IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF ATHABASCAN TRIBAL GOVERNMENTS, Plaintiff, v. UNITED STATES OF AMERICA; MICHAEL O. LEAVITT, Secretary of the Department of Health and Human Services; and ROBERT G. McSWAIN, Acting Director, Indian Health Service; Defendants.	)	Civil Action No. 07-1270 (RWR)

DEFENDANTS' MOTION TO DISMISS
OR IN THE ALTERNATIVE FOR MOTION FOR SUMMARY JUDGMENT

Defendants hereby move to dismiss Plaintiff's Complaint, pursuant to Rule 12(b)(1) and 12(b)(6), because the Court lacks subject matter jurisdiction over one of the claims and, for all claims, the facts alleged in the complaint and attachments thereto establish that Plaintiff's claims fail as a matter of law. Alternatively, Defendants move for summary judgment pursuant to Rule 56 on the basis of laches because Plaintiff waited ten years to bring this contract action, despite having full knowledge of any claims ten years ago and the ensuing prejudice to Defendants from the delay. A memorandum of points and authorities in support of this motion is attached.

December 21, 2007

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Introduction

In 1994, the Indian Health Service ("IHS"), an agency of the U.S. Department of Health and Human Services ("HHS"), entered into a contract with Plaintiff Council of Athabascan Tribal Governments ("CATG") to provide certain health care services to Alaska Native villagers pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* ("ISDA"). Now, more than ten years later, Plaintiff has brought breach of contract claims to recover additional funds for indirect contract support costs in fiscal year 1995. Relying on snippets of language from the ISDA, Plaintiff asserts three theories to claim it should have been awarded additional money under the contract. The bottom line, however, is that the contract itself specified a dollar amount IHS would pay to Plaintiff for indirect contract support costs and,

as Plaintiff concedes in its complaint, IHS did pay that amount to Plaintiff for indirect contract support costs. Moreover, Plaintiff's second and third claims for damages assume that IHS used a negotiated rate to calculate the amounts due but the contract itself makes clear that IHS did not use such a rate. Because Plaintiff concedes that IHS paid it in accordance with the express terms of the contract, IHS did not breach the contract and Plaintiff's complaint must be dismissed for failure to state a claim.

Plaintiff altogether failed to present its claim relating to carry forwards to the agency, which is a jurisdictional prerequisite to judicial review under the Contract Disputes Act. See Tunica-Biloxi Tribe of Louisiana v. United States, No. 02-2413, slip op. at 8-15 (D.D.C. Dec. 9, 2003) (presentment of claim to contracting officer is a jurisdictional requirement for ISDA contractors), copy attached hereto. Therefore, this Court lacks jurisdiction over the third claim.

In addition, Defendants move in the alternative for summary judgment because Plaintiff's claims are barred by laches. Plaintiff waited ten years after IHS completed performance under the contract in September 1995 before presenting IHS with two of its three claims in September 2005, and did not present its third claim until July 2007. This unreasonable and unjustifiable delay has undermined the government's ability to rebut any extrinsic evidence Plaintiff may now attempt to introduce in support of its claims and adversely affects Defendants' access to appropriated funds to pay any judgment against them. Plaintiff should not be allowed to proceed at this late date.[1]

[1] Note that the six-year catch-all statute of limitations does not apply to actions controlled by the Contract Disputes Act, as this one is. See 28 U.S.C. § 2401(a).

STATUTORY BACKGROUND

Congress enacted the ISDA to allow Indian tribes and Alaska Native Villages to contract with the federal government to operate many of the programs which the government previously operated for the benefit of their members, through what is termed a self-determination contract. The ISDA has the stated purpose to "permit an orderly transition from Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b). To achieve these policy objectives, the ISDA provides a framework for the orderly transfer of the administration and operation of traditionally government-run programs to the Indian and Alaska Native people. A primary means for achieving this transfer is the self-determination contract. Pursuant to 25 U.S.C. § 450m-1(a), this Court has concurrent jurisdiction with the Court of Federal Claims for this case.

IHS, an agency within the Department of Health and Human Services, was established to carry out the responsibilities, authorities, and functions of the United States in providing health care services to Indians and Indian tribes, including Alaska Native villages. 25 U.S.C. 1661(a). See 25 U.S.C. § 1603(d) (defining "Indian tribe" to include Alaska Native villages). Under the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601-1683, IHS is authorized to provide a wide range of health care programs, including clinical programs and public health programs. 25 U.S.C. § 1621(a)(4). IHS provides these programs either directly or through contracts with tribes or tribal organizations under the ISDA. 25 U.S.C. § 1680(a).

