



Any unsuccessful tenderer can access documents related to the performance of a public contract

The judgment of the Spanish National High Court of 1 October 2021 contends that the way in which a contract is performed affects public interest

Background

The judgment under analysis derives from Resolution no. 122/2019, of 25 March, of the Council of Transparency and Good Governance (CTBG, according to its Spanish acronym). A company that submitted a bid in the context of a public tender and was not awarded the contract requested the Ministry of Public Works and Transport to provide access to *"the documentation relating to the bid that was finally awarded and to all that which served as a basis for the award"*. The Ministry rejected the request on the grounds that it was unjustifiably abusive. According to the Ministry, in the context of the contracting procedure in which the company participated as a bidder, it received all information to which it was entitled pursuant to the Law on Public Sector Contracts.

In view of this denial of access, the bidder lodged a complaint with the CTBG. As a result, the CTBG partially upheld the complaint and ordered that the requested information be provided. However, the CTBG clarified that *"information affecting technical or trade secrets and confidential aspects of the awarded bid"* should not be provided.

The Ministry of Public Works and Transport filed a judicial appeal against the decision of the CTBG and obtained a favourable ruling. The Central Administrative Court no. 4 analysed whether *"controlling the performance of the contract"*, which was the interest invoked by the company requesting access to information, served the purpose of the Law on Transparency, Access to Information and Good

Governance. The Court concluded that this was not the case, as the purpose of this Law is to control public action, not *"the conduct of the awardee in a phase that did not involve actions by the Ministry of Public Works and Transport"*.

The decision of the Spanish National Criminal and Administrative Court

The Spanish National Administrative Court overturns the lower Court's judgement and states that unsuccessful bidders, even if they have not challenged the award, have the right to access documentation produced throughout the performance of the contract, provided that the limits set out by the CTBG are respected. Thus, information affecting technical or trade secrets and confidential aspects of the awarded tender must never be provided.

On the basis of the Law on Transparency, Access to Information and Good Governance, this ruling of the Spanish National Administrative Court grants any person the possibility to access information produced by any Public Administration in relation to the performance of public contracts. According to this judgment, the way in which a given contractor performs the contract is not foreign to the contracting administration and affects the public interest. The Court further emphasised that the contracting administration must control that the provision of the relevant service complies with the contract, and the way in which it does so is undeniably of public interest. Therefore, the documentation generated in the performance of the contract must also be transparent.