

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-193861

DATE: March 27, 1979

MATTER OF: Federal Judicial Center

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DIGEST:

1. Although Federal Judicial Center (FJC) is exempt from 41 U.S.C. § 5 (1976) and civilian agency procurement statutes do not apply to FJC, examination of FJC's enabling legislation shows Congress' intent that FJC enter into contracts by "negotiation." Further, maximum practicable competition should be obtained as matter of sound Federal procurement whenever contracts utilizing appropriated funds are to be awarded. Therefore, FJC should award contracts by using competitive negotiation where practicable.
2. Federal Judicial Center (FJC), as establishment in judicial branch, is "Federal agency" as term is used in Brooks Act, 40 U.S.C. § 759 (1976). Since no law expressly exempts FJC from Brooks Act, FJC must comply with Brooks Act and General Services Administration's implementing regulations in all automatic data processing equipment procurements.

This decision results from our current [survey of the Federal Judicial Center's (FJC) activities.] Incident to the survey, a question arose on (1) whether the FJC is exempt from Public Law No. 89-306, the Brooks Act, and (2) whether the FJC must procure ADP equipment and services in compliance with the Federal Procurement Regulations and competitive procurement statutes.

In sum, the FJC maintains that it is exempt from the requirements of the Brooks Act because (1) the legislative history of 28 U.S.C. § 620(a) (1976)--establishing the FJC--shows Congress' intent that the FJC be exempt from the Brooks Act, (2) the goal of the Speedy Trial Act of 1974, 18 U.S.C. § 3161-74 (1976), can only be realized if the FJC

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is free from the time delays of the General Services Administration (GSA) regulations concerning ADP equipment procurement, and (3) when the FJC's claim of exemption was placed before the GAO in a bid protest, the GAO did not express disagreement with that claim. The FJC's detailed rationale, our legal analysis, and our conclusion are presented below.

I. BACKGROUND

The FJC's purpose is "to further the development and adoption of improved judicial administration in the courts of the United States." 28 U.S.C. § 620(a) (1976). The FJC was established as a research and development organization with the general functions of supporting the Federal judiciary through independent research, education and training of judicial and parajudicial personnel, and the application of innovative technology to court management. 28 U.S.C. §§ 620(b)(1)-(4), 623(a)(5) (1976).

In addition, Congress established a seven-man board of directors, permanently chaired by the Chief Justice of the Supreme Court, and Congress directed that proposals be evaluated for possible application of data processing and system techniques to the administration of the Federal courts. 28 U.S.C. § 623(a)(5). The reason for the mandate appears in the legislative history:

"The computer revolution, sweeping the financial and industrial enterprises of our Nation, has thus far made little headway in the courts. Claims of unprecedented efficiency for the courts in the age of the computer, on the one hand, and fears of 'mechanized justice' and 'trial by computer,' on the other, have been voiced in various circles, but it is apparent to your committee that an objective evaluation of the potential of data processing systems in the work of the courts is

a necessity. By its very nature as a center for the study of court administration, the Federal Judicial Center is an appropriate medium for such an evaluation." S. Rep. No. 781, 90th Cong., 1st Sess. at 2416.

In light of this mandate, the FJC developed a comprehensive local court management information and research system and purchased two mini-computers to conduct pilot projects in two district courts. In fiscal year 1974, the minicomputer specifications were approved by GSA and the FJC was advised to proceed with solicitation of bids based on these specifications. Once the responses were received and a vendor selected, award was made independent of GSA but with GSA's full approval. Since then, the FJC has made sole-source ADP awards without GSA involvement.

II. THE FJC'S POSITION ON EXEMPTION FROM THE BROOKS ACT AND COMPETITIVE PROCUREMENT REQUIREMENTS.

A. The FJC was given specific statutory exemption from 41 U.S.C. § 5 (1976), which requires that a Government agency, including one in the judicial branch, must obtain needed supplies and services by means of formal advertising:

"The Board is authorized --

"(3) to contract with and compensate government and private agencies for research projects and other services, without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. § 5), and to delegate such contract authority to the Director of the Federal Judicial Center, who is hereby empowered to exercise such delegated authority."

The Senate report on this section states:

"It is contemplated that much of the research and analysis stimulated by the Center will be conducted by independent contractors, providing services on either a voluntary or a for-profit basis. The nature of these services will be varied and often custom tailored to the needs of the Center. To require that the Center employ the methods of advertising, bidding, and acceptance promulgated for Government contracts generally might mean impairment of the Center's ability to negotiate effectively for the services it needs. In many instances, it may be that few or no enterprises exist that are capable of meeting the Center's requirements without detailed negotiation and special improvisation." S. Rep. No. 781, 90th Cong., 1st Sess. 2411. (Emphasis added.)

Although the FJC's enabling legislation does not specifically exempt it from GSA control over ADPE procurement, the FJC contends that such legislation should be read in pari materia with duties of JFC's Board and the Brooks Act.

Under traditional principles of statutory construction, in the FJC's view, the three statutory provisions should be read together and each provision should be construed in connection with every other provision so as to produce a harmonious whole. Since, in the FJC's view, both the Center's enabling legislation and the Brooks Act contain provisions that deal with the same subject matter (ADPE) and since the two provisions are in apparent conflict, the FJC argues that the ambiguity must be resolved in a manner which gives effect to the

latest legislative expression and still leaves an area of effective operation for the earlier expression. International Union of Elec. Radio and Mach. Workers, AFL-CIO v. NLRB, 280 F.2d 757 (D.C. Cir. 1960). The FJC states that although it very well may have been Congress' original intent to include every Federal agency within the scope of the Brooks Act, it must be remembered that the legislation creating the FJC was not passed until 1967, 2 years later. Given the legislative history of the FJC's statutory functions, the duties of its Board, and the grant of a statutory exemption from other procurement regulations, it is evident to the FJC that Congress has changed its position and exempted the FJC from the Brooks Act.

Moreover, in the FJC's view, its exemption from the Brooks Act would not frustrate the purpose of that act because once ADP is adapted for use in the Federal courts, the Administrative Office will assume general management and budgetary responsibilities for it. Then the Brooks Act would properly require GSA involvement in further computer procurement and maintenance. By this construction neither is emasculated.

The FJC also contends that there is ample legislative history showing Congress' strong desire that the FJC remain an independent organization in order to carry out its statutory responsibilities. By statute, the FJC is responsible only to Congress, the Judicial Conference of the United States and its Board of Directors. In the FJC's view, to require that another administrative agency control all ADPE, in effect and in practice, destroys the very independence that Congress so zealously provided.

B. The FJC further argues that the Speedy Trial Act of 1974, 18 U.S.C. § 3161-74 (1976), clearly recognizes the need for broad-based planning by each Federal district court to meet a 3-month criminal case processing goal and the FJC is required to play a substantial role in this planning process.

The FJC states that its computer-based local court information system (Courtran II) is the only system that has the capacity and potential to significantly assist the Federal judiciary in meeting the information-gathering, monitoring and research demands of the Speedy Trial Act, and thus is the only method by which the FJC can meet its statutory responsibilities under that act. Under the demands of the Speedy Trial Act, the FJC believed that some procurement of ADPE had to be completed immediately. Obviously, this could not have been completed if the FJC were bound to the time delays of GSA regulations concerning ADPE procurement.

Further, in 1975, the FJC advised the House Appropriations Committee of its view that it was exempt from the Brooks Act and that it would proceed with Courtran II without regard to the Brooks Act. At the same time, the FJC proposed that its appropriation bill be amended to specifically provide that the FJC was exempt from the Brooks Act. The FJC's proposal, however, was never introduced because, the FJC reports, the appropriate subcommittee chairman thought it unnecessary.

C. On July 30, 1975, a formal protest was filed with our Office. The FJC's award of a contract to the Digital Equipment Corporation for the majority of the computer equipment needed to support Courtran II development and subsequent pilot implementation. In responding to the protest, the FJC specifically raised the issue of exemption from the Brooks Act. The protester withdrew the protest after receiving the FJC's response and our Office subsequently closed our file on the entire matter. The FJC states that although our Office did not expressly support the claim of exemption from the Brooks Act, this claim was squarely placed before GAO in our response to the protest and GAO did not in any way express disagreement with that claim.

D. In October 1976 the Administrative Office wrote to the GSA questioning an FJC contract with Bird Engineering Research Associates for software development and analysis relating to juror selection by the Federal courts. GSA responded stating, among other things, that the Brooks Act gave GSA exclusive authority to provide automated data processing equipment, including software, to Federal agencies, and expressed the opinion that the FJC contract was in violation of the GSA regulations and was not authorized.

In a very strongly worded reply to GSA, Judge Hoffman completely disagreed with GSA's conclusion and presented the FJC's claim of exemption.

Judge Hoffman requested that GSA contact him if, after reviewing his letter and attachments, any question remained concerning the exemption. GSA did not respond to Judge Hoffman's letter and the FJC proceeded with the Bird contract.

From this event, the FJC concludes that GSA concurs in its exemption claim.

III. ANALYSIS

A. The FJC's Requirement to Procure Competitively.

First, we note that the Administrative Office has the primary authority and duty to purchase equipment and supplies for the FJC. 28 U.S.C. § 604(a)(9) (1976). Second, we note that the Administrative Office would be required to comply with the requirements of competitive procurement in general since the Administrative Office is not exempt from the provisions of 41 U.S.C. § 5 (1976), the statute requiring competition in Government procurements. 5 Comp. Gen. 717 (1926). Third, we note that (1) the FJC has limited procurement authority for "research projects and other services," and (2) Congress expressly exempted

the FJC from the provisions of 41 U.S.C. § 5. 28 U.S.C. § 624 (1976). Some research projects could necessitate utilizing ADP equipment or services which would be considered a part of the research project. To the extent that the ADP equipment is part of the research project, FJC should procure subject to the Brooks Act and implementing regulations. See "The Applicability of the Brooks Act etc." infra.

Regarding "research projects," the question arises as to whether the FJC's practice of purchasing and installing equipment in the Federal district courts would be considered a research project. Unquestionably, the FJC's first attempt to solve a problem at the Federal district court level could be considered a research project. It seems obvious that the application of the pilot solution to the same problem at other Federal district courts would not be considered a research project. Of course, the facts will determine whether a problem in one court is so substantially similar to a problem in another court that it is the same problem. Since the FJC's independent procurement authority is limited to research projects and other services, it would appear that the Administrative Office would be the procurement agency for equipment to be installed in nonpilot-project courts.

From the language of the referenced statutes, it could be concluded that in the FJC's direct procurements, the FJC could award contracts without competition. Note that the general statutes applicable to civilian agency procurements refer only to GSA and other executive agencies and, thus, would not be applicable to a judicial agency. 41 U.S.C. § 251-260 (1976); CSA Reporting Corporation, 54 Comp. Gen. 645 (1975), 75-1 CPD 70. The legislative history of the FJC's exemption from 41 U.S.C. § 5 clearly shows Congress' intent that the FJC be exempt from the requirements of formal advertising so that the FJC could enter into contracts by "negotiation." S. Rep. No. 781, supra, at 2411. However, in our

judgment, the maximum practicable competition should, as a matter of policy, be obtained whenever contracts utilizing appropriated funds are to be awarded. See 51 Comp. Gen. 57, 61 (1971), involving the Atomic Energy Commission, which was similarly exempt from the requirements of 41 U.S.C. § 5. We recognize that in many instances the practicalities of the situation may impose severe limits on the amount of competition obtainable. Id. Consequently, it is our view that the FJC's award of a contract without competitive negotiation, where practicable, would be violative of sound Federal procurement policy.

B. The Applicability of the Brooks Act to ADP Procurements by or for the FJC.

Our decision at 55 Comp. Gen. 1497 (1976) held that the Brooks Act authorized GSA to procure ADP equipment for the Administrative Office or to delegate its ADP procurement authority to that Office. The rationale for our conclusion in 55 Comp. Gen. 1497 was simply this: (1) 40 U.S.C. § 759(a) authorizes and directs GSA to coordinate and provide for the purchase, lease and maintenance of ADP equipment by "Federal agencies"; and (2) the term "Federal agency" is defined in 40 U.S.C. § 472(b) to include any establishment in the judicial branch of the Government.

Since the Administrative Office and the FJC are establishments in the judicial branch, both would fall within the literal coverage of the Brooks Act, GSA's implementing regulations (41 C.F.R. part 101-36), and the scope of our decision at 55 Comp. Gen. 1497, supra.

Accordingly, ADP procurements by or for the FJC must be in accord with the Brooks Act and GSA's implementing regulations. We note that it is not uncommon for GSA to issue a delegation of procurement authority conditioned in part on the requirement that the procuring agency conduct a competitive procurement. We would suggest that

in the future GSA so condition any delegation of procurement authority to FJC. Moreover, such a conditional delegation would be consistent with the Brooks Act because Congress contemplated that GSA would actually make the necessary ADP purchases for Federal agencies and GSA is governed by the competitive procurement regulations.

We reach the above conclusion after thorough analysis and consideration of the FJC's position. With regard to the FJC's first basis for the exemption claim--the statutory construction of the Brooks Act and its enabling legislation--we note that the basis for the FJC's position is that the two laws conflict. We find no conflict in the laws since the Brooks Act unquestionably covers all judicial branch agencies and no law specifically or expressly exempts the FJC from that coverage. Further, no passage of the FJC enabling act's legislative history shows congressional intent to exempt the FJC from the Brooks Act. Accordingly, the principles of statutory construction relied on by the FJC are not applicable.

On the other hand, we refer to another well-recognized principle of statutory construction overlooked by the FJC: the legislative history of a statute may be considered in determining the intention of Congress only (1) when the language of the statute is not clear, or (2) when its literal application would produce an absurd result. See LTV Aerospace Corporation, 55 Comp. Gen. 307, 317 (1975), 75-2 CPD 203, and the cases and decisions cited therein. Here, the language of the Brooks Act is literally broad enough to encompass the FJC and the FJC admits that its enabling legislation does not expressly exempt it from the Brooks Act. Moreover, we have reviewed the legislative history involved and we can find no support for the FJC's view. Further, a construction of the statutes including the FJC within Brooks Act coverage would be in accord with Congress' intent and would not produce

an unreasonable burden on the FJC. We arrive at the latter conclusion after due consideration of the important and pressing work of the FJC relative to other Federal agencies and their programmatic ADP needs which must be satisfied in compliance with the Brooks Act. We also note that the congressional list of agencies exempt from requirements applicable to "Federal agencies" has been amended twice since the passage of the FJC's enabling legislation and Congress did not exempt the FJC. 40 U.S.C. § 474 (1976).

With regard to the FJC's second basis for exemption--"Speedy Trial Act" demands--the FJC cannot point to a single passage in that act or its legislative history exempting it from the Brooks Act. We note that the requirements of the Speedy Trial Act were to be met on a phase-in schedule over more than 4 years. In other urgent programs of national importance, agencies have complied with the Brooks Act and implementing regulations. See, e.g., PRC Computer Center, Inc., et al., 55 Comp. Gen. 62 (1975), 75-2 CPD 35 (the Federal Energy Administration (FEA) procurement of ADP services for use in combating the "energy crisis" was subject to the Brooks Act). Therefore, in our view, Speedy Trial Act demands do not provide any support for the FJC's exemption claim. Further, the fact that a House Appropriations Subcommittee took no action on the FJC's proposal--to amend its 1975 supplemental appropriations bill to specifically exempt the FJC from the Brooks Act--does not support the FJC's position. First, that fact does not overcome the Brooks Act's clear and unambiguous language encompassing the FJC. Second, where Congress is requested to revise existing law and no action is taken, a valid inference could be drawn that Congress did not intend to exempt the FJC from the Brooks Act. See Wage rate coverage of offsite work under Federal-Aid Highway Act of 1956, as amended, B-185020, December 28, 1978, 78-2 CPD 439.

Regarding the FJC's third basis for exemption--our handling of an FJC bid protest--when a protester withdraws its protest and requests that we close our file (B-194650) on the matter, that is precisely what we do. Our action is not a decision on the merits of the protest and usually the agency is so advised. Here, we closed the file at the protester's request without any consideration of the protest's merits. Similarly, we do not regard the FJC's fourth basis for exemption--GSA's failure to rebut the FJC's claim--as supportive of the exemption claim. GSA's views of record contain its conclusion that the FJC is covered by the Brooks Act.

C. The Effect of the FJC's Past Noncompliance.

In view of the circumstances of the FJC's past ADP procurements and its firm belief that it was exempt from the Brooks Act, we do not question the validity of such contracts. See PRC Computer Center, Inc., supra (FEA relied on GSA's authorization to proceed with an ADP procurement); B-115369, May 31, 1978 (the Department of Transportation relied on the Office of Management and Budget's authorization to proceed with an ADP procurement).

IV. CONCLUSION

Future FJC ADP procurements must be in compliance with the Brooks Act and GSA regulations and all future FJC procurements should be competitively negotiated, where practicable.

By letter of today, we are advising the Director of the FJC and the Administrator of GSA of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies of the Senate Committees on Governmental Affairs and Appropriations and the

House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.



Comptroller General
of the United States