

PUBLIC CONTRACTS REVIEW BOARD

MF112/2020

Procurement of Card Services

Case 1539

DATE: 18th March 2021

Page | 1

This Board,

Having noted the Notice of Objection filed by Dr Clement Mifsud Bonnici and Dr Antoine Cremona on behalf of **Credorax Bank Limited**, (hereinafter referred to as the Appellant) and the contents of the correspondence received by the Board on the 24th December 2020.

Having also noted the contents of the joint letter of reply received by the Board on the 4th January 2021 and filed by Dr Daniel Inguanez on behalf of the **Ministry for Finance and Employment** as well as the **Director of Contracts**;

Having noted the reply sent by Dr Jonathan Thompson on behalf of the preferred bidder **Truevo Payments Limited**, received by the Board on the 8th January 2021;

Having taken cognisance and evaluated the evidence produced, all the acts and documentation filed, as well as the submissions made by the representatives of the parties.

Having noted and evaluated the minutes of the Board sitting of the 2nd March 2021 hereunder re-produced:

Case 1539 – MF112/2020 – Tender for Procurement of Card Services (Negotiated Procedure)

The tender was published on the 17th August 2020 and the closing date was the 22nd September 2020. The recommended contract value of the tender (exclusive of VAT) was €901,904.

On the 24th December 2020, Credorax Bank Ltd filed an appeal against the Ministry for Finance and Financial Services (subsequently known as the Ministry for Finance and Employment) as the Contracting Authority in terms of Regulation 270 of the Public Procurement Regulations

A deposit of €4,509.57 was paid.

There were four (4) bidders.

On 2nd March 2021 the Public Contracts Review Board composed of Dr Ian Spiteri Bailey as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Credorax Bank Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Antoine Cremona	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Charlon Scicluna	Representative

Contracting Authority – Ministry for Finance and Employment

Dr Ivan Sammut	Legal Representative
Dr Franco Agius	Legal Representative
Dr Daniel Inguanez	Legal Representative
Mr Noel Bezzina	Member Evaluation Committee
Ms Audrey Anne Callus Randich	Member Evaluation Committee
Ms Stephanie Grech Mallia	Member Evaluation Committee
Mr Carmel Saliba	Member Evaluation Committee
Mr Paul Micallef	Member Evaluation Committee
Mr Mario Bugeja	Representative
Mr Mark Sammut	Representative

Recommended Bidder – Truevo Payments Ltd

Dr Jonathan Thompson	Legal Representative
Mr Francesco Sultana	Representative

Ms Abigail Gauci
Mr Rob Lemmen

Representative
Representative

Dr Ian Spiteri Bailey Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board.

Page | 3

He mentioned that there was an issue with regard to the deposit originally requested by the Contracting Authority which has now been sorted and the position has been regularised.

Dr Clement Mifsud Bonnici Legal Representative for Credorax Bank Ltd (hereafter referred to as the Appellants) begged to disagree and stated that he will make submissions on this point later in the proceedings. The additional deposit requested has been paid under protest.

The Chairman stated that on the two preliminary pleas raised by the Contracting Authority the Board will first deal with the first exception for a preliminary decision to be delivered thereon and requested submissions on the claim that Appellants had no *locus standi* and juridical interest in this case.

Dr Franco Agius, Legal Representative for the Ministry for Finance and Employment (hereafter referred to as the Ministry) said that an invitation was issued to several parties to participate in a negotiated procedure. Appellants decided not to participate, and the Director of Contracts verified that this was not due to any failure on the part of the EPP system. The request by Appellants for cancellation of the procedure and the revocation of the tender award was not admissible as Appellants had no juridical interest – since the Appellant decided not to submit a bid they had no right of appeal. Article 270 of the Public Procurement Regulations (PPR) clearly states that the right of appeal is limited to a tenderer or bidder – in this case Appellant is neither and hence they have no interest in this call nor have they specified that they suffered any damages. In these circumstances Appellants are not entitled to request cancellation of the tender or to challenge the award decision.

If, alternatively, the appeal is being filed under Regulation 277 then it is invalid as no contract has, as yet, been signed but Appellants might be able to exercise that right if a contract were to be signed.

Dr Mifsud Bonnici stated that the Board should hear the appeal on both the preliminary point and the full claim but at this stage he will deal primarily with the preliminary objection. Regulation 270 has a very wide meaning allowing freedom to claim ‘*to any person having or having had an interest*’. European Directive 89/665 too lays down the principle of interest and harm present or future on a wide basis. Appellants have an interest despite the fact that they did not accept the terms of the tender. Harm is being suffered in their being prevented from applying for this tender to render the requested service. Credorax did not say that they did not want to participate but were aware of the PCRBR past rulings regarding restrictive elements on pre-contractual remedies. Reference was made to PCRBR Cases 1396 and 1416 both of which laid down the principle that once a bid was cast the bidder must have accepted the tender terms.

