



## **Opinion on the notification for prior checking from the Data Protection Officer of the Education Audiovisual and Culture Executive Agency concerning procurement procedures**

Brussels, April 2011 (case 2011-0135)

### **1. Proceedings**

On 3rd February 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the Education Audiovisual and Culture Executive Agency (EACEA) a notification for prior checking concerning procurement procedures. The notification was accompanied by the following documents:

1. Model data protection clauses contained in the invitation to tender;
2. Model data protection (confidentiality) clause included in contracts;
3. Privacy statement for processing of personal data related to procurement procedures;
4. Note of the Director to the Head of Units on data protection within the selection and management of experts and procurement procedures.

The draft opinion was sent to the DPO for comments on 31 March 2011. These were received on 26 April 2011.

### **2. Facts**

The **purpose** of the processing in question is the management and administration of calls for tenders and contracts between EACEA and economic operators.

The data is collected and processed with the purpose to evaluate the eligibility of economic operators to participate in the procurement procedure in accordance with exclusion and selection criteria as defined in Articles 93 to 97 of the Financial Regulation, and/or to evaluate the content of tenders submitted during the procurement procedure with the view to award the contract, in accordance with award criteria as defined in Article 97 of the Financial Regulation.

The **controller** is to be considered the EACEA, represented here by the Head of Unit R2 - Finance, Accounting and Programming.

**Data subjects** are natural persons associated with the applicant entities, including tenderer's staff and /or subcontractors, whose details are submitted in tenders and related documents. The data are collected from the tenderer's offer or supporting documents necessary to participate in the tendering procedure.

The following **data categories** may be processed:

*Information about the tendering party's representative and staff members:*

- Name, first name, title, position, telephone number, mailing address, passport number, ID number, extract from judicial records and signature;
- Information for the evaluation against the selection criteria like e.g. personal data included in curriculum vitae of staff members, expertise, technical skills and languages, educational background, professional experience including details on current and past employment.

*Information about the tenderers (natural persons):*

- Certificates for social security contributions and taxes paid;
- Bank account reference (IBAN and BIC codes), VAT number;
- List of personnel capable of performing the tasks described in the tender specifications;
- Declaration on honour that the tenderer is not in one of the exclusion situation referred to in Article 93 and 94 of the Financial Regulation.

The following **retention policy** applies:

- Files relating to tender procedures, including personal data, are to be retained in the service in charge of the procedure until it is finalised, and in the archives for a period of 10 years following the signature of the contract. However, tenders from unsuccessful tenderers have to be kept only for 5 years following the signature of the contract;
- Until the end of a possible audit if one started before the end of the above period;
- After the period mentioned above has elapsed, the tender files containing personal data are sampled to be sent to the historical archives of the Commission for further conservation. The non-sampled files from unsuccessful tenders are destroyed.

Personal data provided in replies to invitations to tender is **processed by automated means and manually**. The tenders are submitted in paper form. Processing of replies to invitations to tender involves the recording and processing of personal data (such as name, address and CV). On the date set for the opening of the tenders, the tender documents are sent to the Opening and Evaluation committee with the purpose to evaluate the tenders in relation to the eligibility, selection and award criteria. The evaluation committee drafts an evaluation report on the results of the evaluation. The authorising officer takes the final decision and awards the contract. After the contract is awarded, the data of the winning bid are processed by the unit in charge of the contract for purposes of management and follow-up of the contract. All data recipients are reminded of their obligation not to use the data received for any further purpose than the one for which they were transmitted.

Data processed within the processing operation may be disclosed on a need-to-know basis to the following **recipients**:

- EACEA staff as well as outside experts and contractor's staff who work for the purposes of management of the procurement procedure and tender evaluation;
- Union bodies tasked with control and monitoring of the application of Union law (e.g. respective services of the European Commission, incl. Internal Audit Service and OLAF, Court of Auditors, EU Courts etc.);
- Members of the public: Limited personal data will be made public, in accordance with the EACEA's obligation to publish information on the outcome of the procurement procedure and on the beneficiaries of funds deriving from the budget of the European Community (Article 90 and Article 30(3) of the Financial Regulation respectively). This information will concern in particular the name and address, the year, the amount awarded and the name of the project or programme for which the successful candidates are awarded a

contract. These data may be published on a yearly basis on the website of the EACEA, of the European Commission and/or in supplement S of the Official Journal of the European Union.

The data subjects are granted **rights of access and rectification** upon a request to the controller. However, material data demonstrating compliance with the eligibility and selection criteria may not be updated or corrected after the deadline for submission of the tenders since elements that would change the nature of the offer cannot be changed after the offer has been received as this would compromise the award procedure. Any request for access or rectification of personal data shall be addressed in writing to the controller. Information of the possibility to contact the DPO is also provided.

**Information to data subjects** is provided at different stages of the procedure in the following documents:

- Model invitation to tender containing standard data protection clauses;
- Model confidentiality (data protection) clause to be inserted in every contract;
- Privacy statement for processing of personal data related to procurement procedures.

The *model invitation to tender* provides information about:

- certain categories of data processed;
- certain data recipients;
- existence of rights of access and rectification and the procedure to follow;
- existence of a right to have a recourse to the DPO and EDPS.

The *privacy statement* provides information about the following details:

- identity of the controller;
- categories of data processed;
- purpose of the processing;
- legal basis of the processing;
- modalities for the processing operation;
- recipients of the data processed;
- indirect information as to whether replies to the questions are obligatory and the possible consequences of replies (by referring to Articles 93 - 97 of the Financial Regulation);
- security measures;
- retention policy;
- right of access and rectification;
- right to have recourse to the DPO and EDPS.

The *model confidentiality clause* to be inserted in every procurement contract specifies that personal data included in or related to the procurement contract shall be processed in accordance with Regulation (EC) 45/2001 and solely for the purposes of the performance, management and monitoring of the contract by the EACEA without prejudice to possible transmission to the bodies charged with a monitoring or inspection task in application of Union law. Information on the right to access and rectify personal data and the right to have recourse to the DPO and EDPS is also provided.

Where the procurement contract requires **processing of personal data on behalf of the controller**, the above mentioned *model confidentiality clause* states that the contractor may act only under the supervision of the data controller, in particular with regard to the purposes of processing, the categories of data which may be processed, the recipients of the data, and the means by which the data subject may exercise his rights. Further, the confidentiality clause specifies that data shall be confidential within the meaning of Regulation

(EC) No 45/2001 and the contractor shall limit access to the data to the staff strictly necessary for the performance, management and monitoring of the procurement contract. The contractor has to agree also to adopt appropriate technical and organisational security measures as required by Article 22 of Regulation (EC) 45/2001.

### **3. Legal aspects**

#### **3.1. Prior checking**

The processing of personal data related to procurement procedures falls within the scope of Regulation (EC) 45/2001 and is subject to prior checking by the EDPS pursuant to its Article 27(2) (a) and (b).

Data is collected and processed with the purpose to evaluate information relating to the legal, financial, economic, technical and professional capacity of tenderers with a view to select the proposals which best satisfy the criteria set in the call for tenders in accordance with Articles 93 to 97 of the Financial Regulation. It also involves processing of data relating to (suspected) offences and criminal convictions.

The scope of the present prior check is limited to the processing of personal data within the management and administration of the procurement procedure. It does not relate to the execution of the procurement contract signed with the selected tenderer at the end of the respective procedure.

In principle, prior checks by the EDPS should be carried out before the processing operation is implemented. Since the relevant data processing operations have already been established, the check has to be carried out *ex post*. In any case all recommendations made by the EDPS should be fully taken into account and the processing operations should be adjusted accordingly.

The notification of the DPO was received on 3 February 2011. According to Article 27(4) of Regulation (EC) 45/2001, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for 26 days to allow for comments on the draft opinion. Therefore, the present opinion must be delivered no later than 2 May 2011.

#### **3.2. Lawfulness of the processing**

The legal basis of the processing of personal data within procurement procedures can be found in the following legal acts:

- Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1), as subsequently amended ("Financial Regulation"), in particular Articles 93, 94 and 97 (1);
- Commission Regulation (EC, EURATOM) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002, p. 1), as subsequently amended ("Implementing Rules"), in particular Articles 135-137;
- Commission Regulation (EC) No 1653/2004 of 21 September 2004 on a standard financial regulation for the executive agencies pursuant to Council Regulation (EC) No 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, (OJ L 297, 22.09.2004, p. 6), as subsequently amended, in particular Article 50 on procurement.

The EDPS notes that the EACEA has not issued a specific decision on the organisation of procurement procedures.

Processing of respective personal data within public procurement procedures at the EACEA can clearly be considered as necessary for the performance of tasks carried out in the public interest on the basis of the above mentioned regulations and to ensure compliance with obligations arising from them. The EDPS would like however to invite the EACEA to adopt an internal decision on the organisation of procurement procedures without prejudice to the conclusion that processing of personal data in the case at hand seems to be lawful within the meaning of Article 5(a) of Regulation (EC) 45/2001 (read together with its recital 27),

### **3.3. Processing of special categories of data**

The processing of personal data contained in the extracts from judicial records, other certificates to this respect<sup>1</sup> or the above mentioned declarations of honour is explicitly authorised in Article 93(1) of the Financial Regulation. Thus, the condition for processing of data relating to (suspected) offences and criminal convictions set out in Article 10(5) of Regulation (EC) 45/2001 is met.

### **3.4. Data quality**

The collection of personal data listed above seems to be necessary either for the identification of tenderers within the procurement procedure and evaluation of their eligibility and/or capacity pursuant to the respective provisions of the Financial Regulation, as well as its Implementing Rules.

The accuracy of the factual data processed is ensured by the fact that they are provided by the respective data subjects so that the procedure itself helps to guarantee the accuracy. Also, the rights of access and rectification contribute to ensure that the data processed are accurate and up to date (cf. point 3.7. below).

### **3.5. Data retention**

As indicated above, files relating to procurement procedures, including personal data, are to be retained in the service in charge of the procedure until it is finalised, and in the archives for a period of 10 years following the signature of the contract. However, tenders from unsuccessful tenderers have to be kept only for 5 years following the signature of the contract. In this respect the EACEA makes reference to the Common Conservation List, adopted by the European Commission in 2007.<sup>2</sup> In any case, personal data in the files will be retained until the end of a possible audit if one started before the end of the above period.

After the period mentioned above has elapsed, the tender files containing personal data are sampled to be sent to the historical archives of the Commission for further conservation. The non-sampled files from unsuccessful tenders are destroyed.

The EDPS is of the opinion that keeping files relating to successful tenderers for **seven years following the end of the procurement contract** would correspond to the maximum time period for which personal data is necessary for control and audit purposes in line with Article 49(1)(d) and (2) of the Implementing Rules to the Financial Regulation<sup>3</sup>. Therefore, the EDPS would recommend to the EACEA to reconsider the data retention period in regard to the data in point *from ten years following the signature of the procurement contract to seven years*

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<sup>1</sup> As mentioned in Article 134(3) of the Implementing Rules to the Financial Regulation.

<sup>2</sup> Common Conservation List (CCL), SEC (2007) 970 adopted by the Commission on 04/07/2007, Annex 1, p.11, point 7.1.4 and p. 23, point 12.6.1.

<sup>3</sup> cf. case 2007-222 – EDPS Comments on the Draft Common Conservation List (CCL) of 7 May 2007 as well as EDPS Note concerning the CCL adoption of 12 October 2007

*following the end of the procurement contract in order to comply with Article 4(1)(e) of Regulation (EC) 45/2001.*

In any case, the EDPS would like to point out that according to Article 49(3) of the Implementing Rules to the Financial Regulation as modified by the Commission Regulation 478/2007 of 23 April 2007 *"personal data contained in supporting documents [relating to the budget implementation measures] shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes"*.

### **3.6. Transfer of data**

As indicated above, intra -and inter- institutional transfers of personal data take place within the procurement procedure. Pursuant to Article 7 of Regulation (EC) 45/2001, the transfers within the EACEA and to other institutions have to be *"necessary for the legitimate performance of the tasks covered by the competence of the recipient"* (paragraph 1) and the recipients can process the data *"only for the purposes for which they were transmitted"* (paragraph 3).

In the present case, the transfers of personal data to the EACEA staff participating in the evaluation and selection of contractors are considered necessary for the administration and management of the procurement procedures. Similarly, the transfers to the bodies tasked with control and monitoring of the application of Union law (e.g. respective services of the European Commission, incl. Internal Audit Service and OLAF, EU Courts etc.) are considered necessary in the context of their specific competences.

EACEA staff is reminded of the obligation arising from Article 7 (3) of Regulation (EC) 45/2001 by the practical guidelines sent to all Heads of Units dealing with personal data within the procurement procedure. The guidelines state that only limited staff will have access to personal data and the files (including CVs) can be accessed only by persons who manage the procedure on a need-to-know basis. They also give instructions to the staff to mention the purpose limitation in case of a transfer of curriculum vitae to the Commission. The EDPS considers that the above data protection measures ensure compliance with Articles 7 (3) of Regulation (EC) 45/2001 in respect of internal recipients.

Provided that a similar approach is adopted in case of data transfers to other Union bodies and they are always reminded of the purpose limitation of the transfer in question, compliance with Article 7 (3) of Regulation (EC) 45/2001 will be ensured also regarding inter-institutional transfers of personal data.

Further, the notification for prior checking specifies that external experts and contractors may participate in the evaluation of tenders. Consequently, data are transferred to recipients subject to national law adopted pursuant to Directive 95/46/EC. Such a transfer will be covered by Article 8 (a) of Regulation (EC) 45/2001 which provides that data may be transferred *"if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority"*. In this case, external experts and contractors process the data on behalf of the EACEA in connection with tasks described above which are carried out in the public interest. Given that the data are not requested by the recipient but rather are transferred on the basis of a decision by the controller, it is for the latter to establish the "necessity" of the transfer. The "necessity" of the processing for the purposes of performing the EACEA`s tasks was established in section 3.2. The recipients should be however always reminded of the purpose limitation of the transfer in question according to Article 7 (3) of Regulation (EC) 45/2001.

### **3.7. Right of access and rectification**

As already mentioned, data subjects are granted rights of access and rectification upon a request to the controller. The right to rectify however is subject to certain limitations and can only be exercised up to the closing date for submission of tenders. The EDPS notes that this limitation of the rectification right could be considered as justified in light of Article 148(3) of the Financial Regulation aiming to ensure transparency and equality of treatment; hence it is in compliance with Article 20(1) (b) and (c) of Regulation (EC) 45/2001.

### **3.8. Information to the persons concerned**

The EDPS notes that the privacy statement contains necessary information to be supplied to data subjects as prescribed by Regulation (EC) 45/2001. In addition, information related to different aspects of the data processing operations is provided in the invitation to tender and the data protection provision to be inserted in every contract. Provided that the privacy statement is published on the EACEA Internet page together with the respective call for tenders so as to ensure timely information of data subjects, the data processing under review guarantees the right to information in light of Articles 11 and 12 of Regulation (EC) 45/2001.

### **3.9. Processing of data on behalf of the controller**

The present case implies two different aspects of processing of data on behalf of the controller:

a) processing of data on behalf of the controller where the procurement contract to be signed with the selected contractor requires such processing.

According to Article 23 of Regulation (EC) 45/2001, the carrying out of a processing operation by way of a processor shall be governed by a contract or legal act binding the processor to the controller and stipulating that the processor should act only on instructions from the controller. The processor should provide sufficient guarantees in respect of the technical and organisational security measures required by Article 22 and comply with the obligation set out in Article 21 of Regulation (EC) 45/2001.

As already mentioned, the procurement contract to be signed with the selected contractor contains a confidentiality clause on data protection which refers to the obligations set out in Articles 21 and 22 of Regulation (EC) 45/2001. The security obligation in terms of applicable technical and organisational measures is explicitly mentioned and the obligations to act only under the supervision of the data controller and to respect confidentiality are included. The EDPS considers that this data protection provision guarantees compliance with Articles 21-23 of Regulation (EC) 45/2001.

b) processing of data on behalf of the controller where external experts participate in the evaluation and selection of tenders within the procurement procedure.

The EDPS takes into consideration the clarifications provided by the EACEA in the comments on the draft opinion that the above mentioned confidentiality clause will be equally included in the contracts with external experts. Provided that the external experts are legally binded to process personal data only on instructions from the controller and reminded of their obligations of confidentiality, compliance with Articles 21 and 23 of Regulation (EC) 45/2001 should be ensured;

### **3.10. Security measures**

(.....)

The EDPS has no reason to believe that the measures implemented by the EACEA are not adequate in light of Article 22 of Regulation 45/2001.

#### **4. Conclusion**

The processing under review does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means, in particular, that:

- the ten years time limit for storage of personal data contained in files relating to procurement procedures should be reduced in line with section 3.5 of the present opinion (Article 4(1)(e) of the Regulation);
- inter-institutional and external recipients of files relating to procurement procedures should be reminded of the purpose limitation of the transfer in question (Articles 7 (3) of Regulation (EC) 45/2001);
- the privacy statement should be published on the EACEA' Internet page together with the respective call for tenders so as to ensure timely information of data subjects (Articles 11 of Regulation (EC) 45/2001);
- external experts participating in the evaluation of tenders should be legally binded to process personal data only on instructions from the controller and reminded of the obligation of confidentiality (Articles 21 and 23 of Regulation (EC) 45/2001).

Done at Brussels, on 29 April 2011

**(signed)**

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