

WINTER 2022

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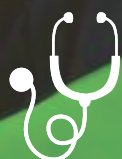
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On The Cover

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CONTENTS

- 6 MITA Board Of Directors
- 8 Member Profile
- 12 Associate Member Profile
- 14 Comment — Acting Executive Vice President
- 16 Comment — Vice President Of Government Affairs
- 17 PAC Update
- 18 Legislative Q & A
- 20 Comment — Vice President of Industry Relations
- 24 Comment — Director of Safety and Compliance
- 26 Legal Issues
- 29 2022 Events
- 36 Did You Know?
- 40 Member Project Profile — Fonson Company, Inc.
- 42 MDOT News
- 46 Underground Spotlight
- 52 Calendar of Events
- 54 ARTBA NEWS



2022

EVENT CALENDAR

PAGE 52

WHAT'S IN
STORE FOR
2022!

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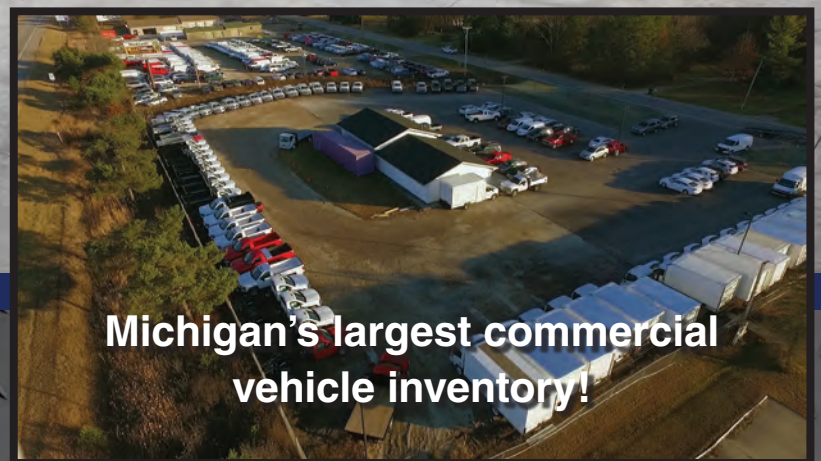




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Whenever you have the pleasure to talk to Steve Jackson, President of Jackson-Merkey Contractors in Muskegon, you get a clear picture of what the life of a seasoned underground contractor with 37 plus years in the industry is really like: never a dull moment.



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Constructing a temporary peninsula in Lake Michigan as part of a water intake construction project in Benton Township.

"The other day, my work had already been hectic and all of a sudden, for a project we had bid, the engineer called and we had to get ready to meet with the owner at 9:30 a.m. the next day," recalls Steve, who served on the board of Associated Underground Contractors (AUC), and was Board President right before AUC merged with the Michigan Road Builders in 2005 to become MITA. "It is always one of those things. That morning, I also had a United Way Finance Committee meeting at 8 a.m. Today, the County called us and they have a force main issue that is broken or plugged. The life of an underground contractor is never dull, but I don't need any more gray hair."

The gray hair started back in 1984 when Steve and Gary Merkey decided they would try their hand in the business of heavy construction after having worked in the field for another company for nearly 10 years prior. As of 2021, they have around 20 employees, having cut back during

the 2008 recession. They would like to add more employees but, like others in the industry, it is hard to find good employees. "We can buy the iron," Steve jokes, "but it's much harder to find additional employees to put in it."

"We are the type of company where everyone pitches in and helps out wherever needed," he says. "We have many long-term employees who are talented and committed and have been with us since the beginning, including Paul Reenders, Foreman, 34 years; Greg Edmondson, Operator, 33 years; and Scott Hodges, Superintendent, 28 years. We treasure the fact that they stuck with us even when things were slower. When things were slower following the recession, we worked as far as Bay City and Milwaukee to keep our people working."

Today, Jackson-Merkey Contractors, Inc., focuses their work mainly within a 50-mile radius of Muskegon and specializes in water, sanitary sewer, storm sewer and earthwork projects, primarily for public sector

municipalities, counties, MDOT, and other entities.

Steve's favorite project this year is a job for White Cloud Sherman Utilities Authority, which started in the late fall of 2020 and involves rebuilding 14 sewer pump stations. The project has gone smoothly because of the collaboration between everyone involved, Steve says, including the engineer – Spicer Group – and the owner. Jackson-Merkey also completed a multi-year project for the City of Newaygo, featuring pump stations and



In another partnership with West Michigan Shoreline Regional Development Commission, JMC overhauled Veteran's Park in Muskegon installing a pump

wastewater storage lagoon upgrades.

Another recent project, which began in 2020 and will be completed in 2021 for the West Michigan Shoreline Regional Development Commission, involved moving 100,000 cubic yards of earth on a 54-acre green infrastructure site along the Muskegon River. The project included removing and disposing of

contaminated soils and completely reshaping the area to support wildlife rehabilitation with native planting and habitat construction, transforming a site that was previously a celery farm into a thriving wetland.

"We do such a wide variety of work that there truly is never a dull moment, which actually makes it nice," says Steve, who has been married to his wife, Deb, for 47 years. They have three grown children: Patrick, who works as Jackson-Merkey's Director of Operations; Tracey, who works in

that we couldn't get done."

Steve was quick to point out that the business would not be where it is today without strong partners and a support network in the industry. Atop that list for him is his business partner and close friend, Gary Merkey. Jackson and Merkey first met on the track team in high school, which is fitting as they have been running their business together for nearly four decades. Steve has also relied on the soon to be retired Glenn Bukoski, P.E., at MITA for MDOT issues over the years.

"Glenn has always been helpful," Steve says. "We also appreciated the help we have received from other MITA staff. It is nice being a MITA member. Greg Brooks did a great job on our safety training this spring. Both through our internal efforts and with the support of people like Greg, we have never had a serious accident in our 37 years of operation. We have a good safety record because we have good workers who are safety minded.

That's the only way they want to work."

Steve also says that he appreciates his time on the Board of Directors because he learned so much about the association. "It is good that AUC became MITA, because so many contractors perform dual work – both underground and road." For Jackson-Merkey that transition mirrored their own story, starting with deep roots in the underground business and then naturally expanding into roadwork operations as well.

In reflecting on their journey and looking to the future, Steve shared how happy he is to have his son, Patrick, and the latest addition to the JMC team, Nick Ginsberg, Estimator, in the business and prepared to carry on Jackson-Merkey's legacy for decades to come. "Patrick and Nick will be the ones to lead the next chapter for the business and then Gary and I can slow down (but likely never retire), and they can get some of the gray hairs," Steve jokes. **CS**



station to facilitate more controlled water levels and reshaping the wetland area to promote a healthier habitat.

finance in Chicago; and Stephanie, who works in the area as a second-grade teacher. "We are willing to tackle projects that are more challenging and complex. It can make for sleepless nights, but when you look back after completing those projects it's satisfying to see what you accomplished. We have never had a project in 37 years



Working on wastewater lagoon improvements as part of a multi-year project with the City of Newaygo. In addition to re-lining 4 lagoons, JMC also upgraded the aeration system and multiple pump stations before moving to the final stage of the project which entailed a full road reconstruction and storm system improvements in the area.

ASSOCIATE MEMBER PROFILE



Caprice and Heath Muzzall,
owners of HC Ryan Print & Promotional Products.

HC Ryan & Company has been finding cost-effective ways to market and promote the success of businesses with superior print and promotional products since 1996.

The family business is located in Okemos, Mich., and includes owners Caprice and Heath Muzzall and their son, Quinton who have been successfully navigating the recent changes in product supply and demand. While they are still feeling

the impacts of the pandemic because of supply chain issues, they have been able to still meet the needs of their customers.

"It has been a challenge to get inventory and our turnaround time has gone up," Caprice said, "but we handle it by being transparent with our customers and helping them plan ahead."

The Christmas rush starts now, Heath said in September, due to

the shipping and inventory issues happening at that time. "The inventory crunch at this time is only expected to get worse and won't be getting better until next year," he said. "Some products are sitting on docks and they can't be moved. In addition, there is a lack of employees to decorate on the supplier side. So, an imprinted coffee tumbler might take up to four weeks or more to deliver than the previous two-week standard delivery."

MITA members rely on HC Ryan mainly for high visibility gear, safety apparel, hats, miscellaneous apparel and printing. Customers place orders through emails, phone calls and sometimes even texts. "Whichever is the most convenient for our customers, works for us," said Caprice, who handles the order processing/office duties, while Heath and Quinton are the sales force.

MITA members who have multiple locations and require large quantities to fulfill their staff/customer needs may qualify for a company store, Caprice explained.

"A company store is a great way to offer our customers a fully branded, online store that streamlines the ordering process," she said. "This allows their corporate office to maintain the integrity/branding of the products/content selected for their online store."

On the printing side of the business, Heath explained, their close relationships with their paper suppliers enables them to offer companies considerable savings. Their print solutions include basic office supplies like custom printed envelopes and forms to full color brochures and marketing materials. They can handle your printing project from design to the finished product and can have it delivered to your office door.

"We work with associations such as MITA to increase their footprint by

providing quality printing, promotional and apparel products," Heath summed up. "We love what we do and we continue to grow."

Even during the pandemic, HC Ryan has experienced their best years two years in row with increased sales. "Through the adversity of the pandemic we are doing extremely well, considering the current business challenges and uncertainty," Caprice said. Heath added many of their customers still have a budget for promotional products, apparel and printing.

"Our industry is constantly adapting to issues as well as trends to make it possible for us to continue to service our customer needs," Caprice added.

Caprice and Heath have been married 24 years, have three children and recently added a fourth to their "crew", their seven-year-old niece. While their son, Quinton, works for the company, their daughter, Olivia, is attending Grand Valley State University.

Their other daughter, Ava, works at Hawk Hollow Golf Course as well as a doctor's office and will be attending Lansing Community College in the fall. Their fourth child, Avah, is a hardworking second grader who loves to learn new things and dance.

"We put our family first in everything we do," Caprice said. "Sunday dinners are a priority in our home! We also love what we do at work and believe that marketing makes a positive impact in so many ways. Building relationships throughout the years has helped us and our customers grow and develop in our industry. Providing our customers with the products that they want and need to build their business and brand awareness is really a great feeling."

For more information about HC Ryan & Company, visit their website at www.hcryan.com. **CS**



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- Sports Tournaments
- Company Outings
- Thank You Programs
- E-Commerce Services: Online Stores and Fulfillment Services



Rob Coppersmith

To contact Rob Coppersmith, email him at roboppersmith@thinkmita.org or call the MITA office at 517-347-8336.

Challenges come in a variety of forms. For MITA members the industry's current problem will be: how to manage, build, and staff all the work headed our way, and recognize that this is "flash in the pan money" and a proper long-term funding mechanism does not exist. As a membership, we need to set our politics aside and work together to create an atmosphere where we celebrate each other's successes and learn from our setbacks. We must understand that when one fails, we all fail. The competitive bid system is how we determine and award projects and just that.

Simple math tells us that we will have a lot of issues heading our way. \$1.7 billion of additional funding over five years from the federal government. \$7 billion in electrical grid upgrades over five years from DTE. Consumers Energy's goal is to end coal use by 2025 and be able to power one million electric vehicles by 2030. We are asking for an additional \$2.5 billion for infrastructure funding and \$1.5 billion for bridge funding from the \$6 billion in residuals from the American Rescue Plan and still enjoy a strong private market. This is all mixed in with material shortages, shorter completion dates and a lack of workforce that has even

STEP INTO THE STORM

performed construction and probably has never worked six or seven days in a row, let alone all summer, will present some challenges. Sound dismal for such a good problem to have?

Our industry has always risen to the challenges it has faced and will continue to. Many of the building blocks are in place to support contractors with workforce development efforts. MDOT committees, Work Zone Safety Task Force efforts, legislative efforts, FixMIState, etc. What this industry needs is a big funnel. Many of our efforts are fractionalized by too many independent efforts that don't necessarily lead to one trough. My last count of workforce efforts in Metro Detroit yielded at least six with two more independent efforts coming. All of these efforts compete for workers we prefer to be in our industry. MITA will be working hard at trying to funnel those and other efforts the industry's way. Another example would be the MITA efforts as it relates to taking elected officials out to members' job sites to demonstrate funding needs. MITA has been doing job site visits for over a decade and now everybody is doing this, which is a good thing. But are we sending the same message? Are we promoting the same needs and funding numbers? I would suggest that there are probably gaps in the messaging. MITA understands that our individual disciplines have independent needs, but we should all be working from a solid base of common information developed by a collective voice in the form of an Industry Council that could be composed of members from various industry boards. The information

developed should be shared and promoted as the industry gospel.

My fear for us is that as this work hits and the storm builds, we will only move from crisis to crisis instead of long-range planning and process development. MITA doesn't build work. Our members do, so it should be easy to understand that the good ideas for building work come from our members and should be championed by MITA. Please do not underestimate your field crews when it comes to this arena.

The 2019 MITA Annual Conference Keynote Speaker Wally Adamchik demonstrated the chasm between the field and the office is at an epic disconnect. This needs to be corrected, and I'm sure all members have some good ideas shared at lunch that never make it to the office or MITA. This crisis-to-crisis attitude also extends to downtown Lansing known as our legislature. Our industry should have the taxpayers of Michigan at the heart of all we do.

MITA applauds all the effort from our national partner, the American Road and Transportation Builders Association (ARTBA), to secure some of our recent federal funding as well as our Michigan Congressional leaders who were supportive. However, to that end, the industry's focus should turn to long-term funding solutions for all infrastructure while we start the process of rebuilding our great state with the current "flash in the pan money". It is no secret that funding levels need to be enhanced with inflation in mind. There will be no silver bullet for this problem. It will require heavy lifting from the membership and our industry partners and ultimately the public. **cs**

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A large advertisement for Rehmann. On the left, a man in a blue hard hat, white shirt, and black tie smiles while holding blueprints. On the right, a smaller image shows a construction worker in a hard hat and safety gear pointing upwards. The background is a light gray with a diagonal line.

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CONGRESS PASSES INFRASTRUCTURE BILL

The U.S. House of Representatives, in a rare Friday session in November passed the Infrastructure Investment and Jobs Act (IIJA), a \$1.2 trillion infrastructure bill that includes \$450 billion for highway and public transportation investments and a new, five-year reauthorization of federal surface transportation programs. The information coming out of DC has been confusing with a lot of different numbers and figures thrown around

investments for road and bridge repairs from the federal government over the next five years. That is simply not true. The entire federal program for Michigan will be approximately \$7.8 billion and it will be about \$1.7 billion more, or “new money” for Michigan’s roads and bridges over the next five years compared to the previous five years of distribution from the federal government. Below is a chart of the annual appropriations for Michigan

other types of infrastructure, including underground infrastructure. The bill provides \$1.3 billion in new money for water infrastructure for Michigan alone. Overall, the bill represents a doubling of funding compared to recent funding allocations for improved water quality. The money will be distributed to communities in grants and low interest loans to replace lead service lines and upgrade wastewater and stormwater systems.

2021	2022	2023	2024	2025	2026
\$1,152,611,274	\$1,394,849,821	\$1,422,748,656	\$1,451,205,467	\$1,480,231,414	\$1,509,837,877

and confusion over a larger spending bill, the Build Back Better Plan, that invests money in non-traditional infrastructure including childcare and climate control measures. What is clear, this is the single largest investment from the federal government for the nation’s transportation network in more than 50 years.

What does this all mean for Michigan’s infrastructure specifically? Some reports have suggested that this would mean \$7.8 billion in new

from 2021 through 2026 under the new bill.

In addition to the annual increase through 2026, a general fund appropriation was also included and Michigan will see an additional \$563 million to be used to repair and replace bridges in Michigan. Despite all the new investment coming into Michigan, it is still woefully short of the over \$2 billion annual investment that has been proven to be needed.

Several billions will also be spent on

While this isn’t exactly the infrastructure bill that MITA or our affiliates would write, it represents a 24 percent increase in the program in the first year and overall a 38 percent increase for surface transportation over the five-year reauthorization. Traditionally, MITA supports user fee increases to pay for our infrastructure; however, there is not a lot of support to increase the federal gas tax in Congress. [cs](#)

WINTER 2022: MITA PAC UPDATE

Thank you to everyone who has contributed to the MITA PAC. Your generosity is greatly appreciated. If you haven't donated to the MITA PAC yet this year, please consider making a contribution today.

Name	Company	Donation
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Kyle Fortier	Bacco Construction Company	\$1,000.00
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Nic Troshak	Cardinal Fabricating, Inc	\$250.00
Dave TerBeek	AIS Construction Equipment	\$500.00
Bob Allison	AIS Construction Equipment	\$500.00
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Sean Morrissey	GM & Sons, Inc	\$300.00
Chad Listerman	CL Trucking & Excavating	\$1,000.00
Craig Fons	GBM Companies	\$1,000.00
Ron Measel	Ace Cutting Equipment & Supply	\$1,000.00
Mark Campbell	GM & Sons, Inc	\$200.00
Jack Dykstra	Jack Dykstra Excavating	\$1,000.00
J.W. Fisher	Fisher Companies	\$3,000.00
Don Meram	F.D.M. Contracting, Inc	\$1,000.00
Frank DiPonio	DiPonio Contracting	\$1,500.00
Fred Meram	F.D.M. Contracting, Inc	\$1,000.00
Gerald Kalin	Kalin Construction Co. Inc	\$1,000.00
John Zito	Zito Construction Company	\$1,000.00
Jamie Lemke	Give 'Em A Break Safety	\$3,000.00
Brandie Meisner	M & M Excavating Company	\$1,000.00
Lucas Fleischmann	Michigan Pipe & Valve - Grand Rapids	\$500.00
John Landrie	M & M Excavating Company	\$1,000.00
Gabe Nowicki	M & M Excavating Company	\$500.00
Ken Nowicki	M & M Excavating Company	\$1,000.00
Kurt Shea	PK Contracting	\$500.00