The precontractual remedy terms have changed since the MCSI vs Director of Contracts Appeal Court case quoted by the Authority, whilst Legal Notice 196/2020 changed the terms to the first two-thirds of the time period allocated in the call for competition. There is not much logic in depriving Credorax of an interest at this stage only for them to appeal again once the contract is signed as suggested by the Authority. Regulation 270 covers interest or harm suffered by an alleged infringement or decision taken and both the Director of Contracts and the Ministry are taking a very narrow view of the Regulation in their reply and on the face of it the negotiated procedure is illegal to the extent that the Ministry did not even reply to the points raised in Appellants' letter of objection.

Dr Antoine Cremona Legal Representative for the Appellants said that the Authority was mistaken in their view of what constitutes juridical interest. Under Regulation 270 the *locus standi* is not the traditional point recognised in Maltese law but is much wider in the wording used as it even covers an economic operator's interest lost through not bidding on a tender.

Dr Mifsud Bonnici then dealt with the matter of the deposit. The Ministry indicated the deposit as €400 subsequently increasing this to the actual amount paid. Appellants objected to this since once the Authority stated an amount there was a legitimate expectation that that was the figure to be paid. The European doctrine of legitimate expectation holds that one can rely on the Authority on specific issues. By their action the Authority waived their right to the added amount, they were not entitled to increase it and the additional amount requested should be refunded.

Dr Agius counter argued that the law on deposit is clear and there can be no exceptions. It also allows the PCRB to request correction of mistakes made by contracting authorities. The payment of the correct deposit is a matter of public order and there is a Court of Appeal case (Dondi vs Director of Contracts) supporting this fact.

Appellants are claiming that in 2020 the regulations regarding precontractual remedies changed; however, the Court of Appeal decision regarding the right of exercising a claim still stands. Article 262 of the PPR gives the right to anyone to exercise that right and an economic operator could use it to participate since a remedy is available if it was felt that the call to negotiate was illegal.

Dr Mifsud Bonnici suggested that the PCRB should direct that contracting authorities should ensure that they request the correct amount from the very start. It should be borne in mind that Regulation 262 states that a request for a remedy should be before the close of a call for competition.

Dr Jonathan Thompson Legal Representative for Truevo Payments Ltd stated that Regulation 262 covers concerns expressed at the earliest possible moment of a process and refers to prospective candidates and bidders. It transpires that Credorax tried to participate but encountered problems with the EPP system – it appears therefore that this present move is solely an attempt to alter the outcome of this process and to give them an opportunity of participating; once they opted not to participate Credorax cannot now change the outcome so instead they are requesting cancellation of the tender.

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

End of Minutes

Hereby resolves:

That this is a preliminary decision, which, in terms of the minutes above re-produced, is to decide the first preliminary plea submitted by the respondents to the Appeal, namely whether the appellant has the locus standi and necessary juridical interest to pursue with this appeal.

It transpires that towards the latter part of the year 2019, the respondent Ministry approached a number of economic operators for the provision of card services to the Government of Malta. In mid-August 2020, the appellant company was invited together with other economic operators, to participate in the Negotiated Procedure on ePPS. The tender submission deadline was set for the 22nd September 2020.

It furthermore results that the appellant did not submit its bid, and on the 17th December 2020, a recommendation of award notice was issued to Truevo Payment Limited, the recommended bidder. The financial offer of the bid was of EUR 901,914 excl VAT.

The appellant company felt aggrieved with this decision and lodged this appeal, claiming to have locus standi in terms of art. 270 of the PPR. It claims to have had and still has an interest in the procurement opportunity subject matter of the Negotiated Procedure. It also reserves the right to proceed in terms of Regulation 277 of the PPR as an interested party.

That the contracting authority, on the other hand, submits the appellant insists that in terms of art. 270 of the PPR it has the necessary locus standi and interest to file this appeal, but pleads that the appellant company failed to file an objection before the PCRB in terms of regulation 262 of the PPR, which was the remedy available before the closing date of the call.

From the submissions filed by either party, whereas the appellant company reserved the right to file proceedings in terms of Regulation 277 of the PPR, it seems there is consent that this procedure was filed in terms of Regulation 270 of the PPR.

Furthermore, the contracting authority refers to decisions by the Court of Appeal and argues that, once the appellant failed to make use of other remedies, such as that in terms of regulation 262 to challenge clauses of the tender and given that the

conditions of the tender have not been altered, then the appellant cannot claim his objection now to be beneficial to it, and it will not achieve an effective remedy.

The respondents furthermore claim that the appellant is not a candidate in the Negotiating Procedure de quo and hence, on the basis of Court Judgments cited (AIS Environmental Ltd), it cannot be said to have an interest in this procedure.

In respect of the “harm” element found in regulation 270 of the PPR, the respondents claim that the appellant failed to indicate how it can be harmed.

The appellant company rebuts these arguments, stating that “Regulation 270 has a very wide meaning allowing freedom to claim ‘*to any person having or having had an interest*’. It insists that the European Directive 89/665 too lays down the principle of interest and harm present or future on a wide basis. It claims to have an interest despite the fact that it did not accept the terms of the tender. The harm being suffered lies in being prevented from applying for this tender to render the requested service. Despite abstaining to participate in the process, the appellant company Credorax claims that it never said it did not want to participate.

