



Opinion on the notification for prior checking from the Data Protection Officer of the Community Plant Variety Office concerning procurement procedures and related procurement contracts

Brussels, 30 November 2011 (case 2011-0740)

1. Proceedings

On 29 July 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the Community Plant Variety Office (CPVO) a notification for prior checking concerning procurement procedures and related procurement contracts. The notification was accompanied by a privacy statement and documents relating to the respective processing operations.

Further to the request of the EDPS for clarifications, a revised notification form and additional supporting documents were submitted.

The draft Opinion was sent to the DPO for comments on 24 November 2011. These were received on 25 November 2011.

2. Facts

The **purpose** of the processing operations under review is the management and administration of procurement procedures intended to obtain the supply of goods, the execution of works or the provision of services necessary for the CPVO's activities.

The processing operations include in particular evaluation of the eligibility of economic operators and other candidates (natural and legal persons) to participate in public procurement procedures and to be awarded a procurement contract in accordance with the selection and exclusion criteria as defined in the Financial Regulation and further specified in the Calls for tenders launched by the CPVO.

The **controller** is the CPVO.

The **person responsible for the processing operation** is the Head of the Administration and Financial Unit.

Data subjects are tenderers - natural persons and tenderers' representatives in cases when the tenderer is a legal person. The data are collected from the tender offer and supporting documents.

The following **data categories** may be processed:

- identification data: name and contact details; proofs of the legal existence of the tenderer such as extracts from the Chamber of commerce; proofs that no exclusion criteria are present, including extracts from judicial records;
- evidence of financial and economic capacity: bank statements or evidence of professional risk indemnity insurance, balance sheets or extracts from balance sheets for at least the last two years for which accounts have been closed, where publication of the balance sheet is required under the company law of the country in which the economic operator is established;
- evidence of technical and professional capacity: principal services provided and supplies delivered in the past three years, with the sums, dates and recipients, public or private and an indication of the proportion of the contract which the service provider may intend to subcontract;
- summary of the strategy of the tenderer related to the tender specification such as a description of the goods and services the tenderer may propose;
- declaration of absence of conflict of interest;
- financial identification: name, address and contact details of the natural person owning the account.

The following **retention policy** applies:

- data relating to unsuccessful candidates to a call for tender shall be destroyed after a retention period of 3 years starting on the date of the decision of the CPVO awarding the contract;
- data relating to selected candidates to a call for tender shall be destroyed after a retention period of 7 years starting on the date of the termination of the procurement contract.

Data processed may be disclosed on a need-to-know basis to the following **recipients**: CPVO staff who participate in the procurement procedure:

-members of the Administrative and Financial Units and members of Opening and Selection Committees and the EU institutions and bodies tasked with monitoring or inspection tasks in application of Union law:

-EU Court of Auditors, the European Ombudsman, the EDPS and European Court of Justice.

The data subjects are granted the **rights to access and rectify** their social, economic and financial data upon a request to the controller. The privacy statement provides information on the categories of data considered by the CPVO as social, economic and financial and sets up the timeframe for the exercise of these rights which is until the deadline for submission of tenders and after the date of the award of the contract. The internal procedure to be followed upon a request from a data subject to access, rectify, block or erase his/her data is regulated by respective internal rules, adopted by the CPVO on 1 September 2011.

The following **information to data subjects** is provided in the privacy statement, confidentiality clause inserted in the invitations to tenders and data protection clause inserted in procurement contracts:

- information on the controller;
- categories of data processed;
- purpose of the processing;
- legal basis of the processing;
- recipients of the data processed;
- retention policy;
- rights of access and rectification;
- right to submit a request for an investigation to the DPO and to have recourse to the EDPS.

Unsuccessful candidates may receive upon request a note of evaluation concerning their offer only.

As regard **security measures**, (.....)

3. Legal aspects

3.1. Prior checking

The processing of personal data relating to procurement procedures falls within the scope of Regulation (EC) No 45/2001 ("the Regulation") and is subject to prior checking by the EDPS pursuant to its Article 27(2) (a) and (b).

Data are collected and processed with the purpose to evaluate information relating to the legal, financial, economic, technical and professional capacity of tenderers with a view to select the proposals which best satisfy the criteria set out in the call for tenders in accordance with Articles 93 to 97 of the Financial Regulation. It may also involve processing of data relating to (suspected) offences and criminal convictions in the form of an extract of the judicial record.

Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, the EDPS regrets that the processing operations have already been established *prior* his prior-checking Opinion. However, the EDPS underlines that all his recommendations given in the present Opinion should be duly implemented and the processing operations adjusted accordingly.

The notification of the DPO was received on 29 July 2011. According to Article 27(4) of Regulation (EC) 45/2001, the EDPS Opinion must be delivered within a period of two months. The procedure at hand was suspended for 11 days to allow for the submission of additional information and comments on the draft Opinion. Further, the deadline for the Opinion was suspended in the month of August and additionally extended with three weeks due to the complexity of the case and the significant number of revised documents, including the notification for prior checking, submitted as a reply to the EDPS request for clarifications. Therefore, the present Opinion must be delivered no later than 1 December 2011.

3.2. Lawfulness of the processing

Under Article 5(a) of the Regulation, personal data may be processed "*if processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*".

The legal basis of the processing of personal data within procurement procedures can be found in the following legal acts:

- Council Regulation (EC, Euratom) N° 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities "the Financial Regulation";
- Commission Regulation (EC, Euratom) N° 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) N°1605/2002 on the Financial Regulation applicable to the general budget of the European Communities "the Implementing Rules of the Financial Regulation";

- Article 70 of the CPVO's Financial regulation adopted by its Administrative Council on 16/09/03.

Since the purpose of the processing operations is the management and administration of procurement procedures intended to obtain the supply of goods, the execution of works or the provision of services necessary for the Agency's activities, the respective processing of personal data within these procedures can clearly be considered as necessary for the performance of tasks carried out in the public interest on the basis of the above mentioned legal acts. Therefore, the data processing under review is lawful within the meaning of Article 5(a) of the Regulation.

3.3. Processing of special categories of data

The processing of personal data contained in the extracts from judicial records, other certificates and declarations of honour to this respect¹ is explicitly authorised in Article 93(1) of the Financial Regulation. Thus, the condition for processing of data relating to (suspected) offences and criminal convictions set out in Article 10(5) of the Regulation is met.

3.4. Data quality

Pursuant to Article 4(1)(a), (c) and (d) of the Regulation, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected or further processed, as well as accurate and kept up to date.

Lawfulness of the data processing has been already discussed in section 3.2. Furthermore, the collection of data listed above seems to be justified and necessary for the purpose of the procurement procedure. Data are provided by the respective data subjects; hence the procedure itself helps to guarantee accuracy of data being processed. The rights of access and rectification contribute further to ensure that the data processed are accurate and up to date.

The EDPS takes note that the tender documentation provides information on the categories of data requested for the purpose of the processing operation. However, it cannot be excluded that despite this guidance provided, applicants may submit in tenders and supporting documents information which might not be necessary or excessive for the purpose pursued by the procedure. Provided that the controller does not process data that are irrelevant and excessive to what is requested and necessary for the processing operations at hand, compliance with the principles relating to data quality as stipulated by Article 4 (1)(c) of the Regulation can be ensured. Therefore, the EDPS invites the CPVO to procedurally ensure that unnecessary and excessive information submitted by tenderers is not treated (e.g. by providing specific guidance or instructions to the CPVO staff participating in procurement procedures).

3.5. Data retention

According to Article 4(1)(e) of the Regulation, personal data may be kept in a form enabling 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.

As indicated above, data relating to unsuccessful candidates to a call for tender shall be destroyed after a retention period of 3 years starting on the date of the decision of the CPVO awarding the contract while data relating to selected candidates shall be destroyed after a retention period of 7 years starting on the date of the termination of the procurement contract.

The EDPS notes that these retention periods do not seem to exceed the maximum periods of time for which personal data are necessary for control and audit purposes in line with Article

¹ As mentioned in Article 134(3) of the Implementing Rules of the Financial Regulation.

49(1)(d) and (2) of the Implementing Rules to the Financial Regulation. These retention timeframe is acceptable also in view of the deadlines to exhaust available legal remedies and can be therefore considered justified in light of Article 4(1)(e) of the Regulation.

In any case, the EDPS would like to point out that according to Article 49(3) of the Implementing Rules to the Financial Regulation as modified by the Commission Regulation 478/2007 of 23 April 2007 "*personal data contained in supporting documents [relating to the budget implementation measures] shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes*".

3.6. Transfer of data

The internal and inter-institutional data transfers mentioned above are subject to Article 7 of the Regulation. They should be necessary for the legitimate performance of tasks covered by the competence of the particular recipient who can process the data only for the purposes for which they were transmitted.

In the present case, the transfers of personal data to the CPVO staff are in principle considered as necessary for the management and administration of procurement procedures. Similarly, the transfers to the bodies tasked with control and monitoring of the application of Union law (EU Court of Auditors, the European Ombudsman and the European Court of Justice) are necessary in the context of their specific competences.

Further, the EDPS notes that the members of the Evaluation and Selection Committees sign a declaration of confidentiality and absence of conflict of interest before starting their work. Provided that all intra- and inter- institutional data recipients are always reminded of the purpose limitation of the transfer in question and the obligation of confidentiality, compliance with Articles 7 (3) and 21 of Regulation (EC) 45/2001 will be ensured.

3.7. Rights of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the data subject concerned. Article 14 of the Regulation provides that "*the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

In the case at hand, data subjects are granted rights of access and rectification upon a request to the controller. These rights are subject however to certain limitations and can only be exercised up to the closing date for submission of tenders and after the date of the award of the contract. The right of unsuccessful candidates to receive information on the evaluation results is also subject to limitation since the data subjects may request only information in respect of their offer. The EDPS considers that these limitations are necessary to ensure the fairness of the procurement procedure, i.e. safeguard the protection of rights of other applicants in terms of Article 20(1)(c) of the Regulation.

The EDPS notes however that the privacy statement does not contain information on the right of unsuccessful candidates to receive information on their evaluation results subject and invites the CPVO to make respective changes in this document. The EDPS considers that such clarification would further contribute to the predictability and legal certainty of the processing operation, thus providing better guarantees to the rights of data subjects stipulated in Article 20 (1) and (3) of the Regulation.

3.8. Information to the persons concerned

Articles 11 and 12 of the Regulation provide that the data subjects must be informed of the processing of data relating to them and list a range of general and additional items which apply insofar as they are necessary to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

The EDPS notes that the privacy statement, the confidentiality clause inserted in the invitations to tenders and the data protection clause inserted in procurement contracts provide information on the main aspects of the processing operation as required in terms of Articles 11 and 12 of the Regulation with the exception of information concerning the right of unsuccessful candidates to receive information on their evaluation results as stated above in section 3.7.

3.9. Security measures

On the basis of the available information, the EDPS has no reason to believe that the security measures implemented by the CPVO are not adequate in light of Article 22 of the Regulation.

4. Conclusion

The processing under review 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 means, in particular, that:

- intra- and inter- institutional recipients of files relating to procurement procedures should be always reminded of the purpose limitation of the transfer in question;
- the controller should procedurally ensure that data supplied by the data subjects but that are irrelevant or excessive to what is requested for the purpose of the processing operation, are not processed;
- the privacy statement should be revised in order to provide information concerning the right of unsuccessful candidates to receive information on their evaluation results.

Done at Brussels, on 30 November 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor