ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Robinson Quality Constructors	)	ASBCA No. 55784
	)	
Under Contract No. DAHA23-97-C-0005	)	

APPEARANCE FOR THE APPELLANT: D. Lynn Whitt, Esq.
Mountain Grove, MO

APPEARANCES FOR THE GOVERNMENT: COL Anthony M. Helm, JA
Chief Trial Attorney
CPT Marlin D. Paschal, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING

The Missouri Air National Guard (the government) entered into a renovation contract with Robinson Quality Constructors (Robinson or RQC) in 1997. After it completed its contract in 1999, Robinson submitted a $493,280.82 claim in 2005. The claim was denied and Robinson appealed. The government moves to dismiss the appeal for lack of jurisdiction on the ground that the claim is time barred. Robinson opposed the motion. A hearing on jurisdiction was held in St. Louis, Missouri.

FINDINGS OF FACT

1. On 2 September 1997, the government awarded Contract No. DAHA23-97-C-0005 (Contract 0005) to Robinson. The contract was in the amount of $2,204,840. (R4, tab 1 at 2) The contract incorporated by reference, among other clauses, FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) and FAR 52.242-14, SUSPENSION OF WORK (APR 1984), and included in full text FAR 52.243-4, CHANGES (AUG 1987) (*id.* at 15, 17, 22).

2. The contract required Robinson to begin performance within 10 calendar days and to complete the specified repair and alteration work at the Communications Electronics Facility, Building 36, Jefferson Barracks, within 180 calendar days after receiving notice to proceed (NTP) (R4, tab 1 at 1). The NTP was issued on 17 September 1997 (R4, tab 9). March 16, 1998 was established as the contract completion date.

3. Jefferson Barracks is a historic site on the National Historic Register. The installation was first purchased by the War Department in 1826, and has been in

continuous operation since that time. Today, Jefferson Barracks is owned by the State of Missouri and leased back to the federal government, primarily for use by the National Guard. (Tr. 10)

4. Because of the age of the facility, records of many of the buildings are not available. There had never been a project at the Jefferson Barracks that did not involve some kind of differing site condition such as asbestos, unexploded ordnance, or lead paint. (Tr. 10-11, 113) The lack of historical records and the possibility of encountering differing site conditions were brought to bidders' attention at a pre-bid conference held at Jefferson Barracks (tr. 12-13).

5. Robinson had done work on other buildings at Jefferson Barracks several years prior to the Building 36 project as Robinson Steel (tr. 15, 191). Wayne M. Roberts (Roberts), President of Robinson, and his wife owned 100 percent of the company. Roberts testified that he was in "total charge" of the Building 36 project. He was the project manager involved in estimating, coordinating with subcontractors, "all the paperwork," and "all our correspondence." (Tr. 191)

6. Robinson initially submitted a critical path method (CPM) schedule. It became impossible to track "all of the problems that were going on." The CPM schedule was never updated and was abandoned. According to Roberts, in lieu of a CPM schedule, the government wanted a "progress report." He testified he ran the project "on a daily basis and making plans…kept a log of the things that needed to be done…[and kept] things going as quickly as possible" based on his "25, 30 years of experience." (Tr. 201-02) We find that Roberts, being a hands-on project manager, was totally familiar with the day-to-day progress of the project. To the extent the project was delayed by various causes, we find that due to his experience he could foresee, if not with absolute certainty, potential schedule and other impact that might follow from the delay. In the same vein, we find that Roberts would know when the impact of any delaying events had run its course during construction.

7. During the course of performance, Robinson submitted Contract Progress Reports. These reports showed the individual "Work Elements" under the contract, the period covered, and the cumulative percentage of the total job completed up through the period covered. (Supp. R4, tab 13) The percentages of completion included change order work. The percentage of completion for the period covered was used to determine what Robinson was allowed to invoice. (Tr. 115) In the absence of a more reliable and updated schedule, we find the Contract Progress Reports to provide the best measure of progress of the project.

8. Altogether, 17 Contract Progress Reports were submitted by Robinson. Pertinent information with respect to the percentages of completion for the periods covered is summarized below:

Contract Progress Report No.	Period	Percentage Completed During Period	Percentage of Total Project Completed	Supp. R4 Reference at Tab 13
1	9/17 to 9/30, 1997	11.01	11.01	Bates 782
2	10/1 to 10/29, 1997	12.77	23.78	Bates 779
3	10/30 to 11/30, 1997	5.47	29.26	Bates 776
4	11/30,1997 to 1/9,1998	5.87	35.12	Bates 773
5	1/10 to 1/31, 1998	5.66	40.76	Bates 769
6	2/1 to 2/28, 1998	16.82	57.60	Bates 765
7	3/1 to 4/10, 1998	10.33	67.93	Bates 760
8	4/11 to 5/8, 1998	2.86	70.79	Bates 755
9	5/8 to 6/2, 1998	3.75	74.54	Bates 749
10	6/3 to 7/7, 1998	7.30	81.83	Bates 747
11	7/8 to 8/17, 1998	1.48	83.31	Bates 742
12	8/18 to 9/19, 1998	2.66	85.97	Bates 736
13	9/19 to 11/30, 1998	4.28	90.25	Bates 734
14	12/1 to 12/31, 1998	3.05	92.99	Bates 732
15	1/1 to 2/1, 1999	2.25	95.24	Bates 730
16	2/2 to 3/1, 1999	2.72	97.96	Bates 728
17	3/1 to 6/1, 1999	2.04	100	Bates 726

9. During the contract, 39 modifications – Modification No. P00001 to Modification No. P00039 – were issued (R4, tab 3). While most of the modifications added work and thus increased the total contract price, several modifications were issued as credits to the government and thus reduced the contract price. In the end, the total contract price increased by 11 percent from $2,204,840 to $2,428,310.08. (R4, tab 11 at 714) According to Robinson, the government added "$331,047.55 to the contract price, representing a 15 percent increase in the original contract price" (amended compl. ¶ 17).

10. Fifteen of the modifications extended the contract performance period by a total of 452 calendar days as follows:

Modification No.	Days Extended	New Completion Date	Rule 4 Reference (Tab 3)
P00001	8	26 March 1998	Bates 214
P00003	26	19 April 1998	Bates 361

P00007	42	31 May 1998	Bates 458
P00011	30	30 June 1998	Bates 479
P00013	31	31 July 1998	Bates 484
P00014	31	31 August 1998	Bates 494
P00016	31	1 October 1998	Bates 513
P00022	32	2 November 1998	Bates 543
P00023	11	13 November 1998	Bates 545
P00024	63	15 January 1999	Bates 547
P00030	31	15 February 1999	Bates 573
P00032	28	15 March 1999	Bates 592
P00034	16	31 March 1999	Bates 598
P00035	62	1 June 1999	Bates 600
P00038	10	11 June 1999	Bates 610
TOTAL	452		

11. LTC Aubrey B. Carpenter, Jr., was contracting officer (CO Carpenter) from September 1997 until he retired in September 1998 (tr. 9). Kerrey A. Renkemeyer (CO Renkemeyer) took over as CO on 29 September 1998 (tr. 112).

12. CO Carpenter issued 19 modifications (Modification Nos. P00001-P00019) before he retired (tr. 15, 41-42). Modification No. P00019 was signed by Roberts and CO Carpenter on 8 and 11 September 1998 respectively (R4, tab 3 at 525). Issuance of Modification No. P00019 coincided with Robinson's submission of Contract Progress Report No. 12. That report shows that the project was 85.97% complete. (Supp. R4, tab 13 at 736) CO Renkemeyer testified that when she took over Contract 0005, the project was "85, 86 percent complete" (tr. 114, 141). We find the project was 86% complete nine months prior to 11 June 1999 to which the project completion date was ultimately extended.

13. A Request for Information or "RFI" is normally used when a contractor has a question about a specification. To "encourage free communication," the parties used "RFIs" somewhat differently. On this project, Robinson would identify a problem and propose a solution with an RFI. (Tr. 19) Roberts testified that RFIs were used as "documentation of the issues that had already…been discussed…in the field," and the RFIs were used to "provide solutions" (tr. 193).

14. When Robinson submitted a RFI, it would usually submit a cost estimate breakdown. For example, in connection with RFI #2, dated 24 September 1997, Robinson submitted a Construction Cost Estimate Breakdown to remove asbestos pipe insulation under the floor in the vicinity of Room X117. In addition to total material and

labor costs, Robinson added 15 percent overhead and 10 percent profit for a total of $2,770.02. Robinson also asked for a two-day time extension to do the work. (R4, tab 3 at 251-52; tr. 242) As a result of discussion between the parties, CO Carpenter issued Modification No. P00001 which, among other things, provided:

> d. Request #2 received from Contractor dated September 24, 1997 for asbestos pipe insulation underneath the floor system. Increase contract price in the amount of $1,806.93 for a new contract total of $2,189,370.93. Additional two (2) days required for this change for a new contract completion date of March 26, 1998.

Paragraph j of Modification No. P00001 provided:

> j. CONTRACTOR'S STATEMENT OF RELEASE: In consideration of the modification agreed to herein as complete equitable adjustment for the credits and adds to this contract, the Contractor hereby releases the Government from any liability under this contract for further equitable adjustment attributable to such facts or circumstances giving rise to said proposal for adjustment.

(R4, tab 3 at 214-15)

15. Roberts signed Modification No. P00001 on 28 October 1997. He wrote below his signature "See Attached Letter 10/28/97." That letter to CO Carpenter stated:

> Attached is the executed modification number P0001 [sic]. The execution of this modification constitutes accord and satisfaction for the direct costs as presented in the cost proposal. It does not include impact or delay costs, or the impact of this work on unchanged work.
>
> The work delayed by P0001 [sic] is on the critical path of the project. It delayed critical work while awaiting direction from September 26, 1997 through commencement of the additional work on October 27, 1997 per your verbal directive on October 22, 1997.
>
> ….

> I anticipate that once the center building in-fill enclosure is completed the impact of P0001 [sic] may be measurable. I will strive to promptly submit the cost impact at that time.

(R4, tab 3 at 214, 216) After CO Carpenter received Modification No. P00001 back from Robinson, he signed it on 28 October 1997 (*id.* at 214).

16. As illustrated in this modification, the parties would negotiate and agree upon the direct costs and time (in this case two days) to perform the changed work. Robinson reserved its right to claim delay and impact costs, the precise amount of which was not measurable at the time. From his 28 October 1997 letter, we find that, although he was not able to quantify Robinson's delay and impact damages at the time, Roberts knew there might be "impact or delay costs, or the impact of this work on unchanged work," and he knew the source of this damage came from critical work being delayed while waiting direction from 26 September 1997 through 27 October 1997 when additional work commenced.

17. Modification No. P00013, which Robinson addressed at the hearing, also illustrates its reservation of the right to submit a claim for impact costs. Modification No. P00013 increased the contract price by $17,069.76, and extended the contract performance period from 30 June 1998 to 31 July 1998. The modification was issued as a result of an unsolicited proposal the government received from Robinson dated 7 May 1998 for adding structural steel lintels in Building 36. The modification included the government's standard release clause and was signed by Roberts and then by CO Carpenter on 8 July 1998. (R4, tab 3 at 484-85)

18. Following the same pattern, Roberts' 8 July 1998 letter, returning his signed modification – Modification No. P00013 – stated that "[t]he execution of this modification constitutes accord and satisfaction for the direct costs as presented in the cost proposal. The modification does not include impact or delay costs, or the impact of this work on unchanged work." Roberts' letter went on to describe the specific impact that he saw resulting from Modification No. P00013 and other modifications:

> The work delayed by item b in modification P0007 [sic] is on the critical path of the project. Several subcontractors including the demolition, concrete, drywall, fire protection, electrical and mechanical subcontractors have demobilized and will have to be brought back onto the job. The additional work item delayed critical work while awaiting direction. Work will proceed on the additional items as soon as the

> additional materials and equipment can be delivered after execution of this modification.

(R4, tab 3 at 486) As before, Roberts' letter closed with this comment: "Once the additional work is completed the actual impact of P[0]0013 may be measurable, I will strive to promptly submit the cost impacts at that time. By this letter I am reserving RQC's rights to pursue impact cost." (*Id.* at 486)

19. With respect to item b. of Modification No. P00007, the record does not reflect when the demobilized electrical and mechanical subcontractors were brought back to the job. With respect to the work which was covered by Modification No. P00013, the record does not show when the additional materials and equipment were delivered and the work accomplished. It is logical to conclude, and we find, that the work covered by item b. of Modification No. P00007 and Modification No. P00013 would have been accomplished, at the latest, when Robinson began working on punchlist items.

20. Of the 39 modifications issued under Contract 0005, the CO included all but Modification Nos. P00002, P00005, P00009 and P00012 under tab 3 of the Rule 4 file. With the exception of these modifications, we find all of the modifications up through Modification No. P00019 were signed by both parties. Other than Modification No. P00006 which involved a correction, and Modification No. P00008 which involved a credit to the government, Roberts returned his signed modifications with a letter stating that Robinson's work would be impacted and reserving his right to claim impact costs with the statement: "The modification does not include impact or delay costs, or the impact of this work on unchanged work." (R4, tab 3)

21. After CO Renkemeyer took over in September 1998, a different pattern of processing modifications emerged. Beginning with Modification No. P00020, and up through Modification No. P00039, only one modification – Modification No. P00029 involving a $2,079 credit to the government – was bilaterally executed (R4, tab 3 at 567). Roberts did not sign any other modifications, nor did he return signed modifications with a letter reserving his right to claim impact costs (tr. 159).

22. Roberts testified that "I was told that it didn't matter whether I signed them or not. I was obligated to perform the work." (Tr. 209) He also testified that he was told "This is a unilateral modification. Do the work. You can submit a claim letter." (Tr. 266) Even though Roberts did not sign the unilateral modifications CO Renkemeyer issued granting money (*e.g.,* Modification No. P00021), time (*e.g.,* Modification No. P00024), or both (*e.g.,* Modification No. P00030), Robinson did perform the work required and received the payments and time extensions unilaterally given in the modifications (tr. 178).

23. CO Renkemeyer issued Modification No. P00034 on or about 15 March 1999. This modification extended the contract completion date from 15 to 31 March 1999 "to allow for completion of project" (R4, tab 3 at 598). CO Renkemeyer testified that the modification was issued when there were just a few cleanup items for the contractor to do "so that the project doesn't look like it's out there and they were still doing work when the project was supposed to be complete" (tr. 119-20).

24. CO Renkemeyer issued Modification No. P00035 on 1 April 1999. This modification extended the contract completion date by 62 days from 31 March to 1 June 1999 "to allow for completion of punchlist items and unresolved change orders." (R4, tab 3 at 600) CO Renkemeyer testified that this modification was "to allow for completion of – items and unresolved change orders," and that "the contractor was having trouble getting some doors delivered" (tr. 120-21).

25. CO Renkemeyer issued Modification No. P00036 on 14 May 1999. This unilateral change order was issued to "replace/repair drywall at exterior light locations as indicated on attached drawings (3 sheets)" in the amount of $1,473.56. (R4, tab 3 at 602)

26. CO Renkemeyer issued Modification No. P00037 on 19 May 1999. This modification required Robinson to tuckpoint an estimated area of 14 square feet above door E-5 in accordance with Section 4525 of the Building 36 renovation specification. Robinson was told not to exceed $1,500 without first notifying the CO. (R4, tab 3 at 607-08; tr. 123)

27. CO Renkemeyer issued Modification No. P00038 on 1 June 1999. This modification extended the contract completion date from 1 June to 11 June 1999 "for the *last* completion of punchlist items" (emphasis added) (R4, tab 3 at 610). Apparently, notwithstanding the 62-day time extension granted by Modification No. P00034, Robinson still had not completed all the punchlist items. CO Renkemeyer explained the contract performance period was extended to 11 June 1999 "so that it wouldn't look like the contractor…had work to do yet when the project was already completed." She testified "If we don't extend it out then it looks like he [Robinson] might be delinquent." (Tr. 125)

28. Robinson's 19 June 1999 letter states that "[a]s far as RQC is concerned we have completed everything in our contract." The letter indicated that Robinson asked for a final inspection during the week of 1 June 1999. (Ex. A-7 at 2) On 10 June 1999, the government made a final inspection of the project. The Final Inspection/Acceptance Report certified that "all work, including any punchlist items, is complete" in accordance with the contract document. Box 6 of the inspection report contained this remark:

"Boiler Make-Up Water Supply, Humidifier, Water Supply (ELU-1) and Condensate Line (ELU-1) not resolved. As-Builts are at WVP [Architect/Engineer] for Final Revision." (R4, tab 11 at 716) Although the government did not conduct a final inspection until 10 June 1999, inasmuch as Robinson asked for a final inspection during the week of 1 June 1999 (which was a Tuesday), we find that it considered the project completed as of 1 June 1999.

29. On 21 June 1999, Robinson faxed its Invoice #18 to the government. The invoice sought payment of $47,089.13. As Invoice #18 indicated, it covered the period 1 June to 21 June 1999. It referred to Progress Report No. 17 and "Modification 1 through 38" as 100% complete (R4, tab 5 at 650).

30. With the exception of Modification No. P00039 which was cancelled by letter dated 2 July 1999, all modifications (Modification No. P00001 to Modification No. P00038) were issued prior to 1 June 1999 (tr. 143). CO Renkemeyer testified that, between 1 and 11 June 1999, Robinson was dealing strictly with punchlist items and was not doing change order work (tr. 141). When asked what Robinson was doing on the project between May and 1 June 1999, Roberts testified that Robinson was "doing punch list items," and "some of the items that…were approved." He testified that "we were doing very little during that period of time," and there was work Robinson could not do because it was still waiting for a government decision. (Tr. 233)

31. On 19 June 1999, Robinson submitted a proposal to complete the condensate pump hook up. On 23 June 1999, CO Renkemeyer issued unilateral Modification No. P00039 "for completion of the condensate pump/hook up." The modification stated that no additional amount would be paid because the amount to do the work would be offset by a number of credits Robinson still owed the government. (R4, tab 3 at 612-13) As reflected in Roberts' letter of 30 June 1999 (ex. A-5), he did not agree with the amount of credit the government proposed to take nor the scope of work involved in connection with the condensate line (tr. 138).

32. Roberts acknowledged that, as of 1 July 1999, the only issue left was negotiating a price for the condensate line and the amount of credits that was owed the government (tr. 292). In a letter dated 1 July 1999, CO Renkemeyer notified Roberts that "[t]he Government feels that your request for the condensate line is extremely high and therefore we will entertain other means to complete this item" (ex. A-14).

33. In response, Roberts' 1 July 1999 letter said that he understood that the government had been installing equipment in Building 36 "over the past several days." He stated that he assumed the government had taken possession of the building. The letter stated that he "will not be signing the Contractor's Release until all issue's

including our claim for all the additional time and cost due to the negligence and errors of the Government are settled." The letter asserted that Invoice #18 was not a final payment application because additional work done on the ECU/Boiler was not included and because Robinson had not received Modification No. P00039. (Ex. A-6)

34. CO Renkemeyer's 2 July 1999 letter to Roberts acknowledged that "[t]he Government took possession of building 36 on July 1, 1999." The letter explained that since no agreement could be reached on the items discussed in the 30 June and 1 July 1999 letters regarding Modification No. P00039 and credits, "the Government feels that close out of this project is the best solution." The letter also stated that "[n]o additional modifications will be issued to this contract." (Ex. A-10) Roberts testified that he "never knew the contract was over until July 2nd [1999] or thereabouts," and "until that point there was still issues I was waiting answers on" (tr. 229). The government ultimately performed the work on the condensate line itself "in a matter of a few hours" (tr. 151).

35. The record reflects that CO Renkemeyer checked Invoice #18 and revised the amount due to $46,789.93 (R4, tab 11 at 714; tr. 146). On 2 July 1999, Roberts faxed its revised Invoice #18 in the amount of $46,978.89[1] (R4, tab 11 at 713). A handwritten note by CO Renkemeyer indicated that she "sent for final payment" on "7-7-99" (R4, tab 5 at 650).

36. On 2 June 2005, Robinson submitted a certified claim to CO Renkemeyer (Claim). The claim set out the factual and legal bases of its $493,280.82 claim and consisted of a two-volume request for equitable adjustment dated 25 May 2005. According to Robinson's claim, immediately after commencing work, it discovered asbestos in the center building infill area and concrete structures under the center building (Claim at 5). Robinson contends that the delay caused by this discovery caused it and its subcontractors to move from area to area to find available work (*id.* at 5). The claim asserts that the government failed to "timely review and process change proposals, provide requested information and provide revisions to the plans and specifications" (*id.* at 11). Robinson contends that the government failed to provide adequate plans and specifications and provided defective specifications (*id.* at 11). In addition, Robinson charges that the government issued 39 modifications "the majority of which do not address the delays encountered" and the "costs for delays, disruption and effects on unchanged work" (*id.* at 6, 13). These allegations in the claim formed the basis of Robinson's complaint (Count I through V) and amended complaint. Robinson cites FAR 52.243-4, CHANGES, FAR 52.243-5, CHANGES AND CHANGED CONDITIONS, and FAR 52.236-2, DIFFERING SITE CONDITIONS as the bases for its claim for price adjustment (*id.*

[1] The revised invoice amount is slightly different from CO Renkemeyer's handwritten calculations. There is no explanation for the difference.

at 6-10). Although Robinson alleged that the contract work was completed on 11 June 1999, it identified no specific original contract work or change order work that was not completed as of 1 June 1999.

37. On 1 August 2006, Defense Contract Audit Agency (DCAA) issued an audit report (No. 3141-2006G17200001) on Robinson's claim. The report questioned the $493,280 claimed costs in their entirety due to "lack of support for claimed delay days and the contractor's inability to demonstrate it incurred costs over and above those already included in various modifications." (R4, tab 7) The CO's decision, issued on 21 December 2006, denied Robinson's claim in its entirety on the basis of the analysis and conclusions of the DCAA audit report (R4, tab 10). Robinson appealed the decision by notice dated 24 January 2007.

38. On 17 August 2007, the government filed a motion to dismiss all counts for lack of subject matter jurisdiction. Relying upon *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378, the government contends that because Robinson "submitted its certified claim on or about June 2, 2005…**all** claims accruing prior to **June 2, 1999** are time-barred as a matter of law." (Gov't mot. at 5)

39. Robinson filed a response on 12 October 2007. It contends that none of its proposals and modifications included delay and impact costs such as those arising out of the cumulative effect of multiple changes and the government's failure to cooperate in providing timely solutions. It asserts that such costs could not have been known "until after the date of contract completion (June 10, 1999)." Robinson tells us that it could not assert a claim "until all of the facts leading to a calculation of Appellant's damages could actually be developed." (App. resp. at 8)

40. At a telephone conference held with the parties on 15 November 2007, the Board directed Robinson to "amend count II, III, and V…to specify by listing the RFIs changes, and defective specifications, etc., covered by those counts" (Bd. corr. ltr. dtd. 16 November 2007). Thereafter, Robinson filed an amended complaint dated 21 January 2008. It amended Count II by adding a nine-page spreadsheet (amended compl., ex.1). It amended Count III by adding an eight-page spreadsheet (*id.*, ex. 2). It amended Count V by adding a two-page spreadsheet (*id.,* ex. 3). (Amended compl., ¶¶ 33, 41, 56)

41. Although Robinson performed unidentified punchlist items as late as 16 June 1999 (amended compl, ex. 1 at 9), we do not find such punchlist work crucial to the completion of the project. Based on the entire record, we find that Robinson completed all contract work, including changed work, on or before 1 June 1999.

42. At the hearing on jurisdiction, Roberts testified that he waited until 2005 to submit his claim because he was advised by his counsel that "there was no limitation on the time that I could submit the claim" (tr. 230). He testified that he "fought over" some issues for "a couple of years," with his electrical subcontractor, and he had finally resolved his problems with the subcontractor six months prior to submitting his claim on 2 June 2005. (Tr. 230-31)

DECISION

Pertinent Statutory and Regulatory Provisions

Section 6(a) of the Contract Disputes Act (CDA) provides, in part, that "[e]ach claim by a contractor against the government relating to a contract…shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 605(a). FAR 33.206, Initiation of a claim, implements this provision and states:

> (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, 1995.

As applicable in 1997 when Contract 0005 was executed, FAR 33.201 provided that:

> Accrual of a claim occurs on the date when all events, which fix the alleged liability of…the Government…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.

We held in *Gray Personnel Inc.,* ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475, that the requirement that a CDA claim be submitted within six years after its accrual is jurisdictional.

In opposing the government's motion to dismiss which relied on *Gray Personnel*, Robinson contends that "[t]he instant case is a complex construction matter revolving around the issue of consequential damages. *Gray* [*Personnel*] involved a firm fixed price personal services requirement contract for licensed practical nurses." Robinson argues that "[w]hile Appellant here, may have begun performance, whether it actually incurred extra costs and the extent of costs incurred could not have been known until after

completion of its work on the Project." Robinson argues that while the CDA permits contractors to "submit claims before they have incurred the total cost relating to the claim, such practice as it relates to the construction industry is highly impractical, in that it would encourage contractors to seek speculative damages…." (App. resp. at 9, ¶ 26) Robinson also argues that a different result "based on the facts here should be evoked" because the contractor in *Gray* "did not have to deal with the lingering effects of defective plans and specifications, a multiplicity of government directed changes, lengthy government caused delays, and the cumulative consequences of all of this, upon changed and unchanged work" (app. br. at 10).

We reject the suggestion that the rules relating to application of the six-year statute of limitations should depend on the subject matter of the contract or the complexity of the facts. Neither the statute nor its implementing regulations makes such distinctions. *Gray Personnel*, therefore, set out the legal standard for determining whether Robinson's claim is time barred. *See, e.g., Environmental Safety Consultants, Inc.*, ASBCA No. 54615, 07-1 BCA ¶ 33,483 at 165,983-84 (CDA's six-year statute of limitations jurisdictional in a fixed price construction contract); *Robertson & Penn, Inc.*, ASBCA No. 55622, 08-1 BCA ¶ 33,921 at 167,858 (CDA statute of limitations applicable to laundry operations contract), *appeal docketed*, No. 09-1055 (Fed. Cir. Nov. 4, 2008).

At the close of the hearing on jurisdiction, Robinson submitted a supplemental response to the government's motion to dismiss (app. supp. resp.). Relying on *Franconia Associates v. United States*, 536 U.S. 129 (2002), and *Emerson Construction Co.*, ASBCA No. 55165, 06-2 BCA ¶ 33,382, Robinson argues that these cases stand for the proposition that "a cause of action for breach of contract accrues at the time of breach." Robinson contends that in this appeal, "the breach of contract occurred when the Government refused to equitably adjust the contract." (*Id.* at 5) We understand Robinson to be saying that its claim did not accrue until the CO issued a decision on 21 December 2006. The government also understood this to be Robinson's argument (*see* gov't br. at 16).

Franconia involved a federal statute which took away the borrower's preexisting absolute prepayment right on its low-interest mortgage loans issued by the Farmers Home Administration. The Supreme Court found that the Congress' action in passing the statute was "a repudiation of the parties' bargain, not a present breach of the loan agreement." 536 U.S. at 133. The case established the principle that when a contract is repudiated, the time of accrual of a breach of contract action, for purposes of the statute of limitations (28 U.S.C. § 2501), depends on whether the injured party chooses to treat the repudiation as a present breach. If the injured party chooses to wait for performance, the statute of limitations begins to run at the time of the breach. No repudiation is

involved in this appeal. Therefore, Robinson does not get to choose the timing of the government's alleged breach.

Emerson involved a requirements contract for construction work at a military base. The contractor claimed an under run of the work ordered during the base contract year. For purposes of computing whether the six-year statute of limitations had run, we concluded that liability under FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY (APR 1984) (the VEQ clause), "was not fixed, at the earliest, until the time period for issuing delivery orders expired on 31 July 1998." 06-2 BCA ¶ 33,382 at 165,500-01. Since the government could issue delivery orders for the base year up through 31 July 1998, it made no sense for the government to argue that liability under the VEQ clause for a variation below the estimated quantity could be fixed, for statute of limitations purposes, before the time period for issuing delivery orders expired. Unlike *Emerson*, there was no fixed "window" within which the government could order changes in Contract 0005.

Neither *Franconia* nor *Emerson* supports the proposition that a claim does not accrue until the CO decides a contractor's claim. That interpretation is at odds with the plain language of 41 U.S.C. ¶ 605(a), FAR 33.201 and FAR 33.206.

When Did All of Robinson's Claims Accrue?

In this case, there is no dispute that Robinson's certified claim was submitted to the CO on 2 June 2005 (finding 36). The only dispute relates to when Robinson's claim accrued.

The facts show that beginning in mid-March 1999, completion of the project was underway and little new work was added: Modification No. P00034 issued on or about 15 March 1999 extending the contract completion date from 15 to 31 March 1999 was to "allow for completion of project" when there were just a few cleanup items for the contractor to do (finding 23). Modification No. P00035 issued on 1 April 1999 extending the contract completion date by 62 days from 31 March to 1 June 1999 was "to allow for completion of punchlist items and unresolved change orders" (finding 24). Modification No. P00038 issued on 1 June 1999 extending the contract completion date from 1 June to 11 June 1999 was "for the last completion of punchlist items" (finding 27).

CO Renkemeyer testified that, between 1 and 11 June 1999, Robinson was dealing strictly with punchlist items and was not doing change order work. Roberts agreed that was the case except that Robinson was still waiting for the government's answer on the ultimately cancelled unilateral Modification No. P00039 (completion of condensate pump/hook up). The facts show Robinson asked for a final inspection during the week of

1 June 1999. We have found that although the government did not conduct its final inspection until 10 June 1999, Robinson considered the project complete as of 1 June 1999 (finding 28).

We have found the Contract Progress Reports which showed the percentage of work, including change order work, to provide the best measure of progress of the project (finding 7). As confirmed by Robinson's own Contract Progress Report No. 17, covering the period from 1 March to 1 June 1999, the project was 100% complete as of 1 June 1999 (finding 8). In order for Robinson to reach the point of performing only punchlist work on 1 June 1999, it would have actually begun performance and incurred some extra costs on all of the changes required throughout the project long before 1 June 1999. We have found that Roberts, being a hands-on project manager, was totally familiar with the day-to-day progress of the project. To the extent the project was delayed by various causes, we have found that due to his experience, he could foresee, if not with absolute certainty, potential schedule and other impact that might follow from the delay, and that Roberts would know when the impact of any delaying events had run its course. (Finding 6) Therefore, all events which fixed the liability of the government would have been known before 1 June 1999 and all of the claims Robinson asserted in this appeal accrued on or before 1 June 1999.

We need not, therefore, analyze more particularly when the various separate claims encompassed within the overall claim accrued. For example, we need not determine whether the differing site condition which was the subject of Modification No. 1 accrued in September 1997.

Robinson argues that until the facts of its damages "could actually be developed," "the extent of costs incurred could not have been known until after completion of its work on the Project" (finding 46). We rejected this argument in *Gray Personnel*, and said for a claim to accrue, the contractor "must have actually begun performance and incurred some extra costs for liability to be fixed," and the completion of a change or of the contract was not necessary in order for liability to be fixed. *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476.

CONCLUSION

In this instance, because all of the events which fixed the alleged liability of the government were known or should have been known by 1 June 1999, and appellant's claim was asserted more than six years thereafter, all of the elements of appellant's claim are time barred pursuant to 41 U.S.C. § 605(a).

Accordingly, this appeal is dismissed for lack of jurisdiction.

Dated: 6 January 2009

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55784, Appeal of Robinson Quality Constructors, rendered in conformance with the Board's Charter.

Dated:

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