

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NOS. 2015-SC-000204; 2015-SC-000635; 2015-SC-000636

ON APPEAL FROM COURT OF APPEALS NOS. 2012-CA-000440; 2012-CA-000495;  
2012-CA-000441; 2012-CA-000494  
AND KENTON CIRCUIT COURT NO. 07-CI-03886

SUPERIOR STEEL, INC.

AND

BEN HUR CONSTRUCTION COMPANY, INC.                      APPELLANTS/CROSS-APPELLEES

v.

THE ASCENT AT ROEBLING'S BRIDGE, LLC,  
CORPOREX DEVELOPMENT & CONSTRUCTION MANAGEMENT, LLC,  
DUGAN & MEYERS CONSTRUCTION COMPANY

AND

WESTCHESTER FIRE INSURANCE COMPANY                      APPELLEES/CROSS-APPELLANTS

**BRIEF OF AMICUS CURIAE**  
**THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION**

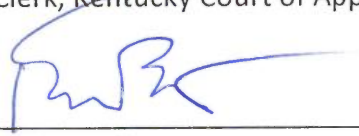
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## CERTIFICATE OF SERVICE

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Kenneth A. Bohnert

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## STATEMENT OF THE CASE

This case arises out of a claim for the cost of additional structural steel fabrication and erection services required at a construction project known as The Ascent at Roebling's Bridge (the "Ascent project"). These services – like most structural steel fabrication and erection services on large construction projects – were provided pursuant to a certain Contract Specification 05120 – known both here and generally in the industry as the "Structural Steel Specification" – issued on behalf of the construction owner and design builder.<sup>1,2</sup> The project construction manager, a separate entity, selected a steel contractor through a competitive bid process to fabricate and erect the structural steel frame required by the initial project design.<sup>3</sup> The steel contractor, in turn, retained a steel erector to lift, place, weld, and bolt together the fabricated structural steel members at the project site.<sup>4</sup> In all, four separate contracts connect the five separate parties involved in specifying, coordinating, fabricating, and ultimately erecting the steel frame at the Ascent project.

After execution of the steel contract, and after work had begun on the project site, modifications were issued to the initial structural design. These modifications required the steel contractor and erector to provide additional material and labor. The steel contractor and erector were not paid for this additional material and labor, giving

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<sup>1</sup> Joint Trial Exhibit ("JX") 6.

<sup>2</sup> The Ascent hired Corporex as developer to design and build the project. (JX 2). They are related entities.

<sup>3</sup> JX 226.

<sup>4</sup> JX 131.

rise to this litigation.<sup>5</sup> After a trial, a jury determined that the steel contractor and its erector were entitled to additional compensation for the additional material and labor they provided.<sup>6</sup> The Court of Appeals vacated the judgment and remanded the case for a new trial, essentially directing the trial court to treat each of the four contracts as though they created separate and independent rights and obligations between the two parties to each of the contracts, divorced from the interrelated, functional contracting relationship that was affirmatively created by all five parties to enable the Owner to obtain the steel structure it requested - resultant of the labor and materials provided by the steel contractor and erector. Left unaddressed, the “form over function” analysis of the Court of Appeals would create unintended conflicts and outcomes, potentially leaving the parties that did the work they were contracted to do with no recourse for payment from the party that asked for and benefited from the work.

The primary focus of the this *amicus* brief is to respectfully invite the Court’s attention to the American Institute of Steel Construction<sup>7</sup> *Code of Standard Practice*

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<sup>5</sup> VR No. 5: 5/17/11; 11:15:20-38; 11:20:20-11:22:12; JX 72.

<sup>6</sup> R. 4778-82 and R. 1-9 (No. 07-CI-03886), Judgment 2/3/12.

<sup>7</sup> *Amicus curiae* American Institute of Steel Construction (“AISC”), a non-profit technical institute headquartered in Chicago, Illinois, was established in 1921 to serve the construction industry in the United States. AISC membership includes more than 900 of the major domestic steel fabrication firms, all the U.S. based structural steel producers, the dozen leading U.S. steel service centers, 2,500 general contractors, 10,000 engineering students and professors, and 27,000 professional engineers. Annually AISC responds to in excess of 5,000 technical inquiries involving fabricated steel construction from around the world. AISC develops non-biased technical Codes and Standards as well as research, educational, quality certification, and technical assistance programs. AISC Codes and Standards are incorporated into the International Building Code and nearly every state and local building code (including the Kentucky Building Code). AISC Codes and Standards are also incorporated into construction specifications issued by agencies of the United States government, nearly every state and local building and transportation agency, and nearly all private construction contracts in the United States, including the contracts for construction of The Ascent at Roebling’s Bridge.



