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# Greater New York Contractors' NEWS



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February 2008

## President's Message



Ron Nathan

**I**T IS  
A  
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H O N O R  
F O R M E to  
be able to  
wish you all  
a happy and  
healthy new  
year. I thank

all my friends and colleagues at ACCA for the opportunity to serve as your president, and I am sure you join me in thanking Ken Ellert for his outstanding service during the past two years as ACCA President. I look forward to his guidance to assist me in this new position.

The Board of Directors and I  
*Turn to President's Message on page 3*

## FEBRUARY MEETING

### Thursday, February 7th, 2008

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**Prospective  
New Member?  
DINNER IS ON US!  
See page 4**

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*See page 4...*

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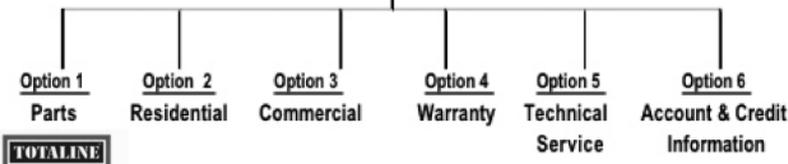


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**PRESIDENT'S MESSAGE**

*Continued from page 1*

are looking forward to exciting new programs for 2008. The January meeting focused on Going Green with USGBC. Jim Carlson arranged for an informative presentation on the Green Council and how it relates to contractors in terms of certifications and profits. Art Desin of the Workplace Group and Robert Bier of TM Bier were also on hand at the LaGuardia Marriott to discuss the United States Green Building Council, its mission, and what contractors can do to get involved in this very important movement.

Please be sure to check out the ACCA website at [www.acca.org](http://www.acca.org). There have been some great changes! You can update and renew your membership, participate in webinars, and train yourself and your staff for one low fee. Also available at [www.acca.org/biz/legaltools](http://www.acca.org/biz/legaltools) is a free series of articles on legal issues and answers to general legal questions to help you protect your business.

The Greater New York ACCA Chapter also has its own website. You can find out more about upcoming events and register for meetings. Be sure to visit [www.accany.org](http://www.accany.org) to get

the latest on our local chapter.

I welcome your ideas, comments and suggestions. You may reach me by phone at (516) 997-5656 or by email at [nathan@countyfair.com](mailto:nathan@countyfair.com). As our chapter continues to grow and strengthen, I look forward to meeting each of you personally at meetings and events. Your involvement in ACCA is essential for our future direction. Together, as contractors, we can explore changes in our industry and build better businesses and friendships. — **Ron Nathan**



Kevin Cirincione  
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*technical advice. Accordingly, the Association cannot warrant the accuracy of the information contained in this newsletter and disclaims any and all liability which may result from publication of or reliance on the information provided herein. If legal advice or other expert assistance or advice is required, the services of a competent, professional person should be sought.*

# National Grid to Present at February Meeting

Nationals Grid (formerly KeySpan Energy Delivery) will present the featured speaker at our membership meeting on Thursday, February 7th. He is Kenneth Camillieri, who will discuss energy efficiencies for HVAC equipment and the money saving programs offered by National Grid to owners and contractors. There are a number of programs, some of which contain rebates. Mr. Camillieri will explain how to align these rebates and how contractors can navigate through these many plans.

It is important for contractors to understand just what National Grid is offering the public and how we can be knowledgeable and participate in these programs.

Join with your fellow contractors at the Westbury Manor on Thursday, February 7th. Cocktails begin at 5:30 pm with dinner at 6:30 pm. The presentation follows.

*Please let us know you are coming by going to our interactive website at [www.accany.org](http://www.accany.org).* •

## SPECIAL NOTE FOR PROSPECTIVE NEW MEMBERS! DINNER IS ON US!

If you are considering joining ACCA, enjoy dinner and this valuable presentation on us. We'll even give you an ACCA cap and a golf shirt. All this and an opportunity to make new friends and contacts in our industry. Go to our website [www.accany.org](http://www.accany.org) to let us know you are coming or call 516-922-5832.

**Register Online  
for this meeting now! [www.accany.org](http://www.accany.org)**

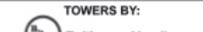
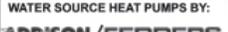
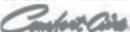
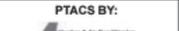
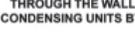
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# Editor's Notes

By Anthony N. Carbone

On January 3, 2008, our first meeting of the New Year, the ACCA Greater New York Chapter drew a record crowd of participants to our monthly program at the LaGuardia Marriott.

The topic was, as the Newsletter showed, all about "Green" (the color of our newsletter was green, also); the buzzword and reality for many industries today. Everyone today is talking about "going green."

What is "green?" Green is the pursuit of using environmentally friendly material that will produce little to no negative impact to the environment. The carbon footprint of what is left behind after producing or using

manufactured products.

The United States Green Building Council (USGBC) provided a program introducing the value and added potential revenue for contractors that are LEEDAP (Leadership in Energy & Environmental Design Accredited Professional) certified.

There is a movement in this country, and throughout the world, to be more environmentally friendly. Former Vice President, Al Gore, has produced an award winning film called "The Inconvenient Truth." The message conveyed is how we are impacting the environment and how we must act to stop the negative deteriorating direction of industrialization.

Well, this is a point of view that some agree with and others are disputing. Regardless, the current relevance and

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attention being placed by the general public is huge. All large corporations are seeking LEED certified buildings for tax abatements and for greater marketing potential to purchasers or lessors of commercial property.

We, as contractors, are being asked for more environmentally friendly products and materials. The U.S. Department of Energy is mandating changes that impact the HVAC industry.

The 1970's were a huge time for recyclable and renewable energy. It was when the oil embargo skyrocketed gasoline prices and the American public got a wake-up call from the Middle East. Odd and even license plate numbers dictated the day you could buy fuel for your car.

Today gasoline prices have skyrocketed and instead of gas lines, we are being saddled with \$100 per barrel oil prices and \$3.50 per gallon, plus, at the pump. This time it's not an embargo, it's a shortage of refined oil to gasoline and competition for the commodity from China and India. These developing countries are now experiencing an industrial revolution similar to that of which the United States had in the early 1900's through the 1960's.

The USA is now becoming more service oriented as opposed to being industrial. Will other developing nations now have this deep interest of being environmentally friendly as the initiatives are being imposed by the USA and Europe?

We will see if these changes equate to more expense to the American public or just a change in paradigm that will last for generations or last for the moment.

"Green" is here now and if you wanted a good insight to where the HVAC industry is going, you would have found it at our January meeting.

I want to thank Ken Ellert for investing his time as President to the Greater New York Chapter of ACCA for the past two years. Ken provided a positive, mature direction that has brought greater relevance to our local chapter. His collaboration with the Board of Directors, and our Executive Director, John DeLillo, has brought about positive change, new members, interesting programs, educational opportunities and, most important, industry networking.

We look forward to continuing Ken's efforts with our new President, Mr. Ron Nathan of County Fair Air Conditioning. Ron has served as treasurer and has invested many years with ACCA New York Chapter. His leadership will be needed in these changing times. We wish him great success and certainly will be supporting him throughout his term.

Please make it your business to attend our functions and monthly meetings and allow your membership to pay for itself. — *Anthony N. Carbone*



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# People & The Workplace

By Alan B. Pearl,  
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 Website: www.pmpHR.com

## Recent Changes Affecting New York Employers

Employers and employees are concerned about identify theft. Recent legislation in almost every single state has addressed this issue. Whether the federal government interceded or the legislation was drafted by selected states, the common theme is to protect valuable personal information, financial or otherwise. Concurrent with that effort, New York has, effective January 1, 2008, amended the General Business Law relating to the use of Social Security numbers. The new enactment essentially states that no person, firm, partnership or corporation shall (a) intentionally communicate to the general public or otherwise make available to the general public in any manner, an individual's social security account number; (b) print an individual's social security account number on any card or tag required for the individual to access products, ser-

vices or benefits provided by the person, firm, corporation or partnership; (c) require an individual to transmit his or her social security account number over the internet, unless the connection is secure or the social security account number is encrypted; (d) require an individual to use his or her social security account number to access an internet website unless a password or unique personal identification number or other authentication device is also required to access the internet; (e) print an individual's social security account number on any materials that are mailed to the individual unless required by state or federal law. The new enactment legitimizes the proper use of a person's social security number when maintained by a business or trade where reasonable measures to ensure that no officer or employee has access to such number for any purpose



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other than for legitimate or necessary purpose related to the conduct of such business or trade. Furthermore, safeguards must be applied by the company and steps must be taken to protect the confidentiality of the number. Generally, we advise clients to make sure that any information pertaining to social security numbers be maintained in the Human Resource office under lock and key. The law is so stringent that it recognizes that no waiver of the provisions of this section is allowable. In other words, any agreement that is directly or indirectly contrary to the above provisions is absolutely void and unenforceable.

The logical question is what happens if a violation of the new provision of the General Business Law occurs? Well, that's an interesting one. The Attorney General is authorized by statute to institute actions in the appropriate court and

seek injunctive relief and damages. For a first violation, the court can impose a civil penalty of not more than \$1,000 for a single violation, and not more than \$100,000 for multiple violations resulting from a single act or incident. A second violation brings a civil penalty of not more than \$5,000 for a single violation, and not more than \$250,000 for multiple violations. Defense to any such action would be to demonstrate to the satisfaction of the court that the violation was not intentional and resulted from a bona fide error made notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

**Best Practices**

I note a procedure you should follow: During the hiring  
*Continued on page 12*



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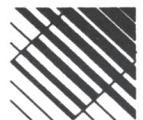
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**People & The Workplace** *Continued from page 11*

process, never note an applicant's race, sex, religion, age or national-origin information on their applications or any other pre-offer documents unless you're required to do so under affirmative-action laws. If you are required, it's best to use a "tear off" sheet that's kept separate from applicant files. Even better: Advise hiring managers to refrain from writing anything on applications or resumes.

**Washington Updates**

Finally, if you are subject to FMLA, kindly note that the President vetoed a bill that contained among other things, a provision allowing 26 weeks of unpaid leave to immediate family members (spouses, children and parents) of reservists and members of the National Guard who are providing care for family members wounded while serving in the U.S. Military. Expect the legislation to be signed by the President in February when the non-FMLA parts are deleted by the Senate.

If you have any questions or concerns regarding any of the articles, do not hesitate to contact Alan Pearl at (516) 921-3400 or [abpearl@pmphr.com](mailto:abpearl@pmphr.com).

*This issue reviews employment law issues. It is designed to provide accurate and informative information, but should not be considered legal advice.*



**February 5-7  
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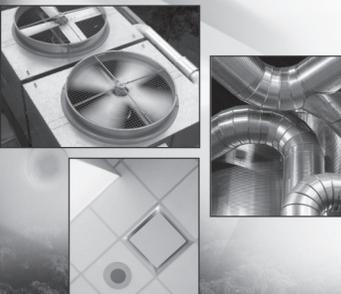

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## ***Statement From Stuart S. Zisholtz, Esq.***

### **Payment and Performance Bonds — Rights of the Surety Company**

Almost all public projects require payment and performance bonds. Many large private projects also require payment and performance bonds. I have written various articles about the time restraints associated with claims under each of the bonds. This article, however, will address the rights of the surety company in any claim brought against it.

A payment bond inures to the benefit of the subcontractors and suppliers. In the event a subcontractor and/or a supplier are not paid, they have the right to institute a claim against the surety for the balance due. The surety, in turn, will defend the claim utilizing various legal arguments but, most of all, will adopt all of the defenses of its principal.

A performance bond inures to the benefit of the owner. The principal on the bond guarantees performance of the contract with the owner. Failure to perform under the terms of the contract may result in the owner seeking to have the surety complete the project. Again, the surety's defenses are based solely on various legal arguments as well as adopting the position of the principal.

Once litigation commences, the surety usually has two options available to it. The surety may defend the claim using its own counsel or it may tender the defenses to the principal requesting that the principal pay all legal costs and retain its own counsel. However, if the surety tenders the defense but later on, determines that it may be at risk in paying any of the claims under the bond, a conflict of interest between the surety and the principal may exist. The surety will ultimately seek reimbursement through an indemnification agreement that was executed with the principal at the time the bonds were issued.

In the event a loss has been sustained by the surety, which includes payment of legal fees in defending the claim, the surety has the right to seek indemnification from its principal. It also has the right to utilize a "hammer clause" to settle, dispose or discontinue any claim.

Many of the indemnification agreements with a surety contain a hammer clause and also the right by the surety to step in on behalf of the principal to resolve, settle or discontinue a claim. What that means is that if you are a principal on a bond and are seeking to collect money from an owner or a general contractor and the surety has already sustained losses, it may take over the claim in order to recover and recoup its losses.

Recently, a claim was made by a general contractor for more than \$1,500,000 against the Village of Lynbrook. The

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Village of Lynbrook claimed that the work was deficient and maintained its own claim against the general contractor and the surety for more than \$500,000. The surety retained its own counsel and had sustained losses.

After six weeks of trial, numerous witnesses and more than 225 exhibits, an offer was made to resolve the matter. The general contractor, who was the principal on the bond, refused to accept the offer. The surety, however, believed that the offer was satisfactory and believed that there was a strong possibility that the principal would not succeed for the full amount of its claim based upon the claims asserted by the Village of Lynbrook. The surety believed it was at risk and was unwilling to take that chance without the principal posting \$500,000 in cash collateral.

As a result, the surety, using the hammer clause and the indemnification agreement, made an application to the court to enforce the hammer clause and to permit it to step into the shoes of the principal. The application was granted and the surety accepted the settlement proposal.

The lesson to be learned is that when you obtain a payment and performance bond and execute an indemnification agreement, you are not necessarily playing with your own cards. In the event there are losses sustained by the surety, it has the right to exercise the hammer clause in order to

protect itself. While you may be “the plaintiff” in an action against an owner or general contractor, the surety, in the event it believes it is at risk, may step in and put an end to the litigation.

Never let your lien time run out.

For a free copy of our pamphlet pertaining to mechanic’s liens and payment bond claims, kindly contact me or the Association.

*Stuart S. Zisholtz is a partner in the law firm of Zisholtz & Zisholtz, Mineola, New York, a general practice firm specializing in Construction Law and Mechanic’s Liens. He is also a member of the Greater New York Chapter, ACCA. He can be reached at 516-741-2200. •*

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