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

Dear Mr Ahola,

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 Institute of Innovation and Technology (EIT) on 15 June 2015.

As this notification relates to a set of processing operations that were already in place, the deadline of Article 27(4) of Regulation (EC) 45/2001<sup>1</sup> (the Regulation) does not apply. This case has been dealt with on a best-effort basis.

We note that the procurement procedure at the EIT is in most aspects in compliance with the Regulation as further explained in the EDPS Public Procurement Guidelines<sup>2</sup> and will only address those aspects which do not seem to be fully compliant.

The EDPS observes that all information required in terms of Articles 11 and 12 of the Regulation is provided in the related privacy statement, which is made available on the EIT website as well as linked to in the model invitation to tender.

Nevertheless, the information about the rights of access and rectification, as well as some additional information about the data subjects provided therein seems to be misleading and/or incomplete. In particular, it mentions that "personal data relating to the exclusion, selection and award criteria" cannot be accessed or rectified after the deadline for submitting tenders.

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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), available on the EDPS website

Furthermore, it mentions that the requests for rectification are handled within thirty days after [the receipt of] the request. Finally, it mentions the "EIT staff responsible for the implementation of the contract" among the data subjects whose personal data are processed in the context of the procurement procedure.

The limitation of the right of rectification in terms of Article 112 of the Financial Regulation<sup>3</sup> may indeed be considered necessary to safeguard the rights of other tenderers as well as the equality of their treatment. At the same time, the limitation of the right of access is questionable as the tender cannot be altered by mere *access* by the tenderer. In this respect, the restriction of the right of access cannot be considered necessary to safeguard the equal treatment of the other tenderers or any of other of the particular general interests listed in Article 20(1) of the Regulation. Therefore, when so requested, **EIT should therefore provide access in line with Article 13, even after the deadline. The information provided to data subjects should be amended accordingly, by only referring to the restriction of the right of rectification in the privacy statement.**

Concerning the right to rectification, we would like to point out that a differentiation should be made between factual and evaluation data. The right of rectification is limited to the objective factual data (e.g. contact information for the tenderer). For the subjective evaluation statements, it refers to whether the information in fact reflects the evaluation committee's assessment. When a tenderer disagrees with the assessment of its bid, the respective appeal and review procedures are the way to address this. **The data subjects need to be informed about this limitation and the possibility to complement the existing evaluation data by means of the respective appeal and review procedures<sup>4</sup>.**

Furthermore, we would like to recall that pursuant Article 14 of the Regulation, the rectification of inaccurate or incomplete data should be provided "without delay". **Rectification should be provided with the same speed as the erasure of unlawfully stored data or the blocking of inaccurate data.** For those operations, the EDPS recommends a period of maximum 15 working days<sup>5</sup>.

Finally, we would like to point out that the EIT staff members cannot be considered as data subjects whose personal data is processed for the purpose of selection and/or evaluation of contractors selected in the related public procurement procedure. The

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 EIT should:

- **provide access in line with Article 13, even after the deadline and update the privacy statement accordingly;**
- add information about the scope of the right to rectification concerning the evaluation data together with information about the respective appeal and review procedures to the privacy statement;

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<sup>3</sup> Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, read together with Article 160 of the Rules of Application, 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 of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union

<sup>4</sup> EDPS Guidelines on the Rights of Individuals with regard to the Processing of Personal Data of 25 February 2014 (EDPS 2011-0272), available on the EDPS website, page 18

<sup>5</sup> EDPS Guidelines on the Rights of Individuals with regard to the Processing of Personal Data of 25 February 2014 (EDPS 2011-0272), available on the EDPS website, pages 21-23

- provide rectification with the same speed as the erasure of unlawfully stored data or the blocking of inaccurate data and update the privacy statement accordingly;
- delete the reference to the EIT staff as data subjects.

Please also resubmit an updated notification, revised in accordance with the recommendations made.

The EDPS expects the EIT to implement these recommendations accordingly and will close the case as soon as we have received the updated notification.

Yours sincerely,

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

Cc: Ms Beata GYÖRI-HARTWIG, DPO