ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Bruce E. Zoeller	)	ASBCA No. 56578
	)	
Under Contract No. DACA41-1-99-532	)	

APPEARANCE FOR THE APPELLANT: Mr. Bruce E. Zoeller
Hiawatha, KS

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
William M. Edwards, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Kansas City

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

The U.S. Army Corps of Engineers has filed a motion for partial summary judgment on the grounds that three issues raised by Mr. Bruce E. Zoeller (appellant) in this appeal have previously been litigated and decided adversely to appellant, and a fourth issue should be decided adversely to appellant as a matter of law. Appellant opposes the motion. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.[1]

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 22 June 1999, the U.S. Army Corps of Engineers (government), on behalf of the U.S. Army Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas (the "Post") entered into a lease with appellant, Lease No. DACA41-1-99-532. The lease covered three parcels of government-owned land at the Post, described as units AA, FW, and FE, that were to be used by appellant for agricultural purposes as prescribed therein. Paragraph 1 of the lease provided that the lease was for a period of five hay crop-years, beginning on 20 May 1999 and ending on 31 December 2003. This paragraph also stated that the government could revoke the lease "at will by the

[1] See Decision portion of this opinion for discussion of jurisdictional issues.

Secretary" (R4, tab 2 at 10).[2] Appellant could also terminate the lease by notice "at any time" under Paragraph 18, TERMINATION (*id*. at 15).

2. Paragraph 31, OPTION TO RENEW, as amended per Supplemental Agreement No. 1, stated as follows:

> Lease Units AA, FE and FW may be renewed for an additional five (5) year term without competition under the following conditions. Between 6 and 3 months prior to the expiration date of this lease, the Lessee shall provide a written request to the District Engineer...of the Lessee's desire to renew the lease. If the Lessee is considered to have performed satisfactorily under this lease, is willing to pay the then fair market rental value, and the property is determined to be available for continued agricultural use by the said officer, this lease may be extended for an additional five (5) year term, beginning on the date of present expiration, by mutual supplemental agreement to this lease.

(R4, tab 2 at 10, 19, 38-39) Paragraph 5, LAND USE REGULATIONS, GENERAL MANAGEMENT AND OPERATIONAL CONDITIONS, stated as follows:

> 5. Lease Renewal Option All leases are for five years, however, the lessee of Unit AA has the option to renew the leases [sic] without competition for an additional five years. This option is offered to the lessees of Lease Units AA only because of the difficult nature of establishing an economically feasible agricultural operation.

(R4, tab 2 at 22)

3. Paragraph 11, RENTAL ADJUSTMENT, stated as follows:

> In the event the United States revokes this lease or in any other manner materially reduces the leased area or materially affects its use by the Lessee prior to the expiration date, an equitable adjustment will be made in the rental paid

[2] In this opinion, we cite to the Rule 4 documents in a number of Board appeals. Rule 4 documents from other appeals will be identified by docket number. Absent such a reference, our reference to the "R4" file or "supplement" shall refer to the Rule 4 documents filed under the subject appeal, ASBCA No. 56578.

> or to be paid under this lease. Where the said premises are being used for farming purposes, the Lessee shall have the right to harvest, gather and remove such crops as may have been planted or grown on said premises, or the District Engineer may require the Lessee to vacate immediately and, if funds are available, compensation will be made to the Lessee for the value of the remaining crops....

(R4, tab 2 at 13)

4. Paragraph 20 of the lease, PROTECTION OF NATURAL RESOURCES, provided that:

> The Lessee shall use the premises in accordance with the attached Land Use Regulations, **Exhibit "A"**, and shall at all times: (a) maintain the premises in good condition and free from weeds, brush, washes, gullies and other erosion which is detrimental to the value of the premises for agricultural purposes; (b) cut no timber, conduct no mining operations, remove no sand, gravel or kindred substances from the premises; (c) commit no waste of any kind nor in any manner substantially change the contour or condition of the premises except changes required to accomplish soil and water conservation measures as may be authorized by said officer.

(R4, tab 2 at 15)

5. Insofar as pertinent, Exhibit A provided as follows:

> **LEASE UNIT AA**: The tract of land designated on the attached map as AA (Bottomland) is restricted to native plant seed production and harvesting. The residue may be cut for hay or alternative energy generation after seed harvest....
>
> a. ...Parcel AA#4 is to be leased for the production of plants which will not be used for animal feed nor human foodstuffs, nor the ingredients thereof. Plants grown on Parcel AA#4 may be used for the production of plant seeds or for the production of ingredients of alternative fuels and other such non-food/feed end uses.

....

c. ...The lessee will prepare the site and plant the native plants, grasses, forbs, and/or native legumes, most suitable for this site.

LEASE UNIT FW: The tract of land designated on the attached map FW (upland) is restricted to mowing for hay. FW tract contains one unit labeled as FW#1.

a. FW tract is situated substantially as shown on the tract map, MAP B. Parcel FW#1 will be limited to the production of native plants that will be produced for their seeds. No plants produced from FW#1 will be used for animal feed, or for food for human consumption, or for the ingredients of food for feed.

….

LEASE UNIT FE: The tract of land designated on the attached map as FE (upland) is restricted to mowing for hay.

(R4, tab 2 at 27-29) Exhibit "A", paragraph "p" also provides that "[t]he lessee shall not conduct...any subsurface excavation, digging, drilling or other disturbance of the surface without the prior written approval of the Government" (R4, tab 2 at 26).

6. Shortly after 11 September 2001, the government took over roughly 5 acres of land from parcel FE to construct certain security facilities. On 4 October 2002, appellant submitted a claim to the government, seeking $17,550.45 for the value of its crops in parcel FE for the duration of the lease, including the five-year option period (54160, tab 3). Pursuant to a contracting officer's (CO's) decision, dated 17 December 2002, the CO allowed $1,920.00 for the value of the crops from the area seized, but otherwise denied the claim (*id*., tab 2), from which appellant appealed to this Board. The appeal was docketed as ASBCA No. 54160, and at appellant's request, was prosecuted under expedited procedures under Board Rule 12.2.

7. By letter from the government to Barsto Construction, Inc. (Barsto) dated 9 January 2003, the government issued a limited notice to proceed for site demolition in the FW parcel, under Contract No. DACA41-02-C-0009, incident to the development of a new family housing project on the Post (app. supp. R4, tab 15). It does not appear that appellant was copied on this letter, or was otherwise notified of this project. There is nothing of record to indicate that this new housing project was imminent when appellant

executed this lease in 1999. The record does contain an email dated 27 March 2002 reflecting governmental awareness of a new housing construction plan as of this date, but this was years after appellant had begun performance under the lease (*id*., tab 12).

8. By email to appellant dated 12 February 2003, the government advised appellant that it was removing the FE and FW areas from the lease (app. supp. R4, tab 17 at 106). This was followed by a letter from the government to appellant dated 21 February 2003, providing "official" notice of the removal of parcels FE and FW from the lease in accordance with paragraph 1 of the lease that gave the government the right to revoke the lease "at will." This notice also stated that the lease will expire on 31 December 2003 and the government did not intend to exercise its option to renew the lease. (R4, tab 20) Appellant treated this notice as a CO's decision under the CDA, and appealed to this Board, disputing the government's right to partially cancel the lease. This appeal was docketed as ASBCA No. 54205, and was prosecuted under regular Board procedures.

9. The Board held one evidentiary hearing in ASBCA Nos. 54160 and 54205. After the hearing, the Board issued a single judge bench-type decision in ASBCA No. 54160. The trial judge found appellant entitled to an equitable adjustment for the value of the perennial crops with respect to the seized portion of the FE parcel through the end of 2003, the last year of the original five-year term, plus a rent adjustment of $28.00, for a total recovery of $10,511 plus interest under the CDA. The trial judge determined that appellant was not entitled to recover damages for the option period because the government did not exercise the option. (R4, tab 17 at 148, 158-163) Per Board Rule 12.2(d) and 41 U.S.C. § 608(d), this decision was final, conclusive and not subject to appeal absent a showing of fraud.

10. With respect to ASBCA No. 54205, the Board issued a panel decision, ruling that the government's decision to revoke the lease, in part, pursuant to the notice dated 21 February 2003 was authorized and lawful. *Bruce E. Zoeller*, ASBCA No. 54205, 04-1 BCA ¶ 32,486, *aff'd on recons.*, 04-1 BCA ¶ 32,562. Appellant appealed the Board's decision to the Federal Circuit, and the Court affirmed per curiam. *Zoeller v. Brownlee*, 113 Fed. Appx. 390 (Fed. Cir. 2004).

11. By CO decision dated 26 September 2003, the government provided appellant with notice that as of 31 December 2003, the end of the basic five-year term, the government was revoking any and all portions of the lease that remained unrevoked (R4, tab 18). Appellant then filed suit in the United States Court of Federal Claims. Appellant alleged, *inter alia*, that the government's revocation of the lease and the destruction of its plants was a material breach of contract and breach of warranty for which it was entitled to damages; that the government failed to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URARPAPA), 42

U.S.C. § 4651; and that the government's actions resulted in a compensable "taking" under the Fifth Amendment of the U.S. Constitution. *Zoeller v. United States*, 65 Fed. Cl. 449, 452 (2005).

12. Upon the government's motion, the Court dismissed appellant's action. In brief, the Court concluded that the propriety of the partial lease termination/revocation was already litigated before this Board and was affirmed in the Federal Circuit and plaintiff was barred from re-litigating the issue. As for the claim of damages due to the partial termination, the Court held it was without jurisdiction since appellant failed to submit such a claim for decision to the contracting officer. As to appellant's allegation that the government failed to comply with the URARPAPA, the Court held, *inter alia*, that the Act did not apply because the Act is directed at federal acquisition of an individual's land and appellant was not a land owner but a tenant under the subject lease. The Court also dismissed appellant's allegations of a compensable "taking," holding that the actions of the government did not arise out of a "taking" of appellant's private property but arose out of the partial termination of its lease agreement, which prescribed the contract rights of the parties upon the event of termination. *Zoeller*, 65 Fed. Cl. at 456-462.

13. Thereafter, appellant filed an administrative request for relief with the government on or about 30 May 2006, seeking $313,245.60 for "permanent or recurring damages to claimant's tangible and intangible property, rights and interests…." (55654, tab 1 at 9) Appellant took an appeal to this Board based upon the government's denial of this request, and the appeal was docketed as ASBCA No. 55654. Upon the government's motion, the Board dismissed the appeal for lack of jurisdiction on the grounds that appellant failed to submit the claim to the CO for decision as required by the CDA. The Board's dismissal was made without prejudice to the appellant filing a written claim to the CO for decision. *Bruce E. Zoeller,* ASBCA No. 55654, 07-1 BCA ¶ 33,581 at 166,347.

14. On or about 29 February 2008, appellant furnished the government a 35-page "certified"[3] claim in the amount of $313,245.60. Under the "subject" line of the claim document, appellant requested a CO's final decision under the CDA, 41 U.S.C. § 605, "on 32 CFR § 552.16 Claims."[4] Appellant claimed that the government's issuance of a notice to proceed to Barsto on 9 January 2003 under Contract No. DACA41-02-C-0009

[3] Appellant's claim was in excess of $100,000 but the claim did not provide the full certification language required by the CDA, 41 U.S.C. § 605(c)(1). By letter dated 20 August 2009, the Board directed appellant to submit a claim certification in accordance with the language provided in 41 U.S.C. § 605(c)(1). By letter dated 27 August 2009, appellant complied with the Board's Order.

[4] See Decision for a discussion of these regulations.

to clear the FW parcel incident to the construction of new family housing (SOF ¶ 7), without notice to appellant, was an unlawful take-over of parcel FW. More specifically, appellant claimed as follows:

> I maintain that contract DACA41-02-C-009 activities were an *unapproved 32CFR§643.57* [sic] *sublease* and therefore all Federal, state and local laws, regulations applicable to such unapproved sublease activities became expressed contractual compliance requirements with imperative duties and implied cooperative duties. I maintain that after a CO executed its sublease document and became a sublessee of its own outlease it was that CO regulatory duty and by expressed executed covenants, its contractual duty to terminate the outlease prior to commencement of its demolition and raze activities which materially effected my right to exclude, my remaining crops and my non-competitive 5 yr. renewal. (Emphasis added)

(R4, tab 9 at 88-89)

15. Appellant also claimed that the government withheld "superior knowledge" from appellant, presumably prior to execution of the lease, with respect to its planned use of the FW parcel for family housing:

> The Army Corporate Group (ACG), of which the CO is a lead acting part, possessed unique superior engineering, real property master planning and legal knowledge which was solely within their possession. They failed to share this vital and unique information with me even though I maintain it was their affirmative cooperative duty to do so.[project design/ contracting/ execution/ supervision/ inspection/ appraisal/ disposal/ demolition/ raze/ timing/ scheduling/ acquisition]

(R4, tab 9 at 77, brackets in original) According to appellant, given the government's planned use of the FW parcel, it knew that lease renewal was impossible but failed to disclose this superior knowledge to appellant (*id.* at 89).

