State of West Virginia
Office of the Attorney General

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May 19, 2014

The Honorable R. Craig Tatterson
Prosecuting Attorney
Mason County
200 6th Street, Room 11
Point Pleasant, WV 25550

Dear Prosecutor Tatterson,

You have asked for an Opinion of the Attorney General regarding whether it is permissible to construct a building on the premises of the West Virginia State Farm Museum with proceeds of a decedent's estate without resorting to competitive bidding. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of Attorney General.

You explain that certain issues have arisen following the death of Christopher H. Bauer, a resident of Mason County. According to your letter, Mr. Bauer has bequeathed certain collectibles, including his works of taxidermy, to the West Virginia State Farm Museum ("Museum"), a nonprofit corporation located on land owned by the Mason County Commission ("County Commission"). The remainder of Mr. Bauer's estate ("Estate") is to be liquidated with the proceeds used by the Estate to construct and maintain a separate building on the grounds of the Museum for the purpose of housing and preserving Mr. Bauer's collectibles in perpetuity. You explain that the Estate will gift the new building to the Museum after construction is completed.

Your letter raises the following legal question:

> *[W]hether it is permissible for a building to be constructed on the premises of the West Virginia State Farm Museum with proceeds of a decedent's estate without resorting to competitive bidding?*

The West Virginia Fairness in Competitive Bidding Act ("Act") generally requires competitive bidding for all state construction contracts. *See* W. Va. Code § 5-22-1, *et seq*. Under the terms of the statute, the Act reaches contracts entered into by "the State of West Virginia, every political subdivision thereof, every administrative entity that includes such a subdivision, all municipalities and all county boards of education." W. Va. Code § 5-22-1(b)(2). Moreover, the West Virginia Supreme Court of Appeals has determined that it must also "examine who the real parties in interest are" in order to best fulfill the statute's purpose of "protect[ing] public coffers." *Affiliated Const. Trades Found. v. Univ. of W. Va. Bd. of Trustees*, 210 W. Va. 456, 471, 557 S.E.2d 863, 878 (2001) (internal quotations omitted).

To ensure that the State or its agencies do not "escape the requirements of the bidding statute by involving a third-party," *id.*, the Supreme Court of Appeals has created a multifactor test to determine whether the competitive bidding requirements apply. *See* Syl. Pt. 7, *id.* A court should examine:

> (1) whether the State or its agency initiated the construction project; (2) the extent of control retained by the State or its agency during the development and construction phases; (3) the extent to which the project will be used for a public purpose; (4) whether public funds are used either directly for the costs of construction or indirectly by means of a lease arrangement which contemplates payments essentially covering the amount of the construction; and (5) all other relevant factors bearing on the issue of whether the construction is properly viewed as government construction.

Id.

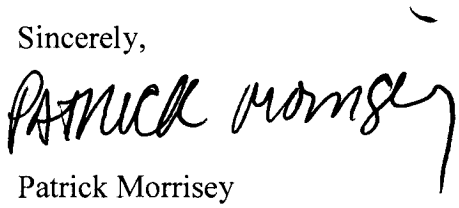
Applying each factor to the facts provided, we conclude that the Estate's construction project is not subject to competitive bidding under section 5-22-1. *First*, no facts indicate that the construction project was "initiated" by the State. *Id.* As you explain, the project arose entirely from the deceased's will—not by the action or influence of the State or its subdivisions. *Second*, you provided no facts indicating that the State will exert control during the "development and construction phases" of the building project. *Id.* *Third*, the "public purpose" factor is likely to be satisfied because

the building project will benefit a nonprofit museum that sits on county property, but we note that your letter does not describe the extent to which the Museum serves an educational or other public purpose. *Fourth*, no public funds will be used—directly or indirectly—to construct the new building. *Id.* Your letter indicates that the private executor of the Estate will serve as trustee of a trust established by the Estate to maintain the building and collectibles. Furthermore, the net income and principal of the trust will pay the utilities and maintenance of the new building and the collectibles. *Fifth*, no other facts provided suggest that the project should be viewed as "government construction." *Id.*

We stress that this letter is based solely on the facts you have provided. Our analysis could change if there were facts suggesting that the County Commission or other state subdivision would be "intimately involved" in the building project. *Id.* at 472, 557 S.E.2d at 879. As the Supreme Court of Appeals has explained, neither the Estate nor the Museum may be used to deliberately "insulate" the County Commission from the competitive bidding requirements. *Id.*

Should you have further questions, please do not hesitate to contact this Office.

Sincerely,



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