

## **Contract Exemption 2018-06**

**Issued on October 4, 2018, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

The **Clay County Commission** requests an exemption to continue to use wrecker services provided by a business owned by a county commissioner.

### **Facts Relied Upon By the Commission**

The owner of King's Wrecker Service ("King's") is a member of the Clay County Commission, having taken office on January 1, 2017. On March 2, 2017, the Ethics Commission granted a Contract Exemption authorizing the County Commission to contract with King's Wrecker Service for the towing and impoundment of vehicles for a contract period not to exceed one year.

In Contract Exemption 2017-01, the Ethics Commission ruled as follows:

At the expiration of one year, if the Requester seeks to continue contracting with King's Wrecker Service, it must submit a new request for a contract exemption.

Should the Requester submit another contract exemption, the County must demonstrate that it made a good faith effort to evaluate what other comparable services, if any, are available to procure and the cost thereof. Further, the Requester must set forth in its exemption request what efforts were taken to evaluate all potential options which may be available to the County for purposes of making a decision in regard to whether continuing to contract with King's is in the best interest of the County. Additionally, the owner of King's may not be involved in the County's efforts to evaluate other options. She must recuse herself from all matters relating to the County Commission's decision in this regard. W. Va. Code § 6B-2-5(j)(3).

The County Commission is now seeking another Contract Exemption so that it may continue to contract with King's.

The County Commission cites identical reasons as those cited in its 2017 request as to why the Ethics Commission should grant this year's request. It states that King's has worked well with the County Commission in the past and has abided by the terms set forth in the county's current towing agreement policy. King's Wrecker Service opened in 1991 and is the only towing service in Clay County.

The County Commission states that Clay County is centrally located in West Virginia and has a population of about 9,000 residents. It states that the Clay County E911 Communication Center is responsible for dispatching a wrecker when requested by law enforcement in Clay County. It further states that the Clay Ambulance Service is owned and operated by the County Commission and sometimes needs a wrecker due to breakdowns or being stuck on rural roads due to inclement weather. The County Commission represents that it runs both the E911 Communication Center and the Office of Emergency Services and appoints the directors of both organizations.

The County Commission also provided letters from the Director of the Clay County Ambulance Service. The Director states that using a wrecker service from outside the county would cause the Ambulance Service additional cost, extended wait times and put a financial burden on their service. The Director states that if an ambulance loaded with a patient needs towing services, it needs a quick response from a wrecker service that can be there to help in a matter of minutes not an hour or two.

The County Commission additionally adds in this request that it uses any wrecker service available to it to secure wrecker services at the lowest cost to the County. Depending on the location of a vehicle breakdown, the County Commission states that it will use wrecker services in the Charleston, Elkview or Gauley Bridge areas. The County Commission states it only uses King's when it tows from the Clay area because King's is the closest wrecker service available to it. The County Commission states that the purpose of its request is to use King's only when it is financially advantageous to the County.

The County Commission states that “[i]t would create an undue hardship, involve excessive cost and cause a wait time of at least an hour for a wrecker to travel from another county.” It also states that its “law enforcement, fire department and local citizens would suffer these undue consequences created by this law.”

### **Provisions Relied Upon By the 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:

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). 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 contracts in a calendar year. W. Va. Code § 6B-2-5(d)(2)(A).

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 to contract with an official under this statute as well. W. Va. Code § 61-10-15(h). Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. Unlike the Ethics Act, the prohibition in W. Va. Code § 61-10-15 does not have a \$1,000 threshold. Accordingly, if either the Ethics Act or W. Va. Code § 61-10-15 prohibits a public official from entering into a public contract, a Contract Exemption will be necessary.

The County Commission desires to contract with one of its member’s businesses, King’s Wrecker Service, to provide wrecker services to the County Commission and its subordinate county departments. As sole owner of King’s, the County Commissioner has a financial interest in King’s public contracts with the County Commission and its subordinate county departments. In 2017, King’s responded to five calls from the County for a total of \$1,110.50. In 2018, King’s has responded to six calls from the County for a total of \$1,597.30.

Furthermore, as a County Commissioner, the owner of King’s 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 Commission to contract with King’s.

