CONFLICT OF INTEREST

Gerry Kaufman
ASBSD Director of Policy & Legal Services
605-773-2513
gkaufman@asbsd.org

Copyright © 2017 Associated School Boards of South Dakota
All Rights Reserved

SDCL 3-23-6

- The law requires school board members, business managers, chief financial officers, superintendents, chief executive officers,
- and any other person with the authority to enter into a contract or spend money

Copyright © 2017 Associated School Boards of South Dakota
All Rights Reserved

SDCL 3-23-6

- in an amount greater than $5,000,
- or multiple contracts in an amountgreater than $5,000 with the same party within a 12 month period,
- must disclose their "personal interest" in any contract between their school district and a third party.
  - "interest in a contract", and
  - "direct benefit from a contract"

**School District**

- **Contract**
- **School Official: Interest in or Benefit from the Contract**
- **3rd Party**

**SDCL 3-23-7.1**

- **INTEREST IN A CONTRACT**: if the person, person's spouse, or any other person with whom the person lives and commingles assets:
SDCL 3-23-7.1

(1) is employed by the party who has a contract with the school district or ed co-op; or
(2) receives more than nominal compensation or reimbursement for actual expenses for serving on a board of directors of an entity that derives income or acquires property directly from the contract.

SDCL 3-23-7

DIRECT BENEFIT FROM A CONTRACT:
- if the person, person's spouse, or any other person with whom the person lives and commingles assets:

SDCL 3-23-7

DIRECT BENEFIT FROM A CONTRACT

(1) is a party to or intended beneficiary of any contract held by the school district (or ed co-op, etc.) and a 3rd party;
(2) has more than a 5% ownership interest in an entity that is a party to any contract held by the school district or ed co-op;
DIRECT BENEFIT FROM A CONTRACT
SDCL 3-23-6

(3) acquires property under the contract; or
(4) receives compensation, commission,
    promotion, or other monetary benefit directly
    attributable to a contract with school district
    or ed co-op.

SDCL 3-23-7.2

NO
direct benefit from
OR interest
in a contract
IF:

SDCL 3-23-7.2  No direct benefit
from or interest in a contract IF:

(1) the contract/multiple contracts with the
same party within a 12 month period has a
total value of less than $5,000;
(2) the person only receives nominal income
or compensation, a per diem authorized by
law, or reimbursement for actual expenses
incurred;
SDCL 3-23-7.2 No direct benefit from or interest in a contract IF:

(3) the person receives income as an employee of a party with whom the school district or ed co-op has a contract, or is independent contractor, unless the person receives compensation or a promotion directly attributable to the contract, or unless the person is employed by the party as a board member, executive officer, or other person working for the party in an area related to the contract;

(4) the contract is subject to bidding;

(5) discussion/vote relates to general application;

(6) the contract is for the sale/services/repairs/maintenance at price or below price offered to all customers;

(7) the contract is with the official depository; or

(8) the contract value is associated with publicly-traded investments or holdings.
A person receiving a **direct benefit** from a contract and requesting an authorization shall make the request prior to entering into any contract that requires disclosure or within 45 days after entering into the contract.

The Board may authorize a person to derive a direct benefit from a contract if:
1. The person has provided full written disclosure to the governing board
   - of all parties to the contract,
   - the person's role in the contract,

... disclosure of
- the purpose or objective of the contract,
- the consideration or benefit conferred or agreed to be conferred upon each party,
- and the duration of the contract;
and

(2) The governing board finds that the terms of the contract are fair, reasonable, and not contrary to the public interest.

SDCL 3-23-7

• No board member of a local service agency, school district, or cooperative education service unit may participate in or vote upon a decision of a local service agency, school district, or cooperative education service unit relating to a matter in which the member derives a direct benefit.

SDCL 3-23-8

• An authorization by the governing board requires no further disclosure or authorization unless the contract extends into consecutive fiscal years.
• If the contract extends into consecutive fiscal years, disclosure shall be made annually at the annual reorganization meeting but no new authorization is required.
SDCL 3-23-8

- If the Board rejects the request for authorization, the contract is voidable and subject to disgorgement, or the person may resign from the school district or cooperative education service unit.

SDCL 3-23-8

Any request for authorization or governing board action are public records.
- The official minutes of the governing board shall include any governing board action on each request for authorization and shall be filed with the auditor-general and attorney general.

SDCL 3-23-8

- Auditor-General Dept. of Legislative Audit:
  email to: Sheri.Doolittle@state.sd.us.
- South Dakota Attorney General:
  email to: ATGMinutes@state.sd.us; OR mail to: Office of the Attorney General, 1302 E.Hwy 14, Suite #1, Pierre SD 57501
A person who has an interest in a contract shall disclose the existence of the contract and the person's role in the contract, but no governing board authorization is required for the person to have an interest in the contract.

