

## **ADVISORY OPINION NO. 98-03**

**Issued on March 5, 1998 by the**

### **WEST VIRGINIA ETHICS COMMISSION**

#### **PUBLIC SERVANT SEEKING OPINION**

Mayor of a Town

#### **OPINION SOUGHT**

Is a Town entitled to a waiver of the Ethics Act's prohibition against private interests in public contracts?

#### **FACTS RELIED UPON BY THE COMMISSION**

A small Town presently uses a sixteen year-old one-half ton truck with approximately one-half million miles to perform snow plowing and other tasks associated with street maintenance. The Town's Street Commissioner has offered to sell his larger eight year old four-wheel drive truck, with approximately 150,000 miles of use, for \$5,500. This Commissioner is one of only two Town employees who would use the vehicle in their official duties.

The Mayor received a statement from an area truck dealer that the wholesale book value of the truck proposed for sale to the Town is \$5,400 and the retail book value is \$7,800. The Mayor also received offers to sell other smaller used trucks for approximately \$10,000 or more.

The truck offered by the Street Commissioner is the size and type which would best suit the needs of the Town and the Mayor requests that an exemption be granted so the purchase may be completed.

#### **PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

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...

West Virginia Code 6B-2-5(d)(3) states in pertinent part that...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 a written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

## **ADVISORY OPINION**

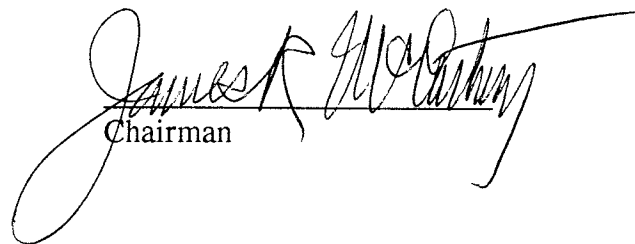
The Ethics Act prohibits public servants from being a party to or having a financial interest in any contract if their public positions give them authority or control over that contract.

The Ethics Commission has held in prior advisory opinions that influence over a contract constitutes "control" over that contract. In those opinions the Commission found that a person may have influence over a contract if he or she initiates the contract, evaluates potential vendors for the final decision maker, or serves in a position which requires him or her to monitor compliance with the contract.

In this case the Street Commissioner has initiated the sale of his truck and is the Town employee who will use the truck daily in performing his official duties. The Town is relying to a large extent on his determination that the truck suits the Town's needs. Therefore he has control over the contract.

However, WV Code 6B-2-5(d)(3) provides that a governmental entity may obtain an exemption from the prohibition against a private interest in a public contract if it can demonstrate application of that ban would result in excessive cost, undue hardship, or other substantial interference with its operation.

In this case the Commission finds that the price for the truck is substantially less than the Town would have to pay if it purchased a similar vehicle at retail. Applying the prohibition of WV Code 6B-2-5(d) to this case would create excessive cost and undue hardship for the strained budget of a small town. Therefore, the Commission grants an exemption pursuant to the provisions of WV Code 6B-2-5(d)(3).

  
Chairman