

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Overstreet Electric Co., Inc. ) ASBCA No. 53163  
)  
Under Contract No. N62467-98-C-3128 )

APPEARANCE FOR THE APPELLANT: Terrance R. Ketchel, Esq.  
Ft. Walton Beach, FL

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Ellen M. Evans, Esq.  
Trial Attorney  
Naval Facilities Engineering  
Command  
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Overstreet Electric Co., Inc. (Overstreet) appeals the denial of its claim for remission of \$17,000 of liquidated damages for delay in completing a construction contract. The Government moves to dismiss for failure to state a claim upon which relief can be granted. Alternatively, it moves for summary judgment on the grounds of no genuine issue of material fact and collateral estoppel.

On the motion to dismiss, we look to the allegations of the complaint, and not to the evidence or lack thereof, in support of the complaint. *See Dennis Anderson Construction Corp.*, ASBCA Nos. 48780, 49261, 96-1 BCA ¶ 28,076. Overstreet’s complaint alleges that the liquidated delay damages provision of the contract is unenforceable because at the time of contracting (i) the damages for possible delay were neither uncertain nor difficult to prove, and (ii) the specified daily rate bore no reasonable relationship to any actual damages that might be incurred. *See Complaint*, ¶¶ 4-5. These allegations state a claim for which relief from the assessed damages may be granted. *See Orbas & Associates*, ASBCA Nos. 32922 *et al.*, 87-3 BCA ¶ 20,051 at 101,523-24. The motion to dismiss is denied.

The alternative motion for summary judgment is also without merit. The claim letter submitted to the contracting officer is sufficiently detailed to raise genuine issues of material fact with respect to the general allegations in the complaint. *See R4*, tab 4 at 4-6. Moreover, there is no basis for finding a collateral estoppel in *Overstreet Electric Co., Inc.*, ASBCA No. 52401, 00-2 BCA ¶ 30,981. That appeal addressed affirmative claims for time extension, Eichleay damages, and the computation of a Value Engineering Change Proposal

savings. Overstreet's present appeal does not contest the number of days for which the liquidated damages were assessed, and there were no other relevant issues in the prior appeal. The motion for summary judgment is denied.

Dated: 13 June 2001

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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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. 53163, Appeal of Overstreet Electric Co., Inc. , rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals