Federal-Aid Policy Guide

July 6, 2005, Transmittal 34

NS 23 CFR 646B

Attachment 3

Non-Regulatory Supplement
Attachment

OPI: HSA-10

USE OF FIXED AMOUNT (LUMP SUM) PAYMENTS TO RAILROADS (PARAGRAPH 6, NS 23 CFR 646B)

Occasionally on Federal-aid highway projects the States consider proposals that involve the use of fixed amount (lump sum) payments to railroads either as reimbursement for needed adjustments to accommodate construction of the highway project or as compensation for facilities taken.

The FHWA regulations have long treated railroad facilities impacted by highway construction as essential public services that must be maintained if the need for the services continues to exist. Where services must be maintained, the FHWA may reimburse the State based upon necessary costs to restore the essential services in the most economical method. This is usually done by paying for construction of a replacement facility. Where the railroad and the highway agencies agree that existing facilities do not need to be replaced, the FHWA should pay for the railroad facilities as a right-of-way acquisition matter. The FHWA policy and use of fixed amount (lump sum) payments are discussed below.

Case I - Operational Capabilities are to be Functionally Restored

The FHWA's regulations covering reimbursement for railroad work on Federal-aid highway projects are contained in 23 CFR 140, Subpart I. The basic concept incorporated into these regulations is that FHWA is willing to reimburse actual costs incurred to functionally restore a railroad’s existing operating facilities which existed prior to undertaking a highway project. It is intended that a railroad's financial and productive situation be maintained as if the adjustment needed for the highway project had not occurred. This does not mean that a replica facility is required, rather that the railroad is to be made whole by restoring the existing functions of the impacted facilities.

Typically, a railroad uses its own forces or lets a contract to accomplish the needed adjustments to its facilities. Records of actual costs incurred then form the basis for FHWA reimbursement to the State. For work performed by a railroad with its own forces, FHWA regulations allow a fixed amount final payment based on an estimate of costs prior to construction. This is commonly known as the lump sum payment method. For railroad work, FHWA's lump sum payment regulation is 23 CFR 646.216(d)(3).

The lump sum payment method should only be used where the end product, in this case the railroad adjustment, can be clearly and concisely defined. The cost estimate in support of the lump sum agreement should be accurate, comprehensive, verifiable, and in sufficient detail to give a clear picture of work involved and the cost of the individual items. A principal benefit of using the lump sum payment method is that it should reduce administrative and record keeping costs associated with documenting payment for completed work. However, these savings may be offset by inaccuracies in the cost estimating process. In recognition of this, the regulation establishes a $100,000 ceiling for use of the lump sum payment method, although for routine railroad crossing safety improvements (i.e., active warning devices, crossing surface, etc.) there is no ceiling.

The railroad regulation contains a mechanism for approving lump sum amounts where this is found to be in the public interest. Approval of proposals to exceed the $100,000 ceiling should be a relatively rare occurrence. Two situations where this may be justified are as follows:

- Where the estimated cost of the eligible adjustment work slightly exceeds, for example, by no more than a few thousand dollars, the $100,000 ceiling. In this case the ceiling is not being treated as an inviolable barrier and some flexibility is allowed.

- Where the cost of the railroad work eligible for Federal-aid participation represents only a small portion of the overall cost for all the railroad work that is being performed in conjunction with the construction of the highway project. For example, a railroad may be undertaking a major upgrading of its facilities in an area where a highway project occurs, and the portion of the work eligible for Federal-aid participation may be relatively small in comparison, for example $75,000 out of an $800,000 effort. In this case, it may make sense for the highway agency to agree to a fixed payment to represent its share of the overall work being accomplished, thus simplifying administration of the project.

In either of the above situations, the lump sum payment method should only be used where the work can be clearly defined and the costs accurately estimated. Also, whenever a lump sum payment is used, the highway agency should still verify that the eligible work has been satisfactorily completed in accordance with the approved agreement, plans, and specifications before reimbursement can be approved.

Processing of a State's proposal for a lump sum payment for railroad work in excess of $100,000 other than for crossing safety projects requires approval by the Division Administrator.

Case II - Operational Capabilities Need not be Functionally Restored

Where the railroad determines that its existing facilities do not need to be replaced to maintain its operational capabilities, then payment for the railroad facilities needed to accommodate construction of the highway project should be handled as a right-of-way acquisition matter. The fixed amount (lump sum) payment for the real property interest of the railroad to be acquired would be based on the fair market value of its existing facilities developed in accordance with approved State right-of-way appraisal and acquisition procedures.

Any administrative settlement over and above the fair market value should be supported in accordance with 49 CFR 24.102(i). Various means, such as appraisals, recent court awards, estimated trial costs, or valuation problems are recognized as providing support for a settlement value.

Case III - Payment for Nonoperational Facilities

Instances can arise where a highway project may require the acquisition of a portion of a railroad’s property or facilities that are not directly a part of the company's physical plant providing the service (e.g., an office that houses the company's marketing and billing operations). In these cases, the fixed payment to the railroad should always be based on applicable right-of-way procedures.