Section 450f(a)(1) of the ISDA directs the Secretary of Health and Human Services ("the Secretary" or "HHS"), "upon the request of any Indian tribe by tribal resolution, to enter into a

self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof[.]" 25 U.S.C. § 450f(a)(1).[2] If the parties are unable to agree on the appropriate funding level, the Secretary can decline the proposal in part or in full. The tribe has the right either to seek review of a declination through the administrative appeals process or by a direct federal court action. See 25 U.S.C. § 450f(b).

There are two types of funding for each ISDA contract. First, the ISDA contractor receives the amount the Secretary "would have otherwise provided for the operation of the programs" ("Secretarial amount"), which "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs." 25 U.S.C. § 450j-1(a)(1). Second, it receives contract support costs ("CSC"), id. § 450j-1(a)(2), which are the focus of this lawsuit.

CSC can be broken down into three categories: (1) direct CSC, which are administrative costs specific to the contracted-for program, such as unemployment taxes or workers' compensation insurance, see id. § 450j-1(a)(3)(A)(i) and § 450b(c); (2) startup costs for the initial year of the contract "consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis," id. § 450j-1(a)(5); and (3) indirect CSC, which are administrative costs that are shared by the IHS program with other programs or services. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f). Only indirect CSC are at issue in this lawsuit. See Compl. ¶¶ 20, 27.

Many ISDA contractors recover indirect costs using an indirect cost rate, which is the ratio of the contractor's total indirect costs (known as the indirect cost pool) to the contractor's

[2] The statute also applies to certain (non-healthcare) services provided to Native Americans by the Department of the Interior and the Secretary of the Interior by Interior's Bureau of Indian Affairs ("BIA"). However, BIA contracts are not at issue in this case.

total direct funding for all of its programs. See Compl. ¶ 21. For example, if a tribe operates a total of $100,000 in programs, and incurs $20,000 in common indirect costs, then it would have an indirect rate of 20%. To determine the amount of common overhead costs the tribe could allocate to an individual award, the tribe would multiply the amount of the award by the rate. So, if the tribe operated a dental program for $50,000, then it could allocate $10,000 of its overhead costs to the award. See Compl. ¶ 20 (applying indirect rate to a program base).

Using indirect cost rates is not required by the ISDA, however, which gives contractors the option of annually negotiating with IHS for the amount of funds the contractor is eligible to receive for indirect costs with IHS. 25 U.S.C. § 450j-1(a)(3)(B). Thus, the hypothetical contractor operating a dental program for $50,000 could negotiate a different amount for its overhead costs directly with IHS. Regardless of the method used to calculate the amount, the ISDA's statutory authority permits payment of only those CSC that are reasonable in light of the activities to be conducted. Id. § 450j-1(a)(2). Moreover, appropriations for IHS "may be expended only for costs directly attributable to [ISDA contracts or grants] and no funds . . . shall be available for any [CSC] associated with [any non-IHS contracts or grants]." Id. § 450j-2. Finally, IHS's payment of CSC, like all funding under the ISDA, is subject to the availability of appropriations. See id. § 450j-1(b); id. § 450j(c).

Factual and Procedural Background

Plaintiff CATG is a tribal organization that operates health facilities and provides public health services to Alaska Natives and other beneficiaries pursuant an ISDA contract with IHS. Compl. ¶ 1. In 1994, IHS entered into contract number 243-94-0038 with Plaintiff to provide for the operation and administration of the Yukon Flats Health Center, an ambulatory care referral

center in Fort Yukon, Alaska, and certain health development activities and support services for the eight villages served by CATG. See Def's Ex, A, Administrative Record (A.R.) 18-19.[3] The contract provided funding from June 1, 1994 through September 30, 1995. Plaintiff does not challenge the payments it received for the first four months of the contract during FY 1994.

Plaintiff brings this action under the Contract Disputes Act, 41 U.S.C. § 601 et seq. ("CDA"). Id. ¶ 6. Plaintiff asserts IHS underpaid it indirect CSC in fiscal year 1995 using three theories. First, Plaintiff alleges that IHS should have reprogrammed money from its lump-sum appropriation to pay the difference between the amount IHS awarded in the contract and what Plaintiff now claims is the "full amount" of indirect CSC. Id. ¶¶ 16-20. Plaintiff's second claim is a "miscalculation" claim, in which Plaintiff alleges that the defendants used a method to establish indirect CSC that "understated" CATG's "true costs of operating the IHS's contracted programs." Id. ¶¶ 21, 24. Plaintiff's third claim is that the defendants used "carryforward calculations to "improperly deflate" CATG's indirect cost recovery further. Id. ¶¶ 24-26.

Pursuant to the CDA, which requires that contract claims against the government first be submitted to the contracting officer for a decision, 41 U.S.C. § 605(a), Plaintiff sent two of its three claims for fiscal year 1995 to the Indian Health Service on September 2, 2005. See Compl. ¶ 7.[4] IHS denied the claims in a letter dated July 17, 2006, which Plaintiff received "some days later." Id. ¶ Plaintiff filed the instant action on July 17, 2007.

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[3] The entire contract and modifications are included in the agency's Administrative Record. Defendants attach hereto only relevant excerpts of the 1995 contract and modifications thereto. Page numbers therein are cited by the Bates numbering of the Record.

[4] Plaintiff also submitted claims for fiscal years 1996-2000 at that time, but appealed the agency's denial of those claims to the Civilian Board of Contract Appeals pursuant to 41 U.S.C. § 606.

Standards of Review

The District Court should grant a Rule 12(b)(6) motion when the complaint does not contain factual allegations that support recovery under a viable legal theory. Bell Atlantic Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1969 (2007). In deciding a motion to dismiss under Rule 12(b)(6), a court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice." EEOC v. Francis Xavier Parochial Sch.. 117 F.3d 621, 624 (D.C. Cir. 1997). Because the contract is central to Plaintiff's allegations and is referenced in the Complaint, see Compl. ¶¶ 1-2, 13, it is incorporated therein. This should not convert the motion to one for summary judgment. See Kaempe v Myers, 367 F.3d 958, 965 (D.C. Cir. 2004); Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993).

In addition, Defendants move to dismiss Plaintiff's claim for miscalculation of carry forwards under Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiff failed to meet the Contract Disputes Act's jurisdictional requirement that this claim be presented to the agency contracting officer before bringing suit in this Court. Rule 12(b)(1) permits a defendant to move to dismiss a claim on the ground that the court lacks jurisdiction over the subject matter. Where necessary, "the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). Accordingly, a motion to dismiss for lack of jurisdiction that relies on matters outside the pleadings, such as a declaration or other documents, should not be converted to a Rule 56 motion for summary judgment. See Fed. for Am. Immigration Reform, Inc. v. Reno, 897 F. Supp. 595,

600 n.6 (D.D.C. 1995), aff'd, 93 F.3d 897 (D.C. Cir. 1996).

Defendants also move in the alternative for summary judgment because Plaintiff's claims are barred by laches. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (citing Fed. R. Civ. P. 1).

The initial burden is on the moving party to point out the absence of any genuine issue of material fact. See Celotex, 477 U.S. at 323, 106 S. Ct. at 2552. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986). The substantive law identifies which facts are material and "[f]actual disputes that are irrelevant or unnecessary will not be counted." 477 U.S. at 248, 106 S. Ct. at 2510. Once the initial burden of the moving party is satisfied, the burden shifts to the responding party to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. See 477 U.S. at 250, 106 S. Ct. at 2511. In considering a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Worth v. Jackson, 377 F. Supp. 2d 177, 181 (D.D.C. 2005). However, "the non-moving party cannot rely on mere allegations or denials but must set forth specific facts showing that there are genuine

issues for trial." Id. at 180-81.

Argument

I. This Case Should Be Dismissed Because Defendants Fully Performed under Plaintiff's Contract.

Plaintiff asserts that Defendants breached its ISDA contract by failing to pay the full contract support costs owed to Plaintiff. See Compl. ¶ 1, 2. However, a review of the contract, which has been incorporated into the Complaint, demonstrates that it has not been breached. To the contrary, Defendants fully performed all of their obligations under the express terms of the contract at issue.

The Supreme Court has recently interpreted the nature of ISDA contracts, and has held that ISDA contracts are to be interpreted like any other contract, holding the parties to the explicit terms of the contract. Cherokee Nation v. Leavitt, 543 U.S. 631, 639, 125 S. Ct. 1172, 1178 (2005). The Supreme Court found nothing in the ISDA's statutory language that warranted special treatment of ISDA contracts and concluded that "Congress, in respect to the binding nature of a promise, meant to treat alike promises made under the Act and ordinary contractual promises (say, those made in procurement contracts)." Id. at 639, 125 S. Ct. at 1178 (emphasis in original). Therefore, in order to determine whether there has been a breach of contract, the Court must look to the terms of the contracts and the explicit promises made therein.

