

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PUEBLO of ZUNI,)	
)	
Plaintiff,)	
)	
v.)	No. CIV 01-1046 WJ/WPL
)	
UNITED STATES of AMERICA;)	
MICHAEL O. LEAVITT, Secretary of the)	
United States Department of Health and)	
Human Services; and CHARLES W. GRIM,)	
Director of the Indian Health Service,)	
United States Department of Health and)	
Human Services,)	
)	
Defendants.)	

**DEFENDANTS’ REPLY TO PLAINTIFF’S OPPOSITION
TO DEFENDANTS’ MOTION TO DISMISS IN PART**

INTRODUCTION

A simple statutory concept—federal courts lack jurisdiction to review Contract Dispute Act (“CDA”) claims not presented to federal contracting officers in the first instance—inspired a 24-page Opposition containing a catalog of excuses why the Pueblo of Zuni did not present its claims to the Indian Health Service (“IHS”) before filing suit. After full briefing of Defendants’ Motion, there remains no dispute that Zuni presented only thirty (30) specific claims to IHS for a total of \$339,933 in contract damages and no more. It is only over these claims that the Court has subject matter jurisdiction.

As is required by the Indian Self-Determination and Education Assistance Act (“ISDA”) and the CDA, each of the 30 claims that Plaintiff presented notified IHS of the amount that Plaintiff

believed IHS should have awarded to it under a specific ISDA contract, the amount it asserted IHS awarded, and the difference between the two amounts. No two claims were the same; each involved either a different legal theory, a different program under contract, a different indirect cost rate, or a different fiscal year award. Nonetheless, Zuni seeks to litigate in this Court additional claims that it has not presented to IHS, in unknown amounts, under unknown contracts, for unknown fiscal years. In contrast to the specificity Zuni provided in the claims that were presented, the claims in the First Amended Complaint are vague, unlimited in amount, and appear to reach far into the future, perhaps even to contracts not yet executed. The ISDA and the CDA require a much greater degree of specificity from litigating contractors and under no circumstances permit a contract dispute to be a constantly moving target. All claims that Plaintiff did not first present to IHS must be dismissed from this lawsuit.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION TO DECIDE ANY CLAIM NOT TIMELY PRESENTED TO THE INDIAN HEALTH SERVICE.

The CDA, which is incorporated into the ISDA at 25 U.S.C. §§ 450m-1(a), (d) for all claims for monetary relief, requires government contractors to present their contract claims to government contracting officers. See 41 U.S.C. § 605(a). 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, 614-15 (1990); Mendenhall v. United States, 20 Cl. Ct. 78, 82-83 (1990); Thoen v. United States, 765 F.2d 1110, 1116 (Fed. Cir. 1985); Tunica-Biloxi Tribe v. United States,

No. 02-2413, slip op. at 8-10 (D.D.C. 2003) (as amended Jan. 20, 2004) (attached as Exh. E to Defs.’ Mot.).

Congress was explicit about limiting the waiver of sovereign immunity in the ISDA to claims properly presented under the CDA. There are no exceptions to this requirement. (Defs.’ Mem. at 14-17, citing cases.) CDA exhaustion was not created by courts to allow federal agencies an opportunity to settle claims or prepare administrative records, it was mandated by Congress. See id.; see also Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004) (explaining the difference between jurisdictional and prudential exhaustion). It is for this reason that Plaintiff’s Opposition, full of arguments about why this Court should recognize exceptions to CDA presentment that are not recognized in the law, must fail.

Due to perhaps inartful drafting of the Complaint, it is more straightforward to describe those claims properly before this Court than to delineate those that are not. Plaintiff presented 30 claims to IHS in April and September 2001 for a total amount of \$339,933. These 30 claims arise under 22 different ISDA agreements. See Chart on pages 9-10 of Defs.’ Mem. Twenty-two of Zuni’s claims arise under 22 different ISDA agreements in effect between 1993 and 1998, and for these claims, Zuni alleges that, in each year and under each ISDA agreement, IHS should have awarded indirect contract support costs (“CSC”) by calculating the contract’s direct program base funding and multiplying that amount by Zuni’s indirect cost rate in effect in that year (referred to as “Claim One” herein and in Defs.’ Mot.). The remaining eight claims arise under eight of the original 22 ISDA agreements in effect between 1993 and 1995, and for these claims, Zuni alleges that IHS should have awarded indirect CSC only after first upwardly adjusting Zuni’s indirect cost rate in effect in that

year to account for the alleged underpayment of indirect CSC in connection with other, non-ISDA (and non-IHS) federal contracts (referred to as “Claim Two” herein and in Defs.’ Mot.). It is over these claims that the Court has subject matter jurisdiction.

In contrast, the First Amended Complaint alleges seven causes of action. The first and second causes of action involve the same legal theory as that presented in Claim Two, but purport to involve claims from 1993 to 2001.¹ (Am. Compl. ¶¶ 66-73.) The first cause of action alleges that Defendants violated the ISDA in its failure to adjust indirect cost rates as described above, and the second cause of action alleges that Defendants breached Zuni’s contracts in failing to adjust the indirect cost rates. See id. The third, fourth, fifth, and sixth causes of action involve the same legal theory that was presented as Claim One, but involve fiscal years 1993 to 2001. (Am. Compl. ¶¶ 74-87.) The third and fifth causes of action involve alleged statutory violations and the fourth and sixth involve contractual claims. See id. The seventh cause of action is for declaratory relief and is not relevant to this Motion. Defendants’ Motion seeks to limit the first and second causes of action to the eight specific claims presented by Zuni in September 2001, and the third, fourth, fifth, and sixth causes of action to the 22 specific claims presented by Zuni in April 2001.²

¹ The Complaint uses the term “to the present,” but it cannot possibly (or ethically) extend to years and circumstances unknown at the time it was signed and filed (December 2001).

² Plaintiff states that Defendants have not moved to dismiss its “statutory causes of action,” *i.e.*, the first, third, and fifth causes of action, and attempts to draw a distinction between these causes of action and the contractual causes of action. (Opp. at 6-7 & n.5.) But a quick review of the claims asserted and the relief sought in the Complaint demonstrate that there is no such distinction. Plaintiff is a party to ISDA contracts and is seeking to adjudicate the meaning of the contract terms, whether they were breached, and whether Plaintiff is entitled to monetary relief flowing from any alleged breaches. (Am. Compl. ¶ 1.) Plaintiff’s contention that ISDA itself provides a “statutory cause of action” for monetary relief flowing from contractual breach is based upon a fundamental misunderstanding of the statute and the waiver of sovereign immunity

Not only is the dismissal of these claims mandatory, it serves the purpose of presentment: it allows IHS to learn of potential contract disputes in the first instance, it gives IHS an opportunity to resolve its contract disputes without litigation, and, at the very least, it allows IHS and the tribal contractor an opportunity to narrow and/or clarify issues needing judicial resolution. See SMS Data, 19 Cl. Ct. at 614-16. ISDA contracts, like all contracts, are negotiated between two parties, are in effect for a limited period of time, and involve funding specific to the programs or services under contract. See 25 U.S.C. §§ 450f, 450j(c), 450j-1(a), 450l(a)(2). Consequently, every claim of breach of an ISDA contract is necessarily individualized. Each claim may also give rise to specific legal defenses that apply to it alone (e.g., failure to present, release, accord and satisfaction).³ The individualized nature of breach claims highlights the particular need for presentment in the context of contract disputes.

therein. Unless certain exceptions apply, the ISDA directs both the Secretary of HHS and the Secretary of the Department of the Interior, upon the request of an Indian tribe, to enter into self-determination contracts. See id. § 450f(a)(1); id. § 450b(i). Other provisions describe what law applies to these contracts and what should be included therein. See id. § 450j-1(a). No provision provides the actual amount of funding that must be included; the actual amounts to be included in any ISDA agreement are the subject of negotiations between IHS and each tribal contractor. See id. §§ 450j-1(a)(3)(B), 450l(a)(2). It is thus the negotiated agreement itself, and the terms and conditions therein, and not the statute, that may create a particularized right to monetary relief if breached. See generally Cherokee Nation v. Leavitt, 125 S. Ct. 1172, 1177 (2005). This is made clear by the direction in the ISDA that the CDA applies to all claims by contractors against the government for monetary relief. See 25 U.S.C. §§ 450m-1(a), (d). In sum, Plaintiff's first, third, and fifth causes of action have no meaning independent of the second, fourth, and six causes of action. There is simply no free-standing "statutory claim" for monetary relief based on contractual breach.

³ For example, Plaintiff executed "contractual releases" with the government that released the government from all claims arising under eight of the ISDA agreements that it now alleges were breached. These releases bar these eight claims, but do not bar any other claims.

II. NONE OF THE PURPORTED EXCEPTIONS TO CDA PRESENTMENT RAISED BY PLAINTIFF ARE BASED IN LAW.

Plaintiff's Opposition contains a host of excuses why Zuni seeks to adjudicate claims in this lawsuit that were not properly and timely presented to IHS. Zuni's excuses range from arguing that it is not required to present its claims, that it has already presented its claims, and that it still may present its claims. Notwithstanding that these arguments contradict one another, each must be rejected.

A. A Contractor's Future Intention to File Additional Claims Does Not Excuse CDA Presentment.

Plaintiff first asserts that Defendants' Motion should be denied because Plaintiff may still file additional CDA claims. (Opp. at 5-6.) But whether a government contractor such as Zuni desires to file additional CDA claims in the future has absolutely no bearing on whether CDA presentment has been satisfied in this lawsuit as currently pled. The Court may assert jurisdiction only over the 30 specific claims that have been properly and timely presented to IHS for a sum total of \$339,933. See 41 U.S.C. § 605(a); James M. Ellett Constr., 93 F.3d at 1541-42. Because Zuni has presented only 30 claims under 22 ISDA agreements in effect in fiscal years between 1993 and 1998, and has presented only claims involving Claim Two for a few agreements in effect in 1993-1995, all other claims must be dismissed.

To argue, as Plaintiff does, that its Complaint may stand open for future, anticipatory events, is nonsensical. Such a contention turns Article III case and controversy requirements requiring concrete and particularized injury upside down. Instead, the law provides that if Zuni believes it has suffered additional breaches and incurred additional damages, it must properly and timely present

these claims to IHS. See 41 U.S.C. § 605(a). If the claims have merit, IHS will resolve them, and the courts will never have to. By this Motion, Defendants are not asking the Court to adjudicate the merits of, or issue an advisory opinion on, any future, hypothetical claims that Zuni may someday raise. The effect of an Order granting this Motion would be only that claims not properly presented must await their adjudication for another day.

Although Defendants do not move for the adjudication of any claim not properly presented, it appears that most potential claims that Zuni might theoretically present at some future date under fiscal year 1996-1998 ISDA agreements would be barred as untimely under the CDA's six-year administrative statute of limitation. See 41 U.S.C. § 605(a). This administrative statute of limitation conditions the waiver of sovereign immunity in both the ISDA and the CDA and thus, like the presentment requirement, limits the extent of a court's jurisdiction. See SMS Data, 19 Cl. Ct. at 615.

Plaintiff spends a great deal of its Opposition arguing that the administrative statute of limitations applicable to its claims was tolled upon the filing of this putative class action complaint and the putative class action complaint in Tunica-Biloxi Tribe v. United States, No. 02-2413 (D.D.C.). (Opp. at 16-20.) Whether and to what extent tolling applies to any specific claim should await the actual submission of a CDA claim, IHS's analysis of that claim, and an actual case or controversy regarding its timely submission.⁴

⁴ Administrative tolling is not a recognized exception to CDA presentment. Prior to 1992, the Court of Claims held that equitable tolling doctrines did not apply to the time limits in the CDA. See Computer Prods. Int'l, Inc. v. United States, 26 Cl. Ct. 518, 525 (1992); Krueger v. United States, 26 Cl. Ct. 841, 844 (1992); Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991); Gregory Lumber Co. v. United States, 229 Ct. Cl. 762 (1982). Since the Supreme Court's decision in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990), which held that equitable tolling may in very limited circumstances apply to toll statutes of limitation applicable to claims against the United States, the Federal Circuit has not reversed

B. The Assertion of “Similar” Claims Does Not Excuse CDA Presentment.

Zuni next asserts that its 22 claims filed in April 2001 were “omnibus claims” covering any claim for breach related to CSC funding under any of the 22 ISDA agreements claimed to have been breached. (Opp. at 8-11.) Zuni makes this argument notwithstanding the fact that five months later, it submitted eight CDA additional claims, based on a new legal theory and with a new amount claimed to be owed for CSC. Zuni’s argument today is belied by its earlier actions.

Moreover, the case law under the CDA uniformly rejects attempts by government contractors to expand their claims once in federal court. All claims must be presented to the appropriate contracting officer, see 41 U.S.C. § 605(a), and the contours of a “claim” are determined by reference to the underlying operative facts and the policies behind the presentment requirement, i.e., 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 614-15. In Foley Co. v. United States, the court reiterated that the contracting officer must be made aware of the “‘basis and amount of the claim.’” 26 Cl. Ct. 936, 945 (1992) (quoting Contract Cleaning Maint. Inc v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987)); see also Hawkins & Powers Aviation, Inc. v. United States, 46 Fed. Cl. 238, 243 (2000) (same).

Under these authorities, it is clear that for purposes of contract disputes arising under ISDA

course, but has held that even if the CDA’s time limits could be tolled, the facts of the particular case before it did not merit tolling. See, e.g., Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1238-39 (Fed. Cir. 2002) (finding no duress or coercion on the part of the government to warrant consideration of equitable tolling); Bonneville Assocs., Ltd. P’ship v. Barram, 165 F.3d 1360, 1365 (Fed. Cir. 1999) (finding consideration of equitable tolling unwarranted because claimant failed to protect his rights and there was no government misconduct). Thus, even were tolling to apply to the CDA’s administrative statute of limitations, it would only be warranted under limited circumstances not present here.

agreements, a “claim” is limited to an allegation of breach of a specific contract for a particular amount (e.g., a specific contract term provided for the payment of \$300,000 that was not paid). This is because each basis, or legal theory, underlying a claim of breach of an ISDA agreement “involves a set of operative facts sufficiently distinct” from each other, such that “denial of [one] would not necessarily preclude recovery on the other.” Johnson Controls World Servs., Inc. v. United States, 43 Fed. Cl. 589, 593 (1999). For example, Zuni’s allegation that IHS was required to adjust its annual indirect cost rate requires an examination of the costs of a particular set of programs Zuni operated in any one year and the particular indirect costs incurred or expected to be incurred in that year. The amount of the alleged adjustment would be different in every single year and would yield a different amount allegedly due under each ISDA agreement.

This same conclusion about the meaning of a “claim” under the ISDA was reached by the court in Tunica-Biloxi Tribe, which held that certain ISDA claims not presented to IHS by two tribal contractors had to be dismissed from the federal court lawsuit. See Mem. Opin. at 11-15 (attached as Exh. E to Defs.’ Mot.). The court held that a “claim” involved allegations of breach under one legal theory, under one contract, in one fiscal year. See id. at 13-14.

Plaintiff attempts to argue around this well-established law by citing snippets of cases where courts have considered “enlarged” claims. (Opp. at nn.7, 8, citing cases.) But none of the cases cited by Plaintiff stand for a proposition other than that all claims must first be presented to a government contracting officer, and the claim must state its basis and the amount claimed. They also stand for the uncontroversial proposition that when the government contractor makes an error in calculating damages or otherwise learns of a fact that would increase the claimed damages by a certain amount,

the contractor can “enlarge” the damage amount once in district court and need not go back through the agency administrative process. Not even the most contorted reading of these cases could eke out the proposition for which Zuni cites them, i.e., that Zuni can simply skip the CDA presentment process entirely and litigate in federal court new claims of breach under different contracts or in different funding years.

C. Futility Does Not Excuse CDA Presentment.

Plaintiff next argues that it (and other tribal contractors) need not present CDA claims at all, because doing so would be futile. (Opp. at 6, 12-13.) As a matter of law, futility is not an exception to CDA exhaustion. See, e.g., Thoen, 765 F.2d at 1116 (rejecting contractor’s argument that presentment could be excused because submission of CDA claim would be futile); 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); Made in the U.S.A. Found. v. United States, 51 Fed. Cl. 252, 255-56 (2001) (refusing to excuse on futility grounds the failure to present a claim).

As a factual matter, tribal contractors have presented CDA claims for years and continue to do so to this day, demonstrating the lack of futility. See, e.g., Cherokee Nation, 125 S. Ct. at 1176-77 (reciting the fact that the plaintiffs had presented their ISDA claims to an IHS contracting officer pursuant to the CDA). These contractors’ claims have met the full range of responses. As the class discovery has disclosed, many were denied on the basis of insufficient appropriations; some were “deemed denied” because IHS did not respond within the 60-day time period provided in the CDA; and others were settled or resolved. Of those that were denied, some contractors never sought further

review and other contractors, like Cherokee Nation and the Shoshone-Paiute Tribe of the Duck Valley, took their CDA claims to the Supreme Court. Even assuming, arguendo, that futility could possibly excuse CDA presentment, Plaintiff would have to come forward with factual support to controvert the fact that CDA presentment is not and has never been futile. See Honig v. Doe, 484 U.S. 305, 327 (1988) (holding that burden of demonstrating futility rests with the party making claim). Under no circumstances should the Court accept Plaintiff's bare and easily controverted assertions.

An additional point of clarification is necessary here. Plaintiff discusses at various points in its Opposition that it is challenging in this lawsuit "an IHS circular-based policy."⁵ (Opp. at 2, 11 n.8.) Plaintiff argues that since it seeks to challenge an agency-wide policy and make systemwide reforms, presentment would be futile because IHS has taken the position that its policy is consistent with law. (Opp. at 13.) But Plaintiff's apparent logic falls apart when the true nature of its claims is revealed. Zuni's claims are decidedly for monetary relief arising out of its ISDA contracts. (Am. Compl. Prayer for Relief at 37-38.) Zuni's claims do not arise out of an agency-wide policy—in fact, there is no agency policy related to CSC that is independently binding on Zuni or from which contract damages would flow. It is only the actual ISDA agreements that provide a means to obtain contract funding such as CSC, and only the CDA that provides a means by which a tribal contractor

⁵ Plaintiff also badly mischaracterizes the Supreme Court's decision in Cherokee Nation v. Leavitt, 125 S. Ct. 1172 (2005), as having "struck down the circular-based policy IHS employed in the 1990s and awarded damages to two of the affected Tribes." (Opp. at 2.) The Supreme Court said absolutely nothing about "circular-based policies" and instead reviewed whether the two ISDA agreements before it were binding contracts. See 125 S. Ct. at 1177-82. Concluding that they were, the Court held that IHS could not defend against breach of these contracts on the basis of insufficient appropriations in years in which Congress had appropriated a lump-sum appropriation that was legally available to pay CSC. See id. at 1181.

can seek monetary relief under the ISDA. See 25 U.S.C. §§ 450j-1, 450l, 450m-1(a), (d); see also n.2. When monetary relief is sought, the need for strict adherence to presentment requirements is heightened; the defending agency must know the specific amounts at issue in a lawsuit in order to make proper assessments of the claims and defenses and whether to pay, settle, or litigate the claims. Presentment is not futile in this context.

That presentment is (or was) not futile underlies both Defendants' respectful disagreement with Judge Hansen's unpublished class certification order in Ramah Navajo Chapter v. Lujan, No. 90-957 (D.N.M. 1993), which, in Defendants' view, was error and has since been implicitly overruled by the Supreme Court, see Defs.' Mem. at 14-15, and also distinguishes that Order from the circumstances presented here. In certifying a class of Bureau of Indian Affairs ("BIA") contractors without requiring each class member to administratively exhaust their claims under the CDA, Judge Hansen recited the fact that contractors in Ramah were challenging the policies and practices of BIA and sought to make systemwide reforms. See Ramah, slip op. at 4 (attached as Exh. F to Defs.' Mot.). Here, there is no policy or practice to challenge that is binding on Zuni independent of the terms of the contracts themselves.

D. Reliance Does Not Excuse CDA Presentment.

Finally, Plaintiff posits, without any factual support, that Zuni (and other tribal contractors) failed to present CDA claims because Zuni (and other tribal contractors) relied upon the 1993 class certification Order in Ramah. (Opp. at 8, 20.) This excuse also must be rejected. The only tribal contractor before the Court at this time is the Pueblo of Zuni. Therefore, the only claims to which this Motion reaches are Zuni's. A class has not been certified, and the Court need not and should

not bind absent contractors with any of its rulings. This also means that what any other contractor did or did not do with their alleged breach claims is not before the Court.⁶ With respect to Zuni, it cannot be said that Zuni “relied” upon the Ramah Order because Zuni did, in fact, present CDA claims. No further consideration of this argument is merited.

