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B-162539, Oct. 11, 1967

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HIGHWAYS - FEDERAL AID - RECOVERY OF OVERPAYMENTS, ETC. BY STATE DECISION TO THE ADMINISTRATOR OF THE FEDERAL HIGHWAY ADMINISTRATION, DEPT. OF TRANSPORTATION, CONCERNING PROPRIETY OF BUREAU OF PUBLIC ROADS SHARING IN SETTLEMENT RECEIVED BY MISSOURI STATE HIGHWAY COMMISSION IN ANTITRUST PROCEEDINGS AGAINST CONTRACTORS CHARGING EXCESSIVE PRICES. AN AMOUNT RECOVERED BY A STATE HIGHWAY COMMISSION AS RESULT OF ANTITRUST PROCEEDINGS AGAINST CONTRACTORS FOR EXCESSIVE PRICES CHARGED ON HIGHWAY CONSTRUCTION PROJECTS FINANCED IN WHOLE OR IN PART WITH FEDERAL-AID FUNDS SHOULD BE PRO RATED BETWEEN STATE AND FEDERAL GOVT. BASED UPON A DETERMINATION OF THE PROPORTION OF FEDERAL AND STATE FUNDS USED TO FINANCE THE HIGHWAY PROJECTS SINCE TO ALLOW THE STATE TO RETAIN THE FULL AMOUNT RECOVERED WOULD BE TANTAMOUNT TO DENIAL OF FEDERAL INTEREST IN FUNDS AND WOULD PERMIT STATE TO PROFIT TO EXTENT OF FEDERAL INTEREST. THE OUT-OF-POCKET EXPENSES INCURRED BY STATE IN EFFECTING SETTLEMENT SHOULD ALSO BE SHARED PROPORTIONALLY.

TO MR. BRIDWELL:

BY LETTER OF SEPTEMBER 20, 1967, MR. LAWRENCE S. CASAZZA, INTERIM DIRECTOR OF ADMINISTRATION, REQUESTED AN OPINION FROM THIS OFFICE AS TO WHETHER THE BUREAU OF PUBLIC ROADS SHOULD SHARE IN A $335,000 SETTLEMENT RECEIVED BY THE MISSOURI STATE HIGHWAY COMMISSION IN ANTITRUST PROCEEDINGS AGAINST CERTAIN FIRMS ENGAGED ON FEDERAL-AID HIGHWAY PROGRAM PROJECTS.

FROM INFORMATION FURNISHED BY MR. CASAZZA, IT APPEARS THAT THE SETTLEMENT FIGURE OF $335,000 IS BASED UPON THE EXTENT OF DAMAGES SUFFERED BY THE STATE HIGHWAY COMMISSION AS A RESULT OF EXCESSIVE HIGHWAY CONTRACT PRICES AND THAT THE STATE INCURRED OUT-OF-POCKET EXPENSES OF SOME $131,000 IN EFFECTING THE SETTLEMENT, LEAVING A NET RETURN OF APPROXIMATELY $204,000. THE MAJORITY OF THE HIGHWAY PROJECTS INVOLVED WERE FINANCED IN WHOLE OR IN PART WITH FEDERAL-AID FUNDS MADE AVAILABLE TO THE STATE UNDER THE PROVISIONS OF TITLE 23, UNITED STATES CODE.

THERE WOULD NOT APPEAR TO BE ANY REASON FOR CONSIDERING THE RECOVERY MADE BY THE STATE AS OTHER THAN A REDUCTION IN THE COST OF THE VARIOUS HIGHWAY PROJECTS TO WHICH IT APPLIES. IN REALITY, ONLY A PORTION OF THE FUNDS RECOVERED CONSTITUTES RECOVERY OF OVERPAYMENTS BY THE STATE OF STATE FUNDS, SINCE THE REMAINING PORTION HAD BEEN PREVIOUSLY REIMBURSED THE STATE BY THE FEDERAL GOVERNMENT PURSUANT TO THE FEDERAL AID HIGHWAY PROGRAM. TO ALLOW THE STATE TO RETAIN THE FULL AMOUNT RECOVERED WOULD BE TO DENY THE FEDERAL INTEREST THEREIN AND WOULD PERMIT THE STATE A PROFIT TO THE EXTENT OF THAT FEDERAL INTEREST.

ON THE OTHER HAND, IT MUST BE RECOGNIZED, EQUITABLY, THAT THE STATE INCURRED CERTAIN OUT-OF-POCKET EXPENSES IN EFFECTING THE SETTLEMENT REACHED. 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.

ACCORDINGLY, IN THE ABSENCE OF ANY COMPELLING REASON TO THE CONTRARY, IT IS OUR VIEW THAT THE FEDERAL HIGHWAY ADMINISTRATION SHOULD RECOVER FROM THE STATE OF MISSOURI A PRO-RATA SHARE OF THE NET AMOUNT REALIZED BY THE STATE; I.E., $335,000 LESS THE OUT-OF-POCKET EXPENSES RELATIVE THERETO WHICH THE STATE INCURRED. SUCH PRO-RATA SHARE WOULD, OF COURSE, BE BASED UPON A DETERMINATION OF THE PROPORTION OF FEDERAL AND STATE FUNDS UTILIZED TO FINANCE THE HIGHWAY PROJECTS TO WHICH THE SETTLEMENT APPLIES.