

Contract Exemption 2017-02

Issued on April 6, 2017, by

The West Virginia Ethics Commission

Opinion Sought

The **Putnam Public Service District** requests an exemption to continue purchasing replacement parts for its manholes and wet-wells from a business owned by a recently elected county commissioner and to make other purchases from this business in emergency situations.

Facts Relied Upon by the Commission

The Putnam Public Service District ("PSD") is a public water and wastewater utility company. The PSD maintains and operates a sewer system.

The sewer system has manholes and wet-wells. A manhole is a shaft in the ground used by utility workers to enter a sewer system. A wet-well is a chamber used for the collection of wastewater in the sewer system. Both the manholes and wet-wells are made of concrete and various other components. The PSD purchased many of the existing precast concrete manholes and wet-wells from a manufacturer named Oldcastle. Some of the purchases and installations of these structures date back 10 years or more.

The Oldcastle facility in West Virginia was bought by Foster Supply. A recently elected Putnam County Commissioner, Ron Foster, owns a significant portion of the stock in Foster Supply. The Commissioner took office on January 1, 2017, for a six-year term. The Putnam County Commission appoints the PSD Board Members.

At times, due to deterioration of, or damage to, the manholes or wet-wells, the PSD buys concrete replacement parts from Foster Supply for necessary repairs. The Requester seeks to continue purchasing the replacement parts from Foster Supply. The Requester states:

Our manholes and wet-wells have joints that exactly match the concrete molds used by Oldcastle – now Foster Supply. Oldcastle has another facility in Lexington, KY, but they are prohibited from selling their products in West Virginia due [to] a non-compete clause in the Foster Supply Purchase Agreement. Therefore, when the District needs to purchase a replacement piece for a manhole or wet-well, we need the ability to purchase from Foster Supply to ensure the concrete utility pieces will have a precise fit to inhibit infiltration of groundwater into the wastewater collection system and to prevent sewer from leaking between the seams

into the environment. These are not products that are purchased on a daily basis; when they are needed, they are special orders.

For the last two fiscal years, and the current fiscal year to date, the Requester has made the following direct purchases from Foster Supply:

- Fiscal Year 7/1/16 to 3/14/17: \$433.50 (The PSD bought metal manhole rings, not concrete repair parts)
- Fiscal Year 7/1/15 to 6/30/16: \$447
- Fiscal Year 7/1/14 to 6/30/15: \$2,513

Examples of concrete materials purchased are barrel sections (manhole center section), concrete risers also referred to as “donuts,” and manhole top sections, commonly known as “chimneys.” Sometimes the parts are already precast and available at Foster Supply. At other times, the business uses its molds to cast the needed piece.

The PSD states it is unaware of any suppliers with molds or precast components which will match the joints of its existing manholes and wet-wells. The Requester seeks an exemption to purchase replacement parts from Foster Supply in an amount not to exceed \$5,000 in a fiscal year.

The PSD also seeks an exemption to purchase other products from Foster Supply in emergency situations in an amount not to exceed \$1,000 in a fiscal year. The Requester states in support of its request:

Although we strive to have sewer line repair materials on-hand for these types of jobs, it is probable that we will experience a time where we do not have the correct material in stock. Foster Supply is the closest supplier to Putnam Public Service District and, in the event of a sewage spill or other time-sensitive situation, it is imperative that we have the ability to purchase these specific materials from the closest available supplier.

The Requester provided information regarding the geographic distances of the other two closest suppliers from the PSD headquarters. One supplier is 13.2 miles from the PSD office and the other 18.1 miles.

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 relevant 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 the 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. See 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 a public contract, a Contract Exemption is necessary.

The Requester wants to contract with a business in which an elected county commissioner has an ownership interest. The County Commissioner has the requisite voice, influence, and control over the contracts of the PSD pursuant to W.Va. Code § 61-10-15 as the PSD is in the same county where he serves as a Commissioner and the County Commission appoints the PSD board members. 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). Therefore, a Contract Exemption is necessary in the instant situation for the Requester to continue buying material or products from Foster Supply.

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. The Requester seeks an exemption to make purchases in two separate instances. The Ethics Commission will address each separately.

Concrete Replacement Parts

The Requester states that it needs to purchase the concrete replacement parts from the manufacturer of the originally installed manholes and wet-wells to ensure the joints match. The Requester further states it is necessary to have a precise fit to “inhibit infiltration of groundwater into the wastewater collection system and to prevent sewer [waste] from leaking between the seams into the environment.” Lastly, the Requester states it is

unaware of another manufacturer whose concrete components will precisely fit its existing manholes and wet-wells.

Based upon the facts presented by the Requester, the Ethics Commission finds that prohibiting the Requester from purchasing replacement parts for its manholes and wet-wells from Foster Supply would result in undue hardship, excessive cost and substantial interference with the Requester's operations. The Ethics Commission hereby grants the Requester an exemption to continue to purchase replacement parts from Foster Supply in an amount not to exceed \$5,000 per fiscal year until fiscal year ending June 30, 2019.

Emergency Situation

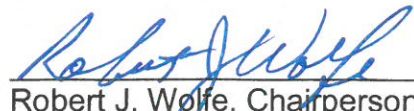
The Requester states that if there is a sewer spill or another emergency, Foster Supply is the closest supplier for sewer line repair materials. It seeks an exemption in case it needs to make purchases in emergency situations which, if not immediately addressed, may affect public health and safety.

In the present case, the Ethics Commission finds that prohibiting the Requester from purchasing a limited amount of materials or supplies from Foster Supply in emergencies would result in undue hardship, excessive cost and substantial interference with the Requester's operations. In the event of an emergency, the Ethics Commission grants the PSD an exemption to make purchases from Foster Supply in an amount not to exceed \$1,000 per fiscal year until fiscal year ending June 30, 2019.

If after June 30, 2019, the Requester wants to continue making purchases from Foster Supply for concrete replacement parts or in emergency situations, it must submit a new request for a Contract Exemption.

Should the Requester submit another Contract Exemption, the PSD must demonstrate that it made a good faith effort to evaluate whether other comparable suppliers, if any, are available to provide the material needed. Further, the Requester must set forth in its exemption request the efforts it took to evaluate all potential options which may be available to the PSD regarding its decision that continuing to contract with Foster Supply is in the best interest of the PSD. Additionally, the County Commissioner, who is part-owner of Foster Supply, may not be involved in the PSD's efforts to evaluate other options.

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