



## Confidentiality of documents in public procurement procedures: scope, limits and application

*Report 11/2013, of 26 of July, of the Consultancy Board for Public Procurement of the Generalitat of Catalunya (Permanent Commission)*

The Consultancy Board for Public Procurement of the Generalitat of Catalunya (JCCA) has issued a report on confidentiality of documents in public procurement procedures.

In its report, the JCCA admits that confidentiality is present *"in all the phases of public sector procurement"*, therefore it must not only be taken into consideration in the phases of selection and implementation of the agreement but also in the phase of contract revision when a special appeal on contracting has been lodged.

The JCCA highlights in its report that the principles of publicity and transparency are the antagonists of the principle of confidentiality and it proposes two criteria to ponder the balance between one and the other: the *"damage test"* - to evaluate in each case what damage is caused if a document is declared confidential or not-, and the *"proportionality"* -the confidentiality cannot exceed the limits of what is appropriate and necessary in order to achieve the objective proposed-.

After these general considerations, the JCCA considers that the documents proving the economic, financial, technical or professional solvency, as well as the personal data, are confidential.

With regard to the technical and economic documents submitted by the bidders and that serve to evaluate the offers, the JCAA considers that in order to determine its confidentiality

what should be examined, in the first place, is if the bidders have qualified the documents as confidential, but it points out that it is not admissible that the bidders make a generic statement or declare that all documents are confidential. It is indispensable that, in the confidentiality statement, it is specified which documents and information are confidential and the reasons for which they must be recognized as such.

Moreover, according to the report of the JCCA, the contracting authority may, in last instance, decide both the fact that a specific information must not be disclosed, as well as the fact that there are no reasons to protect documents that were qualified as confidential.

The JCCA also proposes as a best practice, in the case that there is no privacy statement or in case it is incomplete, that the bidder is consulted about the request for information made by other companies, although it would be required to warn about such possibility in the conditions of the tender.

Finally, the JCCA concludes that the information being a competitive advantage for the company, unknown to third parties, which represents a strategic value for the company and that might affect its ability to compete in the market, can be qualified as confidential. The note in common of confidential information is the great value that such information has as an asset, as a result of the investments in research and the knowledge acquired through experience.