

Memorandum



U.S. Department
of Transportation
**Federal Highway
Administration**

Washington, D.C. 20590

Subject: Bid Rigging Restitution

Date MAY 6 1987

From: Associate Administrator for
Engineering and Program Development

Reply to
Attn of: HHO-32

To: Regional Federal Highway Administrators

By memorandum of September 22, 1986, you were advised of the resolution of a bid rigging restitution case (State of Tennessee v. Dole, et al., Civil No. 3-83-0046, M.D., Tennessee). This decision was of significance in that it affirmed FHWA's position on bid rigging restitution as set forth in Mr. L. Lamm's policy memorandum of September 3, 1982. Copies of both of these memorandums are attached for your ready reference.

More recently, a pending settlement of a civil antitrust claim has caused a State and FHWA to reach agreement, in principle, on restitution of the settlement amount. As a result, several issues in the restitution process were addressed and clarified. These are discussed below for your guidance.

- ° State Recovery Costs--a State is entitled to retain reasonable recovery costs. Such costs should be deducted from the total settlement amount and not computed in the determination of the Federal share. When the settlement amount includes both compensatory and punitive portions, the recovery costs will be deducted proportionally from each amount. All auditable costs are allowable. In the absence of a detailed record of identifiable costs, a negotiated settlement not to exceed 20 percent of the recovered funds is permissible.
- ° Reimbursement of Federal Funds--to be determined in accordance with Mr. Lamm's September 3, 1982, memorandum.
- ° Compensatory Damages--when sums are characterized as compensatory damages or restitution in any settlement agreement, FHWA is entitled to be reimbursed for the Federal share of compensation related to Federal-aid projects.
- ° Punitive Damages--when the settlement is based on claims for both compensatory and punitive damages, FHWA will not share in the punitive portion. However, the rationale in allocating the recovered sums between compensatory and punitive must be reviewed to assure that the Federal interest was not compromised.
- ° Excess Recovery--if a State settles for a sum in excess of all identified losses, the excess will be handled similar to a settlement for punitive damages.

An illustration of how some of the above issues would be handled in a settlement is shown in the attached example.

On a related matter, the Office of Inspector General (OIG) is finalizing an audit evaluating FHWA's procedures and internal controls for assuring receipt of an equitable share of restitutions collected by States from contractors convicted of bid rigging. The OIG's initial findings are that FHWA needs to establish more explicit procedures to: (1) use OIG supplied information on indicted and convicted contractors as a basis for obtaining bid rigging settlement information on specific contractors from the States and (2) review final settlement agreements to verify States' assurances concerning punitive damages awards in settlement agreements.

Since 1983, the OIG has been providing FHWA Headquarters individual reports on contractors who have been indicted or convicted of bid rigging under the Sherman Antitrust Act for consideration of possible suspension/debarment action. Beginning in September 1985, these reports have been provided by the OIG directly to FHWA regional offices. The OIG audit discovered that a significant number of these convicted contractors had been compelled to negotiate settlements of civil antitrust claims with the audited State. Some settlements, however, were not subsequently identified to FHWA for proper crediting. The OIG also found several instances where a State had identified the settlements reached with convicted contractors as involving punitive damages, which would not require crediting to FHWA. Upon review of the actual agreements, it was discovered that the settlements were based on compensatory damages only and specifically excluded punitive damages.

To prevent a continuation of such problems, please take steps necessary to assure that information supplied by the OIG relative to indicted and convicted contractors is properly utilized by division offices to assure that FHWA receives appropriate restitution from bid rigging settlements the State may subsequently reach with such identified contractors. To further assist in this matter, arrangements have been made with the OIG for the Office of Chief Counsel (HCC-50) to receive a composite listing of all contractors indicted for antitrust violations as of June 30 and December 31 of each year. These lists will be distributed to regional offices upon receipt. Relative to the problem of misidentification of settlement basis, division offices should undertake to independently review final settlement agreements to verify State assurances concerning punitive damages.

In addition, the OIG has asked FHWA for updated information on the amount of settlements credited to Federal projects. The Office of Fiscal Services will contact you regarding that request.

Original Prepared By
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3 Attachments

HCC-50
HNG-12

R.R. Anders
J.A. Carney

HED-1

Reader File
Chron File
C.E. Fosliden
R.C. Leathers

FEDERAL HIGHWAY ADMINISTRATION
HHO-32:AKK:Rockne:jev:61562:03/20/87
7461.2
HHO-30
HHO-32
HHO-1
cc: Rockne
Rockne
D.S. Gende