Name	Company	Donation
Marc VanTil	Give 'Em A Break Safety	\$1,500.00
Blake Zapczynski	Z Contractors, Inc	\$1,000.00
Brooke Zapczynski	Z Contractors, Inc	\$1,000.00
Dave Marsh	Penninsula Prestress Company	\$300.00
Doug Kaltz	Kaltz Excavating Co.	\$1,000.00
Ron Wey	1 Wey Safety Training	\$200.00
Rachel Snyder	BCT Benefits	\$500.00
Ed Boucher	Kotz Sangster	\$500.00
Brad Stover	Toebe Construction LLC	\$1,000.00
Andy Stover	Toebe Construction LLC	\$1,000.00
Carrie Pennington	Toebe Construction LLC	\$1,000.00
Dave Fischer	Toebe Construction LLC	\$500.00
Jason Fowler	Toebe Construction LLC	\$500.00
Andy Thelen	Toebe Construction LLC	\$500.00
Matt Hickey	Toebe Construction LLC	\$500.00
Ron Acciavatti	Pamar Enterprises, Inc.	\$1,000.00
Mel Stein	BCT Benefits	\$500.00
Lincoln Noel	Payne & Dolan, Inc	\$250.00
Pat Dunigan	Dunigan Bros., Inc.	\$2,500.00
Derrick Arens	Anlaan Corporation	\$250.00
Remi Coolsaet	R.L. Coolsaet Construction Company	\$800.00
John Schmidt	Tri-City Groundbreakers	\$500.00
Chad Loney	Rieth-Riley Construction Co.	\$1,000.00
Dan Mergens	Edw. C. Levy Co.	\$1,000.00
Ryan O'Donnell	Anlaan Corporation	\$2,000.00
Edward C. Levy	Edw. C. Levy Co.	\$3,500.00
S. Eliot Weiner	Edw. C. Levy Co.	\$3,400.00
S. Evan Weiner	Edw. C. Levy Co.	\$3,300.00
Karl Grant	TCI Inc. of Michigan	\$500.00
Mike Malloure	C.A. Hull Co., Inc	\$5,000.00
Michael Brillati	Salus Group	\$500.00
Michael Definis	Angelo lafrate Construction Company	\$500.00
Mike Buck	Salus Group	\$500.00
Scott Bazinet	Lowe Construction Company	\$4,500.00





State Rep. Scott VanSingel

LEGISLATIVE Q&A: REPRESENTATIVE

REP. SCOTT VANSINGEL, CHAIRMAN OF THE HOUSE TRANSPORTATION APPROPRIATIONS SUBCOMMITTEE

ABOUT THE REPRESENTATIVE

District

State Representative Scott VanSingel was first elected in November 2016 to the Michigan House to represent the people of the 100th District, which includes Lake, Oceana and Newaygo counties.

Committees

VanSingel is the chairman of the Transportation Appropriations subcommittee. VanSingel also serves as the Vice-Chair of the Environment, Great Lakes & Energy committee, as well as being a member on the Appropriations committees for Joint Capital Outlay, School Aid & MDE, and Military & Veterans & MSP.

Education

Scott is a proud graduate of Grant High School. He earned a bachelor's degree from Central Michigan University with majors in Finance and Accounting. In 2011, he earned his Master's in Business from Cornerstone University.

Professional

Scott has worked in public accounting for the world's largest CPA firm. He later went on to work as a Financial Analyst for Dematic in Grand Rapids. During this time, he started a successful rental real estate company.

Personal

Scott has been active in the community serving as a deacon for several years at Grant Reformed Church, treasurer of the Newaygo Co. Republican Party, member and volunteer for various conservation groups, scholarship committee volunteer, and participant in numerous mission trips to Central America. Scott has also served as treasurer of numerous organizations and is a lifetime member of the National Rifle Association.

Q How has your background as an accountant helped you manage Michigan's transportation budget and overall state budget?

A Having an understanding of assets vs. liabilities, how pension programs operate, and a general knowledge of finance, has allowed me to have a long-term focus on

the budgeting process, rather than a single fiscal year. Understanding the difference between depreciation vs. cash flow expenses helps a policy maker see the big picture, particularly when it comes to infrastructure issues.

Q What legislative priorities do you have?

A As I work through my final term in office, I am focusing on leaving a legacy and leaving the state in a better financial condition than when I entered office. This involves creating and implementing a comprehensive road plan as well as finding ways to efficiently use the billions in federal funds the state has received in a way that reduces long-term liabilities, catches up infrastructure backlogs, and frees up cash flow in future years.



Q What thoughts and ideas do you have to adequately fund our transportation network in a long term, sustainable way?

A While some may disagree with my philosophy, I'm not focused on a pure user-based approach to transportation funding. I view roads much like public education, that is a public good. We all benefit either directly or indirectly, therefore we all have some responsibility to help fund roads, regardless of the number of miles or the type of vehicle we drive. We also have to be proactive in addressing the shift to electric vehicles as this makes our current funding methods obsolete. These issues could potentially be addressed by a surcharge on electric or figuring out how to do so with meter chargers and charging stations.

Overall, any funding plan needs to be stable, predictable, equitable, and spread evenly throughout the year. I partnered with Rep O'Malley earlier this year and we were able to come up with a detailed plan which included these concepts; however, it has been put on hold pending details of the federal infrastructure plan.

Q What has been your reaction to the public's calls for increased underground infrastructure investment in Michigan?

A Underground infrastructure is just as important as that above ground; however, it is a silent and unseen crisis we must address. Just like road construction, the cost of delaying the fix increases the cost exponentially. In addition to our current underground infrastructure, I am a big believer in increasing the use of underground electric lines for safety, reliability, and aesthetic purposes. There is obviously a cost to this as well.

Q Do you have ideas for how the state should fund underground infrastructure?

A In the short term, using the one-time federal funds that are available will take a large bite out of this problem; however, we need to take a long-term approach as well as understanding that water, sewer, and electrical lines have a finite lifespan. Ensuring the fees that users pay take into account depreciation is an important part of this conversation. In smaller municipalities where this is not economically feasible, the state and federal governments have a role in subsidization.

Q In what ways can policy makers and interest groups effectively educate the public on the need to properly invest in our underground infrastructure?

A In my opinion the most effective argument is that the cost of doing nothing does not save money, it only makes the problem significantly more expensive. Direct engagement with legislators and policymakers who make these decisions is effective, but these discussions are most effective when backed by data.

Q When do you believe the State Legislature will debate and enact substantive changes to how we pay for our underground water and sewers?

A There is legislation in process right now in the Michigan Senate which would make a major investment in water infrastructure. In the coming weeks or months, a significant and historic investment could become reality.

Q What are your thoughts or comments on your relationship with MITA and the heavy construction industry?

A I have enjoyed the relationship with MITA in my five years in office. They have been helpful in educating me about the needs and challenges their industry faces and their counsel has made me a better lawmaker.

Q How can our MITA members better advocate for their industry and encourage the legislature to act on increased investment for our infrastructure?

A Continue engaging in face-to-face communications with lawmakers and policy makers. Continue to provide factual and data backed information and continue to emphasize the urgency for action. Furthermore, having realistic conversations about the cost of these projects can result in backlash from constituents. Be prepared to provide support for those who are bold enough to tackle these tough issues. **CS**



Rachelle VanDeventer, P.E.

To contact Rachelle VanDeventer, P.E., email her at rachellevandeventer@thinkmita.org or call the MITA office at 517-347-8336.

A FOCUS ON MATERIAL SHORTAGES, SUPPLY DELAYS, RISING PRICES

Right now, it does not appear there is a member of MITA that has not been struggling with material shortages, supply delays, or rising prices. And many are being impacted by all three at the same time. These compounded issues are creating a perfect storm of challenges, all the while business and demand is increasing.

Materials cost and availability concerns are a priority for MITA staff. Many MITA members have shared concerns and issues regarding the unexpected material delays and price increases they are grappling with mid-project. Supply chains all across the industry have been disrupted and many materials that MITA members rely on to complete projects have been impacted, including metals like aluminum and steel, resin, plastic, lumber, and many more. Suppliers have been sending letters alerting contractors of price increases and/or long lead times for many materials and they are now exhibiting a growing reluctance to agree to specific delivery deadlines and/or final prices in general.

MITA is continuing to engage with members and the industry to help educate MDOT, FHWA and others

about the current challenges. MITA has passed along all the collected information related to the material issues to MDOT leadership, who in turn shares the information with FHWA for a national perspective. MITA also continues to discuss material issues weekly at a national level on weekly ARTBA calls, and MITA has been a national leader with ARTBA and FHWA in discussions on these issues. Although some sectors of the industry have declared an industry-wide shortage, the FHWA and MDOT have declined to agree. To date the FHWA position remains firm that no industry-wide shortages exist, material issue delays may be excusable (but not compensable), price escalation provisions cannot be imposed retroactively, and that state DOTs could pay additional material costs from state (only) funds.

Industry has been looking to owners, such as MDOT, for assistance. At this point MDOT is not adjusting any prices to account for price increases due to the fact that their contracts do not allow for it. MDOT has agreed that if there is a project delay caused by a material delay, the related delay may be considered "excusable" but is not "compensable", and the delay issue(s) will be addressed on a project-by-project basis (i.e., no "industry-wide shortage"/blanket declarations). MITA realizes that MDOT's and FHWA's positions continue to disappoint many

and we will continue to push these issues at the highest levels of MDOT and FHWA.

It may be worth noting that in the 2006-2008 time frame, MITA did explore price escalation provisions. During that time, it became clear that a number of factors and terms go into such a provision that raised questions and doubts. And maybe most importantly, all may have been interested in an escalation clause when it meant getting paid for a cost increase, but not many were interested in paying money back to the owner if prices trended in the other direction. MITA at that time did not take an official position to support price adjustment provisions.

The "waiting for things to settle down and get back to normal" period is appearing to just get longer and longer with no clear end in sight. These material challenges are heightened because as industry is working hard to step up and meet demand there remain many factors that are out of a contractor's control and may hinder production. MITA contractors have been doing an impressive job meeting project demands while juggling the growing industry challenges and they are showing every effort to continue to do so. MITA will continue to advocate on behalf of industry and keep members updated on our efforts on this important subject. **CS**

CASE STUDY

COUNTY DRAIN: PRESTO GEOWEB, SE MICHIGAN

PROJECT SUMMARY:

There are many different style culverts that can be installed. The industry is constantly evolving and new, more cost-effective solutions are always being developed. A recent project in southeast Michigan utilized a Presto Geoweb MSE wall as a headwall. This system was able

to be installed in the winter and eliminated any delays related to the time needed for the concrete to cure. The geoweb system is very affordable when compared to precast or CIP concrete headwalls. These walls can be vegetated or non-vegetated.



