

# Recent Court of Federal Claims Decision Invoking *Loper Bright* Demonstrates Agency Discretion is not Boundless

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Practitioners and government contractors are well aware that federal agencies are afforded a great deal of discretion in making procurement-related decisions. A recent decision from the U.S. Court of Federal Claims (COFC), *The QED Group v. United States*, demonstrates that an agency's decision-making may be subject to enhanced scrutiny when it is based on the agency's interpretation of a statute.

Last summer, the U.S. Supreme Court ended the so-called *Chevron* deference in its *Loper Bright Enterprises v. Raimondo* decision. In *Loper Bright*, the U.S. Supreme Court held that federal courts reviewing agency action may no longer give deference to an agency's interpretation of an ambiguous statutory provision. Since then, there has been a great deal of speculation regarding how that decision might affect government contract litigation, particularly in the context of bid protests; however, until the *QED Group* decision, neither the Government Accountability Office (GAO) nor the COFC had occasion to grapple with the impact of *Loper Bright*.

In *QED Group*, the protestor was disqualified from competing for the General Services Administration's (GSA) One Acquisition Solution for Integrated Services Plus (OASIS+) program because it utilized "telecommunications equipment or services" produced by Chinese government-owned companies or an entity headquartered in China. The National Defense Authorization Act (NDAA) for fiscal year 2019 prevents federal agencies from entering into contracts with a company that uses such equipment "as a substantial or essential component of any system, or as critical technology as part of any system." However, the law allows certain government officials to grant a waiver to allow the use of this prohibited equipment in two limited circumstances. First, the law permits the head of an agency to waive the prohibition on a "one-time basis" if there is a "compelling justification." Second, the Director of National Intelligence (DNI) can provide a waiver if it is "in the national security interest of the United States." Notably, while the government amended the Federal Acquisition Regulation (FAR) to incorporate the prohibition and the first waiver prong (head of agency waiver), the amendment did not incorporate the second (DNI waiver).

In 2022, QED Group received a waiver from the DNI to support a U.S. Agency for International Development (USAID) contract in Egypt, where there were no telecommunications service providers compliant with the statutory prohibition. When QED Group submitted its proposal for GSA's OASIS+ program, it indicated that it would not provide prohibited telecommunications equipment or services to the government in performance of any task order issued under the program; however, given its active USAID Egypt contract, QED Group also disclosed that it used prohibited equipment on that contract under a DNI-issued waiver. As a result, GSA excluded QED Group from further competition. QED Group protested its disqualification—first at GAO, which denied the protest, and then at COFC.

In finding for QED Group, the COFC explained that after the Supreme Court's decision in *Loper Bright*, agency interpretations of statutes are no longer entitled to deference, while interpretations of regulations may still receive some deference. In this case, the court noted that GSA's interpretation of the FAR should be owed deference because the agency "is one of the most significant players in government contracting;" however, because only the second form of statutory waiver (DNI waiver) was relevant, and there was no regulation implementing this statutory provision in the FAR, the COFC found that it did not have to consider whether it owed deference to GSA's interpretation.

Having determined that GSA's interpretation of the DNI statutory waiver provision did not qualify for deference, the court concluded that a DNI waiver is limited to the specified use, which was QED Group's USAID contract. Because the DNI waiver applied to the protestor's use of prohibited equipment on another contract, the court concluded that other agencies are not prohibited from contracting with the protestor, concluding that GSA's exclusion decision was based on an erroneous interpretation of the statutory waiver requirement.

### Takeaways and Remaining Questions for Practitioners and Contractors

- Practitioners and contractors should monitor government contracts litigation to determine whether *Loper Bright* is treated as a true limit on agency discretion when making procurement decisions.
- The *QED Group* court suggested that the GSA could be entitled to deference when interpreting a FAR provision that implements a statutory directive. In practice, this may mean that an agency's interpretation of statutes and regulations is still given great discretion in the area of federal procurement.
- The *QED Group* court mentioned that, although the GSA did not draft the language of the FAR, its interpretation of the FAR warranted deference because the agency is a "significant player in government contracting." It is uncertain, however, which other agencies may constitute "significant players" such that their interpretation of the FAR or other applicable regulations may be eligible for judicial deference.
- Contractors should pay close attention to agency action, such as an exclusion decision like in *QED Group*, that is based on the agency's understanding of a statute. Even if *Loper Bright* does not signal a sea change in government contract litigation, it may nonetheless be an effective tool in challenging an agency's procurement-related decision.

Read the full decision [here](#).

Please reach out to Vedder Price's full-service Government Contracts group if it can provide your company with any assistance in navigating these or any other issues faced by federal contractors.

If you have any questions about this article, please contact **Kelly E. Buroker** at [kburoker@vedderprice.com](mailto:kburoker@vedderprice.com) or any other Vedder Price attorney with whom you have worked.

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