U.S. Department of Labor
Pension and Welfare Benefits Administration
Washington, D.C. 20210

AUG 29 1988

88-13A
Sec. 408(c)(2)

Paul D. Myrick, Esq.
McRight, Jackson, Myrick & Moore
1100 First Alabama Bank Building
Mobile, AL 36602

Re: A.F. of L. - A.G.C. Building Trades Pension and Welfare Plans
Identification Number: F-3708A

Dear Mr. Myrick:

This is in response to your letters of July 30, 1987, and September 2, 1987, on behalf of the A.F. of L. - A.G.C. Building Trades Pension and Welfare Plans (the Plans) regarding the application of the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA). You request an opinion as to whether a plan trustee, who is a full-time employee of an employer that no longer makes contributions to the Plans on behalf of its employees, may receive compensation from the Plans for services performed as trustee.

You represent that Mr. Walter Ernest, a management trustee of the Plans, is a full-time employee of Ernest Construction Company (Ernest Construction). Since you state that the trustee is a full-time employee of Ernest Construction, we assume for purposes of this ruling that he is paid full-time in that capacity. Ernest Construction was previously, but is no longer, a party to a collective bargaining agreement that required it to make contributions to the Plans on behalf of its employees. Six former employees of Ernest Construction are retired and are receiving pension payments from the Pension Plan. Four current employees of Ernest Construction have vested rights to Pension Plan benefits. No current or former employees of Ernest Construction are participants in the Welfare Plan or are otherwise entitled to benefits under that Plan. Ernest Construction is an associate member of the Associated General Contractors of America, Inc. (AGC), the Plans' sponsor.[1]

[1] Management trustees are appointed by a vote of all of the full members of the AGC. Full members are those employers who contribute to the Plans and are signatories to the master collective bargaining agreement. At the time Mr. Ernest was appointed, Ernest Construction was a full member of the AGC and participated in the appointment decisions. There is no information in the materials you submitted as to the duties of Ernest Construction Company under its current status as an associate member of the AGC.

Section 406(a)(1)(C) and (D) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction, if he knows or should know that the transaction constitutes a direct or indirect furnishing of goods, services or facilities between a plan and a party in interest; or transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 3(14) of ERISA defines the term "party in interest" to include a fiduciary with respect to a plan.

Further, section 406(b)(1) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his own interest or for his own account.

Section 408(b)(2) of ERISA provides an exemption from the prohibited transactions provisions of section 406(a) of ERISA for any contract or reasonable arrangement with a party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor. However, section 408(c)(2) of ERISA contains limitations with respect to the payment to a fiduciary of such compensation. Specifically, section 408(c)(2) of ERISA provides that nothing in section 406 shall be construed to prohibit any fiduciary from receiving any reasonable compensation for services rendered, or for reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers whose employees are participants in the plan, or from an employee organization whose members are participants in the plan, shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred.

Section 3(5) of ERISA defines the term "employer" to mean any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan. The term "employee" is defined under section 3(6) of ERISA to mean any individual employed by an employer. Section 3(7) of ERISA defines the term "participant" to mean any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

The regulation implementing section 408(c)(2) of ERISA, 29 CFR section 2550.408c-2, further provides, in paragraph (b)(2), that the term “reasonable compensation” does not include any compensation to a fiduciary who is already receiving full-time pay from an employer or association of employers (any of whose employees are participants in the plan) or from an employee organization (any of whose members are participants in the plan), except for the reimbursement of direct expenses properly and actually incurred and not otherwise reimbursed.

As previously stated, section 3(5) of ERISA defines the term "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." A determination of when a person is acting as an employer "in relation to an employee benefit plan" is a determination which must be based on the particular facts and circumstances of each case.

With regard to the Welfare Plan, you represent that Ernest Construction is no longer a party to the collective bargaining agreement, and, thus, is not making current contributions to this Plan. Further, Ernest Construction has no participants (either current employees or retirees) in this Plan. Based on these representations, the Department has determined that Ernest Construction is not acting directly as an “employer” within the meaning of ERISA section 3(5) in relation to the Welfare Plan.[2] Based on the facts and conclusions described above, it is the opinion of the Department that Mr. Ernest would not be precluded from receiving compensation from the Welfare Plan for his services as trustee because, with regard to that Plan, he is not receiving full-time pay from an employer described in section 408(c)(2).

You represent that, in the past, Ernest Construction, as a party to a collective bargaining agreement, made contributions to the Pension Plan on behalf of its employees. You also represent that, at the time of your request for an opinion, six former employees of Ernest Construction were retired and receiving benefits under the Plan and several current employees continued to be covered by the Pension Plan. Based on these representations, the Department has determined that Ernest Construction is acting directly as an "employer" within the meaning of ERISA section 3(5) in relation to the Pension Plan. Further, based on the facts and conclusions described above, it is the opinion of the Department that Mr. Ernest would be precluded from receiving compensation from the Pension Plan for his services as trustee since he receives full-time pay from Ernest Construction, an employer described in section 408(c)(2).

This is an advisory opinion under ERISA Procedure 76-1. It is subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Acting Director of Regulations and Interpretations

---

[2] For purposes of this opinion, the Department assumes that Ernest Construction is not, in its capacity as associate member of AGC, acting "indirectly in the interest of an employer" as described in section 3(5).