INSTALLATION:

Geoweb is installed directly on top of the culvert. The geoweb is then infilled with stone or topsoil.



INSTALLATION:

Depending on the height of the wall, geogrid reinforcement may be necessary.



PERFORMANCE:

The Geoweb is a very economical option for headwalls and is not as susceptible to differential settlement as alternative options.



1 YEAR LATER:

The Geoweb wall is functioning as planned one year after installation. Geoweb walls can be vegetated or left unvegetated.

FEATURES & BENEFITS

- Geoweb MSE Walls are very economical
- Flexible and not as susceptible to differential settlement as other options
- Can be installed in cold weather
- Environmentally friendly
- Vegetated or un-vegetated face

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Ken Bertolini

To contact Ken Bertolini, email him at kenbertolini@thinkmita.org or call the MITA office at 517-347-8336.

MITA ANNOUNCES 2ND ROAD AND INFRASTRUCTURE WORKFORCE SURVEY

What is the current state of the workforce for Michigan's transportation and infrastructure companies? What are expectations for the labor force over the next five years? What are the hiring practices of other companies? These questions, as well as others are what many MITA members have asked themselves as they anticipate their workload for the 2022 construction season and beyond.

Two years ago, MITA provided the first Michigan Road and Infrastructure Workforce Survey to its members. A large portion of MITA's contracting members participated in that first survey and the subsequent report, which was made available to all MITA members and is still available on www.thinkmita.org, summarized the data gathered and provided valuable information through the 2020 MITA Survey Report.

This winter, MITA will be providing all contracting members an opportunity to be a part of the 2nd MITA Road and Infrastructure Workforce Survey. We encourage all contracting members to participate. If more companies participate, the end report will be more accurate. MITA ensures that participation in the survey will be

completely anonymous. MITA will not be aware of the companies that participate in the survey or how they answered the questions. The survey is designed to take no longer than 10-15 minutes to complete. This is done to encourage participation and to not interfere with the work schedule.

MITA will host a session during the Annual Conference in January for anyone who would like to be a part of determining the final survey questions. Questions from the first survey will be provided, and participants will have the opportunity to modify and add questions that they feel are important for the betterment of the survey results. The MITA survey will be distributed shortly after the MITA Annual Convention, and the results will be tabulated and placed in a report that will be made available prior to the 2022 construction season. The format of the survey will include anticipated needs for the upcoming season and a five-year projection of anticipated workforce needs. This is a way for our members to distinguish the current state of the labor force for the road and infrastructure construction industry in Michigan and also help in your future labor force planning strategies.

There are similar surveys that are done by national organizations for the construction industry as a whole, but they do not provide information

on a more regional basis and for the needs of our particular area of the construction industry. The MITA survey will be a tool for our members to help plan for the 2022 season, as well as re-evaluating their current hiring practices and changes that they can make to bring new hires into their companies and ways to keep their workforces intact.

The information will also help MITA to develop programs that assist members in their workforce needs. Current programs can be adjusted to better suit the needs of members. Also, new programs can be developed by MITA to bring people into the industry that may never have considered a career in construction. All of this can be done, but we have one request: please be a part of the MITA Road and Infrastructure Workforce Survey. Many companies have already shown interest in the upcoming survey, and we are working hard to make sure it's a useful tool for all MITA members.

In other news, MITA is in the early stages of developing the 3rd Annual MITA Hiring Fair, which will take place in late March through early April 2022. The 2022 MITA Hiring Fair will be in person and take place in three locations throughout the state of Michigan. The fair will no longer be a virtual event. This is your opportunity to meet face-

Continued on page 54



Greg Brooks

To contact Greg Brooks, email him at gregbrooks@thinkmita.org or call the MITA office at 517-347-8336.

ARE YOUR SAFETY PROGRAMS UP TO DATE?

I hope everyone had a successful season. Winter may be a down time to some, but It should be an active season on the safety side of the house. It's time to take a look at all of your programs and make sure they are in compliance and up to date. MIOSHA requires each crew to have onsite an accident prevention plan. An effective and compliant accident prevention plan will include the following:

- Designation of the qualified employee or person who is responsible for administering the program.
- Instruction to each employee regarding the operating procedures, hazards, and safeguards of tools and equipment when necessary to perform the job.
- Inspections of the construction site, tools, materials, and equipment to assure that unsafe conditions which could create a hazard are eliminated.
- Instruction to each employee in the recognition and avoidance of hazards and the regulations applicable to his or her work environment to control or eliminate any hazards or other exposure to illness or injury.
- Instruction to each employee who is required to handle or use known poisons, toxic materials, caustics, and other harmful substances regarding all of the following:
 - o The potential hazards.
 - o Safe handling.
 - o Use.
 - o Personal hygiene.
 - o Protective measures. Applicable first aid procedures to be used in the event of injury.
- Instruction to each employee if known harmful plants, reptiles, animals, or insects are present regarding all of the following:
 - o The potential hazards.

- o How to avoid injury.
- o Applicable first aid procedures to be used in the event of injury.

MITA has worked extensively with MIOSHA to create an accident prevention plan (Safety and Health Field Book) that meets all of the required standards. It is offered as a weatherproof, jobsite tough version that can fit in a foreman's truck console. It also contains a Confined Space Program, Hazard Communication Program, Fatality/Injury Reporting Requirements, Discipline policy and Foreman's safety checklist.

Winter is also a great time to do safety training. There are several areas that MIOSHA requires training on:

- First Aid: Each crew is required to have at least one person certified in first aid and CPR.
- Welding/Cutting: Assure that each employee has received safety training in the use of equipment for welding operations and instruction in the rules of MIOSHA Part 7 before allowing the employee to use the equipment.
- Excavation, Trenching and Shoring: Ongoing training for all employees involved in excavating and trenching. Excavator operator, "An employer shall ensure that an employee has adequate knowledge of, and is capable of operating, cranes, derricks or excavation equipment before assigning an employee to a crane, derrick or excavation equipment. "
- Ladders: "The employer shall provide a training program for each employee who uses a ladder. The program shall enable each employee to recognize hazards related to the ladder and shall train each employee in the procedures to be followed to minimize these hazards." *Continued on page 50*



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A CONTRACTOR'S GUIDE TO COVID-19 CLAIMS

By Mark L. McAlpine and Lynette T. McAlpine
McAlpine PC



Mark L. McAlpine is the founding and managing partner of McAlpine, PC, an eight-lawyer law firm in Auburn Hills, MI, which specializes in construction law and litigation. He has primarily represented construction contractors for nearly 40 years, is active in many industry associations, and is a frequent author and lecturer on current construction law topics. Mr. McAlpine can be reached at malmcalpine@mc AlpinePC.com.



Lynette T. McAlpine is an associate with McAlpine, PC, specializing in construction law and litigation. She is a Magna Cum Laude graduate of the Thomas M. Cooley School of Law and has been working in the construction law field for over 20 years. Ms. McAlpine can be reached at ltmcalpine@mc AlpinePC.com.



Nearly two years into the COVID-19 pandemic, we are still waiting for concrete guidance on how COVID-19 construction claims will be viewed and resolved by the courts. Contractors have a particular interest in knowing their scheduling and compensation rights, in particular because they will be forced to characterize their claims at some point to satisfy contractual notice requirements. The essential issue is generally the extent to which the pandemic will be treated as a *force majeure* event and, if so, to what result. Many contracts limit *force majeure* relief to schedule extensions without added compensation. Still others don't have *force majeure* clauses, leaving the parties to common law remedies which may or may not be helpful. The courts have not generated the case law decisions one would have expected by now, so contractors potentially act at their peril when developing and negotiating COVID-19 claims.

While thousands of decisions related to COVID-19 have been handed down by courts, meaningful construction cases have not been among them—ironically the likely result of

COVID-19-related court delays throughout the legal system. Trials have only recently recommenced in limited parts of the country but must await the backlog of criminal cases clogging dockets. Unfortunately, construction litigation is seldom prioritized by the courts. As a result, reported decisions have not made their way through the system to produce reliable case precedent. And while much has been written in the legal media about various strategies that may be utilized to recover damages related to COVID-19, those theories must still be reduced to the specifics of the claim and articulated in claim notices. Despite the lack of clarity, contractors and their attorneys are left to formulate the best arguments possible based on what we know now. As such, this article summarizes where we are in the current legal landscape and offers guidance for claim evaluation based on what we know thus far.

As an initial matter, there is no serious question as to the existence of a pandemic or that the impacts are widespread and significant. What started as consumer goods shortages and governmental shelter-in-place orders during the early days of the pandemic have now blossomed into rampant material shortages and delays, along with unpredictable price escalations and still more trade shortages. Supply chain disruptions are as apparent as the media images of fleets of container ships waiting to be unloaded off the shores of California and South Carolina. The results are being felt in nearly every corner of the economy, particularly in construction. From concrete admixtures to metals, gypsum, and machinery, shortages of critical components are becoming the norm on many construction sites. At a minimum, work rules have changed and continue to evolve as OSHA and MIOSHA regulations have been enacted and enforced. And yet, many/most projects have continued, often relying on the ingenuity of the contractors and their subcontractors and suppliers to overcome the COVID-19 impacts. So how does the contractor recover for its losses?

The answer is project-specific. With very little guidance from the courts, each COVID-19 claim is highly dependent on the parties' contract and the specific facts. Invariably, these claims fall into two basic categories: contractual and non-contractual (common law). Contractual claims focus on

the terms of the particular contract and how those terms will be used in articulating the claim and interpreted by the courts. Non-contractual claims look beyond the contract to common law principles that, if applicable, can provide the affected party relief in some cases.

Contractual Remedies

Virtually all standard construction industry contracts have some type of *force majeure* or delay clause. Either the term is specifically defined and enumerated, or provisions are made for delays not caused by either party, particularly in no-damage-for-delay clauses. A *force majeure* clause is a contractual provision that relieves one or both parties of their obligations under the contract when certain circumstances beyond the parties' control arise. The event must not be "caused by the party invoking it or [the event] could have been prevented by the exercise of prudence, diligence, and care." *Great Lakes Gas Transmission Ltd Pship v Essar Steel Minnesota, LLC*, 871 F Supp 2d 843, 852 (D Minn, 2012).

So the initial question is whether the COVID-19 pandemic will be considered a *force majeure* event. Courts interpret *force majeure* clauses using general rules of contract interpretation, and Michigan courts narrowly interpret such

clauses. One of the basic rules of contract interpretation provides that terms used in a contract are to be given their commonly used meanings unless the term is otherwise defined in the contract. Thus, if a series of events are listed in a *force majeure* definition, then only the listed events will be considered *force majeure* events. However, when a *force majeure* clause specifically mentions a series of events that would excuse performance followed by a catchall phrase (such as "act of God" or "other events beyond the parties' control"), the *ejusdem generis* rule of contract interpretation comes into play. *Ejusdem generis* provides that where general words follow an enumeration of two or more things, they also apply to persons or things of the same general kind or class specified. There are few Michigan cases interpreting *force majeure* clauses, but the Michigan Court of Appeals (relying on decisions from New York and Minnesota courts) in *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437; 886 NW2d 445 (2015), stated that courts will generally only excuse a party's nonperformance "if the event that caused the party's nonperformance is specifically identified" in the contract. *Id.* at 451 (citing *In re Cablevision Consumer Litigation*, 864 F Supp 2d 258, 264 (EDNY, 2012).

Courts in COVID-19 cases have routinely relied on the
Continued on page 30

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The Wild Game Dinner at the Palazzo Grande in Shelby Township in September was a great success and raised funds for the MITA Scholarship Fund. Thank you to all the attendees, sponsors and donors. We couldn't have done it without your support.



From left to right flanking Jacqueline Kaltz Coulombe, from Kaltz Coulombe, PLLC: Conner Pytlowany, Mike W. Peake, Jeff Irvin and T.J. Peake from Action Traffic Maintenance.



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Continued from page 27

specific language of the *force majeure* clause in the parties' contract to determine whether the pandemic is a "*force majeure* event." There is little reason to expect that a court interpreting the *force majeure* or delay clauses of any of the major standard contracts (AIA, EJCDC, and ConsensusDocs) would rule that the COVID-19 pandemic is not a *force majeure* event. Indeed, based on experience, it appears that the parties to most contracts executed since the start of the pandemic have generally discussed the potential impacts of the pandemic and have addressed them in some fashion. In many cases, the parties simply agree that the pandemic will be treated as a *force majeure* event should the project be impacted – leaving the parties to their contractual remedies. In any case, it is expected that most courts and arbitrators will likely conclude that the COVID-19 pandemic is a *force majeure* event under most contracts.

Under most *force majeure* clauses, an extension of time is the exclusive remedy available to the contractor. Such an extension entitlement would also avoid the imposition of liquidated damages in most cases. Additionally, if the contractor is entitled to a schedule extension but is not afforded one, the contractor would likely be entitled

to recover its costs to accelerate the work in order to overcome the delay. The precise language of the contract must be considered to determine the degree to which other remedies are also available. For instance, many of the standard contracts have provisions that address changes in laws or regulations (AIA Document A201-2017, General Conditions of the Contract for Construction, §§ 3.2.3, 3.2.4, 8.3.1, and 10.3.6; EJCDC C-700 General Conditions, © 2013 § 7.10(c); and ConsensusDocs 200 – Standard Agreement and General Conditions Between Owner and Constructor – 2011, Revised 2014, §3.21.1) and which allow the contractor both an extension of the schedule and additional compensation. Clearly, various laws and regulations affecting the construction industry have changed due to the pandemic, including stay-at-home orders, work safety protocols, mandated use of personal protection equipment, quarantines, OSHA and MIOSHA requirements, and even unemployment subsidies which some argue contributed to the current trade shortages.

If it can be established, for instance, that labor productivity was lost due to the use of PPE or social distancing requirements, etc., then an argument can be

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made that the provable resulting costs are recoverable under the changes in laws or regulations clause, in addition to the schedule extension available under the *force majeure* clause. In determining whether a change in state law results in “a substantial impairment of a contractual relationship,” Michigan courts consider three factors: “[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial.” *Gillette Commercial Operations N Am & Subsidiaries v Dep’t of Treasury*, 312 Mich App 394; 878 NW2d 891, 903 (2015) (citing *Gen Motors Corp v Romein*, 503 US 181, 186, 112 SCt 1105, 117 LEd2d 328 (1992)). Any claim for a contract price adjustment due to a change in law or regulation must therefore address causation and the severity of the impacts.

Of course, if the contract contains a price escalation clause, that clause would be used to address any price increases that exceed the specified adjustment threshold. For contracts executed after the start of the pandemic, agreeing to such a clause should be considered by both parties, given that it protects the owner from unnecessary price contingencies in the bids while shielding the contractor

from excessive risk due to extraordinary price shifts such as occurred recently with lumber, concrete, and steel prices. For instance, ConsensusDocs offers ConsensusDocs 200.1 Potentially Time and Price-Impacted Materials Amendment. This three-page amendment applies to both price increases as well as decreases.

Another contract remedy may involve invoking the implied duty of good faith and fair dealing. This implied duty is incorporated into all construction contracts in Michigan and other states. It is an obligation to exercise one’s contractual rights in a manner that does not violate “community standards of decency, fairness or reasonableness” (Restatement (Second) of Contracts, §205). Several courts have considered the application of this obligation in the context of submittal reviews and requested contract extensions. As such, it can be argued that the duty applies to a material or equipment substitution request presented in order to avoid delays or price increases due to a COVID-19-induced shortage. This remedy is highly case-specific and would have to be carefully orchestrated to be successful, assuming the facts supported the claim in the first place.


In the right case, it may be

Continued on page 32

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Continued from page 31

possible to argue that the virus represented a contaminated site that required remediation. This is based on the notion that the virus contaminated work surfaces and required restricted access for periodic investigations and cleanings. Similar arguments are being made in insurance coverage cases involving claims for property loss. While not many of the decisions are supportive of this argument, several have at least allowed cases to progress past summary judgment, which may be signaling more receptive treatment with the right facts. Such a claim may be based on a form of denied site access and would likely cover the cost of COVID-19 work protocols and maybe even productivity losses. In this regard, the claim resembles a differing site condition – triggering notice requirements and consultation with the owner and its representatives.

And there may be other contractual remedies depending on the form of the contract. As with all contractual claims, the contractor should comply with stated notice requirements in asserting COVID-19 claims. While owners and design professionals will have a difficult time arguing that the pandemic was not known or that it was not known to be negatively affecting many projects, notice of the possibility of the claim should still be provided as specified in the contract.

However, lack of formal notice is not necessarily fatal given the “actual notice” doctrine applied by some courts and arbitrators. The “actual notice” doctrine excuses formal notice where it can be shown that the owner had actual notice of the claim event and its probable negative consequences.

Non-Contractual Remedies

Where the contract does not expressly provide for pandemic relief, such as where there is no *force majeure*, delay, or price escalation clause, the affected party may still be able to obtain relief through the doctrines of impossibility, commercial impracticability, or frustration of purpose. These common law theories of contract law have evolved over the years to allow relief where the risk of performance has changed severely due to events arising after the contract was executed (and not caused by the claiming party) such that it could not fairly be regarded as within the risks assumed under the contract. Of course, to utilize one of these approaches, it must be proven that the pandemic did, in fact, cause the performance to become severely impracticable or impossible.

Commercial impracticability is defined by Restatement (Second) of Contracts, § 261 as applying if, “after a contract is

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made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary." *Flathead-Michigan I, LLC v Peninsula Dev, LLC*, No. 09-14043, 2011 WL 940048, at *4 (ED Mich, March 16, 2011). This doctrine is applied differently depending on whether the contract is for services as opposed to the sale of goods. The doctrine began as applying only to the sale of goods through the Uniform Commercial Code and then evolved into a common law version applicable to service-based construction contracts. What counts as "impracticable" is generally a case-by-case determination that would likely resemble the analysis one conducts to determine whether a cardinal change has occurred.

Whether performance is "impossible" turns on whether the unanticipated circumstance making performance vitally different from what the parties reasonably expected was within the contemplation of both parties at the time of contract formation. *Nathan v Brownstone Plastics, LLC*, 511 BR 863 (ED Mich 2014). In Michigan, there are two types of impossibility: original and supervening. Original impossibility

occurs when performance was impossible from the time the contract was signed. Conversely, supervening impossibility occurs when the contractual promise becomes objectively impossible to perform after the contract was formed. *Roberts v Farmers Ins Exchange*, 275 Mich App 58, 737 NW2d 332 (2007). Supervening impossibility will extinguish the promisor's liability. *Id.* Whether the liability is extinguished, however, may turn on whether the supervening event that produces the impossibility was reasonably foreseeable when the promisor entered into the contract. *Id.* Thus, contracts entered into after the start of the pandemic will be viewed differently because the pandemic was known, and at least some of the impacts were knowable. However, the doctrine many apply in any event if the precise impact, such as a 300% price increase or actual unavailability of materials or equipment, can be shown to have been unforeseeable.

In Michigan, to prove frustration of purpose, the claimant must show that: "(1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him." *Flathead-Michigan I, LLC v Peninsula Dev, LLC*, No. 09-14043, 2011 WL 940048, at *3 (ED Mich, March 16, 2011) (citing *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 134-135, 676 NW 2d 633, 637 (2003); *Restatement (Second) of Contracts*, § 265). Unfortunately, a claim that the contract was less profitable than originally anticipated is insufficient; rather, the "[t]he frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract." *Id.* To apply, the item affected by the pandemic must essentially be the whole point of the contract, such as where a contractor is providing and installing a transmission tower specified by the owner and the specified tower becomes unavailable or delayed.

There are various other common law remedies that may apply given the precise circumstances of each claim. For instance, the doctrine of mutual mistake may apply to undo a contract which would then allow a court to award damages in the form of *quantum meruit*. *Quantum meruit* requires the owner to compensate the contractor for the value of the benefit provided. In other circumstances, it might be argued that there was no meeting of the minds of the parties, which is necessary to form a valid contract. Given the many variables that might apply, the parties are advised to consult

Continued on page 34



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Continued from page 33

with an experienced construction attorney before a claim is formally submitted to ensure it is properly characterized.

Strategies For Price Increases

While trade shortages are still a continuing and serious problem, material and equipment shortages have become a secondary impact, the intensity of which many did not foresee. Material shortages are both driving up prices and causing disruptive delivery delays. And the effects are variable and not always obvious. For instance, consider where a subcontractor is unable to obtain bulk rates because the supplier is unable to deliver bulk quantities. Or where pent-up demand from initially stalled projects causes price inflation or product unavailability. The conventional wisdom is that where the contractor has accepted the risk of a price increase, such as with a lump sum or unit price contract, they are stuck with the increase. However, exceptions exist, and other strategies to address the impacts may be available.

First and foremost, contractors need to be proactive and deal with COVID-19 issues at the start and while contracts are being executed. Price escalation clauses are a must if they can be negotiated. Contracting strategies that can manage or shift the risk include obtaining advanced permission to

pre-purchase and store volatile commodities or equipment, bids with shorter acceptance periods (usually only available on non-government work), purchasing futures in some circumstances, and shifting the purchase of sensitive items to the owner. Given that the pandemic is still raging, it will be hard to argue that its effects could not be foreseen from this moment forward, and thus it is best to deal with the risks through negotiation where possible.

The problem, of course, is with those contracts entered into before the pandemic or shortly thereafter but before the magnitude of the impacts became known. Here, the first order of business is to mitigate the damages where possible. If a lower-cost substitution is available, it should be proposed to the owner. It can be argued that the owner must consider the request in good faith and deal fairly with the contractor. Where the proposed substitution is truly equal, the owner may be in breach of its implied duty of good faith and fair dealing if it unreasonably rejects the proposal. As such, the contractor's proposal should clearly document both the cost and schedule benefits of the substitution.

Where the price increases can be tied to changes in laws or regulations, a straightforward claim can be submitted seeking a change order to cover the increased costs. The



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challenge will be proving that a law or regulation changed and that the change caused the increase. COVID-19 work-rule costs, such as PPE, distancing, quarantined employees and sites, and related productivity losses may fall into this category.

While a direct *force majeure* argument can be made regarding a price increase, the occurrence of the pandemic alone will likely not win the point; the price increase must be truly massive. In one case, a court concluded that an increase of over 600% justified excusing the contractor's obligation to perform, while another court found that an increase of over 30% was not enough. See *Moyer v Little Falls*, 510 NYS2d 813 (Sup Ct 1986) and *American Trading and Production Corp v Shell International Marine, Lt.*, 453 F2d 939 (2nd Cir 1972). There are very few reported cases where the contractor has prevailed on this kind of challenge, but it is clearly foreseeable that a court could find that a 100% to 200% price increase is enough to void the obligation to provide that item under the contract.

In the absence of better guidance from the courts, it would appear that the best strategy for both parties faced with significant price increases is to negotiate to a resolution

Continued on page 54




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MITA's major focus on safety encompasses regular training, informational updates and regular job site inspections to ensure that member companies are compliant with keeping the workforce and motorists safe when work is being done.

MITA staff is now available for inspections upon requests and will comply with company and government-related COVID-19 policies and procedures on your jobsite.

For more information, to schedule a job site inspection, or to set up a job training session (on site or via Zoom), please contact:

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TAKE ADVANTAGE OF MITA'S SOURCE FOR BLUE BOOK RATES

By Sara Schaibly

As construction prices continue to rise, it is important to keep your equipment costs up to date. Updated costs are key in not only staying competitive when bidding on projects, but also for recovering equipment cost in contract revision situations.

Through our EquipmentWatch, MITA subscribes to the Rental Rate Blue Book in order to provide our members with these rates that can be used as a guide to determine the amount to charge in order to recover equipment-related ownership and operating costs. These rates, updated beginning and mid-year, are derived from cost formulas and factors developed from field research and from analytic methods used in the construction industry. Generally, these methods include both direct and indirect costs and consider such operating variables as annual use hours, maintenance and overhaul costs, as well as unit price information such as fuel prices, labor rates and the cost of money.

Over the past year, hundreds of equipment configurations had monthly ownership and hourly operating cost changes of more than 10 percent; which means if you are using outdated rates, you could be leaving money on the table. For just one asset, this could easily translate to a significant loss on an equipment-related change order. As a benefit of membership, members can request these rates and keep them updated over time and as you acquire new equipment. When the exact piece of equipment is not in the database or is custom to your projects, MITA has the ability to request for a custom rate (custom rates do take some time for EquipmentWatch to develop).



When requesting rates, MITA has a form to complete with the necessary information. This form can also be submitted electronically at www.thinkmita.org in the Service Section under Miscellaneous Forms. The information required for a rate includes equipment category, type, manufacturer, model number and year. In some cases, more information is necessary to find the most accurate rate. These specifications include but are not limited to horsepower, power mode, Gross Vehicle Weight, and ton rating.

Through EquipmentWatch, MITA also has access to monthly analysis of key market performance indicators covering construction, lift/access and agriculture, quarterly reports, market activity, and 2021 Lowest Cost of Ownership and Highest Award Winners.

MITA and EquipmentWatch share confidence that the market appears to be fairly solid and optimism remains high for the future of our industry. Reach out to MITA to make sure you have the most up-to-date equipment costs in order to increase the accuracy of your bids, appropriately recover costs related to contract revisions and maximize profits! **cs**



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NAVIGATING THE EMPLOYEE RETENTION CREDIT

– A VALUABLE BENEFIT STILL AVAILABLE TO CONTRACTORS

By Steve Mihalik, CPA and Terry Dykhous, CPA, MST
Doeren Mayhew



Steve Mihalik, CPA



Terry Dykhous, CPA, MST

DoerenMayhew
CPAs AND ADVISORS

Emerging from the Pandemic

After a grueling stretch of quarantining and Zoom meetings, it felt great mingling in person with other MITA members at the recent Wild Game Dinner. Most attendees shared the sentiment of feeling like we are finally starting to put the pandemic behind us. Certainly, the paycheck protection program (PPP), that did such a great service to the industry, is in the rear-view mirror now. But let's not stay completely forward focused until we double check the possibility of one more powerful benefit which may still be available to contractors. That benefit is the Employee Retention Credit (ERC). The ERC, just like PPP, has undergone several revisions since it was first introduced. Indeed, the rules (and benefits) have been liberalized. Even if you once thought your business was ineligible, it truly merits another look to ensure you are not leaving unclaimed credits on the table.

Cares Act Bill

The ERC was originally introduced as part of the Cares

Act. Initially, the ERC was only available for wages paid after March 12, 2020, and before January 1, 2021. Furthermore, it was not available to businesses that received PPP loans. In addition, qualification rules contained onerous revenue restrictions and employee counts disqualifying many businesses.

Improved ERC

With the passing of the Consolidated Appropriations Act of 2021, the ERC has been revamped and is now more accessible to a broader base of businesses. It is significant to note, businesses that received forgiveness for PPP loans are now able to claim the ERC. The first eligibility test involves a quarter-by-quarter comparison of gross receipts using 2019 as a baseline. Generally, to claim the ERC for 2020 a business must have experienced a 50 percent decline in revenue compared to the same quarter in 2019. The rules for the first two quarters of 2021 were liberalized and require just a 20 percent decline compared to 2019. The act also extended ERC availability through December 31, 2021. Finally preferential treatment for businesses with less than 100 employees was expanded to businesses with up to 500 employees for 2021.

Value of ERC

For those that qualify in 2020, a credit is allowed for 50 percent of qualified wages up to \$10,000 per employee per year. The credit per employee maxes out at \$5,000. To qualify for any quarter, generally there must be a 50 percent or greater decline in revenue compared to the same quarter during 2019. For employers with 100 or more employees, the credit is available only if wages were paid to employees that were providing no services (meaning, those who were paid not to work). For employers with 100 or fewer employees, wages qualify regardless of work status.

Continued on page 53

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RECONSTRUCTING U.S. 12 AND M-17

By Aram Kalousdian

An approximately \$6.1 million reconstruction project on U.S. 12 between Interstate 94 and Wiard Road and on M-17 between Harris Road and Dorset Avenue in Ypsilanti Township began in June 2021 and it was scheduled to be completed in October 2021.

"The project consists of tree and brush removal, road and bridge removal, road realignment, concrete curb and gutter, hot mix asphalt (HMA) paving, Intelligent Transportation System (ITS) fiber relocation, traffic signal replacement, landscape improvements, decorative sidewalk, decorative art, permanent signing and striping and restoration," said Kirk Cooley general manager for prime contractor Fonson Company, Inc., of Brighton.



A CAT D6K2 LGP dozer and a John Deere 345G LC excavator work on the U.S. 12/M-17 project in Ypsilanti Township.

"The realignment consists of demolishing the eastbound M-17 Bridge to eastbound U.S. 12," he said. "That traffic will take the new eastbound M-17 to eastbound U.S. 12 road with a new intersection and traffic signal. There are also two new turnarounds from eastbound U.S. 12 to westbound U.S.



A fly over bridge on U.S. 12 is demolished. Photo courtesy of OHM Advisors.

12 and from westbound U.S. 12 to eastbound U.S. 12 which will also have new traffic signals.

"Eastbound M-17 will have one right turn lane to westbound U.S. 12 and two lanes to eastbound U.S. 12. There will also be a turn lane added from westbound U.S. 12 to westbound M-17. This turn lane will allow eastbound U.S. 12 traffic coming from Interstate 94 to utilize a new turnaround to head to westbound M-17."



A CAT D6K2 LGP dozer pushes dirt on the U.S. 12/M-17 project in Ypsilanti Township.

The road construction consists of 1-½ inches of high stress 5E10 HMA wearing course, 2 inches of high stress 4E10 HMA leveling course and 4-½ inches of high stress 2E10 HMA base course.

“There have been two major challenges on the project – a skilled labor shortage and material delay,” Kirk said. “The skilled labor shortage has been a challenge all year, which made us realize that we need to hire and train within our company. The on-site training of these employees has lowered our production to some extent. The lower production ultimately has the opportunity to put the project behind schedule. We have been fortunate in that many owners have been understanding of this industry-wide challenge.

“There isn’t much that we have been able to do to combat the material delays. We have substituted some materials for equal quality materials but that is not always an option. The issue has the possibility to delay a project past the planned completion date. So far, we have been able to mitigate these challenges in order to meet our contractual requirements on each project.”

Subcontractors on the project include Cadillac Asphalt (HMA paving); Rauhorn Electric, Inc., of Bruce Township (electrical) and Site Solutions, LLC, of Howell (landscaping). OHM Advisors, of Livonia is the engineering firm for the project.

Material quantities on the project include 3,267 feet of curb and gutter removal, 1,665 feet of guardrail removal, 7,830 square yards of pavement removal, 31,345 cubic yards of compacted-in-place embankment, 31,345 cubic yards of earth excavation, 8,568 cubic yards of compacted-in-place subbase and 2,654 square yards of 4-inch aggregate base.

Additional material quantities include 17,598 square yards of 6-inch aggregate base, 8,325 square yards of 8-inch aggregate base, 8,040 lineal feet of 6-inch underdrain subbase, 3,900 square yards of HMA surface cold milling, 18,183 square yards of HMA surface removal, 1,914 tons of HMA 2E10, 2,254 tons of HMA approach and 3,010 feet of Detail B2 concrete curb and gutter with basalt fiber reinforced polymer (BFRP).

Material quantities also include 1,530 feet of Detail F6 concrete curb and gutter with BFRP, 1,830 square feet of 6-inch concrete sidewalk ramp, 15,035 square feet of 4-inch concrete sidewalk and 18,715 square feet of 6-inch concrete sidewalk. **CS**



A CAT articulated truck unloads dirt on the U.S. 12/M-17 project.

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New Hire

Please welcome Terri D. Slaughter as MDOT's new chief culture, equity and inclusion officer (CCEIO). Slaughter will directly oversee the areas of the Bureau of Transportation Planning, the Office of Organizational Development, the Office of Business Development, the Equal Employment Opportunity Office, and the Office of Economic Development.



Terri D. Slaughter

She comes to MDOT from the Youth Development, Education, and Retention Strategy Group (YDER), where she was the founder and principal. As a chief executive with YDER, Slaughter assisted youth development organizations and colleges and universities in creating and implementing scalable diversity, equity, and inclusion (DEI) strategies.

She previously served as the chief diversity officer at Madonna University in Livonia, where she was responsible for DEI-related divisional performance management, strategic, and operational planning. The new CCEIO position was designed to guide MDOT so that the department makes meaningful progress in an intentional, strategic, positive direction.

DBE News

The Office of Business Development (OBD) is beating the virtual bushes to find new firms to participate with MDOT. Please share with any contractor who might qualify! Some of the upcoming events are as follows:

MDOT Workbench Wednesday:

Every Wednesday at noon, Nicole Dungey hosts this series via Zoom, which includes "Take a Look at MDOT's Disadvantaged Business Enterprise (DBE) program." Interested individuals must register in advance by contacting Dungey at DungeyN@Michigan.gov.

Procurement Technical Assistance Center's (PTAC) Coffee and Contracting:

Every month, Nicole Dungey is invited to present at this series that alternates between the Northeast Michigan PTAC and Southwest Michigan PTAC. Please contact PTAC at ptac@nemcworks.org to register.

Battle Creek Area Chamber of Commerce Business Expo:

On the second Tuesday of every month, Nicole Dungey attends this event that provides for a great networking opportunity and ways to connect in southwest Michigan.

Virtual session: 7:30 - 9 a.m.

Certification and Prequalification Overview:

This session helps small individuals to complete their Michigan Unified Certification Program (MUCP) application or MDOT prequalification application or Additional Work Type Request form. Those firms that request more one-on-one assistance are assigned to an OBD individual for individualized one-on-one assistance in understanding information required to complete their application. Interested individuals must register in advance by contacting Kathleen Jones at JonesK49@Michigan.gov.

Virtual sessions: Scheduled the second Wednesday of each month.

Real Talk Wednesday:

Sessions where MDOT OBD has invited other individuals to provide update information from their agencies on the procurement bidding process, or other training that is beneficial to MUCP DBEs or on MDOT processes. Interested individuals must register in advance by contacting Kathleen Jones at JonesK49@Michigan.gov.

Virtual sessions: Calendar year 2022 sessions TBD.

Orientation:

This session is for new, recertifying or individuals within a certified firm that are key. Valuable information about MDOT's contracting, bidding processes and Support Services Program will be provided. We will answer frequently asked questions, as well as take time to hear and respond to firms' specific questions and concerns as we discuss aspects of DBE regulations to maintain certification, payment and more. Sessions are held quarterly. Interested individuals must register in advance by contacting Kathleen Jones at JonesK49@Michigan.gov.

Virtual sessions scheduled: 9:30 a.m. - 1:00 p.m.

- Jan. 20

Project PDF Webinar (Jan. 20, 2022):

The purpose of this event is to present MDOT's new Project PDF deliverable format, as well as allow time for questions and feedback. In the concept being piloted, Project PDF replaces individual 11-by-17-inch plan sheets with a larger-size PDF sheet(s) that provides a (whole) project overview. Project PDF deliverables are currently

being piloted statewide, with at least one Project PDF job planned for each TSC throughout the piloting time period. Industry collaboration will be appreciated since MDOT does plan for Project PDF to be the format used in the future for construction contracts as a step toward digital delivery. To access the webinar, you need to register for the MDOT Engineering Support Training Team. If you have not already been added to the team, contact Carrie Bates at BatesC6@Michigan.gov.

Networking Sessions:

This networking session is held monthly for primes, DBEs and small business owners, and has evolved to include MDOT governmental partners that have upcoming procurement opportunities to share the same as MDOT TSC's and MDOT regions. Everyone must register to attend. This session is facilitated by MDOT's OBD. Interested individuals must register in advance by contacting Kathleen Jones at JonesK49@Michigan.gov.

Virtual sessions: Calendar year 2022 sessions TBD.

Continued on page 44

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Continued from page 43

MDOT's Annual DBE Conference:

As the world continues to adapt to life as we attempt to recover from the COVID-19 pandemic, OBD will host the 2022 Annual DBE Conference virtually. This conference will include some of the successes from last year's virtual conference and will improve upon it in areas where technical difficulties were experienced. The conference date is still being finalized but will take place in late March 2022. Those who attend will have the opportunity to hear from MDOT leadership, Federal Highway Administration Michigan Division, partnering agencies, and others. Information shared will include updates on doing business with MDOT, partnering agencies and other organizations, tools to grow your business, and a host of other topics still being developed. For more information regarding conference

updates, stay tuned to the MUCP website at www.Michigan.gov/MUCP.

On-the-Job Program (OJT) Contractor Training:

This will be a virtual training for all OJT contractors who have OJT assignments for the year. The OJT team will cover requirements of the program; go over required forms, how to fill them out and when they need to be submitted; go over the OJT welcome folder and reimbursements available to OJTs; provide resources in finding and placing OJT(s); and answer questions. For more information on registration, contact PaHoua Schroeder at SchroederP@Michigan.gov.

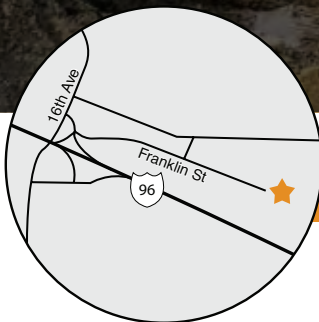
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LOCATE DEMAND MANAGEMENT



In August 2019, the CEO of MISS DIG 811, Bruce Campbell, envisioned a workflow API between contract locators and the Ticket Entry System and challenged his senior staff to propose a feasible solution. The precipitating event to this vision was the large number of “999” responses by major facility owners/operators and their contract locators that had brought about regulator action; in particular, the Consumers Energy and USIC’s non-responses to 20,000 tickets in both April and May 2019. The sole intent of the solution was to educate and inform Michigan excavators of the probability of an efficient locate and provide them the opportunity to adjust their dig start, if they are willing, based on a color-coded system.

The first approach was initially proposing a way to integrate the Locator Workflow Management Systems for the major facility owners/operators in three stages: green, yellow, and red for the dig start date in Newtin Ticket Entry through an API. However, during this process it was discovered no such workflow system existed and most contract locators and facility owners/operators did not have data to indicate how many locates they could handle in one day; therefore, this turned out to be unsuccessful approach.


In the second approach MISS DIG 811 took it upon themselves to calculate the data for the green, yellow, and red states from data they already have. Due to the implementation of Public Act 174 in 2014, Norfield Development Partners (NDP) built a report that looks for all positive responses on tickets entered through the MISS DIG 811 System by member code for a date range not to exceed 31 consecutive days. In 2020, MISS DIG 811 requested that the original report be rebuilt to count the



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total positive responses by county rather than by code. The data was collected in a Five Phase approach:

Phase One: The data was pulled from the Response Stats By County Report for all tickets taken by day, by month, and by year for six years in CSV format and entered into an Excel sheet, which included all the available positive responses going back six years, coinciding with the enactment date of Public Act 174 of April 1, 2014, when facility owners/operators became required by law to post to Positive Response.

Phase Two: The percentages of 999's, actual number of 999 responses, and the actual total ticket amounts by count and day for six years were calculated. The conversion of the date of the month to the day of the month (e.g., from April 1, 2014 to 1st Tuesday of 2014) was also completed in this phase.

Phase Three: This phase calculated the average and weighted average of 999 percentages, 999 responses, and total ticket amounts for each county, every day, and every month for the last six years.


Phase Four: The conversion of each month's individual data was entered into a single document with all necessary

weighted average 999 percentages, 999 responses, and total tickets for each county for every day of each month.

Phase Five: The final phase calculated the start and end data amount for the three states: green, yellow, and red. This is done by taking the 999 total weighted average and subtracting the 999 weighted average to calculate the base data, which then indicated how many tickets each county could handle.

1. The **green** state starts at zero tickets and ends at seventy percent of the base data calculation.
2. The **yellow** state starts at one over the green state end number and ends at eighty eight percent of the data base.
3. The **red** state starts at one over the yellow state end number and continues until all the tickets have been taken for the county for that day.


The color change for the varying states will be indicated to the excavator through the Begin Date box in ticket entry. The data is being tested on the MISS DIG 811 test server and was scheduled to be converted to the live server in March of 2021. **CS**



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Continued from page 24

- Fire Extinguishers: "If an employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an education program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage firefighting."
- Tools: "Ensure that an employee has been trained in the use of tools before authorizing their use."
- Traffic Regulating "Traffic regulator means a person who has been trained, properly attired, and equipped to regulate traffic flow to provide employee protection in a work zone."

These are a few examples of where MIOSHA regulations require training. MITA can assist in providing all of your necessary training. Please contact me as early as possible on this as dates for late winter and early spring fill up very fast. **cs**



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2022 EVENT CALENDAR

JANUARY

19-20 - Annual Conference
Soaring Eagle Casino & Resort

JUNE

8 - Western Golf Outing
Boulder Creek Golf Club, Grand Rapids

JULY

13 - Metro Golf Outing
Twin Lakes Golf Club, Oakland Twp.

28-31 - Summer Conference
Crystal Mountain, Thompsonville

AUGUST

24 - Central Golf Outing
Eagle Eye Golf Course, East Lansing

SEPTEMBER

28 - Wild Game Dinner
Palazzo Grande, Shelby Twp.

DECEMBER

9 - Central Holiday Party, Location TBD

14 - Western Holiday Party, Location TBD

15 - Metro Holiday Party, Location TBD



BID LETTINGS

January 7, 2022

February 4, 2022

March 4, 2022

April 1, 2022

May 6, 2022

June 3, 2022

July 1, 2022

August 5, 2022

September 2, 2022

October 7, 2022

November 4, 2022

December 2, 2022

For the most up-to-date
event information visit
www.thinkmita.org/events.

Continued from page 38

For 2021, the credit becomes much more valuable. The credit is equal to 70 percent of qualified wages up to \$10,000 per employee per quarter. The credit per employee maxes out at \$7,000 each quarter for a total of \$28,000 per year if enough qualified wages are paid. To qualify for any quarter, generally there must be a 20 percent or greater decline in revenue compared to the same quarter during 2019. For employers with 500 or more employees, the credit is available only if wages are paid to employees that are providing no services. For employers with 500 or fewer employees, wages qualify regardless of work status.

For both years, companies that seek forgiveness for PPP loans still qualify for the ERC. However, wages used for forgiveness purposes cannot be the same wages used for the ERC. Careful consideration should be given to the covered period and qualified expenses that were used to apply for PPP forgiveness so as not to comingle them with ERC eligible wages. IRS Notice 2021-20 has clarified that excess wages beyond those needed to qualify for PPP forgiveness can be used to qualify for the ERC.

It's Not too Late

We all hope the pandemic is winding down, but before putting the challenges of the last year and a half out of mind completely, be aware that an ERC opportunity may still exist for your business. Given the labor-intensive nature of construction work, the ERC can result in a significant reduction in payroll tax expense for a construction business. There is still time to take advantage of the ERC. Claiming the credit retroactively for 2020 or 2021 involves amending form(s) 941 and requesting a refund. The clock is ticking as the current ERC credit will sunset December 31, 2021. The infrastructure bill pending in Congress may even accelerate the sunset date to September 30, 2021, so act now. Don't leave this potentially valuable benefit on the table.

*About the authors: Steve Mihalik, CPA is a shareholder at Doeren Mayhew with more than 30 years of construction accounting experience. He can be reached by calling 248-244-3239 or e-mail him at: mihalik@doeren.com. Terry Dykhous, CPA, MST is a tax shareholder at Doeren Mayhew with more than 18 years of construction tax experience. He can be reached by calling 248-244-3069 or e-mail him at: dykhous@doeren.com **CS***

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BRANDIE MEISNER JOINS ARTBA'S BOARD OF DIRECTORS

Brandie Meisner, a past president of MITA has joined the board of directors for the American Road & Transportation Builders Association (ARTBA), MITA's national affiliate. Brandie Meisner, CFO of M&M Excavating in Gaylord, began



a three-year term on ARTBA's board at the end of September. She was one of 28 board members elected on this year's slate, along with 13 officers headed by Chairman Ward Nye, CEO of Martin Marietta Materials.

As a volunteer leader of ARTBA's Contractors Division, Brandie will help represent transportation contractors from Michigan – and across the country – in national dialogues on important industry issues. ARTBA regularly hosts opportunities to discuss these topics with officials from the Federal Highway Administration and other key agencies, as well as members of Congress and their staff. Besides ARTBA's continued advocacy for more federal transportation investment, the association also represents contractors on regulatory and policy issues like local hire mandates, Buy America, the Disadvantaged Business Enterprise (DBE) program, hours of service, work

zone safety and many others.

"Brandie will provide an experienced voice from an important state and ARTBA chapter," said Rich Juliano, the national group's general counsel who staffs its Contractors Division. "We're looking forward to getting her perspective during this very busy time for the industry."

ARTBA's Board of Directors meets two-three times per year, plus periodic virtual briefings on developments in the nation's Capital. In turn, these information-sharing opportunities help board members keep their respective companies and state associations up to date on national issues and ARTBA's activities.

"MITA looks forward to having our past president Brandie Meisner serving our industry at this level with our longtime affiliate ARTBA," said Rob Coppersmith, Acting Executive Vice President of MITA. **CS**

Continued from page 23

to-face with experienced people interested in procuring employment with your company. Even if you already have in-house hiring fairs, this is an opportunity to reach a wider range of workers. Information regarding locations and how to register for the 2022 MITA Hiring Fair will be provided through MITA bulletins, so keep an eye out for your notification, and sign up early because we anticipate a strong member response.

If you would like to be placed on a list of interested companies, contact Ken Bertolini, MITA's Director of Workforce Development at kenbertolini@thinkmita.org, or (517)-449-0155. **CS**

Continued from page 35

that does not unduly punish or enrich either one of them. At the moment, there is excessive demand for construction services throughout the market such that owners who refuse to show flexibility in dealing with such increases may pay the price on later projects, with bidders incorporating large contingencies into their price. By not compromising, both sides risk creating a potentially harmful judicial precedent that may lead to still higher costs.

Conclusion

Who knows how many more waves the COVID-19 pandemic will produce or what further disruptions they will cause. What is certain is that the construction industry will be affected for as long as it takes to resolve the supply chain and labor market disruptions spawned by the pandemic. To avoid still higher costs induced by protective bidding contingencies, owners going forward should be motivated to agree to price adjustment clauses. For contracts pre-dating the pandemic or entered into shortly after the start, the contract itself might provide the remedy, but there are also common law doctrines that may help avoid an obviously unfair result. Each of these COVID-19 claims must be carefully evaluated in light of the precise language of the parties' contract, applicable common law principles and the exact facts of the project and surrounding events. **CS**



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