

Contract Exemption 2017-05

Issued on September 7, 2017, by

The West Virginia Ethics Commission

Opinion Sought

The **Town of Reedsville** requests an exemption to contract with an excavation and repair company owned by its Mayor.

Facts Relied Upon By the Commission

The owner of Brown's Mill Excavating, LLC, ("Brown's") was recently elected Mayor of Reedsville, West Virginia, and took office on July 1, 2017. Additionally, the Mayor's spouse serves as a town council member of Reedsville. The Town of Reedsville ("Requester") wants to contract with Brown's for excavation and repair work on West Street located within the city limits of Reedsville. The Requester states that West Street is having severe drainage issues and that if the street is not repaired by a licensed contractor, damage to residents' property is likely.

Drainage issues on West Street were first brought to the Requester's attention in June 2010. At that time, the Requester built a small retaining wall to divert water running down West Street away from a resident's house. In September 2015, the Requester was approached again regarding water draining from West Street onto two separate properties. The Requester subsequently installed two box culverts to catch the excess drainage. The Requester also purchases anywhere from 25 to 100 tons of gravel each year to place on West Street due to drainage issues. According to the Requester, West Street is not properly crowned, and the water has no place to drain except down the middle of the road. A crowned road surface is one in which each side of the road slopes in opposite directions from the center of the road to provide drainage.

In April 2017, the Requester received calls from several residents regarding flooding at the intersection of First and West streets. Town Council subsequently approved seeking bids to fix West Street during its April 24, 2017, meeting. Records from council's next two meetings in May 2017 indicate that it was still awaiting bids for the project. On June 23, 2017, the Requester received a bid from Brown's for the project with an estimate of \$27,735.

Minutes from the Requester's July 24, 2017, council meeting state that the bid from Brown's was the only bid received for the project, and the owner of Brown's had since begun his term as Mayor of Reedsville. The Requester subsequently approved submitting another advertisement for the project. The advertisement was placed in the August 1, 2017, issue of the Preston County Journal and the Requester's Facebook page. The advertisement read as follows:

DUE TO THE LACK OF RESPONSE, the Town of Reedsville is once again accepting bids for the Crowning and Ditching of West Street. Contractors must be licensed and insured. Please call Reedsville Town Hall . . . for more information. Bids must be in by August 22, 2017.

The Requester states that town officials additionally asked two other companies to submit bids for the project prior to placing the advertisement. The Requester states it has received no other bids to date.

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(j) reads, in relevant part:

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall also be reflected in the meeting minutes.

W. Va. Code R. § 158-8-5 (2009) reads, in relevant part:

5.1. For the purposes of W. Va. Code § 6B-2-5(d), the Ethics Commission will consider a person "recused" if he or she (1) has made a full disclosure of his or her interest in the public contract, (2) has refrained from discussing, voting on or otherwise influencing or deciding the matter, and (3) is absent from the room during the discussion and voting process.

5.2. Making a full disclosure of one's interest means making a prior public disclosure including the amount of interest held directly or indirectly by a public employee or public official or immediate family thereof in a public contract.

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.

Advisory Opinion

The Ethics Act prohibits a public official 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).

The Requester desires to contract with its Mayor's company, Brown's Mill Excavating, LLC, to perform the excavation and repair work associated with ditching and crowning West Street. This contract is prohibited by W. Va. Code § 6B-2-5(d). As sole owner of Brown's, the Mayor has a more than a limited financial interest in the public contract with the Requester to perform the excavation and repair work on West Street, which is

estimated to cost \$27,735. The position of Mayor also has the requisite control over the contracts of the Requester pursuant to W. Va. Code § 6B-2-5(d). Accordingly, a contract exemption is necessary for the Requester to contract with Brown's. See, e.g., Advisory Opinion 2003-01 ("[W. Va. Code § 6B-2-5(d)] prevents a Town Council from entering into a lease agreement with its Mayor. However, the Ethics Commission has the power to grant an agency an exemption from this prohibition where it appears that the prohibition would cause the agency undue hardship.").

The Ethics Commission may grant an exemption from the prohibitions in W. Va. Code § 6B-2-5(d) if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency.

Based on the information provided, the Commission finds there are no other viable options available to the Requester other than contracting with the Mayor's company. The Requester has properly advertised for bids for the West Street project. The Requester has twice advertised for bids, placed ads in its local newspaper and on its Facebook page and Town officials have directly sought bids from two companies other than Brown's. See Advisory Opinion 98-05 (finding that an ad placed in the local newspaper for employment positions was adequate public notice). Furthermore, if unrepaired, West Street will be prone to further flooding likely leading to damage of residents' property.

Consequently, the Ethics Commission finds that the Town will suffer undue hardship and substantial interference with its operations if it is prohibited from contracting with Brown's. The Commission hereby grants the Town of Reedsville an exemption to enter into a contract with Brown's Mill Excavating, LLC, for the West Street project as described herein. Neither the Mayor nor his spouse may be involved in any decisions affecting the contract, and both must be recused, in conformity with W. Va. Code § 6B-2-5(j) and W. Va. Code R. § 158-8-5, from deliberations and voting on matters related to Brown's Mill Excavating, LLC.

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