



Vol. 29, No. 9

(518) 869-9800

March 2011

ESSA Bill Program Introduced

Five of the six bills comprising the Empire State Subcontractors Association's 2011 legislative program have been introduced by sponsors in the State Senate and Assembly. Assemblyman Michael Cusick (Staten Island) has introduced five bills in the Assembly, and Senator John DeFrancisco (Syracuse) has introduced five bills in the Senate. Assemblyman Cusick and Senator Jeffrey Klein (Bronx) will soon introduce the sixth bill in both houses. ESSA's 2011 legislative program consists of a variety of proposals intended to protect the rights of all construction industry subcontractors and suppliers doing business in New York State. The five bills that have been introduced include:

Retainage in escrow account (S.3180/A.5023) - Would require that retainage held on private construction projects (valued at more than \$150,000) in NYS be deposited into an interest-bearing escrow account for the benefit of those from whom retainage has been held.

Lien On Retainage (S.3179/A.5022) - Would allow subcontractors to reopen their lien rights and file a lien for unpaid retainage up to 90 days after the retainage was due to be released. The existing 8-month statute of limitations for filing a notice of lien often expires long before the payment of retainage has become due under many subcontracts. This bill will cure this inequity by allowing subcontractors a reasonable period of time to file a lien for unpaid retainage.

Claims Against Payment Bonds (S.3182/A.5025) - Would clear up the confusion caused by several recent court cases regarding when the statute of limitations for initiating payment bond claims on public projects begins.

Prohibition of 3rd Party Hold Harmless (S.3183/A.5026) - Would close a long-standing loophole in the law by prohibiting hold harmless clauses that require a subcontractor to indemnify the contractor or owner for damages caused by the negligence of 3rd parties.

Release of Retainage (S.3181/A.5024) - Would require state agencies to release retainage held pursuant to work performed by a subcontractor no later than 60 days from the completion and acceptance by the public owner of the subcontractor's work.

NESCA Joins Others to Push for Repeal of Diesel Retrofit Law

NESCA has joined with other construction-related associations in calling for repeal of the Diesel Emissions Reduction Act (DERA) and the related Part 248 regulations for contractors doing business with the state. DERA was enacted in 2006, and requires heavy-duty diesel vehicles with a model year 2006 or earlier used by contractors, subcontractors and material suppliers in connection with state agency and public authority projects to be retrofitted with expensive diesel particulate filter devices. Many NESCA members are finding it impossible to comply with DERA due to the cost, which can be upward of \$15,000 - \$20,000 per vehicle. DERA was due to be fully enforceable effective January 1, 2011, but several pending lawsuits caused the Department of Environmental Conservation to delay enforcement of the regulations.

Even though one court has already ruled that DERA applies only to contractors that have a direct, prime agency relationship with a state agency or public authority, additional litigation is pending and the issue is far from being resolved in the court system. Therefore, NESCA along with the Associated General Contractors of NYS, the Associated Builders and Contractors, the New York Construction Materials Association and other construction-related associations have agreed to jointly pursue a permanent legislative solution.

NESCA Membership Meeting

March 10, 2011

Century House - 6:00 p.m.

6:00 Open Bar/Registration
6:30 Dinner: Sirloin Steak
7:10 Business Announcements
7:30 Program: Panel Discussion - "Dealing With Bid Shopping During a Tough Economy"

Open Bar, Dinner, Tax & Gratuities - \$45



PRESIDENT'S MESSAGE

On February 10th, NESCA, in cooperation with the Associated General Contractors of NYS, held our annual "Meet the Estimators/Purchasing Team" event at the Century House. This enormously successful event just seems to get more popular each year. This year, representatives from twenty-three (23) of the best-known commercial, industrial and public work general contractors from the Capital Region participated, and nearly 450 subcontractors, suppliers and others attended this outstanding networking event. For those of you who were unable to attend, you missed a huge opportunity to meet face-to-face with the estimators and purchasing teams of 23 prominent general contractors. It was a perfect occasion for our members to market their products and services to the general contracting community, and to "put a face to the name" of estimators and purchasing managers who you may have spoken to by phone at various times. In fact, many of the participating general contractors brought more than just their estimators and purchasing

managers. I saw many of these companies' officers and other key personnel in attendance as well. Given its success, it is likely that NESCA will continue to hold this event (or something similar) on an annual basis. In the meantime, I welcome any feedback NESCA members may have regarding the February 10th event and how we might make improvements for next year.

Coming up at NESCA's March 10th membership meeting, we will feature a panel discussion on "Dealing With Bid Shopping During a Tough Economy". Bid shopping can always be a problem in the construction industry even in the best of economic times. However, now into the third year of a difficult economy, bid shopping has only gotten worse, as everyone scratches for work, margins are down, and the number of bidders and sub-bidders for any given project has increased substantially. Our panel, consisting of three subcontractors and two suppliers, will explore how they are attempting to deal with the bid shopping issue in the midst of a sluggish economy.

Our April 14th membership meeting will feature a presentation by the Safety Directors from Turner Construction Company and D.A. Collins Construction Company about what they expect from their subcontractors in terms of safety on their construction sites. We will also conduct our fifth annual Safety Awards Presentation. Last April, 73 NESCA members won safety awards, and this year it appears that a similar number of awards will be presented. All NESCA subcontractor and supplier members are eligible to apply for safety awards, which are based on your company's 2010 lost workday case incident rate from your OSHA 300 log.

Finally, I'd like to remind members that NESCA's continued success in

representing the interests of Northeastern New York subcontractors and suppliers is crucially dependent upon maintaining a strong, active base of members. NESCA is considered the premier subcontractors' association in the nation, in large part, because we have so many active members who understand the value of the association and support its mission. Please help our association by spreading the word about NESCA to subcontractors and suppliers you may know who are not currently members, but should be.

Bill McLeod, President

NESCA NEWSLETTER

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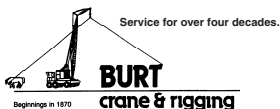
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CGL Insurance May Not Cover Claims for Defective Workmanship

For subcontractors who believe their general comprehensive liability insurance will afford coverage for claims made for defective workmanship, they should read their insurance policies closely to determine if such claims are excluded from coverage. In an instance where a contractor or subcontractor is sued by an owner who seeks return of all the monies he paid for a defective product, particularly where the defective product has not yet caused property damage or personal injury, insurance companies frequently deny coverage stating such claims are either not covered or are specifically excluded from coverage. I would strongly advise subcontractors to consult with their insurance providers to determine up front whether such claims will be covered.

New York Courts have frequently supported the insurance company's position that claims for defective workmanship were not covered by or were excluded from the insurance policy. For example, in *George A. Fuller Co. v. U.S. Fid. And Guar. Co.*, the Court stated that the insurance company's policy did not "insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product."

Finally, it should be noted that while denying coverage for liability, insurance companies may still provide legal defense costs for the litigation.

Terence J. Burke, NESCA Counsel

Governor Calls for Fiscal Restraint in 2011-12 State Budget

Governor Andrew Cuomo "talked the talk", and it now appears he is prepared to "walk the walk" in proposing his State Budget for the 2011-12 state fiscal year. That is, he intends to close the state's budget gap with spending reductions and reductions in the size of state government, rather than with new or higher taxes. The Governor's Executive Budget proposal addresses a \$10 billion gap between projected revenue and projected spending through significant spending reductions for state government operations, the consolidation and

elimination of state agencies, and reductions in spending on major state programs including Medicaid and school aid.

More specifically, state spending on Medicaid in fiscal 2012 will be reduced by \$982 million compared to the current fiscal year, a reduction of 1.8 percent. In addition, state school aid would be reduced by \$1.5 billion, or 7.3 percent, compared to the current year's budget. The budget also proposes a 10 percent reduction in General Fund spending on "state operations", a savings of \$1.4 billion that will come from a combination of consolidations, contract adjustments and, if necessary, layoffs. The budget consolidates eleven existing agencies into four, and the Governor's "Spending and Efficiencies Commission" is charged with recommending another 20 percent reduction in the number of state agencies, authorities and commissions.

While not technically part of the Budget, Governor Cuomo has also proposed a cap on local real property taxes that limits the annual increase in rates to 2 percent or the rate of inflation, whichever is lower.

Despite cuts to the overall budget, the Governor has recognized the critical connection that capital spending and investment in the State's infrastructure has to the economic health of New York State. The Budget maintains the State's core Trust Fund investment in the highway and bridge program at 2010-11 levels and also preserves funding for local highway and bridge projects under the Consolidated Highway Improvement Program (CHIPS) at prior-year levels. Funding includes \$501 million for highway and bridge construction, \$363.1 million for CHIPS, \$39.7 million for the Marchiselli program for local governments, and \$16.9 million for Amtrak service subsidies and additional rail capital improvements.

SUNY capital appropriations will also remain constant with \$550 million for general maintenance and improvements, \$421 million for residence hall facilities and \$31.571 million for community college projects.

The Budget also includes (for the second year in a row) language that would provide SUNY and CUNY with enhanced discretion in procurement processes. The State University Construction fund would be provided new flexibility in choosing project delivery methods to include design, bid, build; design/build; or construction manager at risk. The Budget also authorizes the construction and financing by the Dormitory Authority of facilities for the benefit of SUNY by not-for-profit entities associated with SUNY, subject to prevailing wage and M/WBE requirements.

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Calendar of Events

March 10, 2011

Board of Directors Meeting
Century House, Latham, 5 pm

March 10, 2011

NESCA Membership Meeting
Century House, Latham, 6 pm

March 18-20, 2011

National Subcontractors Alliance
Annual Conference
Las Vegas, Nevada

March 29, 2011

Educational Program
Performing Public Work
Building Industry Center, 6 pm

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Question of the Month

Q. A project manager for large national general contractor recently told me that the New York State private construction prompt payment law does not apply to them because they have incorporated their own payment terms in their agreements with subcontractors. Can this possibly be correct?

A. No. Back in 2002, Governor Pataki signed a law that provided new prompt payment standards on private commercial construction projects. Unfortunately, the prompt payment protections enacted in 2002 were somewhat ambiguous and left open to interpretation as to whether certain provisions were mandatory or merely "default" provisions to be relied upon in cases where the contract was silent about a particular issue. For example, the law required the owner to pay the contractor no later than 30 days after the owner had approved the invoice *unless otherwise agreed to by the parties*. Fortunately, the prompt payment law was amended in 2009 to make it clear that the payment period between owner and contractor shall be no longer than 30 days. A comparison of the original law with the amended version shows that the payment provisions between the contractor and subcontractor were unchanged. Both versions clearly require payment by the contractor to the subcontractor within 7 days after the contractor has received payment from the owner. It should be noted that the law also provides for interest penalties for payments made after the required 7-day period.



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