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¶ 47 DEFERENCE TO AGENCY INTERPRETATIONS OF PROCUREMENT REGULATIONS: Restraining Government Contracts Exceptionalism

A special column by Nathaniel E. Castellano, Special Counsel in the Government contracts practice at Jenner & Block LLP, and Issac D. Schabes, Associate in the Government contracts practice at Crowell & Moring LLP. Nathan previously served as a judicial law clerk to the Honorable Jimmie V. Reyna at the U.S. Court of Appeals for the Federal Circuit; Issac likewise clerked for the Honorable Matthew H. Solomson at the U.S. Court of Federal Claims. The ideas presented here, particularly those that may prove to be in error, are the authors' own and should not be attributed to any other.

Government contracts practitioners frequently encounter (often quite happily) an "expert" agency or tribunal's interpretation of a complex regulatory framework. When confronted with a question of fiscal law or small business issues, for example, we naturally seek the views of the Government Accountability Office (GAO) and the Small Business Administration (SBA). But how much deference is owed to these experts? Some might say "special deference," suggestive of Government contracts exceptionalism. But this arrangement is not unique to public procurement; it pervades administrative law. And as with many important issues of administrative law, the binding precedent flows from the U.S. Supreme Court itself, not our specialized tribunals.

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the U.S. Supreme Court revisited the legal framework that applies when a court is considering whether and how to defer to an agency's interpretation of its own regulations, substantially reigning in the circumstances where such judicial deference is appropriate. And in April 2023, U.S. Court of Federal Claims Judge Solomson issued a decision, distilling and applying that precedent when reviewing an SBA interpretation of its own regulations governing joint venture eligibility for service-disabled veteran-owned small business (SDVOSB) set asides. *Defense Integrated Solutions, LLC. v. U.S.*, 165 Fed. Cl. 352 (2023).

In the wake of *Kisor*, Judge Solomson's analysis in *Defense Integrated Solutions* provides a worthwhile opportunity to survey the current legal landscape and ensure that we *don't forget about the Supreme Court* when weighing the deference, if any, owed to expert agencies' interpretations of procurement regulations.

Government Contracts And Administrative Law

Most fruitful forays into Government contracting will traverse the fundamentals of administrative law. As Professor Joshua I. Schwartz explained more than 20 years ago, the "infusion of administrative law doctrine into the law of bid protests has been dramatic and unmistakable," and "administrative law concepts have, in subtler ways, penetrated the world of claims litigation." Schwartz, *Administrative Law Lessons Regarding the Role of Politically Appointed Officials in Default Terminations*, 30 PUB. CONT. L.J. 143, 151 (Winter 2001). *C.f.* Pachter, *In Memory of John Cibinic*, 35 PUB. CONT. L.J. 11 (Fall 2005) ("While John was renowned as an expert in government contract costs, his broad knowledge of government contracts, and indeed of administrative law generally, was equally impressive.")

In protest practice at the Court of Federal Claims, most factual disputes turn on the familiar administrative law principle, embodied in the Administrative Procedure Act (APA), that judicial review of agency *factual* findings is highly deferential, particularly where technical judgment and expertise are involved. See *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989). Based on this standard of review, courts generally do not second-guess rational agency factual determinations as to their requirements, technical ratings, award decisions, etc.

But what about judicial deference to agencies' *legal* determinations—that is, deference to an agency's interpretation of a statute or regulation? Study of administrative law leads to a mountain of cases, treatises, journals, and blogs (and probably podcasts) debating whether and how courts should defer to an agency's interpretation of statutes (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)), defer to an agency's interpretation of regulations (*Auer v. Robbins*, 519 U.S. 452 (2015); *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)), or at least respect the agency's demonstrated expertise in an area of law, without quite deferring (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). See Koch & Murphy, 4 ADMIN. L. & PRAC. § 11:31 (3d ed.), explaining:

> In modern times, by far the most notorious of these [judicial deference] doctrines is *Chevron* deference, which, simplifying, instructs courts, under some circumstances, to defer to an agency's reasonable and reasoned construction of a statute that the agency is specially charged with administering.... The *Auer* doctrine (which used to go by the much better name of *Seminole Rock*) serves the same basic function for an agency's construction of its own regulations. In some circumstances, however, courts are supposed to eschew *Chevron* and *Auer* deference in favor of applying *Skidmore* deference (a/k/a *Skidmore* "respect"), which instructs courts to choose statutory or regulatory constructions they deem best after giving the agency's construction and supporting analysis whatever respect they might deserve.
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> The administrative law litigant is therefore often left with the problem of figuring out which type of deference, if any, should apply to an agency's construction of a statute (or regulation) that it administers.... [A]lthough the basic rationales for extending judicial deference to agency interpretations of law seem fairly straightforward, they have given rise to an excessively complicated and difficult body of case law that struggles to specify (a) which legal determinations by agencies deserve special deference; and (b) how much. [Footnotes omitted.]

Procurement practitioners frequently encounter supposedly "expert" agency interpretations of complex statutes and regulations. But we do not frequently discuss these issues in terms of *Chevron*, *Auer*, and *Skidmore* deference.

To be sure, the U.S. Court of Appeals for the Federal Circuit has held that *Chevron* deference is appropriate when considering the Federal Acquisition Regulation's interpretation of ambiguous procurement statutes. *Brownlee v. DynCorp*, 349 F.3d 1343 (Fed. Cir. 2003), 45 GC ¶ 488. And, the

Armed Services Board of Contract Appeals indicated that the Defense FAR Supplement could likewise qualify for *Chevron* deference when properly interpreting an ambiguous defense acquisition statute. *Boeing Co.*, ASBCA No. 60373, 18-1 BCA ¶ 37112, 60 GC ¶ 269.

But what about deference to an agency's interpretation of regulations? A line of Federal Circuit precedent concludes that no formal deference is owed to any one agency's interpretation of the FAR because the FAR is not promulgated by a single agency. *Perry v. Martin Marietta Corp.*, 47 F.3d 1134 (Fed. Cir. 1995), 37 GC ¶ 95; *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547 (Fed. Cir. 1993). And there are some Government contracts cases applying *Auer* and *Skidmore* at the Court of Federal Claims, but not many, and not in great depth. See *Melwood Horticultural Training Ctr., Inc. v. U.S.*, 153 Fed. Cl. 723 (2021), 63 GC ¶ 192; *Springfield Parcel C, LLC v. U.S.*, 124 Fed. Cl. 163 (2015); *Aeolus Systems, LLC v. U.S.*, 79 Fed. Cl. 1 (2007).

There are also strands of Court of Federal Claims precedent that speak to a "special" and "particularized" deference owed to certain agencies' interpretations of their own specialized regulations, particularly the SBA. See *Darton Innovative Technologies, Inc. v. U.S.*, 153 Fed. Cl. 440 (2021) (collecting cases); *Baird Corp. v. U.S.*, 1 Cl. Ct. 662 (1983)

But these "special deference" cases do not meaningfully engage with the legal framework the Supreme Court demands before a court defers to an agency's interpretation of law. In *Kisor*, the Court confirmed that there are some scenarios where a court might properly defer to an agency's interpretation of regulations pursuant to *Auer*, but those scenarios are limited, tightly circumscribed by numerous exceptions and preconditions:

> The upshot of all this goes something as follows. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase "when it applies" is important—because it often doesn't. As described above, this Court has cabined *Auer's* scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.

Judge Solomson's opinion in *Defense Integrated Solutions* is notable for bringing these two worlds together by applying the lessons of *Kisor* to determine whether and how to defer to SBA's regulatory interpretation, giving important context to the "special deference" line of cases.

The *Defense Integrated Solutions* Opinion

The *Defense Integrated Solutions* protest was complex, procedurally and substantively. That much is clear from the first line of the opinion: "This case involves the litigation version of Freaky Friday."

To simplify considerably, the question presented to the court was whether the SBA Office of Hearings and Appeals (OHA) properly interpreted an SBA regulation that governs the extent to which a joint venture can qualify as an SDVOSB while allowing non-SDVOSB venture members to exercise control over business decisions. OHA interpreted the regulation to mean that a non-SDVOSB member could retain veto power over claim litigation and settlement decisions without depriving the joint venture of SDVOSB status. *Strategic Alliance Solutions LLC*, SBA No. VET-278, 2023 WL 580566 (Jan 12, 2023).

After surveying the most recent precedent, Judge Solomson distilled the following four-part test

for determining whether and how the court might defer to (or at least appropriately respect) OHA's interpretation of the SBA regulation, recognizing first and foremost that *Auer* deference is only appropriate if the regulation is truly ambiguous, after exhausting all tools of interpretation:

> In sum, synthesizing the recent Federal Circuit cases with *Kisor*, this Court concludes that the deference equation essentially reduces to these four questions:
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> (1) Is the regulation "genuinely ambiguous" after taking a serious, de novo approach to reading the regulation at issue, consistent with the uncontroversial proposition that "[i]t is emphatically the province and duty of the judicial department to say what the law is"?
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> (2) If the regulation at issue is, indeed, genuinely ambiguous, is the agency's interpretation reasonable?
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> (3) If the agency's interpretation of a genuinely ambiguous regulation is reasonable, is there some reason *not* to defer to the agency's interpretation? Such reasons may include, for example, that the new interpretation is not authoritative, is a *post hoc* rationalization merely to support a litigation position, constitutes unfair surprise, or exceeds the agency's competence and expertise.
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> (4) Even if *Auer* or *Seminole Rock* deference is not warranted, is the agency's interpretation nevertheless reasonable and persuasive and, thus, entitled to *Skidmore* deference under the APA standard of review? [Footnotes omitted.]

In Step 1, Judge Solomson employed the tools of regulatory interpretation to conclude that the regulation's plain meaning does permit non-SDVOSB joint venture members to exercise control over claim litigation and settlement decisions without compromising the venture's SDVOSB status. In other words, Judge Solomson independently reviewed the regulation and agreed with OHA's interpretation—no deference needed.

As an alternative holding, Judge Solomson concluded that, to the extent the regulation was ambiguous, OHA's interpretation of the regulation was entitled to *Auer* deference. The alternative holding is not surprising, as all parties seemed to agree that the regulation is ambiguous as written. True to *Kisor* (and his own Steps 2 and 3), however, Judge Solomson did not find deference appropriate just because the regulation was ambiguous. Even assuming ambiguity, he analyzed and concluded that OHA's interpretation was reasonable and not subject to any other exception identified in *Kisor* that would undermine application of *Auer* deference. This included findings that (1) "SBA OHA decisions represent the SBA's official and authoritative position"; (2) OHA was not altering its prior interpretation of the same regulation; (3) OHA's interpretation was not a *post hoc* rationalization advanced as a convenient litigating position, and (4) OHA's interpretation was within the agency's competency and expertise.

And finally, Judge Solomson explained that, at a minimum, OHA's interpretation of the regulation warranted *Skidmore* respect: "Given the persuasiveness and sound reasoning of the…OHA decision—including its policy considerations—not to mention DIS's lack of compelling argument against *Skidmore* or APA deference, this Court sees no reason to enjoin the agency's interpretation…."

Takeaways

There are several lessons for practitioners to take from *Defense Integrated Solutions*.

First, think twice before assuming an agency is entitled to deference in its interpretation of law. Or, at a minimum, think about *Kisor*. While there are circumstances where true deference (*Auer*), or at least serious respect (*Skidmore*) are due to an expert agency interpreting its own specialized regulations, this is a common issue of administrative law that is not unique to Government contracting. As with other areas of administrative law that appear in Government contracts

litigation—e.g., remedies, remands, prejudice, standards of review, etc.—it is imperative to make sure that Government contracting practice is consistent with Supreme Court precedent such as *Kisor*—not to mention *Marbury v. Madison*, 5 U.S. 137 (1803). C.f. *American Relocation Connections, L.L.C. v. U.S.*, 789 F. App'x 221 (Fed. Cir. 2019); Castellano & Whitman, *Bid Protest Remedies and Remand: New Guidance From the Supreme Court*, 36 NCRNL ¶ 52 (Sept. 2022).

So how do we deal with assertions of "special deference" owed to expert agencies? We suggest steering clear of Government contracts exceptionalism. Instead, recognize and frame these issues in terms of the governing Supreme Court precedent, as demonstrated in *Defense Integrated Solutions*:

> All of that is a long way of explaining that the deference owed to an SBA OHA decision isn't "special" at all, but rather is nothing more or less than either (a) an application of *Auer* or *Seminole Rock* deference where the regulation at issue is "hopelessly ambiguous," or (b) the deference courts give to reasonable and persuasive agency interpretations under *Skidmore*, applying the typical APA standard of review. [Citations omitted.]

Second, *Auer* is not an "easy button" for resolving questions of regulatory interpretation. As confirmed in *Kisor* and demonstrated in *Defense Integrated Solutions*, parties and tribunals considering whether to defer to any agency's interpretation have a lot of work to do. Thankfully, the *Defense Integrated Solutions* opinion helps distill the many complex legal standards at play. But each case is likely to require exhaustive application of the rules of interpretation to determine whether a true ambiguity exists and, if so, whether the agency's interpretation is reasonable. Even then, the parties must navigate fact-specific issues, including whether the agency has provided an authoritative interpretation of the regulation, whether the agency's position is consistent or may be a *post hoc* rationale developed for litigation, and whether the agency's interpretation truly reflects its expertise.

Third, to belabor the point just a bit further, counsel engaging with these issues should be well versed in the rules of regulatory interpretation. That much is clear from *Kisor*:

> First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference….
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> And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. For again, only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law. That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved. [Citations omitted.]

Invest in the canons of interpretation. Scalia & Garner, Reading Law: Interpretation of Legal Texts (3d ed.).

Fourth, in many procurement cases, even where a regulation is truly ambiguous, *Auer* deference would seem inappropriate if only because the agency official most often responsible for taking action—the Contracting Officer—is rarely in a position to make an authoritative interpretation of a procurement regulation on behalf of the same agency that implements that regulation. For example, many protests may turn on a CO's interpretation of a FAR provision; but does the CO even work for an agency that is involved in crafting the FAR? As noted above, several cases have declined to defer to any one agency's interpretation of the FAR. Even if, for example, a Department of Veterans Affairs CO was interpreting a regulation unique to the VA, it is not at all obvious that a specific CO could speak authoritatively as to the VA's interpretation of the regulation.

Kisor speaks to the importance of this issue, emphasizing that a primary justification of *Auer* deference is the natural desire to resolve ambiguity by asking the drafter; accordingly, it would appear that *Auer* deference is generally inappropriate unless the court is presented with the agency's official position. The Court stated:

> Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean.
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> [T]he regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. That constraint follows from the logic of *Auer* deference—because Congress has delegated rulemaking power, and all that typically goes with it, to the agency alone. [Citations omitted.]

Finally, don't forget about *Skidmore*. While it may be daunting to clear the legal hurdles necessary to affirmatively establish that *Auer* deference governs, *Skidmore* paves the way for tribunals to pay appropriate respect to an agency's legal interpretation where that respect is due:

> [I]f an agency's thorough, expert explanation for its statutory construction leaves a court with the impression that the agency knows its business better than the court does, then the court should hesitate before declaring the agency either to be "wrong" under *Skidmore* (or "unreasonably wrong" under *Chevron*, for that matter).

Koch & Murphy, 4 Admin. L. & Prac. § 11:37 (3d ed.). This style of deference may, effectively, be the same as the deference that the Federal Circuit and Court of Federal Claims bestow to other procurement tribunals, including the GAO and boards of contract appeals. C.f. *U.S. v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting) ("[T]he rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers."). In some cases, such respect might save a trip to the Supreme Court. Compare *Kingdomware Technologies,* B-406507, 2012 CPD ¶ 165, with *Kingdomware Technologies, Inc. v. United States*, 754 F.3d 923 (Fed. Cir. 2014), 56 GC ¶ 194, *rev'd and remanded*, 579 U.S. 162 (2016), 58 GC ¶ 227.

Conclusion

This Report's readers know well that the law of Government contracting is, in fact, exceptional. But that does not give license for exceptionalism in the application of law—disregarding the foundation already provided by Congress and the Supreme Court. By consistently demonstrating that our practice is firmly rooted in the common core of American jurisprudence, we fortify the future of this exceptional profession. *Nathaniel E. Castellano & Issac D. Schabes*