



## **Opinion on the notification for prior checking received from the Data Protection Officer of the Court of Justice regarding the "Public procurement" case**

Brussels, 16 November 2006 (Case 2006-398)

### **1. Procedure**

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "public procurement" dossier was given by the Data Protection Officer (DPO) of the Court of Justice, by letter dated 8 August 2006.

Public procurement processing is already established so that control cannot be regarded as prior. Processing is therefore subject to ex post verification.

This notification relates to the priority topics set by the EDPS, which include processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)).

On 8 and 26 September 2006 the EDPS requested further information on the processing operation in question. An answer was given on 10 October 2006. On 7 November 2006 the EDPS extended the time-limit for delivering an opinion by 7 days to enable the controller to provide additional information.

### **2. Examination of the case**

#### **2.1. The facts**

This notification relates to the processing of personal data carried out in the context of public procurement procedures in which the Court of Justice is the contracting authority. The controllers are the authorising officers. Pursuant to Article 60(1) of the Financial Regulation, the authorising officer is responsible for implementing revenue and expenditure in accordance with the principles of sound financial management and for ensuring that the requirements of legality and regularity are complied with. Among the authorising officer's tasks are the launching of tendering procedures and the award of public contracts.

Processing is for several purposes: determining cases of exclusion, evaluating the data subjects' technical, professional, financial and economic capacity in order to make a list of those selected under a call for expressions of interest or to select candidates under a procurement procedure, to award a contract and to assess the quality of contract performance.

The following provisions form the legal basis for the personal data processing operation: Articles 93 and 94 of the Financial Regulation with regard to exclusion criteria<sup>1</sup>, Article 97 of that same Regulation with regard to selection and award criteria and Articles 136 and 137 of the detailed rules for the implementation of Regulation (EC, Euratom) No 1261/2005 with regard to economic and financial capacity and technical and professional capacity.

Data processing is both manual and automated. Documents relating to requests to participate and to data subjects' tenders are received on paper. Each Directorate of the Court responsible for tendering files these documents differently. For instance, the Translation Directorate uses a binder or a cardboard box for each candidate. The Press and Information Directorate keeps documents in folders bearing the name of the dossier. Data-processing and spreadsheet software are generally used when tenders are being analysed.

Data subjects are both natural and legal persons. Only natural persons are covered by Regulation (EC) No 45/2001 (Article 2(a)) and they alone are described in this opinion. They may include:

- any person who makes a request to participate in a procurement procedure, who is invited to participate or who submits a tender,
- the employees, the administrators and/or managers, and the subcontractors of an undertaking making a request to participate in a procurement procedure, invited to participate or submitting a tender: when the dossier submitted by the undertaking contains personal data (e.g. curriculum vitae, diplomas, etc.) relating to employees proposed by the undertaking to perform all or part of the contract, personal data relating to administrators, managers or executives (educational and professional qualifications, data relating to professional conduct, extracts from police records, etc.), personal data relating to subcontractors, subcontractors' employees or administrators, managers or executives proposed by the undertaking to perform all or part of the contract.
- references: when the dossier submitted by the undertaking making a request to participate in a procurement procedure, invited to participate or submitting a tender contains personal data relating to persons who have previously received services from that undertaking comparable to those covered by the contract as part of the references attesting to the undertaking's technical and professional capacity.

The data subjects may be established in the European Union, the European Economic Area or third countries with which the Community has concluded specific agreements in the field of public contracts.

In the call for tenders procedure, the following categories of data may be processed:

- name, address, telephone number, fax number and e-mail address;
- data shown on the passport or certificate of nationality (copy);
- proof of self-employed status, proof of tax status;
- bank details (account number, name of the bank, IBAN code);
- data contained in an extract from police records, a certificate relating to (non-)payment of social security contributions and taxes;
- curriculum vitae;
- a list of the main works published or projects carried out;

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<sup>1</sup> Such data processing is examined in prior checking 2006-397 - Early Warning System - currently being analysed. See point 2.2.1 of this analysis.

- a statement setting out the tenderer's turnover;
- bank references or evidence of professional risk indemnity insurance;
- other data relating to the candidate or tenderer submitted under the procurement procedure.

The data subjects may exercise their access, rectification, blocking, erasure and objection rights by submitting a request to the controller (except in the case of processing required for the performance of a legal obligation).

Under Article 49 of the detailed rules for the implementation of the Financial Regulation, documents relating to the contract and containing personal data are stored:

- in the case of unsuccessful tenderers: for five years from the date of Parliament's discharge in respect of the budget for the year in which the contract was awarded;
- in the case of successful tenderers: for five years from the date of Parliament's discharge in respect of the budget for the year in which the last contract performance act took place or the year of expiry of the contractual or legal guarantee enjoyed by the contracting authority under the contract.

The main recipients of the data being processed are the persons working under the authority of the (sub)delegated authorising officer who are responsible for helping him manage the procurement procedure and the members of the opening board (within the institution or on an interinstitutional basis), the members of the evaluation committee(s) evaluating tenders and requests to participate (within the institution or on an interinstitutional basis) and the staff of the Court's financial assistance unit responsible for checking the regularity of the operation.

The members of the ad hoc evaluation committees (when they are set up within the institution) receive a reminder that they are authorised to process personal data appearing in the dossiers solely for the purposes of evaluating tenders and requests to participate. That reminder is issued in the following (or similar) form when the committee members are appointed:

*"Your attention is drawn to the rule in Article 7(3) of Regulation (EC) No 45/2001 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 (OJ L 8, 12.1.2001, p. 1) to the effect that the recipient shall process the personal data only for the purposes for which they were transmitted (in this instance the evaluation of requests to participate in the contract and/or of tenders)."*

The Court of Auditors, the specialised financial irregularities panel, the internal auditor (in the context of the functions devolving upon him under Articles 85 and 87 of the Financial Regulation), the European Parliament (in the context of the discharge procedure), OLAF, the OLAF Supervisory Committee (pursuant to Article 11 of Regulation No 1073/1999), the Court of First Instance of the European Communities and the Court of Justice of the European Communities, the courts having jurisdiction (generally the Luxembourg courts) in the event of a dispute relating to the performance of the contract, the President and Registrar of the Court and the officials who assist them in the context of responsibilities devolving upon under Article 23 of the Court's rules of procedure and the legal adviser on administrative matters may also be recipients.

Information intended for the data subjects is set out in the documents constituting the call for tenders, such as the specifications or invitations to tender and in the contract to be concluded

with the successful tenderer. Information is supplied in the form of an information notice to be included in the documents relating to a public procurement procedure and in the contracts which the (sub)delegated authorising officers are called upon to sign. According to the notification, these clauses provide the tenderer with information on the identity of the controller, the purposes of the processing operation, the possible recipients of the data, the existence of the right of access to and the right to rectify data concerning him, the time-limits for storing the data and information about whether replies to the questions are obligatory or voluntary, about the possible consequences of failure to reply and about the right to have recourse to the EDPS.

Documents relating to requests to participate and to tenders are stored in a locked safe on the premises of the Court of Justice department which issued the call for tenders.

Electronic documents are stored on the part of the server allocated to the department for which the (sub)delegated authorising officer is responsible. Documents are accessible via a password.

### Description of the procedure

#### *Phases of the tendering procedure*

The procedures most frequently used are the call for tenders and the negotiated procedure. Tendering under these procedures takes place in two phases: selection of operators and award of the contract to one or more of them. The first phase focuses on the operators and the second on the tenders. The selection phase comprises two stages: in the first stage the contracting authority examines the admissibility of the operators who have expressed an interest in participating in the tendering procedure. Operators who come under one of the cases of exclusion listed in the regulations are not permitted to participate; the second stage consists of examining whether the interested operator meets the criteria relating to economic, financial, technical and professional capacity. At the end of the selection phase, the contracting authority selects one or more operators on the basis of the tender criteria.

#### Selection phase

Articles 93 and 94 of the Financial Regulation list a number of cases of exclusion from participation in a procurement procedure. Article 95 of the Financial Regulation requires the institutions to establish a database containing details of candidates and tenderers who are in one of the situations described in Articles 93 and 94. A procedure has been put in place to enable the authorising officers, the delegated authorising officers and the subdelegated authorising officers to consult that database and it is covered by EWS processing (Early Warning System – see prior checking currently being analysed: 2006-397).

For the purposes of examining the admissibility of operators interested in participating in the procedure, the competent (sub)delegated authorising officer may be required to process personal data relating to offences and criminal convictions. The data processed are intended to identify operators who must be excluded from participation in the tendering procedure<sup>2</sup>. A *tender and application evaluation committee* drafts a record of the evaluation and of the ranking of applications to participate and tenders which it considers to be in compliance. That record contains at least: (a) the name and address of the contracting authority, and the subject and value of the contract or of the framework contract; (b) the names of the candidates or tenderers rejected and the reasons for their rejection; (c) the names of the candidates or

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<sup>2</sup> Such data processing is examined in prior checking 2006-397 - Early Warning System - currently being analysed. See point 2.2.1 of this analysis.

tenderers to be examined and the reasons for their selection; (d) the reasons for the rejection of tenders found to be abnormally low; (e) the names of the candidates or contractor proposed and the reasons for that choice and, if known, the proportion of the contract or the framework contract which the contractor intends to subcontract to third parties.

The members of the opening board sign the record of the tenders received, which lists those tenders which comply and those which do not and gives the reasons for the rejection of those tenders which do not comply.

Staff members other than those who initiated the operation are responsible for checking the operational and financial aspects.

Articles 136 and 137 of the detailed rules for the implementation of the Financial Regulation lay down criteria for capacity. Article 136 sets out a non-exhaustive list of means of proving economic and financial capacity. Article 137 sets out an exhaustive list of criteria for economic and financial capacity.

For the purposes of assessing the capacity of interested operators, the competent (sub)delegated authorising officer may be required to process personal data relating to personal aspects of the operators themselves, where they are natural persons, or of their staff members where the operators are legal persons. Curricula vitae will be examined in that connection.

#### Award phase

After the selection phase, the awarding authority will then proceed to evaluate the tenders.

Contracts can be awarded in one of the following two ways: (a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price; (b) under the best-value-for-money procedure.

#### *Operations subsequent to the award of the contract*

Once the contract has been awarded to the operator selected (or operators selected in the case of a multiple framework contract), the contract performance stage begins, pursuant to the contract binding the parties.

The performance of the contract involves the establishment of documents (invoices, acceptance reports, passed for payment stamps, payment orders, possibly performance agreements, etc.).

The work done by the successful tenderer is evaluated to ensure proper performance of the contractual obligations. In that connection, data are examined relating to personal aspects of the operators themselves, where they are natural persons, or of their staff members where the operators are legal persons. Curricula vitae will be examined in that connection.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

The notification received by letter on 8 August 2006 relates to processing of personal data within the meaning of Regulation (EC) No 45/2001 - any information relating to an identified or identifiable natural person – Article 2(a). The data are processed by a Community body and

are carried out in the exercise of activities within the scope of Community law (Article 3(1)). Data processing is partly manual and partly automated. Data processed manually are kept in a file, which may in this instance be either a binder or cardboard boxes bearing the candidate's name or folders bearing the name of the dossier concerned (Article 3(2)). This processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 requires prior checking by the EDPS of all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes".

Article 27(2)(b) lists processing operations likely to present such risks, such as "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). In the case in point, the personal data are processed in order to evaluate personal aspects relating to the data subjects (in particular their ability – Article 27(2)(b)). This dossier therefore falls within the scope of the prior checking procedure. Data are also processed for the purpose of excluding data subjects from a right (Article 27(2)(d)). Such data processing is covered specifically by prior checking 2006-397 - Early Warning System - in the Court of Justice. That opinion is currently being analysed.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was notified after the system was set up, the check necessarily has to be performed *ex post*. This does not alter the fact that the recommendations issued by the EDPS should be implemented.

The formal notification was received through the post on 8 August 2006. Two requests for information were made in e-mails dated 8 and 26 September 2006. In accordance with Article 27(4) of the Regulation, the two-month period within which the EDPS must deliver an opinion was thus suspended. Replies were given by e-mail on 10 October 2006. By e-mail dated 7 November 2006, the procedure was suspended for 7 days in order to allow the DPO to provide additional information and make comments deemed relevant. The EDPS therefore had to submit his opinion by 17 November 2006 (9 October plus a +39 day suspension period).

### **2.2.2. Lawfulness of processing**

Under the Regulation (Article 5(a)), the lawfulness of the processing is therefore based on the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of an official authority vested in the Community institution. In this case, the task is one being carried out in the public interest such as the compilation and processing of personal data as part of the procurement procedures with a view to complying with the principles of sound financial management and equal treatment of the tenderers. Moreover, recital 27 of Regulation (EC) No 45/2001 states that "processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies". That being so, the processing operation proposed is therefore lawful.

In the case under examination, the legal basis for the processing operation is of particular importance, since the data processed may be sensitive and the risks in relation to the rights and freedoms of data subjects may be significant. The data processing operation is based on Articles 93, 94 and 95 of the Financial Regulation with regard to exclusion criteria<sup>3</sup>, Article 97

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<sup>3</sup> Such data processing is examined in prior checking 2006-397 - Early Warning System - currently being analysed. See point 2.2.1 of this analysis.

of that same Regulation with regard to selection and award criteria and Articles 136 and 137 of the detailed rules for the implementation of Regulation (EC, Euratom) No 1261/2005 with regard to economic and financial capacity and technical and professional capacity.

### **2.2.3. Data quality**

Data must be "adequate, relevant and not excessive" (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion seem to fulfil these conditions. The data collected are in part of an administrative nature and are necessary for identification purposes in the case of exclusion, for the evaluation of persons in the context of a call for expressions of interest, the award of a contract and the evaluation of the quality of contract performance. Curriculum vitae and other documents relating to publications by the data subject, for example, are submitted by the data subject with his or her consent. Consideration also needs to be given to the appraisal data contained in the minutes drawn up by the committee evaluating tenders and applications to take part, the opening group and the evaluation group. The fact that a clause stipulates that the different members are authorised to process the personal data contained in the files solely for the purposes of evaluating tenders or applications to take part is a means of guaranteeing the quality of the data. The EDPS is satisfied that Article 4(1)(c) of Regulation (EC) No 45/2001 is duly complied with in this respect.

Furthermore, the data must be processed "fairly and lawfully" (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see point 2.2.2. above). The issue of fairness is linked to the information which must be transmitted to the data subject. That point is discussed in section 2.2.7. below.

Article 4(1)(d) of the Regulation stipulates that "data must be (...) accurate and, where necessary, kept up to date". Furthermore, under that Article, "every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified". The system itself must guarantee reasonable accuracy of the data collected and updating of the data. In the case under examination, the system collects data of reasonable accuracy and ensures that they are undated. Moreover, the data subject is made aware of his or her right of access to and right to rectify data, in order to ensure that the file remains as comprehensive as possible. These rights are the means of ensuring that data are accurate and kept up-to-date. They are discussed in section 2.2.6. below.

### **2.2.4. Conservation of data**

The general principle in the Regulation is that personal data may be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed (Article 4(1)(e) of the Regulation).

As already mentioned, in the case of unsuccessful tenderers, the data are kept for five years from the date of Parliament's discharge in respect of the budget for the year in which the contract was awarded. In the case of successful tenderers, they are kept for five years from the date of Parliament's discharge in respect of the budget for the year in which the last contract performance act took place or the year of expiry of the contractual or legal guarantee enjoyed by the contracting authority under the contract. The EDPS considers that the above period is reasonable and consistent with the purposes of the processing operation.

Where data processing is manual, the documents are assumed to be produced by electronic means (computers), and those electronic files and/or documents must follow the same rules as the paper versions of the documents.

### **2.2.5. Transfer of data**

Article 7(1) of the Regulation provides that personal data may only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The case being examined concerns a transfer within an institution, specifically amongst staff of the Court of Justice: to persons working for the (sub)delegated authorising officer, to the members of the opening board or evaluation committee evaluating tenders and applications to take part, to the evaluation group made up of experts in the field of the contract in question and to staff of the Court's financial assistance unit.

We are also dealing with a transfer between institutions; the above committee and board may also be interinstitutional. Moreover, the data may also be transferred to the Court of Auditors, to the Parliament, to OLAF in the context of investigations and budgetary control, to the Court of First Instance of the European Communities and to the Court of Justice of the European Communities.

It follows that the conditions of Article 7(1) are fulfilled since the data collected are necessary for carrying out the processing and, furthermore, are "necessary for the legitimate performance of tasks covered by the competence of the recipient".

Moreover, Article 7(3) of Regulation (EC) No 45/2001 provides that "the recipient shall process the personal data only for the purposes for which they were transmitted". This implies that personal data may be transferred within an institution only if they are necessary for the legitimate performance of tasks covered by the competence of the recipient, which is obviously the case here. Lastly, it must be explicitly guaranteed that any member of an opening board or evaluation committee receiving and processing data for the purpose of evaluating applicants responding to calls for expressions of interest and invitations to tender may not use them for any other purpose. This applies explicitly in the case under examination.

In the context of correspondence exchanged with candidates or tenderers from the European Union or in the case of data transferred to the competent court in the event of litigation relating to the performance of contracts, Article 8 of the Regulation stipulates that personal data can only be transferred to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC, if the recipient establishes that the data are necessary and there is no reason to assume that the data subject's legitimate interests might be prejudiced. The EDPS notes that transfers to candidates and tenderers from the European Union and to competent national courts can only take place in strict compliance with the provisions of Article 8.

Where third countries having concluded specific agreements in the field of public contracts are eligible to participate in invitations to tender, it is not possible to rule out transfers of personal data to those countries in the course of the correspondence necessary for processing. Under Article 9(1) of Regulation (EC) No 45/2001, personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the



country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out.

By way of derogation from paragraph 1, Article 9(6)(b) authorises the institution to transfer data where the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request. Transfers to third countries and to international organisations can be carried out if an adequate level of protection is ensured (Article 9(1)) and, given that they are special transfers, in the context of the abovementioned derogation (Article 9(6)(b)).

### **2.2.6. Right of access and of rectification**

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. In the case in point, the data subject has access to his or her tender file in order to fill in all the sections required for the procedure. Article 14 of Regulation (EC) No 45/2001 allows the data subject a right of rectification. In addition to being given access to their personal data, data subjects may also amend factual personal data directly or have them amended if necessary.

As has been mentioned above, data subjects may exercise their access, rectification, blocking, erasure and objection rights by submitting a request to the controller. Data are blocked and erased within two weeks.

The EDPS considers that the conditions laid down in Articles 13, 14, 15 and 16 of Regulation (EC) No 45/2001 are duly complied with.

### **2.2.7. Information for data subjects**

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. Article 11 provides that when the data are obtained from the data subject, information must be given at the time of collection. When the data are not obtained from the data subject, the information must be given when the data are first recorded or disclosed, unless the data subject already has the information (Article 12).

The provisions of Article 11 (information to be supplied where the data have been obtained from the data subject) on information to be given to the data subject apply to tenderers who send their tender through the post to the unit of the Court of Justice responsible for processing it.

The provisions of Article 12 (information to be supplied where the data have not been obtained from the data subject) on information to be given to the data subject also apply in this case because information is obtained from the various persons involved in the process, in particular the members of an opening board or an evaluation committee. The concept of personal data also covers information relating to the identity, characteristics or behaviour of a person and information which is used to determine or influence how a person is treated or appraised (and this is obviously the case in the context of evaluations carried out by the members of an opening board or evaluation committee).

As already mentioned, the tender documents and the contracts contain to a large extent the information required under Articles 11 and 12. The different Directorates of the institution have

different information on the data subject. The EDPS requests that each of the Court Directorates concerned provide the data subjects with comprehensive information, i.e. information which complies with all the requirements of Articles 11 and 12 without exception.

### **2.2.8. Security**

Following in-depth examination of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) No 45/2001.

### **Conclusion**

The proposed processing does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This implies in particular that:

- Each of the Directorates of the Court concerned provides the data subjects with comprehensive information, i.e. information which complies with all the requirements of Articles 11 and 12 without exception.
- Where data processing is manual, documents produced by electronic means (computers), must follow the same conservation rules as the paper versions of the documents.

Done at Brussels, 16 November 2006.

Peter HUSTINX  
European Data Protection Supervisor