

Pension Benefit Guaranty Corporation

81-13

May 13, 1981

REFERENCE:

4021(b)(2) Plans Covered. Government Plans

OPINION:

This is in response to your letter regarding coverage of the above pension plan (the "Plan") under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). You asked whether the Plan is excluded from Title IV coverage by Section 4021(b)(2) of ERISA. We have concluded that the Plan is not excluded from Title IV coverage by that Section.

Section 4021(b)(2) of ERISA excludes from Title IV coverage any plan "established and maintained for its employees by the Government of the United States, by the government of any State of political subdivision thereof, or by any agency or instrumentality of any of the foregoing"

As you have represented the facts, A Inc. is a wholly owned subsidiary of the B Company, a major private United States corporation. Pursuant to a contract with the United States Department of Energy (the "DOE"), A provides a variety of computer services to the DOE's research facility at * * *, Washington, where all of A employees are located. The contract requires that A maintain the Plan for those employees. Although the contract permits them to [*2] engage in non-contract work, all of A employees in fact engage exclusively in work related to the contract. The parties anticipate that in the event of the termination of the contract, virtually all of A employees would continue work at the * * * facility as employees of a successor contractor and participants in a successor pension plan.

A earns a profit from the contract and is reimbursed by the DOE for its allowable expenses under the contract. Among these allowable expenses are employee salaries and employer contributions to the Plan, to the extent those salaries and contributions are attributable to work performed under the contract. Amendments to the Plan which effect substantive changes or increase costs require the approval of the DOE. All employer contributions to the Plan are deposited with a private insurance carrier pursuant to an agreement between the carrier and the B Company.

In the event of the termination of the contract, a payment adequate to meet all of A obligations to the Plan which are mandated by ERISA is also an allowable cost to the extent those obligations are attributable to work performed under the contract. The contract provides for either the purchase [*3] of annuities from a private insurance carrier or the payment by A into the Plan of a sufficient sum to meet its obligations to the Plan under ERISA. Such obligations are determined by valuing the Plan's assets and liabilities as of a date six months after the date of contract termination. Neither the Plan nor the contract provides for any direct payment by the DOE of Plan participant benefits in the event they become unavailable from other funding media.

We first examine the possibility that Section 4021(b)(2) might exclude the Plan from Title IV coverage as a plan maintained for its employees by a governmental instrumentality. We do not consider A to be a federal instrumentality, and you have not urged that we should. A is wholly owned by a private corporation for which it produces profit and its contract with the DOE designates it as a contractor rather than as an instrumentality. Accordingly, Section 4021(b)(2) does not exclude the Plan from Title IV coverage on that basis.

We therefore consider the question of whether the Plan is maintained by the Government of the United States for its employees. We have concluded that the participants in the Plan are not employees of [*4] the Government of the United States. In two significant respects, the DOE accords A employees different treatment from that which it accords federal civil service employees. The employees of A are ineligible for payments from the federal funds for both unemployment compensation and injured workers' compensation. A reimburses the State of Washington's unemployment compensation fund for its payments to former A employees, while the DOE reimburses the State's workers' compensation fund for its payments to injured A employees.

A further consideration supporting our conclusion is that statutory language pertaining to governmental employees has usually been held not to apply to the employees of independent contractors doing business with the government.

Statutes to which this practice has been applied include the Fair Labor Standards Act of 1938 and the Labor Management Relations Act of 1947.

We therefore conclude, on the basis of the information furnished us, that the Section 4021(b)(2) exclusion does not apply to the Plan and, consequently, that the Plan is subject to the provisions of Title IV.

If you should desire reconsideration of this determination you may file a request [*5] for reconsideration addressed to:

General Counsel, Pension Benefit Guaranty Corporation, 2020 K Street, N.W., Washington, D.C. 20006

All of the requirements pertinent to a request for reconsideration are set forth in Subparts A and C of the PBGC's Administrative Review regulation (a copy of which is enclosed).

A purpose of the reconsideration process is the examination of information not already submitted and of issues not already raised. If you do not file a request for reconsideration it is possible that any judicial review of this determination will be limited to grounds which the PBGC has had an opportunity to consider.

You must file the request for reconsideration within 30 days after the date of this determination. An extension of time within which to file may be available; § 2618.4 of the enclosed regulation contains the provision governing extensions of time.

I trust this responds to your inquiry. If you have any questions, please call * * * of my staff at (202) 254-3010.

Henry Rose
General Counsel