

**UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF HEARING AND APPEALS**

Interior Board of Contract Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

)	
)	IBCA 4724-2005
CONFEDERATED TRIBES OF COOS, LOWER)	IBCA 4725-2005
UMPQUA, AND SIUSLAW INDIANS,)	IBCA 4726-2005
)	IBCA 4727-2005
Appellant,)	
v.)	
)	APPELLEE’S MOTION TO
INDIAN HEALTH SERVICE, Dr. Charles Grim,)	DISMISS AND RESPONSE
Director,)	TO APPELLANT’S MOTION
)	AMEND COMPLAINT
Appellee.)	

Appellee, the United States Department of Health and Human Services, Indian Health Service, Charles W. Grim, Director, moves for dismissal of Appellant’s claims for the following reasons: (1) The Interior Board of Contract Appeals does not have jurisdiction over Appellant’s fiscal year (“FY”) 1996 and FY 1997 claims because the applicable statute of limitations bars recovery; (2) the doctrine of laches bars recovery for Appellant’s FY 1995 claim; and (3) the Congressionally-imposed cap placed on contract support costs in FY 1998 bars recovery for Appellant’s fiscal year 1998 claim. Finally, Appellant’s motion to amend the complaint should be denied because it seeks to add a new claim to that has not been presented to the agency’s contracting officer (“CO”) pursuant to the requirements of the Contract Disputes Act.

INTRODUCTION

The Appellant in this case, the Confederated Tribes of Coos, Lower Umpqua, and

APPELLEE’S MOTION TO DISMISS AND RESPONSE
TO APPELLANT’S MOTION TO AMEND COMPLAINT

Siuslaw Indians (collectively the “Tribe”), is a party to self-determination contracts with the Secretary of Health and Human Services (“HHS”), as authorized by the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. §§ 450 et seq. In its Complaint, Appellant challenges the amount of contract support cost funding it received from the Indian Health Service (“IHS”) under its ISDEAA contracts in fiscal years 1995, 1996, 1997, and 1998.

Relevant to this Motion, the ISDEAA explicitly incorporates the Contract Disputes Act (“CDA”), 41 U.S.C. §§ 601 et seq., and its applicable statute of limitations for filing monetary claims for relief arising under the ISDEAA and ISDEAA contracts. Because the ISDEAA and the CDA constitute waivers of the sovereign immunity of the United States, the CDA’s six-year statute of limitation for filing a claim, and Appellant’s compliance therewith, define this Board’s jurisdiction over this matter. As such, Appellant’s FY 1996 and FY 1997 ISDEAA claims that were not filed within the six-year limitation period must be dismissed for lack of subject matter jurisdiction.

Moreover, while the six-year CDA limitation period does not apply to contracts awarded prior to October 1, 1995, see 48 C.F.R. § 33.206(a), it can be presumed that Appellant’s delay of more than eight (8) years in filing its FY 1995 claim is unreasonable and prejudicial to IHS and, therefore, this claim should be barred by the doctrine of laches. In addition, the Congressionally-imposed cap on CSC in FY 1998 precludes Appellant from recovering under its FY 1998 claim. IHS cannot spend CSC for FY 1998 above the capped amount. Finally, Appellant’s motion to amend must be dismissed because it raises a claim for CSC related to FY 1996 new and

expanded program assumptions that was not specifically presented to the CO. The CDA requires contractors to first present claims to CO's before raising those claims with the Board. Appellant never advised the CO that it was specifically presenting a claim additional CSC related to new and expanded programs assumed in FY 1996.

STATUTORY BACKGROUND

The IHS has as its principal mission the provision of health care to American Indians and Alaska Natives throughout the United States. See Lincoln v. Vigil, 508 U.S. 182, 185 (1993). IHS operates under the authority of the Snyder Act, which authorizes it to “expend such moneys as Congress may from time to time appropriate” for the conservation of the health of Indians. See 25 U.S.C. § 13 (providing that BIA will expend funds as appropriated for, inter alia, the “conservation of health” of Indians); 42 U.S.C. § 2001(a) (transferring to IHS BIA’s responsibility for Indian health care).

