

COMMONWEALTH OF PENNSYLVANIA

THE FARFIELD COMPANY : BEFORE THE BOARD OF CLAIMS
: VS. :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 3995

FINDINGS OF FACT

1. Plaintiff, The Farfield Company (“Farfield”), is a Delaware corporation with its principal place of business at 312 East Meadows Valley Road, Lititz, PA 17543. (Complaint and Answer ¶ 1; Exs. 1, 2)

2. Defendant, the Commonwealth of Pennsylvania, Department of General Services and Farfield entered into a contract dated November 15, 2006 (“the Contract”) for the performance of the electrical work in connection with the construction of the Pennsylvania Judicial Center, Capitol Complex, Harrisburg, PA (Contract No. DGS 948-68.44, Phase 2). (Complaint and Answer ¶ 6; Exs. 1, 2, 4)

3. Included in Farfield’s scope of work was the supply and installation of security/fire alarm system components and audio/visual equipment (collectively “the Equipment”). (Ex. 5 ¶ 2)

4. The Equipment contains components that were originally listed in the U.S. Dept. of Commerce Standard Industrial Classification (“SIC”) No. 36. The SIC 36 category is currently titled “Electronic and Other Electrical Equipment and Components, Except Computer Equipment.” (Ex. 5 ¶ 4; N.T. 103; Board Finding)

5. Heery International (“Heery”) was the construction manager for the Project. (Ex. 5 ¶ 5)

6. Farfield submitted applications for payment to Heery seeking payment for the Equipment after Farfield had supplied it and installed it on the Project. (Ex. 5 ¶ 6)

7. Heery refused to process Farfield’s payment requests for the Equipment unless Farfield first supplied steel certification forms for same. (Ex. 5 ¶ 7)

8. There are four types of steel certification forms:

(a) ST-1 is for steel that comes with “identification and origin;”

- (b) ST-2 is for products that contain some steel, the origin of which can be documented by the manufacturer;
- (c) ST-3 is for products where 75% of the cost of the product has been manufactured in the United States; and
- (d) ST-4 is for products where the origin of the material is unknown but the products are not made in sufficient quantities by domestic manufacturers to supply the needs of the Project.

(Ex. 20; N.T. 26)

9. In order to receive payment for the work it performed on the Project, Farfield was required to obtain steel certification forms from 27 different manufacturers for the audio/visual system and steel certification forms for 7 different components from 3 different systems manufacturers with respect to the security/fire alarm system. (Ex. 5 ¶ 8)

10. Despite having entered into the stipulation of fact stated above in Paragraph 9, DGS appeared to question Farfield's position that it was required to contact the manufacturers of the respective products to complete the ST-4 steel certifications demanded by DGS and instead asserted that Farfield only needed to contact and accept the representation of the supplier (i.e. vendor) from whom Farfield purchased these products in order to fill out the ST-4 steel certifications for these products. (N.T. 73-81, 134-147; Exs. 16, 17, 20)

11. Farfield did not rely on simply contacting the supplier or vendor from whom it had purchased the equipment because of the significant risks and resulting penalties associated with supplying a steel certification form that contains incorrect information. (N.T. 77-90; Ex. 20)

12. The penalties associated with supplying a steel certification form that contains incorrect information could include removal and replacement of the equipment or machinery installed at the contractor's cost as well as possible debarment from future DGS contracts. (N.T. 77-90, 204-205; Ex. 20)

13. Farfield incurred costs of \$10,823.60 in connection with identifying and contacting all 27 of the component manufacturers of the audio/visual equipment specified for the Project. (N.T. 52-53; Ex. 13)

14. Farfield incurred costs of \$867.66 in connection with identifying and contacting the 3 component manufacturers for the security and fire alarm systems specified for the Project. (N.T. 52-53; Ex. 14)

15. The costs incurred by Farfield to obtain the information necessary to complete the steel certification forms required by DGS involved time spent by Farfield's Vice President and Chief Operating Officer, Ed Nescot, and his assistant. (N.T. 56-64, 67-68, 77-90; Exs. 10, 17)

16. Mr. Nescot personally obtained this information because he believed it required both a high level of knowledge regarding the equipment and the ability to discuss the equipment

with vice presidents and senior project managers of the manufacturing companies being contacted. (N.T. 56-57, 67-68, 77-90)

17. DGS asserts that Farfield's costs for obtaining the steel certificates in this case are excessive and the extent of Farfield's efforts to obtain information for these steel certifications was unnecessary. DGS instead takes the position (and so interprets its forms) that, in completing an ST-4 form involving a specified proprietary product, the contractor may rely upon the supplier's knowledge and need not contact the manufacturer. (N.T. 73-81, 134-147)

18. On November 5, 2009, Farfield requested a change order in the amount of \$10,823.60 for the cost it incurred in obtaining steel certification forms for the audio/visual equipment. (Ex. 5 ¶ 9, 13)

19. On January 11, 2010, Farfield submitted a change order request in the amount of \$867.66 for the cost incurred in obtaining and processing the steel certification forms for the security and fire alarm systems. (Ex. 5 ¶ 9, 14)

20. Both of Farfield's change order requests were rejected by DGS. (Ex. 5 ¶ 10)

21. On March 31, 2010, Farfield requested a claims conference to consider the rejection of its change order requests. (Ex. 5 ¶ 11)

22. The claims conference was held on June 10, 2010. (Ex. 5 ¶ 12)

23. On June 21, 2010, DGS denied Farfield's claim. (Ex. 5 ¶ 13)

24. DGS requires steel certification forms for machinery and equipment containing steel that DGS believes are "steel products" as defined in the Steel Products Procurement Act ("the Steel Act"). (N.T. 26, 157-162, 180-187; Exs. 5 ¶ 8, 6, 7, 8, 9, 10, 11, 12, 20)

25. DGS interprets the decision in L.B. Foster Company v. SEPTA, 705 A.2d 164 (Pa. Cmwlth. 1997) to state that if a piece of machinery or equipment is not within SIC 25, 35, or 37 (specific categories added to the Steel Act by amendment in 1984), then one must still look back to the original definition of "steel products" in the Steel Act to determine if the item is a steel product. "Steel products" pursuant to the original definition in the Steel Act are "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 United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process...." (See DGS Post-Hearing Brief at pp. 6-7, DGS Proposed Conclusions of Law at ¶¶ 5-7; N.T. 148-152, 180-187)

26. DGS argues that the mandate to construe the Steel Act liberally requires it to read the original definition of "steel products" so broadly as to include any machinery or equipment in any SIC group (not just SIC 25, 35 or 37) if any portion of this machinery or equipment (no matter how small) is fabricated from steel. (DGS Post-Hearing Brief at p. 10; N.T. 148-152, 180-187)

27. DGS takes the position that even if a product is classified within an enumerated SIC group (i.e. SIC 25, 35 and 37) that alone does not make the product subject to the Steel Act. It must still be fabricated from, or contain, steel. (N.T. 152-154)

28. Even though DGS argues before the Board that a liberal construction of the Steel Act requires that any machinery or equipment with steel in it, no matter the size of the steel component, must be considered a “steel product” subject to certification, it does not, in fact, apply this criteria evenly across products in different SIC groups. For example, DGS flatly states that office furniture made predominately from wood (an SIC 25 product), but containing steel screws and steel brackets, is not a “steel product” but asserts that an SIC 36 product like those in the audio-visual system here at issue containing some small and undefined quantity of steel is a “steel product.” (N.T. 152-162; Finding of Fact (“F.O.F.”) 24-27; Board Finding)

29. Although DGS argues in its briefing that the original definition of “steel products” in the Steel Act includes any product, equipment or machinery that has any amount of steel in it, no matter how small, its own actions and testimony contradict this position. In fact, DGS does recognize that there is some minimum amount of steel (which it sometimes describes as “measurable”) that must be present in a piece of machinery or equipment before it can reasonably be considered a “steel product” subject to the Steel Act. (See, DGS Post-Hearing Brief at p. 10, DGS Proposed Findings of Fact at ¶¶ 11 and 22, and DGS Proposed Conclusions of Law at ¶¶ 13-15)

30. Although DGS sometimes identifies the minimum amount of steel needed to turn a piece of electronic equipment into a “steel product” as a “measurable” amount, it makes no attempt to measure it, but instead DGS determines if an SIC 36 product is a “steel product” by using what is referred to as a “magnet test,” i.e. if a magnet adheres to the item being tested it is declared by DGS to be a “steel product” as defined under the Steel Act. (N.T. 26-27, 150-152, 161-162; F.O.F. 29; Board Finding)

31. The Board was given no evidence as to the relative size, strength or uniformity of the magnets used by DGS inspectors in application of the so-called “magnet test” to SIC 36 products. (Board Finding)

32. Despite its assertions that products in classes other than SIC 36 with steel in them may also be “steel products,” it does not appear that DGS applies its “magnet test” to such items as wood furniture (a SIC 25 product) or computers since small magnets will adhere to steel brackets and screws as well as steel cabinets around electronic equipment, computers and other types of machinery and equipment. (F.O.F. 26-31; Board Finding)

33. Making its application of the Steel Act to SIC 36 products even more uncertain, DGS will not accept steel certification forms for “systems.” Rather, DGS insists that steel certification forms must be supplied for each “component” of the various electronic systems specified for a project. (N.T. 27-50, 91-94, 124-134; Exs. 5 ¶ 8, 6, 7, 8, 9, 10, 11, 12)

34. DGS does not appear to provide any discernible guidance as to the level one is to go in “breaking-down” a security/fire alarm system, an audio visual system or any other

electronic system with SIC 36 parts into its discreet components, which “components” DGS then assesses for steel content on an individual basis. (N.T. 27-50, 91-94, 124-134; Board Finding)

35. DGS takes the position that it does not have the ability to identify in its project specifications what SIC 36 components are products that it believes would require steel certifications because of the length of the list that would have to be created and the time involved. DGS instead takes the position that contractors should use their expertise to ascertain if steel certifications will be required for any SIC 36 product incorporated into a DGS project and use the RFI process during the formal bidding process if they have any questions. (N.T. 91-93, 131-132, 188-196)

36. DGS takes the same position expressed in the preceding Paragraph even where the electronic components are proprietary products specifically identified in its project specifications. (N.T. 91-93, 131-132, 188-196)

37. DGS planning for a construction project, which usually includes the creation of plans and drawings as well as detailed specifications and identification of materials and electronic systems to be incorporated into the project, typically takes 1 and 1/2 years. The typical project bid period is eight to ten weeks. (N.T. 192-194)

38. The State System of Higher Education publishes a list of certain machinery and equipment (which includes products within SIC 36) to provide pre-bid guidance on whether or not it considers these items to be “steel products” requiring a certificate. (N.T. 53-56; Ex. 15)

39. Unlike DGS, it appears that the State System of Higher Education will consider certain machinery and equipment systems as a whole, like those for fire and security, rather than breaking down the system into its component parts. (N.T. 53-56; Ex. 15; Board Finding)

40. Unlike DGS, it appears that the State System of Higher Education does not consider certain machinery and equipment systems (like those for fire and security) to be steel products. (N.T. 53-56; Ex. 15)

41. After the 1984 amendment to the Steel Act, which added specific reference to machinery and equipment in SIC 25, 35 and 37, until sometime in 1999 (following the Commonwealth Court’s decision in L.B. Foster), it appears that DGS itself took the position that machinery and equipment not listed in SIC 25, 35 or 37 was not to be considered a steel product. (N.T. 164-171; Ex. 21; Board Finding)

42. Reading the original definition of “steel products” in the Steel Act to include all machinery and equipment (in SIC 25, 35, 36, 37 or other category) containing minimal or de minimus amounts of steel produces inconsistent unreasonable, impractical and/or absurd results. (N.T. 90. 152-162; F.O.F. 28-41; Board Finding)

43. Where the cost of the steel component incorporated into a piece of machinery or equipment is less than five percent of the total cost to produce the piece of machinery or equipment, we find that the amount of steel in that product to be de minimus, and further find that this piece of machinery or equipment cannot reasonably be considered a steel product. (F.O.F. 24-42; Board Finding)

44. For a contractor supplying SIC 36 products on a DGS project there is meaningful uncertainty caused by the variables described above in Paragraphs 24 through 42 in estimating its costs and attempting to provide the best price possible during the bidding process. This uncertainty benefits neither the contractors bidding on a DGS project nor the Commonwealth. (F.O.F. 24-43; Board Finding)

45. Pursuant to a stipulation between DGS and Farfield, the Board finds that “[a]ll of the Equipment at issue contains at least some measurable portion of steel, but the exact percentage of the portion of steel is unknown, even to the manufacturer.” (Ex. 5 ¶ 21)

46. Timothy J. Gill testified on behalf of Farfield with respect to both the SIC system referred to in the Steel Act and the North American Industrial Classification System (“NAICS”). Gill is the Director of Economics of the National Electrical Manufacturers Association (“NEMA”), an industry association of manufacturers of electrical equipment based in Arlington, VA. (N.T. 98; Ex. 18)

47. Mr. Gill was admitted without objection as an expert with respect to the Standard Industrial Classification System (the SIC system), the NAICS system (its current replacement) and with regard to the nature and types of products manufactured by member companies of the National Electrical Manufacturers Association (NEMA). (N.T. 98-99)

48. Mr. Gill testified that the SIC system referred to in the Steel Act has been supplanted by NAICS. Although the SIC system still currently exists, Gill testified that it is no longer being updated and is considered to be obsolete. (N.T. 101; Ex. 18)

49. The Standard Industrial Classification System remains in existence. However, it was last updated in 1987 and has largely been supplanted by what is known as the North American Industrial Classification System, or NAICS. NAICS is currently the standard classification system that most federal statistics are compiled under and products classified within. There is, however, a concordance published to translate SIC numbered products into NAICS numbered products and vice versa. (N.T. 98-111; Exs. 18, 19; Board Finding)

50. Mr. Gill also testified that the SIC 36 category was the broad category for electronic and electrical equipment, except computer equipment, that includes the Equipment at issue in this lawsuit. (N.T. 103; Ex. 18)

51. The types of equipment listed in SIC 36 consist of electrical, transmission and distribution equipment, electrical industrial apparatus, lighting equipment, wiring and wiring devices for electrical products, communication equipment, audio/visual equipment and a variety of electronic and electrical components. (N.T. 103; Ex. 18)

52. Mr. Gill testified that the SIC system contained subcategories within each broad category. The first 2 digits of each subcategory included in SIC 36 bear the number 36 to indicate that the subcategory is part of SIC 36. (N.T. 103; Ex. 18)

53. Mr. Gill testified that the machinery and equipment listed in SIC categories 25, 35 and 37 are not similar to the electronic equipment identified in SIC 36. (N.T. 105-107; Ex. 18)

54. Mr. Gill testified on direct that equipment listed in SIC 36 generally is not a steel product as defined in the Steel Act. (N.T. 111-112; Ex. 18)

55. On cross-examination, however, Mr. Gill admitted that among the items substantially containing steel in SIC 36 are household refrigerators (3632), household laundry equipment (3633), and commercial, industrial and institutional electric lighting fixtures (3646). Accordingly, it is clear from the testimony that SIC 36 contains numerous items that are substantially made of steel. (N.T. 112-113)

56. Despite admitting that there were items substantially made of steel within SIC 36, Mr. Gill still opined that SIC 36 products are not covered by the Steel Act. (N.T. 113-114; Ex. 18)

57. Mr. Gill produced a chart at hearing (marked and admitted as Exhibit 23) entitled "Steel Cost Ratios for Selected Manufacturing Industries" which purported to show, inter alia, the average "steel cost to materials cost" and "steel, cost to total cost" ratios for various types of product groups and subgroups within SIC 35 and 36 and to relate these groupings to their more contemporary NAICS numbers and groupings. This list was created by Mr. Gill, and is not something that was compiled by the Federal Bureau of Economic Analysis, one of Mr. Gill's information sources for the chart. (N.T. 227-241; Ex. 23)

58. The Equipment at issue in this lawsuit is included in SIC subcategories 3663 (radio and television broadcasting and communications equipment) and 3669 (communications equipment, NEC) which correspond to NAICS category listings 33422 (broadcast and wireless communications equipment mfg.) and 33429 (other communications equipment mfg.), respectively. (N.T. 110-111, 231-236; Exs. 18, 19, 23)

59. Subset SIC 3663 encompasses the audio visual equipment here at issue, and Subset SIC 3669 encompasses the security/fire alarm system components here at issue. (N.T. 110-111, 231-236; Exs. 18, 19, 23)

60. Mr. Gill produced evidence that products in SIC Subset 3663 (radio and television broadcasting and communications equipment) contain, on average, three tenths of one percent (0.3%) of steel (by cost) when compared to the total cost of all materials in these products. He further testified that products in this SIC Subset 3663 contained an even smaller percentage of steel (by cost) when compared to the total cost of the item (i.e. materials plus labor). This latter percentage would be two tenths of one percent (0.2%) of the total cost of the item being attributable to the cost of the steel utilized in the product. (N.T. 231-237; Exs. 18, 23)

61. Mr. Gill also produced evidence that products in SIC Subset 3669 (communications equipment, NEC) contain, on average, one percent (1.0%) of steel (by cost) when compared to the total cost of all materials in these products. He further testified that products in this SIC Subset 3669 contain an even smaller percentage of steel (by cost) when compared to the total cost of the item (i.e. materials plus labor). This latter percentage would be

seven tenths of one percent (0.7%) of the total cost of the item being attributable to the cost of the steel utilized in the product. (N.T. 231-237; Exs. 18, 23)

62. Mr. Gill acknowledged that the purpose of the U.S. Bureau of Economic Analysis, from which he derived the numbers for his chart (Exhibit 23) is to analyze the American economy and only estimates what American manufacturing, industry, and agriculture is outputting every year that ends with a two or a seven, as a snapshot. It does not measure every year. (N.T. 241-244, 252-253; Ex. 23)

63. Mr. Gill acknowledged that the ratios that he used in Exhibit 23 were based solely on costs, not quantities of steel. Furthermore, Mr. Gill admitted that the cost of steel utilized in his numbers in the chart supposedly included domestic and imported steel but that he was unsure of the accuracy of the estimated steel costs, particularly for the steel that is imported into the United States. (N.T. 241-244; Ex. 23)

64. Mr. Gill acknowledged that the raw data utilized to arrive at the cost ratios for steel compared to total material cost in the products and for steel compared to total cost of the products in Exhibit 23 was derived only from products manufactured in the U.S. (and henceforth do not include raw data for imports of similar products sold in the U.S.). (N.T. 241-246, 251-253; Ex. 23)

