UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 20, 2007

CBCA 438

DKW CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Bernard Becton, Operations Manager of DKW Construction, Inc., St. Louis, MO, appearing for Appellant.

Thomas Y. Hawkins, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER**, **BORWICK**, and **HYATT**.

HYATT, Board Judge.

Appellant, DKW Construction, Inc., appealed a contracting officer's decision determining that appellant owed respondent, the General Services Administration (GSA), the amount of $33,450.67 under a contract to complete painting and wall covering work at the Thomas F. Eagleton United States Courthouse project in St. Louis, Missouri. The parties

have submitted this dispute for decision on the written record. Rule 19 (72 Fed. Reg. 36,803 (July 5, 2007)).[1]

Findings of Fact

1. On September 28, 1995, GSA awarded contract number GS06P95GZC0501 to Morse Diesel International, Inc. (MDI), for Phase II construction on the Thomas F. Eagleton United States Courthouse in St. Louis, Missouri. Appellant was MDI's subcontractor for epoxy flooring, painting, and wall covering. Appeal File, Exhibits 1, 4.

2. In June 1999, GSA terminated MDI's contract for default. Shortly after the termination, MDI's Phase II subcontractors were notified of the default termination action. Appeal File, Exhibits 3-5. Because MDI's subcontractors were already familiar with Phase II construction requirements, GSA encouraged them to submit price proposals for completion of outstanding work on the project. *Id.*, Exhibits 3, 35.

3. On June 17, 1999, GSA's contracting officers assigned to the Courthouse project met with MDI's subcontractors, including appellant, to discuss the termination action and GSA's goal to get subcontractors and their workers back on the project as soon as possible. To achieve this objective, GSA announced that it planned to issue letter contracts with stated "not-to-exceed" amounts.[2] The contracting officers explained that these were similar to "Price-to-be-Determined-Later" contracts. At that time, they hoped to award initial contracts in June 1999 and to definitize the letter contracts to lump sum contracts in July 1999. Appeal File, Exhibit 5.

4. On July 23, 1999, appellant submitted its proposal for completion of the painting and wall covering work remaining on the project. Appellant offered to perform the work for the lump sum amount of $2,133,018. Appeal File, Exhibit 13; *see also* Exhibits 8, 12-13, 25.

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[1] The written record submitted in this matter consists of the Government's appeal file, the pleadings and correspondence submitted during the processing of the appeal, and the briefs submitted by the parties in support of their respective positions.

[2] GSA justified the use of letter contracts and time and materials contracts in administration of the reprocurement effort as necessary to achieve timely completion of the project. Appeal File, Exhibit 7.

5. DKW's proposal exceeded GSA's estimate for the remaining work. To get work underway while it reviewed DKW's proposal, on August 10, 1999, GSA awarded DKW a time and materials contract with a not-to-exceed ceiling of $500,000. Appeal File, Exhibit 10. Prior to award of this contract, DKW was advised that for contracts in excess of $500,000 an audit must be performed. Appeal File, Exhibit 35.

6. On September 2, 1999, the Director of GSA's Property Development Division requested the Regional Inspector General for Auditing to conduct an audit of DKW's proposal. This communication advised that a time and materials contract, not to exceed the amount of $500,000, had been awarded to DKW, and requested that the contract be audited in accordance with Federal Acquisition Regulation (FAR) 15.805-5 and General Services Acquisition Regulation (GSAR) 515-805-1. Appeal File, Exhibit 12.

7. GSA and DKW met to discuss DKW's proposal in December 1999. At that meeting it was determined that it would be in the best interests of both parties to continue to contract on a time and materials basis. GSA agreed to increase the contract ceiling by another $500,000, to $1,000,000. In this meeting, GSA again advised DKW that its contract would be audited to determine overhead rates, hourly costs, equipment costs, and other items. Appeal File, Exhibit 13.

8. By letter dated January 24, 2001, GSA's Inspector General requested that DKW supply documentation to supplement the information provided with its billings for costs incurred from October 10, 1999, through September 6, 2000. The letter added that once the documentation had been received and reviewed, GSA's auditors would schedule a meeting with DKW. Appeal File, Exhibit 14.

9. The audit prompted discussions and exchanges of information between the auditors and DKW. Appeal File, Exhibits 15-18. In a report dated April 30, 2001, the Inspector General provided the results of its audit to GSA. The report recommended a downward contract price adjustment of $303,193. *Id.*, Exhibit 19.

10. On May 10, 2001, GSA's contracting officers and specialists, together with the auditors, met with DKW's president, consultant, and subcontractor representatives to discuss the audit findings and to commence negotiations on a settlement of the contract price. After the exchange of additional information, and discussion of the auditors' reasoning versus DKW's views on individual items of cost in dispute, compromises were reached on these elements of cost. The charges in dispute included rates for federal and state unemployment taxes (FUTA and SUTA), the small tool allowance charged by DKW, DKW's overhead rate charged on a portion of the job, and equipment rental. After reaching compromises on these

items, the Government and DKW agreed that DKW owed $128,409 in overpayments made under the contract. Appeal File, Exhibit 20.

11. Additional negotiations were conducted through written exchanges and via telephone conversations. In a telephone conference dated July 2, 2001, in which DKW justified to the contracting officer's satisfaction another $30,000 in costs, DKW agreed to the final settlement amount of $116,409. In subsequent conversations on August 24 and September 24, 2001, GSA noted that labor rates had needed to be revised on a related time and materials order that had been awarded to DKW on this project. GSA advised that it would seek repayment of only the $12,000 in labor costs that had been overpaid and would not seek to recover some $6000 in equipment costs that DKW had not supported. At this point, DKW acknowledged that the amount owed to GSA came to $128,409 ($116,409 + $12,000). Appeal File, Exhibits 21-24, 28.

12. In a letter addressed to the contracting officer, dated August 1, 2001, DKW's president, acknowledging the auditor's determination that appellant had been overpaid under its time and materials orders, asked if appellant could repay the debt in monthly installments over a fourteen-month period. Appeal File, Exhibit 25. This letter led to additional telephone negotiations between the contracting officer and DKW. DKW explained that its request was made because it was financially unable to pay the amount owed in one payment. The contracting officer responded that GSA would prefer a shorter period of time for repayment of this debt, but agreed to take DKW's request for an extended repayment schedule under consideration. The contracting officer also advised DKW's president that in order to recoup the debt promptly, GSA was considering taking an offset against amounts due under other contracts DKW had with the agency. *Id.*, Exhibit 26.

13. Following these telephone discussions, in a letter dated September 7, 2001, DKW repeated its statement that immediate repayment of a sum this size would cause severe financial hardship and could well require the company to close its doors. DKW then offered to make restitution in no more than twelve payments, with a "modest amount" for interest included. Appeal File, Exhibit 27.

14. Upon receipt of this communication, GSA obtained a Dun & Bradstreet financial statement reflecting that, as of December 31, 2001, DKW had a cash balance approaching $268,000. GSA initiated further discussions with appellant, asking it to provide its most recent financial statement and monthly balance sheets. Based on the more recent information provided by DKW, the contracting officer, in a letter dated October 25, 2001, informed appellant that it appeared that, as of October 23, the company had a bank statement balance of $271,887. Appeal File, Exhibit 31.

15. Given this information, the contracting officer notified DKW that GSA was not persuaded that repayment in full would impose a financial hardship on the company. Consequently, GSA intended to apply contractual offset procedures against all open contracts that appellant held with GSA. Appeal File, Exhibit 31. In a follow-up letter dated November 21, 2001, the contracting officer, after receiving additional financial information from DKW, stated that GSA had determined that the company may or may not be in a financial hardship situation and that under these circumstances GSA's best interests would be served by proceeding with offsets against payments due to DKW on other GSA contracts. *Id.*, Exhibit 32.

16. In internal electronic mail communications memorializing discussions held with DKW in November 2001, the contracting officer noted that a demand letter had not been issued because GSA had received affirmative assurance that DKW acknowledged and accepted the debt as owing, and had agreed to its repayment. In a telephone conversation held on November 15, 2001, DKW's president and the contracting officer agreed that a recent pay application under a different DKW contract with GSA would be used to effect a partial offset of DKW's debt. Appeal File, Exhibit 33. At that time, GSA planned to offset the remaining amount due against another open contract. *Id.*, Exhibit 34.

17. Following an initial offset, in the amount of $94,958.33, no additional invoices were submitted by DKW under other contracts to permit an offset of the remaining balance owed to GSA. As of October 26, 2005, GSA determined that the remaining amount of the debt owed by DKW under its contract to perform painting and wall covering in the St. Louis courthouse was $33,450.67. Appeal File, Exhibit 34.

