

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

**MOTION OF THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION  
FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND TO PARTICIPATE IN ORAL ARGUMENT**

The American Institute of Steel Construction ("*AISC*"), respectfully moves the Court, pursuant to Rule 76.12(7) of the Kentucky Rules of Civil Procedure, for leave to file the *amicus curiae* brief tendered with this motion. This brief is timely submitted within 15 days of the June 28, 2016 filing of the appellants' brief. *Amicus curiae* AISC respectfully requests oral argument pursuant to CR 76.16(3) if the motion is granted.

**I. Nature of the Movant's Interest**

*Amicus curiae* AISC, a non-profit technical institute headquartered in Chicago, Illinois, was established in 1921 to serve the construction industry in the United

States.<sup>1</sup> *Inter alia*, 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 (the "Ascent project").

One such standard, the AISC *Code of Standard Practice* ("COSP"),<sup>2</sup> was incorporated into the Contract Technical Specifications for all four construction contracts on the Ascent project, among all five parties to this appeal. It was also incorporated into the 2002 Kentucky Building Code, which governed design and construction of the Ascent project.

The COSP specifically addresses the primary issue facing the Court in this appeal: entitlement and payment for additional steel fabrication and erection services made necessary by late changes to structural steel design documents.

## **II. Points to Be Presented**

The primary focus of the tendered *amicus curiae* brief is to respectfully invite the Court's attention to the fact that the COSP is a contract requirement applicable to all parties to this dispute through its incorporation into Section 05120 of the Contract

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<sup>1</sup> 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.

<sup>2</sup> Select provisions of the 2000 COSP can be found at JX 1; The entire COSP can be found at AISC's website, [www.aisc.org](http://www.aisc.org) at <http://www.aisc.org/content.aspx?id=42278>.

Technical Specifications for the Ascent project and the 2002 Kentucky Building Code.

Through their respective contracts, all parties to this dispute have agreed to the provisions of the Contract Technical Specifications and the 2002 Kentucky Building Code, both of which incorporate the COSP.

As is set out in detail in the tendered brief, the COSP specifically addresses entitlement and payment for additional steel fabrication and erection services made necessary by late changes to structural steel design documents.

The COSP also constitutes a formal statement of custom and usage for the fabricated structural steel industry in the United States. It thereby provides a viable and important tool for use by the Court to interpret seemingly conflicting terms in the four contracts among the five parties to this dispute.

The first edition of the COSP was published in 1924. Since that time AISC has continuously updated the COSP to reflect new and changing technologies and industry practices. The COSP is edited and updated by a balanced committee of industry professionals comprised of 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 a non-biased consensus on the statements of standard practice contained in the COSP.

The *amicus curiae* AISC respectfully submits the COSP to this Court as a common denominator that will provide a neutral roadmap to assist the Court in evaluating the relative rights and responsibilities of the parties.

*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.

**III. Relevance to the Disposition of This Case**

AISC expresses no opinion on matters of disputed fact in the pending action or on interpretation of disputed points of Kentucky law involved in the underlying litigation. However, as stated above, the AISC's COSP is clearly a common provision in all of the contracts involved in this dispute that could serve as a common denominator of assistance to the Court in resolving this dispute. This Court's recognition of the COSP would also be assistance to courts throughout the Commonwealth when resolving contractual disputes involving the fabricated structural steel industry.

Respectfully Submitted,



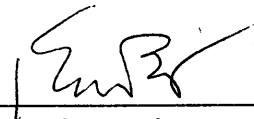
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#### **CERTIFICATE OF SERVICE**

It is hereby certified that copies of this Motion for Leave to File an *Amicus Curiae* Brief were forwarded by regular U.S. Mail postage prepaid on this 12<sup>th</sup> day of July 2016 to Griffin Terry Sumner, J. Kendrick Wells IV, Frost Brown Todd LLC, 400 West Market Street, 32<sup>nd</sup> Floor, Louisville, KY 40202; D. Scott Gurney, Frost Brown Todd LLC, 3300 Great American Tower, 301 East Fourth Street, Cincinnati, OH 45202; Thomas J. Kirkwood, Kimberly E. Ramundo, Heather M. Hawkins, Thompson Hine LLP, 312 Walnut Street, 14<sup>th</sup> Floor, Cincinnati, OH 45202-4029; Gerald F. Dusing, Adams Stepmann & Dusing PLLC, 40 W. Pike Street, P.O. Box 861, Covington, KY 41011; Mark T. Hayden, Taft Stettinius & Hollister, 425 Walnut Street, Suite 1800, Cincinnati, OH 45202; Hon. Gregory M. Bartlett, Kenton Circuit Court, Justice Center, 230 Madison Avenue, 7<sup>th</sup> Floor, Covington, KY 41011; Clerk, Kenton Circuit Court, Kenton County Justice Center, 230 Madison Avenue, Covington, KY 41011; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.



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