

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

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

INTRODUCTION

The Government’s motion to dismiss relies upon statutory and equitable concepts to support its position: (1) the Board lacks jurisdiction to review Contract Disputes Act (“CDA”) claims not presented to the contracting officer within the Congressionally-mandated deadline; (2) a contractor who unreasonably delays in preserving its legal rights with prejudice against the government is barred from bringing an untimely lawsuit; and (3) a Congressionally-imposed cap on contract support costs (“CSC”) bars payment of additional CSC in FY 1998 and FY 1999.

Appellant’s tolling argument contains three flaws. First, legal tolling does not apply to the six-year limitation period for administratively presenting a claim to a contracting officer (“CO”). Second, equitable tolling does not apply to the six-year administrative limitations period under the CDA. Third, Appellant unreasonably delayed attempts to preserve its legal rights to additional CSC. Moreover, Appellant’s explanations fall well short of meeting its burden to

show a diligent pursuit of its claims. Finally, Appellant's attempt to circumvent the Congressional appropriations cap in FY 1998 and FY 1999 must fail because it seeks to apply a retroactive adjustment of funds that is unsupported by the respective contracts or the statute.

ARGUMENT

I. THE BOARD LACKS JURISDICTION TO DECIDE ANY CLAIM NOT TIMELY PRESENTED TO THE CONTRACTING OFFICER WITHIN THE SIX-YEAR STATUTE OF LIMITATIONS

Appellant's failure to present a claim to the contracting officer within six years, in accordance with the CDA, regarding its FY 1996 and FY 1997 claims requires dismissal of those claims for lack of subject matter jurisdiction. 41 U.S.C. § 605(a) (1988). Oceanic Steamship Co. v. United States, 165 Ct. Cl. 217 (1964).

A. The Tolling Rule of American Pipe and Crown, Cork Is Not Applicable Because This Case Involves Administrative Presentment That is Jurisdictional

Appellant's legal (class action) tolling argument misapplies the tolling afforded to potential class members under Rule 23 of the Federal Rules of Civil Procedure. Class action tolling has not been recognized under the CDA, but even if it had been, the appropriate limitation period it would toll is the twelve (12) month deadline to file a lawsuit, not the administrative six (6) year deadline to present a claim to the CO.

It is critical to distinguish between the tolling of a statute of limitation governing the

filing of a complaint in district court (as in American Pipe¹, Crown, Cork², and Stone Container³) and an administrative exhaustion deadline, such as in the one in this case, 41 U.S.C. § 605(a). The purpose of permitting tolling of a statute of limitation under Rule 23 was for judicial economy – preventing a flood of lawsuits in the courts from possible class members while class certification is pending. American Pipe, 414 U.S. at 550-551. In Crown, Cork, the Supreme Court was worried that potential class members would place a unnecessary strain on the courts by attempting to intervene or filing separate lawsuits in order to preserve their legal rights. Crown, Cork, 462 U.S. at 350-51. Similarly, in Stone Container, the Federal Circuit permitted the tolling of a statute of limitation so potential class members would not be forced to file a lawsuits in court during the pendency of class certification. Stone Container, 229 F.3d at 1354-55.

Unlike the American Pipe, Crown, Cork, and Stone Container line of cases cited by Appellant, the filing limitations period at issue in this case is a mandatory administrative exhaustion requirement that must be met **prior** to commencing an action in Federal court or with an administrative board. Refusing to toll the six-year administrative exhaustion deadline actually promotes judicial economy because it does not force potential class members to commence a civil action in order to preserve their legal rights, and thus does not result in a flood of lawsuits for Federal courts or agency boards.

If class action tolling were extended to the six-year administrative limitation period, it

¹ American Pipe & Const. Co. v. Utah, 414 U.S. 538, 553 (1974).

² Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 353-54 (1983).

³ Stone Container Corp. v. United States, 229 F.3d 1345, 1348 (2000).

could actually serve to unnecessarily delay class actions because courts would have to wait until potential class members exhausted their administrative remedies with the contracting officer. This does not serve the purpose of judicial economy. Thus, requiring potential class members to proceed with mandatory administrative exhaustion during the pendency of class certification promotes judicial economy; provides notice to the defendant; and does not harm a potential class member's legal rights.

“[A]dministrative exhaustion under the CDA is a mandatory requirement before federal court jurisdiction can exist.” Pueblo of Zuni, Case No. CV 01-1046, slip op. at 10. (Attached as Exhibit 1). Thus, any claim which has not been presented first to an agency's contracting officer cannot be reviewed by this Board or any other tribunal. Id. at 16-21.

Federal courts have often discussed the propriety of class actions in the context of another mandatory presentment scheme, that of the Federal Torts Claims Act ("FTCA"). Like the CDA, the FTCA's mandatory presentment requirement limits the exercise of federal court jurisdiction. See 28 U.S.C. §§ 2401(b), 2675(a); United States v. Kubrick, 444 U.S. 111, 117-18 (1979); Kendall v. Watkins, 998 F.2d 848, 852 (10th Cir. 1993); Cizek v. United States, 953 F.2d 1232, 1233 (10th Cir. 1992). Based on this statutory presentment requirement, courts have uniformly held that each and every member of a putative FTCA class action must present an individual claim for relief to the relevant agency; the failure to do so requires dismissal or denial of the motion for class certification. See In re Agent Orange Prod. Liability Litig., 818 F.2d 194, 198 (2d Cir. 1987); Caidin v. United States, 564 F.2d 284, 286-87 (9th Cir. 1977). Because Appellant was required to present its claim to the CO regardless of the outcome of class

certification, the pendency of the Cherokee⁴ case cannot be a basis for tolling Appellant's administrative exhaustion requirement under the CDA.⁵

B. Equitable Tolling Does Not Apply Under the CDA and Even if It Did, The Facts of This Case do Not Warrant its Application

Appellant's effort to apply equitable tolling is equally unpersuasive. Appellant argues that it is entitled to equitable tolling in this case because "tolling would be available in a similar suit between private parties and ... Congress did not state any clear intention that tolling not apply." (Appellant's Response at 23). Appellant's efforts to equitably toll the administrative six-year statute of limitations fail because: (1) the waiver of sovereign immunity enacted by Congress after the Irwin decision did not include exceptions for tolling; and (2) even if tolling were considered, the facts of this case do not come close to supporting equitable tolling of the statute of limitation for administrative exhaustion.

In 1990, the Supreme Court decided that equitable tolling may, under some circumstances, apply to toll statutes of limitations applicable to claims against the United States. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990). In Irwin, the Supreme Court ruled that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Id. The Supreme Court

⁴ Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005).

⁵ Some courts have applied the reasoning of American Pipe and Crown, Cork to toll administrative filing deadlines, but none of those causes of action involved a mandatory presentment requirement. See, e.g., Griffin v. Singletary, 17 F.3d 356, 360-61 (11th Cir. 1994) (applying class action tolling to administrative deadlines related to federal discrimination actions); Bailey v. Sullivan, 885 F.2d 52, 65-66 (3d Cir. 1990) (recognizing that class action tolling principles would apply to certain waiveable administrative requirements under the Social Security Act); McDonald v. Secretary, HHS, 834 F.2d 1085, 1092 (1st Cir. 1987) (explaining that tolling of administrative time requirement was permissible because administrative deadline was not jurisdictional).

recognized in Irwin and subsequent cases that equitable tolling of statutory deadlines is not appropriate where Congress has indicated otherwise. *E.g.*, Irwin, 498 U.S. at 95-96; United States v. Beggerly, 524 U.S. 38, 48 (1998) (equitable tolling not appropriate where Congress has incorporated a generous statute of limitations); United States v. Brockamp, 519 U.S. 347, 352 (1997) (equitable tolling was not intended when statutes contained language that is not simple and cannot be read as containing implicit exceptions); Lane v. Pena, 518 U.S. 187, 192 (1996) (equitable tolling available only upon identification of the requisite unequivocal expression of congressional intent to grant such a waiver).

When deciding whether equitable tolling or other exceptions should be applied against the government, the Board must look to the language of the statute and congressional intent. “Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute.” Beggerly, 524 U.S. at 48 (citing Brockamp, 519 U.S. 347). Since Irwin, the Supreme Court and other federal courts such as the Federal Circuit, have barred the application of equitable tolling to numerous federal statutes. *See* Brockamp, (section 6511 of the Internal Revenue Code); Beggerly, (Quiet Title Act, 28 U.S.C. § 2409a(g)); Brice v. Sec’y of Health and Human Svcs, 240 F.3d 1367 (Fed. Cir. 2001) (section 16(a)(2) of the National Childhood Vaccine Injury Act (“Vaccine Act”)); RHI Holdings, Inc. v. United States, 142 F.3d 1459 (Fed. Cir. 1998) (26 U.S.C. § 6532(a)); Weddel v. Sec’y of Health and Human Svcs, 100 F.3d 929 (Fed. Cir. 1996) (section 16(a)(1) of the Vaccine Act).

The Brockamp case pointed to relevant factors that illustrated Congressional intent: time limitations set forth in emphatic terms; time limitations explained in a highly technical manner

(that “cannot be easily read as containing implicit exceptions”); limitations reiterated several different ways; and exceptions provided in the statute. Brockamp, 519 U.S. at 350-352. These factors are instructive and illustrate a clear intent against equitable tolling, but a statute need not contain all of these factors in order to find that equitable tolling is not applicable. See Brice, 240 F.3d at 1372-73. In Beggerly, equitable tolling did not apply to the Quiet Title Act due to the already generous language in the statute of limitations (12 years SOL, and limitations period did not begin to run until plaintiff knew or should have known of the government’s claim). Beggerly, 524 U.S. at 48-49. The Federal Circuit refused to read equitable tolling into a statute because it contained two of the Brockamp factors – detailed statutory scheme with strict deadlines, and the inclusion of specific exceptions to the limitations period. Brice, 240 F.3d at 1373 (“When an act includes specific exceptions to a limitations period, we are not inclined to create other exceptions not specified by Congress.”). The Brockamp factors should also preclude tolling under the CDA.

1. Congress Did Not Intend to Extend Equitable Tolling Under § 605(a)

Appellant correctly notes that no court has ruled on the applicability of equitable tolling under 41 U.S.C. § 605(a). (Appellant’s Response at 29). However, contrary to Appellant’s assertion, there is strong support against applying equitable tolling under the CDA. See Renda Marine Inc. v. United States, 71 Fed. Cl. 782 (Fed. Cl. June 30, 2006) (no tolling under 41 U.S.C. § 605(b)); Hamza v. United States, 36 Fed. Cl. 10, 14 (Fed. Cl. 1996) (failure to timely file under § 605(b) renders contracting officer’s decision “final and conclusive.”). See also John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354 (Fed. Cir. 2006) (post-Irwin

decision - no tolling under § 2501). Appellant attempts to neutralize the above-referenced cases by complaining that those decisions did not follow the Irwin/Brockamp analysis. (Appellant's Response at 30-31). Additionally, Appellant reminds the Board that it is bound by the Irwin and Brockamp decisions, as if the courts deciding the cases cited by the government were not. (Id. at 31.). The Renda and Hamza courts were both bound by Irwin and Brockamp.

Renda likely did not focus on the criteria from Brockamp because the plaintiff did not specifically raise equitable tolling, instead seeking an exception to the filing deadline because of an alleged invalid contracting officer decision. Renda, 71 Fed. Cl. at 788. The plaintiff in Renda argued that a gross mistake by the contracting officer in issuing a final decision provided an exception to the twelve-month time limit in the CDA for seeking judicial review. Id. The Renda decision focused on the emphatic nature of the statement of limitations and the reiteration of the limitation terms, which is clearly in line with Brockamp. Renda, 71 Fed. Cl. at 792 ("The plain language of the statute clearly confers finality and unreviewability on a CO's decision that is not properly appealed within the statutory period provided."). The Court refused to allow an exception "to this clear finality rule." Id.

In Beggerly, the Supreme Court did not engage in an in depth analysis of the Brockamp factors. Like Renda, the Supreme Court simply reviewed the statute to determine congressional intent. Beggerly, 524 U.S. at 48-49 ("Equitable tolling of an already generous statute of limitations incorporated in the QTA would throw a cloud of uncertainty over these rights, and we hold that it is incompatible with the Act.").

Congress added the statute of limitation at issue in this case (41 U.S.C. § 605(a)) in 1994, four years after Irwin was decided. Congress included a specific exception to the limitation

period in § 605(a), which is a key factor supporting the position that Congress did not want equitable tolling to apply to § 605(a). Also, the statute previously did not have a stated limitations period. Obviously, the decision to add a limitations period for contractor claims indicates a desire for Congress to place a time limit on contractor claims. The generous six-year administrative exhaustion deadline further indicates an intention to give contractors ample time to file claims and avoid issues with late filings.⁶ When Congress added the limitation period in 1994, with full knowledge of Irwin, it provided a specific fraud exception to the limitation period but not one for general equitable tolling.

These key factors reveal that Congress clearly intended the six-year statute of limitation in § 605(a) to be strictly applied. When a statute provides specific exceptions to the limitations period, courts “are not inclined to create other exceptions not specified by Congress.” Brice, 240 F.3d at 1373. Furthermore, when a statute provides a generous limitations period, extending that period would be unwarranted. Beggerly, 524 U.S. at 48-49.

Finally, Appellant’s reliance on 28 U.S.C. § 2501 to support its argument for equitable tolling of section 605(a) is both misleading and contrary to recent Federal Circuit decisions. (Appellant’s Response at 27). The Federal Circuit recently stated: “[w]e decline to decide whether equitable tolling is generally available under section 2501.” Martinez v. United States, 333 F.3d 1295, 1318 (Fed. Cir. 2003).⁷ In fact, the Federal Circuit in Martinez stated that despite having some similarities to the statute at issue in Irwin:

⁶ The FTCA provides a two-year deadline to submit an administrative claim, a much shorter time frame than the CDA.

⁷ The Federal Circuit was following the course it took in a prior decision, Frazer v. United States, 288 F.3d 1347, 1353 (Fed. Cir. 2002).

Section 2501 differs from the Irwin statute in that it contains its own tolling provision ... a factor that the Court in Brockamp regarded as weighing against recognizing other nonstatutory exceptions to the limitations period.

Martinez, 333 F.3d at 1318. Like 28 U.S.C. § 2501, § 605(a) contains its own specific exception that weighs against recognizing other nonstatutory exceptions. Accordingly, the language of § 605(a) supports a finding that equitable tolling is not warranted. Applying such an exception to the six-year administrative exhaustion period would run contrary to congressional intent.

2. Facts of the Case do not Warrant Equitable Tolling

Even if equitable tolling applied to the CDA, equitable tolling is very fact specific and requires a finding that: (1) the plaintiff "actively pursued his judicial remedies" but filed a defective pleading, or (2) the plaintiff had been "induced or tricked by his adversary's misconduct" into missing filing deadlines. See Irwin, 498 U.S. at 96; see also Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1238-39 (Fed. Cir. 2002); Bonneville Assocs., Ltd. P'ship v. Barram, 165 F.3d 1360, 1365 (Fed. Cir. 1999); Wood-Ivey Sys. Corp. v. United States, 4 F.3d 961, 964 n.4 (Fed. Cir. 1993); Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994). There is no evidence of those factors in this case. Surprisingly, Appellant states why equitable tolling applies under the CDA, but fails to explain how the facts of this case fit within a recognized circumstance warranting equitable tolling (i.e. defective pleading while diligently pursuing legal rights; or induced or tricked by misconduct of the other party causing the passing of the deadline.) See Irwin 498 U.S. at 96. Even if equitable tolling were available under the CDA, a plaintiff must show how the facts of its particular cases warrant its application. Appellant's equitable tolling argument is devoid of such an explanation.

96. Courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving its legal rights. Id. (citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984)). Since the Supreme Court's decision in Irwin, the Federal Circuit has not reversed course, but has held that even if the CDA's time limits could be tolled, the facts of the particular case must warrant tolling. See, e.g., Am-Pro Protective Agency, 281 F.3d at 1238-39 (finding no duress or coercion on the part of the government to warrant consideration of equitable tolling); Bonneville, 165 F.3d at 1365 (finding consideration of equitable tolling unwarranted because claimant failed to protect his rights and there was no government misconduct). Thus, even if tolling were to apply to the CDA's administrative statute of limitations, it would only be warranted under limited circumstances not present here.

In this case, Appellant did not diligently preserve its legal rights. Appellant's FY 1996 and FY 1997 claims accrued on September 30, 1996 and September 30, 1997 respectively.⁸ Appellant did not file an administrative claim with the contracting officer until June 2005, well after the statutory deadline. Appellant believes it actively pursued its rights by waiting for a decision on class certification in Cherokee. (Appellant's Response at 13-14).⁹ This does not

⁸ Appellant's response hints at the possibility that its claims may have accrued on a date other than the last day of the contract, such as when IHS paid many of the Indian Self-Determination fund queue requests in FY 1999. (Appellant's Response at 25). However, 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. Oceanic Steamship Co. v. United States, 165 Ct. Cl. 217 (1964). See 31 U.S.C. § 1102. If there is no breach of contract before FY 1999, then Appellant has no claim for FY 1996-1998. Moreover, Appellant concedes that a claim for queue funding in FY 1999 would be barred." See Appellant's Response at 35-36.

⁹ It should be noted that Appellant "filed its FY 1995 and 1996 claims in 2005 rather than relying on Zuni." (Appellant's Response at 14). As both parties admit, the class certification in Cherokee was denied in 2001, over four years earlier but Appellant filed its claims "not long after the Federal Circuit decided Thompson." (Appellant's Response at 15). But Appellant's present claims were filed almost two years after the Thompson v. Cherokee Nation, 334 F.3d 1075 (Fed. Cir. 2003) decision.

show active pursuit of legal rights. Even if it did, Appellant still has not shown why the Board should apply equitable tolling when there has been no defective pleading filed or trickery or fraud by the government that caused Appellant to miss the mandatory deadline.

Perhaps the clearest indication of Appellant's failure to diligently pursue its claim for additional CSC surrounds its action following the denial of class certification. After the denial of class certification, Appellant could have easily presented its claim to the CO **within** the required six-year statute of limitation. The six-year statute of limitation for Appellant's FY 1996 and FY 1997 claims ended on September 30, 2002 and September 30, 2003, respectively. Following the denial of class certification in 2001, one year, seven months, and twenty-one days remained on the statute of limitation for presenting Appellant's FY 1996 claim, and two years, seven months, and twenty-one days on the statute of limitation for presentment of Appellant's FY 1997 claim. Yet amazingly, Appellant sat on its legal rights until June 30, 2005. Appellant's attempt to explain this inaction by claiming reliance on class action tolling does not excuse Appellant's inaction.¹⁰

Class certification in Cherokee was denied on February 9, 2001, yet Appellant did not present its claim to the CO until June 30, 2005, a total of four years, four months, and twenty-one days after the denial of class certification.¹¹ That is an exceedingly long delay when Appellant

¹⁰ As stated previously, had Appellant complied with the administrative exhaustion requirement, it would not have needed to worry about class action tolling of the § 605(b) statute of limitation for commencing a civil action until after the contracting officer issued a decision on the administrative claim.

¹¹ Interestingly, Appellant's only explanation of this delay is that it was uncertain of its rights until the Cherokee decision in the Federal Circuit. (Appellant's Response at 6.) This is unpersuasive. Appellant cannot have it both ways. On one hand, Appellant argues that it would have actively pursued its legal rights earlier if not for the pending Cherokee class certification, yet on the other hand, asserts that Appellant was uncertain about its legal rights until the Cherokee Federal Circuit decision, nearly METLAKATLA INDIAN COMMUNITY v. INDIAN HEALTH SERVICE

submitted claims that had no supporting documentation and with amounts that did not appear to be based on a factual investigation or from any facts that were recently learned by Appellant.¹²

C. Appellant's FY 1996 Is Subject to the Applicable Statute of Limitations

Appellant argues that the CDA Statute of Limitations does not apply to its FY 1996 claim because the original contract (Contract No. 243-95-6001) was “awarded on April 4, 1995, almost six months before the October 1 effective date” and “the [annual funding agreement] AFA was executed and became binding on September 28, 1995.” (Appellant's Response at 12).

1. The Government's Contractual Obligation is Based on the Terms of the Annual Funding Agreements, and Not on the Duration of the Multi-Year Contract

Appellant's argument that the April 4, 1995, date determines the applicability of the statute of limitations must fail because the government's contractual obligation for FY 1996 derives from the AFA for that year. Therefore, a claim for any particular year under a multi-year contract must look to the terms of the AFA for that year.

This concept has been applied in the context of accrual under both the “continuing claims doctrine” and the rules governing accrual in installment contracts. Under the continuing claims doctrine, where performance under a contract “was to be carried out over a period of years,” violations of the contracts are considered “a series of actionable wrongs.” Mitchell v. United States, 10 Cl. Ct. 63, 75, 76 (1986). As such, the limitations period for each suit would be controlled by each of the actionable wrongs, rather than by the entire duration of the contract. Id.

three years after class certification was denied.

¹² Most of the hundreds of CDA claims that have been submitted to the Appellee are a similar template that uses the shortfall report as the basis for its claim. It should also be noted that the shortfall report is not an accurate assessment of the expenses incurred by Appellant and a better tool to use would be the annual audits.

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at 75. See also, Apache Tribe of Mescalero Reservation v. United States, 43 Fed. Cl. 155 (1999) (citing Brown Park Estates v. United States, 127 F.3d 1449 (Fed. Cir. 1997), to conclude that the use of AFAs with a multiple year-contract renders the contract “inherently susceptible to being broken down into a series of independent and distinctive events or wrongs, each having its own damages”).

Similarly, the standard rule for accrual in installment contracts is that “‘a new cause of action,’ carrying its own limitations period, ‘arises from the date each payment is missed.’” Bay Area Laundry v. Ferbar Corp., 522 U.S. 192, 208 (1997) (adopting the rule of the Third Circuit, as applied in Bd. Of Trustees of the Dist. No. 15 Machinists’ Pension Fund v. Kahle Eng. Corp., 43 F.3d. 852, 857 (1994)). See also CORBIN ON CONTRACTS, § 951 (1951). Thus, the statute of limitations is specific to each installment due under a contract rather than to the entire duration of the contract. Kahle Eng. Corp., 43 F.3d at 858 (relying on CORBIN ON CONTRACTS, § 989).

Similarly, the AFAs and annual appropriations establish that the ISDA contracts are funded and paid on an annual basis. As a result, analysis of a claim under the CDA for an ISDA contract violation must consider the duration of the corresponding AFA, rather than the full contract term. This principle applies not only to the accrual date of a claim under the contract, but also to determine whether the statute of limitations that became effective on October 1, 1995, will apply to the AFA for FY 1996. As a result, April 5, 1995, does not determine the applicability of the statute of limitations to Appellant’s FY 1996 AFA. Instead, the effective date of the FY 1996 AFA will determine the applicability of the statute of limitations.

2. Appellant’s Annual Funding Agreement was Not Effective Until October 1, 1995

Appellant claims that the AFA was “binding on September 28, 1995.” Appellant’s Response at 12. Although the parties signed the FY 1996 AFA on that date, the AFA contained an effective date of October 1, 1995. Appeal File at (8)(3).

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

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. A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1032 (Fed. Cir. 1992). The general rule is that laches is an equitable doctrine that must be considered in light of the facts of each case. Cornetta v. United States, 851 F.2d 1372, 1379 (Fed. Cir. 1988). The defense of laches requires a showing of (1) unreasonable and inexcusable delay by the claimant, and (b) prejudice to the defendant such as the inability to mount a defense. Id. at 1377-78. 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).

Contrary to Appellant’s assertion (Appellant’s Response at 17), IHS is not arguing that the six-year limitation provision should have retroactive effect. Instead, IHS is arguing that the provision may be used as a guideline or reference of what constitutes unreasonable delay under laches. A court must look at all of the particular facts and circumstances of each case when considering the application of laches. Aukerman, 960 F.2d at 1032. The enactment of the six-year limitation period and the policy behind the enactment are facts and circumstances that the court may consider. The addition of a six-year limitation period to the CDA demonstrates congressional policy against delay in filing government contract claims. Aero Union v. United States, 47 Fed. Cl. 677, 686 (Ct. Fed. Cl. 2000).

A. Appellant Unreasonably and Inexcusably Delayed Filing Its FY 1995 Claim

Appellant's eight-year delay in bringing its FY 1995 claim to a contracting officer is unreasonable and inexcusable. Appellant did not simply delay in filing its claim, for eight years Appellant did not put IHS on notice that it was filing (or even considering) a claim. Appellant argues that its basis for legal and equitable tolling equally applies to any claims of laches. As described in section I of this Reply, Appellants' legal and equitable tolling arguments do not excuse Appellant's failure to timely present its claims to the contracting officer.

On September 30, 1995, the final day of the FY 1995 contract, Appellant knew or should have known that it did not receive what it considered to be 100% funding for CSC. However, Appellant failed to file its FY 1995 or any of its other claims to a contracting officer until the middle of 2005. Under these set of facts, there is sufficient evidence of unreasonable delay in the pursuit of Appellant's FY 1995 claim.

B. IHS was Prejudiced by the Appellant's Unreasonable Delay in Filing its FY 1995 Claim

Appellant's unreasonable delay prejudiced IHS's ability to mount a defense. "Defense prejudice" includes loss of records, destruction of evidence, fading memories, or unavailability of witnesses. Corretta, 851 F.2d at 1378. Appellant claims that this case "does not rely on witness testimony or other evidence that becomes more unreliable over time." (Appellant's Response at 16). That is simply not true.

To the contrary, the parties have had a difficult time: locating all of the relevant documentation surrounding Appellant's numerous claims for CSC; figuring out exactly how Appellant's queue requests were processed; and explaining the confusion surrounding

Appellant's FY 1999 claim (for start-up costs from FY 1997) submitted to the Appellee.¹³

Appellant ignores the fact that in this case, the passage of time has affected the Agency's (and Appellant's) ability to locate all relevant documents.

Contrary to Appellant's contention that Appellee is not prejudiced, the unreasonable passage of time has impacted the potential witness testimony. Mr. Gerald Ivey, the Area Director, retired in January 1997 and Dr. David Schrarer was Acting Area Director for a year but he retired in April 2000. Also, the Senior Contracting Officer, Ms. Deborah Segelhorst, retired in 2004 and Dr. Schrarer also was the Area Lead Negotiator in 1997 and 1998, and as stated above, he retired in 2000.

Additionally, witness testimony is relevant in this case because Appellee has incomplete information for FY 1997 and FY 1998 because the compact agreements relevant to these years were serviced at the Office of Tribal Self-Governance at IHS Headquarters and is incomplete and this is exactly the type of issues that witness testimony can help explain.

III. THE 1998 APPROPRIATIONS CAP BARS PAYMENT OF ADDITIONAL CSC

Appellant's argument that, notwithstanding the appropriation cap, it has a contract right to additional funds in FY 1998 and FY 1999 is an exercise in bootstrapping, unsupported by the statute or the contracts themselves. Appellant had no entitlement under either the ISDA or its contract or the IHS Circulars to anything more than its proportional share of funds under the cap, which it received.

¹³ It should be noted that Appellant's CDA claims were submitted with no supporting documentation to assist with understanding how some of its calculations were reached.

Appellant's contract does not provide for retroactive adjustment of funds. The underlying IHS policy speaks only to funding provided from one fiscal year to the next out of the IHS appropriation, not damage awards. For example, in defining "recurring funding," IHS Circular 96-04 makes clear that "[a]nnual increases are provided through congressional mandatory increases or other resource allocation methodologies applicable to the respective funding category of the award," (Appeal File at (30)(2)) or, in other words, are recurring based on the actual funds IHS receives through the appropriation process.

For this case, the Circular's discussions of how funding is distributed in years following a program assumption are particularly pertinent, because Appellant's argument is premised on a damage award for its queue requests in FY 1997 or 1998. The Circular does not speak to an entitlement to funding on a year to year basis, but instead cautions the IHS Area Offices not to reduce the funding they award a tribe from within the Area's recurring allocation. See Appeal File at (30)(13)¹⁴

In making the distribution of these appropriated IHS funds, the circular anticipates that not all tribes will be fully funded. Id. Thus, the so-called "stable funding rule" is simply a caution not to rob Peter to pay Paul, where neither is funded at 100% of need. There is no promise or duty to take potential damage awards from ten years in the future into account. Such

¹⁴ The Circular provides:

The amount of indirect contract support funds representing the previous year's base will be distributed to Areas as "recurring" to fund each Area's indirect cost need. Each awardee's need for indirect CSC shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If the funds available in the Area's indirect cost base are not adequate to meet all awardee's requirements, then the amount available shall be distributed according to each awardee's proportion of total need, except that prior year funds should not be reduced if justified as described below. These funds will be awarded to the contractor as non-recurring funds.

a requirement would be unreasonable, and would adversely affect the funds each area had available to pay the other contracting tribes, especially in this year, when there was a statutory cap on the total amount of contract support costs to be awarded.

Appellant's reliance on the prohibition on reducing contract funding in subsequent years in 25 U.S.C. 450j-1(b)(2) is equally unavailing. This provision does not mandate the recurring application of damages awarded nine years after the fact. Damage awards are substitute relief, not contract funding. See, e.g., Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) ("Our cases have long recognized the distinction between an action at law for damages--which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation--and an equitable action for specific relief--which may include an order providing for the reinstatement of an employee with backpay, or for the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.") (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949)). And, as a practical matter, Appellee simply cannot go back and readjust funding under a capped appropriation eight or nine years later.

But Appellant's argument would fail even if we did accept that its FY 1997 funding amount should have been increased because IHS had a lump sum appropriation, and if we accept the premise that this increased amount was the pertinent amount under 25 U.S.C. 450j-1(b)(2). In FY 1997, according to Cherokee (and Appellant), IHS had approximately \$1.4 billion legally available for CSC awards. In FY 1998, Appellant concedes that the amount of funds available for ongoing program amounts was \$168,702,000. Therefore, in FY 1998, contract support cost funding falls within the exception to 450j-1(b)(2) for "a reduction in appropriations from the

previous fiscal year for the program or function to be contracted.” 25 U.S.C. 450j-1(b)(2)(A). Given this “reduction,” IHS would have been within its rights to reduce the amount of funds provided to Appellant in FY 1998.

Appellant’s reliance on the Board’s decision in Appeals of the Mississippi Band of Choctaw Indians¹⁵ is misplaced. Appellant’s Reponse at 33. First, the Board’s decision is expressly confined to its facts. In Choctaw, both parties agreed that there was a breach of contract but disputed whether there was a remedy when the funds were to be paid from a capped appropriation. Id. In this case, the parties dispute whether there was a breach of contract. IHS contends it paid everything due and Appellant contends that it was entitled to more. This case thus falls squarely within Oglala.¹⁶

If we accept Appellant’s arguments, it would have been paid from the capped, recurring funds, not the Indian Self-Determination (“ISD”) fund, because Appellant would have received its “ISD” funding in FY 1996. As discussed above, there was no duty to make payment from these funds. Moreover, the ISD fund was part of the overall CSC cap of \$168 million. The cap language reads “Provided further, 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 entered into with the Indian Health Service prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended.” Department of the Interior and Related Agencies Appropriation Act, 1998, Pub. L. No. 105-83 (1997), 111 Stat.

¹⁵ Appeals of the Mississippi Board of Choctaw Indians, IBCA No. 4711, 2006 WL 1009210 (IBCA, 2006).

¹⁶ Babbitt v. Oglala Sioux Tribal Pub. Safety Dept., 194 F.3d 1374 (Fed. Cir. 1999).
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1543, 1582. The ISD fund language is earlier in the paragraph, and states that “of the funds provided, \$7,500,000 shall remain available until expended for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts ... under the Indian Self-Determination Act.” Id. Thus, of the \$168,702,000, \$7,500,000 was earmarked for the ISD fund, and remained available for obligation longer.

Appellant argues that the ISD fund is not included within the statutory cap because the statutory cap speaks to agreements “entered into prior to fiscal year 1998.” However, the “prior to fiscal year 1998” language merely reflects that tribes and IHS frequently negotiate annual funding agreements and contract expansions before the beginning of the fiscal year. See, e.g., 25 U.S.C. 4501(c), Model Agreement section (b)(14) (requiring renewal negotiations no later than 120 days prior to the conclusion of the preceding annual funding agreement). At best, the appropriation act language is ambiguous, and the legislative history makes clear that the ISD fund is included within the statutory cap. See H.R. Rep. 105-163 at 103 (1997) (chart showing total amount of \$168,702,000 for contract support costs within the total IHS appropriation, ISD fund is not listed elsewhere), 104 (recommending \$168,720,000 for contract support costs, including the ISD Fund and \$500,000 transferred from the Facilities account). Since all CSC funds were subject to the Congressionally-imposed cap on CSC in FY 1998, Appellant is not entitled to additional CSC under the Tribe’s FY 1998 or FY 1999 contract.

Finally, Appellant concedes that a CDA claim for unpaid ISD funding: \$88,845 in startup costs and \$44,033 in other CSC associated with the assumption of tribal shares was denied by Appellee in April 2000 and was not appealed. Appellant’s Response at 35-36. Notwithstanding this FY 1999 claim, Appellee reiterates its position that Appellant’s FY 1998 and FY 1999

claims are barred by the Congressionally-imposed cap on CSC spending. See Appellee's Motion to Dismiss at 18-20 and section III, above.

CONCLUSION

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 November, 2006.

Respectfully submitted,

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