



EDUCATION

ALERT

PA STEEL PRODUCTS PROCUREMENT ACT MODERNIZED TO DECREASE COSTS/DELAYS

In 1978, the Steel Products Procurement Act (the Act), 73 P.S. §§ 1881 et. Seq, was enacted under the police powers of the Commonwealth of Pennsylvania as matter of public policy to promote the development of the steel industry of the United States and to stimulate and improve the economic well-being of the Commonwealth and its people.

The Act was recently amended in October 2012 by legislation (H.B. 1840) and co-sponsored by State Rep. Peter J. Daley II, D-Fayette/Washington, who said:

The Steel Products Procurement Act was, and continues to be, a good tool to safeguard and promote the production of U.S. steel. Since 1978, however, applying the act to some equipment and machinery, such as lighting fixtures, speakers, heat pumps, dehumidifiers, sound systems, water treatment systems and fire alarm systems, to name a few items, has become a burden that can increase contract costs and construction delays. In many cases, these products are no longer produced in the U.S. or are produced in very limited quantities. What this measure does is to modernize the act and remove the burden of extra paperwork and costly construction delays from contractors, which in turn saves the public money on projects.

Section 4 of the Act, 73 P.S. § 1884(a), requires every public agency to include in its contracts for construction, reconstruction, alteration, repair,

improvement or maintenance of public works a provision that, if any steel products are to be used or supplied in the performance of the contract, only steel products as defined in the Act are to be used or supplied in the performance of the contract or any subcontracts thereunder. The term “public agency” is broadly defined and includes, for example, Commonwealth agencies, counties, cities, municipalities, school districts, authorities and other public bodies.

Section 6 of the Act, 73 P.S. § 1886, defines “steel products” as (emphasis added):

products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed, or processed by a combination of two or more of such operations, *from steel made in the U.S.* by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process and shall include cast iron products and shall include machinery and equipment listed in U.S. Department of Commerce Standard Industrial Classification 25 (furniture and fixture), 35 (machinery, except electrical) and 37 (transportation equipment) and made of, fabricated from or containing steel components.

In other words, the Act requires public agencies to use products made from U.S. steel in their public works projects. Previously, the Act contained one

exception (73 P.S. § 1884(b)(1)) to the requirement to use products made from U.S. steel – when the head of the public agency, in writing, determined that steel products were not produced in the U.S. in sufficient quantities to meet the requirements of the contract.

The Act was amended on October 24, 2012, effective 60 days thereafter, creating a second exception (73 P.S. § 1884(b)(2)) to the requirement to use products made from U.S. steel – the creation by the Pennsylvania Department of General Services (the Department) of an official list of steel products that are not produced in the U.S. in sufficient quantities. The second exception states that the requirement to use steel products made from U.S. steel does not apply (emphasis added):

to items on a list of exempt machinery and equipment steel products, which have been identified by the Department of General Services as not produced in the U.S. in sufficient quantities in the previous calendar year, and published on the department's publicly accessible Internet website, which contractors, subcontractors, suppliers, bidders, offerors and public agencies can rely upon in preparing bids and contracts. The list of exempt machinery and equipment steel products shall be *updated annually* on a date selected by the Department of General Services. The Department of General Services may not make changes to the list during the year following publication. Prior to publication on the Internet website, and in each subsequent year, the Department of General Services shall publish the list of exempt machinery and equipment steel products in the *Pennsylvania Bulletin* and provide for a 30-day public comment period. The Department of General Services shall, *through a statement of policy, establish a process for creating the list* of exempt machinery and equipment steel products and resolving disputes with respect to items on the list raised during the public comment period prior to the publication of the Internet website. The provisions of 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) shall not apply to this section.

As required by the amendments, the Department issued a Statement of Policy *in the Pennsylvania Bulletin* on February 9, 2013, setting forth the processes by which the Department will establish the list each year and for resolving disputes raised during the public comment period (43 Pa. B. 877). The Department also published an initial list of the exempt steel products *in the Pennsylvania Bulletin* on February 9 (43 Pa. B. 940).

The initial list is presently in the 30-day public comment period and remains subject to change. Accordingly, it should not be relied upon by public agencies, contractors, subcontractors, suppliers, bidders, offerors and public agencies in preparing bids and contracts until it is officially published on the Department of General Services website.

During the 30-day comment period, the public may submit written comments as to the domestic availability of a steel product on the list, which comments must be supported with evidence that the disputed product is produced domestically (4 Pa. Code § 67a.1(a)&(b)). If the Department finds that the product is produced domestically in sufficient quantities, then it may be removed from the exempt list prior to its official publication on the Department's website (4 Pa. Code § 67a.1(c)). Once the list is officially published on the Department's website, it will not be changed for one year (4 Pa. Code § 67a.1(d)). The list will be updated annually utilizing the same process of publication in the *Pennsylvania Bulletin*, 30-day comment period, resolution of disputes and publication of the official list (4 Pa. Code § 67a.1(e)). The Department will update the list on or about January 31 of each calendar year (4 Pa. Code § 67a.1(f)).

Accordingly, once the official list is published, contractors, subcontractors, suppliers, bidders, offerors and public agencies can rely upon the list in preparing bids and contracts. This will ease the administrative burden on both public agencies and contractors, as they will not have to independently verify on a project-by-project basis that a steel product is not produced in the U.S. in sufficient quantities if it is a listed exempt product. The head of a public agency will not need to make a written determination that the steel products

are not produced in the U.S. in sufficient quantities to meet the requirements of the contract if the product is listed as exempt. This will also help to eliminate construction delays associated with procuring domestically produced steel products that are produced in limited quantities and have a long lead time – to the

extent these products have been identified and included on the exempt list.

If you have any questions about the information contained in this Alert, please contact Ellen M. Enters at 610.397.6505 or eesenters@foxrothschild.com or any member of Fox Rothschild's Education Law Practice.



Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement

© 2013 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.