

## **Contract Exemption 2019-03**

**Issued on August 1, 2019, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

The **Sheriff of Hardy County** seeks an exemption to allow the Sheriff's Office to contract for the installation of police vehicle equipment with TJM Enterprises, LLC, a business owned by one of his deputies.

### **Facts Relied Upon By the Commission**

The Sheriff's Office purchased two new police vehicles. The decision to purchase the vehicles was made by the Requester and his Chief Deputy. Before the new vehicles may be used in the field, they need light bars, exterior lighting, a siren light controller and other equipment. This equipment has already been purchased but needs to be installed.

The Requester has in the past occasionally required one of his deputies, Deputy McCausley, to install equipment as part of his official job duties. The Requester states that the Deputy's assigned duties do not presently include vehicle equipment installation or maintenance, and that the last time he had the Deputy install equipment was in the spring of 2018. The Requester further states that, due to a shortage of officers, he cannot justify taking an officer from the field to install equipment.

Pursuant to its normal purchasing practices, the Sheriff's Office placed an advertisement in The Moorefield Examiner, a weekly newspaper publication, soliciting bids for labor to install the equipment on the two new vehicles. The advertisement ran in the newspaper's May 15, 2019, and May 22, 2019, hard copy editions, and bidders were directed to submit their sealed bids to the Hardy County Commission.

TJM Enterprises, LLC ("TJM"), a business which is owned by Deputy McCausley, submitted a bid for \$3,500, and it was the only bid received. The bids were opened by the County Commission during a public meeting, and the County Commission voted to award the bid to the Deputy's business subject to Ethics Commission approval.

In Contract Exemption 2016-05, the Ethics Commission granted an exemption to the Sheriff's Office to purchase two emergency lighting units from TJM. The Commission directed that, before seeking future Contract Exemptions, the Requester must submit written evidence showing that attempts were made to obtain quotes or bids from other vendors.

In 2017, the Requester submitted another Contract Exemption requesting permission to again purchase lighting equipment from TJM. The Sheriff's Office had advertised for bids, and TJM submitted the lowest bid. Contract Exemption 2017-07.

The Ethics Commission denied the exemption request on the basis that the Requester failed to demonstrate that denying the Exemption would result in excessive cost, undue hardship, or other substantial interference with the operation of the Office because the difference between TJM's bid and the next lowest bidder was only \$364.64.

The Requester states that he and his Chief Deputy, who is not McCausley, make all decisions regarding the hiring of contract labor to improve or maintain the Office's vehicles. The Requester states that in September 2018, when the Office began the process of purchasing the vehicles, another vendor quoted a price of \$5,996 for the equipment installation on the two vehicles. His Office attempted to follow-up with this vendor in February 2019, but it never heard back from the vendor. The Requester states that the amount of the prior quote was not disclosed to McCausley, and that McCausley was not involved in the decision to purchase the equipment or to hire someone to install it.

The Requester states that denying the request will result in a hardship to the Office as it cannot use the new vehicles in the field until the equipment is installed. He estimates that if he rebids the contract, it will be at least another 30 days before the Office receives and opens the bids. Moreover, the Requester is not confident that there are other businesses which will submit bids or that future bids, if any, will be lower than TJM's bid.

### **Provisions Relied Upon By the Commission**

W. Va. Code § 6B-2-5(d)(1) states, in relevant part:

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

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

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;

...

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.

## **Opinion**

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 imposes criminal penalties against county officers who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which they 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 Ethics Commission held in Contract Exemptions 2016-05 and 2017-07 that the deputy sheriff in question may exercise voice, influence or control over decisions of the Sheriff's Office to purchase emergency lighting equipment because he, at times, installed equipment on the Office's vehicles as part of his job responsibilities.<sup>1</sup> Contract Exemptions 2016-05 and 2017-07 are incorporated herein by reference. The Commission finds there are no facts provided in the present Contract Exemption request which causes it to reach a different conclusion. While the Deputy may not presently install equipment as part of his job duties, the Commission finds that the recent restructuring of his job duties is insufficient to take him out of the category of persons in the Office who may exercise voice or influence over decisions of the Sheriff's Office to contract for labor or parts for its vehicles because he recently, as part of his job duties, installed equipment for the Office.

**The Ethics Commission finds that the deputy sheriff falls within the category of persons in the Sheriff's Office who may exercise voice or influence over decisions of the Sheriff's Office relating to the purchase or installation of 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.<sup>2</sup>

The Requester publicly advertised for bids for labor, TJM submitted the only bid, and the County Commission voted to award the bid to TJM subject to Ethics Commission approval.

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 Ethics Commission must consider whether prohibiting the purchase of goods or services 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 rebid the contract will result in undue hardship because of the delay it will cause in having the work completed and the vehicles placed in-service. In making this finding the Ethics

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

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

Commission has also considered that the Sheriff's Office had received a prior quote of \$5,996 for the equipment installation, that this prior quote is significantly higher than TJM's bid, and that the other vendor never responded to the Office's follow-up communications.

**Based upon the foregoing, the Ethics Commission hereby grants the Contract Exemption request for the Sheriff's Office to contract with TJM Enterprises, LLC, to install the equipment on the two police vehicles in an amount not to exceed the \$3,500 bid amount. The Deputy must perform the work on his own time and may not use Sheriff's Department resources.**

The Requester also asks if it may contract with TJM in the future for labor services if the business submits the lowest bid. Contract Exemptions must be decided on a case-by-case basis. If TJM is the lowest bidder on future contracts, then the Requester may seek another Contract Exemption from the Ethics Commission. If the Requester submits future Contract Exemption requests, it must demonstrate that it took meaningful efforts to obtain quotes or bids from other qualified vendors which are willing and able to provide the needed vehicle equipment installation services.

*The 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.*

  
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Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission