

DBRA-66

September 23, 1982

This is in further reference to your letter enclosing a copy of the *** Employee Stock Ownership Plan and requesting our review as to whether contributions thereto may be credited towards meeting your fringe benefit obligations under the Davis-Bacon Act.

We have reviewed the provisions of your Employee Stock Ownership Plan and it is our opinion that past and future contributions to such a plan would not be creditable towards meeting your firm's prevailing wage payment obligations unless the following conditions are met or changes noted herein are made.

*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.

Second, we note also that there are eligibility requirements that exclude certain employees from participating in the plan, i.e. union membership. 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 plan are not creditable as an offset against amounts due individual employees who are ineligible to participate in the plan.

Third, the plan is of a discretionary nature, in that pursuant to Section 5 the Board of Directors retains discretion as to whether they will make any contributions and the amount of such contributions. Also, contributions are to be made annually. Thus, the plan provides no guarantee that a specific amount will be contributed by the company to the plan on behalf of each participating employee. A company is not allowed for Davis-Bacon purposes to take credit for contributions which may in fact never be made. Section 5.5(a)(1)(i) of Regulations, 20 CFR Part 5, requires that contributions must be made on a regular basis. It is the Department's position that such contributions must be made not less often than quarterly. These aspects of the plan can be rectified if the company were to irrevocably contribute to an escrow account not less often than quarterly during the period of Davis-Bacon work an amount sufficient to meet the fringe benefit obligations on behalf of employees participating in the plan. Then at the end of the annual period (plan year), the monies placed in escrow could be used as an offset against the company's obligations

*NOTE: By 1983 policy change, this is no longer our enforcement position. to its employees under the plan for that portion of the total hours worked by these employees during the year which are attributable to work covered by the Davis-Bacon and Related Acts. We would point out further that a company is prohibited from using contributions made for work

covered by the Davis-Bacon Act to fund its plan for periods of non-government work. Accordingly, any excess monies remaining in the escrow account after discharging this proportionate obligation must be distributed to the employees in cash.

Fourth, the provisions of Sections 7(e) and 13(c) provide for the allocation of forfeitures. 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 such provisions, 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 company's allocation to a participants' account as provided for under Section 7(e) for which the company has taken credit towards meeting its Davis-Bacon prevailing wage obligations, must be paid to the participants in cash.

Finally, Section 19(c) and (d), provide for recovery of contributions for a variety of reasons, pursuant to the rules of the Internal Revenue Code or mistake. Such Provisions are not prohibited under the Davis-Bacon Act. However, any such contributions for which your company 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 plan.

Sincerely,

Sylvester L. Green
Director, Division of Government
Contract Enforcement