

PUBLIC CONTRACTS REVIEW BOARD

Case 1466 – CT 2265/2019 – Framework Agreement for the Supply of Ammunition to the Armed Forces of Malta (Lot 12)

The tender was published on the 18th September 2019 and the closing date of the tender was the 22nd October 2019. The estimated value of the tender (exclusive of VAT) was € 100,000 (Lot 12).

On the 18th June 2020 Companhia Brasileira de Cartuchos filed an appeal against the Armed Forces of Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid for Lot 12 was technically non-compliant. A deposit of € 500 was paid.

There were four (4) bidders.

On 29th July 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Companhia Brasileira de Cartuchos

Dr Rabih Nasser	Legal Representative
Mr Fernando Salm	Representative

Contracting Authority – Armed Forces of Malta

Major John Stroud	Chairperson Evaluation Committee
Lt Mark Philip Borg	Secretary Evaluation Committee
Captain Pasquale Papa	Member Evaluation Committee
Captain James Gauci	Member Evaluation Committee
Captain Joseph Tabone	Member Evaluation Committee
Col Melvin Haber	Representative
Major Keith Mizzi	Representative
WO Johann Miruzzi	Representative

Department of Contracts

Mr Nicholas Aquilina	Representative
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Preferred Bidder – Phoenix Group Ltd

Mr Stephen Petroni	Representative
Ms Ann Petroni	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He then invited submissions.

Mr Fernando Salm Representative of Companhia Brasileira de Cartuchos (CBC) said that the ammunition that his Company was offering is perfectly reliable and adequate for the use by the Armed Forces of Malta (AFM). The reason for the rejection of the offer was that the weapon manufacturer said that using CBC ammunition had caused reliability problems and that therefore their offer was not compliant. These allegations are refuted totally as CBC have no knowledge of any problems in the use of their ammunition which is extensive, since they supply many countries including NATO special forces which have been using the same weapons as the AFM for two years. In their efforts to overcome these unsubstantiated claims by a competitor CBC has offered to supply samples free of charge to enable AFM to test the ammunition. The claims by the AFM that CBC's ammunition was not reliable must be viewed with caution.

Major John Stroud Chairperson of the Evaluation Committee said that this was the first time that the AFM were ordering ammunition for their recently acquired rifles – they had contacted the rifle manufacturers about the use of CBC ammunition which as explained in their reply to the rejection letter had been advised that it was not reliable. They had relied on the information supplied by the rifle manufacturers to base their tender decision.

In reply to a question by the Chairman, Major Stroud replied that he was aware that the manufacturers of the rifles are also the providers of the selected ammunition.

Mr Marcelo Moreno called as a witness by Appellants testified on oath that he was the Research and Development Manager at CBC. The ammunition rejected by the Contracting Authority has been in use for almost eight years and millions of rounds have been produced since. They have been providing this ammunition to many end users including specialised forces. The Company is currently in discussions with NATO to adopt its use for militarised specialisation. The ammunition is totally manufactured by CBC in its own premises. The MCX rifle is a very demanding weapon and cannot use commercially made ammunition. There have been no complaints from a NATO country's special forces with whom CBC have very good working relations.

Mr Salm repeated the offer that his Company was prepared to provide samples and any references on a product which offered good value for money. They could guarantee manufacturing of ammunition to very stringent military standards as can be confirmed by NATO and American forces which all have positive results from its use and which ammunition is compatible with the rifle in use by the AFM.

The Chairman asked the Authority why the rifle manufacturer did not apply to supply ammunition in this tender. Major Stroud replied that they had not applied as the AFM wanted to establish compatibility with the rifles.

Mr Stephen Petroni Representative of the preferred bidder stated that he was the SAUR representative in Malta which company supplied the rifles and will now be supplying the ammunition. Two cartridge calibres had been offered in the tender and both have been awarded to his company. The supply of ammunition was coming from the same company as the rifle manufacturers.

Mr Moreno, in reply to a question from Mr Petroni, confirmed that CBC was in discussions with NATO regarding the standardisation of ammunition but no standards had yet been set.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Decision

This Board,

having noted this objection filed by Companhia Brasileira De Cartuchos (hereinafter referred to as the Appellants) on 18th June 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2265/2019 listed as case No. 1466 in the records of the Public Contracts Review Board awarded by the Armed Forces of Malta (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Rabih Nasser

Mr Fernando Salm

Appearing for the Contracting Authority: Major John Stroud

Appearing for the Department of Contracts: Mr Nicholas Aquilina

Appearing for the preferred bidder:

Mr Stephen Petroni

Whereby, the Appellants contend that:

- a) **Their offer was rejected by the Authority for the alleged perception that, their ammunition caused reliability problems when applied on Appellants' Rifle SIG MCX. In this regard, Appellants insist that, such an assumption is based only on the advice given by one of their competitors so that, the alleged fact is not only biased but also, intentionally misleading. It should also be noted that, the same type of ammunition is used by NATO Forces on the same type of weapon, as that of the Authority, and since then, they are not been made aware of any complaints as those being alleged by their competitor.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 30th June 2020 and its verbal submissions during the virtual hearing held on 29th July 2020, in that:

- a) **The Authority maintains that, it was imperative that, the ammunition which was to be procured was compatible with the rifle SIG MCX, presently being deployed by the Armed Forces of Malta. In this regard, after obtaining advice from the weapon manufacturer, the latter indicated that, there were instances where the reliability of the ammunition being offered by Appellants was questionable so that the Authority opted for the other competing offer.**

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

Mr Marcelo Moreno duly summoned by Companhia Brasileira De Cartuchos

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the technical witness, Mr Marcelo Moreno opines that, the only issue which merits consideration is the basic concept on which the Evaluation Committee decided upon the award of the tender.

- 1. This Board appreciates the fact that, in their deliberation, the Evaluation Committee took also into consideration the preservation of the present rifles being used by the Armed Forces of Malta so that, at the same instance, same Committee had to reassure themselves that, the ammunition being procured will be compatible with the present SIG MCX rifles and that such ammunition will be reliable and effective, in its performance without causing any possible damage to the rifles.**
- 2. In this particular case, there were two offers, one from Companhia Brasileira De Cartuchos and another offer from Phoenix Group Ltd, the latter being representative of ‘SAUR’ the arms (Rifle SIG MCX) manufacturer, which is also the preferred manufacturer of the ammunition being selected for the award.**
- 3. This Board also notes that, the Chairman of the Evaluation Committee did state that, the rifle manufacturer did not participate in this particular tender. At the same instance, through the submissions made by Mr Stephen Petroni, the Managing Director of Phoenix Group, it was**

established and confirmed that Phoenix Group are the agents for ‘SAUR’ the manufacturers of the SIG MCX rifles and also of the ammunition being recommended, so that, this Board only became aware of the actual situation through the preferred bidder’s submissions and not from the Authority, who should have replied in the affirmative when asked directly by the Board on this issue.

- 4. This Board deplors the fact that, the Evaluation Committee based their opinion on the reliability of the ammunition, on the unproven assumption of a competing bidder participating in the same tender. This definitely goes against the principle of transparency in Public Procurement and should never have been allowed to happen.**
- 5. At the same instance, the Evaluation Committee should have been diligent enough to realise that, no competitor in the business community would talk favourably on other competitors’ products. On the other hand, if the Authority wanted to obtain reassurance about the reliability of Appellants’ product, they should have obtained an opinion from users of same rifles with the same ammunition and not from a competitor which is also participating in the tender.**

In conclusion, this Board opines that,

- a) **The unproven assumption on which the Evaluation Committee based their adjudication in the award of the tender was incorrect, unproven and based on hearsay.**
- b) **The Evaluation Committee did not carry out the evaluation process in a transparent and level playing field manner.**
- c) **The Authority failed to disclose the manufacturer of the preferred bidder's product, instead opting to accept a local representative's offer without any further research.**
- d) **Public Procurement demands discipline, transparency and equal treatment and in this particular case, such basic principles in the expenditure of public funds were completely ignored by the Evaluation Committee.**
- e) **Opinions on the reliability of ammunition on a particular rifle being offered by a particular competing bidder should be obtained from an independent user of the same weapon and the same ammunition.**

In view of the above, this Board,

- i. **upholds Appellants' contentions,**
- ii. **Cancels the Contracting authority's decision in the award of the tender,**
- iii. **directs that a re-evaluation process of the offers be carried out by an Evaluation Committee differently composed.**

- iv. any opinions sought on the reliability of the ammunition should be obtained from users of such ammunition and not from competing manufacturers. At the same instance, such opinions received should be documented to form an integral part of the evaluation report.**
- v. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

4th August 2020