Excluding Veolia from public contracts

A legal briefing note prepared by Hickman & Rose, Solicitors[1]

There is every reason for excluding Veolia from public contracts in the UK and no good legal reason not to do so.

The multinational company, Veolia operates as a single entity worldwide, providing transport, sewage treatment, landfill and waste collection services that benefit illegal Israeli settlements in East Jerusalem and the occupied West Bank. These actions amount to "grave misconduct" in the conduct of business under any reasonable interpretation, given that they directly assist serious violations of international humanitarian law by Israel. Veolia should be excluded from public contracts on these grounds. There is no foundation for the argument that exclusion of Veolia is itself illegal and contrary to the Local Government Act 1988. Indeed Minister for the Cabinet Office Francis Maude in a written parliamentary answer on 23rd May 2012 regarding illegal Israeli settlements was explicit that companies that have committed "an act of grave professional misconduct in the course of their business or profession" "may be excluded from a tender exercise".[2]

This briefing sets out the reasoning behind these contentions. You will find links to further evidence and arguments in their support on this web page:

http://jfjfp.com/?page_id=30763

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[2] http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120523/text/120523w0004.htm

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1. Grave misconduct

Under the Public Contracts Regulations 2006[3] a public body may exclude a bidder or reject a bid where it is found that the individual or organisation in question has "committed grave misconduct in the course of his business or profession" (s.23(4)(e)). The Regulations were enacted to comply with the requirements of EU Directive 2004/18/EC of 31 March 2004.[4] "Grave misconduct" is not specifically defined in the Directive or the Regulations, but is understood to be something that can be proven to be such.

In this case, the claim of grave misconduct concerns Veolia's activities in linking Israel to its illegal settlements located in the occupied West Bank and East Jerusalem. Veolia has done so with the provision of a light railway and bus services, and by supplying sewage treatment, waste collection and landfill services to such illegal settlements. In doing this, Veolia aids, abets, exacerbates and facilitates Israel's continued violation of international humanitarian law – including the commission of "grave breaches" of the Fourth Geneva Convention 1949 and the First Additional Protocol of 1977 – as well as Israel's continued human-rights violations, in breach of international law. Furthermore, Veolia breaches international codes of conduct and authoritative guidance applicable to multinational corporations, including the OECD Guidelines for Multinational Enterprises (2000). All of these actions amount to "grave misconduct" on any reasonable interpretation.

It is important to stress that Veolia does not deny that it provides these services that openly benefit illegal Israeli settlements in the occupied West Bank (for more on these services see http://jfjfp.com/?page_id=30824).

2. The argument is often heard that what Veolia does in the UK has nothing to do with what it does elsewhere in the world. This is not the case. Veolia is a

[3] http://www.legislation.gov.uk/ssi/2006/1/regulation/23/made

[4] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts *Official Journal L 134 , 30/04/2004 P. 0114 – 0240,* English language version at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:HTML

multinational company with a complex structure, but it operates as a single entity. The conduct of one part of the company cannot be viewed in isolation from the activities of other parts of the company.

(a) Veolia's structure

Veolia Environmental Services in Britain is part of the multinational French corporation, Veolia Environnement SA (henceforth Veolia). So too are Veolia Environmental Services Israel (VES Israel) and Veolia Transdev, companies involved in activities in the Occupied Palestinian Territories.

Veolia has four divisions: environmental services, transport, water and energy. Veolia Environmental Services is a UK subsidiary of Veolia's environmental services division. **In 2005 the company's four divisions adopted the single name, Veolia, and the Veolia website states that this move "signalled the desire of the entire company to link the Veolia divisions in a coherent way and increase its visibility".**[5] Veolia's revenues and profits are calculated as a whole. The corporation is listed on the Paris and New York stock exchanges. In reporting results, Veolia regards its subsidiaries as divisions of itself, and its subsidiaries' contracts as its own contracts. All of these features are important in showing that Veolia and its subsidiaries in the UK and in Israel and the occupied Palestinian territories should be treated as a single entity.

For further elaboration, see http://jfjfp.com/?page_id=30853

(b) UK law

UK public bodies are entitled by law to look behind the corporate structure of a bidding company to assess if any part of the business in question is committing grave professional misconduct.

[5] http://www.veolia.com/en/group/history/today/

English case law establishes that a holding company and subsidiary can be treated as a single entity, and the profits of the subsidiary can be treated as profits of the parent company.[6] The legal position has been described as follows: "[A] court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group or another member of the group if this conforms to the economic and commercial realities of the situation".[7]

(c) EU law and the UK

The case is further strengthened when we take EU law into account. The European Court of Justice recently adopted a wide approach to parent liability for subsidiary conduct where the subsidiary is wholly owned by the parent company.[8] As already pointed out above, Veolia treats itself as a single entity and so the conduct of one division *is* the conduct of Veolia as a whole. The Veolia website states, "Veolia Environnement is the only global company to provide the full gamut of environmental services in the water, environmental services, energy and transportation fields under one brand name."[9] **UK law on procurement of public contracts must be applied so as to give effect to EU law. Given the definitions set out in the Directive and EU law a public body is entitled to treat a group of companies under common control as the bidder even where just the UK part of the group makes the bid.** This means the conduct of all companies in the group can legitimately be imputed to the bidder. EU law will not permit a wrong-doer to shelter behind corporate structures or arrangements that ensure that they were not the bidder for the purposes of the Directive.

In other words, EU law encourages us to focus on substance rather than the legal form of companies, and to view "control" as the key issue of substance when

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[6] *Smith, Stone and Knight Ltd* v *The City of Birmingham* [1939] 4 ALL ER 116

[7] *Supermarkets Limited* v *Crumlin Investments Ltd and Dunnes Stores (Crumlin) Limited (22 June 1981, Unreported, High Court) Connelly* v *RTZ Corporation Plc and others [1998] AC 854* and *Lubbe* v *Cape PLC [2000] 4 All ER 268* further demonstrate occasions where the court has lifted the corporate veil in light of realities on the ground.

[8] *Akzo Nobel NV* v *Commission of the European Communities* (2009) All ER (D) 93 (Sep)

[9] http://www.veoliaenvironnement.com/en/group/activities/default.aspx

examining the status of economic entities. This provides further support for the focus on substance rather than the legal form of companies, and for viewing "control" as the key issue of substance when examining the status of economic entities. In EU competition law it has long been established that companies will be held responsible for the activities of their subsidiaries. There is a presumption that where a company is wholly owned by another company it does "not decide independently upon its own conduct" but rather carries out the instructions of its parent.

In short, EU law permits public bodies to impute the conduct of group companies forming a single economic unit to the bidder. **If one division of Veolia is involved in activities of grave misconduct and Veolia as a whole profits from such conduct, then Veolia as a single entity including all of its divisions and subsidiaries must necessarily be implicated in such misconduct.**

3. Wouldn't it be contrary to the Local Government Act (LGA) 1988 to treat Veolia in this way? The answer is 'no'.

It is often claimed that LGA 1988 prevents public bodies from excluding Veolia from bidding for contracts on the basis of the above considerations. This is not so. There is no such legal impediment set down in any legislation, including LGA 1988.

Section 17 of the LGA 1988 provides as far as relevant (emphases added):

> *s.17 Local and other public authority contracts: exclusion of non-commercial considerations*
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> (1) It is the duty of every public authority to which this section applies, in exercising, in relation to its public supply or works contracts, any proposed or any subsisting such contract, as the case may be, any function regulated by this section to exercise that function without reference to matters which are ***non-commercial matters for the purposes of this section***.
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> …
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> (5) The following matters are non-commercial matters as regards the public supply or works contracts of a public authority, any proposed or any subsisting such contract, as the case may be, that is to say—

> …(e) the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors…

The wording may be complicated but it is clear that only *certain kinds of non-commercial considerations* are ruled out of consideration. Local authorities are *not* entitled to take into account some *specific* non-commercial considerations when making public contract decisions. But they *are* entitled to consider, for example, criminal conduct alleged against a bidder in a particular locality.

The "non-commercial matters" that are being put forward as the basis for excluding Veolia from public contracts do not contravene the LGA 1988 prohibition. That is because the grave misconduct alleged against Veolia does not relate to its activities in Israel or the Occupied Palestinian Territories (OPT) *per se*, or the location *per se* of its business activities or interests in Israel or the OPT. Rather, the (non-commercial) matter in question is the precise nature of Veolia's activities in the West Bank, which is *totally outside* the list of excluded "non-commercial matters" in s17. [10]

To clarify: there would be no complaint if Veolia were providing a bus service solely within Israel proper; or supplying waste disposal services to Palestinian communities alone within the West Bank; or not servicing illegal settlements as part of the Jerusalem Light Railway into East Jerusalem. In short, it is not that Veolia's business activities take place in a particular country or territory that give rise to the allegation of "grave misconduct in the course of [its] business or profession", but the *nature of* Veolia's economic activity in the West Bank, including East Jerusalem (that is to say, the fact that Veolia acts in wilful defiance of international law).[11]

[10] Section 19 LGA 1988 entitles the Government to pass regulations to "specify as a non-commercial matter for the purposes of section 17…any other matter which appears…to be irrelevant to the commercial purposes of public supply or works contracts of any description". But no changes have been made that affect decisions on excluding Veolia for grave misconduct.

[11] Any LGA 1988 argument runs into a further difficulty: EU law requires that the 1988 Act must be "read down" so as to enable the 2006 Regulations to operate effectively within EU procurement law and ensure that the discretion being considered here can be properly exercised i.e. EU law will be dominant in this context.

Conclusion

Veolia's activities, insofar as they aid, abet, facilitate and exacerbate human-rights violations and discrimination, clearly constitute misconduct sufficiently grave to warrant the exclusion of Veolia Environmental Services from bidding for (or being awarded) any new contract. Indeed, it is difficult to imagine what "misconduct" could be more "grave" than the aiding, abetting, facilitation or exacerbation of human-rights violations and discrimination.

Public bodies in the UK need to be aware they could expose themselves to legal action for failing to take on board their obligation to recognise and comply with their duties and responsibilities under the Geneva Conventions and international law.

Accordingly, public bodies should indicate as soon as possible what action they intend to take to investigate the matters raised above and whether they intend to exclude Veolia from bidding for new contracts. It would be fair and appropriate to put the above allegations to Veolia Environmental Services, before making any decisions.