



Vol. 42, No. 11

(518) 869-9800

May 2025

## NESCA Officer Elections to be held at May 8<sup>th</sup> Membership Meeting

In accordance with NESCA's Bylaws, the May 8, 2025 membership meeting will serve as the association's "Annual Meeting", at which time the election of officers to serve during the 2025-2026 fiscal year will be held. The term of all officers elected at the meeting will begin on July 1, 2025 and will end on June 30, 2026. 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**

Joe Jerkowski – Armistead Mechanical, Inc.

### **VICE PRESIDENT**

Jeff Orvis – Dagostino Building Blocks, Inc.

### **TREASURER**

Rick Otis – Amsure

### **SECRETARY**

Mike Lock – PCC Contracting, Inc.

## Stricter Enforcement of NYS Public School Construction Project Insurance Requirements

We bring to your attention the increasing enforcement of the NYSIR Insurance Requirements that are part of public school construction contracts.

Many of you may remember that it was just about a year ago that we sent out an Alert to the construction community to be on the lookout for not only the new insurance requirements that were being made part of the public school contracts but also the strict scrutiny that prime contractors, their subcontractors, and their insurances were receiving.

Over the past year we have worked with dozens of school districts and the New York Schools Insurance Reciprocal (NYSIR) on behalf of our clients and some non-clients to bring everyone to a common ground. While there is nothing exceptional of the coverage and limits that is being required of

the prime contractors, the challenge continues to be the vigilance in which the districts are enforcing the guidelines coverages and limits. If you ask NYSIR nothing has changed. There is no negotiating of the terms, yet the districts' approaches have ranged from strict to lenient with the average falling somewhere in between.

Now for today's concern. In recent days some districts have started enforcing the requirements, among other things, that the subcontractors must carry the same limits as the prime contractor. For example, if the prime contractor has a contract with work over 10 feet and a contract value of more than \$1,000,000, the prime and **EACH** subcontractor, regardless of size or scope must carry:

- An Umbrella policy with a \$10,000,000 limit.
- Owners Contractors Protective Liability policy (OCP) of \$2,000,000 Occurrence and \$4,000,000 Aggregate in the name of the district.

In speaking with some districts:

- They have been advised by NYSIR that should they have an accident on their construction project and proper insurance was not required, that the district's own insurance coverage could be at risk of non-renewal.
- If a subcontractor does not carry the \$10,000,000 umbrella and OCP, the prime would be found in default of the contract until rectified.

While primes have adjusted their coverage to meet these requirements, in most cases the subcontractors have not. The gamble is do you move forward without requiring the subs to carry the required coverages/limits and chance being defaulted or having to eat the added premiums for the subs.

Recommendations to avoid costly issues:

- Pre-bid awareness – Ensure the subs are aware of the requirements and they have accounted for them in their bid.
- Request for Information – Submit an RFI to the district during the bid Q&A period to clarify how they will be enforcing these requirements.

If anything, these recommendations will get the majority of the bidders and their subs on the same page.

Good luck and let us know if we can be of any assistance.

**Kevin A. Viana**

**Sr. Vice President, Construction Practice Group Leader**  
**Marshall + Sterling**



## PRESIDENT'S MESSAGE

Last week NESCA held our annual "Meet the Estimators" event. There was a huge turn out and as always it was a success with great participation from our general contractors and attendance by our NESCA members. While going through the room, I felt the night was buzzing maybe a little more than in prior years. I met a lot of potential members and saw our members sharing with those recruits why NESCA is important to us and how it too would benefit them.

I can't tell you enough why new memberships and partnerships are the key to NESCA's and our individual businesses' success. People do business with people they know. Over this last year I've shared how this organization has helped me both personally and through my own business development. I'm going to share another story this month.

The last two years I saw my business declining to the point of contemplating whether I could keep going or not. If you are like me, the sort who puts your head down and forges your way through difficult moments until you can finally see the light, then this month's newsletter

is for you. I've had the pleasure of meeting with members to share my struggles and learn that I'm not the only one who's been through bad times. They've given me much needed advice on how they navigated their way back to the black. I also learned that all businesses struggle, and I wish I had not been so prideful and opened my mouth sooner. The help is there. The advice is there. All I had to do was say something. That is the reason you pay NESCA dues and go to our membership meetings and classes each year. You're only going to get out of NESCA what you put in.

I also want to touch on another personal issue in my life in hopes that it will help you; the silent type. As I'm writing this newsletter I'm doing it from a hospital bed. Going on my 5th day here. So many of us are used to, as I said before, putting our heads down and forging our way until we see the light. We are always on the go in the attempt to maintain the success of our business. However, are you doing it at the sacrifice of your own personal health and quality of life? You have to figure out that happy medium. One of my favorite quotes is from Goethe: "Things which matter most must never be at the mercy of things which matter least."

Guess what. If you aren't addressing your quality-of-life issues and health what good is a successful business? Is it worth it to ignore? I think not. All are relevant and go hand and hand. My health affected my business. In retrospect, it had slowly been doing so for the last 3 years. Thankfully, I got a grip on my health before it became too late. I encourage each of you to put yourselves first, even above your business; or in the end, you will lose it all and it would have been all for nothing.

I'd like to mention a few of NESCA's upcoming events. On May 8<sup>th</sup> NESCA will hold our annual "Safety Awards" presentation at the Century House. This meeting will also serve as NESCA's "Annual Meeting". On May 15<sup>th</sup> NESCA will hold a Binghamton region membership meeting at McGirk's Irish Pub in Binghamton. And on May 22<sup>nd</sup> NESCA will hold its annual Sales Tax seminar at the Building Industry Center. I hope you will be able to attend these events.

**Bryan Berry, President**

## NESCA NEWSLETTER

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## COUNSEL'S MESSAGE

The membership is fully aware that not all circumstances requiring additional labor or material on a construction project results in the issuance of a change order. Some circumstances involve the lack of clarity or ambiguity in the contract specifications. Other circumstances arise from the owner, or design professional, directing a higher quality of material, or scope of work performance, than that specified in the contract documents.

Such conditions are frequently referred to as "constructive changes." These are changes or modifications to the contract documents caused by the owner but does not acknowledge them as changes.

There is a general principle of contract law that holds an ambiguity within a contractual term and condition is interpreted against the drafter of the contract. However, in the event the ambiguity is clear on its face, the contractor retains an obligation to seek clarification prior to submission of its bid. A failure to do so may result in a

court denying any relief being requested.

This apparent contradiction to the rule that ambiguities are construed against the drafter evolved to prevent contractors from identifying a clear ambiguity, then submit a low bid in reliance that it will secure additional compensation due to the contractual ambiguity. In fact, many contracts now contain language mandating that a bidder bring any alleged contractual ambiguity to the owner's attention prior to submission of bids.

Other examples of constructive changes consist of owner non-disclosure of technical information, owner dictation of performance methods & means, contradictions between what are performance specifications and detailed specifications, over meticulous inspections and demanding a higher degree of material or scope of work than that set forth in the contract documents.

In the event a contractor encounters any of the above situations it is imperative it promptly provides a written notice of its claim to the contractor (if a subcontractor) or owner (if a prime contractor). Failure to do so may result in a denial of a righteous change order.

*Walter G. Breakell, NESCA Legal Counsel*

## Question of the Month

### Q. Am I required to pay our employees on a weekly basis?

**A.** Yes, if they are "manual workers". Section 191 of the NYS Labor Law has long required that "a manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned." While "manual worker" is not well defined in the law, if an employee engages in physical labor, such as working on a construction jobsite, that employee would be considered a manual worker.

Prior to 2019, frequency of payment claims against an employer were brought by the NYS Department of Labor and if DOL found that an employer violated the frequency of pay law, it typically issued a relatively modest civil penalty and a directive to pay manual employees weekly. That all changed in 2019, when the Appellate Division, First Department, ruled that the Labor Law creates a "private right of action" for frequency of pay violations, in the case of *Vega v. CM & Associates Construction Management, LLC*. The *Vega* court ruled that employees could bring private lawsuits against employers for issuing payment on a bi-weekly schedule rather than on a weekly schedule. The Court in *Vega* treated frequency of pay violations as wage theft, with liquidated damages of up to 50% of the employee's wage going back six years. The *Vega* decision opened the floodgates for class action litigation exposing employers to substantial liability to pay liquidated damages to employees who were already paid in full, albeit not on a weekly basis. In a competing decision, the Second Department held that the law does not create a private right of action for late payment when the employee is paid in full.

Due to this split between the courts, Governor Hochul has proposed legislation contained in the pending State Budget to clarify the damages available to manual workers for late payments. That is, a manual worker is not entitled to liquidated damages for pay frequency violations (for a first or second violation) "where the employer paid the employee wages on a regular payday, no less frequently than semi-monthly". However, that would change on a third or subsequent violation by an employer, and liquidated damages would then apply.

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Contact: Donnie Hilliker

### Empire Building Diagnostics

134 Lincoln Ave.  
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315-518-7677

[timd@ebdinc.com](mailto:timd@ebdinc.com)

Contact: Tim Deubel

### Keystone Safety Services Group

20 Herrick Street  
Rensselaer, NY 12144

[nathan@keystonesafety.com](mailto:nathan@keystonesafety.com)

Contact: Nathan Hughes

### Superior Drywall Business LLC

308 Mohawk Ave.  
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518-469-1011

[rob@superiordrywallny.com](mailto:rob@superiordrywallny.com)

Contact: Rob Aubrey

### Crystal Clean Dry Ice Blasting

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[nick@crystalcleandryice.com](mailto:nick@crystalcleandryice.com)

Contact: Nick Mars

### Floor and Décor

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Contact: Todd Sauter

### Standard Steel, Inc.

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[jgregory@standardsteelgroup.com](mailto:jgregory@standardsteelgroup.com)

Contact: Justin Gregory

## 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 Patricia Fahy, 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.

## NESCA Membership Milestone Anniversaries

**Annandale Construction Corp. – 15 Years**

**Louis N. Picciano & Son, Inc. – 20 Years**

**Wood Pro 2 Installers – 20 Years**

**DeBrino Caulking Associates, Inc. – 40 Years**

## Calendar of Events

**May 8, 2025** – Board of Directors Meeting, Century House, Latham, 5 pm

**May 8, 2025** – Membership Meeting, Century House, Latham, 6 pm

**May 15, 2025** – Binghamton Meeting, McGirk's, Binghamton, 6 pm

**May 22, 2025** – Sales Tax Seminar, Building Industry Center, 5 pm



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