Deference Ruling Could Close The FAR Loophole

By **Chad Landmon, James Kim and Christopher Jones** (September 16, 2025)

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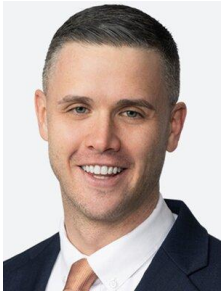

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The U.S. Court of Federal Claims' July 31 decision in The Davinci Co. LLC v. U.S. is more than a technical ruling on procurement law. It is a reminder that the legal machinery of federal acquisition is a set of interlocking gears — when one spins, another must catch.

This case arose from a straightforward need. The U.S. Department of Veterans Affairs needed supplies of tamsulosin, a widely used prostate drug. But what followed was a legal dispute over whether the VA could bypass the Trade Agreements Act, or TAA, based on a previously granted waiver from the U.S. Small Business Administration under the Buy American Act, or BAA.[1]

Following guidance in the U.S. Supreme Court's 2024 decision in Loper Bright Enterprises v. Raimondo, the Claims Court reviewed the relevant statutory text without being bound by the VA's interpretation and rejected the VA's position, holding that the BAA waiver did not permit the agency to sidestep the TAA.[2]

The court's decision seemingly closes a loophole that had allowed government agencies to purchase products from non-TAA countries, namely, China and India, by relying on an SBA waiver to the BAA — even when those products could be sourced from TAA countries.

If it stands, the decision could have a significant impact on the way federal purchasers procure pharmaceuticals and other products previously subject to SBA waivers — particularly where compliant alternatives from TAA countries are available. It may also be a harbinger of increased protest activity related to SBA waiver use.

More broadly, the decision highlights a fundamental shift in how courts are moving away from the now-defunct Chevron deference standard to the new Loper Bright standard in Administrative Procedure Act litigation.

Background

In 2024, the VA determined that all the manufacturers and suppliers of tamsulosin, a drug used to treat prostate conditions, were domestic resellers of tamsulosin products made in foreign countries. None of them were small businesses that manufactured tamsulosin in the U.S.[3]

After receiving a nonmanufacturing waiver from the SBA, the VA issued a solicitation to purchase tamsulosin as a small business set-aside—indicating that the procurement would be subject to the BAA, but not the TAA.[4]

The Davinci Company, a service-disabled veteran-owned small business, submitted a proposal to the VA to provide tamsulosin that it sourced from Spain, a TAA-designated country. But the VA ultimately chose offers from other manufacturers that sourced

tamsulosin from India, a non-TAA country and a major global supplier of pharmaceutical products.[5]

According to the VA, because the SBA's Made in America Office approved a waiver under the BAA based on nonavailability, essentially waiving the domestic preference requirement, the VA was free to ignore the requirements of the TAA, and was allowed to choose manufacturers that sourced tamsulosin from India.[6]

The VA determined and argued that once a nonmanufacturer waiver is issued under Title 19 of the U.S. Code, Section 2511(f), the Federal Acquisition Regulations permit procurement without TAA compliance. Specifically, the VA pointed to FAR 25.401(a)(1), which it interpreted as exempting small business set-asides from the TAA requirements under the statute.[7]

Davinci filed suit in the Claims Court, and the dispute ultimately centered on whether the VA violated procurement regulations or procedures by declining to apply the TAA to its tamsulosin purchase.[8]

Claims Court Decision

The Claims Court began its analysis by reiterating the long-standing statutory and regulatory provisions that allow protestors to file suit over government procurement decisions, and noted that in the context of a motion for judgment on the administrative record, the protestor must demonstrate a clear and prejudicial violation of a regulation or procedure.[9]

However, the court acknowledged that these standards now must be considered in the context of Loper Bright, which held that courts must exercise independent judgment in determining whether an agency acted within its statutory or regulatory authority. Under this framework, ambiguity alone is no longer sufficient to justify deference to an agency's interpretation.[10]

Further, because under Loper Bright courts "must reject administrative constructions which are contrary to clear congressional intent," the court reviewed "the statutory text without being bound by the VA's interpretation."[11]

The court's application of Loper Bright to the issues here was striking in its clarity. The opinion speaks to a broader sea change in how courts review agency decisions post-Chevron.

For decades, courts applied Chevron deference. In situations where a government agency interpreted statutes that were silent or ambiguous on specific issues, courts were told to give significant deference to the agency's interpretation. But in Loper Bright, the Supreme Court overturned Chevron, holding instead that courts need not defer to an agency's statutory interpretation.

In Davinci, the court applied Loper Bright and interpreted Section 2511(f) as prohibiting agencies from using the TAA to waive any small business or minority preference.[12] And the court held that FAR 25.401(a)(1) does not enlarge the statutory provisions of Section 2511(f), as the VA argued.

In other words, no deference was given to the VA's interpretation of the statutes and related regulations. The court independently reviewed and interpreted the statutes and

regulations, and arrived at a different conclusion than the VA, finding that the VA had improperly failed to comply with the TAA when awarding the contract under the solicitation.[13]

The court's decision here also means that government agencies can no longer avoid the requirements of the TAA by relying on BAA waivers or set-asides. As the court explained, the TAA is the controlling statute in situations where there are no domestic producers and a product must be sourced from other countries.[14]

As the court put simply, a "nonavailability waiver … does not overrule the TAA."[15] Rather, the TAA continues to apply to all procurements unless the BAA is actively invoked — and if that invocation is later waived, as it was in this case, the TAA's requirements are reinstated.[16]

Conclusion

The court's decision in Davinci is noteworthy both in the context of agency procurement procedures and in how Loper Bright is affecting judicial review of agency interpretations of statutory provisions.

If it stands, the implication is stark: Davinci likely closes what many called the "FAR loophole," in which small business set-asides, cushioned by waivers, could escape the TAA's reach. This means that agencies can no longer rely on BAA set-asides or exemptions to avoid the TAA's requirement to source products from TAA-approved countries when the product is not available domestically. Once the BAA is set aside, the TAA steps in.

More broadly, Davinci shows that courts will no longer defer to an agency's statutory interpretation under Loper Bright. Had it applied Chevron, the court may well have started and ended its analysis of the issues here by deferring to and adopting the VA's interpretation.

Instead, the court applied Loper Bright and conducted its own statutory interpretation without deference to the VA. With government agencies no longer getting Chevron deference, we may see an increase in protests to procurement decisions and litigation challenges.

This type of analysis is something that practitioners in all areas of regulatory law can expect to see moving forward. It may also mean that future Administrative Procedure Act and regulatory litigation will become more contentious and less predictable, as courts are no longer bound to offer any deference to the government's interpretation of the statutes and regulations.

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[1] The Davinci Co. LLC v. U.S., No. 24-1238 at 5 (Fed. Cl. July 31, 2025).

[2] Id. at 7.

[3] Id. at 2.

[4] Id.

[5] Id. at 3.

[6] Id.

[7] Id. at 7.

[8] Id. at 4.

[9] Id.

[10] Id.

[11] Id. at 7.

[12] Id.

[13] Id. at 5.

[14] Id. at 7.

[15] Id.

[16] Id. at 10.