The plain language of a contract is controlling. Craft Mach. Works, Inc. v. United States, 926 F.2d 1110, 1113 (Fed. Cir. 1991). As the D.C. Circuit has noted, a contract "must be enforced as written." Welch v. Sherwin, 300 F.2d 716, 718 (D.C. Cir. 1962). In this case, the contract specified the amount of funding for indirect CSC that the government would provide to

Plaintiff, and the government provided the full funding specified in the contract. Because the government fully performed under the express terms of the contract, there has been no breach and Plaintiff's case must be dismissed.

A. Plaintiff Concedes Defendants Paid All Funds Promised by the 1995 Contract.

Plaintiff has failed to state a claim for breach of contract because Plaintiff's contract with IHS sets forth the payment amount for indirect CSCs, the subject of this lawsuit, and Plaintiff's Complaint admits that IHS paid that amount. Section B of the Contract breaks out the services to be provided and the costs. For the initial contract period of June 1-September 30, 1994, it lists a line-item figure for indirect-type CSC to be paid under the contract as $114,084.00, as part of a total amount of $435,769.00. See Defs.' Ex. A, A.R.17. Subsection G.1.E provided that "[i]n lieu of a negotiated indirect cost rate by a cognizant agency, ISDM 92-2 is applicable for recipients without established indirect rate agreements." Ex. A, A.R.28. (ISDM 92-2 refers to Indian Self-Determination Memorandum 92-2, an agency guidance document regarding CSC).

On September 30, 1994, Modification 2 to the contract added $152,815.00 for indirect type costs. Id. at A.R.56-57. On October 1, 1994, Modification 3 extended the performance period until September 30, 1995, and added $61,938 for indirect type costs. Id. at A.R.58-59. CATG submitted a Contract Pricing Proposal with a budget for indirect type costs of $307,003. Id. at A.R.60, 65,[5] which IHS incorporated in Modification 3. Id. at A.R.58. Thereafter, IHS added another $160,432 for indirect type CSC. Id. at A.R.71-74. In sum, the total indirect CSC

[5] This document actually shows two columns, one with a budget for $307,003 and one with a budget of $61,938, see Ex, A at A.R.65, but for purposes of this motion to dismiss, will be read in favor of Plaintiff.

that IHS promised for the 1995 contract was $375,185. This is the exact amount that Plaintiff alleges was paid for indirect CSC under this contract. Compl. ¶ 20. Because IHS paid the entire amount for indirect CSC that was promised to Plaintiff in the contract, it did not breach the 1995 contract.

B. Plaintiff Fails to State a Claim for Indirect Rate Miscalculation Because an Indirect Cost Rate Was Not Used under the Contract.

Plaintiff also fails to state a claim when it alleges IHS improperly used an indirect cost rate to calculate the amount due because the contract documents show that IHS did not use an indirect cost rate to calculate the amount due under the contract. Plaintiff's claim that IHS improperly used a rate that understated carry forward amounts fails for the same reason.

Plaintiff's miscalculation claim can be illustrated using the hypothetical tribe with the $50,000 IHS dental program and 20% rate. Suppose that the tribe added another federal program for $50,000, and suppose its total indirect costs rose from $20,000 to $25,000. The tribe's new rate would be 25/150 or 16.67%. If the new rate is applied to the IHS dental program ($50,000 x 16.67%), the total amount of indirect costs allocated to the IHS program would now be $8335. If the new federal program does not pay for its share of indirect costs, then, according to Plaintiff's theory, the tribe has lost $1665 previously used to administer the IHS dental program. See generally Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (setting forth rate miscalculation theory).

Regardless of its merits, this theory has no application to Plaintiff in FY 1995 because it did not use a percentage rate to recover indirect costs, but instead negotiated its overhead costs directly with IHS. As made clear by section G(1)(E) of the initial contract award and the

subsequent modifications, which are incorporated into Plaintiff's complaint by reference, IHS did not use a negotiated indirect cost rate to award funds to CATG in FY 1995. First, CATG did not have a negotiated indirect rate when the contract was awarded. See Ex, A at A.R.28. For fiscal year 1995, CATG proposed an indirect type costs budget, which was incorporated in Modification 3. Id. at A.R.58. None of the subsequent contract modifications in FY 1995 incorporate a negotiated indirect cost rate. See id. at 66-76. Since IHS did not use an indirect rate to calculate the amount of funds due to CATG in FY 1995, it cannot be held liable for misusing such a rate.[6]

Plaintiff's new, unexhausted, carry forward claim has the same flaw. Plaintiff again asserts that the Defendants erred by using an indirect cost rate that incorporated carry-forward adjustments that, according to Plaintiff, did not properly take under recoveries into account, and instead treated funding shortfalls as over-recoveries to depress the indirect cost rate further. Compl. ¶¶ 25-26. Whether true or not, these allegations are irrelevant since, as demonstrated above, IHS did not use an indirect cost rate to calculate the amount due Plaintiff under the contract. Instead, IHS paid Plaintiff the funds it promised for indirect-type costs.

C. The ISDA Does Not Trump the Contract Analysis.

Despite the fact that Defendants fully complied with the terms of the contract, Plaintiff asserts a breach because Defendants allegedly did not comply with the ISDA. See Compl. ¶ 2. Such an allegation, however, runs directly contrary to the Supreme Court's holding in Cherokee Nation, which mandates that ISDA contracts be treated as any other procurement contract, where

[6] Indeed, CATG's Complaint does not allege that a negotiated indirect cost rate was used as part of the contract, and mentions an indirect rate only in the context of an agency report to Congress on implementation of the ISDEAA. See Compl. ¶20.

the parties are to rely on the terms and conditions therein. Cherokee Nation, 543 U.S. at 643-45, 125 S. Ct. at 1180-81.

Moreover, the mere fact that the contract was entered pursuant to the ISDA does nothing to further Plaintiff's claims of breach. The ISDA does not mandate the payment of a specific amount of indirect CSC or that a specific formula be included in the contract. Rather than providing specific dollar amount for funding, the ISDA requires that the parties negotiate a contract. See e.g., 25 U.S.C. §§ 450b(g); 450j(c). An ISDA contract negotiation starts with a contractor's proposal. See 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B); 25 C.F.R. §§ 900.12, 900.8(h). A contract proposal will be accepted if the Secretary agrees to the proposed terms. See 25 U.S.C. § 450f(a)(2). If the Secretary declines the proposal, the Tribe or Tribal organization may: (1) challenge the Secretary's declination in an administrative proceeding or directly in federal court as inconsistent with the ISDA, see id. §450f(b)(3), or (2) acquiesce in the terms offered by the Secretary and accept the contract and funding. If the contractor does not avail itself of immediate review and instead acquiesces in the amount of funding proposed by IHS, the contractor is bound by the negotiated amount in the executed contract. If the contractor determines at a later time that the amount of funding is insufficient, it can suspend operation of the contract or retrocede the program for lack of funding. See id. §§ 450*l*(c)(b)(5), 450j(e). In future annual funding agreement negotiations, the contractor may again propose desired terms and if they are rejected by IHS, the contractor can force a declination and obtain review in federal court. The availability of immediate judicial review prior to contract formation demonstrates Congress's intent that a Tribe or Tribal organization must challenge the Secretary's rejection of the proposed amounts at the time of contract formation. The statutory scheme and purpose

demonstrates that there is no "independent" right under the ISDA to CSC.

The Federal Circuit reached this conclusion in Samish Indian Nation v. United States, 419 F.3d 1355 (Fed. Cir. 2005). In Samish, the Federal Circuit reviewed the ISDA and determined that its funding provisions did not curtail the Secretary's discretion to pay funds, did not set clear standards for the Secretary's payment of funds, did not specify precise amounts to be paid, and did not compel the payment of funds. 419 F.3d at 1364-65; see also Pueblo of Zuni v. United States, 467 F. Supp. 2d 1114, 1116-17 (D.N.M. 2006) (tribes may not bring claims for additional contract funding under the ISDA alone). Regardless of whether Plaintiff characterizes its claims as "shortfall" claims under the ISDA, see Compl. ¶ 16, "miscalculation" claims under the ISDA, see Compl. ¶ 22, or "carry forward" claims under the ISDA, see Compl. ¶ 25, Plaintiff's theories that the ISDA demands an alternate amount of payment under the contracts must fail. It is the contracts themselves that create an entitlement to CSC, the scope of which is determined under traditional contract principles.[7] See Cherokee Nation, 543 U.S. at 639, 125 S. Ct. at 1178; Samish, 419 F.3d at 1365; Pueblo of Zuni, 467 F. Supp. 2d at 1116-17. It is clear that, following traditional contract principles, there has been no breach.[8]

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[7] Even if the Court were to find that the ISDA, as incorporated into the contracts, requires payment in an amount other than that specified in the contract, the Court would still need to resolve conflicting (not ambiguous) provisions in the contract. Any such conflict should be resolved by reference to contract law directing that a specific provision of a contract governs over a general one. See Hometown Fin. Inc. v. United States, 409 F.3d 1360, 1369 (Fed. Cir. 2005); Hills Materials Co. v. Rice, 982 F.2d 514, 517 (Fed. Cir. 1992). Here, the contract and modifications setting the dollar amounts for indirect CSC would govern.

[8] Because the omission of a breach of contract disposes of Plaintiff's claims in their entirety, Defendants base their motion to dismiss on this ground. There are several defenses that Defendant has not raised in the instant motion, but will raise in a motion for summary judgment, if necessary. These include the fact that Plaintiff signed a release waiving all claims for FY 1995, which disposes of all of Plaintiff's claims, see Herson v. Gibralter Bldg. & Loan Ass'n,

II. Plaintiff's Failure to Present its Carryforward Claim to the Contracting Officer Deprives this Court of Jurisdiction.

The Contract Disputes Act governs Plaintiff's claims. Compl. ¶ 7; 25 U.S.C. § 450m-1(d); 41 U.S.C. § 609(a). See Tunica-Biloxi Tribe, No. 02-2413, slip op. at 8-15 (Dec. 9, 2003). The CDA requires that "[a]ll claims by a contractor against the government relating to a contract . . . shall be submitted to the contracting officer for decision." 41 U.S.C. § 605(a). This presentment requirement is jurisdictional. See U.S. v. Intrados/International Management Group, 277 F. Supp.2d 55, 65 (D.D.C.2003) (contracting officer's decision is the "linchpin" for judicial review of contract claims under the CDA ... for the court to accept jurisdiction over [an unexhausted counterclaim] without the defendants exhausting the administrative protocol would frustrate the scheme of the CDA"); Thoen v. United States, 765 F.2d 1110, 1116 (Fed. Cir.1985) ("Congress has determined that submission of a certified claim to the contracting officer in the first instance is a jurisdictional prerequisite to filing a suit in the Claims Court").

To present a claim, the contractor must submit the operative facts to the contracting officer. See SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615-16 (1990)(plaintiff could not claim damages on claim not submitted to contracting officer when new claim required proof of different circumstances than original claim). To determine whether an argument is a new claim or an alternate theory of relief based on the original claim, it is helpful to examine whether the operative facts underlying the new claim are so different from the original claim that failure of the new claim would not logically preclude the contractor from succeeding on the original claim, or vice versa. Pueblo of Zuni v. United States 467 F. Supp. 2d

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864 F.2d 848, 854 (D.C. Cir. 1989), and the fact that Plaintiff recovered more than the actual costs it incurred under the agreement.

1099, 1111 (D.N.M. 2006). Moreover, presentment is not excused when the contractor had the requisite information about the new claim in its possession when it presented the original claim. Id. at 1112.

In this case, Plaintiff presented its claim for rate miscalculation to the contracting officer, but not its claim for carry forward adjustments. Ex, B, A.R. at 2. The new claim related to carry forward adjustments is logically distinct from its claim for rate miscalculation: the rate miscalculation claim is premised on the failure of other federal agencies to reimburse their share of indirect costs, Compl. ¶ 22-23, while the carryforward claim is premised on how the rate negotiators treat the Secretary's alleged failure to fully fund CATG's ISDA contract in FY 1995. Compl. ¶ 25. Even if Plaintiff prevailed on the rate miscalculation claim, it could still lose on the carry forward claim if, for example, Defendants proved that Plaintiff's indirect rate agreement did not provide for any carryforward calculations. Thus, failure on one claim does not equal failure on the other, and the carry forward claim is a separate claim. Plaintiff concedes as much, stating that its carry forward claim is an additional theory of recovery, not an alternate one, based on different factual allegations than its rate miscalculation claim. Id. Moreover, Plaintiff has not asserted that it lacked the information necessary to present the carry forward claim with the rate miscalculation claim in September 2005, since both claims relate to a ten year old indirect cost rate. See Ex, C, A.R.92-93. Since CATG did not present this claim to the contracting officer, it should be dismissed for lack of jurisdiction.

III. The Court Should Grant Summary Judgment Because Plaintiff's Ten Year Delay Has Prejudiced the Government's Ability to Defend the Case.

As demonstrated above, Plaintiff has failed to state a claim for breach of contract, and

failed to meet the statutory presentment requirement for its carryforward claim. Those grounds support Defendants' motion to dismiss under Rule 12(b). In the alternative, Defendants also move for summary judgment on the basis of laches. Plaintiff presented two of its three claims to IHS in September 2005, ten years after the end of its contract in September 1995. "Laches applies where there has been an unfair and prejudicial delay by a plaintiff in bringing an action." CarrAmerica Realty Corp. v. Kaidanow, 321 F.3d 165, 171 (D.C. Cir.), op. supplemented by 331 F.3d 999 (D.C. Cir. 2003). A laches defense exists when: (1) there is an unreasonable and inexcusable delay from the time the claimant knew or reasonably should have known about its claim; and (2) that this delay caused either economic prejudice or injury to the defendant's ability to mount a defense. See, e.g., Pfeiffer v. Central Intelligence Agency, 60 F.3d 861, 865 (D.C. Cir. 1995) (barring former CIA employee's claim that government waived its property right in document under doctrine of laches); Independent Bankers Ass'n of Am. v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980) (laches barred claim brought 12 years after accrual); see also Village of Elk Grove Village v. Evans, 997 F.2d 328, 331 (7th Cir. 1993); A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1032 (Fed. Cir. 1992); Cornetta v. United States, 881 F.2d 1372, 1377-78 (Fed. Cir. 1988). The undisputed facts demonstrate both of these elements here.

First, Plaintiff delayed ten years before bringing this lawsuit. At the latest, Plaintiff's contract claim accrued by the end of the contract year (which corresponds with the federal fiscal year). See Oceanic S.S. Co. v. United States, 165 Ct. Cl. 217, 225 (1964) (per curiam) ("A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute the action. Therefore, 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 the contract.") (internal citations omitted). Plaintiff's cause of action accrued by September 1995 at the latest, when the contract year ended and Plaintiff had been fully paid under the contract. Plaintiff was fully aware at this time of its payment under the contract – if it had disputes regarding the amount of payment, it could have brought suit immediately. By its own admission, Plaintiff did not submit its claim for fiscal year 1995 until September 2, 2005. See Compl. ¶ 7. This 10-year delay is significantly longer than the current six year statute of limitations, and is certainly long enough to meet the standards under the first prong of the test for laches. See Mexican Intermodal Equip., S.A. v. United States, 61 Fed. Cl. 55, 71 (2004) (noting delays ranging from 3½ to 5 years can constitute unreasonable delay); cf. 41 U.S.C. § 605(a) (requiring presentment of all claims within six years of accrual for contracts entered on or after October 1, 1995). (Note, here the contract was entered into 1994.)

To show prejudice, the government must show either evidentiary prejudice or economic prejudice. As discussed elsewhere, the contract documents themselves should dispose of this case. However, to the extent that plaintiff attempts to introduce extrinsic evidence, the government's ability to present a defense has been hampered significantly. See Warren v. United States, 4 Cl. Ct. 552 (1984) ("Prejudice may be shown by some indication that the government's defense has been hampered by the belated prosecution of the plaintiff's claim"). When Plaintiff presented its claim ten years after the fact, memories had faded, and several key witnesses had retired.

For example, as the Contracting Officer's Representative (COR), Paul Young approved CATG's budget for indirect-type costs for FY 1995. See Ex. A, A.R.50-51 (appointing Paul

Young as COR, and requiring him to review performance and financial reports from CATG), A.R 65 (indirect type costs budget initialed "PY"). He was separated from federal service November 12, 1994. See Decl. Maria Cunningham at ¶ 3, attached hereto. Contract Specialist Deborah Segelhorst processed modifications to CATG's contract award in FY 1995. See Ex, A, A.R.56-59; 69-72. She retired from federal service July 2, 2004. See Cunningham Decl. ¶ 3. In 1999, IHS closed out Contract 243-94-0038. As part of the close out, Contract Specialist Olinga Fagan received the Tribe's release of claims under the contract. Ex, D, A.R. AT 146-47. She retired from federal service April 1, 2005. See Cunningham Decl. ¶ 3.

Second, Defendants have been economically prejudiced by this delay, as the appropriations for 1995 have long since lapsed. Congress appropriated money to IHS for Indian Health Services that was available for one year. See Dep't of the Interior & Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28, 2536, 2537-38 (1994). Congress specifically stated in the Appropriations Act that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." Id., 108 Stat. at 2536. By law, IHS funds for ISDA contracts had to be obligated within the appropriation year. Id., 108 Stat. at 2528. Therefore, by the terms of the Appropriations Act itself, this funding has long since expired, and to allow Plaintiff to revive a claim for appropriations that expired over a decade ago would be prejudicial to Defendants.[9]

[9] This is particularly true because the 1995 contract contained a limitation of cost provision, which specified the total cost to the government would not exceed $787,820. See Ex. A at 28 (limitation of cost provision), Mod. 8 (modifying cost ceiling). This provision limits the government's liability to that amount, and the government should have been able to rely on the fact that it would not need to provide additional funds well into the future. See, e.g., Sociotechnical Research Applications, Inc. v. Whitman, No. 01-1232, 2002 WL 123557, at *3-4 (Fed. Cir. Jan. 30, 2002) (finding limitation of cost provision limited government's liability for

Plaintiff has asserted no reason why it delayed for ten years before bringing these claims. It now seeks damages beyond the amounts promised and paid by Defendants under the contract, and its theories are contradicted by the contract documents themselves. Plaintiff had its opportunity to challenge the award amounts back in 1994 and 1995, before IHS's witnesses had retired and its appropriation had lapsed. Plaintiff chose not to do so, and it would be unfair to allow it to proceed with this action now.

CONCLUSION

For the foregoing reasons, Defendant requests that its motion to dismiss be granted and judgment entered in its favor.

December 21, 2007

Respectfully submitted,

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funds allotted in the contract); Advanced Materials, Inc. v. Perry, 108 F.3d 307, 310 (Fed. Cir. 1997) (finding the government's estimated cost a ceiling for its contractual liability when contract contained a limitation of cost provision); Titan Corp. v. West, 129 F.3d 1479, 1482 (Fed. Cir. 1997) (holding the government is not liable for additional costs in the face of a limitation of cost provision).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF ATHABASCAN TRIBAL GOVERNMENTS, Plaintiff, v. UNITED STATES OF AMERICA; MICHAEL O. LEAVITT, Secretary of the Department of Health and Human Services; and ROBERT G. McSWAIN, Acting Director, Indian Health Service; Defendants.	)	Civil Action No. 07-1270 (RWR)

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Civil Rules 7(h) and 56.1, Defendants submit the following statement of material facts as to which there is no genuine issue in support of their alternative motion for summary judgment on the basis of laches.

1. On September 30, 1995, the performance period ended for Contract No. 243-94-0038 between the Council of Athabascan Tribal Governments (CATG) and the Alaska Area Native Health Service (AANHS), an area office of the Indian Health Service (IHS). Exhibit A, A.R.58.

2. On September 2, 2005, CATG sent two claims to AANHS under the Contract Disputes Act, 41 U.S.C. §§ 601-613. Compl. ¶ 7.

3. Paul Young was the Contracting Officer's Representative (COR) for Contract No. 243-94-0038 and required to review performance and financial reports from CATG. Ex, A, A.R.50-

51.

4. Paul Young approved CATG's budget for indirect-type costs for FY 1995. A.R 65.

5. Paul Young was separated from federal service on November 12, 1994. Decl. Maria Cunningham at ¶ 3.

6. Contract Specialist Deborah Segelhorst processed modifications to CATG's contract award in FY 1995. See Ex, A, A.R.56-59; 69-72.

7. Deborah Segelhorst retired from federal service July 2, 2004. Cunningham Decl. ¶ 3.

8. In September 1999, Contract Specialist Olinga Fagan received the Tribe's release of claims under Contract 243-94-0038. Ex. D, A.R.146-47.

9. Olinga Fagan retired from federal service April 1, 2005. Cunningham Decl. ¶ 3.

10. Contract 243-94-0038 contained a limitation of cost provision, which specified the total cost to the government would not exceed $787,820. See Ex. A, A.R.28 (limitation of cost provision), A.R.75-76 (modifying cost ceiling).

11. For fiscal year 1995, Congress appropriated money for Indian Health Services that was available for one year, Dep't of the Interior & Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28, 2536, 2537-38 (1994), stating in the Appropriations Act that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." Id., 108 Stat. at 2536. By law, IHS funds for ISDA contracts in fiscal year 1995 had to be obligated within the appropriation year. Id., 108 Stat. at 2528.

12. By the terms of the Appropriations Act itself, IHS's authority to obligate any funding it would have used to fund CATG's contract in fiscal year 1995 expired at the close of fiscal year

1995.

December 21, 2007

Respectfully submitted,

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