

Pension Benefit Guaranty Corporation

97-2

December 29, 1997

REFERENCE:

[\*1] 4021(b)(13) Plans Covered. Professional Service Employer Plans

OPINION:

I write in response to your request for a reconsideration of the Pension Benefit Guaranty Corporation's ("PBGC") initial determination with respect to the \* \* \* Retirement Plan (the "Plan"). On June 19, 1997, your client requested a determination that the Plan was excluded from coverage as a plan established and maintained by a professional service employer under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). On August 5, 1997, PBGC issued its initial determination that the Plan is covered by the termination insurance provisions of ERISA and not excluded from \* \* \* coverage under ERISA § 4021 (b)(13) as a professional service employer. By letter dated \* \* \* September 4, 1997, on behalf of \* \* \*, you requested \* \* \* reconsideration of PBGC's initial determination.

After review of the facts and circumstances, for the reasons discussed below, the PBGC has determined that the Plan is exempt from coverage under Title IV of ERISA. Thus, the request for reconsideration is granted.

**Request for Reconsideration**

In your request for reconsideration, you have represented that \* \* [\*2] \* is a Virginia professional corporation pursuant to the Code of Virginia of 1950, as amended Title 13.1, § 543, and that the three individuals responsible for controlling the operations of \* \* \* all possess bachelors degrees and all have taken advanced courses in their respective fields. Additionally, all three individuals hold class A or B surveying licenses certified by the Commonwealth of Virginia Board for Architects, Professional Engineers, Land Surveyors and Landscape Architects, and all pay professional license fees.

You further represent that the great majority of \* \* \* 's revenues are derived from surveying and engineering design consulting services. \* \* \* 's principals affix their professional seal and signature to every plat, survey and design they prepare and all of the professional opinions they issue are memorialized in a report. Additionally, you state that all principals remain personally liable to their respective clients, and all three principals maintain professional malpractice acts and omissions insurance, as required by Virginia law. It is undisputed that at no time has the Plan had more than 25 active participants.

**Discussion**

Section 4021 (b)(13) of ERISA [\*3] excludes from coverage any plan "established and maintained by a professional service employer that does not at any time after the date of enactment of this Act have more than 25 active participants in the plan."

Under § 4021 (c)(2) of ERISA, a professional service employer is any entity owned or controlled by professional individuals where both the entity and the professional individuals owning and controlling it are engaged in the performance of the same professional service. See PBGC Opinion Letter 76-106.

As stated in PBGC Opinion Letter 76-106, a professional individual generally is one who provides services that require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship or from training in the performance of routine mental, manual or physical process. The rendering of professional services generally requires the consistent exercise of discretion and judgment in its performance and would be predominantly intellectual in character.

Based on our review of the relevant factors, we believe that [\*4] the Plan is excluded from Title IV coverage as a

plan established and maintained by professional service employer. We agree that the surveying consulting services that \* \* \* provides require knowledge of an advanced type that is customarily acquired through a prolonged course of special intellectual instruction. Surveyors seeking licensure by the Commonwealth of Virginia are generally required to graduate from a surveying or surveying technology curriculum of four years or more prior to being admitted to sit for the sixteen-hour state licensing examination. If an applicant has not graduated from such a program, the applicant must have a specific record of ten years of approved surveying experience before being admitted to sit for the sixteen-hour licensing examination.

Next, it appears that \* \* \* renders professional services that require the consistent exercise of discretion and judgment which are predominantly intellectual in nature. You state in your request for reconsideration that the services from which \* \* \* derives the majority of its revenue are far different from those of the surveyors "one sees locating surveying points and planting surveying stakes as one drives along [\*5] the roadside" (Request for Reconsideration at 4). Rather, \* \* \* 's principals, relying upon knowledge gained through academic study and experience and exercising their professional judgment and discretion, evaluate conflicting data and advise their clients based upon an analysis of this data. Finally, we note that the principals, pursuant to Virginia law, remain personally liable for acts of negligence relating to the rendering of their professional services and maintain professional malpractice insurance.

### **Conclusion**

For the reasons discussed above, and on the basis of information provided to us, we conclude that the Plan is excluded from coverage under Title IV as a plan established and maintained by a professional service employer pursuant to section 4021(b)(13) of ERISA. This letter constitutes a final decision by the PBGC regarding the Plan.

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