

CONTRACT EXEMPTION NO. 2013-02

Issued on June 6, 2013 By the
WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **West Virginia State Police** seeks an exemption to award a contract to Roger Reed, its armorer, to purchase patrol rifles from West Virginia Law Enforcement Distributors, Inc., owned by Roger Reed.

FACTS RELIED UPON BY THE COMMISSION

The West Virginia State Police (State Police) issued a request for bids, along with bid recommendations of five prospective bidders as required by the West Virginia State Purchasing Division (State Purchasing), for AR-15 style patrol rifles (rifles).

Prior to 2010, the State Police did not issue rifles to its members, and in 2010, it placed its first bid request. Roger Reed, then a uniformed officer, made several recommendations about the specifications of the rifle. This bid covered not only the rifles, but also replacement parts packages and training, and was awarded to, based on information available, the manufacturer of the rifles. The current bid was prepared by Major Tincher who requested this contract exemption on behalf of the State Police. Major Tincher modified the prior bid by removing the unnecessary elements, such as training and parts packages, and submitted it to State Purchasing. State Purchasing requires the bid to be accompanied by a list of five recommended prospective bidders in an effort to increase the number of bids received, in addition to being placed on the bulletin posted by the State of open bid requests. This bulletin is freely available and open to the general public.

The recommended prospective bidders, Galls, Southern Police Supply, The Officer's Store, Smith and Wesson Corporation, and Towne Police Supply, all declined to respond to the bid solicitation. The State Police only received one bid, from West Virginia Law Enforcement Distributors, Inc. (WVLED), which was not among the five recommended prospective bidders.

WVLED is owned by Roger Reed, a retired member of the State Police and currently its armorer. The armorer is a full-time civilian position that provides technical assistance with weapon system selection and written technical specifications and advice to facilitate the purchase of firearms, optics, and accessories. Reed generally provides the State Police with technical assistance and written technical specifications about weapons and accessories. The State Police notes, however, that it has purchased and issued these weapons well before Reed took his current position.

The State Police maintains that it needs these rifles to assist in the fulfillment of its statutory mission:

[T]he statewide enforcement of criminal and traffic laws with emphasis on providing basic enforcement and citizenship protection from criminal depredation throughout the state and maintaining the safety of the state's public streets, roads and highways.

W. Va. Code §15-2-12(a).

The State Police has purchased and distributed these weapons in the past and state that the rifles are a useful tool in protecting the citizens of West Virginia. The State Police says it will cause significant hardship and cost, as well as cause a delay in distributing patrol rifles to its members if it forced to re-bid the contract. In some cases of need, the agency is permitted to purchase the items directly from a retailer until a bid can be awarded.

The State Police notes that with current supply and demand issues, the retail price of a base rifle without the special features required by the State Police is approximately \$1,250.00 per rifle, with a wholesale price of approximately \$850.00 each. The bid supplied by WVLED offers the rifles, with the necessary features, for \$785.00 per rifle. The contract is also written to allow other law enforcement agencies within the state to purchase the rifles.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. – (1) A public official or public employee may not knowingly or intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(d)(1) provides, in 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...

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result in excessive cost, undue hardship, or other substantial interference with the operation of a municipality the affected government body may make written application to the ethics commission for an exemption from subdivision (1) of this subsection.

ADVISORY OPINION

The Ethics Act, W. Va. Code § 6B-2-5(d)(1), prohibits public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

Here, a civilian State Police employee who works as its armorer submitted the only bid/proposal to the State Police. The Ethics Commission has previously ruled that care must be exercised in determining whether public servants who participate in obtaining or administering a grant may be paid under the grant due to the control they exercise in the grant application process. See *generally* A.O. 2012-45, wherein the Commission reviewed past opinions discussing this issue and further ruled that, due to the facts presented, a County must submit a contract exemption request if it wants to pay its attorney for performing additional duties for the County Building Commission. As Reed currently works as an armorer for the State Police, the State Police has properly submitted a contract exemption request before awarding the contract to Reed.

To obtain an exemption, the Requester must demonstrate that the prohibitions of the Ethics Act would constitute excessive cost, undue hardship, or other substantial interference with governmental operations. The Requester asks that it be allowed to award the contract to its employee because: it needs to distribute the rifles to its members without delay; it believes he is qualified; and it only received one application. To re-bid this contract would take additional time and may not result in additional applicants.

The State Police would suffer excessive costs because a new bid request would be required which may not result in any additional bids. If the State Police were forced to purchase the rifles at retail costs, the State Police would be required to pay nearly \$500.00 more for each rifle. The current bid offers the rifles at below wholesale cost and with the requested specifications for the rifles included in the price.

The State Police would also suffer undue hardship and substantial interference with governmental operations because the members of the State Police would not have access to the rifles and the State Police would have less money to spend on other needs.

Additionally, aside from any input Reed had regarding specifications on the original bid request that were carried over to the current request, he did not have any voice as to the current bid request.

Based upon the information provided by the Requester, the Commission finds that the Requester has demonstrated that prohibiting it from awarding the contract to its employee will result in excessive cost, undue hardship and other substantial interference with governmental operations as there does not appear to be another suitable candidate who is ready and willing to take on this position; particularly as conducting a search for such a person would involve re-advertising.

Additionally, in order to comply with the Ethics Act, Roger Reed, as the owner of WVLED and potential beneficiary of any future weapons contracts, may not be involved in determining the specifications, requirements, or drafting, of any future bid requests for the State Police in which WVLED, or any other company in which he has a financial interest, may bid. He must recuse himself from all matters relating to the State Police's decision to re-bid the rifle contract or change the specifications of it.

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


R. Kemp Morton, III, Chairperson