("COSP"),<sup>8</sup> which is incorporated into all of the individual contracts made by the parties to this dispute, and clarifies the functional analysis applicable to contracts for structural steel. The COSP is especially helpful when the issue in dispute, as in this case, involves entitlement and payment for additional steel fabrication and erection services made necessary by late changes to structural steel design documents. As is set out in more detail below, specific provisions in the COSP address these circumstances, and provide clear guidance to courts for resolving potentially conflicting provisions contained in individual contracts to determine whether a steel contractor and its subcontracted erector are entitled to payment for additional material and labor they provided; and, if so, which of the parties bears responsibility to pay for that additional material and labor.

On the Ascent project, the Structural Steel Specification, Section 05120, is incorporated into all of the contracts among all of the parties. In turn, the Structural Steel Specification incorporates the 2002 Kentucky Building Code, the 2000 edition of the COSP, and engineering design specifications issued by AISC (currently identified as AISC Specification for Structural Steel Buildings: AISC 360). The Kentucky Building Code also incorporates AISC 360, which, in turn, incorporates relevant provisions of the COSP.<sup>9</sup>

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<sup>8</sup> The first edition of the COSP was published in 1924. Since that time AISC has continuously surveyed the structural steel design community and construction industry to determine standard trade practices, periodically updating the COSP to reflect new and changing technologies and industry practices. The COSP has undergone five complete revisions in that time period. The COSP is edited and updated (and, where necessary, revised) by a balanced committee of industry professionals that has included structural engineers, architects, steel fabricators, general contractors, steel erectors, steel detailers, building code officials and attorneys. The COSP deals with all aspects of the industry from materials, design drawings and specifications, shop fabrication and delivery, erection procedures, quality control and contracts. American National Standards Institute (ANSI) consensus standards-setting protocol is applied to develop, ballot, and reach consensus on the statements of standard practice contained in the COSP.

<sup>9</sup> See footnote 31 and accompanying text, *infra.*; Updated editions of the COSP were issued in 2000 and 2005, prior to issuance of Specification 05120 on this project. The provisions of the COSP relevant to this project are identical in both editions. All AISC publications are posted on AISC's website, [www.aisc.org](http://www.aisc.org) at <http://www.aisc.org/content.aspx?id=42278>; Select provisions of the 2000 COSP are at JX 1.



In addition to being incorporated into the contracts on this project and into the Kentucky Building Code, the COSP is recognized as the established statement of custom and usage in the fabricated structural steel industry in the United States.

The COSP addresses the manner in which parties to contracts for fabrication and erection of structural steel (including construction owners, design professionals, general contractors, and specialty steel contractors alike) are to determine entitlement and payment for costs incurred as a result of late changes to a project's structural design – changes made after the initial design has been released for construction.

Specifically, the record indicates this project was built under a “fast-track” project delivery method.<sup>10</sup> This delivery method is addressed by COSP Section 3.6:

When the fast-track project delivery system is selected, release of the structural Design Drawings and Specifications shall constitute a Release for Construction, regardless of the status of the architectural, electrical, mechanical and other interfacing designs and Contract Documents. Subsequent revisions, if any, shall be the responsibility of the Owner and shall be made in accordance with Sections 3.5 and 9.3.<sup>11</sup>

The Commentary to Section 3.6 elaborates on this provision:

. . . Release of the structural Design Drawings and Specifications to the Fabricator for ordering of material constitutes a Release for Construction. Accordingly, the Fabricator and the Erector may begin their work based upon those partially complete documents. As the architectural, mechanical, electrical and other design elements of the project are completed, revisions may be required in design and/or construction. Thus, when considering the fast-track project delivery system, the Owner should balance the potential benefits to the project schedule with the project cost contingency that may be required to allow for these subsequent revisions.<sup>12 13</sup>

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<sup>10</sup> VR 5/18/11, Tom Ferrell: 4:07:19 - 4:07:30; 4:29:03 – 4:29:27; 4:33:22 – 4:33:28.

<sup>11</sup> JX 1, p. 18 (emphasis added).

<sup>12</sup> JX 1, p. 18 (emphasis added).

In addition, COSP Section 9.3 "Revisions to the Contract Documents" provides:

Revisions to the Contract Documents shall be confirmed by change order or work order. Unless otherwise noted, the issuance of a revision to the Contract Documents shall constitute authorization by the Owner that the revisions is Released for Construction. The contract price and schedule shall be adjusted in accordance with Sections 9.4 and 9.5.<sup>14</sup>

COSP Section 9.4.1, "Contract Price Adjustment," provides in relevant part:

When the scope of work and responsibilities of the Fabricator and the Erector are changed from those previously established in the Contract Documents, an appropriate modification of the contract price shall be made.<sup>15</sup>

The Commentary to Section 9.4.1 explains:

The fabrication and erection of Structural Steel is a dynamic process. Typically, material is being acquired at the same time that the Shop and Erection Drawings are being prepared. Additionally, the fabrication shop will normally fabricate pieces in the order that the Structural Steel is being shipped and erected.

Items that are revised or placed on hold generally upset these relationships and can be very disruptive to the detailing, fabricating and erecting processes. The provisions in Sections 3.5, 4.4.2 and 9.3 are intended to minimize these disruptions so as to allow work to continue. Accordingly, it is required in this Code that the reviewer of requests for contract price adjustments recognize this and allow compensation to the Fabricator and the Erector for these inefficiencies and for the materials that are purchased and the detailing, fabrication and erection that has been performed, when affected by the change.<sup>16</sup>

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<sup>13</sup> Expert witness Thomas Ferrell addressed the challenges of a fast-track project and the relevance of Section 3.6 of the 2000 COSP: "This is advising the owner that on a fast track project there is going to be additional costs when these revisions occur and you should set aside a contingency for these changes. Contingency, meaning dollar funds." VR 5/18/11, Tom Ferrell: 4:30:00 – 4:34:21.

<sup>14</sup> JX 1, p. 71 (emphasis added).

<sup>15</sup> JX 1, p. 71 (emphasis added).

<sup>16</sup> JX 1, p. 72 (emphasis added).

Section 9.4.2 of the COSP parallels the provisions of Sections 7.1 and 13.1 of the contract between the Ascent project owner and design builder<sup>17</sup> when it makes clear that the “reviewer” of such requests is the project owner:

Requests for contract price adjustments shall be presented by the Fabricator and/or Erector in a timely manner and shall be accompanied by a description of the change that is sufficient to permit evaluation and timely approval by the Owner.<sup>18</sup>

*Amicus curiae* AISC respectfully submits that the COSP is a common denominator (through its incorporation into the contract documents for this project, through its incorporation into the Kentucky Building Code, and through its status as a statement of custom and usage in the industry) that can provide a roadmap for the Court in evaluating the relative rights and responsibilities of the parties where general contract terms and conditions do not address the matters in issue or are in conflict.

*Amicus curiae* AISC also respectfully submits that the Court of Appeals’ decision, if left unaddressed, would allow for interpretation of the four contracts separately, and not as a unified whole. This allows for the creation of conflict in this case (and in future cases) that the COSP was designed to avoid and need not exist if the COSP was applied. The practical effect of the lower court’s decision may be that steel contractors have no recourse to obtain payment for extra work that has benefitted an owner.

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<sup>17</sup> The project owner and design builder (related entities on this project) were required to approve all changes in the work, including changes in design or construction. JX 2, Section 7.1 “Changes in the Work” and Section 13.1 – designating the owner’s “representative with sole and complete authority to approve changes in design or construction, to approve payments and to inspect and approve workmanship and materials.”

<sup>18</sup> JX 1, p. 72 (emphasis added).



## ARGUMENT

### I. The AISC Code of Standard Practice is Incorporated Into the Contracts for Construction of the Ascent Project

Terms and conditions incorporated by reference into contracts are enforceable.<sup>19</sup> Multiple jurisdictions have recognized the COSP as relevant contract provisions.<sup>20</sup>

On the Ascent project, the COSP is incorporated into the separate contracts among all of the parties involved in this appeal. The structural steel fabrication and erection services to be provided on this project were set out in Contract Specification Section 05120, the Structural Steel Specification.<sup>21</sup> The Structural Steel Specification is incorporated into all four contracts among the five parties to this dispute.<sup>22,23</sup>

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<sup>19</sup> *Home Lumber Co. v. Appalachian Regional Hospitals, Inc.*, 722 S.W.2d 912, 914 (Ky. App. 1987); *Dixon v. Daymar Group, LLC*, 483 S.W.3d 332, 344 (Ky. 2015); *Helm v. Spieth*, 182 S.W.2d 635, 637 (Ky. 1944)(referenced specifications become part of the parties' contract and are binding).

<sup>20</sup> *Martens v. MCL Const. Corp.*, 807 N.E.2d 480, 483 (Ill. App. 2004)(COSP incorporated and court noted it was "recognized in the industry as authoritative."); *Meredith v. U.S.*, 779 F.2d 51, \*1-2, fn. 2 (6<sup>th</sup> Cir. 1985)(COSP incorporated and applicable); *Weigand Constr. Co., Inc. v. Stephens Fabrication, Inc.*, 929 N.E.2d 220, 227-229 (Ind. App. 2010); *Ryan Iron Works, Inc. v. J.F. White Contracting Co., Inc.*, 6 Mass.L.Rptr. 377, \*1 (Super. Ct. Mass. 1997); *Bethlehem Steel Const. Co. v. Turner Constr.*, 141 N.E.2d 590, 592-593 (N.Y. App. 1957); *Nicholson v. Turner/Cargile*, 669 N.E.2d 529, 537-538 (Ohio App. 1985); *Coffee v. Derby City Steel Co.*, 434 A.2d 564, 573 (Md. Ct. App. 1981).

<sup>21</sup> JX 6.

<sup>22</sup> JX 2; JX 226; JX 10; JX 131; JX 3.

<sup>23</sup> JX 131, Section 1.1 – "Scope of Work: Erection of Structural Steel, ...including but not limited to the following: Steel Drawings Package dated 7/14/06, 05120 Specifications dated 7/14/06..."; JX 226, Section 2.3 – "The Subcontract Documents include this Agreement and exhibits thereto, the Owner-Contractor agreement, special conditions, general conditions, all specifications, all drawings, add addenda, Subcontract Change Orders, amendments and any pending and exercised alternates."; JX 10, Structural Steel Scope of Work – "1) Intent is to provide a complete structural steel and metal decking package per specifications 05120 and 05300..."; JX 3, Article 2 – "AGREEMENT means this Construction Agreement...with all documents and drawings incorporated by reference herein and attached hereto as exhibits or schedules" and "CONTRACT DOCUMENTS consist of this Agreement and all Exhibits...and the Plans and Specifications attached and/or described in 'Exhibit A' to this Agreement" and Exhibit A; JX 2, Section 1.1 – "The Contract Documents consist of this Agreement and General Conditions attached..., all Modifications issued subsequent thereto and the following: Exhibit A: Contract Documents..." and "Exhibit 'A' Drawings and Specifications."



The Structural Steel Specification, in turn, incorporates certain additional documents by reference at Section 1.2 “References,” which requires in relevant part that the parties:

- A. Comply with the provisions of the following codes and standards. Modifications in this specification, when in conflict with the referenced codes and standards, shall take precedence over the referenced codes and standards.
  1. ‘Kentucky Building Code’, 2002
  2. American Institute of Steel Construction (AISC); ‘Code of Standard Practice for Steel Buildings and Bridges,’ effective March 7, 2000 [“2000 AISC COSP”]. See modifications herein at the end of this section.<sup>24</sup>

Specific terms should be given greater weight than general contract language of the individual contracts;<sup>25</sup> and an interpretation that renders all portions of the contract in harmony is preferred over an interpretation that renders any portion of the contract inoperative or void.<sup>26</sup> If inconsistent clauses exist, they should be reconciled if possible, but the clause contributing most essentially to the contract is entitled to greater consideration.<sup>27</sup>

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<sup>24</sup> JX 6, p. 1; The subcontract between Superior and Ben Hur (JX 131) also specifically requires at p. 2 – “All work to be performed in accordance with AISC Code of Standard Practice.” See also, Argument Section IV, *infra*, Legal Efficacy of Attempted Modifications to the COSP.

