IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

OHIO CONCRETE CONSTRUCTION ASSOCIATION, et al.,) Case No. 08 CVH 09-13867
)) JUDGE SCHNEIDER
Plaintiff	E.S. WAGNER'S POST-HEARING MEMORANDUM
-vs- OHIO DEPARTMENT OF TRANSPORTATION, et al., Defendant) John Czarnecki (0013058)) COOPER & WALINSKI, LPA) 900 Adams Street) Toledo, Ohio 43604) (419) 241-1200) Fax (419) 242-9606) e-mail: czarnecki@cooperwalinski.com) Coupeal for Defendent F.S. Wagner, Inc.
) Counsel for Defendant E.S. Wagner, Inc.

Now comes the defendant, E.S. Wagner, Inc. and files this Post-Hearing Memorandum relating specifically to the impact of this litigation and potential harm to the general contractor in the event work on the subject project is enjoined.

This brief was motivated, in principal part, by argument offered by the defendant Ohio Department of Transportation ("ODOT"), in rebuttal, suggesting that the Court could not "carve out" the pavement portion of the contract as suggested by plaintiffs.

While Defendant Wagner does not concede the legitimacy of the State's argument, its effect on the general contractor's interest cannot be ignored. Obviously, a re-bid of this project would not only impact the timing of the construction of this needed project, but would seriously prejudice the winning bidder whose entire bid has now been spread on the public record for competitors to review and analyze.

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Secondly, as was pointed out in closing argument by the undersigned, the general contractor, relying upon the fact that it was awarded the contract on this project, executed numerous sub-contracts with, among others, certain Disadvantaged Business Enterprises. It should be noted that ODOT specifically requires that such contracts be completed, executed and submitted with the executed copy of the contract. If this project is delayed or re-bid, the general contractor would be exposed to claims in damages for breach of those contracts.

Finally, the specific issue which undersigned counsel mentioned in the scheduling meeting held on Tuesday, September 30, 2008, involves an option for purchase of land by the general contractor which is projected to provide a source for approximately 600,000 cubic yards of fill dirt necessary for completion of this contract.

The option expires on Friday, October 10, 2008. If, because this project is delayed and particularly, given the State's position that it would then potentially be re-bid, the Defendant Wagner will not be able to exercise its option. Various alternatives were examined during the bidding process and the nearest viable alternative would add \$1,054,000 to its cost of the project.

While the plaintiffs seek to minimize the impact of their claim upon the general contractor, it is respectfully submitted that the issuance of injunctive relief could well have a devastating effect on the party in this case against whom no substantive claims have been made.

Respectfully submitted,

John Czamecki

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CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of October, 2008, a copy of the foregoing E.S.

Wagner's Post-Hearing Memorandum has been served by facsimile and by ordinary United

States mail upon the following:

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