

Pension Benefit Guaranty Corporation

85-5

January 30, 1985

REFERENCE:

[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption
4212(c) Obligation to Contribute - Liability

OPINION:

This responds to your request for the PBGC's opinion concerning the application of the construction industry rule under Section 4203(b) of ERISA. Specifically, you wish to know whether an employer is liable under that rule when the employer ceases making contributions to a construction industry pension plan but continues in business performing all of its construction work through subcontractors.

Section 4203(b) provides that a construction industry employer that contributes to a construction industry pension plan does not withdraw from the plan unless the employer "ceases to have an obligation to contribute under the plan, and . . . continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required . . ." You pose two situations and ask whether they constitute withdrawals.

First, an employer continues to be obligated to contribute to a plan under a collective bargaining agreement but ceases to perform construction work directly and thus ceases making contributions to the plan. Rather, [*2] it subcontracts the work (which may or may not be covered under the plan). Under these circumstances there is no withdrawal, because the employer has not ceased to have an obligation to contribute for any work that it may perform.

Second, an employer terminates its obligation to contribute and ceases to perform construction work directly. As above, it subcontracts the work instead. Under these circumstances there is no withdrawal unless the employer would have been obligated to make contributions for work performed by subcontractors under the terminated agreement. If contributions would not have been required, there would be no withdrawal, because the employer would not be continuing to perform work of the type for which contributions were previously required.

Please note, however, that Section 4212(c) of ERISA provides that a plan may disregard a transaction if a principal purpose of the transaction is to evade or avoid liability. It is the plan sponsor's responsibility in the first instance to determine whether a withdrawal has occurred and the identity of the liable employer. Disputes arising over such withdrawal liability determinations must be resolved under the dispute [*3] resolution procedures of Sections 4219 and 4221 of ERISA.

I hope this is of assistance. If you have further questions, please contact * * * of my staff at the above address or (202) 254-4873.

Thomas Veal
Acting Director, Legal Department