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Brussels, 12 June 2014
GB/TS/sn D(2014)1307 C 2013-1017
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Subject: Prior checking notification concerning public procurement

Dear Mr Callewaert,

I refer to the notification for prior checking concerning public procurement and related contract management submitted to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the European Asylum Support Office (EASO) on 17 September 2013.

We note that the procurement procedure at the EASO is in most aspects in compliance with Regulation (EC) No 45/2001¹ (the Regulation) as outlined in the related EDPS Guidelines² and will therefore only address the existing practices which do not seem to be fully compliant in this respect.

1. Data conservation. The following data conservation policy is applicable in the present case:

- files of successful tenderers are kept for seven years after the signature of the contract;
- files of unsuccessful tenderers are kept for five years after the signature of the related contract;
- extracts from the judicial records are kept for two years after the signature of the contract;
- contract files are kept for ten years after the last payment order and the expiry of the contract in line with the Common Retention List of the European Commission³.

¹ 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.

² 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).

³ Common Commission-Level Retention List for European Commission Files - SEC(2007)970 adopted on 4 July 2007 and revised on 17 December 2012 as SEC(2012)713.

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 the tenderers files can be considered as necessary for control and audit purposes, respectively to allow for all possible appeals.

At the same time, no sufficient evidence was provided to demonstrate the necessity of the above mentioned storage of the contract files. Therefore, we invite the EASO to reconsider the existing time limit or to provide precise justifications in this respect.

2. Information to data subjects. The information is provided in a specific privacy statement posted on the EASO website as well as in the data protection clauses for invitations to tender templates and model contracts.

We observe that all information listed in Articles 11 and 12 of the Regulation is provided in the privacy statement but information about recipients, legal basis and time limits for data conservation is missing in the invitations to tender templates and model contracts. In order to ensure full compliance with the Regulation, this information should be added to the existing documents.

3. Data transfers. According to the information provided in the notification, personal data processed in this context may be transferred to external evaluators. These transfers may be considered as necessary for implementation of pre-contractual measures taken in response to the data subject's request in terms of Article 9(6)(b) of the Regulation. In any case, the tenderers should be informed at the early stage of the procedure. Consequently, we invite the EASO to add this information in the existing invitation to tender templates.

In conclusion, the EDPS considers that there is no reason to believe that there is a breach of any provisions of the Regulation on condition that the consideration contained in this Opinion are fully taken into account. In particular, the EASO should:

- reconsider the existing time limit for contract files or provide precise justifications in this respect;
- revise the existing privacy statement in a manner outlined above;
- add the information about external evaluators to the existing invitation to tender templates.

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

(signed)

Giovanni BUTTARELLI

(signed)

Cc: Paula Mello McClure, DPO