DBRA-72

June 5, 1978

This is in reply to your letters addressed to *** of our Dallas Regional Office, concerning your proposal to take credit for contributions made towards certain fringe benefits as an offset against your firm's obligations to provide such benefits under the prevailing wage provisions of the Davis-Bacon Act. We regret the delay in responding.

In order for contributions to your fringe benefit programs to be creditable toward meeting your firm's fringe benefit obligations under a particular wage determination, the plan must meet the requirements of section 1(b)(2) of the Davis-Bacon Act and the standards set forth in Regulations, 29 CFR Part 5, Subpart B (copies enclosed).

The information you have submitted is not sufficient to allow us to give you a definitive answer as to whether your fringe benefit programs meet the above standards. Accordingly, we offer the following general comments.

We would initially like to note two general requirements which are pertinent to all fringe benefit plans. First, the administrative expenses, if any, incurred by a contractor or subcontractor in connection with the administration of a "bona fide" fringe benefit plan are not creditable toward discharging his obligation to pay the "prevailing wage" under the Davis-Bacon Act. Our position on this issue was upheld by the Wage Appeals Board of the Department of Labor, in the case of Collinson Construction Company, WAB Case No. 76-9, dated April 20, 1977. You will also be interested in knowing that the Wage Appeals Board held in that case, that a contractor may credit contributions to a "bona fide" fringe benefit plan for Davis-Bacon purposes even though the fringe benefit is not of a type listed on the prevailing wage determination. Secondly, because the Davis-Bacon Act requires that an employer make payments or incur costs in the amount specified by the applicable wage determination with respect to each individual laborer or mechanic performing covered contract work, those employees ineligible to participate in a fringe benefit plan for whatever reason, and for whom the contractor makes no contribution, must be paid in cash.

In order for your contributions to be creditable toward your firm's fringe benefit obligations under the Davis-Bacon Act the benefit must be "bona fide" within the meaning of the Act. It is also required that your contributions be made irrevocably to a trustee or third party independent of and not affiliated with the employer as set forth in section 5.26 and 5.27 of the Regulations, 29 CFR Part 5. Since the types of benefits your program provides are among those enumerated in the Act, they are considered "bona fide."

NOTE: Change of Policy Position: Trusts and trustees may now be affiliated with the employer.
Accordingly, you may credit the costs incurred for providing such benefits towards meeting your Davis-Bacon Act prevailing wage obligations for those employees who are receiving these fringe

benefits. However, we have several comments we wish to make with regard to determining the hourly cash equivalents of such costs.

It is the Department's position that contributions made to a fringe benefit plan for Government work may not be used to fund the plan for periods of non government work. Therefore, it is imperative that the total hours worked by an employee be used as the divisor to determine the rate of contributions per hour, since an employee may work on both government and non government work in the same period. In addition, if you are contributing to the hospitalization plan at different rates for the employees, i.e. single versus family plan, the fringe benefit credit would be determined on the basis of the rate of contribution for the particular employee.

Your computation of the hourly cash equivalent with respect to "Worker's Compensation" raises questions, since the basis of such computations are not available to us. It appears that the fringe benefit may be furnished out of the general assets of the employer on an as needed basis. Under this circumstance credit for such payment can only be taken on the basis of the total cost of the Worker's Compensation actually paid to each employee. Thus, the per hour cost equivalent is computed on the actual cost incurred for the period. This principle would be applicable for all computations of the per hour cost of fringe benefit payments.

With respect to your questions regarding deductions from employee's wages to fund vacation and holiday pay we would point out that some plans or programs require such employee contributions. However, an employer is not permitted to take credit for any contributions made by an employee toward meeting the cost of the employer's fringe benefit obligations under the Act.

With regard to holiday pay, you may claim credit for all employees receiving such pay in the weeks that the payment is made. In other words, you are not allowed to credit the costs of this benefit in weeks other than the weeks in which the holiday payment is made.

We also wish to point out that the Davis-Bacon Act requires the payment of the prevailing wage rate (ie. basic rate and fringe benefits) for all hours worked, including overtime hours as well as straight time hours. However, the Act excludes amounts paid by an employer for fringe benefits in the computations of overtime that may be due. See section 5.32 of Regulations.

With regard to the future, we feel that it will be necessary for you to adopt certain changes in the administration of your fringe benefit plans in order for them to be creditable toward meeting the Davis-Bacon Act prevailing wage requirements. The Paid Absence (sick leave and vacation) and the Worker's Compensation plans described in your correspondence and employee's handbook appear to be unfunded plans within the meaning of section 5.28 of the Regulations. This Regulation requires "an enforceable commitment to carry out a financially responsible plan or program" and authorizes the Secretary of Labor to "direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial principles will be sufficient to meet the future obligations under the plan. Assuming the paid absence and worker's compensation plans are unfunded, in order to insure that they are financially responsible plans and to insure that you may receive credit for the paid absences and worker's compensation benefits for all participating employees it would be necessary for you to establish an escrow account to which you deposit

weekly, or no less often than quarterly, the appropriate paid absences and worker's compensation benefit contributions. At the time the employee takes his paid absence or draws worker's compensation the monies in such an account could be distributed and used as an offset against the paid absence and the worker's compensation plan obligations of the employer. However, since contributions made on Government work may not be used to fund the paid absences or worker's compensation plans for periods of non government work, the monies in escrow can be used to offset only that portion of the total hours worked by such employees during the year which is attributed to work covered by the Davis-Bacon and Related Acts. If an employee should terminate prior to becoming eligible under your paid absence and amounts have been paid into the escrow account on his behalf for which you have taken credit toward meeting your Davis-Bacon wage payment obligations, then the employee must be paid those amounts from the escrow account upon his termination. Since it would appear that worker's compensation is paid only on an as needed basis, the foregoing procedure need not be followed for worker's compensation. However, as mentioned earlier, you would only be able to credit worker's compensation payments actually made to the employees. In addition, an employee would be required to receive a cash payment for any unused sick leave.

It should be noted also that your unfunded plans appear to be employee welfare benefit plans within the meaning of section 3(1) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). ERISA imposes separate requirements in connection with the operation of such plans, which are applicable even with respect to activities which are undertaken in order to comply with the Davis-Bacon Act. For example, ERISA contains provisions relating to reporting and disclosure with respect to welfare benefit plans and requirements relating to eligibility to participate, and vesting rights. In addition, under ERISA all plan fiduciaries have a number of obligations. These include requirements that a fiduciary discharge his duties with respect to the plan solely in the interests of participants and beneficiaries and for their exclusive benefit, and that he act in accordance with the documents and instruments of the plan. Furthermore, unless an exemption is available under section 403(b) of ERISA, all plan assets are required to be held in trust, and persons who handle plan funds or another property are subject to the bonding requirements of section 412 of ERISA.

We hope the foregoing clarifies the Department's position in this matter.

Sincerely,

Dorothy P. Come, Director of
Government Contract Regulations