65. Mr. Gill also acknowledged that the steel cost component utilized for comparison came from the steel producers not from the manufacturers of the specific product and therefore represents only the cost of the raw steel, not the cost of the molded, formed or shaped steel component as used in the product. (N.T. 239, 241-245; Ex. 23)

66. Mr. Gill acknowledged that there is an element of labor in each of the costs listed on his chart and admitted that while labor to manufacture steel in a place like China might be cheaper than in the United States, there are other costs to mine the iron ore, to smelt it, to manufacture it, to transport it to the United States and to then pay tariffs on the import of that steel into the United States. Accordingly, the costs of the steel component in a product potentially subject to the steel certification may be higher or lower depending on whether the product was manufactured in the United States or elsewhere. Mr. Gill also admitted in questioning by Judge Smith that every product manufactured in a foreign country and imported into the United States has different cost structures, including the labor costs, and that there is nothing uniform in those costs across all components. (N.T. 246-259, 257-260; Ex. 23)

67. Because the ratios in Mr. Gill's chart (Exhibit 23) are for products manufactured in the United States as opposed to products sold in the United States and (which would include imported products) and because Mr. Gill also presented conflicting views as to whether or not SIC 36 products sold in the U.S., but manufactured elsewhere, would have steel, other material and labor cost components in the same or similar ratios as their U.S. manufactured counterparts, Mr. Gill's testimony does not allow the Board to extrapolate his observations regarding the percentage of steel cost to total material cost (and/or to the total cost) for U.S. made items to include all equipment (of U.S. and foreign manufacture) sold in the U.S. within SIC 36 or in Subsets 3663 or 3669. (N.T. 241-259; Ex. 23; F.O.F. 50-66; Board Finding)

68. Because the ratios provided by Mr. Gill in his Exhibit 23 do not address all products sold in the United States (for SIC 36 or its subsets); and because the steel costs used are for raw steel not steel parts after they are shaped, formed or modified for actual use in the product; the Board finds that the evidence provided by Plaintiff is not sufficiently reliable to determine that equipment listed within SIC 36 or within SIC Subset 3663 or SIC Subset 3669 contain a steel component below the “five percent” de minimus threshold we believe prevents electronic equipment in SIC 36 from becoming “steel products” for purposes of the Steel Act. (N.T. 241-259; Ex. 23; F.O.F. 50-66; Board Finding)

69. Plaintiff has also failed to provide the Board with sufficient evidence for us to discern what portion of its extra cost of obtaining the steel certifications required by DGS was attributable to which “component.” (Exs. 5-14; Board Finding)

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction over Farfield’s claim for breach of contract asserted against the Department of General Services (“DGS”) in this action because the claim was filed in accordance with Section 1712.1 and because the claim arises from a contract with a Commonwealth agency entered into in accordance with the Commonwealth Procurement Code. 62 Pa. C.S. §§ 1712.1 and 1724; Employers Insurance of Wausau v. Dept. of Transportation, 581 Pa. 381, 865 A.2d 825 (2005); Commonwealth of Pennsylvania, Dept. of General Services v. The Board of Claims, et al., 881 A.2d 14 (Pa. Cmwlt. 2005); Hanover Insurance Company v. State Workers’ Insurance Fund, 35 A.3d 849 (Pa. Cmwlt. 2012)

2. The Board is the ultimate finder of fact and is charged with determining the credibility and persuasiveness of witness testimony, including that of expert witnesses. James Corp. v. North Allegheny School District, 938 A.2d 474, 495 n.21 (Pa. Cmwlt. 2007).

3. As the finder of fact, the Board is charged with the duty of determining the credibility of evidence and resolving conflicting testimony. It may believe all, or part, or none of the testimony of any witness. The Board’s findings need not be supported by uncontradicted evidence, so long as they are supported by substantial evidence. Department of General Services v. Pittsburgh Building Co., 920 A.2d 973, 989 (Pa. Cmwlt. 2007); A.G. Cullen Const. Co, Inc., 898 A.2d 1145, 1155 (Pa. Cmwlt. 2006); Com. v. Holtzapfel, 895 A.2d 1284, 1249 (Pa. Cmwlt. 2006); Miller v. C.P. Centers, Inc., 483 A.2d 912 (Pa. Super. 1984).

4. In asserting a claim for recovery on a breach of contract, it is the asserting party’s burden to show that the facts exist to support the requested recovery. Paliotta v. Department of Transportation, 750 A.2d 388 (Pa. Cmwlt. 1999).

5. Farfield’s contract with DGS on the Project here at issue required it to comply with all applicable statutes, including the Steel Products Procurement Act (the “Steel Act”). Ex. 4, DGS General Terms and Conditions §§ 6.18 and 12.11; DGS Administrative Procedure 12

6. The Steel Act requires that every contract entered into by public agencies “for the construction, reconstruction, alteration, repair, improvement or maintenance of public works contain a provision that, if any steel products are to be used or supplied in the performance of the contract, only steel products as herein defined shall be used or supplied in the performance of the contract or any subcontracts thereunder.” 73 P.S. §1884

7. As used in the Steel Act, a steel product is defined as:

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 United States 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 the United States 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. If a product contains both foreign and United States steel, such product shall be determined to be a United States steel product only if at least 75% of the cost of the article, materials and supplies have been mined, produced or manufactured as the case may be in the United States. Transportation equipment shall be determined to be a United States Steel Product if it complies with Section 165 of Public Law 97-424 (96 Statute 2136).

73 P.S. §1886

8. The Steel Act is intended as “remedial legislation” and is “designed to promote the general welfare and stimulate the economy of the Commonwealth and its people and each and every provision hereof is intended to receive a liberal construction as will best effectuate that purpose and no provision is intended to receive a strict or limited construction.” 73 P.S. §1887

9. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa. C.S.A. § 1921.

10. Rules of statutory construction provide that, in ascertaining legislative intent, the practical results of a particular interpretation may be considered. Additionally, it is presumed that the legislature did not intend an absurd or unreasonable result to follow its enactments. See e.g. Lehigh Valley Coop. Farmers v. Commonwealth, 447 A.2d 948, 950 (Pa. 1982).

11. The history of an enactment in question may always be considered in construing the enactment. Keating v. White, 15 A.2d 396, 399 (Pa. Super. 1940) citing In re Tarlo’s Estate, 172 A. 139, 140 (Pa. 1934).

12. The legislative history of the Steel Act indicates that the phrase “and made of, fabricated from, or containing steel components...” is a phrase that pertains only to the immediately preceding clause: “and shall include machinery and equipment listed in U.S. Dept. of Commerce Standard Industrial Classification 25 (Furniture and Fixture), 35 (Machinery Except Electrical) and 37 (Transportation Equipment)...” Farfield v. Commonwealth of Pennsylvania, Department of General Services, Board of Claims Docket No. 3754 (2006), page 6, affirmed by Commonwealth Court in an unreported Order and Decision dated January 5, 2007.

13. The original definition of “steel products” in the Steel Act reads as follows:

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 United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process....

14. Although we conclude that the phrase “and made of, fabricated from, or containing steel components...” is a phrase that pertains only to the immediately preceding clause: “and shall include machinery and equipment listed in U.S. Dept. of Commerce Standard Industrial Classification 25 (Furniture and Fixture), 35 (Machinery Except Electrical) and 37 (Transportation Equipment)...,” the original definition of “steel products” in the Steel Act, also includes products that are “fabricated” from steel. N.T. 148-154

15. We further conclude that a liberal (i.e. broad) reading of this original definition of steel product would include any machinery or equipment which was fabricated using steel components, provided that the steel component is not of a de minimus nature when compared to the overall product.

16. However, we also conclude that reading of this original definition of steel product would include any machinery or equipment which was fabricated using steel components, where the steel component is de minimus (i.e. less than five percent of the item by cost) produces impractical, unreasonable and absurd results when applied to machinery or equipment.

17. Even though the case did not deal with machinery or equipment, we agree with DGS that the Commonwealth Court’s decision in L.B. Foster Company v. SEPTA, 705 A.2d 164 (Pa. Cmwlth. 1997) mandates that, even if a piece of machinery or equipment is not within SIC 25, 35, or 37 (specific categories added by amendment in 1984), then one must still look back to the original definition of “steel products” in the Steel Act to determine if the item is a steel product. “Steel products” pursuant to the original definition of in the Steel Act are “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 United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process....”

18. Farfield was contractually required to supply steel certifications for the Equipment at issue in this lawsuit because there is some element of steel in each of the pieces comprising the Equipment and Farfield failed to provide adequate evidence that this steel component was so small or de minimus that the pieces of equipment should not reasonably be considered a “steel product” as defined by the Steel Act.

19. Damages need not be determined with mathematical certainty, but only with reasonable certainty. Evidence of reasonable damages may consist of probabilities and inferences. Sufficient facts must be introduced to allow a court to arrive at an intelligent estimate without conjecture. A.G. Cullen Construction, Inc. v. State System of Higher Education, 898 A.2d 1145, 1174 (Pa. Cmwlth. 2006).

20. To be entitled to compensation for extra work, a contractor must demonstrate that this work was performed, that it was requested by the owner and that it was not required by the terms of the contract as agreed to by the parties. A.G. Cullen Constr. Inc., 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006) citing Dep’t of Transp. v. Gramar Constr. Co., 454 A.2d 1205, 1207 (Pa. Cmwlth. 1983); Dep’t of Transp. v. Paoli Construction Co., 386 A.2d 173, 175 (Pa. Cmwlth. 1978).

21. Pennsylvania courts have required payment for extra work done at the behest of the owner even where there is no written change order that covers the work in question. Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 15 (Pa. 1968); James Corp. v. N. Allegheny Sch. Dist., 938 A.2d 474, 487 (Pa. Cmwlth. 2007); A.G. Cullen Constr. Inc., 898 A.2d at 1171.

22. A contractor must establish its damages for alleged extra work or breach of contract claim with reasonable certainty. A.G. Cullen Const. Inc., 898 A.2d at 1174; J.W.S. Delavau, Inc. v. Eastern America Transp. & Warehousing, 810 A.2d 672, 685 (Pa. Super. 2002).

23. Because we conclude that Farfield's Contract required, inter alia, that it comply with the Steel Act in supplying products to the Project; and because the L.B. Foster case requires that the original definition of "steel products" must be applied to any piece of machinery or equipment to determine if that piece of machinery or equipment is a "steel product" subject to the Steel Act; and because the evidence presented at hearing established that the Equipment at issue contained steel and was fabricated in part from steel, but failed to establish that this steel element in the equipment was de minimus (less than five percent by cost), Farfield has failed to establish that DGS breached its contract by requiring steel certifications for the Equipment or by its failure to pay Farfield for the cost incurred in obtaining the various steel certifications required by DGS for this Equipment.

OPINION

Background

This case comes to the Board as a result of a payment dispute between the Farfield Company (“Farfield”) and the Department of General Services (“DGS”) with regard to work performed and products installed by Farfield during construction of the Pennsylvania Judicial Center located at Commonwealth Avenue and North Street in Harrisburg (the “Project”) pursuant to a contract entered by the two parties dated November 15, 2006 and thereafter amended to include additional work (the “Contract”). Pursuant to this Contract, Farfield was required, *inter alia*, to supply and install security/fire alarm system components and audio visual equipment for the Project.

At or near completion of its work, Farfield was told that DGS would not pay for certain components of the security/fire alarm system and the audio visual equipment unless and until certificates showing compliance with the Pennsylvania Steel Products Procurement Act (as amended) (the “Steel Act”) were provided for these items. See 73 P.S. § 1881 *et seq.* Farfield, believing that the items at issue were not “steel products” as defined under the Steel Act because they are included in Standard Industrial Classification (“SIC”) 36, did not include the cost of providing such certificates in its bid. However, in order to be paid for these items, Farfield spent additional time and monies to acquire these steel certifications as required by DGS. It is the additional costs of acquiring these steel certifications for which Farfield has instituted the current claim, alleging DGS breached its Contract by its refusal to pay for these items until such steel certificates were provided by Farfield.

Farfield filed this claim with the Board on July 1, 2010. DGS filed its answer and new matter on August 2, 2010, and Farfield filed its reply to new matter on August 11, 2010. Various

motions were filed subsequent to the close of pleadings including motions for partial and/or full summary judgment. Multiple status conferences were also held. At the status conferences, counsel for both parties indicated a desire for the Board to issue a decision in a form that would resolve this ongoing issue as to the appropriate application of the Steel Act to various electronic components identified under SIC 36 which could then be appealed to Commonwealth Court for more definitive guidance going forward.

Prior to filing its claim with the Board, Farfield filed an administrative claim with the DGS contracting officer on or about March 31, 2010 (Ex. 5 ¶ 11). It then filed a timely claim at the Board. Accordingly, neither party has raised any objection to the Board's subject matter or personal jurisdiction over the case.

Arguments

To begin with, Farfield points to our review of the legislative history of the Steel Act and comments by the Board in an earlier case dealing with variable frequency drives (another SIC 36 item) to support its position that the General Assembly did not intend to subject products in SIC 36 to the requirements of the Steel Act. Additionally, Farfield maintains that DGS has misinterpreted the Commonwealth Court's holding in L.B. Foster Company v. SEPTA, 705 A.2d 164 (Pa. Cmwlth. 1997), the leading Pennsylvania appellate court case in this area. Specifically, Farfield asserts that:

It is at this point that, we contend, DGS's interpretation of *Foster* went off track, so to speak. The *noscitur* doctrine means that "a word or phrase is known by its associates." *Id.* at 170. In *Foster*, the "associates" are not products that contain steel; rather the "associates" are "transportation equipment" that contain "products rolled, formed, shaped, etc. from United States steel." The Court did not hold that the *noscitur* doctrine means that all products containing steel are subject to the Steel Act. What the Court held was that products associated with the equipment listed in SIC 37 (transportation equipment) that contain steel are subject to the Steel Act.

Accordingly, Farfield argues that DGS' interpretation of L.B. Foster, which subjects all products to a "two-pronged" test in order to determine whether or not they are subject to the Steel Act, is in error and should not be utilized to bring equipment listed under SIC 36 under the auspices of the Steel Act.

In contrast, DGS asserts that the Commonwealth Court's holding in L.B. Foster does require this "two-pronged" test which leads to its conclusion that several components of the security/fire alarm system and the audio visual equipment provided for the Project are "steel products" as defined by the Steel Act. Specifically, DGS asserts that even though a piece of machinery or equipment is not identified in the first part of the test for application of the Steel Act by being in one of the specifically listed SIC categories (i.e. SIC 25, 35 and/or 37), the item must, in the alternative, be assessed for application of the Steel Act under the general definition of "steel product." That is to say, even though the machinery or equipment is not in SIC 25, 35 or 37, one must still assess whether or not the product is one that is

. . . 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 United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process and shall include cast iron products. . . .

73 P.S. § 1886

Therefore, according to DGS, regardless of whether or not the Legislature intended to include electrical machinery or equipment as a "steel product" by way of the 1984 amendment to the Steel Act (which added references to the particular SIC categories), any components of the security/fire alarm system and the audio visual equipment which contain any measure of steel at all are subject to the Steel Act and require a steel certification.

Finally, Farfield argues that, even if DGS' interpretation of L.B. Foster is correct (i.e. that a product under the SIC classification 36 must still be evaluated alternatively under the general definition of "steel product"), it has provided sufficient evidence to establish, as a matter of fact, that the security/fire alarm system components and the audio visual equipment here at issue should not be considered "steel products" subject to the Steel Act. The essence of this last argument is that sophisticated pieces of electronic equipment like those in SIC 36 should not reasonably be considered "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 United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process and shall include cast iron products" merely because they have some small amount of steel in their components or housings.

In support of this last argument, Farfield notes the Board's earlier decision excluding variable frequency drives from application of the Steel Act in Farfield Company v. DGS, B.O.C. Dkt. No. 3754, Order of May 25, 2006 (affirmed in an unreported memorandum opinion by Commonwealth Court at DGS v. Farfield Company, Cmwlt. Ct., Dkt. No. 1195, C.D. 2006, Order of Jan. 5, 2007) (referred to hereinafter as "Farfield I"). In addition, Farfield provided expert testimony regarding the average amounts of steel contained in products listed in several subsets of electronic equipment listed in SIC 36, including Subsets 3663 (radio and television broadcasting and communications equipment) and 3669 (communications equipment, NEC). It is these latter two SIC subsets which encompass, respectively, the audio visual equipment and the security/fire alarm system components here at issue. Farfield also elicited compelling testimony from DGS which served to highlight the inconsistent nature of DGS's current application of the Steel Act to its public works projects.

DGS, for its part, argues that its application of the Steel Act has been consistently broad as required by the Steel Act itself, as evidenced by the hearing testimony proffered regarding its procedures. It also challenges Farfield’s computation of damages (costs) for acquiring the steel certifications here at issue, asserting that these costs were excessive and unnecessary.

DISCUSSION

The Board finds itself unable to agree completely with either side in this dispute. We agree with Farfield’s position that the legislative history of the Steel Act (particularly the drafting history of the 1984 amendment which added references to include items in SIC 25, 35 and 37) suggests that the General Assembly did not intend to include SIC 36 equipment as a “steel product.”¹ However, we also agree with DGS that L.B. Foster is the controlling case law authority on this issue and with DGS’s interpretation of the L.B. Foster holding. That is to say, we believe appellate case law precedent requires that we assess whether a piece of machinery or equipment supplied for a public works project is subject to the Steel Act not only by ascertaining if it is in one of the specifically identified SIC categories included in the act by name (i.e. SIC 25, 35 and/or 37), but must also assess, alternatively, whether the piece of machinery or equipment is a product that is

. . . 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 United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process and shall include cast iron products. . . .

¹In Farfield I, the Board reviewed the legislative history of the Steel Act in an attempt to ascertain the Legislature’s intent as an aid to interpreting the language of the statute. Our review of this history, including the multiple drafts of Amendment No. 2 made in 1984, led us to the belief that the General Assembly did not intend to include machinery or equipment in SIC 36 within the definition of “steel product.” DGS also appears to have agreed with this interpretation in 1986 and for some time thereafter. See Ex. 21 Although we still believe this to be the case, we again acknowledge, as we did in Farfield I, that it is not this view, but the appellate court guidance contained in L.B. Foster that must guide our decision.

before we can conclude that the Steel Act does not apply to the item. See L.B. Foster, 705 A.2d at 169-70.

