

## **CONTRACT EXEMPTION NO. 2008-01**

**Issued On January 10, 2008 By The**

**WEST VIRGINIA ETHICS COMMISSION**

### **OPINION SOUGHT**

The **Kenova City Council** asks for an exemption to permit it to purchase merchandise and services from Kenova Box Company, a hardware and building supply business. Kenova City Council President Stanley Wood manages the store; he owns 20% stock and is the treasurer of the company.

### **FACTS RELIED UPON BY THE COMMISSION**

Stanley Wood was recently elected to serve on Kenova's City Council, and also took office as its President on July 1, 2007. For over fifty years, the City of Kenova has transacted business with Kenova Box Company. Since Mr. Wood's election to Council, the amount of business between the City and Kenova Box has been consistent with transactions over the past eight years or more. The City's purchases are frequent but generally small; it is not unusual for the City to make several trips to the store in one day based on the needs of various departments. In Fiscal Year 2007 the City purchased \$10,536.40 of goods and services from Kenova Box, of which \$4,528.55 was spent after Mr. Wood took office.

The Mayor and the Public Works Supervisor generally approve purchase orders without Council's knowledge or input. Only purchases in excess of \$300 require Council's approval. Mr. Wood has never ordered or voted to order any product or service from Kenova Box for the City of Kenova. Upon learning of the potential violation of the Ethics Act, the Mayor suspended all purchases from Kenova Box pending an opinion from the Ethics Commission.

Kenova Box is the nearest supplier of lumber and building supplies. Although the City may be eligible for company credit cards at 84 Lumber and Lowes, Kenova Box is the only local establishment of its kind that will allow the City to purchase on credit. Further, Kenova Box has historically extended quick service when the City experienced frequent water leaks or other after hours emergencies. According to the Requester, Harbor Freight, 84 Lumber and Lowes do not have the capacity to respond to emergencies. Although the City has recently replaced approximately 70% of its water lines, this measure has reduced, but not eliminated, the frequency of water leaks. The Requester further states that the expenses related to emergency transactions have not been high.

According to MapQuest, Kenova Box is 1.03 miles from City Hall. The next closest hardware store is 1.13 miles, but does not carry lumber or building supplies. Further, according to the Requester, it only sells merchandise in bulk. The closest 84 Lumber is 4.5 miles; the nearest Lowes is just over 10 miles away. If the City were unable to transact business with Kenova Box, it would incur costs such as travel time, wear and tear on City vehicles, and increasingly expensive gasoline.

### **CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W.Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control ....

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

### **ADVISORY OPINION**

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract which they have the power to award or control. This prohibition prevents a City from doing business with a business in which one of its Council members has an ownership interest, as here. This prohibition, like the others in the Act, is designed by the Legislature to keep public servants out of harm's way. The prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. It aims to steer public servants away from inherently questionable situations.

The Ethics Act also provides, however, that the Ethics Commission may grant an agency an exemption from this prohibition if the agency demonstrates that its enforcement will cause the agency excessive cost, undue hardship or substantial interference with its operation. If the City is to obtain an exemption, it must demonstrate that compliance with the prohibition is certain to produce substantial harm. It must show that real and significant hardship will result, hardship which outweighs the important role the prohibition plays in preserving propriety and the appearance of propriety in public contracts.

The Commission recognized in Advisory Opinion 2005-05 that small towns have a limited number of employees and financial resources; there the Commission found that requiring the Town to make purchases from a hardware store located thirteen (13) miles away would result in excessive costs and would create an undue hardship. The Commission also observed that not only would such trips be burdensome, there were also associated vehicle and labor costs. In Contract Exemption 2007-04, the Commission granted an exemption to the City of Ripley, with certain conditions, where the distance to the next hardware store was twice as far. Here, however, the nearest competitor, Harbor Freight, is only .10 mile further away. Although Harbor Freight is not a complete hardware store and lacks lumber and building supplies, 84 Lumber is only 4.5 miles away. The Commission recognizes that requiring the City to travel further to these stores may inconvenience the City.

The Commission finds that the City has failed to demonstrate the degree of excessive cost, undue hardship, or other substantial interference required to justify an exemption. Specifically, the Commission finds that the increased cost of traveling to 84 Lumber or Lowes for lumber or building supplies does not constitute undue hardship, excessive cost or substantial interference with the City's operation. The Commission would rather err on the side of caution and avoid any appearance of impropriety in the proposed contract between the City and Councilperson Wood. Thus, the Commission hereby denies an exemption from the provisions of W. Va. Code § 6B-2-5 (d).

Therefore, it would violate W. Va. Code § 6B-2-5(d)(1) for the City of Kenova to transact business with Kenova Box Company with one exception. If an emergency occurs after the aforementioned stores have closed for the day, and no other business is willing or able to assist the City to get through the emergency, the Commission authorizes the City to transact business with Kenova Box Company for the limited purpose of correcting the emergency situation. Further, in such an event, Mr. Wood shall fully disclose his involvement in any such sale or service and excuse himself from any evaluation, discussion or vote to approve the transaction.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may not be relied upon as a precedent by other persons or entities.

The Commission further notes that the City of Kenova made this request in good faith as soon as the alleged violation was brought to its attention. Further, the City has ceased its practice of dealing with Kenova Box as soon as the alleged violation was brought to its attention.

s/s \_\_\_\_\_  
R. Kemp Morton, Chair