

DBRA-128

August 11, 1983

This is in reply to your letter, with attachments, requesting our approval of your pension and retirement programs for Davis-Bacon purposes.

We have reviewed the Profit Sharing Plan and Trust Agreement, and your Money Purchase Pension Trust Plan, and they would qualify as "bona fide" fringe benefit plans within the meaning of the Davis-Bacon Act and applicable Regulations (29 CFR Part 5, Subtitle B), if certain changes and conditions are met.

First, we note that, although the Money Purchase Plan provides for a defined contribution of seven percent, the Plan does not provide for regular contributions as required by section 5.5(a)(1)(i) of Regulations, Part 5. It is the Department's position that in order to meet this requirement, contributions must be made not less often than quarterly. In addition, no contributions are to be made until the wages exceed \$20,000. Your Profit Sharing Plan is also unacceptable for the following reasons. The plan does not provide for specific contributions as the amount actually contributed into the Plan at the end of the year is dependent upon the amount of the firm's profits, assuming, of course, that a profit exists. In short, the Plans provide no guarantee that a specific amount will be contributed by the contractor to the Plans on behalf of each participating employee. An employer cannot be allowed, for Davis-Bacon purposes, to take credit for contributions which may never in fact be made. Our objections to the discretionary aspects of the Money Purchase Plan and Profit Sharing Plan can be satisfied by your irrevocably contributing to an escrow 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 Plans. Then, upon the annual determination of wages and profits, the monies placed in escrow, which are creditable for Davis-Bacon purposes, could be transferred to the Money Purchase and Profit Sharing Plans' Trusts as an offset against your obligations to employees under the Plans for that portion of the total hours worked by these employees during the year which is attributable to work covered by the Davis-Bacon labor standards provisions. You are prohibited from using contributions made for work covered by the Davis-Bacon Act to fund the Plans for periods of nongovernment work. Thus, any excess monies remaining in the escrow account after discharging this proportionate obligation must be distributed to the employees in cash. Also, you are allowed credit based on the effective annual rate of contributions. Thus, if you wish to receive credit at the annual rate of 10 percent of the total compensation paid, the contributions must be made at this rate on all earnings during the plan year on both Government and nongovernment work.

Second, we note that participation in both Plans is voluntary. Accordingly, contributions to the Plans are not creditable as an offset against amounts due individual employees who are not participants in the Plans, since under the Plans, you make no contributions on their behalf.

Third, we also note that there are certain eligibility requirements applicable to the Plans which exclude employees from participating in the Plans, such as age, 1,000 hours of service, and union

membership. Such eligibility standards 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 amounts with respect to each individual laborer or mechanic performing covered work. Thus, contributions to the Plans' trust accounts are not creditable as an offset against amounts due individual employees who are ineligible to participate in the retirement plans.

Fourth, the Plans provide a limit on the amount of annual contributions to a participant's account. Any excess contributions for which you have taken credit towards meeting your Davis-Bacon prevailing wage obligations, must be paid to the participants in cash.

Fifth, the Plans also provide that your contributions may be returned to you for a variety of reasons such as, if made by mistake of fact or if disallowed under the Internal Revenue Code for tax purposes. However, any such contributions for which you have taken credit for meeting the Davis-Bacon requirements if not allocated to the participants' accounts must be paid to the employees in cash.

Sixth, the Plans speak of forfeitures. While they are not prohibited under the Davis-Bacon Act, you may not use such forfeitures as a credit towards meeting the requirements of an applicable wage decision issued under the Act. To do so would allow you to take double credit for the same contributions. This principle would also be true with regards to the use of dividends to reduce premiums under the Money Purchase Plan.

The Profit Sharing Plan provides that the administrative expenses of the Plan Administrator and the Trustees may be paid from the assets of the trust. If the Plan Administrator and/or Trustees are not independent of the firm (i.e., are officers or employees of your firm), payments from the trust for such administrative expenses are not permissible in accordance with the Davis-Bacon Act that contributions be "irrevocably made." In this regard, in the case of Collinson Construction Company, WAB No. 76-9, dated April 20, 1977, the Wage Appeals Board ruled that the contractor's own administrative expenses in providing bona fide fringe benefits were not creditable for Davis-Bacon purposes.

Seventh, the Money Purchase Plan provides that no allocation of contributions are made to the employees who are not in the firm's employ on the last day of the plan year. No credit may be allocated for contributions allegedly made on behalf of employees whose accounts received no allocation solely because they were not employed on the last day of the plan year.

Finally, we would point out that the plan must meet the requirements of the Employee Retirement Income Security Act of 1974 (ERISA) in order to be a bona fide plan for Davis-Bacon purposes.

We note from the attachment to your letter that your firm also provides health and welfare, vacation, and holiday benefits. Although you have not provided any information with regard to these programs we would note for your information the standards that apply to such fringe benefits under the Davis-Bacon Act.

With regard to your health and welfare plan, we are assuming, for the purposes of this reply, that it is of the conventional type and that it is funded under an insurance program. See section 5.29(d) of Regulations, 29 CFR Part 5. Thus, we would assume that you are paying the insurance premiums to an insurance carrier(s) in a weekly or monthly payment, rather than a certain amount per hour as you indicated. If the payment is made on a monthly basis, the total hours worked each month by the participating employees should be divided into the amount paid by you to determine the rate of contribution per hour. It is imperative that the total hours worked by the employees be used as the divisor to determine the rate of contribution per hour, since your employees may work on both government and non-government work in the same period. This principle would be applicable for all computations of the per hour costs of fringe benefit payments. As noted above, you are prohibited from using contributions made for government work to discharge your obligation on nongovernment work. In addition, if you are contributing to the health plan at different rates for employees, i.e., single versus family plan, the fringe benefit credit would be determined on the basis of the rate of contributions for the particular employee.

The paid vacation and holiday plans as noted in your correspondence appear to be unfunded plans within the meaning of section 5.28 of Regulations, 29 CFR Part 5. 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 obligation under the plan." Assuming such plans are unfunded, in order to insure that they are financially responsible plans and to insure that you may receive credit for providing such 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 vacation or holiday contribution. At the time an employee takes his vacation or holiday, the monies in such an account could be distributed and used as an offset against your leave plan obligations. However, contributions made on Government work may not be used to fund the leave plans for periods of nongovernment 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 covered by the Davis-Bacon labor standards provisions. As noted above, the per hour cost of providing the employee benefits may be computed by taking the total cost of the benefits provided and dividing this by the total hours worked (both government and nongovernment) by the participating employees during the period covered by the benefit payment.

We trust that the foregoing responds to your inquiry.

Sincerely,

Sylvester L. Green
Director, Division of
Government Contract Enforcement