U. S. DEPARTMENT OF LABOR
Workplace Standards Administration
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

WASHINGTON, D.C. 20210

DATE: October 30, 1970
REPLY TO ATTN OF: WHGC

SUBJECT: MEMORANDUM # 87

TO: AGENCIES ADMINISTERING STATUTES REFERRED TO IN 29 CFR, SUBTITLE A, PART 5

Re: Opinions on the application of the Davis-Bacon and Related Acts.

In keeping with our practice of transmitting copies of significant opinions and decisions, there are enclosed for your information copies of three recent opinions of the Department of Labor which we feel will be of assistance in carrying out your responsibilities in the administration of the Davis-Bacon and related acts.

Warren D. Landis
Assistant Administrator
Wage and Hour Division

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U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR

August 25, 1970

Mr. Arthur F. Hintze, Director
Government Relations Department
The Associate General Contractors
of America
1957 E. Street, N. W.
Washington, D. C. 20006

Re: California Laborers' Tunnel Agreement

Dear Mr. Hintze:

This is in reply to your letter of June 11, 1970, concerning the computation of overtime payments on the amount determined by this Department as the basic hourly rate under the Davis-Bacon and Related Acts.

You indicate that the subject labor agreement makes a deferred change by reducing the basic hourly rate and putting the reduced amount into a fringe benefit. In those cases the contractor may pay the reduced amount into the fringe benefit, but under our regulations he must continue to pay overtime on the basic hourly rate contained in the wage determination and the contract specifications. You contend that this is inconsistent with section 778.200(a)(4) of the regulations pertaining to overtime compensation under the Fair Labor Standards Act of 1938, as amended and request that the Department issue a variance to bring the regulations into conformity.

We do not agree that an inconsistency exists in the calculation of overtime payments under the various Federal laws. By its term the Davis-Bacon Act excludes amounts paid by a contractor or subcontractor for fringe benefits in the computation of overtime under the Fair Labor Standards Act, the Contract Work Hours and Safety Standards Act, and the Walsh-Healey Public Contracts Act whenever the overtime provisions of any of these statutes apply concurrently with the Davis-Bacon Act or its related prevailing wage statutes. However, it is clear from the legislative history that in no event can the regular or basic rate upon which premium pay for overtime is calculated under the aforementioned Federal statutes be less than the amount determined as the basic hourly rate under section 1(b)(1) of the Davis-Bacon Act. See Senate Report No. 963, page 7, Amendments to the Davis-Bacon Act, dated March 17, 1964. Therefore, the regular or basic rate for the calculation of overtime pay under the Federal statutes, including the Fair Labor Standards Act, would be no less than the basic hourly rate predetermined in the applicable wage determination and contained in the contract specifications. See 29 CFR 778.6.

We hope this explanation will be helpful in your apparent misconception that, for Fair Labor Standards Act purposes, 29 CFR 778.200(a)(4) permits the reduction of the basic hourly rate issued by this Department as the minimum payable under the Davis-Bacon and other related prevailing wage statutes.

Sincerely,

Harold C. Nystrom, Associate Solicitor
for General Legal Services

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR

October 16, 1970

Mr. Robert Nault, Project Manager
Nault Terrace, Inc.
P. O. Box 1086
Havre, Montana 59501

Dear Mr. Nault:

This is in reference to your letter of September 1, 1970 which has been referred to this office for reply. We note that you are concerned with the crediting of fringe benefits payments against minimum wage obligations under the Davis-Bacon Act and related statutes for non-union employees.

Section 5.31 of the Department's Regulations, 29 CFR Subtitle A, discusses the various methods under which a contractor or subcontractor performing work subject to a Davis-Bacon wage determination may discharge his minimum wage obligations for the payment of straight time wages and fringe benefits. We are enclosing a copy of these regulations for your convenience.

