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
Alice J. Edwards, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Kansas City

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties have filed cross-motions for summary judgment in this appeal.[1] In *Bruce E. Zoeller*, ASBCA No. 56578, 10-1 BCA ¶ 34,330, *recon. denied*, 10-2 BCA ¶ 34,556, we granted the government's motion for partial summary judgment. The government's present motion seeks summary judgment on the remaining issues and seeks the denial of the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

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.

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[1] We construe appellant's cross-motion as one for summary judgment. It is entitled as follows: "Appellant's Cross Motion for 5 U.S.C. § 701-706 Final Decree to Compel Law and Full Administrative Record Completion not Excess nor Extra But Corrected as for Unlawful Withholdings – Unreasonably Delayed Here First Instance that Agency Ploys 3 Acts of Faulty Bad Judgment (1.) Non-Construction (2.) Non-Completion (3.) Failure to Comply and/or Obey Statutes – Orders in Deed in Need of ASBCA Senior Deciding Group Statutory Final Remedy ≥ Remand Aimed upon Extragency Contumacy: Default Sanctions and so 28 U.S.C. § 1295 (a)(10) Final Judgment Thereon." To the extent that this is a request for a Senior Deciding Group decision pursuant to Section II(c) of the Preface to the Board's Rules, the Chairman has denied the request.

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 Secretary." (R4, tab 2 at 10) 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 19, 38-39) Paragraph 5, under Exhibit A, 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 Lease 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 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) (Emphasis added)

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 production of plant seeds or for the production of ingredients for 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. [Emphasis added]

....

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. Appellant planted "Illinois bundleflower" (IBF) in the FW#1 parcel (R4, tab 1 at 4). It is undisputed that the government was aware of this and did not object.

7. Shortly after 11 September 2001, the government took over roughly five 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 (ASBCA No. 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.

8. 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 at this time.

9. 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 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 the 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.

10. The Board held one evidentiary hearing for ASBCA Nos. 54160 and 54205. After the hearing the Board issued a single judge, bench decision in ASBCA No. 54160 under Rule 12.2. 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, 158-63)

11. 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 recon.,* 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 F. App'x 390 (Fed. Cir. 2004).

12. 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).

13. 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 a monetary claim for decision to the CO. 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 rights of the parties upon the event of termination. *Zoeller,* 65 Fed. Cl. at 456-62.

14. 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" (ASBCA No. 55654, R4, 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 ground 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.

15. On or about 29 February 2008, appellant furnished the government a claim in the amount of $313,245.60.[2] Under the "subject" line of the claim document, appellant requested a CO's final decision under the CDA, 41 U.S.C. § 605, "on 32CFR§552.16 Claims." 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 to clear the FW parcel under the lease incident to the construction of new family housing (SOF ¶ 8), 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-[0]009 activities were an unapproved 32CFR§643.57* [sic] *sublease* and therefore

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[2] Appellant's claim was in excess of $100,000 but the claim did not provide the complete certification language as required by the CDA. By Order dated 20 August 2009, the Board directed appellant to submit a claim certification in accordance with the statutory language, and by letter dated 27 August 2009 appellant complied with the Board's Order.

> 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)

16. 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)

17. Appellant also claimed that the government acted in bad faith by failing to share information and notify appellant, prior to award, regarding the plan for new family housing in the 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)

18. Appellant's monetary claim of $313,245.60 consisted of two components. First, appellant claimed compensation for the value of the IBF seed crop in the FW parcel for six years–for 2003, the final year of the lease and for the unexercised option period of five years–in the amount of $163,245.60, described by appellant as *fructus industriales*. Second, appellant claimed the value of the IBF plant roots ("root crop") that could have been dug up and used for landscaping, in the amount of $150,000, described by appellant as *fructus naturales*. (R4, tab 9 at 99-101)

19. 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 IBF seed crop in the FW parcel for 2003, the final year of the five-year lease, in the amount of $24,458.40, less costs of production avoided in the amount of $3,234.00. The CO denied appellant's claim for damages for the unexercised five-year option period based upon the decision under ASBCA No. 54160 that denied recovery for the option period; denied appellant's claim for the value of a root crop because such a crop was 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)

20. By letter dated 18 September 2008, appellant timely appealed the CO's decision to this Board (R4, tab 4), and the appeal was docketed as ASBCA No. 56578.

Appellant's Motion for Sanctions

21. By Order dated 17 March 2009, the Board granted appellant's motion to compel discovery of certain documents. The government's disclosure was neither timely nor complete, and appellant filed a motion for default judgment or for such sanctions as would award appellant its claim. The Board acknowledged the government's lack of compliance, but denied the severe sanctions requested by appellant. *Bruce E. Zoeller*, ASBCA No. 56578, 10-2 BCA ¶ 34,549, *recon. denied,* 11-1 BCA ¶ 34,720, *appeal dismissed for lack of jurisdiction*, 448 F. App'x 67 (Fed. Cir. 2011).

Motion for Partial Summary Judgment

22. On 8 January 2009, 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

root crop at lease expiration; and (4) whether appellant is entitled to compensation under the URARPAPA. Appellant filed in opposition to the motion.

23. The Board granted the government's motion, concluding that the removal of the FW parcel from the lease in early 2003 was proper and legal; that appellant was not entitled to seed crop damages in the FW parcel for the unexercised five-year option period; and that appellant was not entitled to damages for a root crop after lease expiration. The Board dismissed for lack of jurisdiction appellant's claim that the government violated the URARPAPA, 42 U.S.C. § 4651. *Bruce E. Zoeller,* 10-1 BCA ¶ 34,330 at 169,571, *recon. denied,* 10-2 BCA ¶ 34,556.

Motion for Summary Judgment and Related Discovery

24. Thereafter, the government filed the subject motion for summary judgment, seeking judgment on appellant's claims relating to the government's withholding of superior knowledge, government bad faith and on the computation of appellant's compensation for the value of the 2003 IBF seed crop. Appellant objected to the government's motion and sought additional time for discovery to enable it to respond to the motion. The Board granted appellant's request, and granted appellant an additional 90 days to take discovery (*see* Board Order dated 23 February 2012).

25. Appellant sought, among other documents, the production of the Installation Commander Annual Real Property Utilization Survey for 1999-2009 and the Environmental Baseline Survey at the time of lease termination. The government represented to the Board and appellant that these documents were not prepared and did not exist. Appellant filed a motion to compel and sought, among other things, a Board order directing the government to create or construct these documents. The Board declined to issue such an order, stating that it was without authority under the Board's rules to order the government to create the documents. The Board otherwise granted appellant's motion to compel in part (*see* Board Order dated 21 September 2012).[3]

26. Appellant also sought, and the Board granted discovery of ER 405-1-12, Real Estate Handbook, which the government had referenced in relevant part in the government's response to appellant's written discovery. The government thereafter provided appellant and the Board with Chapter 8 of the handbook, entitled "Real Property Management," and also provided the Table of Contents of the entire book, Chapters 1-16,

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[3] Appellant objected to the Board's discovery order (*see* appellant's filing dated 17 November 2012 entitled: "Judicial Notice of...41 USC §7105...28USC§1491...5USC§706...as well ASBCA's 21 Sep 12 General Rulings' Prejudic[i]al Error of Confabulation Non-Disclosure of its Responsibilities '*Honest Lying*' Here is Disclosed"). However appellant failed to show that the Board's Order was in error. We affirm our Order.

showing that the balance of the book had no relevance to appellant's claim. Appellant did not establish otherwise. The Board did not require disclosure of the entire book to appellant.

27. After expiration of the extended 90-day discovery period, appellant filed its own cross-motion for summary judgment (*see* note 1 herein). The government opposed appellant's cross-motion.

Quantum Dispute

28. The parties agree on the formula below for calculating the value of appellant's compensation for the IBF seed crop, *fructus industriales*:

(1) IBF Seed "Price per pound" less "Cost per pound."
(2) multiplied by Risk Factor (.375).
(3) multiplied by Average Seed Yield per Acre (632).
(4) multiplied by Number of Acres (20).

The parties agree on the figures for lines (2), (3) and (4) of the formula, but they disagree on the figures to be used for line (1). (R4, tab 9 at 100, tab 7 at 46; gov't mot. at 3)

29. With respect to the figure for "Price per pound," appellant asserts in its claim an average price per pound of IBF seed for 2003 of $6.24 (R4, tab 9 at 100). The government asserts an average price per pound of IBF seed for 2003 of $5.16 (R4, tab 1 at 4). With respect to the figure for "Cost per pound," appellant's claim relies upon an average cost of $.50 per pound (R4, tab 9 at 100). The government asserts an average cost of $.68 per pound (gov't mot. at 5).[4]

[4] The government contends that its cost figure of $.68 per pound was calculated based upon information provided by appellant in appellant's 31 March 2008 letter to the government (*see* R4, tab 7), in which letter appellant escalated its 2002 gross cost by 110% for 2003 (gov't mot. at 5). It is not at all clear that appellant escalated all of its gross cost as alleged by the government. Rather, it appears that appellant escalated its 2002 costs to manage and administer the crops only, and not the costs for harvesting (R4, tab 7 at 46, ¶ 5(a) and (b)). This matter should be clarified in the parties' future submissions.

DECISION

Allegations of Unfair Treatment

By virtue of the Board's issuance of a number of orders and decisions adverse to appellant, appellant has suggested in a number of its filings that the Board has treated appellant unfairly in this appeal.

We do not believe this to be the case. That a tribunal disagrees with a party's legal arguments does not mean that the party has been treated unfairly. Where the Board has disagreed with appellant, it has considered its arguments respectfully and seriously. Indeed, throughout this appeal the Board issued many rulings in appellant's favor, including the following:

1. The Board granted appellant's motion to compel discovery on 17 March 2009.

2. By Order dated 28 January 2010, the Board ordered the government to clarify its efforts undertaken to comply with the Board's discovery order.

3. By Order dated 10 March 2010, the Board ordered the CO to provide an affidavit with respect to the government's efforts to comply with the Board's discovery order.

4. During a telephone conference on 26 April 2010, the Board ordered the government to advise under oath or declaration "of any additional documents located that are responsive to the Board's Order dated 17 March 2009, including the new discoveries referenced by the CO."

5. By Order dated 5 October 2010, the Board granted appellant's request for a more definitive statement of the government's motion for summary judgment.

6. By Order dated 23 February 2012, the Board granted appellant's request for additional time to take discovery in order to respond to the government's motion for summary judgment.

7. By Order dated 21 September 2012, the Board granted, in part, appellant's motion to compel discovery.

We believe the record shows that appellant has been treated respectfully and fairly by this Board.

Pertinent Summary Judgment Principles

It is well settled that summary judgment is appropriate where no material facts are in 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 nonmovant must show evidence of disputed material fact. A party's failure to show any evidence to support a *prima facie* case may be grounds for summary judgment. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). Mere arguments, speculation or reliance upon the pleadings is insufficient to defeat such a motion. *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). We apply these principles to the appellant's remaining claims.

Claim of Failure to Disclose Superior Knowledge

The doctrine of superior knowledge is well settled. As recently stated by the Federal Circuit in *Scott Timber Co. v. United States*, 692 F.3d 1365, 1373 (Fed. Cir. 2012):

> "The superior knowledge doctrine imposes upon a contracting agency an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000).
>
> > The doctrine of superior knowledge is generally applied to situations where (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.
>
> *Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994) (internal quotation marks omitted).
>
> As *Hercules* and other cases make clear, the doctrine only applies if "the government was aware the contractor had

> no knowledge of and had no reason to obtain such information" and "any contract specification supplied misled the contractor or did not put it on notice to inquire." *Id.*

As we understand it, appellant contends that the government failed to share its knowledge about a future family housing project on the lease site, contending that if it had been aware of the government's plans and the resultant risk of lease cancellation, it would not have entered into the lease in the first place or would have taken other steps to prepare or protect itself. However, appellant was fully aware of this risk by signing a lease that was revocable by the government "at will" (SOF ¶ 1). Appellant signed a lease without any guarantee that the lease would last for any prescribed period of time. Appellant has failed to show evidence that the contract specifications misled him or did not put him on notice to inquire, as required by the superior knowledge doctrine. Accordingly, we grant the government's motion for summary judgment on this claim.

Claim of Bad Faith

In *Road and Highway Builders, LLC v. United States*, 702 F.3d 1365, 1368-69 (Fed. Cir. 2012), the Federal Court recently restated the law as it applies to a contractor claim that government officials have acted in bad faith:

> We and our predecessor court, the Court of Claims, have long upheld the principle that government officials are presumed to discharge their duties in good faith. *See e.g., Am-Pro Protective Agency v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). As we clarified in Am-Pro, it is "well-established...that a high burden must be carried to overcome this presumption," amounting to clear and convincing evidence to the contrary. 281 F.3d at 1239-40. Specifically, we described the clear and convincing standard of proof as "impos[ing] a heavier burden upon a litigant than that imposed by requiring proof by preponderant evidence but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt." *Id.* at 1240.... *Moreover, a challenger seeking to prove that a government official acted in bad faith in the discharge of his or her duties must show a "specific intent to injure the plaintiff" by clear and convincing evidence. Id.* [Emphasis added] [Citations omitted]

Assuming, for purposes of these cross-motions, that the government failed to disclose to appellant the government's plan for family housing on the leased premises, and/or failed to prepare certain documents incident to the management of the property as

required, the record does not show that this government conduct was undertaken with the specific intent to injure appellant. Appellant has thus failed to show a material element of its claim of bad faith. Accordingly, we believe summary judgment for the government is appropriate on this issue.

Quantum Dispute

We believe there are material facts in dispute with respect to the compensation owed appellant for the value of the IBF seed crop for 2003. The factual dispute concerns the two data points to be input into line 1 of the formula (SOF ¶ 28). This dispute is narrow and limited, and there appears to be no need for an evidentiary hearing on the matter. However, we believe it is inappropriate on cross-motions for summary judgment to weigh and assess the parties' disputed quantum positions. The Board will give the parties an opportunity to make written evidentiary submissions limited to this issue.

CONCLUSION

For reasons stated herein, the only issue remaining in this appeal is the compensation owed appellant for the value of the IBF seed crop for 2003. The government's motion for summary judgment is granted in part and denied in part consistent with this opinion. Appellant's cross-motion for summary judgment is denied consistent with this opinion.

Dated: 27 June 2013

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

DIANA S. DICKINSON
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 No. 56578, Appeal of Bruce E. Zoeller, rendered in conformance with the Board's Charter.

Dated:

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