

PUBLIC CONTRACTS REVIEW BOARD

MF112/2020

Procurement of Card Services

Case 1540

DATE: 18th March 2021

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This Board,

Having noted the Notice of Objection filed by Dr Steven Decesare on behalf of **Bank of Valletta plc**, (hereinafter referred to as the Appellant) and the contents of the correspondence received by the Board on the 28th December 2020.

Having also noted the contents of the letter of reply received by the Board on the 8th January 2021 and filed by Dr Ivan Sammut and Ms. Vanessa Mangion on behalf of the **Ministry for Finance and Employment**;

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 noted the reply sent by Dr Clement Mifsud Bonnici and Dr Antoine Cremona on behalf of **Credorax Bank Limited**, received by the Board on the 14th 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 1540 – 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 28th December 2020 Bank of Valletta plc filed an appeal against the Ministry for Finance and Financial Services (subsequently known as the Ministry for Finance and Employment) as the Contracting Authority on the grounds that their bid was refused since it was not the cheapest offer.

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 – Bank of Valletta plc

Dr Steve Decesare	Legal Representative
Dr Katja Gatt	Legal Representative
Dr Lisa Abela	Legal Representative
Mr Kenneth Farrugia	Representative
Mr Franco Xuereb	Representative
Dr Stefan Grima	Representative
Mr Chris Degabriele	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	Representative
Mr Rob Lemmen	Representative

Interested Party – Credorax Bank Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Antoine Cremona	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Charlon Scicluna	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 which will deal with the preliminary plea regarding the admissibility of the appeal.

Dr Spiteri Bailey made it known to all parties that he does some private legal work in the Human Resources field for the Bank of Valletta (BOV) and wished therefore to find out if any of the parties objected to him hearing the case. After a short recess to enable the parties to consult, the Board was advised that there were no objections by any of the parties for Dr Ian Spiteri Bailey to continue serving on this Board in this case. The Chairman then invited submissions.

Dr Ivan Sammut, Legal Representative for the Ministry of Finance and Employment (hereafter referred to as the Ministry) stated that the appeal was inadmissible as action should have been taken beforehand under Article 262 of the Public Procurement Regulations (PPR). Appellants were aware of the terms of the tender which had been clarified through meetings and clarifications, as, for example, a clarification sent on the 4th September 2020 when Appellants were advised that the Contracting Authority (Authority) could not provide data on the volume of transactions anticipated. Appellants should have raised the queries on which they were now appealing before submitting their bid.

Dr Steve Decesare, Legal Representative for Bank of Valletta plc said that Article 262 gave a prospective bidder the right to challenge the specifications of a tender. In this case none of the grievances raised now were known prior to the Authority's letter of the 17th December 2020 and no proof has been provided by the said Authority that Appellants were able to raise their complaints any earlier. There was only one meeting with the Ministry held prior to the

publication of the tender and that dealt only with the fees charged to the Government by the Bank. There was no discussion on card services or indeed how the tender was to be evaluated. In any case the ‘informed assumptions and considerations’ could not have been known at the time that the bid was made.

BOV calculated the cost of the operation at nearly €1 million whilst the Evaluation Committee according to the formula used by them calculated the BOV cost at € 6 million – this clearly indicated the different basis of the two calculations. The card services were not split into lots which again made comparison of calculations difficult.

In line with Article 243 of the PPR the Authority had no option but to consider the possibility of an abnormally low bid and to request an explanation of costs. One only has to look at the offer by Truevo Payments Ltd and compare it to the BOV figure to realise the disparity in the calculation of costs whilst also bearing in mind that the latter has more experience in dealing with cash cards. A claim on an abnormally low tender can only be triggered after the tender decision is known, and therefore it is obvious that Appellants’ grievances are all based on information available after the 17th December 2020.

Dr Clement Mifsud Bonnici Legal Representative for Credorax Ltd said that he agreed with the submissions made by BOV that the grievances all arose after the determination of the tender. The Authority is bound and obliged not to change the terms of a tender halfway through the process. This is backed by CJEU decisions in Cases 331/04 and 226/09 confirming that criteria cannot be changed halfway through a 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 the admissibility or otherwise of the appeal submitted by Bank of Valletta plc.

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. 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 23rd September 2020, and the appellant company together with three other companies submitted their bid.

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 was notified on the same day and informed that its bid was not successful “*since the criteria for award for this tender was the cheapest priced offer satisfying the administrative and technical criteria*”.

The appellant company felt aggrieved with this decision and lodged this appeal in terms of the PPR regulations, requesting this Board to cancel and revoke the decision and order the contracting authority to re-evaluate the offers.

That the contracting authority, on the other hand, submits in its reply the appellant’s appeal is inadmissible for the reasons therein stated, primarily invoking regulation 262 of the PPR as the available remedy for the appellant company.

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 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*’. Furthermore it claims that “none of the grievances raised now were known prior to the Authority’s letter of the 17th December 2020 and no proof has been provided by the said Authority that Appellants were able to raise their complaints any earlier”.

This position was also endorsed by the interested party Credorax Bank Limited.

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 thus considers:

Its decision given today in case number 1539 in the acts of the Appeal filed by Credorax Bank Limited and in so far as applicable to this appeal, it refers to the reasoning of the Board therein made.

Most importantly, the Board notes that the applicability of art. 270 of the PPR in this appellate procedure 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 cancelling and revoking MFIN's decision to recommend the award to the recommended bidder, the Board deems that this definitely is 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 Board is of the opinion that the appellant company's appeal is therefore not inadmissible.

The Board,

Having evaluated all the above cannot but resolve to dismiss the preliminary plea raised by the respondent Ministry for Finance and Employment in their reply dated 5th January 2021 and titled "The Inadmissibility of the Appeal",

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

The Board's order in respect of the deposit paid by the appellant and whether that should be refunded or otherwise to the same appellant shall be reserved for the final decision.

Ian Spiteri Bailey
Chair

Lawrence Ancilleri
Member

Carmel Esposito
Member