

DBRA-130

November 23, 1984

This is in reference to your request for our opinion as to whether the Davis-Bacon Act applies to the Bonneville Power Administration's program of purchasing electric energy savings from sponsors of commercial building retrofit projects in the Pacific Northwest.

As we understand the program, the Bonneville Power Administration (BPA) makes payments to a sponsor for energy savings which the sponsor produces in a commercial building. Sponsors, which can be energy service companies, architectural and engineering firms, equipment manufacturers, utilities, or building owners, are responsible for locating interested building owners, performing energy audits, negotiating an agreement with each building owner, and arranging the financing, installation, operation, and maintenance of energy conservation measures. BPA will then make payments to the sponsor for the amount of energy savings produced based upon an agreed incentive level (cents per kWh saved) over the term of a contract between BPA and the sponsor.

After our review of the information presented in your letter and at a meeting between representatives of our respective offices, we do not find that the contract for construction, alteration and/or repair of a public building or a public work within the meaning of the Davis-Bacon Act (40 U.S.C. 276a et seq.) and section 5.2(k) of our Regulations, 29CFR Part 5. Accordingly, we agree with your Agency's conclusion that the Davis-Bacon Act is not applicable to your program as currently envisaged.

On the other hand, if the program were to be extended to the retrofitting of government buildings (Federal, State, or local) or to projects in the nature of a "public work," a question as to prevailing wage coverage under the Davis-Bacon Act would arise.

We note, however, that the contracts in question are subject to the overtime payment provisions of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 et. seq.) by virtue of section 103(a) of the Act which provides such coverage for "any other contract which may require or involve the employment of laborers or mechanics if such contract is one ... (2) which is made for or on behalf of the United States, any agency or instrumentality thereof ..." In this regard, we concur with your Agency's inclusion of the overtime requirements in section 18 of the "General Conservation Contract Provisions." We draw your further attention to subpart (e) of that section ("Records") where the correct citation to payroll record requirements should read "29 CFR 5.5(a)(3)."

Sincerely,
William M. Otter
Administrator