

CNS 33/2020

**Opinion in relation to the consultation made by a Regional Council on several issues related to the fulfillment of the labor obligations of the contractor companies.**

**A letter from a Regional Council is presented to the Catalan Data Protection Authority, in which it is requested that the Authority issue an opinion on various issues related to the fulfillment of the labor obligations of the contractor companies.**

**Specifically, it states the following:**

**"First.- In relation to the control mechanisms by the administration of the obligations of companies awarded public contracts in environmental, social or labor matters (art. 201 of the LCSP), in order to be able to carry out a correct monitoring compliance with the payment of wages and the application of collective agreements to workers, (...):**

**-what would be the documentation that should be requested from companies in order to comply with this obligation and, at the same time, respect the right to data protection of the possible affected persons. In this regard, it is possible to request the presentation of supporting documents such as the list of personnel assigned each month with their identification through the DNI and the NASS, copies of the TC2 and a statement signed by all the workers stating that they have received the payroll for the month previous?**

**Second.- In order to proceed with compensation for salary expenses incurred by public service management companies (in this case transport and school canteens) to which the suspension of the execution of their agreements was applied with Royal Decree-Law 8/2020, of March 17, on extraordinary urgent measures to deal with the economic and social impact of COVID-19 and Decree-Law 17/2020, of March 17, on urgent measures regarding public procurement, health and health waste management, transparency, public transport and in tax and economic matters, as a measure to mitigate the effects of the pandemic generated by COVID-19, (...):**

**-can we request the presentation of the employees' payslips and proof of their payment as reliable documentation of the effectiveness of the expenditure for which they are requesting compensation?**

**Finally, can the administration rely on article 8 of the LOPDGDD to carry out the processing of this personal data and how should the employer proceed to communicate to its workers the transfer of this data?.**

**Having analyzed the query that is not accompanied by other documentation, taking into account the current applicable regulations, and having seen the report of the Legal Adviser, I issue the following opinion:**

## Legal Foundations

I

(...)

II

Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), defines data processing as "any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction" (article 4.2).

In the consultation letter, it is considered whether in order to comply with the obligation to monitor the contractor's labor obligations, the Regional Council could access the DNI, NASS, TC2, and declaration of responsibility of the workers assigned to the execution of the contract through which would accredit the perception of their remuneration.

In accordance with the RGPD definition of the term "treatment", the access that arises in relation to the data of the workers of the contractor company, constitutes data processing subject to the regulations for the protection of personal data.

Article 5.1.a) of the RGPD provides that the data will be treated lawfully, loyally and transparently in relation to the interested party. In accordance with this, in order for this treatment to be lawful, one of the legal bases of article 6.1 of the RGPD must be met, either the consent of the affected person (letter a) or one of the other bases legal provisions provided for in the same article, such as, for the purposes that concern, that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c)).

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), the processing of data can only be considered based on this legal basis of article 6.1.c) of the RGPD when this is established by a rule with the rank of law.

Article 201 of Law 9/2017, of November 8, on public sector contracts establishes:

"The contracting authorities will take the relevant measures to guarantee that in the execution of the contracts the contractors comply with the applicable obligations in environmental, social or labor matters established in the law of the European Union, the national law, the collective agreements or by the provisions of international environmental, social and labor law that bind the State and in particular those established in annex V.

What is indicated in the previous paragraph is established without prejudice to the power of the contracting authorities to take the appropriate measures to verify, during the bidding procedure, that the candidates and bidders fulfill the obligations referred to in the aforementioned paragraph.

**Failure to comply with the obligations referred to in the first paragraph and, in particular, repeated failures or delays in the payment of wages or the application of salary conditions lower than those derived from collective agreements that is serious and willful, will result in the imposition of the penalties referred to in article 192."**

**In accordance with this provision, the contracting authority must guarantee that in the execution of the contracts, the contractors comply, among other obligations, with the labor ones and, therefore, could request the contracting company the certification of compliance with these obligations.**

**In relation to the documentation proposed by the Regional Council to certify the fulfillment of labor obligations by the contractors (DNI, NASS, TC2 and statement signed by the workers stating that they have received the previous month's payroll), it should be borne in mind that, of in accordance with the provisions of article 5.1.c) of the RGD, the data processed must be adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed (principle of m**

**Therefore, in application of the minimization principle, it will be necessary to analyze what information would be proportionate and necessary to treat in order to comply with the contracting authority's obligation to ensure that the contracting company fulfills its labor obligations.**

**With respect to the payroll of the workers assigned to the execution of the contract, it must be borne in mind that this may contain various personal information. Thus, in addition to salary data, your bank details, social security number, ID number, and also, in some cases, personal information on administrative or judicial garnishments of wages, outstanding or other personal circumstances, or information that deserves special protection, such as trade union membership data. Including, the fact that certain deductions or provisions are established in an employee's payroll could come to know, even indirectly, the employee's health data, such as issues related to occupational health or situations of disability**

**Given that the contracting body must only access the data that is necessary, appropriate and relevant to carry out the function of monitoring the fulfillment of the labor obligations of the contracting companies, it is considered that the delivery of the payroll of the workers assigned to the execution of the contract could contravene the principle of minimization in the processing of data.**

**In this sense, it would be possible to communicate to the contracting body only the personal information of the payroll that is relevant for the purposes of monitoring the fulfillment of labor obligations. Thus, it would be proportional to the purpose to be achieved to identify the workers, for example with the last four digits of the number. ID number, professional category and gross remuneration received.**

**With regard to social security contributions, the transfer of the complete TC2 contribution documents would be contrary to the principle of minimization. It should be noted that this is not a document that is limited to incorporating the nominal list of workers with respect to whom the company would comply with its obligation to pay the corresponding Social Security fee, but that it incorporates other information about the workers who may refer to health data and that are not relevant to carry out the function of monitoring the fulfillment of the labor obligations of the contractor company.**

In relation to the content of the TC2, it is interesting to note that this document, in addition to containing the nominal list of workers (abbreviation of the workers' first and last names, DNI and social security number), includes the contribution data (occupation, number of days or hours, contribution base code and the amount of these bases), but also informs about special situations of workers who are entitled to some deduction or compensation.

These deductions and compensations may refer to common illnesses or non-occupational accidents, among other issues. Information that can lead us to know, even indirectly, workers' health data (disability or occupational health situations), that is, data included in what the RGD calls "special categories of data".

Article 9.1 of the RGD establishes:

"The processing of data that reveals ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at unambiguously identifying a natural person, data relating to the health or data relating to the sexual life or sexual orientation of a natural person."

It establishes, in general, the prohibition of treatments that reveal personal data of this type, except in the specific situations provided for in the Regulation itself. Section 2 of article 9 of the RGD lists the circumstances that, if they occur, would allow this treatment, establishing a "numerus clausus" of treatment possibilities.

From the point of view of the protection of personal data, there would be no disadvantage in achieving the intended purpose if the company provides the contracting authority with the information contained in the TC2 form in such a way that it only reveals information of workers assigned to the execution of the contract consisting of identification using the last four digits of the DNI, amount of the contribution base, identification of the company and justification of having paid the corresponding fee.

### III

The consultation also raises whether it is possible to request the workers' payrolls to justify the payment of compensation for the suspension of the execution of certain contracts within the framework of Decree-Law 7/2020, of March 17, on urgent measures in the field of public procurement, of health and health waste management, of transparency, of public transport and in tax and economic matters, and of Royal Decree-law 8/2020, of March 17, on extraordinary urgent measures to deal with the economic and social impact of COVID 19.

Decree Law 7/2020, of March 17, provides that the suspension of the execution of certain contracts, within the framework of what is established in Article 208 of Law 9/2017 on public sector contracts, will entail the payment to the contractor, on the part of the Contracting Administration, of the corresponding amounts, among others, to the salary expenses of the personnel attached to the contract.

**Article 34 of Royal Decree-Law 8/2020, of March 17, on extraordinary urgent measures to deal with the economic and social impact of COVID 19, provides:**

**1. The public contracts for services and supplies of successive provision, valid at the entry into force of this Royal Decree-Law, held by entities belonging to the Public Sector, in the sense defined in article 3 of Law 9/2017 , of November 8, on Public Sector Contracts, by which European Parliament and Council Directives 2014/23/UE and 2014/24/UE, of February 26, 2014, are transposed into the Spanish legal system, whose implementation becomes impossible as a consequence of COVID-19 or the measures adopted by the State, the autonomous communities or the local administration to combat it, will be suspended in whole or in part from the time the de facto situation occurred that prevents its provision and until said provision can be resumed . To these effects, it will be understood that the provision can be resumed when, having ceased the circumstances or measures that would prevent it, the contracting body will notify the contractor of the end of the suspension.**

**When, in accordance with the previous paragraph, the execution of a public contract will be completely suspended, the awarding entity must pay the contractor the damages and losses actually suffered by him during the period of suspension, upon request and valid accreditation of his reality, effectiveness and amount by the contractor. The damages and losses for which the contractor may be indemnified will be solely the following: 1.º The salary expenses that the contractor would have actually paid to the personnel that will be assigned on March 14, 2020 to the ordinary execution of the contract, during the suspension period (...)"**

**In accordance with this, compensation for salary expenses will require prior justification of the payment of salaries and of the payment of the contribution amounts to the General Treasury of the Social Security.**

**It would be considered proportional to the intended purpose that the contracting body has access to the information contained in the payroll sheets consisting of the identification of the company, the identification of the worker (last four digits of the DNI), the gross remuneration and the basis of contribution, as well as the justification of the payment of the payroll, and of the income in the General Treasury of the Social Security.**

#### **IV**

**In the consultation, a final question is raised: "can the Administration rely on article 8 of the LOPDGDD to carry out the processing of this personal data and how should the employer proceed to notify its workers of the transfer of 'these data'.**

**Article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights provides verbatim:**

**1. The processing of personal data can only be considered based on the fulfillment of a legal obligation required of the person in charge, in the terms provided for in article 6.1.c) of Regulation (EU) 2016/679, when so provided by a law of the European Union or a rule with the force of law, which may determine the general conditions of the treatment and the types**

of data object of the same as well as the assignments that proceed as a consequence of the fulfillment of the legal obligation. Said rule may also impose special conditions on treatment, such as the adoption of additional security measures or others established in Chapter IV of Regulation (EU) 2016/679.

2. The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible, in the terms provided for in article 6.1 e) of Regulation (EU) 2016/679 , when it derives from a competence attributed by a rule with the rank of law

In accordance with this, and for what has been set out in this opinion, the transfers of information mentioned in the previous legal foundations would respond to the fulfillment of the obligations mentioned in the regulations with the rank of law to which reference has been made. Therefore, it would fall within the provisions of article 8 of the LOPDGG in relation to article 6.1.c of the RGPD.

With regard to the employer's procedure for notifying its workers of the transfer of this data, it is agreed that in accordance with articles 13.1.f) and 13.2.e) RGPD, the employer must provide information to the workers assigned to the contract about which data will be transferred to the contracting body in compliance with the aforementioned obligations.

In accordance with the considerations made in these legal foundations in relation to the consultation on various issues related to the fulfillment of the labor obligations of the contractor companies, the following are made,

## Conclusions

The information relating to the salary costs of the workers assigned to the execution of a contract, consisting of the identification of the workers (last four digits of the DNI), gross salary, basis of contribution and justification of the payment of the payroll and income of the social security contributions in the General Treasury of the Social Security, in accordance with what has been set out in the legal foundations II and III, would comply with the obligation of the contracting body to ensure the obligations labor of the contractor companies and at the same time would respect the principle of minimization.

Barcelona, October 19, 2020