

6839
DECISION



R. Pearson, C.G.P.
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-189272

DATE: June 27, 1978

MATTER OF: Federal-Aid Highway Program--Federal Reimbursement from State Antitrust Settlement Proceeds

- DIGEST: 1. State brought antitrust treble damages action against suppliers of asphalt used in highway construction under Federal-aid Highway Program. Although United States had declined to share costs of litigation, Federal Government is entitled to share in resultant settlement attributable to actual damages. 15 U. S. C. § 15a does not allow the Federal Government to claim share of treble damages.
2. Amount of Federal share in antitrust settlement may be applied to other allowable costs from the periods covered by settlement if the full percentage of Federal share was not used during these periods.

The Director of Transportation, State of California, requests us to rule on the validity of a demand by the Federal Highway Administration (FHWA), United States Department of Transportation, for a share in a \$5,732,433.24 antitrust action settlement received by the California Department of Transportation (Caltrans) from suppliers of asphalt used in highway construction under a Federal-aid Highway Program. (See Western Liquid Asphalt Cases, 309 F. Supp. 157 (N. D. Cal. 1970) and 303 F. Supp. 1053 (N. D. Cal. 1969)).

According to the California Director of Transportation:

"FHWA has indicated that it will demand to participate in the settlement proceeds by reason of prior opinions of your office, particularly Comptroller General decisions B-162539, dated October 11, 1967, and B-162652, dated November 27, 1967 [47 Comp. Gen. 309], which the State

of California contends are not applicable and should be reanalyzed in view of the particular facts involved. A review of the scope of those earlier decisions may assist in arriving at a mutually acceptable resolution of this matter.

"Basically, the position of the State of California is that the Federal Government, when requested by the State, refused to assist in prosecuting the action, or to share in the costs or risks involved in the prosecution of the case by the State. Under such circumstances, any claim the Federal Government may have had in any recovery has been waived. This and other matters not considered in the two earlier decisions indicate that no reimbursement is owing to the Federal Highway Administration."

According to a legal memorandum accompanying the Director's request, there are four reasons for concluding that the FHWA is not entitled to a share in the Western Liquid Asphalt antitrust settlement, despite our cited decisions. These reasons are:

"First, any 'partnership arrangement' between the Federal Government and the State insofar as the recovery of damages for violations of the antitrust laws was breached by the Federal Government in refusing to assist in the prosecution of the action or to share in the risk involved in the prosecution in the action by the State.

"Second, the overpayments recovered by the State consisted entirely of State funds, since the Federal Government retained no interest in the grants to the State following receipt by the State of such funds.

"Third, the Federal Government is not entitled to recover treble damages.

"Fourth, the State was the party which suffered the real injury from the violation of the antitrust laws and the overpayments, not the Federal Government."

We will discuss each of these arguments in succession:

1. FHWA Has Breached Its "Partnership" Arrangement with the State

In our cited decisions concerning the recovery of a Federal share in antitrust damages in connection with State highway construction programs, we have referred to the Federal-State relationship stemming from the Federal-aid Highway Program as authorized by 23 U.S.C. § 101 et seq. (1970 and Supp. V, 1975), as a "partnership arrangement." For example, in our decision, 47 Comp. Gen. 309, we said in part (at page 31):

"We do not believe that the partnership arrangement under which the Federal-aid highway program is prosecuted may properly be said, in the absence of specific governing provisions, to reach beyond the project costs shared by the Federal and State Governments."

Previously, in decision B-162539, October 11, 1967, we said:

"Full recognition of the partnership arrangement between the State and the Federal Government with respect to the recovery effected dictates that the out-of-pocket expenses incurred also be shared proportionally."

The argument of the State assumes that the "partnership arrangement" spoken of in our two decisions is in the nature of a partnership agreement in law, subject to dissolution because of failure of the partners to agree to contribute to costs of litigating partnership rights. Whether or not this is sound partnership law, the term "partnership arrangement" in our decisions was used in a metaphorical sense, as the context indicates, rather than in the sense of a specific legal relationship.

Used in this sense, the phrase "partnership arrangement" merely describes general rights, stemming from the relationship between Federal and State governments in the Federal-aid Highway Program whereby, pursuant to chapter 1 of title 23, United States Code, the United States and the respective States enter into agreements to share the cost of construction of highways on the Federal-aid highway system. Accordingly, the extent to which FHWA is entitled to share in the settlement depends upon the authority under which it awarded funds to the State and any conditions, express or implied, that attached to the award when the State accepted it.

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In our view, nothing in the relationship between the State and Federal Governments under the Federal-aid Highway Program compels the conclusion that refusal of the Federal Government to participate in the cost of an antitrust action deprives it of the right to receive a share of the settlement to which it is otherwise entitled. As was said in B-162539, supra, to hold otherwise would be to allow the State to profit to the extent of the Federal interest. It would be recovering twice for the overcharge--once by way of reimbursement from the Federal Government and again from the defendants in the settlement.

2. Overpayments Recovered by State are State Funds

The State submission cites decisions to the effect that, when funds are provided to a State under a Federal grant-in-aid program, they lose their Federal character and become State funds. The State argues that:

"If Federal funds become State funds when receipted for by the State, it would be anomalous to suggest that the Federal Government retains an interest in such funds sufficient to demand repayment in the event the project costs for which the funds were used have been indirectly affected after completion of the project."

Contrary to the State's argument, we do not find our decisions inconsistent with the proposition that the funds apportioned under the Federal-aid Highway Program become State funds when received by the State. The amount of money given the State in this case for highway construction is conditional upon payment of a non-Federal or State share. 23 U.S.C. § 120 (1970). The ratio of costs established by statute (id.) places a maximum on Federal participation in the program. (There is no limit on the proportion of State participation, as the cases cited by the State note.) The money given to the State under a grant must be spent only for approved grant purposes.

What our earlier decision (47 Comp. Gen. 310) described is basically a problem of adjusting grant costs because of a correction in the amount properly chargeable to the grant. We are unable to distinguish the process at work here from any routine adjustment in grant costs that would take place as a result of a recovery of an overcharge.

What this adjustment attempts to achieve is the identification of the actual costs to the State for highway construction under the grant, once the settlement is obtained. Where an adjustment

results in the Federal share exceeding the allowable percentage of Federal participation, the excess must be returned to the Federal Government.

The cases holding that Federal grants are gifts or gratuities, and our decisions that grant funds in the hands of a grantee lose their character as Federal funds, do not support the proposition for which they are cited by the State, that the Federal Government may not receive reimbursement in the circumstances here present. We have never considered that the United States could not recover grant funds not properly chargeable to the grant, nor do any cases of which we are aware so hold.

3. The Fact that the Federal Government Is Not Entitled to Treble Damages Should Be Taken into Account in Determining Federal Share of Settlement

The Federal Government is not entitled to treble damages awarded in an antitrust action under 15 U.S.C. § 15a (1970).

In 47 Comp. Gen. 309, we held that the Federal reimbursement from an antitrust judgment should be based on actual, not treble damages. We did not reach the issue here presented, which is how the Federal Government should participate in an antitrust settlement where, although no judgment has been rendered, the potential for treble damages allegedly has a bearing on the amount of settlement.

As the question of antitrust damages and their measurement is not often subject to precise determination (see Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)), we recognize the difficulty in allocating the amount of actual and punitive damages within a settlement resulting from a claim for treble damages. Since actual damages remain speculative to some extent until reduced to a final judgment and any settlement probably reflects the potential for litigative success by either side, we believe the ratio of real to treble damages can be considered to remain constant. Accordingly, we believe that the Federal share in an antitrust settlement should remain proportionate to what its share would have been had the court awarded damages. For example, if the Federal share in a project is 90 percent, its share of the amount of settlement subject to Federal recovery will be 30 percent. This is achieved by dividing 90 (90 percent of real damages) by 300 (treble real damages).

Under this formula, the United States would in no event receive more than its actual contribution to the program. When

settlement is for less than the full amount of damages, trebled, the United States would receive proportionately less than its full contribution to the program. With this method of computing the Federal share of similar settlements, we can see no inherent advantage for the State either in seeking settlement prematurely or in going to trial solely on the basis of the requirement that the Federal Government share in antitrust damages.

For purposes of clarifying our earlier decisions, the language which states that "out-of-pocket expenses incurred also be shared proportionately" means that where the State has incurred all such expenses, it is entitled to recover them from any settlement before the formula for computing the amount of Federal recovery is applied.

We believe that when both of these factors--the method for computing the Federal share in a recovery and the out-of-pocket expenses--are taken into account, Caltrans' concern over bearing the total risk of litigation is significantly lessened. We also believe that such a relationship should provide adequate incentive to the States to pursue similar actions. Since the Federal Government only participates to the extent of actual damages at most, the States will have the potential of treble damages, in terms of their contributions to the program, to encourage them to bring similar actions in the future.

With regard to the legislative history of the Antitrust Parrens Patriae amendments to the Clayton Act, on which the State relies to contend that requiring reimbursement of the Federal Government would weaken the State's bargaining power in future litigation, the provisions under discussion were not enacted. See Pub. L. No. 94-435, 90 Stat. 1383. More significantly, it was intended by the legislative proposal in question that the United States should be able to recover the portion of the monetary damages which it sustained or funded (S. 1284, 94th Cong.; S. Rep. No. 94-803, 55-56 (1976)), which is essentially the view we take herein.

We recognize that there may be a problem in this case in determining the amount of the settlement assigned to the various cost sharing ratios provided in 23 U. S. C. § 120 (1970); however, we do not have sufficient information before us to reach any conclusions in this regard. We believe that, because of the problems previously mentioned in arriving at the precise make-up of an antitrust settlement, FHWA and the State must first make an effort to reach a reasonable allocation. Accordingly, we believe that it would be premature for us to consider this and other specific accounting questions suggested by the State before FHWA and the State have attempted to reach an agreement.

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4. The State Was the Only Party Injured by the Violations of the Antitrust Laws

The State argues that it, not the Federal Government, has been injured by the antitrust violation. With regard to Federal-aid Primary, Secondary, and Urban projects, the State in its submission says:

"For each year as to which there was a claim in the lawsuit for an asphalt overcharge, there were more projects undertaken in California which were eligible for participation under these programs, and more money expended than was necessary to qualify for the full amount of the Federal apportionment to California. Obviously, the costs of such projects which were undertaken without assistance from the apportionment for California was borne entirely by the State of California. In addition, it was the practice of California at that time to seek participation only for construction costs on those programs, but not for certain other eligible project costs, such as right of way acquisition and preliminary engineering. The point is that there was a specific number of dollars made available by the Federal Government to California and all those dollars were expended on various projects, with the State providing more than required to qualify for the Federal participation. To refund to the Federal Government any portion of the amount recovered in the Asphalt Antitrust cases would ignore the additional costs the State incurred in constructing those projects, costs which were eligible for Federal participation but for which no Federal funds were available.

"Theoretically, any recovery related to claims on projects under these programs would have been available for matching otherwise eligible project costs for the years in question for which participation had not been sought (such as right of way acquisition and engineering), or for participating in the construction costs on other projects in those same Federal-Aid programs for which there were insufficient funds in California's apportionment to enable participation at that time. Therefore, refunding any part of the settlement to the Federal Government would have the effect of reducing the sums made available to California by the various Federal-Aid Highway Acts for the years in question.

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"Thus, it has been the State, not FHWA, which has been injured; the overcharge for asphalt on those projects in no way affected the amount of the apportionment to California, or the amount of Federal money participating in California projects. However, the effect to California was to expend more of its own money on projects on those programs. To require that the State return any of the recovery would amount to taking it out of the State's pocket."

With regard to Federal-aid projects on the Interstate system, the State says that:

"The real injured party has also been the State, because the result of the overcharge has been a reduction in the amount of highways constructed in this State with the amount of funds made available, which highways belong to the State. The program is a Federally assisted State program, not a Federal program (23 U.S.C. § 145). Therefore, the loss has been suffered by the State, which will continue to suffer the loss as long as the Interstate system is not completed."

We have no objection to the FHWA reviewing the State's approved programs under 23 U.S.C. § 105 (1970 & Supp. V 1975) and plans, specifications and estimates under 23 U.S.C. § 106 (1970 & Supp. V 1975) from the years in question to see if, as the State represents, it did not apply Federal funds against all eligible costs in approved projects. If, upon review, proper allowable costs can be found that were not claimed as Federal share, we would have no objection to the Department of Transportation applying the Federal share of the settlement in the antitrust cases to such costs as a further adjustment between the Federal and State governments. However, we are not sanctioning either the retroactive approval of projects and plans that were not approved in a timely manner for the years (fiscal year 1969 and prior years) to which the damage settlement applies or projects where, although approved, costs were not actually incurred.


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