

## **Contract Exemption 2018-01**

**Issued on February 1, 2018, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

The **Mineral County Ambulance Authority** requests an exemption to contract with Valley Regional Enterprises, Inc., which employs four Ambulance Authority board members.

### **Facts Relied Upon by the Commission**

On April 11, 2017, the Mineral County Ambulance Authority (“Ambulance Authority” or “Authority”) approved a motion to solicit bids for a contract to provide the Authority with a paramedic and other services related to its new “chase vehicle” program. The only bidder, Valley Regional Enterprises, Inc., a/k/a Valley Medical Transport (“VMT”), employs four members of the Authority’s board. The contract amount is \$88,432.00 per year for five years.<sup>1</sup>

The Ambulance Authority owns a fleet of ambulances, vehicles and equipment, which are dispatched by the county’s 911 dispatching center; however, it relies heavily on volunteer emergency medical service (“EMS”) companies to provide paramedics and emergency medical technicians. The Requester currently staffs its ambulances with personnel from nine EMS volunteer companies located in different geographical zones in the county.

The 911 center receives and dispatches calls for emergency assistance throughout the county. The 911 dispatcher notifies the volunteer EMS company closest to the emergency. The volunteer EMS company occasionally cannot timely respond to a call, *i.e.*, within seven minutes. This is especially true in the northern portion of the county where the response rates are lower than the rest of the county. The second closest EMS squad is then notified and given an opportunity to respond.

If there is no response approximately 14 minutes after the initial call, VMT, using its private ambulances and paid crews, along with the third and fourth closest volunteer EMS companies, are notified to respond to the emergency. If there is still no response, the 911 dispatcher requests help from outside the county. About 15% of the calls in the northern portion of the county are not responded to by the first EMS company in the particular zone. The “chase vehicle” program is intended to provide faster advanced life support services in the northern portion of the county.

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<sup>1</sup> The contract requires VMT to staff the county-owned chase vehicle with a paid paramedic, supplies, any drugs used, and a VMT-owned cardiac monitor.

Prior to soliciting bids for the chase vehicle contract, the Authority created a six-member ad hoc “chase car” committee which prepared the bid specifications. Three of the members of the ad hoc committee are employed by VMT.

The committee modeled its chase vehicle program after Hampshire County’s program. A chase vehicle is stationed at a centralized location and is used throughout a county unlike ambulances which are assigned to specific zones. A chase vehicle may be able to get to an emergency faster than an ambulance stationed in a zone that is farther away from the emergency. The paramedic in the chase vehicle provides advanced life support services while the patient waits for the ambulance and crew to arrive at the scene.

The Authority advertised a request for bids for the chase car contract in the Mineral Daily News Tribune on May 23, 2017, and May 30, 2017. The Authority routinely places its legal advertisements in this newspaper. (The Ethics Commission has reviewed the Requester’s procedure and believes the Requester complied with its normal procedure for soliciting bids for public contracts.)

In response to the advertisement for bids, Health Team Critical Care Transport, LLC, (“Health Team”), a private EMS company, requested bid information. On June 1, 2017, the Ambulance Authority sent it the bid specifications. On June 12, 2017, the Authority sent a follow-up email reminding Health Team that its bid proposal was due the next day. Health Team responded that it would not be submitting a bid.

On October 10, 2017, the Ambulance Authority met in a public meeting to vote on awarding the contract. The four members employed by VMT were present at the meeting and three spoke for and against the VMT contract during the deliberations. Two were in favor of VMT receiving the contract, and one member was against it. A vote on the contract was not held at that time.

### **Provisions Relied Upon by the Commission**

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

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 ....

W. Va. Code § 61-10-15(e) states:

The provisions of subsection (a) of this section do not apply to any person who is a salaried employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee, his or her spouse or child:

- (1) Is not a party to the contract;
- (2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
- (3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
- (4) Does not participate in the deliberations or awarding of the contract; and
- (5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

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.

W. Va. Code § 6B-2-5(j)(1)(A) states, in pertinent part:

Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter . . . [i]n which . . . a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a[n] . . . employee. . . .

W. Va. Code § 6B-2-5(j)(3) states:

For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall be reflected in the meeting minutes.

### **Advisory Opinion**

#### ***Prohibited Contract***

Ambulance Authority members must abide by the prohibitions contained in W. Va. Code § 61-10-15, which imposes criminal penalties against county officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which they exercise voice, influence or control. A governing body may seek an exemption from this prohibition. W. Va. Code § 61-10-15(h).

In *Summers County Citizens League, Inc. v. Tassos*, 367 S.E.2d 209 (W. Va. 1988), the West Virginia Supreme Court ruled that a county officer has a pecuniary interest where he is an employee of a private entity which is the other party to a public contract regardless of whether he is an owner or director of the private entity. In the instant situation, the mere employment of the Authority's board members by VMT creates a prohibited pecuniary interest in a contract between VMT and the Ambulance Authority. Because the board members would have a pecuniary interest in a public contract over which they have voice, influence or control, such a contract would be prohibited by W. Va. Code § 61-10-15.

The Legislature, however, has created an exception which allows county entities, such as the Authority, to contract with a member's employer if these conditions are met: (1) the member is not a party to the contract; (2) the member is not an owner, a shareholder, a director or an officer of a private entity under the contract; (3) the member receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract; (4) the member does not participate in the deliberations or awarding of the contract, and (5) the member does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract. W. Va. Code § 61-10-15(e).

Here, none of the four members employed by VMT is a party to the contract. None is an owner, shareholder, director or officer of VMT. Moreover, none would receive any commission, bonus or other direct remuneration or thing of value should VMT receive the contract. However, because all four members employed by VMT attended the deliberations and three participated in the deliberations,<sup>2</sup> the elements necessary for the W. Va. Code § 61-10-15(e) exception have not been satisfied.

**Accordingly, the Ethics Commission finds that because Ambulance Authority members who are also employed by VMT participated in the deliberations regarding the VMT contract, the Ambulance Authority may only contract with VMT if the Ethics Commission grants it a Contract Exemption.**

### ***Contract Exemption***

The Ethics Commission may grant a Contract Exemption under W. Va. Code § 61-10-15 only if the prohibition against contracting would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency.

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<sup>2</sup> The Ambulance Authority states that three of the four members employed by VMT participated in deliberations after VMT was the only provider to submit a bid. Although the Authority stated that the fourth member did not participate during deliberations, it appears that the attempted recusal of that member was not proper. For recusal to be effective, the public official must "excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall be reflected in the meeting minutes." W. Va. Code § 6B-2-5(j)(3). Because there is nothing to indicate that the fourth member left the room for deliberations and nothing in the meeting minutes reflects the fourth member's recusal, the Commission cannot find that the fourth member did not participate in the deliberations of the contract as required by W. Va. Code § 61-10-15(e).

The Requester states that a hardship exists because no other entity submitted a bid and it does not believe it could “find another company willing to bid.” The Requester states, “Also, since the bid has already been opened publicly it will give other contractors who may now be interested an advantage over VMT since they know what the lowest bid VMT can provide is.” The Authority followed its bidding procedures and received only one bid. It even reminded a second potential bidder of the bid deadline. Based on these facts, the Ethics Commission finds that prohibiting the Requester from contracting with VMT to provide a paramedic and supplies for its chase vehicle would result in undue hardship or substantial interference with the Authority’s ability to provide timely advanced life support services.

**Therefore, the Ethics Commission grants the Mineral County Ambulance Authority an exemption to contract with Valley Regional Enterprises, Inc., a/k/a Valley Medical Transport for a period not to exceed five years. As a condition of this exemption, the four Authority members also employed by VMT must abide by the restrictions in W. Va. Code § 61-10-15(e).**

### ***Voting***

The Ambulance Authority, citing concerns of obtaining a quorum, asks whether its four members employed by VMT may vote on changes to the current contract or any future contracts with VMT. The Ambulance Authority consists of 15 members. Its bylaws state that the quorum necessary to conduct business is seven. The recusal of the four members employed by VMT would not cause the loss of quorum as 11 members would still be available to meet the seven-person quorum.

The Ethics Act requires employees of a business to recuse themselves from deliberating and voting on a matter in which they have a financial interest. The Authority states that its members employed by VMT will not “directly benefit from the procurement of this contract” with VMT. For purposes of the Ethics Act’s voting limitation, employees have a financial interest in their continued employment and the financial stability of their employer. Advisory Opinion 2012-05 (overruled in part by Advisory Opinion 2013-47).

**The Ethics Commission holds that the four Ambulance Authority members may not be involved in any vote or deliberations by the Ambulance Authority regarding the chase car contract or any other contracts with Valley Regional Enterprises, Inc., a/k/a Valley Medical Transport.**

*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