

Wisconsin Chapter NECA
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June 2006

Summer Meeting has the Wright Stuff

As many of you know, one of the most recognized architects, Frank Lloyd Wright, called the Spring Green area home for many years. His prairie style architecture is evident in many of the area structures, including the House on the Rock Resort building, which features the prairie style, limestone facade and red roofs that were also used in Wright's home, Taliesin. Today, Taliesin is a National Historic Landmark and features tours of the residence, the grounds, and the Hillside School, all of which were designed by Frank Lloyd Wright to blend with their natural surroundings.



The Wisconsin Chapter Summer Meeting also has the Wright Stuff, with the Wright speakers for our members, the Wright fellowship with electrical contractors, and the

Wright staff to help you make your weekend seem just Wright.

The meeting starts July 27 with a welcoming cocktail reception at the House on the Rock Resort. The meetings will be held Friday and Saturday mornings, our golf outing complete with "hole in one" contest will be Friday afternoon, and the closing banquet and awards ceremony will be held Saturday evening. In addition, there is a group outing to the House on the Rock attraction on Friday afternoon. Come see why it is the number one tourist attraction in Wisconsin. Other area attractions include Tower Hill and Governor Dodge State Parks, and the American Players Theater. In short, there is something for everyone to make it the Wright weekend for you. Contact Jennifer to get registered for the meeting Wright away.

New OSHA 10 Requirement in Local #494

Effective June 1, 2006, any individual performing work covered under the Inside Agreement between the Milwaukee Chapter NECA and IBEW Local #494 **must possess OSHA 10 certification**. This includes all employees who work in Local #494's jurisdiction under portability.

Employers and employees found in violation will be subject to a \$400 per day fine, and the Union intends to strictly enforce this provision.

A letter was sent by Local #494 to all Business Managers in Wisconsin further detailing work requirements in the Local. A copy is enclosed with this newsletter.

A website developed by the National Electrical Manufacturers Association, co-sponsored by NECA, www.efficientbuildings.org, went online in December to explain the tax deductions that the Energy Policy Act of 2005 makes available to building owners that invest in making their commercial building property more energy efficient. Recently, it gained a companion website that helps electrical contractors generate new business: www.lightingtaxdeduction.org, provides comprehensive education and implementation information exclusively about lighting upgrades as covered by the commercial buildings tax deduction provision of the energy act. It's a great resource for owners, specifiers, installers, and sellers of lighting systems.



Reminder: Time is of the essence. Owners have only a limited window of opportunity for taking advantage of the new deduction. It applies only to new construction and retrofits placed in service during 2006 and 2007.

The Chapter is collecting information from contractors in locals where the expanded Portability Agreement has been implemented, to determine if the agreement is helping contractors obtain work. If your firm has gotten work by utilizing the Portability Agreement, please contact the Chapter Office and let us know. Thanks for your assistance!

The 2006 NECA Convention Will be a Boston Tea Party

The 2006 NECA National Convention and Trade Show will be held in Boston, MA at the John B. Hynes Convention Center, October 7-10. The event features educational opportunities, workshops, and peer-to-peer exchanges that over 3,000 electrical professionals rely on.

Convention registration fees are \$695 (\$290 for spouses) if registered by the Early Bird Deadline of **August 18, 2006**. In addition to the NECA Convention and Show, the IBS Conference and a special Full-Day program called the Lighting Workshop are scheduled to run concurrently. You may register to participate in these for an additional registration fee. We are in the process of obtaining CEU approval from the State of Wisconsin for attendance at some of the workshops.

Wisconsin Chapter members will be staying at the Boston Marriott Copley Place, and will jointly host a hospitality suite with the Milwaukee Chapter again this year.

Registration information has been mailed. Call Jennifer at the Chapter Office if you have questions or need assistance. Don't miss this fun and educational opportunity.



Monitor Personal Protective Equipment Usage

Personal protective equipment (PPE) for construction workers can range from hard hats to safety glasses, and these devices can protect workers from flying debris, falling objects, and noisy equipment in dangerous work zones. Construction workers should be well aware of the PPE requirements when reading their job descriptions, and each worker should be trained to select the best equipment, and if workers are unclear about what equipment to choose, they should consult manufacturers' recommendations and the practices accepted by the industry and associations.

