

GAO Finds That Proposal's Mention of Arbitration Agreements Warrants Sustaining Protest

IN SHORT

The Situation: GAO sustained a protest challenging a task order award where the awardee's proposal included letters of intent that mentioned an arbitration agreement that was required as a condition of employment.

The Result: The decision found that the agreements may have violated the Consolidated Appropriations Act, and that the agency should have investigated the issue prior to making the contract award.

Looking Ahead: GAO's decision emphasizes the need to ensure that arbitration agreements referenced in proposals do not violate the Consolidated Appropriations Act's prohibition against binding arbitration agreements as a condition of employment for certain types of claims.

On October 16, 2017, the U.S. Government Accountability Office ("GAO") sustained a protest by [L3 Unidyne, Inc.](#) ("L3") challenging a task order issued to Leidos, Inc. ("Leidos"). GAO found that Leidos submitted letters of intent for certain key personnel that referenced an arbitration agreement that employees were required to sign as a condition of employment. The letters of intent contained the following language: "All new hires and rehires of Leidos must execute an Arbitration Agreement prior to commencement of employment. Enclosed is a copy of the Arbitration Agreement you are required to execute as a condition of employment."

GAO determined that the Consolidated Appropriations Act prohibits the expenditure of funds for any contract valued at more than \$1 million to a contractor, unless the contractor agrees not to "enter into any agreement with any of its employees ... that requires, as a condition of employment, that the employee ... agree to resolve through arbitration" certain claims. These claims include "any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment" Consolidated Appropriations Act, 2017, [Pub. L. No. 115-31](#), § 8096 (May 5, 2017) (extended under the Continuing Appropriations Act, 2018, [Pub. L. No. 115-56](#) (Sept. 8, 2017)).

GAO found that the arbitration agreements may have violated this provision and concluded that there was no evidence in the record that the agency ever considered whether Leidos's proposal violated the provision. GAO found that the agency could not properly have considered Leidos's proposal eligible for award without resolving this issue.



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The Result

The decision highlights the risk that this little-known provision from the Consolidated Appropriations Act poses to unsuspecting offerors. GAO's decision noted that there was no evidence to show that the agency had a copy of the Leidos arbitration agreements before making the award, and the decision appears to indicate that GAO also did not have a copy of the arbitration agreements.

Nevertheless, the GAO decision found that the agreements may have violated the Consolidated Appropriations Act, and that the agency should have investigated the issue prior to making the contract award. Thus, an unsuspecting offeror may be deemed ineligible for an award if it requires employees to sign binding arbitration agreements as a condition of employment. GAO's decision highlights an additional risk to an unsuspecting offeror: even if an offeror's arbitration agreement does not violate the provision referenced above (which prohibits mandatory arbitration agreements only with regard to certain types of claims, such as Title VII claims), a passing reference to an arbitration agreement in a proposal may be sufficient to serve as a basis for GAO to sustain a protest.

This decision highlights the importance of ensuring that arbitration agreements do not violate the provision in the Consolidated Appropriations Act prohibiting arbitration agreements for certain types of claims as a condition of employment. In addition, even if a company's arbitration agreements are in compliance with this provision, any references in a proposal to arbitration agreements should explain that the arbitration agreement is compliant with the Consolidated Appropriations Act provision.

THREE KEY TAKEAWAYS

1. Current appropriations law prohibits contract awards for more than \$1 million to contractors that require any of its employees to sign binding arbitration agreements for certain claims.
2. The mention of a binding arbitration agreement within a proposal may form the basis for a successful protest.
3. Contractors should be mindful of the language in letters of intent included in proposals.



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