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

Dear Ms Langbakk,

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 for Gender Equality (EIGE) on 25 June 2013.

We note that the procurement procedure at the EIGE is in most aspects in compliance with Regulation (EC) No 45/2001<sup>1</sup> (the Regulation) 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 respect.

**1. Data conservation.** According to the information provided in the notification, documents relating to tender procedures are kept for ten years after the signature of the contract, documents relating to the contract management for ten years after the last payment by the EIGE, whereas the tenders and requests to participate from unsuccessful tenderers and candidates are kept for five years after the signature of the contracts.

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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 subjects for no longer than necessary for the purpose for which they were collected or further processed.

The EDPS observes that the conservation of files of unsuccessful tenderers and candidates for five years after the signature of the related contract can be considered as necessary in order to allow for all possible legal remedies.

At the same time, we note that the lengthy storage of files of the successful tenderers cannot be considered as necessary for the purpose of financial control and audit. Therefore, we invite the EIGE to establish shorter conservation periods in due respect of Articles 48(1)(d) and (2) of the Rules of Application to the Financial Regulation<sup>3</sup>. In similar cases, seven years were considered as appropriate.

Furthermore, we consider that the extracts from judicial records should not be kept for longer than for two years after the signature of the respective contract<sup>4</sup> and thus invite the EIGE to establish such a conservation period for extracts kept in the electronic form.

**2. Transfers of data.** Personal data processed in this context are transferred to the responsible EIGE staff, to the members of the Opening and Evaluation Committees, as well as to other institutional recipients, such as IAS and ECA. External experts can take part in the respective procurement procedure as members of the Evaluation Committee.

The data transfers to the responsible staff at the Institute or in other EU institutions can be considered as necessary for the accomplishment of a respective task in the particular procedure or for the accomplishment of a particular supervisory task and thus in compliance with Article 7(1) of the Regulation. In order to ensure full compliance with the Regulation, the EDPS recommends that all internal recipients are made aware of the purpose limitation set out in Article 7(3).

The transfers to the external members of the Evaluation Committee have to be assessed in light of Articles 8 and 9 of the Regulation, depending on as to whether they are subject to national law adopted pursuant to Directive 94/56/EC, i.e. whether they are established in the EU.

The transfers to external experts established in the EU can be deemed necessary for the performance of the evaluation task in the area of public procurement or grants in terms of Article 8(a) of the Regulation; whereas the transfers to experts established outside of the EU 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 and candidates should be informed about the possible processing of their data by external experts in the respective invitation to tender or request to participate. The information should be included in the related privacy statement.

**3. Information to data subjects.** According to the information provided in the notification, a specific privacy statement is included in the invitation to tender documents. The EDPS

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<sup>3</sup> 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 the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union.

<sup>4</sup> See to this respect the letter on conservation of extracts from the judicial records sent by EDPS to the management of all EU institutions and bodies on 12 March 2013 (EDPS 2011-482).

observes that information about the identity of the controller, legal basis of the processing and data conservation period is completely missing, whereas the information about data recipients and rights of data subjects is incomplete.

In order to ensure full compliance with Articles 11 and 12 of the Regulation, the EDPS recommends that the missing information is added to the existing privacy statement, as well as that the limitation of the right of rectification after the opening of the tenders in terms of Article 112 of the Financial Regulation<sup>5</sup> is clearly mentioned therein.

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 EIGE should:

- shorten the existing time limit for conservation of files of successful tenderers to seven years;
- establish a two years conservation period for extracts from judicial records kept in electronic form;
- remind all internal recipients of the purpose limitation obligation set out in Article 7(3);
- revise the existing information provided in the existing privacy statement in a manner outline above.

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

**(signed)**

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Cc.: Ramunas LUNSKUS, Data Protection Officer - EIGE

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<sup>5</sup> Regulation (EU, Euratom) 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002.