Companies need to monitor their work environments to ensure workers are following proper PPE protocols and if protocols do not exist for a particular task, but it is evident that specific PPE is needed, contractors must develop and implement protocols to protect workers completing those tasks and train workers about what those PPE protocols should be. Moreover, while some situations are more dangerous than others in work zones, construction personnel should be taught to wear their PPE at all times regardless of the perceived danger level in order for firms to avoid liability.

Other things for contractors to consider is to personalize hard hats and other equipment with company logos or safety messages, but stickers are often frowned upon because they can peel, crack, or fade; firms should also ensure that hats maintain their integrity and are inspected regularly to ensure they are in operational order.

OSHA also notes that eye protection and hearing protection should also be monitored for signs of stress and integrity degradation.





From the Desk of Attorney Kay

Occasionally, electrical contractors, as well as manufacturers of materials and equipment that they purchase, encounter unanticipated problems which frustrate performance to such a point that the contractors or manufacturers wish to claim *impossibility of performance*. Recently, the NECA office telephoned me to discuss a Wisconsin contractor who found it impossible to purchase copper at a reasonable price to fulfill an obligation on a project. For the last few months, certain commodities used frequently in construction have increased markedly in price. Therefore, it may be helpful to review what constitutes an adequate defense to contract performance where performance is made impractical or impossible.

It must be recognized at the outset that mere difficulty of performance is not the subject of this article. Normally, a party to a contract is required to perform regardless of the difficulties encountered in performance. Further, subjective difficulties in performance are not usually sufficient to constitute a contract defense. Contracting parties vary in their ability to perform, and the defense of impossibility of performance requires a finding of objective impossibility or severe impracticability rather than subjective impossibility or impracticability.

The terms of a contract may also place upon one of the parties the risk of difficulties in performance or relief from such difficulties. For example, normally a contractor has the risk of difficulties arising in the performance of construction services because of rapidly increasing costs of materials or because of adverse weather conditions. However, unless the contract terms provide that a contractor who is faced with rapidly increasing material costs or who is delayed because of adverse weather may seek additional compensation or extension of time to complete, the contractor will not be relieved of the risk associated with these difficulties. When a contractor is in the bid stage, the contractor in getting prices from suppliers must anticipate the possibility of rapidly rising prices and therefore lock in the price. In the performance stage, a contractor may anticipate delays due to adverse weather and must therefore have negotiated contract terms which permit it to receive an extension of time to complete. In both instances, the contractor must exercise forethought in planning because the defense of impossibility of performance may not be available.

In manufacturing, the essential raw materials for the manufacturing of a product may become unavailable. Although the manufacturer usually assumes the risk of difficulty in obtaining raw materials necessary for the manufacturing of a product, the written contract may relieve the manufacturer entirely or temporarily from performance where the raw materials are unavailable. Unavailability of raw materials may also be excused only where there is an actual shortage rather than a mere subjective or financial difficulty in obtaining or taking advantage of a limited source of supply.

In real estate improvements, a contractor may find that performance of the specifications is objectively not possible. For example, if the owner's professional designer fails to adequately provide for interior space in which to install owner furnished equipment, the contractor may find it impossible to in-

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June 2006 Meetings

June 8

Janesville-Beloit Membership
Indianhead Membership

June 12

Kenosha-Racine Membership

June 14

Madison Membership (golf)
Fox Valley Membership

June 21

Northeastern Membership

June 22

Wisconsin Valley Membership

Upcoming Meetings

July 27 - 29, 2006

Summer Meeting
Spring Green, WI

October 7 - 10, 2006

NECA Convention
Boston, MA

January 26 - 27, 2007

Winter Meeting
Madison

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Consumer confidence in the economy's prospects improved in early April, even as gasoline prices and borrowing costs marched higher. Analysts believe the economy emerged from an end-of-year funk and grew at an annual rate of 4.5 percent in the first quarter of the year.



Have you got a code question for Tom? Let us know and we'll ask him to answer it in a future newsletter.

Michigan DOT Suspends Retainage

The Michigan Department of Transportation (MDOT) has eliminated its retainage requirement on construction projects.

The 1999 Disadvantaged Business Enterprise (DBE) federal regulations required prime contractors to promptly pay retainage to subcontractors after their work was satisfactorily completed.

Prime contractors argued that the requirement to pay the subcontractors in full before receiving retainage from states created a financial burden for them. As a result, the Federal Highway Administration (FHWA) revised the Code of Federal Regulations (CFR) to provide recipients of federal funds with three options to meet the provisions of Part 26.29 of 49 CFR, and address the prime contractors' concerns.



MDOT established a team to review the proposed options to identify the advantages and disadvantages of each option, and recommend which should be adopted. The team was comprised of representatives from MDOT, industry associations, prime contractors and subcontractors, as well as FHWA.

Based on the team's recommendation, MDOT adopted one of the CFR options that eliminates holding retainage from prime contractors and prohibits holding retainage from subcontractors.

The new policy became effective January 1, 2006, and MDOT announced that it would maintain the policy for one year on all projects as a pilot. At that point it will be re-evaluated to determine whether or not it should become permanent.

We'll let you know if Michigan extends this policy to the general construction industry. It's likely other states are closely monitoring how the new policy works.

**"If you can find a path with no obstacles, it probably doesn't lead anywhere."
- Frank A. Clark**

Tom's Code Corner

Question: We use occupancy sensors on hallway lighting, can we connect the emergency and egress lighting to an occupancy sensor to save energy?

Answer: Yes, Part V of Article 700 of the NEC does not prohibit occupancy sensors. The difficulty would be in complying with the IBC (International Building Code) Section 1003.2.11 requirement that "The means of egress, including the exit discharge, shall be illuminated at all times the building space served by the means of egress is occupied." With individual offices and cubicles being served by a means of egress, multiple sensors may be required to ensure the lights are on when the space served is occupied. A method or mechanism to ensure illumination during a period of normal power failure is required. Section 1003.2.10.5 of the IBC covers the power source for exit signs and requires that they be illuminated at all times without reference to the space being occupied.

From the Desk of Attorney Kay

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stall the equipment. Such circumstances are normally detected during construction and design and construction changes are authorized to solve the practical impossibility of performance. It is only when impossibility of performance is not remediable through changes in contract terms that the issue arises as to whether the party asserting impossibility of performance may be relieved of performance entirely. A contractor's failure to perform in accordance with technical specifications will seldom be excused because of an assertion that performance was impossible. However, technical specifications which do not achieve the desired level of performance relieves the contractor of liability, although the engineer may be liable to the owner.

The word *impossible* may have various meanings under contract terms and under factual circumstances, and therefore it may be difficult to anticipate the outcome of a dispute where one party is attempting to be excused from performance because of *impossibility of performance*. For example, performance specifications may be impossible to achieve. Contracts calling for performance specifications may place the risks of impossibility on both contracting parties. The owner calling for a performance standard may have erred in setting an unreachable objective. The contractor or manufacturer agreeing to meet a performance specification may find such significant difficulties in achieving the performance standard that relief from the contractual responsibility is sought. Whether it is granted subjective (a failure to achieve an achievable result) or objective (a failure to achieve an unachievable result).



The law of impossibility of performance does not necessarily require absolute impossibility, but also encompasses the concept of severe impracticability in ordinary technical or commercial activities. Performance at an extremely and unanticipated difficult and costly level may be sufficient for a court to grant relief. However, since commercial impossibility arises only under severe economic conditions, the contracting party asserting commercial impossibility has a heavy legal burden to meet before relief will be granted. The subjective difficulty of a party attempting to perform a contract is not an acceptable legal excuse for non-performance. There must be severe commercial difficulties which would affect all contractors or manufacturers performing under the same or similar circumstances. For example, if copper was not available to anyone, a contractor would have a sound legal ground for asserting impossibility of performance. However, if the copper were not available to the contractor because of a failure to timely order it, that subjective difficulty would not constitute a legally acceptable excuse for non-performance.

In the drafting of contracts, difficulties of performance should be foreseen wherever possible and an allocation of risk may be placed in the written contract document in a manner mutually agreeable to the contracting parties. Thereafter, it is reasonable to expect that unless impossibility of performance arises which objectively would affect any person attempting to perform the contract obligations, any non-performance will constitute a breach for which contract damages may be awarded. Only where there is an objective actual impossibility of performance, or an objective and severe technical impossibility of performance, or an objective and severe economic impracticability of performance, will performance be excused.

U.S. DOL Recommends Drug-Free Workplace Policies

The U.S. Department of Labor recommends that construction companies launch programs to promote a work environment free of alcohol or drug use. Programs that discourage substance abuse should clearly define which employee behaviors will not be tolerated. The programs should also address how possession and distribution of illegal drugs at the work site violates company policies. Penalties for violators should also be addressed in a company's drug-free workplace program. Efforts should also be made to educate employees about what is required of them under the program. Conducting drug tests of employees can also be an effective measure for discouraging substance abuse.