



NESCA

Northeastern Subcontractors Association

N E W S L E T T E R



Vol. 41, No. 7

(518) 869-9800

January 2024

Empire State Subcontractors Association Adopts 2024 Legislative Program

The Empire State Subcontractors Association (ESSA) has adopted its legislative program for 2024. After successfully pursuing legislation in 2023 that limits the amount of retainage private commercial construction owners may hold to no more than 5%, NESCA's statewide affiliate will focus its attention on pursuing legislation that will provide contractors and subcontractors with payment protection on certain "hybrid" construction projects built in New York State.

Currently, the NYS Lien Law has a "gap" in payment protection, whereby subcontractors performing work on "hybrid" projects, that is, projects built by private developers with private funds but on public land, cannot file liens against the public land or the private entity's leasehold interest. To correct this problem, legislation will be introduced that will require either a payment bond or an irrevocable letter of credit to be posted by the private developer on hybrid projects costing more than \$250,000. This will provide all parties supplying labor and/or materials to the project with some measure of protection against non-payment for work performed and/or material delivered.

Unfortunately, this is not ESSA's first trip to this particular well. In 2003, legislation amending Section 5 of the Lien Law was introduced to provide payment security to contractors and subcontractors on such hybrid projects. That legislation required the private developer for whom the improvement was being made to post a bond guaranteeing prompt payment of funds due the contractor and subcontractors. Governor Pataki vetoed that bill and stated in his veto message that the bill would not permit private developers to post other forms of security, such as a letter of credit. The legislation was subsequently amended in 2004 to require a bond or "other form of undertaking" and the Governor signed the amended bill into law.

Unfortunately, in 2018 the NYS Court of Appeals affirmed an Appellate Division, First Department decision which found that a "completion guarantee" provided by a developer to Empire State Development fell within the definition of "other forms of security". That case, *Skanska USA Building, Inc. v. Atlantic Yards B2 Owner, LLC*, effectively made ESSA's 2004 amendment to the Lien Law meaningless because a "completion guarantee" provided to the public entity provides no payment

security whatsoever to the contractors and subcontractors performing work on the project. It merely provides a guarantee to the public entity that the project will be completed.

ESSA agreed with a dissenting judge in the First Department decision that a completion guarantee is not a form of undertaking that satisfies the Lien Law. In order to achieve the objective of the Lien Law, any alternative undertaking must provide substantially equivalent protection to that provided by a bond, that is, a financial arrangement that would afford an unpaid contractor, subcontractor, or material supplier, a fund of money, or an asset, available for predictable and prompt payment. A completion guarantee is not the functional equivalent of a bond.

The new legislation will counter the Court of Appeals decision by limiting the form of payment security to either a bond or an irrevocable letter to credit thereby providing contractors, subcontractors, and suppliers with true payment security on hybrid projects.

NESCA Membership Meeting

January 11, 2024

Century House – 6:00 p.m.

Annual Joint Meeting with NAWIC

6:00 Open Bar/Registration

6:30 Dinner: Prime Rib

7:15 Business Announcements

7:30 Program: General Contractor Showcase
Featuring Bishop Beaudry Construction

Join us at this membership meeting to become better acquainted with Bishop Beaudry Construction and its leadership team.

Reception, Dinner, Tax & Gratuities - \$65



PRESIDENT'S MESSAGE

Happy New Year – wishing everyone a healthy and profitable 2024. It's hard to believe I'm halfway through my presidential run for NESCA but I am. The association remains strong, and we are looking forward to a meaningful 2024. Please, if you have anyone in the industry you think would be a good fit as a member, send them our way.

I'd like to thank members for coming to NESCA's Holiday Reception and Dinner and for their support for the Marine Corps Toys for Tots program. We had over 200 in attendance. In addition to the many toys donated by members, NESCA presented a check to our Marine Corps representative, Master Gunnery Sergeant Chris Croteau, in the amount of \$4,667 (a record amount) in support of Toys for Tots. A special thank you is reserved for several members who made additional spontaneous donations to Toys for Tots at the event that night: Carlo Agneta from Marshall & Sterling threw in an extra \$300; Bob Kind from Teal, Becker & Chiamonte, CPAs won the 50/50 drawing and donated his \$835 in

winnings; and George Schupp from Schupp's Line Construction donated a whopping \$2,500! But there's more. Randall Berkebile from PDC Incorporated contacted the NESCA office to let us know that he was sending a \$1,000 contribution directly to Toys for Tots. Great food, and a very fun night for everyone who attended. Sergeant Croteau left the dinner very thankful and ready to come back next year!

NESCA's first membership meeting of the new year will be held on January 11th at the Century House. This meeting will be our annual joint meeting with the National Association of Women in Construction (NAWIC) and our program will feature a General Contractor Showcase highlighting Bishop Beaudry Construction. The purpose of a General Contractor Showcase is to provide members of NESCA the opportunity to learn more about a featured general contractor and its upcoming projects, meet its leadership team, and find out what they expect from their subcontractors and what subcontractors can expect from them. This meeting will offer members of NESCA a great chance to become better acquainted with the type of work Bishop Beaudry does, their market area, and how they run their projects.

Based on the success of last year's mixer, our February 8th membership event will be a construction industry mixer at Brown's Brewing Co. in Troy. Both NESCA members and the general contracting community will be invited to attend. Last year, more than 175 members of NESCA and AGC attended the mixer, so you don't want to miss this great networking opportunity.

Back on November 29th, the Board of Directors of NESCA's statewide affiliate, the Empire State Subcontractors

Association (ESSA), met virtually, primarily to adopt a legislative program for 2024. Now that the 5% retainage bill has been enacted into law, ESSA's top priority in 2024 will be to advance legislation that would require a developer to post either a bond or an irrevocable letter of credit as payment security for contractors, subcontractors and suppliers working on "hybrid" projects, that is, private projects built on publicly owned land for which there are no lien rights.

Robert L. Kind, President

NESCA NEWSLETTER

*Published monthly by the Northeastern
Subcontractors Association*
6 Airline Drive, Albany, NY 12205
(518) 869-9800 www.nesca.org

ROB KIND, President
BRYAN BERRY, Vice President
JOE JERKOWSKI, Treasurer

DIRECTORS

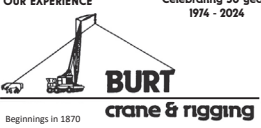
ERNIE BURKART
GARY DRIZOS
ROBERT GENNETT
MIKE HAMEL
EMMA HECK
MIKE LOCK
NATE PANNUCCI
ROBERT RYAN
IAN TOWNSEND

CHRIS WHITE
1st Immediate Past President

JANICE MILLER
2nd Immediate Past President


WALTER BREAKELL
Legal Counsel

TRUST OUR EXPERIENCE Celebrating 50 years
1974 - 2024



Beginnings in 1870

Full Service Warehousing now available at our Selkirk location just minutes from Ports of Albany and Coeymans



• Crane Rentals • Riggers • Erectors • Local & Long Distance Hauling

• Green Island, NY
• Selkirk, NY
• 518-271-6858
• burtcrane.com

SCAN ME

MEMBER
Specialized
Carries &
Rigging
Association

NYS Certified WBE

© 2022 Arthur J. Gallagher & Co. 142502

Gallagher
Insurance | Risk Management | Consulting

The Gallagher Construction team focuses on developing surety, insurance and risk management programs for contractors and subcontractors.

AJG.com | The Gallagher Way. Since 1927.


PROTECTING YOUR LEGAL RIGHTS



KEVIN LAURILLIARD
ATTORNEY AT LAW
Construction Law • Employment Law
Corporate Law • Dispute Resolution • Litigation

O'CONNELL ARONOWITZ
ATTORNEYS AT LAW
A full service law firm established in 1925.
54 State Street | Albany, NY 12207
www.oalaw.com
518-462-5601

Going beyond your expectations



TBC
Teal, Becker & Chiamonte
CERTIFIED PUBLIC ACCOUNTANTS & ADVISORS

Accounting • Auditing • Tax • Consulting
Pension Plan Administration

www.tbccpa.com | 518-456-6663

INSIDE
TOP 300
FIRMS

ALREADY RIGGED BY
BEST PLACES TO WORK

B P T W

TOP
WORK
PLACES
2023



COUNSEL'S MESSAGE

As much of the membership is aware, Governor Hochul signed into law on November 17, 2023 the "5% retainage bill" advocated by the member chapters of the Empire State Subcontractors Association of which NESCA is a member. Many years of persuading legislature members to pass this bill were expended prior to this success. Congratulations to all involved.

This law limits the withholding of retainage by owners of private commercial construction projects, where the project value exceeds \$150,000.00 to no more than the five (5) percent of the contract sum. Since the law prohibits contractors from withholding a higher percentage of retainage from subcontractors than the owner is withholding from the contractor this law is a definite benefit to subcontractors.

In addition, the new law allows contractors (and subcontractors by extension) to permit the contractor to submit a final invoice for payment in full upon reaching substantial

completion as defined in the contract or as contemplated by the terms of the contract.

The new law is effective immediately. There have been rumblings from the Southern part of the State that the law conflicts with the Prompt Payment Law Act and therefore should not be enforced. These arguments are yet to be supported by the courts.

In the interim members should insist that retention in the subcontract is stated to be the same 5% as the Prime Contractor. In the event a member is serving as a prime contractor for an owner on a qualifying project it should require retention be limited to 5%. Inclusion in the subcontract language the right to invoice for final payment upon substantial completion is equally important as specifying the retainage amount.

As we enter a New Year, I extend to the membership my hopes and best wishes to each of you, and your families, for a Healthy, Happy & Successful New Year.

Walter G. Breakell, NESCA Legal Counsel

Question of the Month

Q. On public projects in New York State, what is the difference between a non-responsive bid and a non-responsible bid?

A. As a general proposition, there are two grounds for not awarding a contract to an apparent low bidder: (1) non-compliance with the bid specifications; or (2) a finding that the bidder is not a "responsible bidder". More specifically, contract award may be denied if a bid is either non-responsive or non-responsible as follows:

Non-Responsive Bid – Generally, a public body may waive technical non-compliance with the bid specifications if the deviation is minor and if it is in the best interests of the public body to do so. However, a bid must be rejected if the non-compliance is material or substantial (not responsive). A variance is material or substantial when it would impair the interests of the public body, give a low bidder a substantial advantage not enjoyed by other bidders, or place other bidders at a competitive disadvantage.

Non-Responsible Bid – A public body must examine the low bidder's background and make a factual determination as to whether the bidder is a "responsible bidder". The term "responsible bidder" is not defined in statute. However, the courts have indicated that "responsibility" generally involves a bidder's qualifications and ability to perform in accordance with the terms and conditions of the contract. Factors to be considered include financial ability to complete the contract, accountability, reliability, skill, sufficiency of capital resources and integrity. Whether a bidder is responsible is a question of fact to be determined on a case-by-case basis by the appropriate public officials in accordance with the guidelines established by the courts.

Mark Your Calendar!

Capital District Construction Industry Mixer

Thursday, February 8, 2024 - 6 p.m.

Revolution Hall, Brown's Brewing Co.

425 River Street, Troy

noble
SOLUTIONS



GAS & WELDING SOLUTIONS

- Local Support
- Cylinder Tracking
- Flexible Delivery
- Repairs & Rentals
- Safety Trainings
- Safety Equipment

SERVING THE CAPITAL REGION & BEYOND
ALBANY | KINGSTON | S. GLENS FALLS

noblegasolutions.com (518) 465-5229

HH&K
Hinman, Howard & Kattell
ATTORNEYS

Serving the Capital District Construction Industry Since 1980

A full service law firm with emphasis on

- Commercial and Residential Real Estate
- Contract & Construction Law
- Commercial Litigation | Creditors Rights
- Arbitration | Mediation | Bond Claims
- Appeals (Civil & Criminal) | Criminal Defense
- Banking & Financial Services
- Health Law | Matrimonial & Arbitration
- Personal Injury | Will, Trust & Estates

10 Airline Drive, Suite 205
New York, New York 12205
(518) 869-5552 | www.hhk.com

attorney advertising

"BUILDING THE FUTURE - TOGETHER"

Kamco
SUPPLY CORP.
OF NEW ENGLAND

Installation of doors, bathroom partitions & accessories

Commercial doors & frames hardware

Drywall, insulation and framing

Acoustical ceilings, walls & Isolation products

Millwork

36 Railroad Avenue · Albany, NY 12205
(518) 729-1122 · Fax (518) 453-9527

10 Silver Circle, Queensbury, NY 12804
(518) 798-7245 · Fax (518) 793-8397

CIS

Best in Class Cloud Financial Mgmt Software for Construction Sage Intacct

Apply our 35+ years of industry knowledge & experience. Maximize your investment!

Call to set up a free consultation
518-373-9005
www.consinfo.com

Calendar of Events

January 11, 2024

Board of Directors Meeting
Century House, Latham, 5 pm

January 11, 2024

NESCA Membership Meeting
Century House, Latham, 6 pm

January 11, 2024

7-Week STP Course Begins
"Leadership & Motivation"
Building Industry Center, 6 pm

February 1, 2024

Board of Directors Meeting
Century House, Latham, 6 pm

February 8, 2024

Construction Industry Mixer
Brown's Brewing Co., Troy, 6 pm

February 13, 2024

Seminar: ESOPs for Liquidity and
Diversification
Online via Go-to-Webinar, 9 am

Feb. 29 & March 1, 2024

OSHA 10-Hour Course
116 Railroad Ave., Albany, 9 am

New York's Paid Vaccination Leave

As of January 1, 2024, New York employers are no longer required to provide up to four hours of paid leave for employees to receive a COVID-19 vaccine. However, employers continue to be required to provide paid sick leave to employees who test positive for COVID-19.



Denise Lurenz, Master Gunnery Sergeant Chris Croteau, and NESCA President Rob Kind Celebrate NESCA's December 14, 2023 Toys for Tots Campaign at the Century House

NESCA Milestone Anniversaries

Action Waste Services, LLC – 5 Years

Dig Soft Inc. – 5 Years

Whispering Pines Development Corp. – 5 Years

L.H. LaPlante Co., Inc. – 10 Years

T.P. Monahan, Inc. – 15 Years

Peter K. Frueh, Inc. – 20 Years

Key Bank – 30 Years

Control Network Communications – 35 Years

Francisco Equipment – 35 Years



When Construction Problems
Require Legal Solutions

New York - Albany: Tel: 518.300.3213
New York - Hudson Valley: Tel: 845.538.8204

Connecticut:
Tel: 203.363.0081

Construction,
Real Estate,
Labor & Employment
and Commercial Law



www.WBGLLP.com

**RENTAL, SALES & SERVICE OF
AERIAL WORK PLATFORMS, FORKLIFTS
& TELEHANDLERS**

NEW YORK
STATE OF NEW YORK
Member Business Enterprise

CERTIFIED
NYC
WBE

DBE

MACEQUIPMENTLLC.COM

Customized Insurance
Solutions for Contractors

**Marshall
& Sterling
INSURANCE**

Founded in 1864.
An employee-owned
Company.

518-384-1100
www.marshallsterling.com/scotia
25 Mohawk Ave., Scotia, NY 12302

**JOHN W. MULLINS
RIGGING & HAULING**

CRANE & RIGGING SPECIALISTS SINCE 1870

- Crane Service to 330 Ton
- Heavy Hauling to 300 Ton
- Air Dolly Systems
- Warehousing & Storage
- 24 Hour Emergency Response
- Machinery Moving & Installation
- HAZMAT, MSHA, OSHA Certified Operators & Riggers
- Boom Lengths to 350 Feet
- Forklifts to 80,000 Pounds
- Hydraulic Gantries to 200 Ton
- Plant Maintenance Services
- Three-Dimensional Lift Plans
- Millwrighting & Steel Fabrication

WOMAN-OWNED SMALL BUSINESS ENTERPRISE

www.MULLINSRIGGING.COM

MEMBER
SERRS
Specialized
Carriers
& Rigging
Association

1 Pine Street - Green Island, New York 12183
(518) 273-0771 Phone • (518) 273-3780 Fax