D/L Memos

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

July 28, 1965

MEMORANDUM # 64

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

FROM : E. Irving Manger
Associate Administrator

SUBJECT: Opinions on application of the Davis-Bacon and related Acts.

Reference is made to previous covering memoranda, subject as above, enclosing copies of opinions for your information and guidance in carrying out your responsibilities for enforcement of the cited Acts.

Copies of recent opinions on the same general subject are enclosed which we hope will be of further interest and assistance.

Enclosures: DB-45
DB-46

cc: Divisions + Districts, CEBMCO, Saylor, Gregory, Cornet, Zimmerman
D-B Book

DB-45

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

June 1, 1965

Colonel R. E. Cathcart, USAF
Chief, Contract Management Division
Directorate, Procurement Policy
Department of the Air Force
Washington, D. C.

Dear Colonel Cathcart:

This is in reply to your recent letter requesting our opinion as to the applicability of the Davis-Bacon Act to the following specifications for painting work at Patrick Air Force Base, Florida: (1) PA 1-5R1 - Maintenance Painting of Capehart Housing; (2) PA 21-4 - Maintenance Painting of 43 Buildings; and (3) PA 103-5 - Maintenance by Painting and Minor Repair at 15 Base Buildings. Copies of these specifications were enclosed for our study.

It is our opinion that each of these specifications is subject to the Davis-Bacon Act for the reasons indicated below.

The Davis-Bacon Act applies to every contract exceeding $2,000 to which the United States is a party "for construction, alteration, and/or repair, including painting and decorating" of Federal public buildings or public works. The word "including" in this context would seem to express an enlargement of the coverage standard. Essentially, it would appear to have the meaning of "and" or "in addition to". See the cases cited in Black's Law Dictionary (4th ed.), p. 95. In this regard, it is similar to the use of the same word in section 103(a) of the Contract Work Hours Standards Act in the phrase "to all laborers and mechanics, including watchmen and guards".

The text does not appear to support an interpretation that only painting which complements "construction", "alteration", or "repair" is within the compass of the act.

Any doubt on this point would appear to be removed by an examination of the pertinent legislative history. The phrase in question was added to the act by the 1935 amendments thereto. Its essential purpose was to negate a ruling by the Comptroller General at 11 Comp. Gen. 57 that a Federal contract for painting per se was not covered by the Davis-Bacon Act.

The precise words of the relevant committee report are as follows:

> The definition of construction, alteration, and repair is amended so as to include contracts for painting and decorating. The purpose of this language was to fill a conspicuous gap in the present statute which has been construed as not applying to contracts for the painting of existing buildings (See 11 Comp. Gen. 57). S. Rep. No. 1155, 74th Cong., 1st Sess. 2 (1935).

Reference to the phrase in statements on the floor are fragmentary. But even these appear to support this interpretation. See Legislative History of the Davis-Bacon Act, House Committee on Education and Labor, 87th Cong., 2d Sess., 28-29 (1962)/Committee Print/

You have noted that the definition of the terms "building" and "work" contained in section 5.2(f) of our applicable rules (29 CFR Part 5) indicates that they "generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work." /Underscoring added./ However, the definition of "construction" and other terms contained in section 5.2(g) of the aforementioned rules expressly indicates the unqualified inclusion of "painting" and "decorating". We do not read into the rules any qualification which appears inconsistent with the express intent of the legislation involved.

Moreover, it seems to us that in any event it is extremely difficult to have a painting contract which does not involve some "alteration" or "repair". This is evident from our letters to your Office dated January 16, 1961, and September 11, 1964, to which you refer. Also, each of the specifications in question would seem to require some "alteration" or "repair" concerning surface preparation. For example, Specification PA 1-5R1, Maintenance Painting of Capehart Housing, requires the removal and replacement of certain accessories and fixtures "by workmen skilled in the trades involved"; nailing tightly loose boards and trim; and repair of cracks in exterior masonry, stucco, and concrete walls. As you have noted, Specification PA 103-5, Maintenance by Painting and Minor Repair at 15 Base Buildings, calls for certain minor repairs. Specification PA 21-4 calls for the removal and replacement of door jambs and hinges in one building and other minor alterations.

Yours sincerely,

/s/ Charles Donahue
Solicitor of Labor

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

JUNE 11, 1965

Mr. Allen Cywin
Assistant Commissioner
for Operations and Engineering
Community Facilities Administration
Housing and Home Finance Agency
1626 K Street, N. W.
Washington, D. C. 20410

Dear Mr. Cywin:

Re: Wage Determinations Containing Fringe Benefits

You have informally asked our assistance in replying to the questions raised regarding fringe benefits by your Region III, Atlanta, Georgia, in a memorandum with attachment, dated April 12, 1965. We have set forth below our suggested answers. For easy reading, the questions are repeated.

Question

(1) Please note on the enclosed wage rate determination that the wage specified for plumbers is $4.125 a/ - Basic wage plus fringe benefit payments of $0.25 to Health and Welfare, $0.10 to pensions and $0.035 to apprenticeship training. Footnote (a) states that the basic wage includes a $0.10 employee contribution to vacation fund.

The Applicant for a project using this wage rate has submitted a payroll showing that a plumber was paid a wage of $4.025 per hour. This brings up the following questions:

(a) Should the wage rate for overtime be computed at 1.5 of $4.125 or 1.5 of $4.025?

(b) Is Footnote (a) correct as specified, or should it state a $0.10 employer contribution to vacation fund?

(c) What type documentation, if any, should our Field Engineers require of the contractors concerning the funds to which fringe contributions were made?

(d) If no documentation or verification of funds is required, what procedure would you suggest that the Field Engineer use to satisfy himself that fringe benefit contributions are actually being paid to some type fund and are not being "pocketed" by the contractor.

Answer

(1) (a) The basic hourly wage rate for purposes of the Contract Work Hours Act is $4.125. The $4.125 rate should be shown as such on the payroll.

(b) Footnote (a) is correct. It was intended to indicate clearly that the employee contribution must be considered as part of the basic rate for overtime purposes.

(c) No documentation is required in addition to payroll information indicating the amounts of payments and to whom they are made.

(d) Section 5.5(a)(3) of our applicable Regulations requires the contractor to retain records showing that fringe benefit payments meet the required statutory and regulatory standards. Such records could, for instance, consist of a copy of a binding collective bargaining agreement showing a contractor's obligation to make the fringe benefit payments and receipts of payments thereunder. Also, insurance contracts, receipts for premium payments, and similar documents would establish that the payments meet the requirements of the Davis-Bacon Act, as amended.

Question

(2) Please note on the enclosed wage rate determination that footnote (b) is indicated in the pensions fringe benefit column for linemen. Footnote (b) is explained as follows:

"1% of gross monthly labor payroll"

Our questions concerning this footnote are as follows:

(a) Does gross monthly labor payroll mean the total labor payroll for all crafts or just this craft of linemen?

(b) If the term "Gross Monthly Payroll" refers to linemen only, would there be any objection to our taking 1% of the basic hourly wage of $4.55 and using this as the fringe benefit for pensions?

Answer

(2) (a) 1% of contractor's gross payroll for linemen.

(b) There would be no objection. Please see the enclosed copy of our letter to the Federal Aviation Agency, dated April 26, 1965, on this point.

Question

(3) Please note on the enclosed wage rate determination that footnote (f) is included in the vacation fringe benefit column for elevator constructors. Footnote (f) merely states "6 paid holidays:"

(a) How do you suggest that we convert this 6 paid holidays figure to a cash amount for the non-union worker?

(b) What time period does this "6 paid holidays" cover?

Answer

(3) (a) and (b) In a case such as you have cited, the worker would be entitled to 8 hours pay, at not less than the rate determined for the craft, for any of the "6 paid holidays" occurring during the period the worker is employed on the contract work. When the fringe benefit of "6 paid holidays" is included in a determination, it ordinarily reflects a provision in a collective bargaining agreement for the craft prevailing in the area. It

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Answer

(2) (a) 1% of contractor's gross payroll for linemen.

(b) There would be no objection. Please see the enclosed copy of our letter to the Federal Aviation Agency, dated April 26, 1965, on this point.

Question

(3) Please note on the enclosed wage rate determination that footnote (f) is included in the vacation fringe benefit column for elevator constructors. Footnote (f) merely states "6 paid holidays:"

(a) How do you suggest that we convert this 6 paid holidays figure to a cash amount for the non-union worker?

(b) What time period does this "6 paid holidays" cover?

Answer

(3) (a) and (b) In a case such as you have cited, the worker would be entitled to 8 hours pay, at not less than the rate determined for the craft, for any of the "6 paid holidays" occurring during the period the worker is employed on the contract work. When the fringe benefit of "6 paid holidays" is included in a determination, it ordinarily reflects a provision in a collective bargaining agreement for the craft prevailing in the area. It

should therefore be possible, in the ordinary case, to determine which holidays are paid for in the area and these would be the holidays for which the worker would be entitled to the extra compensation as described above.

In future determinations we are planning to list the specific holidays.

We trust that you will find the answers helpful. If I can be of further assistance, please let me know. The material you furnished is enclosed.

Yours sincerely,

Charles Donahue

Charles Donahue
Solicitor of Labor

Enclosures