

SUMMER 2017

# CROSS SECTION



**PAGE 8:** Member Profile: Grand River Construction, Inc.

**PAGE 10:** Associate Member Profile: Klett Recycle, Inc.

**PAGE 18:** MITA Unveils Contractor Statue

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**COVER PHOTO:** Self-climbing core wall at Helen DeVos Children's Hospital in Grand Rapids. Photo courtesy of Grand River Construction, Inc.



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Floor pour at Notre Dame Stadium. Photo courtesy of Grand River Construction, Inc. See story about Grand River Construction and more photos on page 8.

## Executive Vice President



Mike Nystrom

**R**ecently MITA unveiled a 6-foot statue of a construction worker in front of the MITA headquarters in Okemos on May 9 to commemorate all of the hardworking hands that are rebuilding Michigan's infrastructure. Check out the information and photos starting on page 33, and thanks again to all the MITA members who helped make this project possible. The statue will serve as a reminder that we all need to continue to fight for increased infrastructure investment from the

state and federal government.

Regarding federal infrastructure funding, MITA Member James Burg, owner of James Burg Trucking, was among leaders of the American Trucking Associations (ATA) who met with President Trump and legislators this spring to push for increased federal funding for infrastructure. Jim talks about his experience on page 18. We are proud of his efforts as part of the ATA Infrastructure Task Force that ultimately will benefit the needs of the entire industry.

MITA recently added a new staff member to help the industry face another one of our biggest challenges: workforce development. Meet Ken Bertolini, MITA's director of workforce development, on page 16. Ken is steeped in industry experience and will develop a strong workforce development program to recruit new individuals into the construction industry.

In the area of current legal issues facing the industry, Eric Flessland of Butzel Long discusses differing site condition claims

in design build contracts in an article on page 15 titled "A Double Standard for Differing Site Condition Claims in Design Build Contracts?" Flessland contends that "whether analyzing a DSC claim, either the traditional design-bid-built contract or design-build contract, the same standard should apply."

And we also have an excellent overview on page 50 of the truck driver hours of service regulations and how the industry can maneuver within these seemingly strict requirements. Michael Leavitt of Sullivan & Leavitt, P.C., gives a great analysis.

If you have any questions about truck driver hours of service regulations, or anything else, please remember that MITA staff is only a phone call away at 517-347-8336. 📞



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Executive Vice President

mikenystrom@mi-ita.com

**ROB COPPERSMITH**

Vice President of

Membership Services

roboppersmith@mi-ita.com

**GLENN BUKOSKI, PE**

Vice President of

Engineering Services

glennbukoski@mi-ita.com

**LANCE BINONIEMI**

Vice President of

Government Affairs

lancebinoniemi@mi-ita.com

**RACHELLE VANDEVENTER, PE**

Vice President of Industry Relations

rachellevandeventer@mi-ita.com

**NANCY BROWN**

MITA Cross-Section Magazine Editor

Director of Communications

nancybrown@mi-ita.com

**MATT MCCLINTICK**

Director of Safety and Compliance

mattmcclintick@mi-ita.com

**MARIAM ROBINSON**

Director of Strategic Affairs

mariamrobinson@mi-ita.com

**KEN BERTOLINI**

Director of Workforce Development

kenbertolini@mi-ita.com

**DANIELLE COPPERSMITH**

Events Coordinator

daniellecoppersmith@mi-ita.com

**MARY MOODY**

Accounting Coordinator

marymoody@mi-ita.com

**ELLEN NYSTROM**

Receptionist

ellennystrom@mi-ita.com

**SARA SCHAIBLY**

Membership Services Coordinator

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**JANIS STRANG**

Executive Assistant

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## Grand River Construction, Inc.

**G**rand River Construction, Inc., headquartered in Hudsonville, considers themselves concrete and facility services specialists, with a long resume of projects across Michigan. The result of their teamwork includes building foundations, slabs and toppings, machine bases, press pit foundations, bridge construction and specialty structures. Other trades Grand River Construction performs work in include selective interior demolition, and general trades carpentry.

"We are family owned and we are successful because of the people

who work hard for us, from the estimators in the office to the laborers in the field," said Vice President John W. Kersaan, who was a carpenter by training and came up through the ranks at Grand River Construction sweeping floors. "I feel we have the best employees."

Other family members of the team include John's father, Bill Kersaan, who serves as president; his uncle, John is general superintendent; and his other uncle, Rich, is also a general superintendent. The company was founded by the late John Kersaan Sr. (John W.'s grandfather) in 1984 along

with his three sons, Bill, John B., Rich, and the now retired Stan Buell, the son-in-law of John Kersaan Sr.

The projects John, his family members, and other employees (a total of 160 at the peak of the season) are most proud of are the outcome of hard work and dedication that have become trademarks of the company. Currently the company is completing work on the football stadium at the University of Notre Dame, which involved pouring one million square feet of concrete flatwork. In the past, when John served as superintendent, the company was the concrete contractor for the Helen

◀ Mass foundation (1,600 cubic yard) pour at the new EJ in Elmira, Mich.



▶ **Grand River Construction, Inc.**

5025 40th Avenue  
Hudsonville, Mich., 49426  
Phone: 616-669-5611  
Fax: 616-669-3466  
[www.grandriverconstruction.com](http://www.grandriverconstruction.com)

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**William Kersaan, President**

**John W. Kersaan, Vice President**  
[jwkersaan@grandriverconstruction.com](mailto:jwkersaan@grandriverconstruction.com)

**Rich Kersaan, Superintendent**

---

*Member of MITA Since 2013*



▶ Bridge deck pour on Cheney Avenue over I-96 in Kent County.

DeVos Children's Hospital in Grand Rapids, the Grand Rapids Van Andel Arena, and the Grand Rapids Art Museum. The company was honored to have a photo of their Grand Rapids Art Museum project adorn the cover of the American Concrete Institute (ACI) Reinforced Concrete Design Manual. The museum was a difficult project, John said, but Grand River Construction was up for the challenges involved in this architectural concrete project.

"I like the nuts and bolts of working in the industry, and as a manager seeing the projects, such as the Art Museum, get built," said John, about working in the construction industry from Grand Rapids east to Ann Arbor, south to Indiana, and all areas of Michigan. "We do high profile

jobs, so it is extremely important that the projects reflect our quality, which is a setting point for the industry."

After Grand River Construction is awarded a contract, they form a team, which includes a quality manager, project manager and superintendent, John said. As the project proceeds and prior to starting each construction task, the superintendent coordinates detailed requirements and resources, site conditions, and communicates them through a meeting with all interested parties. Throughout the project, the quality manager performs on-site quality audits to ensure that the Grand River Construction quality system is operating effectively.

"We are also relentless in maintaining an accident-free workplace," John noted, "while we

continue to provide paramount quality and prompt completion." The National Safety Council made note of their attention to safety by honoring them with a Safety Leadership Award from 2010-2015.

John added that MITA has helped the company be successful by assisting with MDOT issues. In addition, he appreciates what MITA does in the area of workforce development.

The biggest challenge facing the industry in the future, and he knows he is not alone in saying this, is "replacing people as the baby boomers retire."

But given Grand River Construction's ability to enjoy a good challenge, they should do just fine. 🏗️

# Klett Recycle, Inc.

*From left to right:  
Andy Monroy and Dale  
Klett of Klett Recycle*



## Klett Recycle, Inc.

62994 Territorial Road  
Hartford, Mich., 49507  
Phone: 269-208-3714

**Dale Klett, President**  
daleklett@yahoo.com

*Member of MITA Since 2005*



**D**ale Klett's road to being a business owner began on a bike. At age 12, he rode that bike six miles to work for his Dad, Jim Klett, at Klett Construction in Hartford, Mich. His title at the time: janitor's assistant. In 2000, Jim sold the company to Aggregate Industries, and remained on the staff.

"When my Dad sold the company, he signed a non-compete," Dale said, "so I purchased the recycle portion of the business on my own, borrowing the necessary funds and struck out totally on my own at age 28. I met the challenges on my own finding out the hard way about keeping up with equipment maintenance to reduce costs, and finding work."

Now, 17 years later, Dale holds the title of president of Klett Recycle and has seven employees working for him during the season from April 1 to January 1. They handle recycling

of asphalt, concrete, limestone and slag throughout Michigan and northern Indiana with their portable plant equipment.

"We are never in one spot for very long," said the father of two (Tyler, age 11 and Ava, age 8) with his wife of 15 years, Tammy. "We move the recycling plant (one large portable plant and one smaller plant) 20 to 30 times year to perform custom crushing on site for our customers. It is all privately bid work for contractors, including Rieth-Riley Construction Co., Inc., and other MITA members."

What he enjoys about the business is seeing customers who were former co-contractors: "We subbed for them, or they subbed for us. It is nice to be in the loop; just a different loop."

That six mile bike ride at age 12 might have been taxing, but he looks back on those days fondly.

"I was lucky to grow up in the business," said Dale, who was

getting ready to go on a bear hunting adventure in Idaho in May with his son and other MITA members. "Now my son has been coming to MITA events since he was a small child. If he likes the business, he can do it, and work his way up – like father, like son."

A favorite MITA event is the annual conference in January, he said, because "there is no other event where all our current customers and all our potential customers are in one place!"

"We aren't the big guys in this business," Dale admitted, "but MITA treats us like anyone else. They don't treat us any differently than they would if we were a huge company."

This is Dale's second year serving on the MITA Board of Directors, and he is already reaping the benefits of his service.

"The more I go to meetings, the more I learn what I don't know," he said, "and that is a good thing!" 🏠



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Construction Risk Management Specialist  
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Brad Poggi, CAWC  
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## LETTERS TO MITA

Dear Mike:

Thank you for your participation at the League's Capital Conference. Future investment in infrastructure is something that we need to continue to spread the message on and we look forward to working with you on this critical issue to the State of Michigan.

**John LaMacchia**

Legislative Associate, State Affairs  
Michigan Municipal League

Dear Mike:

On behalf of the Michigan Municipal League Board of Trustees and the League staff, I would like to thank you for speaking at the "The Future of Asset Management in Michigan" Capital Conference session in Lansing.

We received extremely positive feedback from our members applauding the quality of our speakers and programming. Your participation contributed to the success of our conference!

**Daniel P. Gilmartin**

Executive Director & CEO  
Michigan Municipal League

Dear Nancy:

Thank you for the copies of the magazine. I think the cover and the article look great, but I have to admit my bias.

I also wanted to send you a quick note to thank you personally for making this a pleasant experience.

**Thomas Richeal**

Marketing Manager  
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# A Double Standard for Differing Site Condition Claims in Design Build Contracts?

By Eric Flessland, Butzel Long

The nearly universal opinion is Michigan must improve and replace its aging infrastructure – and fast! Faced with crumbling infrastructure and limited funding, public works owners have explored alternative (and faster) ways of delivering projects. A growing trend over the past two decades has been using the design-build method of delivery to complete numerous construction projects. With the design-build method, the government contracts with one party to perform both the design and construction portions of the project, as opposed to the traditional design-bid-build project delivery, under which the government contracts with a design professional for design and then solicits bids from contractors to complete construction. The notion is that design-build projects expedite project delivery. Unlike the traditional methods, the owner need not wait for and approve the design before it awards the construction contract. Instead, the design and document preparation can be competed in coordination with selection of subcontractors, and early stages of construction can begin before the final stages of design are completed.

Michigan's Differing Site Conditions Act – MCL 125.1591 to 125.1596 – does not distinguish between traditional and alternative project delivery methods. Under the Act, public works owners are required to include a DSC clause in “[a] contract between a contractor and a governmental entity

for an improvement that exceeds \$75,000.00.” This statute places the risk on the owner that the conditions at the construction site will differ materially from those anticipated or specified in the contract documents. Whether analyzing a DSC claim either the traditional design-bid-build contract or design-build contract, the same standard should apply.

In 2011, however, the US Court of Federal Claims applied a more exacting standard to a design-build contractor seeking to recover under the DSC clause than is typically applied to a contractor in cases involving the traditional construction method.<sup>i</sup> In a claim for type I DSC in a traditional contract, the contractor must establish these four elements:

(1) Reading the contract documents as a whole, a reasonable contractor would “interpret them as making a representation as to the site conditions;

(2) Reliance on the representations in the contract documents was reasonable;

(3) The contractor actually did rely on the representations in the contract; and

(4) The conditions at the site differed materially from those representations, which caused the contractor damages.<sup>ii</sup>

In *Metcalfe Const. Co., Inc. v. U.S.*, the Court of Federal Claims reviewed a DSC claim asserted by a design-build contractor. In denying the claim, the court seemed

to hold the design-build contractor to a higher standard than a traditional contractor by deviating from its usual application of its DSC jurisprudence. The *Metcalfe* court's analysis altered the contractor's burden under the first three elements, making it more difficult for the design-builder to recover.

This ruling was worrisome because Michigan has no reported decisions interpreting and applying the DSC clause. When novel issues arise before them, state courts have often turned to federal case law for guidance – especially the Court of Federal Claims and the Court of Appeals for the Federal Circuit because of their extensive experience construing, interpreting, and applying DSC clauses and claims arising the clause.



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Continued on page 25



Ken Bertolini, MITA's new director of workforce development; and Rob Coppersmith, MITA's vice president of membership services (second and third from the right) visited the Michigan Laborers' Training and Apprenticeship Institute in Perry, Mich., in May along with state legislators and institute staff.

## MITA Welcomes Director of Workforce Development

**M**ITA is pleased to announce the hiring of our new Director of Workforce Development Ken Bertolini, who will develop a strong workforce development program to recruit new individuals into the construction industry.

Most recently Ken was an instructor in the Department of Engineering at the Jerome J. Lohr College of Engineering Construction Management

Program at South Dakota State University. During his time there, Ken received the Engineering Educator of the Year Award. Previously, he served as assistant professor in the Construction Management Program at Minnesota State University.

Other key highlights of Ken's career experience include owning and operating a construction/

Continued on page 26



**Ken Bertolini**, MITA's new director of workforce development.



Rachelle VanDeventer

To contact Rachelle VanDeventer, email her at [rachellevandeventer@mi-ita.com](mailto:rachellevandeventer@mi-ita.com) or call the MITA office at 517-347-8336.

**T**his 2017 construction season, the Michigan Department of Transportation (MDOT) is piloting two new construction deliverables on three projects. The new deliverables are the Project Quantity Spreadsheet (PQS) and an overall view of the project in one PDF file, referred to as the Project PDF. The piloted deliverables are being provided as part of the Reference Information Documents (RID) and are included in addition to the MDOT standard contract documents (Plans, Proposals, etc.). The three pilot projects (eProposal Items 1705 032 – PQS only, 1706 033, and a September let project TBD) will focus on leveraging technology in the transportation field, as well as increasing the accurate communication of design intent to the field.

The PQS is an Excel spreadsheet that includes an overview of all project quantities/pay items which are included in the plan set. By means of Excel pivot tables and filters, the PQS provides

## MDOT Pilots Technology Advancements in 2017 Project Deliverables

the ability to manage project quantities/pay items in a variety of ways, including by sheet type, station range, and job number. This file is available at advertisement, so there may be useful ways to use the file at bid time, as well as during construction, for tracking quantities.

The Project PDF provides a whole project overview in one PDF file. There is one file for the profile view and one file for the plan view, and each file is delivered with bookmarks for the standard MDOT sheet views (e.g. Removal, Construction, Pavement Marking, etc.). The Project PDF also includes levels/layers, which can easily be turned on or off to customize a preferred view. In addition, once a preferred view is set, that view can be saved by adding a customized bookmark to the document.

The 2017 testing of the pilot deliverables is significant because MDOT has a long-term goal to replace plan and profile sheets within the standard plan set with the Project PDF, depending on the outcome of the pilots. Since the pilot concepts are new to MDOT projects, training resources for the pilot projects are readily available (<http://mdotjboss.state.mi.us/SpecProv/trainingmaterials.htm>). The MDOT-provided

instructional materials can be accessed online at any time and include instructions on printing the Project PDF in a variety of formats, including “current view” and printing to scale. In addition to training, MDOT will be monitoring the use of the new deliverables throughout the projects, and they will also be sending out a survey to all plan holders of the pilot projects to provide feedback.

As with any new concept or pilot, there may be many good intentions behind the change, but some of those concepts may not fully translate to the field. On the flip side, there may be some unexpected advantages discovered, as well. Any key findings from the 2017 pilots could have lasting impacts on future project deliverables, so please take a moment to review the pilot projects. Now is the time to voice your opinion. Please contact Rachelle VanDeventer ([rachellevandeventer@mi-ita.com](mailto:rachellevandeventer@mi-ita.com)) with any questions and to share any thoughts and/or concerns on the 2017 pilot deliverables. ⚠️



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## Trucking Tells Its Story at the White House



Members of the American Trucking Associations met with President Trump in March. Among those pictured here is Jim Burg, president of MITA Member Company James Burg Trucking of Warren, Mich.

### James Burg Trucking

[www.jbtc.net](http://www.jbtc.net)

#### MITA Member Meets with President Trump

MITA Member Jim Burg had the experience of a lifetime when he and other members of the American Trucking Associations (ATA) met with President Trump in March.

The team of association leaders and truckers visited the White House for a conversation about issues affecting the trucking industry, including health care.

"Trucking is the backbone of the nation's economy," said ATA

President and CEO Chris Spear in press release regarding the meeting with the President. "We employ 1 in 16 people in the U.S. Driving a truck is the top job in 29 states. Trucking moves 70 percent of the nation's freight and 56 percent of GDP. To grow the economy, we need to take care of the people that move America forward. The Affordable Care Act is just plain unaffordable. Replacing this law will help trucking employees, their families and our customers by lowering insurance costs, decreasing mandates, liabilities and administrative burdens, and providing access to quality care and patient choice."

The ATA brought 12 road team captains – elite professional



**James Burg**, president of James Burg Trucking Co. and co-chair of the American Trucking Associations Infrastructure Task Force.



That's Jim Burg, seated the second person to the left of the President, during a meeting in March with other members of the American Trucking Associations.

drivers with a combined 319 years of driving experience and 29.4 million accident-free miles – and 12 heads of some of the nation's most influential trucking companies, including Jim Burg from James Burg Trucking, based in Warren, Mich. For a photo shoot that was held before their meeting, the President sat in the association's "Trucking Moves America Forward" Image Truck, blew the horn, and asked questions.

For Burg, who is co-chair of ATA's Infrastructure Task Force, being in the White House and talking with the President was "phenomenal." Before he and others representatives from ATA entered the cabinet room, they had to turn in their cell phones, and he was seated next to his co-chair, David Congdon of Old Dominion Freight Line. Next to David was the President. To Burg's left was Kevin Burch, current chairman of the ATA and president of Jet Express of Dayton, OH. The press came in and listened, then left. The President thanked ATA for supporting him on health care, and said he wanted to

continue discussing infrastructure. He knows trucks are already heavily taxed and appreciates the industry is willing to do more.

"It was a brief meeting, but we expect to go back," Burg said. "ATA and the White House are already discussing setting up the next meeting, and we are still optimistic that we will have an infrastructure plan passed this year. We were not able to meet with the previous administration, so we are very pleased that this administration is willing to talk with us.

"The ATA originally had asked to meet with the President to discuss infrastructure funding, after he was elected and announced plans to spend a trillion dollars on infrastructure. Immediately after that announcement, ATA formed an infrastructure task force. We reached out to the White House to say that as they got closer to the budget discussion, we wanted to talk about infrastructure and show them our plan for roads and bridges and national growth. In March, they said: 'Yes, we want to meet with

you on that, but will you support us on health care'? We said yes!"

The infrastructure plan the ATA is pushing at the federal level includes raising gas user fees at the wholesale level, specifically a 20 cents a gallon increase over two years, which will raise \$60 billion a year. \$30 billion can pay back the money that is being transferred from the General Fund into the highway trust fund to keep it solvent, Burg said. The rest can be used to repair and improve our nation's roads and bridges.

"Our goal is to share our message with Washington on how important infrastructure is and how their inaction has cost us a nation," Burg said. "Congestion costs \$120 billion a year. Add to that \$80 billion in repair costs stemming from potholes and poor road conditions, and \$100 billion from injuries and accidents. The grand total cost of legislative inaction is over \$300 billion annually."

In fact, ATA has already shared that message throughout the Legislature in February, after they met with the Secretary of Transportation Elaine Cho, during her first official meeting.

"And of course we still need support from the states," Burg added. "Michigan has not done enough. I am proud to be an associate member of MITA, even though my construction revenue accounts for only four percent of my revenue, because I respect what MITA is doing at the state level to increase infrastructure funding. The industry is asking government to do collectively what we cannot do individually. This is the key function of government." 🚧

Written by Nancy Brown

# 2017 MITA Scholarship Recipients & Wild Game Dinner Fundraiser

By Mariam Robinson

**T**he MITA Scholarship Fund was established in 2016 to provide financial support to qualified applicants looking to pursue a career in the heavy/highway construction industry. Last year, two lucky individuals were the inaugural recipients. This year, a

total of six applicants vied for the three scholarships that were made available by the MITA Board of Directors.

This year's winners are excellent and very deserving candidates. Each of them is looking to pursue a career in the industry, and each

one has chosen a different path to accomplish that goal.



**Mariam Robinson**  
Director of Strategic Affairs

## Meet the winners of the 2017 MITA Scholarship



**Brian Pawluchuk** is pursuing a Master's in Construction Management at Eastern Michigan University.

He says, *"When I finish, I look forward to continuing to improve Michigan's roads and infrastructure."*

Continued on page 30



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Robert	Wilson	Mid Michigan Materials, Inc.	\$500.00
Andrew	Ross	Utility Contracting Company	\$300.00
Scott	Miller	Davis Construction, Inc.	\$1,000.00
William	Litz	Aristeo Construction	\$500.00
Alan	Chandler	VTC Insurance Group	\$500.00
M. Todd	Chartier	M.L. Chartier Excavating, Inc.	\$2,500.00
Blake	Zapczynski	Z Contractors, Inc.	\$500.00
Brooke	Zapczynski	Z Contractors, Inc.	\$500.00
Melvin	Stein	BCT Benefits LLC	\$500.00
Bob	Brannan	HYMMCO, LLC	\$1,000.00
Jeffrey	Sment	ISC, Inc.	\$1,000.00
Doug	Kaltz	M.U.E. Incorporated	\$1,000.00
John	Fortier	Bacco Construction Co.	\$1,000.00
Rusty	Rathburn	Rathco Safety Supply	\$1,000.00
Mark	Davis	Davis Construction, Inc.	\$1,000.00
Heather	Hendges	Hendges Diversified Management	\$500.00
Rachel	Snyder	BCT Benefits LLC	\$500.00
Toni	Vandenbos	Pete's Contracting, Inc.	\$200.00
B. Thomas	Stover	Toebe Construction LLC	\$1,000.00
Scott	Bazinet	Lowe Construction Company	\$2,000.00
Michael	Davis	Davis Construction, Inc.	\$1,000.00
Jason	McLelland	VTC Insurance Group	\$250.00
David	Marx	Champagne & Marx Excavating, Inc.	\$1,000.00
James	Zalud	The Isabella Corporation	\$1,000.00
Jim	Canham	Alfred Benesch & Company	\$200.00
Kevin	Brenner	Brenner Exc., Inc.	\$500.00
Linda	Schuring	J.L. Milling, Inc.	\$200.00
Steve	Maranowski	Spartan Specialties, LTD.	\$2,000.00
Joan	Shaffer	E.J.D. Transport, Inc.	\$500.00
Jeremy	Lemke	Give 'Em A Brake Safety	\$1,000.00
Marc	Van Til	Give 'Em A Brake Safety	\$500.00
Kathleen	Day	K. Day Excavating, Inc.	\$200.00
Lee	Johnston	Johnston Contracting, Inc.	\$500.00
Lisa	DiLisio-Lia	DiLisio Contracting, Inc.	\$1,000.00
Patrick	Dunigan	Dunigan Bros., Inc.	\$2,500.00
Jim	Kloote	J.E. Kloote Contracting, Inc.	\$1,000.00
Lynn	Harmala	Lawrence M. Clarke, Inc.	\$1,500.00
Mike	Pittiglio	Florence Cement Company, Inc.	\$2,000.00
Scott	Bazinet	Lowe Construction Company	\$800.00
Anthony	Rau	Rauhorn Electric, Inc.	\$1,000.00

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Fernando	Casasanta	C & P Construction Co., Inc.	\$500.00
Darrell	Kaltz	Kaltz Excavating Co., Inc.	\$1,000.00
Doug	Kaltz	M.U.E. Incorporated	\$5,000.00
Tom	Wagenmaker	Anlaan Corporation	\$5,000.00
Gary	Merkey	Jackson-Merkey Contractors, Inc.	\$750.00
Steve	Jackson	Jackson-Merkey Contractors, Inc.	\$750.00
Aden	Shea	P.K. Contracting, Inc.	\$500.00
Joe	Cook	Pro-Tec Equipment	\$250.00
Dan	Eriksson	Hoffman Bros., Inc.	\$7,500.00
Michael	Peake	Action Traffic Maintenance	\$500.00
Timothy "Mike"	Peake	Action Traffic Maintenance	\$1,500.00
Tom	Peake	Action Traffic Maintenance	\$1,500.00
Chris	Shea	P.K. Contracting, Inc.	\$2,000.00
Karl	Schweitzer	GM & Sons, Inc.	\$1,000.00
Kurk	Schweitzer	GM & Sons, Inc.	\$150.00
Mark	Johnston	Ajax Paving Industries, Inc.	\$5,000.00
Mike	Malloure	C. A. Hull Co., Inc.	\$7,500.00
Christopher	Churches	M&M Excavating Company	\$500.00
Thomas	Larabel	Ferris State University	\$300.00
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# SUMMER 2017: MITA PAC UPDATE

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Ken	Nowicki	M&M Excavating Company	\$500.00
Angie	Greenslade	Old Republic Surety Group, Inc.	\$125.00
J.W.	Fisher	Fisher Contracting Company	\$2,000.00
Tom	Wagenmaker	Anlaan Corporation	\$2,000.00
Ron	Measel	Ace Cutting Equipment	\$1,000.00
Pete	Scodeller	Scodeller Construction, Inc.	\$2,000.00
Dave	Pytlowany	AIS Construction Equipment Corp.	\$2,500.00
Ed	MacKenzie	E. T. MacKenzie Co.	\$5,000.00
Evan	Weiner	Edw. C. Levy Co.	\$1,000.00
Jim	Urban	Butzel Long	\$100.00
Jack	Dykstra	Jack Dykstra Excavating, Inc.	\$1,000.00
Bob	Nobbs	Edw. C. Levy Co.	\$500.00
John	Zito	Zito Construction	\$500.00
Doug	Walls	Eagle Excavation, Inc.	\$2,500.00
Dennis	Scully	Mapes Insurance Agency	\$200.00
Katie	Darrow	Darrow Bros. Excavating, Inc.	\$150.00

First Name	Last Name	Company	Donation
Brad	Lubahn	Brad Lubahn & Sons Heavy Underground LLC	\$500.00
Brian	Hoffman	Hoffman Bros., Inc.	\$5,000.00
Remi	Coolsaet	R. L. Coolsaet Construction Company	\$500.00
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Tom	Horton	Centurion Insurance Agency	\$200.00
Rod	Mersino	Mersino Dewatering, Inc.	\$1,000.00
Nicholas	Baker	Anlaan Corporation	\$2,000.00
Jacquie	Katterman	Katterman Trucking, Inc.	\$300.00
Eric	Morris	HNTB Michigan, Inc.	\$200.00
Daniel	Fredendall	OHM Advisors	\$300.00
John	MacInnis	JRM Consulting	\$200.00
Dave	Maas	Diversco Construction Co., Inc.	\$1,500.00
Marc	Van Til	Give 'Em A Brake Safety	\$500.00
Brent	Gerken	Gerken Paving, Inc.	\$500.00
Brian	Olesky	Pamar Enterprises, Inc.	\$500.00
Brad	Poggi	HUB International	\$250.00
Jeremy	Lemke	Give 'Em a Brake Safety	\$1,000.00



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## Double Standard...

Continued from page 15

So the *Metcalf* decision caused contractors, their lawyers, and legal commentators concern there may be a double standard for DSC claims.

In 2014, the Federal Circuit overturned the trial court's decision, and reaffirmed the meaning and purpose of the DSC clause.<sup>iii</sup> The appellate court rejected the government's argument that contractual language limited the scope of the clause in Design-Build setting. The same standard applies to a DSC claim, regardless of whether it arises in a traditional contract or design-build agreement. The notoriety of this decision creates a good opportunity to review DSC law and its application to public works contracts in Michigan.

### The Original Purpose and Policy Underlying the DSC Clause

Drafting a construction contract requires the owner to allocate the numerous risks involved in construction. One of the biggest decisions the owner must make is how to allocate the risk of differing site conditions. Under common law, if the contract did not address the risk of differing site conditions, the contractor had no recourse and could not recover for any additional costs caused by the site conditions. However, the federal government (like Michigan) is required by statute to include a contract clause placing the risk of differing site conditions on the government in all of its fixed-price construction contracts. If a contractor encounters

a type I or type II condition, the DSC clause allows the contractor to recover its additional costs and gives the contractor additional time to complete construction.

### Why the DSC Clause Is Required

In forming a contract, "a good construction contract is one which is a bargain to both parties, a contract in which one party does not gain unfairly at the expense of the other."<sup>iv</sup> Typically, contract principles hold that the party with

greater knowledge should bear the risk; however, subsurface differing site conditions are usually unknown to both parties. The federal government opted to include the DSC clause to ensure bidders they could rely on information provided by the government and not need a contingency. The government believed this would reduce its costs in the long term by eliminating contingencies and ensuring it pays for only work that is necessary and actually performed. If the contractor must bear the risk, bidders will either (1) not bid on the project (finding the risk is too great), (2) include contingencies in their bids, or (3) be required to conduct an extensive site investigation themselves to gain information regarding subsurface conditions.

All three results of the government forcing contractors to assume the risk of hidden and unknown conditions are likely to increase the government's costs. Clearly, the reduction in the number of bidders on a contract lessens price competition and the government's options in selecting a contractor. Contingencies in bids are also problematic because they vary from contractor to contractor, meaning the government is not likely to receive consistent bids.

The base bid price will be higher than if the contractors were protected from the risk. And because the actual conditions throughout the entire site are impossible to know in advance, the government may pay for contingencies when the site conditions are actually favorable to the contractor and increased costs are not incurred. Placing the risk of differing conditions on the contractor also fails to fulfill the principle that a construction contract should be mutually beneficial to

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## Welcome Director...

Continued from page 16

land development business in Holt, Mich., and serving as a board member for a local and state builder association in Michigan. He worked his way through Michigan State University as a general laborer digging trenches for an excavating company in Perry, Mich. Shortly

after graduating with honors from MSU, with a bachelor's and master's degree in building construction management, Ken was assistant site engineer for Christman Construction Company.

"Ken's wide range of experiences in the construction industry and higher education

will serve the needs of MITA's members very well," said MITA's Executive Vice President Mike Nystrom. "I am confident that those experiences, plus his passion for bringing excellent people into the construction industry, will be an asset to MITA's emerging workforce development initiatives."

Ken and his wife of 25 years, Katherine, have a daughter, 20, and a son, 17. Ken's hobbies include golf, fly fishing, keeping up with his children and his dog, Cooper. Originally from the Shelby Township area, Ken is glad to be back in Michigan.

"I am happy to be back in the state with the industry that I missed," Ken said. "I enjoy working with the students, and working with contractors, so this position at MITA is a perfect blend. I can still educate young minds and teach them about the wonderful industry that we have. Our industry has a great, hard working ethic, with a huge entrepreneurial spirit, and I look forward to serving the contractors while helping to attract new talent into the heavy construction industry." 



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## Double Standard...

Continued from page 25

the owner and the contractor. If the contractor encounters a differing site condition that increases costs beyond those allowed in the fixed-price contract, then the government gets the benefit of paying less than the actual costs of construction. If the contractor includes a contingency and the conditions are as stated in the RFP, the government pays for additional costs that were never incurred. Considering the impossibility of forming a perfect bid and the inexact nature of contingencies, leaving the risk on the contractor is unlikely to result in a mutually beneficial contract.

If owners require contractors to conduct extensive, prebid site investigations to uncover the subsurface conditions at the site, numerous issues arise that are likely to cost the government in the long-term. First, there remains the risk that the contractors would not thoroughly investigate or would use an inexperienced investigator, which is unlikely to avoid problems arising during construction. The cost of the investigation would also increase the contractors' overhead, which be accounted for in each bid proposal. The government would pay for the cost of the investigation when it selects a contractor. Given the high costs of conducting a thorough site investigation (especially given there is no guarantee the contractor can recoup the costs by winning the contract), some bidders may be unwilling to bid projects.

Instead, the government can conduct and pay for one investigation rather than forcing numerous investigations of the same site to be conducted; this happens when the required DSC clause is included in the government's contracts. The government conducts a soils investigation and allows the bidding

contractors to rely on it in formulating their proposals with the assurance that differing conditions uncovered during construction are covered by the DSC clause. The required DSC clause avoids the risks of contingencies and reduced bidding. The clause may also reduce the government's costs because it allows for downward price and time adjustments. For example, in *AFGO Engineering Corp. v. United States*, the government successfully claimed a credit under the clause where the contractor actually encountered less than half the rock it anticipated excavating in calculating its bid price.<sup>9</sup> While the clause ensures the government takes on the risk of costly differing site conditions, it also allows the government to recover if the contractor need not perform as much work as it anticipated in bidding the project.

The federal government is also required to insert a site investigation clause into all of its fixed-price contracts. Most state contracts include a site investigation provision in the General Conditions. This investigation avoids permitting a contractor to recover under the DSC clause due to conditions which are easily discoverable. Generally, site inspection clauses do not obligate a contractor to consult experts or undertake invasive testing in the Prebid

investigation. The clause basically just requires a visual inspection of the site (a site inspection means a "sight" inspection). This visual inspection ensure that obvious conditions do not go unnoticed in the bidding process, which may avoid future lawsuits. Still, failure to conduct a prebid site investigation may prevent a contractor from later recovering under the DSC clause.

### The Metcalf Contract Documents

*Metcalf Construction* received a contract to build 212 housing units on a Marine base in Hawaii for the U.S. Navy. The request for proposal (RFP) cited a government-commissioned report that found the soil at the construction site had slight expansion potential, meaning there was only a slight potential the soil could expand when wet – a result that might cause cracks in concrete foundations and other damage. The RFP, however,

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## OUTREACH SPOTLIGHT

Continued from page 20



**Nicholas Quinn** is pursuing a B.S. in Construction Management at Northern Michigan University.

He says, *"My end goal is to improve Michigan roads to make for safe travel and improve the economy."*



**Nick Andrews** is pursuing a B.S. in Civil Engineering at Michigan State University.

He says, *"I believe that it is time for our generation to build infrastructure that future generations of Americans will marvel at, take pride in and experience an improved quality of life."*

Continued on page 42

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## Double Standard...

Continued from page 28

said the government's soils report was for "preliminary information only," and the contract required the winning contractor to conduct an independent soil investigation after award. The RFP also incorporated Federal Acquisition Regulation (FAR) 52.236-2, Differing Site Conditions, which governs a contractor's right to obtain an equitable adjustment if it encounters conditions at a site that differ materially from those conditions (1) stated in the contract or (2) ordinarily encountered in the work provided for in the contract. The RFP also directed the contractor to use slabs on grade or pier with the concrete footings and specified that the contractor should refer to the "soils report for site preparation, foundation support, footing, slab and reinforcement requirements."

Before submitting its bid, *Metcalf* sought clarification of the requirement to perform an independent post-

bid soils investigation and the DSC clause. *Metcalf* asked if it should "infer from [the contract language] that any unforeseen soil conditions or variances from the Government's soils report [would] be dealt with by change order?" The government confirmed in writing the change order process would be used if there was a "major disparity" from the initial soils report.

After contract award and before beginning construction, *Metcalf* hired an independent geotechnical firm to perform another site investigation. The independent investigation revealed the soil had moderate to high – and not just slight – expansion potential. *Metcalf* immediately notified the Navy about this differing site condition and insisted on following the independent geotech's recommended design changes to address the discrepancy. The Navy, however, insisted that *Metcalf* follow the contract's

construction requirements, claiming the expansion potential assessments in the two reports were not materially different. After the project was delayed almost a year by these discussions, *Metcalf* decided it was too risky to wait any longer for the Navy to approve the recommended design changes. *Metcalf* implemented the changes, despite being aware of the danger in proceeding, possibly as a volunteer, without an approved contract modification.

*Metcalf* ultimately incurred more than \$4.8 million in additional costs to address the expansive soil problem. *Metcalf* filed a claim with the Navy's contracting officer for these and other damages, arguing that the Navy had materially breached the contract and the implied duty of good faith and fair dealing under the contract. After the

Continued on page 43



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These photos represent a bird's eye view of the sculpture creation process from start to finish: sketch, small clay model, armature, foundry mold.



*Michigan-based sculptor Bernadette Zachara-Marcos takes a minute to enjoy the final result of her hard work.*

# MITA Unveils Statue To Commemorate 2015 Road Funding Plan

## Statue Serves As Reminder To Continue Fighting For Infrastructure Investment

By Mariam Robinson



**O**n Tuesday, May 9, 2017, staff unveiled a 6-foot statue in front of the MITA headquarters in Okemos to commemorate the road funding plan that was signed by Governor Rick Snyder in November of 2015. Board members, donors, industry friends and supporters turned out for a celebratory luncheon and to hear remarks regarding the purpose and inspiration behind the statue's conception.

It is the hope that the daily reminder of the statue will encourage and motivate everyone who is working hard to move the industry forward. The on-going focus will be to ensure that infrastructure receives an appropriate level of investment on a regular basis. It is the goal of MITA and the industry that today's hard-working men and women will be able to build and sustain a stronger infrastructure for the next generation.

To that end, the plaque in front of the statue states: "Dedicated to the contractor in all of us. A reminder of all the hard-working hands that are focused on building Michigan's infrastructure for the next generation."

The entire process of commissioning and installing the statue took over a year to complete. The statue was sculpted by

Bernadette Zachara-Marcos, a long-time sculptor who resides in Honor, Michigan, with her husband, Randy. Bernadette was contacted through the Sculptor's Guild of Michigan, in an effort to give the commission to a Michigan-based artist.

The project would not have been possible without the green light from the MITA Board of Directors, as well as the contributions of many MITA members, industry supporters and sister organizations. A total of 43 companies, associations and groups donated to the project.

MITA would like to specifically recognize the following members for their help and generosity in making the final statue a success:

- Hoffman Bros., Inc. ~ For excavating the statue site.
- Superior Materials Holdings ~ For donating the concrete to prep the statue site.
- GM & Sons, Inc. ~ For donating the labor to prep the concrete for the statue site.
- Rauhorn Electric, Inc. ~ For donating custom-made light fixtures for the statue site.

### Fun Facts About The Statue Include:

- Final Weight: 225 pounds
- Final Height: 6 feet
- The statue is made out of silicon bronze: 90 percent copper & 10 percent silicon.
- The statue sits on a 775 pound granite base that was shipped to the United States all the way from India.
- The hardhat and vest worn by the statue were designed specifically to look like the hard hats and vests worn by MITA members on active jobsites, in order to give the sculpture an authentic and realistic quality.

Continued on page 34



*The dedication plaque that accompanies the statue in front of the MITA building in Okemos.*

*From left, MITA members Marc VanTil, (Give 'Em A Brake Safety), Anne Coursey (Champagne & Marx), Jamie Lemke (Give 'Em A Brake Safety) and Christine Davis, (Champagne & Marx) enjoy the sunshine at the unveiling luncheon.*



*MITA Board Member Scott Bazinet (Lowe Construction Company) and Anthony Rau (Rauhorn Electric, Inc.) enjoy a laugh under the tent.*



*From bottom left, Dale Klett (Klett Recycle), Chuck Mills (APAM), Del Rau (Rauhorn Electric, Inc.), Bob Adcock (Angelo Iafate Construction Company), Dan DeGraaf (MCA), Glenn Bukoski (MITA), and Jim Klett (Michigan Paving & Materials Co.) enjoy a friendly lunch together.*





Mike Nystrom (MITA), Bernadette Zachara-Marcos (sculptor) and Mariam Robinson (MITA) pose with the statue, commemorating over a year of collaboration on the project.

From left, Darrell Kaltz (Kaltz Excavating), Bill Bass (Michigan Laborers 1076), Doug Stockwell (Operating Engineers Local 324), Rob Coppersmith (MITA) and Lance Binoniemi (MITA) pose for a group shot.



From left, Geno Alessandrini (Michigan Laborers), Geno Alessandrini, Jr. (Michigan Laborers), Alex Zurek (Michigan Laborers), Marc VanTil (Give 'Em A Brake Safety), and MITA Board Member Brian Hoffman (Hoffman Bros., Inc.) listen to remarks at the unveiling.



MITA staff grabbed the opportunity to capture a staff photo at the luncheon. Missing from the photo are Janis Strang and Ken Bertolini. 🚧

## MITA INTRODUCES Member Milestone Advertising

**S**tarting with the Fall 2017 Cross-Section Magazine, MITA will be recognizing member anniversaries with commemorative advertisements. All MITA members are welcome to purchase ads to congratulate companies on their milestone achievements.

The following companies will be honored in the Fall 2017 Cross-Section Magazine:

**Hoffman Brothers, Inc. (celebrating 70 years in business)**

**TTL Associates (celebrating 90 years in business)**

**Strain Electric Co. (celebrating 70 years in business)**

**Rowe Trucking LLC (celebrating 10 years in business)**

**Kalin Construction Company, Inc. (celebrating 40 years in business)**

The deadline to reserve your ad is August 8. For pricing information and other details, please email MITA's Director of Communications and Cross-Section Editor Nancy Brown at [nancybrown@mi-ita.com](mailto:nancybrown@mi-ita.com) or call her at 517-347-8336.

*Thank you in advance for helping us honor MITA members!*

### Hubbell, Roth & Clark, Inc.

[hrcengr.com](http://hrcengr.com)

Hubbell, Roth & Clark, Inc. (HRC) has opened an office in Kalamazoo, the seventh location for the Bloomfield Hills-based civil engineering firm.

Located in Kingsedge Professional Park, 834 King Highway, the new office offers full-service civil engineering and provides services to municipal, industrial and private clients.

The firm counts the Kalamazoo Road Commission and the City of Kalamazoo among its clients.

"The new Kalamazoo office is a significant step forward to



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the continued growth of our 102-year-old firm,” said Nancy Faught, HRC executive vice president. “As a member of the community, we will have the ability to better serve our clients.”

HRC is a full-service consulting engineering firm providing planning, design and construction engineering to municipalities for roads, bridges, stormwater, water and wastewater treatment projects, traffic engineering, GIS, architectural, surveying, materials testing, plan review services, and grant funding assistance.

In addition to Bloomfield Hills and Kalamazoo, HRC has offices in Delhi, Detroit, Grand Rapids, Howell and Lansing. The company has retained ownership throughout

its history and descendants of its founders are still leaders in the firm.

To reach the office contact: Nancy Faught at [nfaught@hrcengr.com](mailto:nfaught@hrcengr.com), 248-454-6390 or Jesse Morgan at [jmorgan@hrcengr.com](mailto:jmorgan@hrcengr.com), 616-430-9708.

## **RBV Contracting, Inc.**

[rbvcontracting.com](http://rbvcontracting.com)

Detroit-headquartered, minority-owned construction firm, RBV Contracting, was being recognized as one of Michigan’s 50 Companies to Watch, and received the Government Contractor of the Year Award at the 2017 Michigan Celebrates Small Business Awards Ceremony May

4 in Lansing. The 13th annual awards ceremony was presented by Michigan Celebrates Small Business (MCSB), in partnership with the Michigan Small Business Development Center (MSBDC).

“When founding RBV, our leadership team agreed on the basic principal of offering clients the best practices in construction management, derived from over 100 years of combined team experience,” said Rodolfo “Rudy” Villarreal, president of RBV Contracting. “This foundation has proven successful in our industry, helping us establish ourselves positively with government clients and leading to excellent feedback.”

*Continued on page 39*

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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."



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517-625-4046 [www.mi-laborers.org](http://www.mi-laborers.org)



## MORE MEMBER NEWS

Continued from page 37

As a result, we have been directly awarded federal contracts totaling \$9 million, and we are trusted to handle projects involving complex installations on active airfields and renovations of secure areas.”

Michigan’s 50 Companies to Watch honorees are known for their entrepreneurial leadership, innovative techniques, creativity in the workplace and sustainable competitive advantage.

“For us, innovation means working towards transforming the traditional thoughts about construction contractors,” said Jim Foucher, RBV Contracting vice president. “RBV strives to innovate simply by doing the right things every day even when no one is watching.”

RBV has grown in recent years due to its hands-on approach towards assisting in the revitalization of Detroit’s comeback. According to the Bureau of Labor Statics, Wayne County is currently experiencing a 7.0 percent unemployment rate, which is the county’s lowest rate in years.

Professional and business services had the largest increase in annual employment out of all employment sectors within Detroit, adding a total of 18,400 jobs to the city since September 2015. Specifically, jobs within the technical services industry, such as RBV Contracting, added nearly 11,000 jobs to the city since September 2015. This increase equates to a 5.3-percent rise in employment within the professional and business services supersector.

RBV primarily looks to hire Detroit and HUBZone residents, in order to contribute to the city’s comeback and to provide local jobs. Because of their devotion to the city of Detroit, RBV has received support from the Small Business Administration,



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## MORE MEMBER NEWS

Continued from page 39

Procurement Technical Assistance Center and PNC Bank.

"Clients rely on a direct relationship with our team, as RBV typically self-performs over 75 percent of the work on site," Foucher said. "We offer each client a consistent RBV leadership presence on every project, including longer distance projects. We preach quality, not quantity."

To be recognized as one of Michigan's 50 Companies to Watch, businesses must:

- Be a privately held commercial enterprise that has not received the award in the past.
- Be past the startup phase.

- Employ six to 99 full-time employees.
- Have between \$750,000 and \$50 million in annual revenue or working capital from investors or grants.
- Have headquarters in Michigan.
- Demonstrate the intent and capacity to grow.

Michigan's 50 Companies to Watch honorees were selected by Michigan-based judges from the banking, economic development, entrepreneurship development and venture capital communities.

In order to receive the Government Contracting Award, recipients must be a client of the

Procurement Technical Assistance Centers (PTACs) of Michigan.

Award criteria includes profitable product or service niche and previous awards received.

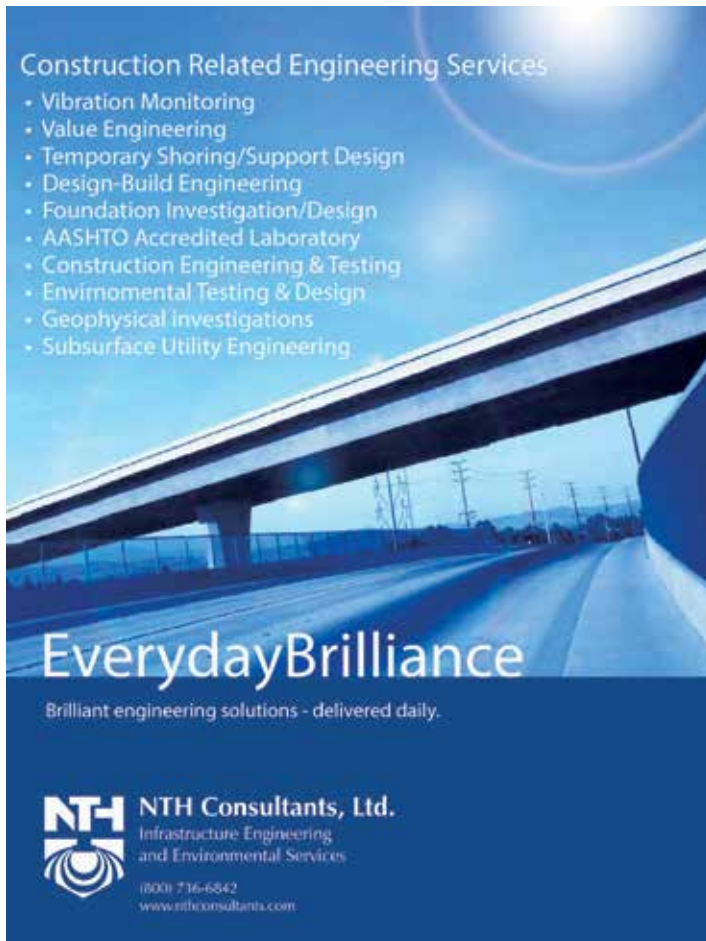
"Receiving these awards signifies that patience, persistence and proficiency produces results," Villarreal said.

For information about the awards, visit [michigancelebrates.biz](http://michigancelebrates.biz). For more information about RBV Contracting, visit [rbvcontracting.com](http://rbvcontracting.com).

### About RBV Contracting, Inc.

Established in March of

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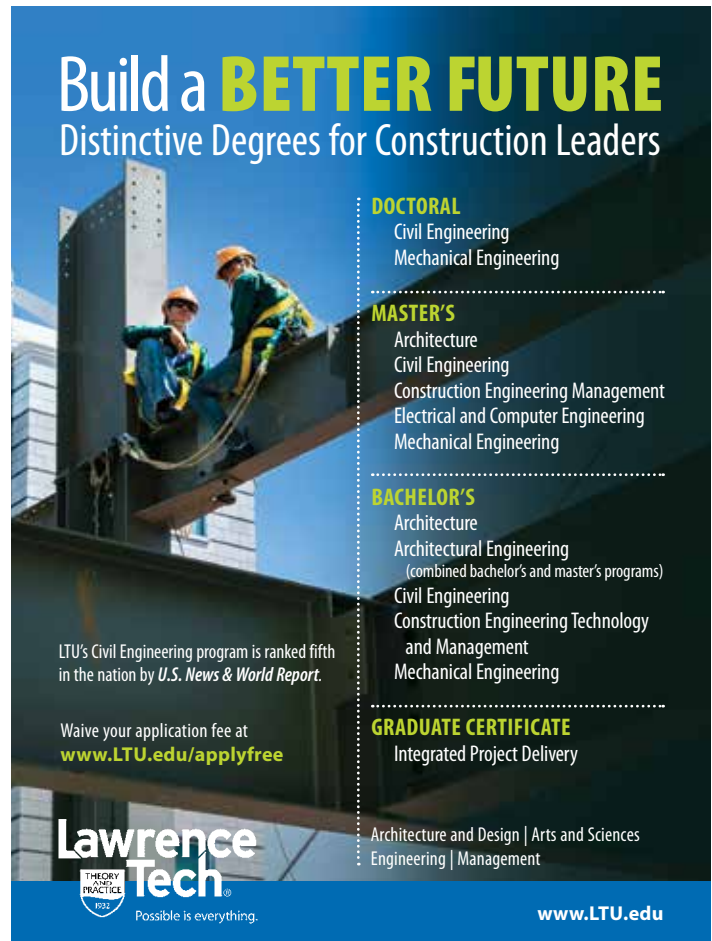
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## OUTREACH SPOTLIGHT

Continued from page 30

The MITA Scholarship Fund is a great way for the industry to invest in the next generation. It's important that members contribute to the success of the scholarship fund by considering a donation on an annual basis. The larger the scholarship fund is, the greater the opportunity is to support young people who want to successfully pursue a career in the industry.

This is where the 2nd Annual Wild Game Dinner comes in. Like the scholarship fund, this event is also in its second year and will serve as MITA's number one scholarship fundraising event. This event is a wonderful way to not only network and have fun with your fellow industry members, but to also raise money for a great cause and a long-term goal. Supporting the MITA Scholarship Fund as an industry is a great way to pay it forward and to demonstrate that today's members are supportive of tomorrow's industry leaders.

The Wild Game Dinner will be held at the Palazzo Grande in Shelby Township on the evening of Thursday, September 21, 2017. We hope you will consider attending, sponsoring and donating to this wonderful event. If you have questions on how to contribute or participate, please contact MITA's VP of Membership Services, Rob Coppersmith, at [roboppersmith@mi-ita.com](mailto:roboppersmith@mi-ita.com) or at 517-896-1495. 🚧

## MITA Scholarship Fund Memorial Contributions

On June 11, 2017, Kevin Folleth, vice president of Best Barricading, Inc., passed away. To honor his memory and legacy, Give 'Em A Brake Safety made a donation to the MITA Scholarship Fund in Kevin's name. If your company ever wants to make a memorial contribution in the name of someone in the industry who has passed away, please don't hesitate to reach out to Mariam Robinson, Director of Strategic Affairs, at [mariamrobinson@mi-ita.com](mailto:mariamrobinson@mi-ita.com).

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## Double Standard...

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contracting officer denied the claim, *Metcalf* sued in the U.S. Court of Federal Claims (trial court), and the Navy counterclaimed for liquidated damages due to *Metcalf's* delayed performance. The Court of Federal Claims found that *Metcalf* was not entitled to damages for its differing site condition claim, the Navy had not breached its implied duty of good faith and fair dealing under the contract, and the Navy was entitled to about \$2.6 million in liquidated damages.

### The Trial Court's Interpretation of the Contract Terms

The Court of Federal Claims found *Metcalf* had given proper notice. The Court reaffirmed there are no formal requirements of the notice – it just must be written and make the owner aware of the issue. Given the proper notice supplied by *Metcalf* and the fact that it took the Navy more than one year to actually deny the claim, the court found *Metcalf* was entitled to a 306-day extension to complete the project due to the government's failure to investigate the alleged condition. However, the court denied monetary damages, finding that *Metcalf* failed to

establish three out of the four elements for recovery under the DSC clause. The court's analysis and reasoning on these three elements suggested a significant shift in the treatment of DSC claims by design-builders.

First, the court found that the contract made no representation on the site conditions. The court held that a reasonable design-build contractor, reading the contract as a whole, would not interpret them as make a representation of the subsurface conditions because "the Contract required *Metcalf* to conduct an independent soil analysis [and so] *Metcalf* was on notice that it could not rely on the 'information only' report."<sup>vi</sup> *Metcalf* was entitled to rely on the report "for bidding purposes," the court said, but not in performing the project. The court therefore treated the contract as placing on the design-builder the risk and costs of dealing with newly discovered conditions different from those stated by the government before the contract became binding.

On the second element, the court found that, since *Metcalf* had experience contracting in Hawaii, it

could not claim that the conditions encountered were not reasonably foreseeable. In this Design-Build context, the contractor's prior knowledge of the subsurface conditions elsewhere in the state preempted the site-specific information in the soil borings.

The court also opined *Metcalf* failed to establish the third element – actual reliance on the contract's representations – because the contract only permitted bidders to rely on the government-provided soils report "for bidding purposes." Even though bidders were instructed to use the report for foundation requirements, the court reasoned *Metcalf* was on notice it could not rely on the report because it had to perform an independent soils investigation if awarded the contract. The court acknowledged that the conditions actually encountered differed materially from those stated in the government's report. However, given the failure to establish the first three elements, the court denied *Metcalf's* recovery.

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## Double Standard...

Continued from page 43

### The Federal Circuit Court Applied the Traditional Standards to the Design-Build Contract

*Metcalf* appealed, arguing that the trial court misinterpreted the contract's provisions governing its differing site condition claim. The Federal Circuit agreed and vacated the trial court's decision. In doing so, the Federal Circuit provided important guidance for all government contractors – including design-builders – about the government's use of broad disclaimer language regarding site condition reports as a basis to deny contractors' differing site condition claims.

### Reasonable Contractor's Interpretation

Under the first element of a DSC claim, the contractor must show that the contract documents contain either

an express or implied statement on the site's condition. This provision ensures that the government is only held responsible for representations it actually makes regarding the site conditions. An express statement makes a clear representation of the conditions the contractor can expect at the site. However, express indications are not the only representations in a contract. Often, design features and directions imply site conditions. Courts have stated that the contractor just needs to show "enough of an indication on the face of the contract documents for a bidder to reasonably not expect 'subsurface or latent physical conditions at the site differing materially from those indicated in [the] contract.'<sup>vii</sup>"

The contractor must show it reasonably interpreted the contract's indications – the contractor need not

be right but must be reasonable. If it turns out the contractor irrationally interpreted data or information in the contract documents, it cannot establish a claim under the DSC clause. Courts require contractors to consider all of the contract documents, and, if information is patently ambiguous, the contractor must seek clarification and cannot base a DSC claim on a known ambiguity. Bidders can reasonably extrapolate information from soil borings to predict the conditions across the site. Soil borings are of particular importance because they are the best indication of subsurface conditions and the specific information in them is favored by courts over more general descriptions of expected conditions based on secondary sources. Even past experience will not foreclose reasonable



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reliance on such soil borings.

The reasonably expected conditions in *Metcalf* were those stated in the government's soils report – soils with "slight expansion potential" – and in the specification that slabs on grade and/or pier should be used. Similar to other DSC clause cases where the contractor recovered, *Metcalf* initially relied on the government's soils analysis, but a subsequent independent investigation revealed conditions unsuitable for the initial design plan. The contract documents included both express and implied statements describing the conditions at the construction site. The provisions describing the soils report were express representations of the subsurface conditions at the site as they clearly described the soils *Metcalf* could expect throughout the site. And bidding contractors could conclude from the foundation and slab design specifications they would not have to

take expansive soils into their design and construction consideration.

*Metcalf* interpreted the contract documents representations as indicating that the soils at the construction site were not significantly expansive, and the design and construction processes would not need to compensate for expansive conditions. This interpretation follows the contract documents and is basically what the government's soils report stated. *Metcalf* did not have to make any inferences to establish its understanding of the documents. Given that actual soil borings and testing is the best indication of subsurface conditions and *Metcalf's* interpretation is a direct reflection of the express and implied indications, the interpretation is reasonable.

The trial court found *Metcalf's* interpretation of the contract documents unreasonable because the contract required the selected

contractor to perform an independent soils investigation. The trial court effectively treated the independent investigation requirement as an exculpatory clause preventing *Metcalf* from holding the government liable for information in the RFP. However, in overturning the trial court, the Federal Circuit noted nothing in the contract indicated to bidders the government had disclaimed the information in the initial soils report. The independent investigation clause did not state, broadly or specifically, that any information in the RFP was not warranted.

To the contrary, the government made those representations in the RFP and in prebid questions-and-answers for bidders' use in estimating costs and therefore in submitting bids, that, if accepted, would create a binding contract. The natural meaning

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## Double Standard...

Continued from page 45

of the representations was that, while *Metcalf* would investigate conditions once work began, it did not bear the risk of significant errors in the pre-contract assertions by the government about the subsurface conditions.”<sup>viii</sup>

Why would the government provide its commissioned prebid technical report to bidders if the government does not want contractors to make use of it in preparing bids? Design-build contracts requiring an investigation post-award does not bear on the reasonableness of contractor’s interpretation of the express and implied indications at the time of contracting.

### Reasonable Reliance / Conditions Reasonably Unforeseeable

The DSC clause requires the

changed condition to be subsurface or latent – something not foreseeable. If the condition could have been discovered by a reasonable site investigation, the contractor cannot recover under the DSC clause. And if the contractor fails to consider the information in the RFP and determines its bid price by only using a portion of the soil borings available it cannot recover if it encounters a condition specified in the unviewed documents. A contractor cannot argue it reasonably relied on documents it never reviewed.

