

12 August 2022

The Director, Investigations 3
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

BY EMAIL:
Investigations3@adcommission.gov.au

Dear Director,

Continuation Inquiry No. 601 concerning Steel Reinforcing Bar exported from Greece, the Republic of Indonesia, Spain (by Nervacero S.A), Taiwan (by Power Steel Co. Ltd) and the Kingdom of Thailand

AUSTRALIAN INDUSTRY RESPONSE TO NERVACERO S.A EXPORTER QUESTIONNAIRE RESPONSE

InfraBuild (Newcastle) Pty Ltd (**InfraBuild**), the applicant for the continuation of the anti-dumping measures the subject of this inquiry, refers to the response to *Exporter Questionnaire* of Nervacero S.A,¹ and makes the following observations and comments.

Overall, InfraBuild considers that certain parts of the public record version of the exporter's questionnaire response fails to meet the standard required under subsection 269ZJ(2)² to the extent that information; claimed to be confidential; does not include a *...summary of that information... that contains sufficient detail to allow a reasonable understanding of the substance of the information...* under paragraph (a).

In this case, the exporter's failure to provide *sufficient detail*, is of considerable consequence and some prejudice to InfraBuild, as it feels unable to engage with respect to the exporter's claims concerning:

- date of sale; and
- adjustments for due allowance.

Understanding the exporter's claims concerning a date of sale other than the invoice date

In response to Question B-1.8(a), the exporter has nominated the *...[d]ate of sale is the date of proforma invoice...* as the date of sale for its exports to Australia. However, in response to Questions B-1.1(a) to (g), the exporter has provided no summary of the substance of its response. To understand whether there is any merit to the exporter's claimed date of sale, it is important to

¹ EPR Folio No. 601/008.

² All legislative references are to the *Customs Act 1901* unless otherwise stated.

understand elements of the ...*negotiation process* [para. (b)], ...*order placement process* [para. (c)], ...*order fulfilment process and lead time* [para. (d)], ...*delivery terms and process* [para. (e)], ...*Invoicing process* [para. (f)] and ...*payment terms and process* [para. (g)]. Some substance as to the order of events; not necessarily exact time frames or terms; permits InfraBuild to understand the merits of the claimed date of sale. Indeed, as the concept of the “proforma invoice” has no fixed or legal definition, some understanding of when in the process, this “document” is generated or issued is critical to an understanding of whether it is representative of the date of sale for exports to Australia.

Further, while addressing the importance (or otherwise) of the exporter’s “proforma invoice”, we find the exporter’s response to Question B-1.8(b) warrants further explanation. In relevant part, the exporter discloses that:

*The date of the proforma invoice is the date of the binding contract that sets out all main agreed conditions of the order such as price, tonnage, delivery conditions, delivery period, payment conditions. **If any of these conditions are not fulfilled by Nervacero, customers have the legal right to sue Nervacero for breach of contract.** (emphasis added)*

With respect, the suggestion that failure to fulfill the conditions of the proforma invoice amounts to a *breach of contract* is an assertion by the exporter, that warrants detailed examination by the Commission. We would consider that the exporter’s *Terms of Sale* should be requested and carefully reviewed – do they reference the proforma invoice at all? If not, we regret that the proforma invoice may simply constitute at law, an ‘invitation to treat/deal’ or colloquially, a ‘quote’. Such a view is also held by other commentators:

A proforma invoice is simply a quote prepared by the exporter to resemble a commercial invoice. An international sale often begins with a letter of inquiry from a potential buyer expressing interest in one or more of your products, outlining the terms of their interest and asking for an informal or formal quote.

...

The Commercial Invoice

Once the buyer and the seller agree upon the terms of the sale and the buyer has accepted the terms of the proforma invoice—usually by submitting a purchase order that the seller has accepted—the transaction is ready to proceed. When the goods are ready to ship, the seller issues a commercial invoice.³

Related to the question of determining the correct date of sale for comparison, we consider further substance of the exporter’s responses to Question D-1.1 are required.

³ <https://www.shippingsolutions.com/blog/proforma-vs-commercial-invoice> (accessed 10 August 2022)

Adjustments for due allowance

We observe that the exporter's responses to Questions E-1, E-3 and E-5, indicate an intention to claim certain adjustments be made to the normal value, primarily under subsection 269TAC(8). However, again, the exporter has provided insufficient detail to permit a reasonable understanding of the substance of the information redacted. Most egregious is the response to Question E-5 (other adjustment claims), where although there is a suggestion that something is being claimed, the response simply states:

[CONFIDENTIAL TEXT DELETED – explanation regarding different circumstances affecting domestic and export sales during the inquiry period]

Again, further substance of the responses to Question B-1 and D-1, will permit interested parties to engage meaningfully on the question of what if any of the adjustments should be made.

CONCLUSION

The exporter's response to *Questionnaire* is deficient, and needs to be revised so as to comply with subsection 269ZJ(2). We therefore request the Commissioner indicate to the exporter that either the information (to the extent that it is not confidential) be included in the public record, or that the exporter prepare a summary of the information for inclusion in that record under either subsection 269ZJ(5) or (6), as appropriate. In the event the exporter fails to comply with the Commissioner's request, we ask that the information supplied by the exporter in its response to questionnaire be disregarded, as permitted under those provisions.

Please do not hesitate to contact your InfraBuild Steel representative on record with any questions.

FOR AND ON BEHALF OF THE

AUSTRALIAN INDUSTRY APPLICANT