

Contract Exemption 2020-08

Issued on November 5, 2020, by

The West Virginia Ethics Commission

Opinion Sought

The **Clay County Commission** requests an exemption to continue using King's Trucking & Wrecker Service, which is owned by County Commissioner Fran King, to tow county ambulances and other emergency vehicles when King's is the closest towing service to the vehicle.

Facts Relied Upon by the Ethics Commission

Fran King is the owner of King's Trucking & Wrecker Service ('King's'), a towing business located in the Town of Clay. Fran King is also a member of the Clay County Commission, ("Clay County" or "County") having taken office on January 1, 2017.

King's opened in 1991 and is the only towing service in Clay County. The County's emergency vehicles are housed in the Town of Clay, and historically the County has used King's to tow them. The County seeks this Contract Exemption solely for the purpose of using King's when it is the closest towing service available to a County emergency vehicle that needs towed.

On March 2, 2017, the Ethics Commission granted its first one-year Contract Exemption to Clay County to contract with King's for wrecker services. (See Contract Exemption 2017-01.) Two subsequent Contract Exemptions were granted. See Contract Exemptions 2018-06 and 2019-04.

In Contract Exemption 2019-04, the Commission authorized Clay County to use King's to tow its ambulances and other emergency vehicles in the Clay County area, subject to the following limitations:

First, King's may only be used for towing ambulances or emergency vehicles. (footnote omitted)

Second, the total amount for services received from King's may not exceed \$3,000 for a period of one year beginning on November 7, 2019, and ending on November 7, 2020. The County Commission's request to increase the amount to \$3,500 is denied.

Third, the County Commission must seek reimbursement from King's in the amount of \$570 for the payment it made that was not exempt from the prohibition in W. Va. Code § 61-10-15 due to King's not being the closest

wrecker available and King's owner participating in the vote to approve that invoice.

Fourth, the County Commission may only pay King's for services when it is the closest wrecker service to the ambulance or emergency vehicle.

Fifth, the owner of King's may not be involved in any decisions relating to utilizing King's. The County Commission must withhold payment to King's if Commissioner King fails to recuse herself from all matters relating to the County Commission's decisions in this regard, including payment of invoices from King's. W. Va. Code § 6B-2-5(j)(3).

This Contract Exemption is effective until November 7, 2020, at which time the County Commission must have received a new exemption from the Ethics Commission if it seeks to continue to utilize King's Wrecker Service for wrecker services. If the County Commission submits a new exemption request, the County Commission must provide verification it attempted to contact other wrecker services used when King's is not the closest wrecker service available. The County Commission must also provide verification that the total amount for services paid to King's did not exceed \$3,000. The County Commission must also provide verification that it sought bids for wrecker services through local publication.

Clay County is now seeking another Contract Exemption to continue contracting with King's to tow the County's emergency vehicles that break down in the Clay County area. The County is requesting that the amount of the Exemption be increased from \$3,000 to \$3,500 per year.

The County has verified that it and Commissioner King have met the conditions in Contract Exemption 2019-04. The County provided documents showing that from November 7, 2019, to October 14, 2020, King's provided wrecker and towing services for the County's emergency vehicles on eleven occasions. The County approved payment to King's at the rate of \$90 per hour in the amount of \$2,610.¹

Clay County verified that, on all but one occasion, March 5, 2020, King's was the closest wrecker service to the emergency vehicle that needed towed.² On March 5, 2020, an ambulance was stolen by a patient and retrieved in the Town of Dixie, West Virginia. There was a wrecker service in Gauley Bridge that was closer in distance. Beverly King,

¹ However, the bid awarded to King's during the 2019 exemption period was for \$80 per hour. At \$80 per hour, the invoice amount would have been \$2,160. Commissioner King states that the mistake was an oversight and that King's is agreeable to reimbursing the difference of \$450 to the County. She notes that her regular rate is \$129 per hour.

² As directed in Contract Exemption 2019-04, King's reimbursed the County \$570 for the payment it made that was not authorized by the 2018 exemption due to King's not being the closest wrecker available and King's owner participating in the vote to approve the payment.

the Director of Ambulance Services, called King's to tow the ambulance back to Clay. She did not attempt to contact the closest wrecker service. She states that she thought that King's was the closest service and that King's was more reliable, faster and cheaper.

Clay County also provided verification that it sought bids for wrecker services through local publication and King's was the only bidder. The local publication was the Clay County Free Press, and the class II legal advertisement sought wrecker services which could respond to a scene within 35 minutes or less from initial dispatch.³ King's submitted the only bid. The bid was for \$129 per hour, which is the rate set by the West Virginia Public Service Commission for King's towing services.

On September 23, 2020, the County accepted the bid from King's for wrecker services. The meeting minutes did not reflect that King recused herself from the vote, but her recusal was confirmed by the County Clerk. The County Commission approved invoices from King's on October 14, 2020. Commissioner King was absent from the meeting. Commissioner King, therefore, recused herself from all County Commission decisions relating to the wrecker service bid process and payments to her business.

Provisions Relied Upon By the Ethics 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:

³ The legal ad further provided that the bidder would have to comply with the Clay County Office of Emergency Services & Clay County E911 Communications Center Towing Agreement – 2015. The Agreement states that towing companies must be housed in and have its headquarters in Clay County. King's is the only towing business in Clay County.

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.

Opinion

Prohibited Contract

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). The County Commission is requesting an exemption in the amount of \$3,500.

Additionally, a county commissioner must abide by the stricter prohibitions contained in W. Va. Code § 61-10-15, a separate criminal statute that 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 from the Ethics Commission under this statute as well. W. Va. Code § 61-10-15(h).

As a county commissioner, Commissioner King has the requisite voice, influence, and control over the contracts of the County Commission 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 S.E.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 County to contract with King's.

Contract Exemption

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

Clay County points to the same circumstances in the instant request that justified the previous Contract Exemptions issued in 2017, 2018, and 2019: It would incur increased costs and additional wait times up to an hour if it is unable to use King's for wrecker services in Clay County for County emergency vehicles. In Contract Exemption 2018-06, the Ethics Commission stated:

Leaving county personnel stranded an extra hour awaiting wrecker services, particularly law enforcement and/or emergency personnel in a small county with limited resources, was found to have substantially interfered with the County's operations. The Ethics Commission was also very mindful of those situations, as the County Commission aptly noted, regarding ambulances transporting patients that would require a quick response from the closest wrecker available.

The Commission finds that the same justifications exist now and that, as discussed above, the County met all the limitations and conditions set forth in Contract Exemption 2019-04, except for the tow on March 5, 2020, involving a stolen ambulance.

Therefore, the Ethics Commission grants the Clay County Commission a Contract Exemption to allow it to contract with King's Trucking & Wrecker Services in an amount not to exceed \$3,500 from November 7, 2020, through November 7, 2021, to tow County ambulances and other emergency vehicles when King's is the closest towing service to the wreck.

If Clay County submits a new exemption request for the period after November 7, 2021, it must verify that 1) it attempted to contact other wrecker services when King's was not the closest wrecker service available, 2) the total amount for services paid to King's did not exceed \$3,500, and 3) it sought bids for wrecker services through local publication.

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
West Virginia Ethics Commission