

**UNITED STATES DEPARTMENT OF THE INTERIOR  
BOARD OF CONTRACT APPEALS**

METLAKATLA INDIAN COMMUNITY,	)	
Appellant,	)	
v.	)	IBCA 4767-2006
	)	thru
	)	IBCA 4771-2006
INDIAN HEALTH SERVICE;	)	
DEPARTMENT OF HEALTH AND	)	
HUMAN SERVICES	)	APPELLEE’S MOTION TO
Appellee.	)	DISMISS
	)	

Appellee, the United States Department of Health and Human Services, Indian Health Service, moves for dismissal of Appellant’s claims related to fiscal years (“FY”) 1995, 1996, 1997, 1998, and 1999 for the following reasons: (1) The Interior Board of Contract Appeals does not have jurisdiction over Appellant’s 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; (3) the Congressionally-imposed cap placed on contract support costs in FY 1998 bars recovery for Appellant’s FY 1998 and FY 1999 claims, and (4) Appellant’s FY 1999 Contracts Disputes Act claim was not timely appealed and therefore, is not subject to review.

**INTRODUCTION**

The Appellant in this case, the Metlakatla Indian Community, is a party to self-determination contracts<sup>1</sup> with the Secretary of the Department of Health and Human Services

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<sup>1</sup>The term “contracts” will refer to contracts or compacts entered into pursuant to the Title I and Title III of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 et seq.

(“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 and compacts in fiscal years 1995, 1996, 1997, 1998, and 1999.

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 and compacts. 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 Court’s jurisdiction over this matter. As such, Appellant’s FY 1996 and FY 1997 ISDEAA claims 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 the IHS and, therefore, this claim should be barred by the doctrine of laches. Additionally, the Congressionally-imposed cap on CSC in FY 1998 precludes Appellant from recovering under its FY 1998 and FY 1999 claims because the IHS cannot spend CSC for FY 1998 or FY 1999 above the capped amount. Finally, Appellant filed a CDA claim in August 1999 and received a denial of that claim in April 2000, but did not appeal that decision and now cannot file another claim or appeal to the Board.

## STATUTORY BACKGROUND

The Indian Health Service 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). The 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 the 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).

In 1988, Congress created Title III of the ISDEAA which authorized the Secretary of Interior to negotiate Self-Governance compacts with a selected number of tribes. Pub. L. 100-472, title II, Sec. 201(a), (b)(1), Oct. 5, 1988, 102 Stat. 2288, 2289. See 25 U.S.C. § 450f. Then in 1992, Congress amended the Indian Health Care Improvement Act to allow the Secretary of

HHS to negotiate Self-Governance compacts and annual funding agreements under Title III of the ISDEAA, which permitted tribes to take over comprehensive responsibility to plan, conduct, consolidate, administer, and even redesign all health care programs, services and functions previously provided by IHS. Pub. L. 102-573, title VIII, Sec. 814, Oct. 29, 1992, 106 Stat. 4590. See 25 U.S.C. § 450f.

A self-determination contract's funding under ISDEAA includes two components--the "Secretarial amount" and contract support costs ("CSC"). The Secretarial amount includes expenses for a broad array of functions and activities that support the delivery of, in the case of IHS, 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, there are direct CSC, which are administrative costs of the contracted-for program, such as unemployment taxes or workers' compensation insurance. See id. § 450j-1(a)(3)(A)(i);<sup>2</sup> 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, there are indirect CSC, which are 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

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<sup>2</sup> 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).

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 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.”).

The IHS’s funding of indirect CSC under individual self-determination contracts and compact, which is at issue in this lawsuit, is based on a variety of factors, including the provisions of the ISDEAA, the specific terms of each negotiated ISDEAA contract and compact, 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, 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).

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 provide health services to its members and other beneficiaries pursuant to contracts and compacts entered into with the Secretary of the

Department of Health and Human Services under the ISDEAA. During FY 1995 – FY 1999, Appellant operated programs pursuant to contracts and annual funding agreements entered into with the HHS and the IHS under the authority of Title I and Title III of the ISDEAA.

Beginning in 1988, Appellant entered into Contract No. 243-88-0184 for “various Health and Related Service for Alaska Native, Annette Island Reserve.” Appeal File (3)(1-31). Effective October 1, 1994, Amendment No. Fifty-Four (54) modified the original contract and extended the period of performance to cover the period from October 1, 1994, through September 30, 1995. Appeal File (4)(1-2). On April 1, 1995, Appellant entered into Contract No. 243-95-6001 to “conduct and delivery of health services.” Appeal File (5)(1-24).

Appellant joined the Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States of America for FY 1997. Appeal File (10)(1-32). In the FY 1997 Annual Funding Agreement (AFA), Appellant’s tribal shares (Area Office and Headquarters) were scheduled to be negotiated and added to the new agreement. Appeal File (11)(4). In an amendment to the FY 1997 AFA, Appellant’s tribal shares were allocated and CSC was calculated on those tribal shares as \$44,033. Additionally, Appellant submitted a proposal to the Area Office on or around July 29, 1996, and requested \$88,845 “to defray start-up costs” but the amount was subject to review by the IHS and to negotiation between the parties. Appeal File (12)(3).

In the FY 1998 AFA, Appellant’s CSC amount on tribal shares was again listed and noted that Appellant had an “[Indian Self-Determination (ISD)] fund request for CSC on tribal shares

in the amount of \$44,033 pending in the ISD queue.” Section 4(A).<sup>3</sup> Appeal File (15)(10).

Also, Appellant’s request for start-up costs (\$88,845) was listed and noted that the amount was “presently pending in the ISD queue” awaiting appropriations. Section 4(D).<sup>4</sup> Appeal File (15)(12).

In the FY 1999 AFA, Appellant’s CSC amount on tribal shares was again listed and noted that Appellant had “an ISD request for CSC on tribal shares in the amount of \$44,033 pending in the ISD queue.” Section 4(A). Appeal File (18)(11). Also, Appellant’s request for start-up costs (\$88,845) was listed and noted that the amount was “presently pending in the ISD queue awaiting appropriations.” Section 4(D).<sup>5</sup> Appeal File (18)(13).

In FY 1999, Congress made changes in the IHS appropriation including: a statutory cap, elimination of the ISD fund, and a moratorium on new contracting activities. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P.L. 105-277, H.R. 4328, 112 Stat. 2681-321; sec. 328, 112 Stat. 2681-337 (Oct. 21, 1998). Congress also appropriated an additional \$35 million to cover some of the shortfall in CSC. After the IHS adopted an

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<sup>3</sup> In FY 1988, the IHS created the ISD fund to pay for the costs of new and expanded contracts. Since 1991, the funding was insufficient to pay 100% of the CSC for any given year. As a result, the IHS created a waiting list, or queue, to track which requests were next in line for funding. A tribe or tribal organization submitted a request to the IHS in order to place it on the queue. See Indian Self-Determination Memorandum (ISDM)No. 92-2 and IHS Circular 96-04. Appeal File (29)(1-9) and (30)(1-22).

<sup>4</sup> Appellant reviewed and approved the revised start up costs proposal on November 6, 1996. The revised amount was reduced by \$5,910 and was listed as \$82,935. This amount was reduced further by \$19,400 because Appellant did assume supply center functions in FY 1997. Therefore, the actual amount should have been listed as \$63,535.

<sup>5</sup> The amount of \$88,845 was listed in error. Start-up costs were negotiated and reduced to \$63,535. Both parties failed to notice the mistake and correct the amount.

allocation methodology for the CSC, Appellant received an additional \$21,904 (\$11,349 in direct CSC and \$10,555 in indirect CSC) for FY 1999. Amendment No. Six (6) to FY 1999 AFA. Appeal File (19)(1-2).

Dissatisfied with the new methodology and believing the IHS owed them CSC funds, Appellant requested a contracting officer's decision in the amount of \$132,878 (\$44,033 in CSC funding for tribal shares and \$88,845 to defray start-up costs) on August 19, 1999. Attached as Exhibit A. The IHS responded to Appellant's CDA claim and denied it on April 17, 2000. Attached as Exhibit B.

In five letters dated June 30, 2005, Appellant requested contracting officer's decisions for unpaid CSC for FY 1995 through FY 1999. Appellant alleged that IHS owed an additional CSC amount of \$114,191 for FY 1995. Appeal File (2)(1-3). Besides a certification, no documentation accompanied the request but this amount is the same amount listed on the FY 1996 Report to Congress on Contract Support Costs Shortfall Report. Appeal File (26)(1). Appellant alleged that IHS owed an additional CSC amount of \$155,632 for FY 1996. Appeal File (2)(4-6). Again, no documentation except a certification accompanied the request but this amount is the same amount listed on the FY 1997 Report to Congress on Contract Support Costs Shortfall Report. Appeal File (26)(2). Appellant alleged that IHS owed an additional CSC amount of \$262,116 for FY 1997. Appeal File (2)(7-9). Again, no documentation except for a certification accompanied the request. After the IHS requested further information regarding the claimed amount, Appellant responded and listed the amounts of \$230,980 from shortfall report, ISD queue No. 97-08 for \$24,230, and \$6,906 in indirect CSC. Appeal File (20)(4). Appellant

alleged that IHS owed an additional CSC amount of \$134,767 for FY 1998. Appeal File (2)(10-13). Again, no documentation except a certification accompanied the request but the amount of \$128,396 was listed on the Alaska Area Shortfall Report. Appeal File (26)(4). Appellant alleged that IHS owed additional CSC amounts of \$119,429 and \$211,330 for FY 1999.<sup>6</sup> Appeal File (2)(14-17). As with the other requests, no documentation except a certification accompanied the request but the amount listed under the statutory theory (\$211,330) is the same amount listed on the shortfall report. Appeal File (26)(5).

On October 27, 2005, the contracting officer notified Appellant that the IHS needed an additional 120 days to evaluate and respond to the FY 1995 and FY 1996 claims. Appeal File (20)(1). On November 1, 2005, the IHS Director notified Appellant that the IHS needed an additional 120 days to evaluate and respond to the FY 1997, FY 1998, FY 1999, FY 2000, and FY 2002 claims. Appeal File (20)(2). On November 23, 2005, the contracting officer notified Appellant that the IHS needed an additional 120 days to evaluate and respond to its FY 1997 claim. Appeal File (20)(3). On March 15, 2006, the contracting officer notified Appellant that the IHS needed an additional 120 days to evaluate and respond to the FY 1995 and FY 1996 claims. Appeal File (20)(9). On April 28, 2006, the IHS Director notified Appellant that the IHS needed an additional 120 days to evaluate and respond to the FY 1997 through FY 2004 claims. Appeal File (20)(10).

On or about May 5, 2006, Appellant filed this appeal with the Interior Board of Contract Appeals. Appellant failed to mention the contracting officer and IHS Director's letters

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<sup>6</sup> Appellant listed two amounts based on two different legal theories: \$119,429 under a contract theory and \$211,330 under a statutory theory.

notifying them that more time was needed to evaluate and respond to Appellant's claims.<sup>7</sup>

## ARGUMENT

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

Appellant's failure to follow 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.").

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<sup>7</sup> It should also be noted that the Appellant is only one of numerous Tribes and Tribal organizations who have submitted claims to Appellee covering several years dating back to 1995 to the present. Currently, Appellee has received over 300 claims in the last year and most, if not all, of these claims do not include any supporting documentation.

**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 (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 must 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 July 1, 2005. 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 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 (1992); Krueger v. United States, 26 Cl. Ct. 841, 844 (1992); Gregory Lumber Co. v. United States, 229 Ct. Cl. 762 (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.<sup>6</sup>

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.

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<sup>6</sup> The Aukerman court cited the following examples of laches presumptions arising in 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.

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 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 waited over eight years to file a claim and failed to explain the reason for such an undue delay. 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 AND FY 1999 CLAIMS FOR ADDITIONAL CSC**

Starting in the FY 1998, Congress explicitly limited the amount that the 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 the 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 (2<sup>nd</sup> 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, 1084-85 (Fed. Cir. 2003) (“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 the 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 (Fed. Cir. 2003) (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, the IHS legally allocated the CSC earmark to pay legitimate CSC obligations in accordance with applicable Federal law and policy.

Federal law prohibited the IHS from allocating additional funds for CSC in FY 1998. Despite this, Appellant seeks additional CSC funding from FY 1998 and FY 1999. Since Congress capped the CSC amount for FY 1998, Appellant's FY 1998 and FY 1999 claims must fail because Appellant cannot recover funds from FY 1998 or FY 1999 above the amount earmarked by Congress.

**IV. APPELLANT'S FY 1999 CLAIM OF \$132,878 IS BARRED BECAUSE APPELLANT DIDN'T APPEAL THE AGENCY'S FINAL DECISION**

Appellant's failure to follow the statutory deadlines for filing an appeal under the CDA with respect to its FY 1999 claim for \$132,878 requires dismissal for lack of subject matter jurisdiction. Appellant received a decision from the IHS Director on or about April 17, 2000, denying its claim for CSC tribal shares (\$44,033) and start-up costs (\$88,845). Appellant did not appeal this decision within the appropriate time frames and is now barred from any administrative consideration of the merits of a contracting officer's adverse decision. Olsberg Excavating Co. v. U.S., 3 Cl. Ct. 249, 252 (1983).

## **PRAYER FOR RELIEF**

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

Dated this 30th day of October, 2006.

Respectfully submitted,

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