

Contract Exemption 2022-03

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The West Virginia Ethics Commission

Opinion Sought

The **West Virginia Department of Transportation, Division of Highways**, seeks a contract exemption to allow it to contract with one of its employees, Charles Murphy, for the free use of a computer application under a license agreement that allows Murphy to retain the intellectual property rights to any improvements to the application that may result from the agency's use of the product.

Facts Relied Upon by the Commission

1. The West Virginia Division of Highways (DOH) is part of the West Virginia Department of Transportation (DOT).¹
2. One of the DOH's primary duties is to develop infrastructure in the state for the welfare of WV citizens and for economic development. The DOH is responsible for maintaining the state road system. W. Va. Code § 17-2A-8.
3. The DOH employs Charles Murphy as a Highway Engineer Trainee 2. The job description for this position states, in part:

Employees in this class participate in an on-the-job training program under the supervision of Highway Engineers. Assignments are varied, becoming more complex, and designed to further develop the employee's ability to apply knowledge and skills in the civil engineering field for the solution of practical problems and to develop solutions which conform to departmental policies, rules and regulations as well as professional standards.

4. Mr. Murphy performs work for the DOH District 2 Maintenance Design Section, which covers five counties and is based in Huntington. Mr. Murphy's work with the Maintenance Design Section mostly involves pavement and pile wall design.² His other responsibilities include performing data analysis and helping to reconcile the District's data with the DOH Central Office Operations Division data.
5. Mr. Murphy also has assigned duties which he performs at the DOH Central Office Operations Division located in Charleston, WV. Mr. Murphy reports to and performs work for the Operations Division one or two days a week. His Operations Division duties include assisting the DOH with developing its Maintenance Management System

¹ W. Va. Code § 5F-2-1.

² Pile walls are a form of a retaining wall.

("Maintenance System"). For example, he reconciles data from the ten DOH Districts. He also assists with the system software and system architecture for the DOH's new asset management system, a technology-based system. He also assists with extrapolating and compiling data for items such as road miles paved, ditching progress, and related DOH activities.

7. Mr. Murphy's other roles at the Operations Division include reviewing data collection initiatives that are underway. He is not in charge of the Operation Divisions' computer applications nor does he oversee other aspects of its data collection procedures. The DOH states, however, that Mr. Murphy has significant expertise in computer systems and serves in an internal consulting role on improving the DOH's internal maintenance system.

8. Mr. Murphy is the sole owner of Road Data System, LLC, which he formed in 2019. The listed business purpose on the Secretary of State's website is "data processing, web hosting, and related services." [Secretary of State Business and Licensing](#) Individually and through this company, Mr. Murphy has developed a computer application ("app") that allows data to be inputted and uploaded even if there is no cellular phone or internet service in the area. His app also has an information system which uses data from the linear referencing system used by the DOT and other government agencies and industries.

9. The DOT describes the linear referencing system on its [website](#) as follows:

The WVDOT [linear referencing system \(LRS\)](#) contains multiple linear referencing methods (LRMs) by which events (assets or activities) are recorded against a location in the agency's highway network.

The LRS road network data here is developed based on the Countywide Milepoint LRM. Per the LRM, Interstates are set up as continuous routes across county boundaries and their mile points are not reset at county boundaries. However, such a route has a unique Route ID in each county that it crosses; and for all the other routes, belonging to various other sign systems, their Start / End mile points are reset at county boundaries. For more detail on the WVDOT Countywide Milepoint LRM, please refer to the documents below.

10. The DOH seeks permission to use Mr. Murphy's app for the following reasons:

a. The app will allow DOH maintenance employees and other employees to upload information in the field, as opposed to inputting their information back at an assigned workstation. For example, if a DOH employee discovers that a roadway on a rural secondary route is slipping over the hillside, the DOH employee can note that deficiency and upload the information in real time.

b. The use of the app will allow the DOH to determine what it needs to enable its employees to remotely input data in real time. While technology included with the app is part of the system it will need, the DOT will need other equipment and technology services to make the new system workable.

11. The DOH will have some of its crews use the app to determine what type of technology would best serve the DOT's needs and objectives relating to maintaining its road system and accurately keeping track of repairs or improvements that are needed or have been made.

12. Once the DOH has used the app, it will issue a Request for Proposals and any vendor with the applicable technology may submit a proposal. The DOH does not state whether it would accept a proposal submitted by Mr. Murphy or his company. This Contract Exemption request is not intended to request authority to purchase Mr. Murphy's app in the future. The request is limited, instead, to allowing the DOH to use his app to determine the future technology needs of the DOH to meet its objective of uploading data in real time in the field.

13. Mr. Murphy has a patent pending on his app. He has not, at present, sold his app to any government agency or business.

14. Mr. Murphy will allow the DOH to use his app for free, pursuant to the terms of the agreement, however, any improvements made to his app by the DOH will belong to him as the app licensor. The License Agreement also states that: "To the fullest extent practicable, LICENSEE [the DOT] shall cooperate in assisting the Licensor [Murphy] in pursuing any patent applications LICENSOR elects to file at LICENSOR's sole cost and expense. Provided, LICENSEE cannot provide legal advice or services to LICENSOR."

15. Mr. Murphy, as part of his public job duties and during his public work hours, will participate in matters relating to the use and development of his app by the DOH.

16. The DOH states that its technology employees and the WV Office of Technology have determined that the use of Mr. Murphy's app is in the best interest of the state to enable the DOT to determine what apps, operating systems, and services it needs to implement real time data inputting by DOH employees.

17. Mr. Murphy's regular job duties do not involve responsibility for bidding, letting, or approving DOH contracts.

18. If the DOH is authorized by the Ethics Commission to contract with Mr. Murphy to use his app, the DOH will sign a formal License Agreement that governs the use of the app, including, as set forth above, providing that Mr. Murphy will retain the intellectual property rights to any improvements made by the DOH to his app.

19. The DOH states that its goal is not to improve Murphy's app, but acknowledges that through its use of the app, it might make changes which improve the app.

20. The DOH states that it will cause a hardship if it is unable to use Mr. Murphy's app because the app's capabilities allow the DOH to achieve, in part, its goal of uploading data in real time. The DOH states, however, that the implementation of this goal will require various additional technology components. Until the DOH implements and tests the app in the field, it will not be able to troubleshoot or determine exactly what technology is required to meet its overall objectives. Only after testing the technology, will the DOH have the necessary information to draft and publish a Request for Proposals to purchase the required technology on the open market.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(d)(1) states, in relevant part:

[N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control Provided, however, That nothing herein shall prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code § 6B-2-5(d)(3) states, in relevant part:

If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

W. Va. Code § 6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

Opinion

Prohibited Contract

The Ethics Act prohibits a public official or public employee from having more than a limited financial interest, i.e., \$1,000, in the profits or benefits of a public contract over which he or she has direct authority or control unless the government agency which employs him or her seeks, and receives, an exemption to contract with the public employee. W. Va. Code § 6B-2-5(d).

Pursuant to the terms of a proposed License Agreement, DOH employee Charles Murphy will allow the DOH to use his app for free, but Mr. Murphy will retain the intellectual property rights to any improvement made by the DOH to the app he has developed. Further, Mr. Murphy will be working with the DOH, during his public work hours, to facilitate the DOH's use of his app and to make changes to the app to conform to the DOH's needs. Murphy thereby may derive benefits from the DOH's use of his app and the terms of the License Agreement. While it is not the DOH's goal to improve the app, the DOH acknowledges that its use and testing of the app might result in the improvement of the technology employed by the app.

There is a \$1,000 exception in the Ethics Act but this exception only allows a public employee or public official to have an interest in a public contract when he or she has not been involved in matters relating to the contract. Mr. Murphy has been involved in his capacity as a DOH employee in assisting the DOH Operations Division with consulting on its Maintenance System, a technology system used for various reasons, including repairs to the state road system.

The Ethics Commission finds that Mr. Murphy has an interest in a public contract, the License Agreement, over which he exercises control because 1) he has served in a consulting role in the DOH's Operations Divisions on its maintenance operating system and 2) he will be using state time and resources to work on an app that he owns but is allowing the DOH to use and, if the DOH improves the app, those improvements will belong to him. The DOT must, therefore, receive a contract exemption to contract with Mr. Murphy.

Contract Exemption

The Commission may grant an exemption from the prohibitions in W. Va. Code § 6B-2-5(d) if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. The DOH states that its objective is to improve its maintenance tracking system by using technology that allows its employees to upload data in the field, even when there is no internet access or cellular phone coverage in an area. The app developed by Mr. Murphy allows data to be entered and uploaded in the field without internet or cellular phone coverage. Moreover, Mr. Murphy's app is programmed to pinpoint locations on the state roadway system based upon the linear referencing system, a system employed by the DOH,

other government agencies, utility companies, and other persons or entities to mark and track roads, pipelines, and similar assets.

The DOH states that it will cause an undue hardship if it is unable to use Mr. Murphy's app because the app's capabilities allow the DOH to, in part, implement its long-term goal of having DOH employees upload data in real time in the field. The DOH states, however, that the implementation of this goal will require various additional technology components and that the DOH will not be able to troubleshoot or determine the types of technologies required to meet its overall objectives until it uses Mr. Murphy's app. Only after testing the app's technology with the DOH's current maintenance computer system and its employees who work in the field, will the DOH have the necessary information to draft and publish a Request for Proposals to purchase the required technology, required to upload data in real time in the field, on the open market.

The Ethics Commission finds that it would create an undue hardship to prohibit the DOH's free use of Mr. Murphy's app for the purpose of determining its technology needs to improve the state road maintenance system in the long run. **The DOH may, therefore, enter into a License Agreement with Mr. Murphy under terms that allow the DOH to use his app for free but allow Mr. Murphy to retain the ownership interests in any improvements made to his app by the DOH through its use of the app. This Contract Exemption does not authorize the DOT or DOH to purchase the app or other technology from Mr. Murphy in the future.**

The Ethics Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this Contract Exemption is limited to the facts and circumstances of this particular case and may not be relied upon as precedent by other persons or entities.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission