ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Gray Personnel, Inc.	)	ASBCA No. 54652
	)	
Under Contract No. DADA15-97-D-0023	)	

APPEARANCE FOR THE APPELLANT: Bradley Alan Rush, Esq.
Bradley Alan Rush, Attorney
At Law, P.C.
Silver Spring, MD

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
CPT Christopher L. Krafchek, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THOMAS
ON JURISDICTION

This appeal is taken from a contracting officer's decision denying appellant's claim for an alleged constructive change to the terms of its personal services requirements contract. The contractual period of performance ran from 21 June 1997 through 31 March 2002. Appellant claims that the government changed the contract "from the very first delivery orders," issued in 1997 (app. decl. ¶ 23). Appellant submitted its claim on 26 April 2004. The government moves for summary judgment based on the six-year statute of limitations for submitting claims in the Contract Disputes Act (CDA), 41 U.S.C. § 605(a). We conclude that the motion should be characterized as one to dismiss the appeal for lack of subject matter jurisdiction. We grant the motion as to those delivery orders on which performance began prior to 26 April 1998 and deny it as to those delivery orders on which performance began thereafter.

STATEMENT OF FACTS
FOR PURPOSES OF THE MOTION

1. On 13 May 1997, Walter Reed Army Medical Center (WRAMC or the government) awarded Contract No. DADA15-97-D-0023 to appellant through the Small Business Administration. The contract was a firm fixed-price personal services requirements contract for Licensed Practical Nurses (LPNs). The period of performance consisted of a base year from 21 June 1997 through 30 September 1997 and four option years, fiscal years 1998 through 2001. The total estimated price of the contract at the

time of award was $3,926,840.09, including all option years. Payment was to be made monthly for services satisfactorily performed. The government ultimately exercised all options and extended the contract six months, resulting in a completion date of 31 March 2002. (R4, tab 7 at 1-3, 8, G-1; app. decl. ¶¶ 9, 12)

2. The contract line items (CLINs) stated that WRAMC required an estimated number of full time equivalent (FTE) LPNs including specific estimated quantities of hours of LPN services for different shifts. For example, CLIN 0001 provided:

SECTION B
SUPPLIES OR SERVICES AND PRICES/COSTS

ITEM	DESCRIPTION	ESTIMATED QUANTITY	U/I	UNIT PRICE	ESTIMATED AMOUNT
0001	BASE CONTRACT PERIOD: 21 JUNE 1997 THROUGH 30 SEPTEMBER 1997 THE WALTER REED ARMY MEDICAL CENTER REQUIRES AN ESTIMATED TEN (10) FULL TIME EQUIVALENT MEDICAL SURGICAL LICENSED PRACTICAL NURSES (LPN), EMERGENCY ROOM AND PSYCHIATRIC LPNS, WHICH INCLUDES THESE AREAS:				
0001AA	DAY SHIFT (6:45 A.M. – 3:15 P.M.)	2,095.00	HR	19.960000	41,816.20
0001AB	EVENING SHIFT (2:45 P.M. – 11:15 P.M.)	1,675.00	HR	19.960000	33,433.00
0001AC	NIGHT SHIFT (11:00 P.M. – 7:00 A.M.)	1,650.00	HR	19.960000	32,934.00
0001AD	WEEKEND AND HOLIDAY DAY SHIFT (6:45 A.M. – 3:15 P.M.)	835.00	HR	19.960000	16,666.60
0001AE	WEEKEND AND HOLIDAY EVENING SHIFT (2:45 P.M. – 11:15 P.M.)	1,080.00	HR	19.960000	21,556.80
0001AF	WEEKEND AND HOLIDAY NIGHT SHIFT (11:00 P.M. – 7:00 A.M.)	1,080.00	HR	19.960000	21,556.80

(R4, tab 7 at B-1)

3. The contract included the following FAR clauses: FAR 52.216-18, ORDERING (OCT 1995) (Ordering clause); FAR 52.216-21, REQUIREMENTS (OCT 1995) (Requirements clause); FAR 52.233-1, DISPUTES (OCT 1995)—ALTERNATE I (DEC 1991); and FAR 52.243-1, CHANGES—FIXED-PRICE (AUG 1987)—ALTERNATE III (APR 1984). The Requirements clause provided:

> (a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule.

> The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.
>
> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. . . .

The Ordering clause provided:

> (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. . . .

(R4, tab 7 at F-1, F-2, I-5)

4. The government issued delivery orders (DOs) to purchase different types of services, such as Nursing, OB-Gyn, General Medicine and Dermatology. The government issued DO Nos. 1-3 for the base year and DO Nos. 4-13, 15-16 for the first option year. DO No. 4 required services exclusively in 1997. DO Nos. 5 through 12 required services beginning on dates between 1 October 1997 and 1 March 1998. DO Nos. 13, 15 and 16 required services beginning on 1 May 1998 or later. Apparently there was no DO No. 14. (R4, tab 14)

5. By letter dated 19 November 1997, appellant requested an increase in the unit price. Appellant asserted that its bid was based on an incorrect Service Contract Act wage determination (WD) in the original request for proposals (RFP), which led appellant to underestimate the hourly wage rate in its bid. It also asserted that it was entitled to an increase in the fringe benefit rate. (R4, tab 9)

6. By letter dated 23 March 1998, appellant submitted a certified claim in the amount of $109,904.25 for increased costs in the base year (DO Nos. 1-3) plus part of option year one (DO Nos. 4-11). Appellant stated "[t]his amount represents the

difference in the amount of actual required wages and the erroneous Wage Hour Determination that was included in the . . . solicitation." (R4, tab 11 at 1)

7. By letter dated 10 September 1998, appellant revised its claim upward to $255,991.99. Appellant also included a proposal to modify the contract for option years two, three, and four by increasing the unit price. (R4, tab 14)

8. On 24 September 1998, appellant and the government entered into Modification No. P00004. This modification awarded appellant $255,991.99 in settlement for specified WDs and increased the unit price for option year two. (R4, tab 15)

9. On 14 May 1999, appellant's president wrote the contracting officer that "Section B refers to an estimated quantity of 15 FTEs. As you know, we have only 6 FTEs and the remainder of LPNs are ordered on an as needed basis, or PRN's. This discrepancy in estimated vs actual quantities has caused problems in scheduling and job cost over-runs . . . ." The letter did not quantify the job cost overruns or otherwise assert a "claim." (App. supp. R4, tab 5)

10. Effective 3 November 2000, Modification No. P00010 increased certain unit prices in the fourth option year as a result of a revised WD (R4, tabs 17, 30).

11. By letter dated 26 April 2004 appellant submitted a certified claim for $952,859 for damages incurred during the first three option years, fiscal years 1998-2000. Appellant alleged that "the government breached the . . . contract in two ways," as follows: "First, after the base year, the government changed the contract from the supply of full-time equivalent ('FTE') LPN services to the supply of 'as needed' LPN services," dramatically increasing appellant's performance costs. Second, in reliance on the RFP, appellant "used the wrong Wage Hour Determination to determine its bid, dramatically under-pricing the true costs of its performance." (R4, tab 36)

12. By letter dated 19 May 2004, appellant reduced its claim to $704,431. The rationale for the claim was unchanged. (R4, tab 38)

13. By letter dated 10 June 2004, the CO denied the portion of the claim that asserted changes to the contract. He indicated that a detailed audit of appellant's payroll records would be required in order for him to determine if appellant was underpaid regarding Department of Labor wage determinations. He expressed the belief, however, that based on the contract files appellant had been "paid far in excess of what you were entitled to." (R4, tab 39)

14. Appellant considered the contracting officer's 10 June 2004 letter a complete denial of its 19 May 2004 revised claim and filed a notice of appeal with the Board, which the Board docketed as ASBCA No. 54652. (R4, tab 40)

APPELLANT'S DECLARATION

In support of its opposition to the motion, appellant has submitted the declaration of its president, Mrs. Janice Gray Johnson (sometimes "app. decl."). The declaration states in pertinent part:

> 4. On or about April 2, 1996, the Army issued [the RFP] seeking proposals to fill an estimated 25 Full Time Equivalent ("FTE") LPNs to service nursing shifts as ordered primarily by WRAMC. The FTE contract language indicated that the nurses the winning contractor would supply to WRAMC under the resulting contract would be permanent placements, as opposed to "PRN" or "pro re nata" staffing, which indicates staffing on an as-needed or supplemental basis. In fact, Gray Personnel was only interested in this contract because it was for FTE staffing. I would not have offered a proposal in response to this RFP if it had contained any PRN staffing requirements. While both a FTE contract and a PRN contract would estimate the hours needed, the cost impact on the contractor performing a PRN contract is very different and more costly, . . .
>
> . . . .
>
> 7. A day before its Best and Final Offer was due, Gray Personnel discovered WRAMC had included an outdated Department of Labor Wage Hour Determination ("WHD") in the RFP. . . .
>
> . . . .
>
> 15. . . . [T]he first month after contract award, the contracting parties met at WRAMC for an in process review ("IPR") meeting. . . . [U]pon arrival, WRAMC informed Gray Personnel that it required an IPR on the 3rd Wednesday of every month until further notice,

which turned out to be for the duration of the Contract. . . .

16. This changed the terms of the Contract since this travel requirement was not in the SOW. . . . The Army also changed the terms of the Contract through its further micro-management of the Contract, manifested by the Army's treating the Contract as one to fulfill PRN nursing requirements as opposed to the FTEs specified. . . . [T]here is a distinct difference between FTE employment, which requires one initial LPN placement on a full-time job for an extended period of time, and PRN employment, which requires 24-hour, 7day/week recruiting, screening (including license and background checks), scheduling, placement, replacement, and employee management of various LPNs. . . .

. . . .

18. WRAMC, however, did not convert all FTE requirements to PRNs: The GIMC Ward, for the most part, and the facility at Westpoint, NY both ordered FTE placements, and scheduled and supervised them as stated in the Contract for the entirety of Gray Personnel's Contract performance. The costs Gray Personnel incurred to perform the FTE hours at these locations is comfortably within the pricing included in the Contract. The costs Gray Personnel incurred to perform the PRN hours at the other locations was dramatically higher and not within the prices Gray Personnel contemplated when it proposed its offer.

19. These increased responsibilities to fill PRN requirements, from staffing to scheduling to supervision, increased Gray Personnel's costs to perform the Contract. However, as Gray Personnel's President, I did not immediately recognize what was actually causing this cost impact, because at the time I was unable to categorically distinguish these costs from contract start-up costs. During the early months of Contract performance, all I was aware of was that

Gray Personnel was losing money in performing the Contract. Obviously, the reason appeared to be the gross discrepancy between what we could charge under the Contract rates and the amounts we paid the nurses, i.e., what we all understood to be the DOL wage determination issue.

. . . .

23. Thus, from the very first delivery orders, there were two pricing pressures on Gray Personnel. The first was that its contract pricing had been based on out-of-date DOL wage determinations. The second was the conversion of the contract from providing FTE LPNs to providing PRN LPNs, who not only had to be paid a higher wage due to market conditions than Gray Personnel contemplated based on the specifications stated in the RFP and resulting Contract, but which had a much higher impact on Gray Personnel's G&A.

. . . .

29. Gray Personnel discussed these pricing pressures, the changes in Gray Personnel's work not called for by the Contract and the need for contract price adjustment, with WRAMC at the regular IPRs [In Process Reviews]. Again, often WRAMC brought this issue up in terms of Gray Personnel's alleged fill rate problems.

. . . .

37. . . . Contracting Officer Thomas led me to believe that the only way he would adjust the Contract pricing would be through DOL's issuance of a new wage determination, which would then allow WRAMC to raise my rates.

. . . .

42. On May 17, 2004, on behalf of Gray Personnel, I

> submitted a revised certified REA to the Contracting Officer requesting a COFD on Gray Personnel's revised claim. In the revised REA, I explained that Gray Personnel's claim as a whole was due to two factors: (1) the change from FTE to PRN, discussed above, and (2) the fact that Gray personnel had dramatically underpriced its true costs from the very beginning of the Contract due, in part, to WRAMC's supplying the wrong DOL information in the RFP but more importantly due to the fact that WRAMC primarily ordered PRNs as opposed to the contractually specified FTEs. . . .
>
> . . . .
>
> 44. No part of Gray Personnel's May 17, 2004 REA includes monies allegedly due Gray Personnel due to any alleged lack of contract modification based on DOL wage determinations. Rather, Gray Personnel's present appeal is to recover costs incurred due to the change in what services WRAMC ordered in comparison with the services WRAMC contracted for.

(App. opp'n, ex. 1)

CONTENTIONS OF THE PARTIES

The government moves for summary judgment as to the alleged change from FTE to "as needed" services upon the ground that the claim "is barred by the statute of limitations because, by Appellant's own admission, the alleged changes occurred prior to April 1998, Appellant was aware of the alleged changes when they occurred, and Appellant failed to make any claim regarding these alleged changes within six years of when they occurred" (mot. at 2). It moves for summary judgment as to the WD claim upon several grounds including accord and satisfaction (mot. at 2).

Appellant states that the six-year limitation on submitting claims is jurisdictional in nature (sur-rebuttal at 2-3). It argues that it "brought the complained-of change to the government's attention within months of its occurrence," pointing to discussions at the IPRs and the 14 May 1999 letter (app. opp'n at 6, 9, *see* app. decl. ¶ 29, SOF ¶ 9). Appellant also argues that all events permitting assertion of the claim, *viz.*, determination of monetary damages, could not have been known before the end of contract performance in March 2002 (app. opp'n at 10). Appellant also asserts *inter alia* that the six-year

limitation on submitting claims should be equitably tolled because it vigorously prosecuted its WD claims against the government and the government misled it into thinking that adjustments to the contract price would only be made pursuant to the Service Contract Act (sur-rebuttal at 13-16).

As for the WD issue, appellant has advised that its claim is not based on the failure to supply the correct WD, and that its claim is only based on the change from FTE to "as needed" services. *See, e.g.*, app. opp'n at 7-8. Accordingly, the WD issue is not present in the appeal before us, mooting the government's motion as to it.

In teleconferences with the Board, appellant has clarified that it does not seek damages for the first quarter of fiscal year 1998, leaving the period from 1 January 1998 through 30 September 2000 in contention. *See* memorandum of telephone conferences 5 and 8 June 2006.

DECISION

Appellant alleges the government breached its personal services requirements contract by ordering "as needed" instead of full time equivalent (FTE) nursing services. Appellant submitted a certified claim on 26 April 2004 seeking damages of $952,859 for the first three option years (fiscal years 1998-2000). Appellant reduced the amount of the damages to $704,431 by letter dated 19 May 2004 and only seeks damages for the period from 1 January 1998 through 30 September 2000. For limitations purposes, 26 April 2004 rather than 19 May 2004 is the critical date since the 19 May 2004 letter merely reduced the claimed amount.

We address two issues below. First, whether the requirement to submit a CDA claim within six years after its accrual is jurisdictional, and second, when appellant's claim accrued. We do not express any opinion as to whether appellant's claim is meritorious.

Whether the Requirement to Submit a CDA Claim Within Six Years After Its Accrual is Jurisdictional

1. Statutory and Regulatory Provisions

The first two sentences of section 6(a) of the CDA, 41 U.S.C. § 605(a), provide:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims

> by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer.

The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322, added the following provision to § 605(a):

> Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.[1]

FAR 33.206, Initiation of a claim, implements this provision as follows:

> (a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. . . .
>
> (b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

In addition, FAR 33.201 defines "Accrual of a claim," *infra*.

2. Discussion

The Board's jurisdiction of this appeal arises, if at all, under the CDA. Under the CDA, there are two prerequisites to an appeal to the Board or to the United States Court of Federal Claims:

---

[1] The language in the CDA is different from that in the Tucker Act, 28 U.S.C. § 2501: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

> Those prerequisites are (1) that the contractor must have submitted a proper CDA claim to the contracting officer requesting a decision, . . . § 605(a), and (2) that the contracting officer must either have issued a decision on the claim, . . . § 609(a), or have failed to issue a final decision within the required time period, . . . § 605(c)(5).

England v. Sherman R. Smoot Corp., 388 F.3d 844, 852 (Fed. Cir. 2004). If a contractor has not submitted a proper claim, the contracting officer does not have the authority to issue a decision:

> The Act, . . . denies the contracting officer the authority to issue a decision at the instance of a contractor until a contract "claim" in writing has been properly submitted to him for a decision. § 605(a). Absent this "claim", no "decision" is possible—and, hence, no basis for jurisdiction . . . .

Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981). Thus, "[i]t is well established that without . . . a formal claim and final decision by the contracting officer, there can be no appeal . . . under the CDA. It is a jurisdictional requirement." *Milmark Services, Inc. v. United States*, 231 Ct. Cl. 954, 956 (1982).

Section 605(a) as implemented by FAR subpart 33.2, Disputes and Appeals, is the key provision in determining whether there is a proper or formal claim for purposes of the CDA. *See, e.g., Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*) (definition of a claim); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (requirement that a claim be submitted for a decision). FASA added the six-year requirement to this key provision, rather than, for example, to 41 U.S.C. §§ 606 or 609, establishing filing periods at the boards and the United States Court of Federal Claims. We conclude, in view of the placement of the six-year provision in § 605(a), that the requirement that a claim be submitted within six years after its accrual, like the other requirements in that section, is jurisdictional. *Accord Axion Corp. v. United States*, 68 Fed. Cl. 468, 480 (2005).[2]

[2] Accordingly, we do not follow the *dictum* to the contrary in *Woodside Summit Group, Inc.*, ASBCA No. 54554, 05-2 BCA ¶ 33,113.

When Appellant's Claim Accrued

1. Regulatory History of the Definition of Accrual

FASA did not define "accrual." The proposed rules implementing FASA, issued 10 January 1995, would have revised FAR 33.206 to cover the subject of accrual as follows:

> (a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after the contractor knew or should have known the facts and circumstances giving rise to the issue in controversy unless a shorter time period has been agreed to. . . .
>
> (b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim. The 6 year period shall not apply to a Government claim against a contractor that is based on a claim by the contractor involving fraud.

60 Fed. Reg. 2630, 2633 (Jan. 10, 1995).

The final rules issued 18 September 1995 added a stand-alone definition of "accrual of a claim" to FAR 33.201, Definitions, and revised the language of FAR 33.206 to that quoted above under Statutory and Regulatory Provisions. The new definition read as follows:

> *Accrual of a claim* occurs on the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

60 Fed. Reg. 48,224, 48,230 (Sept. 18, 1995). According to the explanatory material in the Federal Register, "[i]n addition to the discovery of the events, a discovery of some damage has been added to cover the unusual case where the party is aware of the events giving rise to the claim, but not of any resulting damage" (*id.* at 48,225).

Effective 12 March 2001, as part of the project to revamp the definitional sections of the FAR, the definition of accrual was revised to its present form:

> "Accrual of a claim" means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

The background information in the Federal Register states that there was no intent to make any substantive change. 66 Fed. Reg. 2117 (Jan. 10, 2001).

2. Discussion

As quoted above, the first sentence of the definition states that "'[a]ccrual of a claim' means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known." To determine when liability is fixed, we start by examining the legal basis of the particular claim. *See, e.g., RGW Communications, Inc. d/b/a Watson Cable Company*, ASBCA Nos. 54495, 54557, 05-2 BCA ¶ 32,972 at 163,331-32. Appellant's 26 April 2004 claim alleges that the government changed the contract from one for the supply of FTE nursing services to one for the supply of "as needed" nursing services, resulting in increased costs (SOF ¶ 11). Appellant's president's declaration amplifies that the government changed the contract "through its further-micro-management . . . , manifested by the Army's treating the Contract as one to fulfill PRN [as needed] nursing requirements as opposed to the FTEs specified." (App. decl. ¶ 16)

Based on the foregoing, the claim alleges a constructive change arising under the contract rather than a breach of contract.[3] A constructive change occurs where, although the contracting officer has not issued a formal change order pursuant to the Changes clause, "the contracting officer has the contractual authority unilaterally to alter the contractor's duties under the agreement; the contractor's performance requirements are enlarged; and the additional work is not volunteered but results from a direction of the Government's officer." *Len Co. and Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967). Under those circumstances, the contractor is entitled to an equitable adjustment pursuant to the Changes clause for any increase in its costs or time required to perform the contract.

In order for the contractor to assert a claim of this type, therefore, the government must have enlarged its performance requirements. Appellant's contract was a

[3] A cause of action for breach of contract accrues at the time of the breach. *Franconia Associates v. United States*, 536 U.S. 129, 141-42 (2002).

requirements contract. The Requirements clause provided that "performance shall be made only as authorized by orders issued in accordance with the Ordering clause." The Ordering clause provided that any "services to be furnished under this contract shall be ordered by issuance of delivery orders." (SOF ¶ 3) Absent a delivery order, therefore, no performance was required. We conclude that the government's potential liability for enlarging appellant's performance requirements could not be "fixed" until the government had issued a delivery order authorizing performance, and required appellant to provide "as needed" services under that order.

The second and third sentences of the definition in FAR 33.201 state that in order for liability to be fixed "some injury must have occurred," but "monetary damages need not have been incurred." Although the drafters apparently contemplated the possibility of nonmonetary injury, appellant alleges monetary damages. Accordingly, appellant must have actually begun performance and incurred some extra costs for liability to be fixed. We do not think, however, that appellant must have completed the delivery order, or even, as appellant argues, have completed the contract in order for liability to be fixed. The CDA permits contractors to submit claims before they have incurred the total costs relating to the claim. Indeed, the Congressional intent was that "contractors . . . submit claims as soon as they are identified." *Servidone Construction Corp. v. United States*, 931 F.2d 860, 863 (Fed. Cir. 1991); *cf. Forman v. United States*, 329 F.3d 837, 841-42 (Fed. Cir. 2003) (under 28 U.S.C. § 2501, claim accrued when performance of services contract was complete).

The definition of accrual of a claim further requires that "all events" that fix the alleged liability "were known or should have been known." Once a party is on notice that it has a potential claim, the statute of limitations can start to run. *Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967) (28 U.S.C. § 2501); *see also Massachusetts Bay Transportation Authority v. United States*, 254 F.3d 1367, 1380 (Fed. Cir. 2001) (claim did not accrue until plaintiff became certain cracking was due to design error). Appellant's president's declaration indicates that "increased responsibilities to fill PRN requirements, from staffing to scheduling to supervision, increased Gray Personnel's costs to perform the Contract. However, as Gray Personnel's President, I did not immediately recognize what was actually causing this cost impact, ..." (App. decl. ¶ 19) We are unpersuaded that appellant should not have known of the events fixing the alleged liability, increasing its costs, at the time of those events, particularly in light of appellant's president's statement in the same declaration that as needed services have such a cost impact that she would not have submitted a proposal if the RFP contained as needed (PRN) requirements (*id.* ¶ 4).

Appellant submitted its certified claim on 26 April 2004. Accordingly, the claim is barred to the extent liability was fixed prior to 26 April 1998. DO Nos. 5 through 12 required services beginning on dates between 1 October 1997 and 1 March 1998 (SOF

¶ 4). Based on the analysis above, appellant's claim as to those delivery orders is barred. Complaints made at IPR reviews or letters such as the 14 May 1999 letter, which do not qualify as claims, do not toll the statute. *Woodside*, 05-2 BCA at 164,102 n.3.

The government argues that appellant's claim should be barred in its entirety. We disagree because we believe the "continuing claim" doctrine developed under the Tucker Act is applicable here. As explicated in *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997):

> In *Friedman v. United States*, 159 Ct.Cl. 1, 310 F.2d 381 (1962), the Court of Claims explained the doctrine:
>
> > Over the years, the court's pay cases . . . have often applied the so-called "continuing claim" theory, i.e., periodic pay claims arising more than six years prior to suit are barred, but not those arising within the six-year span . . . .
> >
> > . . . .
> >
> > In order for the continuing claim doctrine to apply, the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages. . . .
> >
> > However, a claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim.

Although the continuing claim doctrine found its genesis in pay cases, it potentially applies to contract cases as well. *See, e.g., Aktiebolaget Bofors v. United States*, 153 F. Supp. 397 (Ct. Cl. 1957).

In this case, appellant's claim is inherently susceptible to being broken down into a series of independent and distinct events, *viz.*, the changes to the individual delivery orders. The government contends that the government's action in requiring "as needed" services from the very first delivery orders was a single distinct event having continued ill effects later, as described in *Brown Park Estates*. Had the government not issued additional delivery orders, however, and changed the performance requirements as to them, there would have been no continuing ill effects later.

We have considered the parties' other arguments and conclude they do not change the result above.

CONCLUSION

The appeal is dismissed for lack of subject matter jurisdiction to the extent it relates to DO Nos. 5 through 12. The Board has jurisdiction of the appeal insofar as it relates to DO Nos. 13 and later.

Dated: 9 August 2006

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
Of Contract Appeals

I concur

I concur

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

CARROLL C. DICUS, JR.
Administrative Judge
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. 54652, Appeal of Gray Personnel, Inc., rendered in conformance with the Board's Charter.

Dated:

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