

CONTRACT EXEMPTION NO. 2014-03

Issued On November 13, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **City of Cameron** requests an exemption to allow the City to contract with the Mayor's spouse to provide emergency repairs at the Cameron Water Treatment Plant.

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. The City is a Class IV municipality of approximately 946 residents and operates a water plant which was built in 1956.

In Contract Exemption 2013-07, the Commission granted the City of Cameron an exemption to allow it to contract with Jeff Beresford, a licensed pipefitter and plumbing contractor who is married to the Mayor, to make emergency repairs to the plant. That request relied on the fact that if the filtration equipment was not repaired, the city would have been without water within a few days.

Since then, there have been more mechanical problems at the plant. The backwash pump failed, and then High Lift Pump No. 2's valves began to decay to the point of creating an "emergent situation," according to the Requester. The City ran legal advertisements seeking sealed bids for "repairs to the infrastructure of the City's Water Treatment Plant" in the *Moundsville Daily Echo* newspaper for two weeks and received no bids. The City further explains that the water plant operator has not been able to find anyone in more than a year to repair the piping and valves.

The City, accordingly, contracted with Mr. Beresford to complete these additional repair projects at the plant. The first, replacing the failed backwash pump, took from September 3, 2014, to October 4, 2014, and cost \$16,575.00. The second, replacing High Lift Pump No. 2, took from September 3, 2014, to October 1, 2014, and cost \$13,500.00. The City Council approved the invoices for both projects. The Mayor recused herself from all deliberations and voting on the contracts. The City of Cameron now seeks a contract exemption from the Ethics Commission in order to pay the invoices.

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. These prohibitions are intended to prevent both actual 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 its governmental agency.

According to the Requester, plumbing contractors in the area are not interested in performing the necessary work for the City. The City believes that due to the significant increase in energy facilities in the Northern Panhandle, area contractors are able to obtain higher paying jobs and contracts. The Requester also believes that the piping and valves at the water plant are so deteriorated that potential contractors fear liability if the pump fails following repairs.

The City states that it was unable to request a Contract Exemption prior to having Mr. Beresford to repair the backwash pump and High Lift Pump No. 2. As justification for its retention of Mr. Beresford, it states that if the valves would have failed, the effects would have been "catastrophic." A nursing home less than a mile from the water plant would have been immediately affected, and the town water supply in general would have suffered significantly, according to the Requester.

The Commission concludes that the Requester has demonstrated that contracting with the Mayor's husband was necessary in this case to secure the safety of the City's water supply. Accordingly, the Commission hereby grants a contract exemption to permit the City to pay the costs of those repairs in an amount not to exceed \$16,575.00 for the backwash pump repairs, and in an amount not to exceed \$13,500.00 for the repairs to High Lift Pump No. 2.

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