



GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Ms Emily O'REILLY
European Ombudsman
1, Avenue du Président Robert
Schuman
F - 670001 STRASBOURG

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GB/BR/sn/D(2014)0806 C 2013-0875
Please use edps@edps.europa.eu for all
correspondence

Subject: Prior checking notification concerning public procurement

Dear Ms O'Reilly,

I refer to the notification for prior checking concerning public procurement submitted to the European Data Protection Supervisor ("**EDPS**") by the Data Protection Officer ("**DPO**") of the European Ombudsman ("**EO**") on 16 July 2013.

We note that the procurement procedure at the EO is in most aspects in compliance with Regulation 45/2001¹ ("**the Regulation**") as further outlined in the EDPS Public Procurement Guidelines ("**the Guidelines**")² and will therefore only address the existing practices which do not seem to be fully compliant in this respect.

As far as the **scope** is concerned, the notification does not cover the phase prior to the grant procedure, that is to say the selection of external experts who will assist the EO in the assessment of the tenders. Therefore, the EO should submit a separate notification for prior checking regarding the selection and use of external experts as contractors to this end.

As this is an **ex-post case**, the deadline of two months for the EDPS to issue his Opinion does not apply. This case has been dealt with on a best-effort basis.

¹ 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.

² 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).

1. Information to data subjects

(i) Invitation to tender

As far as tenderers are concerned, information is provided in the invitation to tender documents. The data protection statement of the invitation to tender mentions that the data can be disclosed to staff members in charge of managing tenders and contracts, as well as to "*other individuals in the Evaluation Committee*". The data protection statement complies with Articles 11 and 12 of the Regulation. However, for the sake of clarity, the EDPS suggests **adding in the data protection statement that the data can be disclosed to "external experts"** in the Evaluation Committee instead of "other individuals".

(ii) Contractual documents

The information about the rights of data subjects included in the contractual documents is rather misleading as it refers to the contractor's rights. It goes without saying that the Regulation applies to the processing of the contractor's data by the EO. However, the privacy statement -such as the one inserted at the end of the invitation to tender- is the most appropriate channel to do so. By contrast, contractors' own obligations when processing personal data should be included in the contractual documents. Therefore, the EDPS recommends **amending the data protection clause** included in both the General Conditions of Contracts and the Model Contract, to delete any reference to the contractor's rights and to **focus on the contractor's obligations** as regards data protection when processing personal data in the performance of the contract.

2. Transfers of data

Data transfers to other institutions or bodies participating in tender procedures on which the EO takes the lead can be considered as necessary for the accomplishment of their respective tasks in the procurement procedure and thus in compliance with Article 7(1) of the Regulation. In order to ensure compliance with the Regulation, the EDPS recommends that these recipients are made aware of the purpose limitation set out in Article 7(3) of the Regulation.

3. Processing of data on behalf of the controller

External experts are considered as processors in terms of Article 2(e) of the Regulation as they are processing personal data on behalf the EO. Pursuant to Article 23 of the Regulation, a contract or legal act binding the external expert to the EO should therefore be established stipulating, in particular that the external expert can act only on instructions from the EO and has to comply with the obligations of confidentiality and security set out in Articles 21 and 22 of the Regulation. No model contract with the external experts that would include these obligations has been provided by the EO.

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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 EO should:

- submit a notification for prior checking as regards the selection and use of external experts;
- add in the data protection statement of the invitation to tender that the data can be disclosed to external experts in the Evaluation Committee;
- amend the data protection clause of the General Conditions of Contracts and of the Model Contract, so as to delete any reference to the contractor's rights and to include contractor's obligations as regards data protection;
- establish a contractual document between external experts and the EO, which is compliant with the requirements of Article 23 of the Regulation.

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

Yours sincerely,

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

Cc: Rosita Agnew, Data Protection Officer
Christina Karakosta, acting Data Protection Officer