

Contract Exemption 2017-07

Issued on November 2, 2017, by

The West Virginia Ethics Commission

Opinion Sought

The **Sheriff of Hardy County** requests an exemption to purchase emergency lighting equipment for the Sheriff's Office's law enforcement vehicles from a business owned by one of his deputies.

Facts Relied Upon by the Commission

The Hardy County Sheriff's Office ("Sheriff's Office") wants to purchase emergency lighting equipment for some vehicles it will be purchasing. The Sheriff's Office received three written quotes for the equipment. The names of the vendors and the prices they quoted are:

1. TJM Enterprises LLC - \$4,868.94
2. Mallimar, Inc. - \$5,233.58
3. Adamson Industries Corp. - \$8,032.50

TJM Enterprises is a business owned by Tommie L. McCausley II, an employee of the Sheriff's Office whose job title is Deputy Sheriff. According to the Requester:

This contract exemption would not be for the installation of the equipment due to the possibility that the employee may be utilized to install the equipment, no matter who it is purchased from, during normal working hours and would not receive any extra compensation for the installation of said equipment.

In Contract Exemption 2016-05, the Ethics Commission considered a Contract Exemption request from the Sheriff to make a similar purchase from the same deputy's business. In its ruling, the Commission granted the Sheriff a limited exemption to purchase, for a total cost of \$900, two emergency lighting equipment units from the deputy's business.

The Commission ruled in Contract Exemption 2016-05:

If the Requester seeks future Contract Exemptions for the purchase of additional emergency lighting equipment from the Deputy, he must submit written evidence that an attempt was made to obtain quotes or bids from other vendors to ensure no other vendors are willing and able to sell the office comparable units at a comparable price.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(d)(1) states, 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

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

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 (j) of this section.

W. Va. Code § 6B-2-5(d)(4) states, in relevant part:

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.

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

It is unlawful for ... any 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..., he or she may have any voice, influence or control

W. Va. Code § 61-10-15(h) states:

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.

Analysis

The Ethics Act prohibits a county employee or official 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 unless his or her governing body seeks, and receives, an exemption to contract with the public employee or official. W. Va. Code § 6B-2-5(d).

In addition to the Ethics Act, a county officer, including a deputy sheriff, must abide by the stricter prohibitions contained in W. Va. Code § 61-10-15. This Code provision, a separate criminal statute, imposes criminal penalties against county officers who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officers may exercise voice, influence or control. If either the Ethics Act or W. Va. Code § 61-10-15 prohibits a public official from entering into a public contract, a contract exemption is necessary.

The Commission held in Contract Exemption 2016-05 that the deputy sheriff in question, due to his job responsibilities in the Sheriff's Office, may exercise voice, influence or control over decisions of the Office relating to the purchase of emergency lighting equipment.¹ See Contract Exemption 2016-05, incorporated herein by reference. The deputy's job responsibilities included installing emergency lighting equipment on the Sheriff's Office's vehicles. The Commission finds there are no facts provided in the present Contract Exemption request which causes it to reach a different conclusion.

The Ethics Commission finds the deputy sheriff may exercise voice, influence or control over decisions of the Sheriff's Office relating to the purchase of emergency lighting equipment for its vehicles.

Next, the Ethics Commission must determine whether to grant an exemption. The Ethics Commission may grant an exemption from the prohibitions in W. Va. Code § 61-10-15 if it finds the prohibition will result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency.²

The quotes submitted by the deputy's business, TJM Enterprises, LLC, and the next lowest bidder, Mallimar Inc., are \$4,868.94 and \$5,233.58, respectively. The difference in the quoted prices is only \$364.64.

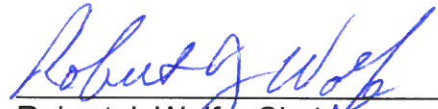
The test under the Ethics Act and W. Va. Code § 61-10-15 is not whether the public official or employee is the lowest bidder. Instead, the Commission must consider whether prohibiting the purchase will result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. In the present case, the Commission finds that requiring the Sheriff's Office to select the second lowest bidder will not result in excessive cost to it. Further, there are no facts which indicate that awarding the contract to the second lowest bidder will cause undue hardship or result in other substantial interference with the operation of the Sheriff's Office.

¹ The Commission did not analyze the application of the Ethics Act as it would have been academic.

² The test is the same under the Ethics Act. W. Va. Code § 6B-2-5(d).

Based upon the foregoing, the Ethics Commission hereby denies the Contract Exemption request. Accordingly, the Sheriff's Office may not purchase the emergency lighting equipment from TJM Enterprises, LLC, a business owned by a deputy sheriff.

The Ethics Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this Contract Exemption is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent by other persons or entities.



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission