PUBLIC CONTRACTS REVIEW BOARD

Case 1341 – CT 2028/2019 – Supply and Delivery to two Wasteserv Sites of One Tonne Rolls, 4mm Diameter, Pre-Greased Black Annealed Wire

Remedy before Closing Date of a Call for Competition

The publication date of the call for tenders was the 31st May 2019 whilst the closing date was the 23rd July 2019.

On the 8th July 2019 SR Environmental Solutions Ltd sought a Remedy against Wasteserv Malta as the Contracting Authority claiming that in the 'Revision of Prices' clause the index used is not in the currency used in the tender.

On 13th August 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr. Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – SR Environmental Solutions Ltd

Ms Sarah Muscat Representative

Contracting Authority – Wasteserv Malta

Mr Martin Casha	Representative
Ms Branica Xuereb	Representative

Department of Contracts

Dr Franco Agius Legal Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Ms Sarah Muscat Representative of SR Environmental Solutions Ltd said that her company were not contesting the mechanism of the tender but to the particular index to be used in the revision of prices. The Contracting Authority was proposing to use the Australian Market index which is denominated in United States currency. Moreover, the index was referring only to the price of iron ore which is only a small part of the finished product. Low Carbon Rod wire was the main component of the annealed wire which the tender specified. Dr Franco Agius Legal Representative of the Department of Contracts said that the intention behind the use of the index was to protect the Contracting Authority against volatile price changes by pegging the changes to an index. It was irrelevant which index was used but it was essential to have a fixed point. The Australian index had been used because there was no charge imposed for its use and therefore of benefit to the bidders. Other indices levied very high charges.

Ms Muscat said that while she accepts that a point of reference is essential, it is incongruous that the Australian market has been chosen when the majority of suppliers are located in Europe. The market is very volatile and small changes have big overall effect on prices and you cannot measure the European market by what happens in Australia in US Dollars. The low carbon rod iron is the main component in this product but it has not been considered in the tender which makes the index chosen even more unfair. She suggested that the manufacturer supplying the winning bidder should provide the index to the low carbon rod and the follow up order prices adjusted according to this.

Dr Agius said that the Department of Contracts cannot check if Appellants' claim is correct but they have no objection to using a different index as long as it is free of charge. There has to be a fixed point for everyone and he accepts that what affects the Australian market may not affect Europe and vice-versa.

Mr Martin Casha Representative of Wasteserv Malta said that the prohibitive cost of some indices is not justified either to bidders or the Contracting Authority. The materials may be sourced from different countries and would require indices from all those countries.

The Chairman proposed to give the Contracting Authority an opportunity to have another look at the tender and research if there are any alternatives to those specified in the tender. The hearing will resume on the 20th August 2019 at 11.30am.

SECOND HEARING

On the 27th August 2019 the Public Contracts Review Board consisting of Dr Anthony Cassar Chairman, Dr Charles Cassar and Mr Carmel Esposito convened a public hearing to resume discussing this objection.

The Attendance for this public hearing was as follows:

Appellants – SR Environmental Solutions Ltd

Ms Sarah Muscat Representative

Contracting Authority – Wasteserv Malta

Mr Martin Casha	Representative
Ms Branica Xuereb	Representative

Department of Contracts

Dr Franco Agius Legal Representative

Dr Anthony Cassar Chairman of the Public Contracts review Board welcomed the parties and invited them to proceed with their submissions noting that the original date set for this second meeting had to be changed.

Dr Franco Agius Legal Representative for the Department of Contracts said that the Contracting Authority had carried out the necessary research, the outcome of which was that they decided to maintain the same parameters as published in the tender.

Mr Martin Casha (43457M) called as a witness by the PCRB testified on oath that he was representing Wasteserv Malta. Consignments of annealed wire would be requested 'as and when' over a four year period, normally every three or four months. The effect of price changes should therefore even out over a period of four years. The Authority had carried out research to try to find an index for low carbon rod wire as discussed at the first hearing – however no such index could be traced on that product that was available free of charge. Similarly research had been carried out to find indices for scrap metal.

Witness stated that at the end of the day whichever international index was chosen it was bound to affect one or other bidder – they had therefore decided to stick to the original terms of the tender bearing in mind the lack of frequency that the index will be used and that the basic material of the product is iron ore. In reply to questions witness said that he was not aware of the origin of materials of previous consignments and that he had no knowledge on the composition of annealed wire and had only been made aware that scrap metal is its major component at the first hearing.

Dr Agius said that the concept of using an index was to reduce the risk inherent in market fluctuations, and it was immaterial which territory's index was chosen as compensation would be based on changes reflected in that particular index.

Ms Sarah Muscat Representative of SR Environmental Solutions said that the Contracting Authority was ignoring the fact that the price index proposed is based on the wrong material. This is the crux of the problem – iron ore is only a very small part of the product which is mainly made of scrap iron. The international demand for scrap iron is on the increase and likely to go on increasing because of market conditions and could lead to severe fluctuations in the price of the product.

Dr Agius stated that the Authority would not object if the Board ruled that a different index be used although it must be borne in mind that they are unable to decide which index is the appropriate one to use.

The Chairman made a final comment that it would be preferable if the scrap metal index was used as long as it could be sourced free of charge.

He then thanked the parties for their submissions and declared the hearing closed.

This Board,

Having noted this 'Call for Remedy Prior to Closing Date of Call for Competition' filed by S R Environmental Solutions Ltd (herein after referred to as the Appellants) on 8 July 2019, refers to the claims made by the same Appellants with regard to the Tender of reference CT 2028/2019 listed as case no 1341 in the records of the Public Contracts Review Board.

Appearing for the Appellants:	Ms Sarah Muscat
Appearing for the Contracting Authority:	Mr Martin Casha
Appearing for the Department of Contracts: Dr Franco Agius	

Whereby, the Appellants contend that:

a) Their main concern is the index to be used in the revision of prices. In this regard, the proposed index refers only to the price of Iron Ore, which forms only a negligible part of the finished product. The index that should be

applied must be related towards scrap iron, since this material forms the major component of the product.

This Board also noted the Contracting Authority's 'Letter of Reply' dated 9 July 2019 and its verbal submissions during the hearings held on 13 and 27 August 2019, in that:

a) The Authority confirmed that it finds no objection to apply a different index, as long as it could be sourced free of charge.

This same Board also noted the testimony of the witness namely:

Mr Martin Casha duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation to this 'Call for Remedy' and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, opines that the issue relates to the price index which is to be applied in the revision of prices during the supply of the tendered product.

- 1. This Board notes that the authority has no objection in applying the most suitable index for the adjustment of price fluctuations during the period of supplies, as long as the chosen index can be accessed free of charge.
- 2. During the second hearing, this Board was made aware that the major component of the product consists of scrap iron, so that the proposed index should be inclined towards such a particular iron. In this regard, this Board notes that the Authority will endeavor to identify an index which satisfies such a requirement.
- 3. In the meantime, this Board received, from the Authority, a list of indexes, which are related to scrap iron and which are free of charge and in this respect, this Board directs the Authority to apply any one of these indexes which corresponds, as near as possible, to the main component of the product. For clarity sake, such a list of indexes is being denoted as set hereunder:

