ARMED SERVICES BOARD OF CONTRACT APPEALS

| | | |
|---|---|---|
| Appeal of -- | ) | |
| | ) | |
| Electric Boat Corporation | ) | ASBCA No. 58672 |
| | ) | |
| Under Contract No. N00024-03-C-2101 | ) | |

APPEARANCES FOR THE APPELLANT:

Richard C. Johnson, Esq.
Daniel Q. Horner, Esq.
Smith Pachter McWhorter PLC
Tysons Corner, VA

D. Joe Smith, Esq.
Eric K. Herendeen, Esq.
Jenner & Block LLP
Washington DC

Stephen J. McBrady, Esq.
Skye Mathieson, Esq.
Crowell & Moring LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Craig D. Jensen, Esq.
Navy Chief Trial Attorney
Russell A. Shultis, Esq.
David B. Stinson, Esq.
David M. Marquez, Esq.
Alana M. Sitterly, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Pending before the Board are cross-motions for summary judgment. Appellant, Electric Boat Corporation (Electric Boat or EB) seeks entry of summary judgment, in part, holding that its Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, claim was timely filed. Respondent, the Department of the Navy (government or Navy), seeks entry of summary judgment that Electric Boat's claim is barred by the statute of limitations.

Both motions ask that the Board determine the date of accrual for Electric Boat's claim pursuant to the CDA. Electric Boat's claim is based on a December 2004 regulation issued by the Occupational Safety and Health Administration (OSHA), requiring Electric Boat, and its subcontractor Huntington Ingalls, Inc. (HII), to post a

fire watch during "hot work" in the assembly of Virginia Class attack submarines. Electric Boat's prime contract contains a clause, H-30, allowing a price adjustment for certain changes in federal laws or regulations. Clause H-30 was not included in the list of contractual provisions designated to flow-down to Electric Boat's subcontractors, but this apparent oversight was corrected by modification. For the reasons discussed below, we find that Electric Boat's claim for HII's costs was timely filed, but that Electric Boat's claim pertaining to its own costs is barred by the statute of limitations. Accordingly, we grant both motions in part and deny both motions in part.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

**The Block II Contract**

On August 14, 2003, the Navy and EB entered into Contract No. N00024-03-C-2101 (the contract) for the construction of six Block II Virginia Class submarines (R4, tab 52). The contract was primarily firm-fixed-price, but with some cost-reimbursement line items. Construction of each submarine was a fixed-price line item with cost sharing of costs above or below the target cost (R4, tab 52 at 280-96). The contract included Clause H-30, NAVSEA 5252.215-9016, PRICE ADJUSTMENT FOR CHANGES IN FEDERAL LAW (FT) (NOV 1996). The clause provided in part:

> (b) If, at any time after the effective date of this contract, a New Federal Law is enacted or a change is made to a Currently Applicable Federal Law or a New Federal Law or regulations thereunder promulgated by Federal authorities, and compliance with such new law or change directly results in an increase or decrease in the Contractor's cost of performance of this contract, the contract price(s) shall be adjusted as provided in paragraph (c) below. No such adjustment shall be made for contract costs incurred or projected to be incurred during the two (2) year period after the effective date of this contract.
>
> (c) The price adjustment provided for in paragraph (b)...shall not include:
>
> ....
>
> (ii) Increases or decreases in prices charged by subcontractors or suppliers....
>
> (d) The Contractor shall promptly notify the Contracting Officer, in writing, of the enactment of New Federal Laws

> or of a change that reasonably may be expected to result in an adjustment under the provisions of this requirement.
>
> (e) Requests for price adjustments hereunder shall be made in accordance with the procedures of the requirement entitled "DOCUMENTATION OF REQUESTS FOR EQUITABLE ADJUSTMENT."

(R4, tab 52 at 480-81) Also relevant to this appeal is Clause C-2-54, PROVISIONS MANDATED FOR FLOW DOWN TO SUBCONTRACTS WITH NEWPORT NEWS SHIPBUILDING (now known as HII). Paragraph 3 of this clause provides that: "The Government requires the Contractor to include the specific provisions identified below in all subcontracts.... The following provisions...do not represent all provisions required in subcontracts by statute and regulation." (R4, tab 52 at 377) Clause H-30 was not included among the clauses identified in C-2-54. However, Clause H-30 was included in the subcontract between EB and HII (gov't opp'n, ex. 3 at 351-53).

The parties agree that the Navy's original plan for the Virginia Class New Attack Submarine Program envisioned design plus construction of the first submarine by EB and construction of the second submarine by HII, with a full sharing of design data between them, to be followed by competitive acquisition of the follow-on submarines based on price (app. mot., ex. 1). On February 25, 1997, the two shipyards entered into a team agreement (*id.*, ex. 4). EB contends that this agreement between it and HII required "equal participation" such that, although EB does not use the term, it was essentially a joint venture (app. mot. at 9). However, the contract (between EB and the Navy) was not modified to incorporate the team agreement, and the team agreement provides that Electric Boat would remain the prime contractor with HII remaining a subcontractor (app. mot., ex. 4, § 2.3.2 ("In the Team proposal...EB shall be the prime contractor and [HII] shall be a subcontractor under those prime contracts.")). Also relevant to this appeal, effective January 29, 2004, by Modification No. P00003, the Navy changed the contract to a multi-year procurement that funded a portion of the costs for nuclear submarine (SSN) 782 and SSN 783 (gov't mot., ex. 4)

Relevant to these cross-motions, the team agreement provides that:

> The Parties agree that they will be equal team members with respect to construction of NSSN submarines under the Program. [redacted]

[redacted]

(App. mot., ex. 4, § 2.3.1) [redacted]

[redacted]

[redacted] Congress referenced the existence of the teaming agreement in the National Defense Authorization Act for Fiscal Year 1998, in a provision providing that EB and HII are the shipbuilders eligible to receive attack submarine procurement contracts, and providing that the contract for construction of four submarines "be awarded to one of the two eligible shipbuilders as the prime contractor on the condition that the prime contractor enter into one or more subcontracts...with the other of the two eligible shipbuilders" (app. mot., ex. 2, Pub. L. No. 105-85, 111 Stat. 1648, § 121(a)(2); *see also* § (b)(4) ("[T]he term 'New Attack Submarine Team Agreement' means the agreement known as the Team Agreement between Electric Boat Corporation and Newport News Shipbuilding and Drydock Company, dated February 25, 1997, that was submitted to Congress by the Secretary of the Navy on March 31, 1997."). Although Congress referenced the teaming agreement, Congress referred to the shipbuilders as a prime contractor and a subcontractor, and not as a team.

**OSHA Subpart P**

On September 15, 2004, OSHA published a new regulation, referred to as Subpart P, Fire Protection in Shipyard Employment. 29 C.F.R. § 1915.501 *et seq.* The regulation became effective on December 14, 2004. Fire Protection in Shipyard Employment, Final Rule, 69 Fed. Reg. 55,667-708, OSHA (Sept. 15, 2004). The new Subpart P replaced the shipyard procedures promulgated at 29 C.F.R. § 1915.52, Fire Prevention, Subpart D – Welding, Cutting and Heating.

Internal Electric Boat email correspondence demonstrates that, at least as early as October 5, 2004, EB was aware of the new OSHA regulation and that EB "must comply with the new requirement and pursue an equitable adjustment" (gov't opp'n, ex. 5 at 435-36). In addition, on February 8, 2005, EB submitted a Contract Change Memorandum to the Navy indicating entitlement pursuant to Clause H-30 for the OSHA Subpart P regulation (gov't opp'n, ex. 13 at 531). Electric Boat further provided the Navy with a February 24, 2005 Notification of Change stating that "the Contracting Officer is hereby notified that Electric Boat anticipates that compliance with [the OSHA

Subpart P regulations] will result in an increase in the cost of performance of this contract in excess of $125,000 per ship" (*id.* at 527). The record also contains a January 30, 2006 Estimate of Cost Summary provided by HII to EB (gov't opp'n, ex. 17), and an EB Cost Proposal dated November 2006 (gov't opp'n, ex. 27).

Electric Boat's review culminated in a June 27, 2007 cost proposal, including costs for both EB and HII. The proposal included EB's estimated costs of $35,166,238, and HII's estimated costs of $27,524,878. The Navy received the combined proposal and initiated steps to analyze it. (App. supp. R4, tabs A225, A227-28, A234) In October 2008, the Navy made an offer to EB on just the EB portion of the proposal (app. supp. R4, tab A305).

EB submitted a revised and updated proposal to the Navy on April 29, 2009, again including HII's proposed costs. The EB portion of the combined proposal was $56,516,943, and the HII portion was $16,149,340. (App. supp. R4, tab A369) On June 8, 2009, the Navy completed a technical analysis of the EB portion of the April 29 proposal, called a Technical Advisory Report (TAR) (app. supp. R4, tab A379). On September 9, 2009, the Navy completed a TAR of the HII portion of the combined proposal (app. supp. R4, tab A399). Electric Boat contends, and the Navy disputes, that throughout the last half of 2009 and extending through the end of 2010 and beyond until May 2, 2011, the Navy made no response to either HII or EB with respect to their combined proposal, aside from a briefing of EB on December 16, 2009 (app. supp. R4, tab A504).

On July 14, 2009, the Navy administrative contracting officer (ACO) responsible for the Block II Prime Contract notified his superior at Naval Sea Systems Command (NAVSEA) that the "Price Adjustments...Clause is included in C-35 Provisions Mandated for Flowdown clause in [the later] Block III [contract]. It's not in the equivalent Block II clause (C-2-54)." He added that "[t]his is a pretty critical issue for going forward with the OSHA issue." (App. supp. R4, tab A389) On July 22, 2009, the same ACO notified a senior contracting official at NAVSEA that "I need [NAVSEA's intent regarding inclusion of the clause] in order to proceed with our evaluation" of EB's proposal, noting that "[HII] represents $16M of the $72M" (*id.*). The ACO sent a second follow-up on August 20, 2009 (app. supp. R4, tab A396). A NAVSEA contracting official responded on August 24, 2009, stating his belief that the clause was unintentionally omitted from the Block II contract, and confirming that "we indeed drove for, and must preserve the Prime-Sub Relationship but with regard to building the ships unique items for shipbuilding were to be flowed down to the Major subcontractor [HII]" (*id.*).

**The 2010 Contract Modification**

On August 9, 2010, the Navy executed bilateral Modification No. P00031. The modification stated:

> WHEREAS, clause H-30 entitled "NAVSEA 5252.215-9106 PRICE ADJUSTMENT FOR CHANGES IN FEDERAL LAW (FT) (NOV 1996)" is considered a significant clause that failed to be listed under the aforementioned Section C provision due only to an administrative oversight;
>
> WHEREAS, this administrative oversight is considered a mutual mistake of the parties;
>
> NOWTHEREFORE, the parties hereby agree to correct this mutual mistake under contract N00024-03-C-2101 without further consideration as follows[.]

The modification then amended Clause C-2-54 of EB's prime contract to add Clause H-30 to the list of identified flow down provisions. (Gov't opp'n, ex. 66) The modification had a stated effective date of August 9, 2010 (*id.*).

In an April 6, 2012 letter, the Navy, in response to a letter from EB, wrote that "[t]he Government's intent is to resolve this issue on a full and final basis. If EB elects to proceed without its subcontractor's supporting data, EB can exercise its rights to submit a certified claim under the Disputes Clause in the subject contract." (App. supp. R4, tab A643) In an October 5, 2012 Navy Business Clearance Memorandum, the Navy addressed Modification No. P00031 stating that:

> Prior to P00031 effective 9 August 2010, HII-NN costs could not have been considered as part of the increased cost to effect a target cost adjustment to the contract per H-30's requirement that the price adjustment pursuant to a change in law not include the increases or decreases in prices charged by the subcontractor.

(App. supp. R4, tab A698 at 5256) In addition, Mr. John Leonard, EB's chief financial officer, testified at his deposition that there was nothing that prevented EB from filing a CDA claim (gov't mot., ex. 107 at 3842-43).

**EB's CDA Claim**

On December 19, 2012, EB filed a certified claim pursuant to the CDA, including both EB and HII's claimed costs (R4, tab 71). The Navy denied the claim on February 27, 2013 (R4, tab 76), and this appeal followed.

DECISION

We will grant summary judgment only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact, and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Once the moving party has met its burden of establishing the absence of disputed material facts, then the non-moving party must set forth specific facts, not conclusory statements or bare assertions, to defeat the motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The fact that both EB and the government have moved for summary judgment does not require us to grant summary judgment for one side or the other, both motions can be denied in the event that there are material factual disputes regarding each motion. *See, e.g., Mingus*, 812 F.2d at 1391.

Resolution of the cross-motions for summary judgment depends upon the interpretation of Clause H-30 of the prime contract between the Navy and EB; Clause H-30 between EB and its sub, HII; and Modification No. P00031 of the prime contract between the Navy and EB. The parties do not dispute that Clause H-30 was contained in the prime contract between the Navy and EB. Additionally, there is no dispute that the clause provides EB with the right to an adjustment to the contract amount for certain changes to federal laws or regulations. Additionally, it is not disputed that the prime contract between the Navy and EB did not include Clause H-30 as one of the provisions flowing-down to EB's subcontractor HII. Further, it is not disputed that EB's subcontract with HII included Clause H-30, despite the fact that EB's prime contract did not authorize it to flow-down the provision to its subcontractors. Finally, it is not disputed that there was a bilateral modification to EB's prime contract, Modification No. P00031, that, by its terms, indicates that it was correcting a mutual mistake, and authorized the flow-down of Clause H-30 to HII.

Pursuant to statute, a claim must be submitted within six years of accrual of the claim. 41 U.S.C. § 7103(a)(4)(A). We interpret the term "claim" based upon the definition in the Federal Acquisition Regulation (FAR). *See Kellogg Brown & Root*

*Services, Inc. v. Murphy*, 823 F.3d 622, 626 (Fed. Cir. 2016). The FAR defines claim accrual as:

> *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.

FAR 33.201. In addition, the contractor must be legally able to assert a claim for the statute of limitations period to begin to run. Thus, "the limitations period does not begin to run if a claim cannot be filed because mandatory pre-claim procedures have not been completed." *Kellogg Brown & Root Services*, 823 F.3d at 628.

I. Electric Boat's Claim for Its Own Costs

Here, Electric Boat certainly knew of the existence of its claim not later than February 8, 2005 – about a month and a half after the December 14, 2004 effective date for the OSHA Subpart P regulation – when EB submitted a Contract Change Memorandum to the Navy indicating entitlement pursuant to Clause H-30 for the OSHA Subpart P regulation (gov't opp'n, ex. 13 at 531). In addition, EB suffered some injury not later than August 15, 2005, the date two years after the effective date of the contract when Clause H-30 would first provide the right to a price adjustment to Electric Boat. In addition, August 15, 2005, is after the December 15, 2004 effective date for Subpart P, when Electric Boat was forced to comply with the new regulation, at what it contends was an increased cost of performance.

A. Electric Boat's Motion for Partial Summary Judgment

EB seeks a determination that its claim was timely filed pursuant to the CDA (app. mot. at 1). According to EB, its cause of action did not accrue until August 9, 2010, the date of Modification No. P00031, because until that date the H-30 clause barred it from recovering costs for itself and HII related to the OSHA hot-work rules (app. mot. at 9). According to EB, the teaming agreement required it to be equal partners with HII, and thus required a joint submission of its claim seeking recovery of both its costs and those of HII (*id.*).

The Navy opposes EB's motion, asserting that Modification No. P00031 corrected a mutual mistake of the parties, and thus that EB, HII, and the Navy were all operating under the belief that the H-30 clause flowed from EB to HII (gov't opp'n at 85-91). Moreover, the Navy asserts EB's argument that its teaming agreement required "equal participation" and prohibited it from submitting a cost proposal that did not include HII's costs is "nonsensical" (*id.* at 91-94).

EB's theory implicitly depends upon the notion that it and HII were equal partners in the Virginia Class Submarine Program and that this partnership created an impediment to EB seeking relief independently. While we agree with EB that it could not assert a claim for HII's costs prior to Modification No. P00031, we find that, prior to the modification, EB was not prevented from presenting a claim for its own costs. EB's motion relies upon the teaming agreement (app. mot., ex. 4) for the proposition that EB and HII were equal partners in the Virginia Class Submarine Program and were required to participate equally in all elements of the contract. EB additionally cites to the Navy's October 5, 2012 Business Clearance Memorandum which states that:

> Prior to P00031 effective 9 August 2010, HII-NN costs could not have been considered as part of the increased cost to effect a target cost adjustment to the contract per H-30's requirement that the price adjustment pursuant to a change in law not include the increases or decreases in prices charged by the subcontractor.

(App. supp. R4, tab A698 at 5256) Additionally, EB cites to the Navy's response to an EB letter in April 2012 as evidence that the Navy required EB to include HII costs in its request for relief (app. supp. R4, tab A643).

Notably, neither EB nor the Navy address the possibility that EB and HII could have different claim accrual dates. Absent the teaming agreement, EB does not present an argument as to why EB's claim (independent of HII's costs) did not accrue more than six year prior to its December 19, 2012 claim submission. In fact, EB admits that, absent the question of whether Clause H-30 had flowed down to HII, the events fixing liability would have been established "as soon as Subpart P became effective on December 14, 2004" because "(1) clause H-30 had been included in EB's Block II Contract, and (2) OSHA Subpart P, which imposed new shipyard fire protection practices and standards, had taken effect" (app. opp'n at 23-24).

As the Navy notes, EB remained the prime contractor on the contract. Absent a modification of the contract adding HII as a second prime contractor or a novation transferring the contract to an EB-HII joint venture, nothing in the teaming agreement between EB and HII could change the terms of the contractual relationship between EB and the Navy. The fact that Congress mentioned the existence of the teaming agreement in the National Defense Authorization Act for Fiscal Year 1998, in a provision providing that EB and HII are the shipbuilders eligible to receive attack submarine procurement contracts, and requiring that the shipbuilder awarded the prime contract subcontract work to the other shipbuilder, does not modify the terms of the contract between the Navy and EB (app. mot., ex. 2). Moreover, the Act refers to the awardee as the "prime contractor" and the other shipbuilder as a "subcontractor" and not to EB and HII as a "team."

Similarly, we reject EB's argument that it had to present a complete claim to the Navy representing both its costs and those of its subcontractor, HII. First, EB cites no contractual provision for this purported "requirement." Second, EB's argument that the Navy required it to present a unified claim for negotiation is irrelevant to the claim accrual. Even assuming that EB is correct in its interpretation of email statements from the Navy, EB does not explain how a contracting officer's preference for negotiating all potential claims at the same time prevented EB from filing a claim for just its own costs. We note that EB relies upon an April 6, 2012 letter from the Navy as directing it to present a unified claim (app. supp. R4, tab 643); however, that document states: "The Government's intent is to resolve this issue on a full and final basis. If EB elects to proceed without its subcontractor's supporting data, EB can exercise its rights to submit a certified claim under the Disputes Clause in the subject contract." (App. supp. R4, tab A643) Thus, the Navy clearly informed EB that it could file a claim. Moreover, this letter was sent more than six years after EB's claim accrued, so even if the Navy had somehow prevented EB from submitting a claim, which it did not, it was after EB's claim was already time-barred.

Similarly, EB relies upon a statement in a Navy Business Clearance Memorandum (app. supp. R4, tab 698 at 5256). Like the previous document, this document in October 2012, was also written after EB's claim was already time-barred. EB cites to language in the memorandum that HII's costs could not be considered because clause H-30 excludes changes in subcontractor costs. (App. supp. R4, tab A698 at 5256) Here, the document simply notes that HII's costs could not be included in a claim prior to Modification No. P00031, an interpretation with which we agree. The quoted language says nothing about EB not being able to present a claim for its own costs prior to Modification No. P00031. For these reasons, we deny EB's motion for partial summary judgment with regard to EB's claim for its own costs.

B. The Government's Motion for Summary Judgment

The Navy seeks summary judgment, in its favor, that EB's claim accrued more than six years prior to its December 19, 2012 claim, based upon EB's September 2004 cross-functional team, its February 2005 notice of claim, its 2006 and 2007 cost proposals, and its internal budgeting process (gov't cross-mot. at 70-79). In opposition, EB asserts, as in its own motion for summary judgment, that the teaming agreement between EB and HII prevented it from presenting a claim until Modification No. P00031 (app. opp'n at 21). For the reasons discussed above we reject EB's argument that it could not present a claim for its own costs until Modification No. P00031. EB additionally asserts that its claim could not have accrued before June 27, 2007, because EB was not able to approve a claim for submission prior to that date (app. opp'n at 22-25). Alternatively, EB asserts that no claim accrued until EB exhausted a purported pre-claim resolution process (*id.* at 26-29), or until EB suffered an actual injury when an invoice was not paid in full (*id.* at 29-31). EB also asserts that its statute of limitations should run from the date each

submarine was funded pursuant to the continuing claim doctrine (*id.* at 31-34) and that EB is entitled to equitable tolling due to the Navy's purported concealment of its decision regarding EB's entitlement to an adjustment (*id.* at 34-43). As discussed below, we find no merit in EB's multiple arguments.

EB asserts, incorrectly, that its claim did not accrue until it was able to meet the CDA standard for asserting a claim (app. opp'n at 23). According to EB it was first able to assert its claim in June 2007 when its management was able to approve the submission of its initial target cost impact proposal (*id.*; app. supp. R4, tabs A225, A227). According to EB, for it to be able to submit a claim, it must be able to certify that the claim is made in good faith with accurate and complete supporting data and that the contractor believes that the claim amount accurately reflects the amount for which the contractor believes the government is liable (app. opp'n at 24 (citing FAR 33.207(b)). Even assuming that EB is correct that it did not have the information necessary to assert its claim until June 2007, this does not establish that its claim accrued on that date. Rather, EB's claim accrued not later than August 15, 2005, after EB submitted a Contract Change Memorandum to the Navy indicating entitlement pursuant to Clause H-30 for the OSHA Subpart P regulation (gov't mot., ex. 13 at 531), and after EB suffered injury because it incurred costs it contends were reimbursable pursuant to Clause H-30.

While claim accrual is a fact-dependent determination, Board precedent is clear that claim accrual is not suspended until a party "performs an audit or other financial analysis to determine the amount of its damages." *Raytheon Missile Systems*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,018. "Delay by a contracting party assessing the information available to it does not suspend the accrual of its claim." *Id.* A rule delaying claim accrual until the party performs such analysis would allow it to "unilaterally and indefinitely" postpone the running of the statute of limitations. *Id.* (citing *United States v. Commodities Export Co.*, 972 F.2d 1266, 1271 (Fed. Cir. 1992)). Moreover, a claim accrues when a contractor incurs some injury and is first able to assert a claim, even if the contractor has not incurred all possible costs due to a change or breach. *Ariadne Financial Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998). We find that accrual of Electric Boat's claim was not suspended while Electric Boat gathered the information it deemed necessary to assert its claim.

EB next argues that its claim did not accrue until May 2, 2011, when it completed a purported pre-claim resolution process (app. opp'n at 26-27). As noted above with regard to HII's costs, the statute of limitations does not begin to run when a claim cannot be filed because mandatory pre-claim procedures have not been completed. *See Kellogg Brown & Root,* 823 F.3d at 628; *CB&I AREVA MOX Services, LLC v. United States*, 138 Fed. Cl. 292, 302 (2018). Here, EB relies upon the text of Clause H-30(b) as requiring a pre-claim resolution process. The clause provides that, "[i]f...compliance with such new law or change directly results in an increase or decrease in the Contractor's cost of performance of this contract, the contract price(s) shall be adjusted" (app. opp'n at 27 (citing R4, tab 52

at 480)). However, EB cites selectively from Clause H-30, as Clause H-30(d) and (e) explicitly provide that:

> (d) The Contractor shall promptly notify the Contracting Officer, in writing, of the enactment of New Federal Laws or of a change that reasonably may be expected to result in an adjustment under the provisions of this requirement.
>
> (e) Requests for price adjustments hereunder shall be made in accordance with the procedures of the requirement entitled "DOCUMENTATION OF REQUESTS FOR EQUITABLE ADJUSTMENT."

(R4, tab 52 at 481) EB did, in fact, comply with the requirement imposed by Clause H-30(d) on February 8, 2005, when it submitted its Contract Change Memorandum to the Navy indicating entitlement pursuant to Clause H-30 for the OSHA Subpart P regulation (gov't mot., ex. 13 at 531). Moreover, Electric Boat's reliance upon *CB&I AREVA* is misplaced. In that case the Court of Federal Claims found that the re-baselining process was "a mandatory pre-claim procedure identified in the contract as the mechanism to adjust" the contract fees. *CB&I AREVA*, 138 Fed. Cl. at 302. Here, the requirements set forth in Clause H-30(e) are the standard government dispute procedures requiring a request for equitable adjustment and a certified claim. Thus, we find that EB has not raised a material factual issue that it was required to comply with a pre-claim process that tolled the accrual of its cause of action.

EB next asserts that its claim did not accrue until it suffered an actual injury which first occurred on December 15, 2006, with respect to one of the six submarines, when an invoice was not paid in full (app. opp'n at 29-31).[1] According to EB, it was reimbursed for all of its actual costs and allocable profit, including the costs of complying with the Subpart P fire protection regulations, until its Invoice No. 79, which included a limitation on incurred cost plus profit caused by Subpart P (app. opp'n at 31). Even assuming the truth of EB's factual assertions, EB's argument is contradicted by the plain language of FAR 33.201 which provides that "[f]or liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." FAR 33.201. Here, EB alleges that it incurred additional costs in complying with the Subpart P regulations (compl. ¶¶ 13-15). Moreover, EB submitted a Contract Change Memorandum to the Navy indicating entitlement pursuant to Clause H-30 for the OSHA Subpart P regulation on February 8, 2005 (gov't mot., ex. 13 at 531). Thus, EB asserted that it expected to be injured beginning in August 2005, and the fact that payment of

---

[1] Because the contract was effectively a firm-fixed-price contract, Electric Boat contends that it was harmed because the target price had not been increased pursuant to Clause H-30 to reflect Electric Boat's cost of complying with Subpart P, thus limiting the amount of its progress payment (app. opp'n at 8-10, 29-31).

EB's invoices was not reduced until December 2006 is irrelevant. Pursuant to the FAR, the date of injury starts accrual of the claim, not the date payment was denied. *See, e.g., Robertson & Penn, Inc.*, ASBCA No. 55622, 08-2 BCA ¶ 33,921 at 167,858 ("Here, as in *Gray Personnel, [Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378] at 165,476, the appellant has claimed monetary damages. Accordingly, we must look to when [appellant] incurred extra costs for liability to be fixed."). We find that EB's claim accrued in August 2005 when it was first eligible for a cost adjustment pursuant to Clause H-30, and not based upon the date it first received a reduced payment amount.

EB next asserts that, even if its claim first accrued more than six years prior to the submission of its claim, that it has a continuing claim and we must determine the accrual date for each submarine independently. According to EB, the Navy did not fund SSN 782 until December 28, 2006, and did not fund SSN 783 until January 10, 2008. According to EB, until funded, SSN 782 and SSN 783 were merely options and were not contracts, and EB's claims pertaining to these submarines did not accrue until they were funded, and that was a date less than six years prior to claim submission. (App. opp'n at 31-34) However, EB's argument is based upon the contract as awarded, and completely ignores Modification No. P00003, effective January 29, 2004, which changed the contract to a multi-year procurement and funded a portion of the costs for SSN 782 and SSN 783 (gov't mot., ex. 4).

The continuing claim doctrine applies to periodic claims, such as pay claims, where the claims arising more than six years prior to suit are barred, but claims arising less than six years prior to suit are considered timely. To be applicable, the 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." *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476-77 (quoting *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997)). Here, Modification No. P00003 converted the contract between EB and the Navy into a multi-year contract and funded a portion of the costs for each of the submarines at issue. Thus, contrary to EB's allegations, the submarines were not funded in a "series of independent events" but were a single procurement. EB's alleged damages, both in its claim, and predating its claim, were based upon a single distinct event, the enactment of Subpart P regulations, which was not the source of a continuing claim.

Finally, EB argues that it is entitled to equitable tolling due to the Navy's purported concealment of its determination that EB was not entitled to an equitable adjustment. EB asserts that the Navy "lulled" it into continuing negotiations rather than filing a CDA claim because the Navy had, according to EB, determined by December 2009 that EB was not entitled to a cost recovery. However, according to EB, the Navy had not disclosed this determination to EB, but instead, invited EB to respond to questions, asked EB to "try again" to submit additional supporting

documentation, and encouraged EB to file a request for equitable adjustment, falsely representing that an issue of Rhode Island law was a sticking point in the negotiations, and by not promptly responding to EB's proposals. (App. opp'n at 31-39) Even assuming the truth of each of EB's allegations, EB does not allege facts sufficient to equitably toll the statute of limitations.

The Board has held that the CDA's six-year statute of limitations "may be equitably tolled when a litigant has (1) been pursuing his rights diligently, and (2) some extraordinary circumstance 'stood in his way and prevented timely filing.'" *Adamant Group for Contracting and General Trading*, ASBCA No. 60316, 16-1 BCA ¶ 36,577 at 178,136 (citing *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016)). Here, EB has not made any allegations that would constitute "extraordinary circumstances" that prevented it from filing a CDA claim. In fact, evidence cited by the government established that EB was aware of its right to file a CDA claim, but that it preferred to continue to negotiate a contractual adjustment. For instance Mr. John Leonard, EB's chief financial officer, testified at his deposition that there was nothing that prevented EB from filing a CDA claim (gov't mot., ex. 107 at 3842-43).[2] Yet, despite the knowledge that there was a potential statute of limitations issue, and the recognition that there was nothing preventing EB from filing a CDA claim, EB did not file a CDA claim. For this reason, equitable tolling is not appropriate.

Electric Boat cites to *Environmental Safety Consultants, Inc. v. United States*, 97 Fed. Cl. 190, 200-01 (2011), for the proposition that equitable tolling is available when there is "serious government misconduct that induces the claimant to forgo filing a certified CDA claim" (app. opp'n at 41). According to Electric Boat, the Navy's alleged "deception" satisfies this test (*id.*). However, *Environmental Safety* presents a narrower holding than that argued by Electric Boat, noting that equitable tolling is available "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Environmental Safety Consultants*, 97 Fed. Cl. at 200-01 (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). *Irwin* in turn cites *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231 (1959), as an example where equitable tolling was available because the respondent represented to the petitioner that the statute of limitation for his claim was seven years, rather than three years inducing him to allow the statute of limitations to run. As we noted in *Raytheon Missile Systems*, in the absence of trickery, once a claim has accrued and the statute of limitations begins to run, "subsequent communications between [the contractor] and the government about the claim's merits and magnitude [do] nothing to toll it." *Raytheon Missile Systems*, 13 BCA ¶ 35,241 at 173,018. The evidence in this appeal demonstrates that Electric Boat was fully aware of its right to

[2] Further support is provided by the deposition testimony of Mr. Kevin Carroll, EB's director of contracts and estimating, that in May 2011, after receiving the Navy's letter denying entitlement, he was aware of the potential statute of limitations issue and discussed it with others at EB (gov't mot., ex. 100 at 3091).

file a CDA claim and was conscious of the running statute of limitations. Accordingly, there is no basis for equitable tolling. We conclude that Electric Boat's claim, for its own costs, accrued not later than August 15, 2005, a date that is more than six years prior to the date of Electric Boat's December 19, 2012 CDA claim. We grant the government's motion for summary judgment, in part, holding that Electric Boat's claim for its own costs is time-barred.

II. Electric Boat's Claim for HII's Costs

The claim accrual date for HII's costs is different. While EB knew or should have known of the potential claim for HII's costs not later than the date of EB's contract change memorandum (February 8, 2005), HII's costs were not eligible for adjustment because Clause H-30 did not flow-down from EB to HII. By the terms of prime contract Clause H-30(c)(ii) EB was not permitted an adjustment for "Increases or decreases in prices charged by subcontractors or suppliers" (gov't opp'n, ex. 3 at 352-53). Thus, EB's inclusion of Clause H-30 in its subcontract with HII did not create a right for EB to seek an adjustment for HII's costs from the Navy.[3] Thus, EB did not have a claim for its subcontractor's increased costs until Modification No. P00031 added Clause H-30 to the list of the clauses that flowed-down to its subcontractors.

A. Electric Boat's Motion for Partial Summary Judgment

EB's motion seeking a determination that its claim was timely filed pursuant to the CDA also applies to HII's costs (app. mot. at 1). According to EB, its cause of action did not accrue until August 9, 2010, the date of Modification No. P00031, because until that date the H-30 clause barred it from recovering costs for itself and HII related to the OSHA hot-work rules (*id.* at 9). EB also contends that the inclusion of Clause H-30 in its subcontract with HII was "unauthorized and inoperative" (app. reply to gov't resp. to proposed findings of uncontroverted fact ¶ 8). We find that EB was prohibited from seeking reimbursement of HII's costs until Modification No. P00031. Because the limitations period does not begin to run if a claim cannot be filed, *Kellogg Brown & Root Services*, 823 F.3d at 628, we grant summary judgment in part in favor of Electric Boat, holding that its claim for HII's costs is not time-barred.

B. The Government's Motion for Summary Judgment

The Navy contends that Electric Boat's claim for HII's costs is also time-barred because Electric Boat included Clause H-30 in its subcontract with HII. The Navy asserts

[3] The Navy asserts that HII might have had a cause of action against Electric Boat if Electric Boat had not asserted HII's claim to the Navy (gov't surreply at 3). We make no findings of fact regarding whether EB's inclusion of Clause H-30 in its subcontract with HII creates liability on the part of EB for HII's costs in the absence of an adjustment by the Navy.

that EB's claim for HII's costs is also time-barred because Modification No. P00031 corrected a mutual mistake. Thus, according to the government, because Clause H-30 was included in EB's subcontract with HII, the claim for HII's costs accrued prior to Modification No. P00031. The fact that Modification No. P00031 may have corrected a mutual mistake does not mean that the modification was retroactive for statute of limitations purposes. Parties to a contract can agree to a modification with a retroactive effective date (*see, e.g.*, *Omega Services, Inc.*, ASBCA No. 38885, 93-3 BCA ¶ 25,980); however, the normal rule is that contract modifications, like statutes, are interpreted as being prospective only.[4] *See, e.g., Hicks v. Merit Systems Protection Board*, 819 F.3d 1318, 1321 (Fed. Cir. 2016). Here, Modification No. P00031 does not state that it was intended to have retroactive effect. In fact, the modification states that its effective date is the "Same as Block 16C" – the date the modification was signed by the contracting officer, August 9, 2010 (app. mot., ex. 10 at 11073). *See also Landgraf v. USI Film Products*, 511 U.S. 244, 257 (1994) ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

The Navy additionally asserts that the government and Electric Boat "reformed the Contract to reflect the true intentions of the parties" (gov't opp'n at 90). As an initial point, "reformation" is a power of tribunals to modify the express terms of a contract to reflect the intention of the parties. *See, e.g., Defense Systems Co.*, ASBCA No. 50918, 01-1 BCA ¶ 31,152 at 153,879. The parties can always modify the terms of a contract by bilateral modification. The "reformation" referred to by the Navy was a modification to the contract; however, as discussed above, the "reformation" did not expressly provide that the modification was to have retroactive effect. Accordingly, we deny the Navy's motion for summary judgment with regard to EB's claim for HII's costs.

[4] Because the modification does not assert a retroactive effect we need not reach the question of whether a modification can have retroactive effect for statute of limitations purposes, an argument of which we are dubious. Also, as the contract was modified, we need not determine if laches apply.

## CONCLUSION

For the reasons stated above, both motions for summary judgment are granted in part and denied in part. Electric Boat's claim for its own costs in complying with the Subpart P fire protection regulation is barred by the statute of limitations, but its claim for the costs of its subcontractor HII are not time-barred.

Dated: December 10, 2018

DAVID D'ALESSANDRIS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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. 58672, Appeal of Electric Boat Corporation, rendered in conformance with the Board's Charter.

Dated:

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