



## **QORTI TAL-APPELL**

### **IMĦALLFIN**

**S.T.O. PRIM IMĦALLEF MARK CHETCUTI  
ONOR. IMĦALLEF JOSEPH R. MICALLEF  
ONOR. IMĦALLEF TONIO MALLIA**

**Seduta ta' nhar L-Erbgħa, 30 ta' Ġunju, 2021.**

**Numru 30**

**Rikors numru 95/21/1**

**Truevo Payments Limited (C62721)**

**v.**

**1. Direttur tal-Kuntratti;**

**2. Ministeru għall-Finanzi u x-Xogħol**

**U**

**3. Credorax Bank Limited (C46342)**

**Il-Qorti:**

1. Dan hu appell imressaq fis-6 ta' April, 2021 mis-soċjeta` rikorrenti Truevo Payments Ltd wara deċiżjoni datata 18 ta' Marzu, 2021, mogħtija

mill-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi (min hawn 'l quddiem imsejjaħ "il-Bord") fil-każ riferenza MF 112/2020 (każ numru 1539).

2. Dan il-każ huwa marbut ma' sejha għall-offerti li ħareġ il-Ministeru għall-Finanzi u x-Xogħol "*for procurement of card services (negotiated procedure)*". Għal dan il-kuntratt kien hemm erba' offerti u l-kuntratt ġie rakkomandat li jingħata lis-soċjeta` rikorrenti Truevo Payment Ltd. Sar appell għal quddiem il-Bord mis-soċjeta` intimata Credorax Bank Ltd. Kemm is-soċjeta` rikorrenti kif wkoll l-intimati Direttur tal-Kuntratti u l-Ministeru għall-Finanzi u x-Xogħol eċċepew in linea preliminari n-nuqqas ta' interess ġuridiku da parti ta' Credorax Bank Ltd peress li din is-soċjeta` naqset milli tissottometti l-offerta tagħha fil-ħin. Il-Bord ta d-deċiżjoni tiegħu fit-18 ta' Marzu, 2021, li biha ċaħad l-eccezzjoni preliminari li ressqu l-appellati fil-proċeduri quddiemu. Id-deċiżjoni tal-Bord hija s-segwenti:

"

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

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

*It furthermore results that the appellant did not submit its bid, and on the 17<sup>th</sup> December 2020, a recommendation of award notice was*

*issued to Truevo Payment Limited, the recommended bidder. The financial offer of the bid was of EUR 901,914 excl VAT.*

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

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

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

*Furthermore, the contracting authority refers to decisions by the Court of Appeal and argues that, once the appellant failed to make use of other remedies, such as that in terms of regulation 262 to challenge clauses of the tender and given that the conditions of the tender have not been altered, then the appellant cannot claim his objection now to be beneficial to it, and it will not achieve an effective remedy.*

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

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

*The appellant company rebuts these arguments, stating that “Regulation 270 has a very wide meaning allowing freedom to claim ‘to*

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

*The Board refers and notes:*

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

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

**Art. 270 of the PPR** which states:

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

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

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

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

**And Article 2 thereof which defines:**

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

**The Board, furthermore, refers to the 2015 LL.D. thesis by Dr Joseph Calleja<sup>1</sup>, and specifically to its title 2.1 entitled Locus Standi:**

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

*The Court of Justice of the European Union (CJEU) also made it clear that even though this article allows Member States to determine the detailed rules according to which they must make available the review procedures provided for in the Remedies Directives to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement, it does not authorise them to interpret the term interest in obtaining a public contract in a way which may limit the effectiveness of that directive. (C-470/99*

---

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

*Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH. I-11617 [12 December 2002] (CJEU) para 72; C-410/01 Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others v Autobahnenund Schnellstraßen-Finanzierungs-AG (Asfinag) I-06413 [19 June 2003] (CJEU) para34)*

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

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

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

*The Board thus considers:*

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

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

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

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

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

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

*The Board,*

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

3. Is-soċjeta` rikorrenti Truevo Payments Ltd issa qed tappella mid-deċiżjoni preliminari li ħa l-Bord għal quddiem din il-Qorti u resqet aggravji marbuta mal-fatt li la darba li s-soċjeta` intimata ma kinitx qed tipparteċipa fil-proċedura negozjata li nieda l-Ministeru ntimat, ma setgħetx tappella mid-deċiżjoni li ħa l-Kumitat Evalwattiv. Tgħid ukoll illi, f'kull każ, setgħet tikkontesta l-proċedura użata minn qabel ma ħarġet ir-rakkomandazzjoni tal-imsemmi kumitat a bazi tar-Regolament 262 tal-Leġislazzjoni Sussidjarja 601.03.4.

4. Wara li semgħet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, din il-Qorti sejra tgħaddi għas-sentenza tagħha.

Ikkonsidrat:

5. Illi f'din il-materja qed jiġi kkontestat id-dritt tas-soċjeta` Credorax Bank Ltd li tikkontesta rakkomandazzjoni li saret favur is-soċjeta` Truevo Payments Ltd, u dan peress illi din l-ewwel soċjeta` ma pparteċipatx fin-negozjati li saru mal-ministeru konċernat. Jidher li Credorax ma pparteċipatx fis-sejha għall-interess minħabba problemi tekniċi min-naħa tagħha, u għalkemm ippruvat tiġġustifika dan in-nuqqas tagħha, ma ġiex konċess lilha li tissottometti applikazzjoni wara d-data tal-għeluq. Mhiex din il-kwistjoni li għandha quddiemha din il-Qorti f'dan l-istadju iżda, jekk

Credorax Limited, li bħala fatt ma ressqitx applikazzjoni, tistax tappella fuq il-proċedura użata għal din l-offerta.

6. Din il-Qorti rat ir-Regolament 240 tal-Leġislazzjoni Sussidjarja li jagħti 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-deċiżjoni tiegħu fuq dan ir-Regolament, u din il-Qorti tara li dan ir-Regolament huwa wiesa' biżżejjed biex jagħti nteress lis-soċjeta` Credorax Ltd tappella mid-deċiżjoni tal-Kumitat Evalwattiv. Din is-soċjeta` kellha interess fil-materja tas-sejha tal-offerti u wriet dan l-interess meta ppruvat tipparteċipa fin-negozjati. Din ir-regola ta' interess tista' tkun differenti mir-regoli ta' interess ġuridiku li joperaw lokalment b'mod ġenerali għall-kawżi quddiem il-qorti tagħna, pero`, trattandosi ta' liġi speċjali li, hi bażata fuq Direttiva tal-Unjoni Ewropea, hija din li għandha applikazzjoni għall-każ in materja.

7. Mhux l-istess jista' jingħad fil-kuntest tal-aggravju l-ieħor tas-soċjeta` issa appellanti, dak marbut mal-inammissibilita` tal-azzjoni in vista tar-rimedju ikkontemplat fir-Regolament 262 aktar qabel indikat. Hu ċar li l-ilmenti tas-soċjeta` Credorax Ltd huma diretti lejn il-proċedura wżata u ma humiex marbuta mas-sustanza tal-offerta. Din is-soċjeta` qed tilmenta mill-użu tal-proċedura tal-għoti tal-kuntratt b'negozjati, fuq il-mod

kif ġie imfassal il-proċess ta' din il-proċedura u li ma kienx hemm l-approvazzjoni tad-Direttur tal-Kuntratti għall-użu ta' din il-proċedura. Dawn it-tlett aggravji li abbażi tagħhom il-kumpanija appellata Credorax Ltd ppreżentat l-appell tagħha jirrigwardjaw materji illi kienu jeżistu sa mill-bidu nett tal-proċedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taħt ir-Regolament 262. Dawn l-ilmenti kellhom jitressqu qabel id-data tal-għeluq ta' sejha għall-kompetizzjoni u mhux , bħal fil-każ tallum, wara dik id-data, u saħansitra wara d-deċiżjoni dwar l-għoti tal-kuntratt.

8. Saret referenza għas-sentenza tal-Qorti tal-Ġustizzja tal-Unjoni Ewropea tat-12 ta' Frar, 2004 , fil-każ fl-ismijiet **Grossman Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v. Republik Österreich (C-230/02, CJEU)** fejn fost il-konkluzjonijiet milħuqa jingħad is-segwent:

*“1. Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract awarded.”*

(Sottolinear ta' din il-Qorti).

9. Jidher ċar mill-premess illi darba li, anke f'dan il-każ, il-kuntratt ġie rakkomandat u s-soċjeta` Credorax Ltd naqset li tfittex ir-rimedju opportun skond il-liġi qabel l-għeluq tat-terminu għall-preżentata tal-offerta, ma tistax aktar tappella biex tressaq l-aggravji tagħha.

Għaldaqstant , għar-raġunijiet premessi, tiddisponi mill-appell ta' Truevo Payments Ltd billi tilqa' l-istess, tħassar u tirrevoka d-deċiżjoni li ta l-Bord tar-Revizjoni dwar Kuntratti Pubbliċi fit-18 ta' Marzu, 2021, u tiddikjara bħala inammissibli u null l-appell li ressqet Credorax Ltd quddiem dak il-Bord.

L-ispejjeż ta' dawn il-proċeduri jithallsu mis-soċjeta` intimata Credorax Ltd.

Mark Chetcuti  
Prim Imħallef

Joseph R. Micallef  
Imħallef

Tonio Mallia  
Imħallef

Deputat Registratur  
da