



Vol. 41, No. 11

(518) 869-9800

May 2024

### NESCA Officer Elections to be held at May 9<sup>th</sup> Membership Meeting

In accordance with NESCA's Bylaws, the May 9, 2024 membership meeting will serve as the association's "Annual Meeting", at which time the election of officers to serve during the 2024-2025 fiscal year will be held. The term of all officers elected at the meeting will begin on July 1, 2024 and will end on June 30, 2025. All members of NESCA are encouraged to attend this meeting and cast your vote. NESCA's Nominating Committee has recommended the following slate of officers:

#### **PRESIDENT**

Bryan Berry – Color Code Painting, Inc.

#### **VICE PRESIDENT**

Joe Jerkowski – Armistead Mechanical, Inc.

#### **TREASURER**

Jeff Orvis – Dagostino Building Blocks, Inc.

#### **SECRETARY**

Rick Otis – Amsure

In addition to the above slate of officers, the Nominating Committee has nominated several Directors and Alternate Directors to serve on NESCA's Board of Directors for terms beginning July 1, 2024, as follows:

#### **Steel Fabricators & Erectors – (3-year terms)**

Director – Robert Gennett, Schenectady Steel Co., Inc.  
Alternate Director – Justin Gregory, Midwest Steel, Inc.

#### **Suppliers – (3-year terms)**

Director – Ernie Burkart, L&W Supply  
Alternate Director – Tim Doherty, United Rentals

#### **Plumbing & Heating Contractors – (3-year terms)**

Director – Jesse Gorman, Postler & Jaekle Corp.  
Alternate Director – Phil Cuddy, Appolo Heating, Inc.

#### **Service Providers – (2-year term)**

Alternate Director – Nate Pannucci, Teal, Becker & Chiamonte, CPAs

The election of Board members is accomplished via ballots mailed to members in each respective trade group.

### OSHA Finalizes New "Walkaround" Rule for Inspections

The Occupational Safety and Health Administration (OSHA) has issued a final rule regarding who can participate in an OSHA inspection. The regulation continues to allow both a representative of the employer and a representative of the employees to accompany the Compliance Officer during an inspection. However, the new rule clarifies that the representative authorized by employees may be an employee of the employer or a third party who is not employed by the employer.

Under the prior regulation, employees were permitted to designate a nonemployee to represent them during OSHA inspections, but third parties were limited to professionals such as safety engineers or industrial hygienists. The new rule creates very broad discretion to be exercised by the Compliance Officer. It permits a third party to accompany a Compliance Officer during an inspection if the Compliance Officer determines that good cause has been shown that the third-party representative is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace by virtue of their knowledge, skills, or experience as determined by the Compliance Officer.

The new rule goes into effect May 31, 2024, but many believe it is likely to be challenged in court.

### **NESCA Membership Meeting**

**May 9, 2024**

**Century House – 6:00 pm**

### **18<sup>th</sup> Annual Safety Awards Presentation**

6:00	Open Bar/Registration
6:30	Dinner: Prime Rib
7:15	Business Announcements
7:25	Election of Officers
7:30	18 <sup>th</sup> Annual Safety Awards Presentation

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



## PRESIDENT'S MESSAGE

NESCA had a busy April which of course centered around one of our marquee events “Meet the Estimators/Purchasing Team” at the Century House in Latham. We would like to thank the 30 general contractors that participated and hope the 500 attendees had a great evening. In these days of technology hopefully everyone got to see some faces of the individuals they e-mail and call throughout the year. Another impressive note about this event is that representatives from over 170 construction and construction-related companies were in attendance.

On April 17<sup>th</sup> NESCA held a regional membership meeting at Coppola’s Italian & American Bistro in Hyde Park and we had great attendance. More than 40 of our Mid-Hudson members came to the meeting to hear Mike Misenhimer present a legislative/regulatory update. On May 16<sup>th</sup> we’ll be holding a similar membership meeting for our members in the Binghamton region at McGirk’s Irish Pub.

NESCA’s May 9<sup>th</sup> membership meeting will not only include the

presentation of our 18<sup>th</sup> Annual Safety Awards to deserving members, it will also serve as NESCA’s “Annual Meeting” at which time officers will be elected to serve during our July 1, 2024 – June 30, 2025 fiscal year. Come celebrate 98 members receiving Gold, Silver or Bronze awards.

NESCA Membership Directory update forms were sent to all members in April. Please review your current listing in the Directory and provide the NESCA office with any updates or changes. NESCA’s Directory is not only sent to all members, but also to general contractors, design professionals and public contracting agencies. As such, all members are encouraged to place an advertisement in the Directory.

April and May represent a busy stretch of meetings, educational programs, and events for NESCA.

NESCA’s series of six professional development seminars targeting NESCA, AGC and ECA young professionals began with the first seminar on “Fundamentals of Insurance” which was held on April 2<sup>nd</sup>. The second seminar in this series on “Fundamentals of Employment/HR” was held on April 16<sup>th</sup>. This will be followed by four more seminars to be held every two weeks covering accounting, bonding, banking and construction law. I am very pleased to report that all six of these seminars have effectively sold out with more than 50 attendees at each of them.

On May 14<sup>th</sup> NESCA will hold its annual “Sales Tax” seminar at the Building Industry Center. This seminar sells out every year, so if you want to attend, please register early.

And finally, I’d like members to mark your calendars for several upcoming NESCA events. On July 25<sup>th</sup> NESCA will be holding our annual “Day at the Races” in Saratoga, and then on September 9<sup>th</sup> we’ll be holding our annual Golf Outing at Shaker Ridge Country Club.

*Robert L. Kind, President*

## NESCA NEWSLETTER

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JEFF ORVIS, Secretary

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## COUNSEL'S MESSAGE

On occasion our members, both material suppliers and subcontractors, are presented with business opportunities which, due to the time, money and development of a product, procedure or unique service, the involved parties seek to contractually protect themselves by restricting contractual parties' ability to work with other companies who desire the materials or unique services the contracting parties possess. These contractual clauses are designated Restrictive Covenant Clauses.

Restrictive Covenant Business Contract Clauses are lawful. However, like restrictive covenant clauses within individual employment contracts, their language is strictly scrutinized by, and narrowly construed, by courts.

In late March 2024, a New York Appellate Court issued a decision in a case entitled *Twitchell Technical Products, LLC -v- Mechoshade Systems, LLC* which analyzed the factors to be considered when evaluating whether a restrictive

covenant in an ordinary commercial contract is enforceable.

The court articulated the standards of evaluating restrictive covenants as being conducted under a rule of reason, considering (1) Does the covenant protect a legitimate business interest; (2) the reasonableness of the geographic scope and time duration; and (3) the degree of hardship placed upon the party against whom the covenant is to be enforced. This analysis is like that utilized when courts analyze restrictive covenants in employment contracts.

The court noted the case required them to consider whether, as they do in employment agreements, they possessed the power to sever elements of the covenant and grant partial enforcement of overly broad restrictive covenants in ordinary commercial contracts. They concluded they possessed such power.

It was also stated that in ordinary commercial contracts courts should give more deference to the parties' freedom to contract and that the application of the rule of reason factors identified above depends entirely on the totality of the circumstances.

Prior to returning the case to the lower court for more information regarding the dispute, the Appellate Court did note that language subjecting "slightly modified fabrics which are substantially similar to the exclusive fabrics" to the restrictive covenant may render the restrictive covenant to be overly broad and unenforceable.

Finally, the court determined the unlimited geographic scope combined with the lack of any time restriction to the restrictive covenants rendered them overly broad on their face. It also noted that while it possessed the power to sever various provisions it would be impermissible to rewrite the agreements.

The message in this decision is to understand the time duration and geographic restriction as well as the current and future hardships to be imposed when considering whether to participate in a contract which restricts your ability to conduct business now or into the future.

*Walter G. Breakell, NESCA Legal Counsel*

## Question of the Month

**Q.** On occasion, my company has been given a subcontract to sign that requires us to indemnify the general contractor for OSHA penalties they may receive in connection to work we have performed. Is this something I should try to negotiate out of the subcontract?

**A.** Yes. OSHA frequently cites both the employing contractor (the subcontractor) and the controlling contractor (the general contractor) for jobsite safety violations related to the subcontractor's work. It is dangerous to indemnify the general contractor for OSHA citations it receives in connection with your work because those citations may represent repeat violations subject to much higher penalties. It also provides a disincentive to the general contractor to control overall safety on the jobsite. The bottom line is, OSHA violations are matters that should be addressed with OSHA by the party cited.

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## Welcome New Members

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[jdunn@jdunnngroup.com](mailto:jdunn@jdunnngroup.com)  
Contact: Jeffrey Dunn

**JC Structures, Inc.**  
600 Consaulus Avenue  
Schenectady, NY 12306  
518-357-4211  
[jcstruc@gmail.com](mailto:jcstruc@gmail.com)  
Contact: Joe Cileinto

**Pedro's Constr. & Drywall, Inc.**  
819 Little Britain Road, Suite 250  
New Windsor, NY 12553  
845-580-2050  
[info@pedroconst.com](mailto:info@pedroconst.com)  
Contact: Pedro Hinostroza

## NESCA Membership Milestone Anniversaries

**MBA Metal Framing – 5 Years**  
**A-Verdi, LLC – 10 Years**  
**HMA Paving & Contracting – 10 Years**  
**New Millennium Building Systems – 15 Years**  
**Rommel Fence – 20 Years**  
**P & D Electric of Hudson Valley, Inc. – 25 Years**  
**CNA Surety – 30 Years**  
**Abele Tractor & Equipment Co., Inc. – 35 Years**  
**T&J Electrical Associates, LLC – 40 Years**  
**MMB & Co., LLP – 45 Years**  
**Noble Gas Solutions – 45 Years**

## Payment Security Bill Poised to Pass in Senate

Legislation that will provide contractors, subcontractors and suppliers with a degree of payment protection on certain “hybrid” construction projects built in New York State has been reported out of the Senate Judiciary Committee and is poised to soon pass in the Senate. The bill, sponsored by Senator Neil Breslin, would address a “gap” in payment protection on hybrid projects, that is, projects built by private developers with private funds but on public land. Contractors, subcontractors and suppliers do not have lien rights on such projects. To correct this problem, NESCA’s state affiliate, the Empire State Subcontractors Association (ESSA) drafted legislation that will require either a payment bond or an irrevocable letter of credit to 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.

Legislation was previously enacted in 2004 to require that developers post a bond or “other form of undertaking” as payment security on hybrid projects. Unfortunately, in 2018 the NYS Court of Appeals affirmed an Appellate Division 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 ESSA’s 2004 amendment to the Lien Law meaningless because a “completion guarantee” provided to the public entity provides no payment security whatsoever to the contractors and subcontractors performing work on the project. It is ESSA’s position that any alternative undertaking must provide substantially equivalent payment protection to that provided by a bond.

The new legislation will counter the Court of Appeals decision by limiting the form of payment security to either a bond or an irrevocable letter to credit thereby providing contractors, subcontractors, and suppliers with true payment security on hybrid projects.

ESSA will now focus on moving this bill in the NYS Assembly.

## Calendar of Events

**May 9, 2024**

*Board of Directors Meeting*  
Century House, Latham, 5 pm

**May 9, 2024**

*NESCA Membership Meeting*  
Century House, Latham, 6 pm

**May 14, 2024**

*Fundamentals of Bonding Seminar*  
Building Industry Center, 8 am

**May 14, 2024**

*Sales Tax Seminar*  
Building Industry Center, 5 pm

**May 16, 2024**

*Binghamton Membership Meeting*  
McGirk’s, Binghamton, 6 pm

**May 28, 2024**

*Fundamentals of Banking Seminar*  
Building Industry Center, 8 am



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