DB-50

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-107

UNITED STATES GOVERNMENT

Memorandum #68

TO : Agencies Administering Statutes Referred to in 29 CFR, Subtitle A, Part 5.

DATE: JUL 19 1966

FROM : Charles Donahue
Solicitor of Labor

SUBJECT: Guidelines for Application of Predetermined Rates

Some wage determinations issued by the Department of Labor contain more than one schedule of rates, i.e., rates for building construction, heavy construction, highway construction, etc. When these are incorporated in the construction contract there is introduced an element of doubt as to the proper schedule or schedules to be used on various phases of the work. It is desirable, of course, to eliminate any possible uncertainties with respect to the application of the wage rates prior to contract negotiations or opening of bids.

We hope the following guidelines will serve to eliminate some of the uncertainties:

1) Where only building construction is contemplated under a given contract include only the building schedule of rates in the advertised specifications.

2) Where only heavy or only highway construction is contemplated under a given contract include only the heavy or the highway schedule in the advertised specifications.

3) Where a proposed contract involves building, heavy, and highway work, and the applicable wage decision specifies separate schedules for these various types of construction work, the advertised specifications should identify, as specifically as possible, the schedules which will apply to the particular work items.

4) Where the proposed construction involves primarily building construction and, based on area practice, the Department of Labor in addition to the building schedule also issues a schedule of rates for related incidental paving and utility work, the work to which such schedules are applicable should be clearly indicated by the agency in its advertised specifications.

5) Local Contracting Officers should make every effort to keep informed as to area practices, not only to assure contract compliance, but also to assure fairness to all prospective bidders on contracts to be awarded.

Released by CofEngrs (ENGGC-L) to all Divisions (except M[illegible] Districts (except Gulf), Army Map Service, CEBMCO and Waterways Experiment Station for compliance (15 [illegible] 1966).

Signed on 8-15-66
J. RANKING SELTZER
General Counsel

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Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

When requests are prepared for wage determinations for a specific project (as distinguished from area determinations) the agency should furnish as detailed a description of the proposed contract work as possible, (including pertinent portions of the specifications if available).

In issuing these guidelines we are aware that the local Contracting Officer is in the best position to know what kind or kinds of construction activities are included in any specific contract to be awarded. Moreover, he is in the best position to determine from current practices in the area which schedules are applicable to which work.

The nature of the construction industry and the differing practices found in various sections of the country preclude the guidelines from being as specific as may be desired. However, as they are applied and experience is gained, further refinements will be made. In this connection, we welcome any suggestions your experience in this area may be able to provide.

Enclosure - GAO Decision B-157732
Dated 3/1/66

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-157732

March 1, 1966

Dear Mr. Secretary:

Reference is made to the letter dated October 28, 1965 (ENGGC-L), from the Acting General Counsel, Office of the Chief of Engineers, transmitting a report and file concerning the protest of the Southwest Engineering Company, Inc., against certain withholdings made by the Corps of Engineers, U. S. Army Engineer District, Kansas City, Missouri, under the Davis-Bacon Act, 40 U.S.C. 276a, from payments otherwise due under contract No. DA-23-028-CIVENG-65-659 on account of alleged underpayments of wages to a workman.

The contract was awarded on January 11, 1965, and called for the construction of a sewage treatment system which involved the excavation for and installation of approximately 475 feet of 6-inch sewer line and the installation of an aeration sewage plant at the Damsite Camping Area, Pomme de Terre Reservoir, Pomme de Terre River, Hickory County, Missouri. It appears that contemporaneously in the same area, the Corps also let contracts for the construction of approximately 4 miles of oiled surface access road, parking areas, comfort stations, and shelter houses.

In accordance with the Davis-Bacon Act, the advertised specifications of contract No. DA-23-028-CIVENG-65-659 contained the wage rates determined by the Secretary of Labor to be prevailing for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area in which the work is performed. This was designated as Decision No. AD 6,815, dated November 2, 1964, and apparently pursuant to the Corps' description of the work it described as such work as:

> "Contract for heavy and highway and building type construction-construction of approximately 4 miles oiled surface access road, parking areas, comfort stations, and shelter houses."

There was no mention in such description that the specific contract work in question was actually the construction of a sewage treatment system.

