ADVISORY OPINION NO. 2012-29

Issued On August 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Emergency Services Director** asks whether it is permissible to privately contract with the County to manage a federal grant given to the County for mitigation projects.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the Director of Emergency Services for a County, a full-time, salaried position. As the Director, the Requester is responsible for overseeing multiple County programs and services. His duties further include serving as the 911 Director and the floodplain permit officer.

The stated mission of the County Emergency Services is "[t]o guide and assist in response and recovery in times of disaster in [the] County" as well as "[t]o manage development within the floodplain by enforcement of the floodplain ordinance and the teaching of safe and secure development practices." Additionally, as the floodplain permit officer, the Requester is charged with enforcing the County's floodplain ordinances, as well as the issuance of permits for construction in a floodplain.

Over the past several years, the County experienced damaging floods, and the County Commission sought State/Federal funding for mitigation projects. In particular, the County has sought and received multiple Hazard Mitigation grants. While not a specified responsibility, the Requester states that he typically works with the County in securing the grant. Often times, following a disaster, the State/Federal entities will notify affected Counties of the availability of funds. In the past, the County Commission has designated the Requester to take the necessary steps to secure the grant, and then report back to the County Commission for finalizing the grant (e.g. approval and signature). According to the Requester, the grants are 75% Federal and 25% State, and are overseen by the WV Division of Homeland Security and Emergency Management.

Typically, the mitigation projects include: (1) Acquisition/demolition (e.g. county acquiring a flood prone structure and demolishing the structure); (2) Elevation (e.g. raising a structure out of the flooding hazard while ensuring the lower part of the structure will allow for the unobstructed flow of water.); (3) Relocation (e.g. physically moving a structure out of the hazard area); and (4) Flood-proofing (e.g. making a structure more resistant to the effects of flooding).

Under these grants, the County Commission serves as grantee and is responsible for overseeing/contracting with vendors to perform the various mitigation projects. As part of the oversight, the County typically is allocated a percentage of the grant for administration. Some counties use this administrative money to offset salaries for county employees that manage the mitigation projects as part of their county job duties/responsibilities.

Other counties contract with non-County government entities/individuals to manage the projects. In these situations, the entity/individual is treated as a vendor for purposes of the grant, and the entity/individual's services are invoiced and billed to the County. The County in turn pays the contractor from the allocated administrative percentage of the grant monies. The selection and payment of the project manager must comply with the grant guidelines, and the invoicing/payment is subject to oversight by the State in its role as Grantor.

The Requester's situation represents a hybrid of both practices. According to the Requester, the County sought and received a Hazard Mitigation Grant from the State/FEMA. According to the Requester, the County Commission desired to contract out the project manager position, and advertised for applicants. The Requester stated that he applied and was the only applicant.

As such, the County Commission executed a contract with the Requester to serve as the project manager under the Hazard Mitigation Grant. According to the Requester, his contractual role as the project manager is to administer the various mitigation projects through their completion. The Requester further states that the Municipality has historically only utilized the acquisition/demolition mitigation, and not the relocation or elevation mitigations. As a result, the Requester states that he has not yet sought or obtained a floodplain permit from the County for the mitigation projects.

The Requester states that he separates his project manager duties from his duties as Director of the County Emergency Services. In particular, he states that he works four 10 hour day shifts as the Director, and then performs his contractual work in the evenings and on days five and six of a typical week. He further states that he is compensated separately for the two jobs. With respect to his Director position, he is salaried employee of the County and paid from the County general fund. With respect to his contractual position, he states that he provides an invoice to the county for his contractual work, and is paid by the County, which in turn seeks reimbursement from the grant.

In light of his county position, the Requester desires to know whether it is permissible for him to contract with the County as the project manager.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads in relevant part:

> A public official or public employee may not knowingly and 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.
>
> 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) reads 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.

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

> 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 U) of this section.

Finally, W.Va. Code§ 61-10-15(a) reads, in pertinent part:

> It is unlawful for any member of a county commission, ... or any other county or district officer 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, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control...

ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W.Va. Code§ 6B-1-2(d).

In furtherance of this goal, the Legislature established certain limits and prohibitions to a public servant contracting with his/her own governmental entity. In particular, the Ethics Act prohibits public servants from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code§ 6B-2-5(d)(1). For purposes of this provision, a limited interest is defined as an interest which does not exceed one thousand dollars in the profits or benefits of the contracts in a calendar year. W.Va. Code§ 6B-2-5(d)(2)(A).

Additionally, the Ethics Act prohibits public servants from using their public office for private gain, and from receiving compensation for "the performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services." W.Va.Code § 6B-2-5(b).

Given the overlap between the Requester's floodplain duties and the mitigation projects, the Commission hereby finds that the contract with the County is impermissible under the Ethics Act. Specifically, the Commission finds that the Requester has direct authority and control over the contract, and would be receiving compensation for the performance of usual and customary public duties in violation of W.Va. Code§§ 6B-2-5(d) and (b).

In reaching this conclusion, the Commission notes that the Requester was involved in the approval and securing of the grant, even though the Requester has no formal voting authority on the County Commission. In particular, the County Commission delegated the grant process to Requester. He was responsible for obtaining the grant guidelines and in preparing the grant application to the State/Federal entity. Additionally, there is a clear appearance of control over the county contract since Hazardous Mitigation Project grants are only issued upon declaration of an emergency, and the stated mission of the Director is to "[t]o guide and assist in response and recovery in times of disaster in [the] County".

Finally, since there is potential overlap between his County employment duties and the mitigation project, the project manager contract constitutes impermissible "compensation" for the performance of the usual and customary duties, as well as constituent services within the County. This is especially true when considering flood mitigation projects, where the project manager is also the floodplain officer delegated to enforce floodplain ordinances.

Accordingly, having established that the Requester has a prohibited financial interest and improperly derives private compensation for his usual and customary public duties under the Ethics Act, the Commission hereby concludes that it is impermissible for the Requester to contract with the County to be the project manager for the County's mitigation projects.

Having found the contract to be prohibited, the Commission need not address whether W.Va. Code§ 61-10-15 (a criminal provision prohibiting certain County officials from having a financial interest in a public contract) is applicable.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.* and W.Va. Code§ 61-10-15, and does not purport to interpret other laws or rules. In accordance with W.Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson