

The Quarterly Magazine of the Associated Builders & Contractors New Hampshire/Vermont Chapter

CONSTRUCTION RESOURCE



Volume 30, Issue 4

INSIDE:

**ABC's New Hampshire/Vermont Chapter Announces
New Registered Carpentry Apprenticeship Program**

ALSO INSIDE:

Understanding "No Damage for
Delay Clauses" in Construction Contracts
Burlington Considers Responsible
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The Vision of ABC is an environment in which people and companies succeed based on free-enterprise principles within the free-market system.

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ABC will continually strive to be the leading voice promoting free enterprise within the construction industry. ABC will promote and defend the merit shop philosophy. This philosophy encourages open competition and a free-enterprise approach to construction based solely on merit, regardless of labor affiliation.

CORE PURPOSE

The Core Purpose of ABC is to advance and defend the principles of the merit shop in the construction industry and to provide members and their employees with an opportunity to succeed.



Contents

FROM THE CHAIR

Thank You for a Successful Year5

WORKFORCE

New Registered Carpentry
Apprenticeship Program7

LEGAL & REGULATORY

Understanding “No Damage for Delay Clauses”
in Construction Contracts.....9

MEMBER NEWS 11

NEW MEMBERS 17

CELEBRATE OUR MEMBERS 19

PROFESSIONAL RESOURCES 22-24

LEGISLATIVE

Burlington Considers Responsible
Contractor Ordinance..... 28-29

BUSINESS

Denron and J. Lawrence Hall Merge
to Continue a Shared Legacy 35

ADVERTISER INDEX 42

Associated Builders and Contractors, Inc. is a national non-profit organization whose mission is to represent the construction industry as a cohesive group of professionals, to serve as their vision and voice, and to pursue quality, common goals, and solutions to industry issues. Construction Resource is published quarterly by the NH/VT Chapter of Associated Builders and Contractors. Subscription rate is \$20 per year.

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From the Chair

Thank You for a Successful Year

Our team effort has paid off in so many ways!

It is hard to believe that my year is almost over as Chair of the ABC NH/VT Chapter. I want to thank all the other Board members and staff who have made this year as successful as it has been.



Without their support and constant engagement, the Chapter would not have had the success it did this year.

Even though we still had to do battle with the COVID19 pandemic, the Chapter was able to put on several very successful in-person meetings, beginning

with the Safety Awards and Graduation barbeque where Governor Sununu agreed to come and speak to the membership. Governor Sununu has always been a strong advocate for the construction industry and he reinforced that commitment with his support of all of you and what you do at the barbeque. Additionally, we were able to host in downtown Manchester the Excellence in Construction program towards the end of this year. We had a great turnout for this event. By all accounts, the event was very well received and it was nice to be able to see everybody in person and present in person all of the awards.

The other major initiative that was started this year—and I

look forward to seeing continued under Dan Smith's leadership next year—is the ongoing effort to focus on growing our membership value and services in Vermont. This has been a multi-year project that I touched on at the start of my tenure. Even though the initiative was delayed slightly by the onset of COVID, the Chapter has now hired Brian Kent who is now on the ground in Vermont and promoting our Chapter. Hiring Brian will allow us to fulfill our strategic goal of improving the value we can provide and the impact we can provide in the State of Vermont.

Thanks again for making my year as Chair a rewarding year. I could not have done it without all of the sponsors and members of the construction industry that have worked to help make this Chapter succeed. I look forward to seeing everyone at the ABC Holiday Extravaganza coming up on December 16, 2021 at the Bedford Village Inn.

Sincerely,

Matt Johnson

2021 Chairman

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ABC's New Hampshire/Vermont Chapter Announces **New Registered Carpentry Apprenticeship Program**

ABC's New Hampshire/Vermont Chapter recently partnered with the New Hampshire Home Builders Association, ApprenticeshipNH and Manchester Community College to create a registered carpentry apprenticeship program approved by the U.S. Department of Labor. The program is desperately needed to help address the shortage of carpenters in the state.

"We are excited for our consortium model carpentry apprenticeship program because it creates pathways and opportunity for future ABC member employees," said Josh Reap, president & CEO of ABC's New Hampshire/Vermont Chapter. "Creation of this program is part of the industry's solution to the

workforce shortage, and ABC is proud to be a program sponsor. Each person who enters the apprenticeship program is on the path to earning a competitive salary, learning new skills and answering the call to help solve the construction industry's workforce shortage."

The chapter and NHHBA worked together to develop standards and a curriculum. Apprentices will receive 6,000 hours of on-the-job learning and 455 hours of classroom training at Manchester Community College over three years, all while earning pay. The curriculum will also include modules in plumbing, HVAC, electrical, masonry and estimating.

"Even though they may be getting training in carpentry,

we think it's really important for apprentices to get a full understanding of the trades," said Jennifer Landon, vice president of education and workforce development at the chapter. "It will allow them to work more collaboratively with other skilled trades professionals."

Since the program was announced, several other colleges have reached out to get something similar started on their campuses. The chapter hopes to launch the program statewide within the next few years.

*For more information
on this program,
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Understanding “No Damage for Delay Clauses” in Construction Contracts

BY KELLY J. GAGLIUSO

Unforeseen delay tops the list of risks project owners want to eliminate by contract. Typically, this is accomplished through a “no damage for delay” (NDD) clause. An NDD clause provides that all forms of delay, even if excusable, are non-compensable. The sole remedy available to the contractor for delays is a time extension. This limitation applies even under circumstances where fault for the delay lies with the owner, the architect or their consultants and separate contractors.

Although a handful of states have enacted legislation invalidating NDD clauses (primarily in public contracts), most jurisdictions have ruled that a clear and

unambiguous NDD clause is enforceable unless the contractor can show that the owner has engaged in conduct tantamount to fraud or bad faith. Most courts do, however, construe an NDD clause strictly against the party attempting to enforce it. As a result, NDD clauses lacking in clarity or conflicting with other contract provisions which allow delay compensation are likely to be disregarded.

In order to discourage abuse of the protections granted by NDD clauses, courts have tried to level the playing field by adopt-

ing a number of conduct-based exceptions to enforcement. An NDD clause will not generally be enforced where the party asserting it has engaged in 1) active or intentional interference with the progress of the work, 2) willful misconduct, 2) grossly negligent conduct or 3) conduct causing delays so unreasonable as to constitute an abandonment of

through negotiation.

For this reason, and many others, contractors and lower tiers must read the agreements presented to them carefully to identify NDD clauses that may be lurking in provisions regarding commencement, completion, compensation or schedule. Understanding the impact of NDD clauses, and the

Given the difficulties in proving fraud and willful behavior, an outrageous level of misconduct is often necessary in order to overcome a well drafted NDD clause.

the contract – sometimes called a “cardinal change.”

The Supreme Court of Maine upheld an NDD clause in a 1962 case known as *Yonkers Contracting v. Maine Turnpike Authority* but has provided no guidance on exceptions. The highest courts in New Hampshire and Vermont have not directly addressed the validity of NDD clauses, but there are lower court cases suggesting that NDD clauses in both states would be upheld. Massachusetts, Connecticut and Rhode Island have followed the majority and determined that NDD clauses are enforceable, subject to exceptions for arbitrary or bad faith conduct similar to that described above.

Given the difficulties in proving fraud and willful behavior, an outrageous level of misconduct is often necessary in order to overcome a well drafted NDD clause. As a result, it is important to consider the impact of these clauses during the bid stage and determine whether the risk is worthwhile and, if not, whether the NDD clause can be eliminated, or its impact reduced

conditions under which they are enforceable, will help you better manage contracting risks.

About the Author: Kelly J. Gagliuso, is a shareholder at Bernstein Shur in Manchester, New Hampshire. Her practice is heavily concentrated in construction for nearly 30 years, including contract negotiation, liens, arbitration and litigation. Kelly is an active member of the American Bar Association's Forum on the Construction Industry and she is a Fellow of the Construction Lawyers Society of America. Kelly served on the Board of Directors for NHGRA for several years, and as its President for two years. She also served as a Director of the New Hampshire/Vermont Chapter of Associated Builders and Contractors for more than ten years, holding the positions of Board Chair and National Director. Kelly is a long time member of the National Association of Women in Construction and she is a frequent lecturer on construction law topics in the States of New Hampshire, Maine and Vermont.

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Troy Purington

As the Project Manager of nine ABC "Excellence in Construction" award-winning projects, all complex with several over \$1M, Troy's depth of knowledge, level of communication, and dedication to project safety are unparalleled. He will be working closely with Alpine Environmental Operations leadership to hone Project Management & Safety procedures for large scale projects, assist with the incorporation of those processes, and craft the standard that will

accommodate Alpine's growth in the commercial and federal space.

■ **NORTH BRANCH CONSTRUCTION** is pleased to announce the recent addition of Bronson Raspuzzi and Jessica Raymond to the company, as well as the promotion of Thomas Hannan.

Bronson Raspuzzi joins North Branch Construction in the role of Project Manager, with over 20 years of experience working in the commercial construction industry managing a multitude of commercial, multi-family, hospitality, health-care, retail, and educational sector projects in both the public and private sectors.

Thomas Hannan was recently promoted from Project Coordinator II to Project Manager. Hannan joined the firm as a summer intern in 2020 work-



Bronson Raspuzzi

ing within all departments of the company over the course of the summer, spending three days per week in the office and two days per week in the field. North Branch Construction hired Hannan at the end of the summer into the role of Project Coordinator while he continued his studies at Southern New Hampshire University pursuing a degree in Construction Management.

Jessica Raymond, Project Coordinator, comes to North Branch Construction with extensive administrative experience, most recently working for the City of Concord, New Hampshire with the Concord Police Department, providing technical and administrative support the project



Thomas Hannan



Jessica Raymond

management team and other project team constituents.

■ Jason "Jay" Aube of **TFMORAN's** Seacoast Division has earned his Certified Wetland Scientist License for the State of New Hampshire from the Board of Natural Scientists. Mr. Aube joined TFMoran as an Environmental Permitting Specialist in October of 2020. He has over twenty years of experience including twelve years in the public sector as an employee of the New Hampshire Department of Environmental Services, where he was responsible for Shoreland Program outreach, wetlands and shoreland permitting, and compliance. Mr. Aube has a Bachelor of Science degree in Environmental Biology with a minor in



Jason Aube

NEWS, CONT. ON PAGE 13

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Michael Dahlberg

Academy in Portsmouth, NH, designed by Oak Point Associates of Biddeford, ME. The successful completion of this project in the midst of mounting supply chain problems is the direct result of our seasoned leadership team. Leadership at Meridian Construction had the foresight to plan their purchases, leverage influence and intensely manage every project aspect in spite of unprecedented delays and rising costs rippling across the construction supply chain.

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■ Right on schedule and within budget, **MERIDIAN CONSTRUCTION** completed Saint Sebastian Hall at St. Patrick's

■ New Hampshire Governor Chris Sununu spoke at the ribbon cutting and grand opening ceremonies of 145 Maplewood Avenue, a mixed-use office

building located in Portsmouth's North End held on October 7, 2021. Calling the Kane and **PROCON** project "one of the

has been involved in all aspects of the family business from the time he was a teenager working as a laborer, intern, architect.



most state-of-the-art office buildings with the coolest views..." Governor Sununu stated, "everyone benefits from" the building. The first-class four-story office building includes Class A office space as well as retail space and was designed and built by PROCON, a family-owned and operated, award-winning, true design-build firm, for the Kane Company.

"To have so many people recognize the great work done by our team of experts is gratifying," said John Stebbins, Managing Director of PROCON.

"It truly was a terrific team effort from pre-design to design to construction. We are grateful to The Kane Company for allowing us the opportunity to build this tremendous structure. My father was a big part of this effort and, I am sure, he is proudly watching. We are honored to carry on his legacy."

With the sudden passing of their father, Mark Stebbins, earlier this year, John and Jennifer stepped into leadership roles at PROCON that in many ways their father was preparing them for all their lives. John, who holds a master's degree in Architecture,

Over a decade ago, John returned to the family business full time working as a Senior Project Manager for some of PROCON's largest projects. Likewise, Jennifer began working with the PROCON accounting department in high school. After time at a global management consulting firm, Jennifer returned to focus on the financial, legal and strategic aspects of the business. Combined John and Jennifer have over three decades of experience working with PROCON's team.



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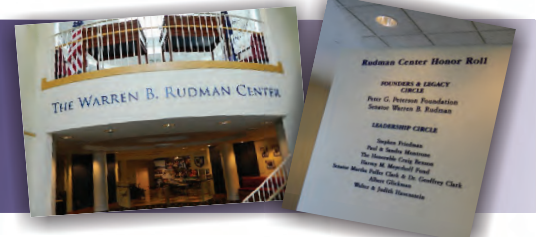
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Eckman Construction Co., Inc.
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Gorman-Thomas, Inc.
H.P. Cummings Construction
Company
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Johnson & Jordan, Inc.
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Services, LLC
Page Street Leasing, LLC
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Bernstein, Shur, Sawyer & Nelson
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ENE Systems of NH, Inc.
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Graybar Electric Co., Inc.
Hickok & Boardman Insurance Group

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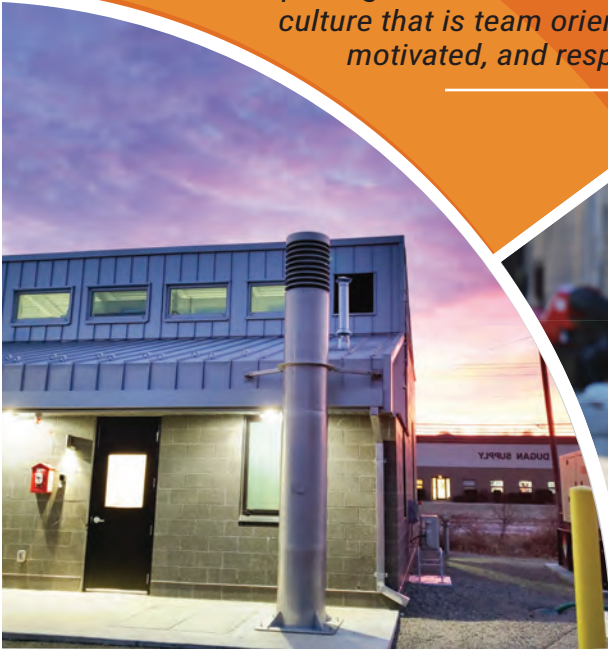


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Burlington Considers Responsible Contractor Ordinance

ABC: Proposal is anti-competitive and will lead to higher public construction costs

BURLINGTON, VERMONT - The Burlington City Council is considering legislation that would modify the bidding qualifications for contractors seeking to perform public work for the city. ABC believes that the proposed changes to law will limit the city's ability to secure bidders and cost taxpayers significantly more for construction.

A responsible contractor ordinance is a policy that sets minimum requirements for all contractors bidding on publicly funded projects in the jurisdiction. RCOs apply to the prime contractor and typically also to subcontractors, with the burden of responsibility for enforcing and ensuring that a subcontractor meets the requirements on the prime contractor.

As written, the Burlington legislation proposes prequalification criteria, bidder/contractor to subcontractor liability, damages and debarment provisions that are all substantially flawed. Specifically, the bill:

- Requires prevailing wage on all city and school district projects
- To prequalify a bidder must already be paying "wages and fringe benefits set by the current Vermont State Construction Prevailing Wage Rate Schedule"
- Applicant must certify that its workers are properly classified as employees or independent contractors
- If a violation of the law happens, at the city's discretion the following happens:
 - Work stops until compliance is obtained
 - Withholding of payment due to under any contract or subcontract until compliance is obtained
 - Permanent removal from any further work on the project
 - Liquidated damages payable to the city in the amount of 5% of the TDV of the contract
 - Civil penalty of \$50 to \$500.
- In addition to the sanctions above, the bidder/general contractor is liable for violations by its subcontractors. If you're found to have violated this law, you're barred from city projects for six months (first violation), three years (second violation) permanently (third violation).
- All violators are disclosed to the public.

MANDATING PREVAILING WAGE ON PRIVATE CONSTRUCTION. As written the legislation requires a look-back period to prove a contractor's history of paying government-set prevailing wage on past public and private construction projects. The ABC interprets this to mean a contractor must open its payroll history for inspection by city officials to prove the firm has already been paying prevailing wage/benefits on all their construction work – including private construction. In ABC's research, this would be a historic gross overreach of government mandate. Even after satisfactorily completing work for the city, a contractor will need to continue paying prevailing wage on all projects if they wish to bid a Burlington government job again.

MICROMANAGEMENT OF SUBCONTRACTOR'S PAYROLL.

The certified payroll requirements of the bill would make a general contractor responsible for the payroll of subcontractors. In effect that would introduce new inefficiencies by involving a firm with the labor and payroll practices of a subcontractor. There is no doubt the process involved would make one company responsible for thousands of pages of payroll records from multiple subcontractors, each with their own unique processes. Holding a general contractor liable for a legally separate entity's responsibility is a disproportionate punishment.

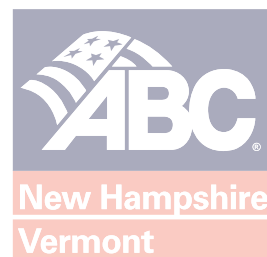
DEBARMENT TO THE NEXT LEVEL. As drafted, a violation in another municipality, city or state could translate into a de facto debarment in Burlington. In effect, this provision subjects Burlington contractors to the rules and whims of other governments, thus doing a disservice to bidders and taxpayers.

CITY LACKS ABILITY TO ENFORCE. Typically, municipalities with such requirements have dedicated departments or personnel that ensure compliance and assist contractors with the onerous regulations. Burlington does not have a centralized office for construction contracts or personnel familiar with prevailing wage. This is likely to lead to enforcement challenges, worker labor classification challenges and more.

SOLUTION LOOKING FOR A PROBLEM. When asked why Burlington needs such a law, proponents of the legislation cite passage of a similar law in Montpelier. Montpelier has yet to bid any projects where the new law would come into effect, so the effects are unknown. To our knowledge there has been no study by Burlington to determine impact of this legislation or investigations into any alleged problems justifying passage of this legislation.

From a practical perspective, this proposal will certainly deter competition from current and potential bidders. Our construction economy is robust and very competitive. Contractors are turning away lucrative projects because demand for their services are at an all-time high. This legislation will limit the ability of the city of Burlington to secure multiple bidders and perhaps in some cases any at all.

ABC has testified against this legislation and remains strongly opposed to it. We encourage contractors to voice opposition to the RCO by contacting the city council directly: <https://www.burlingtonvt.gov/ContactUs>





City Councilors and Mayor Weinberger
City Hall
149 Church Street
Burlington, VT 05401

Dear Councilors and Mayor Weinberger,

The New Hampshire/Vermont Chapter of Associated Builders and Contractors (ABC) represents hundreds of merit shop construction contractors and industry-affiliated firms that are committed to workforce development, safety training, and promoting fair and open competition. On behalf of the ABC, I write regarding the proposed amendments to Burlington's "Prequalification of Construction Contractors-Responsible Contractors" ordinance.

From a practical perspective, this proposal will certainly deter competition from current and potential bidders. Our construction economy is robust and very competitive. Contractors are turning away lucrative projects because demand for their services are at an all time high. This legislation will limit the ability of the city of Burlington to secure multiple bidders and perhaps in some cases any at all.

We are concerned that the proposed changes to law are problematic in several ways. As written, the prequalification criteria, bidder/contractor to subcontractor liability, damages and debarment provisions are all substantially flawed.

Section 21073 "Employment practices" appears to be an improperly applied requirement to pay state-set prevailing wage and benefits on all work, public and private. This is a de facto mandate that all contractors pay Vermont's government prevailing wages, specifically those paid in Burlington. As written the legislation requires a look-back period to prove a contractor's history of paying government-set prevailing wage on past public and private construction projects. Here creates a problem: a new construction company with no employment/wage history qualifies; yet an established firm that does work for the city under current law could no longer qualify because they do not the specific Burlington-area prevailing wage on their private projects. Even after satisfactorily completing work for the City, a contractor will need to continue paying prevailing wage on all projects if they wish to bid a Burlington government job again.

There are multiple other problems with this requirement, though this is the most glaring concern, all of which will certainly restrict your qualified bidder pool. The current law provides the people of Burlington with legal surety that contractors working for the city are paying wages and benefits customary for the local market. Currently the law sets fair wages by asking a contractor to show they pay "consistent with" a standard that is easy to understand.

Customarily, liquidated damages are not something enforced and may be questionable in its implementation if the city were to take action. Furthermore, it makes no practical sense to hold a general contractor equally liable for the actions of a subcontractor. Under this proposal, a long-standing responsible contractor can become debarred from the actions of a single subcontractor seems like a disproportionate punishment. In any other situation, violations are given to the immediate alleged offending party.

As drafted, we are concerned that a violation in another municipality, city or state could translate into a de facto debarment in Burlington. In effect, this provision subjects Burlington contractors to the rules and whims of other governments, thus doing a disservice to bidders and taxpayers.

From an implementation perspective, does the city have the infrastructure -human and technology resources- necessary to effectively and consistently execute the provisions outlined in the prequalification measures? Typically, municipalities with such requirements have dedicated departments or personnel that ensure compliance and assist contractors with the onerous regulations. Additionally, can it ensure effective oversight of projects to make sure all parties are adhering to the new standards as outlined in the proposal? What is the additional cost to taxpayers to ensure effective and appropriate resources are implemented to ensure the legislation reaches its intended success?

Lastly, Montpelier, which passed similar legislation in 2019 has yet to see how their version of this ordinance will impact city projects. Given the huge demand for construction services and that wages in the industry are rising rapidly, we caution the Council and ask that you consider our points and table this legislation.

Sincerely,

Joshua Reap
President & CEO
New Hampshire/Vermont Chapter,
Associated Builders & Contractors
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Denron and J. Lawrence Hall Merge to Continue a Shared Legacy

Two longtime Associated Builders and Contractors members announced the merger of their companies forming the largest commercial HVAC and plumbing company in New Hampshire. Denron Plumbing and HVAC LLC of Manchester and J. Lawrence Hall of Nashua have united. The new company, named Denron Hall Plumbing and HVAC, was introduced at the beginning of November and promises to continue the legacy of its founders.

The skill set of both companies aligned perfectly, like two pieces of a puzzle. With a strength in plumbing, Denron has provided commercial services across New England since 1974. The HVAC strong J. Lawrence Hall has provided commercial and industrial HVAC and plumbing services for over eighty years. Combining their equal forces to create a dynamic, powerful company made sense.

That was not the main consideration for a merger, however. Charlie Hall, co-owner of J. Lawrence Hall said that, "throughout the whole process the main thing for us was our employees and the legacy of the company. And the more we started talking to Denron and comparing things, the



more we determined it would be a great fit."

Joel Pickering, President of Denron, echoed this sentiment. "Both recognize that it's our people that drive the companies. For both groups as we came together, we realize that our priority is to provide support for our employees. And we do everything we can to take care of those people very, very well knowing that they will in turn take care of our customers. Everything we do, how this company operates, it's

all based around that core concept. You take care of your people

can find that a little bit unsettling," said Pickering. "But this is

"Everything we do, how this company operates, it's all based around that core concept. You take care of your people and you let your people take care of the customers."

and you let your people take care of the customers."

With that philosophy at heart, Denron Hall will continue to operate both the Nashua and Manchester locations keeping the same phone numbers they have had for years. The company now consists of more than 230 employees, 128 vehicles and services over 500 buildings.

"Whenever there is a change in a business, sometimes people

a great thing for us. It's a great thing for the J. Lawrence Hall people and our customers. What this will give us is better capacity and with larger size, gives us more stability. And it's going to be a really good thing for the marketplace overall, for construction and building services and what it is that we can provide to our customers. We have more resources together."



