

## **DBRA-87**

February 23, 1982

This is in reference to the Money Purchase Pension Plan and Trust \*\*\* adopting for purposes of meeting the fringe benefit requirements of the Davis-Bacon Act.

In order for contributions to a fringe benefit program to be creditable towards meeting a contractor's or subcontractor's fringe benefit obligations under a particular wage decision, 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. We have reviewed this prototype pension plan and trust, and it is our opinion that contributions to such a plan (as checked in the application and adoption agreement) would be creditable towards meeting the contractor's prevailing wage payment obligations with certain possible exceptions or conditions as noted below.

\*Initially, we would point out that the trustee(s) must be independent of and not affiliated with the company in order to meet the requirements of section 5.26 of Regulations, 29 CFR Part 5. Therefore, the person or persons named as the trustee(s), if affiliated with the company, must be removed.

Secondly, we note from the adoption agreement that there is an eligibility requirement that excludes employees from participating in the plan because of age. In addition, it appears from Article VIII that participation is voluntary.

Such provisions are permissible in an otherwise "bona fide" plan under the Davis-Bacon Act and need not be changed; however, the Act requires that an employer must make payments or incur costs in the applicable specified amount with respect to each individual laborer or mechanic performing covered work. Thus, contributions to the pension plan are not creditable as an offset against amounts due individual employees who are ineligible to participate, or elect not to participate in the pension plan.

Third, it appears that contributions to the plan are to be made at different rates (\$1.00 and \$1.50) per hour. Under the Davis-Bacon Act, a contractor is allowed credit based on the effective annual rate of contributions. Thus, if the contractor wishes to receive credit at the annual rate of \$1.50 per hour, then contributions must be made at that rate on all hours worked during the plan year on both government and non-government work. Employers are prohibited from using contributions made for work covered by the Davis-Bacon Act to fund the plan for periods of non-government work.

NOTE: By 1983 policy change, this no longer represents our enforcement position. Fourth, Article IV of the plan refers to forfeitures being used to reduce future employer contributions under the plan. Such forfeitures allocated to a participant's account do not

constitute a portion of the employer's contributions for purposes of the Davis-Bacon Act. Although the Act does not prohibit an employer from decreasing his future contributions as a result of forfeitures, such forfeitures may not be used as a credit towards meeting the requirements of an applicable wage decision under the Act. To do so would allow the employer to take double credit for the same contribution.

Fifth, any excess contributions which result from the limitation on the contractor's contributions to a participant's account as provided for under Article XI, and for which the contractor has taken credit towards meeting its Davis-Bacon prevailing wage obligations, must be paid to the participants in cash.

Finally, Article XII of the plan provides that employer contributions may be returned to the employer if disallowed under the Internal Revenue Code. However, any such contributions for which the contractor has taken credit for meeting Davis-Bacon requirements, if not allocated to the participants' account, must be paid to the employees in cash.

We trust that the foregoing responds to your inquiry regarding the acceptability of the plans.

Sincerely,

Dorothy P. Come  
Assistant Administrator