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THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

FEBRUARY 12, 2025 | VOLUME 67 | ISSUE 6

¶ 31 FEATURE COMMENT: The Most Important Cost Cases Of 2024

This article discusses noteworthy decisions of the Armed Services Board of Contract Appeals, U.S. Court of Federal Claims, and U.S. Court of Appeals for the Federal Circuit over the past year regarding cost and pricing issues. The decisions address the Limitations of Costs restrictions (*Reliability and Performance*), the statute of limitations for Government cost claims (*STI*), the rules regarding waiver of unallowable cost penalties (*Left Hand Design*) and challenges to regulations as inconsistent with statute (*Boeing*).

***Reliability and Performance Techs., LLC v. U.S.*, 2024 WL 2478320 (Fed. Cl. May 23, 2024)**—In this decision, the COFC, in denying the Government's motion for summary judgment, addressed a familiar area of cost-reimbursement contracting, but with some interesting twists occasioned by the court's belief that it needed to distinguish the 1997 Federal Circuit decision in *Advanced Materials v. Perry*, 108 F.3d 307 (Fed. Cir. 1997); 39 GC ¶ 167. The courts and boards have long tempered the strict cost-reimbursement limitations of the Limitation of Cost and Limitation of Funds clauses where the contractor can establish that without its fault it could not foresee incurrence of costs in excess of the limitation, or where Government fault prevented the contractor from providing the notice. See Cibinic, et al., Cost Reimbursement Contracting, 4th Ed. 2014 (hereinafter "Cost Reimbursement Contracting"), at 772, 780 (cases of Government fault would also seem to require at least a fair measure of unforeseeability on the part of the contractor). Cases favorable to the contractor, while limited in number, have typically involved unforeseen increases in indirect cost. *Reliability and Performance* was just such a case.

Reliability and Performance performed a five-year cost-reimbursement technical support contract for the Naval Sea Systems Command. During performance it submitted annual final indirect rate proposals, none of which the Government audited and negotiated in a timely manner. The contractor's final indirect costs for 2012 and 2013 were higher than the respective billing rates, leaving a sizable balance owed by the Government. The Navy refused to pay, and issued a final decision to that effect, asserting that the costs were not recoverable because the costs exceeded the contract funding amount under the Limitation of Funds clause. Reliability and Performance appealed to the COFC, asserting that its failure to provide notification of the additional costs was unforeseeable. The Navy disputed the assertion, placing its principal reliance on the Federal Circuit decision in *Advanced Materials*. The Navy also claimed the amounts involved had been released, which the court disposed of in summary fashion.

In *Advanced Materials,* 108 F.3d at 308–09, a contractor subject to the provisions of the Limitation of Cost clause (functionally identical to the Limitation of Funds clause) exceeded funding for both direct and indirect costs. Upon the Government's refusal to fund the extra amounts, the contractor appealed to the ASBCA, arguing "that the cost limitation provision was unenforceable because it had no reason to foresee the overrun." Id. at 309. However, the ASBCA held that "the company 'knew or had reason to know' its year-to-date direct and G&A … costs as it was performing [the] contract … and that no unforeseen event prevented" the contractor from complying with the clause. Id. at 310. The contractor's assertion that it was entitled to the benefit of the unforeseeability exception to the Limitation of Cost clause was thus squarely refuted by the Board's factual finding that the overrun was foreseeable. Id. at 311. Nothing in *Advanced Materials*, therefore, altered prior established law with respect to application of the Limitation of Costs and Funds clauses. See, e.g., *Gen. Elec. Co. v. U.S.,* 440 F.2d 420 (Ct. Cl. 1971). Nevertheless, the COFC in *Reliability and Performance* believed it was necessary to distinguish *Advanced Materials.*

First, the court pointed to the difference between a contract for a specific product (such as the contract at issue in *Advanced Materials*) and one for a level of effort over a specified period (such as the contract at issue in *Reliability and Performance*). As the court explained, the former case presented the contractor "all the relevant information and control over the cost and schedule of completing the specified work since the contract specified all of the work that needed to be done upfront," and the contractor thus sought to recover for a "classic 'overrun.' " 2024 WL 2478320, at 6. Conversely, under the latter type of contract, the contractor could not reasonably be expected to know what work the Government would require and thus could not foresee the prospective costs and provide the Government notice. Id.

Second, the COFC further distinguished *Advanced Materials*, pointing out the alleged breach by the Navy of Federal Acquisition Regulation 52.216-7, the Allowable Cost and Payment Clause, based on the Navy "not promptly negotiating final indirect rates" and "not adjusting the billing rates sufficiently to avoid the variance between the incurred costs and the final indirect rates." 2024 WL 2478320, at 5–6. This argument thus invoked the second branch of the judicial rule excusing compliance with the limitation clauses, which is invoked in the case of Government fault. While the rule does not require Government breach, if a contractor could establish a ***prior*** Government breach, this case suggests without quite establishing that such a breach would excuse further contractor performance of the Limitation of Costs/Funds clauses. The court here only invoked Government fault as an independent reason potentially justifying non-enforcement without further analysis.

Because compliance with the Allowable Cost and Payment clause as well as foreseeability of the indirect cost overrun were disputed, the COFC cited them as a basis for denial of the Navy's summary judgment motion. Whether any of the issues discussed above will attract the court's attention in further proceedings remains to be seen.

***Strategic Tech. Inst., Inc. v. Sec'y of Def.,* 91 F.4th 1140 (Fed. Cir. 2024); 66 GC ¶ 55**—In 2009, the Navy awarded Strategic Technology Institute, Inc. (STI) a cost-reimbursable contract to provide various aircraft engineering and support services to the Naval Surface Warfare Center, with a one-year base period and four options of one year each.

As with all cost-reimbursable contracts, the Navy paid STI based on provisional indirect cost rates. STI was obligated to submit an adequate rate proposal each year within six months of the conclusion of its previous fiscal year containing its actual indirect rates for the prior year. The Navy was then required to establish final indirect rates based on the proposal. If final rates were higher than the provisional rates used for the invoices in the prior year, the Navy would owe STI the difference. Conversely, if the final rates were lower than the provisional rates, STI would owe the difference back to the Navy.

STI apparently failed to submit indirect cost rate proposals for fiscal years 2008 and 2009, which was identified first by the Defense Contract Audit

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Agency (DCAA) when it audited STI's 2010 rate proposal in July 2014. This prompted the Government to request rate proposals, which STI provided first in July 2014, followed by required certifications in August 2014, and final rate proposals for both years on Sept. 30, 2014.

DCAA determined that STI's proposals were "high risk" given the missing submissions and initiated a multi-year audit of STI. DCAA issued two audit reports questioning STI's indirect *and* direct costs in June 2015. Then in June 2016, the Defense Contract Management Agency (DCMA) informed STI that the Government was seeking $368,860 in reimbursement for direct costs, penalties, and interest, and was also questioning indirect costs, although the Government did not inform STI of the magnitude of the indirect cost challenge. Then, more than two years later, on Nov. 30, 2018, DCMA issued a final decision, unilaterally establishing rates and demanding payment in the amount of $1,107,788, including $117,245 in penalties and interest.

STI appealed to the ASBCA. On appeal, STI *did not* challenge the merits of the Government's determination that the costs were unallowable. Instead, STI argued that the Government's claim was barred by the six-year statute of limitations under the Contract Disputes Act, 41 USCA § 7102. STI contended first that it had submitted timely incurred cost proposals for 2008 and 2009, and second, that even if it had not, the Government claims accrued in July 2009 and July 2010, when the proposals were due.

The Board rejected STI's arguments and denied the appeal. First, the Board determined that the Government did not receive STI's indirect cost proposals until July 11, 2014, which STI did not dispute on appeal. Second, the Board found that the Government did not know and could not have known of the basis for its claim until it received STI's indirect rate proposals. Indeed, the Board went further, cited its decision in *Doubleshot, Inc.*, ASBCA 61691, 20-1 BCA ¶ 37,677 at 182,905, for the proposition that the statute of limitations in Government challenges to indirect costs does not begin "until the contractor submits the incurred cost proposal and makes available sufficient audit records." Because the Government brought its claim in 2018, within six years of July 2014, the earliest time the claim could have accrued, the claim was timely.

STI appealed. The Federal Circuit began its analysis by noting that the CDA does not define when a claim accrues. Accordingly, the Federal Circuit analyzes when a claim accrues "in accordance with the FAR, the conditions of the contract, and the facts of the particular case." ***STI***, 91 F.4th at 1144 (citing *Kellogg Brown & Root Servs., Inc. v. Murphy,* 823 F.3d 622, 626 (Fed. Cir. 2016); 58 GC ¶ 194). FAR 33.201 provides that a claim accrues "when all events, that fix the alleged liability of ... the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred."

STI argued that the events that arguably established STI's liability to the Government were its billing of unallowable direct and indirect costs in 2008 and 2009, coupled with its failure to submit indirect cost proposals. But, as the Circuit observed, Government payments prior to establishing final indirect rates are provisional, based on project costs. The contract provides a clear mechanism for establishing, and resolving, final balances based on the contractor's actual cost experience. That the contractor incurs more (or less) than the anticipated rates does not create liability for either side, but instead, the final balance is determined through the indirect cost proposals, which STI failed to submit in a timely fashion.

The Court agreed with the Board that the Government's claim accrued first in July 2014 when STI submitted its proposals due to the nature of the claim at issue. The Government could have unilaterally established rates when STI first failed to submit its proposals, or it could have asserted a claim against STI for breaching the contract by failing to submit its proposals. In either case, such a claim might have accrued in 2009 and 2010, or whenever the Government first unilaterally established rates. Instead, the Government claim disputed the allowability of costs contained in STI's final cost proposals. The Government could not have known the basis for such a claim prior to receiving those cost proposals.

The Circuit observed that STI attempted to challenge the propriety of the claim accrual rule in the FAR, asserting that the proper measure of claim accrual is when the facts exist that fix liability, not when the party asserting the claim "knew or should have known" of those facts. STI observed that the discovery standard is absent from the CDA and the Supreme Court in 2019 found that discovery rules "cannot be supplied by the courts" when absent from the applicable statute (citing *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019)). The Circuit declined to resolve this issue because it found the claim accrued only in 2014 regardless of whether the discovery rule applied because it was triggered by STI's submission of its indirect rate proposals, not its incurrence of the unallowable costs. Unfortunately, this meant that the Circuit left unresolved this interesting challenge to the FAR claim accrual definition.

The Circuit's decision also overlooked the distinction between direct and indirect costs. The Government may only have had basis to know that STI's indirect cost proposal included unallowable indirect costs in July 2014. But STI submitted invoices for its actual direct costs regularly throughout performance, and the Government thus should have known the basis for its claim in 2008 and 2009. To the extent that the Government's claim included *direct* costs, that portion of the claim should have been time barred if the invoices contained sufficient information to alert the Government to the basis of its challenge, consistent with the ASBCA's decision in *Spartan DeLeon Springs, LLC*, ASBCA 60416, 17-1 BCA ¶ 36,601; 59 GC ¶ 28. The Circuit ignored this issue entirely.

Arguably, the Circuit's decision in *STI* departs from the ASBCA's holding that a Government claim based on unallowable costs included in indirect rates accrues only when the contractor submits its incurred cost proposal ***and makes available sufficient audit records***. *Doubleshot*, ASBCA 61691, 20-1 BCA ¶ 37,677 at 182,905. The Circuit found that the Government's claim here accrued in July 2014, when STI submitted its proposal, not at some later date when STI made sufficient audit records available.

In sum, although the holding in *STI* largely just reiterates the basic principle that a Government claim for including unallowable indirect costs in indirect rates is triggered only by the contractor's submission of a final rate proposal, the decision leaves important questions unresolved.

***Left Hand Design Corp.*, ASBCA 62458, 24-1 BCA ¶ 38,698; 66 GC ¶ 329**—While not precedential, the ASBCA's decision in *Left Hand Design Corp.*, provides valuable guidance for contractors regarding provisions related to the waiver of penalties for expressly unallowable costs.

Left Hand Design Corp. (LHDC) held cost-reimbursable contracts with the Government. However, like the contractor in *STI*, it failed to submit its indirect cost rate proposals in a timely manner. On April 3, 2017, it submitted all its indirect cost rate proposals for its fiscal years 2009 through 2015 to DCMA. On Aug. 8, 2018, DCAA released its audit report, questioning several costs as unallowable and subject to penalties. On July 24, 2019, the administrative contracting officer (ACO) sent LHDC a spreadsheet identifying the questioned costs by fiscal year, type of cost, and cost principle. The ACO asked LHDC to respond with its view as to whether the identified costs were expressly unallowable and whether the ACO should waive penalties. LHDC acknowledged that it misclassified certain costs and provided the correct classifications for its fiscal year 2011 proposal, and addressed other categories of costs in an email to the ACO:

- **Interest**: LHDC stated it was unaware that "the appreciation of the stock options that were issued as deferred compensation for our employees was an unallowable expense." LHDC conceded that the costs were unallowable, but asked for a waiver of penalties because the company did not have experience with this specific cost, "made no financial gain from this error," and did not appreciate the difference between IRS rules and the FAR.
- **Federal tax**: LHDC stated that it was trying to determine whether its bookkeeper knew that these costs were unallowable, and suggested that DCAA should have told LHDC the costs were unallowable as LHDC had included such costs in prior years.

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In sum, LHDC argued that penalties should be waived because (1) its bookkeeper was its liaison with DCAA and prepared all incurred cost reports, and the company trusted her work and lacked sufficient experience when preparing the incurred cost proposals at issue after the bookkeeper left the company; (2) the Government had accepted previous incurred cost submissions, which included the tax costs at issue, without challenge; and (3) LHDC did not benefit from the error because all of its cost-type contracts had cost ceilings that it had already exceeded, meaning the costs at issue were not recoverable in any case.

On Oct. 1, 2019, the ACO waived penalties for fiscal years 2009, 2010, 2012, and 2015 pursuant to FAR 42.709-5(b) because the amount of unallowable costs subject to penalty in each proposal was less than $10,000. In response, on Nov. 7, 2019, LHDC sent an email to the ACO, stating that it has changed its policies regarding unallowable costs to ensure that its policies properly address taxes and interest expenses; it trained current personnel; and it established a management review process to ensure that future rate proposals do not contain "any of these errors."

On Jan. 14, 2020, LHDC sent another email to the ACO requesting waiver of penalties and explaining that certain costs DCAA had questioned were improperly characterized and were allowable. First, LHDC argued that penalties should be waived because it established policies, training, and controls, and because the inclusion of unallowable costs was inadvertent. Second, LHDC asserted that the "interest expense" for fiscal year 2011 was actually allowable deferred compensation, and a small amount of what had been labeled federal tax for 2011 was actually a state income tax.

The ACO responded by explaining that, while she did not believe LHDC intentionally included unallowable costs or financially gained by including these costs in its proposal, LHDC had not done its due diligence "in understanding the FAR requirements" and that it had apparently "relied on DCAA to identify wrong doings." The ACO then issued final decisions on Jan. 17, 2020, addressing fiscal years 2011 and 2013. For 2011, the ACO determined that $177,343 was unallowable, and assessed a penalty of $59,977, with interest of $693. For 2013, the ACO determined that $236,241 was expressly unallowable, calculating a penalty of $12,426.

On Feb. 10, 2020, LHDC sent the ACO an email again asserting it qualifies for a waiver. LHDC read the waiver provisions as mandating waiver when a contractor prospectively establishes policies, training, and an internal control and review system *after* submitting a proposal including expressly unallowable costs. LHDC also emphasized that its inclusion of unallowable costs in its proposals was inadvertent notwithstanding spending significant time on the proposals. LHDC also insinuated in the letter that the unallowable amounts were not necessarily an issue, because LHDC would refund the money and then bill for the direct costs it otherwise could not recover as over the cap established for the contracts at issue, but that it was "in shock" about the $73,096 in penalties and interest. LHDC then appealed to the Board and elected for expedited proceedings under ASBCA Rule 11. LHDC conceded that the costs at issue were expressly unallowable. At issue on appeal was only whether LHDC is entitled to a waiver.

The ASBCA began its analysis by explaining that the contractor "bears a heavy burden to prove that a contracting officer's determination not to waive a penalty was an arbitrary and capricious abuse of discretion." Citing *Raytheon Co.,* ASBCA 57743, 17-1 BCA ¶ 36,724 at 178,854. Per the FAR, implementing statutory requirements, the CO cannot waive penalties above $10,000 unless satisfied that two requirements are met:

1. [The contractor] has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals.
2. The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; i.e., their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

Regarding the first condition, LHDC argued that the ACO recognized it met the requirement because her email acknowledged that LHDC conducted training and implemented processes to avoid including unallowable expenses in its future cost proposals. However, the Board has repeatedly held

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that the determinative question is whether the policies, personnel training, and internal control and review system were in place *at the time* the costs in question were included in an indirect cost proposal. Citing *Exelis Inc.,* ASBCA 58966, 17-1 BCA ¶ 36,708 at 178,752; *Energy Matter Conversion Corp.*, ASBCA 61583, 19-1 BCA ¶ 37,225 at 181,209. Tacitly acknowledging that the plain language of the regulation could be read to mean that the contractor has established policies at any time before the penalties are assessed, the Board stated that the regulation must be read as a whole to mean that the policies were in place when the questioned costs were submitted. The Board reached this conclusion because the second prong requires the exercise of due diligence to prevent the inclusion of unallowable costs, which when read together, suggests that the required due diligence includes establishing policies, training, and controls required by the first prong of the waiver analysis. Additionally, the Board commented that the policies explicitly must be sufficient to "provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals." The Board explained that the "assurance" required in the first prong is to the specific unallowable costs subject to the penalties being assessed, so adopting policies after the fact cannot provide such assurance.

Applying its construction of the regulation, the Board found that LHDC was not entitled to a waiver because it neither had established policies, training, and controls, when it submitted its proposals, nor did it exercise due diligence to exclude unallowable costs.

We recognize that the Board is bound by its own precedent but must disagree with the Board's interpretation of the FAR. FAR 42.709-6(c)(1) asks whether the contractor *"has* established policies and personnel training," not whether it *had* established policies and personnel training in place when it submitted the cost proposal. The plain language of the provision is thus focused on the present state, not whether the contractor had such policies in place previously. Further, the provision is incoherent if read to require that controls must have been in place when the contractor submitted its cost proposal, because the controls must provide assurance that unallowable costs subject to penalties are "precluded from being included in the contractor's final indirect cost rate proposals." In the Board's view, such controls could not logically satisfy this test because the insufficiency of the controls is demonstrated by the fact that the controls *failed* to preclude inclusion of costs that were in fact included—if the costs had been excluded, then penalties would not be relevant. Further, the citation to FAR 42.709-6(c)(2), which requires that the contractor's inclusion of the costs be inadvertent notwithstanding exercise of "due diligence" provides no support for the Board's rationale. If "due diligence" is the same as maintaining the controls required in FAR 42.709-6(c)(1), then the reference to "due diligence" in FAR 42.709-6(c)(2) is superfluous. We are hopeful that the Federal Circuit will correct this misreading of the regulation.

***Boeing Co. v. U.S.*, 119 F.4th 17 (Fed. Cir. 2024); 66 GC ¶ 288**—The Federal Circuit penned another chapter in Boeing's ongoing saga challenging the FAR restriction on offsetting the cost impacts of unilateral cost accounting practice changes with savings achieved through other changes implemented at the same time. In this case, which has been in litigation since 2017, Boeing contends that the restriction on offsets at FAR 30.606(a)(3)(ii) violates the Cost Accounting Standards (CAS) statute, which prohibits the Government from recovering costs "greater than the aggregate increased cost to the Federal Government as defined by the [CAS] Board." 41 USCA § 1503(f). Boeing also argues that FAR 30.606 is invalid because by statute only the CAS Board, not the FAR Council, is authorized to define what constitutes "the aggregate increased cost." Boeing made eight changes to its disclosed cost accounting practices. DCMA demanded a price adjustment of roughly $1 million for increased costs associated with two of the changes. Boeing estimated that given decreased costs in some of the other six changes, the net effect was a cost reduction of $1.5 million. Boeing argues that since there was no aggregate increased cost to the Government, Boeing owes the Government nothing.

As discussed in prior cost case reviews, the COFC first dismissed Boeing's suit on grounds that Boeing waived its contract claims by failing to contest

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the legality of FAR 30.606 before entering into the relevant contracts, and that the court had no jurisdiction over an alternative illegal exaction theory under the Tucker Act because the CAS statute is not a "money-mandating" statute. *Boeing Co. v. U.S.*, 143 Fed. Cl. 298 (2019); 61 GC ¶ 181; Manos, Feature Comment, "The Worst Government Contract Cost And Pricing Decisions Of 2019," 62 GC ¶ 1. The Federal Circuit reversed and remanded both rulings. *Boeing Co. v. U.S.*, 968 F.3d 1371 (Fed. Cir. 2020); 62 GC ¶ 235. The Federal Circuit held that Boeing did not waive its claims by not bringing an action before award, ruling any such action would have been futile because the CO lacked authority to decline to apply FAR 30.606 to the contract. As to the illegal exaction claim, the Federal Circuit ruled that, under its precedent, actions seeking only the return of money paid to the Government need not be based on a money-mandating statute. Johnson, Prince, Amen, Ramish, Feature Comment, "The Most Important Cost Cases of 2020," 63 GC ¶ 1.

On remand, the trial court dismissed Boeing's claims a second time. *Boeing Co. v. U.S.*, 162 Fed. Cl. 78 (2022); 64 GC ¶ 283. The court ruled that Boeing's contract claims were not proper CDA claims within the jurisdiction of the COFC. Rather, the court held that the "true nature" of Boeing's claims is a challenge to the validity of a regulation, which can only be reviewed by a federal district court pursuant the Administrative Procedure Act. The court dismissed the illegal exaction claim on the basis that the CAS statute requires that disputes over price adjustments be brought exclusively under the CDA, precluding alternative administrative actions.

The Federal Circuit once again reversed the court below on all counts and remanded the case for consideration on the merits. *Boeing Co. v. U.S.*, 119 F.4th 17 (Fed. Cir. 2024). The Court noted although "Boeing's claims implicate the validity of FAR 30.606," Boeing's primary contention is that it does not owe the Government the $1,064,773 demanded under the relevant contracts. That is a contract dispute properly within the COFC's exclusive jurisdiction under the CDA. Circuit precedent is also clear that "when a contract dispute properly falls under the CDA, it 'is of no consequence to the question of jurisdiction' that the complaint seeks to invalidate a regulation." 119 F.4th at 23–24 (citing *Tex. Health Choice, L.C. v. Off. of Pers. Mgmt.*, 400 F.3d 895, 898–900 (Fed. Cir. 2005); 47 GC ¶ 142. Regarding the illegal exaction claim, the Circuit held that the CDA's status as the exclusive mechanism for resolving applicable contract actions did not foreclose Boeing from asserting a non-contract Tucker Act claim as an independent, alternative basis for relief. The Circuit distinguished its decision in *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014 (Fed. Cir. 1995); 37 GC ¶ 234. The Court noted that where Congress intended administrative review under the Transportation Act and the general provisions of CDA to be mutually exclusive, Congress conferred jurisdiction on the COFC over both contract claims arising under the CDA and non-contract claims.

The *Boeing* decision deserves attention because it was issued in the same year as the Supreme Court's landmark decision in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

Loper Bright overruled *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which required courts to resolve ambiguities in a statute by deferring to the reasonable interpretation of the agency that administers the statute. The 6-3 majority in *Loper Bright* held that *Chevron* deference could not be reconciled with the APA, which expressly calls for the courts to "decide all relevant questions of law," "interpret... statutory provisions," and "hold unlawful and set aside agency action, findings and conclusions found to be... not in accordance with law." 5 USCA § 706; *Loper Bright*, 603 U.S. at 391–96. In overruling *Chevron*, Chief Justice Roberts explained that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires," and "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." Id. at 412–13. "Courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." Id. at 413. On the other hand, the Court said that in overruling *Chevron*, it did not "call into question prior cases that

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relied on the *Chevron* framework," but that "special justification" was needed to overcome *stare decisis* and require overruling such cases.

Loper Bright is considered by many to be a tectonic shift that may alter the landscape of administrative law. *Chevron* was the most cited Supreme Court decision of all time. In the dissenting opinion, Justice Kagan predicted that overruling *Chevron* would "rais[e] new doubts about agency constructions of statutes," and that "[s]ome agency interpretations never challenged under *Chevron*" now would be. Id. at 448, 477. The dissent further predicted that courts would have little trouble identifying "special justifications" for overruling cases that relied on *Chevron*, e.g., citing poor reasoning or something in the decision that is "unworkable" (the justifications cited by the majority). Id. at 478.

In the wake of *Loper Bright*, commentator Nathan Castellano has noted that the effects of the decision on some aspects of federal procurement may be limited. Castellano, *After Chevron: How Might Loper Bright Impact Procurement Law*, 38 Nash & Cibinic Rep. NL ¶ 49. For one, while *Loper Bright* addresses interpretation of statutes under the APA, the FAR is not subject to the rulemaking provisions of the APA. 5 USCA § 553(a)(2). Also, Congress expressly delegated procurement rulemaking authority under the Office of Federal Procurement Policy Act to the OFPP Administrator, and *Loper Bright* indicated courts may accord greater "respect" for agency interpretations of statutes when Congress delegated rulemaking authority to the agency. 41 USCA § 1121.

Nevertheless, in emphasizing the courts' responsibility to independently interpret the law, *Loper Bright* may influence how courts approach statutory interpretation. Even where agencies are delegated rulemaking authority by statute, *Loper Bright* stresses that courts have a role in " 'fix[ing] the boundaries of [the] delegated authority' and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries." Id. at 395 (cleaned up).

Boeing's action alleging that the FAR offset restrictions violate statute may serve as a test case for how Government contract tribunals will approach such actions post-*Chevron*. Again, the Federal Circuit has confirmed that challenges to unlawful regulations are not necessarily waived even if they are not raised before contract execution, and that monetary disputes under a contract should be brought under the CDA instead of the APA even if they challenge the validity of a statute. Other Government contractors may follow Boeing's lead and bring more such actions moving forward.

Cost regulations are an area where the FAR Council has taken some liberties and may have exceeded the scope of its statutory authority or otherwise violated statute. In that instance, under *Loper Bright*, because there is no clear delegation, the reviewing court would owe no deference to the agency's interpretation. Mr. Castellano identified appellate court decisions that applied *Chevron* deference to the FAR Council's interpretation of statute in relation to regulations regarding the allowability of legal costs, which "may be ripe for disruption." See Castellano, *After Chevron*; *Brownlee v. DynCorp*, 349 F.3d 1343 (Fed. Cir. 2003); 45 GC ¶ 488; *Southwest Marine, Inc. v. U.S.*, 535 F.3d 1012 (9th Cir. 2008).

Contractors have also long been critical of FAR 31.204(d), which states:

> Section 31.205 [Selected costs] does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items.

Courts have applied this general principle of determining allowability with reference to "treatment of similar or related selected items" to greatly extend the reach of certain cost principles, including particularly the legal proceedings cost principle at FAR 31.205-47. See *Geren v. Tecom, Inc.,* 566 F.3d 1037, 1041 (Fed. Cir. 2009); 51 GC ¶ 190. A contractor might challenge whether this broad catch-all provision is consistent with the statutory requirement that FAR "provisions on the allowability of contractor costs... ***shall define in detail and in specific terms*** those costs which are unallowable, in whole or in part, under covered contracts." 10 USCA § 3745. The Federal Circuit

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has not squarely addressed the issue and might be inclined to rule the regulation runs afoul of the statute under *Loper Bright*.

Contractors, guided by the *Boeing* decision, may identify other potential conflicts in the cost regulations to challenge.

Conclusion—There were no blockbuster cost and pricing decisions issued in 2024, but the year's cases offered incremental updates and lessons on some of the timeless issues in this field and, in the case of *Boeing*, perhaps a preview of things to come.

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