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Brussels, 23 May 2014  
GB/TS/sn/D(2014)1189 C 2013-0584  
Please use [edps@edps.europa.eu](mailto:edps@edps.europa.eu)  
for all correspondence

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

Dear Mr Guérend,

I refer to the notification for prior checking concerning public procurement and contract execution submitted to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the European External Action Service (EEAS) on 4 June 2013, as well as the revised notification submitted on 21 October 2013.

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

**1. Data conservation.** According to the information provided in the notification, files of successful tenderers are kept for at least ten years following the contract signature or last payment by the EEAS, whereas the files of unsuccessful ones for at least five years following the contract signature.

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<sup>1</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>2</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).

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

We observe that no maximum time limit was set for the conservation of personal data processed in this context. The files of successful tenderers and contractors can be kept for up to seven years after the budgetary discharge as it can be considered as necessary for the purpose of control and audit in terms of Article 48 of the Rules of Application to the Financial Regulations. The files of unsuccessful tenderers may be kept for up to five years after the end of the particular procedure to allow for all possible appeals. Therefore, we would like to invite the EEAS to establish such time limits.

Furthermore, we note that in principle the extracts from judicial records should not be kept for longer than two years after the signature of the related contract<sup>3</sup>. Therefore, we invite the EEAS to establish such a maximum time limit for a conservation period for extracts kept in the electronic form.

**2. Data transfers.** Data processed in this context may be transferred to external experts in their quality as members of the Evaluation Committee.

The EDPS observes that the transfers to external experts 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 established outside of the EU at an early stage of the procedure. The EDPS thus invites the EEAS to include this information in the already existing model privacy statement and/or the data protection clause for invitations to tender.

**3. Information to data subjects.** According to the information provided in the notification, information to data subjects will be provided in the data protection clause for invitations to tender and contract notices, data protection clause for contracts, as well as a specific privacy statement that will be posted on the EEAS website.

The EPDS notes that both data protection clauses refer to the related privacy statement posted on the website of the European Commission<sup>4</sup> and that it should be replaced by a reference to the EEAS specific privacy statement as soon as it is available on the EEAS website.

As the model specific privacy statement provided together with the notifications contains all information in terms of Articles 11 and 12 of the Regulation, the EDPS recommends that it is done as soon as possible in order to avoid confusion of the data subject particular in terms of controller and data recipients.

Moreover, the EDPS observes that the data protection clauses for contracts refer not only to the obligations of the contractor acting as processor when processing personal data of the tenderers on behalf of the EEAS but also to the contractor's rights as data subject. We would like to invite the EEAS to delete these references as they do not relate to the processing of the personal data by the external experts.

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<sup>3</sup> See to this respect the letter on conservation of extracts from the judicial records sent by the EDPS to the management of all EU institutions and bodies on 12 March 2013 (EDPS 2011-482).

<sup>4</sup> [http://ec.europa.eu/dataprotectionofficer/privacystatement\\_publicprocurement\\_en.pdf](http://ec.europa.eu/dataprotectionofficer/privacystatement_publicprocurement_en.pdf).

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

- establish a maximum time limit of seven years for conservation of files of successful tenderers and contractors;
- establish a maximum time limit of five years for conservation of files of unsuccessful tenderers;
- establish a maximum time limit of two years for conservation of extracts from judicial records kept in the electronic form;
- add the information about possible data processing by external experts established outside the EU to the existing privacy statement;
- made the EEAS specific privacy statement available on the EEAS website;
- replace the reference to the related privacy statement in the existing data protection clauses as indicated above;
- delete the references to the contractor's rights from the data protection clauses for contracts.

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

**(signed)**

Giovanni Buttarelli  
(signed)

Cc: Carine CLAEYS, Data Protection Officer