No. 17-

IN THE

Supreme Court of the United States

GARCO CONSTRUCTION, INC.,

Petitioner,

v.

SECRETARY OF THE ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled.

PARTIES TO THE PROCEEDING

Petitioner Garco Construction, Inc., was appellant before the Armed Services Board of Contract Appeals and appellant before the Federal Circuit. Respondent Secretary of the Army was appellee before the Armed Services Board of Contract Appeals and appellee before the Federal Circuit.

CORPORATE DISCLOSURE STATEMENT

Garco Construction, Inc. is incorporated in the State of Washington. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

There are powerful reasons why several Justices have invited a certiorari petition asking the Court to reconsider *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997). *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211-13 (Scalia, J., concurring in the judgment); *id.* at 1213-25 (Thomas, J., concurring in the judgment); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616-26 (2013) (Scalia, J., concurring in part and dissenting in part); *Talk Am., Inc. v. Mich. Bell Tele. Co*, 564 U.S. 50, 67-69 (2011) (Scalia, J., concurring). It is an important question "going to the heart of administrative law." *Decker*, 568 U.S. at 616 (Roberts, C.J., concurring).

This petition squarely presents the question. This case turns on whether denying access to Malmstrom Air Force Base to government contractor employees with criminal records adhered to the applicable Air Force regulation or instead represented a change in policy. The Federal Circuit upheld the government's reading under *Auer*.

Seminole Rock/Auer deference should be revisited. This misguided canon of interpretation allows self-interested agencies to dictate the meaning of their own ambiguous regulations, deprives those who must labor under them of fair warning, raises serious constitutional questions, and encourages agencies to abuse the Administrative Procedure Act's exceptions to notice-and-comment rulemaking. The Court should grant this petition.

OPINIONS BELOW

The Federal Circuit's opinion is reported at 856 F.3d 938 and is reproduced in the Appendix ("App.") at 1a-32a. The decisions by the Armed Services Board of Contract Appeals are reported at 2014 WL 493902, 2015 WL 6437563, and 2016 WL 899835 and are reproduced at App. 33a-99a.

JURISDICTION

The Federal Circuit issued its opinion on May 9, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at App. 100a-108a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The United States pervasively regulates who may enter its military bases. *See Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 890 (1961). To that end, Congress passed the Internal Security Act of 1950 ("Act"). *See* 50 U.S.C. § 797 *et seq.* As relevant here, the Act confers on the Secretary of Defense or "a military commander designated by the Secretary of Defense" the authority to issue "defense property security regulations … for the protection or security of Department of Defense property." *Id.* § 797(a)(2)(A). Among other things, the Act

authorizes the Secretary to issue regulations covering "the ingress … or egress or removal of persons" from military property. *Id.* § 797(a)(3)(A); *see* App. 100a-101a.

In compliance with the Act, the Department of Defense has issued regulations for "controlling entry" to Air Force bases. 32 C.F.R. § 809a.0. These regulations delegate to the "installation commander" the authority to "implement random checks of vehicles or pedestrians," *id.* § 809a.1, "grant or deny access to their installations," *id.* § 809a.2, detain persons "who reenter an installation after having been properly ordered not to do so," *id.* § 809a.3, regulate and control demonstrations, *id.* § 809a.4, and "deny access to the installation through the use of a barment order," *id.* § 809a.5.

The regulations further instruct commanders with regard to issuing rules that control access to military bases. "In excluding or removing persons from the installation, the installation commander must not act in an arbitrary or capricious manner." *Id.* § 809a.2(b). The decision to remove or exclude persons also "must be reasonable in relation to" the commander's "responsibility to protect and to preserve order on the installation and to safeguard persons and property thereon." *Id.* "As far as practicable," moreover, installation commanders "should prescribe by regulation the rules and conditions governing access to their installation." *Id.*; *see* App. 103a.

B. Entry to Malmstrom Air Force Base

Malmstrom Air Force Base is located in Great Falls, Montana. Malmstrom's commander has issued defense property security regulations in accordance with the Act.

App. 104a-106a. These regulations set forth Malmstrom's base access policies, including the rules applicable to government contractors and their employees. *Id*. The contractors must obtain Air Force approval before their employees may enter the base. To do so, the contractors "must submit a Contracting Entry Authority List (EAL) to the contracting office." App. 105a "A contracting officer approves the list and hand carries it to the visitors control center (VCC) for review." *Id.*

"The VCC staff" then "will forward the Contracting EAL to the 911 dispatch center." *Id.* As of July 2005, *i.e.*, before this dispute arose, the final step in the process was as follows:

> A 911 dispatcher certified on the National Criminal Information Center system (NCIC) will run the contractor names through the NCIC *for wants and warrants* .... Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the [security forces squadron commander].

Id. (emphasis added).[1]

If approved for entry, the employees then must go to the visitor control center on their first visit to the base. App. 105a-106a. There, they receive a pass that gives them limited base access. *Id*. The "passes are for granting access to the installation for the sole purpose of employment." App. 106a.

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1. This portion of the base access regulation is repeated nearly verbatim in a pamphlet the base issued during the same time period. *See* App. 107a-108a.

C. The Contract Dispute

In early 2006, the United States Army Corps of Engineers solicited bids for a contract to build housing units on Malmstrom Air Force Base. App. 44a. Garco Construction was awarded the contract. *Id.* The contract allowed Garco, in compliance with Federal Acquisition Regulations ("FAR"), to employ individuals who may have criminal records. App. 45a (citing 48 C.F.R. § 52.222-3). The contract further required Garco and its subcontractors to comply with base regulations and security directives. App. 46a-47a.

After winning the contract, Garco hired James Talcott Construction as a subcontractor to perform concrete, framing, and roofing work. App. 48a. Talcott had worked extensively on the base for over 20 years. App. 48a-49a. In May 2007, for example, Talcott had seven active projects on the base, which accounted for about a third of the active construction jobs at that time. App. 55a. Staffing those projects could often prove challenging because the labor pool in the Great Falls area is quite small. App. 58a, 62a, 64a. Like other contractors in the area, Talcott would sometimes hire qualified individuals who happened to have criminal records. App. 49a, 64a, 66a. Some of those qualified individuals were from the Great Falls Pre-Release Center, a facility that helps those being released from prison to transition back into society. *Id.*

Malmstrom personnel, for their part, authorized entry to the base for those Talcott employees with criminal records—both before and after July 2005—in order to work on other projects. App. 48a, 49a, 66a. This included individuals from the Great Falls Pre-Release Center.

Id. Talcott thus bid for the Garco subcontract on the understanding that it would have that same labor pool available to it for this project. App. 49a.

Talcott began work on the contract in Fall 2006. App. 48a-49a. In September 2006, Talcott submitted its first Entry Authority List. App. 48a. That list included two employees who were residents of the Great Falls Pre-Release Center. *Id*. Base personnel allowed both of them to enter Malmstrom and work on the project. *Id*.

Things abruptly changed a few months later. As before, Talcott submitted Entry Authority Lists for new employees who needed base access to work on the Garco project. App. 50a-51a. But base personnel did not issue passes to several Talcott employees. *Id*. Although base personnel initially refused to explain those decisions, Talcott eventually learned that the base was running full background checks—not "wants and warrants" checks—and then denying access to all Talcott employees with criminal records. App. 53a-55a.

This led to numerous exchanges between Talcott and base personnel. In a letter, Talcott explained that the "unemployment rate in Montana is at a historical low," that the contract incorporated a FAR provision allowing contractors to use employees with criminal records, and that Talcott needed these "qualified employees" to complete the project. App. 53a. A base official responded that Malmstrom's "contracting, legal and security experts are meeting early next week to discuss the issue" with the stated "goal" of providing "recommendations with regard to the various needs and requirements." *Id*.

The base needed the time to get its story straight. At one point, a contracting officer informed Talcott that "individuals who have been convicted as violent offenders or any sexual crime in nature will be denied entry to the installation." App. 54a. Yet, according to an internal document, the base planned to take the position that the "current policy" was to prohibit "sex offenders, violent offenders *or anyone currently in the penal system (parole, probation, or pre-release).*" App. 55a-56a (emphasis added). Another document described the policy as allowing entry to "*no one* with a prior felony conviction." App. 55a. (emphasis added). In the end, the Talcott employees being denied access were not violent or sex offenders. App. 54a-55a. They had been convicted of far less serious, non-violent offenses. *Id.*

Eventually, a Malmstrom representative notified Talcott that a "new policy is being worked on" and the "Wing Commander has been briefed on the issue." App. 58a. "Until the new policy is finalized," Talcott was told, "the Base has no further news to offer regarding this issue." *Id.* On October 22, 2007, Major General Sandra Finan—the Malmstrom base commander—changed the regulations for contractor access. App. 59a-61a.[2] Under the new rules, the 911 dispatch center would run a full background check—not just a check for "wants and warrants":

> The 911 Dispatch Center will input all listed employees' names and data into the National Criminal Information Center (NCIC) database

2. Major General Finan was a Colonel during this timeframe but has since been promoted. App. 4a n.1.

> for a background check in accordance with Air Force directives.
>
> Unfavorable results from the background check will result in individuals being denied access to the installation … [if they] fall into one or more of the following categories: those having outstanding *wants or warrants*, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program.

App. 60a (emphasis added). Major General Finan described the new rule as "a large change" from the policy in place when Garco was awarded the contract. App. 110a.

On Talcott's behalf, Garco sought an equitable adjustment for the increased costs that had been incurred. App. 62a. Talcott had relied on its ability to employ "individuals convicted of an offense for this contract," and had therefore based its "cost estimates … on [its] ability to use these same individuals or pool of individuals." *Id.* Malmstrom's non-compliance with the base-access regulation (before it was changed) had been especially hard on Talcott given the "nationwide shortage of experienced construction workers" and "that the problem is even more acute in Montana with our very low unemployment rate." *Id.* Garco sought $454,266.44 in additional costs that Talcott had incurred in locating, hiring, and training replacement personnel to the base before the change in policy. App. 62a, 64a-65a, 89a.

Garco's request was denied. The government took the position that: "the security restrictions for certain types of convict labor were in effect before the August 2006 award

of the ... contract"; "[t]he October 2007 policy was a reissue of the same restrictions"; and "there was no information that indicates the base access policy has changed" since then. App. 63a. In May 2011, after completing the project, Garco submitted a final equitable-adjustment claim on Talcott's behalf. App. 64a-65a. Later that same year, the government issued its final decision denying Garco's claim. App. 67a.

D. The Administrative Appeal

Garco appealed Talcott's "pass through" claim to the Armed Services Board of Contract Appeals. The government sought summary judgment on the ground that both the original and revised base-access regulations were "sovereign acts." App. 81a. Garco acknowledged that the base commander had the statutory authority to issue those regulations. App. 89a. The dispute was over whether Malmstrom had complied with the original base-access regulation, *i.e.*, the "wants and warrants" rule, when it ran full background checks and then denied access to all Talcott employees with criminal records. App. 89a-98a.

The Board "divided" the dispute "into two distinct timeframes: before and after [Major General] Finan issued the October 2007 memorandum." App. 94a. "It was not until October 2007," the Board explained, "that the policy of denying base access to pre-release convicts was put in writing." App. 95a. Because that was definitively the base policy once the October 2007 memorandum was issued, the government had sovereign immunity as a matter of law from that point forward. App. 96a-97a.

But the government's entitlement to sovereign immunity was "less clear" before October 2007 given its "inconsistent explanations" as to the meaning of a "wants and warrants" check under the original base-access regulation. App. 98a. Because the record was "not sufficiently developed to allow the Board to grant the motion for the period between contract award in August 2006 and [the] issuance of the October 2007 memorandum," the case proceeded to an evidentiary hearing. *Id.*

After a four-day hearing, the Board determined that the original base-access regulation also was a "sovereign act." App. 39a-80a. The Board recognized that the government was not immune if it "failed to follow" the original regulation, and that Garco was making a "regulatory interpretation argument." App. 73a. Garco argued that "nothing in the Base's access regulations or orders prior to October 2007 stated that persons with felony convictions would be denied access or precluded personnel with felony convictions on the base." *Id.* To the contrary, the plain meaning of "a check for 'wants and warrants' is not a general background check." *Id.*

The Board disagreed, holding that the "wants and warrants" regulation had authorized base personnel to run full background checks and to deny base entry to all Talcott employees with criminal records. App. 73a-75a. The Board relied on witness testimony to resolve the issue. Base personnel testified as to their subjective understanding of what the "wants and warrants" check allowed. One official, Michael Ward, testified that he considered the "NCIC wants and warrants check" to be a term of art "that is used to get the information that was conducted in the background check." App. 113a. At

least to Mr. Ward, a "wants and warrants check" and a "background check[]" are "synonymous." App. 112a. He also testified that anyone with "a want or a warrant … wouldn't even gain access because they would be detained and turned over to the proper authorities until that warrant could be cleared." App. 113a. As a consequence, there would be no reason for base personnel to "scrutinize" the check's results and determine eligibility for entry on a "case-by-case basis." *Id.*

Major General Finan similarly testified that a "wants and warrants check" meant "more than just wants and warrants." App. 111a. To her, it meant a "background check" that would "turn[] up convictions, arrests, you know, drug use, sex abuse, domestic abuse, anything like that," and that base personnel would then review the information "case-by-case" to deny entry to anyone with "unfavorable results." App. 109a.

In the end, the Board recognized that the original regulation's "language only refers to running a NCIC check for 'wants and warrants'" and "a literal reading of the language might support [Garco's] argument." App. 74a. The Board rejected that reading, however, based on the fact that "[u]nfavorable results [would] be scrutinized and eligibility [would] be determined on a case-by-case basis." *Id.* Seizing on Mr. Ward's testimony, the Board held that Garco's interpretation "breaks down." *Id.* Even though the "wants and warrants" check was a predicate to getting a pass to enter the base—and only employees with an approved pass would even try to enter the base—the Board believed that "anyone with a 'want or warrant' would be immediately detained upon showing up." *Id.* Relying on this belief, the Board explained that "[a]ny such individual

with 'unfavorable results' would never be 'scrutinized' and access eligibility would not be 'determined on a case-by-case basis.'" *Id*. The Board therefore held that "the NCIC check for 'wants and warrants' is a background check and an individual's criminal record uncovered by the background check could be scrutinized to decide if access to [the base] will be granted.'" App. 74a-75a.

Garco sought reconsideration of the Board's decision, which was denied on January 27, 2016. App. 33a-37a. Garco timely appealed to the Federal Circuit.

E. The Federal Circuit's Decision

The Federal Circuit affirmed. App. 1a-32a. The court agreed with the Board that the government's entitlement to sovereign immunity turns on whether its actions amount to "a change in the base access policy." App. 2a, 7a-13a. The enforcement of an existing base policy is a sovereign act; but there is no immunity if the regulation "did not authorize the exclusion of workers with criminal records." App. 6a-7a.

Because the case required the court to "interpret the base access policy, an agency regulation," *Seminole Rock* and *Auer* provided the rule of decision. App. 8a. The court explained, in turn, that "[t]he agency's construction of its own regulations is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* (citing *Auer*, 519 U.S. at 461). Garco argued that the regulation's "language is plain on its face and means that only a search for outstanding wants or warrants was to be performed." *Id*. And, "no deference is due when the agency's interpretation contradicts the plain and sensible meaning of the regulation." *Id*.

The Federal Circuit disagreed with Garco that the regulation's "plain text ... unambiguously resolves the dispute." App. 9a. Like the Board, the court acknowledged that there was "merit to Garco's argument that the plain meaning of 'wants and warrants check' in isolation suggests a check only for wants or warrants." *Id.* Yet it concluded that "the surrounding language," *i.e.*, that "[u]favorable results will be scrutinized and eligibility [to enter] will be determined on a case-by-case basis," "casts doubt on that interpretation." *Id.* Because the court believed that this "sentence cut[] against Garco's plain meaning interpretation," it needed to "consider the Air Force's interpretation" through the lens of *Auer*. App. 10a.

The court held that the government's reading was not plainly erroneous. In reaching that conclusion, the court pointed to the testimony adduced at the evidentiary hearing, including the testimony of Mr. Ward and Major General Finan. App. 10a-13a. The court then weighed the competing views of that controverted testimony in the light most favorable to the government. 12a-13a. In sum, the court afforded the government's interpretation "controlling weight" because it was "not plainly erroneous" to interpret the "wants and warrants" regulation to encompass a full background check. App. 13a.[3]

3. Judge Wallach dissented. App. 17a-32a. He would have vacated the Board's ruling without reaching the *Seminole Rock*/*Auer* question because, in his view, the government may not be entitled to sovereign immunity *even if* its interpretation of the regulation is controlling. *Id.* Judge Wallach would have remanded the case to the Board for a fresh evaluation of the immunity question under what he believed to be the correct legal standard. App. 25a-28a.

REASONS FOR GRANTING THE PETITION

Review is warranted because the Federal Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c). First, whether *Seminole Rock* and *Auer* should be overruled is an important federal question. Second, those decisions are incorrect and should not be upheld for *stare decisis* reasons. Third, this is the ideal case to decide the question.

I. Whether *Seminole Rock* and *Auer* should be overruled is an important question of federal law.

Several Justices have recognized the importance of the question presented. *See supra* at 1. For good reason. Whether the Court should abandon *Seminole Rock/Auer* deference raises "serious questions" that warrant the Court's review. *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring).

There are more than "430 departments, agencies, and sub-agencies in the federal government."[4] Thus, agencies have accumulated "vast power" that they now wield in ways that touch "almost every aspect of daily life." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington, Tex. v. FCC*, 133

4. *Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 1 (2015).

S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (citation omitted).

The Administrative Procedure Act ("APA") was tasked with keeping this "headless fourth branch of government" from taking over. *Freytag v. CIR*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in part and concurring in the judgment). It was seen as a "'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)). The APA's notice-and-comment provisions thus were considered "essential ... to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." S. Doc. No. 77-8, Administrative Procedures in Government Agencies, at 102 (1941). The purpose behind the APA is simple and fundamental: "Citizens should be able to know what conduct is permitted or prohibited by an agency rule." 3 Richard J. Pierce, Jr., Administrative Law Treatise § 6.8 (5th ed. 2010).

The problem is that the APA exempts interpretive rules from notice-and-comment rulemaking. 5 U.S.C. § 553(b)(3)(A). The exemption "was meant to be more modest in its effects than it is today." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment). This immodesty is traceable to *Seminole Rock/Auer* deference. Interpretative rules were supposed to "*advise* the public by explaining [an agency's] interpretation of the law." *Id.* Over time, however, agencies learned that they could "use

these rules not just to advise the public, but also to bind them." *Id*. at 1212.

Seminole Rock/Auer deference thus creates an obvious incentive for agencies to "write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id*. In promoting this kind of gamesmanship, the doctrine breaks the vow that the politicians and judges who allowed the administrative state to accumulate this vast power made: namely, that the regulated would always be able "to anticipate the rule and plan accordingly." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 542 (2003). Today, that promise is honored in the breach.

Indeed, this is not an abstract concern. Agencies know just what to do. *See Perez*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). They routinely exploit *Seminole Rock/Auer* deference by using "interpretive" rules to rewrite legislative rules, and then issue that guidance in the most informal ways imaginable. *See, e.g.*, *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 398 (2008) (*amicus* brief and "various internal directives"); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 722-23 (4th Cir. 2016) ("dear colleague" letter), *vacated*, 132 S. Ct. 1239 (2017); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 878 (8th Cir. 2011) (handbook); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 214 (4th Cir. 2009) (letter after litigation began); *Belt v. EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) (*amicus* brief, opinion letter, and handbook).

