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European Chemical Agency

Brussels, 18 December 2013  
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correspondence

**Subject: Prior checking notification concerning public procurement**

Dear Ms Hakala,

I refer to the notification for prior checking concerning public procurement and related contract management submitted to the European Data Protection Supervisor (EDPS) on 3 January 2013 by the Data Protection Officer (DPO) of the European Chemicals Agency (ECHA).

We note that the procurement procedure<sup>1</sup> at the ECHA is in most aspects in compliance with Regulation (EC) No 45/2001<sup>2</sup> (the Regulation) as outlined in the EDPS Public Procurement Guidelines<sup>3</sup> and will therefore only address the existing practices which do not seem to be fully compliant in this respect.

**1. Data conservation.** According to the information provided in the notification, all files relating to tender procedures - including files of pre-selected candidates to be invited to respond to a restricted invitation to tender - are kept for at least five years after the budgetary discharge. The files of unsuccessful candidates are kept for two years after the closure of the respective call for expression of interest.

Article 4(1)(e) of the Regulation states that personal data can be kept in a form permitting identification of data subjects for no longer than necessary for the purpose for which they were collected or further processed.

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<sup>1</sup> The related management of framework contracts at the ECHA will be addressed in a separate Opinion.

<sup>2</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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.

<sup>3</sup> EDPS Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts of 25 June 2013 (EDPS 2012-501).

The EDPS notes that the existing time limit for conservation of files of unsuccessful candidates for two years after the closure of the respective call can be considered as necessary for the related appeals.

At the same time, we observe that no maximum time limits were set for either conservation of files of successful tenderers and candidates or files of unsuccessful tenderers. We would like to recall that pursuant to Article 48 of the Rules of Application to the Financial Regulation<sup>4</sup>, procurement related documents may be kept for up to seven years after the budgetary discharge, whereas personal data contained therein should be deleted when no longer necessary for budgetary discharge, control or audit. The files of unsuccessful tenderers may be kept only for up to five years to allow for all possible appeals.

Furthermore, we note that the extracts from judicial records should not be kept for longer than two years after the signature of the related contract<sup>5</sup> and invite the ECHA to establish a conservation period of two years for extracts from judicial records kept in the electronic form.

**2. Transfers of data.** Personal data processed in this context are transferred to the responsible staff in the operational and finance units of the ECHA, OLAF, ECA and IAS, as well as external experts and contractors involved in the tender evaluation and procurement management on behalf of the ECHA.

The data transfers within the ECHA can be considered as necessary for the accomplishment of the respective task in the particular procurement procedure, whereas the transfers to OLAF, ECA and IAS can be deemed necessary for the particular supervisory task in terms of Article 7(1) of the Regulation. In order to ensure full compliance with the Regulation, the EDPS recommends that all internal recipients are made aware of the purpose limitation set out in Article 7(3) of the Regulation.

The transfers to the external experts and contractors have to be assessed in light of Articles 8 and 9 of the Regulation, depending on as to whether they are subject to national law adopted pursuant to Directive 94/56/EC<sup>6</sup>, i.e. whether they are established in the EU.

The transfers to the external recipients established in the EU can be deemed necessary for the performance of the evaluation task in the area of public procurement in terms of Article 8(a) of the Regulation; whereas the transfers to experts established outside of the EU may be considered necessary for the implementation of pre-contractual measures taken in response to the data subject's request within the meaning of Article 9(6)(b) of the Regulation. In any case, the tenderers and candidates should be informed about the possible processing of their data by external experts in the respective invitation or call.

**3. Information to data subjects.** According to the information provided in the notification, the information to data subjects is provided in the specific privacy statement as well as included in the invitations to tender/tender specifications and contracts (in the form of data protection clauses).

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<sup>4</sup> Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union.

<sup>5</sup> See to this respect the letter on conservation of extracts from the judicial records sent by EDPS to the management of all EU institutions and bodies on 12 March 2013 (EDPS 2011-482).

<sup>6</sup> Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

The EPDS observes that the information about rights of data subjects seems to be rather misleading as the data protection clause for contracts refers to the rights of the "contractor".

In order to ensure full compliance with Articles 11 and 12 of the Regulation, the EDPS recommends that:

- the information about data recipients clearly refers to external experts in case they may be involved in the processing of personal data in the context of the particular procurement procedure;
- the reference to "contractor's" rights in the data protection clause for contracts is deleted as it does not refer to the processing of data of the tenderers and candidates by the external expert.

In conclusion, the EDPS considers that there is no reason to believe that there is a breach of the Regulation provided that the considerations contained in this Opinion are fully taken into account. In particular, the ECHA should:

- establish a maximum conservation time limit of seven years for the files of successful tenderers and candidates;
- establish a maximum conservation period of five years for the files of unsuccessful tenderers;
- establish a two years conservation period for the extract from judicial records kept in electronic form;
- remind all internal recipients of the purpose limitation obligation set out in Article 7(3);
- ensure that tenderers and candidates are duly informed about any possible data transfers to external experts;
- revise the existing data protection clauses and privacy statement as outlined above.

We would like to invite the ECHA to inform us about the implementation of these recommendations within three months after receipt of this letter.

Finally, we would like to invite the ECHA DPO to submit a separate notification for prior checking on the management of the framework contracts which would outline all aspects of the related data processing and in particular the further evaluations of the contractors' abilities to perform a specific contract.

**(signed)**

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Assistant European Data Protection Supervisor

Cc: Bo Balduyck, DPO