

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1541 – MF112/2020 – Procurement of Card Services**

**23<sup>rd</sup> May 2022**

The Board,

Having noted the letter of objection filed by Dr Mario de Marco and Dr Clinton Calleja on behalf of Guido de Marco Advocates acting for and on behalf of Global Payments Limited, (hereinafter referred to as the appellant) filed on the 30<sup>th</sup> 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 8<sup>th</sup> 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 8<sup>th</sup> 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 14<sup>th</sup> January 2021;

Having heard and evaluated the testimony of the witness Mr Adrian Cachia (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 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 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 2<sup>nd</sup> March 2021, 23<sup>rd</sup> September 2021, 14<sup>th</sup> October 2021, 2<sup>nd</sup> November 2021, 19<sup>th</sup> November 2021 and 23<sup>rd</sup> November 2021 hereunder-reproduced;

## Minutes

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

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

On the 30<sup>th</sup> December 2020 Global Payments Ltd filed an appeal against the Ministry for Finance and Financial Services (subsequently known as the Ministry for Finance and Employment) as the Contracting Authority on the grounds that their bid was refused since it was not the cheapest offer.

A deposit of € 4,509.57 was paid.

There were four (4) bidders.

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

The attendance for this public hearing was as follows:

#### **Appellants – Global Payments Ltd**

|                            |                      |
|----------------------------|----------------------|
| Dr Mario De Marco          | Legal Representative |
| Dr Therese Comodini Cachia | Legal Representative |
| Dr Clinton Calleja         | Legal Representative |
| Mr Adrian Cachia           | Representative       |

#### **Contracting Authority – Ministry for Finance and Employment**

|                               |                             |
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| 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**

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| 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  
Dr Antoine Cremona  
Dr Calvin Calleja  
Mr Charlon Scicluna

Legal Representative  
Legal Representative  
Legal Representative  
Representative

Dr Ian Spiteri Bailey Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board which will deal with the preliminary plea regarding the admissibility of the appeal.

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

Dr Mario De Marco Legal Representative for Global Payments Ltd stated that he disagreed completely with the statements made. The condition of a tender and any related clarifications cannot be changed. In this case the basis of the tender was the price as stated in Clause 6.1 and the subsequent technical and administrative terms. Any earlier meetings and the later 'assumptions and considerations' are not the basis for evaluating the tender. Section 4 of the tender details the basis for submitting the financial offer yet after the closing date unknown computing 'assumptions and considerations' were introduced in evaluating the bids. No one has the least idea of how these assumptions were arrived at.

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

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

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

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

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

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

End of Minutes

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## **SECOND HEARING**

On 23<sup>rd</sup> 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 hear further submissions on this objection.

The attendance for this public hearing was as follows:

### **Appellants – 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**

|                               |                             |
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| 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 |
| Ms Stephanie Grech Mallia     | Member Evaluation Committee |
| Mr Carmel Saliba              | Member Evaluation Committee |

### **Preferred Bidder – Truevo Payments Ltd**

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

### **Interested Party – Bank of Valletta**

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|-------------------|----------------------|
| Dr Steve Decesare | Legal Representative |
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### **Observer – Credorax Bank Ltd**

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|---------------------------|----------------------|
| 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 Mario De Marco Legal Representative for Global Payments Ltd said that the submissions on the preliminary pleas had already been heard.

Dr Steve Decesare Legal Representative for Bank of Valletta stated that a decision has already been made on the preliminary pleas and hence this matter was a '*res judicata*'.

Dr Jonathan Thompson Legal Representative for Truevo Payments Ltd and Dr Ivan Sammut Legal Representative for the Ministry for Finance and Employment both indicated that they agreed with the observations made by Dr Decesare.

The Chairman said that regarding the preliminary pleas the Board has taken note of what the legal representatives have stated 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.

Dr Mifsud Bonnici queried why the Application had not been sent by e-mail which would have given the parties the opportunity to respond.

Dr Sammut pointed out that the Application had been filed with the Tribunal and it was up to that body to circulate the parties.

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

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### **THIRD HEARING**

On 14<sup>th</sup> 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 hear further submissions on this objection.

The attendance for this public hearing was as follows:

#### **Appellants – 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 |
| Ms Stephanie Grech Mallia     | Member Evaluation Committee |
| Mr Carmel Saliba              | Member Evaluation Committee |

#### **Preferred Bidder – Truevo Payments Ltd**

|                      |                      |
|----------------------|----------------------|
| Dr Jonathan Thompson | Legal Representative |
| Mr Francesco Sultana | Representative       |
| Mr Rob Lemmen        | Representative       |

#### **Interested Party – Bank of Valletta**

|                   |                      |
|-------------------|----------------------|
| Dr Steve Decesare | Legal Representative |
|-------------------|----------------------|

#### **Observer subsequently Interested Party – Credorax Bank Ltd**

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| 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. 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 17<sup>th</sup> 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 30<sup>th</sup> 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 Mario de Marco Legal Representative for Global Payments Ltd said that Appellant's submissions were reflected in the letter of objection, namely that on the 17<sup>th</sup> December 2020 Appellant was disqualified and the tender was recommended for award at a price of € 901,914 based on a series of assumptions and considerations applied to all bidders. These assumptions and considerations were not communicated to any of the parties irrespective of whether they were applied consistently or not, whether they were disclosed or not, and which would have affected the bids if the criteria had been known. Non disclosure means that there was lack of transparency and openness in the process and distortion of competition as it did not enable the parties to compete on price. Reference was made

to Article 6 of the tender dossier which states that price was the sole criterion and to Section 4 which laid out the pricing structure; nowhere is there any reference to the assumptions made by the Contracting Authority.

The bid submitted by Appellant was fully compliant but deemed not to be the cheapest for undisclosed reasons. This is in breach of Articles 38 and 39 of the Public Procurement Regulations and CJEU Cases 368/10 and 469/99 which give clear and precise definitions to allow tenderers to understand the terms of the tender and if there is compliance with these requirements. The lack of this information did not enable the Appellant to formulate the best bid and also prevented the Government from obtaining the best bid.

In paragraph 30 subparagraph (a) of the letter from the Ministry of Finance they state that the total price is not the amount paid *per se* but the result of the input formula common to all. However the formula is not disclosed. Clarifications also stated that the Authority could not disclose the formula and assumptions of volume and values of transactions which were made but not disclosed and which defeat the principle of an open tender.

Dr Ivan Sammut contested the claim that the Authority did not divulge information. Clarifications were issued and certain information given at that stage and the assumptions were based on information on market knowledge as will be demonstrated in the evidence to be heard.

Dr de Marco said that there is a common thread in all the appeals in this matter and he suggested that the appeals should be heard together and witnesses testify once to avoid repetition.

Dr Clement Mifsud Bonnici Legal Representative for Credorax Bank suggested that the Board should hear the testimony of Mr Saliba first with Global Payments taking receipt of Mr Bezzina's earlier testimony.

Dr Thompson expressed the view that the Bank of Valletta's appeal was not part of the appeal in this Case and the two cases should be treated differently.

Dr Decesare agreed with Dr de Marco's suggestion that separate testimonies be heard and the cases joined up later.

The Chairman said that at this point one appeal had already been heard. The grievance in this case was similar to the one in the BOV case which however has a wider range of grievances.

Dr de Marco suggested that the transcripts of previous testimonies be issued to Appellant. Dr Decesare agreed with this suggestion and requested that this should apply to all cases.

At this stage the Chairman asked for a recess to enable the Board to consider this suggestion.

After the recess the Chairman said that the Board has taken note of Dr de Marco's request, that Dr Decesare agreed to that request and noted also Dr Thompson's objections and Dr Sammut's submissions.

He further stated that the Board agrees with Dr de Marco's request whereby the sole grievance of Global Payments is similar, if not identical, to that of the BOV appeal. The Board believes that now Mr

Noel Bezzina will not be called to testify further today. A copy of the transcript of the testimony already taken place will be provided to the legal representatives of Global Payments. Parties are requested to advise the Board with the number of further witnesses.

Dr de Marco said that he will be asking Mr Adrian Cachia to testify and maybe Mrs Vanessa Mangion.

Dr Decesare would wish a Central Bank of Malta representative and a BOV representative to testify.

All parties requested that they also be provided with Mr Bezzina's transcript.

Dr de Marco then asked Mr Adrian Cachia to give his testimony.

Mr Adrian Cachia (161766M) called as a witness by the Appellant testified on oath that he has been the Head of Sales and Relationships for over two years at Global Payments Ltd and that he was responsible for preparing the financial aspect of the tender. After certain proposals were put to the Ministry of Finance witness was advised by Mr Noel Bezzina that the tender would be issued in the normal process. The Government was looking at receiving more payments by card for services, payment of taxes and such thus eliminating cash payments and this related to all Ministries.

Witness described the system for online and EPOS payments with online payments which are done on the internet carrying higher costs, the processing between the different cards issued and that local cards carry the lowest cost whilst international cards carry higher costs. What is referred to as 'blended pricing' is an overall cost split in three parts - one of these costs is the interchange fees which is regulated and cannot be modified. Appellant opted to go for interchange pricing and has given own costs to the Government in the tender.

Witness was referred to Section 10 of the tender which requests a total fee and he stated that this was made up of the interchange fee, a fixed rate scheme and the transaction fee of the acquirer – all these charges are blended into one fee. In each of the different cards bidder was requested to insert a total fee for a range of transactions between € 100 to € 10,000 and this applied to all cards – local or international, consumer or corporate as mentioned in the tender. In Section B the tender requested pricing for online transactions which are more expensive than face to face transactions – again five examples had to be costed. Global Payments gave the Authority two types of acquiring fee; a fixed fee or one percentage based.

Witness stated that till 10<sup>th</sup> September 2021 prospective bidders were allowed to request additional information in writing via a portal but there were no physical meetings. In Clarification 6 no information was given to bidders so Appellant requested indication of volume and a breakdown of all types of card use. This data was important as it was necessary to have these figures to formulate the tender as bidders did not know whether they were quoting on a small number of transactions with high value or the converse as this obviously affects the tender input. There was absolutely no idea of the level of transactions – hence the bid was 'a shot in the dark'. The only data supplied related solely to the Commissioner for Revenue and to ARMS. In a letter dated 17<sup>th</sup> December 2020 the Authority indicated that it had taken informed assumptions and considerations on which it had calculated the value given to bidder's offer – these assumptions and considerations were never disclosed to the Appellant who still has no idea of how the figures were calculated. The difference between a price based on percentage or a fixed price makes a difference between the number and the value of



transactions and affects the overall price; the volume and values of transactions are very crucial in deciding the final price.

After having submitted proposals to Mr Bezzina, in August 2020 Appellants were notified that the procedure was a normal tender open to anybody and from that stage it was no longer a negotiated procedure.

In reply to questions from Dr Thompson, witness said that without the assumed figures Appellant had to take a shot in the dark. The lack of information was identified early on in the bidding process and clarifications were sought. Witness was not aware of what remedies were available before submitting the bid. He reserved the right not to answer further questions which he deemed were of a commercially sensitive nature but insisted that there was a difficulty in assessing values without knowing the assumptions and considerations.

Dr Thompson reserved the right of cross examining witness further, as did Dr Sammut and Dr Mifsud Bonnici.

Dr Decesare stated that he had no questions to ask the witness.

After thanking the parties the Chairman declared the hearing deferred to the 2<sup>nd</sup> November 2021 at 9.00am.

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#### **FOURTH HEARING**

On 2<sup>nd</sup> 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  
Mr Carmel Saliba

Member Evaluation Committee  
Member Evaluation Committee

**Preferred Bidder – Truevo Payments Ltd**

Dr Jonathan Thompson  
Ms Abigail Gauci  
Mr Rob Lemmen

Legal Representative  
Representative  
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.

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 19<sup>th</sup> November at 9.00am.

End of Minutes of fourth hearing

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### **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 | 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.

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 23<sup>rd</sup> November 2021 at 1.30pm.

End of Minutes of Fifth Hearing

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## **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 |
|---------------------------|----------------------|

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 17<sup>th</sup> 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 12<sup>th</sup> 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

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 2<sup>nd</sup> March, 23<sup>rd</sup> September 2021, 14<sup>th</sup> October 2021, 2<sup>nd</sup> November 2021, 19<sup>th</sup> November 2021 and 23<sup>rd</sup> November 2021.

Having noted the objection filed by Global Payments Ltd (hereinafter referred to as the Appellant) on 30<sup>th</sup> December 2021, refers to the claims made by the same Appellant with regards to the tender of reference MF112/2020 listed as case No. 1541 in the records of the Public Contracts Review Board.

|  |  |
|--|--|
| Appearing for the Appellant:                           | Dr Mario de Marco & Dr Clinton Calleja |
| 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 (Bank of Valletta): | Dr Steven Decesare                     |

**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 2<sup>nd</sup> March 2021 and a decision was issued on the 18<sup>th</sup> 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 2<sup>nd</sup> and 3<sup>rd</sup> hearings which were held on 23<sup>rd</sup> September 2021, 14<sup>th</sup> October 2021, 2<sup>nd</sup> November 2021, 19<sup>th</sup> November 2021 and 23<sup>rd</sup> 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 17<sup>th</sup> 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 (Global Payments Ltd), 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' biżżejjed 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 which 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:

- a) That the grounds for such objection and appeal are clear and manifest for the determination of the award was affected by the application of criteria which were unknown to the bidders, making the terms of the tender unclear and uncertain, breaching the transparency and openness to competition that the public procurement process is expected to fulfill so as to allow room for fair competition and thereby distorting competition and not providing bidders with the information necessary for a price to be worked out competitively in their bid. That article 6 of the tender document itself indicated that the *‘sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest offer satisfying the administrative and technical criteria’*.
- b) That furthermore the tender document in its Section 4 – ‘Supplementary Documentation’ demanded the bidders to present their bids according to the pricing structure indicated in the ‘Financial Offer’.
- c) That this Section 4 stated all the criteria that the Contracting Authority required for it to be in a position to evaluate the bids and thereby provided prospective bidders with the indication of the criteria and information upon which their financial bids were to be evaluated and considered.
- d) That following the publication of the tender, the Contracting Authority published a number of clarifications some of which continued to indicate the criteria upon which the financial bids were to be evaluated and assessed.

- e) That the appellant provided all the information and data that the tender document required from a bidder in respect to the pricing structure and rates and clearly the appellant's bid was considered by the Ministry for Finance and Financial Services and by the Director Corporate Services compliant with all the criteria set in the tender document thus having ranked in the final evaluation of all bids submitted.
- f) That however the reason for not being awarded the tender as indicated to appellant by the Director Corporate Services was that its bid did not represent the cheapest price, this however having been calculated by the defendants on *'an adopted approach of taking a series of informed assumptions and considerations that were applied to all bids consistently'*.
- g) That the *'series of informed assumptions and considerations'* are unknown to the appellant as they were unknown to it as a prospective bidder when the tender document was published, such that while the appellant met all the criteria made known in the tender document and was deemed compliant with the tender requirements, it was then assessed and evaluated on *'assumptions and considerations'* which were and still are unknown to it.
- h) That public procurement is a process which of itself has the scope of being open to fair competition and requires transparency in the criteria of assessment by which bids will be assessed once opened.
- i) That adding to the criteria by which bids are assessed or indeed changing such criteria without the bidders being aware of such criteria brings about a situation whereby the tender document was therefore unclear and ambiguous in its terms and whereby it gave rise to unfair competition and whereby it lacked the transparency and accountability that all public procurement processes are required to fulfill and failed to provide bidders the full set of criteria upon which their price was to be evaluated and therefore established and proposed by bidders.
- j) That it is unknown to the appellant how its bid was given a comparison contract value of €1,680,208 for Transactions through POS and of €1,749.239 for Transactions Online since it is and was always unknown to it what the *'assumptions and considerations'* against which its financial bid was to be evaluated are.
- k) That this lack of clarity or addition of or use of criteria for assessing bids rendered it impossible for the appellant to prepare its bid in a way that could take into account these *'assumptions and considerations'* and also rendered the evaluation of the bids incorrect and false based on criteria which were not contained in the tender document itself.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6<sup>th</sup> January 2021 and its verbal submission during the virtual hearing held on 23<sup>rd</sup> September 2021 and 14<sup>th</sup> October 2021, 2<sup>nd</sup> November 2021, 19<sup>th</sup> November 2021 and 23<sup>rd</sup> November 2021, in that:

- a) In regards to the issue/contention raised by Appellant company, the defendant humbly submit that there is no legal obligation to disclose the value or volume of transactions that could be expected or assumed. 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.
- b) The Objecting Company contends also that the tender document contravenes the transparency and openness to competition that the public procurement process is expected to fulfil so as to allow room for fair competition and thereby distorting competition. 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.
- c) Defendant also stresses that during the clarifications stage the Contracting Authority did provide clarifications on the assumptions and considerations on which it was going to compute its 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 could not provide "an estimated value" as it did not know the future level of card usage take up from the general public, and even if the Contracting Authority had try to assume this, one could not then assume which cards they will be using. In fact, even the bidders in their submission were not asked to give an expected value as this was illogical. The method adopted was fair in that it was based on considerations and assumptions that were discussed with CBM and they (i.e. the assumptions/considerations and the volumes) were applied to ensure consistency and comparability. One here re- iterates that during the preliminary meetings the bidders were informed that such workings will be based on approximate volumes and that the Central Bank of Malta would assist with the formulation of the assumptions/considerations.
- d) 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) In this particular tender we are dealing 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.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 6<sup>th</sup> January 2021 and its verbal submission during the virtual hearing held on 23<sup>rd</sup> September 2021 and 14<sup>th</sup> October 2021, 2<sup>nd</sup> November 2021, 19<sup>th</sup> November 2021 and 23<sup>rd</sup> November 2021, in that:

- a) By means of its appeal, GPL submits that “the award was affected by the application of criteria which were unknown to the bidders, making the terms of the tender unclear and uncertain, breaching the transparency and openness to competition that the public procurement process is expected to fulfill so as to allow room for fair competition and thereby distorting competition and not providing bidders with the information necessary for a price to be worked out competitively in their bid”;
- b) That Truevo rejects as unfounded in fact and at law the ground of appeal brought forward by GPL and GPL's appeal should be rejected in its entirety.
- c) That the information requested by the Contracting Authority in order to enable it to evaluate and determine the award was requested uniformly and indiscriminately from all participants who submitted a bid and participated in this Negotiated Procedure. Truevo fails to understand why GPL states in its appeal that the criteria were unknown to the bidders and GPL fails to state which terms of the tender were "unclear and uncertain". Had GPL felt that certain terms were unclear and uncertain, it had every opportunity to request a clarification or to file an application in terms of Regulation 262 of the Public Procurement Regulations before the closing date of the call for competition in order to clarify any such lack of clarity or certainty;

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

- a) 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.

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 Appellant’s 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 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 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.



**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