DBRA-127

August 11, 1983

This is in reply to your letter requesting our review and approval of your firm's prototype money purchase pension plan and accompanying trust in order that individual contractors who make contributions into such a plan and trust may credit those contributions towards meeting their prevailing wage and fringe benefit obligations under the Davis-Bacon Act.

In order for contributions to a money purchase pension plan and trust to be creditable towards satisfying a contractor's wage and fringe benefit obligations under the Davis-Bacon Act, the plan and trust must meet the requirements of section 1(b)(2) of the Act and satisfy the standards set forth in Regulations, 29 CFR Part 5, Subpart B (copy enclosed). Although we cannot unequivocally state that every plan modeled after your prototype money purchase pension plan and trust would meet the Act's requirements, it appears from the information you submitted that such a plan would fulfill the Act's requirements, provided certain changes are made and/or conditions are met, as noted below.

Article 2 of the plan contains certain eligibility requirements that exclude employees who are union members from participation in the plan. Further, it appears from Article 2.2 that participation in the plan may be voluntary. Such eligibility standards are permissible in an otherwise "bona fide" plan under the Act and the employer is not required to change them. However, the Act requires contractors to make payments or incur costs in the amount specified by the applicable wage decision with respect to each laborer and mechanic performing covered contract work. Thus, a contractor may not take credit on behalf of any individual employee who either elects not to participate or who is excluded from the plan for any reason (other than a bona fide waiting period), and for whom no contributions are made.

As noted above, a contractor may only take credit for contributions made on behalf of individual employees. However, it appears from Article 4.6 of the plan that no contributions will be made for employees in an inactive status (with fewer than 1,000 hours of service in any plan year).

We note Article 4.2 provides that allocations under the plan only will be made on behalf of participants who are employed on the allocation date (i.e., the last day of the plan year). No credit is permitted for contributions made for employees whose accounts receive no allocation solely because they are not employed on the allocation date of the plan.

We note from your letter and Article 3 of the plan that contributions only will be made for hours worked on Davis-Bacon covered work but that all hours of service (both Government and non-Government) will be used in determining an employee's years of service for vesting purposes. This funding method is contrary to our position that employer contributions for Government work may not be used to fund a plan during periods of non-Government work. Thus, an employer adopting this plan would only receive credit under the Davis-Bacon Act for the effective annual rate of such contributions. For example, if the applicable Davis-Bacon wage determination lists a pension contribution rate of 11 percent and an employee works half of the

plan year on a Davis-Bacon project, the employer would contribute at a rate of 11 percent during the period of the Davis-Bacon project and then make no contribution on behalf of the employee for the remainder of the year when the employee worked on non-Government jobs. In this situation, the effective annual contribution rate would be 5.5 percent.

Accordingly, Davis-Bacon credit would be allowed at the effective annual rate of 5.5 percent and not at a rate of 11 percent. Any fringe benefits which may be required by the wage determination in excess of those contributed at a rate of 5.5 percent per year must be furnished to the employee either in cash, or in other bona fide fringe benefits, or a combination thereof.

Article 4.5 provides that forfeitures will be used to reduce future employer contributions. While this provision is not prohibited under the Davis-Bacon Act, an employer may not use forfeitures as a credit towards satisfying the requirements of an applicable wage determination. To allow an employer to do so would result in the employer taking credit for the same contribution twice.

Articles 14.3 of the plan and 1.4 of the trust provide that contributions may be returned to the employer for a variety of reasons, such as a mistake of fact or if the plan fails to qualify for tax exempt status. Further, Article 5 provides limitations on the annual additions which may be allocated to a participant's account under the plan and provides for the disposition of any excess amounts. However, any such excess or returned contributions for which the employer has taken credit for meeting the Davis-Bacon requirements may not revert to the employer. Rather, these contributions must either be retained in the Trust or paid to the employees for whom such credit was taken.

This plan provides throughout that the administrative expenses of the plan and trust may be paid for out of the trust. This would not be permissible if the plan administrator or the trustees are comprised of the owner and/or officers and employees of the contractor because a contractor's own administrative expenses in providing fringe benefits are not creditable towards discharging Davis-Bacon prevailing wage obligations. Our position on this issue has been upheld by the Department's Wage Appeals Board. (Collinson Construction Company, WAB Case No. 76-9, April 20, 1977.)

If the plan is contributory in nature for the employees, i.e., the employees make contributions to the plan through payroll deductions in addition to the contributions required of the employer by the wage determination, such payroll deductions for employee contributions must meet the requirements of section 3.5(d) of Regulations, 29 CFR Part 3. Among the requirements for such deductions are that they must be voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done or provided for in a bona fide collective bargaining agreement between the contractor and representatives of its employees. However, no credit can be taken by an employer towards fulfilling its fringe benefit obligations under the Act for any contributions into the plan made by an employee.

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 trust the foregoing will be helpful to you.

Sincerely,

Dorothy P. Come
Assistant Administrator