

Contract Exemption 2017-01

Issued on March 2, 2017, by

The West Virginia Ethics Commission

Opinion Sought

The **Clay County Commission** requests an exemption to continue to use wrecker services provided by a business owned by a recently elected county commissioner.

Facts Relied Upon By the Commission

The owner of King's Wrecker Service ("King's") was recently elected to the Clay County Commission and took office January 1, 2017. The Requester wants to continue using King's for the towing and impoundment of vehicles, stating that King's has worked well with the Requester in the past and has abided by the terms set forth in the county's current towing agreement policy. King's Wrecker Service opened in 1991 and is the only towing service in Clay County.

The towing agreement policy ("policy") was adopted in 2015 by the Requester, the Clay County Office of Emergency Services and the Clay County E911 Communication Center. The owner of King's was not a member of the commission at the time the agreement was adopted. The policy states:

No person, firm, corporation or other entity shall tow for the Clay County Commission or provide services such as towing, removal, recovery or storage of a wrecked, abandoned, disabled or other vehicle, pursuant to a lawful order of [the] Clay County Commission, unless they comply with the rules and regulations promulgated by the Director of [the] Clay County Office of Emergency Services and E911.

The policy further states that "[a]ll entities furnishings [sic] these services to Clay County must be housed within the boundaries of Clay County and conduct their business from headquarters located in Clay County." Additionally, the policy provides that "[m]otor vehicle storage must be in an area convenient to the public and in Clay County, no exceptions to this rule will be tolerated."

The Requester states that Clay County is centrally located in West Virginia and has a population of about 9,000 residents. The Requester states that the Clay County E911 Communication Center is responsible for dispatching a wrecker when requested by law enforcement in Clay County. The Requester further states that the Clay Ambulance Service is owned and operated by the Requester and sometimes needs a wrecker due to breakdowns or being stuck on rural roads due to inclement weather. The Requester

represents that it runs both the E911 Communication Center and the Office of Emergency Services and appoints the directors of both organizations.

Finally, Requester states that “[i]t would create an undue hardship, involve excessive cost and cause a wait time of at least an hour for a wrecker to travel from another county.” Requester finally states that the “request is being made so that we can serve the citizens of Clay County in an efficient manner.”

Provisions Relied Upon By the Commission

W.Va. Code § 6B-2-5(d)(1) states, in relevant part:

[N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the 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)(2) states, in relevant part:

In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;

....

W.Va. Code § 6B-2-5(d)(3) states, in relevant part:

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 shall also comply with the voting rules prescribed in subsection (j) of this section.

W.Va. Code § 6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a

state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

W.Va. Code § 61-10-15(a) states, in pertinent part:

It is unlawful for any member of a county commission ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member ..., he or she may have any voice, influence or control

W.Va. Code § 61-10-15(h) states:

Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

Advisory Opinion

The Ethics Act prohibits a county commissioner from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control unless his or her governing body seeks, and receives, an exemption to contract with the public official. W.Va. Code § 6B-2-5(d). For purposes of this provision, a "limited interest" is defined as an interest which does not exceed \$1,000 in the profits or benefits of the contracts in a calendar year. W.Va. Code § 6B-2-5(d)(2)(A).

In addition to the Ethics Act, a county commissioner must abide by the stricter prohibitions contained in W.Va. Code § 61-10-15. W.Va. Code § 61-10-15, a separate criminal statute, imposes criminal penalties against county officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise voice, influence or control. A governing body may seek an exemption to contract with an official under this provision as well. W.Va. Code § 61-10-15(h). Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. Unlike the Ethics Act, the prohibition in W.Va. Code § 61-10-15 does not have a \$1,000 threshold. Accordingly, if either the Ethics Act or W.Va. Code § 61-10-15 prohibits a public official from entering into a public contract, a contract exemption will be necessary.

The Requester desires to contract with one of its member's businesses, King's Wrecker Service, to provide wrecker services to the Requester and its subordinate county departments. As sole owner of King's, the county commissioner has a financial interest

in King's public contracts with the Requester and its subordinate county departments. Furthermore, as a county commissioner, the owner of King's has the requisite voice, influence, and control over the contracts of the Requester and its subordinate departments and boards pursuant to W.Va. Code § 61-10-15. See Advisory Opinion 2009-01 ("[T]he appointment power of a county commissioner constitutes voice, influence or control over county hospitals and the contracts entered into by the hospital board of trustees."); see also *State v. Neary*, 365 SE.2d 395, 400 (W.Va. 1987) (holding that the power of a County Commissioner to nominate and vote for a Public Service District Board Member gave the County Commissioner voice, influence and control over PSD contracts). Accordingly, a contract exemption is necessary for the Requester to contract with King's.

The Ethics Commission may grant an exemption from the prohibitions in W.Va. Code § 61-10-15 if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. The Ethics Act contains identical requirements for an exemption.

In the present case, the Requester maintains that it would cause "undue hardship, involve excessive cost and cause a wait time of at least an hour for a wrecker to travel from another county." The Requester provided a list of towing services that it would have to use should they be prohibited from using King's. The closest service is located in Servia, West Virginia, which is approximately 24 miles from the center of Clay County. King's is located approximately 13 miles from the center of Clay County.

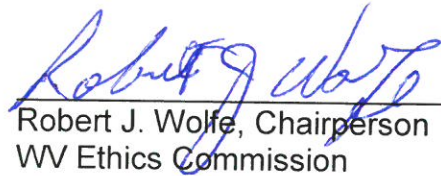
In addition to increased wait time and distance, prohibiting the Requester from contracting with King's would also leave the Requester without a towing service in compliance with its towing agreement policy. The towing agreement policy provides that all entities furnishing towing services to Clay County must be housed within the boundaries of Clay County and further that motor vehicle storage must be in Clay County. King's is the only towing service in Clay County.

Based upon the foregoing, the Ethics Commission finds that prohibiting the Requester from contracting with King's Wrecker Service would result in undue hardship, excessive cost and substantial interference with the Requester's operations. See Advisory Opinion 89-125 (granting an exemption to utilize automobile service facilities owned by a county commissioner). **The Ethics Commission hereby grants the Requester an exemption to continue to contract with King's Wrecker Service for a contract period not to exceed one year. At the expiration of one year, if the Requester seeks to continue contracting with King's Wrecker Service, it must submit a new request for a contract exemption.**

Should the Requester submit another contract exemption, the County must demonstrate that it made a good faith effort to evaluate what other comparable services, if any, are available to procure and the cost thereof. Further, the Requester must set forth in its exemption request what efforts were taken to evaluate all potential options which may be available to the County for purposes of

making a decision in regard to whether continuing to contract with King's is in the best interest of the County. Additionally, the owner of King's may not be involved in the County's efforts to evaluate other options. She must recuse herself from all matters relating to the County Commission's decision in this regard. W.Va. Code § 6B-2-5(j)(3).

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


Robert J. Wolfe, Chairperson
WV Ethics Commission