



Commercial interests and access to documents

Resolution 352/2020 of the Council of Transparency and Good Governance of 15 September 2020

Background

This case refers to an application for access to the list of all international contracts signed by INECO (a Spanish public entity) and their prices filed by a private citizen under Spanish Law 19/2013 on transparency and access to public information. INECO refused access to such list on the basis that disclosure would undermine the protection of its commercial interests (article 14.1.h of Law 19/2013). The citizen filed a complaint before the Council of Transparency and Good Governance (CTGG).

Proceeding before the CTGG

During the proceeding before the CTGG INECO argued that disclosing the requested list would allow its competitors to gain strategic information about INECO without INECO being able to access to the same information regarding its competitors. INECO considered that this asymmetry would have placed INECO at a competitive disadvantage with respect of its competitors and, therefore, it would have clearly undermined its commercial interests. INECO further alleged that the majority of contracts contain confidentiality provisions that prohibit the disclosure of their existence or their content.

After hearing INECO's view, the CTGG ruled in favor of the applicant. It did so by first clarifying that what the applicant was actually asking was only a list of contracts and their prices (without any further information or documentation) and

thereafter concluding that the disclosure of the list of contracts neither breaches the confidentiality undertakings regulated therein nor affects the position in the market of the contracting parties. As per the prices, the CTGG pointed out that all public entities subject to Law 19/2013 on transparency (including INECO) are obliged to disclose all the contracts that they sign along with their prices.

Take-home message

If a company wishes to argue against disclosure to a public document on the grounds that such disclosure will damage its commercial interests, it is very important to: (i) properly assess and evaluate the specific impact that the disclosure will have on its commercial interests, and (ii) include as much evidence as possible regarding such impact in the allegations submitted before the CTGG. In this respect, it is important to be aware that guidelines 1/2019 of the CTGG provide that any impact on commercial interests that is to be used as a ground to refuse an access request must be real, significant, clear, and directly connected to the disclosure.

Any third party that may be affected by the disclosure of information following an access request has to be notified and given the chance to submit allegations. This is of utmost importance to allow the affected company to properly protect its legitimate rights. Unfortunately, our experience shows that this has not been always the case.