

## DBRA-23

October 23, 1981

We apologize for the delay in responding to your request for our opinion as to whether \*\*\* may take credit for certain fringe benefit payments made on behalf of its employees against the firm's prevailing wage obligations under the Davis-Bacon labor standards provisions.

Since the hospital and major medical insurance, the vacation and holiday pay, and the sick day pay are among those enumerated in section 1(b)(2)(B) of the Davis-Bacon Act and considered "bona fide" within the meaning of the Act, contributions thereto or costs incurred in providing the benefits are creditable towards meeting the contractor's fringe benefit obligations under the Act. The other items provided by the firm (use of truck and cash bonuses) are not bona fide fringe benefits within the meaning of the Act, and the costs incurred for such items are not creditable. (See section 5.29(f) of Regulations, 29 CFR Part 5). The omission in the Act of any express reference to such payments suggests that they should not normally be regarded as bona fide fringe benefits under the Act. However, we would like to make some comments regarding the contractor's method of determining the hourly cash equivalents of the costs incurred for the bona fide fringe benefits.

As noted above, the cost of the cash bonus and use of the truck are not considered fringe benefits and must be excluded from the cost of fringe benefits. In addition, the inclusion of the cost for five (5) sick days for all employees is not permissible where the unused sick days are forfeited at the end of each year. Accordingly, the contractor may only include in the computation the total cost of the sick days actually used by each employee. Finally, it is the Department's position that the total compensable hours worked (on both government and non-government projects) must be used as the divisor to determine the rate of contribution per hour. Therefore, the use of seven (7) hours as the basic workday in the contractor's computation is inconsistent with the information submitted with your memorandum, which indicates that the contractor's standard workday is eight (8) hours, which must be used.

For the future it will be necessary for the contractor to adopt certain changes in the administration of its fringe benefit plans in order for them to be creditable towards meeting the Davis-Bacon Act prevailing wage requirements. The vacation, holiday and sick day pay plans noted in your correspondence 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". Assuming such plans are unfunded, in order to insure that the contractor may receive credit for providing such benefits for all participating employees, it would be necessary for the contractor to establish a trust account to which the contractor deposits weekly, or no less often than quarterly, the appropriate vacation, holiday or sick day benefit contribution. At the time the employee takes his vacation, holiday or sick days, the monies in such an account could be distributed and used as an offset against the leave plan obligations of the contractor. However, contributions made on government work may not be used to fund the leave plans for periods of non-government work. Accordingly, the monies in trust can be used to

offset only that portion of the total hours worked by such employees during the year which is attributed to work subject to the Davis-Bacon labor standards provisions. Any excess monies remaining in the trust account at the end of the year would have to be proportionately divided among the participating employees according to the number of hours they worked on government projects during the year. Since the material submitted indicates unused sick days are not paid for at the end of the year, the foregoing procedure need not be followed for the sick days. However, as mentioned earlier, the contractor would only be able to credit sick day payments actually made to the employees.

The principles expressed above apply equally to the contractor's computation of the hourly cash equivalent with respect to the hospital and major medical benefits. Since the insurance premiums are paid monthly to an insurance carrier, a trust account is not required.

Finally, where the cash wages paid out and the per hour cost equivalents for fringe benefits together do not equal the prevailing wage rate and fringe benefits set forth in the applicable wage decision, the balance due must be paid in cash to the affected employees.

We trust that the foregoing will be helpful.

Sincerely,

Sylvester L. Green  
Director, Division of Government  
Contract Enforcement