

DBRA-68

May 22, 1984

This is in reply to your letter, on behalf of ***, regarding the fringe benefit requirements of the Davis-Bacon Act.

You indicate in your letter that it is *** policy to pay nine percent of each employee's wages while working on a Davis-Bacon covered job into an escrow account from which the firm pays vacation, holiday and group insurance benefits. In the event there are funds remaining in the escrow account at the end of a quarter which have not been used for fringe benefit costs, such funds are refunded to the employee. However, if the employee so requests, the unused funds will be retained in the escrow account until the end of the year to pay vacation and/or holiday benefits. You state the firm shares fringe benefit costs with each employee for the portion of the fringe benefit costs allocated to private work, but that the firm pays the fringe benefit costs for that portion of the total fringe benefit costs allocated for Davis-Bacon covered work. You have requested our comments regarding the plan's acceptability under the Davis-Bacon Act.

In general, in order for contributions to a fringe benefit plan to be creditable towards a contractor's wage and fringe benefit obligations under the Davis-Bacon Act, the plan 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 (copies of the Act and regulations are enclosed). In this case, although the information you submitted is not sufficient for us to comment definitively as to whether the fringe benefits provided by *** meet these standards, we wish to offer the following general comments.

As you may be aware, section 5.28 of Regulations, Part 5, 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 obligations under the plan". *** policy to contribute into an escrow account for the vacation, holiday and group insurance benefits would be in accord with this Department's requirement that fringe benefit plans must be financially responsible plans.

Section 5.5(a)(1)(i) of Regulations, 29 CFR Part 5, requires that regular contributions must be made (no less often than quarterly). Thus, *** contributions into the escrow account must be made on a regular basis (and no less often than quarterly). In addition, any excess funds remaining in the escrow account at the end of the year for which the firm has taken credit towards meeting its Davis-Bacon prevailing wage obligations would have to be paid to the employees in cash.

It appears from your letter that the firm may be contributing into the plan at two different rates; nine percent of employee wages for Davis-Bacon covered work and some lesser percentage for non-government work. If this is the case, such a funding arrangement would result in the

employer contributions for government work being used to disproportionately fund the plan for periods of non-government work. In this regard, this Department has taken the position that, for Davis-Bacon purposes, a contractor is permitted credit based on the effective annual rate of employer contributions made for all hours worked during the year. Thus, if a contractor wishes to receive credit at a rate of nine percent of the total compensation paid, then contributions must be made at this rate on all earnings and for all hours worked during the plan year. If contributions were not made this way, then credit for Davis-Bacon purposes would have to be revised accordingly.

For example, assuming that a firm's contribution for health and welfare benefits was computed to be \$2,000.00 a year for a particular employee, if that employee worked 1,500 hours of the year on a Davis-Bacon covered project and 500 hours of the year on another job not covered by the Davis-Bacon provisions, then only \$1,500.00 or \$1.00 per hour would be creditable towards meeting the firm's obligation to pay the prevailing wage on the Davis-Bacon project. This method of determining fringe benefits credit is required because employers are prohibited from using contributions made for work covered by the Davis-Bacon Act to fund the plan for periods of non-Davis-Bacon work.

Finally, for your information, we are enclosing copies of some additional material regarding the general requirements for fringe benefit plans under the Davis-Bacon Act.

Sincerely,

Sylvester L. Green
Director, Division of
Contract Standards Operations