

# STATE OF NEW YORK

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5449--A

2019-2020 Regular Sessions

## IN SENATE

May 1, 2019

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Introduced by Sen. SKOUFIS -- (at request of the State Comptroller) -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- recommitted to the Committee on Finance in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the state finance law, in relation to establishing the ethical standards for state agency contractors act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Legislative findings and intent. The legislature finds that  
2 to a great extent, state agencies and public authorities rely on  
3 contractors to help accomplish a broad array of complex, inherently  
4 governmental and mission-critical functions. State agencies and public  
5 authorities contract for services that involve the contractors' exercise  
6 of judgment, providing operational and policy advice to state officers  
7 and employees, overseeing other contractors and, at times, working  
8 alongside state officers and employees on the same projects. This inter-  
9 mingling of public and private workforce reveals a need to address what  
10 processes are in place to ensure the integrity of government operations  
11 and maintain public confidence.

12 While a majority of contractors deliver services with integrity, some  
13 contractors could, nonetheless, engage in misconduct during the course  
14 of the contract term - for example, engaging in acts for personal finan-  
15 cial gain, accepting inappropriate gifts, or inappropriately negotiating  
16 for certain jobs.

17 Furthermore, in carrying out the day-to-day tasks for state agencies  
18 and public authorities, contractors often require extensive access to  
19 and use of nonpublic government information. Protection of nonpublic  
20 information is critical, because unauthorized disclosure can erode the  
21 integrity of government operations and lead to situations in which such

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 information is misused for private gain, potentially harming important  
2 interests such as the privacy of individuals, commercial business  
3 proprietary rights, security, and law enforcement.

4 The legislature further finds that opportunities for organizational  
5 and personal conflicts of interest by contractors, and the misuse of  
6 nonpublic information by contractors through negligence or misconduct,  
7 can have a significant effect on the government's ability to perform its  
8 primary functions, potentially resulting in inappropriate use of taxpay-  
9 er dollars, damaged reputation, and loss of public trust.

10 The legislature further finds that while few cases of improper conduct  
11 by contractors have been publicly identified, safeguards are lacking to  
12 identify whether organizational or personal conflicts of interest exist  
13 among contractors. The cost to the state of contractors or their employ-  
14 ees engaging in actions reaping organizational or personal gain - an  
15 outcome increasingly likely based on sheer numbers - would likely never  
16 be known, let alone calculable, as long as there is no transparency.

17 § 2. Short title. This act shall be known and may be cited as the  
18 "ethical standards for state agency contractors act".

19 § 3. The state finance law is amended by adding a new section 148 to  
20 read as follows:

21 § 148. Ethical standards for contractors performing inherently govern-  
22 mental and mission-critical functions or rendering services pursuant to  
23 an information-risk contract. 1. For the purposes of this section, the  
24 following terms shall have the following meanings:

25 (a) "State agency contractor" or "contractor" shall mean an individ-  
26 ual, subcontractor, or other agent of the contractor who, or an entity  
27 which, pursuant to contract or other arrangement with a state agency and  
28 under the supervision or oversight of a state officer or employee, (i)  
29 performs or assists a state agency in the performance of inherently  
30 governmental activities and mission-critical functions, or (ii) renders  
31 services pursuant to an information-risk contract.

32 (b) "State agency" shall mean any state department, or division,  
33 board, commission, or bureau of any state department; the state univer-  
34 sity of New York or the city university of New York and the independent  
35 institutions operating statutory or contract colleges on behalf of the  
36 state; any public benefit corporation, public authority or commission at  
37 least one of whose members are appointed by the governor other than a  
38 local authority as defined in section two of the public authorities law;  
39 and any governmental entity performing a governmental or proprietary  
40 function for the state, other than the legislature or the judiciary.

41 (b-1) "Employee" shall mean any officer, employee, agent or represen-  
42 tative of a state agency contractor.

43 (c) "Inherently governmental and mission-critical function" shall mean  
44 a function that involves the discretionary exercise of state government  
45 authority, or involves monetary transactions and entitlements including,  
46 but not limited to, program management support, systems engineering,  
47 technical assistance, or contract and acquisition support. Inherently  
48 governmental and mission-critical functions shall include, but are not  
49 limited to:

50 (i) The determination of state budget priorities, policy, guidance or  
51 strategy;

52 (ii) The determination of state agency policy, such as determining the  
53 content and application of regulations;

54 (iii) The direction and control of state employees;

1 (iv) The selection or non-selection of individuals for state govern-  
2 ment employment, including the interviewing of individuals for employ-  
3 ment;

4 (v) The approval of position descriptions and performance standards  
5 for state employees;

6 (vi) The approval of state government property to be acquired or  
7 disposed of and on what terms; provided, however, a state agency may  
8 give contractors authority to dispose of property at prices within spec-  
9 ified ranges and subject to other reasonable conditions deemed appropri-  
10 ate by such state agency;

11 (vii) Approving any state contractual documents, including documents  
12 defining requirements, incentive plans and evaluation criteria;

13 (viii) Awarding, administering or terminating contracts;

14 (ix) Determining whether contract costs are reasonable, allocable and  
15 allowable;

16 (x) The approval of state licensing actions and inspections;

17 (xi) The conduct of criminal investigations; or

18 (xii) The control of prosecutions and performance of adjudicatory  
19 functions.

20 (d) "Nonpublic information" shall mean information under a state agen-  
21 cy's authority or control, the unauthorized access to, or loss, misuse,  
22 or modification of, which may compromise important interests, such as  
23 personal or medical privacy, government security, law enforcement,  
24 proprietary rights, or the conduct of state agency programs. Nonpublic  
25 information includes, but is not limited to, information that:

26 (i) is exempt from disclosure under article six of the public officers  
27 law or otherwise protected from disclosure by law, rule or regulation;  
28 is private information, the release of which would constitute a security  
29 breach under section two hundred eight of the state technology law; has  
30 been designated as confidential by a state agency; has not been dissem-  
31 inated to the public and is not authorized to be made available to the  
32 public on request; is personal identifying information including, but  
33 not limited to, a person's name, social security number, birth date,  
34 health/medical information, financial information, or taxpayer data; or  
35 is source selection information including, but not limited to, source  
36 selection plans, technical evaluation plans, cost evaluations or rank-  
37 ings;

38 (ii) is business proprietary information relating to trade secrets,  
39 operations, apparatus, or processes; or

40 (iii) is state agency information related to continuity of operations  
41 information; security management information, planning information,  
42 budgeting information, protection services/ building security informa-  
43 tion, or personnel records.

44 (e) "Proprietary information" shall mean information including, but  
45 not limited to, source selection, business proprietary information or  
46 personal information as such term is defined in section ninety-two of  
47 the public officers law.

48 (f) "Information-risk contract" shall mean any contract pursuant to  
49 which certain state agency contractors may:

50 (i) receive access to information relating to a state agency's deli-  
51 berative processes, management operations, or staff, which is not gener-  
52 ally released or available to the public;

53 (ii) have access to proprietary information that could be exploited  
54 for financial gain; or

55 (iii) have access to nonpublic information.

1 (g) An "organizational conflict of interest" shall mean a state agency  
2 contractor's present or currently planned interests, including business  
3 or relationships with other private sector entities, which either  
4 directly or indirectly relate to the work to be performed under a state  
5 agency contract and (i) which may diminish its capacity to give impar-  
6 tial, technically sound, objective assistance or advice, or (ii) may  
7 result in it having an unfair competitive advantage.

8 (h) A "personal conflict of interest" shall mean a state agency  
9 contractor's employee's performance of services or exercise of  
10 discretion under a state agency contract, in a way to benefit such  
11 contractor's employee or his or her relative including, but not limited  
12 to, financial conflicts of interest where the contractor's employee or  
13 relative stands to gain or lose financially from the contractor's work;  
14 lack of impartiality; acceptance of gifts valued at fifty dollars or  
15 more alone or in the aggregate within a given twelve-month period from  
16 an individual or entity reviewed, audited, or investigated under the  
17 state agency contract, or from anyone who could be affected by the  
18 performance of the contractor's duties.

19 (i) "Relative" shall mean any person living in the same household as  
20 the individual and any person who is a direct descendant of that indi-  
21 vidual's grandparents or the spouse of such descendant.

22 (j) "State agency contract" shall mean a contract with a state agency  
23 to perform an inherently governmental and mission-critical function, or  
24 an information-risk contract.

25 2. Any contract executed by a state agency with a contractor perform-  
26 ing or assisting or providing advice to a state agency in the perform-  
27 ance of an inherently governmental and mission-critical function, and  
28 any information-risk contract shall:

29 (a) prohibit a contractor from organizational conflicts of interest  
30 with respect to such state agency contract except to the extent that  
31 such contractor has disclosed such conflict to the state agency and  
32 proposed a method of mitigation or elimination satisfactory to such  
33 agency;

34 (b) prohibit contractors' employees from taking any action that would  
35 constitute a personal conflict of interest as defined in paragraph (h)  
36 of subdivision one of this section and provide that such agency may,  
37 when a contractor discloses that a personal conflict of interest has  
38 occurred, take appropriate action;

39 (c) include a nondisclosure agreement or clause requiring the contrac-  
40 tor to certify that they have an executed nondisclosure agreement for  
41 each individual employed by such contractor pursuant to a state agency  
42 contract as a condition of access to nonpublic information and requiring  
43 that agreements between such contractors and third parties must protect  
44 the state agency's nonpublic information;

45 (d) require contractors to obtain written consent from the state agen-  
46 cy prior to disclosing nonpublic information to subcontractors or  
47 others;

48 (e) require contractors to train at least biannually its employees and  
49 subcontractors, if any, rendering services on state agency contracts  
50 regarding organizational conflicts of interest, personal conflicts of  
51 interest and protection of nonpublic information and the consequences  
52 for unauthorized disclosure or misuse of such information;

53 (f) require contractors to immediately notify the state agency regard-  
54 ing any such organizational or personal conflicts of interest, or the  
55 misuse or unauthorized disclosure of nonpublic information; and

56 (g) impose consequences for violations.

1 3. Contractors shall be responsible for the security of any system  
2 relating to nonpublic information whether such system is maintained  
3 electronically or otherwise.

4 4. Contractors involved in source selection and related activities  
5 supporting award of state agency contracts shall be subject to laws and  
6 regulations to prevent release of nonpublic information.

7 5. In addition to the requirements of subdivisions two, three and four  
8 of this section, contractors performing inherently governmental and  
9 mission-critical services or information-risk contract services for  
10 which more than five million dollars is to be paid and involving work in  
11 excess of one hundred twenty days shall be required to have a written  
12 code of business ethics and conduct. The provisions of this subdivision  
13 shall not apply to contracts for the purchase of commodities.

14 6. The comptroller, in his or her discretion, may promulgate rules and  
15 regulations addressing the appropriate content for a model written code  
16 of business ethics to be utilized by contractors and employees of such  
17 contractors performing inherently governmental and mission-critical  
18 functions, or rendering information risk contract services, for the  
19 purpose of preventing organizational and personal conflicts of interest  
20 and protecting nonpublic information.

21 (a) The comptroller's regulations may include safeguards to identify  
22 and prevent organizational and personal conflicts of interest including,  
23 but not limited to:

24 (i) prohibiting the contractor's employees from participating in a  
25 state agency contract in which they have a personal conflict of inter-  
26 est, absent notification to the contracting state agency and specific  
27 approval to proceed following mitigation;

28 (ii) requiring the contractor's employees avoid the appearance of loss  
29 of impartiality in performing contracted duties;

30 (iii) requiring the contractor to review and address any of its  
31 employees' personal conflicts of interest before assigning them to  
32 deliver services;

33 (iv) prohibiting the contractor's employees from using nonpublic  
34 information obtained while performing work under contract for personal  
35 gain;

36 (v) prohibiting the contractor's employees who provide procurement  
37 support services from initiating a future employment contact or future  
38 employment contacts involving a bidding state agency during an ongoing  
39 procurement;

40 (vi) imposing limits on the ability of the contractor and its employ-  
41 ees to accept gifts in connection with contracted duties;

42 (vii) prohibiting misuse of contract duties to provide preferential  
43 treatment to a private interest; and

44 (viii) establishing disciplinary processes for violations of such  
45 codes.

46 (b) Such regulations shall require contractors to:

47 (i) report any organizational or personal conflict of interest  
48 violations by an employee of such contractor to the applicable state  
49 agency contracting officer as soon as identified;

50 (ii) maintain effective oversight to verify compliance with safe-  
51 guards; and

52 (iii) establish and maintain procedures to screen for potential  
53 conflict of interest for all employees either on a task by task basis or  
54 annually, through a financial disclosure statement.

55 7. When review of contractor disclosure pursuant to paragraph (a) of  
56 subdivision six of this section reveals an actual or potential conflict

1 of interest, financial conflict of interest, impaired impartiality or  
2 misuse of information and authority, contractors shall establish proce-  
3 dures to mitigate such conflict, impairment or misuse including, but not  
4 limited to, disqualification from being assigned to the government task,  
5 reassignment or divestiture.

6 8. In addition to the vendor responsibility process, state agencies  
7 may conduct regular background checks of state agency contractors and  
8 employees of such contractors performing inherently governmental and  
9 mission-critical functions, or rendering information risk contract  
10 services. Such background checks may include, at the state agency's  
11 discretion, fingerprinting of the state agency contractor's employees  
12 performing inherently governmental and mission-critical functions, or  
13 rendering information risk contract services or its personnel.

14 9. A contractor's failure to implement an adequate system for employee  
15 conflict certification, to disclose or correct instances of personnel  
16 misconduct, or to take appropriate disciplinary measures against an  
17 employee who commits misconduct may be grounds for contract termination  
18 by the state agency.

19 § 4. This act shall take effect one year after the date on which it  
20 shall have become a law and apply to contracts executed on and after  
21 such date; provided, however, that effective immediately, any rule or  
22 regulation necessary for the timely implementation of this act on its  
23 effective date is authorized and directed to be made and completed on or  
24 before such effective date.