



September 2013  
PE 13-06-542

## SPECIAL REPORT

# Failure to Comply With State Purchasing Laws in the Procurement of Broadband Technology Opportunities Program (BTOP) Towers



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# CONTENTS

Background ..... 5

Issue 1: The Construction of the 17 BTOP Towers Was Not Competitively Bid as  
Required By West Virginia State Code ..... 15

Issue 2: State Agencies Provided Grants to Individual Counties to Make Statewide Purchases  
on Behalf of the State. Such ‘Pass Throughs’ Avoided the State’s Purchasing Statutes  
and State Oversight of the Procurement Process ..... 27

Issue 3: The State Interoperability Radio Network Should be Codified Under  
the Department of Military Affairs and Public Safety ..... 35

List of Tables

Table 1: Current Membership of SIEC (Titled Officer or Their Designee)..... 7

Table 2: DMAPS Lottery Surplus Sub-Grant Awards ..... 8

Table 3: BTOP Tower Subcontractors..... 24

Table 4: Tower Work Known to Have Utilized Premier’s “Menu-Bid” ..... 25

List of Figures

Figure 1: Lewis County Legal Advertisement for the Roanoke Tower ..... 10

List of Appendices

Appendix A: BTOP Tower Erection by Company ..... 39

Appendix B: WV E9-1-1 Council’s Message Board ..... 41



## BACKGROUND

The Office of the Legislative Auditor continues to evaluate the expenditure of Broadband Technology Opportunities Program (BTOP) grant funds following the finding of misspent funds on oversized routers in a February 2013 report (PE-12-24-535). BTOP funds were also used to construct twelve new and five replacement microwave communication towers to enhance emergency communications throughout the state. BTOP tower construction represents approximately \$38 million of the \$126 million grant award.

Several representatives of state agencies, counties, and private construction companies were integral in building the BTOP and other towers using federal grants and state legislative appropriations. The primary entities and individuals involved:

**Department of Health and Human Resources (DHHR)-** DHHR owns and insures 114 radio communications towers that are a part of the statewide network.

Dr. Bill Ramsey – former State EMS Medical Director. Dr. Ramsey brought many of the state radio network towers and contracts under DHHR control after previous ownership by local governments and a non-profit company.

Joe Gonzalez – Communications Director, Office of Emergency Medical Services. Mr. Gonzalez was hired by Dr. Ramsey in 2005 for his expertise in radio communication from his experiences as the Chief of the City of Clarksburg Fire Department and part owner of a tower construction company called Tri Star Communications.

**Various interoperable communications committees created by gubernatorial executive orders from 2002-2011** – committees created by the executive branch to consolidate the state interoperable radio communication that had previously been under the control of various counties, state agencies, and private corporations in the interest of public safety and emergency preparedness. From 2007 to 2011 this committee was known as the Interoperability Working Group (IWG) The current incarnation is the Statewide Interoperable Executive Committee (SIEC).

**Department of Military Affairs and Public Safety (DMAPS)**—administered a \$10 million Lottery Commission Surplus legislative appropriation to improve interoperable communications in the State. A representative of DMAPS has consistently chaired the interoperable communication committees established by governors' executive orders.

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*BTOP tower construction represents approximately \$38 million of the \$126 million grant award.*

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**Grant Implementation Team (GIT)** – State agency leaders tasked with administration of the BTOP grant on behalf of the State. This management team was originally composed of former Department of Commerce Cabinet Secretary Kelley Goes, Division of Homeland Security (DHSEM) Director Jimmy Gianato, and Lt. Col. Michael Todorovich (Ret.) of the West Virginia National Guard. Currently, the GIT is composed of Mr. Gianato, Lt. Col. Todorovich (Ret.), and Chief Technology Officer Gale Given.

**Lewis County Commission (LCC)** – secured a county contract for a single tower construction project funded by a DMAPS grant. The contract was later used for other counties’ construction projects as well as the State for construction of BTOP towers.

**Premier Construction Group, LLC** – winning bidder of the Lewis County Commission grant for tower construction that has been used to construct towers statewide.

**I. Governor Tomblin’s Executive Order 2-11 Established the Statewide Interoperable Radio Network, the Statewide Interoperable Executive Committee and the Statewide Interoperability Coordinator**

In order for local, state and federal emergency and public safety agency officials to communicate, the State maintains a network of microwave radio towers. This network of towers was constructed in a disjointed manner requiring cooperation among local governments and the State as well as private entities as funding sources were made available and where needs arose. In 2002, Governor Wise’s Executive Order 8-02 created the State Interoperability Executive Committee comprised of representatives from multiple cabinet level departments, state agencies, and representatives from the Legislature with the objective of improving West Virginia’s interoperability radio network. Two executive orders during Governor Manchin’s administration in 2005 and 2007 reestablished and evolved oversight of a statewide public safety network.

In 2011, per Executive Order 2-11, Governor Tomblin created the Statewide Interoperable Radio Network (SIRN) and the Statewide Interoperable Executive Committee (SIEC) as an advisory committee to the Statewide Interoperability Coordinator (SWIC). These entities replaced the committees created by the previous administrations. The SWIC reports to the Homeland Security Advisor, who reports to the Governor. The SIEC is charged with the implementation and operation of the Radio Network and to assist in establishing goals for the improvement

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of the network. Participation in the Radio Network requires SIEC approved two-way radio, microwave and satellite equipment, landowner leases, memorandums of understanding/agreement, training contracts, agreements, or services. All local entities that utilize state or federal funds distributed by the State of West Virginia must be reviewed and approved by the SWIC to ensure compatibility with the SIRN. Table 1 displays the membership of the SIEC outlined by Executive Order 2-11.

<b>Table 1 Current Membership of SIEC (Titled Officer or Their Designee)</b>	
<b>Agency</b>	<b>Title</b>
<b>Department of Military Affairs and Public Safety</b>	<b>Statewide Interoperability Coordinator</b>
WV Legislature	President of the Senate
WV Legislature	Speaker of the House of Delegates
Office of Technology	WV Chief Technology Officer
WV County Commissioners' Association	President
WV Municipal League	President
WV State Police	Superintendent
WV National Guard	Adjutant General
WV Division of Homeland Security and Emergency Management	Director
WV Division of Highways	Commissioner
WV Parkways Authority	General Manager
WV Enhanced 911 Council	President
WV Sheriffs' Association	President
WV Fire Commission	State Fire Marshal
WV Chapter of the Association of Public-Safety Communications Officials	Representative
WV Emergency Management Council	President
DHHR Office of Emergency Medical Services	Director
Division of Natural Resources Law Enforcement Section	Chief
<i>Homeland Security</i>	<i>Occupational community member, elected by SIEC</i>
<i>Emergency Management</i>	<i>Occupational community member, elected by SIEC</i>
<i>First Responder</i>	<i>Occupational community member, elected by SIEC</i>
SIRN's zone master site switches not already represented	Representative(s)
Regional Interoperability Committees	Chairperson(s)
<i>Source: Executive Order 2-11</i>	



**II. County Tower Construction and DMAPS Grant Funding**

In 2007, the State of West Virginia was awarded a one-time \$8.4 million Public Safety Interoperable Communications (PSIC) grant by the National Telecommunications and Information Administration (NTIA) for interoperable radio network supplies including mobile tower and microwave radios, and mobile and satellite radio gateways. PSIC grants required that a minimum of 80 percent of the total award “pass through” local governmental bodies. Limitations in the PSIC grant made actual tower construction with the funds very difficult, resulting in the funds’ use entirely for equipment.

In 2008, the Legislature appropriated \$10 million of a surplus from the State Lottery Commission from the State Excess Lottery Revenue Fund to DMAPS for use in improving interoperable communications in the State. DMAPS grants had fewer restrictions, and allowed for construction of towers. Though the local government “pass through” requirement did not apply to these state funds as it did with PSIC grant, DMAPS issued sub-grants to Pleasants, Lewis, Fayette and Ohio counties. Most of the sub-grant awards were used to continue Phase 11 of the build-out of the State interoperable radio system. Phase 11 began as a three county project that was extended statewide to finalize and clean up phases 7-10. Table 2 outlines the sub-grant recipients and award amounts for DMAPS State Excess Lottery Revenue Fund awards.

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*In 2008, the Legislature appropriated \$10 million of a surplus from the State Lottery Commission from the State Excess Lottery Revenue Fund to DMAPS for use in improving interoperable communications in the State.*

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<b>Table 2</b>		
<b>DMAPS Lottery Surplus Sub-Grant Awards</b>		
<b>Sub-Grant Recipient</b>	<b>Sub-Grant Number</b>	<b>Amount</b>
Pleasants County	08-SR-01	\$ 39,787.74
DHSEM	08-SR-02	\$ 4,040,176.30
Lewis County	08-SR-03	\$ 2,496,979.50
DHHR	08-SR-04	\$ 2,522,226.71
Fayette County	08-SR-05	\$ 381,145.09
Ohio County	08-SR-06	\$ 474,076.75
<b>Total</b>		<b>\$ 9,954,392.09</b>

*Source: DMAPS document, (unaudited)*

**III. State Employee Joe Gonzalez Coordinated a Contract For Lewis County Which Ultimately Was Used to Construct the BTOP Towers**

Dave Coffman, Chief Deputy of the Lewis County Sheriffs’ Office (since elected Sheriff of Upshur County) invited Mr. Gonzalez to speak with him about the possibility of constructing a tower in the Lewis County town of Roanoke. Together the two met with the Lewis County Commission about the possibility of the application for a DMAPS



grant. The Lewis County Commissioners at that time and Chief Deputy Coffman understood this grant would only be used for the Roanoke tower. The Lewis County Commission applied for a DMAPS sub-grant and was awarded the amount of \$307,347 in sub-grant 08-SR-03 to construct the Roanoke tower on July 31, 2009.

In anticipation of the award of the DMAPS grant, the Lewis County Commission issued a Class II Legal Advertisement in the Weston Democrat on July 8 and July 15, 2009, advertising a July 20, 2009 pre-bid meeting for the construction of the Roanoke tower. The Weston Democrat is a weekly newspaper appearing on Wednesdays with a circulation of 6,564 in 2012.<sup>a</sup> Three vendors responded to the advertisement: Bossie Electric of Charleston, West Virginia; Premier Construction of Jane Lew, West Virginia; and GlenMartin Inc. of Boonville, Missouri. At the July 20, 2009 pre-bid meeting and tower site visit, potential bidders were informed by Mr. Gonzalez that in addition to their bid for the Roanoke tower, they would be required to submit a “menu bid” outlining their quotes for many specific tower erection configurations and civil work for an indefinite number of future state projects that would utilize the Lewis County contract. Additionally, bidders were asked to provide a quote to dismantle, transport and re-erect an historic Division of Natural Resources fire tower from Gauley Mountain in Fayette County to Cass in Pocahontas County. The menu bid language, the possibility of a statewide, open-ended contract, and the Gauley Mountain fire tower relocation were not mentioned in the Class II Legal Advertisement. The advertisement read as follows:

*The Lewis County Commission Request for Proposal Homeland Security Communication Tower and Site Preparation*

*The Lewis County Commission is giving notice for a mandatory pre-bid meeting for the complete installation of a steel 340 feet, self-supporting Homeland Security Communication Tower including all site preparation. This pre-bid meeting will include a site visit and will be held on July 20, 2009 at 1:30pm in the Lewis County Commission office located at 18 Garton Plaza, Weston, West Virginia. The ‘request for proposal’ accompanying information may be obtained at this meeting only.*

*Bid opening will be held on July 27th, 2009 at 10:15am in the regular Lewis County Commission Meeting. For more information you may contact:*

*Chief Deputy David Coffman, Lewis County Sheriff’s Department at 304-269-8201. The Lewis County Commission reserves the right to reject any and all bids.*

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*The Lewis County Commission issued a Class II Legal Advertisement in the Weston Democrat on July 8 and July 15, 2009, advertising a July 20, 2009 pre-bid meeting for the construction of the Roanoke tower.*

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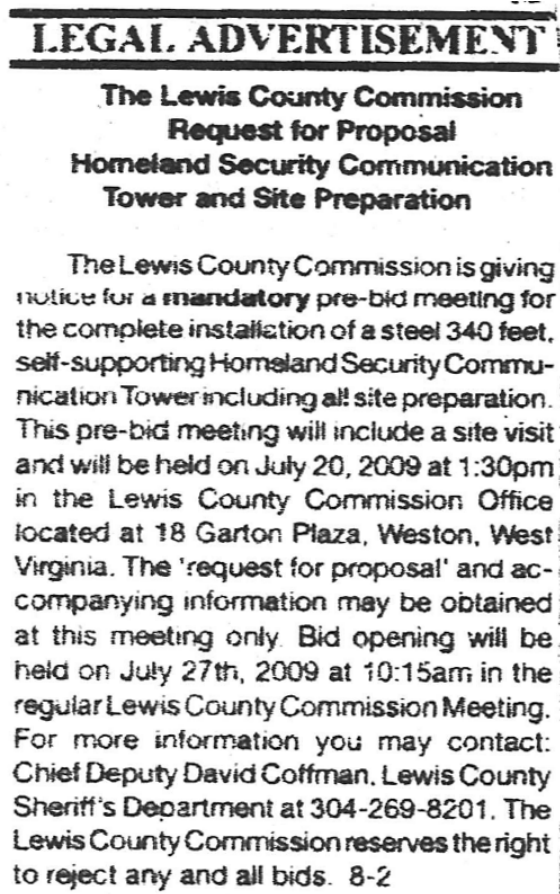
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*At the July 20, 2009 pre-bid meeting and tower site visit, potential bidders were informed by Mr. Gonzalez that in addition to their bid for the Roanoke tower, they would be required to submit a “menu bid” outlining their quotes for many specific tower erection configurations and civil work for an indefinite number of future state projects that would utilize the Lewis County contract.*

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The advertisement is shown in Figure 1 as it appeared in the Weston Democrat on July 15, 2009.

**Figure 1**  
Lewis County Legal Advertisement for the Roanoke Tower



*Source: Weston Democrat, July 15, 2009*

The Lewis County Commission opened the bids and held a bid review at their July 27, 2009 meeting. Mr. Gonzalez, Lewis County 911 Director Bill Rowan, and then-Lewis County Chief Deputy Coffman reviewed the bids for the Commission. According to Commissioners Boyle and Queen, the Commission did not invite Joe Gonzalez to be a member of the bid review committee for the RFP, rather it was understood that since he was running the project, he would also take part in the bid reviews.

The Lewis County Commission relied on the experience of Mr. Gonzalez, Chief Deputy Coffman and Mr. Rowan to ensure that bidders met the qualifications outlined in the Request for Proposal (RFP). This was Mr. Rowan's first experience with tower construction bidding. Chief Deputy Coffman did not have any technical knowledge with regard to microwave or antennas. The bids for the Roanoke tower were

read aloud: GlenMartin submitted a letter stating no submittal of a bid, Bossie Electric bid \$233,440.00, and Premier bid \$192,318.00. After bid announcements, Mr. Gonzalez, Chief Deputy Coffman and Mr. Rowan went into another room to review the bids further.

According to Mr. Gonzalez, the bid review process took between ten and fifteen minutes. The Lewis County Commission did not require bid reviewers to maintain score sheets to compare bids, instead Mr. Gonzalez described that the criteria for evaluating bids included verifying materials requested were included and the total dollar amounts for the Roanoke tower bid. After their review, Mr. Gonzalez announced that both companies met the bid requirements and submitted all the proper paperwork, and that Premier Construction was the low bid. The bid was accepted by the Commissioners and the Lewis County Commission immediately entered into a contract with Premier Construction. Mr. Gonzalez initially informed members of the Legislative Auditor's staff that the bid reviewers "looked through" the menu bids, but could not recall if menu bid line items were compared directly. He stated that it is possible that Bossie's menu bid could have contained lower prices than Premier for some items other than 340' tower erection, and that it is also possible that the quote for the Roanoke tower from Bossie could have had additional line items that the bid from Premier did not contain. In response to the Legislative Auditor's interview summary containing the above, Mr. Gonzalez denied that statement, stating

*Bossie provided an item to item in comparison to Premier. Bossie was higher on the menu bid. I recall you asking that could they have had items higher on the menu bid and to the best of my recollection I said no.*

#### **IV. Unusual Circumstances With the Lewis County Commission Contract**

Though bidders were required to submit a total of four copies of their bid to the Lewis County Commission, the Legislative Auditor could only obtain the bid of the winner, Premier Construction, and was only able to obtain what he believes is the complete bid from Premier Construction, not the Commission or Mr. Gonzalez. The Legislative Auditor was unable to obtain the bid of Bossie Electric from the Lewis County Commission members or their administrator, Mr. Gonzalez or Mr. Rowan of the bid review committee, DHHR, or the BTOP grant implementation team. The Legislative Auditor contacted Mr. Richard Bossie, owner of Bossie Electric, who stated he no longer had a copy of his company's bid. In addition, the Lewis County Commission's copy of Premier Construction's bid did not contain Premier Construction's proof of five years experience in "Communication Tower installation" and proof of similar work required by the RFP. The Legislative Auditor could only obtain this document from Premier Construction. Upon review of this

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document, the Legislative Auditor found that Mr. Gonzalez was listed as a reference for Premier Construction's proof of experience. Marion Dougherty, owner of Premier Construction, stated that she was unaware that Mr. Gonzalez would be a member of the bid review committee. Mr. Gonzalez stated that he did not consider recusing himself from the bid review committee because he did not see his name listed as a reference by Premier Construction. It does not appear that the Lewis County Commissioners reviewed the bid packages. Mr. Gonzalez also did not make the Commission aware that he had existing professional relationships with both bidders. Commissioners were under the impression that Mr. Gonzalez was meeting them for the first time at the pre-bid meeting. On July 22, 2013, Mr. Gonzalez informed the Legislative Auditor's staff that before the July 2009 pre-bid meeting for the Lewis County Commission, he had no personal knowledge of Premier Construction, or Marion or Carlton Dougherty. After the Legislative Auditor was informed by Dr. Ramsey that "Joe would not have been doing his job" if he was not familiar with Marion Dougherty (because of her previous work on state tower projects), Mr. Gonzalez changed his statement and said that he first met Marion Dougherty in a professional capacity in 2006. He also stated that he disclosed his professional knowledge of Premier and other contractors to the Commission, most likely to Cindy Whetsell, but also possibly to their President. President Boyle, Commissioner Queen and County Administrator Cindy Whetsell all state that Mr. Gonzalez did not inform them that he was familiar with Premier or any of the other bidders.

**The Premier Construction bid package provided by the Lewis County Commission consisted of:**

- Quote for the Gauley Mountain fire tower
- Valid Contractor's License
- Business Registration Certificate from the State Tax Department
- Proof of Insurance
- Letter of good standing from Insurance Underwriter
- Certificate of Liability Insurance
- Proof of registration with the West Virginia Bureau of Employment Programs
- Certificate of good standing with the West Virginia Tax Department
- County Tax receipts
- Certificate of Existence from the Secretary of State
- Affidavit of bidder
- Proof of Registration as West Virginia Purchasing Division Vendor
- Menu bid

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*Upon review of this document, the Legislative Auditor found that Mr. Gonzalez was listed as a reference for Premier Construction's proof of experience.*

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*President Boyle, Commissioner Queen and County Administrator Cindy Whetsell all state that Mr. Gonzalez did not inform them that he was familiar with Premier or any of the other bidders.*

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- Roanoke Construction Schedule
- Quote for the Roanoke Tower site

#### **V. Expansion of Tower Construction With 08-SR-03 Grant Funds and BTOP Funds**

Beginning in September of 2009, the IWG and DMAPS grant implementation team headed by Dr. Ramsey began to increase the sub-grant to the Lewis County Commission, 08-SR-03, for tower work throughout the State. Funds were transferred from various sources including sub-grant 08-SR-04, DMAPS award to DHHR. The ultimate award of 08-SR-03 reached \$2,497,901.01 by September of 2012. The Lewis County Commission was not aware of, and did not participate in the IWG vote to increase the 08-SR-03 sub-grant. The Lewis County Commission complied with the IWG decision out of a collective desire to improve statewide interoperable radio communication, with which the County had prior negative experiences. Sub-grant 08-SR-03 was closed in April of 2013 when funds were exhausted.

In August 2009 the State of West Virginia applied for a Broadband Technology Opportunities Program (BTOP) grant administered by the Federal National Telecommunications and Information Administration (NTIA). The application was submitted by former Department of Commerce Secretary Kelly Goes on behalf of the Executive Office of the State of West Virginia. The grant application outlined the intentions for funding and the management team that would form the grant implementation team (GIT) that would administer the grant on behalf of the State. This management team was originally composed of Cabinet Secretary Goes, Chief Technology Officer Kyle Schafer, DHSEM Advisor Jimmy Gianato, and Lt. Col. Michael Todorovich (Ret.) of the West Virginia National Guard.

The State requested BTOP funds for an expansion of middle-mile fiber connectivity, the purchase of internet routers for use by community anchor institutions, and the expansion of the interoperable microwave radio tower network build-out. The grant application requested \$33,032,000.00 for the tower portion of the BTOP grant for the construction of twelve new towers and upgraded equipment for existing towers. The total grant award amount of \$126,323,296 was awarded to the Executive Office of the State of West Virginia on February 12, 2010.

In 2010 the SIEC was approached by the GIT about increasing the capacity of the microwave tower system in the State with the twelve additional towers, and the SIEC subsequently voted on their desired locations. Early in 2011, the Lewis County Commission was approached by the GIT about participation in the BTOP grant as a subrecipient because of the existing county contract with Premier Construction. The Commission was told by the GIT that their agreement with Premier Construction was needed because BTOP grant conditions required that

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contracts should be in place and “shovel-ready.” The Commission agreed in order to help the State expand the interoperable radio network. DHHR held all contracts used for the BTOP towers project except construction. These contracts included: Alexander Utility Engineering for architectural and engineering services, Allstate Tower Co. Inc. for steel tower manufacture, Aviat U.S. Inc. (formerly Harris-Stratex) for microwave antennas, lines, and accessories, Firebond Corporation for the pre-fabricated communications buildings and Master Service Mid-Atlantic Inc. for generators. GIT formally requested to designate the Lewis County Commission as a subrecipient of the BTOP award on March 21, 2011, and was approved by NTIA on March 29, 2011.

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*DHHR held all contracts used for the BTOP towers project except construction.*

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“Shovel ready” is not a requirement that appears in the American Recovery and Reinvestment Act of 2009, which funded the BTOP grant. While it states that the NTIA “shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of the enactment of this Act,”<sup>am</sup> the State Purchasing Director informed the Legislative Auditor that his division could turn around a contract within thirty to sixty days if the requesting agency prioritized the project accordingly. Thus it is the opinion of the Legislative Auditor that the tower contracts could have been legally and competitively bid by the State Purchasing Division.

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*“Shovel ready” is not a requirement that appears in the American Recovery and Reinvestment Act of 2009, which funded the BTOP grant.*

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The GIT requested an additional five tower locations from BTOP funds as replacement towers to replace state towers that could not support the new equipment made available through the grant. GIT requested the modification to the grant without change to the timeline or the appropriation. The request was made April 19, 2012 and approved by NTIA August 20, 2012. This brought the number of BTOP towers to seventeen. The Lewis County Commission did not envision the administrative burden that would result from participation in the BTOP grant administration (for which the Commission received no administrative compensation). The Commission and their Administrator separately agreed that they would not have taken on the burden if the Commission had known this.

## ISSUE 1

### The Construction of the 17 BTOP Towers Was Not Competitively Bid as Required By West Virginia State Code

#### I. Background

The Executive Office of West Virginia applied for a BTOP Grant on August 20, 2009 to fund a statewide broadband infrastructure project (“Middle Mile”) designed to connect community anchor institutions. As part of the grant application the State proposed to add 12 microwave communication towers to a system of 84 existing towers. West Virginia’s BTOP grant application, certified by Governor Manchin, stated that:

*Any towers constructed in concert with this grant will be via coordination with the State of West Virginia Interoperable Working Group (IWG)/Statewide Interoperable Coordinator. This group has installed 84 towers using systems, contracts, etc that are tried and working. For these reasons we will utilize current existing contracts negotiated by the IWG...*

The National Telecommunications and Information Administration (NTIA), within the U.S. Department of Commerce, awarded the Executive Office of the State of West Virginia BTOP grant funding on February 12, 2010 on the basis of their application. On March 21, 2011, the West Virginia Grant Implementation Team (GIT) requested that the NTIA make the Lewis County Commission (LCC) a subrecipient of the BTOP grant, solely for the construction of the BTOP towers.

On March 29, 2011, the NTIA granted the Executive Office’s request to make LCC a subrecipient of the BTOP grant. The non-competitive selection of LCC as a subrecipient was justified by the State in its request on the basis that “Lewis County has an existing fully bid construction contract using State of WV standards,” “is in compliance with all Special Award Conditions” and that acceptance of LCC as a subrecipient was “critical to completion of the grant on time and at cost.”

The “existing fully bid construction contract” referenced by the GIT in the award action request was the contract entered into between the LCC and Premier Construction Group, LLC (Premier) on July 27, 2009 for a project funded by DMAPS. The DMAPS grant was sought by Lewis County in 2009 for the construction of a single emergency service tower in Roanoke, Lewis County, WV.

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*The non-competitive selection of LCC as a subrecipient was justified by the State in its request on the basis that “Lewis County has an existing fully bid construction contract using State of WV standards,” “is in compliance with all Special Award Conditions” and that acceptance of LCC as a subrecipient was “critical to completion of the grant on time and at cost.”*

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## II. Applicable Law

### a. BTOP Award Terms & Conditions

By accepting the BTOP grant award the Executive Office of the State of West Virginia agreed to comply with all ten of the applicable award terms and conditions. The BTOP award terms and conditions agreed to by Governor Manchin, included, among others: Department of Commerce Financial Assistance Standard Terms and Conditions;<sup>c</sup> Award Specific Special Award Conditions;<sup>d</sup> Uniform Administrative Requirements for Grants and Agreements to State and Local Governments;<sup>e</sup> and Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements.<sup>f</sup>

While BTOP award recipients may work with subrecipients, the NTIA only has a direct legal relationship with the recipient, and the recipient is responsible for meeting all award terms and conditions.<sup>g</sup> The terms and conditions set forth that: **“all subawards will be made in a manner to provide, to the maximum extent practicable, open and free competition. The recipient must be alert to organizational conflicts of interest as well as other practices among subrecipients that may restrict or eliminate competition.”**<sup>h</sup>

The Award Specific Special Award Conditions set forth Project Specific special award conditions that include, as a construction-related requirement, that: **“The recipient shall comply, and must require each contractor or subcontractor to comply, with all applicable Federal, state and local laws and regulations.”**<sup>i</sup> The Uniform Administrative Requirements states that the state “must expand [sic] and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds.”<sup>j</sup> Similarly, the procurement standard set forth for subrecipients is that said procedures should “reflect applicable State and local laws and regulations.”<sup>k</sup> **Therefore, the BTOP Award Terms and Conditions make clear that the Executive Office of West Virginia, as the recipient, is responsible for ensuring that LCC, as the subrecipient, complies with state law in the procurement of BTOP tower construction.**

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*The DMAPS grant awarded to the LCC, 08-SR-03, was subject to compliance with the requirement that “State procedures and practices will apply to all funds disbursed by the SAA”.*

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### b. DMAPS Grant Special Conditions and Assurances

Like the Terms and Conditions associated with the BTOP grant, the DMAPS grant that LCC received in 2009 to build the Roanoke communications tower came with Special Conditions and Assurances. The DMAPS grant awarded to the LCC, 08-SR-03, was subject to compliance with the requirement that “State procedures and practices will apply to all funds disbursed by the SAA”. In addition, when making purchases relevant to the DMAPS grant, LCC agreed to “abide by applicable State and local laws, which address purchasing procedures by a state or local unit of government.”<sup>l</sup>

### c. WV Purchasing law

In July 2009, when Lewis County bid out the construction of their communication tower at Roanoke, the procurement was required to comply with the West Virginia State Code.

#### I. West Virginia Code, Article 3, Chapter 5A

Article 3, Chapter 5A of the West Virginia Code creates and provides for the procedures of the Purchasing Division within the Department of Administration. Unless specifically exempted, the provisions contained in Article 3 apply to all of the spending units of state government.<sup>m</sup> “Spending unit” means a department, agency or institution of the state government for which an appropriation is requested, or to which an appropriation is made by the Legislature.<sup>n</sup> The Lewis County Commission does not receive appropriations by the state Legislature, therefore it is not a spending unit of the state government, and thus not required to comply with the requirements of Article 3, Chapter 5A of the West Virginia Code. BTOP Grant Funds received and spent by the recipient, the Executive Office of West Virginia, through its spending units were required to be expended in accordance with W. Va. Code §5A-3-1 *et seq.*

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*The Competitive Bidding Act requires, in part, that: The state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding twenty-five thousand dollars in total cost.*

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#### II. West Virginia Code, Article 22, Chapter 5

While the LCC is not a “spending unit” of the state government, and therefore was not required to comply with W. Va. Code §5A-3-1 *et seq.*, in procuring the construction of its Roanoke communication tower, it is a political subdivision and therefore subject to the requirements of the Government Construction Contracts statute contained in Article 22, Chapter 5 of the West Virginia Code, also known as the West Virginia Fairness in Competitive Bidding Act.

The Competitive Bidding Act requires, in part, that:

*The state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding twenty-five thousand dollars in total cost: Provided, That a vendor who has been debarred pursuant to the provisions of sections thirty-three-a through thirty-three-f, inclusive, article three, chapter five-a of this code may not bid on or be awarded a contract under this section. All bids submitted pursuant to this chapter shall include a valid bid bond or other surety as approved by the State of West Virginia or its subdivisions.*

W. Va. Code §5-22-1(c) (emphasis added).

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*The construction of the emergency communication tower at Roanoke was \$192,318.00, well above the twenty-five thousand dollar threshold that would trigger the Competitive Bidding statute.*

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The quoted cost from Premier, the winning bidder of the LCC contract, for the construction of the emergency communication tower at Roanoke was \$192,318.00, well above the twenty-five thousand dollar threshold that would trigger the Competitive Bidding Statute.

The competitive bidding statute goes on to state that “following the solicitation of bids, the construction contract shall be awarded to the *lowest qualified responsible bidder* who shall furnish a sufficient performance and payment bond.”<sup>o</sup> W. Va. Code §5-22-1(d).

The competitive bidding statute defines “lowest qualified responsible bidder” as:

*The bidder that bids the lowest price and that meets, as a minimum, all the following requirements in connection with the bidder’s response to the bid solicitation. The bidder must certify that it:*

- (A) Is ready, able and willing to timely furnish the labor and materials required to complete the contract;*
- (B) Is in compliance with all applicable laws of the State of West Virginia; and*
- (C) Has supplied a valid bid bond or other surety authorized or approved by the contracting public entity.*

W. Va. Code §5-22-1(b)(1).

Pursuant to the competitive bidding statute, the bid bond requirement may not be waived by any public entity.<sup>p</sup> In addition, “the contracting public entity may not award the contract to a bidder which fails to meet the minimum requirements set out in this section.” W. Va. Code §5-22-1(e).

### **III. BTOP grant funds were improperly used to pay for construction of BTOP Towers**

In the BTOP grant application the State made the exaggerated claim, in referencing the existing LCC construction contract with Premier, that it had been “negotiated by” the Interoperable Working Group, a group that “has installed 84 towers using systems, contracts, etc that are tried and working.” And in the subsequent Award Action Request seeking that LCC be made a subrecipient of the grant, the State mischaracterized the LCC contract with Premier as “competitively bid” and “fulfilling State requirements” when it failed to comply with the requirements of the competitive bidding statute when initially awarded. Furthermore, Premier failed to comply with terms and conditions of the Request for Proposal

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(RFP) that formed the basis of the negotiated contract entered into with LCC, prior to the GIT requesting NTIA make LCC a subrecipient of BTOP.

#### **a. Bid Bond Required**

The competitive bidding statute clearly states that “all bids submitted pursuant” to the competitive bidding statute, i.e., bids for a government construction contract projected to exceed twenty-five thousand dollars, “shall include a valid bid bond or other surety as approved by the State of West Virginia or its subdivisions.”<sup>q</sup> Section 2, Article 22, Chapter 5 of the Code reiterates the requisite nature of the bid bond, stating: “No public entity may accept or consider any bids that do not contain a valid bid bond or other surety approved by the State of West Virginia or its subdivisions,”<sup>r</sup> before going on to state that the provisions and requirements of the competitive bidding statute “may not be waived by any public entity.”<sup>s</sup>

The Lewis County Commission, when seeking Requests for Proposal for the communication tower at Roanoke, did not require bidders to submit a bid bond in violation of W. Va. Code §§5-22-1 and 5-22-2. Purchasing Director Tincher stated by letter to the Legislative Auditor that “for all construction projects issued under Purchasing Division authority” in accordance with the competitive bidding statute “the Purchasing Division reviews the proposals after bid opening to ensure that a valid bid bond has been provided.” However, because DMAPS grant funds were provided to Lewis County, a political subdivision, which allowed them to avoid the authority of the Purchasing Division in overseeing this procurement for construction, there was no state entity to ensure Lewis County’s enforcement of the bid bond requirement.

#### **b. “Menu Bid” for Government Construction Contracts not contemplated by State Code or Rules; Must Solicit Bids for Every Project**

The RFP used by the Lewis County Commission in 2009 was provided to them by Mr. Gonzalez. Prior to the pre-bid meeting it was the belief of the Lewis County Commissioners, the LCC Administrator, the Lewis County Chief Deputy (and author of the DMAPS grant application), Dave Coffman, and the Lewis County 911 Director, Bill Rowan, that Lewis County was only bidding out the construction of one communication tower at Roanoke. Accordingly, the Lewis County Commission advertised by Class II Legal Advertisement for “the complete installation of a steel 340 feet self-supporting Homeland Security Communication Tower”.

Despite the belief of the Lewis County officials that they were only bidding out a contract for the construction of one communication tower, the RFP provided to them by Mr. Gonzalez sought “sealed proposals for the site preparation and installation of **various** steel communications towers.” The Request for Proposal (RFP) further stated:

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*The Lewis County Commission, when seeking Requests for Proposal for the communication tower at Roanoke, did not require bidders to submit a bid bond in violation of W. Va. Code §§5-22-1 and 5-22-2.*

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*Because DMAPS grant funds were provided to Lewis County, a political subdivision, which allowed them to avoid the authority of the Purchasing Division in overseeing this procurement for construction, there was no state entity to ensure Lewis County’s enforcement of the bid bond requirement.*

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*The RFP used by the Lewis County Commission in 2009 was provided to them by Mr. Gonzalez.*

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*Despite the belief of the Lewis County officials that they were only bidding out a contract for the construction of one communication tower, the RFP provided to them by Mr. Gonzalez sought “sealed proposals for the site preparation and installation of various steel communications towers.”*

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*“This request for quotations is on various projects and is to be bid as such those projects of varying sizes and scopes may be priced from the proposal.” By way of clarification, it should be noted that the purpose of this specific sections of the **RFP** was a request to permit Lewis County Commission and other state agencies to utilize the unit prices from such bids and “Piggy-Back” on any Lewis County Commission Contract that may be issued as a result of the **RFP**. As a result, other agencies [. . .] may be able to require that the successful bidder under the current RFP also construct towers for the use and benefit of those agencies at various sites within the State of West Virginia. [. . .] Bidders able to comply with this requirement should include any relative documentation as one section to be labeled **“Menu Bid”**.*

The RFP contained a blank “menu bid,” broken down by category. Bidders were required to quote prices for a wide variety of items, including civil work site preparation, civil work roadway, foundation work, electrical work, tower installation, tower demolition, fencing, grounding, antennas and lines, and a wide range of general “menu bid options.” Each category was further broken down into specifics; the tower installation section alone contained thirty-three varieties of tower erection, as well as boom, ice shield, and ice bridge installation.

