

Memorandum

March 27, 1985

TO : Director, HRD - Richard L. Fogel

FROM : Assistant General Counsel - Robert H. Hunter 

SUBJECT: Procurement of Investment Manager Services by the Pension Benefit Guaranty Corporation-B-217281-O.M.

The Chairman of the House Select Committee on Aging has asked whether the Pension Benefit Guaranty Corporation (PBGC) is subject to compliance with Federal procurement regulations in procuring investment manager services for (1) excess capital in PBGC's revolving funds and (2) assets of terminated plans for which it serves as trustee. We conclude that the revolving funds of PBGC are appropriated funds so that procurements using such funds could not be exempted from the application of Federal Property and Administrative Services Act of 1949 (1949 Act) or the regulations implementing the Act.

As for the procurement of investment manager services for assets of terminated plans when PBGC serves as trustee for such plans, PBGC primarily serves the interest of the participants and beneficiaries of the plans in the same manner and to the same degree as would a nongovernmental party when it acts in that capacity. It therefore possesses all of the powers and duties a private party would possess when serving as a trustee. Because the trusts PBGC administers are privately established and privately funded it is unlikely that they would be considered public funds even when they come into PBGC's possession. Thus, PBGC is not required to follow the 1949 Act or its implementing regulations when contracting for investment managers in its capacity as trustee for terminated plans.

PBGC

PBGC is a nonprofit, wholly-owned Government corporation within the Department of Labor whose purpose is to insure that participants in private pension plans have guaranteed pension benefits should the plan under which they are covered terminate. See, section 4002 of the Employment Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, September 2, 1974, 29 U.S.C. § 100 et seq., 29 U.S.C. § 1302; and 31 U.S.C. § 9101(3)(I).

The law creating PBGC vests in it two fundamentally different duties. On one hand, the law vests in PBGC the power to serve as trustee for terminated plans. ERISA § 4042; 29 U.S.C. 1342. When serving as trustee for a terminated plan, PBGC is serving primarily the interests of the participants and beneficiaries of the plan in the same manner and to the same degree as would a nongovernmental party appointed to the same position. That is, PBGC, as trustee to a terminated plan, is authorized to require the transfer of all or any part of the assets and records of the plan to itself as trustee and to invest any assets of the plan which it holds in accordance with the provisions of the plan, regulations of the corporation, and applicable law.

On the other hand, PBGC serves in its corporate capacity as an insurer of the plans covered under the laws it administers. ERISA § 4005; 29 U.S.C. § 1305. When acting in this capacity, its costs are financed through revolving funds. ERISA § 4005(b)(2)(D); 29 U.S.C. § 1305(b)(2)(D).

ISSUE

The issue here is whether PBGC should follow the procedures governing negotiated procurements set forth in applicable procurement regulations when procuring investment manager services for assets (1) of terminated pension plans for which it serves as trustee and (2) capital in PBGC's revolving funds. This memorandum does not address the necessity of acquiring investment manager services in either situation.

PBGC's POSITION

PBGC's position is that it is a nonappropriated fund activity since its revolving funds and trust funds (assets of terminated plans when PBGC is appointed trustee in accordance with the law's requirements) are derived from sources other than the U. S. Treasury. Therefore, PBGC's position is that it is excepted from the competitive negotiation requirements in the procurement regulations since it contends the regulations were never intended to apply to nonappropriated fund activities. Further, while PBGC concedes that it is a wholly-owned Government corporation expressly made subject to the 1949 Act, it contends that the Act does not apply to nonappropriated activities. Thus, PBGC retained investment manager services using procurement procedures outside the requirements of the 1949 Act and its implementing regulations.

PBGC IS A WHOLLY-OWNED CORPORATION

The PBGC was established as a corporate body within the Department of Labor and classified as a wholly-owned Government corporation in 31 U.S.C. § 9101(3)(I), thereby subjecting

it to the laws governing the budgets, audits, accounts and obligations of wholly-owned Government corporations. The effect of this designation was to subject the PBGC to other provisions of law specifically made applicable to wholly-owned Government corporations in the absence of a clear indication of congressional intent to the contrary. Moreover, PBGC has been judicially determined to be a wholly-owned Government corporation. See, LLC v. Pension Benefit Guaranty Corporation, 537 F. Supp. 355, 356 (E.D. MO. 1981) reversed in part and modified, 703 F.2d 301 (8th Cir. 1983).

Section 472 of the 1949 Act defines a Federal agency to include "any executive agency." 40 U.S.C. § 472(b) "Executive agency" is defined in 40 U.S.C. § 472(a) to include wholly-owned government corporations, such as PBGC.

The Federal Procurement Regulations, (FPR) 41 C.F.R. § 1 et seq., which were effective until April 1, 1984, applied to all Federal agencies to the extent specified in the 1949 Act with respect to contracting activities before April 1, 1984. 40 U.S.C. § 471 et seq.

PBGC'S REVOLVING FUNDS ARE APPROPRIATED FUNDS

The Congress has not authorized PBGC to issue stock. Instead, PBGC operates through the use of revolving funds established on the books of the Treasury. ERISA § 4005, 29 U.S.C. § 1305. ERISA initially provided for the establishment of four revolving funds; however, it was amended in 1980 to establish two additional revolving funds. ERISA §§ 1305(d), 1305(e), 29 U.S.C. § 1305(d),(e). Section 3005 specifies what may be deposited into the funds, what may be expended from the funds, and how they are to be controlled. Each revolving fund may include as credit (1) up to \$100 million borrowed from the Secretary of the Treasury; (2) premiums, penalties, interest, and charges collected by PBGC; (3) assets of a terminated plan but only to the extent they exceed the liabilities; (4) earnings on investment of the fund; and (5) receipts from other operations. Each of the revolving funds is then available for making payments guaranteed under the law, to repay the Secretary of the Treasury for any borrowed sums, and to pay PBGC's operational and administrative expenses. ERISA § 4005(b)(2); 29 U.S.C. § 1305(b)(2).

That these revolving funds are appropriated funds is clear. We have held that:

"It is well settled that statutes which authorize the collection and credit

of fees to a particular fund and which make the fund available for a specific purpose, constitute continuing or permanent appropriations." B-210657, May 25, 1984, and decisions cited therein.

The basis for this principle is that, absent specific statutory authority to use monies collected for the benefit of the United States, a Government agency must deposit collections into the general fund of the Treasury as miscellaneous receipts. 31 U.S.C. § 3302(b) (formerly 31 U.S.C. § 484 (1976)). See, 50 Comp. Gen. 1323; and 36 Comp. Gen. 436. Once deposited to the Treasury, they may not be "* * * drawn from the Treasury but in consequence of appropriations made by law." Constitution of the United States, Article 1, section 9. Consequently, legislation which directs an agency to collect monies and use them for specific purposes is, in effect, a continuous appropriation of funds for those purposes, eliminating the need for a new appropriation each fiscal year. United Biscuit Company of America v. Wirtz, 359 F.2d at 212 (D.C. Cir. 1965).

Furthermore, 31 U.S.C. § 1101(2) broadly defines the term "appropriations" to include funds, authority to make obligations by contract in advance of appropriations, and any other authority making amounts available for obligation or expenditure. Consistent with this analysis we have held that other wholly-owned Government corporations operating by use of similar funds were operating with appropriated funds.^{1/}

Finally, based upon this analysis, the U.S. Court of Appeals for the District Court of Columbia circuit affirmed a decision by the Federal Labor Relation Authority that the PBGC's revolving funds were appropriated funds and that

^{1/} Federal Prisons Industries, Inc., 60 Comp. Gen. 323 (1981) proceeds of sale; Federal Savings and Loan Insurance Corporation, 43 Comp. Gen. 759 (1964) funded by premiums and interest on investments; St. Lawrence Seaway Development Corporation (Fees), B-193573, December 19, 1979. (Fees) See, also 63 Comp. Gen. 285 (1984); 59 Comp. Gen. 215 (1980); 57 Comp. Gen. 311 (1978); 35 Comp. Gen. 436, 615 (1956); B-197118, January 14, 1980; B-191761, September 25, 1978; and, B-99865, May 21, 1951.

therefore, the PBGC was not excluded by 5 U.S.C. § 5102(c)(14)^{2/} from the application of chapters 51 and 53 of title 5, United States Code.^{3/} (Civil Service classification and equal pay).

In view of the foregoing, it seems clear that PBGC's revolving funds are appropriated funds.^{4/} Thus, PBGC should have followed the procurement regulations that implement title III of the 1949 Act in procurements funded from the revolving funds.

FPR REQUIREMENTS

The FPR, which implement title III of the Federal Property and Administrative Services Act of 1949, as amended, for actions occurring before April 1, 1984,^{5/} require that all purchases and contracts whether by formal advertising or by negotiation be made on a competitive basis to the maximum practicable extent. 41 C.F.R. § 1-1.301-1 (1984). When using negotiated procurement procedures, the procuring agency is required to give consideration to, and compare the prices quoted by the offerors and other prices for the same goods and

^{2/} 5 U.S.C. § 5102(c)(14) excludes from the coverage of Civil Service classification and equal pay provisions:

"Employees whose pay is not wholly from appropriated funds."

^{3/} Unpublished decision: National Treasury Employees Union v. Federal Labor Relations Authority, N. 82-2176 (D.C. Cir. May 10, 1983) affirming National Treasury Employees Union and Pension Benefit Guaranty Corporation, Case No. O-NG-320, August 3, 1982, (9 FLRA No. 82).

