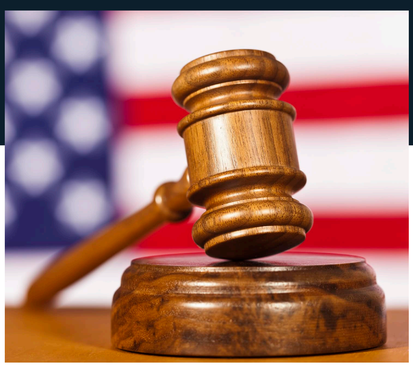
COURT OF FEDERAL CLAIMS APPLIES LOPER BRIGHT IN CONTRACTOR ELIGIBILITY CASE REVIEWED UNDER THE APA

By Cindy Crawford | March 19, 2025



Loper Bright has reached the Court of Federal Claims for review of bid protests under the Administrative Procedures Act (APA).

In a dispute over whether a prospective bidder for a broad pre-approved vendor list could be excluded because it was subject to a waiver on an existing contract, the Court of Claims applied the requirements of *Loper Bright*, and its instruction regarding *Skidmore* and *Auer* deference, to side with the bidder.

Section 889 of the John S. McCain National Defense Authorization Act prohibits federal executive agencies from contracting with an entity that uses "covered telecommunications equipment" as a substantial or essential component of any system where "covered telecommunications equipment includes equipment produced by entities headquartered in China" or "that the Secretary of Defense … reasonably believes to be an entity owned or controlled by, or other-wise connected to, the government of [China]."

Two subsections (d)(1) and (d)(2) allow for waivers. Section (d)(1) applies to waivers by an agency head and includes a variety of limitation on time and scope. Section (d)(2) applies to waivers by the Director of National Intelligence (DNI) and is not subject to the same limitations.

Q2 Impact was covered by a DNI waiver under §(d)(2) for its contract supporting a USAID learning activity in Egypt. As a result, when the General Services Administration solicited proposals for its OASIS+ program, GSA found Q2 Impact ineligible to be placed on a pre-approved providers list because of its existing DNI waiver, explaining it was "unable to enter into a contract with any entity that represents it 'DOES' use covered telecommunications equipment or services …".

Q2 Impact filed suit in the Court of Claims alleging that the government relied on the wrong subsection of §889 to exclude it.

The Court of Claims reviews bid protests under the APA, which provides that a reviewing court shall set aside agency action that "not in accordance with law." Such review, like agency interpretations of the Constitution—is not entitled to deference. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 391-92 (2024). And thus it "remains the responsibility of the court to decide whether the law means what the agency says."

Using the standard tools of statutory construction, such as whether the law has a "plain and unambiguous meaning" and the "context in which that language is used" and the "broader context of the statute as a whole" the court determined that Q2 Impact had the correct interpretation of § 889.

To reach this conclusion, the court compared Section (d)(1) waivers with Section (d)(2) waivers.

The government argued that where a provider and "covered product" has been granted a waiver under a particular contract, a new contracting agency must get a separate waiver under the new contract regardless of whether the original waiver was granted under §(d)(1) or §(d)(2). The Court of Claims disagreed, looking first for any statutory language providing deference to the government's position. Finding none, it applied *Loper Bright*:

> In *Loper Bright*, the Supreme Court recently held that "[s]ection 706 [of the APA] makes clear that agency interpretations of statutes … are not entitled to deference. … [I]t thus remains the responsibility of the court to decide whether the law means what the agency says." *Loper Bright*, 603 U.S. at 391-92 (citations and quotation marks omitted).

But that was not the end of the inquiry, because under *Skidmore*, an agency's

> "interpretations constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance consistent with the APA." *Loper Bright*, 603 U.S. at 394 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Moreover, when interpreting its own rule or regulation, *Auer* deference may apply if three requirements are satisfied.

> (1) "the regulatory interpretation must be the agency's authoritative or official position, rather than [an] ad hoc statement not reflecting the agency's views"; (2) "the agency's interpretation must in some way implicate its substantive expertise"; and (3) the "agency's reading of a rule must reflect its fair and considered judgment." *Id.* at 577-79.

The court held that no deference applied because the government's interpretation addressed only the agency-head waiver process, not the DNI waiver process. Relative to DNI waivers, the government had not released considered guidance related to the applicable subsection and only three DNI waivers were identified as the historical pool of waivers to evaluate agency practice, including the waiver applicable here. This was not sufficient, leaving the court to "determine the meaning of § 889(d)(2) and rule 4.2104(b) without formal deference to GSA's interpretation in the government's briefs. *Loper Bright*, 603 U.S. at 391-92."

Because the court determined that the clearest reading the DNI waiver subsection is that it applies only to the equipment and contract for which the waiver is given, prohibiting equipment subject to the waiver from being used for any other contract, the contractor is not prohibited from receiving other government contracts that would not use the covered equipment. The court then addressed the policy concerns presented by the government and held "[u]nder *Loper Bright*, the courts cannot construe the law 'with an eye to policy preferences that had not made it into the statute.' Loper Bright, 603 U.S. at 403-04."

Applying *Loper Bright* all the government's claims for deference were rejected and petitioner's interpretation prevailed.

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