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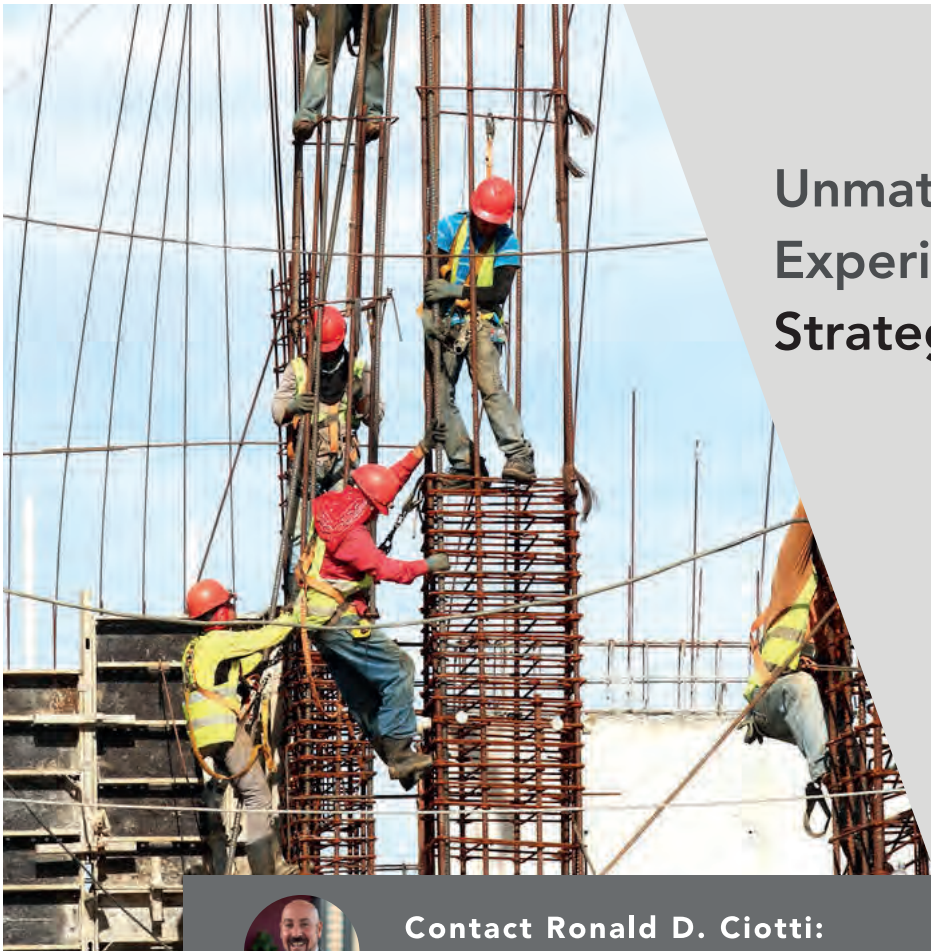
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To accommodate growth, PROCON is looking to hire employees for all aspects of their business including Project Managers, Superintendents, Estimators, Accountants, Architects and Mechanical Engineers. PROCON is known for the longevity of employee tenure. The firm's leadership team averages nearly 25 years of employment with the company and employees' average tenure is more than a decade. The company offers employees well-above industry-standard wages and immediate benefits upon hire to include medical, dental, vision and 401K. Additional perks include surprise extra paychecks, bonuses, free breakfast Fridays, lunch with leadership, strategic flexibility, wellness reimbursement, and liberal paid vacation and holiday leave. PROCON currently employs 125 people and is looking to expand its workforce by 20% in the coming months.

■ Earlier this year, **WAYNE J. GRIFFIN ELECTRIC, INC.** (Griffin Electric) completed work on UConn's Athletic District Development in Storrs, CT. Spanning 23 acres, the project involved

Griffin Electric's on-site services included the installation of new medium-voltage transformers, low-voltage switchgear, panelboards and related distribution. Griffin was also responsible for the installation of new building and remote building branch lighting and power, low voltage systems including telecom, security and access control systems. The Griffin team, along with its project partners, installed wiring for the new stadium lighting including foundations, poles, light racks, and controllers.

■ **NOBIS GROUP** is pleased to announce the promotion of Jennifer Lambert, PG to Director of Environmental Services of the firm's New Hampshire environmental group. Lambert, a Senior Hydrogeologist and Associate of the firm, offers over 17 years of experience completing complex environmental investigation and remediation projects throughout the Northeast. In the role of Director, Lambert will ensure that her environmental team is supported with the resources



Jennifer Lambert



renovations to some of the aging facilities on campus, specifically for the Division I soccer, baseball, softball, and lacrosse programs.

they need to continue delivering valued and exceptional technical solutions to Nobis Group's diverse and growing set of clients.

Advertiser Index

ABC Group Trust / USI	16	Meridian Construction .. inside front	
ABC NH/VT Premium Sponsors.....	4	Methuen Construction Co., Inc.....	21
ABC Premium Sponsors	4	Metro Walls.....	8
Alpine Environmental	40	Nathan Wechsler & Co.	32
Al Terry Plumbing & Heating	33	NHSaves	13
Cross Insurance	6	North Branch Construction, Inc. ...	10
DECCO	26	NorthPoint Construction Management, LLC	30
Denron Hall Plumbing & HVAC....	31	Oliver Mechanical	25
Devine Millimet.....	12	PacVan	11
DEW Construction	37	Page Street Leasing, LLC.....	14
EnviroVantage.....	back cover	Ponemah Contractor Supply.....	36
Fulcrum.....	34	Service Credit Union	20
Granite Financial Partners	15	Sign A Rama of Concord.....	18
Granite State Plumbing & Heating.....	41	Simpson Strong-Tie	42
Hampshire Fire Protection Co., LLC	inside back	Skilled Trades Partners.....	14
Hinckley Allen.....	39	The Rowley Agency.....	27
Life Safety Fire Protection	24	USI Insurance Services	9
Longchamps Electric.....	38	VHV Company.....	5

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