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Subject: Prior checking notification concerning public procurement

Dear Ms Arnould,

I refer to the notification for prior checking concerning public procurement¹ submitted to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the European Defence Agency (EDA) on 28 June 2013.

We note that the procurement procedure at the EDA is in most aspects in compliance with Regulation (EC) No 45/2001² (the Regulation) as outlined in the EDPS Public Procurement Guidelines³ 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 data processed in this context is kept for five years after the budgetary discharge.

¹ The related "ad hoc A and B contracting activities" concerning joint programmes of cooperation aimed at developing technological military capabilities will be addressed in a separate opinion.

² 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.

³ 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).

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.

We consider that the extracts from judicial records should not be kept for longer than for two years after the signature of the respective contract⁴ and thus invite the EDA to establish such a conservation period for extracts kept in the electronic form.

2. Transfers of data. Personal data processed in this context are transferred to the responsible staff at the EDA, to the external experts involved in evaluation teams or contract management, as well as - in case of litigation - to the European Court of Justice, the European Ombudsman or the EDPS.

The data transfers to the responsible staff at the Agency or in other EU institutions can be considered as necessary for the accomplishment of a respective task in the particular procedure or for the accomplishment of a particular supervisory task and thus in compliance with 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).

The transfers to the external experts 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, i.e. whether they are established in the EU.

The transfers to external experts 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 as 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 should be informed about the possible processing of their data by external experts in the respective invitation to tender.

3. Information to data subjects. Pursuant to Articles 11 and 12 of the Regulation, at the time of data collection / recording, the controller has to provide the following information to the data subjects:

- identity of the data controller,
- purpose of the data processing operation,
- data recipients,
- rights of access, rectification and recourse to the EDPS,
- legal basis of the processing,
- data conservation time limits.

We observe that no information is provided in the tender documents and therefore invite the EDA to establish a privacy statement in this respect.

⁴ 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).

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

- establish a two years conservation period for extracts from judicial records kept in electronic form;
- remind all internal recipients of the purpose limitation obligation set out in Article 7(3) of the Regulation;
- establish a privacy statement for the tender documents containing all information listed above.

The EDPS would like to invite the EDA to inform him about the implementation of these recommendations within three months after receipt of this letter.

(signed)

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Cc.: Gabriele BORLA, Data Protection Officer - EDA