



Vol. 42, No. 7

(518) 869-9800

January 2025

### **ESSA Adopts 2025 Legislative Program**

At its December 4, 2024 Board of Directors meeting, the Empire State Subcontractors Association (ESSA) adopted its legislative program for 2025. 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 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.

ESSA will also draft legislation to clarify that the amount of retainage private commercial owners may withhold from contractors is limited to no more than five percent. Members may recall about a year ago Governor Kathy 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. However, due to existing 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 will pursue legislation to make it absolutely clear that 5% retainage is the maximum that may be withheld by private owners. This will be accomplished 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.

### **WC Benefits Expanded to Include Job-Related Stress**

Governor Kathy Hochul has signed into law legislation that amends the New York State Workers' Compensation Law to allow workers to secure workers' compensation benefits for "mental injury premised upon extraordinary work-related stress incurred at work". The new law became effective on January 1, 2025. Previously under the Workers' Compensation Law, stress related claims were limited to first responders, including police officers, firefighters, and paramedics. The new law significantly expands the reach of workers' compensation benefits to all employees who experience "extraordinary work-related stress" from their work. Unfortunately, what constitutes "extraordinary work-related stress" is not defined in the law and remains to be determined. However, the Governor has announced that a Chapter Amendment is pending "that will specify the categories of mental injury eligible for compensation".

### **NESCA Membership Meeting**

**January 9, 2025**

**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 LeChase Construction Services**

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

**Reception, Dinner, Tax & Gratuities - \$65**



## PRESIDENT'S MESSAGE

As we close out 2024, for those of us who believe in recreating new goals or simply making small adjustments each year, I hope we are able to take a moment to both look behind and ahead. Looking behind at the past year is hopefully a testament to our resilience, hard work, and dedication to not only maintain a successful business, but to create and maintain jobs. In looking ahead, with each positive thought and action we create new beginnings and opportunities.

As we step into the New Year, let's remember that it was you that got you this far. Your determination; your patience; your foresight. Your ability to forge ahead when others didn't see what you were seeing and embrace the challenges that came your way as opportunities is what got you here. Let's remember the saying "Every obstacle we overcome is a steppingstone to greater achievements."

As NESCA members, we must also remember the power of unity. Our strength lies not only in our individual capabilities but in our ability to come together, share knowledge, and support each other. I know from my own

experiences with fellow NESCA members, we continue to commit to being each other's allies, mentors, and advocates. That, in my opinion, is one of many reasons why I say NESCA is such a great group to be a part of.

With all sincerity I hope this New Year brings each of you prosperity, growth, and countless opportunities both personally and professionally.

NESCA held its annual Holiday Reception and Dinner at the Century House on December 12<sup>th</sup>. It was a fun evening with superb food and great company. Thank you to NESCA's Board of Directors and past presidents for sponsoring this special event. Your kindness and generosity are greatly appreciated. In addition to all the holiday merriment, we also held our annual Toys for Tots drive. Members contributed a vanload of toys to the campaign and NESCA was able to present Marine Corps Staff Sergeant Ted Kleniewski with a \$5,100 check, a record amount. Better yet, Schenectady Steel pledged to match NESCA's contribution with its own \$5,000 check to the Toys for Tots Foundation, so the Marines walked away with over \$10,000!

Looking ahead to the new year, NESCA's January 9<sup>th</sup> membership meeting will be a general contractor showcase featuring LeChase Construction Services. Come to this meeting for the opportunity to meet LeChase's management team, and hear their presentation on the type of work they do, project delivering systems used, what they expect from their subcontractors, what subcontractors can expect from them, and much more.

In January NESCA will be sending out application forms to members for the Roger H. Jones NESCA Scholarship. The NESCA Educational

Foundation will have scholarships available for the 2025-26 academic year for students enrolled in or about to be enrolled in a construction-related program of study at an accredited two-year or four-year college or university. When you receive the application forms please share this information with your employees.

I hope everyone has a safe and happy new year. It's hard to believe that the year 2025 is upon us!

*Bryan Berry, President*

## NESCA NEWSLETTER

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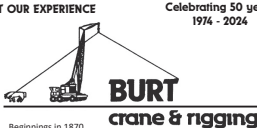
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### COUNSEL'S MESSAGE

The intent of this article is to alert subcontractors and materialmen to the significant ramifications which they may be exposed should they be found responsible for destruction or spoliation of potentially relevant evidence to a pending or future litigation.

An issue of significant concern evolving out of litigation within the construction industry, as well as many other industries, is the preservation and maintenance of potentially relevant evidence for another's use in pending or reasonably foreseeable litigation. The definition of relevant is very broad and includes something that has any tendency to make a fact more or less probable than not and may be of consequence in determining the action. The definition of reasonably foreseeable is not whether the affected party foresaw litigation but whether a reasonable party in the same factual circumstance would have reasonably foreseen the potential for litigation.

In today's world of electronic communication such duty of preservation extends, not just to hard

documents but also to e-mails, electronic submissions, RFI's, schedules, physical aspects of construction and all other matters transacted in electronic format. In the construction context the duty to preserve potentially relevant evidence can include the removal, remediation and/or alteration of defective work or testing of defective work. This would include concrete I beams which may potentially become a focus of investigation.

A failure to preserve and maintain such potentially relevant evidence is characterized as Spoliation. Spoliation includes the intentional or negligent withholding, hiding, altering or destroying of evidence relevant to a proceeding and/or the failure to preserve property for another party's use as evidence. The consequences of being held responsible for Spoliation of Evidence by the court can include severe penalties and impacts for a party to adjudicate its claim.

If found to be responsible for spoliation of evidence, the court may impose sanctions ranging from dismissal or judgment by default, preclusion of evidence (evidence will not be considered by the court), imposition of adverse inference (a presumption that destroyed evidence would have been beneficial to the opposing party) or assessment of attorney fees and costs for failure to preserve evidence. The scope and severity of the sanction is within the discretion of the court.

What can you do to comply with your duty to preserve evidence. As a business it is important to develop a strong retention and destruction policy of both electronic and hard copy project documentation, in a written format, which is followed by all employees. As part of that policy, it is important that litigation hold, retention and procedure policies are developed and in place before an issue arises. Like most procedures it is important the entire company, including the field and subcontractors, follow those procedures. It is advisable the policy & retention procedures be developed with your legal counsel.

Provide timely notice of construction defects discovered to all parties and the potential of a claim or litigation. Immediately implement litigation hold and retention procedures. It is unlikely legal counsel will be on the project so fully document testing, repairs, remediation and other actions by photo's, video's, signed written narratives, samples of damaged and defective materials. Document condition of the defective work or deficiency before, during and after testing, repair and remediation and document testing methodology to evaluate the defective item as well as to implement repair.

It is extremely important that physical evidence be preserved by being properly stored so as not to decay. All samples are preserved so it can be demonstrated the samples constitute a representative sample of the deficient work or material. Be sure to prohibit testing, by yourself or others, which completely destroys evidence. The foregoing represents just some fundamentally basic actions and procedures which a business in any industry, but especially the construction industry, should implement in order to comply with its duty to preserve potentially relevant evidence in a pending or reasonable foreseeable litigation.

*Walter G. Breakell, NESCA Legal Counsel*

### In Memoriam

NESCA sadly announces the passing of James R. "Jim" Willis, 67, on December 16, 2024. Jim was CEO of LHV Precast, Inc. and an active member of NESCA for more than 30 years. Jim had a great sense of humor, frequently attended NESCA Mid-Hudson membership meetings, and always stepped up the plate as a sponsor at NESCA golf outings. Jim will be greatly missed by his many friends and colleagues at NESCA.

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[michael@burke-electricny.com](mailto:michael@burke-electricny.com)

Contact: Michael Ryzner

### Firetek Sprinkler Systems

75 Carey Road  
Queensbury, NY 12804  
518-244-3772

[mikeoc@fireteksprinkler.com](mailto:mikeoc@fireteksprinkler.com)

Contact: Mike O'Connor

## Milestone Member Anniversaries

Albany Insulation, LLC – 5 Years  
Adirondack Mechanical Services, LLC – 15 Years  
A & K Slip Forming, Inc. – 20 Years  
AllSteel Structures, Inc. – 20 Years  
Parker & Hammond Construction, LLC – 20 Years  
Maximum Security Products Corp. – 30 Years  
The Woodward Company – 45 Years  
RBM Guardian Fire Protection, Inc. – 50 Years

## Calendar of Events

### January 9, 2025

Board of Directors Meeting  
Century House, Latham, 5 pm

### January 9, 2025

NESCA Membership Meeting  
Century House, Latham, 6 pm

### January 16, 2025

7-Week STP Course Begins  
"Contract Documents"  
Building Industry Center, 6 pm

### January 28-31, 2025

OSHA 30-Hour Course  
AGC-NYS Offices  
10 Airline Drive, Albany

### February 6, 2025

Board of Directors Meeting  
Century House, Latham, 6 pm

### February 13, 2025

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



NESCA President Bryan Berry, Staff Sergeant Ted Kleniewski, and Executive Director Mike Misenhimer Celebrate NESCA's December 12, 2024 Toys for Tots Campaign at the Century House.



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