The Board refers and notes:

Art. 1 para 3 of the European Directive 89/665 which states:

The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

Art. 270 of the PPR which states:

Within ten (10) calendar days following the date on which the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period, any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken, may file an appeal by means of an objection before the Review Board, which shall contain in a very clear manner the reasons for their complaints.

As explained in the Remedies Directive, the term ‘having or having had an interest’ is construed to mean any person who has submitted a request for participation or a tender.

Article 270 of Subsidiary Legislation 174.04 (LN 352/2016 as amended by LN 155/2017 and LN 26 of 2018)

Where the estimated value of the public contract meets or exceeds five thousand euro (€5,000) any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract, a rejection of a tender or a cancellation of a call for tender after the lapse of the publication period, may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints.

And Article 2 thereof which defines:

"candidate" means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership;

The Board, furthermore, refers to the **2015 LL.D. thesis by Dr Joseph Calleja¹**, and specifically to its title 2.1 entitled Locus Standi:

Article 1(3) of Directive 89/665/EEC and article 1(3) of Directive 92/13/EEC provide an indication to Member States on the admissibility requirements to whom the review procedure under the public procurement legislation should be available. These articles stipulate two criteria which are to be met cumulatively. Firstly, it should be available to any person having or having had an interest in obtaining a particular contract and secondly that such person has been or risks being harmed by an alleged infringement. Thus, one could note that the formal capacity of a tenderer or candidate is not required. (Christopher Bovis, EU public procurement law (Edward Elgar Publishing 2012) 222)

The Court of Justice of the European Union (CJEU) also made it clear that even though this article allows Member States to determine the detailed rules according to which they must make available the review procedures provided for in the Remedies Directives to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement, it does not authorise them to interpret the term interest in obtaining a public contract in a way which may limit the effectiveness of that directive. (C-470/99 Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH. I-11617 [12 December 2002] (CJEU) para 72; C-410/01 Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others v Autobahnenund Schnellstraßen-Finanzierungs-AG (Asfinag) I-06413 [19 June 2003] (CJEU) para34)

¹ A Critical Review of the Remedies Available Under the Domestic Public Procurement Regime in the Light of EU Developments

In this regard it could be said that the CJEU has adopted quite a liberal interpretation when it comes to admissibility for review proceedings. An important case in which the CJEU provided a definition of interest in obtaining a public contract, as a condition for locus standi under the Remedies Directives is the Grossmann case. (C-230/02 Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v Republik Österreich I01829 [12 February 2004] (CJEU))

This case concerned a preliminary ruling wherein the Austrian Court asked the CJEU whether Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if the economic operator did not participate in the award procedure for that contract. This claim was made on the ground that the economic operator was not in a position to supply all the services for which the bids were invited, due to allegedly discriminatory specifications in the 42 documents relating to the invitation to tender. Moreover, the economic operator in this case had failed to initiate review proceedings prior to the award of the contract. The Court replied that an aggrieved tenderer's interest in seeking review of a decision or an act of a contracting authority should not be prejudiced by the fact that such person did not participate in the award procedure for that contract because there were allegedly discriminatory specifications in the documents relating to the invitation to tender and did not seek review of those specifications before the contract was awarded.

The Court thus confirmed the existence of an interest in obtaining a contract even in the case when a bid is not submitted. In addition, one may further point out that this interpretation enables potential tenderers to initiate review proceedings whenever a contract has been awarded directly.

The Board thus considers:

That in terms of article 270, the law refers to “tenderer”, “candidate” and “any other person” as having or having had an interest or who has been harmed or risks being harmed.

Furthermore, the definition of the term “candidate” as an economic operator who has sought an invitation or has been invited to take part in a restricted procedure but does not require the actual submission of the tender or offer.

Moreover, as defined in Para 270 of the PPR, the term ‘*having or having had an interest*’ is construed to mean any person who has submitted a request for participation or a tender, and again, does not require that the tender or offer be submitted.

The Board also notes that the applicability of art. 270 of the PPR is not excluded with what art. 262 of the PPR dictates. Whereas the Board notes that the first request of the appellant company to this Board is that of revoking MFIN's decision to recommend the award of this Negotiated Procedures to the recommended bidder – definitely not a request which could in any way or by any stretch of imagination, be made in terms of art. 262 of the PPR. The request also affirms the juridical interest the appellant has in this procedure.

The Board finally notes that our laws and regulations are in line with the scope of the Directive as above explained and illustrated.

The Board is of the opinion that the appellant company therefore has the necessary locus standi and necessary juridical interest to file and pursue this appeal.

The Board,

Having evaluated all the above cannot but resolve to dismiss the preliminary plea raised by the respondents Ministry for Finance and Employment and the Director of Contracts in their reply dated 4th January 2021 and titled “Locus Standi and Juridical Interest”,

And puts off the appeal for continuation for the sitting of the 13 April 2021.

Ian Spiteri Bailey
Chair

Lawrence Ancilleri
Member

Carmel Esposito
Member