The Indian Self-Determination and Education Assistance Act. In 1975, Congress enacted the ISDEAA, which was designed to encourage Indian self-government by permitting the transfer of certain federal programs, including health care programs, to tribal governments and other tribal organizations. See 25 U.S.C. §§ 450, 450a. The ISDEAA directs both the Secretary of HHS and the Secretary of the Department of the Interior (“DOI”), upon the request of an Indian tribe, to enter into “self-determination contract[s].” See id. § 450f(a)(1); id. § 450b(i) (defining “Secretary”). A self-determination contract is a contract for “the planning, conduct and administration of programs or services which are otherwise provided [by IHS or DOI] to Indian tribes and their members pursuant to Federal law.” Id. § 450b(j).

Funding of a self-determination contract under ISDEAA includes two components--the “Secretarial amount” and contract support costs (“CSC”). For IHS contracts, the Secretarial amount includes expenses for a broad array of functions and activities that support the delivery of health care services. See id. § 450j-1(a)(1) (the “amount of funds . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program”).

Contract support costs can be broken down into three categories. See id. § 450j-1(a)(3)(A). First, direct CSC consists of administrative costs of the contracted-for program, such as unemployment taxes or workers’ compensation insurance. See id. § 450j-1(a)(3)(A)(i);¹ id. § 450b(c). Second, in the initial year of a contract, CSC includes “startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis.” Id. § 450j-1(a)(5).

Finally, and most relevant here, indirect CSC consists of administrative costs that are shared by several different programs or services. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f). The ISDEAA defines indirect CSC as “costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved.” Id. The ISDEAA permits payment of only those CSC that are reasonable in light of the activities to be conducted. See 25 U.S.C. § 450j-1(a)(2). Congress also provided that “[n]otwithstanding any other provision in [the ISDEAA], the provision of funds under [the ISDEAA] is subject to the

¹ Congress added this provision in 1994. See Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 1457-58 (1994).

availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization” Id. § 450j-1(b); see also id. § 450j(c) (“The amounts of such [self-determination] contracts shall be subject to the availability of appropriations.”).

IHS’s funding of indirect CSC under individual self-determination contracts, which is at issue in this appeal, is based on a variety of factors, including: the provisions of the ISDEAA; the specific terms of each negotiated ISDEAA contract; each contracting tribe’s annual indirect cost rate, if it has one; the amount of funding made available by Congress in the annual IHS appropriation; and IHS policies and procedures for the calculation and distribution of indirect CSC.

The Contract Disputes Act. The ISDEAA also provides that the CDA “shall apply to self-determination contracts.” 25 U.S.C. § 450m-1(d). The CDA itself is found at 41 U.S.C. §§ 601 et seq. and provides a mandatory administrative exhaustion scheme applicable to contract disputes between government contractors and the United States. The first step in the CDA process is that “[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for decision.” 41 U.S.C. § 605(a); see also 25 C.F.R. §§ 900.215-900.230 (explaining the exhaustion requirement for contract dispute claims brought under the ISDEAA). Most relevant to this motion, the CDA requires that each claim by a contractor against the government relating to a contract shall be submitted within six years after the accrual of the claim. 41 U.S.C. § 605(a). For claims under \$100,000, the contracting officer shall issue a decision within 60 days, if the contractor requests that a decision

be rendered within that period, and for claims over \$100,000, the contracting officer shall issue a decision within 60 days or notify the contractor when a decision will be issued (and it must be within a reasonable time, given the nature of the claim). See 41 U.S.C. § 605(c). The CDA explains further that “[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim” Id. § 605(c)(5).

As the United States District Court for the District of New Mexico recently confirmed, the CDA’s “presentment” requirement is mandatory – meaning that any claim which has not been presented first to an agency’s contracting officer cannot be reviewed by this Board or any other tribunal. See Pueblo of Zuni v. United States, Case No. CV 01-1046, slip op. at 16-21 (D.N.M. October 11, 2006) (mot. for recons. filed Oct. 25, 2006). (attached as Exhibit A) (citing SMS Data Products Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (Cl. Ct. 1990); Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 589, 594-95 (Fed. Cl. 1999); Diversified Energy, Inc. v. Tennessee Valley Authority, 339 F.3d 437, 445 (6th Cir. 2003); Cerberonics, Inc. v. United States, 13 Cl. Ct. 415, 418 (Cl. Ct. 1987)). Accordingly, even where a contractor has presented certain claims to a contracting officer, claims seeking additional relief that are not based on the same set of operative facts may not be brought before a reviewing tribunal.

The ISDEAA contractor thereafter has the option of appealing a contracting officer’s decision to: (1) the Interior Board of Contract Appeals (within 90 days of the decision), see id.

§ 606; 25 U.S.C. § 450m-1(d), (2) the United States Court of Federal Claims (within 12 months of a decision), see 41 U.S.C. § 609, or (3) a federal district court (within 12 months of a decision), see id. § 609; 25 U.S.C. § 450m-1(a). Finally, the CDA provides that “a contracting officer’s decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter.” 41 U.S.C. § 605(b).

STATEMENT OF FACTS

Appellant operates health facilities and provides health services to its members and other beneficiaries pursuant to contracts entered into with the Secretary of Health and Human Services under the ISDEAA. During FY 1995 – FY 1998, Appellant operated programs pursuant to contracts and annual funding agreements entered into with HHS and IHS under the authority of Title I of the ISDEAA.

In July, 1994, Appellant submitted a proposal to the IHS Portland Area Office to assume responsibility for expanded programs. (Appeal File 00080-82.) In connection with this expansion, Appellant sought Level of Need Funding (“LNF”). Id. Appellant administered these expanded programs from FY 1995 through FY 1998 (and beyond). Under IHS policy in effect at the time of Appellant’s proposal in 1994, funding for new and expanded contracts was to be paid from the Indian Self-Determination (ISD) Fund. See Indian Self-Determination Memorandum (“ISDM”) No. 92-2 § 4A. (Appeal File 00379.) At the time of program expansion in FY 1995, IHS did not have sufficient funds to pay CSC related to this expansion, thus in accordance with IHS policy, an ISD request was generated under the first-come, first-served system, which was

known as the “queue.” ISDM No. 92-2 § 4C (Appeal File 00381-82.) The amount of Appellant’s ISD request for \$186,979. (Appeal File 00080.)

On or about June 29, 1995, Appellant submitted a detailed proposal and budget to assume new and expanded programs in FY 1996 associated with the Western Oregon Service Unit (“WOSU”), Portland Area Office, and Headquarters tribal shares. (Appellant’s First Amended Complaint, Ex. E.) Appellant’s proposed budget included \$150,000 for its share of the WOSU, \$42,000 in start-up costs, \$26,000 in direct CSC, and indirect costs of \$41,856. The total proposed budget was \$259,856. (*Id.* at 11.) Appellant’s FY 1996 AFA provided a base program amount of \$201,181 (\$150,000 for WOSU, plus \$51,181 for Area office and Headquarters tribal shares) for the Tribe’s FY 1996 new and expanded programs.¹

In September 1995, IHS reviewed Appellant’s ISD request from the queue related to its FY 1995 program expansion(LNF). (First Am. Compl., Ex. G at 3.) Although the request sought \$186,979, IHS determined that the entire amount was not allowable and recommended approval of \$74,286. (*Id.*) Appellant was notified of the ISD payment by amendment to its FY 1996 AFA on September 28, 1996. (Appeal File 00294.) At the time payment was received, Appellant never questioned or complained about the amount.

In late 1995, after negotiations between the parties, the record shows that IHS agreed to submit an ISD request for Appellant related to the FY 1996 new and expanded program assumptions. (First Am. Compl., Ex. H.) Unfortunately, it appears that the in April 1996, IHS

¹ Amendments three and four to the FY 1996 AFA show that the amount of Area Office and Headquarters tribal shares negotiated was \$51,181 (\$31,161 for Area Office tribal shares and

incorrectly submitted the previously paid ISD request from the FY 1995 new and expanded programs, instead of the ISD request related to Appellant's FY 1996 new and expanded programs. (Appeal File 00079-82.) The record is unclear exactly how or why this was done. Thus, the queue listed ISD Request 95-52 in the amount of 186,979, which was the same amount as Appellant's ISD request for the FY 1995 new and expanded program assumptions (which had already been paid in September 1995).

Both parties failed to notice and correct this mistake. The incorrect information related to appellant's ISD request remained on the queue until 1999, when Appellant received payment in the amount of \$64,546 related to ISD Request 95-52. See Amendment No. five (5) to Appellant's FY 1999 AFA, attached as Exhibit B.

In a letter dated December 29, 2003, Appellant requested a contracting officer's decision for unpaid CSC in FY 1995 and 1996. (Appeal File 00036 – 00106.) The letter seeks unpaid CSC related to a proposal submitted on October 1, 1994, to assume programs in FY 1995, including Western Oregon Service Unit, Area Office tribal shares, and Headquarters tribal shares. (Appeal File 00036.) However, as discussed above, Appellant did not assume WOSU, Area Office, and Headquarters tribal shares until FY 1996.

In another letter dated December 29, 2003, Appellant requested a contracting officer's decision for unpaid CSC due in FY 1997. (Appeal File 00107-182.)

In a letter dated September 27, 2004, Appellant requested a contracting officer's decision related to unpaid CSC in FY 1998. (First Am. Compl., Ex. A at 7-9.)

\$20,020 for Headquarters tribal shares).

In three letters dated September 6, 2005, Appellant again requested a contracting officer's decision for unpaid CSC in fiscal years 1995, 1996, and 1997. (Appeal File 00019-00034.) In each of those letters, Appellant specifically stated that "[t]he present claim clarifies the claim filed on December 29, 2003." (Appeal File 00020, 00024, 00028.) In a letter dated September 28, 2005, Appellant submitted a request for a contracting officer's decision for unpaid CSC in FY 1998. In this letter Appellant notified IHS that "this letter supplements our letter dated September 24, 2004." (Appeal File 00031.)

On November 4, 2005, the contracting officer notified Appellant that IHS needed an additional 120 days to evaluate and respond to the FY 1995, FY 1996, and FY 1997 claims. (Appeal File 00003, 00007, 00011.) On November 25, 2005, the contracting officer notified Appellant that IHS needed an additional 120 days to evaluate and respond to its FY 1998 claim. (Appeal File 00015.)

On or about December 15, 2005, Appellant filed this appeal with the Interior Board of Contract Appeals, prior to the expiration of the 120-day period for any of the claims. Appellant's notice of appeal and complaint filed with the IBCA failed to mention the letters the Tribe submitted to IHS in November 2005 requesting contracting officer decisions for unpaid CSC in fiscal years 1995, 1996, 1997, and 1998. Nor did Appellant mention the contracting officer's letters notifying the Tribe that more time was needed to evaluate and respond to Appellant's claims.

ARGUMENT

I. THE BOARD LACKS SUBJECT MATTER JURISDICTION OVER APPELLANT'S FY 1996 AND FY 1997 CLAIMS

Appellant's failure to meet the statutory deadlines for filing a claim under the CDA with respect to its FY 1996 and FY 1997 claims requires dismissal of those claims for lack of subject matter jurisdiction. The Supreme Court has unequivocally stated that a court's jurisdiction is a threshold inquiry that should be resolved before proceeding to the merits of an action. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (citations and internal quotation marks omitted). "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." Id. "Without jurisdiction the court cannot proceed at all in any cause." Id.; see also United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1048 (10th Cir. 2004) ("Questions of jurisdiction, of course, should be given priority--since if there is no jurisdiction there is no authority to sit in judgment of anything else.") (quoting Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 778 (2000)); Payton v. USDA, 337 F.3d 1163, 1167 (10th Cir. 2003) ("The jurisdictional issue must be resolved first.").

A. The Board Lacks Jurisdiction Over Claims Not Timely Filed Under the CDA.

A party seeking to sue the United States bears the burden of demonstrating that a specific statutory provision waives the government's sovereign immunity from suit. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); United States v. Sherwood, 312 U.S. 584, 586-87 (1941); see also Weaver v. United States, 98 F.3d 518, 520 (10th Cir. 1996). As a

sovereign, the United States is immune from suit unless it consents to be sued; the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit; and a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. See United States v. Mitchell, 445 U.S. 535, 538 (1980).

The ISDEAA directs that, for all claims by contractors against the government for monetary relief, the CDA applies. See 25 U.S.C. §§ 450m-1(a), (d). Thus, the ISDEAA conditions its waiver of sovereign immunity for monetary claims against the government on the application of the CDA. See id.; see also Demontiney v. United States, 255 F.3d 801, 806 (9th Cir. 2001) (explaining limited waiver of sovereign immunity found in the ISDEAA).

The CDA itself operates as a limited waiver of sovereign immunity for claims arising under contracts with the United States. See 25 U.S.C. §§ 450m-1(a), (d). In waiving sovereign immunity under the CDA, however, Congress put specific conditions on that waiver. First of all, “[a]ll 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.” 41 U.S.C. § 605(a). Most relevant here, the CDA also requires that each claim by a contractor against the government relating to a contract shall be submitted within six years after the accrual of the claim. Id. A contracting officer’s decision shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized. 41 U.S.C. § 605(b). The CDA has very explicit timeliness requirements, see 41 U.S.C. §§ 605, 606, 607, 608, 609, the violation of which renders a reviewing court without subject matter jurisdiction, see, e.g., SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (Cl. Ct. 1990).

Because Congress has limited the Court’s jurisdiction over CDA claims by such conditions, these conditions cannot be waived or excused. See, e.g., Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991) (refusing to read exceptions or tolling provisions into the CDA that Congress did not authorize); McNeil v. United States, 508 U.S. 106, 111 (1993) (declining to excuse a violation of the specific statutory administrative exhaustion process by stating, inter alia, “[w]e are not free to rewrite the statutory text.”); McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (“Where Congress specifically mandates, exhaustion is required.”).

B. Appellant’s FY 1996 and FY 1997 Claims Were Not Filed Within the Six-Year Period Mandated by the Contract Disputes Act.

Any claim for breach of an ISDEAA contract awarded on or after October 1, 1995, is subject to the administrative statute of limitations provided in 41 U.S.C. § 605(a), which states: “[e]ach claim by a contractor against the government relating to a contract...shall be submitted within six years after accrual of the claim.” 41 U.S.C. § 605(a). A tribal contractor’s claim for breach of contract related to an ISDEAA contract or compact entered into on or after October 1, 1995, accrues on the last day of the applicable fiscal year, and would be barred as untimely six years later. See 31 U.S.C. § 1102; Oceanic Steamship Co. v. United States, 165 Ct. Cl. 217 (1964)(Where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of contract). ISDEAA funding is distributed throughout the fiscal year under annual funding agreements, however, it may be distributed up until the last day of the fiscal year.

Regarding Appellant’s FY 1996 and FY 1997 contracts, any claims would have accrued

as of September 30, 1997 and September 30, 1998, respectively (the end of the fiscal year). In order to be timely, claims under the FY 1996 contract should have been filed by September 30, 2002, and claims under the FY 1997 contract must have been filed by September 30, 2003. However, Appellant's claim letters were not filed until December 29, 2003. At no point prior to this date did Appellant file a claim with the contracting officer. It was not until well after the six-year limitations period lapsed that Appellant made an effort to pursue a claim for fiscal years 1996 and 1997. Accordingly, Appellant's claims relating to fiscal years 1996 and 1997 are barred by the CDA's six-year statute of limitations.

Congress has limited the Court's jurisdiction over CDA claims to those claims that meet the presentment requirement. See Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991); Thoen v. United States, 765 F.2d 1110, 1116 (Fed. Cir. 1985); Renda Marine Inc. v. United States, 71 Fed. Cl. 782, 792 (Fed. Cl. 2006); Made in the U.S.A. Found. v. United States, 51 Fed. Cl. 252, 255-56 (2001); Computer Prods. Int'l, Inc. v. United States, 26 Cl. Ct. 518, 525 (Cl. Ct. 1992); Krueger v. United States, 26 Cl. Ct. 841, 844 (Cl. Ct. 1992); Gregory Lumber Co. v. United States, 229 Ct. Cl. 762 (Cl. Ct. 1982). Because Appellant failed to present its claims relating to fiscal years 1996 and 1997 within the six-year period mandated by the CDA, these claims must be dismissed.

II. APPELLANT'S FY 1995 CLAIM IS BARRED BY LACHES

When Congress adopted the six-year limitations period codified on October 13, 1994, it did not make the limitation applicable upon passage, but provided that it would go into effect as prescribed by the Federal Acquisition Regulation ("FAR") (but no later than October 1, 1995).

See Pub. L. No. 103-355, 108 Stat. 3243 § 10001 (Oct. 13, 1994). On September 18, 1995, the Office of Federal Procurement Policy issued a new FAR provision that stated:

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.*

48 C.F.R. § 33.206(a) (emphasis added). Accordingly, the CDA's statute of limitations would not directly bar Appellant's fiscal year 1995 claim. Nevertheless, this claim should be barred by laches.

The equitable defense of laches is based on the Latin maxim vigilantibus non dormientibus aequitas subvenit: "equity aids the vigilant, not those who slumber on their rights." See Cornetta v. United States, 851 F.2d 1372, 1375 (Fed. Cir. 1988). Laches prevents unreasonable and prejudicial delays in the commencement of a suit even in those areas of the law that are not governed by statutory time bars. The laches defense is available to the government in CDA cases. See, e.g., S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 8-9 (Fed. Cir. 1985).

Moreover, although it does not directly apply to bar Appellant's FY 1995 claim, the CDA's six-year limitation period may be referenced in order to find that the FY 1995 claim – filed *more than eight years* after it accrued – should be barred by the equitable doctrine of laches. See A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 1030 (Fed. Cir. 1992) (examining a six-year damages limitation in a patent statute); see also Aero Union v. United States, 47 Fed. Cl. 677, 686 (Ct. Fed. Cl. 2000) ("the addition of a six-year limitation period to the CDA . . . demonstrates the congressional policy against delay in filing government contract

claims, which the application of laches would prevent in the case at bar”).

In Aukerman, the patent provision examined by the United States Court of Appeals for the Federal Circuit did not regulate the commencement of litigation but merely limited recoverable damages to costs incurred in the six years prior to the suit’s commencement. Aukerman, 960 F.2d at 1030. Nevertheless, the court held that this provision created a rebuttable presumption that laches should bar patent infringement actions brought more than six years after the plaintiff became aware of the allegedly infringing behavior. Id. at 1034. Even though the statutory limitation regulated only the calculation of damages, imposing no restriction on the timing of suits, the court determined that the damages provision was relevant in determining whether a delay of more than six years in filing suit was unreasonable. Id.; see also Tenneco Automotive Operating Co. v. Visteon Corp., 375 F. Supp. 2d 375, 381 (D. Del. 2005) (affirming that a delay of more than six years is presumptively inequitable in the context of patent infringement actions).

In finding that the damages limitation created the presumption of a six-year time bar, the Aukerman court relied on the history of the laches defense, which originally applied only in courts of equity. Although equity courts were not restricted by statutes of limitations barring similar suits at law, equity courts developed a habit of “borrowing” the statutory time period as a presumptive metric for the fairness and reasonableness of long delays. See Aukerman, 960 F.2d at 1034. In Aukerman, the Federal Circuit listed similar “laches presumptions” that modern courts have adopted when analogous but inapplicable time limitations exist. Id. at 1034 & n.12.²

² The Aukerman court cited the following examples of laches presumptions arising in

Applying the analysis of Aukerman, this Board should find that the CDA's statute of limitation also creates a laches presumption in which case delays exceeding six years should be presumptively inequitable. Accordingly, the burden should be on Appellant to show that its delay of more than eight years in filing its FY 1995 claim was not unreasonable and that no prejudice has resulted to IHS as a result of this delay. Appellant's complaint provides no explanation for why Appellant waited so long to file its FY 1995 claim, and the passage of time has inevitably hampered the ability of the agency to mount a defense to Appellant's claim due to the fading memories of IHS witnesses and the unavailability of one or more former IHS employees with knowledge concerning the facts regarding the FY 1995 contract.

ISDEAA contractors, including Appellant, are not strangers to the terms of their own contracts and the amounts they are awarded by IHS. The entire underpinning of ISDEAA is that tribal contractors know what is best for their members and their communities. Consequently, tribes have been given large sums of federal funds to administer federal programs previously directly operated by the federal government. See 25 U.S.C. §§ 450, 450a. Tribal contractors are

other contexts: Public Adm'r of the County of N.Y. v. Angela Compania, Naviera, 592 F.2d 58, 64 (2d Cir. 1979) (maritime action); Leonick v. Jones & Laughlin Steel, 258 F.2d 48, 50 (2d Cir. 1958) (Selective Service Act reemployment action); Gruca v. United States Steel, 495 F.2d 1252, 1258–59 (3d Cir. 1974) (back pay action); Henry v. United States, 46 F.2d 640, 642 (3d Cir. 1931) (land condemnation action). More recent examples include: Sanchez-Garcia v. United States, 2004 WL 1922115, at *4 (D. P.R. 2004) (employment benefits action); Robinson v. Prior, Slip Copy, 2005 WL 1115455, at *3 (D. Me 2005) (maritime action); TAG/ICIB Services v. Northwestern Selecta, Inc., Slip Copy, 2005 WL 1653095, at *2 (D. P.R. 2005) (maritime action); Santana Products, Inc. v. Borrick Washroom Equipment, Inc., 401 F.3d 123, 138 (3d Cir. 2005) (Lanham Act action); Ford Motor Co. v. Catalanotte, 342 F.3d 543, 550 (6th Cir. 2003) (same); Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 837 (9th Cir. 2002) (same). All of these cases hold that a presumption of laches applies if the suit is filed after the expiration of an analogous statute of limitations.

responsible for negotiating their ISDEAA contracts, have a great deal of discretion over the federal funds they are awarded, and are responsible for contract administrations and reporting. See Id. §§ 450c, 450j, 450j-1(a)(3)(B), 450l. There is no reason for excusing tribal contractors for not timely asserting any contract disputes that they may have.

In this case, Appellant was notified when it assumed the new and expanded program in FY 1995 that there were not sufficient funds to pay all CSC related to its new program assumption. An ISD request for additional CSC was placed on the queue that year and in September 1996, IHS paid Appellant the remaining allowable CSC pursuant to that ISD request. Yet, Appellant waited over eight years to file a claim and failed to explain the reason for such an undue delay. Additionally, it was not until after the filing of this appeal, that Appellant claimed the amount paid by IHS related to the FY 1995 program assumption was objectionable. This is exactly the type of conduct the laches doctrine is supposed to prevent. Having failed to diligently pursue its FY 1995 claim, Appellant should not now be permitted to do so.

III. THE CONGRESSIONALLY-IMPOSED CAP ON CSC SPENDING BARS RECOVERY FOR APPELLANT’S FY 1998 CLAIM FOR ADDITIONAL CSC

Starting in FY 1998, Congress explicitly limited the amount that IHS could expend on CSC by imposing a “cap” directly in the appropriations act. In FY 1998, Congress appropriated \$1,841,074,000, together with various collections, to IHS to carry out its mandate under certain health care statutes, but provided that “not to exceed \$168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts” Dep’t of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997). The phrase “not to exceed” is a standard phrase

Congress uses to place a limit on the amount of funds an agency may spend on a particular program. See Principles of Federal Appropriations Law (GAO Redbook), Volume II, Chapter 6-8 (2nd ed. 1992) (“[t]he most effective way to establish a maximum (but not minimum) earmark is by the words ‘not to exceed’ or ‘not more than’ ... These are all phrases with well-settled plain meanings.”); see also Thomson v. Cherokee, 334 F.3d 1075, 1084 (Fed. Cir. 2003), aff’d, Cherokee v. Leavitt, 543 U.S. 631 (2005) (“Congress generally uses standard phrases to impose a statutory cap.”).

Two federal courts of appeal already have concluded that a statutory cap, such as that imposed by Congress in IHS’s appropriation since 1998, limits the total amount of funds available for ISDEAA contracts and thus conditions each individual ISDEAA contractor’s right to CSC funding on the availability of appropriations. See Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t, 194 F.3d 1374, 1378-79 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000); Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996). “[I]f there is a statutory restriction on the available appropriations for a program, either in the relevant appropriations act or in a separate statute, the agency is not free to increase funding for that program beyond that limit.” Thompson v. Cherokee, 334 F.3d at 1084 (citing Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t, 194 F.3d 1374, 1376, 1378 (Fed. Cir. 1999)).

The cap amount set by Congress in FY 1998 was not sufficient to pay 100% of the CSC need for every Tribal contractor. However, in that year, IHS allocated the CSC earmark to pay legitimate CSC obligations in accordance with applicable Federal law and policy. Federal law prohibited IHS from allocating additional funds for CSC in FY 1998. Despite this, Appellant

seeks additional CSC funding from FY 1998. Since Congress capped the CSC amount for FY 1998, Appellant's FY 1998 claim fails because it cannot recover funds for FY 1998 above the capped amount.

IV. APPELLANT'S MOTION TO AMEND SHOULD BE DENIED BECAUSE IT ADDS A NEW CLAIM THAT WAS NOT SPECIFICALLY PRESENTED TO THE CONTRACTING OFFICER

Appellant's motion to amend seeks to add, for the first time, a specific claim for additional CSC related to program assumptions in FY 1996. Appellant's First Amended Complaint, for the first time, includes in its statement of damages, funding related to FY 1996 new and expanded program assumptions, even though this claim and the corresponding amounts were never presented to the contracting officer. While in general, motions to amend a complaint should be construed liberally, the Board must have jurisdiction over any new claim contained in the amended complaint.

The CDA is clear that before the Board can exercise jurisdiction over a claim, the contractor must exhaust its administrative remedies by presenting that claim to the appropriate contracting officer. 41 U.S.C. § 605(a); see also Pueblo of Zuni v. United States, Case No. CV 01-1046, slip op. at 16-21 (D.N.M. October 11, 2006) (mot. for recons. filed Oct. 25, 2006). (attached as Exhibit A) (citing SMS Data Products Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (Cl. Ct. 1990); Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. at 594-95; Diversified Energy, Inc. v. Tennessee Valley Authority, 339 F.3d at 445; Cerberonics, Inc. v. United States, 13 Cl. Ct. at 418. This "presentment" requirement is mandatory; the failure to present a claim bars a reviewing court from asserting jurisdiction over that claim. See James M.

Ellett Constr. Co. v. United States, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996); Reliance Ins. Co. v. United States, 931 F.2d 863, 866 (Fed. Cir. 1991); SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 614 (1990); Mendenhall v. United States, 20 Cl. Ct. 78, 82 (1990); Thoen v. United States, 765 F.2d 1110, 1116 (Fed. Cir. 1985).

The parameters of a CDA “claim” are determined by reference to the operative facts underlying the claim and the policies behind the exhaustion requirement--notifying the agency of a dispute and allowing the agency the first opportunity to review the claim and attempt to resolve it without litigation. See SMS Data, 19 Cl. Ct. at 614-16. “The relevant determination is whether the claim [the plaintiff] submitted was a clear and unequivocal statement that put the agency on sufficient notice of the basis for the claim currently before the court.” Hawkins & Powers Aviation, Inc. v. United States, 46 Fed. Cl. 238, 243 (2000).

There are distinctly different operative facts pertaining to Appellant’s FY 1995 and FY 1996 new and expanded programs. The new and expanded programs involved in each of those years were different; the funding related to those programs were different; and the AFA’s containing each of those new and expanded programs were different. Appellant’s attempt to amend the complaint is not simply a correction of “potentially confusing factual inconsistencies.” (Motion to Amend Complaint at 3.) Instead, Appellant is now seeking additional damages related to CSC for a new and expanded program from an entirely different fiscal year. This claim was not presented to the contracting officer. Appellant’s December 2003 claim letter did not constitute a “clear and unequivocal” claim for CSC related to FY 1996 new

and expanded program assumptions.³

Appellant wants the Board to believe that the Tribe was somehow unaware that it assumed new and expanded programs in FY 1996 when it filed claims in December 2003, even though Appellant submitted a detailed proposal and budget to assume new and expanded programs in FY 1996. As a self-determination tribe, Appellant is responsible for knowing the amount of its own ISD requests on the queue and understanding the CDA and its explicit filing deadlines. Thus, Appellant's attempt to add a new claim as part of its first amended complaint should be denied.

CONCLUSION

For the reasons set out above, the U.S. Department of Health and Human Services, Indian Health Service, and Charles W. Grim, Director of the Indian Health Service, respectfully request that the Board grant its motion to dismiss Appellant's appeal, and deny Appellant's motion to amend complaint.

Dated this 26th day of October, 2006.

Respectfully Submitted,

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Office of the General Counsel, Region 10
U.S. Department of Health and Human Services

Counsel for Government-Appellee

³ Claim I of the Complaint specifically states that the alleged breach of contract resulted from IHS failing to pay CSC related to *FY 1995 program assumptions*. (Compl. ¶ 24.) While Coos mentions WOSU, Area Office, and Headquarters tribal shares in their administrative claim letter, the Tribe incorrectly asserts that those programs were assumed in FY 1995 and fails to use CSC amounts related to those new and expanded programs.