Advisory Opinion 2017-02

Issued on January 13, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commissioner** asks whether his company may bid on contracts with contractors when those contractors will subsequently bid on county contracts. The Requester additionally asks whether his company may directly bid on contracts to provide materials and supplies to other county agencies.

Facts Relied Upon By the Commission

The Requester owns 47 percent of the stock in a privately-held company headquartered in the same county in which the Requester serves as a County Commissioner. The Requester's spouse owns one percent of the stock in the company, and his two sons own 19.5 percent and 17.5 percent, respectively. The company manufactures and purchases for resale all types of construction materials primarily used in on-site construction projects throughout West Virginia and surrounding states.

The Requester states that the company is the leading supplier in the state for many construction products. The Requester estimates that the company provides 80 to 90 percent of certain construction materials that are used on site in West Virginia. The Requester further estimates that the company provides approximately 80 percent or more of the construction items used in the local region, including in the Requester's county and surrounding counties. The Requester states that if the company is prevented from bidding on materials to contractors, the cost of the projects would likely increase as the availability of the products would be greatly reduced. The Requester states that the company even provides one of its products to its competitors because its competitors have no other source for the product and cannot produce the item internally.

The Requester states that before he took office as a County Commissioner, the County Commission set up a tax increment financing fund for projects in the county which were approved by the state. The Requester also states that before he took office, the Parks and Recreation Commission requested and received approval from the County Commission for a major expansion that is estimated to cost approximately $15 million. The project is to be completed in two phases. The Parks and Recreation Commission, whose members are appointed by the County Commission, accepted bids for phase one of the project before the Requester took office.

The Requester states that, in general, contractors receive multiple bids from suppliers for projects that the contractors will subsequently bid on. The Requester states that the contractors make an independent decision on who they purchase from and that contractors typically select the supplier that can provide the lowest price. Before the

Requester took office as a County Commissioner, his company bid on contracts to provide materials to contractors who subsequently bid on the contract for phase one of the Parks and Recreation Commission project. The Requester states that the two lowest bidding contractors for phase one of the Parks and Recreation Commission contract indicated that the bids they received from the Requester's company were low and were utilized in those contractors' bids to the Parks and Recreation Commission. The Requester states that based upon information provided to his company from these two contractors, the contract price for phase one of the project would be higher if his company is prohibited from bidding on the materials contracts.

The Requester states that due to a technical error, phase one of the project must be re-bid. The Requester asks whether his company may bid on providing materials to the contractors who will be bidding on phase one of the project. The Requester additionally asks whether the company may similarly bid on providing materials to contractors for phase two.

The Requester additionally asks whether his company may directly bid on providing materials and supplies to other county agencies, such as the county public service district and school board.

Provisions Relied Upon By the Commission

W.Va. Code§ 68-2-5(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 ....
>
> (2) In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:
>
> (A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;
>
> (B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.

(4) 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.

158 CSR 8-2 provides:

> Examples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents, assistant superintendents, purchasing directors, *County Commissioners,* County Board members and City managers.

(emphasis added).

158 CSR 8-4 provides:

> The prohibition of W. Va. Code § 6B-2-5(d) against being a party to or having an interest in the profits or benefits of a contract applies only to public contracts involving a governmental body or agency.
>
> Public officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

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 ....
>
> (h) Where the provisions of subsection (a) of this section 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 governmental body or agency, the affected governmental body or

agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

Advisory Opinion

The Ethics Act prohibits a county commIssIoner, or a business with which the commissioner is 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." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

The Ethics Commission will first address W.Va. Code§ 61-10-15 given the more stringent standards contained therein.

Analysis under W.Va. Code§ 61-10-15

The Requester, as a County Commissioner, is expressly subject to the prohibitions contained in W.Va. Code§ 61-10-15. The Requester has asked two separate questions that may implicate W.Va. Code § 61-10-15. The Commission will first address whether W.Va. Code§ 61-10-15 prohibits the Requester's company from bidding on providing materials to contractors who, utilizing the materials provided by the Requester's company, will subsequently bid on securing a contract with the Parks and Recreation Commission. The Commission will then address whether W.Va. Code § 61-10-15 prohibits the Requester's company from directly bidding on providing materials and supplies to county agencies, such as a public service district or school board.

Voice, influence or control

To decide whether the Requester's proposed conduct with regard to the Parks and Recreation Commission violates W.Va. Code § 61-10-15, the Commission must determine whether the Requester has "voice, influence or control" over the public contracts of the Parks and Recreation Commission and, if so, whether the Requester has a direct or indirect pecuniary interest in the contracts regarding the project at issue.

The Commission finds that the Requester has "voice, influence or control" over the public contracts of the Parks and Recreation Commission. The Requester states that the County Commission appoints the members of the Parks and Recreation Commission. The Ethics Commission has previously held that the power to appoint members to a public agency is enough to constitute voice, influence or control over that agency's contracts for

purposes of W.Va. Code § 61-10-15. Advisory Opinion 2009-01 ("[T]he Ethics Commission finds that the appointment power of a county commissioner constitutes voice, influence or control over county hospitals and the contracts entered into by the hospital board of trustees.") (citing *State v. Neary,* 365 S.E.2d 395, 400 (W. Va. 1987)); *see also* Advisory Opinion 2008-10 (finding that a county commissioner has voice, influence or control over the public contracts of a county airport authority because the county commission has the authority to appoint members to serve on the county airport authority board).

Direct or indirect pecuniary interest

The Ethics Commission must now determine whether the Requester has either a direct or indirect pecuniary interest in the public contract regarding either phase of the project. The Commission first finds that the Requester has a direct pecuniary interest in the privately-held company in which he owns 47 percent of the stock. *See* 158 CSR 8-4 ("Public officials ... or members of their immediate family are considered to be 'associated' with a business if they or their immediate family member are a ... holder of stock which constitutes five percent or more of the total outstanding stocks of any class.").

The Requester's company, however, is not directly entering into a public contract with the Parks and Recreation Commission. His company is instead seeking to provide materials to contractors who will thereafter bid on the Parks and Recreation Commission contract.

The Ethics Commission has consistently maintained that public officials who enter into subcontracts to perform work for a private employer with whom the public body has entered into a public contract remain subject to the prohibitions in W.Va. Code§ 61-10-15. In Advisory Opinion 95-44, the Commission held that it would be a violation ofW.Va. Code§ 61-10-15 "for a steel corporation which employs a County Commissioner to enter into a public contract directly with the County Commission or indirectly as a subcontractor to perform work on a County Commission project." The Commission relied upon the decision of the Supreme Court of Appeals of West Virginia in *Fisher v. Jackson,* 107 W.Va. 138, 147 S.E.541 (1929), from which it quoted:

> It is argued that the defendant was in fact working for C.C. Herring, and not for the board. Even if this were true, the statute covers this situation. A member of the Board will not be permitted to participate in the letting of a contract to one and then derive benefit indirectly therefrom by working for the party obtaining the contract. The plain mandate of the statute denies him the right to receive a benefit by indirection where he may not profit directly.

The Commission has applied this principle in several Advisory Opinions which hold that a public official has a prohibited indirect pecuniary interest in subcontracts on public projects. *See* Advisory Opinion 2013-27; Advisory Opinion 2013-22; Advisory Opinion 2012-40; Advisory Opinion 2003-02; Advisory Opinion 99-16; Advisory Opinion 94-22; Advisory Opinion 91-20 Supp.

The Commission, however, has taken a different approach when it comes to suppliers. In Advisory Opinion 95-38, the Commission was asked whether it is "a violation of WV Code 61-10-15 if a subcontractor of a County Board of Education contractor purchases materials for use in a board project from a corporation in which the spouse of a board member has an ownership interest." The Commission found "that it would not be a violation of WV Code 61-10-15 if ... a subcontractor for a Board contractor, exercising independent judgement in its choice of material supplier, purchased materials from the spouse's corporation for use on a Board project." The Commission cautioned though that its "opinion is not a blanket grant of immunity from the sanctions contained in WV 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."

Similarly, in Advisory Opinion 2002-15, a county school board member asked "if it [was] a problem for the Board, or its contractors, to buy building materials from retailers who buy their products from the Board Member's employer." The Commission stated that both the Ethics Act and W.Va. Code§ 61-10-15 "will be a problem, if the Board Member can be said to have an indirect financial interest in the Board's purchases from local building suppliers or in the Board's construction contracts, if they incorporate materials from his employer." *Id.* The Commission nonetheless 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, "[t]he Board Member's financial interest is fixed and immutable when the sale to his customer takes place and is unaffected by the ultimate disposition of the materials - regardless of where, when or whether they are sold." *Id.* The Commission still cautioned, though, that "[t]here remains a final, different type of sale which could pose a problem for the Board Member[,]" stating that "[i]t would be a violation of both WV Code 61-10-15 and the Ethics Act for him to sell building products directly to the Board or to special order materials for one of his customers for a Board job and receive a commission from the sale." *Id.*

The Ethics Commission finds that the Requester's company providing materials directly to the contractors for a specific Parks and Recreation Commission project is akin to the Commission's forewarning in Advisory Opinion 2002-15 of providing special order materials to a customer for a public agency job. The Requester's financial interest is not fixed and immutable as was the sale at issue in Advisory Opinion 2002-15. In that Opinion, the board member knew to whom he sold his products, but did not know to whom his customers sell those products. Additionally, the board member in Advisory Opinion 2002-15 stated there was not and would not be any "special orders" from his customers for sale to the board or from contractors for use on board projects. Here, the customers of the Requester's company are bidding on the project of the Parks and Recreation Commission, and are specifically relying on bids for materials provided by the Requester's company for a specific project of the Parks and Recreation Commission. The Requester's financial interest is directly tied to whether the contractors are able to secure the public

contract. **This is the type of indirect pecuniary interest in public contracts that W.Va. Code § 61-10-15 seeks to prohibit. Accordingly, W.Va. Code § 61-10-15 prohibits the Requester's company from submitting bids to provide contractors with materials for both phases of the Parks and Recreation Commission project.**

Additionally, the Commission acknowledges the Requester's representations that the cost of the Parks and Recreation Commission project will rise if the Requester's business does not provide materials to the contractors. The Commission notes that W.Va. Code§ 61-10-15(h) provides that "[w]here the provisions of subsection (a) of this section would result ... in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency, the *affected* governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section."

The Requester also inquires whether his company may directly bid on providing materials and supplies to other county agencies, such as the county public service district and school board. W.Va. Code§ 61-10-15 prohibits the Requester's company from directly entering into contracts with county agencies over which the Requester, as a County Commissioner, has voice, influence or control. **The Requester states that the County Commission appoints members to the county public service district. As stated above, this authority is enough to provide the Requester with the requisite voice, influence or control over the contracts of the public service district. Therefore, W.Va. Code§ 61-10-15 would also prohibit the Requester's company from directly contracting to provide materials to the public service district.** The Commission is without sufficient information to determine whether the Requester has voice, influence or control over other county agencies such as the school board.

Analysis under the Ethics Act

There is no need to address the Ethics Act's prohibition on public contracts since the Commission has determined that the Requester's proposed conduct is prohibited by W.Va. Code§ 61-10-15.

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 Jaw is changed.

/s/ Robert J. Wolfe, Chairperson
Robert J. Wolfe, Chairperson