

Pension Benefit Guaranty Corporation

81-32

1981 PBGC LEXIS 9

September 25, 1981

REFERENCE:

[\*1] 4204 Sale of Assets

4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of Security

OPINION:

This responds to your request for an advisory opinion concerning satisfaction of the escrow requirement of Section 4204(a)(1)(B) of ERISA. Specifically you wish to know whether the deposit of a letter of credit in an escrow account may satisfy the requirement.

Section 4204(a)(1) provides that a withdrawal from a multiemployer plan "does not occur solely . . . as a result of a bona fide, arm's-length sale of assets to an unrelated party" provided that certain conditions are met. Section 4204(a)(2)(B) provides one of the conditions:

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of Section 412 of this Act, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of --

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale [\*2] of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale. . . . [Emphasis added.]

In our view a letter of credit held in escrow satisfies the requirements of Section 4204(a)(1)(B). We note, however, that it is within the plan's discretion whether a given institution is an acceptable party to hold a letter of credit in escrow under Section 4204(a)(1)(B). The plan sponsor is responsible under Section 4204 for determining the acceptability of any agreements such as those which you provided for our examination.

Mitchell L. Strickler  
Deputy General Counsel