SUMMER 2021

Substance

Illinois Mechanical & Specialty Contractors Association

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A Message from IMSCA's President

Chad Fricke,
IMSCA President

This past year has been a reminder that our ability to adapt plays a key role in the survival of our business. A year or so ago, my staff and I were scrambling to develop new safety precautions, company policies, and new processes that were demanded by the COVID-19 public health crisis. We had to develop new procedures for technicians servicing our customers, new methods for handling paperwork and materials, how to respond when employees called stating he or she had been exposed to someone with COVID-19, and of course - where to purchase toilet paper.

This experience was not unique to my company, but every business was forced to adapt to sudden change. As I reflect on these many developments, it is clear to me that our ability to adapt to these unusual circumstances helped keep my company and employees safe. The changes we made in response to COVID-19 have streamlined the future of our company, and will ultimately lead to our continued success.

All of us faced many "unknowns" throughout 2020 and in to 2021. This experience made me more appreciative of my professional trade association memberships, such as IMSCA. I am thankful to my IMSCA colleagues for being a trusted source and a place to turn for guidance in adapting to an ever-changing business environment.

I wish I could say that business has gotten easier now that 2021 is about half-way over, but so far, that isn't the case. We are now presented with a new set of challenges. In addition to the latest COVID-19 developments, we are also facing material shortages, supply chain disruptions, shortage of qualified labor, rising costs for fuel and materials and much more. No matter what the challenge may be – I encourage IMSCA members to be ready to adapt!

IMSCA remains a key organization for our industry's ability to adapt to changing times. IMSCA has been making changes for the betterment of our industry through the legislative process since 1967. The resilience of IMSCA's members is a key factor in driving our continued success. I look forward to working with each IMSCA member and providing you with the necessary tools to continue to adapt to whatever challenges we face next.

contents

Legislative Representation for over 2,000 Construction Employers

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featured **story**

Combating Material Supply Disruptions and Cost Escalation

James T. Rohlfing is a partner in the national law firm of Saul Ewing Arnstein & Lehr, and a member of the firm's Construction Practice Group and Litigation Practice Group. Mr. Rohlfing represents subcontractors and other participants in the construction industry. He is editor of Illinois Construction Law Manual, a treatise published by Thomson Reuters. Mr. Rohlfing is the current general counsel as well as the past president of the Illinois Mechanical & Specialty Contractor's Association (IMSCA), the largest organization for subcontractors in Illinois. He is an active member of the ABA Construction Forum, the Society of Illinois Construction Attorneys (SOICA), the Chicago Bar Association's Construction Law committee, and the Association of Subcontractors and Affiliates in Chicago. He has drafted and assisted in passing Illinois legislation critical to the construction industry and he has testified on numerous occasions on construction law issues before committees of the Illinois Legislature.

After surviving the pandemic, the construction industry is confronting new post COVID challenges – construction materials shortages, extreme material price increases and supply chain disruptions exacerbated by economic uncertainty. Owners, contractors, subcontractors and the material suppliers themselves are struggling to understand and reduce the negative effects of supply chain disruptions. All participants in the construction industry should understand the trends and protect themselves by carefully monitoring the availability of needed materials, and in addition, by negotiating cautionary contract clauses at the beginning of new projects to avoid battles when the increased cost or shortage of materials drastically increases the cost and time to perform the work.

According to a recent survey conducted by the Associated General Contractors of America, 52% of the respondents reported problems with projects due to a shortage of construction materials, parts or equipment. Almost one third claimed a shortage of skilled labor. Though the lumber shortages and steep lumber prices are broadly known, unusual price increases and unavailability is affecting a wide range of materials, including steel joists, insulation, stainless steel, PVC piping and semiconductors. According to Ken Simonson, AGC's chief economist, escalating materials costs and lengthening delivery times are making many projects more difficult for contractors and their customers. Another report shows 71% of contractors surveyed are facing at least one material shortage with lumber the most common, but many citing shortages of steel, electrical supplies and lighting supplies. Some of the material shortages and delays are compounded by a shortage of shipping containers and trucking across the country, resulting in longer than usual lead time.

"...report shows 71% of contractors surveyed are facing at least one material shortage with lumber the most common..."

Some contractors have tried to reduce the impact of material shortages by making procurement decisions in advance, collaborating with suppliers to

continued on page 3

increase commitments, insisting on short windows of time from owners to place advance orders, locking in production slots and working with customers to understand risks of delay or disruptions. In some cases, drastic price increases for key materials, such as lumber and steel, might make it more feasible to use alternative materials, such as concrete. In other situations, assessing the effect of material price increases or shortages on a project at an early stage might lead to a decision to cancel a project all together, before losses are even greater.

Often the most effective means to protect against losses from material supply uncertainties is a carefully drafted contract that spells out which parties will be responsible for extreme price increases and delays caused by material shortages. The risk of price escalation or acceptance of liability for delay should not be assumed lightly or without consideration. Contracts that clearly allocate such risks permit all parties to price their work accordingly and encourages responsible parties to take preventative steps to mitigate damages. Owner, contractor and subcontractor might divide responsibility for unexpected or excessive price increases and negotiate upfront how to deal with shortages. If a contractor is excused by contract from liability for a delay in furnishing materials, the contractor is typically obligated to promptly give notice of a delay, a force majeure event, or a request for change order. If the required notice is not given as soon as it becomes known that a delay in materials or extreme cost increase will adversely affect the price or schedule, the contract may preclude schedule or price relief though it otherwise would have been available. Therefore, it is important that the party ordering the materials pay close attention to the supplier's schedule to promptly learn of delays and follow all of the contract requirements for requesting a schedule extension or price increase at the earliest possible juncture.

Under some circumstances, a contractor can recover damages for acts or omissions of an owner (including material shortages) which burden the performance of the work and increase the costs of completion. It is not uncommon for contracts to include a "no damage for delay" clause which precludes damage claims for increased expense to perform work due to delays. These clauses often relieve owners of such liability, but they can be drafted to protect any of the parties. In any event, the "no damage for delay" protection is not limitless. Courts will refuse to enforce such provisions when: 1) a party is guilty of bad faith, fraud, concealment, misrepresentation or hindrance; 2) where the delay was not within the contemplation of the parties when the contract was entered into; 3) where the delay is unreasonable in duration; or 4) where the delay is attributable to the inexcusable ignorance or incompetence of another party. The best practice is for the construction contract to clearly allocate responsibility for material shortages and delivery delays.

If material shortages result in a delay in performing the work, many construction contracts provide for liquidated damages because it is so difficult to establish the precise amount of damages resulting from delay. Such provisions are enforceable if they are a reasonable estimation of anticipated actual damages and not a penalty. Without a liquidated damage provision, proving delay damages at trial is usually a complicated and time-consuming process involving expert witnesses. Attention should be paid in the contract negotiation stage to terms allocating actual damages or liquidated damages, especially because the trend toward supply chain disruptions is unlikely to end soon.

Thanks to COVID-19, the construction industry is now more familiar with the term "Force Majeure," a French phrase meaning "superior force." A force majeure clause in a construction contract will excuse performance by a party due to unforeseen or unanticipated circumstances outside of that party's control. Often, the force majeure events or categories of circumstances will be specified in the contract. Now that disruptions in the supply of construction materials are foreseeable, a force majeure clause should specify whether the parties intend it to cover such shortages. Moreover, for a party to invoke the protection of a force majeure clause, it is often necessary to provide written notice within a short period after learning of the circumstances causing the event.

There are additional legal theories that might excuse a party from damages caused by material shortages or delays. These include the doctrines of impossibility, commercial impracticability, and frustration of purpose. A well drafted contract will usually alleviate the need for litigating such theories in a lawsuit.

Of course, the best remedy is to address the issue of material shortages and extreme price increases when negotiating your contracts rather than wait until the issue occurs during performance. Contacting your construction attorney to assist with the contract negotiation is one way to reduce the likelihood of a dispute after the work has begun. ■

IMSCA Virtual Town Hall Legislative Forum a Success!

The Illinois Mechanical & Specialty Contractors Association's (IMSCA's) Virtual Town Hall Legislative Forum was held on Friday, March 19, 2021 via Zoom. IMSCA had an exciting panel of legislators who provided IMSCA members with an overview of important issues facing our state that the Illinois General Assembly will tackle during the spring 2021 legislative session. This event was designed to provide IMSCA members with a unique opportunity to receive an "insider's view" from key Illinois State Senators, which included: Senate President Don Harmon, Assistant Majority Leader Linda Holmes and Senator Ram Villivalam. Each panelist provided a brief presentation, and a Q & A period followed.

The program began with a brief update of the Budget process, Redistricting, and COVID-19-related issues. Senator President Don Harmon informed the IMSCA members that as an initial priority, the Senate has made great strides to meet "in-person" and will continue to do so. They are reviewing varied legislation from clarification of Special Warranty Deeds (SB46) to reviewing the recently submitted Budget proposal from the Governor.

Assistant Majority Leader Linda Holmes re-affirmed her sponsoring of the IMSCA legislative initiative that seeks to amend the Public Construction Bond Act (SB178) to provide that a local government entity may not require retainage when a contractor has furnished a surety bond or its equivalent. This bill is a continuation of IMSCA's previous work on retainage reform. She is aware that IMSCA worked hard for many years seeking a reduction in retainage on private, commercial construction projects, which became law in 2019. Retainage is still withheld at an unreasonably high rate of 10% for most local government construction projects, even though a payment and performance bond is also required to protect local governments from defects and delinquencies. The combination of the two is excessive and creates unnecessary cash flow burdens. IMSCA asserts SB178 will ease this financial burden experienced by many contractors.

Senator Ram Villivalam re-affirmed his sponsorship of SB2494, an IMSCA initiative. SB2494 seeds to extend a sunset provision in current law (P.A. 97-966) that allows the time a commercial construction project may last and still permit the filing of a mechanics lien from 3 to 5 years. This law is set to expire on December 31, 2021. SB2494 seeks to extend the sunset provision through 2026.

Each presenter emphasized the

continued on page 5

 (continued from page 4)

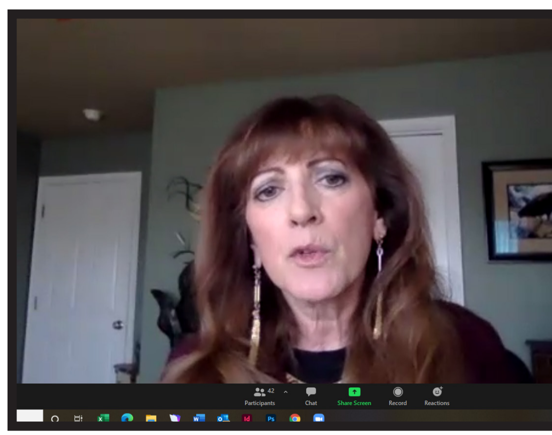
Senate President Don Harmon (D-38th District)

Senator Ram Villivalam (D-8th District)

importance of proper utilization of the $7.5 billion Illinois is to receive from the "American Rescue Plan." Also, the "Rebuild Illinois Plan" from 2019 is also being scrutinized for best utilization of available funds / projects. Transportation, infrastructure, overall Energy Policy, expansion of proper utilization of electronic signatures, streamlining of government were also highlighted during their presentations.

Also, the presenters anticipated passage of the "Future of Work Act" (SB2481). The Future of Work Act would establish the Future of Work Task Force to assess new and emerging technologies that have the potential to impact employment and wages, develop a baseline of job standards and working conditions, facilitate workforce development and research best practices on how to deploy technology to benefit working people. The Task Force would consist of 16 bipartisan members of the General Assembly, six members appointed by the governor, the Superintendent of the State Board of Education and the Directors of the Illinois Departments of Labor, Commerce and Economic Opportunity and Employment Security.

We hope that you were able to participate with this event and learned more about legislative issues important to the Illinois construction industry and your business. If you have any questions regarding how IMSCA members can work together to ensure IMSCA efforts move successfully through the legislative process, please contact Jessica Newbold Hoselton, Executive Director, Illinois Mechanical & Specialty Contractors Association (IMSCA) at (217) 523-4361.



Senate Assistant Majority Leader Linda Holmes (D-42nd District)

Are Criminal Background Searches Still Worth It?

Jason Tremblay is a business attorney and litigator who advises companies in a wide range of industries on employment law and commercial matters. Jason's breadth of experience as a litigator and problem solver enables him to be a trusted advisor and outside general counsel to his clients. His experience in employment matters includes counseling, negotiation and litigation on issues critical to the evolving workplace including wage and hour disputes, restrictive covenant matters, FMLA, ADA, ADEA and Title VII claims. Jason also provides his clients with an array of services including drafting and negotiating employment and independent contractor agreements, and counseling clients relating to employment and contract related issues. Beyond these services, Jason also draws on his experience to help business owners triage the issues they face and, when necessary, direct them to outside sources of assistance.

On March 23, 2021, Illinois Governor J.B. Pritzker signed into law the Employee Background Fairness Act (the "Act"), which bans the use of criminal convictions in employment actions in Illinois, with limited exceptions.

The passage of the Act is just the last of several steps the Illinois legislature has recently taken to curtail the ability of employers to base employment decisions on an applicant's and employee's criminal history. In 2015, Illinois became one of the first states to enact a "ban the box" law, preventing employers from inquiring about criminal histories on employment applications. The "ban the box" law followed a general prohibition in Illinois under the Illinois Human Rights Act ("IHRA") on basing any employment decisions on an applicant's or employee's arrest history. Now, under the Act, Illinois has taken one step further and has generally banned the use of criminal convictions in employment decisions.

Specifically, the law makes it a civil rights violation to use a conviction record in any employment-related decision, unless (1) there is a "substantial relationship" between the criminal offense and the position, or (2) it would involve an "unreasonable risk" to property or the safety of a specific individual or the general public. The Act does not, however, prohibit employers from using conviction records where required to do so by law.

New Illinois Law Significantly Restricts Employers' Ability to Use Criminal Convictions in Employment Decisions.

The Act defines "substantial relationship" as a consideration of whether the employment position offers the opportunity for the same or a similar offense to occur and whether the employment circumstances are likely to result in a

continued on page 7

recurrence of the criminal conduct.

In determining whether one of the two exceptions apply, employers will be required to consider the following factors:

(1) the length of time since the conviction;
(2) the number of convictions that appear on the conviction record;
(3) he nature and severity of the conviction and its relationship to the safety and security of others;
(4) the facts or circumstances surrounding the conviction;
(5) the age of the employee at the time of the conviction; and
(6) evidence of rehabilitation efforts.

Employers who wish to take an adverse action must engage in an "interactive" process with the employee to understand the context behind the conviction record and must also navigate the law's notice provision by advising the employee both before and after the final decision is made, of his or her rights.

Notably, if an employer wishes to apply one of the two exceptions, the Act requires the employer to notify the employee or applicant in writing with a copy of the conviction report, and to give the employee or applicant five (5) days to submit information that may convince the employer not to take the adverse action. The employer may not make a final decision until the employee is given this five-day window.

If, after providing the five-day window, an employer decides to proceed with the adverse action, it must issue the employee or applicant another notice, explaining the basis for the decision, advising of any internal procedures for requesting reconsideration, and notifying the employee or applicant of his or her right to file a charge of discrimination with the Illinois Department of Human Rights.

As a practical matter, the new law puts Illinois employers in a precarious position. Many employers may opt to forego criminal background checks altogether, as their utility is greatly limited under the Act. While employers are still allowed to conduct criminal background checks, they are not able to use the information unless they can meet the strict standard for one of the two enumerated exceptions. And, if an employer does perform a background check on an applicant that reveals a prior conviction, and then rejects the applicant for an unrelated reason, the employer may have to defend its reasoning and prove that the conviction was not the basis for the decision. Moreover, employers will have to comply with the notice requirements set forth in the Act. Ultimately, it may be less burdensome for employers to forego criminal history checks altogether, unless operating in a particularly sensitive industry that requires such measures.

As with all new laws, we are sure to see additional guidance once regulations are implemented and/or the interpretation of the new law's scope makes its way into the court system.

Illinois State Capitol Report

JESSICA NEWBOLD HOSELTON
IMSCA
Executive Director

The scheduled adjournment date for the 2021 spring legislative session was May 31st. However, things often don't go as planned in Springfield, and the spring session rolled in to overtime. The Illinois Senate returned to session Tuesday, June 1st. Lawmakers put in a marathon session over the Memorial Day weekend and by late afternoon on May 31st, it looked like both chambers were on track to wrap up their business by midnight. It was reported that agreements had been reached on the budget, and a comprehensive energy policy. In addition, other bills addressing important issues such as ethics, elections, criminal justice reform, the FOID card renewal process and others were teed up for passage.

As the clock continued ticking, many of these issues "went off the rails" including the energy policy legislation. As quickly as the deal came together – it fell apart. The tensions revolved around Senate President Harmon's strong urging to exempt the Prairie State Energy Campus from the 2035 decarbonization target goals, which was a non-starter for environmental groups. This Illinois-coal burning facility is located in the metro-east, and many municipalities purchase their energy from the Prairie State Energy Campus. The promises of "clean energy" from this location have not kept pace with expectations, which has caused some municipalities to go into debt. The argument Senate President Harmon made is that closing this facility by 2035 would cause additional fiscal damage to municipalities holding bonds throughout the state and will eliminate good-paying local union jobs.

Despite this reported tension, President Harmon released a statement regarding positive steps in ongoing energy bill negotiations. President Harmon stated that an "agreement has been reached between the Governor and Exelon on a proposal that would save jobs". He further stated he stands "with the governor on the decarbonization targets that need to be in the final deal". It appears an energy policy agreement is back on track and will possibly be dealt with in the coming weeks by the Illinois General Assembly.

The budget **(SB 2800 House Floor Amendments #2 and #3)** approved by the Illinois General Assembly, takes in $42.3 billion, and spends. $42.2 billion. The spending plan generates $600 million in revenue by closing what Governor Pritzker categorized as "corporate tax loopholes". Those loophole closures include freezing the phaseout of the state's corporate franchise tax, limiting the amount of operating losses businesses can deduct per year, treating foreign and domestic dividends the same for tax purposes, and rolling back a provision that allows business to write off the full cost of eligible equipment in a single year rather than in smaller increments over time.

The budget calls for spending nearly $7.5 billion in state general revenues on Medicaid, $7.4 billion for other human services, $1.9 billion for higher education, $1.9 billion for public safety and $1.4 billion for general services. The proposed spending plan also reinstates $350 million for public school funding that was promised annually in 2017

continued on page 9

school funding overhaul legislation.

In addition to these regular line items included in the budget, the spending plan also calls for spending $2.5 billion of the American Rescue Plan (ARP) revenue Illinois expects to receive. $1.5 billion will go toward continued economic recovery programs to help businesses hardest hit by the COVID-19 pandemic, public health, affordable housing and violence prevention programs. ***In addition, $1 billion of the ARP funds will be redirected to the ongoing Rebuild Illinois capital program to jump start capital projects slated for construction.***

Democrats stated that federal relief and a stronger than expected economy were key factors in crafting a spending plan for the upcoming budget year and described the FY 22 budget as "balanced". Democrats further defended the plan as a reflection of "Democratic priorities" against "Republican interests". Republicans repeated their annual complaint that they didn't have enough time to review the budget. However, Republican lawmakers were most vocal in their displeasure at not being given an opportunity to include construction projects from their districts in the dedicated $1 billion infrastructure spending funds.

In addition to approving the FY 22 budget plan, legislators also addressed other important issues, including: ethics reform, changes to the upcoming 2022 elections and legislative re-districting.

SB 539 House Floor Amendment #2 is the General Assembly's effort to tackle ethics reform. Although most Republicans stated this legislation doesn't go far enough, it was approved with bi-partisan support. In response to the Republicans criticisms, the bill sponsors (Sen. Ann Gillespie and Rep. Kelly Burke) stated they are open to re-visiting the language in the future to make additional improvements. The legislation bans legislators from lobbying units of local government (with the exception of the City of Chicago), strengthens the Statement of Economic Interest form and includes a six-month "cooling off period" for legislators before they can become registered lobbyists. SB 539 as amended, also bans fundraisers during session, and the day before and the day after scheduled session dates.

SB 825 House Floor Amendment #2 provides for a one-time delay in the Illinois 2022 primary election from March 15th to June 28th. The 2022-only election date change is necessary because the congressional remap has been delayed until after census data is published in a few months. Vote by mail ballots can be requested on March 30th, and early voting will begin May 19th. This measure also allows voters to put their names on a list of those who always want to vote by mail, all county sheriffs will be allowed to set up ballot booths at their jails, creates a pilot program to require all election authorities in the state to establish at least one location next year where anyone in that county or municipality can vote on election day, makes curbside voting permanent, and makes

continued on page 10

the November 8, 2022 general election a state holiday.

The Democratic majority also approved **HB 2777**, which provides for the new legislative re-districting maps. Democrats hold super-majorities in both chambers, so it was of great importance to them that a new map was approved by the General Assembly by June 30th. Otherwise, according to the constitution, an avenue would have presented itself for the Republicans to participate in the map making process. HB 2777 has been sent to Governor Pritzker for his approval, and it is widely expected he will approve the legislation. While HB 2777 re-draws the legislative boundaries for Illinois Senate and House districts, the new maps for Illinois' congressional districts will be dealt with at a later date due to delays in federal census results.

In other election news, **Senate Joint Resolution Constitutional Amendment 11 (Sen. Villivalam/Rep. Evans, Jr.)** proposes a constitutional amendment banning local "right to work" zones. SJRCA 11 is a labor initiative and was approved by both chambers with bi-partisan support. Voters will have the opportunity to vote on this ballot initiative in the November 2022 General Election. ***SJRCA 11 will become part of the constitution if approved by 60% of those voting on the question or a majority of these casting a ballot in the election.***

Additional issues that were debated by the Illinois General Assembly in the final days of session that are of importance to the construction industry include:

IMSCA's legislative initiative, **SB 2494 Amendment #1 (Sen. Villivalam/House Majority Leader Natalie Manley)** seeks to extend a sunset provision in current law (P.A. 97-966) that allows the time a commercial construction project may last and still permit the filing of a mechanics lien from 3 to 5 years. This law is set to expire on December 31, 2021. SB 2494 as amended, seeks a 3-year sunset extension through 2024. ***SB 2494 was approved by both chambers and will soon be headed to Governor Pritzker for his approval.***

SB 166 House Amendment #2 (Sen. Scott Bennet/Rep. Sonya Harper) is a trailer bill to the Economic Access, Equity and Opportunity policy pillar that was passed during the January 2021 Lame Duck session. SB 166 as amended is the result of negotiations between the Legislative Black Caucus, the Governor's Office and the Department of Central Management Services. This legislation includes clean-up language for the transition of the Business Enterprise Program to the newly created Commission on Equity and Inclusion. This bill also includes language stating all goals for minority and women participation shall be based upon the results of the most recent disparity study conducted by the Department of Central Management Services, which is due to be issued by June 1, 2022. ***SB 166 as amended is awaiting a concurrence vote in the Senate.***

SB 1767 (Sen. Belt/Rep. Greenwood) amends the Prevailing Wage Act to provide that the electronic database of certified payrolls must be searchable by the general public no later than January 1, 2022. The data that must be searchable by the public includes each worker's classification, skill level, gross wages paid in each pay period, number of hours worked each day, starting and ending times, and hourly wage rate. In addition, the database shall be searchable by contractor name and project name and personal identifying information such as social security number, birth date and address shall be redacted. ***SB 1767 was approved by both chambers and will soon be headed to Governor Pritzker for his approval.***

SB 2459 (Sen. Villivalam/Rep. Buckner) amends the Electronic Commerce Security Act. This legislation seeks to allow the Department of Transportation, Illinois State Toll Highway Authority and the Capital Development Board to accept the use of electronic signatures. ***SB 2459 was approved by both chambers and will soon be headed to Governor Pritzker for his approval.***

SB 1847 (Sen. Hunter/Rep. Harper) is a trailer bill to SB 1480, which was passed during the January 2021 Lame Duck session and signed into law in March. SB 1847 House Amendment #1 amends the provisions of SB 1480 dealing with the newly required Equal Pay Certificate for Illinois businesses with 100 or more employees. SB 1847 as amended delays the date Illinois employers must apply for and obtain an equal pay certificate to between March 24, 2022, and March 23, 2024. The amendment also provides a time period to allow business owners to cure any deficiencies that may be found during the application process. ***SB 1847 as amended was approved by both chambers and will soon be headed to Governor Pritzker for his approval.***

HB 2567 Senate Amendment #2 (House Assistant Majority Leader Jay Hoffman/Sen. Castro) renews the Capital Development Board's current statutory authority to use the single prime delivery method through 2024. The current statute states "the CDB shall not use the single prime delivery method for more than 50% of the total number of projects bid for each fiscal year". ***HB 2567 as amended is awaiting a concurrence vote in the House.***

Lawmakers covered a lot of ground and approved many important measures this spring. The spring 2021 legislative session was a busy one for IMSCA. All in all, it was a successful one for our association. Thank you to everyone who participated in our Calls to Action and provided feedback on legislation to help define our position on these bills. ■