Courts typically look at all of the information available at the time of bidding and determine whether a reasonable and prudent contractor could have foreseen the alleged changed condition. For example,

where contract documents included soil borings indicating the strength of the soils at the construction site and nothing to indicate otherwise, the softer conditions actually encountered were not foreseeable, and the contractor reasonably relied on the contract’s indications. The contractor in this example made a reasonable site investigation before submitting its bid, and could not be expected to discover the subsurface conditions based on the visual inspection.

Here, the expansive conditions *Metcalf* encountered were subsurface, type I conditions because the actual conditions at the site differed from those described in the contract documents. A reasonable site

Continued on page 48

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# 2017 Calendar of Events

For more information and to register for these events, log on to [www.mi-ita.com/events](http://www.mi-ita.com/events).

## AUGUST 17

MITA Central Golf Outing  
Eagle Eye Golf Club,  
East Lansing

## SEPTEMBER 14

MITA Board Meeting  
Country Club of  
Lansing, Lansing  
8 a.m.

## SEPTEMBER 21

Wild Game Dinner  
Palazzo Grande,  
Shelby Township  
5:30 p.m.

~

## DECEMBER 8

MITA Board Meeting  
Country Club of Lansing  
9 a.m.

~

## DECEMBER 8

MITA Central Holiday Party  
Country Club of Lansing  
11:30 a.m.

~

## DECEMBER 12

MITA Western Holiday Party  
The Waldron Public House  
Grand Rapids  
11:30 a.m.

~

## DECEMBER 14

MITA Metro Holiday Party  
Somerset Inn, Troy  
11:30 a.m.

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## Double Standard...

Continued from page 46

investigation could not have uncovered the latent, expansive conditions. Only testing by a geotechnical engineer could have uncovered the condition and this is beyond a mandatory prebid site inspection. Looking at all of the information in the RFP, none of the government provided information indicated anything other than the possibility of slight expansion.

The trial court found the subsurface condition was foreseeable based on past construction performed in Hawaii. But a contractor should not be expected to conclude, contrary to all indications in the contract documents (and the purpose of the DSC clause), that the actual soils report is wrong based on secondary information from another construction site in the state. Otherwise, every contractor in Michigan must

assume squeezing blue clay will be encountered because it is a soil condition encountered in portions of the state even if the government's boring logs indicate stiff brown clay is present. This undermines the purpose of the government taking the risk of differing site conditions by forcing contractors to include contingencies if they have ever heard of a differing site condition in the general area of the construction. Here, the contract documents indicated nothing other than slight expansion potential. The subsurface conditions in *Metcalf* were otherwise undetectable by a reasonable site investigation, and the contractor relied on government-provided soils information to its detriment.

### In-Fact Reliance

After proving reasonable reliance on the contract indications, the contractor must show it actually relied on those indications in formulating its bid. The trial court found that *Metcalf* failed to establish actual reliance because it could only use the contract information for bidding purposes and not during construction. The trial court failed to realize this amounts to in-fact reliance because *Metcalf* relied on the information at the time of bidding. In-fact reliance is established at the time of bidding; otherwise a contractor must rely on information it knew was incorrect during construction to recover. *Metcalf* relied on the contract documents to estimate the costs of design and construction on slightly expansive soils. *Metcalf* received assurances

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in both the government's response to its request for information and in the contract's directive to consult the soils report for "site preparation, foundation support, footing, slab and reinforcement requirements."

The contract documents induced bidders to rely on the government's representations on the subsurface conditions and *Metcalf* did so, establishing actual reliance. Left in place, *Metcalf's* standard would have created a virtually impossible hurdle for a design-builder to overcome to recover for differing site conditions. Essentially, it would have punished the contractor for relying on information it is typically allowed to depend on in the traditional construction model. In-fact reliance can only be viewed at the time of bidding. Otherwise, a contractor who uncovers a detrimental condition must show it still relied on the initial, incorrect information during construction to recover. Such a high standard would have likely induced design-build bidders to include contingencies in their bids, which is contrary to the intent behind the clause.

The Federal Circuit overruled the trial court's misinterpreted reliance standard:

The conclusion is not changed by the statement in a revised RFP that the expansive-soil report was "for preliminary information only."... That statement merely signals that the information might change (it is "preliminary"). It does not say that *Metcalf* bears the risk if the "preliminary" information turns out to be inaccurate. We do not think that the language can fairly be taken to shift that risk to *Metcalf*, especially when read together with the other government pronouncements, much less when read against the longstanding background presumption against finding broad disclaimers of liability for changed conditions.<sup>ix</sup>

## Material Difference

Finally, the contractor must present evidence of the difference between the conditions indicated in the contract and those actually encountered. This can be done by showing that different methods had to be employed or more work had to be done to complete the project. The contractor need not prove an increase in its costs, but this may affect the amount the contractor can recover if it successfully establishes its DSC claim. *Metcalf* established a material difference by showing it had to change its design and use a different method of constructing the project's foundations. The Federal Circuit did not address this factual finding by the trial court when it vacated the lower's ruling on liability.

## Consistent Application of Uniform Standards for DSC Claims

Applying a higher standard to design-build contractors would have undermined the purpose behind allocating the risk of differing site conditions to the government through the DSC clause. In utilizing a DSC clause, the government hoped to generate more competition by taking on the risk itself and encouraging contractors who otherwise could not afford the risk to bid. Had the Federal Circuit not overruled the lower court, *Metcalf* might have discouraged contractors from bidding on design-build contracts because they would be unwilling to assume the risk of differing site conditions or to invest in an extensive Prebid subsurface investigation. By employing a higher standard in design-build construction, the court would have discouraged risk-adverse bidders who would otherwise bid if in traditional construction. Essentially, the negative effects the government sought to avoid by requiring a DSC clause would have likely materialized in the design-build context. Fortunately,

the Federal Circuit recognized those detrimental effects, and adhered to the long-standing principles applicable to DSC claims.

The design-build method is an important alternative construction method for the federal and Michigan governments. Government spending is constantly criticized, yet so is the condition of the nation's failing infrastructure. Utilizing the design-build method may help the state and federal government stretch its budget and complete more projects more efficiently. Hopefully Michigan Courts will follow this influential federal court, and reject any argument applying heightened standards to design-build contracts. Michigan Courts should continue to enforce the DSC clause as the Legislature intended regardless of whether the clause is in a design-build contract or more traditional design-bid-build scenario. Design-build construction may not be appropriate for all construction projects; however, it should be recognized as a valuable alternative that can provide great benefits to the state government. 🚧

<sup>i</sup> *Metcalf Construction Co., Inc. v. United States*, 102 Fed. Cl. 334 (2011).

<sup>ii</sup> Some courts break these four elements down further and conduct a six-part examination. See *Gleason Construction Company v. Cascade Township*, 2001 U.S. Dist. LEXIS 4373 (W.D. Mich. 2001). Courts using either the four-part or six-part test conduct the same inquiry to determine whether the plaintiff established a DSC claim. Compare *Int'l Tech. Corp.*, 523 F.3d at 1348-49, with *Youngdale & Sons Constr. Co. v. United States*, 27 Fed. Cl. 516, 528(1993).

<sup>iii</sup> *Metcalf Construction Co., Inc. v. U.S.*, 742 F.3d 984 (2014).

<sup>iv</sup> *Collier, Construction Contracts* (Prentice Hall, 3rd Ed., 2000), p. 56.

<sup>v</sup> *AFGO Eng'g Corp. v. United States*, 227 Ct. Cl. 730, 733 (1981).

<sup>vi</sup> *Metcalf*, 102 Fed. Cl. at 354.

<sup>vii</sup> *Foster Construction C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 8751 (Ct. Cl. 1970).

<sup>viii</sup> *Metcalf*, 742 F.3d at 996.

<sup>ix</sup> *Id.*

### Contact:

Eric J. Flessland  
Butzel Long, PC  
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# Understanding **Hours of Service Rules** and Electronic Logging Device Mandate for Michigan Transporters

By Michael J. Leavitt, Esq. — Sullivan & Leavitt, P.C

## OVERVIEW

Considerable confusion exists amongst transporters of construction equipment and materials as to whether or not drivers are required to maintain log books while operating solely within the State of Michigan. The Federal Motor Carrier Safety Administration's mandate that electronic logging devices ("ELDs") are required to record duty status for all commercial transporters by December 18, 2017 of this year adds to this confusion. This article is intended to help answer many of the questions Michigan construction transporters have

regarding record of duty status and the use of ELDs.

## STANDARD HOURS OF SERVICE RECORDING REQUIREMENTS

The Federal Motor Carrier Safety Administration ("FMCSA") limits the number of hours that commercial motor vehicle drivers can work and drive. The hours of service rules mandated under CFR 395.1, adopted by Michigan, apply to any driver who operates a commercial motor vehicle. Under CFR 395.3, a driver:

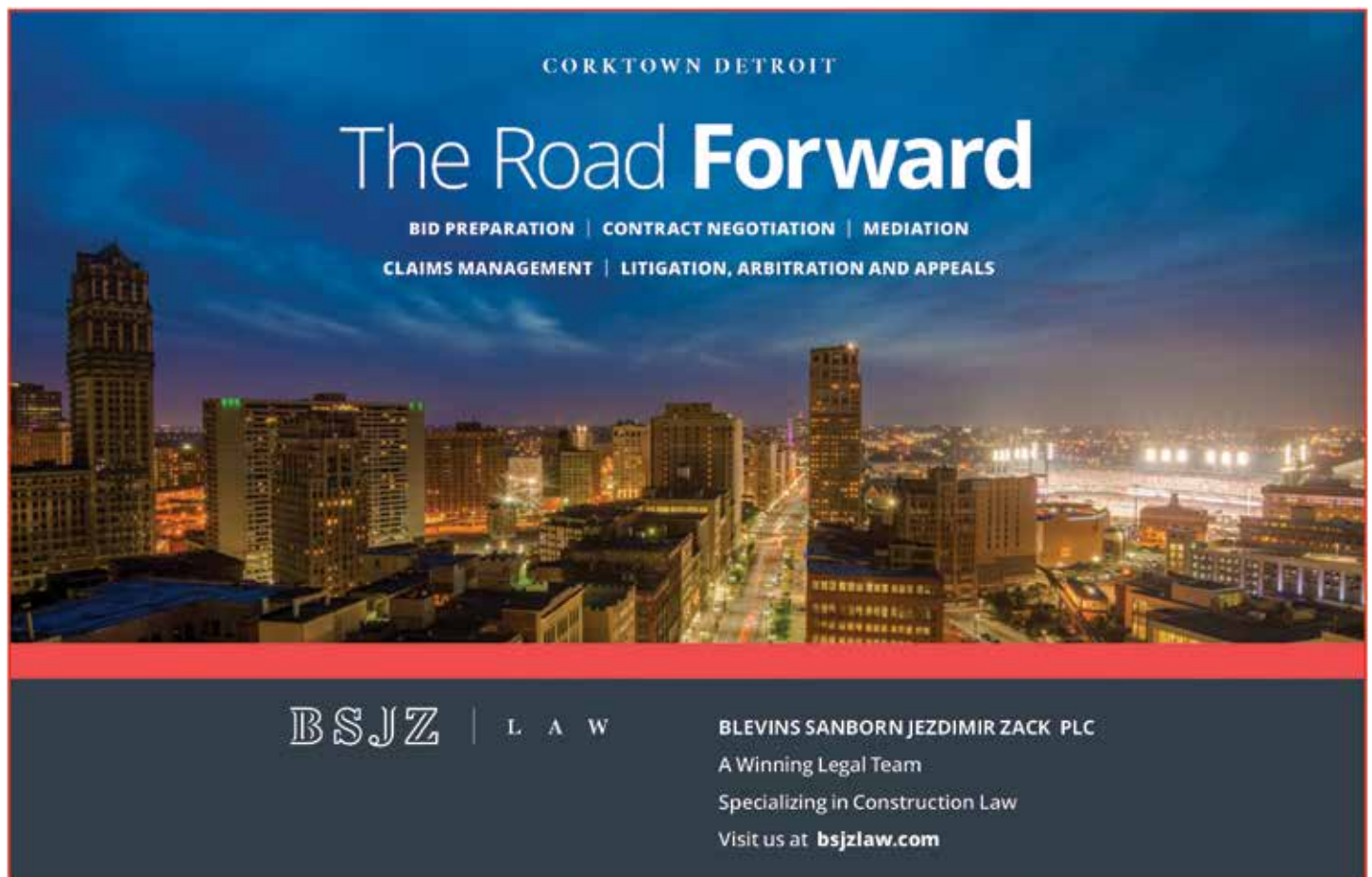
- May drive 11 hours following 10

consecutive hours off-duty;

- May not drive beyond the 14th hour after coming on duty (the 14 hour calculation begins when a driver comes on duty and includes all off-duty time, driving time, on-duty not driving time, and all sleeper berth time of less than 8 hours);
- May not drive after 60/70 on-duty in any 7/8 consecutive days; and
- Must take 34 consecutive hours off duty before being able to drive for the next 60/70 hour period.

Drivers who are required to

Continued on page 52



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**W**ork continues on the Fraser sinkhole project in Macomb County, which is formally known as the Macomb Interceptor Drain Drainage District (MIDDD) PCI-12A 15 Mile Road Recovery Shaft. The contractor on the project is Dan's Excavating, Inc., with major subcontractors Mersino, Inland Waters Pollution Control, Inc., Rotor Electric, Malcolm Drilling and Doetsch Environmental Services.

Dan's Excavating, Inc., began their work as the contractor on the project March 20 of this year, and their estimated finish date is this fall. The project, with a contract bid of \$32.7 million, involves the installation of a temporary earth retention system to excavate and repair a collapsed 11-foot-diameter combined sewer that affects over 600,000 residents.

An emergency response in Fraser began on December 24, 2016 when a homeowner heard strange noises caused by the collapse of the sewer. The 100-foot-wide, 250-foot-long sinkhole caused the evacuation of over 20 homes. Governor Snyder declared a state of emergency and three homes were eventually condemned. 🚧

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## Hours of Service Rules...

Continued from page 50

complete a daily log book must take a 30 minute rest period within 8 hours of any previous off duty period before continuing to drive. Finally, drivers must be off duty for 10 consecutive hours before returning to duty to begin work the following day.

### LOG BOOK REQUIREMENTS

Under CFR 395.8, all commercial motor vehicle drivers must record their duty status using a daily log book, the entries must be accurate and legible, employers must maintain for review all drivers' logs for the previous 6 months and employers are required to maintain and review supporting documents to verify that the logs are accurate and complete.

### ELECTRONIC LOGGING DEVICE MANDATE

The FMCSA has implemented a mandate requiring electronic logging devices to be utilized by all commercial transporters on or before December 18, 2017. The mandate will apply to commercial drivers who are currently required to keep paper records of duty status ("RODS"). Drivers who are required to keep RODS in 8 or more days out of every 30 days must convert to implementation the ELD versus utilizing current paper logs by December 18, 2017. An ELD is technology that automatically records a driver's driving time and other hours-of-service data. This allows easier, more accurate recordkeeping. An ELD monitors a vehicle's engine to capture data on whether the engine is running,

whether the vehicle is moving, miles driven, and duration of engine operation. Law enforcement can review a driver's hours-of-service by viewing the ELD's display screen, located in the truck or from an ELD printout. This is the general rule. Exemptions to this rule which in all probability apply to your operations will be discussed further in this article.

### WHO IS EXEMPT FROM THE ELD RULE?

The following drivers are exempt from the mandatory ELD installation mandate:

- Drivers who qualify for the short haul operations exemption pursuant to CFR 395.1(e);
- Drivers who use paper RODS for not more than 8 days out of every 30-day consecutive period;
- Drivers who conduct drive-away, tow-

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away operations, when the vehicle being driven is the commodity being delivered; and

- Drivers of vehicles manufactured before 2000.

### SHORT-HAUL OPERATIONS EXEMPTIONS

Pursuant to CFR 395.1(e), a driver operating a commercial vehicle which requires a CDL to operate, does not have to complete a daily log, and would in turn be exempt from the ELD recording requirements if he or she:

- Following 10 consecutive hours off duty, does not drive more than 11 hours, and
- Operates within a 100 air-mile radius of the normal work reporting location, and
- Returns to the work reporting location and is released from duty within 12 hours after coming on duty.

Although short haul operations, for which it is assumed most of the readers to this article would qualify, are exempted from the log book requirement, an employer must still keep a daily record of each driver's hours of service such as timecards and/or timesheets to verify qualification for the short-haul exemption hours.

If your operation fits under the short-haul exemption, adopted by the State of Michigan by reference, then your operations do not have to maintain paper logs nor would be required to install ELDs.

Drivers that are not required to use a log book, such as short-haul operation drivers, are not obligated to take the 30-minute break required by the FMCSA regulations for drivers required to keep a log.

Short-haul operation drivers otherwise exempt who on rare occasions travel outside the 100 air-mile radius or are on duty longer than 12 hours in any given day, have to maintain paper logs, unless those same drivers deviate from their short-haul operations for more than 8 days out of every 30-day consecutive period, at which point ELDs

would have to be utilized.

For those carriers who haul pavement materials, construction equipment, and construction maintenance vehicles, and said property is being hauled to or from an active construction site within a 75 air-mile radius of the normal work reporting location of the driver, then under CFR 395.1(m), the 34 hour restart rule is reduced to 24 hours permitting the driver to begin the new 7/8 consecutive work period faster.

### SPECIAL MICHIGAN SEASONAL CONSTRUCTION EXEMPTION

Pursuant to MCL 480.15, Michigan

motor carriers operating entirely in intrastate commerce, are allowed to utilize drivers engaged in seasonal construction activities 70/80 hours during any 7/8 consecutive days and those drivers may drive an extended 12 hours during an extended 16 hour tour of duty. These seasonal construction drivers must still comply with requirement for 10 consecutive hours off-duty rule between each tour of duty.

Michigan construction drivers that fit under this seasonal construction exemption are required to maintain logs on the days that they exceed the short-

Continued on page 58



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## Hours of Service Rules...

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haul operation exemption requirements, by operating beyond a 100 air-mile radius of the normal work reporting location, and/or being on duty more than 12 hours for that day after coming on duty. On those occasions, seasonal construction drivers would not qualify for the short-haul operation exemption, and for those days only, they would have to maintain RODS logs. However, as long as those same drivers do not exceed driving beyond the short-haul operation exemption for more than 8 days out of every 30-day consecutive period, they will only be required to maintain paper logs versus the new, more expensive ELD requirement as mandated by the FMCSA, which has been fully adopted by reference by the State of Michigan.

### UCR-1 REPORTING AND AFFECT ON ELDs

If your operations conduct both interstate and intrastate travel, the Unified Carrier Registration form

(UCR-1) requires that all vehicles used intrastate and interstate by motor carriers be listed on the registration application and renewals, however, those vehicles used exclusively in intrastate transportation operations are removed from the reporting requirements of the UCR-1 registration. Based on this distinction, it would appear that the RODS log book requirements as well as the ELDs mandate would not apply to those intrastate vehicles in your fleet unless those same vehicles are driven beyond the short haul exemption parameters more than 8 days in any 30 consecutive day period. Unfortunately, the FMCSA is unclear at this point as to whether this interpretation is correct since the issue has never been addressed before. Any vehicles of your fleet that conduct interstate operations would with certainty be required to maintain logs currently as well as complying with the ELD mandate by December 18, 2017.

### CONCLUSION

Every construction transporter whose business uses commercial motor vehicles over the public highways must be aware of the RODS log reporting requirements and must further determine whether those requirements apply to their operations. Most construction transporters will meet the short-haul operations exemption requirements and will not have to maintain log books. Those intrastate drivers who exceed the short-haul operations exemption requirements infrequently, may still avoid compliance with converting to the new ELDs system as long as those drivers do not have to keep paper RODS for more than 8 days out of every 30-day consecutive period. If not, then the ELD installation mandate will apply. 

*Sullivan & Leavitt, P.C. has been a leading advocate for the heavy transportation and related industries for over 60 years. Michael J. Leavitt, Esq., handles trucking compliance enforcement section. He can be reached (248) 349-3980, Ext. 208.*

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