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U.S. Court of Appeals for the Federal Circuit Revives Boeing's Challenge to Federal Acquisition Regulation's Implementation of Cost Accounting Standards' Offset Rules: Impacts for Government Contractors Subject to CAS and Future Implications Under *Loper Bright*

By Gale R. Monahan, Natalie Seelig, Steven M. Masiello and Seamus Curley*

In this article, the authors examine a recent decision by a federal circuit court of appeals reversing a dismissal of a challenge to the government's implementation of the Cost Accounting Standards' offset rules through Federal Acquisition Regulation Section 30.606.

The U.S. Court of Appeals for the Federal Circuit (CAFC) has reversed and remanded the U.S. Court of Federal Claims' (COFC) most recent dismissal of Boeing's challenge to the government's implementation of the Cost Accounting Standards' (CAS) offset rules through Federal Acquisition Regulation (FAR) Section 30.606, holding that Boeing's claim is a contract dispute action that merely involves a question of whether a regulation properly implements the CAS such that it affects Boeing's rights under its CAS-covered contract.

The COFC previously found that "the gravamen of plaintiff's complaint is a challenge to the validity of FAR 30.606," and under the COFC's rationale, this meant the case was not a contract dispute, and it lacked jurisdiction to review the validity of regulations pursuant to the Administrative Procedure Act (APA). The CAFC disagreed with this logic, holding instead that while the COFC lacks jurisdiction to decide "pure challenges to the validity of a regulation," the mere fact that a contract dispute implicates the validity of a regulation does not preclude jurisdiction, so long as the "true nature of the action" is contractual.[1] In this case, the " 'true nature of the action' is undoubtedly a contract dispute" because it involves a disagreement on contract price adjustments and Boeing's resultant challenge to the government's demand

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[1] See Boeing Co. v. United States, No. 2023-1018 (Fed. Cir. Oct. 4, 2024).

for payment of over US$1 million.[2] As the CAFC noted, 41 U.S.C. § 1503(a) provides that a disagreement on contract price adjustment constitutes a dispute under the Contract Disputes Act (CDA),[3] and 28 U.S.C. § 1491(a)(2) of the Tucker Act grants the COFC exclusive jurisdiction over all CDA claims.[4]

In addition to Boeing's contract claims, the CAFC also revived Boeing's illegal exaction claim, holding that the COFC has jurisdiction to hear this claim under 28 U.S.C. § 1491(a)(1) of the Tucker Act. In a significant narrowing of *Dalton v. Sherwood Van Lines, Inc.*, a CAFC case frequently cited in the government's frequent jurisdictional challenges to contractor claims, the CAFC rejected the COFC's rationale that if a dispute is within the scope of the CDA (as a challenge to the application of the CAS statute), it cannot simultaneously be brought under an alternative claim with a separate jurisdictional basis.

The *Boeing* decision has the potential to expand the interpretation of what it means for a claim to "relat[e] to a contract." This also means that contractors may have leeway to challenge the validity of FAR and Department of Defense FAR Supplement (DFARS) that are implicated in contract disputes at the COFC or the boards, which may be especially significant in the current post-*Chevron* context.[5]

THE CAFC'S ANALYSIS OF WHETHER THE TRUE NATURE OF THE DISPUTE IS CONTRACTUAL EMPHASIZED THAT THE VALIDITY OF THE REGULATION IS OUTCOME DETERMINATIVE FOR BOEING'S BREACH OF CONTRACT CLAIMS

In addition to finding that the dispute was inherently contractual in nature because it involved a disagreement around contract price adjustments stemming from cost accounting practice changes, the CAFC further explained that jurisdiction was proper because the contractual dispute at issue—whether the government is entitled to recover the contract adjustments of over US$1 million—is wholly dependent on the validity of FAR § 30.606. FAR § 30.606 outlines the procedures government contracting officers follow for adjusting contract prices stemming from contractor cost accounting practice changes or noncompliances.[6] The relevant portion of the clause prohibits contracting officers from combining the cost impacts of more than one unilateral cost accounting practice change in a manner that would aggregate cost impacts that

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[2] Id.

[3] 41 U.S.C. §§ 7101, et seq.

[4] Boeing, supra.

[5] See Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[6] FAR § 30.606(a)(2).

increased costs to the government with cost impacts that decrease costs to the government (i.e., offset).[7] In the subject case, Boeing made eight cost accounting practice changes, two of which increased the costs on CAS-covered contracts, and six of which were either neutral or decreased the costs on CAS-covered contracts. Boeing estimated the net effect of these eight changes was a savings of nearly US$1.5 million (i.e., if the impacts were offset). The government rejected Boeing's cost impact proposal and demanded payment for US$1 million associated with only the two cost accounting practice changes that resulted in increased costs, while disregarding the offsetting cost impacts associated with the other six cost accounting practice changes.

Boeing argued that FAR § 30.606 is invalid because it violated the CAS statute's requirement that "[t]he Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government" and results in a windfall to the government.[8]

If Boeing prevails, and FAR § 30.606 is determined to be invalid, the government's demand for payment of the US$1 million breached the contracts, which incorporate the CAS regulations and contract terms, because Boeing should have been permitted to offset the cost impacts of its cost accounting practice changes.

If, instead, the government prevails, Boeing's contract claims must fail because the government was entitled to payment for the cost impact of the two cost accounting practice changes that increased costs to the government, regardless of the aggregate impact of the other six cost accounting practice changes. Based on this framework and these implications, the CAFC held that the issue of whether the government's demand for payment breached the contract is "inextricably intertwined with the validity of the regulation."

The CAFC's focus on this analysis suggests that a potentially new test must be used to determine whether a dispute's true nature is contractual when it implicates a challenge to the validity of a regulation; namely, would a finding that the regulation is invalid be an outcome determinative for the contract claim? For Boeing, the answer is yes, and it can now argue its three breach of contract claims at the COFC under the theory that FAR § 30.606 is invalid because it violates CAS.

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[7] FAR § 30.606(a)(3)(ii)(A).

[8] 41 U.S.C. § 1503(b).

IN A NARROWING OF *DALTON*, THE COURT HOLDS THE COFC CAN ALSO HEAR BOEING'S ALTERNATIVE ILLEGAL EXACTION CLAIM

The CAFC also revived Boeing's alternative illegal exaction claim, reinforcing that the COFC has jurisdiction pursuant to 28 U.S.C. § 1491(a)(1) of the Tucker Act, to adjudicate "monetary claims against the United States based on contracts with the United States, the Constitution, or other money mandating statutes or regulation," which specifically contemplates illegal exaction claims. Through its alternative illegal exaction claim, Boeing argued that through FAR § 30.606, the government improperly recouped money from Boeing based on its refusal to offset the cost impacts from multiple cost accounting practice changes. The COFC determined that because a challenge to the application of the CAS statute is covered under the CDA, under *Dalton*, such a dispute must be brought exclusively under the CDA, and cannot be brought under an alternative claim with a separate jurisdictional basis.

The CAFC reversed this holding, explaining that the COFC properly has jurisdiction over the illegal exaction claim because Boeing pled this claim as an alternative count that would apply only if the COFC determines there is no remedy in contract. In reaching this conclusion, the CAFC distinguished *Dalton*, which held that the ASBCA lacked jurisdiction to hear contract-related transportation claims because it determined the claims were not subject to the CDA since they were instead governed by the administrative review procedures of the Transportation Act.

In *Dalton v. Sherwood Van Lines, Inc.*,[9] the CAFC determined that the CDA was not designed to supplant any pre-existing remedial schemes, and pre-existing administrative review under the Transportation Act of 1940[10] was designed to cover the dispute at issue in *Dalton*, which precluded the CDA's applicability to the same dispute. Boeing's illegal exaction claim, in contrast, is not governed by some other remedial scheme provided for by Congress and Boeing did not try, as the plaintiff in Dalton did, to extend CDA jurisdiction to a non-CDA claim.

Instead, Boeing's illegal exaction claim was properly brought under the COFC's 28 U.S.C. § 1491(a)(1) jurisdiction and nothing in *Dalton* precludes the COFC from exercising jurisdiction over non-CDA claims while simultaneously exercising CDA jurisdiction over other claims subject to the CDA.

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[9] Dalton v. Sherwood Van Lines, Inc., 50 F.3d 1014, 1018–19 (Fed. Cir. 1995).

[10] 31 U.S.C. § 3726.

IMPLICATIONS FOR CONTRACTORS SUBJECT TO CAS AND FUTURE REGULATORY CHALLENGES IN THE POST-*CHEVRON* LEGAL FRAMEWORK UNDER *LOPER BRIGHT*

Although the CAFC declined to rule on the merits of the FAR § 30.606 challenge, the decision signals the potential for change to the current prohibition on aggregating cost impacts for several unilateral cost accounting practice changes. In addition to providing Boeing the opportunity to argue the merits on remand, the decision also suggests a rebuke of the government's argument that the regulation is not inconsistent with the CAS because it merely provides instructions to the contracting officer.[11]

While a decision on the merits of this case is too uncertain to predict, the decision signals a potential opportunity for contractors to challenge the regulation, especially in the post-*Chevron* context. Under the long-standing Chevron Doctrine, when a court reviews an agency's construction of an ambiguous statute, and that agency is charged with administering that statute, courts would defer to the agency's interpretation of the statute, so long as it was reasonable, even if the court would have reached a different interpretation if the question had arisen in a judicial proceeding. *Loper Bright* overturned *Chevron*, holding that "[t]he deference that Chevron requires of courts reviewing agency action cannot be squared with the APA," and that it was Congress's intent for the reviewing court, rather than the agency, to "decide all relevant questions of law."[12]

The holding in *Loper Bright*, coupled with the *Boeing*, seemingly opens the door for a broader, and potentially much more efficient, mechanism to challenge the validity of FAR and DFARS regulations implicated in contract disputes at the COFC, rather than through the APA in the district courts.

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[11] See Boeing, supra ("If, as Boeing contends, the regulation is invalid, then the instructions the contracting officer used to calculate the alleged increased costs central to this dispute would also be invalid.").

[12] Loper Bright, 144 S. Ct. at 2260.