

## West Virginia Ethics Commission



# Prohibited Interest in a Public Contract Guideline

The Ethics Act prohibits public officials and employees or members of their immediate family from having a financial interest in the profits or benefits of a contract if the official, employee or family member may have either direct authority to enter into the contract or control over the contract. W. Va. Code § 6B-2-5(d).

This prohibition extends to businesses with which the official, employee or family member are associated.

### **Direct authority or control over a contract**

A Legislative Rule, at W. Va. Code R. § 158-8-2, provides that:

Examples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents, assistant superintendents, purchasing directors, County Commissioners, County Board members and City managers.

Further, the Ethics Commission has issued numerous Advisory Opinions which have analyzed whether a public official or employee had direct authority or control over a public contract.

For example, in Advisory Opinion 2019-04, the Commission held that a Fire Chief exercised direct authority or control over decisions of the City to purchase equipment or supplies for use by the City to provide fire protection to the City. Conversely, in Advisory Opinion 2013-22, the Commission held that a state employee employed as a laborer had no direct authority or control over the selection of the state agency's contractors. Therefore, the employee's trucking company was not prohibited from entering into a subcontract with the agency's contractor.

## **“Immediate family members” defined**

As used in the public contracts section of the Ethics Act, an “immediate family member” means the public official’s or employee’s spouse with whom he or she is living as husband and wife, any dependent child or children, any dependent grandchild or grandchildren and a dependent parent or parents. W. Va. Code § 6B-1-3(f).

## **Businesses with which official is associated**

For purposes of this prohibition, public servants and their immediate family members are “associated” with a business if they are a director or officer in the business or if they hold stock in the business which constitutes 5% or more of the outstanding stock of any class.

## **Interests which are not prohibited under the Ethics Act**

The Ethics Act provides that certain interests are “limited” and therefore do not constitute a “prohibited financial interest” in a public contract. “Limited interests” are:

- An interest which does not exceed \$1,000 in the profits or benefits of a public contract or contracts in a calendar year, and
- An interest as a creditor of a public official or employee who exercises control over the contract (or a member of his or her immediate family) if the amount is less than \$5,000.

If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials must also comply with the voting rules set forth in the Ethics Act.

## **Exception for Legislators**

Members of the Legislature may contract with any governmental body, but they may not use the prestige of their office to obtain unwarranted advantage in the awarding of the contract. If a Legislator has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his or her office or employment to influence a government decision affecting his or her financial interest. Legislators also must comply with the voting rules set forth in the Ethics Act.

## **Exception for part-time appointed officials**

The Ethics Act does not prohibit a part-time appointed public official from entering into contracts over which he or she may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation of

the contract, has been recused from deciding or evaluating the contract, has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

Certain county officials and county school employees are also governed by W. Va. Code § 61-10-15, which contains stricter limitations on prohibited interests in contracts. County officials and school board employees therefore also should refer to the Ethics Commission Guideline entitled “W. Va. Code § 61-10-15 Governing County Officials and County Schools.”

### **Contracts being put out on bid**

The Ethics Act does not govern the contract bidding process. This is governed by other provisions of the West Virginia Code, by local ordinances, or by an agency’s procurement policies. However, if an agency wants to contract with one of its officials or employees, normally it must seek a contract exemption from the Ethics Commission. *For more information, refer to the Guideline entitled “How to Seek a Contract Exemption.”*

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