

PUBLIC CONTRACTS REVIEW BOARD

Case 1540 – MF112/2020 – Procurement of Card Services

23rd May 2022

The Board,

Having noted the letter of objection filed by Dr Steven Decesare on behalf of Camilleri Preziosi Advocates acting for and on behalf of Bank of Valletta Limited, (hereinafter referred to as the appellant) filed on the 28th December 2020;

Having also noted the letter of reply filed by Ms Vanessa Mangion and Dr Ivan Sammut acting for Ministry for Finance and Employment (hereinafter referred to as the Contracting Authority) filed on the 6th January 2021;

Having also noted the letter of reply filed by Dr Jonathan Thompson acting for Truevo Payments Ltd (hereinafter referred to as the Preferred Bidder) filed on the 8th January 2021;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici, Dr Antoine Cremona and Dr Calvin Calleja on behalf of Ganado Advocates acting for Credorax Bank Limited (hereinafter referred to as the Interested Party) filed on the 14th January 2021;

Having heard and evaluated the testimony of the witness Mr Mario Bugeja (Representative of Ministry for Finance and Employment) as summoned by Dr Steven Decesare acting for Bank of Valletta Limited;

Having heard and evaluated the testimony of the witness Mr Noel Bezzina (Member of the Evaluation Committee) as summoned by Dr Ivan Sammut acting for the Ministry for Finance and Employment;

Having heard and evaluated the testimony of the witness Mr Carmel Saliba (Member of the Evaluation Committee) as summoned by Dr Steven Decesare acting for Bank of Valletta Limited;

Having heard and evaluated the testimony of the witness Mr Franco Xuereb (Representative of Bank of Valletta Limited) as summoned by Dr Steven Decesare acting for Bank of Valletta Limited;

Having heard and evaluated the testimony of the witness Mr John Baylis (Representative of Global Payments Limited) as summoned by Dr Mario de Marco acting for Global Payments Limited;

Having heard and evaluated the testimony of the witness Mr Rob Lemmen (Representative of Truevo Payments Ltd) as summoned by Dr Jonathan Thompson acting for Truevo Payments Ltd;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sittings of the 2nd March 2021, 23rd September 2021, 12th October 2021, 2nd November 2021, 19th November 2021 and 23rd November 2021 hereunder-reproduced;

Minutes

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 had done 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. 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

SECOND HEARING

On 23rd September 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider further submissions on this objection.

The attendance for this public hearing was as follows:

Appellants – Bank of Valletta Ltd

Dr Steve Decesare	Legal Representative
Dr Katja Gatt	Legal Representative
Mr Franco Xuereb	Representative

Contracting Authority – Ministry for Finance and Employment

Dr Ivan Sammut	Legal Representative
Dr Franco Agius	Legal Representative
Mr Mario Bugeja	Representative
Ms Vanessa Mangion	Representative
Mr Noel Bezzina	Member Evaluation Committee
Ms Audrey Anne Callus Randich	Member Evaluation Committee
Mr Paul Micallef	Member Evaluation Committee
Mr Carmel Saliba	Member Evaluation Committee

Preferred Bidder – Truevo Payments Ltd

Dr Jonathan Thompson	Legal Representative
Ms Abigail Gauci	Representative
Mr Rob Lemmen	Representative

Observer – Credorax Bank Ltd

Dr Clement Mifsud Bonnici	Legal Representative
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Mr Kenneth Swain 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. He then went on to state that this Board is of a quasi-judicial nature and is now composed differently

from the time the case was first heard, as Dr Spiteri Bailey has since been appointed a judge of our Courts. Due to this change in the Board, the Chairman asked whether the parties wish to exercise their right to have the Case reheard from the beginning by hearing submissions on the preliminary pleas.

Dr Steve Decesare Legal Representative for Bank of Valletta stated that the appeals of three bidders had been heard in the first case. One case was decided by the Court of Appeal, and since no other appeals had been made to the Court the other parties' cases had been decided. He noted that in the Appeal Court no objections had been raised against the decision, but simply legal arguments had been put forward and these cannot be overturned.

Dr Ivan Sammut Legal Representative for the Ministry for Finance and Employment said that the Contracting Authority remitted itself to the decision of the Board.

Dr Clement Mifsud Bonnici Legal Representative for Credorax Bank Ltd pointed out that his clients were an interested party in this Case, which point was rebutted by Dr Sammut who stated that the Authority had filed an Application for the removal of Credorax from the proceedings.

The Chairman said that Credorax had been admitted to this hearing as a member of the public not as an interested party following the Court of Appeal decision that they had no judicial interest in these cases.

Dr Mifsud Bonnici said that such decision is in breach of procedural rights of Credorax. His clients had not been served with the Application referred to and have not been given an opportunity to make representations thereon. The decision of the Court of Appeal relates to Credorax and does not affect the other two cases which were not appealed and are therefore '*res judicata*' – this includes Credorax interest as an interested party.

Dr Mifsud Bonnici requested the Board to reconsider its decision and allow Credorax to make submissions and cross-examine witnesses. If this request is rejected his clients reserve their position and appropriate action will be taken as their rights have been breached.

Dr Jonathan Thompson Legal Representative for Truevo Payments Ltd stated that his clients were not aware of the application by the Authority. As regard the preliminary plea this had been decided by the Court and they abided by this decision.

After a short recess the Chairman said that regarding the preliminary pleas the Board has taken note of the legal representations made and therefore the case will proceed to be decided on its merits. However, the Board has also been made aware that the Application presented by the Contracting Authority has for some unknown reason not yet reached Credorax Bank. This shortcoming will be dealt with and remedied as soon as possible. To this effect Credorax will be given seven (7) calendar days from the date of receipt to file their reply accordingly. Submissions made by Credorax will in return be circulated to all interested parties appearing before this Board.

The Chairman thanked the parties for their submissions and said that the Case will be deferred to a later date which will be communicated to all parties in due course.

End of Minutes

THIRD HEARING

On 12th October 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider further submissions on this objection.

The attendance for this public hearing was as follows:

Appellants – Bank of Valletta Ltd

Dr Steve Decesare	Legal Representative
Dr Katya Gatt	Legal Representative
Mr Franco Xuereb	Representative
Mr Chris Degabriele	Representative

Contracting Authority – Ministry for Finance and Employment

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

Preferred Bidder – Truevo Payments Ltd

Dr Jonathan Thompson	Legal Representative
Ms Abigail Gauci	Representative
Mr Rob Lemmen	Representative
Mr Francesco Sultana	Representative

Observer subsequently Interested Party – Credorax Bank Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative

Mr Kenneth Swain 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. Prior to inviting submissions he stated that as previously agreed the case will now be heard on its merits. He made reference to the Application presented by the Contracting Authority on the 17th September requesting the Board to remove Credorax Bank from this case, to exclude them from further participating and to expunge all submissions made by them from the records of this Case. Replies filed by Appellant, the preferred bidder and Credorax on this point have been noted. The Court of Appeal in the Case Truevo vs Director of Contracts, Ministry for Finance and Credorax on the 30th June 2021 had stated that Credorax has an interest but it deemed that their specific arguments should have been dealt with under Public Procurement Regulations 262 which had not been done. The Board

will therefore allow Credorax to remain as an interested party in these proceedings but will not allow it to raise matters which fall under the scope of Regulation 262 but only those that are within the scope of Regulation 270 of the PPR.

Dr Decesare said that he wished to call a witness from the Contracting Authority to testify on the matter of the value of the deposit.

Mr Mario Bugeja (515974M) testified on oath that he was an employee at the Ministry for Finance and his role was to facilitate the publishing of the tender. The question of the value of the deposit was tackled at the time that the appeal was filed and was established in line with figures supplied by the Permanent Secretary at the Ministry. Originally a deposit of the minimum of € 400 was requested as no estimate of value was set in the tender. Subsequently this was revised according to the actual value estimate provided. Referred to the actual Public Procurement Regulations regarding deposits witness stated that he was not familiar with such provisions - neither was he aware that the PCRБ had asked for additional amount of deposit. The instructions to increase the figure had come from the Permanent Secretary and the PCRБ acted accordingly. From memory the witness could not recall the date when this document was issued.

Dr Sammut intervened to point out that the document was issued on the 18th February 2020 and the value was established at € 1.5 million.

Mr Noel Bezzina (332184M) called as a witness by the Contracting Authority testified on oath that he is an Accountant by profession currently working for the Government and was part of the Evaluation Committee. He stated that coming up with an estimate on the value of the tender was virtually impossible and therefore an assessed volume was given to the bidders having had previously been given preliminary rates and volume – so the estimate was based on the lowest rate they could offer. The volume was worked out on the basis of three highest use entities (notably Commissioner for Revenue and ARMS) and worked on the potential card transactions and the volume circulated to all bidders as at December 2018. At the clarification stage the volume was revised based on the December 2019 figures. The Authority used the volume multiplied by the rate assumption for all card schemes for all three cards for all users.

Witness said that throughout the process the Evaluation Committee had technical advice from the Central Bank of Malta (CBM) and they based their calculations on the Bank's input on card payments. The assumptions provided were converted into numbers and these assumptions were necessary to have a common denominator. A change of figures between the different categories of cards would not alter which bid would be successful. There were, according to the witness, 24 different types of cards split into two categories and five assumption, namely the volume circulated to bidders, number of Points of Sale (POS) included in the tender and three market conditions. The focus was mainly on the five cards mostly in use – MasterCard Debit and Credit; Visa Debit and Credit and Visa SEPA Debit since these were used in the vast majority of local transactions. Number of cards in circulation was estimated at 100,000 cards. Other cards were not included as the numbers were small and would have made no difference in the weighting. Visa brand was in use in 90% and MasterCard in 10% of all transactions, with credit cards being used in 25% and Debit cards in 75% of transactions. POS volume, according to the witness is disclosed in page 11 of the tender with figures distributed at clarification stage to all market players.

The Authority always stated that the volumes indicated were assumptions and were discussed at the preliminary stage with the bidders: further witness confirmed that the prospective bidders were advised that the Ministry wanted to go ahead in issuing the tender on those assumptions. The volumes were created as bidders themselves requested them, to enable them to come up with the rates to be charged but the witness could not recall the volume figures included in the tender. On being referred to the spreadsheet prepared by the Ministry regarding the split in the number of transactions (according to the mentioned assumptions) witness stated that the split between the potential users was not disclosed to bidders – the Authority used it as a baseline which applied to, and was the same to all bidders. Bidders were aware of the percentage use of cards between say MasterCard or Visa and the potential volumes were known; however the split was not known although the bidders had enough market knowledge to know how the split worked out.

For each category the volume was not stated in the tender but the figures were based on the number of transactions not on value. This was explained further by the witness indicating that the calculation was based on the average transaction value multiplied by the number of transactions in that category multiplied by the rate offered by bidder. The mathematical calculations in comparing bids made no difference between the offers as the rates did not change. The Authority focussed on five rates based on what cards the CBM considers to be mainly used in Malta and the percentage use of the different cards. The Ministry's calculations included weighting according to the type of cards and their use with percentages of use being as given by the CBM.

The tender dealt with the potential shift to the use of cards from cash or cheques and bidders were already familiar with the percentage card use through their market knowledge. Witness confirmed that although the tender stated the list of cards one could tender for, there was no obligation to bid for all cards; however if a bidder failed to submit an offer for VISA it would render the exercise useless since this card was the one mainly in use and for this reason the bidder would be excluded. It was not specifically stated in the tender that cards other than those mentioned had to be included but it was assumed that the bidders knew which the cards mainly in use were and also that the winning bidder would be awarded all four card schemes and which could not have been broken into lots. The whole exercise would have been useless if both MasterCard and Visa had been excluded. Witness said that in the case of the Bank of Valletta's bid the rate for the five cards for EPOS and online transactions happened to be the same.

In reply to a question from Dr Thompson witness confirmed that the assumptions made were applied in the same way for all the bidders. Dr Thompson reserved his right to cross exam witness at a later stage.

Questioned by Dr Mifsud Bonnici witness stated that the document on assumptions to which he referred was for his personal use and had been prepared a couple of weeks before in readiness for this hearing. The assumptions referred to were established by the Evaluation Committee at the evaluation phase after the closing date of the tender and after all bids had been received. At evaluation stage transactions were combined and taken as one but it was not specified as so in the tender. The data referred to was not indicated in the tender dossier but given in the clarification. Witness stated that he was not aware why the 2019 figures were not included in the tender. The Evaluation Committee had not been advised that the figures and volumes were not to be divulged to the bidders. Witness could not recall the date when he was appointed as an evaluator in this tender – at Dr Mifsud Bonnici's request he listed the names of the members of the Evaluation Committee. Asked if the evaluators had considered the possibility of any abnormally low bids, witness said that

the CBM representative on the Committee had advised them that there were no low offers. He went on to explain that the CBM representative assured the Committee that the Truevo offer was lower than the estimate as the operator has an operation structure enabling them to offer a figure lower than the estimate and which was not deemed to be abnormally low.

In reply to a question by Dr Decesare witness said the decision about low offers was based solely on what the CBM member said and not on an assessment of the bid.

Further questioned by Dr Mifsud Bonnici witness agreed that the tender did not state that all potential transactions were included and said that the assumptions used followed what the evaluators considered reasonable advice by the CBM on this point – witness personally did not know if this was a fact.

In reply to Dr Thompson witness stated that the mention of the 1.5 million estimate was used merely as a bearing of cost in the evaluation. He re-iterated that the evaluators definitely did not feel the need to query if the bid was abnormally low once reassured otherwise by the CBM representative.

Dr Sammut proposed that instead of hearing witnesses the Board should consider the submission of affidavits. This proposal was objected to by the other parties since it is not allowed whilst a hearing is in progress and after the some witnesses had already testified. The Chairman said that the Board will proceed with hearing witnesses.

The Chairman thanked the parties for their submissions and declared the hearing deferred to the 2nd November 2021 at 9.00am.

End of Minutes

FOURTH HEARING

On 2nd November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider further submissions on this objection.

The attendance for this public hearing was as follows:

Appellants – Bank of Valletta Ltd

Dr Steve Decesare	Legal Representative
Mr Franco Xuereb	Representative
Mr Chris Degabriele	Representative

Appellants (Case 1541) – Global Payments Ltd

Dr Mario De Marco	Legal Representative
Dr Clinton Calleja	Legal Representative
Mr Adrian Cachia	Representative

Contracting Authority – Ministry for Finance and Employment

Dr Ivan Sammut	Legal Representative
Mr Noel Bezzina	Member Evaluation Committee
Ms Audrey Anne Callus Randich	Member Evaluation Committee
Mr Carmel Saliba	Member Evaluation Committee

Preferred Bidder – Truevo Payments Ltd

Dr Jonathan Thompson	Legal Representative
Ms Abigail Gauci	Representative
Mr Rob Lemmen	Representative

Interested Party – Credorax Bank Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative

Mr Kenneth Swain 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. He also noted that as agreed the testimonies in both Cases 1540 and 1541 will be combined and then invited the parties to proceed.

Dr Thompson said that he had not been provided with a transcript of Mr Adrian Cachia's testimony according to the normal procedure followed in the Courts.

The Chairman pointed out that in accordance with PPR 90 (2) the Board has the power to determine the procedure for the hearings and the procedure is that it does not issue transcripts during the course of a hearing. No request had been made at previous hearing or in the interim with an exception being made in the case of Dr Demarco who had not had the opportunity of being present during the testimony of Mr Bezzina.

The Board directed that the hearing is to proceed.

Dr De Marco said that apart from the cross examination of Mr Cachia there are several other witnesses to be heard. To expedite matters he suggested that the transcript of Mr Cachia's testimony is sent to Dr Thompson to enable him to cross examine witness at a later sitting.

The Chairman said that the hearing of witnesses should proceed.

Mr Noel Bezzina (332184M) recalled to be cross examined under oath by Dr De Marco said that the preliminary meeting about this tender with all five parties was held sometime between early summer and September 2019 followed by individual meetings. The meetings were not 'just about discussing volumes' – it was at bidders' request that the volumes were given. The main point of the joint meeting was to explain to the interested parties what the Ministry had in mind regarding this tender. The CBM advised the Ministry which parties to approach namely; Credorax Bank, Acquiring.com, Global Payments, Bank of Valletta and Truevo Payments and later added the VISA representative. The meetings were not minuted and the one, or at the most two, meetings with the individual parties were

to enable them to present their submissions – the volumes were given as a consequence of a request at the first meeting. The 2018 volumes were sent to the parties by e-mail with the December 2019 figures submitted by way of a clarification.

Asked to point out the difference between the two sets of figures witness said that the 2018 figures were not to hand but could be provided later; however there were no significant difference between the figures. It was difficult to come up with a figure of what the cost of the system would be – the 1.5 million Euro annual cost was an assumption and the highest figure that the Government expected to pay. The formula to reach the possible expenditure of 1.5million took different elements of likely users' average transactions multiplied by the number of transactions multiplied by card used and multiplied by weighting. All bids were worked on this basis.

Witness confirmed that the estimate to assess volumes was based on three entities– the IRD, VAT and ARMS chosen as they were the biggest three entities covering 80% of the Government revenue. Asked to produce the working on this formula witness said that he needed a few minutes to locate the figures in his records on his computer as they had been archived.

The Chairman proposed a short recess to enable Mr Bezzina to retrieve the figures.

After resumption of the hearing Mr Bezzina advised the Board that the 2018 figures had been circulated by e-mail and that the formula workings that he is producing are based on the rates of one of the bidders.

Following a complaint from Dr Sammut that the information in the formula was commercially sensitive a discussion ensued on how much of the formula should be made available.

Dr De Marco then proposed that since two formulae were used - a pre-evaluation and an evaluation one both should be produced omitting the rates hence removing the commercially sensitive part.

Dr De Marco proceeded with the cross examination. Witness stated that no distinction was made in the calculations between EPOS and online transactions as the data was not refined enough – the same volumes were used for both transactions since the Authority was not after precise figures of how much it will cost. Witness agreed that page 10 of the tender distinguished between EPOS and online transactions but the evaluators did not make such a distinction since the object was to compare figures so the volumes which were not relevant were kept constant using different rates.

At this stage Dr De Marco illustrated by a mathematical example how if you changed the equal assumptions on volume between EPOS and online transactions one would get a completely different result to the Authority's assumptions.

Witness agreed that if EPOS and online transactions were calculate singly rather than combined then once the volumes shifted one got a different result and therefore the volumes were relevant. Bidders gave bids with different split elements and therefore it was impossible to come up with the right figures unless the assumptions were known. Witness said that he was not the right person to answer if the negotiated procedure chosen for this tender was the correct procurement procedure.

Five assumptions were chosen for the formula, according to the witness – volumes, number of Points of Sale (POS), the five types of cards mentioned earlier focussing only on consumer cards, that VISA

covered 90% and MasterCard 10% of transactions and that 75% of the users utilised debit cards and 25% credit cards. Exact figures could not be provided so the 2018 and 2019 figures were supplied and this data taken for calculation purposes. There was nothing specific in the tender regarding these assumptions. The information used in the tables in the tender for the card schemes was provided by the CBM who advised that the five columns will cover all the necessary information – however witness agreed that the formula was not refined enough to cover all the earlier mentioned categories.

Questioned by Dr Decesare witness stated that each bidder was told that there were other parties involved in the negotiations and the rates had been given to all bidders. At the two meetings held with the Bank of Valletta they were not told, as such, that these were preliminary market consultations, whilst in the second meeting the rates were discussed. When reference was made in correspondence to including Malta Post, the Permanent Secretary, according to the witness made it clear that the Government wanted all departments included, although there is no written confirmation of this. The volumes were known to bidders and as they had knowledge of the market they were aware of the split; however witness agreed that this knowledge indicated a different split to the parity adopted by the Authority for EPOS and online. The average transaction value was provided by the entities and merely entered in column (f) of the formula. The figures provided were applied for both types of transactions. Witness outlined the makeup of the typical fee charged by bidders for EPOS transactions and a bidder could offer all three charges in a blended rate with capping. [Dr Decesare quoted examples of these rates to the witness]. The indication of values were not included in the tender but in a separate sheet sent to bidders and the transaction values were taken without differentiating between the different cards. Clause 3 indicated that the tender is not split into lots as the Authority wanted one winner for all cards – if different rates had been given for online and EPOS the tender would still have been awarded to one bidder.

In reply to a question from Dr Thompson witness stated that both in relation to EPOS and online transactions the best rates came from the same bidder.

After a short recess further testimonies were heard.

Mr Carmel Saliba (329762M) called as a witness by Appellant testified oath that he has managed a Unit at the Central Bank of Malta since 2017 and was member of the Evaluation Committee on technical aspects. He agreed that certain assumptions were made in this tender, three of which were provided by the CBM: namely the type of main cards used; that the majority of clients will use domestic cards in a 75/25% ratio; that co-branded VISA is used in 90% and MasterCard in 10% of transactions. This information is available on websites. The type of cards in use is market knowledge not data based information, whilst international cards were included as they have some use impact. Cashlink was not considered as it would hinder competition – this assumption was not disclosed to bidders.

Witness stated that the assessments would not be the same if the percentages were different as well as the transaction values could change. He was not always present at meetings with the bidders but may have attended one meeting with BOV and possibly another particular meeting but does not recall the discussions. He stated that he is not *au fait* with the regulations regarding abnormally low tenders. Truevo themselves stated that their offer was better for two reasons – their focusing on e-commerce and by offering an unblended rate i.e. the rates negotiated by the Ministry would apply. There was no investigation as to why the Truevo offer was low but from examination of the submissions by him and another member of the Evaluation Committee they did not feel that the bid was low bearing in

mind the knowledge that bidder focussed on e-commerce. It was obvious from the submissions that BOV had a higher operational structure, although the Committee were not aware of what the structure was nor did they seek any information. This view was formed by examining the fees quoted and which led the Committee to deduce why certain costs were higher than others.

According to the witness he was not aware of the Ministry's requirement that the CBM wants BOV to open up the Cashlink to other acquirers. If BOV was awarded the contract they would be at an advantage because of Cashlink which is limited to them unless it was co-branded with VISA.

Questioned by Dr De Marco witness testified that he could not recall how many meetings he attended with Global Payments or what information was given out as no minutes were taken. He confirmed that the information data was obtained from the IRD, VAT and ARMS direct and that the CBM assisted the Ministry in the technical assessment of the offers. Witness could not recall if a formal request was made regarding abnormally low tenders – he had informal discussions with Mr Bezzina on this point not as a CBM representative nor could he recall if there was any reference on low tenders to the CBM. He relied on his personal assessment and on the background knowledge of the proposal of the preferred bidder. From the information available one could not say if the bid was cheaper than that of Global Payments but from experience he knew that Truevo is new to the market and smaller so had lower expenses – this was obvious from the documents supplied but agreed that they would have to expand to meet the tender award.

In reply to a question from Dr Thompson witness said that on the information quoted he was satisfied that the bid was not abnormally low.

Questioned by Dr Sammut witness stated that even at the earlier quoted figure of 1.2million he does not consider the bid as abnormally low but reasonable.

Questioned by Dr Mifsud Bonnici witness said that without the three assumptions mentioned in the tender it would be difficult to evaluate the bids. The assumptions were discussed at the initial meetings but not cast in stone till the evaluation stage but were not included in the tender nor disclosed. Mr Bezzina asked witness to consider and make enquiries if the bid was abnormally low. The Truevo operating structure knowledge is what is in the public domain but was also quoted in a short resume as background information by the bidder in the tender bid.

Witness agreed that he contacted Mr Kirsten Ellul at the CBM who was neither a consultant nor a member of the Evaluation Committee regarding abnormally low tenders. Witness stated that he was involved in evaluating some CBM tenders regarding haulage contracts in 2004 or 2006.

Questioned by Dr Sammut witness said that Mr Ellul was consulted as an expert.

In reply to a question by Dr De Marco witness stated that he was not involved in the creation of the formula set up to determine the cheapest bid; this was created by Mr Bezzina and explained to witness.

In reply to a final question from Dr Mifsud Bonnici witness said that he consulted Mr Ellul as the latter had the necessary expertise in the field of fees.

The Chairman said that regarding the requests made for copy of the transcripts of witnesses the Board would allow it in this case although this was not normal procedure since as a matter of principle the PCRB does not issue transcripts in the course of a hearing.

He then thanked the parties for their submissions and declared the meeting deferred to the 19th November at 9.00am.

End of Minutes of fourth hearing

Fifth Hearing

On 19th November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider further submissions on this objection.

The attendance for this public hearing was as follows:

Appellants – Bank of Valletta Ltd

Dr Steve Decesare	Legal Representative
Dr Katya Gatt	Legal Representative
Mr Franco Xuereb	Representative
Mr Chris Degabriele	Representative

Appellants (Case 1541) – Global Payments Ltd

Dr Mario De Marco	Legal Representative
Dr Clinton Calleja	Legal Representative
Mr Adrian Cachia	Representative
Mr John Baylis	Representative

Contracting Authority – Ministry for Finance and Employment

Dr Ivan Sammut	Legal Representative
Mr Noel Bezzina	Member Evaluation Committee
Ms Audrey Anne Callus Randich	Member Evaluation Committee
Mr Carmel Saliba	Member Evaluation Committee
Mr Mario Bugeja	Representative
Mr Mark Sammut	Representative

Preferred Bidder – Truevo Payments Ltd

Dr Jonathan Thompson	Legal Representative
Ms Abigail Gauci	Representative
Mr Rob Lemmen	Representative

Interested Party – Credorax Bank Ltd

Dr Clement Mifsud Bonnici
Dr Calvin Calleja

Legal Representative
Legal Representative

Mr Kenneth Swain 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. He also noted that as agreed the testimonies in both Cases 1540 and 1541 will be combined and then invited the parties to proceed.

Mr Noel Bezzina, recalled to testify under oath, in reply to questions by Dr Decesare stated that Cashlink cards had been disregarded in the financial evaluation for two reasons – according to the testimony of Mr Saliba their volume was insignificant and because the CBM representative informed the Ministry that they could only be used on BOV EPOS machines and that made them uncompetitive. With regard to the spreadsheets presented at an earlier hearing, witness said that these were prepared in October 2019 to estimate the value whilst the evaluation spreadsheet was done one year later – both were prepared after the meetings with the prospective bidders. The estimate spreadsheet took into consideration only two cards, credit and debit domestic, with preliminary rates, cost of each bidder and an average was struck.

According to the witness there were five preliminary bids; the Ministry ignored the most expensive one and took the ‘middle offer’ from the remaining offers with a 75/25% ratio assumption on the use of cards to arrive at the total values between VISA credit and VISA debit. He was not sure if the assumptions had been disclosed to prospective bidders as it was assumed that they would be familiar with them. In the second spreadsheet the 2019 data was incorporated and it was more complex as five different cards schemes were included – split between MasterCard 10% (7 debit/3 credit) and VISA 90% (22.5 credit domestic 67.5 debit domestic) with an assumption that there are 70 EPOS machines. The cost of these splits between the card values was not disclosed to the bidders nor included in the tender dossier. In reply to a clarification the Contracting Authority understood that Appellants were asking for the volume of transaction numbers for each card. The Authority did not specify the volume of transaction value to bidders as the only way to change the result was by changing assumptions. In the 2019 evaluation form the average transaction volume was as given to the Ministry by their ‘sources’. Witness was not aware what the percentage allocation for Cashlink was.

Questioned by Dr Sammut, witness said that Cashlink was distorting competition as it could only be used at BOV Point of Sale terminals. Only if the adopted 75/25 percentage split was radically changed would the outcome be any different.

Dr De Marco referred witness to the Financial Offer and Pricing Structure in the tender (Section 4) and particularly to the makeup of the fee structure. He said that he could not answer technical questions as they were outside the field of his expertise.

In reply to questions from Dr Mifsud Bonnici witness stated that from the questions submitted by bidders it was evident that the split between card types was material and relevant to them. The split was not given as a large part of it was refined and finalised at the final evaluation stage so it was not stated in the tender nor available to bidders.

Dr Carmel Saliba cross examined under oath by Dr De Marco said that Cashlink was excluded from the formula as the Ministry was not aware of the volume of transactions but he did not think they were

'much' significant at around 20% but the issue was not the volume but that it is not accepted by everyone, although he conceded that it is accepted by Government. Witness detailed the breakdown of fees with reference to the financial offer and pricing structure and agreed that out of the four segments of the fees chargeable on the use of cards the only variable is the acquirers' fee and that SEPA and domestic cards are regulated by EU regulations. The gateway fee on online transactions was what translates into the fee from the card to the Government. Witness was not *au fait* with the ATCO scheme which is currently in use by the Government.

Mr Franco Xuereb (606764M) called as a witness by Appellant testified on oath that he has worked in the banking industry for some 39 years with 15 years experience in e-banking. He stated that the interchange fees are normally capped but this was not the case with Government which was not considered as a normal merchant – this factor was taken into consideration in calculating pricing. The data provided by the Ministry in the 2019 tables is 'totally way off reality' and is incorrect in so far as it includes all online transactions which are not necessarily card transaction as, for example, payment by direct debit, which is made on line but does not involve a card. The average transaction value supplied therefore could not be relied on and the total number quoted was not split between the different cards. According to data published by the CBM the average transaction value for EPOS was € 51 and € 63 for e-commerce transactions. The average transaction value for POSs was decreasing as cards are being more widely used. The pricing which the Ministry came up with is wide of the mark as the volumes assumed are not real. The average transaction value is the crux of everything since if it is off the mark then 'the rest all goes out of the window'.

