

West Virginia Ethics Commission



How to Seek a Contract Exemption Guideline

Two provisions of the West Virginia Code prohibit public servants from having an interest in public contracts over which they may have control. These provisions are set forth in the Ethics Act, at W. Va. Code § 6B-2-5(d), and in the “Crimes and their Punishment” section of the Code at W. Va. Code § 61-10-15. (W. Va. Code § 61-10-15 applies only to certain county officials, teachers and county school officials.)

These prohibitions were designed by the Legislature to steer public officials away from inherently questionable situations. They are intended to prevent actual impropriety as well as the appearance of impropriety.

What is a Contract Exemption?

A Contract Exemption is written permission from the Ethics Commission for a governmental agency to be a party to a contract that is otherwise prohibited by the Ethics Act or by W. Va. Code § 61-10-15. The Ethics Commission may only grant an exemption if it finds that denying the exemption will result in excessive cost, undue hardship or other substantial interference with the operation of a public agency.

Who may request a Contract Exemption?

Only the governmental agency which may be adversely affected – not the public servant who has a financial interest in the contract -- may request a Contract Exemption.

What must an agency do before requesting a contract exemption?

A governmental agency may not simply decide to do business with one of its public officials or employees. It instead must exercise due diligence in ensuring that all interested persons or businesses are given a full and fair opportunity to compete for the governmental agency's business. This typically includes public notice, a good faith search and/or obtaining estimates. If

the agency determines that it is in its best interest to contract with one of its public officials or employees, it may seek an exemption.

The governmental agency must demonstrate in its request to the Ethics Commission that it will experience undue hardship, excessive cost or substantial interference with its operation if it is unable to enter into the contract with public official or employee. W. Va. Code § 6B-2-5(d)(3). Contract Exemption requests should include information reflecting the totality of the circumstances; the basis for the contention that entering into the contract is in the best interest of the agency; what other options the agency considered and why they were rejected, and the agenda and minutes of meetings in which the agency decided to seek a Contract Exemption or discussed it.

How do public servants with interests in contracts comply with the statutes?

If a public official or employee has an interest in the profits or benefits of a contract, he/she may not make, participate in making or in any way attempt to use his/her office or employment to influence a governmental decision affecting his/her financial or limited financial interest. Public servants also may not informally “lobby” or otherwise attempt to influence voting members or other decision-makers in the government agency.

Public officials must also recuse themselves from voting. For recusal to be proper, public officials must first fully disclose on the record their disqualifying interest in the public contract. This includes making a prior public disclosure of the amount of interest held in the contract directly or indirectly by the official or his or her immediate family member. W. Va. Code R. § 158-8-5 (2009). They also must leave the room during the discussion, deliberation and vote on the matter. Finally, the minutes must reflect the basis for the recusal and that the public official left the room during the consideration, discussion and vote on the item under consideration. W. Va. Code § 6B-2-5(j)(3).

Previously issued Contract Exemptions

Contract Exemption requests ruled upon since 2007 are available at ethics.wv.gov under the section entitled “Advisory Opinions.”

For more information about public contract limitations, see the Ethics Commission’s Guidelines entitled “Prohibited Interest in a Public Contract” and “W. Va. Code § 61-10-15 Governing County Officials and County Schools” on the Ethics Commission’s website under the section entitled “Forms, Booklets and Guidelines.”

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210 BROOKS STREET, SUITE 300
CHARLESTON, WV 25301-1804
(304) 558-0664 - FAX (304) 558-2169
ethics@wv.gov ethics.wv.gov