



ESSA Adopts 2026 Legislative Agenda

At its December 17, 2025 Board of Directors meeting, the Empire State Subcontractors Association (ESSA) adopted its legislative program for 2026. NESCA's statewide affiliate will focus its attention on pursuing legislation that will provide contractors, subcontractors and suppliers with payment protection on certain "hybrid" construction projects built in New York State.

This legislation will require either a payment bond or an irrevocable letter of credit be posted by private developers on "hybrid" projects which will provide all parties supplying labor and/or materials to the project a measure of protection against non-payment for work performed and/or material delivered.

On private projects, subcontractors and suppliers performing work or furnishing materials can file mechanic's liens, which attach to the real property, if they are not paid for work performed or materials delivered on the project. On public projects, unpaid subcontractors and suppliers can file public improvement liens, which attach to the public fund set up to pay for the project. However, the 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, can not file liens against the public land or the private entity's leasehold interest.

In 2004, legislation amending Section 5 of the Lien Law was enacted to provide payment security to contractors, subcontractors, and suppliers on such hybrid projects. That legislation required the private developer for whom the improvement was being made to post a bond or "other form of undertaking" guaranteeing prompt payment of moneys due the parties performing work and supplying materials.

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, effectively made the 2004 amendment to the Lien Law meaningless because a completion guarantee provided to the public entity provides no payment security whatsoever to the contractors, subcontractors and suppliers performing work on the project.

This year's legislation simply substitutes "Irrevocable letter of credit" for "other form of undertaking" thereby providing all parties supplying labor and materials to a hybrid project with payment protection.

ESSA will also pursue a second bill during the 2026 legislative session to prohibit contract provisions conditioning a subcontractor's or materialman's right to commence a lawsuit or arbitration proceeding for breach of contract on the exhaustion of another legal remedy by making such provisions against public policy, void and unenforceable.

This legislation will expand on ESSA's 2009 amendment of Section 5-322.1.2 of the General Obligations Law which prohibited contract provisions conditioning a subcontractor's or materialman's right to file a claim and/or commence an action against a payment bond on the exhaustion of another legal remedy against public policy, void and unenforceable.

NESCA Membership Meeting

March 12, 2026 – 6:00 pm

Duo at the Dunes

**Italian American Community Center
257 Washington Avenue Extension, Albany**

- 6:00 Open Bar/Registration**
- 6:30 Dinner: Filet-Merlot Demi Glaze**
- 7:15 Business Announcements**
- 7:30 Program: "Construction Legislative Update"**

Presented by

**Greg Serio – ESSA Lobbyist and Partner &
Managing Director of Park Strategies, LLC**

Reception, Dinner, Tax & Gratuities - \$75



PRESIDENT'S MESSAGE

As winter starts to fade away, I hope everyone is looking forward to spring soon as NESCA is gearing up for some good programs. Our new meeting place at the Italian American club has been great so far and I look forward to our members joining us for the events.

NESCA's February 12th Construction Industry Mixer at Brown's Brewing Co. in Troy was a great success and nearly 250 registered for this event, including over 80 individuals representing 17 local general contracting companies. The Mixer allowed NESCA members and general contractors to network in a relaxed and fun atmosphere, and the weather has been so cold I think everyone was just happy to be out and about.

NESCA has some upcoming meetings, seminars and events that should offer something for all our members, so please try to take advantage. Our March 12th membership meeting will feature a presentation by our lobbyist, Greg Serio from Park Strategies. Greg has been our lobbyist for over a dozen years, and has helped us to achieve several important

legislative victories, including legislation that requires public owners to provide the contractor with a complete punch list no later than 45 business days after substantial completion has been reached, and our most recent success, legislation that limits the withholding of retainage by owners of private commercial construction projects to no more than five (5) percent of the contract sum. Greg will be discussing our 2026 legislative agenda and will also explain the many hurdles a bill has to overcome in the legislative process to get passed by both houses and signed into law by the Governor.

Performing public work for New York State's various contracting agencies, public authorities and political subdivisions (cities, counties, towns, school districts, etc.) can be a daunting endeavor due to the large number of complicated laws, rules and regulations a contractor or subcontractor must comply with. On March 18th the NESCA /AGC/ECA Educational Partnership will hold a seminar on "Performing NYS Public Work" at the Building Industry Center, from 9:00 am – 12:00 noon. This 3-hour seminar will provide an overview of what every contractor and subcontractor need to know when performing public work, from the bidding process to project closeout. If you perform public work here in New York I highly recommend you attend this seminar which will come with a comprehensive Performing Public Work manual for all attendees.

On April 9th NESCA will be hosting one of our most popular networking events of the year. Our annual "Meet the Estimators/Purchasing Team" event will be held at the Italian American Community Center beginning at 6:00 pm. More than 30 commercial general contractors will be on hand that evening

(last year 34 general contractors participated). Each general contractor will have its own well-identified table manned by their estimating and purchasing staff for NESCA members to visit with and learn more about their companies. This event gives our members the chance to "put a face to the name" of people they may interact with on the phone or through email but may not have had the opportunity to meet in person. This event is a "must attend" so please mark the date on your calendar.

This will serve as a "last call" for submitting an entry form for a NESCA safety award. NESCA's 20th annual Safety Awards presentation will be held at our May 14th membership meeting. If you are eligible for an award, please return your completed entry form so that your company can be recognized.

I look forward to seeing you all at our upcoming events. If there is anything Mike, his staff, one of the Board members or I can assist with your business please feel free to reach out and utilize the resources available at NESCA.

Joe Jerkowski, President

NESCA NEWSLETTER

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COUNSEL'S MESSAGE

One of the most difficult tasks to perform is to inform a client that its bonafide claim for additional compensation has been dismissed for failure of the contractor to comply with a fundamental tenet of a construction contract.

That tenet is the responsibility in nearly every construction contract, whether Owner-Contractor, Contractor-Subcontractor or Subcontractor-Sub-subcontractor, is the obligation of one party to provide written notice of an event giving rise of a potential claim to the other party. Failure to provide that written notice within the contractually specified time limits virtually always results in a dismissal of the claim.

The law classifies compliance with this written notice as a condition precedent to being able to prosecute a claim against another party. If you do not comply your claims will likely be dismissed.

The context in which contractual written notice is frequently mandated is represented by any claim for extra work, changed conditions, damage,

delay or other specified conditions the contract documents require. Unfortunately, those are the General Conditions of Contract contractors frequently refer to as "boiler plate." Regardless of whether the documents are "boiler plate" a failure to strictly comply will result in broiling your bank account!

New York courts have consistently held the purpose of written notice is to allow the recipient owner, contractor, subcontractor etc. opportunity to timely investigate and determine the validity of a claim. The courts have emphasized strict compliance with written notice on contracts for public improvements.

An added complexity to the subject is that many requirements for written notice have varied time limits. It could be 3 days, 10 days, 21 days, 90 days or may not even be in the contact documents. Many written notice time limits are established by statutory law which all are presumed to be knowledgeable.

NESCA's office possesses a written list of New York laws requiring written notice of claim as a condition precedent for recovery of relief. A member would be wise to contact them for a copy and boldly post it in every job trailer and project manager's office.

Walter G. Breakell, NESCA Legal Counsel

Member Payment Tip

If you perform work or supply materials on public projects in New York State (state agencies, public authorities, municipalities, school districts), your right to file a lien for unpaid funds expires 30 days after the project has been completed and accepted by the public owner. Unfortunately, many subcontractors and suppliers are unaware of the date when a public project they are working on has been certified as completed and accepted. This can cause their lien rights to tick away and ultimately expire without them knowing.

Fortunately, in 1977 NESCA drafted and lobbied into law Section 11-a of the NYS Lien Law. Section 11-a of the Lien Law requires that, upon the written request of a subcontractor or supplier, a public owner must provide the subcontractor or supplier with written notice within five days of the completion and acceptance of the project. This notice requirement provides subcontractors and suppliers the information they need to take action before their lien rights expire. It is recommended that all subcontractors and suppliers file a written request with the public owner for notice of project completion at the beginning of every NYS public project you become involved with.

NESCA has a sample letter members may use to do just that! In fact, NESCA membership provides members with access to all types of sample letters to assist you with almost any situation you may encounter. From a sample request for a copy of the payment bond to a sample notice of delay, NESCA can help.

Mark Your Calendar!

2026 Meet the Estimators/Purchasing Team Sponsored by Marshall & Sterling Upstate

April 9, 2026 – 6:00 pm

Duo at the Dunes – Italian American Community Center

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Calendar of Events

March 12, 2026

NESCA Membership Meeting
Italian American Comm. Ctr. 6 pm

March 18, 2026

Seminar: Performing Public Work
Building Industry Center, 8:30 am

NESCA Milestone Anniversaries

Perreca Electric Co., Inc. – 5 Years
John W. Danforth Company – 10 Years
Alarm & Suppression, Inc. – 15 Years
Downey Sales Associates – 15 Years
Pompa Bros. – 15 Years
TD Bank – 15 Years
Tri-City Scaffold Co., Inc. – 15 Years
Wolberg Electrical Supply Co., Inc. – 15 Years
L and W Supply – 25 Years
Bubonia Holding Corp. – 30 Years
Selby & Smith, Inc. – 45 Years

Governor Signs Several Construction Industry Amendments

On February 13, 2026, Governor Kathy Hochul signed several bills into law which amended legislation enacted at the end of 2025. These Chapter Amendments are as follows:

Prevailing Wage on Custom Fabrication - This law was signed by the Governor on December 20th and includes certain off-site custom fabrication as public work for purposes of payment of the prevailing wage. This law will take effect on June 18, 2026. Specifically, the legislation requires payment of the prevailing wage rate for the fabrication of exterior or interior wall panel systems, woodwork, electrical, plumbing, heating, cooling, ventilation or exhaust duct systems, rebar cages, and mechanical insulation solely and specifically designed and engineered for installation in the construction, repair or renovation of a public or covered project. The Chapter Amendment restricts application of the law in several ways, to include:

- The term “custom fabrication” does not include components, modules, or materials that are otherwise stocked or readily available absent a specified public work project.
- Exempts certain transportation projects (highways and bridges) from the definition of custom fabrication while including work in rest areas, transit stations, and depots.
- Clarifies the new custom fabrication requirements will not affect current exemptions for certain affordable housing projects.

Opioid Antagonist in First Aid Kits - This law was signed by the Governor on December 12th and requires private employers to include an opioid antagonist (such as NARCAN) where first aid kits are required by OSHA. OSHA requires that if an infirmary, clinic, or hospital is not reasonably accessible to the workplace, adequate first aid supplies must be readily available at the place of work or jobsite. The Chapter Amendment clarifies that opioid antagonists must be kept in the workplace, but not in EVERY individual first aid kit, and requires the NYS DOL to issue rules addressing workplace training and quantities of the antagonists that must be maintained.

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