^{4/} For an excellent analysis of the nature of revolving funds as appropriations and their establishment by the Congress for the use of Government corporations for the conducting of their activities, see: The Report to the Congress by the Commission on Organization of the Executive Branch of the Government (Hoover Commission) on Federal Business Enterprises March 1949, accompanied by the Task Force Report on Revolving Funds (Appendix J), January 1949, pages 164-171.

^{5/} The Federal Acquisition Regulations become effective on April 1, 1984. Although this memo discusses the application of the FPR, the corresponding provisions of the Federal Acquisition Regulations contain the same essential requirements.

services. 41 C.F.R. § 1-3.102 (1984). In this regard, it is the government's policy to procure services from responsible sources with fair and reasonable prices calculated to result in the lowest overall cost to the Government. 41 C.F.R. § 1-3.801-1 (1984). While in negotiated procurements an agency may find that due to technical considerations a proposal which is not lowest in cost provides a better value to the Government, price is still a decisive factor. 41 C.F.R. § 3-805.1.

The procedures used by PBGC in procuring investment manager services were akin to those authorized by the Brooks Act when agencies procure architect-engineer services, rather than the procedures governing negotiated procurements set forth in FPR, which normally would be followed in procuring professional services.

The Brooks Act^{6/} requires an agency head to evaluate the qualifications and performance data submitted by practitioners when procuring architectural and engineering services. On the basis of criteria which he establishes, the agency head selects no less than three firms as most qualified for a given project. 40 U.S.C. § 543. The agency head then is required to negotiate with the highest qualified firm for services at a price which he determines to be fair and reasonable. 40 U.S.C. § 544(a). In the event that the agency head cannot secure a contract with the most qualified firm, he terminates negotiations with that firm and negotiates with the second most qualified firm. Should the agency head fail to reach agreement with the second most qualified firm, he ceases negotiations and moves on to the next qualified firm, and so on until a contract is entered into 40 U.S.C. § 544(b) and (c). Thus, price is not a decisive factor in Brooks Act procurements.

Because PBGC's revolving funds are appropriated funds and procurements using such funds could not be exempted from the application of the 1949 Act or the FPR, procedures similar to those used for the procurement of architect-engineer services were not legally available.

PBGC AS TRUSTEE

Section 4042(b)(1) of ERISA, 29 U.S.C. § 1342(b)(1), vests in PBGC the power to serve as a trustee for terminated plans. As a court appointed trustee, PBGC has the power to

^{6/} Title IX of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 541-544.

conduct any activity authorized by the plan documents, to require that all records and assets of the plan be transferred to it, to invest any assets of the plan, and to do anything else PBGC considers necessary to continue operation of the plan without increasing PBGC's potential liability. A trustee of a terminated plan is considered a fiduciary. ERISA § 4042(d), 29 U.S.C. § 1342(d).

Under section 404 of ERISA, a fiduciary must discharge his duties solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to them and defraying reasonable expenses of administering the plan, and in accordance with the plan documents. Thus, when serving as trustee for a terminated plan, the PBGC is serving primarily the interests of the participants and beneficiaries of the plan in the same manner and to the same degree as would a nongovernmental party appointed to that position. Thus, the PBGC possesses the same authority and duty to act, vis-a-vis the participants and beneficiaries of a terminated plan, as would a nongovernmental party.

Since a nongovernmental party acting as trustee would not be required to procure professional services in accordance with the requirements of title III of the 1949 Act or the FPR unless otherwise required by the PBGC, see, section 4042(h)(2) above, we see no compelling reason to extend such a requirement to the PBGC when it is by express provisions of law serving in same capacity. The trusts PBGC administers are privately established and privately funded and are unlikely to be considered public funds even when they come into the possession of PBGC as trustee for a terminated plan. See, Varney v. Warehime, 147 F.2d (6th Cir. 1945). Thus, PBGC is not required to follow the FPR when contracting for investment managers of trust funds. Of course, PBGC may elect to follow the procurement procedures contemplated by the 1949 Act.

DIGEST

Pension Benefit Guarant Corporation (PBGC) (a wholly-owned Government corporation) revolving funds, to which are deposited: borrowings from the Treasury; premiums, penalties, interest, and charges collected by PBGC; assets of terminated plans but only to the extent that they exceed liabilities; earnings on investment of the fund in Government issued or guaranteed securities; and, receipts from other operations, and out of which are paid operating and administrative expenses of PBGC and insurance payments for covered plans, are appropriated funds. It is well settled that statutes which authorize the collection and credit of fees to a particular fund and which make funds available for a specific purpose constitute continuing, permanent appropriations. Thus, PBGC must follow Federal Property and Administrative Services Act of 1949 and implementing Regulations when procuring investment manager services for the revolving funds.

Where under Employee Retirement Income Security Act of 1974, the PBGC may serve as a trustee for a terminated plan and possess all the powers and duties a private party would possess when serving as a trustee, it is not required to follow the Federal Property and Administrative Services Act of 1949 and implementing regulations when procuring investment managers services for trust assets.