

Contract Exemption 2020-04

Issued on June 4, 2020, by

The West Virginia Ethics Commission

Opinion Sought

The **Town of Reedsville** seeks an exemption to contract with a company owned by its Mayor to perform tree trimming services.

Facts Relied Upon By the Commission

On October 10, 2018, a resident notified the Town of Reedsville ("Town") of low hanging tree limbs on 3rd Street. Town employees inspected the area the following day, finding numerous trees with dead limbs on both 3rd Street and within the nearby town park. During its October 22, 2018, meeting, the Reedsville Town Council ("Council") voted to seek estimates to have the limbs removed.

The Town contacted Arnold's Tree Service, Busy Bee Lawn & Tree Service and C&M Tree Service. One of the companies, Busy Bee Lawn & Tree Service, responded but ultimately did not want the job. On December 6, 2018, another company, All Tree Services, was contacted about removing the limbs and was to give the Town a quote. The Town did not hear back from All Tree Services after several contact attempts.

Council revisited the issue during a meeting held the following year on October 28, 2019. The Town states that many limbs which had damaged some park items had fallen during the preceding year. Council decided to contact another company, All Tree Services, about limb removal and if the company declined the job, it would seek permission from the Ethics Commission for the Mayor's business, Brown's Mill Excavating, LLC, to perform the removal. The Town failed to receive a bid from All Tree Services.

On April 13, 2020, four of the five Council members voted to seek an exemption to contract with the Mayor's company, Brown's Mill Excavating, LLC, to remove the limbs. Both the Mayor and the fifth Council member, the Mayor's spouse, recused themselves from the vote. The estimate received from the Mayor's company totaled \$4,488.

Given that over a year had passed since the Town attempted to contact area tree services concerning limb removal, the Town clerk made contact attempts again on April 22, 2020. The Town Clerk contacted Arnold's Tree Service, Busy Bee Lawn & Tree Service, C&M Tree Service and All Tree Services. The lone response received was from Busy Bee, which indicated on April 23, 2020, that it would be putting in a bid for the project. The Town thereafter withdrew its Contract Exemption request to secure a bid

from Busy Bee. The Town informed Busy Bee that the job needed to be completed by the middle of May so that the park could officially open.

On May 21, 2020, the Town informed Busy Bee that it needed a bid by the end of the day. Busy Bee has failed to provide a bid to date. On May 21, 2020, the Town voted to renew its request for an exemption to contract with Brown's Mill Excavating, LLC.

The Town states that the trees to be trimmed are very large and contain a large number of dead limbs. If the trees are not trimmed, injury or damage to residents' personal property, park equipment and electrical lines is likely, according to the Town. The Town has warned parents in the park to watch their children closely to avoid falling limbs. The Town wants the project completed quickly before children begin frequenting the park as the weather warms.

Provisions Relied Upon By the Commission

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

In addition to the provisions of §61-10-15 of this code, no 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;

(B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than \$5,000.

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 R. § 158-8-2 states:

Examples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents, assistant superintendents, purchasing directors, County Commissioners, County Board members and City managers.

W. Va. Code R. § 158-8-4 states, in relevant part:

Public officials or public employees or members of their immediate family are considered to be “associated” with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

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The Ethics Act prohibits a city official, or a business with which the official is associated, 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 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 public contract or contracts in a calendar year. W. Va. Code § 6B-2-5(d)(2)(A).

The Town desires to contract with Brown’s Mill Excavation, LLC, a company owned by the Mayor. As sole owner of the company, the mayor has more than a limited financial interest in the contract to perform tree trimming for \$4,488. W. Va. Code R. § 158-8-4 (public officials are associated with a business if they are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any

class). The Mayor's position also gives him the requisite authority and control over Town contracts. W. Va. Code R. § 158-8-2. The contract is thus prohibited by W. Va. Code § 6B-2-5(d)(1).

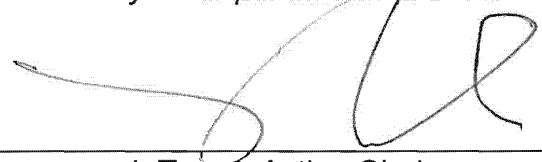
The Ethics Commission may grant an exemption from the prohibition in W. Va. Code § 6B-2-5(d)(1) if the prohibition would result in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency.

The Ethics Commission finds that prohibiting the Town from contracting with Brown's Mill Excavating, LLC, will result in undue hardship for the Town. The Town took meaningful efforts to obtain quotes or bids from other qualified area businesses willing and able to perform the tree limb removal in October 2018 and most recently in April 2020. The Town represents that the situation has become a safety issue and that the project needs to be completed quickly before children begin frequenting the park. The Ethics Commission agrees.

Based upon the foregoing, the Ethics Commission hereby grants the Contract Exemption request for the Town of Reedsville to contract with Brown's Mill Excavating, LLC, to perform the limb removal service in an amount not to exceed the \$4,488 bid amount.

The Ethics Commission reminds the Town that neither the Mayor nor his spouse may make, participate in making, or in any way attempt to use their positions to influence a decision affecting their financial interest in Brown's Mill Excavating, LLC, including decisions regarding the above-mentioned contract. W. Va. Code § 6B-2-5(d)(3).

The 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.



Lawrence J. Tweel, Acting Chairperson
West Virginia Ethics Commission