Advisory Opinion 2017-11

Issued on April 6, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A County Commissioner asks what precautions he must take to ensure that his company does not supply construction materials and supplies for use in county construction projects.

Facts Relied Upon by the Commission

The Requester is the same Requester as in Advisory Opinions 2017-02 and 2017-10. He indicated in his request for Advisory Opinion 2017-02 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.

The Requester states that his company provides construction products to many contractors, individuals and resellers for stock. He does not always know the final disposition and use of his products after he sells them. The Requester states that he does not knowingly provide his products to contractors and subcontractors to use on county projects.

The Requester's company informs all customers that want special order items for county projects that they may not use his products on county projects.

The Requester asks to what extent his company and its employees must inquire as to the final disposition of all materials sold to resellers and walk-in customers. In other words, the Requester asks, "Is ... [his company] and its staff required to ask all customers that walk in the office what the final disposition of the materials purchased will be to assure that no products end up on County projects?"

Provisions Relied Upon by the Commission

W.Va. Code§ 68-2-S(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."

In Advisory Opinion 2017-02, 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 as a subcontractor in county contracts.

As a result of the Ethics Commission's holding in Advisory Opinion 2017-02, the Requester asked, in Advisory Opinion 2017-10, whether he may sell materials and supplies to those same contractors to use for non-county projects. The Commission held that the Requester's company could sell its products to the contractors because, in that situation, the company would not be a subcontractor to a county project and the Requester's financial interest in the sale of materials to be used for non-county projects would not be dependent on whether the contractor was awarded county projects.

The Requester now asks whether and to what extent his company and its employees must inquire as to the final disposition of all of his products to ensure that his company does not supply construction materials and supplies for use in county construction projects.

The Ethics Commission took up this issue in Advisory Opinion 95-38. In that Opinion, the Requester was a county board of education member. The member's spouse had an ownership interest in a materials supply company. The Commission stated:

> The requester outlines reasonable steps which have been taken to ensure that the corporation in which her spouse has an ownership interest does not supply materials for use in county school board projects. The Board has instructed its own personnel and its contractors not to make purchases from

> the corporation. The requester's spouse, although a minority stockholder, requested the corporation not to sell materials for use on board of education projects. The Commission finds that it would not be a violatiol') of W.Va. Code§ 61-10-15 if, despite such precautions, a subcontractor for a Board contractor, exercising independent judgment in its choice of material supplier, purchased material from the spouse's corporation for use on a Board project ... The Commission cautions that this opinion is not a blanket grant of immunity from the sanctions contained in W.Va. Code§ 61-10-15 for transactions involving suppliers and materialmen to subcontractors of a county contractor. Situations could arise where the board of education, collectively or through the efforts of an interested member alone, exercised voice, influence or control over a subcontractor's choice of material supplier for use on a board project. If such voice, influence or control were established, then a violation of W.Va. Code§ 61-10-15 would exist.

The Commission now reaffirms its holding in Advisory Opinion 95-38.

The Ethics Commission declines to decree specific steps the Requester or other public servants must take to ensure compliance with Advisory Opinion 2017-02. The Commission instead holds that the Requester may not knowingly sell his products to contractors or subcontractors to use for county projects. The Requester's staff is not required to ask all customers what the final disposition of the materials purchased will be but, instead, the Requester must take reasonable precautions to ensure that his products are not sold to county contractors or subcontractors to use for county construction projects. By way of example only, taking the precautions set forth in Advisory Opinion 95-38 or posting a conspicuous notice at the company's sales locations would qualify as a reasonable precaution.

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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