

## PUBLIC CONTRACTS REVIEW BOARD

MF112/2020

Procurement of Card Services

Case 1541

DATE: 18<sup>th</sup> March 2021

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**This Board,**

Having noted the Notice of Objection filed by Dr Mario De Marco and Dr Clinton Calleja on behalf of **Global Payments Limited**, (hereinafter referred to as the Appellant) and the contents of the correspondence received by the Board on the 30<sup>th</sup> December 2020.

Having also noted the contents of the letter of reply received by the Board on the 8<sup>th</sup> 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 8<sup>th</sup> 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 14<sup>th</sup> 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 2<sup>nd</sup> March 2021 hereunder re-produced:

**Case 1541 – MF112/2020 – Tender for Procurement of Card Services (Negotiated Procedure)**

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

On the 30<sup>th</sup> December 2020 Global Payments 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 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 2<sup>nd</sup> 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 – Global Payments Ltd**

Dr Mario De Marco	Legal Representative
Dr Therese Comodini Cachia	Legal Representative
Dr Clinton Calleja	Legal Representative
Mr Adrian Cachia	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 Ivan Sammut, Legal Representative for the Ministry for Finance and Employment (the Ministry) said that Appellants grievance should have been raised at an earlier stage. Meetings had been held with Appellants to explain the methodology to be used in evaluating the tender and it had been explained to them that the data on the volume of transactions could not be specified. Further, clarifications had been issued and if any doubts still existed on the part of the Appellants they should have been raised before they placed their bid. The same methodology was used in evaluating all bids and reference was made to the MCSI case in support of the claim that a bidder forfeits the right to challenge a tender if they failed to seek a precontractual remedy.

Dr Mario De Marco, Legal Representative for Global Payments Ltd stated that he disagreed completely with the statements made. The condition of a tender and any related clarifications cannot be changed. In this case the basis of the tender was the price as stated in Clause 6.1 and the subsequent technical and administrative terms. Any earlier meetings and the later ‘assumptions and considerations’ are not the basis for evaluating the tender.

Section 4 of the tender details the basis for submitting the financial offer yet after the closing date unknown computing ‘assumptions and considerations’ were introduced in evaluating the bids. No one has the least idea of how these assumptions were arrived at.

Articles 38 and 39 of the Public Procurement Regulations (PPR) clearly emphasise the need for clarity and lack of ambiguity in tender instructions and the requirement for the Contracting Authority to deal with economic operators equally and fairly.

Any reference made by the Authority regarding prior doubts about the terms of the tender, under Article 262 of the PPR are misleading as the assumptions made in the evaluation process did not form part of the tender and it is self-evident that one cannot ask for a remedy on something that did not exist as it was not part of the tender. The appeal is precisely on this point.

Dr Therese Comodini Cachia stated that an appeal can be made before or after the award of a tender. This appeal is based on Article 270, since although the tender is clear new criteria were introduced after its close. In their letter of reply (page 9 para 30D) the Authority confirm that the assumptions could not be made public thus admitting that the criteria could not be declared, contrary to the principle of open competition and the only recourse available to bidders to discover what these new criteria were was through an appeal.

Dr Clement Mifsud Bonnici Legal Representative for Credorax Ltd said that all the points raised dealt with what happened after the close of the tender. There was no disclosure of information on the evaluation criteria used by the Evaluation Committee. He referred to CJEU C331/04 dealing with the importance of treating all operators equally.

Dr Franco Agius Legal Representative for the Ministry for Finance and Employment said that one must draw a distinction between the call and the evaluation process – if the call was correct it should not affect the subsequent proceedings.

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

End of Minutes

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### **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 Global Payments Limited.

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 22<sup>nd</sup> September 2020, and the appellant company together with three other companies submitted their bid.

On the 17<sup>th</sup> 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 declare that the process by which tender reference number MF112/2020 was determined is vitiated and consequently null and void.

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. The contracting authority further states that the present appeal relate exclusively to matters which existed before closing date of the call for competition.

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 any person having or having had an interest*’ to put forward an appeal. Furthermore, it claims that the appeal was filed at this stage because the award decision was based on assumptions unknown to the appellant at any stage before the close date even though it should have been the case that all information would be found in the tender document. The appellant company stated that it couldn’t appeal before on matters which were not known and which became known only upon the award.

This position was also endorsed by the interested party Credorax Bank Limited. Dr Mifsud Bonnici on behalf of Credorax Bank Limited referred to **ECJ Case 331/04** (the ATI EAC Srl e Viaggi di Maio Snc case), which states:

Article 36 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and Article 34 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:

- does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;
- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;
- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

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.

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**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 request of the appellant company to this Board is that of declaring that the process by which tender reference number MF 112/2020 was determined is vitiated and consequently null and void, 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 7<sup>th</sup> January 2021 and received by the Board on the 8<sup>th</sup> 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