No. 26-_____

In the Supreme Court of the United States

ANDERS CONSTRUCTION, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, after *Loper Bright* and related decisions, courts must independently interpret solicitation requirements as questions of law rather than defer to an agency's interpretation when evaluating bid protests under the APA. The petition argues that the appellate court deferred to the United States Army Corp of Engineers' ("USACE") interpretation of solicitation requirements instead of independently deciding what the Solicitation required, in tension with the APA's command that courts "shall decide all relevant questions of law."

2. Whether an agency may reject a proposal based on unstated evaluation criteria or *post hoc* demands that do not appear in the solicitation. This petition contends that the USACE faulted Anders Construction, Inc. ("Anders" or "Petitioner") for not expressly labeling a "Lost Diver Plan" and for not providing a "more comprehensive" outline of administrative and record-keeping procedures—standards the Solicitation did not specify or require.

PARTIES TO PROCEEDING

Petitioner, Anders Construction, Inc. was the appellee below. Respondent, United States of America was the appellant below.

RELATED PROCEEDINGS

United States Court of Federal Claims:
Anders Construction, Inc. v. The United States,
No. 23-759 (May 5, 2024)

United States Court of Appeals
for the Federal Circuit:
Anders Construction, Inc. v. United States,
No. 2024-2247 (May 12, 2026)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Anders Construction, Inc. discloses the following. There is no parent or publicly held company owning 10% or more of Petitioner's stock

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PETITION FOR WRIT OF CERTIORARI

Anders petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

I. OPINIONS BELOW

The Court of Appeals' unpublished opinion (App., *infra*, 1a-12a) reversing and remanding the trial court's decision is not published in the Federal Supplement but is available at 2026 WL 1298183 (Fed. Cir. May 12, 2026). An order of the district court (App., *infra*, 16a-30a) is published in the Federal Supplement but is available at 171 Fed. Cl. 300 (2024).

II. JURISDICTION

The Court of Appeals entered judgment on May 12, 2026. *See* Appendix 1. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, are reproduced in the appendix to this petition.

IV. STATEMENT OF THE CASE

A. Factual Background

1. The Solicitation and Discussions.

The Solicitation was issued by the USACE on July 30, 2021. Pet. App. 18a. Proposals were submitted to the USACE by Anders, Lotus USA, Inc. ("Lotus") and Specialty Diving of Louisiana, Inc. ("Specialty"). *Id.* at 19a. On December 2, 2021, the USACE made a competitive range determination, and found that the proposals submitted by Specialty and Lotus were considered technically unacceptable and were eliminated from the competitive range. *Id.* Further, the USACE notified the unsuccessful bidders that Anders was the apparent successful offeror. *Id.* Therefore, Anders was the only technically acceptable bidder remaining. *Id.* Accordingly, the USACE entered discussions with Anders by way of a letter dated December 2, 2021. *Id.* From December 2021 through March 2022, Anders received multiple letters from the USACE, and at no time during those communications did the USACE raise any technical deficiencies in Anders' proposal. *Id.* at 19a-20a. On December 6, 2021, Specialty requested a pre-award debriefing on December 13, 2021, the USACE provided Specialty with a pre-award debriefing. *Id.* at 19a. Subsequently, on January 11, 2022, Specialty sent a letter to the USACE requesting reconsideration of its proposal. *Id.* Within this letter, Specialty stated that it had all of the contents the USACE alleges it did not in its proposal, the inclusion

of its "Lost or Disoriented Diver Plan." *Id.* After Specialty's request for reconsideration of its proposal only, the contracting officer requested that the SSEB reconvene and reevaluate all proposals. *Id.* Neither Anders nor Lotus requested that its proposals be reconsidered, and the contracting officer did not provide any reasoning as to why reevaluation of all proposals, rather than just Specialty's, was necessary. *Id.*

Nothing contained in the Administrative Record ("AR") indicated that the SSEB reevaluated the proposals of Specialty and Anders. The SSEB prepared a spreadsheet with the findings of its reevaluations, which it submitted to the contracting officer on February 4, 2022. *Id.* Notably, however, the SSEB did not appear to reevaluate and prepare a spreadsheet concerning Lotus' proposal, despite the contracting officer 's request that all proposals be reevaluated. *Id.* It was not until after this unwarranted reevaluation of Anders' proposal by the SSEB, after such proposal had been deemed technically acceptable, that Anders received a letter from the USACE raising alleged technical deficiencies. *Id.*

2. Anders' Initial Protest

On April 19, 2022, the USACE sent a letter to Anders in response to the Initial Agency Protest. *Id.* at 20a. However, the USACE's response to the Initial Agency Protest was insufficient as it did not address any of the substantive arguments raised by Anders in the Initial Agency Protest, nor did the USACE provide any reason why it chose not to address the substance

of the Initial Agency Protest. Further, the USACE's response did not provide any explanation as to why it chose not to wait for the results and recommendation of the independent review, which was requested by Anders and is required under FAR 33.103(d).

On April 19, 2022, the USACE issued a Notice of Corrective Action for the Solicitation (the "Notice of Corrective Action"), informing Anders that the USACE "determined that need existed to take corrective action by revising and re-issuing the Solicitation." *Id.* Accordingly, along with the Notice of Corrective Action, the USACE issued A7, which, among other things, added language that conceded Anders' position that drive time to divers was payable under the Solicitation but stated that prevailing wage rates did not apply to that time.

FAR 33.103(c) states, "The USACE should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests." Pursuant to FAR 33.103(c), on April 25, 2022, Anders attempted to resolve its concerns through open and frank discussions, requesting a conference call with the USACE to discuss the Initial Agency Protest and the Notice of Corrective Action. *Id.* On April 26, 2022, Shaun McAfee, "Deputy Chief, Contracting" with the New Orleans District, informed Anders that he had "received [Anders'] correspondence, and reviewed all related documentation, letters and decisions provided from the Contracting Officer. As of right now, the Government is reviewing this information to determine the correct course of action."

Despite Anders' attempt to resolve its concerns through open and frank discussions, the USACE refused to do so expeditiously, and on April 29, 2022, the deadline for Anders to timely file a protest at the GAO arrived. By April 29, 2022, the USACE had failed to partake in open and frank discussion with Anders; therefore, Anders took further action as necessary to preserve its rights by filing a bid protest with the GAO. Nevertheless, Anders was still interested in working with the USACE to pursue the inexpensive, informal, procedurally simple, and expeditious resolution of the Initial Agency Protest pursuant to FAR 33.103(c). Accordingly, on May 3, 2022, counsel for Anders sent correspondence to the USACE which again expressed Anders' desire to partake in discussions with the USACE and explaining that it "was simply required to file with GAO due to the deadline and the USACE's lack of a timely response."

On May 12, 2022, counsel for Anders received correspondence from the USACE through Tristan S. Brown, Senior Procurement Counsel. This correspondence failed to address the substance of the May 3, 2022, email in any way whatsoever, instead it merely directed that all further communication should go through him, as lead counsel for the USACE, and essentially deferring the matter to the Initial GAO Protest.

3. Anders' Initial GAO Protest.

On April 29, 2022, Anders filed the Initial GAO Protest maintaining that it should be awarded the

contract under the Solicitation or, in the alternative, that the independent review requested by Anders at the Agency level be compelled as required by FAR 33.103 and the results of same be provided to Anders. Similar to the Initial Agency Protest, the Initial GAO Protest challenged the USACE's finding of alleged deficiencies in Anders' proposal. In addition, the Initial GAO Protest challenged the USACE's actions related to the issuance of A7, which were in violation of FAR 15.206(g)(5) and FAR 15.206(c).

4. Further Amendments to the Solicitation and Anders' Second Agency Protest and Second GAO Protest.

On April 27, 2022, the USACE issued Amendment #8 ("A8") which amended the Solicitation to "[r]emove the last two sentences in Paragraph 16c, Payments." These last two sentences were previously added to the Solicitation by A7 and read as follows: "Note: Prevailing Wage rates do not apply to mobilization and demobilization. The prevailing wage rates strictly apply to the dive time once they arrive at the dive site as stated below in sub-paragraph d." Through the issuance of A8, the USACE back peddled on one of the significant additions to the Solicitation contained in A7 concerning payment of drive time to divers, removing the language that addressed diver drive pay in Section C, Paragraph 16(c).

The addition of those last two sentences to Section C, Paragraph 16(c) in A7 was part of the alleged "corrective action" taken by the USACE, which was the subject of the USACE's dismissal of the Initial Agency

Protest and the GAO's decision to dismiss the Initial GAO Protest. Removal of this language through A8 is functionally an acknowledgement by the USACE that the denial of Anders' Initial Agency Protest was baseless, or at the least, evidence that the action was not "corrective."

On August 10, 2022, following the dismissal of the Initial GAO Protest, the USACE issued Amendment #10 ("A10"), which implemented several changes to the Solicitation. Among the changes made in A10 was the re-inclusion of those last two sentences to Section C, Paragraph 16(c) which were originally added in A7 and subsequently removed by A8. However, in violation of FAR 15.206(g)(5), A10 failed to include any mention whatsoever of this change in the description.

Nevertheless, Anders noticed the re-inclusion and, on August 11, 2022, reached out to the USACE asking for clarification on the payment of prevailing wages during drive time, since A10 reinserted this language that was previously removed by A8. On that same day, the USACE responded to Anders' inquiry, stating as follows: "Please refer to Amendment 0008. Amendment 0008 removed the sentences relating to the prevailing wages." This response from the USACE was misleading and effectively unresponsive as the language removed in A8 was clearly added back in through A10,

Subsequently, on August 24, 2022, the USACE issued Amendment #12 ("A12"), responding to questions posed by bidders. In A12, the USACE listed, among others, Anders' inquiry concerning payment of

prevailing wages during drive time and again responded that A8 removed the two sentences in Section C, Paragraph 16(c) that referenced prevailing wages, without any mention or acknowledgment that those same sentences were reinserted in A10. This response from the USACE citing to A8, which had been effectively nullified by the reinsertion of the language in A10, was again misleading and simply wrong. The USACE's actions and its answers to Anders directly and in A12 (*i.e.*, citing an Amendment that had been effectively nullified) were misleading, factually incorrect, and arbitrary and capricious.

On August 26, 2022, Anders filed an Agency level protest (the "Second Agency Protest") arguing that the USACE had failed to answer whether prevailing wage rates are to be paid to divers under the Solicitation in compliance with Department of Labor prevailing wage rates. Subsequently, on September 30, 2022, the USACE dismissed the Second Agency Protest. *Id.* at 20a. Thus, on October 10, 2022, Anders filed the Second GAO Protest, which concerned payment for drive time to divers related to work performed under the Solicitation. *Id.* at 20a.

B. Procedural History

On May 23, 2023, Anders filed its Complaint alleging that USACE committed the following FAR violations: (a) USACE's reversal of its technical acceptability rating for Anders' proposal lacks a rational basis; (b) USACE's corrective action failed to provide a description of Amendment 7's Solicitation revisions; and

(c) USACE failed to provide an independent review of Anders' proposal. *Id.* at 21a. Because of these errors, Anders sought permanent injunctive relief. *Id.* Alternatively, Anders requested the Court—reinstate "fair competition" back into the bidding war— and "declare and require [USACE] to mandate payment of prevailing wages" to Anders' divers when traveling to and from USACE's site. *Id.*

On July 24, 2023, the USACE filed the Administrative Record. That same day, Anders filed its Motion for Judgment on the Administrative Record asking the trial court to determine whether the "USACE's reversal of its evaluation of plaintiff's proposal—from technically acceptable to unacceptable—'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law'?" *Id.* To which, on May 7, 2024, it did, finding that the "USACE's reversal, based on five interrelated factors, lacks a rational basis and was thus arbitrary." *Id.* at 23a. The thrust of its opinion can be summed up by as follows: "To [Petitioner], this case is a product of administrative bait-and-switch. Its original proposal was deemed technically compliant; but after it was required to resubmit its proposal under Amendment 7, USACE reevaluation reversed this determination, finding the resubmitted proposal as technically noncompliant." *Id.* at 16a.

The USACE filed its Notice of Appeal, which was subsequently docketed in the United States Court of Appeals for the Federal Circuit as *Anders Construction, Inc. v. United States*, No. 2024-2247. The USACE

and Anders timely filed their respective briefs. Oral argument was held on April 6, 2026.

On May 12, 2026, the appellate court issued its opinion reversing the trial court's judgment, vacating the permanent injunction, and remanding for further proceedings. *Id.* at 1a-11a. The court held that the trial court erred in concluding that the USACE acted arbitrarily when it determined Anders' proposal was technically unacceptable. As to the lost diver plan, the appellate court found that because Anders did not title it a "Lost Diver Plan" and that it was not clearly identifiable as such, Anders' proposal was not technically compliant. *Id.* at 6a-7a. Behind their reasoning was that "the burden is on the offeror to submit a well-written proposal" and that the USACE could not be faulted for not treating Petitioner's lost diver plan—albeit not titled as one—as having complied with Solicitation's requirements. *Id.* at 7a. As to the outline of administrative and record-keeping procedures, the appellate court further held that it was not arbitrary for the contracting office to demand a "more comprehensive" outline, and that doing so did not amount to an unstated evaluation criterion, because an agency "must have the latitude to apply its technical expertise" without "explicitly previewing every possible ground for technical insufficiency." *Id.* at 7a-8a. Notably, the appellate court reached that conclusion notwithstanding that the SSEB, the body possessing the technical expertise, had recorded no such deficiency, and the appellate court expressly declined to require the contracting officer defer to the SSEB's evaluation.

Having found two independent grounds sufficient to sustain the USACE's technical unacceptability determination, the appellate court declined to reach the third ground concerning the sample completion report. *Id.* at 10a.

The appellate court further held that the trial court erred in directing an award to Anders without the USACE first having determined that Anders' proposed prices were reasonable.[1] *Id.* at 10a. Finally, the appellate court declined to address in the first instance Anders' arguments that the USACE violated FAR 33.103(d)(4), FAR 15.206(c), and FAR 15.206(g)(5), remanding those arguments to the trial court while instructing that, if the trial court determines neither alleged violation prejudiced Anders in light of the appellate court's holding, it "should grant judgment on the administrative record to the government." *Id.*

No petition for panel rehearing or rehearing *en banc* was filed. Anders now timely petitions this Court for a writ of certiorari pursuant to Supreme Court Rule 13.1.

V. REASONS FOR GRANTING THE WRIT

[1] Petitioner disagrees with the appellate court's finding on its prices, as the trial court, citing to authority not challenged by the USACE, with both evidence and support to find Petitioner's prices' reasonable.

Since 1781, our government has encouraged "full and open competition" for federal contracting.[2] This has been formally promulgated through the Competition in Contracting Act ("CICA") and implemented through the Federal Acquisitions Regulation ("FAR").[3] CICA generally requires "full and open competition through the use of competitive procedures,"[4] a phrase that Congress defined to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."[5] The FAR in turn commands that an agency "shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation."[6] The FAR promotes competition in federal procurement by assuring prospective offerors that they need only satisfy the requirements set forth in the solicitation for their proposals to be considered.

The ruling below turns that principle on its head. By insulating the agency's decision from meaningful review, the court below allowed an offeror to be rejected based on a rationale untethered from the solicitation itself. And it did so in a case that presents none of the concerns that typically warrant agency deference. Even the USACE's technical evaluator found

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[2] *See* James F. Nagle, A HISTORY OF GOVERNMENT CONTRACTING 49 (2d ed. 1999).

[3] *See Electronic Data Systems, LLC v. United States*, 93 Fed. Cl. 416, 430 (2010).

[4] 41 U.S.C. § 3301(a)(1).

[5] 41 U.S.C. § 107; *see also* 41 U.S.C. § 152.

[6] 48 C.F.R. § 15.305(a).

that Petitioner's proposal met the Solicitation's requirements, only to have that finding reversed in a one-sentence determination by another agency official. But that does not comport with the requirements thrusted upon it by CICA, the FAR, and case law, which provide that when an agency such as the USACE issues a solicitation under federal procurement law, it must live and die by the criteria it published. "It is hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation."[7] Said differently, agencies cannot reject a proposal for failing to meet a standard that appears nowhere in the solicitation, or that appears so obliquely that no offeror reading it in good faith would have discerned it.

The crux of Petitioner's Writ is best summed up by the trial court who distilled this dispute to a single point:

> That being, if USACE wanted different information—whether it be labeling or be additional documentation—it should have clearly stated such requirements in the Solicitation. Clarity controls our federal government contracts' system. **And in this case, as a matter of law, [the] USACE went beyond the bounds of its discretion when it reversed the proposal's technical compliance**

[7] *Banknote Corp. of Am., Inc. v. United States*, 56 Fed. Cl. 377, 380 (2003), *aff'd*, 365 F.3d 1345 (Fed. Cir. 2004).

> **determination**. Nor do any of the above reasons evince accepting the USACE's decision anyways because the "explanation for its decision . . . runs counter to the evidence" presented above. (internal citations omitted) (emphasis added).

"What we've got here is a failure to communicate."[8] And under the decision below, that failure is borne not by the agency but by every contractor that bids on federal projects. Petitioner submits that for all of the reasons discussed below, granting its Writ of Certiorari is proper and just.

A. The decision below leaves federal procurement as the last refuge of agency deference this Court repudiated in *Loper Bright,* and only this Court can say so.

It is no secret that the judiciary and the administrative state are, at times, at odds with each other. Deference is the division of authority between them, and it is the tool through which some of that tension is resolved, albeit one that is resolved predominantly in the agency's favor. "The wider the deference a reviewing court provides an administrative agency, the

[8] COOL HAND LUKE (Warner Brothers 1967).

wider the discretion the law provides the agency, and vice versa."[9]

Since this Court's landmark decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[10], commentators and judges alike, have criticized the doctrine for "its apparent obliviousness to the fundamental alterations it makes in our constitutional conception of the administrative state."[11] The crux of these criticisms on deference can be best summed up by Justice Thomas' concurring opinion in *Michigan v. EPA*:

> *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is "the best reading of an ambiguous statute" in favor of an agency's construction from Courts the ultimate interpretative authority to "say what the law is," and hands it over to the Executive. Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial

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[9] Yoav Dotan, *Deference and Disagreement in Administrative Law*, 71 Admin. L. Rev. 761, 801 (2019) (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

[10] 467 U.S. 837 (1984).

[11] *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989); Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 799 (2007)

> power exclusively in Article III courts, not administrative agencies.[12]

This Court is no stranger to the many criticisms it has lodged regarding agency deference,[13] as *Chevron* and other agency deference doctrines effectively imbue the federal judiciary with institutional bias in favor of the most powerful party in the room—the federal administrative state.[14]

Given these critiques, over the past decade, this Court has moved steadily to cabin the nebulous and boundless concept of agency deference. *Loper Bright Enterprises v. Raimondo*[15], and *Relentless, Inc. v. Department of Commerce*[16], overruled the need for *Chevron* deference and held that courts "need not and under the APA may not defer to an agency interpretation

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[12] *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (internal citations omitted).

[13] *Id.; See also Cuozzo Speed Techs., LLC v. Lee,* 579 U.S. 261, 286 (2016) (Thomas, J., concurring) ("[t]his Court should reconsider that fiction of *Chevron* and its progeny."), *Dep't of Transp. v. Ass'n of Am. Railroads,* 575 U.S. 43, 69 (2015) (Thomas, J., concurring) ("[T]he discretion inherent in executive power does not comprehend the discretion to formulate generally applicable rules of private conduct"), *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 118 (2015) (Thomas, J., concurring) ("Those who ratified the Constitution knew that legal texts would often contain ambiguities [. . .] [t]he judicial power was understood to include the power to resolve these ambiguities over time.").

[14] Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016).

[15] 603 U.S. 369 (2024).

[16] *Id.*

of the law simply because a statute is ambiguous," and restored to Article III courts the obligation to exercise independent judgment.[17] *Kisor v. Wilkie*[18], cabined any deference to an agency's reading of its own regulations, requiring genuine ambiguity, a reasonable reading, and, critically, that the interpretation "implicate its substantive expertise" and reflects a "fair and considered judgment."[19]

The gist of the appellate court's opinion was that the USACE could not "be faulted" for having rejected Petitioner's proposal on technical criteria that the agency itself never articulated in its own Solicitation. In reaching this decision, the court leaned on a series of Federal Circuit decisions holding that "[e]ffective contracting demands broad discretion,"[20] that a reviewing court may not "second guess" the "discretionary determinations of procurement officials,"[21]; and that the disappointed bidder bears a "heavy burden"[22] to dispute otherwise.

This Court's recent decisions have addressed this issue made by the appellate court and is why Petitioner is requesting relief from this Court. *Loper*

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[17] *Id.* at 412.
[18] 588 U.S. 558 (2019).
[19] *Id.* at 573-79.
[20] *Lockheed Missiles & Space Co. v. Bentsen*, 4 F.3d 955, 958-59 (Fed. Cir. 1993).
[21] *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed. Cir. 1996).
[22] *Banknote Corp. of America, Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004).

Bright Enterprises v. Raimondo[23], and *Relentless, Inc. v. Department of Commerce*[24], overruled the need for *Chevron* deference and held that courts "need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous," and restored to Article III courts the obligation to exercise independent judgment.[25] *Kisor v. Wilkie*[26], cabined any deference to an agency's reading of its own regulations, requiring genuine ambiguity, a reasonable reading, and, critically, that the interpretation "implicate its substantive expertise" and reflects a "fair and considered judgment."[27]

While *Loper Bright* and *Kisor* concern statutes and regulations, Petitioner submits the reasoning from those cases are germane here and should extend to federal procurement decisions. Deference to agency interpretation has historically rested on three rationales: that agencies possess expertise courts lack[28], that Congress implicitly delegated authority to them[29], and that "the value of uniformity in its administrative and judicial understandings of what a national law requires."[30] Each is absent from this case.

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[23] 603 U.S. 369 (2024).
[24] *Id.*
[25] *Id.* at 412.
[26] 588 U.S. 558 (2019).
[27] *Id*. at 573-79.
[28] *Chevron,* 467 U.S. at 865 (1984).
[29] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).
[30] *United States v. Mead Corp*., 533 U.S. 218, 234 (2001).

With respect to expertise, the interpretation of a solicitation is, after all, a legal[31], not a technical question and involves principles of contract interpretation, not agency expertise. The terms of the Solicitation at issue here were unambiguous, to which Petitioner complied with, and the USACE had no reasoning to support their position otherwise, as further detailed in Sections "B" and "C". Delegation is not at issue here, while CICA and the FAR grant agencies authority to conduct procurements, that is conditioned upon agencies evaluating proposals "solely on the factors and subfactors specified in the solicitation." Congress did not delegate agencies the authority to insert *ad hoc* criterion not published in its solicitations and not communicated clearly to offerors, as set forth in Section "C" below. As discussed further in Section "D" below, federal procurement remains as an anomaly in the wake of this Court's recent administrative law decisions, and why granting Certiorari is proper.

"To adapt the law to changing circumstances, the founders thought, the collective wisdom of the people's representatives is needed. To faithfully execute the laws often demands the sort of vigor hard to find in management-by-committee. And to resolve cases and controversies over past events calls for neutral decisionmakers who will apply the law as it is, not as they wish it to be." The appellate court here failed to even analyze and review the requirements of the Solicitation as written; and effectively deferred broadly to

[31] *See NVT Technologies*, 370 F.3d at 1162.

agency discretion under the cases cited above, thereby bypassing the question whether the agency's decision was consistent with the Solicitation's actual requirements.[32]

B. The decision below elevates agency authority over agency expertise and shields the result from meaningful judicial review.

Every rationale this Court has offered for deferring to an agency runs through expertise. *Skidmore* weight depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[33] *Kisor* requires that the agency's reading "implicate its substantive expertise."[34] *Loper Bright* preserved respect for agency views precisely to the extent they rest on "a body of experience and informed judgment."[35] But an agency's decision will be overturned when an agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

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[32] *Elec. Data Sys., LLC v. United States*, 93 Fed. Cl. 416, 430 (2010); *Banknote Corp. of Am., Inc. v. United States*, 56 Fed. Cl. 377, 380 (2003), *aff'd*, 365 F.3d 1345 (Fed. Cir. 2004).

[33] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[34] *Kisor,* 588 U.S. at 578.

[35] *Loper Bright,* 603 U.S. at 402.

agency expertise."[36] However, none of which occurred here.

This Court should look no further than to the USACE's conflicting review and response to the administrative and record-keeping procedures in Petitioner's proposal. To which, the SSEB, the body charged with the technical evaluation of proposals, and on reevaluation, recorded no issues with Petitioner's administrative and record-keeping procedures. To the contrary, the SSEB even remarked that "[f]orms and documents submitted under other requirements satisfy my confidence that [Anders] has organized administrative and record keeping procedures." Then the contracting officer, overruled that finding, and in a single sentence, merely stated that [Petitioner's] technical proposal should be more comprehensive for their 'outline of administrative and record-keeping procedures.'" No explanation of what was missing was provided and no standard against which comprehensiveness would be measured were provided. Despite this inter-agency conflict, and for no apparent reason, the appellate court did not challenge that reasoning. And instead stated that it "see[s] no justification for treating contracting officers, who have the responsibility to determine technical compliance, as lacking sufficient technical expertise to differ with

[36] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing the framework courts should employ when determining whether an agency's actions were "arbitrary and capricious" under the APA.)

the SSEB." But this reasoning conflates misplaced expertise into authority. It holds that whoever signs the finding is, by virtue of signing it, the expert. If that is correct, the rationale does not work at all, and deference is owed not to informed judgment but to a position in an organizational chart. This Court has never so held, and the whole thrust of *Loper Bright* and *Kisor* is that it must not.

Moreover, under that approach, an agency's technical "experts" may find a proposal compliant with the solicitation's requirements, yet a single agency official may override that determination without explanation, and a reviewing court may never ask why. That is not the reasoned review the APA or this Court's jurisprudence requires. Effectively insulating and shielding an agency's decision, such as the USACE's described above, from meaningful review, even when they depart from the agency's own technical findings without reasoned explanation. This now begs the question of when an agency's discretion begins and ends, as it seems limitless in this instance. More importantly, that does not comport with this Court's recent decisions in *Loper Bright* and *Kisor*. For these reasons, granting Certiorari is proper.

C. This Court should grant certiorari to make clear that agencies must evaluate proposals according to the requirements stated in the solicitation and may not rely on unstated criteria shielded from meaningful judicial review.

The threshold question is whether an agency may invite competition through a solicitation, require offerors to conform their proposals to its stated criteria, and then depart from those criteria when evaluating the proposals it receives. This Court should grant certiorari and make clear that federal procurement is no exception, and that agency discretion cannot supplant the requirements the agency itself has chosen to adopt.

Interpretation of a solicitation is a question of law and begins with "the language of the [solicitation]." [37] Courts must examine the "[solicitation] as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts[;]-"[38] which flows directly from an agency's obligation to evaluate proposals "*solely* on the factors and subfactors specified in the solicitation[,]"[39] to ensure that the agencies "[c]onduct business with integrity, fairness, and openness."[40]

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[37] *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *Banknote*, 365 F.3d at 1353 (citing *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993))

[38] *McAbee Constr., Inc. v. United State*s, 97 F.3d 1431, 1434–35 (Fed. Cir. 1996).

[39] FAR 15.305 (emphasis added).

[40] *Asia Pac. Airlines v. United States*, 68 Fed. Cl. 8, 27 (2005).

Practically, this makes sense. Drafting proposals responsive to a solicitation is a laborious and costly endeavor, and in doing so offerors have to rely upon the criteria published. Shielding an agency from the consequences of an imprecisely drafted solicitation forces every contractor to bid against requirements it cannot know, casts a chilling effect on all federal contractors.

The Solicitation required each offeror to submit an outline of its administrative and record-keeping procedures. Nowhere does the Solicitation state or even suggest that such procedures were required to be "comprehensive." Yet somehow the appellate court disagreed, stating: "[i]t is reasonable and consistent with the explicit requirement for an 'outline of administrative and record-keeping procedures' to require Anders to propose comprehensive procedures." To justify their position, the court rationalized that agencies, which "must" be able to exercise "dictionary determinations" without disclosing the need for a more "comprehensive" outline. So an agency may reject a proposal for failing to satisfy criteria the solicitation never disclosed, read that solicitation to require more than it states, and exercise near boundless discretion in imposing the very criteria it left unspoken. That is arbitrary and capricious in the most literal sense.

Rather than interpret the Solicitation's text itself, the appellate court relied on the USACE's unstated criteria that Petitioner title its lost diver plan, a "Lost Diver Plan" and that Petitioner had failed to carry the burden of establishing that the two were the same.

But nowhere in the Solicitation was it required that that section bear the title "Lost Diver Plan." Petitioner's "Severance of Complete Umbilical" plan addressed the same concerns (*i.e.,* what happens when a diver is "lost"), and Petitioner's proposal was hyperlinked by section so that any component could be located directly. The effect of the holding is to enforce a labeling requirement the Solicitation never imposed, which is precisely what evaluating proposals "solely on the factors and subfactors specified in the solicitation" prohibits. And the deference that produced that result, extended to an agency's reading of a document the agency itself drafted, is the deference *Kisor* confined and *Loper Bright*'s reasoning forecloses.

Compounding the problem, any ambiguity in a solicitation is construed against its drafter.[41] Had the USACE wanted a document bearing the label "Lost Diver Plan," it could have said so in the Solicitation. It did not, and an agency cannot fault a bidder for failing to anticipate a requirement that was never conveyed in the first place. Yet that is what the decision below permitted, by construing the Solicitation's ambiguity against Petitioner to the benefit of the USACE that drafted it.

The problem is not that the law has no remedy. The problem is that the decision below allows agencies to evade meaningful review by invoking discretion and allows courts to evade meaningful review by invoking deference.

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[41] *See NVT Technologies*, 370 F.3d at 1162.

D. This Court should grant certiorari because no other court can resolve the question presented or bring federal procurement law into line with this Court's recent decisions rejecting broad agency deference.

This case presents a unique posture in which the ordinary reasons for withholding review are unavailable. The Court of Federal Claims has exclusive jurisdiction over bid protests[42], and the Federal Circuit has exclusive appellate jurisdiction over its decisions.[43] There is one court of appeals for federal procurement, so there will never be a circuit split. There is no percolation to await, no conflicting authority to let mature, and no possibility that another circuit will bring this body of law into line with *Loper Bright*. If this Court does not take the question, *E.W. Bliss*, *Lockheed Missiles*[44], and their progeny will continue to govern indefinitely, unreviewed and unreconciled.

Federal agencies obligated approximately $755 billion dollars in 2024 to federal contracts through the procurement system CICA governs.[45] Every potential bidder who prepares a proposal does so in reliance on the purported guarantee that it will be evaluated on the disclosed criteria and nothing else. A rule

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[42] 28 U.S.C. § 1491(b)(1).

[43] 28 U.S.C. § 1295(a)(3).

[44] *See E.W. Bliss*, 77 F.3d at 449; *see also Lockheed Missile*s, 4 F.3d at 958–59 ("Effective contracting demands broad discretion.").

[45] (https://www.gao.gov/federal-contracting) (last accessed August 5, 2026).

permitting an unexplained reversal by a single contracting officer insulated from review under the broad guise of "agency deference" that is untethered from expertise, does not only cost this Petitioner a contract; but also devalues the requirement for every offeror in every procurement.

Finally, this case is an ideal vehicle for review. The question is purely legal and was resolved conclusively by the appellate court. The administrative record is complete and was fully developed below. The trial court, having examined that same record, reached the opposite conclusion to the appellate court, so the disagreement is squarely joined. And the appellate court itself doubted that the issues it remanded could yield relief for Anders, confirming that its holding on deference is the decision in this case.

CONCLUSION

For the foregoing reasons, this Court should grant Certiorari and create case law that falls in line with this Court's recent jurisprudence and dispels the notion of broad agency discretion.

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