



## Access to public tenders files is possible even before the contract is awarded

*Resolution 21/2017 of 1 February by the Committee for Guaranteed Access to Public Information of Catalonia (Case 176/2016)*

### Background

This case arose as a result of the claim filed by a bidder seeking to access different documents included in a public tender file, once the bidding process had ended but before the contracting authority had awarded the contract.

The documents to which the bidder sought access included expert appraisal reports produced by the contracting authority that had been used as a basis to score the participating companies, and certain documents presented by other bidders.

The company claimed its right to access under the Law on Common Administrative Procedure (LCAP), under the fact that the propositions were no longer secret once the bids had been opened, and under the principles of publicity and transparency governing public tenders.

The contracting authority refused access, considering that it should not be granted until the contract is awarded. Only then, according to the contracting authority, is there a true interest in accessing the requested documents, and demanding said access beforehand would be a breach of the principle of administrative efficiency. Furthermore, the contracting authority indicated that the Law on Public Contracts (LCSP) does not provide for access by bidders to the documents requested.

### The right to access before the award decision

The Committee for Guaranteed Access to Public Information (GAIP) acknowledges that the LCSP does not provide for access by bidders to documents forming part of the file for tender while it is being processed, although it does add that this does not mean that said right does not exist. The GAIP believes that the right to access an administrative file is a basic right acknowledged for any interested party under Article 35 of the LCAP, and rules out the fact that this right only enters into effect once the contract has been awarded.

### Expert appraisal reports are not confidential

Another relevant issue in the process was related to the confidential nature of the documents requested to be seen.

In terms of the expert appraisal reports produced by the contracting authority, the company sustained that these could not be considered confidential because they contained public information, according to the Spanish laws on freedom of information. In fact, the contracting authority accepted this stance, agreeing to the request of the claimant even before the GAIP had issued its decision.



## Access to documents provided by competitors

Insofar as the documents presented by other bidders, the GAIP sustains that the contracting authority may not deny access merely because the company presenting the documents has declared them to be confidential. Instead, such confidentiality must be assessed by the contracting authority, case by case.

However, the GAIP remains particularly respectful of the right by companies to ask the authority to keep its business secrets confidential and highlights the fact that, within the scope of public tenders, the issue of the confidentiality of bids must be analysed on the basis of the following premises:

- The request for confidentiality is made by the bidders, but it does not bind the contracting authority, which is the one who must make a critical assessment of such request and must rule, by means of a reasoned decision, whether the information at issue deserves to be protected or not.
- The request for confidentiality of the bidders cannot cover all the documents submitted, must accurately specify the specific affected documents and the objective and specific reasons justifying the confidentiality.
- The proportionality principle forces to seek a balance between protecting the commercial interests of the bidders and the right of defence of those who are not successful bidders, in such a way that none of them is adversely affected more than is strictly necessary. Bidders must be able to have access to the documents

submitted by other companies if it is necessary in order to check the correctness of the award and support their application.

- The requests for access must be accepted unless the existence of a legal limit is properly reasoned (for instance the protection of the economic and commercial interests), but such limit must be interpreted in a restrictive way and must not prevent the partial access to the information that is not affected by such limit.

Having said this, the GAIP adds that in order to decide what must be considered a commercial secret, it is necessary to decide on the basis of Directive (UE) 2016/943, which considers as such *information which meets all of the following requirements:*

- a) *it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question:*
- b) *it has commercial value because it is secret;*
- c) *it has been subject to reasonable steps under the circumstances to keep it secret*

The GAIP, after consulting the complete public tender file, understood that most of the information requested by the claimant company did not fit in such description.