



## Assembly Fails to Act on Payment Security Bill

Lawmakers in Albany wrapped up their legislative session on June 7<sup>th</sup>, but despite being passed by the Senate on May 30<sup>th</sup> the Assembly failed to act on legislation that would have provided contractors, subcontractors and suppliers with payment security on “hybrid” projects. Hybrid projects are defined as projects built by private developers and with private funds but located on public land. Contractors, subcontractors and suppliers do not have lien rights on such projects.

Specifically this legislation, which was drafted by NESCA and the Empire State Subcontractors Association (ESSA) and supported by the Associated General Contractors of NYS, would require that a payment bond or an irrevocable letter of credit be posted by the private developer on projects costing more than \$250,000, which would provide all parties supplying labor and/or materials to the project some measure of protection against non-payment for work performed and/or material delivered.

In the flurry of activity that defines the end of the legislative session, of the 805 bills that passed both chambers of the Legislature this year, more than 60% (489) were passed in the final week of the session. Unfortunately, the NESCA/ESSA bill did not make the cut this year, despite having solid support from the construction industry and no identifiable opposition. It is likely the ESSA Board of Directors will include this bill as part of its 2025 legislative program and take another stab at getting it enacted into law.

NESCA and ESSA have a long history of seeking payment protection for contractors and subcontractors on hybrid projects. Back in 2003, ESSA-drafted 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 legislation 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 form of undertaking”. That case, *Skanska USA Building, Inc. v. Atlantic Yards B2 Owner, LLC*, effectively made the 2004 amendment to the Lien Law meaningless because a “completion guarantee” provided by the developer 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.

It is NESCA’s position that the Legislature never intended for contractors, subcontractors, suppliers and workers to be left without payment protection simply because a private developer enters into a ground lease agreement with a public entity. To achieve the objective of the Lien Law, any alternative undertaking must provide substantially equivalent protection to that provided by a bond. The alternative undertaking should be a financial arrangement that would afford an unpaid contractor, subcontractor, laborer or provider of materials, a fund of money, or an asset, available for predictable and prompt payment. A completion guarantee is not the functional equivalent of a bond. And that’s why NESCA and ESSA have come back to the well one more time with the current legislation – to simply substitute “irrevocable letter of credit” for “other form of undertaking”, thereby providing true payment security for all parties engaged in performing work or supplying materials on hybrid projects.

**There are Still Tickets Available for the  
NESCA Bus Trip to Yankee Stadium  
\$165 Per Person**

**NYS Yankees vs Toronto Blue Jays  
August 3, 2024 – Game Time 1:05 pm**

**Please Call the NESCA Office for Your  
Ticket(s) Today!**



## PRESIDENT'S MESSAGE

As the 2024-25 season is under way, I am filled with gratitude for the trust you've placed in me as the President of NESCA for the upcoming year. Your confidence is not just a testament to my commitment but also a reflection of our collective vision for the future of NESCA and the construction industry.

I would like to extend my heartfelt congratulations to Rob Kind for his exemplary leadership over the past year. His efforts have significantly contributed to our organization's success and set a high standard for us all.

It's a moment of pride to acknowledge once again the enduring legacy of Rob and his father before him. As a second-generation member and now Past President, it prompts me to ponder—have any other families shared this honor? We have had one other family with the same honor – Tom McDermott of Schenectady Steel Co., Inc. and his son David of Stone Bridge Iron and Steel. What a remarkable testament to the generational dedication within our NESCA community.

Although summer brings a pause to our regular membership meetings, it does not slow the vibrant pulse of our activities. On July 25th, we will host our annual Day at the Races in Saratoga, and I am thrilled to announce that all 400 plus tickets have been sold. Come August 3rd, we'll embark on a bus trip to Yankee Stadium to cheer on the Yankees against the Toronto Blue Jays. And let's not forget our annual golf outing on September 9th, at Shaker Ridge Country Club—a tradition that continues to grow. With several months to go before the golf outing, we have already sold-out both the morning and afternoon flights. One of our past presidents and probably the most accurate weather predictor for this event, Mr. Roger Jones, is already working with the powers that be to hopefully give us another dry event.

Our advocacy for subcontractors and suppliers remains unwavering. This year, we celebrated a legislative victory with our bill passing in the New York Senate. Although the session concluded without Assembly action, our resolve has not waned. The proposed legislation aims to secure payment protection for contractors on "hybrid" construction projects—private developments on public land. We anticipate that our state association, Empire State Subcontractors Association, will renew efforts to advance this critical bill in both houses next year.

I urge every member to leverage the full spectrum of benefits that NESCA offers. From our lien filing service and Workers' Compensation Safety Group to networking opportunities and direct staff support, these resources are designed to empower your success.

As we look ahead, I invite you to share your insights and concerns with me. Your voice is invaluable, and together, we can navigate the challenges and

opportunities that lie ahead. I encourage each of you who attend regular contractor meetings to bring NESCA pamphlets with you in an effort to increase our membership.

I eagerly anticipate connecting with you at our upcoming events and meetings throughout the year.

**Bryan Berry, President**

## NESCA NEWSLETTER

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

BRYAN BERRY, President  
JOE JERKOWSKI, Vice President  
JEFF ORVIS, Treasurer  
RICK OTIS, Secretary

### DIRECTORS

ERNIE BURKART  
GARY DRIZOS  
ROBERT GENNETT  
JESSE GORMAN  
MIKE HAMEL  
EMMA HECK  
ROGER JONES  
MIKE LOCK  
PETE RYAN  
IAN TOWNSEND

### ROB KIND

1<sup>st</sup> Immediate Past President


### CHRIS WHITE

2<sup>nd</sup> Immediate Past President

WALTER BREAKELL  
NESCA Legal Counsel


MICHAEL MISENHIMER  
Executive Director

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  
burcrane.com



MEMBER  
Specialized  
Carriers  
& Rigging  
Association

NYS Certified WBE

SCAN ME

"BUILDING THE FUTURE - TOGETHER"



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

PROTECTING YOUR LEGAL RIGHTS



**KEVIN LAURILLIARD**  
ATTORNEY AT LAW

Construction Law • Employment Law  
Corporate Law • Dispute Resolution • Litigation



ATTORNEYS AT LAW

A full service law firm established in 1925.  
54 State Street | Albany, NY 12207  
[www.oalaw.com](http://www.oalaw.com)  
518-462-5601

Going beyond your expectations



Teal, Becker & Chiaramonte  
CERTIFIED PUBLIC ACCOUNTANTS & ADVISORS

Accounting • Auditing • Tax • Consulting  
Pension Plan Administration

[www.tbccpa.com](http://www.tbccpa.com) | 518-456-6663

INSIDE  
300  
FIRMS  
2024

ALBANY BUSINESS REVIEW  
BEST PLACES TO WORK



TOP  
WORK  
PLACES  
2024



## COUNSEL'S MESSAGE

Recently there has been a flood of media reports regarding different prime contractors who allegedly have been paid contract funds received from a construction loan, or project owner, but failed to pay subcontractors or suppliers providing material or labor on a project funded by those monies.

In New York State, as well as many adjacent states, there have been laws enacted to ensure subcontractors and suppliers who have provided material and labor for the improvement of a public or private project at the direction of an owner, general contractor or subcontractor receive payment for those services.

Those laws are located within Article 3A of the New York Lien Law and classify construction contract funds received as part of a bank construction loan by an owner, or construction contract funds received by a contractor or subcontractor to be Trust Funds for which the owner, contractor or subcontractor are trustee's (fiduciaries) corporately, and

individually, responsible for applying all trust funds toward satisfaction of trust claims.

The use of trust assets for any purpose other than the expenditures contained in Lien Law §71 before all trust claims have been paid or discharged represents an improper diversion of trust assets regardless of the trustee's intentions.

Under Article 3A of the lien law, a trust fund beneficiary (ie; contractor, subcontractor, materialmen) may commence a lawsuit to recover trust assets from anyone to whom assets have been diverted with notice they constituted trust funds for which they were not a beneficiary.

It is also important to emphasize that illegal diversion of trust funds is classified as a felony under New York's Penal Law. Over the years there have been several criminal prosecutions for illegal diversion of trust funds for which individuals have been incarcerated.

In addition to the trust fund enforcement tools, the Lien Law allows trust fund beneficiaries to demand a verified itemized trust fund statement from the trust fund trustee every 30 days.

Alternatively, a beneficiary can make a demand to examine the books and records of the trustee every 30 days. The Lien Law identifies the financial information that must be maintained and requires identification of trust funds received and identification of whom are paid trust funds along with the date and amount paid.

It is important the membership becomes knowledgeable of these beneficial laws to assist them in receiving payment for labor and materials furnished to private and public construction projects.

*Walter G. Breakell, NESCA Legal Counsel*

## Legislation to be Delivered to the Governor

Several bills of interest were passed during the final week of the Legislative session and will be delivered to Governor Hochul for her consideration as follows:

**Certified Payrolls** – Will require contractors and subcontractors on public projects to submit certified payroll records in an electronic format to the Department of Labor on a monthly basis. This legislation will also require contractors and subcontractors to provide documentation of each fund, plan or program where any supplement has been paid or provided. Further, prime contractors will be required to provide a copy of the payment bond required by Section 137 of the State Finance Law. Finally, the legislation will require the Labor Department to establish an online database of electronic certified payroll records open to public inspection. If signed by the Governor, these requirements will take effective immediately, and the database of certified payroll records will be implemented by December 31, 2024.

**Worker's Compensation Stress Claims** – Will expand to all workers the ability to receive PTSD coverage under the NYS Workers' Compensation Law where a worker files a claim for mental injury premised upon extraordinary work-related stress incurred on the job. If signed by the Governor, this legislation will take effect on January 1, 2025.

**Brownfield Remediation** – Requires prevailing wage requirements to be applied to certain brownfield remediation work performed under private contract. If signed by the Governor, this legislation will take effect on January 1, 2025.

**HH&K**  
Hinman, Howard & Kattell, LLP  
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

**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.

© 2022 Arthur J. Gallagher & Co. | 42502

**CIS**  
Construction Information Systems, Inc.

**Unlock Efficiency using  
Cloud based Sage Intacct  
for Construction!**

Secure Anywhere, Anytime Access  
Powerful financial insights

Call Paul Unter 518 373-9005  
www.consinfo.com

For All Your WBE Building Material Needs

**COMMERCIAL RESIDENTIAL**  
**BONDED**  
BUILDING MATERIALS, INC.

A New York Certified Woman-Owned Business Enterprise

- \* SHINGLES \* INSULATION \*
- \* EPDM \* TPO \* PVC \* TRUSSES \*
- \* METAL ROOFING \*
- \* CUSTOM METAL FABRICATION \*
- \* SIDING \* WINDOWS \* DOORS \*
- \* SKYLIGHTS \* COATINGS \*
- \* PLYWOOD \* LUMBER \*
- \* AIR BARRIERS \*
- \* SNOW RETENTION SYSTEMS \*

1329 Amsterdam Rd., Scotia, NY 12302  
**(518) 346-2395**

## Welcome New Members

### AFI Glass & Architectural Metal, Inc

161 Smith Street  
Poughkeepsie, NY 12601  
845-485-1080  
[angelo@afiglass.com](mailto:angelo@afiglass.com)  
Contact: Angelo Incorvaia

### Brinkman Contracting Co., LLC

583 County Route 25  
Stuyvesant, NY 12173  
518-929-4271  
[brinkmancorp@gmail.com](mailto:brinkmancorp@gmail.com)  
Contact: Adam Brinkman

### Crum & Forster

305 Madison Ave  
Morristown, NJ 07960  
678-886-5469  
[joseph.lolli@cfins.com](mailto:joseph.lolli@cfins.com)  
Contact: Joe Lolli

### National Business Technologies

15 Corporate Circle  
Albany, NY 12203  
518-507-4661  
[ncampana@national1927.com](mailto:ncampana@national1927.com)  
Contact: Nicolas Campana

### Petcosky Companies

421 Commerce Street  
Vestal, NY 13850  
607-797-0160  
[mpetcosky@petcosky.com](mailto:mpetcosky@petcosky.com)  
Contact: Mike Petcosky

### Triple E Power & Light

1500 Campus Drive  
Vestal, NY 13850  
607-725-1981  
[triplee@stny.rr.com](mailto:triplee@stny.rr.com)  
Contact: Sue Brusso

## NYS Department of Labor Releases Proposed Contractor Registry Regulations

As NESCA members may recall, about a year ago Governor Hochul signed legislation requiring contractors and subcontractors performing public work (or work on covered private projects) to register with the NYS Department of Labor. The registration process will require contractors and subcontractors to provide information about their companies such as principal place of business, form of business entity, ownership interest, tax identification number, unemployment insurance number, and workers' compensation board employer number. Additional information to be submitted includes information regarding past violations of various labor laws such as the prevailing wage law, whether the contractor or subcontractor has any outstanding wage assessments, and whether the contractor or subcontractor has been debarred within the last eight years. The Department of Labor was also charged with establishing an online system to make available all registrations and disclosures required by this law. The law will become effective on December 30, 2024.

On May 29, 2024, the Labor Department released proposed regulations implementing this new law. The proposed regulations are not extensive and set registration fees at \$200 for non-MWBEs and \$100 for MWBEs. The proposed regulations also identify when a contractor or subcontractor is "unfit" to register under the following circumstances:

- If a contractor or subcontractor is currently debarred or ineligible pursuant to Section 220-b(3) of Article 8 of the Labor Law.
- If a contractor or subcontractor is currently debarred or ineligible pursuant to Section 141-b of the Workers' Compensation Law.
- If a contractor or subcontractor is currently subject to a final administrative or court order for violation of State or federal prevailing wage law which has not been fully satisfied.
- The commissioner may revoke or suspend a registration if a contractor or subcontractor becomes unfit pursuant to the provisions of the law.

The full text of the proposed regulations can be found on the NYS Department of Labor Website at <https://dol.ny.gov/public-work-and-prevailing-wage>. Public comment on the proposed regulations will be accepted for a 60-day period until July 29, 2024.

## Milestone Member Anniversaries

Reo Welding Co., Inc. – 35 Years  
Mechanical Testing, Inc. – 45 Years  
Northern Stud Welding, LLC – 45 Years

**Payment problem? Take full advantage of your membership in NESCA by utilizing our free lien filing service. All members are eligible to file up to three liens each fiscal year absolutely free of charge!**

**WELBY,  
BRADY &  
GREENBLATT, LLP**  
ATTORNEYS AT LAW

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

**L&W SUPPLY**

L&W Supply is your local resource  
for all building materials

- Drywall & Wallboard
- Steel Framing
- Ceilings & Acoustical
- Commercial Doors/Frames/  
Hardware
- Interior Finishing
- Insulation
- Fasteners
- Tools & Accessories

**L&W Supply - Cohoes**  
36A Green Mountain Drive  
Cohoes, NY 12047

Phone: (518) 783-6121  
[www.lwsupply.com](http://www.lwsupply.com)

**MARSHALL  
STERLING**  
SECURE YOUR SUCCESS

518-384-1100  
[marshallsterling.com/scotia](http://marshallsterling.com/scotia)

25 MOHAWK AVE., SCOTIA, NY 12302

**JOHN 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
- 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
- HAZMAT, MSHA, OSHA Certified Operators & Riggers

WOMAN-OWNED SMALL BUSINESS ENTERPRISE  
[WWW.MULLINSRIGGING.COM](http://WWW.MULLINSRIGGING.COM)

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