

PUBLIC CONTRACTS REVIEW BOARD

Case 1348 – MEDE/308/2019 – Concession for the Running of School Tuck Shop at Gozo College Secondary School, Victoria, Rabat, Gozo for Scholastic Year 2019/2020

The publication date of the tender was the 14th June 2019 whilst the closing date was 10th July 2019. The estimated value of the tender (exclusive of VAT) was € 120,912 (for two years).

On the 9th August 2019 S.K. Victoria Wanderers filed an appeal against the Ministry for Education and Employment as the Contracting Authority contesting the decision to disqualify them as their bid was not compliant for a variety of reasons. A deposit of € 604.56 was paid.

There were two (2) bidders.

On 5th September 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – S.K. Victoria Wanderers

Dr Chris Mizzi	Legal Representative
Mr Brian Azzopardi	Representative
Mr Keith Vella Muscat	Representative
Mr Raymond Grech	Representative

Contracting Authority – Ministry for Education and Employment

Dr Dennis Zammit	Legal Representative
Dr Denise Mifsud	Chairperson Evaluation Committee
Ms Joelle Mifsud Bonnici	Secretary Evaluation Committee
Ms Mary Jane Camilleri	Member Evaluation Committee
Mr Joseph Cutajar	Member Evaluation Committee
Mr Simon Farrugia	Member Evaluation Board

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and prior to inviting them to make their submissions mentioned that the value of the tender as stated in the Information Sheet does not appear to tally with the figure of the recommended contract value and there does not seem to be any relationship between the figures.

Dr Dennis Zammit Legal Representative for the Ministry for Education and Employment said that this was probably due to the Ministry using a standard template based on the number of pupils in the school and the average daily spend by each pupil.

Dr Chris Mizzi Legal Representative for S.K. Victoria Wanderers (hereinafter referred to as SKVW) said the tender was on a small concession for a school tuck shop. There were two bids submitted and the preferred bid was the higher offer. SKVW were disqualified. The letter of appeal filed on behalf of Appellants went into full details but the cardinal point of the appeal was the alleged conflict of interest of an individual in his role as a teacher and a member of the School Council at the school in question and his involvement with SKVW.

The disqualification was wrong in that Mr Brian Azzopardi was not the bidder but SKVW whose current president happened to be the same Mr Azzopardi. SKVW was a completely separate entity and Mr Azzopardi had not interest in the tender. The tender included a form declaring that Appellant had no conflict of interest. The Evaluation Committee were obliged to rely on that declaration. Extraneous information came to the attention of the evaluation committee at which stage they became obliged to seek a clarification from the Appellant. The information received cannot be used as grounds for disqualification, as a possible conflict of interest does not fall under the ethics clauses in the tender as there was no false declaration by Mr Azzopardi.

Referring to an e-mail of the 13th March 2019 dealing with a matter on a past contract Dr Mizzi stated that a record of past experience was not requested as the tender did not ask for Appellants' track record - this was therefore a fundamental breach vis-a-vis the Appellant, and was *ultra vires*. Regarding the claim that there is a conflict of interest because in his role on the School Council Mr Azzopardi might have to deal with any disputes involving the tuck shop contract, this again was not factual as the Council is not involved in the running of the contract and its implementation. Conversely having a teacher involved in the running of the tuck shop is beneficial to the School as it leads to better relations.

Dr Frank Abela (55556G) called as a witness by Appellants testified on oath that he is a retired Head of Gozo College Secondary School. He stated that the procedure in the last few years was for the Ministry for Education to issue tenders for the running of tuck shops. He affirmed that the School Council is not involved at all in the running of the tender or in any parts thereof. The Council is only involved in relations with parents and students. He never experienced any conflict of interest between SKVW and the school tuck shop.

Questioned by Dr Mizzi witness expressed his belief that it was beneficial to have a warranted teacher in a supervisory role but not hands on. In his experience complaints regarding the tuck shop were referred to the head of School who then took the complaints to the contractor.

Questioned by Dr Zammit witness said that he recalls occasions when the tuck shop was run by wholly external people – it was not necessary to have a warranted person supervising but it was a

plus. He was not certain that there could exist a perception that if a teacher was involved in supervision any complaint would likely be swept under the carpet.

Dr Zammit stated that if Mr Azzopardi came across something wrong in the running of the tuck shop he would find it difficult to decide what action to take. The regulations of School Councils allow certain latitude – they can, for example, discuss cancelling the contract – therefore the perception of a conflict of interest exists.

Dr Mizzi said that the School Council was not mentioned either in the tender or the contract – they had no role to play.

Ms Mary Jane Camilleri (29067G) called as a witness by the PCRB testified on oath that she was a member of the evaluation committee. She stated that the tuck shop was discussed by the School Council formulating replies to an annual questionnaire from the Ministry. Mr Azzopardi was involved in these discussions. When the matter of unhealthy food was discussed Mr Azzopardi's view was that that the incident was a one-off and the school should carry on with the contract as having outsiders running the tuck shop was a better system than having teachers involved.

Questioned by Dr Mizzi witness agreed that the incident regarding unhealthy food was prior to the issue of the Concession document. When the choice between outsourcing the contract or of teachers running it the School Council opted for outsourcing, with the possibility of an extension for another year, the contractor was already one year into the contract. The issue on the non-healthy food was in March and the decision to go for the issue of a tender was taken in April. Mr Azzopardi was present and part of the decision making to outsource. When asked why no clarification, as demanded by law, was sought once the extraneous information was brought to the attention of the committee, witness stated that personally she did not see the need to clarify matters. The question of a conflict of interest was deliberated upon by the committee. Witness agreed that it was advantageous to have a warranted person in a supervisory role in the tuck shop.

Dr Zammit said that SKVW was a voluntary organisation and as such it was not even legal for them to submit an offer.

Dr John Seychell Navarro (228177M) called as a witness by the PCRB testified on oath that he was the Director of Legal Services at the Office of the Administrator of Voluntary Organisations. He stated that SKVW were enrolled as a voluntary organisation (V/O 1386 enrolled 31.7.2017).

Under Article 38 of Cap 492 of the laws of Malta a voluntary organisation should not be involved in commercial operations. However, if the service offered is in line with the objectives and aims of the voluntary organisation and provided that it is within a 10% limit of its income then that does not infringe the law. In the case of SKVW the service provided is above the 10% limit and therefore there is a problem and SKVW cannot bid at this point in time.

In reply to questions from Dr Mizzi witness stated that at the time of the bid in March 2019 SKVW were fully compliant and a certificate of compliance was issued at the time entitling them to bid.

In reply to a comment by Dr Mizzi that the Board is only considering infringements of Public Procurement Regulations the Chairman stated that the PCRB is obliged to take into consideration any aspects of law breaking which affects its decisions.

Dr Mizzi re-iterated that the evaluation committee had carried out the process incorrectly in that they should have sought a clarification on the additional information received which they had decided to take into consideration, thus breaking the procurement regulations. They had an obligation not to prejudice the Appellants and once they had two sources of information they had an obligation to clarify matters. The PCRB should order a re-evaluation of the tender before a different Board to deal with these shortcomings.

Dr Zammit said that Mr Azzopardi's conflict of interest was very clear in fact and also in being perceived as such. The PCRB are now aware of this possible conflict and should consider all the facts revealed in the several roles of Mr Azzopardi as a teacher, a School council member and President of the SKVW.

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

This Board,

having noted this objection filed by S. K. Victoria Wanderers (herein after referred to as the Appellants) on 9 August 2019, refers to the claims made by the same Appellants with regard to the tender of reference MEDE/308/2019, listed as case no 1348 in the records of the Public Contracts Review Board, awarded by Ministry for Education and Employment (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Chris Mizzi

Appearing for the Contracting Authority: Dr Dennis Zammit

Whereby, the Appellants contend that:

a) Their offer was rejected due to the alleged claim by the Authority, that there was a conflict of interest through the involvement of one of the teachers, in the selection of the award. In this regard, Appellants maintain that, the teacher involved is not the actual bidder and the involvement of a teacher in the running of the School's Canteen is beneficial to the students and the school, in general.

This Board also noted the Contracting Authority's 'Letter of Reply' dated 19 August 2019 and its verbal submissions during the hearing held on 5 September 2019, in that:

a) The Authority insists that, the teacher involved namely Mr Brian Azzopardi was definitely involved both in the offer submitted and the decision to 'Outsource' this tender, hence a conflict of interest is apparent.

This same Board also noted the testimony of the witnesses namely;

Dr Frank Abela, duly summoned by S. K. Victoria Wanderers,

Dr John Seychell Navarro, duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony

of the witness duly summoned by Appellants, opines that, the issue that merits consideration is whether a conflict of interest existed through the involvement of Mr Brian Azzopardi, a teacher at the same school where the ‘Tuck Shop’, is situated.

- 1. First and foremost, this Board notes that although Mr Brian Azzopardi is not the actual bidder in this tender, he is the Legal Representative of the bidder namely S. K. Victoria Wanderers. At the same instance, Mr Azzopardi is a teacher who is also a member of council of the same school, where the tendered catering service is to be carried out.**
- 2. This same Board was made aware that the school council was involved in the decision as to whether the School’s Administration should run the ‘Tuck shop’ or to ‘Outsource’ and eventually, it was decided to ‘Outsource’. Mr Brian Azzopardi participated in this decision and in this regard, the least one would have expected, in such a delicate circumstance, was for Mr Azzopardi to abstain from participating in this decision, as he knew very well that, through such a decision, S. K. Victoria Wanderers would likely submit an offer.**

3. Through the testimony of Dr John Seychell Navarro, this Board was made aware of the fact that, the Appellants are registered as a Voluntary Organisation. The witness also confirmed that under article 38 of chapter 492, of the Laws of Malta, such Voluntary Organisations cannot be involved in commercial operations unless the income delivered therefrom is within 10% of its total income. In this particular case, the witness informed this Board that Appellants were not in a legal position to submit an offer.

In conclusion, this Board opines that:

a) Mr Brian Azzopardi who is the Legal Representative of S. K. Victoria Wanderers, was also a member of the School's Council which, in turn decided to 'Outsource'. Mr Azzopardi was knowledgeable enough to realise that through such a decision, in which he actively participated, Appellants would be submitting their offer, hence there existed a conflict of interest in the Procurement Process.

b) From the testimony and detailed information submitted by the witness, Dr John Seychell Navarro, the Board was made aware that, Appellants were not within the Legal Framework of Article 38 of Chapter 492 of the

Laws of Malta and it is the duty and remit of this Board to point out such irregularity.

- c) The inclusion of Mr Brian Azzopardi in the participation of the decision to ‘Outsource’ the tendering service created a perceived conflict of interest.**

- d) The advantages of having an inhouse teacher to participate in the supervision of the running of the School’s ‘Tuck Shop’, do not outweigh the consequences which may be derived from a blatant conflict of interest.**

In view of the above, this Board,

- i) does not uphold Appellants’ contentions,**

- ii) upholds the Contracting Authority’s decision in the award of the contract,**

iii) confirms that there existed a conflict of interest in the decision making of the School's Council, to outsource the tendered service,

iv) directs that the deposit paid by Appellant should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

12 September 2019