

OHIO TURNPIKE COMMISSION

Resolution Pertaining To Waiver In Part of
§G-9.06 and §G-9.07 of Contract C-22

WHEREAS the Lombardo Bros. Construction Company, contractor under Contract C-22, has completed the work required of it under said contract and has refused to accept payment deemed final by the Commission thereunder except upon condition that the acceptance thereof shall not prejudice its right to seek further payment with respect to a matter in controversy with the Commission, i. e., the number of additional cubic yards of borrow for which the contractor may be entitled to receive payment at the rate of 53¢ per cubic yard based on methods of measurement, and amounts which the Commission, in view of its own measurement, has refused to recognize, the maximum additional amount of said borrow asserted by the Lombardo Bros. Construction Company being 167,774 cu. yds. and a monetary claim of \$88,920.22;

WHEREAS the contract entered into by and between the Commission with the Lombardo Bros. Construction Company provides under §G-9.06, as amended by Supplemental Specification A-5 of August 7, 1953, for payment to the contractor of 95% of the contract price as the work proceeds, with 5% to be withheld until final payment, and the said 95% having been heretofore paid by the Commission, the Commission deems it desirable and in its interest and in that of the contractor to waive the provisions of §G-9.06, as amended, and §G-9.07, with respect to the final payment operating as a release, to the extent that the retained percentage withheld as aforesaid, less an amount equal to the maximum amount of the contractor's monetary claim predicated upon the dispute concerning borrow quantity mentioned in the preceding paragraph hereof, may be released and paid to the contractor upon compliance with all pertinent procedures otherwise governing the release of retained percentages, and to permit the contractor to receive payment of said retained percentage (less said \$88,920.22) and to continue to submit evidence in support of its contention that it is entitled to payment under its contract for borrow allegedly furnished in an amount of \$88,920.22 in addition to the amounts determined by the Commission's computations of borrow quantities; and

WHEREAS the Commission has been advised by its general counsel that it may lawfully make such waiver, and the Commission's executive director, chief engineer, and consulting engineer have recommended that it do so;

NOW, THEREFORE, BE IT

RESOLVED that the proper officers of the Commission be, and each is hereby, authorized to pay to the Lombardo Bros. Construction Company the amounts heretofore withheld by the Commission as the retained percentage pursuant to Contract C-22 less the sum of \$88,920.22;

FURTHER RESOLVED that such payment, or payments, may be made notwithstanding the provisions of §§G-9.06 and 9.07 of the General Specifications of said contract, which provisions are, to that extent, waived;

FURTHER RESOLVED that nothing herein contained shall be construed so as to prevent the Commission's officers and employees concerned therewith from taking into account the rights and claims of third parties having claims, attested accounts, or assignments which affect, or may be claimed to affect, the Commission's right to make the payment aforesaid to the Lombardo Bros. Construction Company, and in making such determinations with respect to such claims asserted by such third parties, the Commission's officers and employees shall not consider the aforesaid sum of \$88,920.22, which is to be further withheld pursuant to said Contract C-22, as being available for the satisfaction of such claims, attested accounts, and assignments;

FURTHER RESOLVED that such payment, or payments, shall be made only upon agreement by the contractor to waive all disputed claims and any claim to interest, except that the contractor may nevertheless assert and seek to maintain for a period not to exceed six months (and, of course, by legal action continued beyond said six month period if commenced within the same) its contention that it has furnished borrow under said contract in an amount of 167,774 cu. yds. greater than the amount heretofore determined by cross sections, at a price of 53¢ per cubic yard; and that the contractor shall accept and agree, in writing, to the terms and conditions hereof; and

FURTHER RESOLVED that nothing herein shall constitute an admission by the Commission of any allegation of the contractor concerning said dispute over borrow quantities.

(Resolution No. **6** -1960 adopted June 21, 1960)

MEMORANDUM FROM
FRANCIS K. COLE
ASSISTANT GENERAL COUNSEL

6/24/60

TO: General Counsel

Attached is a copy of Resolution No. 6-1960 pertaining to Lombardo's retainage, as I revised it after returning to Berea. The revisions were made primarily because of the number and amount of attested accounts and the assignment. I was fearful that the specific authorization to pay a definite amount, as contained in the form presented in Columbus, would afford the contractor too much opportunity to claim that attested accounts were covered by the amount still retained and should not be considered for that reason.

✓ J. K. Cole

MEMORANDUM FROM
FRANCIS K. COLE
ASSISTANT GENERAL COUNSEL

6/24/60

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The revision was cleared with
Messrs. Soller and Hartford.

Attached also are the work papers
used in Columbus and also a summary
of attested accounts prepared by Jim.


FKC