cmdty Scrap Metal Price Indexes

№ flipcharts

Symbol	Cash Index Name	A flipchart
ALPAUSY11,CM	Scrap Aluminum Radiator Idx	0.2254 +0.0101 +4.67% -0.0101 -4.27% 08/02/
ALPAUSY12,CM	Scrap Aluminum Auto Wheels Idx	0.4415 -0.0019 -0.43% -0.0852 -16.18% 08/02/
ALPAUSY15.CM	Scrap 6063 Aluminum Extrusion Idx	0.4339 +0.0119 +2.82% -0.0935 -17.73% 08/02/
ALPAUSY19.CM	Scrap Aluminum Old Sheet Idx	0.22.73 -0.0009 -0.39% -0.0244 -9.69% 08/02/
ALPAUSY20.CM	Scrap Aluminum Old Cast Idx	0.2300 +0.0035 +1.59% -0.0235 -9.27% 08/02/
ALPAUSY22.CM	Scrap Painted Siding Idx	0.2809 -0.0011 -0.39% -0.0366 -11.53% 08/02/
ALPAUSY51.CM	Scrap Aluminum Can Idx	0.3090 -0.0027 -0.87% -0.0404 -11.56% 08/02/
ALPAUSY54.CM	Scrap Mixed Extrusion 6061/6053 Idx	0.2106 -0.0023 -1.08% -0.1125 -34.84% 08/02/
ALPAUSY55.CM	Scrap ACSR/Neoprene/Mixed Idx	0.2549 +0.0052 +2.08% -0.0307 -10.75% 08/02/
ALPAUSY57.CM	Scrap Irony Aluminum Copper Radiator Idx	0.5949 -0.0004 -0.07% -0.0143 -2.35% 08/02/
BRPAUSY23.CM	Scrap Brass Solids Idx	1.2691 +0.0349 +2.83% -0.1402 -9.95% 08/02/
BRPAUSY26.CM	Scrap Brass Radiator Idx	1.2755 -0.0120 -0.93% -0.0330 -2.52% 08/02/
BRPAUSY27.CM	Scrap Iron Brass Radiator Idx	0.6331 -0.0057 -0.89% -0.0428 -6.33% 06/02/
BRPAUSY29,CM	Scrap Red Brass Idx	1.5812 ·0.0117 ·0.73% ·0.0433 ·2.67% 08/02/
BRPAUSY30.CM	Scrap Yellow Brass Idx	1.3740 +0.0081 +0.59% -0.070S -4.88% 08/02/
BRPAUSY58.CM	Scrap Heater Cores Idx	0.7470 .0.0554 -6.90% +0.1604 +27.34% 08/02/
CUPAUSY1.CM	Scrap Bare Bright Copper Wire >99% Idx	2.1916 +0.0540 +2.40% +0.0838 +3.58% 08/02/
CUPAUSY10,CM	Scrap Cu/Al Radiators Idx	0.9360 -0.0096 -1.02% +0.0247 +2.71% 08/02/
CUPAUSY2.CM	Scrap #1 Copper 96-98% Idx	2.0275 -0.0398 -1.93% -0.1392 -6.42% 08/02/
CUPAUSY4.CM	Scrap #1 Insulated Copper Wire >85% Idx	1.1330 -0.0261 -2.25% -0.0794 -6.55% 08/02/
CUPAUSY5.CM	Scrap #3 Insulated Copper Wire 25-50% Id	0.3537 +0.0008 +0.23% +0.0410 +13.11% 08/02
CUPAUSY6.CM	Scrap #2 Copper 94-96% Idx	1.8436 -0.0400 -2.12% -0.1182 -6.03% 08/02/
CUPAUSY7,CM	Scrap #3 Copper - Light Copper Idx	1.6500 -0.0240 -1.43% -0.0429 -2.53% 08/02/
CUPAUSY74.CM	Scrap #2 Insulated Copper Wire 50-75% Id	0.5446 -0.0153 -2.73% -0.0549 -9.16% 08/02/
CUPAUSY91.CM	Scrap Electric Motor Idx	0.1265 +0.0065 +5.42% +0.0156 +14.07% 08/02/
FSPAUSY41,CM	Scrap #1 HMS Prepared Idx	6.5620 +0.1200 +1.86% -1.3607 -17.17% 08/02/
FSPAUSY42.CM	Scrap #1 HMS Unprepared Idx	4.3497 +0.0330 +0.76% +1.7841 -29.09% 08/02/
SPAUSY46,CM	Scrap Shredded Scrap Idx	
SPAUSY59.CM	Scrap Cast Iron Idx	
SPAUSY70,CM	Scrap Shredded Tin Idx	Marine - Land - Calabele - Land - Francesco - Andre - Richard - Land -
SPAUSY71,CM	Scrap Auto Cast Idx	
BPAUSY47.CM	Scrap Lead Wheel Weights Idx	The second s
BPAUSY48.CM	Scrap Soft Lead Idx	
BPAUSY86.CM	Scrap Auto Batteries Idx	and the first of the second
SPAUSY39.CM	Scrap 304 Stainless Steel Solid Idx	and a manage from broken and an an and a state of the sta
2NPAUSY50.CM	Scrap Old Zinc Die Cast Idx	0.2518 -0.0070 -2.70% +0.0087 +3.58% 08/02/1 0.3207 -0.0304 -8.66% -0.0863 -21.20% 08/02/1

In view of the above, this Board,

- Directs that the Authority selects an index from the above-mentioned list and through a clarification note <u>amends</u> article 26 clause 26.9, to dictate the index that will be applied for the revision of prices,
- ii) Directs that the tendering process be resumed.

Dr Anthony Cassar Chairman Dr Charles Cassar Member Mr Carmel Esposito Member

5 September 2019