

United States Senate

WASHINGTON, DC 20510

July 25, 2000

Via Facsimile (202) 512-5507 and Regular Mail

Mr. David M. Walker
Comptroller General of the United States
U.S. General Accounting Office
441 "G" Street, N.W.
Washington, D.C. 20548

Dear Mr. Walker:

On February 16, 1999, the Special Committee on Aging and the Committee on Small Business (Committees) requested the General Accounting Office (GAO) to conduct a study of management and contracting practices at the Pension Benefit Guaranty Corporation (PBGC). On March 16, 2000, the Committees requested that GAO include several other areas to the work already in progress; however, GAO declined to include this part in its study of the PBGC. On May 11, 2000, GAO met with the Committees' staff to discuss the request, as well as provide a status report on the project. At that time, GAO indicated that it intended to proceed with an exit conference with the PBGC and to issue the draft report in June 2000. Our Committees continue to have concerns about the draft GAO report from verbal briefings we received from GAO, since we have not yet read the draft report. GAO has not issued the draft report as of this date.

Failed pension plans jeopardize the financial security of the retirees who were counting on those plans' promises. By taking over those failed plans, the PBGC becomes the last line of defense to ensure these pensions are paid, despite that failure, and the trust funds are vital resources that make payment possible. The Congress must be assured that these funds are protected, and the Congress must continue relying on the findings of GAO in monitoring the use of those funds

It has come to our attention that one of the findings of the GAO study relates to the PBGC's adherence to the Federal Acquisition Regulation (FAR). It is our understanding that the GAO report will claim that the PBGC is not required to adhere to the FAR in soliciting and awarding contracts. It is our further understanding that GAO concluded that the PBGC is not required by law to adhere to the FAR in contracting matters, despite its apparent status as a wholly owned Government corporation, and even though it voluntarily adopted the FAR early in its formation. Of particular concern to our Committees is GAO's finding that the PBGC may have no obligation to adhere to the FAR in contracts concerning the billions of dollars in pension funds it administers.

The Committees' staff raised concerns about GAO's conclusions throughout the briefing process. On June 2, 2000, the Committees' staff requested that GAO provide the statutory provisions

and/or case law it relied upon to reach the conclusion that the FAR did not apply to the PBGC. In reviewing the cases provided by GAO, it appeared to us that these cases do not support GAO's contention that the FAR does not apply to the PBGC. Rather, GAO's cases appear to support the view that the FAR does indeed apply to the PBGC, as a wholly-owned Government corporation.

On June 23, 2000, GAO's legal staff met with staff from our respective Committees and further explained the basis for GAO's legal conclusion that the FAR does not apply to the PBGC. At that meeting, we were unfamiliar with the legal basis for GAO's conclusions that exempts trust funds from adherence to the FAR. We would appreciate being provided the citation upon which GAO relies for this conclusion.

In light of the significance of GAO's findings, we believe it is imperative to examine this matter more closely. Accordingly, we would appreciate your providing us with a written statement that includes all of GAO's legal conclusions discussed at the meeting with staff on June 23, 2000. Specifically, we would appreciate the following responses/information:

1. Does the Federal Acquisition Regulation, in whole or in part, apply to the PBGC, in whole or in part? Please provide appropriate citations.
2. Chapter 91 of Title 31 includes the PBGC as a "wholly owned Government corporation" at 31 U.S.C. § 9101(3)(J). Does the definition of "executive agency" at 40 U.S.C. § 472(a), which includes wholly owned Government corporations, include the PBGC? If not, why not? Further, what wholly owned Government corporations are referenced by 40 U.S.C. § 472(a), if not those listed at 31 U.S.C. § 9101(3)? Please provide appropriate citations.
3. The Administrator of General Services (under whose authority the FAR is issued, jointly with the Department of Defense and the National Aeronautics and Space Administration) is authorized under 40 U.S.C. § 481(a)(1) to "prescribe policies and methods of procurement" for executive agencies. Why does this authority not extend to the PBGC, given the definition of "executive agency" at 40 U.S.C. § 472(a)?
4. Government corporations, as defined in Chapter 91 of Title 31, are exempted from 40 U.S.C. §§ 486(b) and 487(c) by § 474. These exemptions extend to accounting and auditing practices. Does GAO believe this exemption provides a general exemption from the FAR?
5. Notwithstanding the existence or nonexistence of statutory provisions subjecting the PBGC to the FAR, would a voluntary decision by the PBGC to accept the provisions of the FAR be binding? Would the PBGC be able to waive that decision at will? Is the PBGC permitted to adopt the FAR except on those occasions when it finds the FAR inconvenient?
6. Are all contracts executed by the PBGC done so in carrying out its governmental functions? Are contracts related to administration of the trust funds carried out by the PBGC as an exercise of its governmental powers, and if so, are these contracts reimbursable by the trust funds? If not, do the trust funds have actual administrators who solicit and award contracts under their own authority? Please provide supporting citations.

7. Do the trust funds, in GAO's opinion, contain private funds or government funds?
8. To whom, in either the Executive or Legislative Branches, is the PBGC accountable for its expenditure of funds from the trust funds, particularly for contracting?

In addition, please provide our respective Committees a copy of each Comptroller General opinion with regard to the PBGC since the PBGC's inception. Finally, please provide our Committees with a copy of each GAO report with regard to PBGC since its inception.

We would appreciate your response to these questions by August 11, 2000. If you have questions about this letter, please contact Lauren Fuller of the Special Committee on Aging on (202)224- , or Cordell Smith of the Small Business Committee on (202)224- .

Sincerely,


Christopher S. Bond
Chairman
Committee on Small Business


Charles E. Grassley
Chairman
Special Committee on Aging