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ESSA Set to Adopt 2025 Legislative Program

NESCA and its state affiliate, the Empire State Subcontractors Association (ESSA), will continue to advocate for additional subcontractor protections when ESSA adopts its legislative program for 2025 at its December 4, 2024 Board of Directors meeting.

One of the proposals that is likely to be a priority for ESSA in 2025 is legislation that would provide contractors and subcontractors with a degree of payment protection on certain “hybrid” construction projects built in New York State, that is, projects being constructed by private developers with private funds, but built on public land. Because the Lien Law does not address such hybrid projects, unpaid contractors, subcontractors, and suppliers providing labor and material on these projects are left without lien rights. To address this problem, last year legislation was introduced that required a bond or an irrevocable letter of credit be posted by the private developer on all hybrid projects costing more than \$250,000. During the 2024 legislative session, the bill was passed in the NYS Senate, but the Assembly failed to act on the measure before wrapping up its business for the year. ESSA thought this problem had been fixed through an amendment to Section 5 of the Lien Law that was enacted back in 2004. Unfortunately, a 2018 NYS Court of Appeals decision rendered that amendment meaningless, thereby necessitating this new legislation to deal with payment security on hybrid construction projects.

Another issue the ESSA Board will likely tackle will be legislation to clarify that the amount of retainage private commercial owners may withhold from contractors is limited to no more than five percent. As NESCA members may recall, about a year ago Governor Hochul signed into law ESSA-drafted legislation that limited the withholding of retainage by owners of private commercial construction projects to no more than five percent of the contract sum. Because the law prohibits the contractor from withholding a higher percentage of retainage from subcontractors than the owner is withholding from the contractor, subcontractors also greatly benefited. Unfortunately, due to nuanced language contained in the General Business Law, some attorneys are advising their clients that contract language providing for retainage in amounts exceeding 5% can actually supersede the law. Because of the confusion resulting from

various interpretations of the law, ESSA’s Board of Directors will consider drafting legislation that will make it clear that 5% retainage is the maximum that may be held. This will be done by adding language to the law which will make retainage in excess of 5% a void and unenforceable provision of a construction contract. It has long been NESCA’s position that excessive retainage financially penalizes all parties regardless of performance, and owners are notoriously slow in paying it back. In many cases, retainage is withheld by owners for up to six months or longer after project completion. Retainage is also sometimes abused by owners who use retained funds as leverage to induce contractors and subcontractors to accept a reduction in the amount of their final payment or to resolve claims or change orders for extra work. The trend in the construction industry nationwide has been toward reducing, eliminating or using alternatives to retainage. Limiting retainage on private commercial construction projects to no more than five percent of the contract sum is a reasonable approach and would relieve contractors and subcontractors operating throughout the state from a significant financial burden.

NESCA Membership Meeting

November 14, 2024

Century House – 6:00 p.m.

- 6:00** Open Bar/Registration
- 6:30** Dinner: Sirloin Steak
- 7:15** Business Announcements
- 7:30** Program: “New York’s New Contractor/
Subcontractor Registry AND the New
Electronic Certified Payroll Requirements”

Presented by

Donald J. Hillmann, Esq. – Couch White, LLP

Reception, Dinner, Tax & Gratuities - \$65



PRESIDENT'S MESSAGE

NESCA's 43rd Annual Trade Show was held on October 10th at the Century House. As usual, exhibit space quickly sold out and 50 members displayed their products and services to hundreds of attendees representing general contractors, subcontractors, design professionals, suppliers and others connected with the commercial construction industry. The Trade Show was a great networking opportunity for all who attended, the food was delicious, and everyone had a lot of fun! I am very happy to report that we were able to raise nearly \$4,000 from our silent auction, which will be turned over to the Marine Corps Toys for Tots program in December. And the lucky winner of our Super 50/50 raffle was Kelsey Martin from MLB Construction Services, who won \$2,010 when her ticket was drawn. Kelsey promptly donated half of her winnings to the Roger H. Jones NESCA Scholarship fund. Thank you, Kelsey!

November is going to be a busy month for NESCA. Our first regular

membership meeting will be held on November 14th at the Century House. Our program will feature a presentation by attorney Don Hillmann from Couch White, LLP on a new law requiring contractors and subcontractors who perform public work to register with the NYS Department of Labor. This new law becomes effective on December 30, 2024, so if you perform public work, you don't want to miss this presentation. Don will also provide us with information on an even newer law that will require public work contractors and subcontractors to submit certified payroll records and other information directly to the Department of Labor in an electronic format. Later in the month, on November 21st Walter Breakell with Hinman, Howard & Kattell, LLP will make a similar presentation at NESCA's Binghamton region membership meeting at McGirk's Irish Pub.

On November 12th, NESCA will hold its annual "Notary Public Review Class" at the Building Industry Center. All NESCA members have documents notarized from time to time, so wouldn't it be convenient to have someone on your staff become a Notary Public? NESCA has offered this course for nearly 40 years, and it is always one of our most popular and well-attended educational programs. Once again, this course will be instructed by Kevin Laurilliard with the law firm O'Connell and Aronowitz.

I'd also like to remind members to mark your calendars for NESCA's Annual Holiday Reception and Dinner, which will be held on December 12th at the Century House. This is always a fun event with great company and great food. And don't forget, spouses and "significant others" can come free of charge. In the spirit of the holidays, we will again be asking members to bring an

unwrapped toy with you as part of our Toys for Tots campaign.

With so many meetings and events still to come, please invite subcontractors and suppliers who are not currently members of NESCA to attend. If they join, you will receive a \$100 sponsorship award and they will begin reaping all the benefits of membership. A true win win for everyone!

Bryan Berry, President

NESCA NEWSLETTER

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COUNSEL'S MESSAGE

It is extremely important for subcontractors to participate in any pre-bid site walk-throughs, or site visits, offered by a project owner prior to compiling their competitive bid for submission to either a project Owner or General Contractor.

The primary importance of this activity is to observe the conditions under which the work will be performed and to identify potential obstacles or problems that may be anticipated during the work. It is during this walk-through that questions should be asked of the design professional or construction manager to better clarify a particular scope of work and the procedure in which issues outside the scope of work are to be handled. Identify who will be the authorized individual on behalf of the owner, GC or CM to give direction, sign authorizations and address scheduling & job conflicts. Be absolutely sure the attendees at the site visit are recorded in your job log, questions and answers written down

and minutes distributed following the site visit.

If allowed to do so, the subcontractor should take as many as photo's as possible documenting the existing conditions of the project site, areas in which a subcontractor's scope of work will be performed, ingress & egress to the work, evidence as to the existence of any water conditions, identification of planned utility line construction which may impact work access, potential work staging areas, evidence of rock croppings and any other visible signs which potentially may result in additional costs being incurred. Be sure to review any test borings made available and physically locate them at the site to determine whether the conditions in the borings will impact your work. If the work may push into winter conditions evaluate the site as to what additional costs may be incurred, who will be responsible for any requisite enclosures or temporary heat. If not clear be sure to obtain definitive answers during the walk through.

A pre-bid walk through is particularly important when performing rehabilitation or retrofit work. Inquire whether an asbestos or hazardous waste survey has been performed and then be sure to review the survey (they are frequently located in an administrative office when a public-school project.) Identify the method and procedure by which an area containing suspected asbestos containing material will be cleared for work. During the project be sure you secure written authorization prior to entering an area that had been identified with ACM but has purportedly been abated. Determine whether you can gain access behind walls, roof top area or other areas within your scope of work not readily visible.

After your walk through of the project site it is important that you consult with an insurance professional who has extensive experience in the construction industry, is familiar with the myriad of risk shifting clauses normally encountered in the contracts and understands the projected issues and problems identified during the site walk-through. The contract documents may also, through indemnification mandates, allocate certain insurance requirements you may not currently have and may represent additional cost. It needs to be recognized that not all risks are insurable, or insurable at an acceptable cost, and the subcontractor needs to understand the assumed risk prior to bidding the project. An uninsured risk, which was insurable but missed, can result in catastrophic damages should a loss incident occur.

Many subcontracts allocate responsibility to the subcontractor for various discoverable conditions or obstructions, not necessarily shown on the drawings, but which would have been readily identified had the contractor participated in a pre-bid walk through.

The value of a pre-bid walk through, combined with a thorough insurance requirement review, cannot be over emphasized especially if an unnecessary risk is avoided or a previously unidentified insurable risk is covered before a loss is incurred.

Walter G. Breakell, NESCA Legal Counsel

Take Advantage of NESCA's Lien Filing Service

Members of NESCA are entitled to have up to three liens per (fiscal) year filed by NESCA absolutely free of charge. This includes the cost of all filing fees, postage and administrative expense.

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Sunbelt Rentals, Inc. – 20 Years

The Precision Group – 30 Years

Carver Construction – 30 Years

Calendar of Events

November 12, 2024

Notary Public Seminar

Bldg. Industry Center, 12 noon

November 14, 2024

Board of Directors Meeting

Century House, Latham, 5 pm

November 14, 2024

NESCA Membership Meeting

Century House, Latham, 6 pm

November 21, 2024

Binghamton Membership

Meeting

McGirk's, Binghamton, 6 pm

2025 Paid Family Leave Rates Released

The Department of Financial Services (DFS) has announced the paid family leave benefit and employee contribution rates effective January 1, 2025. Below are the 2025 rates compared to the 2024 rates.

	2024	2025
Weekly Benefit (% of AWW)	67%	67%
Benefit Duration	12 weeks	12 weeks
NYS Average Weekly Wage	\$1,718.15	\$1,757.19
Maximum Weekly Benefit	\$1,150.49	\$1,177.32
Employee Contribution Rate	0.373% of wages per pay period	0.388% of wages per pay period
Maximum Annual Contribution	\$333.25	\$354.53

Mark Your Calendar!

NESCA Holiday Reception & Dinner
December 12, 2024 – Century House, Latham
Look for More Information to Come!



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