



## A reflection on the often discussed confidentiality of the proposals of bidders

*Report 15/2012, of 19 of September, of the Consultancy Board for Administrative Contracting of the Autonomous Region of Aragon*

On 19 of September of 2012, the Consultancy Board for Administrative Contracting of the Autonomous Region of Aragon (JCC-CAA for its Spanish acronym) issued a report on the confidentiality of the proposals of bidders.

### Confidentiality versus transparency

In its Report the JCC-CAA begins by highlighting the possibility that there may be a conflict between the right to confidentiality of information, established in Directive 2004/18/EC and in Royal Legislative Decree 34/2011, Recast Text of the Law on Public Sector Procurement (TRLCSPP for its acronym in Spanish); and the principle of transparency of the proceedings foreseen in article 1 of the TRLCSPP, principle that results in the publicity of the tenders as well as in the possibility to access the information in order to review and, if applicable, to appeal against decisions that are considered to be a breach of law or of the conditions of the tender.

According to the report of the JCC-CAA the concurrence of both rights must be resolved by trying to find the right balance, since neither the confidentiality may cover the offer presented in its entirety, nor may the transparency imply unlimited access to the record of procurement proceeding and to the documents it contains.

### The secrecy of proposals

The Report of the JCC-CAA is very clear on the fact that the access to the documents of the

record is possible only from moment when the proposals cease to be secret.

The proposals of bidders are secret up until the moment of the opening of the bids. After the offers submitted are opened, in public, they stop being classified. Therefore, before the public opening of the offers they cannot be examined.

After the public opening of the proposals, the question arises whether for the exercise of the right of access one has to wait for the award of the tender or such right may be exercised before the award. To this regard, the Report invokes the supplementary regulation of article 37 of Law 30/1992, of the Legal Regime applicable to Public Administration and the Common Administrative Procedure, establishing the right of access to files corresponding to procedures completed on the date of the request for access. Depending on what is understood by "completed procedure" in the field of public procurement, the right of access may or may not be exercised before the award.

According to the JCC-CAA the procedure will be typically considered as completed when the award is notified, but it will also be possible to grant access to the documents provided by bidders in Envelope I (containing corporate information regarding the bidder other than the technical and economic offer) to those other bidders with regard to whom procedural acts have been issued- e.g. regarding their exclusion from the procedure- which prevent them from continuing with the procedure.



## Who has the right to access the information and about what?

The Report from the JCC-CAA under discussion qualifies previous reports issued by other Consultancy Boards for Contracting which restricted the access to the records only to rejected candidates and accepted bidders.

This report considers that in the view of the many rulings of the Courts the access to the records must be recognized not only to those who have participated in the tender, but also to other persons who prove to be holders of legitimate rights or interests that are disadvantaged or might be affected. This would be the case, for instance, of associations or companies not invited to a particular negotiated procedure.

Likewise, in its Report the JCC-CAA considers that it is also necessary to qualify the interpretation given in previous reports of other advisory bodies which pointed out that the access should be granted to the documents provided by the tenderer to whom the contract is awarded but not to the documents provided by the rest of the bidders.

According to the Report from the JCC-CAA, since the reform brought about by Law 34/2010, of 9 of August, the notification of the award to the bidders must state the characteristics and advantages of the proposal of the winner of the tender which were determining factors in its selection vis-à-vis those of other bidders which also presented admitted offers.

For this reason it is understood that the contracting body must allow the access, by any company, to the proposals presented by all admitted parties, and not only to the offer of the company which won the tender, since the

motivation must be based on a comparison between all the offers.

According to the Report, in order to exercise the right to inspect the file the interested parties shall have to request it previously and specify what documents are to be examined. It will be possible to take notes but no copy of the offers submitted by the other bidders will be provided. Prior to granting access, the contracting body shall have to identify and take out the documents declared as confidential under the terms demanded in the Specifications, to which no bidder shall have access.

## Scope of the confidentiality: technical or commercial secrets

A first reading of Directive 2004/18/EC and the TRLCSP would allow to conclude that the bidders are free to declare what information of their offer is confidential and that this statement should be respected by the contracting body.

However, the necessary balance between the right to confidentiality and the principle of transparency serves to conclude that the confidentiality cannot affect the entire submitted offer, since in that way the duty of informing the candidates and bidders would be prevented from being fulfilled.

According to the Report, if a bidder marks all the documents of its offer as being confidential, it is the contracting body who will determine what document is not a technical or commercial secret, since these are the only genuinely confidential matters.