

Contract Exemption 2019-04

Issued on November 7, 2019, by

The West Virginia Ethics Commission

Opinion Sought

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

Facts Relied Upon By the Ethics Commission

The owner of King's Wrecker Service ("King's"), Fran King, 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. Contract Exemption 2017-01. On October 4, 2018, the Ethics Commission granted another Contract Exemption authorizing the County Commission to contract with King's Wrecker Service for the towing and impoundment of vehicles for a contract period of one year. Contract Exemption 2018-06.

In Contract Exemption 2018-06, the Ethics Commission reasoned that the Clay County Commission would incur increased costs and wait times if it was unable to use King's for wrecker services in the Clay area. The Ethics Commission found that while the additional cost of \$95 per tow (for using a company other than King's) alone did not rise to the "excessive cost, undue hardship or other substantial interference" standard, the increased costs combined with the increased wait times that would be endured by county personnel did. Leaving county personnel stranded an extra hour awaiting wrecker services, particularly law enforcement and/or emergency personnel in a small county with limited resources, was found to have substantially interfered with the County's operations. The Ethics Commission was also very mindful of those situations, as the County Commission aptly noted, regarding ambulances transporting patients that would require a quick response from the closest wrecker available.

The Ethics Commission set forth the following limitations in Contract Exemption 2018-06:

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).

The Ethics Commission additionally ruled:

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.

Contract Exemption 2018-06 expired on October 4, 2019. The County Commission is now seeking another Contract Exemption so that it may again contract with King's. The County Commission provided a report listing all payments made to King's from October 4, 2018, to October 4, 2019. The payments totaled \$1,941 for wrecker services for the County Ambulance Service and the Sheriff's Department. Therefore, the County Commission spent an amount within the limit authorized by the Ethics Commission in its 2018 Contract Exemption.

The County Commission also sought bids for wrecker services through local publication. It provided a copy of a Class II legal advertisement placed in the September 12, 2019, edition of the local weekly newspaper, the Clay County Free Press. The advertisement sought sealed bids for wrecker services to tow county-owned vehicles within the boundaries of Clay County. The advertisement sought wrecker services which could respond to a scene within 35 minutes or less from initial dispatch and set a September 20, 2019, deadline to receive bids. The only bid the County Commission received was from King's Wrecker Service.

The County Commission was also required to contact other wrecker services when King's was not the closest wrecker service available. King's was the closest wrecker service on all occasions except one. On April 18, 2019, the County Ambulance Services used King's to pick up an ambulance that had broken down in Charleston. The ambulance was taken to the repair shop in Clay County that had previously serviced the ambulance. Kanawha County has wrecker service providers closer to Charleston than King's. A County Ambulance Services employee indicates that King's was contacted out of habit and convenience. The Director of the County Ambulance Services stated that, in her past

experience, it was less expensive and more convenient to use King's when an ambulance breaks down in Charleston than a Kanawha County wrecker service since the ambulance had to be taken back to Clay County. This nonetheless was a violation of the 2018 Contract Exemption. The amount of this invoice was \$570.

Another limitation in the 2018 Contract Exemption was that "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." The County Commission approved invoices from King's during two separate meetings. The first meeting was on April 24, 2019, and Fran King, the owner of King's, was present. The minutes from the April 24, 2019, meeting do not reflect that she recused herself from the vote to approve the payment of all invoices, including the King's invoice for \$570 for towing an ambulance from Charleston to Clay County. The Clay County Clerk confirmed that Fran King did not recuse herself from voting on that invoice. The second meeting was on August 14, 2019, and Fran King was absent.

Finally, the County Commission additionally requests that the total amount it may pay to King's be increased from \$2,000 to \$3,500 per year. The County Commission provided invoices from King's reflecting that it paid King's \$1,941 during the prior Contract Exemption period (October 4, 2018, to October 4, 2019). It did not pay an invoice in the amount of \$903 because it had almost reached the \$2,000 Contract Exemption limitation. The County Commission seeks an exemption to allow it to pay King's \$3,500 per year for its services.

Provisions Relied Upon By the Ethics 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, County Commissioner Fran King has a financial interest in King’s public contracts with the County Commission and its subordinate county departments.

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 Clay 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.

The County Commission points to the same circumstances in its instant request that justified its previous Contract Exemptions issued in 2017 and 2018.

As directed by the Ethics Commission in Contract Exemption 2018-06, the County Commission has provided a copy of an advertisement in a local publication which sought bids for wrecker services and provided a report reflecting that total payments to King’s were less than \$2,000.

However, not all the conditions of the 2018 Contract Exemption have been satisfied by the County Commission. Specifically, King's was contacted to pick up an ambulance that had broken down in Charleston when King's was not the closest wrecker service provider available. Additionally, Commissioner King failed to properly recuse herself at the County Commission's meeting on April 24, 2019, and voted to approve the payment of invoices which included the King's invoice for \$570 for towing the ambulance from Charleston.¹ Therefore, the County Commission's payment of \$570 was not exempted from the prohibitions in W. Va. Code § 61-10-15.

The Ethics Commission must now determine whether to grant the current request for a Contract Exemption considering violations of the terms of the 2018 Contract Exemption and of the Ethics Act's voting provisions.

In the 2018 Contract Exemption, the Ethics Commission reasoned:

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

¹ W. Va. Code §6B-2-5. (j) *Limitations on voting.*

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

- (A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

...

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall also be reflected in the meeting minutes.

W. Va. Code R. §158-8-5. Recusal.

5.1. For the purposes of W. Va. Code §6B-2-5(d), the Ethics Commission will consider a person "recused" if he or she (1) has made a full disclosure of his or her interest in the public contract, (2) has refrained from discussing, voting on or otherwise influencing or deciding the matter, and (3) is absent from the room during the discussion and voting process.

5.2. Making a full disclosure of one's interest means making a prior public disclosure including the amount of interest held directly or indirectly by a public employee or public official or immediate family thereof in a public contract.

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.

Even though the County Commission violated conditions of the 2018 Contract Exemption, the Ethics Commission cannot overlook the fact that not granting this Exemption could have an adverse effect on ambulance patients who may 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 for its ambulances in the Clay area. The following limitations apply:

First, King's may only be used for towing ambulances or emergency vehicles².

Second, the total amount for services received from King's may not exceed \$3,000 for a period of one year beginning on November 7, 2019, and ending on November 7, 2020. The County Commission's request to increase the amount to \$3,500 is **denied**.

Third, the County Commission must seek reimbursement from King's in the amount of \$570 for the payment it made that was not exempt from the prohibition in W. Va. Code § 61-10-15 due to King's not being the closest wrecker available and King's owner participating in the vote to approve that invoice.

Fourth, the County Commission may only pay King's for services when it is the closest wrecker service to the ambulance or emergency vehicle.


Fifth, the owner of King's may not be involved in any decisions relating to utilizing King's. The County Commission must withhold payment to King's if Commissioner King fails to recuse herself from all matters relating to the County Commission's decisions in this regard, including payment of invoices from King's. W. Va. Code § 6B-2-5(j)(3).

² "Authorized emergency vehicle" is defined in the West Virginia Code at § 17C-1-6 as follows:

"Authorized emergency vehicle" means vehicles of a fire department, duly chartered rescue squad, police department, ambulance service, state, county or municipal agency and such privately owned ambulances, tow trucks, wreckers, flag car services, vehicles providing road service to disabled vehicles, service vehicles of a public service corporation, postal service vehicles, snow removal equipment, Class A vehicles of firefighters, Class A vehicles of members of ambulance services, and Class A vehicles of members of duly chartered rescue squads, and all other emergency vehicles as are designated by the agency responsible for the operation and control of these persons or organizations"

This Contract Exemption is effective until November 7, 2020, 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 Wrecker Service 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 \$3,000. The County Commission must also provide verification that it sought bids for wrecker services through local publication.

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.



Lawrence J. Tweel, Acting Chairperson
West Virginia Ethics Commission