national;
- (20) "Proposal," any offer to enter into contract in response to a request for proposals;
- (21) "Purchasing agency," any governmental body or officer authorized by law, administrative rule, or delegated authority, to enter into contracts;
- (22) "Public improvement," the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency, and includes any local improvement for which a special assessment is to be levied;

- (23) "Qualified agency," any public or private nonprofit corporation geographically located in the State of South Dakota that provides services for persons with disabilities and is certified by the Department of Human Services;
- (24) "Request for proposals," any document, whether attached or incorporated by reference, utilized by a purchasing agency when soliciting proposals for contracts for the procurement of supplies, services, or construction;
- (25) "Request for qualifications," the document or publication whereby a purchasing agency solicits interested design-builders to pre-qualify for a design-build contract;
- (26) "Resident," any person, partnership, association, limited liability company, foreign limited liability company, corporation, or foreign corporation licensed to do business within this state that has maintained a substantial and bona fide place of business and has conducted business from within this state for at least one year prior to the date on which a contract was awarded. The members of the partnership or association shall have been bona fide residents of the state for one year or more immediately prior to bidding upon the contract. A foreign corporation licensed pursuant to §§ 47-1A-1501 to 47-1A-1532, inclusive, is not a resident as defined by this section if the state or country in which it is organized enforces or has a preference for resident bidders;
- (26A) "Reverse auction," a purchasing process in which bidders submit bids in competing to sell supplies or nonprofessional services in an open environment via the internet;
- (27) "Sealed bid or proposal," a response to an invitation for bids or request for proposals submitted in a manner where the contents of the bid or proposal cannot be opened or viewed before the date and time of the formal opening without leaving evidence that the bid or proposal has been opened or viewed;
- (28) "Services," furnishing of labor, time, or effort by a contractor not involving the delivery of a specific end product other than reports which are merely incidental to the required performance;
- (29) "Supplies," any property, including equipment, materials, and printing;
- (30) "Surety," a bond or undertaking executed by a surety company authorized to do business in the State of South Dakota and countersigned by an agent of the company resident in the State of South Dakota. However, nothing in this subdivision requires countersignature of a bid bond.

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

A purchasing agency may not execute a contract that is subject to § 5-18A-14, 5-18A-40, 5-18B-29, 5-18B-44, or 5-18D-17 with a prohibited entity. A purchasing agency may rely on a contractor's certification, made pursuant to section 3 of this Act, without conducting any further investigative research or inquiry.

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

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

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

If at any time thereafter, any party to a contract subject to § 5-18A-14, 5-18A-40, 5-18B-29, 5-18B-44, or 5-18D-17 becomes a prohibited entity, that party

must provide written notification to the purchasing agency. Upon receiving the notification, the agency may terminate the contract.

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

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

- (1) Compliance is not possible;
- (2) The supplies or services subject to the contract are unique or would be otherwise unavailable; or
- (3) There is no other market participant.

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

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

Signed March 22, 2023
