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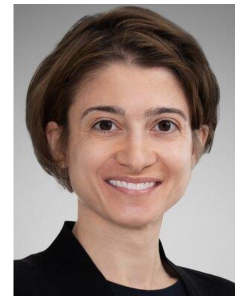
After Chevron: Bid Protest Litigation Will Hold Steady For Now

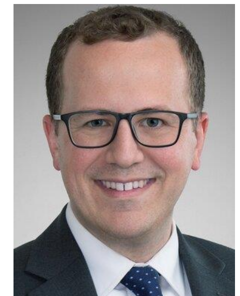
By **Kayleigh Scalzo and Andrew Guy** (July 17, 2024, 6:34 PM EDT)

On June 28, the U.S. Supreme Court overturned a decades-old precedent, known as Chevron deference, that favored federal agencies' rulemaking interpretations. In this Expert Analysis series, attorneys discuss the decision's likely impact on rulemaking and litigation across practice areas.

On June 28, the U.S. Supreme Court issued a landmark decision in Loper Bright Enterprises v. Raimondo, overruling the Chevron doctrine.[1] This doctrine had generally required courts to defer to agencies' interpretations of statutes following a two-step analysis: (1) ask whether Congress had directly spoken to the question at issue; and (2) defer to an agency's reasonable interpretation if the statute was not clear.[2]


Kayleigh Scalzo

What impact will Loper Bright likely have on federal bid protests, particularly those before the U.S. Government Accountability Office, the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit?


Andrew Guy

Protests at the GAO

With respect to bid protests before the GAO, Loper Bright is unlikely to have much direct effect. The question of Chevron deference typically arose in cases before federal courts applying the Administrative Procedure Act.[3] The GAO, by contrast, is not a federal court and does not actually apply the APA.

Instead, the GAO sets its own rules and standard of review — a standard which generally asks whether an agency decision is "reasonable and consistent with the stated evaluation criteria and with applicable statutes and regulations."[4]

Perhaps unsurprisingly, then, the GAO rarely cited Chevron in the years before Loper Bright, and it hardly ever employed the actual two-step Chevron analysis. Instead, when the Chevron decision was cited, it was typically to support the proposition — from Chevron's first step — that where the language of a statute is clear, that clear meaning controls without the need for deference to the agency's interpretation.[5]

Although the GAO is now likely to cite a different case for that proposition, the underlying premise —

i.e., that the meaning of clear statutory language controls — presumably will continue post-Loper Bright.[6]

Protests at the Court of Federal Claims and the Federal Circuit

With respect to bid protests before COFC and the Federal Circuit, even though those courts apply an APA standard of review, the impact of Loper Bright still may be limited. That is the case for at least two reasons.

First, questions of statutory interpretation — i.e., the scenario where Chevron deference applied — are a relative rarity in bid protests. Bid protests more commonly involve interpretations of solicitations, proposals and federal regulations rather than statutes. These interpretive questions are reviewed under their own distinct doctrines — doctrines that may have been inspired by Chevron, but are separate from Chevron.

For example, agency interpretations of federal regulations are currently subject to the doctrine set forth by the Supreme Court's 2014 decision in Kisor v. Wilkie. The Kisor doctrine asks whether a regulation is genuinely ambiguous, whether an agency's interpretation is reasonable, whether the interpretation is authoritative or official, whether the interpretation implicates the agency's substantive expertise, and whether the interpretation is "fair and considered."[7]

Agency interpretations of federal regulations thus were not entitled to Chevron deference even before Loper Bright.

Second, even in the rare instances when questions of statutory interpretation arise in bid protests, they are even more rarely the result of notice and comment rulemaking or a formal adjudication.

In 2001, more than two decades before Loper Bright, the Supreme Court observed in U.S. v. Mead Corp. that these more-formal agency processes were generally — albeit not necessarily — required in order for Chevron deference to apply.[8] This requirement was commonly known as "Chevron step zero."[9]

Bid protests, by contrast, usually involve informal interpretations made in the context of a single procurement. These informal interpretations were unlikely to pass Chevron step zero, and thus were unlikely to be entitled to Chevron deference even before Loper Bright.

As a result, even before Loper Bright, the COFC and the Federal Circuit rarely cited — let alone applied — Chevron in recent bid protest decisions.[10] In that respect, there likely will be little change at the COFC and the Federal Circuit either.

Impact on Bid Protests

That does not mean that Loper Bright will have no impact on bid protests, however. What remains to be seen is whether Loper Bright may signal a general trend away from agency deference, even under existing standards of review.

In other words, the COFC and the Federal Circuit may begin to take a less deferential approach when determining whether an agency decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as provided in Title 5 of the U.S. Code, Section 706(2)(A).[11]

Or the GAO may begin to take a less deferential approach when deciding whether an agency decision is "reasonable and consistent with the stated evaluation criteria and with applicable statutes and regulations," as stated in the GAO's 2023 Leidos Inc. decision.[12]

Although the Supreme Court did not take on that question in Loper Bright, the rationale of its decision naturally leads to it. For instance, the court emphasized that courts are equipped to tackle tricky issues of interpretation, even when those issues concern technical or complex matters: "Congress expects courts to handle technical statutory questions," and interpreting questions of law has been "the province and duty" of the courts since Marbury v. Madison.[13]

The court further noted that courts do not confront those technical questions alone: "The parties and amici in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives."[14]

Loper Bright therefore underscored that courts should not hesitate to resolve questions of law, even when those questions potentially overlap with matters requiring subject matter expertise. It will be worth watching whether these themes end up permeating beyond questions of statutory interpretation and into the technical, complex issues that frequently arise in bid protests.

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Disclosure: Covington submitted two amicus briefs in support of the petitioner in Kisor v. Wilkie, a case discussed in this article.

[1] https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf ("Loper Bright Slip Opinion").

[2] See id. at 19.

[3] See, e.g., U.S. v. Mead Corp., 533 U.S. 218, 227-29 (2001); SawStop Holding LLC v. Vidal, 48 F.4th 1355, 1359-60 (Fed. Cir. 2022); Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 669 F.3d 1340, 1345 (Fed. Cir. 2012).

[4] Leidos Inc., B-421252.4, Apr. 28, 2023, 2023 CPD ¶ 97 at 5; see also generally GAO Office of General Counsel, Bid Protests at GAO: A Descriptive Guide (May 2018), available at https://www.gao.gov/assets/gao-18-510sp.pdf.

[5] See, e.g., J. Caye Premier Dining, Inc., B-421890, Nov. 2, 2023, 2023 CPD ¶ 244 at 5; PublicRelay, B-421154, B-421154.2, Jan. 17, 2023, 2023 CPD ¶ 28 at 5; AGC Sols. Corp. d/b/a Am. Sys. Grp., B-420743, Aug. 10, 2022, 2022 CPD ¶ 211 at 3.

[6] See Loper Bright Slip Opinion at 31 (explaining that each statute has a "best meaning" that is

"necessarily discernable by a court deploying its full interpretive toolkit").

[7] See generally Kisor v. Wilkie, 588 U.S. 558, 574-79 (2019).

[8] Mead, 533 U.S. at 226-27, 229-31.

[9] Loper Bright Slip Opinion at 27.

[10] See, e.g., SH Synergy, LLC v. U.S., 165 Fed. Cl. 745, 777 (2023) (citing Chevron but not applying a two-step Chevron analysis); Goodwill Indus. of S. Fla., Inc. v. U.S., 162 Fed. Cl. 160, 192 (2022) (similar).

[11] 5 U.S.C. § 706(2)(A).

[12] Leidos, 2023 CPD ¶ 97 at 5.

[13] Loper Bright Slip Opinion at 24, 35 (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).

[14] Id. at 24-25.