

Legal report in relation to the draft Decree regulating the Register of Bidding and Classified Companies of Catalonia and the Public Register of Contracts of Catalonia

Background

It is presented to the Catalan Data Protection Authority the draft Decree regulating the Register of bidding and classified companies of Catalonia and the Public Register of Contracts of Catalonia , in order for the Authority to issue its opinion.

The Draft Decree consists of a preamble, nineteen articles, a transitional provision, a repealing provision, two final provisions, and an Annex.

Having analyzed the draft Decree and the file that accompanies it, and taking into account the current applicable regulations, in accordance with the report of the Legal Counsel, I report the following:

Legal Foundations

I

(...)

II

The purpose of the draft decree being examined is, according to what is included in its statement of reasons, *"to establish, in a single regulatory body, the regulation on the organization and operation of the two registers attached to the Board Public Procurement Consultancy of Catalonia: the Register of bidding and classified companies of Catalonia and the Public Register of Contracts of Catalonia."*

From the point of view of data protection regulations, it must be taken into account that the concept of personal data refers to *"all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person"* (Article 4.1 GDPR).

The data relating to legal entities are excluded from the scope of protection of the data protection regulations, as specified by the RGPD itself by establishing that *"the protection granted by this Regulation must be applied to natural persons, regardless of their*

nationality or of your place of residence, in relation to the processing of your personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies constituted as legal entities, including the number and form of the legal entity and its contact details" (recital 14) . However, it must be understood that the data of natural persons who provide services in a legal entity and the data relating to individual entrepreneurs and liberal professions are included within this scope of protection.

Therefore, the processing of the personal data of natural persons who provide services in a legal entity and the data of individual entrepreneurs and liberal professions, as well as, where appropriate, that of public workers and holders of 'procurement bodies that are carried out through the Register of bidding and classified companies of Catalonia and the Public Register of Contracts of Catalonia must comply with the provisions of the RGPD and Organic Law 3/2018 , of December 5, of protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD).

Article 5.1.a) RGPD establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party.

In order for a treatment to be lawful, it must meet one of the conditions provided for in article 6 of the RGPD. In the case of public administrations, legality is usually found in the cases provided for in letters c) *"the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment "* ie) *"the treatment is necessary for the fulfillment of a mission made in interest public or in the exercise of powers public given to the person responsible for the treatment "*.

As can be seen from Article 6.3 of the RGPD, the legal basis for the treatment indicated in letters c) and e) of Article 6.1 of the RGPD must be established by European Union Law or by the law of the Member States that apply to the data controller.

The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 8 of Organic Law 3/2018, of December 5, on Data Protection Personal and guarantee of digital rights (LOPDGDD), that the enabling rule has the status of law. Therefore, the draft decree cannot enable data treatments that are not provided for in a standard with the rank of law.

In general, it must be taken into account that the contact details and, where applicable, the details relating to the function or position carried out by the natural person providing services in a legal entity, as well as the details of individual entrepreneurs and professionals lliberals, can be treated by public administrations when it derives from a legal obligation or is necessary for the exercise of their powers under the protection of what is established in article 19 of LOPDGDD. Consequently, the processing of this data for the management of the Register of bidding and classified companies of Catalonia, and for the Public Register of Contracts of Catalonia, would have as its legal basis article 19 LOPDGDD in relation to the forecasts of articles 337 et seq. and 346 et seq. of the LCSP, without prejudice to the fact that this treatment must be carried out respecting the principles established in the RGPD, in particular that of data minimization (article 5.1.c)) and the principle of 'accuracy (article 5.1.d)).

III

Chapter 1 of the draft Decree regulates the Register of bidding and classified companies in Catalonia. This regulation modifies some aspects of the current Decree 107/2005, of 31 May, creating the Electronic Register of Bidding Companies of the Generalitat of Catalonia.

Among the general provisions, article 3 of the draft Decree lists the functions of the Register of bidding and classified companies of Catalonia, including the official registration of companies that obtain the classification granted by the Business Classification Commission of the Consultative Board of Public Procurement of Catalonia and those declared prohibited from contracting by the contracting bodies of Catalonia, facilitate secure electronic access to all contracting bodies to the information entered and the documents deposited in the register, and facilitate public access to the information contained therein relating to the name of the companies, the business classifications granted and the prohibitions to contract. As indicated, this information should be published in open and reusable formats.

As indicated, the data relating to legal entities is outside the scope of protection of the data protection regulations, therefore no impediment, from the point of view of the data protection regulations, to the processing of the information referred to in this chapter of the draft decree regarding information relating to legal entities.

However, as has also been indicated, the data protection regulations do apply to the processing of the data of individual entrepreneurs and liberal professions as well as natural persons who provide services in a legal entity.

One of the purposes of the register is the ex officio registration of hiring prohibitions declared by the contracting authorities of Catalonia. Also, article 7.2 of the draft decree expressly provides that *"All bodies that issue judgments or resolutions that impose a prohibition on hiring must send ex officio a witness of the judgment or a copy of the resolution to the Technical Secretariat of the Public Procurement Consultative Board of Catalonia"*. This ex officio registration and the communication provided for in article 7.2 involve the processing of data related to criminal convictions, disciplinary sanctions and administrative sanctions, among others. It should be noted that in this respect article 10 of the RGPD relating to the processing of personal data of convictions and criminal offenses, as well as article 27 of the LOPDGDD relating to the processing of data of offenses and sanctions, is applicable administrative Both articles require that the processing of this data is provided for in a rule with the rank of law with the specific guarantees.

In this regard, Law 9/2017, of November 8, on Public Sector Contracts (hereafter LCSP), in article 341, provides:

1. The Communities Autonomous they can take sus own Registers of bidders and companies clasificadas , in which they will write the classifications referred to in the second paragraph of article 81 and, in any case, the prohibitions of contracting that are declared by _organs competent , by those of the entities su premises _ territorial scope , or by those of the organisms and entities dependent on one or the other .

In order to be able to comply with the provisions of the previous paragraph , the body issuing the resolution that imposes the prohibition on hiring must ex officio send a copy of this to the organ competent for the lifting of the register, sin prejudice that by part of this organ , to have knowledge of existence and not having received a copy of the resolution can request it from the organ from which it emanated .

The rest contracting prohibitions that must be registered in the Official Register of Bidders and Classified Companies of the Public Sector will be likewise published in the registers of bidders and companies classified of the Communities Autonomous , applying to that effect the provisions of article 345.

2. They will be able to likewise be entered in the register, cuando this is how the interested party requests it from the Community Autonomous , data and circumstances indicated in article 339.

3. Registration in the register of bidders and companies classifieds of a Community autonomous will accredit the data and circumstances of the employers before the contracting authorities of the own community Autonomous , of the entities su premises _ territorial scope , and of the organisms and entities dependent on one or the other .

For its part, article 345 LCSP establishes:

"The Official Register of Bidders and Classified Companies of the Public Sector and the Registers of bidders and companies classified of the Communities Autonomous will be facilitated mutually the information relative to the prohibitions to contract in them registered ."

(...)

These provisions constitute the legal basis that enables the processing of data relating to the prohibitions on hiring that affect individual employers or representatives, in relation to articles 6.1.c) i) of the RGPD, and in relation to article 10 of the RGPD and 27 of the LOPDGDD. Therefore, the planned treatment has sufficient legal authorization from the point of view of the right to data protection.

IV

Letter c) of article 3 of the draft Decree establishes as another of the purposes of the register, " to provide all contracting bodies with secure electronic access to the information entered and to the documents deposited in the Register and allow the generation of registration and classification certificates for companies".

Article 4.3 provides that "Inscription in the Register implies the consent of the interested person to allow the dissemination of the data entered by electronic means to the contracting authorities , respecting the legal limits."

