

Important Guidance on Critical Changes to the Interpretation and Application of the Pennsylvania Steel Products Procurement Act

By **Scott D. Cessar**

Owners, contractors, subcontractors, suppliers, architects and engineers working on public projects in Pennsylvania should take immediate notice of the September 22, 2021 decision by the Pennsylvania Supreme Court interpreting the Pennsylvania Steel Products Procurement Act.

Under the Act, contractors are required to certify in writing and under oath to the owner that products, such as machinery and equipment, supplied on all state or local government funded projects in Pennsylvania which include steel contain at least 75% domestic made steel as opposed to foreign sourced steel.

Engineers and architects on government funded projects are tasked with reviewing these certifications for compliance. Failure to comply by providing incorrect certifications may result in penalties to contractors of forfeiture of payments for non-compliant products and, if willful, potential debarment for upwards of five years.

Over the years, however, there have been significant differences in opinion on what costs may be included in the determination of the steel products and on the appropriate method to calculate these percentages.

In a case involving a contractor located in Central Pennsylvania which supplied blowers to a wastewater treatment plant, the Supreme Court, in what it identified to be a case of "first impression" under Pennsylvania law, adopted a protectionist interpretation of the Act and set forth a conservative method of determining whether items of material or equipment meet the 75% domestic steel test.

First, the Supreme Court held that domestic overhead, such as charges for transportation, warehousing and the like, should not be deducted from the cost of the foreign steel components of the product.

Second, the Supreme Court held that, in determining the ratio of domestic steel to foreign steel, the denominator should be the cost of the foreign steel used divided by the cost of all steel used. According to the Court, this properly places the burden on the supplier because it is in the best position to identify the origin of the steel and substantiate its costs.

The Supreme Court sent the case back to the lower court to calculate, based on its ruling, the percentages of domestic steel to foreign steel contained in the blowers at issue. The Supreme Court's opinion offered no guidance on whether its ruling has retroactive application. Certainly, all stakeholders on Pennsylvania construction projects -- particularly suppliers and manufacturers -- should take heed of this ruling in preparing future domestic steel certifications.