NESCA Northeastern Subcontractors Association
NEWSLETTER

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5% Retainage Legislation Passed by Senate/Assembly

Legislation pursued by NESCA and its state affiliate, the Empire State Subcontractors Association, has been passed by both houses of the NYS Legislature and will be sent to Governor Hochul for her consideration. The bill, sponsored by Senator Neil Breslin (Albany) and Assemblyperson Pam Hunter (Syracuse), was passed in the Senate on June 6th, and followed with passage in the Assembly on June 9th.

If signed into law by the Governor, this legislation will limit the withholding of retainage by owners of private commercial construction projects valued at more than $150,000 to no more than five percent (5%) of the contract sum. Current law provides that owners may withhold a "reasonable amount" of retainage. Unfortunately, that term is not defined in the law, and some commercial construction owners believe that retainage in amounts of 10-15% is reasonable.

Because the existing law prohibits a prime contractor from withholding a higher percentage of retainage from subcontractors than the owner is withholding from the contractor, the 5% limitation will flow down to subcontractors.

It has long been NESCA's position that excessive retainage financially penalizes all contractors and subcontractors regardless of performance, and private owners are notoriously slow in paying it back. In many cases, retainage is withheld by owners for up to six months or more after project completion. Retainage can also be 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.

It is worth noting that a principal problem with retainage is that it is often based upon a faulty premise. That is, retainage should not be used as a warranty by another name. It is the contractor's/subcontractor's contractual warranty and manufacturers' warranties 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 the subcontractor's work. Curiously, the withholding of retainage isn't even the most effective way to assure performance. The most effective option to induce performance or correction of faulty work is to withhold the progress payment due the contractor or subcontractor until the specific performance problems are remedied.

Retainage represents money that has been earned by the contractor or subcontractor but is not released until project completion or later. Retainage essentially requires that contractors and subcontractors incur the expense of financing a portion of the project, and the practice has persisted because it remains a form of interest-free financing for an owner. There is obviously a cost to this which prudent contractors and subcontractors price into their bids.

As more owners, both public and private, have discovered the hidden cost and relative ineffectiveness of holding excessive amounts of retainage, the trend in the construction industry nationwide has been toward reducing, eliminating or using alternatives to retainage. For example, in 2014 the State of Massachusetts enacted legislation that limited retainage on private commercial construction projects to no more than 5%. Likewise, in 2016 Minnesota enacted a retainage reform measure that limits retainage to 5%. 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. The Federal Acquisition Regulations state that "If the federal contracting officer finds that satisfactory performance was achieved during any period for which a progress payment is to be made, the contracting officer shall authorize payment to be made in full." Simply, it is the policy of the federal government that retainage should not be used as a substitute for good contract management.

It is NESCA's position that limiting retainage on private commercial projects to no more than 5% is a reasonable approach and will relieve contractors and subcontractors from a significant financial burden.

NESCA will now focus its attention on the Governor's office and will urge Governor Hochul to sign this legislation.

PRESIDENT'S MESSAGE

I'd like to thank the membership for providing me the opportunity to serve as NESCA president for 2023-2024. It truly is an honor to be elected to this position and I won't take this nomination lightly. I'd like to thank Chris White for all he did over the past year as NESCA President and good luck as the recently elected Vice President of the National Subcontractors Alliance. It's been a privilege to serve as an officer with him for the past 3 years, and I believe our friendship will last a long time. I'm sure he won't be a stranger and will continue to support the association however he can.

For more than 50 years, NESCA has worked to achieve a multitude of rights, remedies, and benefits for all subcontractors and suppliers doing business in New York State. During the coming year, I hope to help NESCA to continue to move forward with additional achievements. With nearly 500 members, the association continues to be a loud voice in New York supporting subcontractors and suppliers. I hope the sharing and brainstorming of ideas to help the industry continues and I will do my best to keep the momentum going.

I encourage you all to take full advantage of your NESCA membership and can't urge you enough to attend NESCA meetings and events. The benefit of networking face to face with other members is outstanding and presents an opportunity to create new relationships. If you're having trouble securing payment on a job, NESCA will file a lien for you free of charge. Or, if you have questions about a business or construction issue and are unsure where to turn, call the NESCA office. Over the years, NESCA staff has developed a reputation for prompt and courteous assistance in dealing with the myriad of business problems and issues that most subcontractors and suppliers face, from competitive bidding requirements to remedies for non-payment. Also, be on the lookout for the 2023-24 membership directory which should be out soon.

I am very pleased to report that NESCA was successful in getting our 5% retainage bill passed in both the Senate and Assembly. This legislation, if signed by the Governor, will be of great benefit to our members because it will limit the withholding of retainage on private commercial construction projects to no more than five percent. NESCA has been our constant advocate in the State Legislature for more than 45 years, and during this time has successfully ushered 39 bills into law, all which benefit subcontractors and suppliers. Let's hope the 5% retainage bill becomes number 40.

In the coming months, NESCA has several fun events on the calendar. On July 20th, NESCA will hold its annual Day at the Races at Saratoga Race Course (almost all of the 350 tickets have been sold). On September 18th, I'm looking forward to our annual golf outing which will be held at Troy Country Club. Both the morning and afternoon flights are already sold out for this popular event. Golfers get ready to enjoy a fun course but be careful on the hills! On July 13th our young professionals mixer will be held at Philly's Bar and Lounge in Latham. I hope to see you all at these, and many more, events we have planned for the coming year and thank you for your continued support of NESCA.

Robert L. Kind, President

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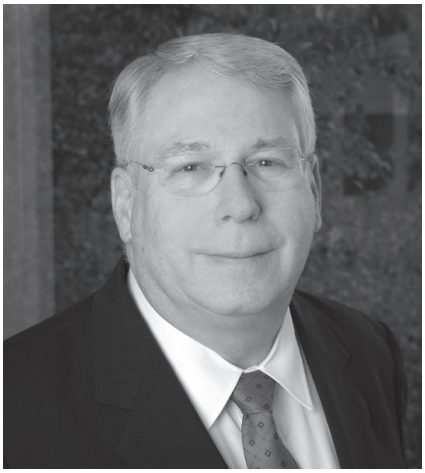

COUNSEL'S MESSAGE

Our office is frequently consulted by clients who believe they are being told to perform work that is not within the scope of their contract, and the prime contractor refuses to provide a change order because it believes the work is within the contractual scope. Frequently the subcontractor desires to refuse performance of the work due to the cost to perform the work without a change order.

There are a few ways to address this situation. Initially it should be recognized that the work is classified as disputed work if the parties disagree on responsibility. Most subcontracts require a subcontractor to perform disputed work at the subcontractor's cost and pursue reimbursement through the disputes clause of the subcontract. The subcontractor normally will not have an option to refuse performance.

Most subcontracts also require a subcontractor to secure a signed change order BEFORE performing changed or extra work or any claim for additional cost will be deemed waived. Those clauses have been repeatedly enforced by the courts.

The issue then becomes how does a subcontractor protect itself if it is orally told to perform work believed to be outside its contractual scope, the prime contractor will not issue a change order, and the subcontractor is required to perform the disputed work under the subcontract.

In the circumstance involving disputed work the subcontractor retains the right to demand a written directive to perform the specified work. That written directive is the key relied upon by the prime contractor to compel subcontractor's performance of disputed work in accordance with the contract language.

The subcontractor relies on the written directive as the prime contractor's assertion the work is within the subcontract. The subcontractor needs to send a written response to the written directive by disputing the determination but will perform the work under protest as directed. The subcontractor also needs to submit the estimated and actual cost of performance to the contractor demanding payment after completion of disputed work.

What should occur if the prime contractor refuses to issue a change order and refuses to issue a written directive to perform disputed work? Under those circumstances the subcontractor, upon being advised neither will be issued, BEFORE COMMENCING THE DISPUTED WORK, must send a written notice to the prime contractor confirming the oral directive to perform specified work, that subcontractor disputes the work as not being within the scope of the subcontract but will perform the disputed work as required and submit a claim for the additional cost of performance.

The written protest should also direct the prime contractor to immediately notify the subcontractor in writing if it asserts that a directive to perform specified disputed work was not given.

Upon completion of the disputed work an invoice should be submitted as a demand for a written change order and claim for additional compensation (remember to include time for a contractual time extension). If refused the subcontractor should pursue the dispute procedures of the subcontract and not wait until completion of the subcontract.

Importantly the subcontractor must at all times comply with the written notification(s) of additional/changed work to the prime contractor within the time frames of the subcontract.

Walter G. Breakell, NESCA Legal Counsel

Question of the Month

Q. Do you have any information about hiring teenagers as summer help? I'm not sure what they are allowed to do in the field or around our shop.

A. Well, they can't do much. The NYS Labor Law prohibits minors under the age of 18 from working or assisting in construction work unless they are: (1) apprentices registered with the NYS Department of Labor; (2) student-learners enrolled in recognized cooperative vocational training programs; (3) trainees in approved on-the-job training programs; (4) workers 16 or 17 years old who have completed training as a student-learner or trainee; or (5) workers 16 or 17 years old who have completed a training program by a public school or non-profit institution that includes DOL approved safety instruction.

Welcome New Members

The Asphalt Doctor
26 Farm Road
East Greenbush, NY 12061
(518) 273-8005
asphaltdr1@aol.com
Contact: Kathleen Trong

Encon Services & Supply, Inc.
1141 River Road
Selkirk, NY 12158
(518) 439-9412
jamesforster615@gmail.com
Contact: James Forster

Fairview Hearthside Distributors
68 Violet Ave.
Poughkeepsie, NY 12601
(845) 452-8444
paul@fairviewhearthside.com
Contact: Paul Ackert

Gill Technical, Inc.
368 Broadway, Ste 11
Saratoga Springs, NY 12866
518-410-4325
chris@gilltechnical.com
Contact: Christopher Gill

Philadelphia Insurance Companies
3 Hayes Drive
Saratoga Springs, NY 12866
(781) 297-6568
harry.ungeheuer@phly.com
Contact: Harry Ungeheuer

Calendar of Events

July 20, 2023
NESCA Day at the Races
Saratoga Race Course, 11 am

September 18, 2023
NESCA Annual Golf Outing
Troy Country Club

Milestone Member Anniversaries

IAT Surety – 15 Years
SRI Fire Sprinkler LLC – 15 Years
Dagostino Building Blocks, Inc. – 40 Years
Access Anvil Corp. – 45 Years
Gallagher – 45 Years
NFP – 45 Years
S.D. Carruthers Sons, Inc. – 45 Years
Stants Capital Combustion, LLC. – 45 Years
All-Lifts, Inc. – 50 Years
Kasselman Electric Co., Inc. – 50 Years
Troy Boiler Works, Inc. – 50 Years

Final Rule Adopted by DOL on Prevailing Wage for the Hauling of Aggregates

The NYS Department of Labor has adopted a final rule regarding the payment of prevailing wages for the hauling of aggregate supply construction materials. This new rule became effective on May 31, 2023 and applies to all projects bid on or after May 31st and all contracts entered into on or after May 31st if the project was not put out to bid.

This rule comes as a result of legislation signed into law in December 2021 that requires payment of the prevailing wage and supplements for any work involving the delivery to and hauling from public projects "aggregate supply construction materials", as well as return hauls, whether empty or loaded, and any time spent loading or unloading. Governor Hochul signed the bill pursuant to an agreement with the Legislature to clarify that prevailing wages will be required only at the worksite itself and for travel between the worksite and a designated central stockpile where aggregate materials are delivered. On February 24, 2022 a chapter amendment was signed by the Governor.

Shortly after the chapter amendment was enacted, the Department of Labor filed a proposed regulation for the purpose of defining key terms in the law. NESCA provided comments on the proposed rule and observed that while several definitions provided needed clarification, DOL had added language that expanded the applicability of the law beyond what is found in either the original legislation or the chapter amendment. This additional language requires that the prevailing wage shall be paid "for work performed within a 50-mile radius of a worksite". Nowhere in the language of the statute is there a requirement that the prevailing wage be paid for work performed within a 50-mile radius of a worksite. NESCA objected to this regulatory expansion as not being supported by the underlying law and asked that it be removed from the final rule. Unfortunately, the language was not removed.

For a copy of the final rule please contact the NESCA office.