16. Appellant also claimed that the government acted in bad faith by failing to share information and notify appellant, prior to award, regarding the new family housing in its leased space:

> [S]uch secrecy and inaction is clear bad faith and unfair dealing, taking into account the SA's [the Secretary of the Army's] multi-agency, multiyear advanced knowledge of intentions to demolish outlease unit FW for new AFH [Army family housing], considering all the uniform planning /notice/ appraisal /displacement /URA /NEPA /negotiation policies and the Army's required knowledge of State and Fed. Laws/codes/regulations/ and related implied as well as expressed contractual real property just compensation affirmative obligations.

(R4, tab 9 at 90)

17. Appellant's monetary claim of $313,245.60 included a claim for seed crop damages in the FW parcel for 6 years (the final year of the lease plus the unexercised option period of 5 years), in the amount of $163,245.60, described by appellant as *fructus industriales,* and a claim for the loss of plants/roots that could be dug up and used for landscaping after these 6 years in the amount of $150,000, described by appellant as *fructus naturales* (R4, tab 9 at 99-101).

18. By CO decision dated 26 June 2008, the government granted appellant's claim in part, in the amount of $21,224.40. This figure was based upon the gross value of appellant's lost seed crop on the revoked leased premises for 2003, the final year of the five-year lease, in the amount of $24,458.40, less costs of production in the amount of $3,234.00. This lost seed crop was for the Illinois bundle flower crop planted by appellant in the FW#1 parcel. It is undisputed that the government was aware of, and did not object to appellant's planting of Illinois bundle flower in FW #1 under the terms of the lease. The CO denied appellant's claim for crop loss during the five-year option period, based upon the single judge decision under ASBCA No. 54160 that denied recovery for the option period; denied appellant's claim for losses to its root crop because the government viewed this as an unapproved use under the lease; and denied appellant's claim for recovery under the URARPAPA, based upon the dismissal of this claim by the Court of Federal Claims. (R4, tab 1)

19. By letter dated 18 September 2008, appellant appealed the CO's decision to this Board (R4, tab 4) and the appeal was docketed as ASBCA No. 56578. After the pleadings were filed, the government filed the subject motion.

The Government's Motion

The government filed a motion for partial summary judgment on the following issues: (1) whether the lease was terminated properly by the government; (2) whether

appellant is entitled to seed crop damages in the FW parcel for the unexercised five-year option period; (3) whether appellant is entitled to damages for a lost "root crop" at lease expiration; and (4) whether appellant is entitled to compensation under the URARPAPA. The government contends that with respect to issues (1), (2), and (4), competent tribunals have already rendered final judgments adverse to appellant and these matters may not be re-litigated. With respect to issue (3), the government contends that the lease does not allow for any recovery for the root crop as a matter of law.

Appellant filed an opposition to the motion. This opposition is difficult to follow. As best as we can glean, appellant contends that it is not precluded from litigating its claims because there are genuine disputes of material fact on the record; the prior Board and court judgments were inconsistent with law; the prior Board and court judgments were based upon different facts; and its present claims are based on facts of which appellant was previously unaware.

DECISION

Jurisdiction

Appellant's claim letter, in a sum certain, properly sought a CO's decision under the CDA, 41 U.S.C. § 605. However, appellant characterized its claims as "32 CFR § 552.16 Claims." (SOF ¶ 14) This characterization is not correct. This regulation applies to real estate claims to be settled and adjusted by the Government Accountability Office, and does not apply to claims resolved under other procedures mandated by statute or pursuant to a provision of a contract. 32 C.F.R. § 552.16(d)(3) (2009). Paragraph 21(a) of the lease, DISPUTES, states that "Except as provided in the Contract Disputes Act of 1978...all disputes arising under or relating to this lease shall be resolved under this clause and the provisions of the Act" (R4, tab 2 at 15). Appellant's disputes arise under or relate to this lease. We conclude we have jurisdiction over this appeal under the CDA.

It is well settled that summary judgment is appropriate where no material facts are in genuine dispute and the moving party is entitled to judgment as a matter of law. *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1371-72 (Fed. Cir. 2005); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order to counter a motion for summary judgment, the non-movant must show evidence of disputed material fact. Mere arguments, speculation or reliance upon the pleadings is insufficient to defeat a motion for summary judgment. *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999); *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984). Reasonable inferences are to be drawn in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Riley & Ephriam Construction Co. v. United States*, *supra*.

As we recently stated in *Corners and Edges, Inc.*, ASBCA Nos. 55611, 55619, 09-2 BCA ¶ 34,174 (recons. pending) at 168,923:

> Under *res judicata*, a final judgment on the merits precludes the parties from re-litigating claims that were or could have been raised in the prior action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *Res judicata* applies when the following factors are met:
>
> > (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first [citation omitted].
>
> *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1268 (Fed. Cir. 2008).

The Removal of Parcel FW from the Lease: January–February 2003

In essence, appellant claims that the government's entry onto the FW parcel in January 2003 – via the notice to proceed to Barsto to clear the site for purposes of the new family housing project – was an unlawful revocation of a portion of its lease. Appellant contends that the government's action created an unlawful sublease or assignment that failed to meet various state and federal regulations and requirements.

Under ASBCA No. 54205, appellant previously challenged the government's right and authority to remove parcels FW and FE from the lease pursuant to the government's notice of revocation dated 21 February 2003 (SOF ¶ 8). After an evidentiary hearing in which appellant called witnesses and presented documentary evidence, the Board denied appellant's claim on the merits. Appellant filed a motion for reconsideration and the Board affirmed its decision. Appellant appealed to the Federal Circuit and the Court affirmed the Board *per curiam*: "[W]e agree with the Board of Contract Appeals that the Army properly terminated Mr. Zoeller's lease in this case..." *Zoeller v. Brownlee*, 113 Fed. Appx. at 391.

We believe that appellant is barred from re-litigating the government's 2003 revocation of the FW parcel under the subject appeal on the grounds of *res judicata*. The prerequisites for establishing this defense have been shown. The parties in the two Board actions are identical, the first suit (ASBCA No. 54205) proceeded to a final judgment on the merits, and the issue under the subject appeal is based upon the same set of

transactional facts as the first, *i.e.*, government actions in early 2003 that had the effect of removing the FW parcel from the lease.

While it appears that appellant did not specifically address at the earlier Board hearing Barsto's entry onto the FW site in January 2003 for purposes of the new housing project, appellant did generally address the new housing project at the hearing. Appellant questioned the Post engineer as follows:

> Q (by Mr. Zoeller) Do you know when the construction started on the family housing units?
> A The family housing project was being done at three different sites....The third site, the one I think you are probably most interested in, is the one by Hancock Gate, and I believe that they started that probably late this winter or early this spring, but I am not sure....
>
> ....
>
> Q Do you know what the first project was that they did on that unit? Was it entrenching or utilities, or what was the –
> A Well, the first thing they probably did out there was just pull the top soil off, and that is probably what he did first. ...
> Q So in the stripping of the top soil, do you think that they would have any effect on the crops that were there at the top?
> A Oh, sure. Yes, definitely.
> Q Were there crops there that were destroyed by that activity?
> A Whatever was there, where they were building, was destroyed by their activity. If there were crops there, then they would have been affected, yes.

(54160, 54205, tr. 1/38-41)

It is well settled that *res judicata* precludes consideration of matters not only that were raised but that could have been raised in the prior proceeding. *Corners and Edges, Inc., supra* (collecting cases). From the above, it is clear that appellant was well aware of the new family housing project and its encroachment upon its leased premises. Since appellant could have fully raised this subject matter under ASBCA No. 54205, we believe that it is barred from litigating this same subject matter under this appeal on the grounds of *res judicata*.

Accordingly, we grant summary judgment to the government on the legality of the government's removal of the FW parcel from the lease in 2003 based on *res judicata*. Specifically, appellant is barred from litigating the legality of the encroachment of the family housing project upon its leased premises pursuant to the Barsto contract -- called by appellant the unlawful "sublease"[5] -- insofar as such encroachment relates to the government's removal of the FW parcel from the lease by notice of partial revocation dated 21 February 2003. Since the government's motion for partial summary judgment does not seek judgment on appellant's "superior knowledge/bad faith" claim, this matter remains before us.

Whether Appellant is Entitled to Seed Crop Damages in the FW Parcel for the Unexercised Five-Year Option Period of the Lease

The government contends that appellant is barred from litigating this claim on the grounds of *res judicata* since it was decided against appellant by Board decision under ASBCA No. 54160 (SOF ¶ 9). The government is not correct. This decision was rendered by a single Board judge in a bench-type decision under Board Rule 12.2, and related to a seized portion of the FE parcel, not the FW parcel. This decision was not subject to appeal and cannot be given preclusive effect for purposes of the present claim. *Packard Construction Corp*., ASBCA No. 55383, 07-1 BCA ¶ 33,459.

In any event, since the legality of the government's removal of the FW parcel from the lease has been established, consistent with the government's right to revoke the lease "at will," it follows that neither party thereafter retained any right to exercise an option to extend the lease of the FW parcel. Once the lease was properly revoked within the original five-year lease term, there was no option left to exercise. We conclude that appellant is not entitled to recover any seed crop damages related to the FW parcel for the unexercised five-year option period as a matter of law.

Whether Appellant is Entitled to Compensation Under the URARPAPA

With respect to appellant's claim that the government failed to comply with the URARPAPA, 42 U.S.C. § 4651, we note that appellant previously raised this claim at the Court of Federal Claims. The Court dismissed the claim for lack of jurisdiction. Insofar as pertinent, the Court stated as follows:

[5] Parenthetically, we note that an "assignment" or "sublease" of leased premises is the transfer of the property interest from the tenant/lessee to a third party. It is undisputed here that the government, the *lessor*, executed the contract with Barsto. Accordingly, the government's action did not constitute an assignment or sublease.

> In the first place, the Uniform Relocation Assistance and Real Property Acquisitions Policy Act is directed at acquisition by the federal government of an individual's land. In this case, no realty was acquired from the plaintiff; the plaintiff was leasing government owned property. Therefore, the provisions of the Act cited by the plaintiff appear to be inapplicable to the present facts. Furthermore, the Act does not mandate money damages for the failure of a federal agency to comply with the guidelines provided in the Act, a requirement discussed above.

The court also held that judicial review of agency action is precluded under the Act. *Zoeller*, 65 Fed. Cl. at 459 (collecting cases).

We concur with the court's analysis and conclusions. For reasons stated, we dismiss for lack of jurisdiction appellant's claim that the government failed to comply with the URARPAPA .

Whether Appellant is Entitled to the Value of a "Root" Crop Upon Lease Expiration

We read Paragraph 11 of the lease to provide that in the event the government revokes the lease in whole or in part, appellant had the right to harvest, gather and remove the "crops" that it had planted in the revoked area. If the government did not provide this opportunity -- which appears to be the case here -- appellant had the right to compensation, subject to the availability of funds, for the "value of the remaining crops." .

Appellant contends that the "value of the remaining crops" includes the value of the "*fructus naturales*", or the value of the root stock of the plants that could be dug up at the expiration of the lease and used for landscaping purposes. The government maintains that the lease does not provide for compensation for the value of the root stock for landscaping purposes. According to the government, the lease requires the lessee to use the premises for agricultural purposes in accordance with the land use regulations in the lease, which insofar as pertinent, state that "Parcel FW#1 will be limited to the production of native plants that will be produced for their seeds" (SOF ¶ 5).

We believe that no disputed material facts have been shown and that the interpretation issue is amenable to decision on summary judgment. Appellant, as claimant, does not cite to any language in the lease – and we have found none – that supports its interpretation that the value of the remaining crops includes the value of a "root" crop. On the other hand, the lease clearly limits the use of the FW#1 parcel to "the production of native plants that will be produced for their seeds," *i.e.*, a "seed" crop. In addition, the lease's proscription against "digging" or other "disturbance of the surface"

without government approval (SOF ¶ 5) lends support to the government's interpretation that precludes harvesting of "roots" as a permissible crop under the lease.

We conclude that upon removal of parcel FW from the lease, appellant was not entitled to the value of a root crop under Paragraph 11 of the lease. We conclude that the government is entitled to summary judgment on this claim.

CONCLUSION

The government's motion for partial summary judgment is granted consistent with this Opinion. Specifically, we grant summary judgment to the government on the legality of the government's removal of the FW parcel from the lease in early 2003. We grant summary judgment to the government on appellant's lack of entitlement to seed crop damages in the FW parcel for the unexercised five-year option period. We also grant summary judgment to the government on appellant's lack of entitlement to root crop damages in the FW parcel after lease expiration. We dismiss for lack of jurisdiction appellant's claim that the government violated the URARPAPA, 42 U.S.C. § 4651.

Dated: 7 December 2009

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
Of Contract Appeals

I concur

EUNICE W. THOMAS
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 No. 56578, Appeal of Bruce E. Zoeller, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals