Alert

July 10, 2024

COZEN O'CONNOR

How the End of Chevron Deference Could Impact Government Contractors

On June 28, 2024, the Supreme Court of the United States (SCOTUS) issued its decision in *Loper Bright Enterprises v. Raimondo,* which put an end to Chevron Deference. Chevron Deference was a doctrine that required courts to generally defer to administrative agencies, typically (but not always) of the executive branch, in their regulatory rulemaking and interpretation of congressional statutes/acts in developing regulations. The Chevron Deference doctrine arose out of the 1984 case of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 US 837 (1984)* and required that the judiciary branch generally defer to an agency's interpretation of a statute if the court determined that the statute was not clear and unambiguous. In other words, the court was to defer to the agency's reading of the ambiguous statute because the agency was deemed to be more of the expert in the subject matter it was trying to regulate than the court. In *Loper Bright*, the SCOTUS reversed this, holding in a 6-3 vote that courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous." Put simply, courts will interpret the law as they see fit without any longer deferring to the agency's interpretation.[1]

Government contractors should be aware that the *Loper Bright* decision could have a significant impact on their contracts moving forward. Indeed, this decision will likely lead to increased litigation to overturn agency rulemakings/regulatory schemes, create new avenues for challenging agency determinations that are adverse to government contractors, and raise the possibility of fewer partisan swings in rulemakings when the presidency changes hands.

Increased Litigation Regarding Agency Rulemakings

This decision may have wide-ranging implications for government contractors because it will further open the door to courts overruling agency rulemakings – rulemakings are the procedure in which typically executive branch agencies develop, promulgate, and issue regulations that govern all manner of policies, procedures, and statutes. They are also the basis for how the FAR and agency-specific FAR Supplements are made. For example, a Cozen O'Connor alert on July 1, 2024 highlighted the action taken by a federal judge for the U.S. District Court for the Northern District of Texas to strike down portions of the Department of Labor's (DOL) 2023 rulemaking titled "Updating the Davis-Bacon and Related Acts Regulations." There, the Court found that the DOL had explicitly exceeded its statutory authority in a variety of ways, and an injunction was issued. Moving forward, in light of *Loper Bright*, the likelihood of similar actions taken by courts will greatly increase because a court's interpretation of any ambiguity in a statute will now govern, whether ambiguous or not. Agencies will no longer be able to successfully assert an argument of ambiguity in a statute for which they filled in the gaps.

This shift from agency discretion to the discretion (and interpretations) of courts will create short-term uncertainty for government contractors as the likelihood for frequent challenges of rulemakings through litigation will increase, and, as such, it will require added vigilance with respect to court cases on rulemakings impacting contractors' agencies and contracts.

Possible New Avenues to Challenge Agency Determinations

Another impact that the *Loper Bright* decision may have on government contractors is with respect to administrative agency determinations. Government contractors are frequently faced with decisions made by agencies, including rulings on requests for equitable adjustment and agency protests. This shift away from deferring to an agency's interpretation could possibly pave the way for a higher likelihood of success in challenging an agency's decision with regard to a protest or a request for equitable adjustment (depending on the facts). For instance, if a protest implicates the

Lawrence M. Prosen

Member

lprosen@cozen.com
Phone: (202) 304-1449
Fax: (202) 861-1905

Related Practice Areas

- Construction Law
- Government Contracts

Industry Sectors

- Real Estate & Construction

agency's interpretation of a statute, and the protestor challenges that interpretation, then it is possible that a reviewing court would not simply defer to the agency's interpretation, regardless of whether that statute is ambiguous. However, the immediate impact of *Loper Bright* on such an inquiry is presently unclear and is likely limited because the *Loper Bright* decision was made in the context of Article III courts rather than Article I courts. What is the difference?

Article III versus Article I Courts

Indeed, the Court in *Loper Bright* discusses its ruling in the context of Article III of the US Constitution, which "…assigns to the Federal Judiciary the responsibility and power to adjudicate Cases and Controversies—concrete disputes with consequences for the parties involved."[2] It appears on its face that this decision is limited to Article III courts, but it is likely that future cases will undoubtedly try to expand this to Article I courts. The general federal judiciary and the judiciary branch as a whole are authorized by Article III of the US Constitution. In contrast, the US Court of Federal Claims (COFC) is a creation under Article I. Likewise, the Boards of Contract Appeals (Armed Services and Civilian Boards) (BCAs), which, along with the COFC, hear appeals of government contract disputes (and interpret common law and the FAR (the Federal Acquisition Regulations)) are creatures of statute, namely the Contract Disputes Act. Both the COFC and BCA review contract appeals *de novo*, but they do recognize that the relevant agencies have broad discretion under the Administrative Procedure Act (APA), which consists of determining whether the agency acted in an arbitrary, capricious, legal, and reasonable manner. As these tribunals are not creatures of the Constitution's Article III and the judiciary branch's independence, as the SCOTUS discusses in *Loper Bright*, one can see future efforts by contractors to get these triers to reconsider their long-standing precedent of deference to agencies (albeit more in the vein of interpretation of regulations, as opposed to rulemaking itself), and try to expand *Loper Bright* to government contracts disputes.

How that plays out in the future remains to be seen, but the authors certainly see the possibility of such arguments being made, particularly where the facts and, more critically, applicable regulations (e.g., FAR Clauses) do not play in favor of the contractor's argument. While currently considered in the abstract, practical arguments may very well exist for making such an argument. How the COFC and Boards react remains to be seen, but the future fights and considerations created by *Loper Bright* in this arena are certainly visible.

Long-Term Clarity?

An aspect of *Loper Bright* that may actually result in increased clarity for government contractors in the long term is that it could reduce the significant swings in regulations put in place by administrations of opposing political parties whenever the executive branch changes hands. Rather than the interpretation of statutes changing drastically through rulemakings driven by political interests, the Court's hope is that these swings will be significantly tamped down by the removal of Chevron Deference because the Court's statutory interpretation rather than the agency's statutory interpretation will govern. Only time will tell if this will actually come to fruition.

Conclusion

Government contractors should be aware of the likelihood of increased litigation with respect to agency interpretation of statutes through rulemakings. As such, it is important to stay informed regarding any and all decisions regarding statutory interpretation for agencies for which you perform work. Additionally, government contractors should be hyper-vigilant regarding adverse agency determinations for any statutory interpretation issues that could serve as the basis for challenging an agency's interpretation. Critically, the SCOTUS has effectively opened up a bit of a wild west scenario as relates to regulatory rulemaking and the likely increase in litigation that will arise out of both future and existing regulations.

---

[1] It is worth noting that the Court will still give respectful consideration to the agency's interpretation under the prior precedent of *Skidmore v. Swift & Co.*

[2] *Loper Bright* at 7.