Disclosure shall also be made at the annual reorganization meeting if the contract extends into consecutive fiscal years. The interest disclosure shall be included in the official minutes of the governing board.

Each local service agency, school district, or cooperative education service unit shall develop a written conflict of interest policy, including any disclosure and authorization form that includes the list of any disclosable interest in contracts or direct benefits covered by this chapter.
Consequences for not complying with SDCL Ch. 3-23 conflict of interest laws:

Penalties (for knowing violation)
- $2,000 fine and/or one year in jail (Class 2 M)
- Removed as school board member
- Employment terminated
- Contract voidable
- Benefit forfeited

However, the law also says that a person who submitted a good faith disclosure and, if applicable, an authorization request, may not be convicted of a crime.
"No elective county, municipal, or state officer or the holder of any other office, the duties of which are incompatible or inconsistent with the duties of a school board member, shall be eligible for such membership."

* "Teacher," a person whose assigned duties require the person to be issued a certificate as a teacher. SDCL 13-42-1(7)
SDCL 6-1-1

- It shall be unlawful for any officer of a ... school district, who has been elected or appointed, to be interested, either by himself or agent, in any contract entered into by said ... school district, either for labor or services to be rendered, or for the purchase of commodities, materials, supplies, or equipment of any kind ... or in the purchase of any real or personal property belonging to the ... school district....

SDCL 6-1-1

- Such contract shall be null and void from the beginning.

SDCL 6-1-2

- The provisions of § 6-1-1 are not applicable if the contract is made pursuant to one of the conditions in the following subdivisions, without fraud or deceit.... the contract is voidable if the provisions of the applicable subdivision are not fully satisfied or present at the time the contract was entered into.
Any contract involving

(1) $5,000 or less regardless of whether other sources of supply or services are available within the school district, if the consideration for such supplies or services is reasonable and just;

(2) more than $5,000 but less than the amount for which competitive bidding is required*, and there is no other source of supply or services available within the school district if the consideration for such supplies or services is reasonable and just and if the accumulated total of such contracts paid during any given fiscal year does not exceed the amount in § 5-18A-14; [* $25,000/$50,000]

(3) Any contract with any firm, association, corporation, or cooperative for which competitive bidding is not required and where other sources of supply and services are available, and the consideration for such supplies or services is reasonable and just, unless the majority of the governing body are members or stockholders who collectively have controlling interest, or any one of them is an officer or manager of any such firm, association, corporation, or cooperative association;
(4) Any contract for which competitive bidding procedures are followed pursuant to chapter 5-18A or 5-18B, and where more than one such competitive bid is submitted;

(5) Any contract for professional services with any individual, firm, association, corporation, or cooperative, if the individual or any member of the firm, association, corporation, or cooperative is an elected or appointed officer of the school district, whether or not other sources of such services are available within the school district, if the consideration is reasonable and just;

(6) Any contract for commodities, materials, supplies, or equipment found in the state contract list established pursuant to § 5-18D-6, at the price there established or below;
(7) Any contract or agreement between a governmental entity specified in § 6-1-1 and a public postsecondary educational institution if an employee of the Board of Regents serves as an elected or appointed officer for the governmental entity, and if the employee does not receive direct compensation or payment as a result of the contract or agreement; and

(8) Any contract with any firm, association, corporation, individual, or cooperative association for which competitive bidding procedures are followed pursuant to chapter 5-18A, and where only one such competitive bid is submitted, provided the procedures established in § 6-1-2.1* are followed.

*bid notice placed on the state's central bid exchange for two weeks prior to the opening of bids

"If a board member's interest fits within any of these categories, that board member either has an actual bias or an unacceptable risk of actual bias. These categories are succinct and informative. We believe the categories can serve as guidance to South Dakota officials and courts in determining whether an actual bias or an unacceptable risk of actual bias exists."
(1) “Direct pecuniary interests,” when an official votes on a matter benefiting the official’s own property or affording a direct financial gain;

(2) “Indirect pecuniary interests,” when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;

(3) “Direct personal interest,” when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman’s mother being in the nursing home subject to the zoning issue; and
Hanig v. City of Winner, 2005 SD 10, ¶ 19

(4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.

The SD Supreme Court decided Hanig v. City of Winner in January, 2005.

During the 2005 legislative session, the legislature passed what is now SDCL 6-1-17 (effective July 1, 2005).

SDCL 6-1-17

"No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in discussion or voting. However, no such official may participate in discussing or vote on an issue if the following circumstances apply:
(1) The official has a direct pecuniary interest in the matter before the governing body; or
(2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.”

“If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official’s vote.”

- The Supreme Court in Hanig said the entire board decision is thrown out!!!!