The Court must draw a line somewhere, and this is the place to draw it. Whether or not it is possible to judicially address every problem the administrative state has created, *Seminole Rock/Auer* deference is "a matter that can be addressed by this Court." *Perez*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment). The Court should decide this important federal question.

II. The Court should overrule *Seminole Rock* and *Auer*.

The Court should abandon *Seminole Rock/Auer* deference for two reasons. First, those decisions are incorrect. Second, *stare decisis* is not a justification for retaining them.

A. *Seminole Rock* and *Auer* were wrongly decided.

The Court has held that an agency's reading of an ambiguous regulation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414; *see also Auer*, 519 U.S. at 461. *Seminole Rock* and *Auer* were incorrectly decided.

Foremost, no constitutional principle or federal statute commands *Seminole Rock/Auer* deference.[5] This rule of

5. In contrast, *Chevron* deference has been justified on constitutional and statutory grounds—*i.e.*, that deference to an agency's interpretation of the federal law it administers follows from Congress' delegation of its lawmaking power to fill statutory gaps. *City of Arlington*, 133 S. Ct. at 1880; *Decker*, 133 S. Ct. at 1340-41 (Scalia, J., concurring in part and dissenting in part). For this and other reasons, *Chevron* raises questions distinct from

deference is based on the pragmatic conclusion that the agency—and not the Court—is in the best position to interpret an ambiguous regulation because that process "require[s] significant expertise and entail[s] the exercise of judgment grounded in policy concerns." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991); *see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). The agency, in other words, has "comparative expertise" in making the "policy judgment" as to the regulation's intended meaning. *Belt*, 444 F.3d at 417.

Therefore, while *Seminole Rock/Auer* deference occasionally has been described in grander terms, it is merely a tool of construction. *See Decker*, 133 S. Ct. at 1340-41 (Scalia, J., concurring in part and dissenting in part). As with any tool of construction, the Court must decide whether *Seminole Rock/Auer* deference continues to be a worthwhile interpretative guide. Time and experience confirm that, for several reasons, this was an ill-conceived interpretative canon that should be discarded.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Yet *Seminole Rock/Auer* deference denies "'fair warning of the conduct a regulation prohibits or requires.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S.

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whether an agency's interpretation of an ambiguous regulation warrants judicial deference. *See Talk Am., Inc.* 564 U.S. at 68-69 (Scalia, J., concurring).

142, 156 (2012) (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)). If the regulation clearly embraced the disputed issue, after all, "there would be nothing for *Auer* to do." *Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part). Given that the agency may always revise the regulation and impose that new rule prospectively, the function of *Seminole Rock/Auer* deference is to authorize the agency to punish regulated entities and individuals for misunderstanding an ambiguous rule; the agency "retain[s] a 'flexibility' that will enable 'clarification' with retroactive effect." *Id.* at 1341. A canon that gives controlling weight to an agency interpretation that "would not be obvious" even to "'the most astute reader,'" *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted), cannot be defended.

Lack of notice is not the only fairness concern that *Seminole Rock/Auer* deference raises. A policy that allows "the person who promulgates a law to interpret it as well" is problematic. *Talk Am., Inc.*, 564 U.S. at 68 (Scalia, J., concurring). It is a basic tenet of Anglo-American law "that no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). The agency has a clear self-interest in wielding its ambiguous regulation to impose its policy agenda retroactively—there would never be an Article III case unless the agency had surrendered to that temptation. By transferring to the agency the authority to dictate the meaning of its own ambiguous regulation, *Seminole Rock/Auer* deference effectively authorizes "the same person [to serve] as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

That concern is acute here. The government was a party to the contract at issue. Garco argues that the government violated it by restricting the labor pool in ways that contradicted the plain meaning of the regulation that was in place when the agreement was formed. In any other setting, a neutral arbiter would decide who had the better reading of the regulation. Yet unless its interpretation is simply implausible, the government gets to decide if it owes Garco money for violating the contract. That is the very definition of self-interest.

Seminole Rock/Auer deference is not just flawed doctrinally; it creates incentives that undermine the rule of law. As explained above, *see supra* at 15-16, by allowing agencies to profit from their own ambiguity, it encourages them to issue vague and capacious rules, *see Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J., concurring), and then to rewrite those rules "without observance of notice and comment procedures," *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part). Allowing agencies to issue "vague and open-ended regulations that they can later interpret as they see fit"—as *Seminole Rock/Auer* deference does—thus "'frustrat[es] the notice and predictability purposes of rulemaking.'" *Christopher*, 132 S. Ct. at 2168 (citation omitted). That kind of warped process ultimately "promotes arbitrary government." *Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J., concurring); *see also Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment).

Given these problems, there would need to be weighty interests underlying this canon to sustain it. But the two interests upon which *Seminole Rock/Auer* deference has been built are weak. Justifying deference based on

the agency's expertise misapprehends the interpretive enterprise. "The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means." *Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment). Although agencies may be expert in fashioning policy, they are not expert interpreters of legal text unless "what we are looking for is the agency's intent in adopting the rule." *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part). We are not; "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). The same goes for our regulators.

This dispute showcases how perilous the search for subjective intent can be. It led the Federal Circuit to credit testimony from the base officials charged with enforcing the regulation as to their subjective understanding of the overall policy outcome it was intended to achieve. App. 11a-13a. Testimony, in fact, that the government proffered seven years after the legal dispute over the regulation's meaning began. App. 109a-113a. Remarkably, the Federal Circuit did this after recognizing, quite correctly, that application of *Seminole Rock/Auer* deference "is a legal issue" it must review "de novo." App. 8a. This is not the first time *Seminole Rock/Auer* deference has hinged on a quasi-factual inquiry into the regulator's subjective intent. *See*, *e.g.*, *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1223 (11th Cir. 2015) (relying on "USDA's explanations" as to the rule's "intended meaning"). Nor will it be the last. There is a chasm between this kind of bizarre process and any legitimate method for interpreting legal text.

The efficiency of *Seminole Rock/Auer* deference is likewise an insufficient justification for retaining it. Allowing agencies to issue vague rules and then to refine them as they go is *in*efficient. This and myriad other cases show that it inevitably spawns litigation over the legality of the "interpretative" guidance as to both process and substance. It would be wiser to discourage the agencies from taking these short cuts around notice and comment. When agencies use the latitude *Seminole Rock/Auer* deference affords them to rewrite regulations without public input, they often will overlook legal vulnerabilities, use a sledgehammer when a scalpel would do, and fail to adequately consider the real-world consequences of their actions.

Regardless, it is no surprise that a doctrine concentrating the authority to legislate, execute, and adjudicate in one agency is efficient *for that agency*. "'Convenience and efficiency,'" however, "'are not the primary objectives—or the hallmarks—of democratic government.'" *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting *INS v. Chada*, 462 U.S. 919, 944 (1983)). This kind of efficiency is not a reason to celebrate *Seminole Rock/Auer* deference. It is yet one more reason for the Court to condemn it.

But even if this were a close call, constitutional avoidance counsels in favor of abandoning *Seminole Rock/Auer* deference. Were the Court to hold that pragmatic considerations weigh in favor of retaining this interpretive canon, it would then need to decide if *Seminole Rock/Auer* deference nonetheless violates the APA or the Constitution.

There is every reason to believe it violates both. "The [APA] contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment). Worse still, because *Seminole Rock/Auer* deference "effects a transfer of the judicial power to an executive agency, it ... undermines [the Court's] obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent." *Id.* at 1213 (Thomas, J., concurring in the judgment). In sum, the "opinions of Justice Scalia and Justice Thomas" in *Perez* offered "substantial reasons why the *Seminole Rock* doctrine may be incorrect." *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).

The Court rejects "agency interpretations to which [it] would otherwise defer where they raise serious constitutional questions." *Miller v. Johnson*, 515 U.S. 900, 923 (1995). That is this situation here. Adhering to this dubious canon of deference would force the Court to confront serious constitutional questions that it could otherwise avoid. As a result, any pragmatic considerations that champions of *Seminole Rock/Auer* deference might raise in the doctrine's defense cannot save it. These cases should be overruled.

B. *Stare decisis* does not weigh against reconsidering these cases.

To start, it is unclear whether *stare decisis* even applies to decisions like *Seminole Rock* and *Auer*. *See, e.g.*, *Perez*, 135 S. Ct. at 1214 n.1 (Thomas, J., concurring). An interpretative tool is not a binding construction

of a statute or the Constitution. It is a methodological principle that the Court believed, at least at one point, had interpretative value. A later conclusion that the Court's trust in that principle was misplaced does not implicate the fundamental concerns from which the doctrine of *stare decisis* emerged. The construction of the regulations that the Court interpreted in *Seminole Rock* and *Auer* is controlling precedent. The ill-conceived methodological principle that the Court employed to reach those judgments is not.

The Court's decision in *Pearson v. Callahan*, 555 U.S. 223 (2009), illustrates the point. In *Pearson*, the Court overruled the two-step procedure for evaluating qualified-immunity claims set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). The Court explained that some of the *stare decisis* factors, "which are appropriate when a constitutional or statutory precedent is challenged, [were] out of place in [that] context." *Pearson*, 555 U.S. at 234. Abandoning the qualified-immunity rule with which the Court had become dissatisfied "would not upset expectations" because the "two-step protocol [did] not affect the way in which parties order their affairs," it was "a judge-made rule," "experience [had] pointed up the precedent's shortcomings," and the issue "implicate[d] an important matter involving internal Judicial Branch operations." *Id.* at 233-34. So too here.

In any event, there are additional reasons why *stare decisis* is not a compelling basis for retaining *Seminole Rock* and *Auer*. As an initial matter, neither case was "well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). *Seminole Rock* "offered no justification whatever" and, as explained, "later cases provide two principal

explanations, neither of which has much to be said for it." *Decker*, 568 U.S. at 617-18 (Scalia, J., concurring in part and dissenting in part); *see also Perez*, 135 S. Ct. at 1222-24 (Thomas, J., concurring in the judgment).

Moreover, "intervening decisions 'have removed or weakened the conceptual underpinnings'" of *Seminole Rock*. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 104 (1993) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)). *Seminole Rock* is the product of an era when the object of statutory interpretation was to discern the "intention of [the law's] makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892); *see, e.g.*, *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is ... to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention."). But discerning the legislature's subjective intent (or here, the agency's) is no longer a cornerstone of interpretation. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 472-73 (1989) (Kennedy, J., concurring); *see supra* at 20-21. *Seminole Rock* thus is "no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

Finally, overturning these decisions would not "implicate the usual concerns with upsetting reliance interests protected by *stare decisis* principles." *Martinez v. Ryan*, 566 U.S. 1, 15 (2012). Regulated entities do not rely on *Seminole Rock/Auer* deference to order their affairs. In truth, the doctrine often thwarts them from doing so. To the extent that *agencies* claim a reliance interest, the need for the Court's intervention is all the more urgent. The prospect of agencies strategically

relying on *Seminole Rock/Auer* deference to game the APA and, in turn, retroactively punish regulated entities is troubling. Reliance is not a factor here.

III. This is an ideal case for reconsidering *Seminole Rock/Auer* deference.

This is the right case to decide the *Seminole Rock/Auer* question. First, the question is squarely presented. The Board and the Federal Circuit agreed that the case turned on the proper interpretation of the regulation. The Federal Circuit resolved that issue by deferring to the government under *Auer*. The Federal Circuit had every opportunity to hold, in the alternative, that the government would prevail even in the absence of *Auer* deference. It declined to do so.

Second, Garco has "properly raised" the issue in its petition, and the issue will be comprehensively argued if review is granted. *Decker*, 568 U.S. at 616 (Roberts, C.J., concurring). Indeed, Garco confines its request to *only* this question. As a result, the Court will confront no obstacle to deciding this recurring issue if it grants review of this case.

Third, and last, this case is emblematic of where *Seminole Rock/Auer* deference is headed if the Court does not intervene. In *Seminole Rock*, the Court deferred to the agency in a dispute in which "the rule 'clearly' favored the Administrator's interpretation" anyway. *Perez*, 135 S. Ct. at 1214 (Thomas, J., concurring in the judgment). Yet the doctrine has taken "on a life of its own," to the point that—as this case highlights—*Seminole Rock/Auer* deference now occupies a place in the law that the Court could never have anticipated. *Id.*

Here, the Federal Circuit has upheld the government's reading of a regulation because it was "not plainly erroneous," based on the controverted testimony of regulators as to their subjective understanding of the rule's intent, and in a case in which the government has a financial stake in the outcome. Reconsideration of this runaway interpretive canon is overdue.

CONCLUSION

For all of these reasons, the Court should grant the petition for writ of certiorari and reverse the judgment of the Federal Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DATED MAY 9, 2017

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2016-1936

GARCO CONSTRUCTION, INC.,

Appellant,

v.

SECRETARY OF THE ARMY,

Appellee.

Appeal from the Armed Services Board of Contract Appeals in Nos. 57796, 57888, Administrative Judge Craig S. Clarke.

Decided: May 9, 2017

Before WALLACH, HUGHES, and STOLL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* STOLL.

Dissenting opinion filed by *Circuit Judge* WALLACH.

STOLL, *Circuit Judge*.

Appendix A

Garco Construction, Inc., appeals a decision of the Armed Services Board of Contract Appeals denying Garco's damages claim arising out of its contract with the U.S. Army Corps of Engineers to build housing units on Malmstrom Air Force Base. Garco argues that a change in the base access policy prevented its subcontractor from bringing many of its workers onto the base, requiring its subcontractor to hire and train more workers, and forcing it to incur additional costs. Garco also alleges a constructive acceleration of the contract. Because we conclude that there was no change to the base access policy, we reject Garco's arguments and affirm the Board's decision.

Background

Malmstrom Air Force Base in Great Falls, Montana, is the largest missile complex in the Western Hemisphere. The base houses the Minuteman III intercontinental ballistic missiles, which carry a nuclear payload. The U.S. Army Corps of Engineers put out for bid Contract No. W912DW-06-C-0019 to build housing units on the base, and on August 3, 2006, awarded the contract to Garco Construction, Inc. Garco subcontracted some of the work to James Talcott Construction ("JTC") in September 2006. JTC had performed considerable work on the base in the past.

The Corps of Engineers-Garco contract contained two provisions especially pertinent here: (1) it incorporated Federal Acquisition Regulation ("FAR") § 52.222-3, which provides that contractors are permitted to employ

ex-felons; and (2) it required contractors to at all times adhere to the base access policy. The base access policy, in place since at least 2005, indicated:

> A 911 Dispatcher will run the employees[']name[s] through the National Criminal Information Center [("NCIC")] system for a *wants and warrants check*. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFG/CC.

J.A. 51 (emphasis added).

After work on the contract began, JTC began experiencing difficulty bringing its crew onto the base. JTC bussed many of its workers to the base from a local prison's pre-release facility, and those workers in particular experienced difficulty accessing the base. Other JTC workers who were not from the pre-release facility but who had criminal records were also refused base entry. JTC's President testified that JTC had not encountered similar access denials in its performance of other Malmstrom contracts over the nearly twenty years it had worked on the base.

Malmstrom's Chief of Security Forces Plans and Programs at the time, Michael Ward, stated in a 2012 declaration that JTC had been "essentially by-pass[ing] security procedures" at the base. J.A. 279, ¶ 6. Mr. Ward explained that JTC had been gaining base access for its bussed-in, pre-release facility workers by having a retired

military member ride on the bus and vouch for everyone on it, which the base permitted at the time. Eventually, there was an incident on a Garco jobsite where a pre-release facility worker beat his manager with a wrench, and Mr. Ward later discovered that this worker had a violent criminal background.

In May 2007, JTC voiced concerns to Garco and the Air Force regarding the difficulty it experienced getting its workers onto the base, although it acknowledged that violent criminals and sex offenders should not be granted base access. Informal communications from the Air Force indicated that violent criminals and sex offenders would continue to be denied base access. After numerous exchanges between the parties, the Base Commander Major General Sandra Finan[1]—who was ultimately responsible for base access—issued a memorandum on October 22, 2007, indicating:

> The 911 Dispatch Center will input all listed employees' name[s] and data into the National Criminal Information Center (NCIC) database for a *background check* in accordance with Air Force directives. *Unfavorable results from the background check will result in individuals being denied access to the installation, including*, but not limited to, individuals that are determined to fall into one or more of the following categories: *those having outstanding*

1. Maj. Gen. Finan was the rank of Colonel at the time, but has since been elevated to Major General. This opinion refers to Maj. Gen. Finan by her elevated rank.

> *wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program*. The definition of sex offender and violent offender can be found at Montana Code Annotated § 46-23-502.

J.A. 151 (emphases added).

Two days after Maj. Gen. Finan issued her base access memorandum, JTC submitted a request for equitable adjustment ("REA") of the contract. JTC explained in the REA that its inability to use convict labor on the base greatly reduced the size of the experienced labor pool from which it could hire in the Great Falls, Montana, area. JTC claimed that, as a result, it incurred nearly half-a-million dollars ($454,266.44) of additional expenses from additional time interviewing and hiring new workers, paying overtime to new workers, and training new and less experienced workers. Notably, the REA only requested additional money; it did not request a time extension.

The Air Force denied the REA, and JTC, through Garco, requested reconsideration by the contracting officer. Eventually the claim reached the Armed Services Board of Contract Appeals. The Board first granted partial summary judgment, "holding that [Maj. Gen.] Finan's 22 October 2007 base access memorandum was a sovereign act and the Air Force was not liable for damages from that date forward." *Appeals of—Garco Constr., Inc.*, ASBCA No. 57796, 15-1 B.C.A. (CCH) ¶ 36,135 (Sept. 22, 2015). In a later decision, the Board held that the base

access policy in place at contract award in August 2006 was also a sovereign act, and moreover, was not changed by the October 2007 memorandum. The Board therefore rejected Garco's argument that prior to October 22, 2007, the Air Force could only deny access to workers who had outstanding "wants or warrants." Instead, the Board found that a "wants and warrants" check was synonymous with a background check and Maj. Gen. Finan's memorandum was simply a clarification of—not a change to—the base access policy, and therefore the Air Force was not liable for damages before the memorandum issued either. The Board also concluded that the Air Force's increased enforcement of the base access policy did not constitute a constructive acceleration of the contract, and that JTC could not recover under that theory.

Garco appeals the Board's decision, and we have jurisdiction under 28 U.S.C. § 1295(a)(10) and 41 U.S.C. § 7107(a)(1).

Discussion

On appeal, Garco raises two narrow issues, which we address in turn below: (1) that Maj. Gen. Finan's October 2007 memorandum changed the base access policy and the policy it allegedly supplanted did not authorize the exclusion of workers with criminal records; and (2) that the Air Force's sovereign act of denying base entry to JTC's workers constituted a compensable constructive acceleration of the contract. Notably, Garco concedes that if we determine Maj. Gen. Finan's October memorandum did not change the base access policy, then their arguments

fail. *See* Oral Arg. at 4:28-4:48, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2016-1936.mp3 . Garco does not challenge the Board's determination that the base access policy is a sovereign act.[2]

I.

Garco first asserts that the base access policy did not authorize the Air Force to prohibit workers with a criminal record from entering the base until Maj. Gen. Finan's October 2007 memorandum issued, and therefore JTC's request for equitable adjustment (or REA) should have been granted. As support, Garco turns

2. Because Garco does not challenge the Board's determination that the base access policy is a sovereign act, and in fact agrees that the Air Force had the right to limit base access, *see* Oral Arg. at 2:17-2:31, we do not address the doctrine generally. Moreover, we do not address the issues raised by the dissent because Garco "failed to argue that the government did not satisfy the 'impossibility' requirement of the sovereign acts defense, [and thus] it has waived that argument for purposes of appeal." *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1379 (Fed. Cir. 2008). We disagree with the dissent's contention that the sovereign acts doctrine is a jurisdictional defense that cannot be waived. Through the Contract Disputes Act, Congress waived the government's sovereign immunity in this case, establishing the court's jurisdiction. The sovereign acts doctrine, in contrast, has no effect on jurisdiction; it is, instead, an affirmative defense that serves only to prevent the United States from being "held *liable* for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S. Ct. 344, 69 L. Ed. 736, 61 Ct. Cl. 1025 (1925) (emphasis added). Like other affirmative defenses ruled on by the Board, an appellant waives its right to challenge the Board's ruling by failing to raise the issue on appeal.

to the language of the base access policy, particularly its reference to the NCIC "wants and warrants check" that the 911 dispatcher was to perform under the policy. Garco argues that this language is plain on its face and means that only a search for outstanding wants or warrants was to be performed. Garco argues that anything more, such as a search of a criminal record, falls outside the stated restrictions on access. Garco also directs us to a line from Maj. Gen. Finan's testimony where she stated that denying access from those with a violent background or in pre-release programs was a "large change" to the base access policy. Appellant Br. 37 (citing J.A. 299). As further support, Garco notes that Maj. Gen. Finan's October 2007 memorandum refers to a "background check," rather than a "wants and warrants check."

Addressing Garco's argument requires us to interpret the base access policy, an agency regulation. This is a legal issue which, under the Contract Disputes Act, 41 U.S.C. §§ 7101-09, we review de novo. *Gen. Dynamics Corp. v. Panetta*, 714 F.3d 1375, 1378 (Fed. Cir. 2013). However, "[t]he agency's construction of its own regulations is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009) (quoting *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1364 (Fed. Cir. 2005)); *see also Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). Garco does not challenge this proposition, but instead argues that no deference is due when the agency's interpretation contradicts the plain and sensible meaning of the regulation. *Roberto v. Dep't of the Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006).

We disagree with Garco that the plain text of the base access policy unambiguously resolves the dispute. As when we construe statutory language, we must consider the regulation as a whole and the term "wants and warrants check" in the context in which it was used. *See Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace & Agric. Implement Workers of Am.*, 523 U.S. 653, 657, 118 S. Ct. 1626, 140 L. Ed. 2d 863 (1998) ("[I]t is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." (internal quotation marks omitted)); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). While there may be some merit to Garco's argument that the plain meaning of "wants and warrants check" in isolation suggests a check only for wants or warrants, the surrounding language casts doubt on that interpretation.

For example, the sentence immediately following the disputed "wants and warrants check" language reads: "Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis." J.A. 51. This directive for a case-by-case analysis of unfavorable results suggests that the check is more searching than a simple check for outstanding wants or warrants. Indeed, the government introduced testimony that anyone with a want or warrant would be immediately detained and would

not be "scrutinized" with "eligibility . . . determined on a case-by-case basis." J.A. 25. Garco's explanation that this sentence could mean that the Air Force may grant base access to those with old, but still outstanding, warrants is not convincing. At bottom, we find that this sentence cuts against Garco's plain meaning interpretation such that we must consider the Air Force's interpretation. *Reizenstein*, 583 F.3d at 1336-37 (considering agency interpretation of its own regulation when "the text of the regulation does not unambiguously answer the question" presented).

The Air Force interprets the base access policy as providing for a criminal background check. The Air Force presented significant evidence to support this interpretation. JTC's own statements and actions during the relevant timeframe support the Air Force's interpretation. Meeting minutes from a project meeting held around the time JTC executed the subcontract with Garco indicate that worker "names will be sent to dispatch for background checks. . . . No one with outstanding warrants, felony convictions, or on probation will be allowed on base." J.A. 270-71. The minutes directed the recipients to "review these minutes and respond within ten days in writing should any discrepancies or omissions be noted." J.A. 270. Neither JTC nor Garco contacted the Air Force about how the minutes characterized the base access policy. Further, when JTC first experienced base access issues with its workers, it specifically requested that certain workers be granted base access but "recognize[d] that this would not apply to sexual offenders or violent offenders." J.A. 281.

Appendix A

In addition to JTC's own statements and actions, the government presented testimony from Michael Ward, Chief of Security Forces Plans and Programs for the base at the time the dispute arose. Mr. Ward provided consistent testimony that a "NCIC wants and warrants check" is a term of art denoting a specific type of background check in the NCIC system, explaining that "[b]ackground check is a very generic term. Wants and warrants is what is titled out of the NCIC check that provides the data that is being reviewed." J.A. 316, l. 17 - 317, l. 2. He further explained that the NCIC wants and warrants check includes a search for criminal background information:

> Q: What is your understanding of a wants and warrants check?
>
> A: *A wants and warrants check is the background check.* Basically what it is, is it's the information that is loaded into the actual 9-1-1—or the NCIC system. Probably the name, date of birth, Social Security Number, driver's license number, or a combination of that information would reveal the background, any wants or warrants, registration in the—*any formal programs such as sexual offender or violent offender programs and their criminal history would be listed as well.*

J.A. 306, ll. 5-20 (emphases added). Mr. Ward also described an NCIC "wants and warrants check" and a "background check" as "synonymous." J.A. 313, ll. 15-20. Finally, he explained that Maj. Gen. Finan's October 2007

memorandum was not a change to the base access policy. J.A. 315, ll. 16-19 ("Q: Was this list [of those banned from the base in the October 2007 memo] different than your understanding of Malmstrom's current policy described in the background paper? A: No, sir, it was not.").

Maj. Gen. Finan's testimony supports the testimony of Mr. Ward. During her testimony, Maj. Gen. Finan described an "unfavorable result," which the access policy instructs should be scrutinized, as "convictions, arrests, you know, drug use, sex abuse, domestic abuse, anything like that, that would come up on the background check." J.A. 295, l. 18 - 296, l. 5; *see also* J.A. 300, l. 8 - 301, l. 1. Garco makes much of Maj. Gen. Finan's testimony that barring those with a criminal record from entering the base was a "large change" to the access policy. Appellant Br. 37 (quoting J.A. 153, l. 17). But this testimony is less precise than Garco claims. It is unclear whether Maj. Gen. Finan meant that her October 2007 memorandum itself effected the change, or if the change was the institution of the base access policy her memorandum clarified. Indeed, only moments before mentioning the large change, Maj. Gen. Finan testified that allowing violent and sex offenders on the base would have been a "dramatic change" to the base access policy at the time she drafted her memorandum. J.A. 298, ll. 5-13; J.A. 284.

Ultimately, Maj. Gen. Finan's less-than-clear testimony about a "large change" in the access policy—which, under Garco's interpretation, is at odds with the rest of Maj. Gen. Finan's testimony—does not render the Air Force's interpretation of the access policy plainly

erroneous. Neither does the fact that Maj. Gen. Finan used the term "background check" in her memorandum instead of the term "wants and warrants check" as used in the access policy. The purpose of Maj. Gen. Finan's memorandum was to clarify the base access policy, so it makes sense that she would use a different term than the one that was generating confusion.

Garco also argues that the Air Force's interpretation is flawed in light of the fact that the contract incorporated FAR § 52.222-3, which permits contractors to employ exfelons. We disagree that the incorporation of this provision makes the Air Force's interpretation of the access policy inconsistent with the contract. For example, this provision could apply to JTC off-site employees who were not working on the base. Further, as Garco has acknowledged, the contract expressly required contractors to comply with the base access policy. And Garco does not dispute that Maj. Gen. Finan had the authority to ban exfelons from entering the base. We therefore are not persuaded to draw the inference that Garco would have us draw from incorporation of the FAR provision.

After considering the ample support for the Air Force's interpretation, we conclude that the interpretation is not plainly erroneous or inconsistent with the regulation, and we therefore must give it controlling weight. *See Reizenstein*, 583 F.3d at 1335. As a result, Maj. Gen. Finan's October 2007 memorandum was not a change to the base access policy, but rather clarifying guidance on the existing policy, and the Board properly denied JTC's REA on the basis of a changed base access policy.

II.

Garco also argues that the Air Force's sovereign act effectuated a constructive acceleration of the contract. Although actions taken by the United States in its sovereign capacity shield the government from liability for financial claims resulting from those acts, the contractor may be allowed additional time to perform. *See Conner Bros.*, 550 F.3d at 1371, 1380 (affirming Board's ruling that the sovereign acts doctrine relieved the government of liability for damages but recognizing that the contractor received additional time to complete its project). Garco cites to a provision in the contract that allowed for delay in completing work if unforeseeable causes arose, including sovereign acts. Garco posits that by not allowing JTC to bring its more experienced workers on base, the Air Force compelled JTC to hire more workers, who had less experience and required training. Garco reasons that this additional hiring and training increased the time required to complete the work due under the contract.

This argument lacks merit. Our conclusion that the October 2007 memorandum was not a change to the base access policy significantly undermines Garco's assertion that there was an unforeseeable action that impacted JTC's work. But to the extent Garco argues that the unforeseeable action involved changes in the Air Force's enforcement of its base access policy, which JTC contends the Air Force had not fully enforced during JTC's past contracts on the base, we also disagree that such action gives rise to constructive acceleration. The contract assigned the risk of adhering to Air Force regulations

and orders to the contracting party. Thus, this risk must be borne by Garco.

In any event, Garco fails to make a prima facie case of constructive acceleration for an additional reason. Constructive acceleration typically requires a party to show both that it made a timely and sufficient request for a time extension and that its request was denied. *Fraser Constr. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004). JTC never formally requested a time extension, and the government, therefore, could not have denied JTC's non-existent request.

Citing John Cibinic & Ralph Nash, Administration of Government Contracts 451 (3d ed. 1995), Garco asserts that a formal request for additional time is not always required if the parties understand there to be a request for additional time. First of all, the Cibinic & Nash treatise Garco cites indicates that "many cases" require "that the contractor have actually submitted a request for time extension," which did not occur here. Cibinic & Nash at 451. Moreover, even if we were to accept Garco's legal position, it would not save Garco's constructive acceleration claim in this case. While JTC did submit an REA seeking additional money, there is no record evidence that any party interpreted that REA as also being a request for additional time. Further, while Cibinic & Nash cites a case from the Postal Service Board of Contract Appeals where an administrative judge held that a formal request is not always necessary when "there is a very clear indication from the contracting officer that no delay in the schedule will be tolerated," *id.*, such a "clear indication"

did not occur here. For these reasons, we reject Garco's constructive acceleration claim.

CONCLUSION

We have considered Garco's remaining arguments and find them without merit. We affirm the decision of the Board denying Garco's claims for contract damages.

AFFIRMED

Costs

Costs to Appellee.

Appendix A

WALLACH, *Circuit Judge*, dissenting.

The instant appeal is about the sovereign acts doctrine.[1] It hinges entirely on whether that doctrine, an affirmative defense, shields the U.S. Army Corps of Engineers, the U.S. Air Force, and the Secretary of the U.S. Department of the Army (collectively, "the Government") from liability for preventing James Talcott Construction, Inc.'s ("JTC") employees from accessing the Malmstrom Air Force Base ("Malmstrom") in Montana.[2] Nonetheless, the majority never applies the sovereign acts doctrine to the analysis of the case.

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1. The sovereign acts doctrine is part of the principle of sovereign immunity, i.e., "[a] government's immunity from being sued in its own courts without its consent." *Sovereign Immunity*, Black's Law Dictionary (10th ed. 2014). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999) (internal quotation marks and citation omitted). The Contract Disputes Act of 1978, 41. U.S.C. §§ 7101-7109 (2012), is one such waiver of sovereign immunity, as it waives the [G]overnment's sovereign immunity for claims brought by prime contractors in privity of contract with the Government. *E.g., Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1371-72 (Fed. Cir. 2009). The sovereign acts doctrine is an affirmative defense to contract claims brought pursuant to this waiver of sovereign immunity, permitting the Government to reassert its sovereign immunity despite entering into privity of contract with a contractor. *See United States v. Winstar Corp.*, 518 U.S. 839, 860, 891-99, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996) (plurality opinion) (discussing the sovereign acts doctrine as a defense to a breach of contract claim).

2. Appellant Garco Construction, Inc. ("Garco") hired JTC as a subcontractor. J.A. 9.

"Ordinarily, it is incumbent on the defendant to plead and prove [an affirmative] defense . . . ." *Taylor v. Sturgell*, 553 U.S. 880, 907, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (citation omitted). Our precedent is clear that "[t]he [sovereign acts] doctrine is an affirmative defense that is an inherent part of every government contract." *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008) (citation omitted). The Armed Services Board of Contract Appeals ("ASBCA") found that the Government met its burden of proving entitlement to this affirmative defense, *see Garco Constr., Inc.* (*Garco III*), ASBCA Nos. 57796, 57888, 16-1 BCA ¶ 36,278 (J.A. 31-34); *Garco Constr., Inc.* (*Garco II*), ASBCA Nos. 57796, 57888, 15-1 BCA ¶ 36,135 (J.A. 4-28); *Garco Constr., Inc.* (*Garco I*), ASBCA Nos. 57796, 57888, 14-1 BCA ¶ 35,512 (J.A. 37-48), and the majority bypasses this determination under the guise of waiver in affirming the ASBCA, *see* Maj. Op. 6 n.2. However, because the sovereign acts doctrine is grounded in the Government's sovereign immunity, *see supra* n.1, I believe that finding waiver is inappropriate, *see Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) ("Sovereign immunity is jurisdictional in nature. Indeed, the terms of the [Government's] consent to be sued in any court define that court's jurisdiction to entertain suit." (internal quotation marks and citations omitted)); *City of Gainesville v. Brown-Crummer Inv. Co.*, 277 U.S. 54, 59, 48 S. Ct. 454, 72 L. Ed. 781 (1928) ("Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time." (citations omitted)).

The majority's conclusion suffers from two additional flaws. First, although the ASBCA correctly treated the sovereign acts doctrine as an absolute bar to finding the Government liable, *see, e.g.*, J.A. 28, 33, 47, it failed to consider whether the Government satisfied the second factor in the two-factor test for applying the doctrine. The majority compounds that error by ignoring the application of the doctrine altogether. Second, even though the ASBCA's conclusion that the sovereign acts doctrine applied would preclude a merits analysis and liability determination, the majority misinterprets the ASBCA's opinions below and incorrectly considers the merits. For these reasons, I respectfully dissent.

I. The Sovereign Acts Doctrine

I begin by articulating the two-factor framework we apply to determine whether the Government is entitled to the affirmative defense of the sovereign acts doctrine. After articulating this framework, I turn to the ASBCA's analysis.

A. Legal Framework

The U.S. Supreme Court has not established the precise contours of the sovereign acts doctrine. Indeed, the Supreme Court has applied the sovereign acts doctrine in only two cases, the second of which produced a highly divided court without a majority opinion.

In *Horowitz v. United States*, the Supreme Court explained that the sovereign acts doctrine distinguishes

between the Government's distinct roles as a private contractor and as a sovereign, providing that "the [Government] when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." 267 U.S. 458, 461, 45 S. Ct. 344, 69 L. Ed. 736, 61 Ct. Cl. 1025 (1925) (citations omitted). The Supreme Court did not address the doctrine again for the next seventy years. *See Winstar*, 518 U.S. at 923 (Scalia, J., concurring-in-the-judgment) (stating that the sovereign acts doctrine "has apparently been applied by th[e Supreme] Court in only a single case, our 3-page opinion in *Horowitz* . . . , decided in 1925").

In *Winstar*, Justice Souter authored a four- (and as to some portions, three-) Justice plurality opinion explaining that

> [t]he sovereign acts doctrine . . . balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as a contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law.

Id. at 896 (plurality opinion) (footnote omitted). The Supreme Court has not revisited the sovereign acts doctrine since *Winstar*.

Lacking a definitive framework for applying the sovereign acts doctrine from existing Supreme Court precedent,[3] we have adopted the standard articulated by the plurality opinion in *Winstar*. *See, e.g., Conner Bros.*, 550 F.3d at 1374 (stating that "this court has treated th[e plurality] opinion [in *Winstar*] as setting forth the core principles underlying the sovereign acts doctrine"). Pursuant to this framework, we evaluate the applicability of the sovereign acts doctrine using a two-factor test. *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 521 (Fed. Cir. 2011); *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1366 (Fed. Cir. 2009). First, we ask whether the governmental act "is properly attributable to the Government as contractor" or to the Government as sovereign, i.e., whether the act was designed "to relieve the Government of its contract duties" or was a "genuinely public and general act that only incidentally falls upon the contract." *Stockton*, 583 F.3d at 1366 (internal quotation marks and citation omitted). Second, if the governmental act was a genuine public and general act, we ask "whether that act would otherwise release the Government from liability under ordinary principles of contract law." *Id.* (internal quotation marks and citation omitted).

As explained above, the sovereign acts doctrine "is an affirmative defense that is an inherent part of every government contract." *Conner Bros.*, 550 F.3d at 1371 (citation omitted). As an affirmative defense, the Government, as defendant, bears the burden of

3. It does not appear that our sibling circuits have elaborated substantively on the guideposts provided by *Winstar*. *See, e.g., Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1172 n.10 (10th Cir. 2004) (discussing *Winstar*).

establishing its entitlement to the sovereign acts defense. *See Taylor*, 553 U.S. at 907. This burden applies to both factors of our two-factor framework. *See Klamath*, 635 F.3d at 521-22 (stating that "the [G]overnment has the burden of establishing" all elements of the sovereign acts defense). Determining whether the Government has met its burden is a legal conclusion based on underlying factual findings reviewed for substantial evidence. *Conner Bros.*, 550 F.3d at 1378; *see* 41 U.S.C. § 7107(b)(2) (stating that the ASBCA's "decision . . . on a question of fact . . . may not be set aside unless the decision is," inter alia, "not supported by substantial evidence").

B. The ASBCA Erred in Determining That the Sovereign Acts Doctrine Shielded the Government from Liability

The majority does not articulate or address the test concerning the sovereign acts doctrine. *See generally* Maj. Op. Because I believe both the ASBCA and this court are bound by the two-factor framework articulated above, I evaluate whether the Government satisfied its burden as to each factor. In my opinion, it did not.

1. Substantial Evidence Supports the ASBCA's Finding That the Government's Acts Were Public and General Acts

The first factor, i.e., "whether the sovereign act is properly attributable to the Government as contractor," is a subjective inquiry that examines the purpose of the governmental act. *See, e.g.*, *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1573, 1575 (Fed. Cir. 1997) (stating that the parties' "characterization [of the

governmental act] frames the dispositive issue" and then evaluating whether the Government was "acting for the purpose of" increasing prices charged to plaintiffs or solving problems related to uranium enrichment). We evaluate whether the act was "genuinely public and general" or "specifically directed at nullifying contract rights." *Stockton*, 583 F.3d at 1366, 1367 (internal quotation marks and citation omitted); *see Conner Bros.*, 550 F.3d at 1374 (similar). This inquiry can be informed by "whether the governmental act[] applies exclusively to the contractor or more broadly to include other parties not in a contractual relationship with the [G]overnment." *Conner Bros.*, 550 F.3d at 1375.

The dispute here concerns the Government's decision to deny JTC's employees access to Malmstrom. Although JTC had not encountered difficulty obtaining base access for its employees for prior contracts at Malmstrom, the Government began denying access to JTC employees with criminal records soon after JTC commenced performance of the contract at issue here, forcing JTC to hire a less experienced work force and increasing JTC's cost of performance. J.A. 10-12. The ASBCA determined that the denial of access to JTC's employees pursuant to three documents—the July 21, 2005 341st Space Wing Pamphlet 31-103 ("the 31-103 Pamphlet") (J.A. 49-54), the July 26, 2005 341st Space Wing Instruction 31-101 ("the 31-101 Instruction") (J.A. 55-76), and the October 2007 base access memorandum ("the October 2007 Memorandum") (J.A. 144-46)—constituted sovereign acts that shielded the Government from liability.[4] J.A. 22-24, 46. In support, the

4. Garco does not contest the ASBCA's finding that denying base access pursuant to the October 2007 Memorandum was a

ASBCA noted that each of these documents applies "to all contractors and contractor personnel" and that "[t]here is no evidence that the policy was intended to nullify contract rights or that it provided to the [G]overnment an economic advantage." J.A. 24, 46; *see* J.A. 24-25 (evaluating the October 2007 Memorandum), 46-47 (evaluating the 31-103 Pamphlet and 31-101 Instruction).

Substantial evidence supports the ASBCA's factual findings that the Government's base access policy was a public and general act. It is true that there is ample evidence that the Government's base access policies were subject to the "whim[s]" of the Wing Commander. J.A. 173; *see* J.A. 119 (stating that, over twenty years and dozens of projects, no JTC employees had been denied access prior to the contract at issue here), 153 (stating that the October 2007 Memorandum was a "large change"), 173 ("Good luck on this one, the policy appears to be undefined and pretty hard to defend."). However, the relevant provisions in both the 31-103 Pamphlet and the 31-101 Instruction applied to "contractors" generally rather than specifically to Garco or JTC, J.A. 51, 71; *see* J.A. 49 (setting forth the "policy for contractors who require[] entry" to Malmstrom), and the October 2007 Memorandum was addressed to "*all* contractors and contractor personnel," J.A. 145 (emphasis added) (capitalization omitted). In addition, the record is replete with evidence indicating that the purpose of the base access policy was to ensure Malmstrom's security. *See, e.g.*, J.A. 284 (assessing the security impacts of three separate

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sovereign act but, instead, contends that the Government is liable for the delays caused by the denial of base access to JTC prior to October 2007. Appellant's Br. 11.

base access policies), 287 ("The purpose of [a National Crime Information Center] check i[s] to determine if there is any unfavorable information which may be detrimental to the security of the installation and preservation of good order and discipline on the installation."). Finally, Garco has not identified any evidence either below or before this court that demonstrates that the 31-103 Pamphlet, the 31-101 Instruction, or the October 2007 Memorandum were directed at nullifying Garco's or JTC's contract rights. J.A. 24 ("There is no evidence that the policy [articulated in, inter alia, the 31-103 Pamphlet or 31-101 Instruction] was intended to nullify contract rights or that it provided to the [G]overnment an economic advantage."), 46 ("[Garco] presents no evidence contradicting [Major General] Finan's declaration" as to the general purpose of the policy.); *see generally* Appellant's Br. Thus, I agree with the ASBCA that the Government's denial of access to Malmstrom was a public and general act.

2. Substantial Evidence Does Not Support the ASBCA's Finding That the Government's Acts Would Release It from Liability

Because I would find that substantial evidence supports the ASBCA's determination that the Government's denial of access to Malmstrom was a public and general act, I believe we must consider the second factor of the test, i.e., "whether that act would otherwise release the Government from liability under ordinary principles of contract law." *Stockton*, 583 F.3d at 1366 (internal quotation marks and citation omitted). "This second [factor] turns on what is known in contract law as the 'impossibility'

(sometimes 'impracticability') defense." *Id.* To establish this defense, the Government must show that both full performance and substantial performance of the contract by the Government are "impossible." *Winstar*, 518 U.S. at 905; *Carabetta Enters., Inc. v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007). To make this showing, the Government must demonstrate that the event "rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed[] and . . . that the language or circumstances do not indicate that the Government should be liable in any case." *Winstar*, 518 U.S. at 904; *see* 12 No. 7 Nash & Cibinic Rep. ¶ 37 ("The determination of whether the nonoccurence of a specific sovereign act was a basic assumption of the contract will depend on the nature of the act and the circumstances surrounding the formation of the contract as well as its terms."). If the Government does not carry its burden of showing impossibility, then its invocation of the sovereign acts defense fails. *See Klamath*, 635 F.3d at 522 (stating that the trial court "erred in holding that impossibility of performance is not a factor to be taken into account in considering the sovereign acts doctrine").

The ASBCA neither made any findings as to impossibility nor referenced it at all, *see* J.A. 4-28, 31-34, 37-48, and nothing in the record indicates that the Government raised impossibility before the ASBCA. On appeal, the Government does not argue impossibility or provide evidentiary support for a finding of impossibility. *See generally* Appellee's Br. Indeed, neither "impossibility" nor its variants appear in the parties' briefs or in the Joint Appendix. *See generally* Appellant's Br.; Appellee's Br.; Appellant's Reply; J.A.

Where the ASBCA has failed to make factual findings as to impossibility in prior cases, we have reached three different results. In one instance, we vacated and remanded for additional fact finding "so that the [G]overment [would] have the opportunity to carry [its] burden" of "establishing that performance of the various contracts at issue was impossible." *Klamath*, 635 F.3d at 522 (footnote omitted). In another, we reversed and remanded the trial court's application of the sovereign acts doctrine because "[t]he [G]overnment c[ould]not avail itself of the impossibility defense to save it from this breach of contract claim." *City Line Joint Venture v. United States*, 503 F.3d 1319, 1323 (Fed. Cir. 2007). Finally, in a third, we found that the plaintiff waived its arguments as to impossibility by failing to raise them before the ASBCA and affirmed the ASBCA's application of the sovereign act defense. *See Conner Bros.*, 550 F.3d at 1379.

I would find vacating and remanding to be the most appropriate result here.[5] *See Fla. Power & Light Co.*

5. "[W]e retain case-by-case discretion over whether to apply waiver . . . ." *Xianli Zhang v. United States*, 640 F.3d 1358, 1371 (Fed. Cir. 2011) (citation and footnote omitted). Unlike the majority, Maj. Op. 6 n.2, I would decline to find waiver here for two reasons. First, the sovereign acts doctrine is grounded in the Government's sovereign immunity, shielding the Government from liability for its actions as a sovereign. *See supra* n.1; *Horowitz*, 267 U.S. at 461. Therefore, I believe questions regarding the doctrine's application cannot be waived. *See, e.g., Meyer*, 510 U.S. at 475; *Brown-Crummer*, 277 U.S. at 59. Second, the Government did not meet its burden of establishing impossibility in this case and, thus, did not meet its burden of establishing the sovereign act defense. Because the Government had not met its burden of establishing each factor of the sovereign act defense, Garco was under no obligation to rebut

v. Lorion, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985) ("[I]f the agency has not considered all relevant factors, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."). "Appellate courts do not make factual findings; they review them." *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 875 (Fed. Cir. 2008). Because the ASBCA did not make any factual findings as to impossibility, I believe that it is inappropriate for us to do so in its stead. When both the ASBCA and the Government have failed to address one of the requisite factors, I believe the proper course is to vacate and remand "so that the [G]overment may have the opportunity to carry [its] burden" of "establishing that performance . . . was impossible." *Klamath*, 635 F.3d at 522 (footnote omitted).[6] Therefore, I would vacate the ASBCA's opinions and remand for additional fact finding and explanation as to the impossibility factor's applicability.[7]

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the Government's position on impossibility. *See Klamath*, 635 F.3d at 522 n.14.

6. This course aligns with our practice in other administrative proceedings. *See, e.g., In re NuVasive, Inc.*, 842 F.3d 1376, 1382, 1385 (Fed. Cir. 2016) (vacating and remanding so that an agency could fulfill its obligation to "make the necessary findings and have an adequate evidentiary basis for its findings" and to "articulate a satisfactory explanation for its action" (internal quotation marks and citations omitted)).

7. Having determined that the sovereign acts doctrine shielded the Government from liability, the ASBCA additionally found

II. The Majority Misinterprets the ASBCA's Conclusions

In addition to failing to consider the sovereign acts doctrine and progressing directly to the merits, the majority further errs by misinterpreting the ASBCA's conclusions as being directed to the merits. The majority characterizes the ASBCA's opinions as concerning a matter of regulatory interpretation, i.e., interpreting the base access policy at Malmstrom. Maj. Op. 7-12. I believe that this characterization is inaccurate.

In each of its three opinions, the ASBCA determined that the Government is not liable because the sovereign acts doctrine shields it from liability. In *Garco I*, the ASBCA determined that "[t]he implementation of the base access policy by the October 2007 [M]emorandum was a sovereign act and the [G]overnment is not liable in damages that may have been caused from October 2007 forward." J.A. 46?47. In *Garco II*, the ASBCA determined that: "JTC presented ample credible evidence that it was harmed by the . . . change in . . . enforcement of [the] base access policy"; "JTC was not able to hire as experienced a work force as it had in the past"; and "this had an adverse impact on JTC's labor hours and associated costs of

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that constructive acceleration "does not provide [Garco] a path to entitlement to monetary damages resulting directly from the sovereign act of limiting access to" Malmstrom. J.A. 27; *see* J.A. 33 (affirming that conclusion on reconsideration). If the Government were to fail on remand to carry its burden as to impossibility of the sovereign acts doctrine, the ASBCA should reconsider Garco's claim for constructive acceleration, as well as any other liability theory that the Government previously advanced before the ASBCA.

performance." J.A. 21, 21-22. On these bases, the ASBCA determined that the Government "*could be liable* for this damage *unless* it is protected by the sovereign act defense." J.A. 22 (emphases added) (footnote omitted). Nonetheless, the ASBCA "extend[ed] the sovereign act protection" from *Garco I* "back to the spring of 2007 or whenever the [Government] first started denying access" to JTC's employees. J.A. 27; *see* J.A. 28 ("Conclusion" section of the opinion stating in its entirety: "The [Government]'s enforcement of its base access policy commencing on or about the spring of 2007 *was a sovereign act*. To the extent JTC suffered as a result of the denial of access to its desired workers, the [Government] *is not liable* in monetary damages. The appeals are denied." (emphases added)). Finally, in *Garco III*, the ASBCA denied Garco's request for reconsideration of *Garco II*. J.A. 33. In so doing, the ASBCA stated in its penultimate sentence that "[w]e are unwilling to establish a new limit on the breadth of the sovereign act doctrine." J.A. 33 (footnote omitted).

It is evident from each of these three decisions that the foundation of the ASBCA's conclusions is that the sovereign acts doctrine shields the Government from monetary liability. Considered in the context of the ASBCA's full opinions, the ASBCA's discussion of the October 2007 Memorandum's text and the parties' other arguments is part of its analysis of whether the sovereign acts doctrine applies to the Government's acts prior to October 2007. Indeed, the very section of *Garco II* that the majority cites (*see* Maj. Op. 8) is entitled "JTC's Interpretation Argument/Scope of the Sovereign Acts," and this section concludes by stating "[w]e have already held that th[e

National Crime Information Center check] process is embodied in documents that *qualify for sovereign act protection*." J.A. 24 (italics omitted), 25 (emphasis added).

Instead of acknowledging the context in which the ASBCA made its findings, the majority engages in an analysis of the merits. The ASBCA did not decide against Garco on the merits. In fact, the ASBCA expressly acknowledged that the Government "could be liable" on the merits but for the sovereign acts doctrine. J.A. 22 (footnote omitted). The ASBCA determined that its sovereign acts analysis in *Garco I* applied equally to the Government's acts both before and after the issuance of the October 2007 Memorandum. But, as explained above, the ASBCA's analyses as to pre- and post-October 2007 governmental acts are equally deficient—neither addresses impossibility. It is unclear why the majority undertakes an analysis of merits when (1) it is unknown at this time whether the Government properly pleaded the affirmative defense and (2) the ASBCA did not consider the merits. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

Finally, the majority's analytic framework produces more questions than answers. For example, if the majority reached a different conclusion on the merits—i.e., if it found that the Government's interpretation was erroneous and that the October 2007 Memorandum was a change in base access policy—Garco still could not recover damages. Recovery would require consideration and reversal of

the ASBCA's application of the sovereign acts doctrine, the very threshold issue that the majority bypasses here. *See Horowitz*, 267 U.S. at 461 (stating that the Government "cannot be held liable" when the sovereign acts doctrine applies (citations omitted)). Because the approach employed by the majority sows confusion and does not comport with what precedent demands, I decline to follow it.

III. Conclusion

The sovereign acts doctrine was the sole issue decided below. Yet, this threshold inquiry is entirely absent from the majority's analysis, which focuses on the merits. Maj. Op. 7-13. However, affirming the ASBCA's finding that the sovereign acts doctrine applies here precludes a finding that the Government is liable, rendering this analysis superfluous. I believe that the more appropriate course is to follow our clear precedent that the sovereign acts doctrine is an affirmative defense for which the Government bears the burden as to both factors. Because the Government did not satisfy its burden as to the second factor, I would vacate the ASBCA's opinions and remand with instructions to consider the second factor.

APPENDIX B — OPINION OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS, DATED JANUARY 27, 2016

ARMED SERVICES BOARD
OF CONTRACT APPEALS

ASBCA Nos. 57796, 57888

Appeals of --

GARCO CONSTRUCTION, INC.

Under Contract No. W912DW-06-C-0019

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON APPELLANT'S MOTION FOR RECONSIDERATION

Garco Construction, Inc. (Garco), timely moves the Board to reconsider its 22 September 2015 decision denying Garco's appeals.[1] In order to succeed in a motion for reconsideration the moving party must demonstrate a compelling reason for the Board to modify its decision. We look to whether the party presents newly discovered evidence or whether there were mistakes in the decision's findings of fact or errors of law. Motions for reconsideration are not intended to provide a party with an opportunity

1. Garco's motion caption references ASBCA Nos. 57796, 57888 and 57889. Our 22 September 2015 decision concerns only ASBCA Nos. 57796 and 57888. ASBCA No. 57889 was settled and dismissed with prejudice on 6 September 2012. We have no reason to believe Garco's reference of ASBCA No. 57889 was intentional.

to reargue issues previously raised and denied. *CI², Inc.*, ASBCA No. 56257, 15-1 BCA ¶ 35,829 at 175,194.

Garco presents two arguments in support of its motion, both suggesting errors of law. The first is essentially an argument that the Board's regulatory interpretation was erroneous. The language we interpreted was: "[a] 911 Dispatcher will run the employees name through the National Criminal Information Center system for a wants and warrants check. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFG/CC." *Garco Construction, Inc.,* ASBCA Nos. 57796, 57888, 15-1 BCA ¶ 36,135 at 176,381. We concluded that although a literal reading of this language might support appellant's interpretation, the fact that no one with wants or warrants would be allowed to enter the base renders the rest of the language inconsistent with the regulatory scheme and leads to the "absurd" result that convicted felons not currently wanted by law enforcement would be allowed access to Malmstrom Air Force Base (MAFB). *Id.* at 176,382. Garco complains that the language does not notify it that individuals with "wants and warrants" would be detained (app. mot. at 1). Although Mr. Ward provided testimony to that effect, we consider it self-evident that an individual wanted by law enforcement would not be allowed entrance to MAFB. In its reply brief the Air Force argues that Garco's interpretation fails to take into consideration Space Wing Pamphlet 31-101 (15 October 2002) and Space Wing Pamphlet 31-103 (21 July 2005) "maintain the Base Commander's flexibility in granting base access" (gov't opp'n at 2). We agree Garco raises nothing new in its reply brief to change our opinion.

We reject Garco's argument that "[a] reasonable and natural reading without bias would lead the reader, in this case JTC,[2] to interpret it to mean that not all individuals with a want or warrant would be immediately detained, but rather scrutinized and eligibility determined on a case by case basis" (app. mot. at 2). As we found in our decision, it is unreasonable to adopt an interpretation that would allow an individual currently wanted by law enforcement to be allowed access to MAFB. There was no error of law in our regulatory interpretation.

In its second argument Garco suggests that the Board should allow compensation for constructive acceleration (app. mot. at 3). In its opposition brief the Air Force argues that Garco cites to no clause or case that allows for monetary compensation for delay caused by a sovereign act (gov't opp'n at 3). It also points out that the contract was completed early (*id.*). In its reply brief Garco reiterates the argument made in its motion for reconsideration (app. reply at 2; app. mot. at 3-5).

In our decision, we recognized a contractor harmed by a sovereign act might be entitled to additional time but not compensation:

> It is true that Garco might have been able to specifically request additional time to perform as a result of the sovereign acts. *Troy Eagle*

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2. James Talcott Construction, Inc. (JTC), was the subcontractor with a pass-through claim. *Garco,* 15-1 BCA ¶ 36,135 at 176,372.

> *Group,* ASBCA No. 56447, 13 BCA ¶ [35,258] at 173,060 ("Actions taken by the United States in its sovereign capacity shield the government from liability for financial claims resulting from those acts, although a contractor is allowed additional time to perform.") (citations omitted). However, even if appellant had a right to a time extension it does not provide it a path to entitlement to monetary damages resulting directly from the sovereign act of limiting access to MAFB.

Garco, 15-1 BCA ¶ 36,135 at 176,383-84. Garco relies upon *Dougherty Overseas, Inc.,* ENG BCA No. 2625, 68-2 BCA ¶ 7165 stating, with respect to that case that "the government's order to continue construction by whatever means possible despite difficulties imposed by a border closure was an acceleration order because at that time appellant would have been within its legal rights to suspend or pace its operations to adapt them to the situation in which it found itself with its supply line cut-off" (app. mot. at 4-5). Garco failed to mention that the "border closure" was Afghanistan, closing its border with Pakistan, "[a]ppellant was well along in contract perfo1martce on 6 September 1961 when the Afghanistan Government decided for political reasons to close the border without notice." *Dougherty,* 68-2 BCA ¶ 7165 at 33,245. There was no sovereign act on the part of the United States involved in *Dougherty.*

Garco provided no support for its argument that it should be compensated for the harm caused by

the sovereign act of enforcing entrance screening requirements at MAFB. We are unwilling to establish a new limit on the breadth of the sovereign act doctrine by agreeing with Garco that because it might be entitled to additional time and was not given any[3], it somehow avoids the provisions of the default clause and the doctrine. There was no error of law in our analysis of this argument.

CONCLUSION

There being no errors of law in our decision, Garco's motion for reconsideration is denied.

Dated: 27 January 2016

/s/
CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur
/s/
MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur
/s/
RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

3. While there is evidence that Garco notified the Air Force that it was delayed by the access restrictions (15-1 BCA¶ 36,135 at 176,376, finding 19), there is no evidence in the record or argument in appellant's briefs that JTC asked for more time.

Appendix B

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57796, 57888, Appeals of Garco Construction, Inc., rendered in conformance with the Board's Charter.

Dated: January 27, 2016

/s/_____
JEFFREY D. GARDIN
Recorder, Armed Service
Board of Contract Appeals

APPENDIX C — OPINION OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS, DATED SEPTEMBER 22, 2015

ARMED SERVICES BOARD
OF CONTRACT APPEALS

ASBCA Nos. 57796, 57888

Appeals of --

GARCO CONSTRUCTION, INC.

Under Contract No. W912DW-06-C-0019

OPINION BY ADMINISTRATIVE JUDGE CLARK

Garco Construction, Inc. (Garco), sponsors a pass-through claim by its subcontractor James Talcott Construction, Inc. (JTC), for work on a project to construct base housing on Malmstrom Air Force Base (MAFB), Montana. JTC claims that the government interfered with its work by changing its base access policy, making it much harder for JTC to get access for its workers and depriving JTC of its ability to hire from the pool of workers it traditionally used. In our decision dated 14 January 2014, we granted partial summary judgment in favor of the Air Force holding that Col Finan's 22 October 2007 base access memorandum was a sovereign act and the Air Force was not liable for damages from that date forward. We left open the question of Air Force liability before 22 October 2007 stating "the record is not sufficiently developed to allow the Board to grant the motion for the period between contract award in August 2006 and issuance of the

October 2007 memorandum." *Garco Construction, Inc.*, ASBCA Nos. 57796, 57888, 14-1 BCA ¶ 35,512 at 174,075. This decision addresses the period before the 22 October 2007 memorandum. Both entitlement and quantum are before us. We have jurisdiction pursuant to the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109. We deny the appeals.

FINDINGS OF FACT

1. In 2002 MAFB access policy was defined in part by the 341st Space Wing Pamphlet 31-101, 15 October 2002, Local Security Policy and Security Procedures for Contractors. The pamphlet is annotated **"BY ORDER OF THE COMMANDER 341ST SPACE WING (AFSPC)."** It superseded MAFBP 31-209, dated 13 January 1998. (R4, tab F, subtab 101) There is no indication that the 1998 version was changed.[1] This pamphlet included:

> **5. Obtaining Entry Credentials/Passes.** Contractors will be permitted to enter Malmstrom AFB by following the procedures set forth in this pamphlet....
>
> > 5.1. Contractor employees must possess identification such as a driver's license or company ID card. This identification should include, as

1. Later versions use vertical lines to the left of the text to indicate changes from the superseded version. This protocol was not stated in the 2002 version of the pamphlet.

> a minimum, the physical description of the individual (i.e., height, weight, date of birth, eye and hair color), a picture of the individual, and the individual's signature.
>
> 5 .2. Upon award of a contract, the contractor will be issued an Entry Authority List (EAL) (**Attachment 4**) by the contract administrator in 341 CONS. The contractor will need to submit the required information for the EAL, to the contract administrator in 341 CONS prior to coming to Malmstrom AFB.

(*Id.* at 2)

2. The 341st Space Wing Instruction 31-101,[2] 26 July 2005, Installation Security Instruction, superseded the 18 November 2003 version of 341SWI31-101 (DVD, supp. R4, tab 22 at PDF 1). The instruction is annotated with **"BY ORDER OF THE COMMANDER 341ST SPACE WING."** A vertical bar on the left side of the text indicated a revision to the 2003 edition. (Tr. 3/149; DVD, supp. R4, tab 22 at PDF 264) Paragraphs 4.1.5.1. and 4.1.5.1.1. did not have a vertical bar on the left of the text which means there was no change to the 2003 policy (tr. 3/151). They read as follows:

---

2. This number duplicates the number for the 15 October 2002 pamphlet, Local Security Policy and Security Procedures for Contractors, that was changed to 31-103 on 21 July 2005 (R4, tab F, subtab 102).

> 4.1.5.1. Prior to entry onto the installation, all General contractors must submit a Contracting Entry Authority List (EAL) to the contracting office. A contracting officer approves the list and hand carries it to the visitors control center (VCC) for review. VCC personnel will compare the approving official's signature against a DD Form 577, **Signature Card,** or an appropriate letter on file at the VCC.
>
> > 4.1.5.1.1. The VCC staff will forward the Contracting EAL to the 911 dispatch center. A 911 dispatcher certified on the National Criminal Information Center system (NCIC) will run the contractor names through the NCIC for wants and warrants. After the dispatcher completes the NCIC check, they will sign the letters and return them to VCC. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFS/CC and 341 SFG/CC.

(Tr. 3/117-18; DVD, supp. R4, tab 22 at PDF 279) The "341 SFS/CC" was the security forces squadron commander, Col Asher (tr. 3/191). Since 2008, Mr. Ward has been the chief of information protection for the 341ST Missile Wing/ MAFB (tr. 3/115). Between 2004 and 2008 Mr. Ward was chief, security forces plans and programs (tr. 3/116). This position included pass and registration (*id.*). Mr.

Ward confirmed that Col Asher personally reviewed the unfavorable results for individuals to determine if access would be granted (tr. 3/191-92).

3. The 341st Space Wing Pamphlet 31-103, 21 July 2005, Local Security Policy and Security Procedures for Contractors, was derived from 341st Space Wing Pamphlet 31-101, 15 October 2002 (tr. 3/119; R4, tab F, subtabs 101, 102). MAFB, 341st Space Wing Pamphlet 31-103, 21 July 2005, established "policy for contractors who require entry to the installation" (R4, tab F, subtab 102). The pamphlet is annotated **"BY ORDER OF THE COMMANDER 341ST SPACE WING."** Paragraph 5 of the pamphlet deals with entry to the base:

> **5. Obtaining Entry Credentials/Passes.** Contractors will be permitted to enter MAFB by following the procedures set forth in this pamphlet ....
>
> ....
>
> 5.2 Upon award of a contract, the contractor will be issued an Entry Authority List (EAL) **(Attachment 5)** by the contract administrator in 341 CONS. The contractor will need to submit the required information for the EAL, to the contract administrator in 341 CONS prior to coming to MAFB. Once the letter is received from 341 CONS, the Visitor Control Center will forward the EAL to the 911 Dispatch Center. A 911 Dispatcher will run the employees name

> through the National Criminal Information Center system for a wants and warrants check. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFG/CC.

(R4, tab F, subtab 102 at 2) Paragraph 5.2 has a vertical bar to the left of the text indicating that it included changes from the previous, 15 October 2002, version of the pamphlet *(id.* at 3). Mr. Ward testified that 341 SFG/CC was Col Asher and that he would look only at individuals identified with unfavorable information (tr. 3/156). He testified that a "wants and warrants" check with the NCIC is a "background check" (tr. 3/120, 135, 151). Unfavorable results would be serious offences such as felonies, sexual offenses and people still in the penal system (tr. 3/125). These offenses would be highlighted and submitted to the security forces group commander Col Asher (tr. 3/123).

4. On 24 May 2006, JTC submitted its bids to Garco for the concrete ($8,110,675) and rough framing ($3,417,193) subcontract work in connection with Garco's plan to bid on the Phase IV MAFB Family Housing Project (tr. 1/178-79; DVD, supp. R4, tab 51 at PDF 567, 573, tab 53 at PDF 581, 586).

5. On 3 August 2006 the U.S. Army Corps of Engineers (COE) awarded Contract No. W912DW-06-C-0019 (Contract 0019) to Garco to replace family housing, phase VI, at MAFB (R4, tab D at 1-2). MAFB supports the 341st Missile Wing, one of three U.S. Air Force Bases that maintains and operates Minuteman III intercontinental

ballistic missiles. MAFB is designated a Protection Level 1 (PL 1) installation, the highest security level in the Air Force. (Tr. 3/48-49; DVD, supp. R4, tab 25, ¶ 2)

6. The contract included the following FAR clause:

> 52.204-9 PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL (JAN 2006)
>
> (a) The Contractor shall comply with agency personal identity verification procedures identified in the contract that implement Homeland Security Presidential Directive-12 (HSPD-12), Office of Management and Budget (OMB) guidance M-05-24, and Federal Information Processing Standards Publication (FIPS PUB) Number 201.
>
> (b) The Contractor shall insert this clause in all subcontracts when the subcontractor is required to have physical access to a federally-controlled facility or access to a Federal information system.

(R4, tab D at 30) The contract also included FAR 52.222-3, CONVICT LABOR *(id.* at 46).

7. The contract included section 01001, "SUPPLEMENTARY REQUIREMENTS," that included:

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1.6 IDENTIFICATION OF EMPLOYEES AND MILITARY REGULATIONS:

(a) The Contractor shall be responsible for compliance with all regulations and orders of the Commanding Officer of the Military Installation, respecting identification of employees, movements on installation, parking, truck entry, and all other military regulations which may affect the work.

(b) The work under this Contract is to be performed at an operating Military Installation with consequent restrictions on entry and movement of nonmilitary personnel and equipment.

(R4, tab D at 01001-2)

8. The contract included section 01005, "SITE SPECIFIC SUPPLEMENTARY REQUIREMENTS," which included the following:

1.3 GENERAL AREA REQUIREMENTS

Security requirements and procedures shall be coordinated with the 341 Security Forces Squadron, Resource Protection (telephone 406-731-4344), Malmstrom AFB. Activities of the Contractor and Contractor's employees and subcontractors and their employees while on the base, will be conducted in accordance

> with base regulations, including those of the fire marshal, as well as security directives .... Security directives include Antiterrorism Force Protection (paragraph 1.3.4 below) and the GENERAL CONTRACTING ENTRY AUTHORITY LIST (EAL) attached [at] the end of this Section. This list shall include all Contractor personnel working on the base.

(R4, tab D at 01005-1)

9. The Notice to Proceed was issued to Garco on 21 August 2006 (DVD, supp. R4, tab 12).

10. A pre-construction conference was held on 12 September 2006. Representatives of Garco and its intended subcontractor JTC attended. (DVD. supp. R4, tab 13 at PDF 143-44)

11. The signed version of the minutes of the 12 September 2006 meeting were sent out on 27 September 2006 (DVD, supp. R4, tab 13). The minutes included the same *"Access and Security"* paragraph as in the 12 September draft version, but added in the *"Air Force Briefings"* section of the minutes that "[n]o one will be allowed on base if not on the EAL list .... The names will be sent to dispatch for background checks .... No one with outstanding warrants, felony convictions, or on probation will be allowed on base." (DVD, supp. R4. tab 13 at PDF 137-38) In his stipulated testimony, Mr. Barnett, Garco

project manager,[3] recalled that he attended the meeting and the "information" that "[n]o one with outstanding warrants, felony convictions, or on probation will be allowed on base" was "stated" during the meeting, but be is not sure if the exact words in the minutes were used (ex. G-2, ¶ 13).

12. On 14 September 2006, JTC's EAL was submitted to Garco (tr. 1/94-95; DVD, supp. R4, tab 15), which in turn was submitted to MAFB. Based on the individuals' address, Mr. Talcott identified two individuals as residents at the pre-release center (tr. 1/97). These two individuals were allowed to enter MAFB to work for JTC (tr. 1/97-99).

13. On 26 September 2006, JTC signed firm-fixed-price contracts with Garco for concrete work (SC#064000-008/$5,033,543) and rough carpentry work/framing (SC#064000-11/$2,975,604) (DVD, supp. R4, tabs 72, 74). Phase VI framing was a labor only contract where Garco provided the materials. However, JTC provided labor and concrete for the concrete work (tr. 1/32). Mr. Talcott recalled that JTC commenced concrete work on MAFB in late 2006 or early 2007 (tr. 1/99). Mr. Talcott testified that JTC did not anticipate any difficulty in getting workers for phase VI. Phases IV and V were finishing up and JTC was talking to workers who worked on those projects. (Tr. 1/104-06)

14. Mr. Talcott testified that JTC had been working on MAFB for 20 years and they never had an employee

3. Mr. Barnett did not appear at the hearing.

denied base access until this contract (tr. 1/66, 86. 229). Mr. Talcott stated:

> So I'll get off my soapbox now, but never in the 20-year plus history -- I don't want to sound repetitive here, but never in the dozens of projects that we had worked on at Malmstrom Air Force Base with the Corps of Engineers, on the missile ale1t facilities, at the launch facilities, weapons storage area or anywhere else for Malmstrom Air Force Base or the Corps of Engineers, had we ever had anybody turned down that we turned in to work on our site.

(Tr. 1/86) MAFB allowed JTC employees with criminal records or in pre-release access to MAFB both before and after release of the 21 July 2005, Pamphlet 31-103 (tr. 1/82-83). This practice was still in place when JTC bid on phase VI subcontract work (tr. 1/83). When JTC bid the work they assumed that they would have the same labor pool that they had in the past and that they had for contracts JTC was performing at the same time (tr. 1/66-67). Mr. Talcott testified that on phase VI, for the first time individuals on JTC's EAL were being denied access to MAFB at the visitor's center saying, "it's totally contrary to anything that we've seen in the past" (tr. 1/108). JTC did not keep track of all of the people that were denied access to MAFB (tr. 1/226, 239, 2/26-27, 50).

15. Mr. Talcott testified:

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The troubles were that while we should have been in the spring of 2007 putting together our base crews for concrete and framing and having them well in place so that the production system could work for us as we anticipated, we were turning in list after list and we're -- I mean, it was very interesting to be around our office at that time because they were going through hundreds of applicants. We were going through dozens and dozens of interviews and trying to get manpower on the base because we had a general contractor that -- and rightfully so -- saying you're getting behind. And we just couldn't get the manpower on base. We would send them -- put them on the EAL, we would turn the list in to the government, we would send them, as called out, to the base Visitor's Center for a pass, and they wouldn't get one. So we would send other people out there. We went through more employee packets than you can imagine, we escorted people to the base to show them the process, then we'd be turned down. And the frustrating part is we just never had an answer as to why they were being turned down.

....

So we did the best we could to man up the job, but as it turned out, we were putting people on the job that should never have been on a construction site. We had people with zero construction experience that we had to hire

> because when they went to the base Visitor's Center, they could get a pass. And the turnover rate was extremely high.

(Tr. 1/109-10) Mr. Talcott testified that JTC was not able to "man up" with qualified people (tr. 1/113). JTC had "plenty of bodies out there, but not skilled personnel" (tr. 1/114).

16. Mr. Gary Richerson works for JTC and has about 26 years of experience in construction (tr. 2/53). He was the general superintendent on the phase VI project for JTC (tr. 2/54). He did all the hiring for JTC including phase VI contract work (tr. 2/93-94). Before JTC started having problems with employee access to MAFB, Mr. G. Richerson did not ask applicants about their criminal history (tr. 2/94-95). Mr. G. Richerson recalled that "phase VI was a showstopper...for some reason when we hit phase VI, it was hard to get people on [to MAFB]" (tr. 2/56). In phase VI access to MAFB became the "driving factor" to hiring decisions (tr. 2/73). Mr. G. Richerson recalled that base access started to become a real problem at the end of winter 2006 or spring 2007 (tr. 2/79).

17. Mr. Jason Richerson was project superintendent on phase VI for JTC (tr. 2/103, 106). Phase VI was a "very large project" with construction of over 40 housing units (tr. 2/107). He recalled that the contract with Garco was signed in the fall and JTC wanted to start the concrete work as soon as possible to work during good weather (tr. 2/107-08). JTC's work on phase VI was pouring concrete, rough framing and roofing (tr. 2/110). JTC organized teams ("crews") of five people consisting of one crew leader

with strong construction and management skills and four journeymen members with strong construction skills (tr. 2/111). Even with an experienced crew there is a learning curve issue, but with over forty similar building once the crew has built one or two they "should be rolling" (tr. 2/112, 125). However, Mr. J. Richerson did not expect to have to train crew members on basic construction work (tr. 2/113). When JTC started in the fall of 2006 he did not expect to have any difficulty getting the kind of crews he needed onto MAFB (tr. 2/115). He recalls that JTC was not able to hire from the pool of workers it was accustomed to using because they could not get on base (tr. 2/117). JTC had never had that problem before (tr. 2/118).

Mr. J. Richerson testified that his crews were taking quite a bit longer than anticipated to do the work (tr. 2/120-21). Also, he expected to have his crews all ready by late spring or early summer of 2007 but because of the base access problem he never really got the fully trained and efficient crews during the entire project (tr. 2/127). Mr. J. Richerson attributed the high turnover in employees JTC experienced to the young age and inexperience of many of the employees and the difficulty associated with the work (tr. 2/153).

18. On 19 February 2007, JTC contracted with Piene Construction, Inc., to do framing on the phase VI contract (tr. 1/229; DVD supp. R4, tab 63 at PDF 1). The second tier subcontract value was based on 464,534 square feet of framing work *(id.).* Mr. Talcott testified that 464,534 square feet represented close to the total amount of framing (tr. 1/230).

19. On 9 May 2007, Garco forwarded a letter to the COE, dated 8 May 2007, from JTC that stated in part:

> Per FAR 52[.]222-3 Convict Labor, this clause allows for the employment of persons on parole or probation. However, JTC does not understand why these individuals are continually being denied base access/passes. The unemployment rate in Montana is at a historical low. The construction industry is in need of qualified employees and these individuals should not be denied access to our jobsites. This issue is impacting and delaying JTC's performance of this contract.

(R4, tab E, subtab 102)

20. On 17 May 2007, JTC emailed Col Geofrey A. Frazier, MAFB, asking if JTC could chauffer pre-release convict employees on post and take other precautions in order to gain access to the jobsite (DVD, app. supp. R4, ex. 322 at PDF 2). Col Frazier responded stating, "Our contracting, legal and security experts are meeting early next week to discuss this issue. The goal is to provide recommendations with regard to the various needs and requirements. I'll ensure you are briefed on Col Finan's direction." *(Id.* at PDF 1) Mr. Talcott testified that his 17 May 2007 email to Col Frazier was trying to find a solution to the access problem by allowing individuals covered by the convict labor clause access to the base (tr. 1/116-18). He recalled one of the responses was that MAFB would not allow sex offenders and violent offenders access to the

base (tr. 1/119). Mr. Talcott recalled that he agreed sex offenders should not be allowed on base, but he wanted clarification on what constituted a violent offender (tr. 1/119-20).

21. On or about 21 May 2007 MAFB personnel had an "initial meeting concerning base access for contractors" to prepare options for Col Finan (DVD, app. supp. R4, ex. 324 at PDF 2). A talking paper for that meeting included, "Current policy prohibits sexual offenders, violent offenders, and offenders currently in the penal system (i.e. parole, probation, and pre-release) from access to the installation" *(id.* at PDF 3).

22. By letter dated 21 May 2007 from contracting officer (CO) Carroll to JTC, CO Carroll took the following position:

> The ability to grant or deny an individual entry to federally controlled property rests with the individual appointed with the authority to grant or deny. In the case of Malmstrom Air Force Base; this authority is granted to the Wing Commander. The Wing Commander makes all decisions to grant or deny on a case-by-case basis. However, individuals who have been convicted as violent offenders or any sexual crime in nature will be denied entry to the installation.

(DVD, app. supp. R4, ex. 323) Mr. Talcott testified that people who were not sexual offenders or violent offenders,

people with DUI convictions, drug convictions, criminal endangerment, etc., were being denied access to MAFB (tr. 1/123).

23. Minutes from a 22 May 2007 Partnering Meeting included the following:

> The issue with using work release enrollees or parolees is being discussed with Malmstrom security to try and arrive at a consensus as to what level of prior offense will exclude someone from receiving a base access pass. At this time no one with a prior felony conviction is being permitted on base.

(DVD, app. supp. R4, ex. 327 at PDF 4) Mr. Talcott agreed that MAFB was not allowing anyone that ever had a felony conviction on base (tr. 1/125). Mr. Talcott testified he agreed that sex and violent offenders should not be allowed access to MAFB (tr. 1/130). As of 22 May 2007, JTC had seven active construction jobs on MAFB that constituted 33% of active construction jobs on base (DVD, app. supp. R4, ex. 324 at PDF 1).

24. By email dated 25 May 2007, Ms. Sinclair, Air Force attorney advisor, distributed an information paper entitled "BACKGROUND PAPER ON CONTRACTOR ACCESS" within MAFB (DVD, supp. R4, tab 29).[4] The paper includes three options for the commander's

4. The transcript erroneously refers to supp. R4, tab 30 (tr. 3/10).

consideration and the first option reads, "[m]aintain the current policy of no sex offenders, violent offenders or anyone currently in the penal system (parole, probation, or pre-release)" *(id.* at PDF 3). MG Finan[5] recalled that accurately stated the policy (tr. 3/11-12).

25. By email dated 3 August 2007 from administrative contracting officer (ACO) Bradley, to Mr. Ward and Ms. Sinclair, ACO Bradley stated:

> I've had both Talcott and Garco Construction ask me during the past few days about the status of the Parollee [sic] Labor access issue. They both were wondering if the Base has a policy letter regarding access; I told them that I'd check on both of these items. Any information that you can send me would be appreciated.

(DVD, app. supp. R4, ex. 329) Mr. Ward testified that the only policy in place at the time was found in Pamphlet 31-103 and Instruction 31-101 (tr. 3/183).

26. In a 31 August 2007 email from Mr. Ward to Ms. Sinclair, Mr. Ward wrote:

> Talcott called again today wanting to know the status of convict labor. I thought this [w]as settled, I guess I was wrong. He talked

5. When she testified at the hearing "Col Finan" had been promoted to Major General.

> to Joanne Bratten and wants to know what the definition of violent offenders is, and his contract has a convicted labor clause in it. I assume he is talking about the FAR. Again, he is allowed to use convict labor, but that doesn't guarantee them access to the installation. The final decision remains the same.
>
> No Sexual Offenders
>
> No Violent Offenders as described as Montana Code Annotated
>
> - Violent offenders are registered with the state, that how we find out who is who
>
> - If they are registered, they are not authorized on base
>
> No person currently in the correctional system (Parole or under the supervision of a probation officer)
>
> Please past [sic] this on to COE, Contracting, etc.
>
> A new wing instruction concerning contractors is currently in coordination[.]

(DVD, app. supp. R4, ex. 395) Mr. Ward testified that this was the policy that was being enforced through the duration of the project (tr. 3/185). Mr. Ward testified that

prior to Col Finan's October 2007 memo there was no document that defined what would constitute unfavorable information from the NCIC (tr. 3/187).

27. In a 10 September 2007 email from ACO Bradley to JTC concerning parolee labor access to MAFB, ACO Bradley wrote:

> I've received an email from Nancy Sinclair of the JAG office. A new policy is being worked on. The Wing Commander has been briefed on the issue. Until the new policy is finalized, the Base has no further news to offer regarding the issue. Wish I could offer more insight on this. I can tell you that I was at a meeting in the June timeframe with COL Finan regarding this issue, and I tried to stress to her just how tight the labor pool is right now. She was willing to readjust her policy, but she is concerned how the change would be implemented so that it is applied fairly to all Base contractors.

(DVD, app. supp. R4, ex. 333)

28. On 11 September 2007, CO Bryan sent JTC a letter stating:

> 1. The contracting office is in receipt of your letter(s) regarding FAR 52.222-3/Convict Labor. You are correct in the fact that FAR 52.222-3/Convict Labor does allow you to use that labor force however, the National Defense

> Act of 1959 gives the Wing Commander the authority to enforce security requirements for the base. At this time, as stated in our previous letter of 21 May 2007, anyone convicted as a violent offender or of a sexual crime will be denied access to the installation.
>
> 2. Violent offenders as described in Montana Code must be registered with the state and if they are registered with the state they are not authorized on Malmstrom AFB. Also, any persons in the correctional system, paroled or under the supervision of a probation officer are not authorized on Malmstrom AFB.

(DVD, app. supp. R4, ex. 334) Mr. Talcott testified that adding persons "paroled or under the supervision of a probation officer" to the list of people who will not be allowed on MAFB went beyond violent and sexual offenders (tr. 1/131).

29. On 30 October 2007 ACO Bradley, forwarded to Garco an "updated" MAFB policy memorandum on contractor personnel access to MAFB signed by the base commander Col Finan, but undated (R4, tab E, subtab 103). An Air Force internal email dated 23 October 2007 distributed Col Finan's signed Memorandum for all Contractors and Contractor Personnel and stated, "Col Finan signed the letter yesterday" (DVD, supp. R4, tab 31 at 1). During the hearing the parties stipulated that Col Finan signed her memorandum on 22 October 2007 (tr. 2/101-02). The memorandum read in part:

Appendix C

MEMORANDUM FOR ALL CONTRACTORS AND CONTRACTOR PERSONNEL

....

SUBJECT: Malmstrom AFB Installation Access for Contractor Personnel

1. In order to preserve good order and discipline and safeguard personnel, resources and facilities by the authority granted to me by the Internal Security Act of 1950, this policy is effective immediately for all contractors and contractor personnel.

....

c. The 911 Dispatch Center will input all listed employees' name and data into the National Criminal Information Center (NCIC) database for a background check in accordance with Air Force directives.

Unfavorable results from the background check will result in individuals being denied access to the installation, including, but not limited to, individuals that are determined to fall into one or more of the following categories: those having outstanding wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program. The definition of sex offender and

violent offender can be found at Montana Code Annotated § 46-23-502.

(DVD, app. supp. R4, ex. 337 at PDF 1) Mr. Ward testified that if an individual had "want and warrant" come up from the NCIC he would be detained and turned over to the proper authorities until the warrant could be cleared (tr. 3/188-89). The individual with a "want and warrant" would not be considered at all for access to the base (tr. 3/189).

30. MG Finan was shown her 22 October 2007 memo, specifically paragraph 1.c. and asked if she believed it was a "big change." Her response was, "I believe it was a large change." (Tr. 3/13; DVD, supp. R4, tab 31)[6] She was asked if she thought it was "arbitrary" and she testified "Absolutely not. It's standard." (Tr. 3/14) She testified that "[t]he intention of the policy was to keep the mission and the people at Malmstrom Air Force Base safe and secure" (tr. 3/15). She explained that her 22 October 2007 memo gave guidance on what was deemed unfavorable results referred to in Pamphlet 31-103 (tr. 3/48). MAFB access policy was "always to be fair and equally applied to everybody" (tr. 3/54). She also testified that once access was granted to an individual, it could be revoked at any time (tr. 3/15). MG Finan did not review individual's seeking access to MAFB (tr. 3/45). She delegated the authority to consider "unfavorable results" to the security forces commander, Col Asher (tr. 3/22, 25, 48).

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6. The copy of the memorandum at DVD, supp. R4, tab 31, referred to in the transcript is missing the 30 October 2007 transmittal letter. The full document is at R4, tab E, subtab 103.

31. By letter dated 13 November 2007, Garco submitted to the ACO a request for equitable adjustment (REA) from JTC, dated 25 October 2007, in the amount of $454,266.44 (DVD, app. supp. R4, ex. 341 at PDF 2, 3). JTC explained:

> FAR 52.222-3 CONVICT LABOR (JUN 2003)
>
> specifically states that we are allowed to hire and employ individuals convicted of an offense for this contract. This FAR has been in previous contracts, and we planned on and used these individuals for other contracts. Because it is also in this contract, we based our cost estimates for Phase VI on our ability to use these same individuals or pool of individuals. There is a nationwide shortage of experienced construction workers. It is well documented that the problem is even more acute in Montana with our very low unemployment rate.

(Id. at PDF 3) Included with the REA was a list of 28 individuals with construction experience that JTC submitted to MAFB but were denied access *(id.* at PDF 7-8; tr. 2/28, 31).

32. On 18 December 2007, CO Gary determined that JTC's REA "has no merit" and suggested that if Garco/JTC disagreed they should "pursue resolution per the requirements of FAR 52.233-1, DISPUTES" (R4, tab E, subtab 106).

33. In a 30 January 2009 response to JTC's 18 December 2008 Freedom of Information Act request, the Air Force took the position that Col Finan's undated memorandum to all contractors concerning base access was signed in August 2006 "shortly after she assumed Command" (DVD, app. supp. R4, ex. 382 at 1). Mr. Talcott testified that he didn't see the memo until October 2007 (tr. 1/168).

34. By letter dated 21 February 2008 to the ACO, Garco requested reconsideration of JTC's REA (R4, tab E, subtab 107).

35. In a 1 April 2008 letter to Garco concerning JTC's REA, ACO Bradley wrote in part:

> We researched the base security restrictions and according to Malmstrom Air Force Base personnel and documentation dated before March 2006, the security restrictions for certain types of convict labor were in effect before the August 2006 award of the aforementioned contract. The October 2007 policy was a reissue of the same restrictions as those implemented shortly after September 11, 2001. We have no information that indicates the base access policy has changed since September 2001.

(DVD, app. supp. R4, ex. 500 at PDF 300) ACO Bradley found no merit in the REA *(id.).* Mr. Talcott testified that this was not true because JTC never had any of its employees denied access to MAFB until this contract (tr. 1/163).

36. By letter dated 24 May 2011, Garco submitted JTC's pass-through claim to the COE. Garco's vice president, Mr. Barnett, certified the claim. The claim included the following:

> Talcott's bid(s) anticipated staffing the Project with experienced and qualified individuals available in the local labor pool which typically includes "convict" labor, specifically individuals on probation or available through the Great Falls Pre-Release Center. In the past Talcott has successfully employed individuals with minor criminal records on a variety of projects including some at Malmstrom AFB. Talcott has no history of hiring violent or sexual offenders and did not contemplate doing so on this Project.
>
> In preparing its bid for Phase VI framing work, Talcott reasonably anticipated achieving its standard historical productivity rates. To accomplish this it was necessary for Talcott to obtain an experienced and qualified labor force. Due to changes in base policies regarding the admission of certain individuals onto Malmstrom AFB – changes which occurred after project bid and award but prior to the sta1t of the work – Talcott was not permitted to staff the job as planned and was seldom able to achieve its normal and expected productivity rates. As a direct result of changes to base access policies Talcott experienced increased framing labor hours and employee turnover well

> in excess of what it reasonably contemplated and allowed for in its bid. Changes to base access policy also required Talcott to incur substantially increased administrative costs associated with locating, processing, hiring and training personnel.

(DVD, app. supp. R4, ex. 500 at PDF 37, 41-42)

37. By letter dated 12 June 2008 to Garco, JTC again explained its position:

> When our employees were first denied access to MAFB in early 2007, we asked for an explanation. A response from MAFB Contracting Officer Arlene Stern dated May 21, 2007, informed us that **"The Wing Commander makes all decisions to grant or deny on a case-by-case basis. However, individuals who have been convicted as violent offenders or any sexual crime in nature will be denied entry to the base."**
>
> However, JTC employees denied access were not violent or sexual offenders.

(R4, tab E, subtab 111 at 2, 3) On 25 June 2008, Garco forwarded JTC's letter to the ACO and requested a contracting officer's final decision *(id.* at 1).

38. In an undated letter[7] by Mr. Lesofski, job developer/system analyst of Great Falls Pre-Release Center, to JTC, Mr. Lesofski wrote:

> Per our discussion last week the 19th of May, I went back and checked my employer records at the Pre-Release Center. I can confirm to you that we had many residents working on Malmstrom AFB during the new construction period starting in 2001 thru 2005 and most of 2006. As you are aware we had residents working for you, Atherton Construction and other subcontractors. Which was working exceptionally well for us, as well as the contractors. We were able to insure to the contractors that these individuals were tested on a weekly basics [sic] for drugs, which provides a better work force. During the period that Colonel Finan became the base commander approximately 2 years ago, [a] Memorandum for all contractors was released from her office. The Memorandum stated that Pre Release residents would be denied access to work on the base. Thus in effect eliminating the opportunity for your company and other contractors the use of our trained and qualified workers.

(DVD, supp. R4, tab 14)

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7. The copy in the record has a partial fax date at the top reading "y 28, 2008." In addition, the reference to "2 years ago" in the letter implies that this letter was written in 2008.

39. By letter dated 12 September 2008 to Garco, the alternate ACO, Mr. Gallagher, stated that it had no record of Garco's 25 June 2008 request for a final decision and suggested that if Garco/JTC desired a final decision that they should submit a certified claim (R4, tab E, subtab 113).

40. According to the final as-built schedule Garco completed work on the contract on 28 July 2009 (DVD, supp. R4, tab 77 at PDF 20).

41. On 28 September 2011, Garco appealed, on a deemed denial basis, the CO's failure to issue a final decision (R4, tab E, subtab 118). On 29 September 2011 the Board docketed Garco's appeal as ASBCA No. 57796 that was later consolidated with ASBCA No. 57888.[8]

DECISION

Procedural History

By decision dated 14 January 2014, this Board granted partial summary judgment in favor of the Air Force. *Garco Construction, Inc.,* ASBCA Nos. 57796, 57888, 14-1 BCA ¶ 35,512. We found that Col Finan's 22 October 2007 memorandum was a sovereign act and the government was not liable in damages that may have been caused by the memorandum from 22 October 2007 forward. For the period before 22 October 2007 we held:

8. By agreement of the parties, the contracting officer issued a final decision on 23 November 2011 denying JTC's pass-through claim. A timely protective appeal was filed and docketed as ASBCA No. 57888. Both ASBCA Nos. 57796 and 57888 concern the same claim.

> For the time period before the October 2007 memorandum the record is less clear. In its opposition, appellant presents an analysis of contemporaneous documents detailing the process leading up to COL Finan's execution of her October 2007 memorandum. This analysis paints a picture of inconsistent explanations of the policy. However, it appears that the Air Force was consistent about not allowing pre-release convicts on MAFB from early 2007 (SOF ¶ 8). The record is not sufficiently developed to allow the Board to grant the motion for the period between contract award in August 2006 and issuance of the October 2007 memorandum.

Garco, 14-1 BCA ¶ 35,512 at 174,074.

Harm to JTC

JTC presented ample credible evidence that it was harmed by the Air Force's change in its enforcement of its base access policy (findings 15-17, 19-20, 38). We conclude from this evidence that JTC was not able to hire as experienced a work force as it had in the past and that this had an adverse impact on JTC's labor hours and associated costs of performance. The Air Force could be liable for this damage unless it is protected by the sovereign act defense before 22 October 2007.[9]

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9. To the extent this is viewed as a "course of dealings" argument by JTC (subcontractor), it was not between the contracting

Appendix C

The 3 August 2006 to 22 October 2007 Base Access Policy/Sovereign Acts

We next examine the period from contract award, 3 August 2006 up to the 22 October 2007 memorandum and decide if the Air Force base access policy during that time was entitled to treatment as a sovereign act.

The pre-22 October 2007 MAFB access policy is embodied in four documents, only three of which are in the record. We go back to the 341st Space Wing Pamphlet 31-101,[10] 15 October 2002,[11] Local Security Policy and Security Procedures for Contractors to start this analysis. The only prerequisite for access to MAFB stated in the pamphlet is individuals seeking access must be listed on an EAL and have proper identification as defined in the pamphlet. There is nothing in this pamphlet requiring a background check or identifying a criminal record as a limitation on access to MAFB. (Finding 1) This is consistent with JTC's contention that historically MAFB allowed individuals with criminal records to work on base.

---

parties, i.e. Garco and the Air Force, as required *(see BAE Systems Technology Solutions & Services Inc.,* ASBCA No. 57581, 13 BCA ¶ 35,414 at 173,737) and certainly would not defeat the sovereign act defense.

10. As we stated in footnote 2, this pamphlet was renumbered to 31-103 in 2005.

11. This pamphlet superseded the 13 January 1998 version and there is no indication that there was a change to the 1998 policy (finding 1).

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The next document is the 341st Space Wing Instruction 31-101, 18 November 2003, Installation Security Instruction. The record does not include a copy of this instruction, but the superseding instruction, dated 26 July 2005, indicates that the relevant language in the instruction was not changed from the 2003 version. (Finding 2) The 341st Space Wing Instruction 31-101, 26 July 2005, Installation Security Instruction requires that names on the EAL will be run through the NCIC for "wants and warrants" and "[u]nfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFS/CC and 341 SFG/CC" (finding 2). Therefore, from November 2003 the requirement for checking for "wants and warrants" and "scrutinizing" unfavorable results existed at MAFB. This is consistent with the Air Force's contention that such a policy was in place before Contract 0019.

The "wants and warrants" language in the 2003 version of Instruction 31-101 was added to the 21 July 2005 version of the 341st Space Wing Pamphlet 31-103, Local Security Policy and Security Procedures for Contractors:

> A 911 Dispatcher will run the employees name through the National Criminal Information Center system for a wants and warrants check. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFG/CC.

(Finding 3) The 2005 versions of the 341st Space Wing Pamphlet 31-103 and 341st Space Wing Instruction

31-101 were in effect when Contract 0019 was awarded on 3 August 2006 (finding 5). The record reflects that between May 2007 and the 22 October 2007 memorandum, the Air Force was debating internally how to clarify what was considered "unfavorable results" and if it was appropriate to balance that clarification with the tight labor market in the area (findings 21-29). MG Finan testified that her 22 October 2007[12] was not "arbitrary" and simply gave "guidance" on what the terms "unfavorable results" in the 341st Space Wing Pamphlet 31-103 envisioned (finding 30).[13]

We apply the same standard for sovereign acts we applied in our decision granting partial summary judgment. In *M.E.S., Inc.,* ASBCA No. 56149 *et al.,* 12-1 BCA ¶ 34,958, *aff'd,* 502 F. Appx. 934 (Fed. Cir. 2013), the contractor claimed costs associated with a change in the base access policy that caused its employees to spend an hour each day gaining access to the installation. Citing clauses similar to those in Contract 0019 (findings 6-8) and in the preamble of the pamphlets and instructions, the Board in *M.E.S.* decided that the change in the base access policy was a sovereign act. The Board applied the following criteria:

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12. We note that on two separate occasions MAFB incorrectly informed JTC that the memo was signed in August 2006 and that it was a "reissue" of a policy put in place shortly after 11 September 2001 (findings 33, 35).

13. She also testified that her 22 October 2007 memorandum was a "big change," testimony that seems inconsistent with her other testimony and evidence in the record (finding 30).

> With respect to the claimed price adjustment for the delay, we have found above that the changed entry procedures were required by the installation Security Forces Squadron and Air Force Instructions. They were of a public and general nature applicable to all contractors at the installation. They were intended to improve the physical security of the installation, were not intended specifically to nullify contract rights, and they provided no economic advantage to the government. (Finding 37) We conclude that the changed entry procedures were a sovereign act of the government for which no monetary compensation is due. *See Conner Bros. Construction Co. v. Geren,* 550 F.3d 1368 (Fed. Cir. 2008).

Id. at 171,856. The 341st Space Wing Pamphlet 31-103, 21 July 2005, Local Security Policy and Security Procedures for Contractors and 341st Space Wing Instruction 31-101, 26 July 2005, Installation Security Instruction, are each issued by order of the MAFB Commander and are required by the installation Security Forces Squadron and Air Force Instructions (findings 1-3). These documents apply to all contractors and contractor personnel, therefore, they are public and general in nature *(id.).* They were intended to improve the physical security of the installation (findings 29, 30). There is no evidence that the policy was intended to nullify contract rights or that it provided to the government an economic advantage. All criteria in *M.E.S.* are satisfied and we conclude that

the pamphlet and instruction[14] are sovereign acts. This, however, does not put an end to our inquiry.

JTC's Interpretation Argument/Scope of the Sovereign Acts

JTC contends that the Air Force failed to follow base access regulations in place prior to Col Finan's 22 October 2007 memorandum (app. br. at 33). JTC argues, "[n]othing in the Base's access regulations or orders prior to October 2007 stated that persons with felony convictions would be denied access or precluded personnel with felony convictions from working on the Base" (app. br. at 34). This is true. JTC mounts what is essentially a regulatory interpretation argument (app. br. at 33-36). JTC argues that the policy in place before Col Finan's 22 October 2007 policy memorandum was limited to a check for "wants and warrants." JTC contends that a check for "wants and warrants" is not a general criminal background check (app. br. at 34). Mr. Ward disagrees (finding 3). In any event we resolve this matter by employing well known standards of regulatory interpretation. The language to be interpreted is:

> A 911 Dispatcher will run the employees name through the National Criminal Information Center system for a wants and warrants check. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFG/CC.

14. Air Force Instruction 31-101 was held to be a sovereign act in *M.E.S.*, 12-1 BCA ¶ 34,958 at 171,853, 171,855-56.

(Finding 3) It is true that this language only refers to running a NCIC check for "wants and warrants." It is also true that a literal reading of the language might support JTC's argument. However, once it is understood that anyone with a "want or warrant" would be immediately detained upon showing up at the MAFB gate (finding 29), JTC's interpretation breaks down. Any such individual with "unfavorable results" would never be "scrutinized" and access eligibility would not be "determined on a case-by-case basis." An individual with a "want or warrant" would never gain access to MAFB. *(Id.)* JTC's interpretation therefore violates the requirement that when interpreting regulatory language we must find an interpretation that is harmonious with the regulatory scheme and thus look not only to particular language but to design of the provision as a whole. *Space Gateway Support, LLC,* ASBCA Nos. 55608, 55658, 13 BCA ¶ 35,232 at 172,978. Additionally, JTC's interpretation leads to the absurd result that all convicted felons are to be allowed onto MAFB. Even Mr. Talcott agreed that violent felons and sex offenders should not be allowed access to MAFB (findings 20, 22-23). If clear and unambiguous language results in an "absurd" result, the language must be construed to avoid the absurdity. *Church of the Holy Trinity v. United States,* 143 U.S. 457, 460 (1892); *Public Citizen v. United States Department of Justice,* 491 U.S. 440, 454 (1989) (Where the literal reading of a statutory term compels an odd result the court must look for other evidence of congressional intent to find the proper interpretation). Accordingly we decline to adopt JTC's interpretation and conclude that the NCIC check for ··wants and warrants" is a background check and an

individual's criminal record uncovered by the background check could be scrutinized to decide if access to MAFB will be granted. We have already held that this process is embodied in documents that qualify for sovereign act protection.

Air Force's Failure to Enforce its Base Access Policy

Mr. Talcott testified that over a 20-year period of working on MAFB, JTC never experienced a rejection of anyone it listed on its EALs. He relied on this experience in bidding on this job and assumed he would have access to the same pool of workers he had used in the past. (Finding 14) Mr. Talcott recalled that JTC started getting rejections of workers on its EALs in the spring of 2007 (finding 15). Mr. G. Richerson recalled seeing rejections in the winter of 2006 or spring of 2007 (finding 16). We adopt spring of 2007 as the general date the Air Force began enforcing its base policy and denying access to workers on the JTC's EAL. The record is replete with evidence that JTC complained about these rejections and alleged that as a result its workforce was less experienced and inefficient (findings 14-17, 19-20, 25-26, 31).

We have found that at least since 2003, well before Col Finan's 22 October 2007 memorandum, MAFB had written policies in place that required a NCIC background check and a case-by-case evaluation of "unfavorable results." Having policies in place does not answer the question - "were they enforced?" The Air Force presented no evidence that it was actually conducting background checks and denying access to individuals on EALs prior to

the spring of 2007. The Air Force presented no evidence that would lead us to conclude that Mr. Talcott's testimony should not be believed. Since there is no evidence in the record that rebuts JTC's evidence that MAFB did not enforce its access policies until the spring of 2007, we can only conclude that JTC is correct. We conclude that MAFB failed to enforce its access policies, in place since at least 2003, until the spring of 2007. For reasons that follow, we need not discuss whether Garco relied upon JTC's bid and thus relied upon the assumptions made in JTC's bid to Garco with respect to base access policies. *See Fruin-Colnon Corp. v. United States,* 912 F.2d 1426, 1428-29 (Where a contractor seeks recovery based upon its subcontractor's interpretation of the contract, it must prove that it relied in that subcontractor's interpretation when submitting its bid.).

At this point we consider whether the Air Force's failure to enforce its base access policy somehow waived the sovereign nature of the policy thereby forfeiting the defense. The sovereign nature of the 341st Space Wing Pamphlet 31-103, 21 July 2005, Local Security Policy and Security Procedures for Contractors and 341st Space Wing Instruction 31-101, 26 July 2005, Installation Security Instruction arises because they were issued by order of the base commander pursuant to various authorities and satisfy the requirements of our case precedence. *M.E.S.,* 12-1 BCA ¶ 34,958 at 171,856. There is nothing in the record indicating that it was the base commander's decision not to enforce the policy. If this were the case, it is possible that the sovereign act defense would not be available to the Air Force. There is nothing in the record

telling us who was responsible for failing to enforce the policy or whether it was or was not enforced regarding contractors other than JTC. However, it is unlikely that any subordinate would have the authority to waive the base commander's policy. There is nothing in the record even remotely connecting the base commander with the decision not to enforce the access policy. We conclude that the sovereign nature of MAFB's access policy was not affected by the Air Force's failure to enforce it for several years prior to 2007.

The government can act in its sovereign capacity without warning. In *Conner Brothers Construction Co. v. Geren,* 550 F.3d 1368 (Fed. Cir. 2008), Conner was denied access to its work site on Fort Benning, Georgia, shortly after the attacks on 11 September 2001. The Federal Circuit upheld the Board's decision that the denial of access was a sovereign act. *Id.* at 1371, 1378-79. In *M.E.S.* the Air Force "updated procedures for installation entry by contractors." *M.E.S.,* 12-1 BCA ¶ 34,958 at 171,853. It was undisputed that this change added one hour each day for compliance by M.E.S. and its subcontractors. *Id.* This Board held that the "update" was a sovereign act for which the Air Force was not liable for money damages. *Id.* at 171,856. This case is analogous to *M.E.S.* The Air Force's spring 2007 decision to enforce its base access policy has the same effect as the update in policy in *M.E.S.* Since we have held that the Air Force's failure to enforce its policy did not affect the sovereign nature of the policy, the Air Force's decision to commence enforcing its existing base access policy in 2007 was protected as a sovereign act. This conclusion extends the sovereign act protection in

our decision granting partial summary judgment from 22 October 2007 back to the spring of 2007 or whenever the Air Force first started denying access to individuals on JTC's EAL.

JTC's Other Arguments

JTC alleges that the government failed to prove that its conduct in reviewing each unfavorable result from the NCIC "was not arbitrary, unpredictable or discriminatory" (app. br. at 38). First of all it is not the government's burden of proof. The government's actions in this regard are presumed reasonable. *SIA Construction, Inc.,* ASBCA No. 57693, 14-1 BCA ¶ 35,762 at 174,988 ("Government agents arc presumed to discharge their duties in good faith, and a party alleging 'bad faith' or 'bad intent' can overcome this presumption only by clear and convincing evidence." (citation omitted). Second, while we see deliberations within the Air Force about the access policy (findings 21-29), we see nothing to support a finding that the Air Force was "arbitrary, unpredictable or discriminatory" *(id.).* JTC argues that Col Finan's 22 October 2007 memorandum was arbitrary and capricious, however, we adjudicated Col Finan's memorandum in our earlier decision, it is too late to make this argument now and there is nothing in the record that supports that conclusion anyway.

JTC argues that the government is liable in monetary damages because it did not grant a time extension. Appellant points out that JTC informed the Air Force that the problem with base access was delaying JTC's

performance (app. br. at 43). JTC relies on two documents wherein it informed the government that it was being impacted from both a cost and time standpoint *(id.).* It is true that Garco might have been able to specifically request additional time to perform as a result of the sovereign acts. *Troy Eagle Group,* ASBCA No. 56447, 13 BCA ¶ 35,258 at 173,060 ("Actions taken by the United States in its sovereign capacity shield the government from liability for financial claims resulting from those acts, although a contractor is allowed additional time to perform.") (citations omitted). However, even if appellant had a right to a time extension it does not provide it a path to entitlement to monetary damages resulting directly from the sovereign act of limiting access to MAFB. We have considered all of JTC's arguments and none of them affect our analysis and decision.

Quantum

Having decided that before Col Finan's 22 October 2007 base access memorandum the Air Force's change from its practice of allowing workers with criminal backgrounds access to MAFB was protected as a sovereign act, we need not discuss other arguments advanced by the parties, nor do we determine quantum.

CONCLUSION

The Air Force's enforcement of its base access policy commencing on or about the spring of 2007 was a sovereign act. To the extent JTC suffered as a result of the denial of access to its desired workers, the Air Force is not liable in monetary damages. The appeals are denied.

Appendix C

Dated: 22 September 2015

/s/
CRAIG S. CLARKE
Administrative Judge
Armed Services Board of
Contract Appeals

I concur

/s/
MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

/s/
RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board of
Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57796, 57888, Appeals of Garco Construction, Inc., rendered in conformance with the Board's Charter.

Dated: 23 September 2015

/s/
JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals

APPENDIX D — OPINION OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS, DATED JANUARY 14, 2014

ARMED SERVICES BOARD
OF CONTRACT APPEALS

ASBCA Nos. 57796, 57888

Appeals of --

GARCO CONSTRUCTION, INC.

Under Contract No. W912DW-06-C-0019

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The government moves for partial summary judgment[1] based on what it contends is a sovereign act limiting access of contractor convict employees to the jobsite on Malmstrom Air Force Base (MAFB). We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We grant the government's motion for partial summary judgment in part and deny it in part.

1. ASBCA No. 57796 is the original convict labor appeal. ASBCA No. 57888 is a "protective appeal" for 57796. The motion is styled "partial" because the issue of a time extension remains.

Appendix D

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 3 August 2006 the U.S. Army Corps of Engineers (COE) awarded Contract No. W912DW-06-C-0019 (0019) to Garco to replace family housing, phase VI, at MAFB (R4, tab D at 10-2, -3). MAFB supports the 341st Missile Wing, one of three U.S. Air Force Bases that maintains and operates Minuteman III intercontinental ballistic missiles (gov't mot., ex. C, BG Finan decl. ¶ 2). MAFB is designated a Protection Level 1 (PL 1) installation, the highest security level in the Air Force (*id.*).

2. The contract included the following FAR clause:

> 52.204-9 PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL (JAN 2006)
>
> (a) The Contractor shall comply with agency personal identity verification procedures identified in the contract that implement Homeland Security Presidential Directive-12 (HSPD-12), Office of Management and Budget (OMB) guidance M-05-24, and Federal Information Processing Standards Publication (FIPS PUB) Number 201.
>
> (b) The Contractor shall insert this clause in all subcontracts when the subcontractor is required to have physical access to a federally-

> controlled facility or access to a Federal information system.

(R4, ex. D at 30)

3. The contract included Section 01001, "SUPPLEMENTARY REQUIREMENTS," that included:

> 1.6 IDENTIFICATION OF EMPLOYEES AND MILITARY REGULATIONS:
>
> (a) The Contractor shall be responsible for compliance with all regulations and orders of the Commanding Officer of the Military Installation, respecting identification of employees, movements on installation, parking, truck entry, and all other military regulations which may affect the work.
>
> (b) The work under this Contract is to be performed at an operating Military Installation with consequent restrictions on entry and movement of nonmilitary personnel and equipment.

(R4, ex. D at 01001-2)

4. The contract included Section O 1005, "SITE SPECIFIC SUPPLEMENTARY REQUIREMENTS," which included the following:

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1.3 GENERAL AREA REQUIREMENTS

> Security requirements and procedures shall be coordinated with the 341 Security Forces Squadron, Resource Protection (telephone 406-731-4344), Malmstrom AFB. Activities of the Contractor and Contractor's employees and subcontractors and their employees while on the base, will be conducted in accordance with base regulations, including those of the fire marshal, as well as security directives. This includes, but is not limited to, obtaining a Work Clearance Request (AF Form 103) before any digging and yielding to alert vehicles during alerts if located on a marked alert route. Security directives include Antiterrorism Force Protection (paragraph 1.3.4 below) and the GENERAL CONTRACTING ENTRY AUTHORITY LIST attached [at] the end of this Section. This list shall include all Contractor personnel working on the base.

(R4, ex. D at 01005-1)

5. At time of award, MAFB, 341st Space Wing Pamphlet 31-103, 21 July 2005, Local Security Policy and Security Procedures for Contractors, established "policy for contractors who require[] entry to the installation" (R4, tab F, subtab 102). Paragraph 5 of the pamphlet deals with entry to the base:

Appendix D

> **5. Obtaining Entry Credentials/Passes.** Contractors will be permitted to enter MAFB by following the procedures set forth in this pamphlet ....
>
> ....
>
> 5 .2 Upon award of a contract, the contractor will be issued an Entry Authority List (EAL) **(Attachment 5)** by the contract administrator in 341 CONS. The contractor will need to submit the required information for the EAL, to the contract administrator in 341 CONS prior to coming to MAFB. Once the letter is received from 341 CONS, the Visitor Control Center will forward the EAL to the 911 Dispatch Center. A 911 Dispatcher will run the employees name through the National Criminal Information Center system for a wants and warrants check. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFG/CC.

(R4, tab F, subtab 102 at 2-3)

6. The Notice to Proceed was issued to Garco on 21 August 2006 (gov't mot., ex. G).

7. A pre-construction conference was held on 12 September 2006 that was documented in a 27 September 2006 set of minutes sent to Garco (R4, tab E, subtab 101).[2]

---

2. The copy in the record is unsigned, however, Garco did not contest the accuracy of the minutes in its opposition.

Representatives of Garco and its subcontractor James Talcott Construction, Inc., (JTC) attended (gov't mot., ex. H). The minutes included, "[n]o one with outstanding wmrnnts, felony convictions, or on probation will be allowed on base" (R4, tab E, subtab 101 at 2).

8. On 9 May 2007 Garco forwarded a letter, dated 8 May 2007, from JTC that stated in part:

> Per FAR 52.222-3 Convict Labor, this clause allows for the employment of persons on parole or probation. However, JTC does not understand why these individuals are continually being denied base access/passes. The unemployment rate in Montana is at a historical low. The construction industry is in need of qualified employees and these individuals should not be denied access to our jobsites. This issue is impacting and delaying JTC's performance of this contract.

(R4, tab E, subtab 102)

9. On 17 May 2007, JTC emailed COL Geofrey A. Frazier, MAFB, asking if JTC could chauffer pre-release convict employees on post and take other precautions in order to gain access to the jobsite (app. opp'n, ex. 6 at 3). COL Frazier responded stating, "[o]ur contracting, legal and security experts are meeting early next week to discuss this issue" and brief COL Finan *(id.* at 2).

10. Between 17 May and 10 September 2007, there were a number of meetings and communications both internal to the Air Force and between the Air Force and Garco/JTC relating to the pre-release convict employee access issue (app. opp'n, exs. 7, 8, 10, 11).

11. In a 10 September 2007 email from Mr. Brad A. Bradley, Administrative Contracting Officer (ACO Bradley), to JTC concerning the parolee labor access to MAFB, he wrote:

> I've received an email from Nancy Sinclair of the JAG office. A new policy is being worked on. The Wing Commander has been briefed on the issue. Until the new policy is finalized, the Base has no further news to offer regarding the issue. Wish I could offer more insight on this. I can tell you that I was at a meeting in the June timeframe with COL Finan regarding this issue, and I tried to stress to her just how tight the labor pool is right now. She was willing to readjust her policy, but she is concerned how the change would be implemented so that it is applied fairly to all Base contractors.

(Gov't mot., ex. K)

12. On 30 October 2007 ACO Bradley, forwarded to Garco an "updated" MAFB policy memorandum on contractor personnel access to MAFB signed by the base commander COL Finan, but undated (R4, tab E, subtab 103). The memorandum read in part:

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MEMORANDUM FOR ALL CONTRACTORS AND CONTRACTOR PERSONNEL

....

SUBJECT: Malmstrom AFB Installation Access for Contractor Personnel

1. In order to preserve good order and discipline and safeguard personnel, resources and facilities by the authority granted to me by the Internal Security Act of 1950, this policy is effective immediately for all contractors and contractor personnel.

....

c. The 911 Dispatch Center will input a listed employees' name and data into the National Criminal Information Center (NCIC) database for a background check in accordance with Air Force directives. Unfavorable results from the background check will result in individuals being denied access to the installation, including, but not limited to, individuals that are determined to fall into one or more of the following categories: those having outstanding wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program. The definition of sex offender and violent offender can be found at Montana Code Annotated § 46-23-502.

(R4, tab E, subtab 103) Garco does not dispute that COL Finan, as MAFB's Base Commander, had the authority to issue the policy memorandum nor does Garco dispute that the policy memorandum, by its terms, applied to "all contractors and contractor personnel" effective immediately.

13. By letter dated 13 November 2007, Garco submitted to the ACO a request for equitable adjustment from JTC, dated 25 October 2007, in the amount of $454,266.44 (R4, tab E, subtab 104). JTC explained:

> FAR 52.222-3 CONVICT LABOR (JUN 2003) specifically states that we are allowed to hire and employ individuals convicted of an offense for this contract. This FAR has been in previous contracts, and we planned on and used these individuals for other contracts. Because it is also in this contract, we based our cost estimates for Phase VI on our ability to use these same individuals or pool of individuals. There is a nationwide shortage of experienced construction workers. It is well documented that the problem is even more acute in Montana with our very low unemployment rate.

(*Id.* at 2)

14. On 18 December 2007, CO Nancy A. Gary determined that JTC's REA "has no merit" and suggested that if Garco/JTC disagreed they should "pursue resolution per the requirements of FAR 52.233-1, DISPUTES" (R4, tab E, subtab 106).

15. By letter dated 21 February 2008 to the ACO, Garco requested reconsideration of JTC's REA (R4, tab E, subtab 107). The ACO responded on 1 April 2008 reiterating that it found no merit in the REA and again referring Garco/JTC to the disputes process (R4, tab E, subtab 109).

16. By letter dated 12 June 2008 to Garco, JTC again explained its position:

> When our employees were first denied access to MAFB in early 2007, we asked for an explanation. A response from MAFB Contracting Officer Arlene Stern dated May 21, 2007, informed us that **"The Wing Commander makes all decisions to grant or deny on a case-by-case basis. However, individuals who have been convicted as violent offenders or any sexual crime in nature will be denied entry to the base."**
>
> However, JTC employees denied access were not violent or sexual offenders.

(R4, tab E, subtab 111 at 3) (Emphasis in original) On 25 June 2008, Garco forwarded JTC's letter to the ACO and requested a contracting officer's final decision *(id.* at 1).

17. In an undated letter[3] by Mr. Roger Lesofski, Job Developer/System Analyst of Great Falls Pre-Release Center, to JTC, Mr. Lesofski wrote:

> Per our discussion last week the 19th of May, I went back and checked my employer records at the Pre-Release Center. I can confirm to you that we had many residents working on Malmstrom AFB during the new construction period starting in 2001 thru 2005 and most of 2006. As you are aware we had residents working for you, Atherton Construction and other sub contractors. Which was working exceptionally well for us, as well as the contractors. We were able to insure to the contractors that these individuals were tested on a weekly basics [sic] for drugs, which provides a better work force. During the period that Colonel Finan became the base commander approximately 2 years ago, [a] Memorandum for all contractors was released from her office. The Memorandum stated that Pre Release residents would be denied access to work on the base. Thus in effect eliminating the opportunity for your company and other contractors the use of our trained and qualified workers.

(Gov't mot., ex. L)

---

3. The copy in the record has a partial fax date at the top reading "y 28, 2008." In addition, the reference to "2 years ago" in the letter implies that this letter was written in 2008.

18. By letter dated 12 September 2008 to Garco, the alternate ACO, Allen R. Gallagher, stated that it had no record of Garco's 25 June 2008 request for a final decision and suggested that if Garco/JTC desired a final decision that they should submit a certified claim (R4, tab E, subtab 113).

19. On 24 May 2011, Garco submitted a certified "Pass Through" claim in the amount of $1,415,718.40 (R4, tab E, subtab 115). On 28 September 2011, Garco appealed, on a deemed denial basis, the CO's failure to issue a final decision (R4, tab E, subtab 118). On 29 September 2011 the Board docketed Garco's appeal as ASBCA No. 57796 that was later consolidated with ASBCA No. 57888.

DECISION

Moving for summary judgment the government argues that COL Finan's policy of excluding pre-release convicts from MAFB was a sovereign act and as such appellant cannot recover money damages even if the policy caused its costs of performance to increase (gov't mot. at 14-16). The government relies in large part on *Conner Bros. Construction Co. v. Geren,* 550 F.3d 1368 (Fed. Cir. 2008) wherein the Federal Circuit affirmed the Board's decision in *Conner Bros. Construction Co.,* ASBCA No. 54109, 07-2 BCA ¶ 33,703. The government argues that FAR 52.222-3, CONVICT LABOR (JUN 2003) (Convict Labor clause) does not guarantee access to military installations.

Appellant counters that it has a "long history" of over 20 years performing construction projects on MAFB and

that during this time it was allowed to employ workers with criminal records and they were allowed on MAFB (app. opp'n at 6-7). It complains that in early 2007 under COL Finan, workers that were previously allowed on base were excluded and the change in policy increased its costs of performance (app. opp'n at 7-8). Appellant argues that the new policy was established in an arbitrary, unpredictable or discriminatory manner (app. opp'n at 25). Appellant complains that there was no pre-award notice of the policy change (app. opp'n at 30), that the "unwritten" policy was implemented without notice (app. opp'n at 29), that the COE was "Intimately Involved in Developing and Promulgating the New Policy" (app. opp'n at 34), and that questions of material fact exist relating to each of its allegations. Alternatively, it argues that the motion should be denied because it has not had a full opportunity to conduct discovery in defense of the government's motion (app. opp'n at 39).

Summary judgment is appropriate only where there is no genuine of material fact and the moving party is entitled to judgment as a matter of law. Any significant doubt over factual issues, and all reasonable inferences, must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Dixie Construction Co.,* ASBCA No. 56880, 10-1 BCA ¶ 34,422 at 169,918. "[S]ubstantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Colbert v. Potter,* 471 F.3d 158, 164 (D.C. Cir. 2006).

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FAR 52.222-3, CONVICT LABOR (JUN 2003) provides, in part, that "(a) Except as provided in paragraph (b) of this clause, the Contractor shall not employ in the performance of this contract any person undergoing a sentence of imprisonment imposed by any court of a State ...." Paragraph (b) of the clause provides, however, that the contractor "is not prohibited from employing person" meeting certain criteria. We agree with the government that this Convict Labor clause does not mandate that convict labor hired will be granted access to military installations.

The facts of this case can be divided into two distinct time frames: before and after COL Finan issued the October 2007 memorandum setting forth MAFB's policy on contractor employee access to MAFB. We have reviewed the reasons Garco advances for denying the government's motion for summary judging pending further discovery (app. opp'n at 39-42). As explained below, we are not persuaded that any of the reasons Garco articulated are material to the legal elements of the sovereign act issue that arises as a consequence of COL Finan's October 2007 policy memorandum. Further discovery, however, may yield material facts in dispute relating to the exclusion of pre-release convicts from MAFB prior to the issuance of the October 2007 policy memorandum.

COL Finan was commander of MAFB between July 2006 and May 2008 (gov't mot., ex. C). Contract 0019 was awarded to Garco on 3 August 2006 (SOF ¶ 1). The contract included clauses that required Garco to comply with agency personal identity verification procedures (SOF ¶ 2),

with all regulations and orders of the Commanding Officer of the Military Installation affecting the work (SOF ¶ 3), and with base security requirements and procedures (SOF ¶ 4). In August 2006 MAFB's policy concerning contractor employee access to MAFB provided that an employee's name would be run through the National Criminal Information Center system and any "unfavorable results" would be "scrutinized" and eligibility for access to MAFB would be determined on a "case-by-case basis" (SOF ¶ 5). During a 12 September 2006 pre-construction conference attended by Garco and JTC, it was explained that "[n]o one with outstanding warrants, felony convictions, or on probation will be allowed on base" (SOF ¶ 7).

Garco/JTC's claim arises from the fact that JTC hired pre-release convicts with construction experience to work on contract 0019, but MAFB denied these employees access to the base (SOF ¶¶ 8, 16). JTC asserts that this policy was not consistent with its prior experience with MAFB or the Convict Labor clause, and it "impact[ed] and delay[ed] JTC's performance" (SOF ¶¶ 8, 13, 17). It was not until October 2007 that the policy of denying base access to pre-release convicts was put in writing in a memorandum for "ALL CONTRACTORS AND CONTRACTOR PERSONNEL" issued by the base commander, COL Finan (SOF ¶ 12).

While the parties focus on *Conner Bros. Construction,* 550 F.3d 1368, in their briefs, we rely both on *Conner* as well as a more recent case that is factually similar to this appeal, *M.E.S., Inc.,* ASBCA No. 56149 *et al.,* 12-1 BCA ¶ 34,958, *aff'd,* 502 F. Appx. 934 (Fed. Cir. 2013). In

M.E.S. (ASBCA No. 56350) the contractor claimed costs associated with a change in the base access policy that caused its employees to spend an hour each day gaining access to the installation. Citing clauses similar to those in contract 0019, the Board decided that the change in the base access policy was a sovereign act. The Board applied the following criteria:

> With respect to the claimed price adjustment for the delay, we have found above that the changed entry procedures were required by the installation Security Forces Squadron and Air Force Instructions. They were of a public and general nature applicable to all contractors at the installation. They were intended to improve the physical security of the installation, were not intended specifically to nullify contract rights, and they provided no economic advantage to the government. (Finding 37) We conclude that the changed entry procedures were a sovereign act of the government for which no monetary compensation is due. *See Conner Bros. Construction Co. v. Geren,* 550 F.3d 1368 (Fed. Cir. 2008).

Id. at 171,856.

As in *M.E.S.,* we deal with a change in base access policy and we apply the same standards to arrive at our decision. In her declaration, Brigadier General (BG) Sandra E. Finan, former commander of MAFB during the relevant time period, explained that she issued the October

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2007 Memorandum for all Contractors and Contractor Personnel, Subject: Malmstrom AFB Installation Access for Contractor Personnel, pursuant to authority granted to her by the Internal Security Act of 1950. She stated that she "clarified the requirements of HSPD-12, OMB implementing guidance for HPSD-12, AFI 10-245, AFSPC Sup 1 and 341st Space Wing Pamphlet 31-103" (gov't mot., ex. C, BG Finan decl. ¶ 4). She clarified what constituted "unfavorable" information in the 341st Space Wing Pamphlet 31-103 *(id.;* SOF ¶ 5). The clarification indentified the following individuals that would be denied access to MAFB: "those [individuals] having outstanding wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program" (Finan decl. ¶ 4; SOF ¶ 12). BG Finan stated, "[t]he purpose of my policy was to ensure the safety of personnel on the installation and preserve the good order and discipline on the installation" (Finan decl. ¶ 4). The policy memorandum on its face applies to all contractors and contractor personnel, therefore, it is public and general in nature and applies to all contractors at the installation. There is no evidence that the policy was intended to nullify contract rights or that it provided to the government an economic advantage. Appellant presents no evidence contradicting BG Finan's declaration. All of the criteria in *M.E.S.* are satisfied by the written memorandum of October 2007. The implementation of the base access policy by the October 2007 memorandum was a sovereign act and the government is not liable in damages that may have been caused from October 2007 forward.

Appendix D

For the time period before the October 2007 memorandum the record is less clear. In its opposition, appellant presents an analysis of contemporaneous documents detailing the process leading up to COL Finan's execution of her October 2007 memorandum. This analysis paints a picture of inconsistent explanations of the policy. However, it appears that the Air Force was consistent about not allowing pre-release convicts on MAFB from early 2007 (SOF ¶ 8). The record is not sufficiently developed to allow the Board to grant the motion for the period between contract award in August 2006 and issuance of the October 2007 memorandum.

CONCLUSION

The government's motion for partial summary judgment is granted as to the period after COL Finan signed the October 2007 base access policy memorandum. The government's motion for partial summary judgment is denied as to the time period before COL Finan signed the October 2007 base access policy memorandum.

Dated: 14 January 2014

/s/
CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

/s/

I concur

/s/

Appendix D

MARK N. STEMPLER Administrative Judge Acting Chairman Armed Services Board of Contract Appeals	PETER D. TING Administrative Judge Acting Vice Chairman Armed Services Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57796, 57888, Appeals of Garco Construction, Inc., rendered in conformance with the Board's Charter.

Dated: 14 January 2014

/s/_____
JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals

APPENDIX E — RELEVANT STATUTORY AND REGULATORY PROVISIONS

50 U.S.C.A. § 797

§ 797. Penalty for violation of security regulations and orders

(a) Misdemeanor violation of defense property security regulations--

(1) Misdemeanor

Whoever willfully violates any defense property security regulation shall be fined under Title 18 or imprisoned not more than one year, or both.

(2) Defense property security regulation described

For purposes of paragraph (1), a defense property security regulation is a property security regulation that, pursuant to lawful authority--

(A) shall be or has been promulgated or approved by the Secretary of Defense (or by a military commander designated by the Secretary of Defense or by a military officer, or a civilian officer or employee of the Department of Defense, holding a senior Department of Defense director position designated by the Secretary of Defense) for the protection or security of Department of Defense property; or

(B) shall be or has been promulgated or approved by the Administrator of the National Aeronautics and Space Administration for the protection or security of NASA property.

(3) Property security regulation described

For purposes of paragraph (2), a property security regulation, with respect to any property, is a regulation--

(A) relating to fire hazards, fire protection, lighting, machinery, guard service, disrepair, disuse, or other unsatisfactory conditions on such property, or the ingress thereto or egress or removal of persons therefrom; or

(B) otherwise providing for safeguarding such property against destruction, loss, or injury by accident or by enemy action, sabotage, or other subversive actions.

(4) Definitions

In this subsection:

(A) Department of Defense property

The term "Department of Defense property" means covered property subject to the jurisdiction, administration, or in the custody of the Department of Defense, any Department or agency of which that

Department consists, or any officer or employee of that Department or agency.

(B) NASA property

The term "NASA property" means covered property subject to the jurisdiction, administration, or in the custody of the National Aeronautics and Space Administration or any officer or employee thereof.

(C) Covered property

The term "covered property" means aircraft, airports, airport facilities, vessels, harbors, ports, piers, water-front facilities, bases, forts, posts, laboratories, stations, vehicles, equipment, explosives, or other property or places.

(D) Regulation as including order

The term "regulation" includes an order.

(b) Posting

Any regulation or order covered by subsection (a) of this section shall be posted in conspicuous and appropriate places.

Appendix E

32 C.F.R. § 809a.2

§ 809a.2 Military responsibility and authority.

(a) Air Force installation commanders are responsible for protecting personnel and property under their jurisdiction and for maintaining order on installations, to ensure the uninterrupted and successful accomplishment of the Air Force mission.

(b) Each commander is authorized to grant or deny access to their installations, and to exclude or remove persons whose presence is unauthorized. In excluding or removing persons from the installation, the installation commander must not act in an arbitrary or capricious manner. Their action must be reasonable in relation to their responsibility to protect and to preserve order on the installation and to safeguard persons and property thereon. As far as practicable, they should prescribe by regulation the rules and conditions governing access to their installation.

Appendix E

BY ORDER OF THE COMMANDER
341ST SPACE WING

341ST SPACE WING INSTRUCTION 31-101

26 JULY 2005

Security

INSTALLATION SECURITY INSTRUCTION

***

This directive's command authority is derived from DoD Directive 5200.8, Security of DoD Installations and Resources, in accordance with Section 797 of Title 50, United States Code (Section 21 of "The Internal Security Act of 1950" 50 U.S.C. 797).

***

Chapter 4

INSTALLATION ENTRY AND INTERNAL CONTROL

***

4.1.5. Long haul carriers (from outside the Great Falls area) will be allowed entry upon presentation of a pass, bill of lading, purchase order, or delivery order. All local contractors or vendors must comply with the following:

4.1.5.1. Prior to entry onto the installation, all General contractors must submit a Contracting Entry Authority List (EAL) to the contracting office. A contracting officer approves the list and hand carries it to the visitors control center (VCC) for review. VCC personnel will compare the approving official's signature against a DD Form 577, **Signature Card**, or an appropriate letter on file at the VCC.

4.1.5.1.1. The VCC staff will forward the Contracting EAL to the 911 dispatch center. A 911 dispatcher certified on the National Criminal Information Center system (NCIC) will run the contractor names through the NCIC for wants and warrants. After the dispatcher completes the NCIC check, they will sign the letters and return them to the VCC. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFS/CC and 341 SFG/CC.

4.1.5.1.2. Upon arrival at the VCC, contractor personnel requesting a contractor pass will provide a picture ID to be verified against the Contractor EAL and request for issuance of a base pass letter. Upon verification, the contractor pass is

issued for the duration of the contract or up to one year. If the contract is longer than one year, they must renew their contractor ID upon expiration. If they require a vehicle pass, they must provide current proof of insurance, registration, and driver's license. The vehicle pass is created the same time as the contractor ID.

***

NOTE: Contractor/vendor passes are for granting access to the installation for the sole purpose of employment. These passes do not permit access to or usage of government facilities or services (i.e., gym, service station, and dining hall.)

****

Appendix E

BY ORDER OF THE COMMANDER
341ST SPACE WING

341ST SPACE WING PAMPHLET 31-103

21 JULY 2005

Security

LOCAL SECURITY POLICY AND SECURITY PROCEDURES FOR CONTRACTORS

***

5. Obtaining Entry Credentials/Passes. Contractors will be permitted to enter MAFB by following the procedures set forth in this pamphlet. Contractors obtaining the proper credentials/pass allowing access to MAFB will be permitted to do so through one of the aforementioned entry points.

***

5.2. Upon award of a contract, the contractor will be issued an Entry Authority List (EAL) **(Attachment 5)** by the contract administrator in 341 CONS. The contractor will need to submit the required information for the EAL, to the contract administrator in 341 CONS prior to coming to MAFB. Once the letter is received from 341 CONS, the Visitor Control Center will forward the EAL to the 911 Dispatch Center. A 911 Dispatcher will run the employees name through the National Criminal Information Center

system for a wants and warrants check. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFG/CC.

5.3. Upon initial entrance to MAFB, contractors shall obtain a contractor's pass from the Visitor's Center where the EAL will be filed. Contractor passes will be valid for the duration of the contract. The contractor will be required to resubmit a new EAL upon exercising option years, contract renewals or extensions, or adding names to the EAL.

****

APPENDIX F — TESTIMONY OF MAJOR GENERAL SANDRA FINAN, DATED APRIL 9, 2014

***

[9]Q Can I have you turn the page to page 30? At paragraph 5.2, where it says, "upon award of a contract, a contractor will be issued an entry authority list."

A Okay.

Q Do you see that paragraph?

A (No audible response.)

Q If you go to the last sentence it says, "unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 31st SVG/CC."

What is your understanding of what qualified as an unfavorable result?

A That was from the background check. If it turned up convictions, arrests, you know, drug use, [10]sex abuse, domestic abuse, anything like that, that would come up on the background check.

Q Is it your understanding that those items would be then reviewed?

A Yes.

***

Appendix F

[13]Q If we look at paragraph 1(c), at the second sentence, it says, "unfavorable results from the background check will result in individuals being denied access to the installation, including but not limited to individuals that are determined to fall into one or more of the following categories. Those having outstanding wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program."

Do you recall those categories of people being denied access to Malmstrom Air Force Base?

A I believe some were, yes.

Q Okay. Do you believe, if -- do you believe that this was a big change to Malmstrom Air Force Base's base access policy?

A I believe it was a large change.

***

[29]Q Yes. And then it says, "unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 341 SFG-CC." And I believe SFG-CC is -- is it Colonel Asher?

A It is. Or was.

Q Or was at that time?

A (No audible response.)

Q So isn't it true that the unfavorable results is referring to a wants and warrants check, isn't it?

A Well, when they run the -- I don't know exactly what they get out of the NCIC, so I suggest you ask the security expert exactly what comes out of the NCIC check.

Q Okay. But based upon your understanding of the base policy at the time, was it -- were they running it through NCIC for a wants and warrants check?

A It was more than just wants and warrants.

****

APPENDIX G — TESTIMONY OF MICHAEL WARD, DATED APRIL 9, 2014

***

[135]Q And she says, "the names will be sent to a dispatch for background checks." Now she uses the term "background checks." Is it your understanding that background checks equates to a wants and warrants check?

A Yeah, they're synonymous.

***

[188]BY MR. EUGENIO:

Q If we could focus on the last two sentences? I think it would be helpful to read them together.

"The 9-1-1 dispatcher will run the employees' names through" -- sorry, let me read it correctly.

"A 9-1-1 dispatcher will run the employee's name through the National Criminal Information Center system for wants and warrants checks. Unfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis by the 31st SFG/CC."

Does it make any sense that a person with a want and warrant would be allowed onto Malmstrom Air Force Base?

Appendix G

A Actually, if they had a want or a warrant that was present, they wouldn't even gain access because they would [b]e detained and turned over to the proper authorities until that warrant could be cleared.

[189]Q Okay. So a want and warrant wouldn't be presented to the security force group commander to see if he could get access to the base?

A No.

Q That person would be detained?

A They would be detained and apprehended by either the -- for our case, it would be either be Cascade County Sheriff's office, Montana Highway Patrol or Great Falls Police Department.

Q So that suggests that a wants and warrants check is more of a term of art for a background check?

A Yes. It's the term that is used to get the information that was conducted in the background check. Background check's a very generic term.

****