18. On January 31, 2006, the contracting officer issued a final decision notifying DKW that it continued to owe to the Government the amount of $33,450.67 and demanding payment of the debt in that amount. Appeal File, Exhibit 35.

19. DKW timely appealed the contracting officer's decision. During the processing of the case, the parties made various attempts to settle the matter. GSA's accountants performed a reconciliation process and determined that an additional amount had been offset and that the actual remaining balance owed by DKW is $28,756.40. This is the amount in dispute in this appeal. Respondent's Record Submission, Exhibit 1.

Discussion

GSA argues that it is entitled to collect the remaining $28,756.40 because the parties agreed that DKW had been overpaid under the contract awarded and they agreed upon the amount that DKW was to repay. Thus, GSA characterizes this matter as involving a debt that

it is entitled to collect from appellant, along with applicable interest. DKW disagrees and now asserts that its agreement to the overpayment was made under duress, that the entire audit process was invalid, that GSA improperly offset the alleged debt against amounts owed under other contracts, that nothing further is due to GSA, and that it should be refunded the amounts previously collected by setoff .

The parties to this dispute initially entered into what was denominated as a time and materials contract with a not-to-exceed ceiling amount of $500,000. Because of time pressure to get MDI's subcontractors back to work on the project, GSA was not in a position to perform a pre-award audit of DKW's projected costs, but made clear that DKW could expect its payments under the contract to be audited. The audit was initiated soon after award of the contract. GSA and DKW cooperated in the audit process. The auditors asked for additional information from DKW before concluding that DKW had been overpaid, presented preliminary audit findings to DKW, and met with DKW to obtain further supporting data that might assist in justifying additional costs. Indeed, after providing DKW the opportunity to clarify and offer information to support claimed costs, the audit office revised its report to lower the amount determined to have been overpaid. DKW did not contemporaneously challenge or dispute the audit, or the revised amount identified as the overpayment -- rather, it asked only that GSA allow it to spread repayments over an extended period of time. GSA did not agree to do this, but instead, after considering DKW's request, opted to recover the overpayments by offsetting payments due under other contracts with DKW.

While a formal modification of the contract was not issued, the parties, in correspondence and through their actions, essentially reached agreement on the proper contract price and the amount that DKW was obligated to remit to the Government. Findings 10-11. This forms the basis of GSA's position that under this contract, DKW had agreed, and was bound, to pay the remainder of the debt that could not be collected through offset procedures. In support of this proposition, GSA cites *Swartzbaugh Manufacturing Co. v. United States*, 289 F.2d 81, 84-85 (6th Cir. 1961) (quoting *United States v. United Drill & Tool Corp.*, 183 F.2d 998, 1000 (D.C. Cir. 1950)), as recognizing that "[s]ums due the United States upon renegotiation of contracts are clearly debts" and that "[t]he contractor owes the United States because the United States has overpaid him."

The main argument made by DKW in opposing GSA's claim is that it was forced to accept both the contract and the audit results under duress. DKW asserts that, instead of negotiating a fixed-price (or lump sum) contract, GSA awarded it a time and materials contract. Appellant (apparently) believed it was required to perform all of the work for the not-to-exceed ceiling amount of $500,000, an amount that fell far short of DKW's proposal to perform the remaining work for $2,133,018. Although GSA subsequently issued a

modification adding another $500,000 under the contract, increasing the not-to-exceed amount to $1,000,000, DKW notes that this is still less than half its proposal.[3] DKW deems this to be strong evidence of GSA's determination to extract a "desired contract amount" through duress, undue influence, and the exercise of its superior bargaining position. DKW thus maintains that it was forced to enter into the contract under duress and then was required to return monies that had been paid under the contract because it could not afford to have the Government terminate its contract.

DKW's contentions cannot withstand scrutiny given the facts of record. Three specific showings are required to prevail on a claim that a contract is unenforceable by reason of duress or coercion exerted by the Government:

> [T]he party "must establish that (1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts."

Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1329-30 (Fed. Cir. 2003) (citing *Dureiko v. United States*, 209 F.3d 1345, 1358 (Fed. Cir. 2000)). For Government acts to be found coercive, "[s]ome wrongful conduct must be shown, to shift to the defendant the responsibility for bargains made by plaintiff under the stress of financial necessity." *Johnson, Drake & Piper, Inc.*, 531 F.2d 1037, 1042-43 (Ct. Cl. 1976); see *also Southern Defense Systems, Inc.*, ASBCA 54045, et al., 07-1 BCA ¶ 33,536.

None of the elements critical to establishing that a contract was procured under duress are present in this appeal. The record does not reflect that DKW involuntarily accepted GSA's terms or that circumstances permitted no other alternative. By the same token, there is no evidence of any oppressive or coercive behavior, or wrongful conduct, that could be attributed to GSA. When GSA was reluctant to accept DKW's fixed-price proposal to complete the work, it opted instead to get work underway by using a time and materials contract vehicle. At the time, DKW neither demurred nor otherwise made GSA aware of the reservations it now purports to have had about contracting on this basis. Nothing in the record supports an inference that GSA overreached or exerted undue pressure in any way in its dealings with this contractor.[4] DKW's allegations of duress are raised for the first time

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[3] GSA ultimately authorized increases in the ceiling for the total amount of $1,750,000, an amount much closer to appellant's proposal. Complaint ¶¶ 2-3.

[4] Many of the arguments made by DKW, citing its precarious financial state and need to continue its contracting relationship with GSA, have been rejected as bases for a

in arguments presented by appellant in its record submission. Absent any contemporaneous documents to support these allegations, or an affidavit or other form of sworn testimony executed by a knowledgeable DKW employee, this contention cannot prevail.

DKW's belated claim of duress or coercion stems from its apparent misunderstanding of the Government's use of the time and materials contract vehicle for the purpose of getting the needed work underway. Under a contract containing a "not-to-exceed" ceiling of $500,000, which was subsequently modified to increase the ceiling to $1,000,000, DKW's only obligation was to perform the stated work up to the contract's ceiling amount. After incurring labor and material costs up to the ceiling amount, DKW would have been entitled to stop performing. *See CACI, Inc. - Federal v. General Services Administration*, GSBCA 15588, 03-1 BCA ¶ 32,106 (2002). As GSA points out in its reply to DKW's brief, it is hard to envision how the award of a contract that shifts to the Government the risk that the contract will not be fully performed for the authorized ceiling amount can constitute duress. DKW's subjective belief that given its financial circumstances it had no choice but to accept GSA's terms does not suffice to make the contract unenforceable by reason of duress. *See P.J. Dick, Inc. v. General Services Administration*, GSBCA 11886, 94-3 BCA ¶ 27,266.

Nor is there any basis for the allegation that GSA exerted economic duress in its audit of DKW's expenses. DKW was afforded every opportunity to address the auditors' questions and was able to negotiate a much more favorable refund by meeting with the auditors and contracting officials and explaining its charges. Ultimately, DKW agreed with the amount deemed to have been overpaid. Finding 11. Moreover, GSA does not appear to have been aware of DKW's "precarious" financial situation during this period, as evidenced by its efforts to obtain a Dun and Bradstreet report and its request for further financial statements upon learning of DKW's claim of economic hardship. Finding 14.

DKW's next argument is even less convincing. It argues that the audit was requested after contract award under the authorization of a FAR section that is applicable to pre-award audits. DKW suggests that this somehow makes the audit invalid. This argument is premised upon the citations provided in the internal memorandum sent by GSA's Property Development Division to the Regional Inspector General. Finding 6. Regardless of how the audit request was phrased by the Government, appellant was fully aware of the likelihood

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defense of economic duress. The mere fact of hard bargains or economic pressure felt by the contractor is not enough to establish the existence of coercion on the part of the Government. This is particularly so where an agreement has been hammered out in negotiations between the parties, with concessions on both sides, as was the case here. *See David J. Tierney Jr., Inc.*, GSBCA 7107, et al., 88-2 BCA ¶ 20,806, at 105,173.

of a post-award audit at the time of award. Indeed, it is routine for an audit clause to be included in most negotiated contracts, including those awarded on a time and materials basis. 48 CFR 15.209 (1999) (FAR 15.209). Appellant did not object to the validity of the audit at the time it was performed. Appellant has not shown how the audit as conducted was invalid or incorrect in its conclusions particularly given the bilateral agreement eventually reached by the parties. This argument, as GSA points out, has little relevance in the face of DKW's participation in the audit, the fact that it was granted multiple opportunities to justify expenses, and appellant's eventual agreement to remit the overcharge identified by the auditors. Nothing in the record corroborates DKW's assertion that the audit was improper. We reject this argument as well.

Next, appellant objects to GSA's resort to the right of offset to collect the monies owed. Appellant believes it was improper to invoke the right of offset when appellant was attempting to negotiate a repayment plan and that, before implementing offset procedures, the Government was obligated to send a formal demand letter to DKW. Here, again, it is settled law that the Government, like every other creditor, has the right to "apply the unappropriated monies of his debtor, in his hands, in extinguishment of the debts due to him." *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947). No due process rights of appellant were abridged by reason of the Government's exercise of that right. Had it wanted to, DKW could have submitted a claim to the contracting officer disputing the overpayment. It made no allegations of this nature, however, until the contracting officer issued a decision demanding payment of the remaining amount due. In any event, the only issue properly before us is whether appellant owes the $28,756.40 demanded by GSA, since this is the only amount that has been the subject of a contracting officer's decision. *See*, *e.g.*, *Winslow v. General Services Administration*, CBCA 560, 07-2 BCA ¶ 33,589. This remaining amount has not been collected through offset measures; accordingly, appellant's objection to GSA's use of offset procedures is largely irrelevant to this proceeding.

Finally, appellant argues that even if it is found to owe the amount claimed by GSA, GSA should not be permitted to recover interest on this amount. GSA argues that interest begins to accrue when the principal amount of the debt is due and payable and the Government demands payment of the debt. The general rule established in the absence of an interest clause is that interest will start to accrue when the principal sum is due and payable, if it is not paid within such time as may be allowed for payment, or by the date when the Government first made written demand for payment consistent with the contract. *See Electronics & Space Corp.*, ASBCA 47539, 95-2 BCA ¶ 27,768, at 138,447. GSA posits that DKW was first notified of the possibility of an overpayment when it was presented with a draft of the audit findings. GSA asserts that a demand for repayment was made on or around May 10, 2001, during the negotiation session held between the parties. GSA urges that this should serve as the date on which accrual of interest should be computed. Alternatively, at

the latest, interest should begin to accrue no later than January 31, 2006, the date of the contracting officer's decision.

We agree that the Government is entitled to interest on the amount of the debt. *See Swartzbaugh Manufacturing* (holding that the Government has a common law right to interest on a debt owed to it even in the absence of a statute or contract clause expressly providing for it). The holding of the court in *Swartzbaugh Manufacturing* has been consistently adopted by a number of boards of contract appeals in similar factual circumstances. *Asheville Contracting Co.*, DOT CAB 78-29, 79-2 BCA ¶ 13,898; *Read Plastics, Inc.*, GSBCA 4159, et al., 77-2 BCA ¶ 12,859; *Harrisville Heights, Inc.*, ASBCA 20707, 77-1 BCA ¶ 12,358. As pointed out in *Advanced Injection Molding, Inc. v. General Services Administration*, GSBCA 16504-R, 05-2 BCA ¶ 33,097, the Debt Collection Act of 1982, 31 U.S.C. § 3717 (2000), now provides authority, in the absence of a contract clause,[5] for charging interest on amounts found to have been overpaid to a contractor.

The issue remaining to be resolved is when interest should be deemed to have started to accrue. Although GSA's contracting officer did not initially make a formal written demand for reimbursement of the overpayment, GSA suggests that this was not necessary given that DKW did not dispute the debt but, rather, wanted to repay it over an extended period. The question is when, for purposes of assessing interest, we should deem the claim to have been asserted by GSA such as to constitute a demand for payment. In this case, following a lengthy process of negotiation and the exchange of information, GSA made no explicit request for repayment but instead instituted offset procedures. On November 15, 2001, the contracting officer notified DKW's president that an offset would be taken against an outstanding invoice. GSA offset the amount of $94,954.33 against that invoice, and announced its intent to offset the remaining balance against future invoices expected to be submitted by appellant. No further invoices were submitted against which an offset could be taken, however. The record contains no explanation for the delay from October 2001 until January 2006, when the GSA contracting officer issued a final decision demanding payment of the balance. There is no mechanism establishing a specific time for payment of the debt as contemplated in the approach enunciated in *Electronics & Space Corp.* Absent this, interest may only be deemed to accrue as of the date of the contracting officer's final decision asserting its claim for the remainder of the debt. Accordingly, we conclude that GSA is entitled to interest on the amount it claims calculated from January 31, 2006, the date of the contracting officer's final decision.

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[5] We cannot determine from the record we have been provided whether the subject contract contained the standard Payment of Interest clause.

Decision

The appeal is **DENIED**.

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CATHERINE B. HYATT
Board Judge

We concur:

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ROBERT W. PARKER
Board Judge

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ANTHONY S. BORWICK
Board Judge