According to the Competitive Bidding Act, the state of West Virginia and its subdivisions shall “solicit competitive bids for **every construction project exceeding twenty-five thousand dollars in total cost.**”<sup>1</sup> The Act does not include the term “menu bid,” there are no legislative rules interpreting this Act, and the West Virginia Purchasing Division is not familiar with the term “menu bid”.

The question of how to define a project under this article has also not been directly addressed by the Legislature or the courts. In the Design-Build Procurement Act in the same, chapter, however, the Legislature defines “project” as “that project **described in the public announcement,**”<sup>2</sup> which in this instance would be a single steel 340 feet communication tower. Similarly, the Director of Purchasing stated, in relation to the requirements of the Code for architectural contracts that while there is “considerable leeway in determining what constitutes a ‘project’ and that the [Purchasing Division legal] opinion does not prohibit bidding multiple projects at one time **as long as those projects are somehow identified in the solicitation.**” Although these definitions do not apply directly to the Act, a logical reading of that article in conjunction with the requirements of other related articles of the code indicates that



a so-called “menu bid” could not meet the requirement of the Act. First, with a “menu bid,” it is unspecified what labor and materials will actually be required to complete the contract, which appears to make the bond requirements impossible to fulfill. The act required that the bidder supply a valid bid bond or surety authorized or approved by the contracting public entity.<sup>v</sup> A “menu bid” does not specify an amount for which a bid can be obtained. Second, the Act requires that entities solicit competitive bids; it is not clear how the entities could score or compare menu bids, without any indication of what future projects might be procured using the resulting contract. For example, the Lewis County RFP contained thirty-three tower types, but the bid reviewers could not have determined who the lowest qualified responsible bidder was, because they had no idea how many and which type of tower would ultimately be procured using the contract. Thus, there is no true way to measure the competitiveness of a menu bid, which does not define the specific projects for which it will be used.

Finally, it is not clear that a solicitation for multiple projects would necessarily violate the provisions of the Act; however, it is apparent that the notice of such a bid would have to clearly identify the projects to be bid. In this case, no such notice was provided; and the legal notice, which was published only in the Weston Democrat, did not contain any notice of a menu bid or other projects. It was not until after the contract was awarded that the Lewis County officials were made aware that the DMAPS grant would be adjusted and that the county was asked to administer the grant funding for the construction of additional towers in the Phase 11 Project based off of Premier’s “menu bid”.

Not only are “menu bids” not contemplated by statute, nor did the LCC provide notice that they would be soliciting “menu bids,” but the bid review committee (headed by Mr. Gonzalez and including Chief Deputy Coffman and 911 Director Rowan) did not score or compare the menu bids provided by Premier and Bossie Electric. The selection of Premier as the winning bidder was on the recommendation of Mr. Gonzalez based on the fact that Premier was the low bidder for the Roanoke tower, but not necessarily the low bidder on all configurations of towers contemplated by the “menu bid.”

### **c. The Lewis County Commission Contract with Premier was not “piggybacked”**

The construction of the BTOP towers was not accomplished through the procedure, established by West Virginia Code of State Rules §148-1-7.9 known as “piggybacking.” That procedure, authorized by rule, allows the Director of Purchasing to approve a request by a spending unit to make a purchase from contracts issued by agencies of the federal government, agencies of other states, other public bodies or other state agencies.<sup>w</sup> To be eligible for piggybacking, there must be a valid, properly awarded contract, considered by the director to be available and

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financially advantageous and comparable to what can be obtained by competitive bid.<sup>x</sup>

Any spending unit wishing to piggyback must request permission from the Purchasing Director in advance of any purchase and provide necessary evidence and documentation to prove to the Director that a) the contract would not conflict with any existing state contract, unless the prices are substantially lower than the state contract based on equal specifications, b) the contract will not cause a resident vendor to lose substantial business, unless the price difference is so great that it is in the state's best interest to piggyback, and c) that the contract would not cause extensive hardship to any spending unit offered preference under the code. The director must approve or disapprove any piggybacking.<sup>y</sup>

In this case, there was never a request to or an approval from the Director to piggyback the Lewis County Commission's tower construction contract with Premier Construction Group, LLC. Director Tincher and the Purchasing Division never informed anyone that the use of the arrangement between the state, the Lewis County Commission, and Premier was legal under state purchasing code. Further, Director Tincher has not reviewed the BTOP grant, but, to the best of his knowledge, believes that the tower construction for the state would not have been exempt from the purchasing rules.

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*Without a record of the losing bid submitted by Bossie, and without having scored the menu bids and retained score sheets, it is impossible to determine whether or not Premier was indeed the lowest bidder for all the tower configurations listed on the menu bid, and subsequently erected by Premier through the DMAPS grant adjustments and BTOP grant.*

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#### **d. Complete Bid File Not Retained**

The Competitive Bidding Act states that “after the award of a bid under this section, the bid file of the contracting public agency and **all bids submitted in response to the bid solicitation shall be open and available for public inspection.**”<sup>z</sup> The Lewis County Administrator performed an exhaustive search, on behalf of the Legislative Auditor, of Lewis County's records and could not locate the bid from Bossie Electric, the letter of no bid from GlenMartin, and Premier Construction's complete bid as provided by Marion Dougherty. All members of the bid review committee stated that they did not keep documentation of the losing bid or the letter of no bid.

Without a record of the losing bid submitted by Bossie, and without having scored the menu bids and retained score sheets, it is impossible to determine whether or not Premier was indeed the lowest bidder for all the tower configurations listed on the menu bid, and subsequently erected by Premier through the DMAPS grant adjustments and BTOP grant. The lack of document retention not only indicates that the statutory requirements of the Competitive Bidding Act were not fulfilled, but is also relevant to the selection of the LCC as a BTOP subrecipient. The Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments states that “grantees and sub-grantees will maintain records sufficient to detail the significant



history of a procurement.”<sup>aa</sup> Without records detailing the significant history of the LCC procurement of tower construction it is unclear how the Executive Office of West Virginia could assert in the justification for the non-competitive selection of Lewis County as a subrecipient of BTOP grant that “Lewis County has an existing *fully bid* construction contract *using State of WV Standards*, and is in compliance with all Special Award Conditions such as the Davis-Bacon Act.”

## e. Other Irregularities

### 1. Bid Reviewer Listed as a Reference for the Winning Bidder

As has been stated previously, Mr. Gonzalez was a member of the bid review committee, and given his experience in the procurement of communication towers he was selected as their spokesman. In reviewing the bid from Premier to the LCC RFP it came to the attention of the Legislative Auditor that “Joe Gonzalez” was listed as a “reference for similar type projects.” The Director of Purchasing advised the Legislative Auditor that if his division were administering a contract, and one of the members of the bid review committee was listed as a reference by one of the vendors, “The Purchasing Division would advise the agency that if a committee member is listed as a reference on a bid, that individual should be removed as a voting member of the agency evaluation committee.” Mr. Gonzalez informed the Legislative Auditor that he did not recuse himself from the bid review committee because he was not aware that he was a reference for one of the bidders.

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*Mr. Gonzalez informed the Legislative Auditor that he did not recuse himself from the bid review committee because he was not aware that he was a reference for one of the bidders.*

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### 2. Subcontractors Utilized Contrary to RFP Requirements

The Lewis County Commission RFP, which was included by reference into the subsequent contract entered into with Premier, along with Premier’s “menu bid,” stated that:

*Only one contractor shall be responsible for the total work covered by this project. Utilization of sub-contractors must be pre-approved by the Project Manager. A full description of the work to be performed [sic] by the sub-contractor must be submitted in weighting [sic]. Any sub-contractor used on this project, must provide full documentation that is required by the general contractor. A sub-contractor must provide a certificate of insurance naming the Lewis County Commission as the insured, before any work can be performed [sic], and verified by the project manager.*

Section 4.0 of the LCC RFP, under the heading “Project Director/ Management”, states that “the Lewis County Commission has assigned a representative to function as their responsible person to oversee the purchase, installation and acceptance of these Communication Towers, DHHR (State Trauma and Emergency Care Systems, Communication Division, will act as their representative.)” Mr. Gonzalez was and continues to be the Communications Director for the State Trauma and Emergency Care System (STECS), now known as Office of Emergency Medical Services (OEMS). Coupled with the fact that Mr. Gonzalez was the project manager for communication tower build out for the Interoperable Working Group (IWG), and his daily oversight over the tower construction project it is clear that he is the individual assigned the responsibilities of the project manager.

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*Premier Construction used subcontractors to erect 16 of the 17 BTOP towers.*

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Premier Construction used subcontractors to erect 16 of the 17 BTOP towers. A total of five different contractors were used to erect the towers. The only tower that Premier Construction erected was the Snowshoe tower. Appendix A displays each BTOP tower along with the company that actually erected the tower. It must be noted that the five subcontractors used by Premier were not West Virginia based companies. Two companies were based out of Kentucky, while the other three were based out of Texas, Virginia and Maryland. Table 3 displays the subcontractors, company location, and the number of BTOP towers erected. The Legislative Auditor also found that two of the subcontractors – Installtek Communications LLC based out of Richmond, Kentucky and Quality Tower Services based out of Houston, Texas – are not registered with the Secretary of State’s Office. West Virginia Code §31B-1-101 et. seq. and §31D-1-101 et. seq. requires limited liability companies and corporations doing business in West Virginia to register with the Secretary of State.

**Table 3  
BTOP Tower Erection**

<b>Company</b>	<b>Company Location</b>	<b>BTOP Towers Erected</b>
Allstate Tower, Inc.	Henderson, Kentucky	3
Installtek	Richmond, Kentucky	3
Quality Tower Services	Houston, Texas	1
Shenandoah	Staunton, Virginia	3
Vertical Tech	Hagerstown, Maryland	6
Premier Construction	Jane Lew, West Virginia	1
<b>Total</b>		<b>17</b>

*Source: Premier Construction correspondence, (unaudited)*

Despite the RFP requirement that the “utilization of sub-contractors must be pre-approved by the Project Manager,” Premier did not submit in writing a request to use sub-contractors. Premier made it known at a meeting in Flatwoods before construction began that they would be using subcontractors for the BTOP tower projects; however, they stated that no one at the LCC, GIT or DHHR required them to seek formal approval.

In addition to the BTOP towers, and as more fully discussed in Issue 2, Premier Construction erected a number of towers for the state under prior grants. The Legislative Auditor has been unable to determine exactly how many towers were built by Premier Construction using the Lewis County Commission contract. Table 4 contains towers known to have been built or improved from the Lewis County contract itself or by another entity’s piggyback off of that contract, using the menu bid.

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*Despite the RFP requirement that the “utilization of sub-contractors must be pre-approved by the Project Manager,” Premier did not submit in writing a request to use sub-contractors.*

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*The Legislative Auditor has been unable to determine exactly how many towers were built by Premier Construction using the Lewis County Commission contract.*

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Table 4 Tower Work Known to Have Utilized Premier’s “Menu Bid”				
08-SR-03		08-SR-05	08-SR-06	BTOP
Pennsboro	Keeney	Gauley Mt.	Rotary Park	Cleveland Mtn
Buck Knob	Barbour	Lick Knob	Porters Knob	Cottle Knob
Roanoake	Clendenin	Carretta	Wayne	Franklin/Long Ridge
Taylor	East River Mt.	Windmill Gap	Ward Rock	Glenville
North Fork Mt.	Malden	Kopperston	Horsepen	Grantsville
Webster Springs	Barker Ridge		Dunlow	Greenbrier Mtn.
Valley Grove	Tallmansville		Cabelas	Kenna
Garfield	Malden		Wheeling	Sharps Knob
Windmill Gap	Tucker		West Liberty	Snowshoe
NOROP	Limestone		Moundsville	Spencer
Washburn Knob	Romney		Limestone	Weirton
Sandsprings	State Police HQ		St. Marys	Williamson
PK Mt.	St Marys			Hargreave
Harmony Grove	Building 5			Limestone
Rotary Park				Montgomery Hill
Greenbrier				Mt. Storm
Floe				North Mtn

*Source: DMAPS Document (unaudited), GIT Document (unaudited)*

## Recommendations

1. *The Legislature should consider whether the Purchasing Division should have the power to oversee state grant funds and procurements made by grant recipients (currently considered exempt).*
2. *The Executive Branch should consider, when appropriate, in handling federal grants requiring that funds be spent by local governments or other entities, setting up a statewide contract, and awarding funds to entities to make procurements by piggybacking off the statewide contract.*

## Issue 2

### State Agencies Provided Grants to Individual Counties to Make Statewide Purchases on Behalf of the State. Such ‘Pass Throughs’ Avoided the State’s Purchasing Statutes and State Oversight of the Procurement Process.

#### I. Background

In 2008, the West Virginia Legislature appropriated \$10 million (“the legislative appropriation”) in State Excess Lottery Revenue Funds to DMAPS for the Interoperable Communications System. DMAPS then awarded portions of the appropriation as grants to Fayette (grant 08-SR-05), Ohio (grant 08-SR-06) and Lewis (grant 08-SR-03) Counties to complete portions of the Phase 11 tower construction project.<sup>ab</sup>

DMAPS previously awarded federal Homeland Security grant money to counties because the conditions of those federal grants required that a minimum of eighty percent of the total award be administered by local or tribal governmental bodies or authorized non-governmental public safety agencies. That program, known as the PSIC Grant Program, funded mobile and portable radios, gateways, and tower and microwave radios (but did not contain funds for tower construction). Because of the requirement that local governmental bodies administer the money, the State passed the grant funds through to counties to administer what were ultimately statewide projects. For example, according to Kanawha County Emergency Operations Coordinator Dave Erwin, the Kanawha County Commission acted as a “pass through” to purchase radios that were then distributed throughout the state. DMAPS awarded the funding to Kanawha County, which purchased the radios, and the distribution of the radios was then overseen by the IWG/SIEC, who gave the county a list as to what agencies would receive the radios. As early as 2007, Mr. Gonzalez, in his capacity as Communications Director for the Office of Emergency Medical Services, within DHHR, encouraged counties to piggyback off of other counties’ contracts, appearing to give state legitimacy to the practice.<sup>1</sup>

When DMAPS received the legislative appropriation, it followed the same method it had used to distribute the PSIC funds. In this case, however, there was no requirement that DMAPS award the funds to counties, because the state appropriation did not carry the same Federal Homeland Security requirement that 80 percent of the funds be spent by local or tribal governmental bodies or authorized non-governmental public safety agencies.

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*When DMAPS received the legislative appropriation, it followed the same method it had used to distribute the PSIC funds.*

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*Neither the West Virginia Code nor the Code of State Rules specifically prohibits the use of grants to political subdivisions to make purchases for a statewide project.*

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<sup>1</sup>See Appendix B, page 41.

## II. Applicable Law

Neither the West Virginia Code nor the Code of State Rules specifically prohibits the use of grants to political subdivisions to make purchases for a statewide project.<sup>ac</sup> However, although not legally binding, the Purchasing Division defines a grant within its “Procedures Handbook,” as a

*legal relationship (agreement) whereby state government is transferring a thing of value to a local government (or other recipient) to carry out a public purpose of support or stimulation authorized by law, as opposed to acquiring commodities or services for the direct benefit or use of state government. In a grant relationship, substantial involvement is not expected between the state agency and the local government (or other recipient).<sup>ad</sup>*

The Handbook goes on to clarify that grants are exempt from Purchasing Division approval, but only if they meet the following requirements:

*(1) the principal purpose of the relationship must be the transfer of money, property, services or anything of value to the local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by federal and/or state statute, (2) the relationship must not be to facilitate an acquisition, by purchase, lease or barter, of property or services for the direct benefit or use of the state government, and (3) the Grant or Cooperative Agreement must be targeted at specific recipients thereby making competition unavailable.<sup>ae</sup>*

Each sub-grantee of the legislative appropriation was required to comply with the Special Conditions and Assurances attached by DMAPS’ Homeland Security State Administrative Agency. Those Special Conditions and Assurances included the following requirements:

***Laws of West Virginia:*** *This application/contract shall be governed in all respects by the laws of the State of West Virginia. State procedures and practices will apply to all funds disbursed by the SAA.*

[ . . . ]



**Purchasing:** *When making purchases relevant to the sub-grant, the sub-grantee will abide by applicable State and local laws, which address purchasing procedures by a state or local unit of government.*<sup>af</sup>

The law that applies to government construction projects over \$25,000, West Virginia Fairness in Competitive Bidding Act, applies to political subdivisions, and, accordingly, all procurements of construction projects made by the counties were subject the requirements of the Act.<sup>ag</sup>

### **III. DMAPS' use of the legislative appropriation to award grant funds to the counties to complete the Phase 11 tower construction legally and functionally avoided the oversight of the West Virginia Purchasing Division**

DMAPS' use of the legislative appropriation to award grant funds to the counties to complete the Phase 11 tower construction legally and functionally avoided the oversight of the West Virginia Purchasing Division. Granting funds to counties rather than procuring the tower construction directly, while not technically illegal, did not align with Purchasing Division guidance and avoided the oversight of the Purchasing Division. This lack of Purchasing Division oversight enabled the contract to be noticed, bid and awarded in a manner inconsistent with the requirements of Article 22, Chapter 5 of the West Virginia Code. The resulting contract was then "piggybacked" by other counties, and used to build an indeterminate number of towers, as well as to move a historic fire tower owned by the state from one state-owned location to another for historic preservation purposes unrelated to the purposes of the grant funding. What was originally a contract by Lewis County with Premier Construction Group, LLC, to construct one tower within Lewis County, became the sole vehicle for statewide tower construction, with both Federal and state funds. What follows are three specific examples that highlight the problematic results of this arrangement.

#### **a. Lewis County Contract with Premier Construction Group, LLC**

First, as more fully outlined in Issue 1, the Lewis County Commission's Notice, RFP, and award of the tower construction contract did not meet the requirements of Article 22, Chapter 5 of the West Virginia Code, the West Virginia Fairness in Competitive Bidding Act.<sup>ah</sup> Accordingly, because the contract did not comply with the Act, it also failed to comply with the Special Conditions and Assurances of 08-SR-03, which required that all purchases abide by applicable State and local laws.

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*Granting funds to the county rather than procuring the tower construction directly, while not technically illegal, did not align with Purchasing Division guidance and avoided the oversight of the Purchasing Division.*

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*What was originally a contract by Lewis County with Premier Construction Group, LLC, to construct one tower within Lewis County, became the sole vehicle for statewide tower construction, with both Federal and state funds.*

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*It was the opinion of the Director of Purchasing that DMAPS' use of a grant to procure the tower construction did not qualify as a grant, and was therefore not exempt from the oversight of the Purchasing Division.*

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Second, it was the opinion of the Director of Purchasing that DMAPS' use of a grant to procure the tower construction did not qualify as a grant, and was therefore not exempt from the oversight of the Purchasing Division. In an e-mail dated March 27, 2013 to Mr. Gianato, Mr. Gonzalez, and Lt. McCabe (of the West Virginia State Police), the Purchasing Director expressed concern about the arrangement:

*Recently, I became aware that the tower construction portion of the tower project may have been done by Premier Construction, Jane Lew, WV. Since our office publicly advertises, formally bids and awards all construction projects, I have been unable to locate any contracts formally bid and awarded by my office for this work. The WV Code §5-22 requires each contract to be separately bid and awarded.*

*It has been suggested that the tower construction by Premier Construction may have been accomplished via a DMAPS grant to the Lewis County Commission, who selected Premier Construction to perform the work.*

*Based on this suggestion, I would advise you that to me this activity does not seem to qualify as a grant and may not have been done in accordance with appropriate procedures. [ . . . ]*

*I suggest that if the above information is correct (or even if it is not to assure that everybody involved is comfortable that the appropriate laws, rules and procedures were followed), that you do not proceed with construction until you receive approval from this office.*

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***Despite Purchasing Director Tinch-er's recommendation to Mr. Gianato and Mr. Gonzalez advising that they stop construction of the BTOP towers, this did not occur.***

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Despite Purchasing Director Tinch-er's recommendation to Mr. Gianato and Mr. Gonzalez advising that they stop construction of the BTOP towers, this did not occur.

Neither the award to the Lewis County Commission nor the subsequent procurement of the towers under the contract appears to comport with the requirements of the West Virginia Code and the guidance of the West Virginia Purchasing Division related to grants.

**b. Fayette County Commission Piggybacked the Lewis County Commission’s Contract with Premier Construction Group, LLC to construct multiple towers**

In addition to the tower construction administered by the Lewis County Commission, it also appears that another sub-grant recipient of the legislative appropriation, the Fayette County Commission “piggybacked” the Lewis County Commission’s contract with Premier Construction Group, LLC, to build multiple additional towers for the SIRN. Piggybacking is the process by which one entity purchases goods or services from another entity’s contract.

It is the opinion of the Legislative Auditor that a construction contract subject to the requirements of W.Va. Code §5-22-1 cannot be validly piggybacked. In response to a request by the Legislative Auditor, Director Tincher stated the following regarding the use of piggybacking in government construction contracts:

*The Purchasing Division is unsure of the extent to which W.Va. Code §5-22-1 would restrict piggybacking since the Purchasing Division **has never been requested to piggyback a construction contract governed by W.Va. Code §5-22-1.***<sup>ai</sup>

This is likely because, as Director Tincher notes, “the restrictions in W. Va. Code of State Rules §148-1-7.9 make piggybacking of a construction project extremely difficult.” Because the grant was made to a political subdivision, which then made the procurement, the cited Rules related to piggybacking do not apply and the Division had no oversight over the procurement. The statute that *does* apply to the Fayette County Commission’s tower construction, W.Va. Code §5-22-1 does not specifically authorize piggybacking for government construction contracts. As discussed in Issue 1, however, W.Va. Code §5-22-1 requires that “every construction project” be competitively bid. This requirement simply could not be fulfilled by piggybacking, which, by its nature, eliminates any competition, and awards the work to the company already in possession of the contract.

**c. Fayette County Commission Gauley Mountain Fire Tower Relocation**

In addition to constructing towers, DMAPS’ 08-SR-05 grant to the Fayette County Commission was used, in part, to relocate a state fire tower from Gauley Mountain to the Cass Scenic Railroad State Park. According to Mr. Gonzalez, the fire tower’s location impeded the construction of the Gauley Mountain Communications Tower, one of the towers built by Premier under 08-SR-05 (which was administered

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*It is the opinion of the Legislative Auditor that a construction contract subject to the requirements of W.Va. Code §5-22-1 cannot be validly piggybacked.*

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*In addition to failing to solicit competitive bids for the tower relocation project, the Fayette County Commission again piggybacked the improperly noticed, scored and awarded Lewis County Commission contract.*

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*Although it was included in the DMAPS award to the Fayette County Commission, the dismantling, relocation, site preparation and re-erection of the fire tower at the Cass Scenic Railroad State Park does not appear to further the purposes of the legislative appropriation, which was awarded specifically for “interoperable communications”.*

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by Fayette County). This project, like the towers, “piggybacked” on the Lewis County Commission contract with Premier Construction and was not bid out individually as a government construction project. Therefore, in addition to failing to solicit competitive bids for the tower relocation project, the Fayette County Commission again piggybacked the improperly noticed, scored and awarded Lewis County Commission contract.

Additionally, although it was included in the DMAPS award to the Fayette County Commission, the dismantling, relocation, site preparation and re-erection of the fire tower at the Cass Scenic Railroad State Park does not appear to further the purposes of the legislative appropriation, which was awarded specifically for “interoperable communications”. According to the Division of Natural Resources, the “tower was relocated to Cass at the Whittaker Station rail stop to preserve the historic value and integrity of the structure and to provide historic interpretation.”

Finally, there are some irregularities related to the relocation of the fire tower. First, Premier Construction inexplicably quoted this project in its bid for the Lewis County Commission’s RFP (which preceded the award to Fayette County to complete this work). The project was not noticed in the advertisement, nor described in the RFP, nor was it any part of the work completed by the Lewis County Commission. Second, the cost of the dismantling, relocation, site preparation and re-erection of the fire tower increased without explanation from the time of the quote included in Premier’s bid to the Lewis County Commission to the time the quote was included in the Fayette County Commission’s application for 08-SR-05. Additionally, the Fayette County Commission paid invoices based on line items from a contract which is *specifically* for “site preparation, installation of a 340 foot communication tower and various steel *communications* towers” (emphasis added) for the dismantling, relocation, site preparation and re-erection of an historic fire tower, which, according to Mr. Erwin, will not be used for any communications needs.<sup>aj</sup>

Third, according to the DNR, “[c]oordination of the project and funds used in the same were facilitated by a charitable foundation which is dedicated to Cass, the Mountain State Railroad and Logging Historical Association Inc.” Mr. Gonzalez was, at the time of the relocation of the Gauley Mountain fire tower, a board member of the Mountain State Railroad and Logging Historical Association Inc., and remains on the board today. Mr. Gonzalez stated that he contacted Division of Natural Resources District Administrator Bob Beanblossom to facilitate a solution for the fire tower location, but that it was not his idea to move the tower to Cass. Mr. Beanblossom stated that Mr. Gonzalez contacted him and

*...indicated that [Mr. Gonzalez] wanted to relocate the Gauley Mountain Fire Tower to Cass Scenic Railroad State Park to be reerected at the Whitaker Site as an historical interpretive piece.*

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*Premier Construction inexplicably quoted this project in its bid for the Lewis County Commission’s RFP (which preceded the award to Fayette County to complete this work).*

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*Mr. Gonzalez was, at the time of the relocation of the Gauley Mountain fire tower, a board member of the Mountain State Railroad and Logging Historical Association Inc., and remains on the board today.*

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At the same time, according to Mr. Beanblossom, Mr. Gonzalez informed him that relocating and re-erecting the fire tower would not cost the DNR anything, because he had a had “a grant” to cover the costs.

