



Vol. 29, No. 10

(518) 869-9800

April 2011

Federal DOT Expands DBE Program

The U.S. Department of Transportation (DOT) has adopted a new rule intended to help Disadvantaged Business Enterprises take advantage of opportunities to participate in federally funded highway, transit and airport projects. The final rule, issued by DOT on January 27th and which became effective on February 28th, will also hold states and local agencies more accountable for including disadvantaged businesses in their transportation plans. DOT's Disadvantaged Business Enterprise (DBE) program is intended to help small businesses owned and controlled by socially and economically disadvantaged individuals compete for government contracts. DOT also requires state and local transportation agencies to establish goals for DBE participation.

The new rule will require greater accountability from state and local agencies for including DBEs in their spending plans. Those that fail to meet established goals for DBE participation will be required to evaluate why the goals were not met and offer a plan to help meet the goals in the future. In addition, the rule adjusts the personal net worth limit for DBE owners from \$750,000 to \$1.32 million. The \$750,000 limit was set in 1989 and had not been adjusted since.

The rule also adds provisions to increase post-award oversight so that prime contractors fulfill commitments to utilize DBE subcontractors. State and local agencies will be required to monitor each contract to make sure prime contractors are fulfilling their obligations and do not dismiss DBE subcontractors without good cause.

Another change under the rule will reduce burdens on small businesses seeking DBE certification in more than one state. All states will be required to accept DBE certifications obtained in other states, unless the state finds good cause not to accept it. The rule establishes a process for resolving eligibility issues raised by states concerning out-of-state firms.

What does all this mean? In all likelihood state and local agencies will be forced to re-evaluate their DBE programs to ensure compliance with the new rule. As a result, the evaluation of contractors' good faith efforts to use DBE may become more rigorous and DBE utilization goals on individual contracts may increase.

Senate Bills Introduced to Repeal Imposition of 3% Withholding

U.S. Senators David Vitter (R-LA) and Scott Brown (R-MA) have introduced similar bills that would repeal the requirement that government withhold 3% of payments made to contractors beginning next January.

Section 511 of the federal Tax Increase Prevention and Reconciliation Act of 2005 (Public Law 109-222) is a sweeping new requirement mandating that federal, state and local governments with annual expenditures exceeding \$100 million withhold 3 percent from payments for goods and services, including construction contracts. This law is currently scheduled to take effect on January 1, 2012.

Unless repealed, the withholding mandate will impose a particularly heavy burden on low margin industries like construction. The 3% withholding will have a serious impact on cash flow and will often far exceed a contractor's ultimate total tax liability for a given project. At a time when the construction industry is suffering an on-going recession, this misguided federal law has to go. Members are encouraged to contact U.S. Senators Charles Schumer and Kristen Gillibrand and express opposition to the pending 3% withholding mandate.

NESCA Membership Meeting

April 14, 2011

Century House – 6:00 p.m.

- 6:00 Open Bar/Registration
- 6:30 Dinner: Center Cut Pork Loin
- 7:10 Business Announcements
- 7:30 5th Annual Safety Awards Presentation
- 7:45 Presentation by the Safety Directors of Turner Construction Company and D.A. Collins Construction Company: "Jobsite Safety: What we Expect from our Subcontractors"

Reception, Dinner, Tax & Gratuities - \$45



PRESIDENT'S MESSAGE

I encourage all members to attend NESCA's April 14th membership meeting at the Century House, when we will be recognizing the outstanding safety records of deserving members at our 5th Annual Safety Awards Presentation. Our safety awards are again based on each member company's lost workday incidence rate (LWIR) from their OSHA 300 logs. All member subcontractors and suppliers are eligible to receive safety awards based on their LWIR. For subcontractors, a lost workday incidence rate of 0 – 1.0 qualifies that member for a "Gold" safety award. A subcontractor qualifies for a "Silver" award with a LWIR of 1.01 – 2.50, and a "Bronze" award with a LWIR of 2.51 – 4.00. For suppliers, a member qualifies for a "Gold" award with a LWIR of 0 – 0.67, a "Silver" award with a LWIR of 0.68 – 1.67, and a "Bronze" award with a LWIR of 1.68 – 2.67. During the month of February, NESCA members submitted their safety award entry forms and the results have been tabulated. I am proud to announce that 67 members of NESCA will receive

safety awards this year. This is really impressive, and I congratulate all of this year's safety award winners. I look forward to seeing you at the safety awards presentation on April 14th.

In keeping with the theme of "construction safety", the April membership meeting will also feature a dual presentation by the safety directors from Turner Construction Company and D.A. Collins Construction Company. Christopher Fuller is the Safety Director for Turner's New York North office and Rob Gilchrist is the Corporate Safety and HR Director for D.A. Collins. Chris and Rob will discuss, from the perspectives of a building contractor and a heavy/highway contractor respectively, what they expect from their subcontractors with regard to jobsite safety. This meeting will represent a great opportunity for NESCA members to hear from two major contractors on the issue of jobsite safety, and I hope you make plans to attend.

On March 29th, NESCA held a sold out seminar on "Performing Public Work" presented by Walt Breakell with the Breakell Law Firm and Joe Hogan Vice President of the Associated General Contractors of NYS. Anyone who performs public work for New York State's various contracting agencies, public authorities and localities know that this can be a daunting endeavor due to the large number of complicated laws, rules and regulations a contractor or subcontractor must comply with. From the advertising of bids and letting of contracts, to claims against public bodies, there are numerous legal pitfalls that can mean the difference between success and failure on a public project. This seminar provided attendees with a thorough overview of what every contractor and subcontractor needs to

know when performing public work, from the bidding process to project closeout. All registrants also received a comprehensive "Performing Public Work" manual.

We have another good educational program coming up on April 19th when we present our annual "Sales Tax" seminar. As I'm sure you know, sales tax requirements in the construction industry can be extremely confusing and subject to much misinterpretation. This seminar will review the proper application of sales tax to different construction activities as well as the correct use of the various sales tax certificates. As always, members who attend will receive a comprehensive Sales Tax manual to compliment this seminar.

Bill McLeod, President

NESCA NEWSLETTER

Published monthly by the Northeastern Subcontractors Association

6 Airline Drive, Albany, New York 12205
(518) 869-9800 www.nesca.org

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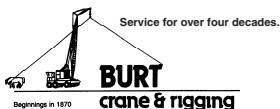
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Court Holds Verified Statement Did Not Meet Trust Fund Requirements of Lien Law §76

On February 17, 2011, the Supreme Court of New York, Appellate Division, Third Department decided in the matter of Bette & Cring LLC, Appellant v. Brandle Meadows LLC, Respondent. In this case, Petitioner was retained by Respondent to serve as the construction manager for the Brandle Meadows – Senior Condominium Community Project in the Village of Altamont, Albany County. A dispute arose between the parties when Petitioner claimed it had completed the work required under the contract and was owed over \$2 million. Thereafter, Petitioner served Respondent for a demand of verified statement pursuant to the trust fund provisions of Lien Law §76. Respondent provided a verified statement which Petitioner claimed did not meet the minimum requirements for such statements. Petitioner thereafter commenced a proceeding to compel Respondent to comply with its demand. The lower court dismissed the Petition and the Petitioner appealed to the Appellate Division.

The Court in rendering its decision stated “Lien Law Article 3A creates a statutory trust for funds received by owners. . . . Pursuant to Lien Law §76(1), a trust beneficiary such as Petitioner is entitled, at its option, not oftener than once in each month, (a) to examine the books or records of the trustee with respect to the trust; . . . or (b) . . . to receive a verified statement setting forth the entries with respect to the trust. Pursuant to Lien Law §75(3), the trustee’s books or records shall contain entries regarding trust asset receivables, trust account payables, trust funds received, trust payments made with trust assets, and transfers in repayment of or to secure advances made pursuant to a notice of lending, together with specific information underlying each trust transaction. If the trustee fails to comply with the beneficiary’s request to examine the trustee’s books or records or for a verified statement, the beneficiary may apply to the court for an order directing that the trustee comply with the request.”

Initially, the Court was unpersuaded by Respondents’ argument that this appeal is moot. Specifically, Respondent argued that any deficiencies in the verified statement should be deemed moot because Petitioner later demanded and was provided with, an opportunity to examine the trustee’s books and/or records. The Court stated “the Lien Law affords the trust beneficiary the option on a monthly basis, to demand to

examine the trustee’s books or records or demand a verified statement. Because the right of examination to receive a verified statement is a continuing one over the life of the trust, noncompliance with one such demand is not cured by compliance with the later one. Thus, Petitioner’s claims that the verified statement Respondent provided was deficient were not rendered moot when Petitioner later demanded, and was permitted, to examine the books and record of the trustee.

The Court next addressed Petitioner’s argument that the verified statement did not comply with the requirements of the Lien Law. The Court held that even though the mechanic’s lien had been bonded and the main claim had been referred to arbitration, it did not alter Respondent’s obligation to supply a verified statement fully compliant with the Lien Law.

Finally, the Court, in reviewing the substance of Respondent’s verified statement found that it was insufficient with respect to four of the five categories of entries that shall comply with Respondent’s books or records as required by Lien Law §75(3).

Terence J. Burke, NESCA Counsel

NLRB Proposes Rule to Require Posting of Right to Unionize

The National Labor Relations Board (NLRB) has proposed a rule that would require employers to post notices informing workers of their right to unionize. Under the proposed rule, employers would have to post an 11-17 inch poster educating employees of their rights under the National Labor Relations Act (NLRA). The notice would have to be posted where the employer posts other workplace notices, such as safety, wage and hour, and anti-discrimination posters. Failure to post the notice could result in monetary fines.

The proposed rule, submitted to the *Federal Register* in December, states that the poster shall spell out the rights of employees to form, join or assist unions; to bargain collectively with their employer; to discuss union organizing with co-workers or a union; to raise work-related complaints with their employer; to strike and picket; and to choose not to engage in any of these activities.

The 60-day comment period for the proposed rule ended in late February and revealed considerable opposition to the rule from all types of employers. It is uncertain when the NLRB may take additional action on the proposed rule, but NESCA will keep an eye on further developments.

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Calendar of Events

April 7, 2011

Board of Directors Meeting
Century House, Latham, 6 pm

April 14, 2011

NESCA Membership Meeting
Century House, Latham, 6 pm

April 19, 2011

Educational Program
NYS Sales Tax Requirements
Building Industry Center, 6 pm

April 21, 2011

NESCA Regional Membership Meeting
McGirk's, Binghamton 6 pm

May 12, 2011

Board of Directors Meeting
Century House, Latham, 5 pm

May 12, 2011

NESCA Membership Meeting
Century House, Latham, 6 pm

June 2, 2011

Board of Directors Meeting
Century House, Latham, 6 pm

Question of the Month

Q. It is my understanding that the lien rights of subcontractors and suppliers working on a public project expire 30 days after the project has been completed and accepted by the public owner. The problem is, I don't always know when a public project I am working on has been certified as completed and accepted. How can I get this information so that my lien rights don't expire without me knowing?

A. In 1977, NESCA's affiliate the Empire State Subcontractors Association drafted and lobbied into law Section 11-a of the Lien Law. Section 11-a requires, upon the written request of a subcontractor or supplier, that a public owner (state agency, city, county, town, school district), provide the subcontractor or supplier with written notice within five days of the completion and acceptance of the project. Subcontractors and suppliers may make such a request for notice of project completion at any time before the project is completed. As a matter of good practice, it is recommended that NESCA members automatically file a written request for notice of project completion at the beginning of every NYS public project you become involved with. Members may contact the NESCA office for a sample form requesting notification of project completion and acceptance.

SUCF to Hold "Doing Business" Seminar

The State University Construction Fund (SUCF) will be holding a "How to Do Business with the State University Construction Fund" seminar on Wednesday, May 11, 2011 from 4:00-6:00 pm at Crossgates Restaurant & Banquet House, 225 Washington Avenue Ext., Albany, New York.

SUCF provides capital planning, design and construction, and funding services, and administers the multi-billion dollar capital program for the 34 campuses of the State University of New York. This seminar will detail the processes used by the Fund in awarding work; will preview upcoming construction projects; and will provide information on new laws affecting the M/WBE program.

There is no cost to this seminar but pre-registration is required. To register, please contact Doreen Bottieri at (518) 320-1639 (doreen.bottieri@suny.edu) no later than Friday, April 22, 2011. Additional seminars will be held in other regions of New York State – dates and times to be announced.

Member Anniversaries

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Piazza & Tompkins Construction

10 Years

Dutchess Mechanical, Inc.

15 Years

Mullally Bros., Inc.

20 Years

LHV Precast, Inc.

Coalition Urges Repeal of DERA

On March 21st, eleven of New York State's leading business and construction organizations joined together to sign a letter to Governor Andrew Cuomo and the State Legislature urging them to address the unfavorable Diesel Emissions Reduction Act (DERA) in the final state budget agreement. The letter was signed by:

Associated General Contractors of NYS * Empire State Subcontractors Association * Construction Industry Council * Northeastern Retail Lumber Association * New York State Motor Truck Association * National Federation of Independent Business * Unshackle Upstate * ABC Empire State Chapter * Long Island Contractors Association * Syracuse Builders Exchange * The Business Council of NYS



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