Although we agree with DGS that L.B. Foster requires the Board to assess whether or not the Steel Act applies to a product by reference to the general definition noted above, we do not agree with DGS that this general definition of “steel product” necessarily includes all security/fire alarm systems, all audio visual components and any other SIC 36 product with even the slightest bit of steel incorporated therein, no matter how small the steel content may be. We reach this conclusion because we believe practical necessity and common sense demand it and because the evidence at hearing established that DGS itself does not adhere to this stated position consistently across all product lines.

Accordingly, the Board was willing to entertain factual evidence from Plaintiff that SIC 36 equipment, subsets thereof such as Subset 3663 and Subset 3669, and/or the specific security/fire alarm or audio visual equipment here at issue does not contain a sufficient amount of steel to be reasonably considered a “steel product” under the Steel Act’s general definition. Despite this invitation, however, Farfield failed to present adequate credible evidence to establish any of these propositions as a matter of fact. As a result, we find in favor of DGS on this claim.

Because the Board’s review of the Steel Act’s legislative history is set forth in full in our Farfield I opinion, and because this review is of no particular use unless the Commonwealth Court would choose to visit this particular issue as to the general application of the Steel Act to SIC 36 products, we will not expound further in this opinion on the Steel Act’s legislative history or our view that this history indicates that it was not the General Assembly’s intent to include SIC 36 products within the definition of “steel products.” Similarly, because we agree with DGS’s interpretation of L.B. Foster as requiring one to assess whether or not the Steel Act

applies to a product by reference to the general definition contained therein as an alternative to inclusion within one of the named SIC categories, and because we believe this interpretation was confirmed to the Board by the Commonwealth Court's unpublished opinion in Farfield I, we find no further explanation on this point is needed. Accordingly, we will instead devote the remainder of this opinion to an explanation of why we find DGS's application of the "steel product" general definition to SIC 36 products to be problematic and how we intend to address this issue in the future (absent appellate court direction to the contrary). We will also explain why we find, as a matter of fact, that Farfield has failed to establish its claim for relief in the case at hand.

To begin this portion of the discussion, we first note DGS's primary argument, i.e. that it has properly applied the Steel Act to the products here at issue because the general definition of "steel product" neither identifies nor requires any minimum or threshold amount of steel to be present in a product in order for the definition to apply. See DGS Brief in Support at pp. 9-12. In other words, DGS argues that the amount of steel in a product does not matter and that it must apply the certification requirements of the Steel Act if there is any steel at all, no matter how small, in any SIC 36 product and/or any subset thereof. This, of course, would include Subset 3663 and Subset 3669 which encompass, respectively, the audio visual equipment and the security/fire alarm system components here at issue. Id.

However, it is abundantly clear from the testimony provided by DGS that, in fact, it does not apply the Steel Act consistently in accordance with the foregoing position which it espouses here in order to justify application of the Steel Act to all SIC 36 products with even the slightest amount of steel contained therein. In fact, having argued that the amount of steel in a product does not matter in its post-hearing brief, DGS contradicts itself in its proposed Conclusions of

Law and elsewhere by introducing amorphous and subjective adjectives such as “measurable” to modify how much steel it actually requires in a product to consider it within the general definition of “steel product.” Compare DGS Brief in Support at pp. 9-12 to DGS Proposed Conclusions of Law at ¶¶ 13, 15, 19 and Ex. 5, Stipulation 21.

More significantly, when questioned as to the application of the Steel Act to a desk or other piece of wooden furniture (an SIC 27 item) which contains and is held together by steel screws and steel brackets, DGS flatly asserts that this item is not a steel product. DGS further acknowledges its use of a “magnet test” on some types of products to determine whether or not there is enough steel in the item to fall within the general definition of “steel products” and trip application of the Steel Act. Here, of course, if an SIC 36 product (no matter how small, large or electronically sophisticated it may be) has a housing with some amount of steel in it, the magnet may stick and the item be declared a “steel product” by DGS inspectors. However, if the product has an even higher quantity of steel embedded somewhere within its components but is housed in plastic, and the magnet does not stick, it is declared by DGS not to be a “steel product” and is not then subjected to the Steel Act. Curiously, there would also appear to be wide discretion as to which type of products the “magnet test” is used upon insofar as small magnets typically adhere to steel brackets of the type holding wood furniture together as well as the housings of most computer processors/servers, but we are not aware of steel certifications being requested or provided for such products acquired by or through DGS.

Leaving aside for the moment the additional question of whether one inspector’s magnet is the same strength or capacity as another’s, the inherent inconsistency in DGS’s current application of the Steel Act is evident. Also evident is how DGS’s actual application of the Steel Act differs from the argument it makes here that the amount of steel in the product does not

matter. Add to this problem the further complication of how far one is to go in “breaking down” a security/fire alarm system and/or an audio visual system into its discreet components (for which DGS appears to provide no discernible guidance), which “components” are then “magnet tested” for steel content on an individual basis, and the uncertainty facing a contractor supplying SIC 36 products during the bidding process is further exacerbated.

To be clear, we are not offering the foregoing observations to suggest that DGS should consider wooden furniture held together by steel screws to be a “steel product.” Our intent is quite the opposite. We offer these factual observations to show that, contrary to its position here that any SIC 36 product with any amount of steel therein must be considered a “steel product,” DGS itself, by its own actions and application of the Steel Act to various other products, acknowledges that there is some minimal threshold of steel content in a piece of equipment, below which the item should not and cannot reasonably be considered a “steel product” under the general definition contained in the Steel Act.

Accordingly, we believe a reasonable application of the Steel Act to SIC 36 products must, by way of practical necessity, seek to establish some consistent standard by which to determine when the steel content of a product is or is not sufficient for the product to fall within the general definition of “steel product.” It is for this reason, as well as to honor the other significant mandate of the L.B. Foster case (i.e. to minimize, to the extent possible, uncertainty in the bidding process) that we restate our intent to determine whether or not SIC 36 items at issue are or are not “steel products” under the general definition in the Steel Act by application of a “five percent” test. That is to say, if a contractor can establish, by credible evidence, that the cost of the steel component to the manufacturer of the SIC 36 product is less than 5% of the total cost to manufacture the product at issue, the Board will consider the steel content to be de

minimus and will not find the item to be a “steel product” under the general definition of the Steel Act. If the contractor cannot do so, it would be well advised to anticipate the need to fail DGS’s “magnet” test for steel content or provide steel certification for the product.

