

**STATE OF SOUTH DAKOTA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER 2023-04**

Whereas, The Second Amendment guarantees to the people the “right to keep and bear Arms,” a right that before the Founding was “one of the fundamental rights of Englishmen” and that was considered fundamental “by those who drafted and ratified the bill of rights,” *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010); and,

Whereas, Article VI, § 24 of the South Dakota Constitution also protects the fundamental and individual “right of the citizens to bear arms in defense of themselves and the state” by providing that the right “shall not be denied”; and,

Whereas, The residents of South Dakota are entitled to a government dedicated to preserving that ancient, fundamental right even when it is hindered by non-state actors; and,

Whereas, The State has the authority to award contracts to financial institutions to perform services for the State of South Dakota where it is intended that the public is directly or indirectly benefited; and,

Whereas, State funds given in consideration for those contracts should not be used to hinder the exercise of fundamental rights, including the right to keep and bear arms; and,

Whereas, Some financial institutions employ subjective or category-based evaluations to deny certain groups—such as firearm-related entities—access to financial services; and,

Whereas, Those decisions are often made in response to pressure from outside advocates whose policy objectives of limiting the availability of firearms, ammunition, or other firearm accessories are served when such financial institutions deny access to financial services to firearm-related entities; and,

Whereas, Denying financial services to an organization based solely on its status as a firearm-related entity seeking financial services is discriminatory; and,

Whereas, Such discriminatory business practices hinder the ability of the residents of South Dakota to exercise their right to keep and bear arms by limiting opportunities for firearm-related entities to do business in South Dakota; and,

Whereas, It is important that financial institutions perform individualized, quantitative risk-based analysis when deciding whether to offer their services to any business; and,

Whereas, Principles of due process forbid financial institutions from denying financial services to firearm-related entities absent a risk analysis that looks not to the entity's status as a firearm-related entity but to whether the entity and trade associations can survive a traditional risk-based analysis:

NOW, THEREFORE, I, KRISTI NOEM, Governor of the State of South Dakota, by the authority vested in me by the Constitution and the Laws of the State, do hereby Order and Direct the following:

Section 1 Definition: These words shall have the meanings indicated:

- A. "Ammunition" means a loaded cartridge case, primer, bullet, or propellant powder regardless of whether it has a projectile;
- B. "Contract" means any type of agreement by or on behalf of the State with a financial institution to provide services of any kind to the State in return for a fee, or any other form of compensation to be paid or provided by the State;
- C. "Contractor" means a financial institution as defined herein that has submitted a bid or offer for or has been selected to engage in providing goods or services to the State;
- D. "Discriminate against a firearm-related entity" means to:
 - a) Refuse to engage in the trade of any good or service with the entity based solely on its status as a firearm-related entity;
 - b) Refrain from continuing an existing business relationship with the entity based solely on its status as a firearm-related entity; or
 - c) Terminate an existing business relationship with the entity based solely on its status as a firearm-related entity; and
 - d) "Discriminate against a firearm-related entity" does not include a financial institution's decision—for reasons other than the entity's status as a firearm-related entity—to refuse to engage with, to refrain from continuing, or to terminate an existing business relationship
 - (i) to comply with federal, state, or local law, policy, or regulations or a directive by a regulatory agency, or
 - (ii) for any traditional business reason that is specific to the customer or potential customer and not based solely on the entity's status as a firearm-related entity;
- E. "Executive branch agencies" means each state agency, authority, bureau, board, commission, department, or institution of the State of South Dakota that is controlled by the governor;

- F. "Financial institution" means a bank, insurance company, credit union, savings and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment, and currency exchange and that has \$100 billion or more in total assets;
- G. "Firearm" means any weapon from which a projectile or projectiles may be discharged by gunpowder, which gunpowder includes any propellant that upon oxidization emits heat and light and is commonly used in firearms cartridges;
- H. "Firearm accessory" means any item that is used in conjunction with or mounted upon a firearm but is not essential to the basic function of a firearm, including any telescopic or laser sight, magazine, flash or sound suppressor, folding or aftermarket stock and grip, speed loader, ammunition carrier, or light for target illumination;
- I. "Firearm-related entity" means:
- a) A firearm, firearm accessory, or ammunition manufacturer, distributor, wholesaler, supplier, or retailer;
 - b) A sport shooting range as defined by SDCL 21-10-33; and
 - c) A firearm trade association; and
- J. "Firearm trade association" means any person, corporation, unincorporated association, federation, business league, or business organization that
- a) Is not organized or operated for profit and for which none of its net earnings inures to the benefit of any private shareholder or individual,
 - b) Has two or more firearm-related entities as members, and
 - c) Is exempt from federal income taxation under Section 501(a), Internal Revenue Code of 1986, as an organization described by Section 501(c) of that code.

Section 2 Prohibition: No executive branch agency may execute a Contract with a Contractor that discriminates against a firearm-related entity, regardless of whether the subject matter of the Contract is related to the discriminatory activity of the Contractor. An executive branch agency may rely on a Contractor's certification made consistent with this Order without conducting any further investigative research or inquiry. Each executive branch agency, however, shall expressly include in any Contract subject to this Order the authority to terminate said Contract if it becomes clear to the contracting executive branch entity that the Contractor submitted a false certification or acts in a way that makes the certification false after it is made.

Section 3 Cancellation: Each executive branch agency that learns that a Contractor has submitted a false certification shall terminate the Contract by giving the Contractor thirty (30) days' written notice and opportunity to be heard. If a Contractor submits a true certification that it later notifies the contracting executive branch in writing is no longer true because of the Contractor's subsequent actions, the notification by the Contractor shall satisfy the right to be heard provided by this section. Upon learning that the Contractor is no longer compliant with the

requirements of this Executive Order, the executive branch agency will give the Contractor an opportunity to become compliant by ceasing any discrimination against a firearm-related entity and, if the Contractor fails to do so, the executive branch agency shall terminate the Contract.

Section 4 Certification: A Contractor must certify in writing when a bid or offer for services subject to this Executive Order is submitted or when a Contract is awarded or renewed, that (a) it has not discriminated against a firearm-related entity, regardless of whether the subject matter of the Contract is related to the discriminatory activity of the Contractor; and that (b) if at any time after making this certification the Contractor engages in such discrimination, the Contractor will timely notify the contracting executive branch agency in writing. All competitive sealed bids and proposals issued for a Contract, as defined within this Executive Order, with executive branch agencies shall include the text of the following certification to be completed by the bidder or offeror:

“For contractors who enter into a contract with the State of South Dakota that involves the expenditure of one hundred thousand dollars (\$100,000) or more, by submitting a response to this solicitation or agreeing to contract with the State, the bidder or offeror certifies and agrees that the following information is correct:

“The bidder or offeror, in preparing its response or offer or in considering proposals submitted from qualified, potential vendors, suppliers, and subcontractors, or in the solicitation, selection, or commercial treatment of any vendor, supplier, or subcontractor, has not discriminated against a firearm-related entity as defined in Executive Order 2023-04. It is understood and agreed that, if this certification is false, such false certification will constitute grounds for the State to reject the bid or response submitted by the bidder or offeror on this project and that the State will terminate any contract awarded based on the bid or response. The bidder or offeror further agrees that falsely submitting this certification shall serve as cause for debarment from consideration of any state contract for a period not to exceed three years.

The successful bidder or offeror further agrees to provide immediate written notice to the contracting executive branch agency if during the term of the contract it no longer complies with this certification and agrees such noncompliance will result in the contract's termination if the noncompliance is not cured as provided for in Section 3 of Executive Order 2023-04. The successful bidder or offeror further agrees that its failure to cure any subsequently arising noncompliance shall serve as cause for suspension or debarment from consideration of any state contract pursuant to SDCL 5-18D-12.”

Section 5 Debarment: Any contracting executive branch agency that either terminates a Contract as provided in Section 3 of this Executive Order or that rejects a bid or response submitted by a bidder or offeror because the bidder or offeror provided a false certification shall report the reason for rejection or termination to the Commissioner of the Bureau of

Administration. A false certification is grounds for suspension or debarment pursuant to SDCL 5-18D-12.

Section 6 Notice: A request for proposal, invitation to bid, or other document issued by an executive branch agency with the intent of soliciting responses for the potential award of a Contract shall include notice of the certification requirement of this Order.

Section 7 Oversight: The Commissioner of the Bureau of Administration, or his designee, shall oversee this Order to ensure implementation and enforcement.

Section 8 Execution: Executive branch agencies shall implement this Order in a manner that is consistent with all applicable state or federal laws or regulations. Nothing in this Order shall operate to contravene any state or federal laws or to affect the State's receipt of federal funding.

Section 9 Severability: If any provision of this Order or its application to any entity is held invalid by any court of competent jurisdiction, all other provisions or applications of this Order shall remain in effect to the extent possible without the invalid provision or application, and this Order is severable.

Section 10 Application: This Order applies to Contractors who enter into a Contract with the State of South Dakota to provide financial services that involves the expenditure of one hundred thousand dollars (\$100,000) or more.

Section 11 Effective Date: This Order is prospective, effective thirty days after signature, and shall continue in effect until amended, modified, terminated, or rescinded by the Governor.

Dated in Pierre, South Dakota this 14th day of April, 2023.

Kristi Noem
Governor of South Dakota

ATTEST:

Monae L. Johnson
Secretary of State