<sup>25</sup> *Journey Acquisition-II, L.P. v. EQT Production Company*, 39 F.Supp.3d 877, 887 (E.D.Ky. 2014)(“...specific and exact terms are given greater weight than general language...”).

<sup>26</sup> *Cantrell Supply, Inc. v. Liberty Mutual Ins.*, 94 S.W.3d 381, 384 (Ky. App. 2002)(“Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.”); *Abco-Bramer, Inc. v. Markel Ins. Co.*, 55 S.W.3d 841, 845 (Ky. App. 2000)(“...a contract must be construed as a whole, and all writings that are a part of the same agreement are construed together.”); *Journey Acquisition-II, L.P. v. EQT Prod. Co.*, 39 F.Supp.3d 877, 887 (E.D.Ky. 2014)(“...Court must read the various provisions of the contract as a whole, and should look to interpretations that ‘promote harmony’ between any apparently conflicting provisions.”); *L.K. Comstock & Co., Inc. v. Becon Const. Co.*, 932 F. Supp. 948, 964 (E.D. Ky. 1994)(“Being obligated to read the parts of the contract as a whole, we must seek interpretations which promote harmony between such provisions.” citing *Cook United, Inc. v. Waits*, 512 S.W.2d 493, 495 (1974)).

<sup>27</sup> *Black Star Coal Corp. v. Napier*, 199 S.W.2d 449, 451 (Ky. 1947); *Int’l Union of Operating Engineers v. J.A. Jones Const. Co.*, 240 S.W.2d 49, 56 (Ky. 1951)(“[W]hole agreement should, if possible, be construed so as

*Amicus curiae* AISC respectfully submits that the specific provisions of the Structural Steel Specification common to all contracts, control over the general terms of any of the individual contracts. The relevant provisions of the COSP harmonize any potentially contradictory contract provisions related to design, fabrication, erection, and payment for structural steel services required to complete project performance.

## **II. The AISC Code of Standard Practice is Incorporated Into the Kentucky Building Code**

It is an accepted principle that included in the terms of all contracts are the laws which exist at the time and place of consummation of the contract.<sup>28</sup> The 2002 Kentucky Building Code in force at the time of the design and construction of the Ascent project also incorporates the COSP.

As noted above, the Structural Steel Specification included in the parties' contracts incorporates the 2002 Kentucky Building Code.<sup>29</sup> Section 2204 of the 2002 Kentucky Building Code incorporates certain AISC specifications for structural steel buildings, stating in relevant part:

The design, fabrication and erection of structural steel for buildings and structures shall be in accordance with either the AISC Load and Resistance Factor Design Specification for Structural Steel Buildings (AISC-LRFD), AISC Specification for Structural Steel Buildings-Allowable Stress Design (AISC-ASD) or AISC Specification for the Design of Steel Hollow Structural Sections (AISC-HSS).<sup>30</sup>

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to conform to an evident consistent purpose. Accordingly, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent may be disregarded.”)

<sup>28</sup> *City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Counties, Ky.*, 301 S.W.2d 885, 888 (Ky. 1957); *Corbin Deposit Bank v. King*, 384 S.W.2d 302, 304 (Ky. 1964); *Bd. of Educ. of Perry County v. Jones*, 823 S.W.2d 457, 459 (Ky. 1992); *Johnson Bonding Co., Inc. v. Com.*, 487 S.W.2d 911, 914 (Ky. 1972); *Kentucky Utilities Co. v. Public Service Com'n*, 252 S.W.2d 885, 896 (Ky. 1952).

<sup>29</sup> See JX 6, p. 1.

<sup>30</sup> See 815 KAR 7:120, Section 2(2)(a) for adoption and 815 KAR 7:120, Section 5(2) for location.

In 2005 the referenced AISC-LRFD, AISC-ASD and AISC-HSS standards in Section 2204 were subsequently superseded by a common, consensus document, AISC 360-05 “Specification for Structural Steel Buildings.”<sup>31</sup> Section 102.4 of the 2002 Kentucky Building Code “Referenced codes and standards” permits use of the latest edition of the structural steel specifications:

The codes and standards in this code shall be considered part of the requirements of this code to the prescribed extent of each such reference. Where differences occur between provisions of this code and referenced codes and standards, the provisions of this code shall apply; **and newer editions of any standards may be used to meet the intent of the code in lieu of the adopted edition.** (Emphasis Added).

Thus, at the time of the project design and consummation of the contracts among the parties, the newer edition of the AISC specification - AISC 360-05 - was the controlling standard.

This is relevant to this case because Section A4 of AISC 360-05 specifically incorporates relevant provisions of the COSP; thereby also incorporating those provisions of the COSP into the Kentucky Building Code.<sup>32</sup> As such, *amicus curiae* AISC respectfully suggests to the Court that provisions so-incorporated into the Kentucky Building Code represent controlling law that may bear relevance to this dispute.<sup>33</sup>

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<sup>31</sup> The basic identification of the AISC Specification for Structural Steel Buildings is designated under the American National Standards Institute numbering system as “AISC 360.” The suffix “-05” designates the 2005 edition of AISC 360. A subsequent edition, “AISC 360-10” was issued in 2010. AISC 360-05 and AISC 360-10 can be found at: <http://www.aisc.org/content.aspx?id=42278>.

<sup>32</sup> Section A4 of AISC 360-05 states in relevant part:

A4. STRUCTURAL DESIGN DRAWINGS AND SPECIFICATIONS  
The design drawings and specifications shall meet the requirements in the *Code of Standard Practice for Steel Buildings and Bridges*, except for deviations specifically identified in the design drawings and/or specifications.

<sup>33</sup> Notably, the latest version of AISC 360, AISC 360-10, is now incorporated into the Kentucky Building Code. Although not the codified law at the time this project was built, it is an accurate statement of



### III. The AISC Code of Standard Practice is a Statement of Custom and Usage in the Fabricated Structural Steel Industry

Evidence of custom and usage in a particular industry is permitted to explain and supplement an agreement's terms.<sup>34</sup> Here, the record recognizes the COSP as the established statement of custom and usage in the fabricated structural steel industry.<sup>35</sup>

In addition, both the 2000 and 2005 editions of the COSP specifically provide:

#### 1.1 Scope

In the absence of specific instruction to the contrary in the Contract Documents, the trade practices that are defined in this Code shall govern the fabrication and erection of Structural Steel.

Commentary:

The practices defined in this Code are the commonly accepted standards of custom and usage for Structural Steel fabrication and erection, which generally represent the most efficient approach...<sup>36, 37</sup>

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public policy both then and now. The operable provisions in AISC 360-10 were strengthened to reinforce that the requirements of the COSP and were intended to be binding, without exception. Section A.4 at Structural Design Drawings and Specifications: "The structural *design drawings* and *specifications* shall meet the requirements in the *Code of Standard Practice*." AISC 360-10 can be found at: <http://www.aisc.org/content.aspx?id=42278>.

<sup>34</sup> *A & A Mechanical, Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 510 (Ky. App. 1999) (may use usage of trade "to explain and supplement" an agreement's written terms.); *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 132 S.W.3d 790, 799 (Ky. 2004); *Martin v. Ben P. Eubank Lumber Co.*, 395 S.W.2d 385, 386 (Ky. 1965) ("...any usage of trade may be competent to explain any ambiguities in a contract.").

<sup>35</sup> Expert witness Thomas Ferrell, a member of the committee that drafts AISC 360, testified that the AISC Manual that contains the COSP is equivalent to "the Bible" in this industry. Mr. Ferrell stated the COSP is "used throughout the country." VR 5/18/11, Tom Ferrell: 3:30:10 – 3:37:40 – Specifications, tasks and manual committee member; VR 5/18/11, Tom Ferrell: 3:27:00 – 3:37:40 – "For steel design, standards are governed by an organization called the American Institute of Steel Construction."; VR 5/18/11, Tom Ferrell: 3:29:11 – 3:30:10 – Stated the COSP is "industry guide for business aspects" and agreed "It is [the Bible or one of its testaments]. I don't know anyone in this country that uses another book or guide to design structural steel buildings or structures."; VR 5/18/11, Tom Ferrell: 4:31:20 – 4:33:00 – "this document [COSP] is used throughout the country" and recognized the COSP as "another chapter in the Bible."; VR 5/19/11, Tom Ferrell: 12:01:22 – 12:05:00 – agreeing "these specifications [the COSP] are controlling documents." See also J. Martin dep., 3/13/09, pp. 52-57 –COSP recognized as "authoritative in the structural design profession."

<sup>36</sup> JX1, p. 1 (emphasis added).

<sup>37</sup> In addition, the preface to the 2000 and 2005 editions of the COSP explains: "Unless specific provisions to the contrary are contained in the contract documents, the existing trade practices that are contained herein are considered to be the standard custom and usage of the industry and thereby incorporated into the relationships between the parties to a contract." – The 2000 and 2005 COSP can be found at <http://www.aisc.org/content.aspx?id=42278>; See also *L.K. Comstock & Co., Inc. v. Becon Const. Co.*, 932 F.



*Amicus curiae* AISC respectfully suggests that the COSP be recognized by this Court as the accepted statement of custom and usage in the fabricated structural steel industry in the United States.

As such, the COSP recognizes fabrication and erection of structural steel as a unified process.<sup>38</sup> The fabricator and erector are treated by the industry as a single entity for the purpose of contract performance unless the owner or general contractor has opted to contract separately for fabrication and erection services<sup>39</sup> – an option that was not invoked on the Ascent project. The Structural Steel Specification for this project followed this standard practice by treating erection as an inseparable portion of the overall steel contract for the project. The steel work was solicited and bid as one package.<sup>40</sup> The fabricator was responsible for every aspect of the erector's performance.<sup>41</sup>

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Supp. 948, 956 fn. 4 (E.D. Ky. 1994)(relying on 1986 version of preface which states: "When contractual documents do not contain specific provisions to the contrary, existing trade practices are considered to be incorporated into the relationships between the parties to a contract.").

<sup>38</sup> See JX 1 – 2000 COSP – at Commentary Section 3.1 ("...the Fabricator and Erector must be able to rely on the accuracy and completeness of the Contract Documents. This allows the Fabricator and Erector to provide the Owner with bids that are adequate and complete."), Section 3.12 ("There are a variety of Connections available in the AISC Manual for Steel Construction for a given situation. Preference for a particular type will vary between Fabricators and Erectors."), Commentary 4.1 ("When the Owner issues Released-for-Construction Design Drawings and Specifications, the Fabricator and the Erector can rely on the fact that these are the Owner's requirements for the project."); Section 4.4.2 ("The Fabricator and Erector shall promptly notify the Owner's Designated Representative for Construction when any direction or notation on the Shop or Erection Drawings or other information will result in an additional cost and/or delay."), Section 9.4.1 ("When the scope of work and responsibilities of the Fabricator and the Erector are changed from those previously established in the Contract Documents, an appropriate modification of the contract price shall be made. In computing the contract price adjustment, the Fabricator and Erector shall consider the quantity of work that is added or deleted, the modifications in the character of the work and the timeliness of the change with respect to the status of material ordering, detailing, fabrication and erection operations."), Commentary 9.4.1 ("...Accordingly, it is required in this Code that the reviewer of requests for contract price adjustments recognize this and allow compensation to the Fabricator and the Erector for these inefficiencies and for the materials that are purchased and the detailing, fabrication and erection that has been performed, when affected by the change."); and Section 9.4.2 ("Requests for contract price adjustments shall be presented by the Fabricator and/or Erector in a timely manner and shall be accompanied by a description of the change that is sufficient to permit evaluation and timely approval by the Owner.").

<sup>39</sup> See Section 7.1 of the 2000 COSP at: <http://www.aisc.org/content.aspx?id=42278>.

<sup>40</sup> See JX 10 – Instructions to Bid/Scope of Work.

#### IV. Legal Efficacy of Attempted Modifications to the COSP

*Amicus curiae* AISC invites the Court's attention to Section 3.11 of Contract Specification 05120, which provides, in relevant part, as follows:

Where a numbered paragraph [of COSP] is noted below, the requirements of said paragraph in the AISC Code of Standard Practice and its commentary are deleted and those requirements noted herein shall apply.

Thereafter, modifications are suggested, *inter alia*, to Sections 3.6, 9.3.1, and 9.3.2 of the COSP.<sup>42</sup> AISC does not believe these suggested modifications are relevant to the issues raised in this brief or have legal efficacy in the context of this appeal; but, in the interest of providing a thorough *amicus curiae* analysis, they warrant discussion.

The COSP acknowledges the potential for "specific [contract] instructions to the contrary;" and AISC 360-05 similarly acknowledges the potential for "deviations specifically identified in the . . . [contract] specifications."<sup>43</sup> However, neither the COSP nor AISC 360-05 acknowledge the legal efficacy of suggested instructions or deviations that do not specifically address standard industry practice as delineated in the COSP.

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<sup>41</sup>See JX 6 - Section 05120 Structural Steel Specification at 1.1.5 - which states: "The Contract Documents do not differentiate between fabrication and erection work. Should the fabrication and erection be performed by separate contractors, the fabricator is responsible for the scope of work of the erector and is responsible for resolution of any disputes that may arise." The Section 05120 Structural Steel Specification was incorporated into all of the parties' contracts.

<sup>42</sup> 3.6 SPECIAL CONDITIONS  
When it is required that a project be bid before the requirements of Section 3.1 can be met, the owner may provide sufficient information in the form of scope, drawings, weights, outline specifications, and other descriptive data to enable the fabricator and erector to prepare a knowledgeable bid.

4.4 REVIEW OF SHOP DRAWINGS

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9.3.1 Revisions to the structural steel requirements are made by issuance of new documents, reissuance of existing documents, or by annotation of shop or erection drawings.

9.3.2 A revision to the contract price is made by formal change order.

<sup>43</sup> This qualification has been removed from AISC 360-10, which is the current standard incorporated into the Kentucky Building Code. AISC 360-10 does not acknowledge deviations from the COSP. See fn. 33.

Attempts to delete, but not replace, standard industry practice as delineated in the COSP creates an ambiguity, a hole in contract terms, which can only be filled by subsequent judicial re-application of custom and usage in the industry.

The suggested modification of Section 3.6 stops at the point of the initial bid and does not address what appears to be the crucial issue in this appeal. It does not address what happens when there are subsequent changes to the design after initial bids have been submitted and contracts have been executed. The suggested modification to COSP Section 3.6 does not go far enough to address the issues presented in this case, and is therefore ineffective.

The suggested addition of Sections 9.3.1 and 9.3.2 deals only with the means of issuing revisions to the structural steel requirements. Suggested Sections 9.3.1 and 9.3.2 do not address the means of determining entitlement to additional compensation arising as a result of revisions to the structural steel requirements. The suggested additions to the COSP leave in place, and do not address, COSP Section 9.4 dealing with determination of fabricator and erector entitlement to contract price adjustments.<sup>44</sup>

Attempted modifications of this nature that do not address key elements of industry custom and usage are of questionable legal efficacy, especially when that industry custom and usage is incorporated into the jurisdiction's building code.

### **CONCLUSION**

The COSP provides a viable and important tool available for the Court to assess the rights and responsibilities of the parties in this case. The COSP is a common denominator that provides a neutral roadmap by which any of the contracts' provisions

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<sup>44</sup> See Argument Section I, *infra*.



may be navigated, interpreted, and, where necessary, reconciled. *Amicus curiae* AISC submits that relevant provisions of the COSP have been incorporated into the parties' contracts, incorporated into the Kentucky Building Code, and represent statements of custom and usage in the fabricated structural steel industry in the United States.

For projects - like the Ascent project - delivered under a "fast-track" method (i.e. construction begins before all project plans are completed), the COSP provides the Owner is responsible for any revisions after the structural design drawings and specifications are released. The COSP recognizes fabrication and erection of structural steel is a dynamic process that is sensitive to changes in the project plans/schedule and thus, the Owner should anticipate and allow for adjustments to the contract price. The COSP also acknowledges fabrication and erection of structural steel involves a unified process and treats the fabricator and erector as a single contract performance. *Amicus curiae* AISC respectfully urges the Court to interpret the contracts through the lens of the COSP as integrated parts of a unified whole, rather than interpreting them in a piecemeal fashion.

Respectfully Submitted,



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