

CONTRACT EXEMPTION NO. 2008-14

Issued On February 5, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Weirton City Council** asks for an exemption to permit it to continue to purchase products and services from Marsh Pipe and Supply Company (Marsh Pipe), a hardware store owned by an elected Councilperson, Fred Marsh.

FACTS RELIED UPON BY THE COMMISSION

Fred Marsh was elected to serve on Weirton's City Council and took office on July 1, 2007. For more than fifty years, the City of Weirton has purchased products and services from Marsh Pipe. The Requester states that Councilperson Marsh has never voted on any issue involving Marsh Pipe.

According to the Requester, if the City were prohibited from purchasing from Marsh Pipe, then excessive cost, undue hardship and substantial interference with the operation of the City of Weirton would occur "causing financial hardship to the City of Weirton and a severe disruption in the services that the City of Weirton provides to its citizens." The City's economy is already fragile, with impending cutbacks and layoffs. The Requester states: "If there is any part of the City budget that cannot be reduced any further it is the purchasing of these materials from Marsh Hardware because Marsh Hardware is consistently the most economical and the most cooperative business available to the City of Weirton. If the City was restricted in purchasing these materials from other sources (which the City does when it is economically feasible) then the Commission would, in reality, financially close the City down."

According to the Requester, Marsh Pipe consistently has in stock the items needed by the City, many of which are specialty items, and consistently has the lowest prices. From February through December 2008, the City purchased items from seven hardware stores, including Marsh Pipe. Total purchases from these hardware stores amount to \$25,394.37, \$14,066.45 of which the City spent at Marsh Pipe. Upon learning of the potential violation of the Ethics Act, the City suspended all but emergency purchases from Marsh Pipe pending an opinion from the Ethics Commission.

The Requester states that:

...most of the items that are purchased by the City of Weirton from Marsh Hardware are specialty items including black iron pipe (that would need to be delivered elsewhere out of this area after purchasing in order to be properly threaded) that Marsh Hardware properly threads for the City

employees immediate use; bolts for snow plows that are high tempered steel that are not available in this area (our employees would have to drive to Pittsburgh, PA and deal with those inherent delays); sign posts that are available at Marsh Hardware for the City of Weirton are not available at any other store in Weirton (which means our employees would have to go to Ohio or Pennsylvania for these items); a specialty lawnmower that was purchased last year at Marsh Hardware was available at Sears (however, it was 15% more expensive at Sears and the closest Sears is in Ohio); the City of Weirton requires many different sizes and shapes of pipes that Marsh Hardware always provides ... with a quick turnaround time and usually below any competitors prices (15%-20% ...) and if the pipe does not fit adequately our employees do not need to make an emergency trip to Pittsburgh or Ohio to get the proper size. Many items are also purchased in emergency situations where the residents of the City of Weirton simply can not wait until our employees drive to Ohio or Pennsylvania in order to purchases these specialty pipes.

The City also states that Marsh Pipe was the only vendor willing to make a recycling can with the WV Recycling logo on the can as an example of not only specialty items, but the store's willingness to cooperate with the City's needs and requirements. Further, assuming arguendo that bulk purchases from a larger chain retail store would be less expensive, it would not be practical for the City to purchase in bulk and store the excess supplies since the City does not use the same materials on a regular basis.

According to the Requester, Marsh Pipe is a ten minute round trip from the City's Public Works Department. Weirton's other hardware stores do not stock the variety of items the City needs on a regular and/or emergency basis. The next closest hardware store is M&M Hardware in Steubenville, Ohio, 9.2 miles away. Further, it appears that the nearest Lowe's with which the City has a corporate account is over 36 miles away, an approximate 45 minute drive from Weirton. The IRS allowable mileage expense reimbursement rate is 55 cents per mile. Applying this rate, the expense of making each round trip to the next closest hardware store is \$10.12, and approximately \$39.60 for each trip to Lowe's. Further, employees' time is taken away from other tasks when required to drive farther, especially when traffic is congested.

Finally, as with many other governing entities in West Virginia, the City generally chooses the lowest price quote and a local (or in-State) business.

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 owned by one of its Council members. The Ethics Act also provides, however, that the Ethics Commission may grant a municipality 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.

Here, the City has demonstrated that many of its purchases are specialty items and/or goods and services not otherwise readily available in Weirton. The Department of Public Works relies on easy access to Marsh Pipe to meet both its day-to-day business as well as its emergency demands. The Commission recognizes that the City's longstanding practice of purchasing from Marsh Pipe diminishes any concern that Councilperson Marsh is taking advantage of the City because of his position. According to the City's records, it purchased goods and services from Marsh Pipe as follows: 2005 –\$19,430; 2006 - \$17,872.51; January – June, 2007, \$8,602.57.

The Commission hereby finds that, under the circumstances, the City would experience undue hardship and substantial interference with its operations if the Commission did not exempt at least some of the City's purchases from Marsh Pipe.

The Commission cannot, however, authorize future purchases of road signs, lawn mowers, or other items that are available on the open market, especially since these purchases were anticipated, not emergencies.

Based upon the foregoing, the Ethics Commission grants the City of Weirton an exemption from the prohibition of W.Va. Code § 6B-2-5(d) to allow it to purchase products and services from Marsh Pipe on an emergency basis or that are otherwise not available in the Weirton area.

Further, it would not violate W. Va. Code § 6B-2-5(d)(1) for Councilperson Marsh to provide goods and services to the City, with the limitation set forth above, so long as he fully discloses his involvement in any such transaction and excuses himself from any evaluation, discussion or vote to approve the sale.

The Commission has heard arguments before that governing bodies prefer to spend their money locally (in-State). While we recognize the value of such a policy, it fails to dissipate the conflict of interest the Ethics Act prohibits. While a laudable practice, it

does not satisfy any of the Act's three limited exceptions: undue hardship, excessive cost, or substantial interference with government operations.

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.

s/s
R. Kemp Morton, Chair