

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Investment Bank regarding the PJ-CMS - PJ contract management system with integrated consultants' register

Brussels, 7 June 2013 (Case 2013-0034)

1. Proceedings

On 10 January 2013, the European Data Protection Supervisor ("**EDPS**") received from the Data Protection Officer ("**DPO**") of the European Investment Bank ("**EIB**") a notification for prior checking relating to the processing of personal data entitled "PJ-CMS - PJ contract management system with integrated consultants' register".

By letter of 21 January 2013, the EIB withdrew this notification and submitted a new notification on 25 February 2013.

On 27 March 2013, the EDPS sent a request for additional information to the DPO, who responded on 26 April 2013. On 3 May 2013, the EDPS sent a draft summary of the facts and additional requests for information to the DPO, who answered on 8 May 2013. On 13 May 2013, the EDPS provided the DPO with a revised summary of the facts and last questions. On 16 May 2013, the DPO provided comments on the summary of facts. The draft Opinion was sent to the DPO for comments on 29 May 2013. On 5 June 2013, the DPO informed the EDPS that he had no comment on the draft Opinion.

2. The facts

The Project Contract Management System ("**PJ-CMS**") is a web-enabled management system for consultancy contracts within the Project Directorate of the EIB ("**PJ Directorate**") of the EIB. PJ-CMS also integrates a consultants' register (the "**Register**").

The consultants' selection includes a pre-screening process for consultants who wish to be included in the Register. This screening process will be used as well to deal with spontaneous applications.

The actual selection of consultants follows the general procurement rules applicable at the EIB. These rules were the subject of a notification to the EDPS for prior checking in 2007 and the EDPS delivered his Opinion in 2008 (case **2007-0126**).¹ The PJ-CMS supplements these rules.

¹ The EDPS delivered his Opinion on 5 December 2008.

The PJ-CMS replaces the previous system of recording and storage of contracts concluded between the EIB and external consultants. This system was notified to the EDPS for prior checking in 2005 and the EDPS delivered his Opinion in 2007 (**case 2004-0301**).²

2.1. Description of the PJ-CMS - Purposes

The PJ-CMS covers the following main functional modules:

- Contract Management,
- Budget Management,
- Budgets and Contracts Reporting,
- Consultants' Register.

The main purposes of the PJ-CMS are as follows.

a) Selection and registration of consultants - Management of the Register

The PJ-CMS integrates a production and management system for the consultants' registration. It allows PJ staff to compare and select the ideal profiles for a project and specific qualifications in the database of technical consultants who are eligible to contract with the PJ Directorate of the EIB following a qualitative screening process (see below). Only consultants who are listed in the Register may be awarded consultancy contracts, either as a natural person, or through their consultancy firm.

1) Pre-selection and insertion in the Register

Consultants (natural persons only) can enter the Register as a result of:

- submitting a bid in response to a call for tenders published in the *OJ* (open procedure) in accordance with Article 2.2.1 of the EIB Guide for Procurement; or
- sending a spontaneous application to join the Register.

The selection process to be listed in the Register is the same in both cases. A specific evaluation panel composed of members of the PJ Directorate is set up to review the applicants' CVs.

The technical mark for the individual CVs is evaluated according to the following criteria:

CRITERION CVs	WEIGHTING
Overall level of experience in the relevant sector(s)	40
Specialist expertise in key areas of Bank need	30
Level of experience with IFIs ³ and Aid Programmes	20
Breadth of experience in key regions of Bank need	10
Total	100

² This system was notified to the EDPS on 9 December 2005 and the EDPS issued his Opinion on 14 July 2006. The scope of the notification covered data processing operations both in the selection procedure of external consultants and in the ex post evaluation of consultancy contracts.

³ International Financial Institutions.

The applications are ranked using the following weighting:

EVALUATION CRITERIA	WEIGHTING
Technical mark for Individual Consultant CV	80
Price (daily fee)	20
Total	100

The percentage required to be included in the Register is 75%.

2) *Subsequent steps*

Insertion in the Register is only a pre-selection. The subsequent steps will depend on whether the consultants responded to a call for tenders or submitted a spontaneous application.

The pre-selected consultants who submitted a bid in response to a call for tenders will still have to go through second-tier screening processes, depending on their ranking during the pre-selection.⁴ Consultants who entered in the Register following a spontaneous application can be appointed through one of the procedures provided in the standard EIB Guide for Procurement.

b) Management of contracts with external consultants

The PJ-CMS shall allow for the day-to-day management of consultancy contracts, associated budgets, consultants' contract performance within the PJ Directorate, as well as for their *ex post* evaluation. It is also used for reporting to PJ senior management and to PJ heads of divisions, as well as for statistical purposes.

One of the major objectives of the PJ-CMS is to improve the interaction with different stakeholders involved in the contract life cycle, by including process automation when needed and flexible notification systems.

All processing operations are done through electronic means.

2.2. Data subjects and data processed

The **data subjects** are external experts, both working as individual consultants and within consultancy firms.

⁴ The top-ranked consultants (maximum 10) during the pre-selection will obtain a framework agreement (referred to in Article 2.3 of the EIB Guide for Procurement). Then, they will go through a specific evaluation process, namely a form of "mini-competition" or "call-off" amongst the framework contractors in the Register (the procedure is the one set out in the framework agreement) to be awarded individual agreements based on their framework agreement.
The other pre-selected consultants can be appointed through one of the procedures provided in the standard EIB Guide for Procurement applicable to consultancy contracts.

The following **data** are collected and processed in the PJ-CMS about external consultants:

- Register:

- identification data (address, phone number, etc.);
- name of the company for which the consultant works (if any);
- fee rate;
- sector(s) of expertise;
- qualifications;
- years of professional experience;
- experience in the project management cycle;
- language skills;
- experience with international financial institutions and aid programs;
- country/region experience;
- results of the screening process (evaluation criteria);
- copy of the CV.⁵

- Contract management:

- key data about the consultants' contracts (date of signature, name of contract signatory, starting/ending date, name of EIB contract manager, contract budget, etc.);
- performance history of consultants on prior consultancy contracts with EIB;
- links to the electronic copies of the bids/offers and of the consultancy contracts stored in a dedicated GED⁶ folder;
- *ex post* evaluations.

There are links between the data on a consultant stored in the Register and information on the same consultant stored in the contract management module.

Consultants who are part of the Register will be regularly asked (every two years on average) to submit updated CVs.

2.3. Information and rights of the data subjects

The data protection clause used by the EIB to inform data subjects is the following:

"Personal data are processed by the EIB in accordance with Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Personal data of EIB consultants are processed during the selection process and during the ex-post evaluation of the consultant's work by staff of the Projects Directorate under the supervision of the Projects Directorate Contract Manager as processing controller, for the purposes of a more efficient management system. You have the right to access, rectify and block your personal data (this includes requesting access to and making comments on the ex-post evaluation of your work). You may exercise your rights by contacting the data processing controller (<mailto:PJdataprocess@eib.org>); you are also entitled to contact the European Data Protection Supervisor (www.edps.europa.eu) at any time".

⁵ The CV model used is an adapted version of the EU "Europass" Model.

⁶ GED = *Gestion Electronique de Document*.

Consultants are informed of the data processing and their data protection rights at different stages of the process:

- in the tender documents in the case of a call for tenders published in the *OJ* (open procedure);
- in the EIB's standard reply in response to a spontaneous application;
- on the last page of the standard EIB CV which all applicants are required to use, and
- in the consultancy contracts which also contain specific data protection clauses.

In particular, the tender document in the case of a call for tenders and the standard reply in the case of a spontaneous application, will explain the screening process to be part of the Register.

Consultants have the rights to access, rectify and block their personal data.

They can exercise their rights by contacting the controller via e-mail (PJdataprocess@eib.org).

Requests to erase and block personal data are treated manually by the system administrator within a time limit of 30 days.

2.4. Recipients

The recipients of the data are the staff members of the EIB Projects Directorate.

2.5. Conservation periods

The conservation periods are as follows:

a) Register

- Unsuccessful candidates: personal data are erased after 3 months from the time of their application to join the Register;
- Successful candidates without a framework agreement: personal data are kept for 4 years from the date of their application to join the Register;
- Successful candidates with a framework agreement: contract details are kept for 4 years after the termination date of the framework agreement.

b) contract management: Contract details are kept for 4 years after the termination date of the consultancy contract.

2.6. Security measures

[...]

3. Legal analysis

3.1. Scope of the notification

As regards the consultants' selection, only the screening of consultants and their insertion (or not) in the Register are new. By contrast, data processing operations in the subsequent steps for the selection of consultants were analysed by the EDPS in his Opinion on notification 2007-0126.⁷ Processing operations in the frame of the management of consultancy contracts and of the *ex post* evaluation of consultants have been addressed by the EDPS's Opinion issued in case 2004-0301. The processing as notified in case 2004-0301 has been replaced by the relevant parts of this notification.

Therefore, this Opinion will focus on the data processing operations in the framework of the **screening process of consultants to be included in the Register**. For the aspects related to the **management of contracts and ex post evaluation**, it will also take into account the recommendations made in case 2004-0301.

3.2. Prior checking

Applicability of Regulation No 45/2001 (the "Regulation"): The processing of data in question constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). During the screening process to be included in the Register, personal data are processed that relate to consultants (physical persons).

The data processing is performed by the EIB in the exercise of activities which fall within the scope of EU law (Article 3(1) of the Regulation in the light of the Lisbon Treaty). The processing of the data is done through automatic means. Therefore, Regulation No 45/2001 is applicable.

Grounds for prior checking: Article 27(1) of the Regulation subjects to prior checking by the EDPS all "*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*". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b) of the Regulation). During the screening process to be included in the Register, the ability and efficiency of the consultant are evaluated and therefore Article 27(2)(b) is applicable.

The notification also refers to Article 27(2)(d) of the Regulation that covers "*processing operations for the purpose of excluding individuals from a right, benefit or contract*". However, in the present case, the purpose of the processing is not to exclude consultants from the *possibility* to be selected to join the Register. Exclusion *stricto sensu* in the meaning of Article 27(2)(d) occurs for example in the framework of processing operations regarding Early Warning Systems.⁸

Therefore, only Article 27(2)(b) shall be taken into consideration in this Opinion.

⁷ The recommendations contained in the EDPS' Opinion on case 2007-0126 were implemented and the case was closed on 18 June 2010.

⁸ See for instance the Opinion of the EDPS of 14 October 2007 on OLAF's EWS.

As mentioned above, the scope of this prior checking does not cover the procurement procedures *stricto sensu*, which have already been addressed in case 2007-0126).

Deadlines: The notification of the DPO was received on 25 February 2013. According to Article 27(4) the present Opinion must be delivered within a period of two months. The procedure was suspended for a total of 45 days. Consequently, the present Opinion must be delivered no later than on Monday 10 June 2013⁹.

3.3. Lawfulness of the processing

Personal data may only be processed if legal grounds can be found in Article 5 of the Regulation. Under Article 5(a) of the Regulation, personal data may be processed *inter alia* if the *processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the [EU] institution or body*". The screening of consultants can be considered as reasonably necessary in the legitimate exercise of official authority vested in the EIB. This needs to be done with an adequate degree of care and on the basis of objective criteria.

According to the notification, Articles 2.1., 2.2. (2.2.1., 2.2.2., 2.2.3.) and 2.3. of the EIB Guide for the procurement of services, supplies and works by the EIB for its own account (the "**Guide**") constitute the specific legal basis for the processing operations covered by this notification. The Guide is based on the principles laid down in the EU directives on public procurement, in particular Directive 2004/18/EC of the European parliament and the Council of 31 March 2004. The latest version of the Guide was approved by the Management Committee of the Bank on 7 June 2011.

The Guide refers to the procurement procedures as such and does not expressly mention the screening and inclusion in the Register as a prior requirement to be awarded contracts with the EIB. However, this screening can be considered as covered by the following provisions of the Guide:

- Article 2.1.: "*The awards of such contracts will be effected following an appropriate market analysis and in accordance with the fundamental principles set out in the introduction [equal treatment, non-discrimination and transparency]*";
- Article 3.2.: "*Tenderers admitted to take part in the [tendering] procedure are normally selected following an appropriate market analysis or on the basis of other information available to the competent Bank services on economic operators' capabilities to perform the contract*".

3.4. Data Quality

Data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4.1(c)). The data required concern identification data and other data allowing evaluation of the consultant's ability to perform a contract (See above 2.3.). The EDPS considers that these data are adequate and in line with the general principles underlying the selection of consultants who can be part of the Register.

⁹ Since the final date is Sunday 9 June 2013, the next working day is considered as the final date for delivering the Opinion.

The data must be processed "*fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see 3.3. above). As regards fairness, this relates to the information given to the persons concerned (see 3.8. below).

"Data must be accurate, and where necessary, kept up to date" (Article 4(1)(d) of the Regulation). Data accuracy seems to be ensured in the screening procedure, as it is the responsibility of the individuals submitting the documents containing their personal data to provide accurate data. In addition, once they are in the Register, the EIB will regularly ask the consultants to update their data. Finally, the consultants also have the right to access and the right to rectify data, so that the file can be as complete as possible. This also makes it possible to ensure the quality of data.

3.5. Conservation of data

According to Article 4(1)(e) of the Regulation, "*personal 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*".

a) Register

As indicated above, the conservation periods of data mentioned in the Register are as follows:

- Unsuccessful candidates: 3 months from the time of their application to join the Register;
- Successful candidates without a framework agreement: 4 years from the date of their application to join the Register;
- Successful candidates with a framework agreement: 4 years after the termination date of the framework agreement.

Since there is no mention of the time-limit within which the panel makes its decision on whether the consultant is inserted or not in the Register, and since the three month retention period starts as of the application and not the actual decision, time allowed for unsuccessful candidates to assess any possible recourses could be very short. Therefore, the **EDPS suggests that the time-limit for unsuccessful candidates starts on the date of notification of the panel's decision to the candidates and that an additional conservation period of 2 years and a half is provided to cover possible complaints with the Ombudsman.**

Regarding the other situations, the EDPS notes that the EIB considered the 4 year conservation period as necessary to for the purposes for which the data are collected or further processed.

b) Contract management

In his Opinion in case 2004-0301, the EDPS requested to establish internal rules for the storage duration of contracts, supporting/background documents, ex post evaluations, etc.

As mentioned above, the notification mentions that "contract details" are kept for four years after the termination date of the consultancy contract. The EIB **should establish precise rules for the storage of the contracts and of any related information contained in the PJ contract management module**: key data about the contracts, performance history, copies of the contracts themselves, *ex post* evaluations. It should also make a distinction between the retention of framework agreements and of individual agreements.

Moreover, the **EIB should ensure consistency with the conservation periods provided in the framework of the notification regarding EIB procurement rules** (case 2007-0126).¹⁰

3.6. Transfer of data

The processing operation should also be examined in the light of Article 7(1) of the Regulation that specifies that "*personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipients*".

The present processing operations include access to data only to the Projects Directorate of the EIB. Only staffs of the Resources Unit have editorial rights as administrators. The other members of the Directorate have read-only rights. These access and editorial rights seem to be necessary for the legitimate performance of tasks covered by the competence of the recipients.

According to the notification, there is no transfer outside the EIB.

3.7. Rights of access and rectification

According to Article 13 of the Regulation, the data subject shall have the right to obtain information at least as to the purposes of the processing operation, the categories of data concerned, the recipients to whom the data are disclosed and communication of the data undergoing processing and of any available information as to their source, and a confirmation as to whether or not data related to him/her are being processed. Article 14 of the Regulation provides that "*the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

The EDPS notes that the rules on accessing their data are clearly defined and made available to data subjects in the data protection clause referred to above.

Article 20 of the Regulation provides for possible grounds for restrictions on the rights to access and rectification. Although there is no mention of such restrictions in the notification, in case any restriction on those rights is considered by the EIB it should be justified according to Article 20 of the Regulation.

3.8. Information to the data subject

The Regulation provides that the data subject must be informed when his or her personal data are processed and lists a set of information that must be given either in cases where the data have been obtained from the data subject (Article 11) or in cases where the data have not been obtained from the data subject (Article 12).

Inasmuch as the consultants provide their personal data required for the screening procedure, Article 11 applies. In other cases, in particular when the panel will evaluate the consultants

¹⁰ The conservation periods for data in relation to contracts awarded in the framework of procurement procedures are as follows (see letter of the EIB of 22 July 2009 following EDPS recommendations in case 2007-0126):

- successful candidates: duration of the contract plus two years in the central archives, unless they are needed in the context of litigations or claims;
- unsuccessful candidates: 4 years, unless they are needed in the context of litigations or claims.

and process data about them, personal data will not be obtained from the data subjects and Article 12 will apply.

The EDPS values that the rules on the screening process to be included in the Register were clearly specified by the EIB in the notification. However, **the EDPS would like to receive a copy of the explanation about the screening process to be included in the Register that the EIB intends to provide to the consultants before the screening process takes place.**

The data protection clause referred to in the notification (see above 2.3.) does not contain all information required under Articles 11 and 12. The following elements are missing:

- an additional purpose, being the screening process and the inclusion in the Register as a prerequisite to be awarded consultancy contracts;
- the recipients or categories of recipients of the data;
- the time-limits for storing the data;
- the legal basis of the processing operation for which the data are intended.

As far as issues raised in the EDPS Opinion in case 2004-0301 are concerned, the data protection clause **should mention that personal data of consultants are processed not only in the selection process and during the ex-post evaluation of their work, but also for the day-to-day management of the consultancy contracts.**

In the interest of efficient information to the data subject, **the full information required under Articles 11 and 12 should be provided as early as possible in the procedure.** The best places for this are the CV form to be used for applications in reply to calls for tender and the standard reply for spontaneous applications. The EIB should ensure that all the information required under Articles 11 and 12 of the Regulation is supplied at this stage.

3.9. Security measures

Article 22 of the Regulation provides that the controller must 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.

On the basis of the available information, the EDPS does not see any indication to believe that the EIB has not applied the security measures required in Article 22 of the Regulation.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following recommendations are fully taken into account:

- establish that the time-limit for the conservation of the data of unsuccessful candidates starts on the notification of the panel's decision to candidates and provide for an additional conservation period of 2.5 years;
- establish precise rules for the storage of the consultancy contracts and of any related information contained in the PJ contract management module;
- ensure consistency with the data retention periods provided in the framework of the notification regarding EIB procurement rules (case 2007-0126);

- provide the EDPS with a copy of the explanation about the screening process to be included in the Register that the EIB intends to provide to the consultants before the screening process takes place;
- insert in the data protection clause the following information on the additional purposes that consultants data are processed in the screening process to be included in the Register and for the day-to-day management of the consultancy contracts; the recipients or categories of recipients of the data; the time-limits for storing the data and on the legal basis of the processing operation for which the data are intended;
- provide the full information required as early as possible in the procedure (in the calls for tender/standard reply to spontaneous applications);
- specify the procedures and rules on the use of the *ex post* evaluations when considering consultants for future assignments (see recommendations made in the Opinion issued in case 2004-0301).

Done at Brussels, 7 June 2013

(signed)

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