

CONTRACT EXEMPTION NO. 2010-02

Issued On April 1, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **City of Hurricane** asks for an exemption to continue contracting with Netranom for the servicing of its phone system. The Mayor of Hurricane, Scott Edwards, is the owner of this company.

FACTS RELIED UPON BY THE COMMISSION

In 2003, the City contracted with Netranom Communications (hereinafter Netranom) for the installation, operation and maintenance of its phone system at City Hall and the wastewater plant. In 2006, the company contracted with the City to host its website and to provide email services; however, since at least 2008, there has been no charge for these two services. Approximately one year ago, the City began administering its own email services. Netranom continues to provide website hosting services for free.

The Mayor of Hurricane, Scott Edwards, owns Netranom. He was appointed to City Council in 2006; hence, the original contract predates his service as a member of the City's governing body. He was elected as Mayor in 2007.

In 2008, the City of Hurricane sought a contract exemption from the Ethics Commission to allow it to continue to contract with the Mayor. On March 6, 2008, the Commission granted the City a two year exemption. See C.E. 2008-03. The Commission, in part, based its decision upon the value of the free website hosting and email services. Further, it considered the value of the free staff hours for service calls. The Commission stated in its opinion:

The Commission finds that under the circumstances presented, the City has demonstrated a hardship and hereby grants it an exemption to allow it to continue contracting with Netranom for a two year period from the date of the approval of this exemption. At the conclusion of the two year period, if the City wants to continue contracting with Netranom, and if Scott Edwards is still an elected official in the City, then the City should seek another contract exemption. Before seeking an exemption, the City should seek at least two other quotes for this service. Moreover, if the City wants the Commission to consider the value of the free website hosting and email service maintenance, then it also needs to allow other companies to submit a quote for these services.

City Council reviewed proposals from three companies: (1) Avaya; (2) NACR; and (3) Netranom. According to the Requester, in evaluating the proposals it considered two components: the flat rate monthly service fee and the service call charges. The quotes for the flat rate monthly service fee are as follows:

VENDOR	MONTHLY MAINTENANCE CHARGE	TOTAL MONTHLY SERVICE CHARGE FEE FOR 24 MONTH PERIOD
Avaya	\$313.69	\$7,528.56
NACR	\$235.84	\$5,660.16
Netranom	\$229.50	\$5,508.00

Next, the City considered the cost proposed by each company for service calls. Based upon its past service call history, the City assumed that there would be an average of one service call/one staff hour per month. This assumption is based upon the general knowledge and recollection of the City employees. It is further consistent with information obtained from Netranom which, according to their records, made eleven service calls in calendar year 2009.

The cost proposals for the service fees are as follows:

VENDOR	PER VISIT SERVICE CHARGE	TOTAL PROJECTED COST OF PER VISIT SERVICE CHARGE FOR 24 MONTH PERIOD
Avaya	\$245.00 (\$100.00 per visit + \$145.00 per staff hour)	\$5,880.00
NACR	\$210.00 (\$70 per visit + \$140.00 per staff hour)	\$5,040.00
Netranom	No charge	\$ 0.00

Using these two measures, the City considered the following price comparisons:

VENDOR	MONTHLY FEE: FLAT RATE PLUS PROJECTED SERVICE CHARGE	TOTAL PROJECTED COST FOR 12 MONTH PERIOD	TOTAL PROJECTED COST FOR 24 MONTH PERIOD
Avaya	\$558.69 (\$313.69 + \$245.00)	\$6,704.28	\$13,408.56
NACR	\$445.84 (\$235.84 + \$210.00)	\$5,350.08	\$10,700.16
Netranom	\$229.50 (\$229.50 + \$0.00)	\$2,754.00	\$ 5,508.00

Based on the foregoing calculations, City Council voted at its March 1, 2010 meeting to seek an exemption to allow it to continue to contract with Netranom. The Mayor recused himself from voting. The City states in its contract exemption request that:

Additionally, Netranom completed the initial cabling and installation of the phone systems at the City, which, coupled with their many years of history here, make them the most qualified to perform maintenance to our systems.

The City also obtained quotes for website hosting. It stated that the two companies, Avaya and NACR, do not offer this service. Hence, it received quotes from two other companies. These quotes were: (1) Gate.com - **\$119.40** per year; and, (2) Kanawha Design - Annual fee of **\$450.00** plus maintenance rate of \$20.00 per hour. According to the City, it is not aware of any companies which provide both phone service maintenance and website hosting.

The current rate quoted by Netranom for telephone servicing is lower than its current flat rate fee of \$345.00 per month. According to Netranom, the monthly rate it presently charges its commercial customers has gone down. The City further states that it considers Netranom the most qualified to continue servicing the phone lines based upon the history of the company's service to the City, including the fact that it installed the original phone system.

The City's budget for the next fiscal year is approximately 3.2 million which is approximately \$120,000.00 less than the preceding year. Based upon information and belief, the budget cut is due to a projected loss of revenue.

The lowest quote is from Netranom. Its quote for a twelve month period is **\$2,754.00**. The next lowest quote is from NACR. Its quote for a twelve month period is **\$5,350.08**. If the City awards the contract to Netranom, it will save **\$2,596.08** over a twelve month period.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. -- (1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be a party to or have an interest in ... a contract

which such official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body....

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

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 its Mayor or other City officials or employees who exercise control over its contracts. The Ethics Act also provides, however, that the Ethics Commission may grant a municipality an exemption from this prohibition, if it demonstrates that its enforcement will cause the agency excessive cost, undue hardship or substantial interference with its operation.

The total projected costs for the services of the three companies which submitted quotes over a twenty-four month period are as follows: (1) **Avaya** - \$13,408.56; (2) **NACR** - \$10,700.16; and, (3) **Netranom** - \$5,508.00. Thus, if the City contracts with Netranom, then it will save **\$5,192.16** over the course of the next twenty-four months or **\$2,596.08** over a twelve month period.

The Commission takes administrative notice that Netranom is located at 2801 Virginia Avenue, Hurricane WV; Hurricane City Hall is located at 3255 Teays Valley Road, Hurricane WV. Thus, according to www.maps.yahoo.com they are .87 miles apart, veritably right around the corner. In CE 2008-14 the Commission wrote:

The Commission has heard arguments before that governing bodies prefer to spend their money locally (in-State). While we recognize the value of such a policy, it fails to dissipate the conflict of interest the Ethics Act prohibits. While a laudable practice, it does not satisfy any of the Act's three limited exceptions: undue hardship, excessive cost, or substantial interference with government operations.

Here, however, Netranom's location may be relevant since its proximity to City Hall may decrease waiting time for service calls which is relevant to analyzing whether there would be a substantial interference with the operations of the City if it is prohibited from contracting with this vendor .

The Commission has considered the facts presented and information provided in the City's contract exemption request. In the opinion of the Commission, the City has not provided concrete facts to support a finding that, based upon its past service call needs, there will be substantial interference with the operations of the City if the City contracts with another company.

For example, if phone extensions need moved, then a service call will be required. The City has not provided information relating to: how soon it would need this type of service performed; the anticipated response time of Netranom as compared to the other providers; and, what negative consequences would result from the delayed response time, if any. Indeed, there are no specific examples provided where, but for the proximity of Netranom, otherwise the operations of the City would have been significantly interrupted in the past. In the absence of such information, the Commission declines to grant an exemption based upon the substantial interference with government operations or undue hardship exceptions.

Next, the Commission considers whether the difference in cost constitutes excessive cost. If the City contracts with Netranom, the cost savings over a twelve month period is **\$2,596.08**. If the City is to obtain an exemption, it must demonstrate that compliance with the prohibition is certain to produce substantial harm or excessive cost. 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 potential savings of \$2,596.08, particularly in relation to a budget of \$3.2 million, does **not** constitute excessive cost for purposes of this exception in the Ethics Act. While it is commendable that the City is seeking to reduce its costs, the Commission would rather err on the side of caution and avoid any appearance of impropriety in the proposed contract between the City and the Mayor.

The Ethics Commission recognizes that cities, as with many public and private sector entities, are facing difficult financial times. However, the amount of savings, \$2,596.08 over a twelve month period, is small in comparison to the size of the City's budget which is approximately 3.2 million. While the Commission recognizes the importance of saving money, the Commission has a duty to uphold a basic tenant in the West Virginia Ethics Act, *i.e.* that elected public servants may not have an interest in a public contract over which they exercise control unless the governing body proves that disallowing the contract will result in excessive cost, undue hardship, or other substantial interference with its operations. In this case, the Commission finds that the City has not met its burden. Thus, the Commission hereby denies an exemption from the provisions of W. Va. Code § 6B-2-5 (d).¹

s/s
Drema Radford, Vice-Chairperson

¹ In reaching this conclusion, the Commission did **not** consider or rely upon the value of the free website hosting. The Commission finds the value of that service to be nominal.