Decision No. AD 6,815 contained wage rates for two types of work. One schedule of wage rates was designated as applying to "Building

Construction"; the other schedule of wage rates was designated as applying to "Heavy and Highway Construction." Both schedules contained classifications which pertained to the jobs performed by the workman in question. The wage rates determined to be prevailing for the type of work designated as "Heavy and Highway Construction" were higher than those for the type of work designated as "Building Construction," as follows:

Building Construction

Laborers	$2.45 per hour
Air tool operators (jackhammer, vibrator)	2.525
Truckdrivers, flatbed, dump	2.80

Heavy and Highway Construction

Common-laborers, unskilled	$2.525 per hour
Jackhammer operators	2.775
Tamper operators	2.625
Dump truck (excavating) operators	2.90

It should be noted that neither the invitation for bids nor the contract as awarded contained any indication as to which schedule of wage rates was considered to be applicable to the contract work.

Construction operations started February 18, 1965. A review of the first weekly payroll the contractor submitted revealed that the common laborer performing work at the site had been paid at the "Building Construction" wage rate of $2.45 per hour. By letter dated March 12, 1965, the Contracting Officer's Representative advised the contractor that the proper rate for laborers performing work on the contract was $2.525 per hour as set forth in the "Heavy and Highway Construction" rates of Wage Decision AD 6,815, and requested that he make restitution of the difference to the laborer. Thereafter he raised the wages of the laborer from $2.45 ("Building Construction" rate) to $2.525 per hour ("Heavy and Highway Construction" rate) and made restitution for time previously worked. He continued to pay the $2.525 rate.

On March 19 and April 2, 1965, the contractor requested the opinion of the Regional Attorney, Department of Labor, on the matter. By letter dated April 6, 1965, the Regional Attorney replied in part as follows:

"Neither the Davis-Bacon Act nor any regulations issued thereunder set forth the difference in heavy highway construction and building construction. The manner by which a question of which type a particular piece of construction falls under is determined by the prevailing practice in the area. The initial decision on that point is made by the contracting agency. I am advised by the Corps of Engineers that this type of construction in the area in question has always been considered heavy highway type construction. * * *"

On April 28, 1965, the Labor Relations Officer visited the job-site and found that the laborer on the job performed duties other than those of unskilled labor, i.e., operated an air tamper, operated a jackhammer, and on several occasions had operated a dump truck, but had been classified and paid only at the hourly rate of $2.525 as unskilled labor for all work performed.

By letter dated May 4, 1965, the Contracting Officer's Representative advised the contractor of that job-site investigation and requested him to make restitution in the amount of $32.05 to cover the differential in pay between unskilled labor and tamper operator, dump truck driver, and jackhammer operator. By letter dated May 25, 1965, the Contracting Officer advised him that on prior work at the reservoir "Heavy and Highway Construction" rates of wages rather than "Building Construction" rates of wages have been used for similar construction operations and, since he had paid the laborer in question ten hours for truck driving at the rate of $2.80 per hour, reduced the amount of restitution from $32.05 to $29.30 as follows:

Jackhammer operator, 95 hours	@	$0.25	$23.75
Dump Truck Driver, 10 hours	@	0.10	1.00
Dump Truck Driver, 10 hours	@	0.375	3.75
Tamper Operator, 8 hours	@	0.10	.80
Total			$29.30

The contracting officer also informed him that the sum of $200 would be withheld until final disposition of the matter. This withholding was subsequently decreased to $100.

The file of this case contains a letter dated June 3, 1965, from Local Union No. 16-16B of the International Union of Operating Engineers, Springfield, Missouri, and a letter dated June 8, 1965, from

the Missouri Chapter of the Associated General Contractors of America, both of which state that the work in question is covered by the Statewide "Heavy and Highway Construction" collective bargaining agreements negotiated between the Associated General Contractors and the Common Laborers, Operating Engineers, Teamsters, and Carpenters unions. In this connection, we note that Article II, section 4, of such "Heavy and Highway Construction" agreements says the work covered thereby shall include all work performed in the construction of sewer lines and sewage disposal plants.

The contractor's position is that the administrative office acted improperly in applying the "Heavy and Highway Construction" wage rates rather than the "Building Construction" wage rates to the contract in question. He describes the work as involving the installation of a small sewage treatment tank and 6-inch drain tile laterals, 30 inches underground. He says that this installation was made at the site of a small, existing toilet and shower building in one of the public camping areas on the lake; that the tank he installed was metal and very similar to an ordinary septic tank; that the drain laterals were made of 6-inch clay tile with joints 4 feet long and were buried 30 inches under the ground from the tank, discharging into a lake some 400 feet distant; that it was necessary to install two manholes approximately 2 feet in diameter and 2 feet deep; and that these units were small enough to be prefabricated and hauled to the job in a pickup truck.

He calls our attention to the fact that during the same period he was installing the tank system there was in progress by another contractor in the same area a considerable amount of highway construction work on which the higher wage rates would apply, since it was specifically "Heavy and Highway Construction." He further says that in his opinion there is no conceivable way that the small, light work he did could be designated as "Heavy and Highway Construction" and that he has completed many similar projects for the Government over a period of many years and has never before been told that this type of work should be designated as "Heavy and Highway Construction." Additionally, he expresses an understanding that the decision to apply "Heavy and Highway Construction" rates to the work in question was based entirely upon a determination by the Associated General Contractors of Missouri that any work performed more than five feet beyond a building line should be paid such rates, and he questions the propriety of a determination on that basis. In support of his position he points out that at the same time he was installing this

unit for the Corps of Engineers, he was preparing a quotation for the U. S. Forest Service on two other projects "exactly of the type of the Pomme de Terre job" and that the labor rates furnished to him by the Forest Service did not include wage rates designated for "Heavy and Highway Construction." He transmitted for our consideration the applicable wage rate decisions and specifications for these two projects. In addition he has transmitted the specifications and wage rate decisions of two other Corps of Engineers projects in other areas, which were not segregated as to the type of construction.

The contractor, additionally, makes the following statement:

> "In preparing our quotation on this job we of course, used the building labor rates as we have done for many years on many similar projects for the Government and have never before in the many projects we have completed, been told that this type of work should be classed as 'heavy highway construction.'"

The Davis-Bacon Act provides that the advertised specifications for every construction contract in excess of $2,000 which requires the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based "upon the wages" that will be determined by the Secretary of Labor "to be prevailing" for the corresponding classes of laborers and mechanics employed on "projects of a character similar to the contract work" in the city, town, village, or other civil subdivision of the State in which the work is to be performed, and that every contract based upon such specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work the full amounts accrued at the time of payment computed at wage rates not less than those stated in the advertised specifications.

The legislative history of the Davis-Bacon Act discloses that its purpose is to prevent a Government construction contractor from importing outside laborers into an area at lower wages than those prevailing in the locality for similar work. To this end the act gives the Secretary of Labor final authority to determine the wage rates prevailing for the work contemplated. United States v. Binghamton Construction Co., 347 U.S. 171 (1954). Such determinations necessarily are based on the rates of wages found to be paid mechanics and laborers on projects of a character similar to the

contract work. In this regard, it appears from the aforementioned letter from the Local of the International Union of Operating Engineers, from the letter from the Missouri Chapter of the Associated General Contractors of America, and from the text of the Union agreements that the wage rates determined to be prevailing for "Heavy and Highway Construction" were properly applicable to the construction of the sewage treatment system in question. Further support therefor is provided by the fact that the wage scales in the Wage Decision No. AD 14,246 (furnished as evidence by the contractor), which was issued on March 3, 1965, in connection with similar work for the Forest Service in Madison County, Missouri, are the same as those in his contract at Pomme de Terre Reservoir listed under "Heavy and Highway Construction."

While we must therefore agree that the prevailing wage rates for the work in question were the rates set out under the heading "Heavy and Highway Construction," it seems reasonably clear from the record that the contractor based his bid price on the lower wage rates set out under the heading "Building Construction," and that his assumption such lower schedule of wage rates was applicable to the contract work was attributable to the fact that, while the nature of the contemplated work was such as to require that only one schedule of wage rates could be applicable thereto, the wage rate decision included in the IFB contained two schedules of wage rates, with no indication as to which was applicable.

Neither the Davis-Bacon Act nor any regulations issued thereunder set forth the difference between "Heavy and Highway Construction" and "Building Construction," and whether a particular piece of construction falls under one or the other is to be determined by the level of wages paid on similar projects in the area, with the initial decision on that point being made by the contracting agency. Under the circumstances, it is our view that where, as here, an IFB requests quotations on a project which calls for a wage schedule applicable to only one particular type of construction, it is incumbent upon the Contracting Officer to prepare his request to the Secretary of Labor for a determination of wage rates in such a manner that the wage rate determination as issued relates only to the construction in question, or where such a procedure is not practicable, as where a general wage determination is used which contains more than one schedule of wage rates, to unequivocably indicate in the IFB which particular wage schedule is considered applicable to the contract work.

B-157732

In view of the foregoing, and since Southwestern's interpretation of the wage rate determination cannot be said to have been entirely unjustified, the moneys withheld on account of alleged underpayments resulting from the contractor's following the "Building Construction" schedule of wage rates rather than the "Heavy and Highway Construction" schedule should be released to the contractor.

The file received with the report from the Acting General Counsel is returned.

Sincerely yours,

Frank H. Weitzel

Acting Comptroller General
of the United States

Enclosure

The Honorable
The Secretary of the Army

COPY

Jun 24 1966

Mr. R. N. Heath

P. O. Box
Pensacola, Florida

Dear Mr. Heath:

This is in reference to your letter of June 6, 1966, in which you request our opinion with respect to the application of fringe benefits predetermined by this Department as a part of the prevailing wage rate. The questions you pose and our answers are set forth below.

Question

Do fringe benefits have to be exactly the same type or can health and welfare fringes be substituted for pension fringes?

Answer

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. Therefore, where only pension payment is shown in the wage determination, the contractor cannot offer health and welfare payments against the pension plan or fund or the basic rate.

Question

If the prevailing wage was found to be $4.30 per hour and fringe benefits 20¢ per hour for total cost per employee would be $4.50 per hour. If the employer has H & W and pension fringes costing $.30 per hour, would he then pay in cash $4.20 per hour to his employes or would he still have to pay the $4.30 per hour rate?

Answer

The cash payment to the contractor's employees would depend upon the fringe benefits found to be locally prevailing in the wage determination. If the wage determination contains both H & W and pension fringes, only then may the contractor discharge his minimum wage obligations by paying $4.20 in cash and $.30 in fringe benefits. See section 5.31(b)(A) of our Regulations (29 CFR, Part 5), copy enclosed.

Question

Are fringe benefits, paid in cash, calculated on only straight time hours worked or do they apply to overtime hours also?

Answer

Fringe benefits apply to all hours worked which would include overtime hours as well as straight time hours. However, in the computation of the regular or basic rate under the Federal overtime Laws the fringe benefits payments or cash equivalent would be excluded. See section 5.32 of the aforementioned Regulations.

We trust that you will find the answers helpful. If we can be of further assistance, please let us know.

Yours sincerely,

Charles Donahue
Solicitor of Labor

Enclosure

by
E. Irving Manger
Associate Administrator

JUN 24 1966

Mr. E. W. Heath
Brown Electric Construction
Company
P. O. Box 12037
Pensacola, Florida 32582

Dear Mr. Heath:

This is in reference to your letter of June 6, 1966, in which you request our opinion with respect to the application of fringe benefits predetermined by this Department as a part of the prevailing wage rate. The questions you pose and our answers are set forth below.

Question

Do fringe benefits have to be exactly the same type or can health and welfare fringes be substituted for pension fringes?

Answer

Under the fringe benefits amendments of the Davis-Bacon Act, a contractor may use credit contributions or costs for fringe benefits against minimum wage obligations under the Davis-Bacon Act in any situation where the wage determination has listed no contributions or costs for fringe benefits to be locally prevailing. Therefore, where only pension payment is shown in the wage determination, the contractor cannot offset health and welfare payments against the pension plan or fund or the basic rate.

Question

If the prevailing wage was found to be $4.20 per hour and fringe benefits 20¢ per hour the total cost per employee would be $4.50 per hour. If the employee had a B & W cost pension fringe costing $.30 per hour, would he then pay in cash $4.20 per hour to his employee or would he still have to pay the $4.50 per hour rate?

Answer

The cash payment to the contractor's employees would depend upon the fringe benefits found to be locally prevailing in the wage determinations. If the wage determination contains both H & W and pension fringes, only then may the contractor discharge his minimum wage obligations by paying $4.20 in cash and $.30 in fringe benefits. See section 5.31(b)(4) of our Regulations (29 CFR, Part 5), copy enclosed.

Question

Are fringe benefits, paid in cash, calculated on only straight time hours worked or do they apply to overtime hours also?

Answer

Fringe benefits apply to all hours worked which would include overtime hours as well as straight time hours. However, in the computation of the regular or basic rate under the Federal overtime law the fringe benefits payments or cash equivalent would be excluded. See section 5.32 of the aforementioned Regulations.

We trust that you will find the answers helpful. If we can be of further assistance, please let us know.

Yours sincerely,

Charles Donahue
Solicitor of Labor

By
E. Irving Hanger
Associate Administrator

Enclosure