

Opinion on a notification for prior checking received from the Data Protection Officer of the European Investment Bank on Calls for Tenders

Brussels, 5 December 2008 (Case 2007-0126)

1. Proceedings

By letter dated 27 February 2007, notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (hereinafter: "the Regulation") was given by the Data Protection Officer (hereinafter: "DPO") of the European Investment Bank (hereinafter: "EIB") on "*Calls for tenders*".

Under this notification, questions were put to the EIB's DPO by e-mail dated 28 March 2007 and replies were received on 7 November 2008. On 26 November 2008 the European Data Protection Supervisor (hereinafter: "EDPS") suspended the deadline to enable the DPO to provide comments. The latter were received on 2 December 2008.

2. Facts

The processing operation in question has been carried out by the EIB, and specifically by the Purchasing and Administrative Services Division (hereinafter: "*PAS Division*") since the entry into force of the Community regulations on public procurement law, currently governed by Directive 2004/18/EC.

Data subjects

The data subjects of the processing are natural and legal persons ¹, i.e. service providers and participants in the EIB's calls for tenders.

Purpose

The purpose of the processing is to evaluate the technical and professional ability of candidates for calls for tenders issued by the EIB in order to award a contract and to evaluate the quality of its performance.

Legal basis

The legal basis for the processing operation is Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2005/75/EC of 16 November 2005 correcting Directive 2004/18/EC. In addition, the rules governing purchasing at the EIB (hereafter: "*the EIB Rules*") and the "*Guide for the procurement of services, supplies and works by the EIB for its own account*" apply.

¹ Only natural persons are covered by Article 2(a) of Regulation (EC) No 45/2001 and are thus the only persons dealt with in this opinion.

According to the EIB Rules, the EIB acts within the framework of the Community Directives on the coordination of the procedures for the award of public contracts. The EIB applies the thresholds and general principles of those Directives which are, specifically, equal treatment of economic operators, transparency and non-discrimination between operators.

The EIB is not subject to the Financial Regulation, as the latter concerns the general budget of the European Communities, of which the EIB does not form part. The EIB is a special Community body, and not an Institution within the meaning of the EC Treaty; it has its own legal personality, has financial autonomy, receives no funds from the Community budget and is independent with regard to the management of its business. The rules concerning public contracts contained in the Financial Regulation do not therefore apply to it either.

Procedure

Under the EIB Rules, two types of calls for tenders are organised by the Bank:

A/ A restricted call for tenders usually takes place over 7 months. This procedure is recommended for complex projects requiring the pre-qualification of operators.

B/ An open call for tenders usually takes place over 5 months.

General award criteria and the relative weightings given to them are defined in advance. These criteria include the qualifications and experience of the operator, the financial and technical ability to perform the service required, the cost of the service and the performance deadlines.

Specific criteria are also defined by the selection board ² according to the nature of the project. These are factors critical for success, such as whether the plan of work and the methodology proposed meet the specifications ³.

(i) Launch of the procedure

- The client department prepares the request and the specifications
- The client department asks for a selection board to be constituted
- At a preliminary meeting, on the basis of the specifications ³, the board chooses the type of call for tenders (open or restricted), draws up the planning for it and determines the content of the exclusion, selection and award criteria.

(ii) The contract notice

- The PAS department drafts the contract notice on the basis of the standard form supplied by the PAS Division.
- The board gives its agreement to the terms of the contract notice.
- The PAS Division sends the contract notice to the Publications Office of the European Union, which will have it translated into the other 10 languages within 14 days. The Publications Office will then send the 11 language versions of the contract notice to the OJEU for publication.

² It is composed of at least 3 persons of different nationalities, one of whom does not belong to the client department involved. Its composition must ensure balanced representation of all the departments involved and enable it to operate with full independence.

³ The information contained in the specifications is administrative and legal: qualifications required or definition of the mission, detailed description of the tasks, definition of the critical factors for success, definition of the award criteria, etc.

(iii) Opening of the applications to participate and selection of the candidates

- Meeting of the board to open the applications to participate.
- The PAS Division draws up the report on the opening of the applications received.
- The members of the board have a period of about 2 weeks in which to assess the applications; the time limit depends on the complexity and number of the applications.
- After that period of 2 weeks for assessment, the board meets to discuss and select the candidates chosen to submit a tender.
- The PAS Division draws up a decision report.
- The PAS Division sends the candidates selected letters inviting them to submit their tenders, together with the documents relating to the call for tenders, as well as letters to the rejected candidates.

(iv) Opening of the tenders and choice of the tenderer

- Meeting of the board to open the tenders. The PAS Division draws up the report on the opening of tenders.
- Each member of the board assesses the tenders and sends his or her assessment table, dated and signed, to the PAS Division.
- The PAS Division draws up a summary table of the individual assessments.
- Meeting of the board to assess and rank the tenders.
- The PAS Division draws up the report on the assessment and ranking of the tenders, which includes, in particular, the name of the tenderer proposed.
- Together with the client department, the PAS Division co-signs the letter sent to the tenderer chosen (possibly subject to the signing of a contract in due and proper form), as well as letters to the rejected tenderers.

(v) Conclusion of the contract and publication of the award notice in the OJEU

- The client department, and possibly the legal service, negotiate the terms of the contract with the tenderer selected. No time limit is set for these negotiations.
- Signing of the contract by the PAS Division and the client department after the legal service has given its opinion.
- The PAS Division sends the award notice to the Publications Office of the European Union for publication in the OJEU.

Data processed

The following data are the subject of the processing operation:

- name, address, telephone and fax numbers, e-mail address
- copy of passport or of certificate of nationality
- proof of self-employed status, proof of tax status
- banking data (account number, name of bank, IBAN code)
- data contained in an extract from the criminal records, a certificate attesting non-payment of social security contributions or taxes
- *curriculum vitae*
- list of major publications or works
- declaration showing the tenderer's business turnover
- statements from banks or evidence of relevant professional risk indemnity insurance

- other data relating to the candidate or tenderer which are sometimes forwarded by the latter as part of the contract procedure, specifically fiscal data for the last three years, balance sheets, income statements and quality certificates (such as ISO certificates).

Processing is manual. The EIB's PAS Division receives the paper documents and sends copies of them to the members of the selection board. The copies are destroyed after analysis and once the selection board has held its meetings. Processing is computerised only in cases involving candidates submitting tenders comprising a large volume of documents. In such cases candidates are asked to submit tenders on a CD medium.

Recipients

The recipients of the processing are the following:

- the client department(s) of the EIB
- the staff of the PAS Division, and specifically the Head of Division and the purchasing officer responsible for the call for tenders
- the members of the selection boards, who are EIB staff.

The data may also be forwarded upon request to certain departments within the EIB, notably to:

- the Office of the Chief Compliance Officer (OCCO),
- the Directorate for Legal Affairs (JU) and
- the Inspectorate General (IG).

Rights of access, rectification, blocking and erasure

The rights of access, rectification, blocking, erasure and objection may be exercised by data subjects upon request by e-mail and/or by telephone to the controller, i.e. the Head of the PAS Division. Blocking and erasure are carried out within a time limit of two weeks.

Right to information

A draft text entitled "*Privacy statement in accordance with Articles 11 and 12 of Regulation 45/2001*" has been prepared, but there is no indication as to how, or at what stage in the procedure, data subjects are able to take cognisance of the text. The text mentions the identity of the controller, the purposes of processing, the recipients, the existence of a right of access to and a right to rectify the data, the time-limits for storage and the right to have recourse at any time to the EDPS.

Retention of data

The data of candidates awarded contracts are kept for 4 years by the PAS Division (the duration of a contract awarded is normally 4 years). After the end of the contract, the data are sent by the PAS Division to the central archives for 4 years in cases where there are disputes and complaints.

The client department keeps copies of the tender, the selection board report, the letter informing the candidate of his selection and the contract concluded with the successful tenderer for 4 years. The documents are destroyed after that 4-year period.

Data concerning candidates who were not selected are kept in the central archives for a period 4 years in order to deal with any complaints. After that period has elapsed, the data held by the central archives are destroyed.

The data are not retained for historical or statistical purposes.

Storage and security measures

The data are stored in locked cupboards in the PAS Division.

Only persons with a specific interest (Head of the PAS Division, purchasing officer responsible for the call for tender, client department for a valid reason) may have access to the documents stored in the central archives.

3. Legal aspects

3.1. Prior checking

Regulation (EC) No 45/2001 applies to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)). We are dealing here with a data processing operation by the EIB and a processing operation in the framework of activities which fall within the first pillar and therefore within the scope of the Community.

The data collected constitute a manual processing operation intended to form part of a filing system. The processing operation is sometimes computerised when a tenderer makes his submission on a CD medium. Article 3(2) of the Regulation thus applies.

This processing operation therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes subject to prior checking by the EDPS. Article 27(2)(a) presents "*processing of data relating to [...] suspected offences, offences, criminal convictions or security measures*" as processing operations likely to present such risks, and Article 27(2)(b) covers "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". It is pointed out in the notification that the processing operation is likely to present a risk under Article 27(2)(d), as it is intended to exclude individuals from a right, benefit or contract.

For the record, the purpose of the processing operation is to assess the technical and professional abilities of candidates having regard to the calls for tenders and to select the best tenderers capable of fulfilling the terms of the published contract notice. The purpose of the processing operation is not to exclude (Article 27(2)(d))⁴ candidates from being selected and awarded a contract, but to assess their abilities and their financial data on the basis of general and specific criteria, including the specifications, with a view to their being considered for a contract (Article 27(2)(b)). Furthermore, extracts from criminal records are collected as part of the assessment and selection of candidates for the award of a contract within the framework of the specifications. This is why the processing operation falls within the scope of the prior checking procedure on the basis of Articles 27(2)(a) and 27(2)(b) of the Regulation respectively.

⁴ It is important to note that exclusion in the strict sense takes place only in the framework of the processing operation relating to the "*Early Warning System (EWS)*" which has already been the subject of prior checking. See the opinion of the EDPS of 14 October 2007 "*EWS of OLAF*", case 2007-243, and the opinion of the EDPS of 16 July 2007 on the "*EWS of the Parliament*", case 2007-147.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up, the check necessarily has to be performed ex post. However, this does not alter the fact that the recommendations issued by the EDPS should be implemented.

The official notification was received by mail on 27 February 2007. In accordance with Article 27(4) of the Regulation, the two-month period within which the EDPS is to deliver his opinion was suspended. Because of the 586 days' suspension, the EDPS is to deliver his opinion by 8 December 2008 at the latest (518 days' suspension + 2 months of August + 6 days for comments).

3.2. Lawfulness of the processing

Under Article 5 of Regulation (EC) No 45/2001, the data may be processed only if one of the five conditions of this provision is fulfilled.

Of the five conditions listed in Article 5, the processing operation in question fulfils the condition laid down in Article 5(a) of the Regulation, under which personal data may be processed only if *"processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution or body ..."*.

In the light of this condition, two points need to be examined: firstly, whether the Treaties establishing the European Communities or other legal instruments provide for a task carried out in the public interest and, secondly, whether the processing is necessary for the performance of that task (test of necessity).

In this case, **the legal basis** for the processing is formed by the provisions of Directive 2004/18/EC. Specifically, paragraph 46 of the preamble to the Directive stipulates that contracts should be awarded on the basis of two criteria, namely that of *"the lowest price"* and that of *"the most economically advantageous tender"*. The EIB rules also constitute a legal basis for the specific procedure of the processing carried out within the EIB.

The necessity for the processing operation is also mentioned, not only in Article 5(a), but also in paragraph 27 of the preamble to the Regulation, which states that *"processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*. In this particular case, processing of the data collected is necessary so that the most suitable candidates are selected for performing a call for tenders published by the PAS Division of the EIB. It is therefore necessary for the management and smooth functioning of the EIB, as the award of contracts by the EIB is intended for the procurement of services and products needed for the EIB's tasks.

The proposed processing operation is therefore lawful.

Data relating to offences, criminal convictions or security measures are also qualified in Article 10 of the Regulation as *"special categories of data"*.

3.3. Processing of special categories of data

Article 10(5) of Regulation (EC) No 45/2001 stipulates that processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof.

This case concerns the processing of personal data relating to offences or criminal convictions, since the required extract from the criminal records may reveal the situation of the data subject in relation to criminal law (i.e. whether or not the data subject has a criminal record).

Article 10(5) of the Regulation stipulates that processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof. As we have pointed out above, justification for the processing of such data is to be found in Article 28(a) of the Staff Regulations of Officials, which provides that an official may be appointed only on condition that he enjoys his full rights as a citizen. The conditions of Article 10(5) of the Regulation are thus fulfilled.

As we mentioned above in connection with the legal basis, the processing of such data is justified in Article 93(1)(b) of the Financial Regulation (No 1605/2002) of 25 June 2002 and therefore complies with Article 10(5) of Regulation No 45/2001, according to which the processing of data relating to offences is to be *"authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof"*.

Where candidates supply other sensitive data relevant to the purpose of the processing, processing of such data will be justified on the basis of Article 10(2)(a) of Regulation No 45/2001, in particular because the data subject has given his explicit consent.

3.4. Data quality

In accordance with Article 4(1)(c) of Regulation No 45/2001 personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed.

The data must be *"adequate, relevant and not excessive"* (Article 4(1)(c) of Regulation No 45/2001). The processed data described at the beginning of this Opinion appear to satisfy these conditions. The data collected are partly administrative and necessary for determining exclusions and partly relate to the assessment of candidates in the framework of a call for tenders and the award of a contract. It is also necessary to consider the assessment data contained in the assessment tables of the members of the selection board and the reports drawn up by the PAS Division. In this connection the EDPS recommends that those managing the candidates' files and members of the selection board be reminded, through a clause, that they are only authorised to process the data necessary for the assessment of applications. This is a means of guaranteeing the quality of data in line with Article 4(1)(c) of Regulation No 45/2001.

Moreover, the data must be processed *"fairly and lawfully"* (Article 4(1)(a) of the Regulation). The lawfulness of processing has already been analysed (see point 2 above). As for fairness, it is connected with the information given to the data subjects. See point 3.8. below.

According to Article 4(1)(d) of the Regulation data must be "*accurate and, where necessary, kept up to date*". In addition, according to this Article "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which the data were collected or for which they were further processed, are erased or rectified*". In the present case the data subject himself supplies the initial data required. The procedure therefore allows it to be reasonably assumed that such data are accurate and up to date. The rights of access and rectification are, moreover, available to the data subject. These rights represent a second means of ensuring that the data concerning him are accurate and up to date (see right of access, 3.7.).

3.5. Retention of data

Article 4(1)(e) of Regulation No 45/2001 states that data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

For the record, data concerning candidates awarded a contract are kept for 4 years by the PAS Division. At the end of the 4 years, the data are sent by the PAS Division to the central archives for 4 years for cases where there are disputes or complaints. For the 4-year term of the contract the client department keeps copies of the tender, the report of the selection board, the letter informing the candidate of his selection and the contract concluded with the successful tenderer. After this 4-year period these documents are destroyed.

Data concerning the candidates who were not selected are kept in the central archives for a period of four years in order to deal with any complaints. After that period has elapsed the data held by the central archives are destroyed.

In the case of candidates who are awarded a contract, data are kept for a total of 8 years, which seems excessive given the purpose of the processing. The EDPS therefore recommends that a new general retention period be adopted that is reasonable and proportionate for achieving the purpose of processing, without prejudice to specific retention in the case of disputes and complaints⁵.

The EDPS considers it justified for the client department to keep some data on the candidates selected for the duration of the contract, the better to ensure the performance of the contract. The EDPS is satisfied with data being destroyed after the 4-year term of the contract.

For candidates who are not selected, the 4-year period seems proportionate when set against the financial obligations and the ultimate purpose for which data are collected, i.e. possible complaints.

3.6. Transfer of data

The processing must also be examined in the light of Article 7(1) of Regulation (EC) No 45/2001. Processing in accordance with Article 7(1) concerns transfers of personal data within or to Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

⁵ See Opinion of the EDPS of 15 September 2008 regarding calls for tenders managed by the EESC and the CoR, Case 2008-346. Their policy for the retention of data on candidates who are awarded a contract is a 5-year period, which the EDPS found reasonable.

In order to comply with Article 7(1), the EIB must ensure both that all the recipients have the appropriate competences and that the transfer is necessary. In this particular case, we are considering a transfer within the EIB, as different departments are involved in assessing the professional abilities of the tenderers and awarding them contracts on the basis of calls for tender - in particular the client department of the EIB, the staff of the PAS Division, the members of the selection board, the OCCO, the General Affairs Directorate and the General Inspectorate. Each recipient has a specific competence and the data that are transferred to each of them are necessary for the legitimate performance of tasks covered by the competence of each department responsible. The EDSP therefore considers this transfer to be acceptable in the framework of Article 7(1) of the Regulation.

Moreover, under Article 7(3) of the Regulation, which states that *"the recipient shall process the personal data only for the purposes for which they were transmitted"*, it is recommended that all persons within the EIB receiving and processing data in connection with this particular processing operation should be informed that the data are to be used for the purposes of the processing operation only.

3.7. Right of access and rectification

Article 13 of Regulation No 45/2001 provides for a right of access at the request of the data subject, together with the detailed rules for exercise of that right. In this particular case the data subject has access to the dossier on his tender in order to fill in all the headings necessary for the proper conduct of the procedure. Article 14 of Regulation No 45/2001 provides for a right of rectification for the data subject. In the same way that the data subject has the right of access, he may also directly amend or obtain the amendment of factual personal data where necessary.

The EDPS points out that where contact between the contracting authority and the tenderer is forbidden during the course of the procedure, that restriction is justified. The temporary restriction of the rights of access and rectification is intended to guarantee transparency and equal treatment during the procedure for the award of public contracts and is legitimate in the light of Article 20(1) of the Regulation, viz.: *"The Community institutions and bodies may restrict the application of Article 4(1), Article 11, Article 12(1), Articles 13 to 17 and Article 37(1) where such restriction constitutes a necessary measure to safeguard: (...) (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; (c) the protection of the data subject or of the rights and freedoms of others; (...)"*.

The data subjects are therefore deprived of their rights of access and rectification during the course of the procedure on the basis of Article 20(1)(b) of Regulation No 45/2001.

However, once the contract is signed and in the event of any disputes or complaints when the contract is awarded, the rights of access and rectification must be respected. It is, moreover, indicated in the notice that the rights of access, rectification, blocking, erasure and objection may be exercised by the data subject at his request via e-mail and/or by telephone to the controller, i.e. the Head of the PAS Division. Articles 13 and 14 of the Regulation are thus complied with.

3.8. Information to be given to data subject

Articles 11 and 12 of Regulation No 45/2001 deal with the information to be given to the data subject in order to guarantee transparent processing of his personal data. These Articles

contain a list of compulsory and optional items. The optional items are applicable where, in view of the specific circumstances of the processing operation, they are required to ensure fair processing in respect of the data subject. In the case under consideration some of the data are collected directly from the data subject and others from other persons.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be supplied to the data subject are applicable to tenderers who send their application with the documents required to the PAS Division.

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be supplied to the data subject are also applicable in the present case as the information is obtained from various participants in the procedure, in particular the members of the selection board, the client department, the head of the PAS Division and the procurement officer responsible for the call for tenders.

For the record, a draft text entitled "*Privacy statement in accordance with Articles 11 and 12 of Regulation No 45/2001*" has been prepared, but there is no indication as to how, or at what stage in the procedure, data subjects will be able to take cognizance of the text. The text mentions the identity of the controller, the purpose of processing, the recipients, the existence of a right of access to and a right to rectify the data, the time limits for storage and the right to have recourse at any time to the EDPS.

The EDPS considers that the note entitled "*Privacy statement*" must be communicated to data subjects when the invitation concerning the call for tenders notice is issued and when the prospective contract is to be signed by the successful tenderer. Furthermore, the note must be supplemented by two additional pieces of information. Specifically, the EDPS recommends that information regarding the compulsory or optional nature of replies to questions and the possible consequences of failure to reply and regarding the legal basis should be clearly indicated in the note, pursuant to Articles 11 and 12 of the Regulation.

3.9. Security measures

In accordance with Article 22 of Regulation (EC) No 45/2001 on the security of processing "*the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected*".

The EDPS feels that taken as a whole the security measures adopted (locked cupboards and limited number of persons who may access the data) can be regarded as appropriate within the meaning of Article 22 of the Regulation.

Conclusion

The proposed processing operation does not appear to be in breach of the provisions of Regulation No 45/2001 provided that the above comments are taken into account. In particular, the EIB should:

- by means of a clause addressed to those managing the candidates' files and to the members of the selection board, give a reminder that only those data necessary for the assessment of applications may be processed;

- adopt a new period for the retention of data concerning tenderers who are awarded a contract; the period should be reasonable and proportionate given the purposes of the processing operation, without prejudice to specific retention in the event of disputes and complaints;
- inform all persons within the EIB who receive and process data in connection with files concerning calls for tender that data are to be used for the purposes of processing only;
- communicate the "*Privacy statement*" note to data subjects when the invitation concerning the call for tenders notice is issued and when the prospective contract is to be signed by the successful tenderer. In addition, the note must be supplemented with information on
 - the compulsory or optional nature of replies to questions and the possible consequences of failure to reply, and
 - the legal basis for processing concerning calls for tender.

Done at Brussels, 5 December 2008

(signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor