DBRA-124

January 14, 1983

This is in reply to your letter requesting our opinion as to whether amounts contributed to a draft pension plan which you submitted would qualify as wages for Davis-Bacon purposes, and also requesting answers to certain other questions concerning pension or profit-sharing plans.

With respect to the draft pension plan, it appears that contributions (section 4.2) are to be made on an annual basis. Section 5.5(a)(1)(i) of the Regulations, 29 CFR Part 5, requires contributions be made on a regular basis. It is the Department's position that in order to meet this requirement contributions must be made not less often than quarterly.

Secondly, sections 4.6 and 4.7 place certain limitations on the allocation of contributions to participants' accounts. If an employer is to take credit towards meeting his Davis-Bacon prevailing wage obligations for such excess contributions, the employees on whose behalf the contributions are to be made must be paid the excess amounts in cash.

Third, section 5.5 provides for the disposition of forfeitures and, although such as provision is not prohibited under the Davis-Bacon Act, such forfeitures may not be used as a credit towards meeting the requirements of an applicable wage decision issued under the Davis-Bacon Act. To do so would allow a contractor to take double credit for the same contribution.

Finally, any contributions returned to an employer, as provided under Article X, for which credit has been taken for meeting the Davis-Bacon requirements, if not allocated to a participant's account, must be paid to the employee in cash.

Given the preceding discussion of your draft pension plan, we will now address your specifically numbered questions. Your first question concerns who may serve as a trustee. Individuals who own stock in or who are employed by the adopting employer may not serve as a trustee. Owners, officers, and/or employees of the firm are considered affiliated with the employer.

Your second question asks if a pension or profit-sharing plan used to receive Davis-Bacon fringe benefit payments may contain a vesting schedule. The answer is yes. The answer is the same regardless of whether or not the plan receives only Davis-Bacon fringe benefit payments. Since the Davis-Bacon Act does not provide specific vesting requirements, we have taken the position that as long as a plan's provisions concerning vesting meet the requirements of the Employee Retirement Income and Security Act of 1974 (ERISA), as they appear to do in the instant case, we have no objection to them.

Your third question concerns the disposition of forfeitures, and has been discussed above.

With respect to your fourth question, as we stated above, contributions must be made at least quarterly. An escrow account may be used to hold contributions until the amount of forfeitures is determined. With regard to your question 4.(b)(2), the account must be a formal escrow

account established with a bank or similar institution. Finally, in answer to your question 4.(b)(3), the interest earnings on the escrow account must inure to the benefit of the employees and the employer may not treat such interest earnings as a Davis-Bacon fringe benefit payment since such contributions must be "irrevocably made" and may not be diverted in anyway for the benefit of the employer. (Section 5.26 of Regulations, 29 CFR Part 5.)

Your fifth question asks if a profit-sharing plan may be utilized as a recipient for Davis-Bacon fringe benefit payments and may an escrow arrangement take the form described in our answer to question 4. The answer to both questions is yes; however, the discretionary and indefinite aspects of profit-sharing plans present problems in crediting contributions against Davis-Bacon prevailing wage obligations. Accordingly, we offer the following general comments regarding the use of such a plan. Since, as you noted the contributions depend on "profit," the plan provides no guarantee that a specific amount will be contributed by an employer to the plan on behalf of each participating employee. An employer is not permitted, for Davis-Bacon purposes, to take credit for contributions which may never be made. Our objections to the discretionary aspects of the plan can be satisfied by an employer irrevocably contributing to a trust account weekly, or no less often than quarterly, during the period of Davis-Bacon work, an amount sufficient to meet the fringe benefit obligations for pensions on behalf of employees participating in the plan. Then, upon the annual determination of profits, the monies placed in trust, which are creditable for Davis-Bacon purposes, could be transferred to the profit-sharing plan and held in trust as an offset against an employer's obligation to employees under the plan for that portion of the total hours worked by these employees during the year which is attributable to work covered by the Davis-Bacon Act to fund the plan for periods of non-government work. Thus, any excess monies remaining in the trust account after discharging this proportionate obligation must be distributed to the employees in cash. Also, an employer is allowed credit at the annual rate of 15 percent of the total compensation paid, then contributions must be made at this rate on all earnings during the plan year on both government and non-government work.

Your sixth question concerns whether fringe benefits due employees under the Davis-Bacon Act may be contributed to a defined benefit pension plan, and if so, how is the amount of credit for such payments determined? The answer is yes and the per hour cost (credit) of providing the employee benefit may be computed by taking total actuarily determined contribution and dividing this by the total hours worked (both Government and non-government) by the participating employees during the period covered by the benefit payment. Since construction workers as a whole usually do not work a full year (2,080 hours), the total hours worked by the participating employees for the preceding calendar plan year are considered as representative of a normal work year for purposes of the above formula. The hourly cash equivalent thus obtained would be a contractor's permissible offset on the Government contract work.

We trust that the foregoing answers your questions.

Sincerely,

Sylvester L. Green
Director, Division of Government
Contract Enforcement