



Comptroller General  
of the United States

Washington, D.C. 20548

527293

## Decision

**Matter of:** Michael J. O'Kane; Lorna H. Owens

**File:** B-257384; B-257384.2

**Date:** September 28, 1994

Michael J. O'Kane, Esq., and Lorna H. Owens, Esq., the protesters,  
Robert M. Echard, Esq., Administrative Office of the United States Courts, for the agency.

### DIGEST

Protests of nonselection of attorneys for inclusion on a list from which attorneys will be selected for appointment to represent financially eligible defendants under the Criminal Justice Act are dismissed as they do not involve a procurement of goods or services over which the General Accounting Office exercises bid protest jurisdiction.

### DECISION

Michael J. O'Kane and Lorna H. Owens protest the rejection of their applications to be panel attorneys eligible for appointment to represent financially eligible defendants in the United States District Court for the Southern District of Florida. O'Kane and Owens assert that their nonselection was not based on any stated evaluation criteria and that the evaluation resulting in their nonselection "was not reasonable as a matter of law." We dismiss the protests.

Attorneys are appointed to represent certain criminal defendants in the federal courts pursuant to the Criminal Justice Act (CJA), 18 U.S.C. § 3006A (1988). The statute provides that each district court, with the approval of the judicial council of the circuit, shall adopt a plan for furnishing representation to those financially unable to obtain adequate representation. 18 U.S.C. § 3006A(a). The statute further provides that counsel appointed to provide that representation "shall be selected from a panel of attorneys designated or approved by the court . . . ." 18 U.S.C. § 3006A(b). Under the approved plan for the Southern District of Florida, a panel selection committee, consisting of a judge, a magistrate, the public defender, and four attorneys in private practice, reviews the

qualifications of panel attorney applicants and recommends the best qualified to the court. The court ultimately makes the selection.

During the fall of 1993, the panel selection committee published notices of a forthcoming deadline for the submission of applications for membership on the CJA panel for the year commencing April 1, 1994. The committee reviewed the subsequent applications received and made its recommendation to the court, which made the final selection. In March, the unsuccessful applicants were so notified.

The agency, the Administrative Office of the United States Courts (AOC), argues that we should not consider these protests because the selection of panel attorneys is not a procurement and thus is not encompassed by our bid protest jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (1988 and Supp. V 1993), which establishes a procurement protest system and defines our role as one of considering objections to solicitations, proposed awards, and awards for the procurement of goods and services. O'Kane asserts, however, that the appointment of an attorney to represent a defendant is a procurement of services and cites as support for this assertion Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990), in which the Supreme Court, in an antitrust case involving attorneys who provided CJA representation, referred to "purchases" of "services" from those attorneys and quoted similar language from the Federal Trade Commission and Court of Appeals decisions under review. 493 U.S. at 422-3.

The agency's position clearly is correct. The action complained of here is not the appointment of an attorney to represent a defendant; it is the preliminary screening of applicants that results in a list of those eligible for such appointments. The creation of this list of panel attorneys does not guarantee that any attorney on the list will receive a CJA appointment, does not obligate the attorney to provide representation in a specific case, and does not obligate the government to pay the attorney for any services. Thus, the process that gives rise to the creation of a list of panel attorneys can be no more than a type of pre-qualification procedure, see generally Stevens Technical Servs., Inc., 72 Comp. Gen. 183 (1993), 93-1 CPD ¶ 385, and cases cited therein, rather than an actual procurement of services.

As stated above, under CICA we have jurisdiction to consider objections to solicitations, proposed awards, and awards of contracts. A complaint concerning the rejection of an application under a pre-qualification procedure does not involve a solicitation or an actual or proposed contract

award. Therefore, we do not have jurisdiction under CICA to consider protests based solely on such complaints. A. Moe & Co., Inc., 64 Comp. Gen. 755 (1985), 85-2 CPD ¶ 144; Int'l Foods Rort Co., B-230921, July 14, 1988, 88-2 CPD ¶ 51; Electro-Methods, Inc., B-218180, Mar. 4, 1985, 85-1 CPD ¶ 272.

Moreover, if these protests went beyond the pre-qualification process and were based on the actual appointment of an attorney under the CJA, we would not consider the matter because even if the protesters are correct in their assertion that the appointment constitutes the procurement of services, such a procurement would not be subject to any legal objection by our Office.

The basic procurement statutes of the federal government--the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 251 et seq. (1988 and Supp. V 1993), and the Armed Services Procurement Act of 1947, 10 U.S.C. § 2301 et seq. (1988 and Supp. V 1993)--as amended by CICA, apply only to the executive branch; they have no applicability to the judicial branch, including AOC. Superior Reporting Servs., Inc., B-230585, June 16, 1988, 88-1 CPD ¶ 576. Thus, the statutory provision regarding evaluation factors cited by O'Kane, 10 U.S.C. § 2305, has no relevance here.


Judicial branch procurements ordinarily are subject to 41 U.S.C. § 5 (1988). Electrographic Corp.--Recon., 66 Comp. Gen. 645 (1987), 87-2 CPD ¶ 233. That statute, however, contains an exception from its requirements "when . . . services are required to be performed by the contractor in person and are (A) of a technical and professional nature . . . ." We think that exception would apply to the procurement of professional services from attorneys.

In any event, the only governing statute is the CJA itself. The CJA imposes no requirements on the appointment process; it requires only that each district court have a plan for providing legal representation for financially eligible defendants. In short, the Congress has simply left it to the courts to determine how they will provide for appointment of counsel--other than requiring a plan, the law imposes no procedural requirements and no standards or criteria for appointment. That being so, in our view, the appointment or non-appointment of a particular attorney

under the CJA would not give rise to any procurement law violation and therefore would not be subject to legal objection by us under our bid protest function.

Protesters are required to provide a detailed statement of the factual and legal grounds of protest, and the grounds stated must be legally sufficient. 4 C.F.R. § 21.1. This requirement contemplates that protesters will provide allegations or evidence which, if uncontradicted, establish the likelihood of improper agency action. Alascom, Inc.--Second Recon., B-250407.4, May 26, 1993, 93-1 CPD ¶ 411; Microform Inc.--Recon., B-246253.2, Mar. 31, 1992, 92-1 CPD ¶ 338. Since appointments or non-appointments under the CJA are not subject to our legal objection, a protest based on such appointment or non-appointment would not meet this requirement and therefore would be subject to dismissal under 4 C.F.R. § 21.3(m).

The protests are dismissed.

  
 In Robert P. Murphy  
 Acting General Counsel

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<sup>1</sup>In Superior Reporting Servs., Inc., supra, we considered a protest of an AOC procurement even though 41 U.S.C. § 5 (1988) also did not apply. AOC, however, had issued a solicitation seeking competitive proposals, and we reviewed the matter to determine if AOC's actions were reasonable in light of the procurement principles that apply in such circumstances. See also Gino Morena Enters., 66 Comp. Gen. 231 (1987), 87-1 CPD ¶ 121, aff'd, B-224235.2, May 13, 1987, 87-1 CPD ¶ 501; Flexsteel Indus., Inc.; Lea Indus., Inc., B-221192; B-221192.2, Apr. 7, 1986, 86-1 CPD ¶ 337.