From the wording of this article, it could be interpreted that *the "dissemination"* of the data entered in the register to the contracting authorities has as its legal basis the consent of the interested parties. However, it must be remembered, on the one hand, that in order

for consent to be a valid legal basis, it must meet the requirements established by article 4.11 of the RGPD "*manifestation of will free , specific, informed and unequivocal for the interested party accept , yes be by means of a declaration or a clear affirmative action , the data treatment personal that _ concern*". As can be seen from Recital 43 of the RGPD and Directives 5/2020 of the CEPD "*it is not likely that public authorities can rely on consent to process data since when the person responsible for the treatment is a public authority, there is always a clear imbalance of power in the relationship between the person responsible for the treatment and the interested party*".

But in addition, it does not appear that the communication to the contracting authorities, whether through electronic access or another form of "dissemination" (using the term used by the draft decree) of the information that must be registered ex officio in the Register of bidding and classified companies of Catalonia can be based on the consent of the interested parties, since their consultation and verification is necessary for the exercise of the public functions that the LCSP attributes to contracting bodies.

A different issue is the fact that, of course, the registration of companies in the Register of Bidding and Classified Companies of Catalonia is voluntary for them and that, apart from the mandatory registration data, companies can decide what information they want to be registered. However, once this information is entered, the legal basis for the processing of personal data would not be the consent of the interested parties.

The legal basis for this treatment should be found in the exercise of the public functions attributed to contracting bodies by the LCSP.

V

Letter f) of article 3 of the draft decree establishes as another purpose of the Registry of Bidding and Classified Companies of Catalonia "*to facilitate public access to the information contained therein relating to the name of the companies, the business classifications granted and the prohibitions to hire*".

The legal basis for this treatment is found in article 13.1.f) of Law 19/2014, of December 29, on transparency, access to public information and good governance, hereinafter (LTC) in relation to the article 6.1.c) of the RGPD, insofar as this article establishes as obligations of active advertising in matters of public procurement, the publication of "*data from the public register of contracts and the official register of bidders and classified companies*".

In any case, it is worth remembering that public access to information containing personal data must be carried out respecting the principles established in the RGPD, especially that of data minimization (article 5.1.c)).

VI

Article 8 of the draft decree regulates, within the registration procedure, the registration request and the updating of the data, and in its section 5 it establishes: "*The Technical Secretariat of the Consultative Board of Public Procurement de Catalunya can obtain directly from the competent bodies the data or registration documents required for registration, through the electronic interconnection and administrative coordination*

mechanisms. In the event that the company wishes to object to this obtaining, it must indicate this expressly in the request, and provide, if applicable, the corresponding documents."

This article specifies the provisions of article 28 of Law 39/2015 of October 1, of the Common Administrative Procedure of Public Administrations, which would enable this data processing, without prejudice to the right of the interested parties to oppose this access and provide the corresponding documents.

Regarding the access of contracting bodies to the information in the register, article 11.3 of the draft decree establishes that the people who access the register must be identified with an electronic certificate. These forecasts are positively evaluated, given that, from the point of view of data protection, it is necessary, among other actions in the field of security, to adopt appropriate mechanisms that allow the correct identification and authentication of users, for the purposes of guaranteeing , as required by the GDPR, that no unauthorized processing will take place (Article 5.1.f)).

With regard to the registration procedure, from the point of view of the data protection regulations, the forecasts relating to the updating of the information entered in the Register of bidding and classified companies of Catalonia (article 9.3,) and the regulation of the cancellation of the registration (article 12), specifically with regard to the principles of accuracy (according to which the data must be accurate and updated so that "they will be adopted all measures _ reasonable for them to be deleted or rectified without data delay _ personal that they are inaccurate with respect to the purposes for which they are treated " (Article 5.1.d) RGPD)); and limitation of the retention period which aims to ensure that the data are kept for no longer than necessary for the purposes for which they were collected. (Article 5.1.e) RGPD).

VII

Title 2 of the draft decree regulates the Public Register of Contracts in Catalonia.

Article 16 establishes that all contracting bodies in Catalonia must communicate to the Public Contracts Register the basic data of the contracts subject to the public procurement regulations that they sign.

In this regard, article 346 of the LCSP obliges the contracting bodies of all public administrations and other entities included in the scope of application of this law, to notify the Registry of Public Sector Contracts, for its registration, the basic data of the awarded contracts (which will include the identity of the successful tenderer, the award amount and the breakdown corresponding to VAT) as well as, where applicable, the extension modifications, term variations or price, its final amount and termination, and section 6 of this article provides that in cases where the public administrations have Registers of similar contracts in their area of competence, the communication of data to which referred to in section 3 may be replaced by communications between the respective Contract Registers.

For its part, the eighth additional provision of the LTC establishes that *"for the purposes of facilitating the consultation of information on public procurement, local administrations*

must inform the Public Register of Contracts and the Public Procurement Services Platform of formalized contracts and those that are in tender or in other contractual phases”.

This forecast was completed with the second additional provision of Law 3/2015, of March 11, on fiscal, financial and administrative measures which provides that “The entities of the local administration and the entities, bodies or entities of their public sector must communicate to the Generalitat de Catalunya Public Contracts Register, so that they can be entered, the basic data of the contracts they award and that are subject to the legislation on public sector contracts, and also, where appropriate, the modifications, extensions, term or price variations, the final amount and termination”.

Article 18 of the draft decree also establishes that the Public Register of Contracts is the tool through which obligations to communicate contractual data to other entities are fulfilled in accordance with the basic public procurement regulations.

Therefore, the planned communications have a sufficient legal basis from the point of view of data protection regulations.

VIII

With regard to public access to the Public Register of Contracts of Catalonia, article 19 of the draft decree establishes that the register allows the access of any interested person, without prior identification, to the information contained therein, through a search engine enabled for the purpose, and that the answers contain contractual data relating to contracts with effective execution in the last five years.

The dissemination of this contractual information is provided for in the active advertising obligations established by article 13 of the LTC. Therefore, also in this case there is a legal basis that enables this treatment.

From the point of view of the right to data protection, the disclosure of information through a search engine that makes it possible to offer all the information about a certain awardee is particularly intrusive, that is to say, the possibility that the search engine allows a search to be carried out based on personal criteria relating to the successful tenderer. However, this possibility appears expressly in the LTC.

Finally, it is positively valued that dissemination is limited to information relating to the last 5 years as provided for in articles 13.1.d) and 13.3 of the LTC.

Regarding the publication of personal information on contracts, it is not superfluous at this point to refer to the recommendations made by this Authority in opinions CNS 57/2016 (prior to the validity of the RGPD), CNS 58/2018 and CNS 1/2019, which are complemented by the opinion CNS 12/2020, regarding the application of the principle of data minimization (Article 5.1.c) RGPD) in the publication of this type of information on the occasion of compliance with the active advertising obligations imposed by the public sector contract regulations, as well as the transparency regulations. The aforementioned opinions are available at the following link on the [Authority's website](#).

IX

Finally, it should be remembered that the person responsible for the treatment must apply the security measures established in the ENS that are mandatory by application of the first additional provision of the LOPDGDD, which provides the following:

"1. The National Security Scheme will include the measures that must be implemented in the case of personal data processing, to avoid its loss, alteration or unauthorized access, adapting the criteria for determining the risk in the data processing to what is established in the article 32 of Regulation (EU) 2016/679.

2. The managers listed in article 77.1 of this organic law must apply to the processing of personal data the security measures that correspond to those provided for in the National Security Scheme, as well as promote a degree of implementation of equivalent measures in companies or foundations linked to them subject to private law.

In cases where a third party provides a service under a concession, management assignment or contract, the security measures will correspond to those of the public administration of origin and will be adjusted to the National Security Scheme."

Point out that the security measures to be implemented in a case like the one under consideration should also include the proper training of the staff who must process the personal data in question.

conclusion

examined the Draft Decree regulating the Register of Bidding and Classified Companies of Catalonia and the Public Register of Contracts of Catalonia, with the considerations made in this report, is considered adequate to the provisions established in the regulations on personal data protection .

Barcelona, June 26, 2023