

Contract Exemption 2021-03

Issued on November 4, 2021, by

The West Virginia Ethics Commission

Opinion Sought

The **Clay County Commission** requests its fifth contract exemption to continue using King's Trucking & Wrecker Service, which is owned by County Commissioner Fran King, to tow county ambulances and other emergency vehicles when King's is the closest towing service to the vehicle.

Facts Relied Upon by the Ethics Commission

Fran King is the owner of King's Trucking & Wrecker Service ('King's'), a towing business located in the Town of Clay. Fran King is also a member of the Clay County Commission ("Clay County" or "County"), having taken office on January 1, 2017.

King's opened in 1991 and is the only towing service in Clay County. The County's emergency vehicles are housed in the Town of Clay, and historically the County has used King's to tow them. The County seeks this Contract Exemption solely for the purpose of using King's when it is the closest towing service available to a County emergency vehicle that needs towed. Fran King was not present during the County Commission meeting on October 13, 2021, when the Commission passed a motion to request a Contract Exemption for King's Trucking & Wrecker Service.

On March 2, 2017, the Ethics Commission granted its first one-year Contract Exemption to Clay County to contract with King's for wrecker services. (See Contract Exemption 2017-01.) Three subsequent Contract Exemptions were granted. (See Contract Exemptions 2018-06, 2019-04, and 2020-08.) In each Contract Exemption, the Commission authorized Clay County to use King's to tow its ambulances and other emergency vehicles in the Clay County area subject to limitations.

The Commission, in the most recent Contract Exemption (2020-08), stated the following:

If Clay County submits a new exemption request for the period after November 7, 2022, it must verify that 1) it attempted to contact other wrecker services when King was not the closest wrecker service available, 2) the total amount for services paid to King's did not exceed \$3,500, and 3) it sought bids for wrecker services through local publication.

Clay County is now seeking its fifth Contract Exemption to continue contracting with King's to tow the County's emergency vehicles that break down in the Clay County area when King's is the closest tow-wrecker service available. The County is requesting that the amount of the Exemption be \$3,500 per year.

The County has verified that it and Commissioner King have met all of the conditions above in Contract Exemption 2020-08. First, on August 25, 2021, the Clay County Commission passed a motion to seek bids for wrecker services. Commissioner King abstained from voting on this agenda item.¹ King's submitted the only bid. The bid was made for the rates set by the West Virginia Public Service Commission for towing services. On October 13, 2021, the County Commission accepted the bid from King's for wrecker services. The meeting minutes reflected that King recused herself from voting on this matter.

Second, the County provided documents showing that during the last exemption period, covered in Contract Exemption 2020-08, that King's provided wrecker and towing services for the County's emergency vehicles on only three occasions, August 30, 2021, September 9, 2021, and October 6, 2021.

Finally, Clay County verified that on these three occasions, King's was the closest wrecker service to the County's emergency vehicles that needed towing.

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:

¹ The local publication was in the Clay County Free Press, beginning on September 2, 2021, and the class II legal advertisement sought wrecker services which could respond to a scene within 35 minutes or less from initial dispatch. The legal ad further provided that the bidder would have to comply with the Clay County Office of Emergency Services & Clay County E911 Communications Center Towing Agreement – 2021. The Agreement states that towing companies must be housed in and have their headquarters in Clay County. King's is the only towing business in Clay County.

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 enter into the contract. W. Va. Code § 6B-2-5(d).

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 county entity may seek an exemption from the Ethics Commission under this statute as well. W. Va. Code § 61-10-15(h).

As a county commissioner, Commissioner King 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 Contract Exemption 2017-08 (finding that a county commissioner has influence and control over the sheriff department's contracts.)

Contract Exemption

The Ethics Commission may grant an exemption from the prohibitions in W. Va. Code § 61-10-15 if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency.

Clay County points to the same circumstances in the instant request that justified the previous Contract Exemptions issued in 2017, 2018, 2019, and 2020: It would incur increased costs and additional wait times up to an hour if it is unable to use King's for wrecker services in Clay County for County emergency vehicles. In Contract Exemption 2018-06, the Ethics Commission stated:

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 Commission finds that the same justifications exist now and that, as discussed above, the County met all the limitations and conditions set forth in Contract Exemption 2020-08.

Therefore, the Ethics Commission grants the Clay County Commission a Contract Exemption to allow it to contract with King's Trucking & Wrecker Services in an amount not to exceed \$3,500 from November 4, 2021, through November 4, 2022, to tow County ambulances and other emergency vehicles only when King's is the closest towing service to the wreck.

If Clay County submits a new exemption request for the period after November 4, 2022, it must verify that 1) it attempted to contact other wrecker services when King was not the closest wrecker service available, 2) the total amount for services paid to King's did not exceed \$3,500, and 3) 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.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission