

FALL 2015

CROSSSECTION

GOING THE DISTANCE

1000 YEARS

IN BUSINESS

Bacco Construction

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Rieth-Riley Construction

Page 10



Michigan Infrastructure & Transportation Association



MITA, Michigan Infrastructure & Transportation Association
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Governor Snyder Signs Historic Road Funding Package at MITA



On November 10, Governor Snyder signed into law the package of road funding bills that passed the House and the Senate on November 3. The official bill signing ceremony took place at MITA, with many MITA members in attendance.

The bill signing legally secures \$1.2 billion annually in much needed investment in Michigan's roads and bridges. It has been a long and difficult battle, but the industry and MITA never gave up.

"The November 10 bill signing was a culmination of nearly a decade of hard



Governor Rick Snyder officially signed the road funding package into law at the MITA headquarters in Okemos on November 10. MITA members (bottom photo) posed with the governor after the bill signing. See page 46 for more photos and letters from MITA members regarding the bill signing.

work and dedication," said Mike Nystrom, MITA's executive vice president. "When MITA was established in 2005 through a merger of Associated Underground Contractors and the Michigan Road Builders Association, the num-

ber one goal was to find a permanent, long-term solution to the road funding problem. We are extremely grateful to the Legislature, the governor, and all the MITA members who helped us reach our goal."

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Mike Nystrom

EXECUTIVE VICE PRESIDENT

We got it done! What an amazing feat. It is still hard to believe that after so many years of effort by MITA members and staff we now have long-term, comprehensive funding for Michigan's roads and bridges. But it is true! A \$1.2 billion funding package was signed into law by Governor Snyder right here at the MITA headquarters on November 10. You can see more information and photos about this historic event on pages 3, 46 and 47.

An equally amazing feat is the fact that two MITA members are among the chosen few who have gone the distance and remained in business for 100 years. Our hats are off to Bacco Construction Company and Rieth-Riley Construction Co., Inc. You can read their success stories and see photos on pages 8-11.

You might now be wondering: what is next for MITA? The answer in one word: *underground*. Our underground infrastructure across the state has faced decades of neglect and the future does not look bright. As part of MITA's ongoing attention to underground issues, we have asked Public Sector Consultants, an economic think tank located in Lansing, to develop a white paper that summarizes the current state of drinking water, wastewater and stormwater infrastructure in Michigan, as well as the current funding available and the investment needed to properly fund these systems. See page 20 for details, and also pages 22 and 23 for other underground news.

In the safety area, MITA's Director of Safety and Workforce Development, Matt McClintick, discusses new MIOSHA injury reporting requirements on page 26. For details about pay-if-paid clauses, read the legal article on page 42, penned by MITA member Ryan W. Jezdimir, of Blevins Sandborn Jezdimir Zack PLC.

As 2015 year winds down, don't forget to mark your calendars for the MITA Annual Conference at Soaring Eagle Casino January 20-22, 2016. Rob Copper-smith, MITA's vice president of membership services, provides all the details on page 15 in an article titled, "Big Names for the Big Show!" Check it out, and we will see you there.

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GOING THE DISTANCE

In this day and age, it is amazing for any company to reach the age of 100. On the following pages we are highlighting two companies, one that turned 100 this year, and another that turns 100 in 2016. We realize other members of MITA have celebrated this milestone, such as A. Lindberg and Sons, who we featured in our last magazine. Be sure to let us know when you have endured success to this wonderful age, as we would like to also honor you with coverage in the magazine.

100
YEARS
IN BUSINESS

Turning 100: Bacco Construction Company

John Fortier, president; and Douglas Rigoni, vice president; answered the following questions regarding the 100th anniversary of their company, which they celebrated in 2015.

1. What was your most memorable job in 100 years?

There have been many. A couple that come to mind are the Victoria Dam Construction and the Mackinac Island Airport reconstruction. Victoria Dam was a replacement of a 110' high by 200' wide dam done in one U.P. construction season. 70,000 cyds of concrete were placed in a seven week period working 24/7. Mackinac Island

reconstruction was a total rebuild of the airport in just seven weeks. Work began after Labor Day and was completed by November 1. The project involved mass earthwork along with aggregate production on the Island. A portable asphalt plant was also mobilized to the island for paving.

2. What are the four "secrets" to your success (ranked)?

- A. Quality People
- B. Quality Work
- C. Hard Work
- D. Cooperation with owners of projects

3. What is the one piece of advice from a "100-year-old" that you want to share with other companies that want to stay "healthy" enough to reach the 100 year mark?"

Enjoy what you do!

4. Is there anything else you want to add?

Current owners John Fortier and Doug Rigoni are now looking to the next generation to begin another successful 100 years.

*Background Photo:
Dumping a batch on U.S. 2, Watersmeet, 1928.*



Bacco was presented with a legislative resolution during their 100-Year Anniversary Open House in 2015. Pictured from left to right: John Fortier, president; Rep. Ed McBroom; Douglas Rigoni, vice president; and Sen. Tom Casperson.



Plowing and wheeling from cut at M-35 in 1926.



Road pouring at Alder Creek Bridge, Big Bay Road, 1927.

Bacco Construction Company History 1915-2015

When you consider the history of modern road construction in Michigan's Upper Peninsula, among the first contracts that comes to mind is Bacco Construction Company of Iron Mountain. It's no wonder – its roots stretch back to before the dawn of the first century.

By 1908, Medio J. Bacco, who founded the company, was working for the Dickinson County Road Commission. Those were the days of horse drawn scrapers, wagons and slushers, backed by plenty of manual labor. Through a combination of intelligence, responsibility and raw muscle power, Medio quickly gained a reputation as a hard worker who stepped up to just about any heavy construction challenge.

By 1915, Medio had established the M.J. Bacco Construction Co., and was awarded his first highway construction contract. The firm handled grading and built concrete roads throughout the Upper Peninsula and in the Wisconsin counties

that border the U.P.

Horse drawn equipment slowly gave way to Model T trucks, gasoline powered tractors and primitive single drum concrete pavement. In 1930 Medio incorporated his company to create Bacco Construction Company.

By the time the depression had ended, the company's operations included a fleet of over 20 trucks, six Northwest power shovels and draglines, assisted by a number of tractors. The company also had a dozen rock trucks and a number of drill rigs to enhance its blasting and rock moving capabilities. This was the mainstay of the company until it bought its first fleet of motor scrapers in 1960.

At one time, Bacco held the Michigan record for the most footage of concrete paving done in one day. The company holds several awards for its concrete pavement projects. As concrete gave way to asphalt pavement, the firm launched

its bituminous paving unit. Today it owns two portable asphalt plants and all of the associated paving equipment required for quality work, including asphalt milling and recycling equipment. Its asphalt work has been frequently praised and honored for its quality.

Over the years, Bacco Construction's philosophy has been to give the project owner a good job at a competitive price. Crucial to this approach has been the efforts of an excellent and experienced workforce.

It has been a successful 20th century for Bacco Construction because the firm has combined traditional core values with a spirit of adventure. Bacco has worked hard to stay at the peak of the industry by playing an active role within it. If there's any secret for success in the next century's highway industry, no doubt you'll find it in Iron Mountain, Mich.

Present day Bacco: 24' Box Culvert Replacement on U.S. 45 over the Baltimore River in Ontonagon County.

Turning 100: Rieth Riley Construction Co., Inc.

Keith Rose, chief executive officer of Rieth-Riley Construction Co., Inc., answered a few questions regarding the 100th anniversary of the company, which they will celebrate in 2016.

1. What was your most memorable job in 100 years?

The high speed parabolic test track for Ford at the Romeo Michigan Proving Grounds in 1972. It led to gaining the experience and expertise to be recognized as one of the highest quality pavers in the market today.

2. What are the four “secrets” to your success (ranked)?

- A. Employee-owners. As employee-owners, our people are truly our greatest asset. Much investment is put into training, as well as continued emphasis in high quality and integrity. We seek to be professional and fair in all business dealings.
- B. Customers. We pride ourselves in taking care of our customers and being

professionals in our industry. We want our customers to look good by the product we provide.

- C. Quality. Our customers drive on our product every day. We don’t want flashy – we want quality that will stand the test of time. We have an extensive quality control staff who have the authority to stop production if quality is not acceptable. Often, our internal specification requirements are even greater than those the customer requests.
 - D. Community. Our employee-owners live in the communities in which the company operates. We support the activities of our employee-owners and the community throughout the organization.
- ### 3. What is the one piece of advice from a “100-year-old” that you want to share with other companies that want to stay “healthy” enough to reach the 100 year mark?”

Don’t compromise your values and standards. Like most industries, construction is very cyclical and when times get lean many companies start to compromise and we have seen them disappear. These standards start at the top of the organization and are reinforced at every level.

4. Is there anything else you want to add?

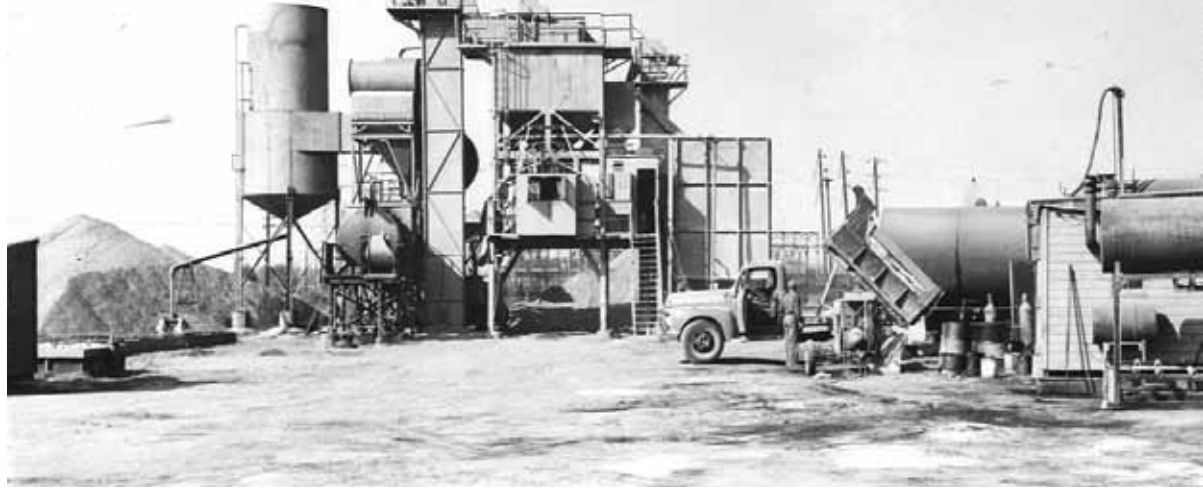
We, the employee-owners of Rieth-Riley, want to thank our local communities, customers, subcontractors and suppliers for their part of our success for 100 years.

Background photo: Horses used to transport materials to jobsite in 1920 near Sawyer, Mich.



RIETH-RILEY

The Ada, Mich. asphalt plant in the 1950s.



Rieth-Riley Construction Co., Inc. History 1916-2016

Rieth-Riley Construction Co., Inc., was founded nearly 100 years ago in 1916 by Albert A. Rieth. Based in Goshen, Indiana, the company soon expanded into Michigan in 1920 with a contract to construct a concrete road near Sawyer, Michigan in Berrien County.

As the popularity of the automobile increased, Rieth-Riley grew in size and geography building roads and small bridges. Later in the 1920s, Rieth-Riley constructed part of the Lincoln Highway through Indiana as the nation sought a coast-to-coast paved road.

Rieth-Riley continued to expand throughout the western part of Michigan and opened its Big Rapids and Ada sites in the 1950s. For the next two decades this expansion continued into Lansing and Battle Creek. This expansion was overseen by the founder's three sons, Bill, Lee

and Blair Rieth.

Indicative of its growing capabilities, in 1972 Rieth-Riley paved the Ford Motor Company's high speed parabolic test track at the Romeo Michigan Proving Grounds.

In 1985, the family made an unprecedented move and sold part of the company to the employees. This sale to employees was the first of its kind in the heavy/highway construction industry. The employees then purchased the remainder in 1992, becoming 100% employee owned.

Since becoming 100% employee-owned, the company has further expanded into other markets through acquisitions and organic expansion, thus allowing for vertical integration to support the construction operations, and to ensure the supply of quality materials.

In Michigan, Rieth-Riley currently operates in the Benton Harbor, Kalamazoo, Lansing, Mason, Zeeland, Grand Rapids, Big Rapids, Ludington, Houghton Lake, Traverse City and Petoskey markets under the leadership of Chad Loney, Vice President-Michigan.

From the beginning, the company has been known for its integrity and quality, traits faithfully handed down for generations which continues today. Rieth-Riley enjoys a long and successful history in the communities in which it operates. Its local ownership and prominence in the heavy and highway sector of the construction industry, coupled with its wide range of customer focused products and services, attractively positions the company for a successful future.

Paving asphalt in Reed City, Mich.



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Problem Solver

MITA Wins Favorable Decision – MDOT Weigh-In-Motion Scales Access

In an August 20, 2015 letter, Governor Snyder's office informed MITA that they would not be altering current policy with respect to granting the sheriff departments' access to the Michigan Department of Transportation's (MDOT) wireless weigh-in-motion (WWIM) scales for the purposes of commercial motor vehicle code enforcement.

The Michigan Sheriffs' Association (MSA) had requested the governor's office grant all 83 county sheriff departments access to MDOT's 39 WWIM scales similar to the access granted to the Michigan State Police – Commercial Vehicle Enforcement Division (MSP-CVED).

In a July letter to Governor Snyder, MITA voiced strong opposition to the MSA request citing the self-serving for-profit incentive that exists for local law enforcement abuse in their efforts related to commercial motor vehicle code enforcement. Under current law 70 percent of the fines collected by local law enforcement for commercial motor vehicle code violations go directly into the coffers of that local government, with the remaining 30 percent going to the local library.

Contrast that with the commercial motor vehicle citations issued by the MSP-CVED where 100 percent of the fines collected go to the state's library system. Absent that profit incentive, State Police enforcement is generally, and appropriately, predicated on protecting public safety.

Governor Snyder's office commented that MITA's comments and position were key in their decision to deny the MSA request.

If you have any questions or comments, contact Glenn Bukoski (glennbukoski@mi-ita.com) or Mike Nystrom (mikenystrom@mi-ita.com), or call the MITA office at 517-347-8336.

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Letters to MITA

Dear Mike:

I read your Guest Column on MLive today about the Flint water crisis. Well done!

Kurt Shea
PK Contracting, Inc.

Dear Mike:

Your MLive article on the Flint water situation and need for adequate funding to rebuild Michigan's infrastructure was timely and useful. I hope that your efforts bear fruit.

I also write because you may also find it useful to point out another aspect of infrastructure funding needs. Every public statement I've seen about infrastructure funding calls for rebuilding our infrastructure. These statements have the tone, if not the express working, that the goal is to rebuild the infrastructure we have, as if what's needed is to restore the condition of infrastructure that we had in 1965, 1980, or some other past time. What such statements don't address, and should, is that we need to get to work building the infrastructure that's needed in 2025 (just 10 years from now – that amounts to an immediate need, (as you know), and even later. And, perhaps, goals like that will motivate legislators and voters more strongly.

James P. Enright
Enright Law Firm PLLC

Dear Mike:

Thank you for allowing M&M the use of your conference room last week. Your staff (Ellen & Mariam) greeted everyone with a smile and made us all feel welcome. We had a successful meeting resolving many issues prior to finally departing around 7:30 p.m. Thanks again. We appreciate the hospitality.

Ken Nowicki
M&M Excavating Co., Inc.

New MITA Members

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G & W Construction Co., Inc.
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Big Names for the Big Show!

Get ready! The largest event for the industry is just around the corner! The MITA Annual Conference at Soaring Eagle Casino is scheduled for take off January 20-22, 2016. Here's your sneak peek of the event.

This year we will have two keynote speakers. On opening day, our keynote will be Scott Dikkers, founder of TheO-nion.com, one of the most popular humor destinations in the world with millions of readers and social media followers. Scott's brand of hard-won wisdom will leave you wanting more. His philosophy on mentorship is what attracted MITA to this speaker. Simply put our industry is in crisis mode when it comes to the need to attract and develop talent. Scott will leave you laughing and thinking all at the same time.

Day two as usual is packed. Keynote Brian Banks will tell his story of a promising young athlete to convicted felon imprisoned for crimes uncommitted. His story is one of longevity and redemption. This is something the heavy construction industry knows a little about concerning our long battle for constructive funding. Banks has caught the attention of Hollywood and feature film about his life is in the works!



As you may also know, MITA believes in the benefits our history

and those who helped create it can bring to the table. MITA will honor some industry legends with our Honorary Member Award. They have supported all of us and will continue to do so as they go forward in their next chapters. Joe Duni-gan of Dunigan Brothers will take the stage along with Gary Putrow with Michigan Pipe and Valve, Tom Idema of EJ and longtime Association Executive Bob Patzer.

We look forward to briefly highlighting their illustrious careers.

As far as break out sessions are concerned, there will be many CEH credit opportunities to choose from as well as some important break-outs that will help you steer your organizational ship into the 2016 construction season. Please visit our website (www.mi-ita.com) for a complete listing of classes and registration.

Last but not least: networking. My personal mantra has always been support those who support us! The quality of this event would not be possible without the support of our sponsors. Two strolling lunches in the vendor area will provide an opportunity for you to see the latest and greatest offerings for field and the office. Please take a minute to thank our vendors for there



continued support of this event.

If you've never attended this event, what are you waiting for? You cannot forge meaningful bonds over the Internet; even people who meet on dating sites eventually have to meet in public. Our industry relies on positive interaction amongst contractors, suppliers, engineers and public officials. The MITA Annual Conference will provide you with this unique opportunity.

To contact Rob Coppersmith, e-mail him at roboppersmith@mi-ita.com or call the MITA office at 517-347-8336.

MDOT Leadership Changes

When MDOT's Chief Operations Officer, Greg Johnson, packed his retirement bags and headed east to take on new challenges as the State Highway Administrator for the Maryland Department of Transportation, it set off a domino effect that created several career advancement opportunities within the department. In this article, I will introduce you to the individuals who have recently advanced into key leadership positions at the department.

Mark Van Port Fleet, P.E. – Chief Operations Officer

With more than 35 years of experience at the department, Mark replaces Greg Johnson as



MDOT's Deputy Director and Chief Operations Officer. Prior to this appointment, Mark served for six years as the Deputy Chief Engineer/Director of the Bureau of Development, and, before that, as Engineer of the Design Division. Mark is nationally recognized



for his role in implementing Context Sensitive Solutions in Michigan,

and his leadership was instrumental in the department's transition to having the majority of their construction projects let in the first two quarters of the fiscal year. He is an active member of the American Association of State Highway and Transportation Officials (AASHTO) where he has chaired several technical committees, and he currently sits on their Technology Implementation Group and the Standing Committee on Performance Management. Mark is a licensed professional engineer in Michigan and Florida, and he holds a bachelor of science degree in civil engineering from Michigan State University.

Bradley Wieferich, P.E. Director of the Bureau of Development

Brad replaces Mark Van Port Fleet as MDOT's Deputy Chief Engineer and Director of the Bureau of Development. Brad has 20 years

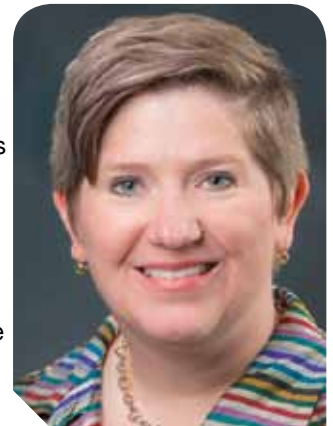


of experience with the department, serving most recently as Engineer of the Design Division. He has worked in three MDOT regions, as well as a road design engineer in MDOT's Lansing central office. Brad, too, is an active member of AASHTO, serving on

the Subcommittee on Design and the Standing Committee on Performance Management. At MDOT, he has served on the Engineering Operations Committee and the Joint Pipe Operations Committee. A licensed professional engineer in Michigan, Brad holds a bachelor of science degree in civil engineering from Michigan State University.

Kristin Schuster, P.E. Engineer of Design

Kristin replaces Brad Wieferich as MDOT's Engineer of Design. With 21 years of experience at MDOT, Kristin previously



managed the Environmental Services Section in the Bureau of Development, and she has served as the Stormwater Program Manager in the Bureau of Field Services. She has several years of design related experience, having worked in the Design Division's road and hydraulics units. Kristin is a graduate of Michigan State University, holding a bachelor of science degree in civil engineering, and she is a registered professional engineer in Michigan.

Unrelated to Greg Johnson's departure, but still noteworthy as key

To contact Glenn Bukoski, P.E., e-mail him at glennbukoski@mi-ita.com or call the MITA office at 517-347-8336.

VICE PRESIDENT OF ENGINEERING SERVICES COMMENT

leadership changes at MDOT are the following:

Kimberly Avery, P.E. -- Region Engineer, Southwest Region

Kim replaced the retiring Roberta "Bobbi" Wekle as the Region Engineer of MDOT's Southwest Region. A 25-year MDOT veteran, Kim has held a variety of positions in the Metro and University Regions, most recently serving as Metro Region's Deputy Region Engineer. Kim's other Metro Region professional experiences include: Region Associate Engineer



of Development, Taylor TSC Manager, Taylor TSC Development Engineer, maintenance engineer and construction engineer. Kim holds a bachelor of science in civil engineering from Valparaiso University, and she is a registered professional engineer in Michigan.

Matthew Chynoweth, P.E. Deputy Region Engineer, Metro Region

Matt replaced Kim Avery as the Deputy Region Engineer in MDOT's Metro Region. In his 12 years with MDOT,



Matt has served in a variety of technical and leadership positions, most noteworthy being his time as the Engineer of Bridge Field Services and as the Manager of the Bay City TSC in the Bay Region. Matt is an active member of the AASHTO Subcommittee on Bridges and Structures, as well as the American Segmental Bridge Institute. Matt holds a bachelor of science degree in civil engineering from Michigan State University and a master of science degree in structural engineering from Wayne State University. He is a registered professional engineer in Michigan and serves as an adjunct faculty member at Lawrence Technological University where he teaches structural engineering.

In closing, we congratulate all of these MDOTers on their recent advancements to prominent leadership positions, and we look forward to working closely and collaboratively with them all on future industry matters.

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Underground SPOTLIGHT

Darts in the Dark! By Rob Coppersmith

Darts in the dark has been the best way I know how to explain the utility locating process on many occasions. Old lines not able to withstand construction activity, new lines not in use, unmapped facilities, joint trenches all add to the often day to day frustration that has nothing to do with the job at hand but everything to do with employee safety and pocket book protection.

In April of 2014 Public Act 174 took effect and the initial results were scary. I thought what the hell

have we done! The thought process was that the contract MITA had in place was working quite well. This should be a no brainer to add the rest of entities that call MISS DIG for locating requests. Unfortunately, the growing pains in the first six months were monumental. I'm happy to report that things are moving in the right direction. How do I know this? Not by any statistical data or pie chart, but simply by my phone. Last year I received on a daily basis an average of six to eight calls a day concerning utility problems or lack of

locating, etc. Today I average just a little over that in a month. Now that's real progress!

Unfortunately, many of us that work in the industry will not bear the real fruits of PA 174. They will become more apparent in the future – with provisions like everything installed underground must be installed in a manner that it is locatable, and many other gems that future generations of construction workers will benefit from once all facility owners get on line. Several small municipalities aren't even

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UNDERGROUND SPOTLIGHT

members of MISS DIG even though the law requires all facility owners to belong. However, I am confident that over time the coalition of stakeholders that comprise the Michigan Damage Prevention Board (MDPB), which I chair, will continue to make strides with regards to compliance concerning all portions of the Act.

The MDPB has completed and continues to work on best practice guidance documents to assist in clarifying expectations concerning certain activities. A few that have been finalized are: fence post exemption, appurtenance requirements and offset staking. Several other topics such as storm work and saw cutting are still being debated by the group. These documents can be found on the MISS DIG website, which is linked via the MITA website through the safety page. The group has also been involved with a pilot project that has a dedicated staker on a job of significant size and scope to try to determine if the practice creates a safer, less damaging environment. I think we know the answer to this, but can the industry afford it? This will be the ultimate question.

In closing, we live in an imperfect world full of conflict utilities and their location will continue to be part of that problem until we can figure out how to make everything wireless. Until that day rest assured that MITA and many interested, and often at odds, parties are trying to make things safer for the public and workers. We just have different ideas on how to get there.

To contact Rob Coppersmith, e-mail him at roboppersmith@mi-ita.com or call the MITA office at 517-347-8336.



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MITA Commissions Underground Infrastructure White Paper

The recent drinking water crisis in Flint has brought attention to a challenge faced by communities throughout Michigan. Our underground infrastructure across the state has faced decades of neglect and the future does not look bright. Many of these systems were installed between 50 to 100 years ago and are approaching, or have exceeded, their lifespan. Though many do not pay attention to our underground infrastructure because it is out of sight and out of mind, without proper investment the problems in Flint will spread throughout the entire state. Action needs to be taken immediately and with long-term goals in mind.

As part of ongoing attention to underground issues, MITA has asked Public Sector Consultants, an economic think tank located in Lansing, to develop a white paper that summarizes the current state of drinking water, wastewater and stormwater infrastructure in Michigan, as well as the current funding available and the proper investment needed to properly fund these systems. The first phase of the project should be completed by the beginning of next year. The second phase of the project will include a more detailed analysis of the cost of clean water in Michigan.

Stay tuned for details on this important project. If you have questions, please contact Mike Nystrom, MITA's executive vice president, at mikenystrom@mi-ita.com or call him at 517-347-8336.



Send Us Your UNDERGROUND Photos!

In light of the on-going Flint Water Crisis, the media and voters around the state are getting an education on the deteriorating condition of Michigan's underground infrastructure.

The Flint Water Crisis has shined a spotlight on the extremely negative consequences of not investing in our underground pipes and sewers, the very mechanisms that provide and distribute the water each and every one of us depends on. No one at the state, federal or local level wants to see a Flint-like crisis in any other city in Michigan.

In an effort to do our part, and to continue the dialogue on this important issue, we are asking all MITA members, particularly those of you who work on the underground side of the industry, to take high-resolution photos of the pipes and sewers you are working on. With these photos, we can educate the Legislature, the media and Michigan residents about the dire needs of our underground infrastructure.

A picture is worth a thousand words, so please take a few minutes at your job sites to snap a high-resolution photo of particularly poor pipes and systems that are in need of investment, and email them to mariamrobinson@mi-ita.com. Your assistance with this important educational project is greatly appreciated! If you have any questions, please don't hesitate to call the MITA office and ask for Mariam Robinson, Outreach Coordinator. She can be reached at 517-347-8336.



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The following is a guest column, written by MITA's Executive Vice President Mike Nystrom, which was published by *Mlive* and *The Detroit News* in October.

Flint water crisis exposes Michigan's infrastructure funding problem

By Mike Nystrom

It was great to see the Michigan Legislature come together and put politics aside as they voted unanimously in finding a resolution to the recent Flint drinking water crisis. However, this single incident also exposed a major flaw in a system that should ensure that all residents of Michigan have access to clean drinking water, not water that is treated from polluted rivers and is brought to them through aging, deteriorating pipes.

We have all witnessed how difficult it has been for our state leaders to legislate changes in the way we fund roads. It is going to be even more difficult to bring about positive legislation to update our aging underground drinking water systems and failing sewer systems that are out of sight and, thus, out of mind.

We all take for granted that our water supply and sewage disposal systems are in fine working condition

and yet, significant troubles lurk just below the literal surface in many, if not most, communities across the state.

The delay in road funding has blemished the image of the state that put the world on wheels. A continued delay in proper funding for our underground infrastructure will also be an embarrassing black eye for the Great Lakes State, whose greatest natural resource is the water in our lakes, rivers and streams.

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Flint is not alone with its aging and dilapidated system challenges. Other municipalities throughout Michigan have significant problems, and no one is talking about them publicly, in most cases. Pictures of many drinking water delivery pipes, which can range anywhere from 50 to 100 years old, would horrify most people.

Many people would be sickened if they truly understood that most of the beach closings that happen in Michigan on a regular basis are the result of fecal contamination due to leaching sewer systems. Even more disheartening is the fact that with very little state and federal financial support, our underground infrastructure is paid for mainly at the local level, and cash strapped municipalities have not been able to implement necessary rate increases for much needed

improvements.

How many more Flint catastrophes need to happen before we wake up and fix the problem?

A comprehensive state plan is sorely needed now to begin the replacement of outdated and failing systems; and, more importantly, to properly fund our ailing underground infrastructure throughout our state. This will take cooperation from the public, as well as local and state leaders – now – not after another public health emergency.

Clean water is essential, but it costs money. Nothing is more important to life, and nothing is taken more for granted.

The lesson of Flint has been painful and costly. Let's not repeat that hard lesson.

Let's find a solution.

Flint is not alone with its aging and dilapidated system challenges.



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Rachelle VanDeventer, P.E., Joins MITA Staff

MITA is pleased to announce that Rachelle VanDeventer, P.E., has joined our staff as Vice President of Industry Relations. Rachelle replaces Douglas Needham, P.E., who is the new executive director of the Michigan Aggregate Association.

Rachelle most recently was employed by the Michigan Department of Transportation as the Engineering Support Services Manager for the design division. Her responsibilities included managing the unit, which was responsible for providing continuous improvements in engineering processes to gain efficiencies and effectiveness. The unit also provided additional services, such as process and



software support/training for MDOT and external partners, including the implementation of e-construction and 3-D modeling design standards.

Prior to MDOT, Rachelle worked at Alfred Benesch & Company as a

designer. A graduate of Michigan State University, with a bachelor of science degree in civil engineering, Rachelle lives in Laingsburg with her husband, Aaron Wekenman and their two dogs. In her spare time she enjoys spending time with family and friends at her cabin in Grayling.

“I feel extremely lucky to have this opportunity to be part of the MITA team and use my professional experience to serve the membership in any way that I can,” Rachelle said.

Rachelle can be reached at MITA by email at rachellevandeventer@mi-ita.com, or by calling her at 517-347-8336 (office) or 517-331-1106 (cell).

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MITA Wins Gold Award For Website Development & Implementation

By Mariam Robinson

In September, MITA was named a Gold Award recipient for achievement in website development and implementation from the Michigan Society of Association Executives at their 14th Annual Diamond Awards Banquet in Troy. The recognition from MITA's peers in the association world for a job well done and professionally executed was much appreciated and is now a source of pride for the association and members like you.

Here's an excerpt from our official submission to be considered for the award:

"MITA's mission is to promote and serve the heavy/highway construction industry in Michigan. In order to do this as efficiently and professionally as possible, it was absolutely necessary to invest in a new website and database for the members to be able to take full advantage of their association membership. Promoting and serving this industry requires that we are an organized, helpful and informative resource on a 24/7 basis. Building and implementing the new website allowed us to make this a reality.

As website trends ebb and flow, the structure of the new site will allow us to update and make changes as we see fit. This is important because we always want to make sure that our members are



constantly being given new advantages and resources to make them as effective as possible in their field. Keeping the website current and organized is key to ensuring success.

Going through this process has also given us the opportunity to utilize features and trends that were not available to us with the old website. We now have a live Twitter feed on our homepage, allowing us to engage in the social media aspect of today's association world. We were able to make helpful How To videos to help our members navigate the new website with ease. We hope to continue this evolutionary process by taking advantage of Google analytics to really analyze the impact the new website has had on member participation and engagement over the next year. This will help us to continue evolving and changing to suit our members' needs.

While the main implementation process of the website is now complete, maintaining and building upon the foundation will absolutely be critical to MITA's continued success as a leader in the heavy/highway construction industry. We always want to be looking to the future, and, as we do that, we want to guide our members in the right direction.

The industry itself is in a constant state of transition, so having the creative control to change, update, re-design and innovate the website continually is important to maintaining the reputation and identity of the association. We always want our members to have access to the best our association has to offer. Going through this process has enabled us to do that and will ensure that we can do that well into the future."

With our award-winning website, MITA's goal is to continue bringing you a high level of service that is both professional and efficient. We want to ensure that your needs are being met consistently and in a way that helps your business move forward. Take advantage of the resources and tools we provide on the site, at www.mi-ita.com, and don't hesitate to contact the office with suggestions for improvement.

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Did You Know?

MIOSHA Implements New Injury Reporting Requirements

Injuries are an unfortunate event on job sites. Depending upon the injury, it's important to know who you need to call (company office, MITA, MIOSHA, etc.). Different

injuries require different phone calls and are subject to different time constraints. As of September 1, 2015, MIOSHA has implemented new injury reporting requirements in response

to the changes federal OSHA made final in September 2014.

The record keeping regulation revision requires employers to report all work-related in-patient hospitalizations, as well as amputations, and losses of an eye to MIOSHA within 24 hours of the event. The new reporting requirements will have a significant impact on MIOSHA enforcement activities. A large increase in the number of workplace incident reports to MIOSHA is anticipated.

Please note that the existing requirement in MIOSHA Administrative Standard Part 11, Recording and Reporting of Occupational Injuries and Illnesses, requiring employers to report work-related fatalities to MIOSHA within eight hours, has not changed. However, employers are no longer required to report within eight hours the inpatient hospitalization of three or more employees as a result of a work-related incident. Instead, employers must report within 24 hours the inpatient hospitalization of one or more employees.

MIOSHA had several hundred phone calls to their reporting system for the month of September. Of those several hundred, only eight were for the Construction Safety Division.

If you have any questions about the new reporting requirements, contact Matt McClintick, MITA's director of safety and workforce development, at 517-347-8336 or mattmcclintick@mi-ita.com.



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Outreach Spotlight

Legislators Visit Major Job Sites To Understand Infrastructure Needs

By Mariam Robinson

Every summer, MITA hosts legislative job site visits for Michigan legislators. The goal of these visits is to educate and to help legislators get a strong visual understanding of the amount of time, skill and effort that goes into repairing, maintaining and building our infrastructure. Investment is a key part of the infrastructure process, so giving legislators the opportunity to see firsthand exactly why so much funding is needed is critical to helping them understand their role in the process. MITA members tackle some very big and very important construction jobs across the state every year, and, a lot of the time, these jobs do not receive the statewide recognition they deserve. The positive safety and economic impact of these projects, upon completion, always benefits millions of Michigan citizens, as

well as the entire state.

MITA and four member companies hosted three visits this summer. In July, Congressman Bill Huizenga visited and was given a tour of MI Paving & Materials Co. headquarters. In August, Dan's Excavating hosted State Representative Dan Lauwers at the I-69 reconstruction site in Port Huron, where he was given a private tour of the entire stretch of the project. Toebe Construction, LLC and Kamminga & Roodvoets, Inc. hosted the final visit of the summer at the I-96/US-23 interchange project in Brighton, where there was great turnout. State Senator Goeff Hansen, State Representative Lana Theis,



From left to right: State Rep. Dan Lauwers, Joe Goodall (Dan's Excavating), Tia Klein (FTCH), Rob Coppersmith (MITA) and Lance Binoniemi (MITA).

State Representative Ed Canfield, State Representative Ben Glardon and three legislative staffers were in attendance. Great questions and strong dialogue



A dusty view of the hard work being done by Dan's Excavating at the I-69 reconstruction site in Port Huron.

MITA's Rob Coppersmith (second from left), Toebe Construction, LLC's Safety Director Andy Thelen (third from left) and Project Manager Josh Goldsworthy (fourth from left) join four legislators and three staffers at the Brighton site visit.



Joe Goodall of Dan's Excavating (left) and Tia Klein of FTCH (middle) show the site plans to State Rep. Dan Lauwers (right).



From left to right: State Rep. Ed Canfield, State Sen. Goeff Hansen, State Rep. Ben Glardon and State Rep. Lana Theis listen attentively during the Brighton site visit.

regarding the road funding issue took place at each of the visits, and the legislators left with a stronger understanding of the need for investment when it comes to building and maintaining our infrastructure. If you are interested in hosting a legislative site visit on behalf of your company, please do not hesitate to reach out to the MITA office for assistance in arranging one. You can contact Mariam Robinson, MITA Outreach Coordinator, to help with logistics and planning, as well as with getting the invitation out to legislators. Mariam can be reached at 517-347-8336 or at mariamrobinson@mi-ita.com.



Toebe Construction, LLC's Safety Director, Andy Thelen, and Project Manager, Josh Goldsworthy, listen as the legislators discuss road funding.



Congressman Bill Huizenga (right) listens attentively to Rob Checkley (left) during his visit to the MI Paving & Materials Co. Woodland plant.



Congressman Bill Huizenga (left) and MI Paving & Materials Co.'s Rob Checkley (right) tour the stacks at the Woodland plant.



MI Paving & Materials Co.'s Rob Checkley (left) points out certain aspects of the plant as Congressman Bill Huizenga (middle) asks a question and Rieth-Riley Construction Co., Inc.'s Kirk Breukink (right) looks on.

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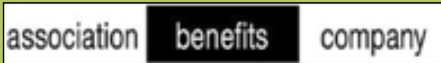
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DBE PROFILE:

Commerce Construction & Landscaping, Inc.

Donna Yaroch, of Commerce Construction & Landscaping, Inc., in Milford Township, Mich., talked to us recently about the business. For more information, you can reach her at 248-685-9476 or dya-roch@commerceconstruction.net.

Specialties

Our service area consists of mainly the Metro, University and Bay Regions. We specialize in landscaping, restoration, removals, edge drain installation, aggregates, minor draining improvements, adjustments and grading.

History

Commerce has been in business since 1995. The company was started with a purchase of a Sterling tri-axle

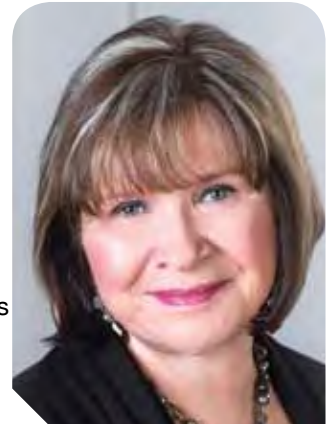
dump truck, followed by a Caterpillar backhoe. In the beginning, Commerce did small weekend jobs to acquire the capital to expand into a full-time business. My company has always prided itself as being dedicated and ethical during good and difficult times. We struggled during the downturn of the economy in Michigan for many years but did not give up hope. Today we are seeing the future as an opportunity to expand to meet the increasing demands of project owners.

Company details

Commerce is basically a seasonal employer, and during the peak of the work year we employ approximately 20 employees. The company has been

fortunate over the years to be able to employ numerous family members and friends of current employees and owners.

This ability creates an amicable work environment and enables everyone to work together as a team to accomplish successful project completions. Commerce has



Donna Yaroch

Continues on pg. 34



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MITA is working on a program to bring experienced, qualified, hardworking veterans to the construction industry.

Stay tuned for more details from Matt McClintick, MITA Director of Safety & Workforce Development.



always completed projects in a timely manner to the complete satisfaction of project owners, as well as project engineers. Our company is extremely safety conscious and we experience a very safe

work environment for our employees on all of our projects.

Project details

Since the 2015 work year is winding down (in October), Commerce still has four projects to complete this season. Commerce is usually the prime contractor on four to six projects a year, and the rest of the time works as a subcontractor for larger companies. When asked about the most memorable job, it would be difficult to define memorable. Some projects flow extremely smooth and easy, while others can be difficult and chal-

lenging. I suppose I like the ones which are in our local community so that I can often see the improvements. We have completed many projects in the City of Wixom, the Village of Milford and Highland Township. Safety paths, parks and intersection improvements would be my choice of memorable projects since they create an immediate enhancement to the community.

How does being a member of MITA benefit you?

I believe that MITA is an extremely efficient and important asset to the construction industry. Since Commerce is a Certified DBE, MITA has provided opportunities for education and assistance that a small company, such as mine, would not otherwise be able to access. The yearly conference in Mt. Pleasant provides all of the DBE companies an area to set up a table and provide information about their individual abilities to provide products and services to the road construction industry.

On a personal level, MITA has helped me be able to deal with issues such as utility conflict resolutions and Blue Book Rental Rates. Again, being a small company does have some limitations that the larger companies do not encounter. MITA treats all member companies as if they are equally important. MITA's newsletters, bulletins and magazines all keep their members informed of changes and news related to the industry and the economy as a whole.

Is there other information you want to add?

I need to also add that MDOT's Office of Business Development also works hard to provide training and other opportunities for their Certified DBE companies. It is increasingly difficult for small businesses to survive in an increasingly competitive economic environment in which economies of scale have advantages.

In conclusion, it would be appropriate that I thank all of our employees, suppliers, prime contractors and engineers, who have all worked together with Commerce to successfully complete projects.

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Awards: G2 was recently named one of the top 100 “Hot Firms” out of a national industry of 100,000 companies in the Architecture/Engineering/Planning and environmental consulting industry. The recognition is based on percentage and actual dollar of revenue growth over a three-year period, which was calculated by Zweig Group, a leading research, publishing and consulting resource.

In addition to being named to the

“Hot Firms” list, G2 also won fourth place in the integrated marketing category in Zweig’s annual Marketing Excellence Awards program. The award is based on marketing creativity and results achieved.

G2 Consulting is a geotechnical, geoenvironmental, and construction engineering firm that has delivered thousands of telecommunications, land development and civil infrastructure projects for two decades across the United States. Based in Troy, Mich., G2 also has offices in Ann Arbor and suburban Chicago.

Hardman Construction Receives ARTBA Safety Award

Hardman Construction of Ludington received ARTBA’s Transportation Development Foundation (ARTBA-TDF) Contractor Safety Award during the association’s national convention September 30 in Philadelphia.


The annual competition is designed to recognize industry firms that have implemented outstanding employee health and safety programs. Winners were named in three categories based on the number of employee hours worked during the previous year and low Occupational Safety and Health Administration (OSHA) recordable rate scores.

Chris Burns, Hardman’s Director of Safety and Administration, made a presentation before a panel of industry professionals during the association’s convention. The judges evaluated his entry based on corporate safety culture, operational safety plans and worker training programs. Hardman won in the category for companies with 500,000 or fewer hours and the company had a 0.0 OSHA recordable rate.

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Chris Burns, director of safety and administration, Hardman Construction, (right) accepting Contractor Safety Award with Leo Vecellio, TDF chairman. Hardman Construction accepted the award during ARTBA’s national convention September 30 in Philadelphia.



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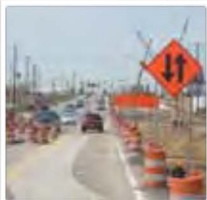

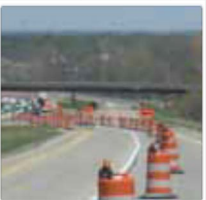

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Promotion: Adrianna Melchior, AIA, LEED AP, to Architectural Department Head. She joined HRC in 2012 and presents a diverse design portfolio featuring commercial, aviation, healthcare, municipal and industrial facilities, including significant projects for the Wayne County Airport Authority, General Motors, Mahle Industries and local communities. She has 15 years of professional experience and holds both a bachelor's degree and a master's degree in architecture from the University of Detroit Mercy.



Adrianna Melchior, AIA, LEED AP




Sal Conigliaro, P.E.

New Hire: Sal Conigliaro, P.E., Senior Project Manager. Conigliaro formerly served as Director of Public Works for the City of Sterling Heights for the past seven years. He holds a bachelor's degree in Civil Engineering from Wayne



State University and a master's degree in Business Management from Walsh College of Accountancy and Business Administration.

Continues on pg. 38



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A gift from the Malloure Family has established an endowed chair in the University of Michigan's College of Engineering

The \$2 million gift established the Donald Malloure Department Chair of Civil and Environmental Engineering. The majority of the gift came from the Malloure Family Foundation, which was set up by Don and Lucille Malloure. Joe, John and Paul Malloure added a modest supplement to the Family Foundation amount.

"The gift is so vital and provides the department with a lasting resource to address strategic needs, now and for years to come," said College of Civil and Environmental Engineering Chair Kim Hayes. "Over the next two years, the Malloure support will be leveraged to enclose and modernize a section of the open structures laboratory, converting the space into shared functional use for smart infrastructure systems research."

In addition to facilities upgrades, Hayes said in the near

future he envisions the Malloure support will be used for next generation research and educational initiatives to continue to attract the best and brightest students to the College of Civil and Environmental Engineering.

Donald Malloure graduated from U of M in 1949 with a degree in civil engineering and began working with contractors in Michigan. Clarence Hull of C.A. Hull offered him a job, and the rest is history. In 1966, when Hull passed away, the company rested solely on Malloure's shoulders. Malloure's sons, Joe, John and Paul, have been active with the company since the 1970s.

Lawrence Technological University

www.ltu.edu

Lawrence Technological University's civil engineering program is ranked fifth nationally among universities offering bachelor's and master's degrees, according to the annual U.S. News & World Report survey of best colleges for 2016.

In addition, for the second year in a row LTU is ranked in the top half, at 23rd nationwide, for all its undergraduate engineering degree programs.

Enrollment in engineering programs at LTU has surged 22.7 percent this year, reflecting the increased demand in the industry for highly educated professionals.

LTU has utilized a multi-year grant from the Kern Family Foundation to develop curriculum modules designed to prepare engineering students to be problem-solvers who can take an entrepreneurial approach to the decision-making process in business. Problem-based learning and active and collaborative learning are two teaching concepts that help students develop an entrepreneurial mindset.

In other news from the recent U.S. News annual survey of universities, LTU remained ranked in the top half of the top tier of the 12-state Midwest Regional University category. This category involves a review of "A-Plus Schools for B Students," or "great colleges for non-superstars," who have a shot at being accepted and being able to thrive in school. These are students for whom hard work could make all the difference to admissions offices that are seeking a broad and engaged student body. And lastly, LTU is on the U.S. News list of universities that offer the best online college degree programs.

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Lawrence Technological University is a private university founded in 1932 that offers more than 100 programs through the doctoral level in Colleges of Architecture and Design, Arts and Sciences, Engineering, and Management. The Brookings Institute ranks Lawrence Tech fifth nationwide for boosting graduates' earning power; PayScale lists it among the nation's top 10 percent of universities for graduates' salaries; and U.S. News and World Report places it in the top tier of best Midwestern universities. Students benefit from small class sizes and a real-world, hands-on, theory and practice education with an emphasis on leadership. Activities on Lawrence Tech's 102-acre campus in Southfield include over 60 student organizations and NAIA varsity sports.

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Kirk Steudle Receives Transportation Research Award

MDOT Director Kirk T. Steudle is the recipient of the 2015 W.N. Carey, Jr., Distinguished Service Award. This honor is in recognition of his outstanding service in transportation research, including being a national leader in the development of connected vehicle technology and service to the Transportation Research Board (TRB).

During his service to the TRB, Steudle has been a member of numerous committees, panels, and task forces in addition to chairing the Executive Committee, Oversight Committee for the second Strategic Highway Research Program (SHRP 2), and Com-

mittee on SHRP 2 Implementation. He also chaired the National Cooperative Highway Research Program panels on Developing an Asset Management Plan for the Interstate Highway System and on Administration of Highway and Transportation Agencies.

Steudle will be presented the award during the TRB 95th Annual Meeting, January 10-14, 2016 at the Walter E. Washington Convention Center in Washington, D.C. The meeting will cover all transportation issues, with more than 5,000 presentations during nearly 750 sessions. A number of sessions and workshops will focus on the meeting's theme: Research Conver-

gence for a Multi-Modal Future. The meeting is expected to attract more than 12,000 transportation professionals from throughout the United States and 70 other countries.



Kirk T. Steudle

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The Pay-If-Paid Clause and Chinks in its Armor

By Ryan W. Jezdimir, Blevins Sanborn Jezdimir Zack PLC

The “pay-if-paid” clause may be the most unforgiving contractual payment limitation confronting a subcontractor’s effort to receive timely payment for work properly performed.¹ The pay-if-paid clause creates a condition that must occur before a general contractor is required to pay a subcontractor—simply that the general contractor is paid by the owner first².

A typical pay-if-paid clause states:

Contractor’s receipt of payment from the owner is a condition precedent to contractor’s obligation to make payment to the subcontractor.

Enforceable pay-if-paid clauses often include key words such as condition precedent, on condition that, *if*, or *provided that*.³ Without key words

such as these, the conditional payment provision may only delay payment to the subcontractor for a reasonable time after work is performed regardless of whether the owner pays the general contractor.⁴

The national trend is to identify conditional payment clauses that merely delay payment as “pay-when-paid” clauses. An example of a pay-when-paid clause is:

[T]he Contractor shall pay each Subcontractor no later than seven days after receipt of payment from the owner.⁵

Noticeably, there is a very fine distinction in the wording of a pay-if-paid clause versus a pay-when-paid clause. The distinction is complicated by lawyers and judges routinely using “pay-if-paid” and “pay-when-paid” interchangeably with-

out recognizing the difference between the two clauses. A diligent subcontractor should, however, carefully review the conditional payment terms of the proposed subcontract and understand that the subtle wording of the clause may mean the difference between being paid within a reasonable time and being paid at all.

The Arguments Over Pay-If-Paid Clauses

There is a robust debate over pay-if-paid clauses because of their effect on subcontractors. An enforceable pay-if-paid clause shifts the credit risk of an owner from the general contractor to the subcontractor; may jeopardize the subcontractor’s lien or bond rights; and may prolong payment even if the owner has

funds, such as where the owner withholds funds from the general contractor because of a dispute. These consequences can severely impact the subcontractor. For example, a general contractor did not have to compensate its drywall subcontractor \$348,155 for work performed because the owner was insolvent and the subcontract had a pay-if-paid clause.⁶ In similar circumstances, a precast concrete subcontractor that had substantially completed its work without any payment lost \$885,507.⁷

Opponents of the pay-if-paid clause argue that the clause should be unenforceable based on public policy. The public policy arguments include:

1. The general contractor’s direct dealings with the owner leave it best positioned to consider and investigate the solvency of an owner.



2. The general contractor has more control over ensuring payment is received because it has the contract with the owner.
3. The general contractor controls the entire project and can best resolve payment disputes with the owner.
4. The general contractor is better able to bear the risk of potential owner insolvency because, generally, subcontractors are smaller and more thinly capitalized.

The foremost argument in favor of the pay-if-paid clause is a bedrock principle of all contract law: Freedom to contract. Proponents argue that the subcontractors, which are commonly sophisticated business entities, may build the risk of nonpayment into their bid price or simply refuse the work. Further, the pay-if-paid clause incentivizes each participant on the project to consider the risk of nonpayment for itself. Proponents also argue that the pay-if-paid clause spreads the risk of nonpayment rather than leaving the general contractor to bear it alone.

The pay-if-paid clause receives disparate treatment among the states, which may be a reflection that both sides of the argument have validity. Courts in California and New York have refused to enforce pay-if-paid provisions based on public policy.⁸ Through legislative action, Massachusetts has limited enforceability of pay-if-paid clauses depending on the size of the project; and other states (North Carolina, South Carolina, Illinois, Maryland, Missouri, and Wisconsin) have banned pay-if-paid clauses in all private projects regardless of the project's size.⁹ And several other states have yet to rule upon the enforceability of the pay-if-paid clause.

Michigan law

Under Michigan law, a properly drafted pay-if-paid clause is enforceable. In the governing 1995 case, the following pay-if-paid clause was enforced:

[A]ll payments to the subcontractor were to be made only from equivalent payments received by the general contractor for the work done,

'the receipt of such payments by [the general contractor] being a condition precedent to payments to the subcontractor.'¹⁰

In that case, the Michigan Court of Appeals found that the clause clearly and unambiguously shifted the risk of

the owner's nonpayment to the subcontractor. Thus, the subcontractor lacked a claim for the payment until the general contractor was paid by the owner. Note that the clause contained the key words "condition precedent,"

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which would signal to the informed subcontractor that the conditional payment term was a pay-if-paid clause rather than a pay-when-paid clause.

Limitations of the Pay-If-Paid Clause

Even a properly drafted pay-if-paid clause has limitations. First, the general contractor may invoke the pay-if-paid clause only if it lacks fault for the owner's nonpayment. As discussed above, a pay-if-paid clause creates a condition that must occur before a subcontractor is entitled to payment—that the owner pays the general contractor. Under Michigan law, a party waives the condition if it prevents the condition from occurring.¹¹ A party “may prevent the condition from occurring by either taking some affirmative action, or by refusing to take action required under the contract”¹²

There is no Michigan case law that defines when a general contractor's conduct waives a pay-if-paid clause. Expectedly, a general contractor may waive the pay-if-paid clause if it fails to persistently pursue payment from the owner, which may be properly invoicing the owner for the subcontractor's

work or suing the owner to collect the subcontractor's compensation. Further, if the owner's nonpayment is the result of a disagreement with the general contractor that is unrelated to the subcontractor, the pay-if-paid clause is likely waived. Indeed, other jurisdictions have found that a pay-if-paid clause is waived where the owner's refusal to pay was due to disputes between the owner and general contractor.¹³

Recently, the Michigan Court of Appeals signaled another limitation to the pay-if-paid clause in the construction arena: The clause does not apply to work that falls “outside the parameters” of the subcontract. In April 2015, the Court of Appeals decided a dispute between a subcontractor and its sub-subcontractor arising from the construction of a dining facility at Fort Sill in Oklahoma.¹⁴ LaSalle Group was the subcontractor and had hired Macomb Mechanical to complete plumbing and mechanical work. Macomb Mechanical alleged that it was owed almost \$22,000 for base scope of work; \$172,049 for extra work triggered by errors in the project drawings; and \$347,786 because of a nine-month delay to its work. Among other things, LaSalle Group

defended on the basis of a pay-if-paid clause.

The Court of Appeals found that Macomb Mechanical could recover its balance for the base scope of work only after LaSalle Group was paid. But absolute application of the pay-if-paid clause to Macomb Mechanical's other claims was rejected. Instead, the pay-if-paid clause failed to govern work that fell “outside the parameters” of the sub-subcontract. The work related to the design errors fell “outside the parameters” of the sub-subcontract because LaSalle Group never executed related change orders. Likewise, if the delay was not contemplated by the parties at the time of executing the agreement, the Court of Appeals found that the delay would fall “outside the parameters” of the sub-subcontract—and the pay-if-paid clause would not apply.¹⁵

Conclusion

An enforceable pay-if-paid clause remains a formidable obstacle for any subcontractor. Like any challenge on a construction project, the pay-if-paid clause is best met by the prepared subcontractor. A diligent subcontractor should (1) understand the differ-

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ences between a pay-if-paid clause and a pay-when-paid clause; (2) mitigate the risks of an enforceable pay-if-paid clause by investigating the solvency of an owner or building the risk of nonpayment into its bid; and (3) know the clause's limitations. Plus, based on the fierce, on-going debate over the enforcement of pay-if-paid clauses, all contractors are well-served by consulting legal counsel to stay abreast of the current law.

- 1 According to a survey conducted by the American Subcontractors Association, "pay-if-paid clauses were identified as a very serious problem by 67.9% of those surveyed." And "[a]nother 22.1% viewed the issue as being somewhat serious." 6 Bruner & O'Connor Construction Law § 19:57 (May 2015).
- 2 Pay-if-paid clauses may be used at all levels of the contracting tiers (i.e. between a subcontractor and a sub-subcontractor). For simplicity, this article uses the general contractor-subcontractor relationship.
- 3 William M. Hill & Mary-Beth McCormack, Pay-If-Paid Clauses: Freedom of Contract or Protecting the Subcontractor from Itself? 31 The Constr. Lawyer 1, 2 (Winter 2011).
- 4 For example, in *Thos. J. Dyer Co. v. Bishop Intern. Engineering Co.*, 303 F.2d 655 (6th Cir. 1962), the court found that the conditional payment clause ("no part of [the payment due subcontractor] shall be due until (5) days after owner shall have paid contractor therefor") was meant to merely "postpone payment for a reasonable period of time after the work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor.")
- 5 American Institute of Architects, AIA Document A201 § 9.6.2 (2007).
- 6 *Architectural Systems, Inc. v. Gilbane Bldg. Co.*, 760 F. Supp. 79, 82 (D. Md. 1991).
- 7 *Universal Concrete Products Corp. v. Turner Constr. Co.*, 595 F. 3d 527, 529 (4th Cir. 2010).
- 8 Hill & McCormack, *supra* n. 3, 31 The Constr. Lawyer at 2.
- 9 *Id.* at 3.
- 10 *Berkel & Co. Contractors v. Christman Co.*, 201 Mich. App. 416, 418-19; 533 N.W.2d 838 (1995).
- 11 *Harbor Park Mkt., Inc. v. Gronda*, 277 Mich. App. 126, 131; 743 N.W. 2d 585 (2007).
- 12 *Id.*

- 13 *D.K. Meyer Corp. v. Bevco, Inc.*, 206 Neb. 318; 292 N.W.2d (1980); *Grady v. S.E. Gustafson Const. Co.*, 251 Iowa 1242; 103 N.W.2d 737 (1960); *Culligan Corp. v. Transamerica Ins. Co.*, 580 F.2d 251 (7th Cir. 1978); *Eastern Heavy Constructors, Inc. v. Fox*, 231 Md. 15; 188 A.2d 286 (1963).

- 14 *Macomb Mechanical, Inc. v. LaSalle Group, Inc.*, et al., Docket No. 319357 (Mich. Ct. App. April 23, 2015)(unpublished).
- 15 The Court of Appeals also found that the pay-if-paid clause was waived if LaSalle's actions or interference caused the unreasonable delay.

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Governor Snyder Signs Historic Road Funding Package at MITA

Continued from pg. 3

Heavy construction equipment formed a ceremonial arch and decoration for the bill signing.



MITA staff, other legislators and industry representatives posed for photos after the bill signing with the governor and lieutenant governor.



Road Funding Appreciation Letters Pour into MITA

Great job and congratulations to all at MITA on your continual leadership and perseverance in helping delivering the much needed road funding bill package! This roller coaster had more dips and turns than the best theme park ride in the world, but at the end of the day the ride came to an end. Because of your efforts we are poised for an improved and known funding apparatus specific to Michigan's much needed infrastructure improvements. Your long hours and consistent determination paid off. Excellent job and results!!

Bill Hodges
President
Michigan CAT

On behalf of Governor Snyder and Lt. Governor Calley, thank you for your relentlessly positive support and dedication in securing a transportation plan that is the largest investment in our roads in more than a half century. We appreciate your commitment to this important issue and look forward to continuing to work with you on meaningful legislation that will reinvent Michigan.

Tori Sachs
Office of Governor Snyder

Great job – we're all proud of you.

Richard A. Juliano, CAE
American Road &
Transportation Builders Association

Great work and great news!

Brandie Meisner
M&M Excavating Co., Inc.

Don't know how you guys pulled that off but, Wow! Put two feathers in your caps for such a coup. In our business that ranks right up with the last 10 seconds of the MSU vs. U of M game. Great job.

James J. Urban
Butzel Long

Good job!!

Jeff Ardelean
Interstate Highway Construction, Inc.

Congratulations and thank you for all your hard work on this.

Jim Kloote
J.E. Kloote Contracting, Inc.

Congratulations, Mike. I'll bet you and Lance are excited and proud to see the successful culmination of all of your and the industry's efforts. It's been a long time coming! Now to get the Legislature to realize that having to close beaches after a rain storm in the summer is not a good thing for a state that relies so much on tourism.

Chris Shea
P.K. Contracting Inc.

First of all, congratulations to you and the MITA staff. You have worked extremely hard and overcome a lot of hurdles to get this accomplished. This is truly something to be proud of. Thanks for all your hard work.

Mike Peake, Sr.
Action Traffic Maintenance

Great job on obtaining a hard earned goal on funding. Congrats again on a well deserved victory.

Mike Mooney
Give 'Em A Brake Safety



MITA Board Member Brandie Meisner, of M&M Excavating Co., Inc., introduced the governor.



Bruce Lowing, president of Hardman Construction, gives the thumbs up beside (from left to right) Aden Shea and Kurt Shea of PK Contracting Inc.



Rob Coppersmith, MITA's vice president of membership services, captured this "aerial" shot of the bill signing ceremony from the MITA roof.



Mike Nystrom, MITA's executive vice president, was interviewed by members of the media.



Members of MITA and the Michigan Transportation Team were on hand to witness the bill signing.

On behalf of myself and Mike Kavanagh and everybody at Cardinal, we wanted to say congratulations and express our gratitude for the hard work that went into getting the new road funding measures passed. It should be a very welcome boost to our industry and is a much needed boon to Michigan's roads. Thank you very much.

Eric Dow
Cardinal Fabricating Inc.

Great honors and great work on all of the MITA team's efforts.

Christopher Fitch
Weiss Construction

Congrats on the road funding victory.

Tom DiPonio
Jay Dee Contractors

Congratulations!

Steve Mancini
Ric-Man Construction, Inc.

Congrats!!

Darrell Kaltz
Kaltz Excavating Co., Inc.

Congratulations on the achievement!

Alan Sandell
Michigan Paving & Materials Co., Cadillac Asphalt L.L.C.

Just wanted to send a short note to thank you both for all you have done to help get us this far. I know we'd all like to see more money, but after all these years, this still feels like a win to me. I hope you are feeling that at least a little bit, too. Now we turn our eyes to Congress. Thanks again!

Polly Kent
MDOT

Congrats to you and yours at MITA! Dogged Persistence & Perseverance!

John Kloet
Upper Peninsula Concrete Pipe Co., Inc.

Congratulations. Ten years is along time to work on something, but it finally happened.

Rich Lehman
E.C. Levy Co.

Just wanted to say nice work on getting this done.

Tom Horton
Centurion Insurance Agency

I know you are swamped. I just wanted to take a second to say thanks for all of your hard work!!!!

Jeff Bartlett, PS
Surveying Solutions, Inc.

Congratulations! A long and difficult road that you and your staff have overcome. Now, what's next on your plate? Whatever it is, let it sit over the weekend and enjoy yourselves.

Jim Dykema
Dykema Excavators, Inc.



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Upcoming Key Events

January 7, 2016
MITA SKI WEEKEND
Harbor Springs

January 20-22, 2016
MITA ANNUAL CONFERENCE
Soaring Eagle Casino and Resort, Mt. Pleasant

March 5-March 12, 2016
MITA MANAGEMENT CONFERENCE
Los Cabos, Mexico

All dates are subject to change and additional events may be added. Please check for updates at www.mi-ita.com.

MITA Members: Have prevailing wage jobs left you feeling like you have nowhere left to turn?

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Contributing to a benefit plan versus a cash raise can reduce your labor burden because fringe benefits are typically exempt from payroll taxes.

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Productivity in Construction

Implemented in 2012; the Michigan Laborers' Training and Apprenticeship Institute has developed a Laborers' Productivity Training Course. In today's competitive environment it is critical that the highest level of productivity be achieved in all aspects of a project. The Michigan Construction Laborers' Union recognizes this need and is leading the way to a more productive workforce by including this training in our Apprenticeship Program and offering the class to our Journeymen as a skills enhancement course.



Kimberly Dohn completed the course recently and commented:

"I was fortunate to be among the first to participate in the Laborers' Productivity Training Course. I am very passionate about the training that was

offered and I feel that ALL laborers will benefit from participating in this course. The skills developed during training will aid them in their daily and future endeavors. I believe that the skills taught throughout this course are invaluable to a person with aspirations of bettering themselves and/or their position in life and it provides real tools to make those things happen.

I am currently employed in a management support position in the construction industry and I feel confident that the skills I learned from the Laborers' Productivity Training Course have prepared me to successfully deal with the challenges that occur on a daily basis. Since completing the course I feel more prepared and I know that the knowledge I acquired has improved my performance and ability to make a positive contribution on any job site."



Michigan Laborers' Training and Apprenticeship Institute
11155 S. Beardslee Road, Perry, MI 48872-9774
517-625-4046 www.mi-laborers.org



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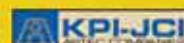
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