

ADVISORY OPINION NO. 97-31

Issued on November 6, 1997 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

City Manager

OPINION SOUGHT

Is it a violation of the Ethics Act if a member of City Council or a member of the City's Planning and Zoning Commission submit bids on advertised contracts with another City agency or with the Volunteer Fire Department?

FACTS RELIED UPON BY THE COMMISSION

1. The City Sanitary Board plans to advertise for bids on a proposed contract. A member of City Council owns a business which provides the type of goods that will be needed by the Sanitary Board. The City Manager inquires whether the Council member may submit a bid.

The Sanitary Board is an agency managed by its three paid, part-time members. The City's six member Council appoints the members of the Sanitary Board, but otherwise has no authority over its day to day operation. Sanitary Board members will select the successful bidder and pay for the work from funds generated by sewer fees collected by the Board.

2. The City's Volunteer Fire Department plans to advertise for bids for the construction of a new fire station. A VFD member owns a business which supplies the type of goods and services involved in building the new fire station. The City Manager asks if the VFD member, who also serves on the Fire Station Building Committee and the City's Planning and Zoning Commission, may submit a bid to the VFD or its general contractor, if one is used.

The VFD, through its governing Board of Officers, will select the contractors and pay construction costs from City tax revenues. The ad hoc Building Committee was set up to advise the City of the VFD's needs and to help establish building specifications. The Committee took no action which could give the VFD member any advantage in the bidding process. The City's Planning and Zoning Commission has no input or authority over the construction of the fire station. The member of the Building Committee is not the Chief or any officer of the VFD.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(a) states that the provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county municipal governments and their respective boards, agencies, departments, and commissions and

in any other regional or local governmental agency, including county school boards.

West Virginia Code 6B-2-5(d)(1) states in pertinent part that...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 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... or prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

ADVISORY OPINION

1.) The Ethics Act prohibits public servants from being a party to or having a financial interest in any public contract which their public position gives them the direct authority to award or control.

The Commission has determined that "control" encompasses influence over the creation, execution, or implementation of a contract. The Commission has held public servants have "control" over a public contract by reason of having suggested the need for the contract, having been involved in the evaluation of potential contract vendors, or having evaluated compliance with the contract specifications.

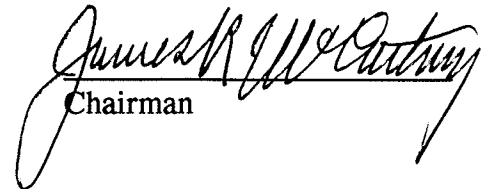
The Commission finds that the City Council has neither direct authority to award, nor control over, Sanitary Board contracts. Therefore, it would not be a violation of the Ethics Act for the Council member to bid on or receive the award of a Sanitary Board contract.

It would, of course, be a violation for the Council member to misuse the influence of his public position to unfairly influence the bid process or otherwise obtain unwarranted advantage in the securing the public contract.

2.) The provisions of the Ethics Act's code of conduct apply to elected and appointed public officials and public employees. The Commission finds that a member of a volunteer fire department who holds no administrative post within that department is not covered by the Ethics Act's code of conduct. The Commission further finds that although this individual is covered by the Ethics Act as a member of the City's Planning and Zoning Commission, that public position does not give him any direct authority or control over the VFD's contract.

Therefore, it would not be a violation of the Ethics Act for the VFD member to bid and receive a VFD contract or act as a VFD subcontractor.

The requester has also inquired whether a provision of the City code which prohibits members of Council and other City Officers from having a direct or indirect interest in any City contract would also prohibit the Sanitary Board and the City from awarding the contracts described above. However, the Commission's authority to give advisory opinions is limited to interpreting only the Ethics Act and WV Code 61-10-15. Therefore, the Commission may not offer an opinion on whether the City code would prohibit the contracts.


Chairman