We have held that a contractor or subcontractor would be precluded from crediting payments paid into union trust funds against the benefits required by the wage determination except for those employees who are actively participating in the programs. From the facts presented, it is not clear whether the non-union employees may participate in the union programs. Therefore, this point must be clarified before we can draw any conclusions in this matter.

Sincerely,

Harold C. Nystrom, Associate Solicitor
Division of General Legal Services

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR

October 22, 1970

Mr. William R. Orlandi
Deputy General Counsel
Office of the Chief of Engineers
Department of the Army
Washington, D. C. 20315

Dear Mr. Orlandi

Re: J-M Company, Inc.
Contract No. DACW25-67-C-0070
Indian Grave Drainage District
Adams County, Illinois

This is in reply to your recent letter to Mr. Landis concerning an apparent conflict between our letter of September 15, 1961 to the Office of the Chief of Engineers and our recent memorandum in the subject case concerning methods of computing wage rates where an employer paid basic rates exceeding those required by the wage determination included in the contract.

The two items of correspondence to which you refer are not in conflict, since they involve different questions based on different factual situations. The 1961 letter dealt with the question of whether payments made by the contractor at a rate substantially higher than the Davis-Bacon rate could be offset against overtime compensation due. We advised your office that the basic rate of pay for the purpose of computing overtime compensation was to be arrived at by using the rate actually being paid (even though the rate of compensation was at a rate in excess of the Davis-Bacon minimum specified in the contract), and that the overtime premimum would be equal to 1/2 the straight time compensation paid.

In the March 26, 1970 memorandum we were rendering an opinion dealing only with fringe benefits. We agreed that it would be permissible for a contractor who paid in excess of the predetermined wage rate to offset the payments above the determined wage rate against fringe benefit obligations. This conclusion is in accord with the express language of the Davis-Bacon fringe benefits amendments to the Act enacted in 1964 and our regulations implementing those amendments. Your particular attention is directed to the proviso to section 2(b) of the amendments and Departmental Regulations published at 29 CFR 5.31(b)(2) dealing with the manner in which a contractor or sub-contractor may discharge his obligations under the amendments.

The facts on which the 1961 opinion was based indicate that the cash payments made to the contractor's employees were not in lieu of fringe benefits but a part of the contractor's straight time cash wage payment. In such a situation the cash payment is not excludable in computing overtime compensation.

I trust this will clarify the matter for you. If you have any further questions in this regard please let us know.

Sincerely,

Harold C. Nystrom, Associate Solicitor
Division of General Legal Services

U.S. DEPARTMENT OF LABOR
WORKPLACE STANDARDS ADMINISTRATION
WASHINGTON, D.C. 20210

OFFICE OF THE ADMINISTRATOR

November 6, 1970

MEMORANDUM #88

To: ALL GOVERNMENT CONTRACTING AGENCIES

As part of our policy of informing the contracting agencies of significant actions taken by the Department of Labor which affect our joint responsibilities in administering the various government contracts programs, we are calling to your attention a recent reorganization which consolidates into one Office of Government Contracts Wage Standards, all the Department's wage determination functions under the Davis-Bacon and Related Acts, Service Contract Act, and Public Contracts Act. This office will also handle matters regarding interpretations, regulations, and exemptions relating to the various laws which provide wage standards for government contracts. The office will be under the direction of Mr. E. Irving Manger, formerly head of the Division of Wage Determinations, who will have as his Deputy, Mr. Warren D. Landis, formerly Assistant Administrator, Wage and Hour Division.

Enforcement matters relating to the Davis-Bacon and Related Acts which in the past were addressed to Mr. Landis should now be addressed to Mr. Francis J. Costello, Assistant Administrator, Wage and Hour Division.

This reorganization, which becomes effective immediately, is part of the consistent effort by the Department to make improvements in the quality and efficiency of the services it has statutory responsibility to provide. We thank you for cooperation in the past and look forward to your continued cooperation in areas of mutual concern.

Robert D. Moran

Robert D. Moran
Administrator