

CONTRACT EXEMPTION NO. 2007-02

Issued On July 12, 2007 By The

WEST VIRGINIA ETHICS COMMISSION

EXEMPTION SOUGHT

The Buckhannon City Council seeks an exemption to purchase furniture and bedding from a furniture store owned by one of its Council members, Geraldine Henderson.

FACTS RELIED UPON BY THE COMMISSION

The City of Buckhannon owns a new fire station. Council must purchase furniture and bedding for the firefighters' use. The Fire Chief went to each of the three furniture stores in Buckhannon for quotes on the desired furniture and bedding. According to the Requester, Councilperson Geraldine Henderson, owner of Hometown Furnishing Store, submitted the lowest bid by offering to sell at cost rather than at retail, at a savings of \$2,760 (based on prices Ms. Henderson obtained from her suppliers). Under this arrangement, Councilperson Henderson would make no profit or receive any other financial benefit from the sale of the furniture and bedding to the City.

According to the information supplied, Ms. Henderson was the lowest bidder¹, providing total savings to the City of \$505. For example, the highest bid for the bedding is \$299 per set; Councilperson Henderson quoted \$236 per set.² Likewise, the highest bid for the furniture was \$347 each; Councilperson Henderson quoted \$309 each. The fire station requires five (5) each of the furniture and bedding.

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code § 6B-2-5(d)(1) provides that...no elected...public official...or business with which she...is associated may be a party to or have an interest in the profits or benefits of a contract which such official...may have direct authority to enter into, or over which she...may have control...

W. Va. Code § 6B-2-5(d)(3) states, in pertinent part, that...where the provisions of subdivisions (1) and(2) of this subsection would result in...excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality...or other governmental agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption....

¹ For the furniture, Councilperson Henderson's quote exceeded the lowest bidder by \$10 per piece, but her product is top quality, according to the Fire Chief. The lower bid was for bottom line quality.

² The City only received two bids for the bedding.

ADVISORY OPINION

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract, which they have the power to award or control. This prohibition prevents a City from doing business with a business owned by one of its Council members. This prohibition, like the others in the Act, is designed by the Legislature to keep public servants out of harm's way. The prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. It aims to steer public servants away from inherently questionable situations.

The Ethics Act also provides, however, that the Ethics Commission may grant an agency an exemption from this prohibition, if the agency demonstrates that its enforcement will cause the agency excessive cost, undue hardship or substantial interference with its operation.

If the City is to obtain an exemption, it must demonstrate that compliance with the prohibition is certain to produce substantial harm. It must show that real and significant hardship will result, hardship, which outweighs the important role the prohibition plays in preserving propriety and the appearance of propriety in public contracts.

The Commission finds that the City has failed to demonstrate the degree of excessive cost, undue hardship, or other substantial interference required to justify an exemption. Specifically, the Commission finds that the loss of a potential savings of \$505 does not constitute undue hardship, excessive cost or substantial interference with the City's operation. The Commission would rather err on the side of caution and avoid any appearance of impropriety in the proposed contract between the City and Councilperson Henderson. Thus, the Commission hereby denies an exemption from the provisions of W. Va. Code § 6B-2-5 (d).

Therefore, it would violate W. Va. Code § 6B-2-5(d)(1) for Councilperson Henderson to sell furniture and bedding to the City.

S/S _____
Member James Shepherd, II for
R. Kemp Morton, Chairman