



## WEST VIRGINIA ETHICS ACT PROHIBITED INTEREST IN A PUBLIC CONTRACT

### OVERVIEW

The Ethics Act prohibits public servants from having a financial interest in any contract, purchase or sale over which their public position gives them control. A public contract is any financial transaction by a government entity (e.g. purchase, sale, lease, etc.). There are limited exceptions to this prohibition which are discussed below.

### WHAT IS CONTROL?

Examples of exercising control include:

- (i) Drafting bid specifications or requests for proposals;
- (ii) Recommending selection of the vendor;
- (iii) Conducting inspections or investigations;
- (iv) Approving the method or manner of payment to the vendor;
- (v) Providing legal or technical guidance on the formation, implementation or execution of the contract; or
- (vi) Taking other nonministerial action which may affect the financial interests of the vendor.

### **NORMALLY I EXERCISE CONTROL OVER MY AGENCY'S CONTRACTS. CAN'T I JUST REMOVE MYSELF FROM THE PROCESS IF I HAVE A FINANCIAL INTEREST?**

Removing yourself from a decision-making role relating to your agency's contracts is **not** sufficient to relieve you of the prohibitions in the Ethics Act against having an interest in a public contract. Limited exceptions may apply; however, these exceptions must be decided on a case-by-case basis. Contact the Ethics Commission for further advice if such a situation arises.

### **DOES THE PROHIBITION EXTEND TO MY SPOUSE, DEPENDENT CHILDREN OR A BUSINESS WITH WHICH I AM ASSOCIATED?**

Yes. The prohibition against having a prohibited interest in a public contract also includes those contracts in which the public servant's spouse, dependent parents, or dependent children have a financial interest, as well as to any business with which the public servant or his or her immediate family members is associated.

For purposes of this prohibition, public servants and their immediate family members are associated with a business if any one of them is a director or officer in the business, or if they hold stock in the business which constitutes 5% or more of the outstanding stock of any class. An "immediate family member" means: a spouse with whom the individual is living as husband and wife, any dependent child or children, any dependent grandchild or grandchildren, and dependent parent or parents.

Also, if a person or business owes you money, or you owe them money, then you may have a prohibited interest. If so, you should contact the Ethics Commission for advice.

## **DOES THE ETHICS ACT PROHIBIT MY SPOUSE OR DEPENDENT FAMILY MEMBER FROM WORKING FOR THE SAME AGENCY ON WHICH I SERVE OR BY WHICH I AM EMPLOYED?**

The Ethics Act expressly states that the public contract prohibition does not apply to employment. Still, you must be aware that other provisions in the Ethics Act prohibit nepotism. See W. Va. Code § 6B-2-5(b); Title 158, Series 6, Section 3 (Nepotism); and related advisory opinions on the Ethics Commission's website, [www.ethics.wv.gov](http://www.ethics.wv.gov). Moreover, there are also strict anti-nepotism provisions governing County Officials and Public Officials and Employees in the County School Systems. W. Va. Code § 61-10-15. State Agencies must also abide by Division of Personnel Rules. See Title 143 Series 1, Section 17 (Employment Conflicts).

### **EXCEPTIONS**

**\$1,000 annually** – There is an exception in the Ethics Act which allows public servants to have a limited interest in a contract if the gross value of a contract, including purchases or sales, does not exceed \$1,000 in a calendar year. Even then, the public official may not be involved in influencing the award of the contract. This \$1,000 exception may not be relied upon by **county officials** who are governed by the stricter limitations in W. Va. Code § 61-10-15. See Ethics Commission Guideline entitled "Public Contract Provisions Governing County Officials and County School Systems (W. Va. Code § 61-10-15)".

**Certain employment** – employment of spouse or dependent child by a company with which your agency conducts business. So long as they are not associated with the business (as defined earlier), and do not receive a bonus or commission as a result of the contract, their employment is not prohibited. You may **not**, however, be involved in any decisions relating to the award of a contract to a business by which your spouse or immediate family member is employed.

**Part-time appointed officials** (except those county officials covered by W. Va. Code § 61-10-15) are not subject to the prohibition. Still, they must properly recuse themselves from deliberating or voting on the contract, and may not work behind the scenes to influence the award of the contract. See W. Va. Code § 6B-2-5(j)(3) (outlining the proper procedure for recusal). Moreover, the public agency must properly bid or advertise the contract. It may not favor one of its own board members over equally qualified persons or businesses.

**Members of the Legislature** may contract with any governmental body; provided that they may not use the prestige of their office to obtain unwarranted advantage.

**Contract exemptions** are granted when a prohibition in the Ethics Act will result in excessive cost, undue hardship or otherwise substantially interfere with the operation of a public agency. If so, then the public agency may seek a contract exemption from the Ethics Commission. See Guideline, "How to Seek a Contract Exemption"

## **DOES THE ETHICS ACT REQUIRE THAT CONTRACTS BE PUT OUT TO BID?**

No, the bid process is governed by the West Virginia Code, local ordinances, or your agency's procurement policies. But, if an agency wants to contract with one of its officials or employees, normally it will need to seek a contract exemption. See Guideline, "How to Seek a Contract Exemption".

**RELEVANT CITATIONS:** W. Va. Code §§ 6B-1-3(f), 6B-2-5(b), 6B-2-5(d), 6B-2-5(j); W. Va. Code § 61-10-15; and W. V.C.S.R. § 158-8-1 *et seq.* (Interest in Public Contracts)