

CONTRACT EXEMPTION NO. 2013-01

Issued on March 7, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **New River Community and Technical College** seeks an exemption to award a contract to William Loope, its Vice President for Institutional Advancement and Workforce Education, to administer a grant awarded by the United States Department of Labor.

FACTS RELIED UPON BY THE COMMISSION

The New River and Community Technical College received a United States Department of Labor grant in the amount of three million dollars (\$3,000,000.00). According to a September 19, 2012 Department of Labor press release, it issued five hundred million dollars (\$500,000,000.00) in grants to community colleges and universities around the country for the development and expansion of innovative training programs. In regard to the grant awarded to New River Community and Technical College, the Department of Labor press release states:

New River Community and Technical College and its industry and community partners seek to fill an urgent market gap in southeastern West Virginia by substantially enlarging its nursing and allied health care program to accelerate re-employment of Trade Adjustment Assistance-eligible participants, as well as returning veterans and other unemployed and underemployed workers into high-skill, high-growth jobs in one of the poorest rural regions in the nation. New River currently offers a small number of allied health care programs, but is seeking to expand and improve on these offerings.

After being awarded the grant, New River Community and Technical College issued a Request for Proposal (RFP) for a project manager. According to the RFP, the College partners with local vocational centers and others to design:

[c]ustomized certificate programs that emphasize industries and skills in which participants can obtain employment quickly and help to alleviate workforce shortages in critical industries that are targeted for growth and economic impact. These programs are designed specifically for adults with little or no postsecondary education, thus increasing adult access to higher education while providing training that is immediately relevant to the adult's employment goal.

The RFP further states that the person selected as the project manager for the grant will be required to provide the following services to New River Community and Technical College:

- Manage the multimillion grant from the Department of Labor (DOL);
- Manage additional grants in the support of the DOL grant;
- Communicate on a regular basis with the Federal Project Officer and the External Evaluator as required;
- Coordinate and oversee the expenditures associated with the grant(s);
- Foster collaboration, provide guidance and work with the college administration, faculty, and staff to meet the objectives of the grant;
- Prepare communication to inform the college community of the progress and achievement of the objectives of the grant; and,
- Attend meetings and workshops as required. Some travel required.

The Requester states that Mr. Loope had the following involvement in regard to securing the grant:

- He, along with other College Administrators, worked with a consulting firm to prepare the grant application.
- He is currently part of the management team for the grant and has been working with other College Administrators and employees to implement the requirements of the grant.

In regard to the RFP, his involvement included providing input. The Requester states that the RFP was developed by the Director of Purchasing at the College based on examples and standards provided by the WV Higher Education Policy Commission and Mountwest Community and Technical College. The draft RFP was reviewed by several members of the grant's management team.

The RFP was advertised on January 17, 2013 in the Charleston and Beckley newspapers and on the college website with sealed bids to be submitted by February 4, 2013. The Requester states that it did not advertise the RFP nationally as it assumed few people would want to move to the area as the RFP/contract is only for a three (3) year period.

The college only received one bid. That bid was from Mr. Loope. He states in his proposal that if he is awarded the contract, he will tender his resignation of employment within thirty (30) days of said award. Pursuant to the terms of the proposal submitted by Loope, he would be paid the following amounts:

Year 1 (2013)	Monthly fee of \$6,600.00 for 9 month period = \$58,500.00
Year 2 (2014)	Monthly fee of \$6,600.00 for 12 month period = \$82,800.00
Year 3 (2015)	Monthly fee of \$6,600.00 for 12 month period = \$82,800.00

In addition, his proposal notes that he is aware that additional grants may be needed to support the project. If the number of additional grants is 3 or less, then he will administer those grants in his flat fee.

If he has to administer four (4) to six (6) active grants, then his fee for service will be an additional \$900.00 per month (\$10,800.00) per year. If the amount increases to seven (7) to nine (9) active grants, then the additional fee for administering up to 9 grants is \$1,400.00 per month. (\$16,800.00) per year. Beyond that, the fee for administering separate grants must be negotiated. Hence, under the terms of the proposal, he may be paid up to \$99,600.00 per year for a three (3) year period.

The Requester states that it is the belief of the college that Mr. Loope did not have an unfair advantage in the RFP process. The Requester states “[a] critical consideration is the serious need of New River Community and Technical College to have a project manager. This \$3 million grant from the Department of Labor is very complex and requires these services immediately.” The three year time period the College has to expend the grant money has already commenced. Hence, the Requester wants to get a person in place to serve as the projector manager ASAP. The Requester has further communicated to the Ethics Commission staff that the College believes the person has the qualifications to serve in this position and it would be in the best interest of the College to hire him.

If awarded the contract, his fees will be paid with College funds, not grant money. The College will issue him a Form 1099; he will not be an employee. Further, as set forth in his proposal, he will resign his present employment position with the College.

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 College employee who assisted the College in applying for the grant and had some participation in the RFP process submitted the only bid/proposal to the College. 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 Mr. Loope was involved in securing the grant and in the RFP process, the College has properly submitted a contract exemption request before awarding the contract to Mr. Loope.

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.¹ The Requester asks that it be allowed to award the RFP to its employee because: it needs a project manager ASAP for this 3 year grant; it believes he is qualified; and it only received 1 application. To re-bid this contract would take additional time and may not result in additional applicants.

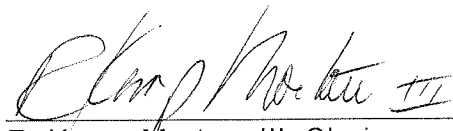
Based upon the information provided by the Requester, the Commission finds that the Requester has demonstrated that prohibiting it from awarding the contract to its employee will result in excessive cost, undue hardship and other substantial interference with governmental operations as there does not 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.

The exemption is contingent upon him resigning his present position before beginning the contract, and is subject to the following limitations: First, the Requester must receive

¹ W. Va. Code § 61-10-15 is inapplicable as this provision only governs County Officials.

confirmation from the DOL that hiring an employee who was involved in the process does not run afoul of any DOL conflict of interest policies or regulations. Second, it must have General Counsel for the Higher Education Policy Commission (HEPC) or his designee review the RFP, the Proposal submitted by Mr. Loope, and this Contract Exemption to ensure that the College has complied with applicable procurement laws and that there is nothing about the RFP process, or the requirements included in the RFP, which gave unfair advantage to the College's employee. Once the College has the DOL and HEPC review this matter, the Requester must submit a letter to the Ethics Commission setting forth the results therein, i.e. whether the DOL and HEPC agree that awarding the contract to Mr. Loope complies with the DOL and HEPC rules and regulations. The Requester must submit this letter to the Ethics Commission no later than 60 days from the issuance of this opinion. If either the DOL or HEPC expresses material concerns about Mr. Loope being awarded the contract, then the Ethics Commission staff will bring this matter again before the Ethics Commission for consideration.

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.

A handwritten signature in cursive script, reading "R. Kemp Morton, III". The signature is written in black ink and is positioned above a horizontal line.

R. Kemp Morton, III, Chairperson