Contract Exemption 2021-01

Issued on April 1, 2021, by

The West Virginia Ethics Commission

Opinion Sought

The **Town of Clendenin** seeks a contract exemption allowing it to use FEMA reimbursement funds to pay Council member John B. Shelton, Jr., for his work, since the 2016 flood, as the Town's Project Manager for its FEMA Hazard Mitigation Grant Program projects.

Facts Relied Upon By the Commission

Council member John B. Shelton, Jr., became a Council member in 2009. In Clendenin, the Mayor customarily appoints Council members to serve as Town department heads. Historically, Council members received no compensation for attending meetings or serving as department heads. In 2015, the Council members began receiving $50 per month for serving on Council. In 2009, the Mayor appointed Council member Shelton to serve as the Town's Floodplain Manager, and he has continuously served in this role since and has never expected to be, nor has been, compensated. Over the years, Council member Shelton has served in other Town capacities without compensation.

In 2011, the Town first appointed Council member Shelton to serve as the Project Manager for the 2011-2013 FEMA Hazard Mitigation Grant Program ("FEMA Hazard Project Manager" or "Project Manager"). Council member Shelton received $10,375 in FEMA funds for his work.

On May 23, 2016, just weeks before the flood of 2016, the Town again appointed Council member Shelton as the FEMA Hazard Project Manager. On August 28, 2017, the Town again re-appointed Mr. Shelton to this position.

The Town did not seek applicants or run advertisements for the FEMA Hazard Project Manager Position in any of these years. The Town states that the appointment of Council member Shelton was made because he was already serving as the Town's Floodplain Manager and was gaining project manager experience over the years.

Council member Shelton did not recuse himself from the discussion and vote regarding his appointment as the FEMA Hazard Project Manager in May 2016 or 2017. Council member Shelton, having worked as a FEMA Hazard Project Manager for the Town in 2013 and being compensated, expected to be compensated at the time of the resolutions making him Project Manager in 2016 and 2017. Shelton signed the May 23, 2016, Council Resolution authorizing him to act as an agent for the Town to manage the Hazard Mitigation Grant Program. The Resolution does not state whether Shelton will be paid for his service as an agent.

The flood of 2016 caused catastrophic damage to homes, businesses, and government structures located in the Town of Clendenin. Council member Shelton's duties as the FEMA Hazard Project Manager unexpectedly and drastically increased. Council member Shelton estimates, as he did not keep records, that he has spent 5,000 hours working in this position as a result of the 2016 flood.

The Town explains that, pursuant to FEMA-related statutes and regulations, it has been and will continue to be reimbursed for certain expenses related to the 2016 flood, including payments covering work performed by the FEMA Hazard Project Manager. The amount of payment to the Project Manager is not decided by Town Council. Nor is it based on an hourly rate. The amount to be paid to the Project Manager instead has been set, by statute and/or regulation, at a rate of up to five percent of the total cost of the project. Town Council's future involvement relating to the amount of money, if any, that will be paid to the Project Manager is limited to approving the pre-determined amount.

Below are the amounts the Town expects to be paid by FEMA, and then to Mr. Shelton, if permissible, from FEMA as Project Manager fees:

Grant 4210-005 $ 26,650
Grant 4273-084 $ 7,644
Grant 4273-092 $ 24,549
Grant 4273-059 $ 7,527
Grant 4273-060 $ 19,331
Grant 4273-061 $ 37,012

Total: $122,713

FEMA's Public Assistance Program

In 2018, the Mayor headed up the Town's projects under a different FEMA program called the Town's Public Assistance ("PA") Program. The Mayor relied on Council member Shelton to oversee the Public Assistance grants that were being written on a weekly basis. The Town advertised for a FEMA Consultant to manage these projects. The ad ran for 10 days and was paid for out of the Town FEMA account. The Town awarded the contract to one of two responsive bidders. The contractor was paid over $12,000 from the Town's FEMA account with money which was earmarked for ongoing PA projects. The Town was not satisfied with the services provided by the contractor, as it asserts no real substantive work had been performed by the contractor for the amounts charged, and therefore the Town terminated the contract after approximately ten (10) months of service.

After the termination of the contract, Council member Shelton began managing both FEMA programs. FEMA is not expected to pay the Town's manager costs under the PA program, and the Town is not seeking an exemption to pay Council member Shelton any additional compensation for his PA work or as the Town's Floodplain Manager.

Provisions Relied Upon By the Commission

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

> In addition to the provisions of section fifteen, article ten, chapter sixty-one 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;
> ...

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 § 6B-2-5(j) states, in relevant part:

> (1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter: (A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

Opinion

Prohibited Contract

The Ethics Act prohibits a public official from having more than a limited financial interest, i.e., $1,000, 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).

Council member Shelton has more than a limited financial interest in the contract. Further, as a Council member with the Town, he has the requisite authority or control over the Town's contracts to implicate W. Va. Code § 6B-2-5(d). See Contract Exemption 2020-01 (Town of Fairview).

The Town, therefore, must receive a contract exemption to contract with Council member Shelton and pay him the same amount FEMA reimburses the Town for his FEMA Hazard Project Manager work.

Contract Exemption

The 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. The burden is upon the Requester to demonstrate sufficient evidence and facts in support of an exemption. Contract Exemption 2010-03.

Mayor Kay M. Summers provided the following statement:

> Please allow this correspondence to serve as a statement on behalf of the Town of Clendenin in support of its request for a contract exemption, further explaining how the prohibition would result in excessive cost, undue hardship, and other substantial interference with the operation of the Town as a government entity.
>
> Council member John Shelton has worked diligently to complete all work asked of him as project manager for the Hazard Mitigation Grant Program

(HMGP) projects, as well as the Public Assistance (PA) projects. He is held in high regard with the hazard mitigation officers with the West Virginia Emergency Management Division because of his diligence and professionalism. Council member Shelton has spent, and continues to spend, many hours managing the projects under both FEMA programs, even though he has not, and cannot, receive any compensation for the work performed under the PA program, as FEMA does not provide for project management fees under the PA program, and the Town does not have the funds available in its budget to compensate Mr. Shelton for the additional PA program work. In fact, the former FEMA consultant that the Town contracted with, during 2018- 2019, for assistance with the PA program, only cost the Town over $12,000.00 from its FEMA account, money which was earmarked for use in ongoing PA projects. That consultant did no real substantive work for the amount charged, and the Town has not been made whole from that terrible experience. Quite frankly, as a result of this experience, the Town has very little trust in any other outside contractor to work diligently in the best interests of the Town.

Further, the financial burden and undue hardship that likely would be incurred by the Town if Council member Shelton was not permitted to continue as FEMA project manager would be enormous. Council member Shelton is intimately familiar with the applicable FEMA statutes and regulations, as well as the details of each ongoing grant project. He also has existing cooperative relationships with the State Emergency Management Division hazard mitigation officers, with whom municipal and county project managers must work closely in order to maximize the necessary FEMA assistance. If the Town were required to seek another person or entity to finalize the open grant projects with FEMA, in all likelihood the same could not be accomplished before the deadline by which those grant projects must close, in spring/summer of 2021. If those grants are not timely closed with FEMA, the Town's Community Rating with FEMA could be impacted, which could result in a penalty or ruling of ineligibility for any future FEMA assistance. As it currently stands, the Town and its citizens are still rebuilding from the devastating June 2016 flood, and cannot afford any further setbacks.

In Contract Exemption 2010-03, the Commission denied a request for a Contract Exemption from The Village of Beech Bottom to pay for landscaping labor work performed by its Mayor, stating,

> The Village has not provided any evidence in support of a hardship or of an excessive cost to the Village. Moreover, it has not demonstrated that prohibiting it from hiring the Mayor would create a "substantial interference with operation of the Village." Aside from one employment advertisement in February, the Village has not provided any facts or documents reflecting further attempts to hire a part-time laborer.

In Advisory Opinion 2012-45, the Commission was asked by a Building Commission whether it may pay the County attorney for work he performed in addition to his legal work. The Commission stated:

> Here, the Ethics Commission is put in an awkward position since the Requester did not seek advice before entering into the contract with the Building Commission. Instead, after having worked for a year, the Requester seeks permission to accept compensation therefor, even though the arrangement had not been submitted to the Ethics Commission for review and approval in advance. Thus, the Commission must apply its interpretation of the law while balancing the Requester's right to be compensated for work performed.
>
> ...
>
> As a result of the foregoing, the County Building Commission or the County Commission may request a contract exemption from the Ethics Commission to allow the Requester to be paid additional compensation for work he performed on behalf of the County Building Commission. In its request, the governing body must state: why the Requester was chosen over other qualified individuals and how the County Building Commission and/or the County Commission reached its conclusion that the Requester was the best qualified for the position; whether the work performed for the County Building Commission constituted additional services having no connection with the duties which he is required to perform as County Attorney; whether the Requester's performance of work for the County Building Commission did not interfere with the performance of his duties to the County Commission; whether such employment was bona fide and not used simply for the purpose of increasing the Requester's income; and whether the Requester advocated for his selection for the position as project coordinator.
>
> Until such time as the County Building Commission or the County Commission seeks and obtains a contract exemption from the Ethics Commission, the Requester may **not** accept additional compensation for work he performed on behalf of the County Building Commission.

The Requester in Advisory Opinion 2012-45 did not request a Contract Exemption.

Using the factors outlined in the above Contract Exemption and Advisory Opinion, the Commission finds that the Requester does not meet its burden of demonstrating that Council member Shelton was the best person qualified for the FEMA Hazard Project Manager position. The Town chose not to place the position out for bid or to seek other applicants. The Commission recognizes that the Town advertised for and contracted with a FEMA Consultant for its PA grant program, an additional FEMA program used after the 2016 flood, and was not satisfied with the work of the FEMA Consultant. After this contract was terminated, Council member Shelton served as the FEMA PA manager as

well. The Town did not contact the other responsive bidder to its 2018 advertisement or re-advertise for another FEMA Consultant to serve as Project Manager.

Another factor from Advisory Opinion 2012-45 to consider is whether Council member Shelton advocated for himself to fill the position. As is discussed above, he was involved in selecting himself for the position both in 2016 and 2017 and he expected to be compensated for his work.

The Town asserts that it would suffer financial hardship if it cannot use the FEMA funds to pay Council member Shelton's fees because it lacks the funds otherwise to pay him. The Town further asserts the following "undue hardship, or substantial interference with" the Town's operations following the 2016 flood:

> If the Town were required to seek another person or entity to finalize the open grant projects with FEMA, in all likelihood the same could not be accomplished before the deadline by which those grant projects must close, in spring/summer of 2021. If those grants are not timely closed with FEMA, the Town's Community Rating with FEMA could be impacted, which could result in a penalty or ruling of ineligibility for any future FEMA assistance. As it currently stands, the Town and its citizens are still rebuilding from the devastating June 2016 flood, and cannot afford any further setbacks.

The Commission cannot speak or opine as to the impact this decision could have on the Town's FEMA rating or future eligibility for FEMA grants.

The Commission does recognize the devastating effects that the 2016 flood has had on the Town. The Commission also recognizes, however, that the possible financial hardship and substantial interference with the Town's operations are a result of the Town's noncompliance with the Act when, in 2016, the Town voted to appoint one of its own members to the Project Manager position. Now, approximately five years later, the Town is seeking to pay that Council member more than $100,000 once the grant projects are finished. The Ethics Commission finds that the Town's justification for requesting permission to pay Council member Shelton is, based upon the totality of the facts presented, insufficient.

The Commission holds, therefore, that the Requester's Contract Exemption request is denied.

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