



The scope of confidentiality in public procurement: beyond trade secrets

Judgment of the Court of Justice of the European Union of 17 November 2022 (Case C-54/21)

Background

This judgment was delivered in the context of a dispute concerning the award of a public contract in Poland. One of the tenderers appealed against the award decision and requested access to certain information relating to the successful tender and a re-evaluation of all the tenders submitted. The contracting authority refused to grant access to this information on the grounds that it had been classified as confidential by the successful tenderer. According to the successful tenderer, disclosure of this information could harm its legitimate interests, given the commercial value of the information and the measures it had taken to keep it secret.

In the context of appeal against this decision, the Court held that the lack of complete information on the various tenders submitted could hinder a tenderer's right to an effective remedy. The Court referred to the Court of Justice of the European Union (CJEU) a number of questions concerning the limits of confidentiality of information shared in the context of public procurement procedures.

Scope of confidentiality of information submitted in public procurement procedures

First, the CJEU examined whether European Directive 2014/24/EU on public procurement is compatible with a national law that requires the publication of all information provided by the tenderers in a public procurement procedure, with the sole exception of trade secrets.

Firstly, the CJEU considers that when Directive 2014/24/EU states that “the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets”, it is protecting a wider range of confidential information than technical and trade secrets.

Secondly, the CJEU recalls that Directive 2014/24/EU also provides that “certain information on the contract award [...] may be withheld from publication where its release [...] would harm the legitimate commercial interests of a particular economic operator [...]”. On these grounds, the CJEU found that national legislation which only allows trade secrets to be classified as confidential in the context of public procurement procedures is contrary to Directive 2014/24/EU.

According to the Court, information which does not fall within the concept of trade secrets may be classified as confidential under the Directive: (i) if it has commercial value outside the scope of the public contract in question, the disclosure of which might undermine legitimate commercial interests or fair competition or; (ii) if has no commercial value, the disclosure of which would be contrary to the public interest.

Under Spanish Law on public procurement (Ley de Contratos del Sector Público or LCSP), technical or trade secrets and information that could be used to distort competition may be considered confidential “amongst others”.



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According to the CJEU judgment of the CJEU, “amongst others” can be interpreted to include information the disclosure of which would harm legitimate commercial interests, beyond trade secrets.

Extrapolating the above to public health procurement, it could be argued that a “legitimate commercial interest” could include the price of a particular medicinal product, which is the result of a confidential analysis of economic information provided by the company to the Ministry of Health. Therefore, if this analysis were to qualify as a legitimate commercial interest under the criterion of the CJEU, it could be argued that it should be treated as confidential.

The possibility of treating all the information submitted by the tenderer as confidential

The CJEU also examines whether a provision which allows all the documents proving the technical capacity and the means of performing the contract to be treated as confidential is compatible with the principles of the Directive. The CJEU states that access to such information may be refused only if the contracting authority finds that (i) if such information has a commercial value outside the scope of the public contract in question, its disclosure might undermine legitimate commercial or fair competition; or (ii) if it has no such commercial value, its disclosure will impede law enforcement or would be contrary to the public interest. In any event, access to the “essential content” of such information shall be granted in such a way as to ensure compliance with the tenderers’ right to an effective remedy.

Where access to information submitted by the successful tenderer is refused on the grounds that it has been wrongly treated as confidential, the CJEU concludes that it is not neces-

sary to adopt a new award decision if: (i) national procedural law permits measures to restore compliance with the right to an effective remedy, or; (ii) the unsuccessful tenderer is given the opportunity to bring a new action against the award decision. In the latter case, the time limit for bringing such an action shall start to run from the date on which the applicant has access to all the information.

Conclusion

This judgment helps to outline the scope of confidentiality obligations in public procurement, while confirming that the Directive protects a broader scope than trade secrets. According to this judgment, it could be argued that confidentiality in public procurement could also include other information, the disclosure of which would harm legitimate commercial interests. In the area of public health procurement, this would provide further grounds to argue that the unit price of medicinal products should not be disclosed, on the basis of legitimate commercial interests.

The judgment also explains the need to ensure access to the essential content of the information supporting technical solvency and the means by which the contract is to be performed. The remaining information may be classified as confidential if it is demonstrated that its disclosure could undermine legitimate commercial interests, fair competition or the public interest. All this while guaranteeing tenderers the right to an effective remedy.