Advisory Opinion 2017-10

Issued on April 6, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commissioner** asks whether his company may sell construction materials and supplies to county contractors to use for their non-county projects.

Facts Relied Upon by the Commission

The Requester is the same Requester as in Advisory Opinion 2017-02. He indicated in his request for that Opinion that his company manufactures and purchases for resale construction materials. He estimated that his company provides 80 to 90 percent of certain construction materials that are used on site in West Virginia. In Advisory Opinion 2017-02, the Requester asked whether he may submit bids to contractors to provide construction materials and supplies that the contractors would in turn use for county projects. In that Opinion, the Ethics Commission held that W.Va. Code § 61-10-15 prohibits the Requester's company from submitting bids for contract materials to contractors because the Requester would have prohibited indirect financial interests in county contracts.

Considering the Commission's holding in Advisory Opinion 2017-02, the Requester now asks whether he may sell materials and supplies to those same contractors; however, the contractors would use these materials and supplies only for non-county projects.

Provisions Relied Upon by the Commission

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

> (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no 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§ 61-10-15 provides, in relevant part:

> (a) It is unlawful for any member of a county commission ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for

or the awarding or letting of a contract if, as a member, ... he or she may have any voice, influence or control ....

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The Ethics Act prohibits public officials, such as county commissioners, or businesses with which they are associated, from having more than a limited interest in the profits or benefits of a public contract over which the public official has direct authority or control. W.Va. Code § 6B-2-5(d). In addition, county commissioners must abide by the stricter prohibitions contained in W.Va. Code§ 61-10-15. W.Va. Code§ 61-10-15, a separate criminal statute, imposes criminal penalties against certain county officials, including county commissioners, who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which they exercise "voice, influence or control."

Under W.Va. Code § 61-10-15, the Ethics Commission must determine whether the Requester has a direct or indirect pecuniary interest in the county's contractors' non-county work. In Advisory Opinion 2002-15, a county school board member asked whether, under the Ethics Act or W.Va. Code § 61-10-15, the school board or its contractors may buy building materials from retailers who buy their stock from a distribution center that employs a board member. The Commission determined "that neither prohibition applies to the Board Member's situation because his financial interest is in the private contract between his customers and his employer - not the public contract between his customers and the Board." *Id.*

The Commission reasoned, in Advisory Opinion 2002-15, that "[t]he Board Member's financial interest is fixed and immutable when the sale to his customer [retail building supply companies] takes place and is unaffected by the ultimate disposition of the materials - regardless of where, when or whether they are sold." *Id.* In that Opinion, the board member did not know to whom the retailer companies would sell the products.

In Advisory Opinion 2017-02, the Ethics Commission found that a county commissioner's business was prohibited from providing materials directly to contractors for specific county projects because the commissioner and/or his business would become the county's subcontractor which is prohibited because a subcontractor has a prohibited indirect financial interest in county contracts. *Id.* "The Requester's financial interest is not fixed and immutable as was the sale at issue in Advisory Opinion 2002-15" but would instead be dependent on whether the contractor was awarded the county's project. *Id. (internal quotation omitted).*

The instant situation is distinguishable from Advisory Opinion 2017-02 and more akin to Advisory Opinion 2002-15. In the present situation, the Requester's company would not be a subcontractor to a county project. Requester's financial interest is in his customers', i.e., contractors', purchases from his materials and supplies business for non-county projects. The Requester's financial interest in the sale to contractors for non-county projects would not be dependent on whether the contractor was awarded county projects.

The Ethics Commission accordingly holds that the Requester's company may sell construction materials and supplies to county contractors to use for their non-county projects.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as *it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W Va. Code §§ 68-1-1 through 68-3-11, and* ***W*** *Va. Code§ 61-10-15, and does not purport to interpret other laws or rules.*

In accordance with ***W.****Va. Code § 68-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law* is *changed.*

/s/ Robert J. Wolfe, Chairperson
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