The baseline costs on cards are applicable to anyone, with generally no capping and with the acquirers' fee up to the acquirer to determine. According to the formula used by Government the fixed costs for BOV are much higher than the figure of 900,000 quoted. Witness confirmed that Cashlink Malta is a BOV scheme but they have been mandated by the CBM to open the scheme to other POS terminals, so anyone can approach BOV to process these payments. BOV handles 50% of Government payments and based on their experience domestic VISA card is used in 75 to 78% of cases SEPA by 7%, MasterCard 5% and Cashlink 10%.

Regarding preliminary meetings with the Ministry, witness said the CBM was present to provide technical expertise. BOV already has an existing card acceptance contract with Government and hence they expected that this meeting was a routine one to renegotiate rates on that contract. There was no mention of any tender at the meeting but there was mention of 70 POS terminals that the Government wanted to install at Post Offices but no costs were discussed.

In reply to a question from Dr Sammut witness said that at the time of the tender in 2020 there was a use of Cashlink facility in process with a client and the CBM was aware of this.

Questioned by Dr Thompson witness stated that just over 10% of transactions are via Cashlink through BOV right across the board. The CBM report confirms this figure also across the board. Once BOV following their request, realised that the Ministry did not have the data requested no further action was taken.

Mr John Baylis (UK PP 76136076) called as a witness by the Appellant testified on oath that since 2008 he has been the Chief Executive Officer of Global Payments Malta which is active in 91 countries and 100% owned by Global Payments Inc. of the USA. His banking experience goes back 37 years, 25 of them with HSBC. He stated that he is familiar with the tender and was involved throughout its processing. The interchange fee is established by the card system and goes to the bank that issued the

card and is regulated by the EU; it is common to all bidders who have to abide by the rules of the payment scheme; the scheme fee goes directly to the card owner whilst the acquirer's fees covers their costs. In a global fee the transaction fee is the only variable; the gateway fee on online transactions goes to the Government. Witness is not aware of the details of the ATCO agreement with the Government; he is aware of the formula used in assessing bids and of the outcome results of the formula. According to the witness if the formula were to be accepted with a 'zero rate' for the acquirer's service the figure of one million would be exceeded quite considerably. If the assumptions in the formula were clear this would give clarity on the assessments and impact on the Global Payment's bid. His firm has a scheme to set up Cashlink transactions on EPOS terminals and the Government is fully aware of this.

In reply to questions from Dr Thompson witness stated that the judging of tenders would have had greater clarity if the assumptions were known. There would have been different cost elements if more information had been made available. The scheme fee can vary according to the card type but within each certain type the fees are common to every acquirer.

Mr Rob Lemmen (165784A) called as a witness by the preferred bidder testified on oath that he has been the Chief Commercial Officer with Truevo Payments Ltd for over three years and has ten years experience in the card business. In September 2019 he had a meeting with the Ministry in which he was informed that the Government wanted to extend the use of cards in payment transactions and the details of the tender explained. The 2019 data was provided to enable submission of the tender which was clearly on best price basis winner. He did not encounter any ambiguity in processing the tender which was completed with ease after seeking a few clarifications and having two years transaction data. It was common to have an interchange plus plus offer and the Bank used its market knowledge on assumptions which were similar to the Government figures. The split between cards was irrelevant to the pricing of the tender and would not have made a material difference if known.

Questioned by Dr Decesare witness said that the data disclosed was sufficient to compute the tender offer. He had one meeting with the Ministry subsequent to which the data was provided and the offer was completed on that data. The bid submitted was not at such a level of detail as requiring the splitting of the percentages of the card schemes as such a split was not essential to calculate costs and not knowing that split did not affect the Bank giving the best price. The average transaction value of an EPOS payment, according to the witness, was dependent on the type of business but it was likely to be higher for Government transactions than for retailers.

This concludes the testimonies of witnesses.

The Chairman thanked the parties and the witnesses for their forbearance and declared the hearing deferred to Tuesday 23rd November 2021 at 1.30pm.

End of Minutes of Fifth Hearing

SIXTH HEARING

On 23rd November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider further submissions on this objection.

The attendance for this public hearing was as follows:

Appellants – Bank of Valletta Ltd

Dr Steve Decesare	Legal Representative
Mr Franco Xuereb	Representative
Mr Chris Degabriele	Representative

Appellants (Case 1541) – Global Payments Ltd

Dr Mario De Marco	Legal Representative
Dr Clinton Calleja	Legal Representative
Mr Adrian Cachia	Representative

Contracting Authority – Ministry for Finance and Employment

Dr Ivan Sammut	Legal Representative
Mr Noel Bezzina	Member Evaluation Committee
Ms Stephanie Grech Mallia	Representative

Preferred Bidder – Truevo Payments Ltd

Dr Jonathan Thompson	Legal Representative
Ms Abigail Gauci	Representative
Mr Rob Lemmen	Representative

Interested Party – Credorax Bank Ltd

Dr Clement Mifsud Bonnici	Legal Representative
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Mr Kenneth Swain 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. He then invited the parties to make their final submissions.

Dr De Marco stated that the basis of this claim was the tender issued by the Ministry for Finance for card services the sole award criteria of which was the price. Offers were meant to cover two transactions – EPOS terminals and online transactions. Bidders were to put forward one inclusive fee with the only difference that in the case of online transactions there was a gateway fee. The transaction fee was the only variable.

After the close of tenders in clarification number 6 there was a request by one of the bidders for an indication of the card volumes and card type transactions. The Contracting Authority replied by stating that they are not in a position to provide such detailed information but provided data for the year 2018 and subsequently, after refining, the data for the year 2019 and solely for indicative purposes.

On 17th December 2020 bidders were advised that Truevo who offered the cheapest price had been awarded the tender after the Authority had adopted the computed approach of applying informed assumptions and considerations and which had been applied to all bidders. This was not part of the tender document as there was no declaration of assumptions and considerations in that document. This created uncertainty through lack of clarity and transparency and is in breach of Public Procurement Regulations (PPRs). The bidder could not understand how the price was determined as it was impossible to prepare a bid without taking this into account.

The reply of the Ministry for Finance, continued Dr De Marco, was to go into further facts which further confounded matters. In their reply they claimed that this was a negotiated procedure and therefore there was no obligation to follow the rules of openness and transparency or to disclose volumes and values of transactions (para 24/26); they claim (para 28) that they provided assumptions and considerations; that there were consultations with the CBM and that the price is obtained as a result of inputting data and bidders rate using a formula. This is the first time that bidder learnt this through the Ministry's reply (para 30) who further state that the Authority could never come up with an exact price and that the assumptions and considerations could not be made public as they could create expectations of legitimate rights and finally that the assumptions made were subjective. The reply by the Ministry is a series of contradictions.

The legal background to the claim is in the PPRs 38 and 39, in that they deal with the need for clarity in procurement documents, treating economic operators equally and according to a prescribed procedure; underlying requirements all left out of the tender. These requirements are confirmed in various CJEU decisions.

A negotiated procedure is the exception to the rule and goes against the main concept of procurement by Government which should be in a public and open manner so that any party may put in a bid. The Ministry's claim that this was a negotiated procedure is nonsense. In their testimony both Mr Bezzina and Mr Saliba were very clear – the offers were calculated on the basis of a mathematical formula based on a series of incomplete assumptions and considerations referring to a limited number of cards and schemes and volumes and values. What witnesses did not state was that the basis for the Government assumptions and the formula did not cover Cashlink, accounting for 25% of online transactions, or consumer and corporate cards. If the data was disclosed as a basis for assumptions and considerations the formula was not – one must make a distinction which, as the formula came after the closure of the tender as confirmed by both the witnesses referred to.

The scant information disclosed, said Dr De Marco, either at negotiating or clarification stage does not qualify as the basis for the evaluation to calculate prices. The assumption and consideration have become the crux to determine the bidder's price and since these formed the basis to calculate price for the formula it totally distorts the principle of openness. If bidders had known this, offers might have been formulated in a different way with possible benefit to the Government. The best bids are only obtained through openness and transparency in a tender. According to a CJEU Case *dictum* 'would information if known have assisted bidder to offer a better price'.

Given that such an important element was not disclosed the Board has no alternative but to decide that the award decision is irregular as the tender document did not disclose the very crux necessary to determine the price.

Dr Decesare said that BOV had three grievances in relation to the manner of the evaluation; the requirement that each bidder had to provide for processing of Cashlink transactions and that the Truevo tender was abnormally low and that an investigation was required in terms of the law. He said

he would not be repeating points already covered by Dr De Marco but was trusting that the Board would take all submissions into consideration. Tenders are regulated by the Public Procurement Regulations – Regulation 38 deals with the requirement of lack of ambiguity and clear instructions whilst Regulation 239 (6) obliges Contracting Authorities to ensure choice criteria and effective competition and does not allow unfettered freedom of choice by the Authority. In CJEU Case 496/99 it was held that the principle of transparency implies clear and transparent terms such that all economic operators interpret them the same way whilst Case C 19/00 reiterated that the terms must allow clear interpretation and the obligation of transparency means that the adjudicating authority must interpret the award criteria on the same basis. Reference was made to PCRB Cases 1139,1252,1241,1245 which all deal with the principle of self limitation whilst in Case 1410 the PCRB concluded, as it has emphasised very often, the obligation of the evaluation committee to abide by self limitation. In case 114 the conditions which must be adhered to by all parties including the contracting authority were laid out.

Continuing Dr Decesare stated that there are a number of matters not previously known to BOV at tendering stage and preceding these present sittings. The Authority claims that it carried out a preliminary market consultation prior to launching this procedure. Regulation 47 of the PPRs albeit in a limited way deals with this procedure and requires the parties being consulted to understand that it is a preliminary market consultation before launching it and that it is an initial stage to publishing of the tender and that there is no distortion of the market. Mr Bezzina in his testimony stated that no minutes of meetings were taken and that not all bidders were informed that this was a market consultation – besides they were required to submit rates and therefore prior to tender publication the Ministry already had all the bidders' rates in their hands. Witness Mr Xuereb from BOV confirmed in his testimony that he was only advised that the meetings were required to negotiate rates on an existing contract and not that a market consultation was being undertaken. The data provided was not disclosed as available data that the Government had collected from a number of Government entities (ARMS, IRD) but were given out purely for information and not disclosed that it would be the basis for evaluation in the prospective tender, and they were not provided in the manner requested by BOV.

In the email filed as DOC BOV3 it was not stated that the rates were to be used for the purpose of the estimate and the evaluation of the tender. The evidence of Mr Bezzina indicates that at these meetings different information was given to different parties with no minutes kept thus infringing the public procurement process and transparency regulations. Dealing with matter of the appeal deposit, Dr Decesare, explained that there were three requests with varying amounts requested. The Ministry stated that it was impossible to come up with the expected value and the future level of card type and usage totally contradictory to what has transpired during these present proceedings and to the letter sent by the Ministry to the Director of Contracts justifying the use of negotiated procedure when the estimated the value as 1.5 million Eur was given. The Ministry was contradicting itself as the figures were known and should have been disclosed to bidders on the principle of transparency.

With regard to the evaluation methodology Dr Decesare agreed with Dr De Marco' statements that, the Ministry's claim that this was a negotiated procedure and hence the fundamental principle and openness did not apply is totally incorrect as all contracts, however defined, are subject to the same award conditions and criteria according to the PPRs. Mr Bezzina confirmed, under oath, that bidders could not have come up with figures without the assumptions and conditions and consequently would not have been able to come up with a price. Mr Saliba, also under oath, said that if the relevant rates were inverted and with a different transaction value allocation a different result would have been obtained.

In relation to Cashlink the tender stated that if the bidder failed to include all schedules in the Technical Offer the proposal would be null and void. Mr Bezzina stated that only two mandatory schemes were considered - VISA and MasterCard as the CBM representative had advised the Ministry that Cashlink usage was very minimal whereas Mr Saliba said that its usage was around 20% and higher than MasterCard; even if the use of Cashlink was minimal the Evaluation Committee had no right to go beyond the terms of the tender and was not authorised to decide mandatory, relevant and market knowledge points. Tender did not indicate that Cashlink was not mandatory and therefore if a bidder failed to include it, the result would be disqualification. Both Mr Bezzina and Mr Saliba testified that no one had use of Cashlink. Mr Saliba said that only BOV can process Cashlink EPOS transactions and that they would be the only one to benefit. It was not up to the Evaluation Committee to interpret the tender document.

Dealing with the grievance regarding an abnormally low tender Dr Decesare referred to the requirements to explain costs covered by Regulations 243 of the PPRs. The Ministry for Finance claim that this is a matter at the total discretion of the Authority to decide but this is totally unsupported at law. The Court of Appeal has held in Cases 126/2021 and 127/2021 that the Authority has a legal obligation to investigate an apparently abnormally low tender. In this Case the Authority relied on the statement made by bidder and decided on the operational costs basis of certain parties. The Authority had an obligation to investigate Truevo's offer as even at a 'nil' acquirer's fee the offer would have been higher using the formula determined by the Authority.

Dr Mifsud Bonnici said that the tender and evidence submitted in this Case were surgically dissected by his colleagues and the manner in which the tender was weighted against all public procurement principles was not worth discussing. What should now be considered is what is going to happen to the tender. There are two options open to the Board either to cancel the award and order a fresh evaluation or exercise its right to cancel the tender which they can do as a matter of law and which is the ideal situation. This is an exceptional power to be exercised by the Board but even the Contracting Authority shares this view as they accept that the assumptions and considerations were crucial and necessary to enable an offer to be made. This is confirmed in the testimony of Mr Bezzina who informed us that if the assumptions had not been used evaluation was impossible and could not happen whilst Mr Saliba likewise stated that evaluation could not have happened.

If the assumptions and considerations had not been created it would have been impossible to evaluate the tender so if those elements were illegal in the first place how can a re-evaluation take place which can only lead the Authority to conclude that the tender cannot not be re-evaluated and propose cancellation themselves. It is therefore clear that the tender should be cancelled as it is impossible to carry it over the line. In Case 388/2018 the Court of Appeal concluded that if it was impossible to do an evaluation of the bids then cancellation of the tender was the course to take. This is exactly the situation at hand and the only solution.

Why was it that the assumptions were illegal, asked Dr Mifsud Bonnici? He referred to CJEU Cases 331/04 and C523/06 which deal with the award criteria and apart from the principles of transparency and equality deal also with two necessary elements – that the award criteria cannot be altered after bids are submitted and if elements in the criteria are not known it could have affected their preparation. Admissions, not contested, have been made that the award criteria were created after; there was therefore a shifting of goalposts which violate the principles of transparency and equality. Some of the elements of the assumptions were very material for bidders in their preparation although a representative of Truevo claims that on tender as issued an offer could have been submitted without knowing assumptions criteria made by the Evaluation Committee and that the assumptions were not relevant. The assumptions were inconsistent and one had to compare the testimony of Mr Bezzina on

the 12th October with the spreadsheets presented after. There are differences in the assumptions but now we have the full picture – the choice of cards was a ‘pick and choose exercise’; request for rates for all cards and types but then chose which ones they selected which is fundamentally wrong and the volumes should have been indicated in the tender dossier and disclosed to bidders. This was stated to be for indicative purposes only so it was not clear that it was going to be used for evaluation purposes. When questioned on this point Mr Bezzina could give no justifiable answer as to the reason why it was not disclosed since the Authority knew they were relevant as they had been requested in clarifications.

The formula created *ex-post* could give two different results as it was so fundamentally wrong; there is a fundamental objection to the argument that the Authority claims that what happened before the tender was irrelevant and immaterial. Likewise the claim that assumptions were not disclosed because they were market knowledge does not hold water – from the evidence heard and the series of questions raised the indication is that they were not market knowledge. The tender is fundamentally incompatible with PPRs and the Board is invited to cancel the tender.

Dr Sammut, in his final submission said that the procedure in this case is different as it is not an open competition but a negotiated procedure without public consultation with different rules. This is confirmed in the Court of Appeal Case 170/19 which upheld that the two procedures are different with two distinct types of negotiated procedures. In the present Ministry for Finance’s case the authority can negotiate without any notification or competition contrary to what has been claimed by colleagues in this case. The underlying principle is that all economic operators were treated equally and there was no special treatment or favouritism as has been clearly demonstrated during this hearing.

On the point of preliminary market consultation Regulation 47 states that the Authority can conduct market consultations with a view to preparing a procurement without informing economic operators and can seek or accept advice from outside bodies so long as there is no distortion of the market. The assumptions used, obtained from known market information, were finalised after the tender was issued with some small changes that would have made no difference to the final result whilst the same information was used to assess all bids. The Authority could never come to an exact price as the exact future volumes are not known neither is the number of entities that would come on board. Assumptions had thus to be made on public response and types of cards as the Authority had ‘just an idea’ of the trends in the market. The cheapest offer reflected the market trends.

Dealing with the BOV grievances Dr Sammut stated that Cashlink was a closed procedure and would have left everyone unable to compete except BOV themselves. Regarding the abnormally low tender grievance the law states ‘appear to be abnormally low’ – since the winning tender was in the region of the estimated figure it is evidently clear that it was not low.

Dr Thompson said that his first submission relates to the nature of the two appeals and the nature of the claims thereon. Both Appellants request cancellation of the evaluation as they allege there is a main issue on the evaluation process due to lack of clarity in the tender and that this lack of clarity leads to ambiguity. This alleged lack of clarity in the tender falls under Regulation 262 as neither party’s grievance is based on the evaluation but on the clarity of the tender and therefore it is not in the ambit of this appeal. Both Mr Cachia and Mr Xuereb in their testimony confirmed that they proceeded with making their submissions after clarification which indicates that they were satisfied with the terms. Mr Lemmen on the other hand testified that all the information he needed was available. The tender document was not complicated and the object was to give the best rate per item indicated – this was not a package but an itemised rate offer. From the evidence submitted there was

no indication that there was a conflict with the tender document or that the formula was incorrect. It was not true that the only variable was the acquirer's fee as Mr Baylis had confirmed that the scheme fee could vary.

Dr Thompson concluded by stating that it was not right that the Cashlink rate was left blank as Truevo dealt with this in their bid whilst with regard to the abnormally low bid claim there is a variable scheme fee. Truevo's offer was in the region of 900,000 Eur which compares favourably with the figure of 1.2million Eur anticipated by the Authority and is not a cause for alarm.

Dr Decesare said that the point made by Dr Sammut in referring to the Court of Appeal judgement was different that what had been stated. The judgement does not state that the general provisions of the PPRs do not apply to all negotiated procedures, and even if it did the law does not make that distinction. As regard the argument that the Truevo tender was not abnormally low and that therefore no investigation was necessary Dr Decesare drew the attention of the Board to the testimony of Mr Bezzina who when asked on this point said that he had consulted the CBM representative and relied exclusively on him without investigation contrary to the law requirements. No remedy before submissions could have been made as the matters related to were not known to Appellants before closing and which therefore could not have been challenged. In any case this claim should not have been made as the matter of remedy was discussed and closed after the first hearing, the decision issued and cannot now be reopened.

On the matter of rates what Mr Baylis said was that there is a distinction between different card schemes rather than different fees per acquirer. As to Cashlink if Truevo have filled in the section on processing Cashlink they could only have done it if they had a co-branded card which is not the same as Cashlink Malta cards and since no contract exists they could not quote the rate.

Dr De Marco wondered how one could ask for a remedy before closing on something that the bidder is not aware of. The application of the formula and the assumptions only became known after the letter of the Authority. Mr Saliba stated that scheme fees are common to all contrary to the claim being made about what Mr Baylis said.

Dr Mifsud Bonnici stated that submissions have been made that negotiated procedure is exempt from PPRs. The Court of Appeal said nothing like what Dr Sammut claims and these procedures are still bound by PPRs and the Board have applied these decisions repeatedly and throughout. PCRB Cases 1408, 1479 and 1521 all reviewed decisions on negotiated procedures, and it is disturbing that this point has even been made.

Dr Sammut re-iterated that negotiated procedure without consultation is different to open competition. The important point was that the assumptions were applied consistently.

Dr Thompson said that the submissions made regarding ambiguity fall within the ambit of Regulation 262 and apply when a tender comes into bidders' hands. The appeals are based on the decisions of whether the Evaluation Committee decisions are correct or not and not on the terms of the tender.

The Chairman thanked the parties for their submissions in this lengthy process and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 2nd March, 23rd September 2021, 12th October 2021, 2nd November 2021, 19th November 2021 and 23rd November 2021.

Having noted the objection filed by Bank of Valletta Ltd (hereinafter referred to as the Appellant) on 28th December 2021, refers to the claims made by the same Appellant with regards to the tender of reference MF112/2020 listed as case No. 1540 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Steven Decesare
Appearing for the Contracting Authority:	Dr Ivan Sammut
Appearing for the Preferred Bidder:	Dr Jonathan Thompson
Appearing for the Interested Party (Credorax):	Dr Clement Mifsud Bonnici
Appearing for the Interested Party (Global Payments):	Dr Mario de Marco & Dr Clinton Calleja

Preliminary pleas

The Board notes that a decision has already been issued by this Board, as differently composed, on the Preliminary pleas raised by the Contracting Authority and Preferred Bidder. This first hearing was held on the 2nd March 2021 and a decision was issued on the 18th March 2021. This decision was not appealed by any party and hence forth, this Board, as differently composed, will continue hearing this case on its merits and shall therefore now only make references to the 2nd, 3rd, 4th, 5th and 6th hearings which were held on 23rd September 2021, 12th October 2021, 2nd November 2021, 19th November 2021 and 23rd November 2021 as per minutes present above.

Application by Contracting Authority re: Credorax Bank

This Board makes reference to the application presented by the Contracting Authority on 17th September. This application requested this Board to i) remove Credorax Bank from this case, ii) exclude Credorax from intervening further in this case and iii) to expunge all submissions made by Credorax from the records of this case.

Cognisance is also being taken of the replies presented by the Appellant (BOV), the Preferred Bidder (Truevo Payments) and Credorax.

Reference is made to the Court of Appeal sentence in relation to the case Truevo vs Director of Contracts, Ministry for Finance and Credorax of 30th June 2021 whereby “*Din il-Qorti rat ir-Regolament 240 tal-Legislazzjoni Sussidjarja li jaghti dritt ta' appell lil, fost oħrajn [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]. Il-Bord ibbaża d-decizjoni tiegħu fuq dan r-regolament, u din l-qorti tara li dan ir-Regolament huwa wiesa' biżżeġġed biex jagħti nteress lis-socjeta Credorax Ltd tappella mid-decizjoni tal-Kumitat Evalwattiv. Din s-socjeta kellha interess fil-materja tal-offerti u wriet dan l-interess meta ppruvat tippartecipa fin negozjati.*”

Hence the Court said that Credorax has “**interest**” but in later arguments by the Court, it was deemed that the “**improper**” tools were exercised, in that their specific arguments had to be dealt with under Regulation 262, something was not done. Hence their specific appeal was deemed null and void.

Therefore, this Board will allow Credorax to remain as an Interested Party within these proceedings however it will not allow it to raise matters which fall under the scope of Regulation 262 of the PPR, but only those which fall within the scope of Reg 270 of the PPR.

Merits

Whereby, the Appellant, contends that:

The objection is based on three grounds:

- a) **Evaluation methodology** - the evaluation methodology adopted by the Contracting Authority is defective and breaches the fundamental principles underlying the PPR;
- b) **Cashlink Services** - Recommended Bidder should not have been deemed technically compliant since the Recommended Bidder is not in a position to provide Cashlink Services as required in the Tender Document;
- c) **Abnormally Low** - Recommended Bidder's offer is abnormally low and should have been disqualified as such.

These will now be dealt into further.

- a) **Evaluation methodology** - BOV submits that the Contracting Authority evaluation methodology was flawed for the reasons set out below. The Tender Procedure is governed by the PPR. The PPR is the national law which transposes Directive 2014/24/EU (the "Directive"). The fundamental principles underlying procurement processes regulated in terms of the PPR are set out in Regulations 38 and 39. In particular, the following obligations are imposed on the Contracting Authority:

"38. (1) The procurement document shall be written in clear and unambiguous terms so as to enable all interested parties to understand properly the terms and conditions of the process." (emphasis added]

"39.(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. (2) The tenderer must be selected in a transparent manner and according to a prescribed procedure. (3) The design of the procurement shall not be made with the intention of excluding it from the scope of these regulations or of artificially narrowing competition, Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators" (emphasis added].

The case-law of the Court of Justice of the European Union on procurement processes has consistently emphasised that the principles of equal treatment and transparency require that tender documents are drafted in a “clear, precise and unequivocal” manner.

In terms of applicable legislation and CJEU case-law, it is incumbent on the Contracting Authority that the Tender Document is drafted in a manner which is clear, precise and unequivocal, allowing all reasonably informed tenderer exercising ordinary care to understand the relevant requirements, both:

- (i) in order for them to be in a position to formulate their tender; and
- (ii) in order to allow the Contracting Authority to conclude whether a tender is compliant

The Computation of the Financial Offer

According to the Decision, the contract value was calculated by taking into account a series of "informed assumptions and considerations" that were applied to all bids consistently. However, the Tender Document provided no indication or explanation as to what assumptions or considerations were to be taken into account with a view to enabling the bidders to understand how the Contracting Authority would proceed to carry out the evaluation of the Financial Offers. Moreover, no indication or estimate was provided in the Tender Document as to the expected or assumed value or volume of transactions to be processed for Category A or Category B. The flaw in the evaluation methodology applied by the Contracting Authority is further evidenced by the fact that, on the basis of its own internal calculations, BOV estimated its Financial Offer to be comparable to that of the Recommended Bidder and, in any event, certainly not over six (6) times more than that of the Recommended Bidder offer. BOV also notes that in its Decision the Contracting Authority published the financial offers of only two (2) of the bidders, and for each of Category A and Category B. The value of the financial offers for both categories are identical and therefore BOV assumes that the Contracting Authority has

estimated that there will be the exact same turnover for the processing of transactions: whether through EPOS terminals or E-Commerce. According to BOV's internal data this assumption is entirely incorrect and unfounded. In fact, on the basis of the data available to it, EPOS transactions represent less than 10% of total turnover. Furthermore, the Contracting Authority's assumption doesn't reflect the fact that BOV (or even other bidders) had submitted different rates, in some of the card categories, for EPOS and E-Commerce transactions.

- b) **Cashlink Services** - The Tender Document is not divided into lots. Accordingly, each tenderer was required to offer all of the services requested. The Recommended Bidder is not currently in a position to accept Cashlink transactions. Indeed, in order for the Recommended Bidder to be in a position to submit its rates for this card category, it would have had to enter into an agreement with BOV in terms of the "open" acceptance instruction issued by the Central Bank of Malta ("CBM"). In other words, in 2018 CBM mandated BOV to "open" acceptance of the Cashlink, indiscriminately, to competing payment service providers by way of agreement for access to Cashlink. The Recommended Bidder and BOV have no agreement in place in this regard.

In view of the above:

- (i) the Recommended Bidder is not in a position to offer all of the services required in terms of the Tender Document and could not be deemed to be technically compliant;
- (ii) the Contracting Authority could not have made a proper and correct evaluation of the Recommended Bidder's Financial Offer.
- c) **Abnormally Low** - Without prejudice to the above, even if the Recommended Bidder was in a position to participate in this Tender Procedure (which, as explained above, it was not due to the fact that it cannot provide services relating to Cashlink), Regulation 243 of the PPR sets out a regime for contracting authorities to exclude bidders which submit tenders which are considered to be 'abnormally low'. The onus is on the authority to "require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services". Indeed, as the CJEU has clearly emphasised, this is a positive (mandatory) and unavoidable requirement, and "Article 55 of Directive 2004/18 [now art. 69 of the Directive] does preclude ... a contracting authority from claiming ... that it is not obliged to request a tenderer to clarify an abnormally low price?". In view of the fact that the Recommended Bidder's offer was, as confirmed by the Contracting Authority, evaluated in the same manner BOV's offer was evaluated, the Recommended Bidder's offer would need to explain the economics of the services provided and how its offer (according to BOV's calculations) would not even cover its costs.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6th January 2021 and its verbal submission during the virtual hearing held on 23rd September 2021, 12th October 2021, 2nd November 2021, 19th November 2021 and 23rd November 2021, in that:

- a) ***Evaluation methodology*** – In regards to issues raised by Appellant company, the defendant humbly submits that there is no legal obligation to disclose the information in question. It depends on the approach which government decided to take and to the amount of risk it was willing to shoulder. By not issuing the volume of transactions, government is clearly shifting the risk onto the bidder. Also, the Objecting Company could have asked for a clarification on this matter but did not do so.

The Objecting Company contends also that the tender document contravenes the fundamental processes regulated in terms of the PPR in regulations 38 and 39 and goes against the jurisprudence of the Court of Justice of the European Union (ECJ) of equal treatment and transparency as it is incumbent on the Contracting Authority that the Tender Document is clear, precise and unequivocal. The defendant humbly submits that this is a negotiated procedure and not an open procedure or any other competitive procedure. The process adopted in such a procedure is not in itself dictated by law. This procedure allows for negotiations, clarifications and amendments of the technical aspects of a bid.

The defendants submit that the financial computation was done after taking a series of informed assumptions and considerations that were applied to all bids consistently. These assumptions were formulated following discussions between the Contracting Authority and the Central Bank of Malta. It is to be stressed that in this tender the price of the service varies per type of card and per type of platform (i.e. EPOS or online) and consequently this method was the only one available to be able to compare like with like.

Defendant also stresses that during the clarifications stage the Contracting Authority did provide the volumes on which it was going to compute their workings. As explained to all bidders during the preliminary meetings the Contracting Authority had with them, the Contracting Authority was never in a position to provide exact volumes because the scope of this tender is for government to procure card services to all Ministries/Public Sector Entities that may wish to utilise such services in future. In this respect, the volumes taken were just there to be able to compute the workings and were applied consistently to all bidders, thus not giving any advantage to anyone.

The Contracting Authority based its assumptions, after consultation with the Central Bank of Malta, on the following considerations:

- (A) The total price mentioned in the award letters is not the amount payable per se but the result of inputting the bidder's rates in the formula (that was common to all).

(B) This particular deals with a whole range of card rates for two distinct categories (i.e. EPOS based or Online), so to evaluate the financial bid the Contracting Authority needed to devise this methodology to come up with a total figure that allows fair comparison between the bids.

(C) The Contracting Authority could never come up with an exact price and this holds also for the budget because:

(i) One does not know exact future volumes and how many entities / Ministries / departments the Contracting Authority will eventually come onboard.

(ii) The Contracting Authority cannot guess what the uptake from the general public will be. Presumably, this would start growing with time.

(iii) The Contracting Authority also cannot be sure what card the client (i.e. the general public) will use. The Contracting Authority just had an idea of current market trends, and which fact was disclosed during the meeting with the Objecting Company, and these were reflected in the assumptions.

(D) Consequently, in order to be able to compare like with like, the Contracting Authority held discussions with CBM and this gave the Contracting Authority a picture of what the current market is. This created the assumptions/considerations which could not be made public, as otherwise this might have created expectations of legitimate rights on the part of the bidders:

(i) The aim of such assumptions/considerations was simply to come up with a total figure that highlights who has the cheapest package and consequently they have 'no impact on the setting of the rates by the bidders. They simply reflect market trends, and the Contracting Authority is sure that the bidders know very well what the market trends are as as they have been operating in the market for many years.

(ii) Obviously like all other assumptions they are subjective and consequently the bidders could have disagreed with the percentages that were used. For example, the Contracting Authority was informed by CBM that in Malta circa 90% of the transactions are done using VISA co-branded cards, while 10% are done using Mastercard co-branded cards. A bidder could have claimed that the ratio is 85%/15%. Such a change in ratio would have had a minor effect on the total results and would definitely not have altered the ranking. Additionally, one notes that the Contracting Authority went to the regulator for such assumptions because of the regulator's impartiality. In this way, the Contracting

Authority ensured that none of the assumptions were influenced by the bidders in their favour.

b) **Cashlink Services** - The Objecting Company is contending that the Tender Document is not divided into lots and consequently, each bidder was required to offer all of the services requested. It states that it does not have an agreement with the recommended bidder for it to use its Cashlink Malta card. On the other hand, and in the same breath, it admits that *"in 2018, CBM mandated BOV to 'open' acceptance of the Cashlink, indiscriminately, to competing service providers"*, an order which apparently the Objecting Company did not adhere to. The defendant contends that the Objecting Company cannot utilize its own omission in order to advantage itself and submit that *"the Contracting Authority could not have made a proper and correct evaluation of the Recommended Bidder's Financial Offer"*. Furthermore, the Objecting Company's contention that the Tender Document is not divided into lots and consequently, each bidder was required to offer all of the services requested is not legally tenable. Clause 3.1 of Section 1 of the Tender Document provides that *"This tender is not divided into lots, and tenders must be for the whole quantities indicated."* Consequently, bidders had to submit their offer on the basis of the whole quantities. To argue that the Cashlink Malta card qualifies as a "lot" does not make sense. The Collins English dictionary defines the noun "lot" as "a collection of objects, items, or people". So, the tender was not issued in respect of a collection of cards, including BOV's Cashlink Malta, but in regard to the whole of quantities of the card services.

c) **Abnormally Low** - The Objecting Company is contending that the Recommended Bidder's offer is abnormally low and should have been disqualified as such. At the outset, defendants wish to point out that during its evaluation, the Contracting Authority did not consider the winning bidder's prices as abnormally low. If anything, the Contracting Authority felt that BOV's prices were abnormally high. In fact, the rates of other bidders are quite close to the winning bidder's rates. The Objecting Company is also stating that according to its calculations the winning bidder with the rates it offered would not even cover its costs. The Contracting Authority is of the view that such a statement is incorrect because the operational structure of the winning bidder is different from that of Bank of Valletta and thus cannot be compared in such manner. The Objecting Company has a much larger operational structure than the preferred bidder, with consequential higher costs and overheads.

Regulation 243 of the PPR states that:

"(1) Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services."

(3) Failure by the economic operator to send his explanations within the written time-frame imposed by the contracting authority, shall be deemed as acceptance from the economic operator that his tender is abnormally low.

(4) The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in sub-regulation (2). ...”

Sub-regulation 2 of regulation 187 on admissibility of tenders inter alia requires that “In particular, tenders which do not comply with the procurement documents, ... or which ***have been found by the contracting authority*** to be abnormally low, shall be considered as being irregular.”

It is evident from a reading of these regulations that it is at the total discretion of the Contracting Authority to decide whether a tender is abnormally low. It is inconceivable that at this late stage, another bidder who was not chosen raises an objection that the chosen bid was abnormally low.

This Board also noted the Preferred Bidder’s Reasoned Letter of Reply filed on 6th January 2021 and its verbal submission during the virtual hearing held on 23rd September 2021, 12th October 2021, 2nd November 2021, 19th November 2021 and 23rd November 2021, in that:

- a) ***Evaluation methodology*** – That by means of its first ground of appeal, BoV submits that the “*evaluation methodology adopted by the Contracting Authority is defective and breaches the fundamental principles underlying the PPR*”. Truevo contests this allegation as being unfounded in fact and at law. The evaluation methodology adopted by the Contracting Authority applied uniformly and indiscriminately to all participants who submitted a bid and participated in this Negotiated Procedure. In this regard, it is pertinent to note that BoV had availed itself of its right to request clarifications which were duly replied to by the Contracting Authority. It is also pertinent to note that BoV did not file any application in terms of Regulation 262 of the Public Procurement Regulations before the closing date of the call for competition which indicates that the replies provided by the Contracting Authority satisfied any issues that BoV might have had in relation to this procedure;
- b) ***Cashlink Services*** - That by means of its second ground of appeal, BoV submits that the “*Recommended bidder should not have been deemed technically compliant since the Recommended Bidder is not in a position to provide Cashlink Services as required in the Tender Document*”. Truevo submits that this ground of appeal is also unfounded in fact and at law. The Cashlink Services referred to by BoV are services offered exclusively by BoV and in order for third parties to avail themselves of such services, they would need to enter into an agreement with BoV as explained by BoV in its appeal. There is no requirement set in the tender document that

mandatorily requires bidders to offer this particular service as BoV seems to imply by means of this ground of appeal;

- c) ***Abnormally Low*** - That by means of its third ground of appeal, BoV submits that the “*Recommended Bidder's offer is abnormally low and should have been disqualified as such*”. Truevo once again contests this ground as unfounded in fact and at law. From a cursory view of the other bids received from the other two participants, it appears that Truevo's bid was relatively similar to the bids of said participants. It is BoV's bid which appears to be excessively high when comparing the same with the bids of the other participants. In any case and without prejudice to the above, Truevo submits that the offer proposed by Truevo is a reflection of Truevo's competitive assessment in relation to the present tender. It is Truevo's expert opinion that the transactions forming the subject matter of this tender carry close to zero risk for Truevo which is consequently reflected in the bid Offer. Additionally, Truevo has in place an efficient IT infrastructure and software that, when also considering the staff ratio, enables Truevo to minimize its costs whilst retaining a competitive edge.

This Board also noted the Interested Party's (Credorax) Reasoned Letter of Reply filed on 14th January 2021 and its verbal submission during the virtual hearing held on 23rd September 2021, 12th October 2021, 2nd November 2021, 19th November 2021 and 23rd November 2021, in that:

- a) On the first ground of appeal, Credorax concurs with the Appellant that any “*informed assumptions and considerations*” used by the evaluation committee as part of their evaluation methodology must have been disclosed to the bidders in advance as part of the procurement documentation. MFIN is patently wrong in its submission that it had no obligation to disclose this information. MFIN would have been right if that information was not used by the evaluation committee, but this was not the case here. MFIN admits, in its letter of rejection to Appellant dated 17 December 2020 that: “*the total was computed following an adopted approach of taking a series of informed assumptions and considerations that were applied to all bids consistently.*” The information should have been disclosed to the bidders in advance since it could have affected how bidders calculated their best financial offers to the contracting authority.
- b) On the second ground of appeal, specifically that Recommended Bidder's bid could not have been technically compliant since it is not in a position to accept Cashlink transactions, and without necessarily concurring with this ground of appeal, the Appellant could only have raised this objection at this stage and not before.
- c) On the third ground of appeal, specifically that the Recommended Bidder's bid could have been abnormally low, they again could only have raised this objection at this stage and not

before. The Appellant presumably expected MFIN to monitor bids for abnormally low offers and to request the Recommended Bidder to provide clarifications on why its financial offer is so low. The total average of the three offers submitted stands at €2,941,524.50. The Recommended Bidder was selected by MFIN on the basis of its financial bid which was given a comparison contract value of €901,914. On the other hand, the Appellant's bid was valued at €6,207,936, and a third bidder's offer was valued at a combined average of €1,714,723.50. Although at least one other bidder participated in the Negotiated Procedure, its financial offer is not known. The very fact that the Recommended Bidder's offer was at least a third of the average of the three bids known to Credorax constitutes sufficient grounds for concern and should have prompted MFIN to request for clarifications from Recommended Bidder- as required by law.

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 witnesses duly summoned, will consider Appellant's grievances, as follows in their entirety:

Evaluation methodology –

Initially this Board will refer to those specific regulations within the Public Procurement Regulations (“PPR”) which are deemed to be most relevant to fully analyse this grievance of the Appellant.

Secondly, this Board will refer to the testimony under oath of various witnesses and list down the main statements which again are deemed the most relevant.

Finally, this Board will provide its conclusions on the matter.

PPR Regulations

- a) Regulation 38 (1) of the PPR which states: “*The procurement document shall be written in **clear and unambiguous terms** so as to enable all interested parties to **understand** properly the terms and conditions of the process.” (bold & underline emphasis added)*
- b) Regulation 39 (1) of the PPR which states: “*Contracting authorities shall treat economic operators equally and without discrimination and **shall act in a transparent and proportionate manner.***
- c) Regulation 39 (2) of the PPR which states: “*The tenderer **must** be selected in a **transparent** manner and **according to a prescribed procedure.** (bold & underline emphasis added)*

Extracts from testimony under oath of Mr Noel Bezzina

- a) *“coming up with an estimate on the value of the tender was virtually impossible and therefore an assessed volume was given to the bidders having had previously been given preliminary rates and volume – so the estimate was based on the lowest rate they could offer”*
- b) *“regarding the split in the number of transactions, the split between the potential users was not disclosed to bidders. the Authority used it as a baseline which applied to, and was the same to all bidders. Bidders were aware of the percentage use of cards between say MasterCard or Visa and the potential volumes were known; however the split was not known although the bidders had enough market knowledge to know how the split worked out”*
- c) *For each category the volume was not stated in the tender but the figures were based on the number of transactions not on value. The calculation was based on the average transaction value multiplied by the number of transactions in that category multiplied by the rate offered by bidder*
- d) *“The tender dealt with the potential shift to the use of cards from cash or cheques and bidders were already familiar with the percentage card use through their market knowledge.”*
- e) *“It was not specifically stated in the tender that cards other than those mentioned had to be included but it was assumed that the bidders knew which the cards mainly in use were and also that the winning bidder would be awarded all four card schemes and which could not have been broken into lots.”*
- f) *“the document on assumptions was for personal use and had been prepared a couple of weeks before in readiness for this hearing. The assumptions referred to were established by the Evaluation Committee at the evaluation phase after the closing date of the tender and after all bids had been received. At evaluation stage transactions were combined and taken as one but it was not specified as so in the tender”*
- g) *“the tender did not state that all potential transactions were included and said that the assumptions used followed what the evaluators considered reasonable advice by the CBM on this point”*
- h) *“that no distinction was made in the calculations between EPOS and online transactions as the data was not refined enough – the same volumes were used for both transactions since the Authority was not after precise figures of how much it will cost. Page 10 of the tender distinguished between EPOS and online transactions but the evaluators did not make such a distinction since the object was to compare figures so the volumes which were not relevant were kept constant using different rates”*
- i) *“that if EPOS and online transactions were calculate singly rather than combined then once the volumes shifted one got a different result and therefore the volumes were relevant”*
- j) *“He was not sure if the assumptions had been disclosed to prospective bidders as it was assumed that they would be familiar with them. In the second spreadsheet the 2019 data was incorporated and it was more complex as five different cards schemes were included – split between MasterCard 10% (7 debit/3 credit) and VISA 90% (22.5 credit domestic 67.5 debit domestic) with an assumption that there are 70 EPOS machines. The cost of these splits between the card values was not disclosed to the bidders nor included in the tender dossier”*
- k) *“that from the questions submitted by bidders it was evident that the split between card types was material and relevant to them. The split was not given as a large part of it was refined and finalised at the final evaluation stage so it was not stated in the tender nor available to bidders”*

Extracts from testimony under oath of Mr Carmel Saliba

- a) *“The type of cards in use is market knowledge not data based information, whilst international cards were included as they have some use impact. Cashlink was not considered as it would hinder competition – this assumption was not disclosed to bidders”*
- b) *“that the assessments would not be the same if the percentages were different as well as the transaction values could change”*
- c) *“The assumptions were discussed at the initial meetings but not cast in stone till the evaluation stage but were not included in the tender nor disclosed”*

Extracts from testimony under oath of Mr John Baylis

- a) *“If the assumptions in the formula were clear this would give clarity on the assessments and impact on the Global Payment’s bid”*

Board conclusions on first grievance

- a) The sole award criteria is the price. Hence this Board deems very relevant the fact that economic operators would know in full certainty how their financial offer is going to be evaluated.
- b) It was only in the rejection letter, i.e. post evaluation, that the appellant was informed that the Contracting Authority has adopted the computed approach of applying informed assumptions and considerations that were applied to all bids consistently. This information which was not included in the tender document, created uncertainty, lacked clarity and transparency going against regulations 38(1), 39(1) and 39(2) referred to above.
- c) All of the above extracts from these testimonies amount to various instances where the evaluation committee made use of assumptions which were not included in the tender dossier, and / or never communicated to economic operators. Such actions from the evaluation committee are certainly in breach of the self limitation principle of public procurement. It is crucially important to note that the award criteria, and hence method of evaluation, cannot be altered after bids are submitted. Such changes, or further information could easily alter the bids had such information been known a priori.
- d) Regulation 262 has already been discussed in further detail in the initial sentence of this Board, as referred to earlier, but this Board would like to point out that now that we are dealing with the merits of the case, regulation 262 is now deemed irrelevant. Moreover, such grievance is built on the fact the application of the formula and assumptions only became known to the appellant once the rejection letter was received and hence not within the stipulated timeframes listed in regulation 262 of the PPR.

When considering all of the above, this Board upholds the Appellant's first grievance but considers also that without such assumptions referred to above in the testimonies of Mr Noel Bezzina and Mr Carmel Saliba, the evaluation of the bids would have been impossible to make. Therefore, this Board opines that it is useless to order this tender back for re-evaluation and exceptionally this Review Board uses the power given to it in Regulation 90(3) to cancel the tendering process as it appears to it that this is the best solution in the circumstances of the case.

Cashlink Services –

- a) The Board notes that nowhere in the tender document it was stated that Cashlink services are mandatory. However, it also notes that the tender was not divided into lots, hence all the types of services were required to be offered.
- b) In this regard, this Board notes that the tender dossier could have been drafted more diligently in detailing such requests and removing such anomalies.
- c) Considering that in 2018, the Central Bank of Malta mandated BOV to 'open' acceptance of the Cashlink, indiscriminately, to competing payment service providers by way of agreement for access to Cashlink, this Board notes that BOV would have limited option, if at all, not to cooperate with the Preferred Bidder in such an instance.
- d) Even though BOV is mandated to 'open' acceptance of Cashlink, this Board notes that the Preferred Bidder never had an agreement with the Appellant for such. Therefore, doubts emerge as to the technical compliance of the Preferred Bidder's bid in such section.

Therefore, this Board will uphold Appellant's second grievance.

Abnormally Low -

- a) The Board notes that the financial offer of the Preferred Bidder amounted to €901,914. This after the Evaluation Committee adopted an approach of *"taking a series of informed assumptions and considerations that were applied to all bids consistently."*
- b) Considering that this bid is at least a third of the average of the three bids received and below the Estimated Procurement Value of the tender, *prima facie* this bid 'appears' to be abnormally low. Therefore, in the Board's opinion, this should have triggered the procedure of regulation 243 (1) of the PPR which states: *"Contracting authorities **shall** require economic operators to explain the price or costs proposed in the tender where tenders **appear** to be abnormally low in relation to the works, supplies or services"* (bold & underline emphasis added).
- c) Such opinion is further re-inforced when this Board takes note of the declarations made by 2 witnesses under oath as follows:

- a. Mr Noel Bezzina – *“the CBM representative assured the Committee that the Truevo offer was lower than the estimate as the operator has an operation structure enabling them to offer a figure lower than the estimate and which was not deemed to be abnormally low”*. Therefore, from this testimony it emerges that such decision was based on the advice of the CBM representative and not from the detailed assessment of the bid.
- b. Mr Carmel Saliba (Member of the Evaluation Committee and also an employee / representative of the Central Bank of Malta), where he stated that *“I am not au fait with the regulations regarding abnormally low tenders.”* Moreover, Mr Saliba could not recall if a formal request was made regarding abnormally low tenders. He had informal discussions with Mr Bezzina on this point but could not recall if there was any reference on low tenders to the CBM. He relied on his personal assessment and on the background knowledge of the proposal of the preferred bidder. He knew that Truevo is new to the market and smaller so had lower expenses.
- d) In the Board’s opinion, Mr Saliba’s assessment regarding a possible abnormally low bid is flawed in at least 2 instances.
 - a. Initially, the assessment of an abnormally low bid was based on his background knowledge of the operating structure of the Preferred Bidder, and not on clear cut documentation. No allowance or detailed assessment was made by Mr Saliba to the possibility that the Preferred Bidder might have to increase his ‘output levels’ / operational efficiency, should he be awarded this tender procedure, hence increasing his operational overheads.
 - b. This while stating that he does not have a good or detailed knowledge of ‘abnormally low’ regulations in the PPR.
- e) Therefore, and in conclusion to this grievance, this Board opines that such an assessment is no more than more assumptions or guess work by the Evaluation Committee.

This Board upholds this third grievance of the Appellant.

In conclusion this Board;

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To cancel the tendering process as per regulation 90(3) of the Public Procurement Regulations,
- b) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Vincent Micallef
Member