### **Contract Exemption**

The Ethics Commission may grant an exemption from the prohibition in W. Va. Code § 61-10-15 if the prohibition results in excessive cost, undue hardship or other substantial

interference with the operation of a governmental body or agency. The Ethics Act contains identical requirements for an exemption.

Much of the County Commission's instant exemption request is identical to last year's request and states that King's abides by the terms set forth in the County's towing agreement policy, that King's is the only towing service in Clay County, and that it would create an undue hardship, involve excessive cost and cause a wait time of at least an hour for a wrecker to travel from another county.

As reflected in Contract Exemption 2017-01, the Ethics Commission is cognizant of the consequences of increased distances and wait times if the County Commission is forced to use a wrecker from outside the County. However, the Ethics Commission ruled in Contract Exemption 2017-01 that if the Clay County Commission seeks another exemption, it must set forth what efforts it has made since the 2017 Exemption to evaluate all potential options which may be available to the County, including any efforts to evaluate whether any other comparable services are available and the cost thereof.

The County Commission represents that it uses all wrecker services available to it to secure the lowest cost to the County. The County Commission states that it cuts costs by using the closest wrecker service available to where the services are needed. By way of example, the County Commission states that it will call wrecker services located in Elkview, Charleston or Gauley Bridge when it needs services in those areas. If wrecker services are needed in Clay, the County Commission states that there are no comparable services available as King's is the only wrecker service in Clay County. If it were unable to utilize King's, and the resulting wait time increased by an hour, the County Commission estimates it would incur additional costs of \$95 per tow. Finally, the County Commission states, through the Director of the Clay County Ambulance Service, that an ambulance loaded with a patient needs a quick response from a wrecker service that can be there to help in a matter of minutes.

The Ethics Commission has recognized in previously granted Contract Exemptions the hardships associated with increased distances in less populated areas. For example, in Contract Exemption 2016-01, the Ethics Commission granted a Contract Exemption to a small city to make purchases from a hardware store owned by its mayor when the next closest store was an additional 30 minutes away. The Commission reasoned that the city would incur costs such as travel time, wear and tear on city vehicles and increasingly expensive gasoline if it were forced to travel an extra 30 minutes to the next closest hardware store. The Ethics Commission granted the exemption to the city with limitations. The limitations included capping the total purchases from the store at \$2,500 in a calendar year, limiting the value of any one item purchased to \$100 and limiting purchases from the store to only those items that were not available from other local stores.

Here, the Clay County Commission will incur increased costs and wait times if it is unable to use King's for wrecker services in the Clay area. While the additional cost of \$95 per tow alone does not rise to the excessive cost, undue hardship or other substantial interference standard, the Ethics Commission finds that the increased costs combined

with the increased wait times that would be endured by county personnel does. The Ethics Commission finds that leaving county personnel stranded an extra hour awaiting wrecker services, particularly law enforcement and/or emergency personnel in a small county with limited resources, substantially interferes with the County's operations. The Ethics Commission is also very mindful of those situations, as the County Commission aptly notes, regarding ambulances transporting patients that would require a quick response from the closest wrecker available.

**Given the foregoing, the Ethics Commission hereby authorizes the Clay County Commission to utilize King's for wrecker services in the Clay area. The following limitations apply:**

**First**, the total amount for services received from King's may not exceed \$2,000 for a period of one year beginning on October 4, 2018, and ending on October 4, 2019.

**Second**, King's may only be used by the County for wrecker services when King's is the closest wrecker service available.

**Third**, the owner of King's may not be involved in any decisions relating to utilizing King's. She must recuse herself from all matters relating to the County Commission's decisions in this regard. W. Va. Code § 6B-2-5(j)(3).

**This Contract Exemption is effective until October 4, 2019, 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 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 \$2,000 during the period of October 4, 2018, through October 4, 2019. The County Commission must also provide verification that it sought bids for wrecker services through local publication. Finally, the Ethics Commission reminds the County that any transactions with King's that occur after October 4, 2019, are no longer exempted from the prohibition in W. Va. Code § 61-10-15, unless a new Contract Exemption has been obtained by that time.**

*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.*



Betty S. Ireland, Acting Chairperson  
West Virginia Ethics Commission