

**DECISION**

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

**FILE:** B-209478

**DATE:** May 25, 1983

**MATTER OF:** CEMREL, Inc.

**DIGEST:**

Contention that contract should have been awarded on a sole-source basis to protester will not be reviewed by GAO in absence of fraud or willful misconduct by procurement or user personnel, and because of other practical circumstances.

CEMREL, Inc. (CEMREL), protests the failure of the National Institute of Education (NIE), United States Department of Education (DOE), to award it a contract based on a finding of nonresponsibility. The protest is dismissed.

In November 1979, NIE entered into contract No. 400-80-0102 and grant No. NIE-G-80-0102 with CEMREL for its services as a midwestern regional education laboratory. The terms of the contract and grant provided that the period of performance expired on November 30, 1982. However, the "special provisions" portion of the contract incorporated a long-term agreement dated January 15, 1979, which discussed a 5-year relationship between NIE and a number of regional laboratories, including CEMREL, that were performing under earlier contracts with NIE.

In March 1982, NIE notified CEMREL that the 3-year contract would expire on November 30, 1982. CEMREL disagreed with NIE's position, contending that the incorporation of the long-term agreement extended the contract to November 30, 1984. On August 30, 1982, at CEMREL's request, the NIE contracting officer issued a final decision, which affirmed NIE's position. In September 1982, CEMREL appealed that decision to the General Services Administration's Board of Contract Appeals (GSABCA). That appeal is still pending. On November 29, 1982, CEMREL applied for a temporary restraining order in the United States District Court for the District of Columbia to prevent NIE's decrease or termination of funding; that

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application was denied on November 30, 1982. CEMREL next sought a preliminary and permanent injunction in the District Court to restrain NIE from terminating or decreasing its funding under the contract and grant. NIE moved that the action be dismissed because the court lacked subject matter jurisdiction. NIE contended that the Tucker Act vested in the Court of Claims exclusive jurisdiction over all nontort claims in excess of \$10,000 against the United States, 28 U.S.C. §§ 1346(a)(2) and 1491 (1976). The District Court granted NIE's motion to dismiss for lack of jurisdiction on March 17, 1983.

Because the original contract would expire on November 30, 1982, NIE, on August 8, 1982, invited CEMREL to submit a proposal for funding covering the 2-year period beginning December 1, 1982. The contract would have been on a noncompetitive, sole-source basis providing an estimated 95 percent of CEMREL's financial support for the 2-year period. On October 5, 1982, the NIE contracting officer determined that CEMREL was nonresponsible for failure to demonstrate a satisfactory record of integrity and business ethics pursuant to Federal Procurement Regulations § 1-1.1203-1(d) (1964 ed., amend. 192). Because of the nonresponsibility finding, NIE did not award the contract to CEMREL and CEMREL protested here on October 12, 1982. Recently, DOE advised us of the following:

"The agency considers that the Conference Report accompanying P.L. 97-377, H.R. Report No. 980, 97th Congress, 2d Sess. 182 (1982), indicates clearly enough that Congress is aware that the agency has currently ceased funding CEMREL for any long period. The Congress has therefore required the Department to conduct a competition for a new laboratory to serve the area previously served by CEMREL. The agency is preparing for a competition to meet that Congressional requirement and expects a new laboratory to be selected before September 30, 1983. Clearly, the non-responsibility determination of October 5, 1982 was not intended to apply to CEMREL's eligibility to enter that competition."

The Conference Report reads as follows:

"EDUCATIONAL RESEARCH AND STATISTICS

"Appropriates \$64,203,000 as proposed by the Senate instead of \$61,978,000 as proposed by the House.

"For the National Institute of Education, the conferees have agreed to a level of \$55,614,000, the full authorization. Of that amount, \$30,000,000 will support the 8 regional educational laboratories and 9 regional centers. To avoid possible disruption in funding in these laboratories and centers, the Secretary is directed to provide sufficient funds to assure that these institutions be continued at the 1982 funding level. Also, within the \$30,000,000 provided for laboratories and centers, sufficient funds should be used to establish and maintain, through a competitive process, a new central midwestern regional laboratory. In addition, of the amount provided for labs and centers, funds should be used to establish a New England regional laboratory or center; and either a new laboratory or center in the southeast, or an equivalent amount to support the Southeast Educational Research Consortium."

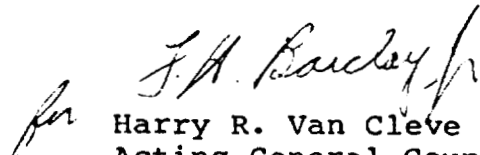
Currently, the agency is in the process of defining the scope of work to be included in the request for proposals. After November 30, 1982, NIE extended the contract with CEMREL for several months for the sole purpose of safeguarding the agency's educational materials until other arrangements can be made. No work is currently being performed under the contract.

CEMREL's protest requests that we find NIE's determination of nonresponsibility invalid and that we direct NIE to reverse its finding and award the contract to CEMREL. CEMREL questions the substantiality and currency of the evidence relied upon by the contracting officer. CEMREL alleges that the determination was issued without any prior consultation with or inquiry of CEMREL. Additionally,

CEMREL questions whether the finding of nonresponsibility can be based on the lack of integrity of CEMREL's Board of Directors. CEMREL also questions the qualifications of the contracting officer. Finally, CEMREL questions the agency's interpretation of language discussing NIE funding of laboratories contained in the Conference Report.

From a practical standpoint, we find that no useful purpose will be served by considering this protest. We recognize that, at the time the protest was filed, DOE apparently intended an award to CEMREL, but for the nonresponsibility determination; even recently, the agency continued to defend that determination. However, the above quote makes it clear that the agency perceives that its current approach complies with a congressional direction to compete this requirement. In addition, the contract was extended on a limited basis, which indicates to us that there is no compelling Government need for the services until the competition takes place. Also, CEMREL's petition to the GSABCA action is still pending. Most significantly, CEMREL would have us recommend a sole-source award to it. In this latter regard, our Office has held that, in the absence of fraud or willful misconduct by procurement or user personnel, see Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176, we will not review a protest that an agency should award a procurement on a sole-source basis since the objective of our bid protest function is to insure full and free competition for Government contracts. Ingersoll-Rand, B-206066, February 3, 1982, 82-1 CPD 83. The protester has not offered any evidence supporting a finding of fraud or willful misconduct.

The protest is dismissed.

  
for Harry R. Van Cleve  
Acting General Counsel