Government Contracts Update

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Loper Bright's Impact on Government Contract Litigation

Since the 1984 U.S. Supreme Court case *Chevron v. Natural Resources Defense Council*, federal courts have followed the doctrine of *Chevron* deference and deferred to a government agency's reasonable or permissible interpretation of an ambiguous statute. Now that the Court has overruled *Chevron* in *Loper Bright Enterprises et al. v. Raimondo*, the implications for government contract law are vast and far-ranging and will play out in litigation and rulemaking for decades to come.

Under *Chevron*, if a statute was silent or ambiguous with respect to a certain issue, a judge would defer to the agency if it had offered a permissible construction of the statute, "even if not the reading the court would have reached if the question initially had arisen in a judicial proceeding." In particular, federal courts deferred to regulators when an agency acted through notice-and-comment rulemaking or formal adjudications.

In the wake of *Loper Bright*, courts can now go a step further and reject deference to the agency's interpretation even in the case of an ambiguous statute. Courts will more frequently disagree with agencies where statutory interpretations are involved, and *Loper Bright* could affect any matter subject to agency interpretation of a statute and related regulation.

Government contract litigation may often turn on an agency's interpretation of a federal statute or related regulation. This could involve, for example, the Competition in Contracting Act, Small Business Act, or annual National Defense Authorization Acts (NDAAs). This may often include litigation over the Federal Acquisition Regulation (FAR) and agency supplements such as the Defense FAR Supplement (DFARS), which often implements the NDAAs.

Government contract litigation affected by *Loper Bright* may involve bid protests, contract disputes, Small Business Administration (SBA) and Veterans Administration statutes and regulations, suspension and debarment, False Claims Act cases, and a wide array of other litigation.

The U.S. Court of Federal Claims (COFC) and U.S. Court of Appeals for the Federal Circuit frequently scrutinize agency interpretations in the course of government contract disputes, and they often give little deference to agencies. These courts have previously rejected any extension of the *Chevron* doctrine to matters of *contractual* interpretation and have construed ambiguous provisions in government contracts against the government.

In bid protests, these courts apply the standard of review governed by the Administrative Procedure Act (APA), the subject of *Loper Bright*. To the limited extent these courts have employed *Chevron* deference in the past, they will now follow the guidance of *Loper Bright* and defer to agencies less often when interpreting statutes and implementing regulations.

This may lead to sharper distinctions between outcomes at the COFC and U.S. Government Accountability Office because the COFC, already less deferential to agencies, may become even more likely to disagree with agencies under *Loper Bright*.

Certain Federal Circuit and COFC decisions have also afforded *Chevron* deference to agencies with respect to SBA regulations, among other regulations subject to government contract litigation. The Federal Circuit and COFC have also previously held in several decisions that the FAR should receive deference under *Chevron*. If that is no longer the case, there will be more frequent challenges in these and other courts to the FAR and agency FAR supplements.

Some courts have also held that because the FAR is administered by multiple agencies, *Chevron* did not apply, illustrating that even before *Loper Bright,* courts were more likely to disagree with agency interpretations when not constrained by *Chevron*. Under the similar deference for an agency's interpretation of a regulation afforded by the Supreme Court in *Auer v. Robbins*, some courts have found that such deference was owed to an agency's interpretation "of only *its own regulations*."

In future cases where contractors challenge an agency's interpretation of a FAR provision or related statute, the contractor may stand a better chance of prevailing against the agency.

Yet another possible implication will be in False Claims Act litigation, where defendants may have new and additional defenses, particularly when liability hinges on agency interpretations of ambiguous statues or regulations.

Other subjects where courts may increasingly disagree with agency interpretations include any matter that is heavily regulated through notice-and-comment rulemaking in addition to statute. As related to procurement, this could include, for example, SBA regulations governing issues like size status and affiliation; regulations governing various employment requirements applicable to government contractors, including Department of Labor regulations; cybersecurity regulations across different agencies; or regulations governing the use of new technologies such as artificial intelligence.

New Challenges to Old Regulations

Now that *Chevron* has been overturned, a broader range of statutes and regulations relating to federal procurement will be challenged more frequently in a wide variety of contexts.

Rulemakings relating to procurement are sometimes driven by statute and sometimes by agencies or the administration. In new rulemaking, agencies will take *Loper Bright* into account, but its implications may be greater for decades of regulations already in place.

In a separate decision issued July 1, *Corner Post v. Board of Governors, Federal Reserve System,* the Supreme Court also extended the statute of limitations for regulatory challenges under the APA, based on when the plaintiff was injured by agency action. This decision opens the door to new challenges against older regulations.

As an example of a recent regulatory challenge, the federal vaccine mandate for contractors, implemented through regulations in 2020, was successfully challenged in the federal courts based on the limits of statutory authority for those regulations.

Some Limited Agency Deference May Remain

Although the Court's decision in *Loper Bright* did not eliminate a lesser form of agency deference that existed prior to *Chevron*, the ruling may limit its application going forward. In *United States v. Mead Corp*., the Supreme Court reversed a Federal Circuit ruling because the lower court's analysis failed to apply the lesser form of deference required under the Court's 1944 decision in *Skidmore v. Swift & Co*., which focuses on the persuasiveness of the administrative construction.

Under *Skidmore*, deference may range from "substantial" to "near indifference." In *Loper Bright*, the Court did not overrule *Skidmore* and referred to its earlier guidance in that decision, which acknowledged an agency's "body of experience and informed judgment." This more flexible type of deference may still be utilized among the lower courts after the demise of *Chevron*.

But in the wake of *Loper Bright*, contractors will have more opportunities to argue that an agency's interpretation of a statute was not the best, not the most reasonable, or not the correct interpretation, and it will be more difficult for the government to successfully defend the agency's position. The broad implications of this increased scrutiny could apply not only to statutory provisions, but to the implementing regulations, including the FAR, DFARS, and other regulations impacting government contractors.

D.C. Circuit and D.C. District Court

The U.S. Court of Appeals for the D.C. Circuit and U.S. District Court for the District of Columbia receive frequent challenges to regulations, which will be directly and extensively affected by *Loper Bright*. These courts also sometimes decide procurement-related disputes, which may also be affected. For example, agency decisions on suspension and debarment, based on the FAR, may be challenged in the D.C. District Court.

Unlike the Federal Circuit, which applies general principles of contract interpretation, the D.C. Circuit has held that *Chevron*-like deference may apply to an agency's reasonable interpretation of ambiguous contract language. This potential application of *Chevron* in the context of contract interpretation may have been effectively eliminated by *Loper Bright*.

Conclusion

The net result under *Loper Bright* is that individuals, contractors, and companies, as plaintiffs against the government in disputes relating to procurement, will succeed more often when challenging an agency's interpretation of a federal statute or implementing regulation.

Likewise, when individuals and companies are defendants and the government's case depends on an agency's interpretation of a statute or related regulation, they will have new and more effective defenses.

In these David versus Goliath litigation battles, the scales have often been tilted in the government's favor, but the Supreme Court's *Loper Bright* decision will provide new opportunities for individuals and contractors to prevail in future cases.

The implications of *Chevron* being overturned will unfold over many years. The new contours of common law under *Loper Bright* will appear in hundreds of decisions in the next few years, including government contract litigation at the COFC, Federal Circuit and throughout the federal courts.

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