

**Matter of Metropolitan Steel Indus., Inc. v  
Dormitory Auth. State of N.Y.**

2008 NY Slip Op 32915(U)

October 23, 2008

Supreme Court, New York County

Docket Number: 112051/08

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN A. RAKOWER  
J.S.C.  
Justice

PART 5

Metropolitan Steel  
Industries, Inc.  
Dormitory Authority  
Et Al.

INDEX NO. 112051108  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

| PAPERS NUMBERED |        |
|-----------------|--------|
| 1               | 234    |
| <del>23</del>   | 456789 |
|                 | 10     |
|                 | 11     |

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**  
OCT 27 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/23/08

[Signature]  
J.S.C.

**EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
In the Matter of the Application of METROPOLITAN  
STEEL INDUSTRIES, INC.,

Petitioner,

Index No.  
112051/08

For a judgement pursuant to Article 78 of the CPLR

- against -

DORMITORY AUTHORITY STATE OF NEW  
YORK and LES CONSTRUCTIONS BEA  
ATLAS, INC.,

Decision/  
Order

Mot. Seq.:  
001

Respondents

**FILED**  
OCT 27 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
HON. EILEEN A. RAKOWER, J.

“Buy American Steel” legislation had a history in the New York Legislature dating back to 1976. The legislative history behind the passage of Public Authorities Law §2603-a (“PAL §2603-a”), which was enacted in 1983, clearly shows that the intent of the statute was to protect American steel workers by requiring steel to be produced or made in whole or in substantial part in the United States.<sup>1</sup> The bill was passed amid an atmosphere of high unemployment rates in the steel industry and was introduced as a way to ensure that more jobs were not lost to foreign steel companies.<sup>2</sup> Many of the commentaries that were submitted in support of the bill made mention of the struggling Bethlehem Steel which was located near Buffalo, New York. At the time that the bill was passed there was high unemployment in the steel industry and

<sup>1</sup>See S.1368-A “Ten Day Bill,” introduced by Volker, et al, at Paragraph (3).

<sup>2</sup>From a letter written in support of the bill by Edward V. Regan, Comptroller during the commentary period.

mills like Bethlehem were in danger of shutting down.<sup>3</sup> A memorandum from Senator Volker which accompanied the introduction of the Bill into the State Senate, states, in relevant part:

The purchase of foreign made steel products, which are only slightly less expensive than the American counterparts, deprive the state, its localities, and industries of important sources of revenue. More important, it can force contraction of domestic industries and loss of jobs . . . the state also has a vital interest in stimulating the domestic economy and providing employment for its citizens . . .

The Department of Commerce, in endorsing the bill, stated:

While the department would prefer that the international trade community take meaningful steps to resolve policies which disadvantage the American steel industry, such agreements do not appear to be forthcoming. The recent federal imposition of tariffs on speciality steel is an indication that the desired resolution is not imminent. In the meantime, New York State can take this reasonable step to prefer American producers where no unreasonable expense will be incurred .

Then Governor Mario Cuomo issued a memorandum when he approved the bill:

Earlier this year, I approved a bill which made permanent similar domestic steel preference requirements for State agency construction contracts . . . On that occasion, I stated my belief that this type of preference presented a moderate and reasonable statement of the State's commitment to the promotion of the domestic steel industry . . . Enactment of this legislation will emphasize the State's efforts to assist the domestic steel industry . . .

Petitioner, Metropolitan Steel Industries, Inc. ("Steelco") brings this Article 78 Proceeding, by Order to Show Cause, seeking an order (1) vacating defendant the Dormitory Authority State of New York's ("DASNY") acceptance of defendant Les

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<sup>3</sup>Bethlehem Steel bought Lackawanna Steel in 1982 and eventually went out of business in 2003.

Constructions Beauce-Atlas, Inc.'s ("BA") bid proposal to be performed in connection with the Harlem Hospital Modernization Project ("the Project") located at Harlem Hospital 506 Lenox Avenue, New York, New York; (2) directing DASNY to accept Steelco's bid proposal; and (3) a preliminary injunction pursuant to CPLR §6301 enjoining DASNY from entering into a contract with BA, pending a final disposition of the instant action. In the alternative Steelco seeks a preliminary injunction enjoining BA from performing any work and/or services in connection with the contract entered into between DASNY and BA. Steelco previously brought an Order to Show Cause seeking a Temporary Restraining Order ("TRO") before the Honorable Justice Eileen Rakower. The parties presented arguments before Justice Rakower on September 4, 2008 and the TRO was granted pending the decision herein.

The undisputed facts are as follows: On or about April 24, 2008, DASNY advertised that it would be soliciting bid proposals with respect to the steel work for the Project. On or about June 17, 2008 BA, a Canadian company, submitted a bid in response to DASNY's advertisement in the amount of \$11,396,000. On or about June 18, 2008 Steelco submitted a bid in the amount of \$11,437,950.<sup>4</sup> In a letter dated that same day, DASNY informed Steelco that it was the "apparent second low bidder." What followed was a series of letters which consisted of Steelco's objection to DASNY's acceptance of BA's bid, and DASNY's defense of that acceptance. Ultimately, DASNY sent Steelco a letter on August 18, 2008 which confirmed that it was the granting the award of the Contract to BA. Thereafter, having exhausted all of its remedies, Steelco commenced the instant action pursuant to CPLR Article 78. When challenging an award of a public contract, it is petitioner's burden to demonstrate that there was "actual impropriety, unfair dealing or some other violation of the statutory requirements." (*Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d 51, 55 [1997]).

Steelco, in support of its petition, argues that BA's bid is non-responsive and DASNY's acceptance of BA's bid violates PAL §2603-a. Thus, Steelco argues that the acceptance of BA's bid should be vacated. Public Authorities Law §2603-a(1)(b)<sup>5</sup> states, in relevant portion:

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<sup>4</sup>Both Steelco and BA are steel fabricator and/or erector companies.

<sup>5</sup>PAL §2603-a is nearly identical to State Finance Law §146. That bill was enacted in 1981 but only applied to state agencies, not to public authorities and contained a Sunset provision.

All contracts in excess of one hundred thousand dollars for the construction, reconstruction, alteration, repair, maintenance or improvement of public works *shall* require that all structural steel, reinforcing steel or other major steel items to be incorporated in the work of the contract shall be produced or made in whole or in substantial part in the United States, its territories or possessions. [emphasis added]

Steelco argues that hiring BA, a Canadian company, would violate that portion of PAL §2603-a which calls for public works contracts to require all steel items to be produced or made *in whole* or in *substantial part* in the United States. PAL §2603-a is incorporated into DASNY's own document titled "General Conditions," which is part of DASNY's bidder information packet. General Conditions §20.09 states, in relevant part:

Domestic Steel. The Authority is required to comply with all provisions of Title 4 of Article 9 of the Public Authorities Law and in accordance therewith the Authority *may* require that structural steel, reinforcing steel or other major steel items to be incorporated into the work of Contracts in excess of \$100,000 be produced or made in whole or substantial part in the United States, its territories or possessions. [emphasis added]

Steelco argues that there are no cases which interpret PAL §2603-a, thus, Steelco argues, it is a matter of first impression which necessitates that the Court determine the legislative intent behind the statute.

DASNY, in opposition, argues that it not in violation and that BA is a responsive bidder because BA is in compliance with PAL §2603-a when it is read in conjunction with DASNY's definition of "Foreign Products" in the General Requirements section of its general contract. That section states:

Foreign Products: Distinguished from "domestic products," are considered items substantially manufactured (50% or more of value) outside of the United States and its possessions . . .

Further, DASNY argues, the legislative history of PAL §2603-a is completely silent as to the meaning of "substantial part." In lieu of a legislative definition of "substantial part," DASNY submits a Websters Dictionary definition which defines "substantial" as "considerable in amount, value, or worth," and defines "part" as "one

of the equal or unequal portions into which something is or is regarded as divided; something less than a whole; a unit (as a number, quantity, or mass) held to constitute with one or more other units something larger.” DASNY also refers to several court decisions which define “substantial part” in other contexts.

BA argues that all steel it intends to use in the Project that can be produced in the United States is, in fact, being produced here. BA asserts that it intends to buy all raw steel products in the United States and that only “final cutting and hole drilling and other miscellaneous work” will be performed in Quebec. The exceptions to this, BA asserts are the large beams (W14x426), which are not available in the United States. These, BA argues, must be ordered, not only by BA, but by Steelco or any other companies which perform steel work. Additionally, PAL §2603-a contains a clause which BA claims gives DASNY the discretion to buy foreign steel in certain circumstances. PAL §2603-a(2) states:

The provisions of this section shall not apply if the governing board or body of such public authority, in its discretion, determines that such provisions would result in unreasonable costs or that such steel products or steel components cannot be produced or made in the United States in sufficient and reasonably available quantities or of satisfactory quality or design.

As an initial matter, the facts here do not support BA’s claim that DASNY’s compliance with PAL §2603-a is discretionary. The difference between Steelco’s and BA’s bid is slightly less than four tenths of one percent. Interestingly, during the Senate debate of the bill, Senator Volkner presented a similar situation, where a European steel firm won a bid worth \$88 Million dollars and the difference between the European firm’s bid and the American firm’s bid was only \$200,000, to demonstrate the need for such a bill. When considering the legislative purpose of PAL §2603-a, the difference in the bid amounts here does not result in an “unreasonable cost” to DASNY, nor does the slight difference in cost outweigh the responsibility bestowed upon the agency when the legislature enacted PAL §2603-a.

The remaining issue before the court then is whether DASNY’s interpretation of the term “whole or substantial part” is rational and in accordance with the legislative purpose of PAL §2603-a. Generally, when the interpretation of a statute involves “specialized knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom,

the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute.” (*Claim of Gruber*, 89 NY2d 225[1996]).(where the Court found that a Labor Law statute governing Unemployment benefits presented a question of statutory interpretation for the Court, requiring no deference to the agency determinations issued below). However, such deference is not afforded an agency when “the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent.” (*Id.* at 231-232). In such a case, there is no reason to rely on the agency for its specialized knowledge and the court is free to “ascertain the proper interpretation from the statutory language and legislative intent.” (*Id.*).

This Court rejects the circular reasoning of DASNY, which uses its own general contract conditions to define the legislative language “substantial part.” Indeed, as noted earlier, DASNY already watered down the intent of the legislation by replacing the mandated language of the statute, *shall*, with the discretionary term, *may* its own general conditions. On its face, there is nothing in the language of §2603-a which requires DASNY to apply its specialized knowledge of the steel industry to the exclusion of the clear meaning of the legislature’s intent. The legislature intended that all steel purchased for public projects be produced or made in whole or substantial part in the United States. DASNY’s argument that it has satisfied the mandate of PAL §2603-a by using its own definition of “substantial part,” items substantially manufactured (50% or more of value) in the United States, is not rational.

Breaking down into the components and interests protected by the Bill, it is important to understand that steel is “made” or “produced” at a steel mill which is defined as “an industrial plant for the manufacture of steel.” The function of the mill is to process raw materials consisting of iron ore, limestone and coal (or coke). The ingredients are put into a “blast furnace” where they become liquid iron and are then either cast into a “pig iron” or another type of vessel. The final products are, among other things, “large structural sections, heavy plate, strip, wire rod . . . bars and pipe.”<sup>6</sup> In contrast, a steel fabricator cuts, shapes and assembles the steel products according to the specifications required by a particular project.<sup>7</sup>

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<sup>6</sup>Wikipedia at [http://en.wikipedia.org/wiki/Steel\\_mill](http://en.wikipedia.org/wiki/Steel_mill)

<sup>7</sup>Wikipedia at [http://en.wikipedia.org/wiki/Fabrication\\_\(metal\)](http://en.wikipedia.org/wiki/Fabrication_(metal))

It is the aim of this legislation that public works projects buy American Steel and support American Steelworkers. The legislation does not separate the processing of the raw materials from the fabrication of the steel product. In Governor Cuomo’s memorandum to PAL §2603-a, he states that the bill establishes a preference in public authority contracts for “steel components, structural steel or other major steel items produced in whole or substantial part in the United States.” Bethlehem Steel sent a telegram to Governor Cuomo urging him to approve the bill because “Galvanized Steel produced at our Lackawanna plant might capture a significant percentage of this important market . . . [which] will create employment for our steelworkers, our suppliers, and the Niagara Frontier economy, in general.” Finally, the “Ten-Day Bill” introduced by Mr. Volker in the senate (S-1368-A). Under “Summary of Provisions” states, in relevant part:

The bill adds a new section 2603-a to the Public Authorities Law . . . to require “all public authorities” that award contracts involving steel products to require that steel in the following categories to be made in whole or substantial part in the United States: . . .Structural, reinforcing or other major steel items incorporated in public works . . .

Although PAL §2603-a was passed over two decades ago, there is no indication that it’s message is any less relevant today. In fact, a federal bill titled the “American Steel First Act” was introduced into the house on April 30, 2008 and was approved by the House Committee on Homeland Security on June 26, 2008. That act requires that a covered Federal agency cannot use funds appropriated to it for a public project “unless *all* of the iron and steel used in such project is produced in the United States.” (emphasis added)(see H.R.5935).

DASNY’s reading of PAL §2603-a is flawed. The matter is referred back to DASNY for the reconsideration of the bids received and making of an award consistent with this decision.

Wherefore it is hereby

ORDERED that petitioner’s application for an order vacating the Dormitory Authority State of New York’s acceptance of Les Constructions Beauce-Atlas, Inc.’s bid proposal is granted.

All other relief requested is denied. This constitutes the Decision and Order of the Court.

DATED: October 23, 2008

  
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EILEEN A. RAKOWER, J.S.C.

**FILED**  
OCT 27 2008  
COUNTY CLERK'S OFFICE  
NEW YORK