Moreover, claimed reliance by government contractors of this sort is not an exception to CDA presentment, and Plaintiff cites no case that so holds. It also would have been entirely unreasonable for tribal contractors to refrain from pursuing their own actions because in 2001, a federal district court, in a published decision, definitively and finally rejected a motion for class certification pursued on behalf of a class of IHS tribal contractors almost identical to the class action filed here. See Cherokee Nation v. United States, 199 F.R.D. 357, 366 (E.D. Okla. 2001). The court specifically held, inter alia, that the types of claims asserted by tribal contractors for the underfunding of CSC lacked sufficient commonality under Federal Rule of Civil Procedure 23 to warrant class treatment. See id. at 363. As the court explained:

To determine entitlement to ‘full’ contract support costs, a detailed examination into the contracts of each plaintiff for each year with the defendant would be required. The court believes the individualized nature of the contracts in question would

⁶ Because no other tribal contractors are before the Court or the subject of Defendants’ Motion, Plaintiff’s arguments about whether putative class members must also present their CDA claims, (Opp. at 14-20 & n.10), is not before the Court at this time. Thus, Defendants state only that they seriously disagree with Plaintiff’s characterizations of the decisions that Plaintiff cites in support of the proposition that putative class members are excused from CDA presentment. For example, Plaintiff compares CDA presentment to the presentment requirements under the Social Security Act (“SSA”). (Opp. at 14 n.10.) While there are many distinguishing factors between these two statutes, what the cases arising under the SSA provide is that the presentment requirement--the request for benefits--cannot be waived under any circumstances. See Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 15 (2000); Heckler v. Ringer, 466 U.S. 602, 615 (1984). The only Supreme Court case cited by Plaintiff, Bowen v. City of New York, 476 U.S. 467 (1986), is not to the contrary.

necessarily lead to individualized claims of each tribe in respect to shortfalls. This examination would develop into a set of mini-trials which would defeat the judicial efficiency which a class action is designed to promote.

Id. This decision was not challenged on appeal and remains good law. In 2003, another decision in an ISDA putative class action involving CSC only reinforced the clear and established law that CDA presentment is a jurisdictional prerequisite to pursuing monetary relief against IHS in federal court. See Tunica-Biloxi Tribe, slip op. at 10-17.

It also bears mentioning that ISDA contractors are not strangers to the terms of their own contracts and the amounts they are awarded by IHS. The entire underpinning of ISDA is that tribal contractors know what is best for their members and their communities and thus have been given large sums of federal funds to administer federal programs previously administered by the federal government. See 25 U.S.C. §§ 450, 450a. Tribal contractors are responsible for negotiating their ISDA contracts, have a great deal of discretion over the federal funds they are awarded, and are responsible for contract administration and reporting. See id. §§ 450c, 450j, 450j-1(a)(3)(B), 450l. There is no reason for excusing tribal contractors from the ultimate responsibility for timely asserting any contract disputes that they may have. The suggestion that Zuni (or any other ISDA contractor) is not capable of understanding the CDA and its explicit presentment requirements is unreasonable and incorrect. In fact, Plaintiff's Opposition cited various ISDA cases at pages 3-4 and footnote 2, amply demonstrating that tribal contractors are more than capable of understanding and adhering to the procedures that are prerequisites to filing suit.

III. THE COURT SHOULD RULE ON THIS MOTION AS A THRESHOLD MATTER.

At the very end of its Opposition, Plaintiff suggests that this Court should hold Defendants' Motion in abeyance pending a ruling on class certification. (Opp. at 21-24.) As explained above, the extent of CDA presentment by a contractor governs the extent of a reviewing court's subject matter jurisdiction. See James M. Ellett Constr., 93 F.3d at 1541-42. Thus, a Motion to Dismiss for failure to present is a proper Rule 12(b)(1) motion to dismiss 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). "Without jurisdiction the court cannot proceed at all in any cause." Id.

Plaintiff's assertion, never explained, that Defendants' Motion is intertwined with the merits of this action (Opp. at 21 n.13) is simply false. Whether a government contractor has properly and timely presented its claims is not in any way an issue that goes to the merits of a breach claim. Moreover, this Motion does not address class issues, but only whether the Court has jurisdiction over the only claims before it at this time, those of the Pueblo of Zuni. The Court should rule on this Motion as a threshold matter.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Opening Memorandum, Defendants' Motion to Dismiss in Part Should Be Granted and all claims except the 30 specific claims, totaling \$339,933, already presented to IHS should be dismissed from this lawsuit.

Respectfully submitted,

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Dated: September 30, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2005, I sent, via electronic mail, a copy of Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss in Part, addressed to:

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