**d. Conclusion**

Whether intentional or unintentional, the use by state agencies of a ‘pass through’ method of administering the legislative appropriation essentially removed, at least in part, the subsequent procurement and administration of tower construction for the Statewide Interoperable Radio Network from the oversight of both the purchasing divisions of the agencies involved (DHHR and DMAPS) and the West Virginia Purchasing Division. This lack of direct oversight and guidance likely contributed to the failure of the grantee, the Lewis County Commission, to comply with the requirements of the West Virginia Code. The resulting contract, which was not overseen by the Purchasing Division, and did not comply with the West Virginia Code, was also “piggybacked” by other recipients of state grant funds, and ultimately used for the procurement of the tower construction using BTOP funds.<sup>ak</sup>

**Recommendation**

- 3. The Legislature should consider statutorily prohibiting the granting of state funds to a political subdivision or any other entity, including 501(c)(3) nonprofits, to make purchases on behalf of the state or for a statewide system, consistent with Purchasing Division guidance.<sup>al</sup>*



## Issue 3

### **The State Interoperability Radio Network Should be Codified Under the Department of Military Affairs and Public Safety.**

In 2002, Governor Wise's administration recognized the need to enhance communications for public safety entities. Executive Order 8-02 created the State Interoperability Executive Committee comprised of representatives from multiple cabinet level departments, state agencies, and representatives from the Legislature with the objective of improving West Virginia's wireless communication network. Two executive orders during Governor Manchin's administration in 2005 and 2007 reestablished and evolved oversight of a statewide public safety network. In 2011, Governor Tomblin's administration established by Executive Order 2-11 the State Interoperability Radio Network (SIRN) for the purpose of implementing an interoperable communications network for first responders. Governor Tomblin's Executive Order also established the Statewide Interoperability Executive Committee (SIEC) to monitor the implementation of the SIRN and to establish goals and guidelines for improvement the radio network.

SIRN is comprised of a UHF digital P25 compliant trunked radio system with over 70 sites currently operational providing radio coverage for public safety entities throughout West Virginia. Funding of the SIRN has primarily been through federal grant funds including Broadband Technology Opportunities Program funds as discussed in the previous issues. Though grant funds continue to be available for the network, no one state agency is charged with the active pursuit of such funding. The state ownership of most state communication towers by DHHR is primarily the result of its steel and engineering contracts, and the more recent involvement of DHHR in the procurement of tower construction at the county level.

The recent expansion of the SIRN towers created an increased need for periodic maintenance. Additionally, weather-related events such as the June 2012 derecho resulted in the use of emergency procurement procedures by DHHR for repairs. Beyond seasonal damage, the system is not invulnerable to periodic theft and vandalism.

The Legislative Auditor finds that oversight of the State Interoperability Radio Network should be codified by the Legislature, and because of its overall responsibility for public safety, it should be under DMAPS. Single agency oversight and ownership of the SIRN would consolidate responsibility over the network and give legal clarity for the future of interoperable communication within the state. Legislative establishment would consolidate the concerns of the network such as emergency preparedness, security, grant funding, and the legal ability to execute maintenance contracts with counties for towers within their borders within one agency.

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*In 2011, Governor Tomblin's administration established by Executive Order 2-11 the State Interoperability Radio Network (SIRN).*

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*Though grant funds continue to be available for the network, no one state agency is charged with the active pursuit of such funding.*

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## **Recommendation**

4. *The Legislative Auditor recommends that the Legislature consider establishing the Statewide Interoperability Radio Network under the Department of Military Affairs and Public Safety. Ownership of state property within the Network should be transferred to the Department, along with the responsibility of maintaining and improving the network throughout the State.*



*(Endnotes)*

- a 2012 West Virginia Press Association Newspaper directory
- b This quote was not requested in the RFP, and, according to Mr. Gonzalez, was not requested at the pre-bid meeting. September 5, 2013 Letter from Joe Gonzalez.
- c Department of Commerce Financial Assistance Standard Terms and Conditions (March 2008) (DOC Standard Terms & Conditions)
- d Special Award Conditions, Award Number NT10BIX5570031, Amendment number 0
- e 15 C.F.R. Part 24
- f 73 FR 7696 (February 11, 2008)
- g DOC Standard Terms & Conditions §J.02.a; *see also* 15 CFR §24.3 Defining “grantee” and “subgrantee”.
- h DOC Standard Terms & Conditions §J.03.a (emphasis added); *See also* 73 FR 7696 §16(c).
- i Special Award Conditions, Award Number NT10BIX557003, 3) 2726 Project Specific SAC
- j 15 CFR §24.20(a)
- k 15 CFR §24.36(b)
- l Special Conditions and Assurances #20, page 9 of WV Homeland Security State Administrative Agency
- m W. Va. Code §5A-3-1(c-d)
- n W. Va. Code §5A-1-1(17)
- o W. Va. Code §5-22-1(d)
- p W. Va. Code §5-22-2
- q W. Va. Code §5-22-1(c)
- r W. Va. Code §5-22-2(a)
- s W. Va. Code §5-22-2(b)
- t W. Va. Code §5-22-1(c) (2011) (emphasis added). Article 22 of Chapter 5 of the Code was amended in 2012 and 2013; the version of the Code in effect at the time of the 2009 Lewis County Commission RFP is included here, because it applied to that procurement.
- u W. Va. Code §5-22A-2(11) (emphasis added).
- v W. Va. Code §5-22-1(b)(1)(C) (2011).
- w W. Va. Code R §148-1-7.9.
- x W. Va. Code R §148-1-7.9.1.
- y W. Va. Code R §148-1-7.9.1(a-c); §148-1-7.9.2.
- z W. Va. Code §5-22-1(e)
- aa 15 CFR §24.36(b)(9)
- ab Other portions of the appropriation were awarded to Pleasants County for its 911 Center Communications Equipment, DHSEM, and DHHR for other related projects.
- ac See Issue 1.
- ad Handbook, 2.1.
- ae Handbook, 9.
- af 08-SR-05 Fayette Award; 08-SR-03 Award.
- ag See Issue 1. Such procurements were not overseen by the Purchasing Division, however, as that agency does not oversee political subdivisions or have authority to require them to comply with the requirements of the Act. Tincher Letter from 6-17-2013, 4a.
- ah See Issue 1.
- ai Tincher Response to 9-11-2013 letter, at 5.
- aj Mr. Gonzalez stated that eventually some communications equipment will be placed atop the fire tower.
- ak See Issue 1.

al In this case, because the grantee, the Lewis County Commission, was a political subdivision, the requirements of W.Va. Code §5-22-1 applied to it regardless. Grants given to non-governmental agencies, however, are exempt from Purchasing Division oversight and also not subject to the requirements of W.Va. Code §5-22-1. The Supreme Court of Appeals of West Virginia has held, however, in order to determine whether the requirements of W.Va. Code §5-22-1 apply to an entity (even a non-governmental entity), trial courts 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; (2) 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.” *Affiliated Construction Trades Foundation v. The University of West Virginia Board of Trustees*, 557 S.E.2d 863, 210 W. Va. 456 (December 12, 2001).

am American Recovery and Reinvestment Act of 2009, P.L. 111-5, Div. B, Title I, Subtitle G, §1602.

## Appendix A

### BTOP Tower Erection by Company


<b>BTOP Tower Erection by Company</b>	
<b>BTOP Tower</b>	<b>Company</b>
Cleveland Mtn	Vertical Tech
Cottle Knob	Vertical Tech
Franklin/Long Ridge	Shenandoah
Glenville	Quality Tower Services
Grantsville/Five Forks	Vertical Tech
Greenbrier Mtn.	Shenandoah
Kenna	Vertical Tech
Sharps Knob	Vertical Tech
Snowshoe	Premier Construction
Spencer	Vertical Tech
Weirton	Allstate Tower, Inc.
Williamson	Shenandoah
Hargreave	Installtek
Limestone	Allstate Tower, Inc.
Montgomery Hill	Allstate Tower, Inc.
Mt. Storm	Installtek
North Mtn	Installtek
<i>Source: Premier Construction correspondence, (unaudited)</i>	



## Appendix B WV E9-1-1 Council's Message Board

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groups.yahoo.com/neo/groups/WVE911Council/conversations/messages/5214

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# WV E9-1-1 Council

🔒 Restricted Group, members

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←
FW: Sayre Brothers Contract (5214)

**Robert Hoge, Mercer**

Attached is a copy of a contract signed with Randolph County for tower work. It is available for anyone to purchase from. Any questions, feel free to contact Joe Gonzalez

Thanks

Bob

-----Original Message-----  
 From: Joe Gonzalez [mailto:jgonzo@...]  
 Sent: Monday, November 12, 2007 12:17 PM  
 To: Robert Hoge, Mercer County WV 9-1-1  
 Subject: Fw: Saayre Brothers Contract

Bobby,  
 Could you forward a copy of this contract to all of the other county 911 folks so they will have a contract that can use for their communication needs. Thanks Joe

\*\*\*

----- Original Message -----  
 From: "Nancy Lilly" <nancylilly@...>  
 To: <jgonzo@...>  
 Sent: Wednesday, November 07, 2007 8:33 AM  
 Subject: Saayre Brothers Contract

> Joe:  
 > Here it is.  
 > Nancy  
 >







WEST VIRGINIA LEGISLATIVE AUDITOR

**PERFORMANCE EVALUATION & RESEARCH DIVISION**

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