With regard to the additional area of uncertainty, i.e. how far one is to go in “breaking down” a security/fire alarm system, an audio visual system or any other electronic “system” into its discrete components in order to apply the test we have outlined above, we are unable to formulate a statement we believe adequate to address all future circumstances. Accordingly we must leave this task to the good faith of the Commonwealth agency involved. That said, we find no prohibition to taking the more practical view embodied by the State System’s list (Exhibit 15) of viewing certain sets of equipment designed to work in tandem with others as integrated “systems.” In any event, we do express our intent to limit any amount of dollars withheld by an agency for failure to comply with the Steel Act to the fair value of the non-compliant component alone rather than condoning retention of the full value of the system as a whole or other compliant components of the system.

Applying the foregoing standards to the current case, we acknowledge that Plaintiff requests the Board to find that all products within the SIC 36 category fail to contain a sufficient measure of steel to fall within the general definition of “steel product.” To this end, the Board entertained testimony from Plaintiff as to the make-up and steel content present in products identified in the SIC 36 category.

As Plaintiff’s testimony regarding SIC 36 products proceeded, however, it appeared that the variety of products contained in this classification was far broader, and the steel content of these products more varied, than even Plaintiff initially contemplated. As a result, the Board invited further testimony as to the make-up and steel content of items within more limited groups

of products contained in various SIC 36 subsets, including Subsets 3663 and 3669 which encompass the items here at issue. Testimony as to the relative steel content of the specific products or components in the security/fire alarm system and audio visual equipment installed on the Project, however, was effectively superseded by the parties' initial stipulation that "[a]ll of the equipment at issue contains at least some measurable portion of steel, but the exact percentage of the portion that is steel is unknown, even to the manufacturer." Ex. 5, Stipulation 21.

Testimony regarding SIC 36 and its various subsets was provided by Timothy Gill. Mr. Gill was admitted without objection as an expert with respect to the Standard Industrial Classification system (the SIC system), the NAICS system (its current replacement) and with regard to the nature and types of products manufactured by member companies of the National Electrical Manufacturers Association (NEMA).² Members of NEMA make security/fire alarm system components and some audio and visual equipment as well.

In addition to general information regarding the SIC and NAICS systems and their relationship, Mr. Gill provided the Board with evidence as to the average steel content (by cost) typically found in the products contained within SIC 36 and its various subsets. In particular, Mr. Gill provided the Board with this type of evidence regarding Subset SIC 3663 (which encompasses the audio visual equipment here at issue) and Subset SIC 3669 (which encompasses the security/fire alarm system components here at issue).

In particular, Mr. Gill asserted that products in SIC Subset 3663 (radio and television broadcasting and communications equipment) contain, on average, three tenths of one percent

² The Standard Industrial Classification System remains in existence. However, it was last updated in 1987 and has largely been supplanted by what is known as the North American Industry Classification System, or NAICS. NAICS is currently the standard classification system that most federal statistics are compiled under and products classified within. There is, however, a concordance published to translate SIC numbered products into NAICS numbered products and vice versa. (N.T. 97-111; Exs. 18, 19; Board Finding)

(0.3%) of steel (by cost) when compared to the total cost of materials in these products. He further indicated that products in this SIC Subset 3663 contained an even smaller percentage of steel (by cost) when compared to the total cost of the item (i.e. materials plus labor). This latter percentage would be two tenths of one percent (0.2%) of the total cost of the item being attributable to the cost of the steel utilized in the product.

Mr. Gill also presented evidence that products in SIC Subset 3669 (communications equipment, NEC) contain, on average, one percent (1.0%) of steel (by cost) when compared to the cost of other materials in these products. He further indicated that products in this SIC Subset 3669 contain an even smaller percentage of steel (by cost) when compared to the total cost of the item (i.e. materials plus labor). This latter percentage would be seven tenths of one percent (0.7%) of the total cost of the item being attributable to the cost of the steel utilized in the product.

Cross-examination and further questioning of Mr. Gill, however, revealed a number of significant problems with his steel content analysis and percentage comparisons. For instance, the raw data utilized to arrive at these cost ratios for steel compared to total material in the products and for steel compared to total cost of the products was derived only from products manufactured in the U.S. and did not include data for foreign made products of a similar nature sold in the U.S. In addition to this short-coming, it also appears that the steel cost component utilized for comparison came from the steel producers not from the manufacturers of the specific end product and represent only the cost of the raw steel, not the cost of the molded, formed or shaped steel component as used in the product.

Mr. Gill also presented conflicting views as to whether or not SIC 36 products sold in the U.S., but manufactured elsewhere, would have steel, other material and labor cost components in

the same or similar ratios as their U.S. manufactured counterpart. Therefore, Mr. Gill's testimony does not allow the Board to extrapolate his observations regarding the percentage of steel cost to total material cost (and/or the total cost) for U.S. made items to include all equipment (of U.S. and foreign manufacture) sold in the U.S. within SIC 36 or in Subsets 3663 or 3669.

In sum, the Board finds that the evidence provided by Plaintiff is not sufficiently reliable to establish that equipment listed within SIC 36 or within SIC Subset 3663 or SIC Subset 3669 or the specific Equipment here at issue contain a steel component below the "five percent" de minimus threshold we believe prevents electronic equipment in SIC 36 from being fairly considered a "steel product" for purposes of the Steel Act. Plaintiff has also failed to provide the Board with sufficient evidence for us to discern what portion of its extra cost of obtaining the steel certifications required by DGS for the Equipment was attributable to which "component." As a result of the foregoing, we can make no award to Plaintiff on its claim as presented.

ORDER

AND NOW, this 14th day of May, 2013, it is hereby **ORDERED, ADJUDGED** and **DECREED** that judgment in this matter is entered in favor of the Commonwealth of Pennsylvania, Department of General Services and against The Farfield Company. No award is made to the Farfield Company. Each party shall bear its own costs and attorneys' fees.

ORDER SIGNED

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Harry G. Gamble, P.E.
Engineer Member

Andrew Sislo
Citizen Member