DB-42 D/L Book

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25 20210

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MEMORANDUM #62

JAN 21 1965

TO : AGENCIES ADMINISTERING STATUTES REFERRED TO IN 29 CFR PART 5

FROM : Charles Donahue
Solicitor of Labor

SUBJECT : Interpretation of the proviso in section 1(b)(2) of the Davis-Bacon Act

The proviso to section 1(b)(2) of the Davis-Bacon Act is as follows:

> "Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as this Act and other Acts incorporating this Act by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2)."

The language of the proviso permits the contractor to combine cash wage payments with contributions or costs for fringe benefits in meeting "the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2)". The quoted language seems to assume that, in order for the proviso to be operative, there must exist some obligation to make payments or contributions

cc: Divisions, Districts, CEBMCO, Messrs. Saylor, Gregory, Conant, McGowen & Mrs. Zimmerman + Policy Book (D-13)

or incur costs for fringe benefits under section 1(b)(2) of the act. No obligation can arise for the making of contributions or incurring costs under section 1(b)(2), unless the Secretary of Labor has found contributions or costs for fringe benefits to be locally prevailing.

The term "prevailing wage determinations", as used in the proviso, refers only to situations where the Secretary of Labor has found contributions or costs for fringe benefits to be locally prevailing for particular classes of laborers or mechanics. The text of the act, the proviso itself, and the legislative history of the proviso support this interpretation.

The legislative history of the proviso seems to indicate that its only purpose is to achieve flexibility concerning the methods whereby contractors may meet contractual minimum wage obligations arising from prevailing wage determinations of the Secretary of Labor containing contributions or costs for fringe benefits. The pertinent House Report (H. Rept. 308, 88th Cong. 1st Sess., (1963)) states, on page 4, that the proviso was inserted "to recognize the situation where a contractor or subcontractor might be paying more or less in fringe benefits and/or cash wages than what is prevailing for each of these categories, yet by combining these payments his total obligation under the bill would have been satisfied." [Underscoring added.] The underscored language seems to assume that the proviso applies in those situations where some contribution or cost for fringe benefits have been found prevailing.

Accordingly, under the fringe benefits amendments of the Davis-Bacon Act, a contractor may not credit contributions or costs for fringe benefits against minimum wage obligations under the Davis-Bacon Act in any situation where the wage determination has found no contributions or costs for fringe benefits to be locally prevailing.