

CONTRACT EXEMPTION NO. 2014-04

Issued On November 13, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **City of Cameron** requests an exemption to allow it to contract with the Mayor's spouse to provide repairs at the Cameron Events Center.

FACTS RELIED UPON BY THE COMMISSION

This contract exemption request was submitted by the City of Cameron through its City Clerk. The City provided documents in support of its request. It is a Class IV municipality of approximately 946 residents.

In Contract Exemption 2013-07, the Commission granted the City an exemption to allow it to contract with Jeff Beresford, a licensed pipefitter and plumbing contractor who is married to its Mayor, to make emergency repairs to the Water Treatment Plant. As justification for contracting with Mr. Beresford, the City stated that if the filtration equipment was not immediately repaired, the City would have been without water within a few days.

The City purchased the former Cameron High School in early 2013 and renamed it the Cameron Events Center. The City has been in the process of developing the property into a multi-faceted community and recreational center. Currently four businesses are housed in the facility. A steam leak in the boiler system is causing peeling paint on the walls and ceilings and water building up on the floors.

The City contacted three heating and air conditioning companies for cost estimates to repair the boiler system. Only one responded. It estimated the cost of repairing the boiler system to be approximately \$6,500.00 to \$7,000.00. The City also placed advertisements in the *Moundsville Daily Echo* newspaper on August 25, 2014, and September 2, 2014, and received no responses. Mr. Beresford has submitted a bid of \$4,500 to make "all necessary repairs to the system," according to the Requester. City Council has approved this estimate, but work has not begun.

The City of Cameron City Council seeks a contract exemption from the Ethics Commission in order to contract with Mr. Beresford.

CODE SECTIONS RELIED UPON BY THE COMMISSION

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

[N]o elected official may be a party to or have an interest in a contract which such official 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 . . . *Provided, however*, That nothing herein shall be construed to prohibit . . . a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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;

(B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.

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:

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.

ANALYSIS

The Ethics Act, at W. Va. Code § 6B-2-5(d)(1), prohibits public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations, and to prevent impropriety and the appearance of impropriety.

To be granted a contract exemption under W. Va. Code § 6B-2-5(d)(4), a public body or agency must demonstrate that compliance with the Ethics Act would cause excessive cost, undue hardship or other substantial interference with the operation of government.

In the instant situation, unlike that considered in Contract Exemption 2013-07 and in Contract Exemption 2014-03, this situation is not an emergency, and there is at least one other company that has bid on the service.

The relative cost of a service, in itself, is rarely enough to justify a contract exemption unless the relative cost is prohibitively high or other circumstances apply. For instance, in Contract Exemption 2010-02, which dealt with the Mayor of Hurricane providing internet services to the town through his private company, the Commission explained:

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 potential savings of \$2,596.08 . . . 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. [*emphasis in original*]

Similarly, in the instant situation the savings from contracting with the Mayor's husband is approximately \$2,000.00 - \$2,500.00. This difference in cost does not constitute "excessive cost" for purposes of the exception set forth in W. Va. Code § 6B-2-5(d)(4).


There is also no indication that the City of Cameron would suffer any non-economic hardship or substantial interference with the operation of government if a contract exemption is not granted. The only concern of this nature expressed by the Requester is that the City would like to have the work completed before cold weather begins because there are tenants in the building. However, nothing in the information provided

by Requester indicates that the choice of contractor would meaningfully impact the project's completion date.

In conclusion, the Commission, as in Contract Exemption 2010-02, would rather err on the side of caution and avoid any appearance of impropriety in ruling upon this request. Accordingly, the City of Cameron's request for an exemption to permit the Mayor's husband to make repairs to the boiler at the former Cameron High School is hereby denied.

This opinion is based on the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Ethics Commission for further advice as it may alter the analysis and render this opinion invalid.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent by other persons or agencies.


Robert J. Wolfe, Chairman
West Virginia Ethics Commission