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December 2023

Wishing You Happy Holidays and a Healthy, Prosperous 2024

5% Retainage Bill Signed Into Law by Governor Hochul

On November 17, 2023, Governor Kathy Hochul signed NESCA drafted legislation which will limit the withholding of retainage by owners of private commercial construction projects, where the value of the project equals or exceeds \$150,000, to no more than five percent of the contract sum. This new law (Chapter 657 Laws of 2023) amended the NYS General Business Law, which previously provided that private commercial owners could withhold a reasonable amount of retainage. Unfortunately, “reasonable amount” was not defined in the law. The amended law essentially clarifies that a reasonable amount is no more than five percent. Because the law prohibits contractors from withholding a higher percentage of retainage from subcontractors and suppliers than the owner is withholding from the contractor, subcontractors and suppliers will benefit significantly from the five percent limitation.

The new law will also accelerate final payment to the contractor (and by extension to subcontractors and suppliers) by providing that the contractor may submit a final invoice for payment in full upon reaching substantial completion, as such term is defined in the contract or as it is contemplated by the terms of the contract. Previously, contractors were entitled to submit a final invoice only “upon the performance of all the contractor’s obligation under the contract”.

In lobbying for the passage and signature of this bill, NESCA and NESCA’s state affiliate, the Empire State Subcontractors Association (ESSA), argued that a principal problem with retainage is that it is often based upon a faulty premise. That is, some owners treat retainage as a warranty by another name and hold on to it long after a project has been completed. NESCA maintained that it is the contractor’s/ subcontractor’s contractual warranty and manufacturers’ warranties, and not retainage, that are intended to survive contract completion. Retainage, on the other hand, is a mechanism to assure performance during the period of the contractor’s or subcontractor’s work.

As more owners, both public and private, have discovered the hidden cost and relative ineffectiveness of holding large amounts of retainage, the trend in the construction industry nationwide has been toward reducing, eliminating or using alternatives to retainage. In 2014 the State of Massachusetts enacted legislation that limited retainage on private commercial projects to no more than 5 percent. Likewise, in 2016 Minnesota enacted a retainage reform measure that limits retainage to 5 percent on private projects. Other states that limit retainage on private projects to no more than 5% include Connecticut, Idaho, Montana, Oregon and Tennessee. One state, New Mexico, completely prohibits the withholding of any retainage on private construction projects. On public projects here in New York, both the Department of Transportation and the Thruway Authority have adopted zero retainage policies, and the largest public owner of them all, the federal government, has long had a policy of withholding no retainage.

This new law takes effect immediately (November 17, 2023) and applies to private construction contracts entered into on or after that date.

NESCA
Holiday Reception & Dinner
December 14, 2023 – Century House
6:00 p.m. – Cocktail Reception and
Hors D’oeuvres
7:30 p.m. – Dinner
Toys for Tots Presentation
Cost - \$100
Spouses/Significant Others Come for Free!



PRESIDENT'S MESSAGE

Being a CPA with many of my clients having calendar year-ends, December is a busy month for me. Along with all the Holiday gatherings I take this time to meet with clients and see how 2023 has treated them and work with them on tax planning and projections. It's also a great time to find out what kind of backlog is carrying into next year as well as work on budgeting for 2024. Make sure you're working with your professional team on these crucial items to your business.

I'm happy to report we had a really successful membership meeting, which was our first of the year for NESCA, on November 9th. This meeting featured a presentation by our Executive Director Mike Misenhimer on a variety of new laws, rules and regulations recently enacted here in New York that will have a significant impact on NESCA members. Mike's presentation filled members in on the new mandates that construction businesses are facing, and the actions companies will have to take to comply as these laws go into effect. I was extremely pleased with the attendance at

this meeting (150 plus) as well as the number of NESCA member companies that were represented at the meeting (90). As part of the 90 members, we had 15 anniversary recipients, with a couple being over 40 years. It's inspiring to see long tenured members and their continued support. Let's keep up this great attendance throughout the year! Thank you, Laura Harbour, for donating your winnings of over \$400 from the 50/50 to the Toys for Tots campaign.

On December 14th NESCA will hold its annual Holiday Reception and Dinner at the Century House. We will start the evening off with a 1 ½ hour cocktail reception with some great hors d'oeuvres, followed by a fantastic dinner. The entire evening will have a festive holiday atmosphere. And here's the best part. Spouses or significant others are invited to attend free of charge! This will also be NESCA's annual Toys for Tots campaign, and we ask that each member bring an unwrapped toy (or toys) to the meeting. A representative of the U.S. Marine Corps will be on hand to accept our toy donations along with a check from NESCA for close to \$5,000. I look forward to seeing you there.

November was an active month for the association. NESCA also held its annual Notary Public Review Class on November 14th, a membership meeting for our members in the Binghamton region on November 16th, and a Young Professionals Mixer, also on November 16th.

I am very pleased to report that the vast majority of NESCA members have paid their 2023-24 membership dues. If you haven't done so yet, please get your dues payment in as soon as possible. I encourage all members to take full advantage of your membership in NESCA and contact the NESCA office

for assistance with any number of business problems or concerns you may have.

I wish you all a happy holiday season and hope to see you at the December 14th Holiday Reception and Dinner.

Robert L. Kind, President

NESCA NEWSLETTER

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COUNSEL'S MESSAGE

Many members are aware something entitled a "flow down" clause exists in their subcontracts and purchase orders. It is also not uncommon to be confused about what defines a "flow down" clause (it is not normally identified by a caption title) and the scope of its application to the terms of a subcontract.

Generally speaking, a "flow down" or "pass through" clause attempts to bind a subcontractor or materialmen to all the obligations of the prime contract between the owner and general contractor by stating the prime contract terms and conditions are incorporated "by reference" into the subcontract and the subcontractor is contractually bound to the obligations of the prime contract as well as the subcontract terms and conditions.

Contract terms within the prime contract may be more specific and onerous than those used in the industry accepted subcontracts such as the AIA A401 and ConsensusDocs 750 subcontract forms. Example contract terms are no damage for delay clauses,

waiver of claims, notice of claim or changed conditions and indemnity provisions which substantially differ from the subcontract terms.

Although not mandated, the typical "flow down" clause will frequently be found in the first few full paragraphs of the subcontract/PO.

It is also not unusual for a subcontractor, or materialman, not to secure a copy of the prime contract terms and conditions or, in the event one is located, to read those terms and conditions. It is imperative that a member obtain a copy of the prime contract terms and conditions, and read them, BEFORE SIGNING A SUBCONTRACT.

There does exist legal decisions from 1983 which, on its face, would limit the scope of a minimally phrased general incorporation clause. Those series of cases held that when the terms of the prime contract are incorporated into the subcontract, without specifying any provisions of the prime contract being incorporated, only those provisions which specifically relate to scope, quality, or manner of performance of the subcontract will be considered incorporated.

A general incorporation clause will not bind a subcontractor to an arbitration clause unless it is specifically agreed to in the subcontract. An agreement to arbitrate must be in writing, clear, explicit, and unequivocal.

Other court decisions have held the basis for incorporating terms of the prime contract to be more simplistic. Language that the general conditions of the prime contract are incorporated into the subcontract have been determined sufficient to subject a subcontractor to the terms found in the general conditions.

The message of this column is that a subcontractor must know the terms and conditions within the prime contract BEFORE signing a subcontract so the full scope of risk and cost associated with performance of work can be evaluated and either accepted, modified, or rejected.

Walter G. Breakell, NESCA Legal Counsel

Question of the Month

Q. We're working on a private project for a general contractor who is asking us to submit, not only certified payrolls, but also monthly benefit remittance reports with copies of cancelled checks to all unions with whom we are signatory. Is this legal?

A. The short answer is yes. What you are experiencing is the general contractor's response to the Construction Industry Wage Theft Act, which was enacted into law several years ago. This law provides that prime contractors on private construction projects shall assume the liability for all unpaid wages and benefits that its subcontractors have failed to pay. The prime contractor is considered jointly and severally liable for any unpaid wages, benefits and wage supplements to the subcontractor's employees, and the subcontractor's employees can sue the prime contractor to collect wages and benefits unpaid by subcontractors. This law also allows the prime contractor to demand from subcontractors certified payroll records and other information for all employees providing labor on the project and which contain sufficient information to apprise the contractor of the subcontractor's payment status in paying wages and in making any applicable benefit payments or contributions to a third party (union). Failure to comply with a demand for such information could result in a withholding of payments to the subcontractor.

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AuCoreElectricLLC@gmail.com

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NESCA's December 14th Holiday Reception & Dinner will be our 45th Annual Toys for Tots Night! Please remember to bring an unwrapped toy with you to the meeting. The Marine Corps will have a representative in attendance.

Calendar of Events

December 5, 2023

*4-Hour Erosion & Sediment
Control Training*
Saratoga Hilton Hotel, 1 pm

December 7, 2023

Board of Directors Meeting
Century House, Latham, 6 pm

December 8, 2023

Handling OSHA Inspections
116 Railroad Ave, Albany, 10 am

December 14, 2023

Holiday Reception & Dinner
Century House, Latham 6 pm

January 11, 2024

NESCA Membership Meeting
Century House, Latham, 6 pm

In Memoriam

NESCA sadly announces the recent passing of a NESCA Past President.

On October 25, 2023, Jeffrey B. Senft, President & CEO of S&O Construction Services, Inc., passed away at the age of 71. Jeff was a long-time member of NESCA's Board of Directors and served as President of NESCA in 2003-04. Jeff was subsequently appointed to the Board of Directors of the Empire State Subcontractors Association (ESSA), where he was actively involved in shaping ESSA's legislative and regulatory agenda. Jeff served as President of ESSA from 2017-2019. Through his unwavering support of NESCA and his active advocacy on behalf of subcontractors, Jeff made extraordinary contributions to the construction industry and to subcontractors doing business throughout New York State. Jeff will be greatly missed by his many friends and colleagues at NESCA.

NESCA Members Please Note These Effective Dates

Update Your Sexual Harassment Policy – April 2023

Roadway Excavation Quality Assurance Act – September 16, 2023

Wage Transparency Act – September 17, 2023

Use of New I-9 Form – November 1, 2023

New Paid Family Leave Rates – January 1, 2024

Minimum Wage Adjustment – January 1, 2024

OSHA Expanded Electronic Submission – January 1, 2024

Contractor/Subcontractor Registration with DOL – December 30, 2024

Milestone Anniversaries

**15 Years – Albany Fire
Extinguisher**

20 Years- Postler and Jaeckle



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