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

NAVAJO HEALTH FOUNDATION – SAGE MEMORIAL HOSPITAL, INC.,

Plaintiff,

v. No. 1:14-cv-958 JB/GBW

SYLVIA MATHEWS BURWELL et al.,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Doc. 27)

Defendants hereby oppose the Motion for Summary Judgment on Plaintiff's Fourth Claim for Relief in its Complaint (Motion) filed by Plaintiff Navajo Health Foundation-Sage Memorial Hospital (Sage). Sage has failed to show "undue delay" on the part of the Indian Health Service (IHS) contracting officer (CO) in responding to Sage's claims under the Contract Disputes Act. In addition, Sage failed to show that the date designated by the CO for deciding Sage's Contract Disputes Act claims was unreasonable. Without these showings, there is no basis for this Court to grant summary judgment under the Contract Disputes Act. Defendants' evidence demonstrates that there are genuine issues of material fact with regard to these issues. Accordingly, Defendants respectfully request that Plaintiff's Motion be denied in its entirety.

STANDARD OF REVIEW

Summary judgment shall be entered for a party who shows that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that

there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986).

STATUTORY BACKGROUND

IHS is a U.S. Department of Health and Human Services (HHS) component whose principal mission is to provide primary health care for American Indians and Alaska Natives throughout the United States. *See* S. Rep. No. 102-392, at 2-3 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3943. It does so through three separate mechanisms: (1) by providing health care services directly through its own facilities; (2) by contracting with tribes and tribal organizations pursuant to the Indian Self Determination Education and Assistance Act (ISDEAA) to allow those tribes to independently operate health care delivery programs previously provided by IHS; and (3) by funding contracts and grants to organizations operating health programs for urban Indians. *Id*. at 4.

IHS's authority to provide health care services to American Indians and Alaska Natives derives primarily from two statutes. The first, the Snyder Act, is a general and broad statutory mandate authorizing IHS to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for the "relief of distress and conservation of health." 25 U.S.C. § 13 (providing the authority to the Bureau of Indian Affairs); 42 U.S.C. § 2001(a) (transferring the responsibility for Indian health care to IHS). The second, the Indian Health Care Improvement Act (IHCIA), establishes numerous programs specifically authorized by Congress to address particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes prevention and treatment, medical training, and urban Indian health. 25 U.S.C. §§ 1601-1683.

In 1975, Congress enacted the ISDEAA, which allows tribes to contract with the HHS Secretary, through IHS, to operate many of the programs that IHS previously operated for the benefit of Indians. Pub. L. No. 93-638, as amended, codified at 25 U.S.C. § 450 *et seq*. Tribes may do so either by entering into contracts under Title I of ISDEAA or into self-governance "compacts" under Title V of the statute. *See* 25 U.S.C. §§ 450*l*(a), (c), 458aaa-3(a).

Once a proposal or portion of a proposal is approved, two general categories of funding are available for a program. *See* 25 U.S.C. §§ 450j-1(g), 450j-1(a); 25 C.F.R. § 900.19. First, as originally enacted, the ISDEAA authorized funding known as the "Secretarial amount" or "106(a)(1) amount," which amount "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . without regard to any organizational level within . . . [HHS], . . . including supportive administrative functions." 25 U.S.C. § 450j-1(a)(1). Thus, the Secretarial amount explicitly includes funding for administrative activities that IHS also carried out in its operation of the "programs, functions, services, and activities" (PFSA) that the tribe contracts to perform. The tribe may assume PFSA that are operated by IHS at the Headquarters, Area, and local levels, and the Secretarial amount may consist of funds associated with shares at any or all of these levels. Second, in 1988, Congress amended the ISDEAA to authorize a reasonable amount of contract support costs (CSC) funding (or the "106(a)(2)" amount) for activities that the tribes must carry out to ensure contract compliance and prudent management, but that were not funded as part of the Secretarial amount—either because the Secretary did not carry on such activities, or because the Secretary funded those activities from resources other than those transferred under contract. *Id.* § 450j-1(a)(2).

Since the early 1990s, tribes have filed numerous lawsuits alleging both IHS and the Department of Interior's Bureau of Indian Affairs (BIA) have failed to pay what the tribes

characterize as the "full CSC" as required by the ISDEAA. It is important to note that most tribal contractors, including Sage, have been paid the full amount of CSC set forth in their ISDEAA contracts with IHS. However, the tribal contractors have argued that the contract amount paid was less than the amount required by the ISDEAA. Until 2012, one of the government's primary defenses against the claims was that Congress limited the amount of the appropriations that was available to the agencies for CSC, thereby limiting the amount owed to ISDEAA contractors. That issue was addressed by the Supreme Court's ruling in 2012 that, despite Congressional limits on appropriations, the government must pay ISDEAA contractors "the full amount of [CSC] incurred by tribes in performing their contracts." *Salazar v. Ramah Navajo Chapter (RNC)*, 132 S. Ct. 2181, 2186 (2012).[1]

Even the Supreme Court acknowledged that the Agency was in an impossible position with regard to the payment of CSC:

> As the Government points out, the state affairs resulting in this case is the product of two congressional decisions which the BIA has found difficult to reconcile. On the one hand, Congress has obligated the Secretary to accept every qualifying [ISDEAA] contract, which includes a promise of "full" funding for all contract support costs. On the other, Congress appropriated insufficient funds to pay in full each tribal contractor. The Government's frustration is understandable, but the dilemma's resolution is the responsibility of Congress.

Id. at 2195. In response to the Supreme Court's decision, most tribal contractors presented claims for additional CSC to IHS under the Contract Disputes Act (CDA).

[1] Although IHS was not a party to the case, the Agency contracts with tribes and tribal organizations under the same authority. *See Arctic Slope Native Ass'n v. Sebelius*, 501 Fed. Appx. 957, 959 (Fed. Cir. 2012) (finding "the Supreme Court's decision in [*RNC*] is controlling" in a case against IHS).

As discussed below, as a result of *Ramah*, over 1,600 CSC CDA claims have been presented to IHS. *See* Declaration of Susan Blair (Blair Decl.), ¶ 4. To respond, IHS hired an outside financial accounting firm, additional IHS staff, and new attorneys in the HHS Office of the General Counsel to assist in handling the claims. *See* Blair Decl., ¶ 5. Upon receipt of a claim, the IHS CO sends a letter acknowledging the claims, requests additional documentation and explanation of the claims that are not available to IHS and are necessary to complete its analysis, and sets forth a date for responding to the claims. *See* Blair Decl., ¶¶ 13, 15; Declaration of Frank Dayish (Dayish Decl.), ¶¶ 17-19. Due to the complexity of the CSC claims, the claims are analyzed by an IHS team that includes financial analysts and staff from the appropriate IHS Area Office. *See* Blair Decl., ¶ 13; Dayish Decl., ¶7. After IHS completes its analysis of the tribal contractor's claims, it notifies the tribal contractor of the results of the analysis or reaches out to the tribal contractor to discuss the claims. *See* Blair Decl., ¶16. Such a collaborative process is time consuming and resource intensive, and the time required to respond to each claim is heightened due to the complexity of each claim, the total number of claims being addressed by IHS, and the time needed to meet with and discuss the claims with tribal contractors. *See* Blair Decl., ¶¶ 14, 18.

At issue in Sage's Fourth Claim for Relief is Sage's CDA claim for additional CSC.[2] Pursuant to the ISDEAA, the CDA shall apply to ISDEAA contracts and compacts for which there is a dispute. 25 U.S.C. § 450m-1(d). Accordingly, Sage must adhere to the requirements of the CDA. Under the CDA, the contractor must first submit its claims to the CO in writing. 41 U.S.C. § 7103(a)(1), (2). The claim must be submitted within six years after the accrual of the

[2] The merits of those claims are not before the Court and are still pending a decision by the IHS CO. Sage has limited its request for relief to the issue of when the IHS CO must issue a decision on the claims.

claim and, if it is over $100,000, it must be certified. *Id.* at § 7103(a)(3), (4). For claims to be certified, the contractor shall certify that: A) the claim is made in good faith; B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and D) the certifier is authorized to certify the claim on behalf of the contractor. *Id.* at § 7103(b)(1).

The CDA itself operates as a limited waiver of sovereign immunity for claims arising under contracts with the United States**.** *See* 41 U.S.C. §7101 *et seq*. In waiving sovereign immunity under the CDA, however, Congress put specific conditions on that waiver. A CO's decision shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized. 41 U.S.C. § 7103(g).[3] For claims over $100,000, the CO shall issue a decision within sixty days or notify the contractor when a decision will be issued if additional time is required. *Id.* at § 7105(f)(2); 25 C.F.R. § 900.223(a). The CDA states that a CO decision shall be issued within a reasonable time, "taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor." 41 U.S.C. § 7103(f)(3); 25 C.F.R. § 900.224. The CDA, at 41 U.S.C. § 7103(f)(4), further provides:

> Requesting tribunal to direct issuance within specified time period. A contactor may request the tribunal concerned to direct a contracting officer to issue a decision in specified period of time, as determined by the tribunal concerned, *in the event of undue delay* on the part of the contracting officer.

(Emphasis added.)

[3] Although the CDA ordinarily requires appeals from agency decisions to be filed to an agency board or to the U.S. Court of Federal Claims, tribal contractors are also authorized under the ISDEAA to appeal to the federal district in which the agreement was in effect. *See* 25 U.S.C. § 450m-1(a).

STATEMENT OF FACTS

Sage, on behalf of the Navajo Nation, and HHS, acting through IHS, entered into ISDEAA contracts and annual funding agreements for fiscal years (FYs) 2009 to 2013. *See* Dayish Decl., ¶ 4. IHS allocated the Secretarial amount and a certain amount of CSC funds to Sage for use towards services provided at the Sage Memorial Hospital for Navajo tribal members and other eligible IHS beneficiaries residing in the vicinity. *Id.* at ¶ 5. The amount of Secretarial funds generally is not to be reduced from the previous FY but may be adjusted during the term of the contract consistent with the ISDEAA. *Id.* at ¶ 5. The amount of CSC funds must be rejustified each year, though tribes may opt not to renegotiate direct CSC on an annual basis; the amount of indirect CSC typically fluctuates from year to year.

In August 2014, Sage submitted a CDA claim alleging IHS failed to pay the full amount of CSC required by the ISDEAA for contracts entered under the ISDEAA for FYs 2009 to 2013. *See* Exhibit 2 to Plaintiff's Motion (Sage Claim letter for FYs 2009 through 2013). In a letter to Frank Dayish, the CO of the Navajo Area IHS, dated August 24, 2014, Sage alleged damages arising out of IHS's failure to pay the amount of CSC Sage claims is required under the ISDEAA for the years in question. *Id.* Sage attached to its claim letter approximately 270 pages of supporting documentation, including Sage's financial audits for FYs 2009 through 2013. *Id.*. The total dollar amount of the claims made in each of the claim letters exceeded $100,000. *Id.*

In accordance with the CDA requirements, Mr. Dayish sent a letter to Sage on October 23, 2014, explaining that due to the size, complexity, age and lack of specificity of the claim, and inadequacy of supporting documentation, he would issue a decision by October 21, 2015. *See* Plaintiff's Exhibit 3 (October 23, 2014 letter from IHS to Sage). Mr. Dayish also requested necessary documents that Sage had in support of its claims that would allow IHS to analyze the

claims. *Id.* Mr. Dayish further requested that Sage "provide further explanation for the methodologies used to calculate the amount of additional CSC funds it claims is owed." *Id.* Mr. Dayish specifically requested that Sage submit documentation of actual CSC incurred in the years at issue, including:

1) Documents showing actual expenditures for direct costs associated with operation of the ISDEAA programs for each fiscal year at issue.
2) Documents showing the Tribe's indirect costs for each fiscal year at issue.
3) Documents showing the Tribe's actual capital expenditures, pass-through amounts, and other exclusions associated with the operation of the ISDEAA programs for each fiscal year at issue.
4) Any additional documentation in Sage's possession that will assist IHS in determining which of Sage's expenditures meet the ISDEAA definition of CSC in section 106(a)(2) and do not duplicate costs funded in the section 106(a)(1) amount.

Id. The letter also stated that "IHS would like to work cooperatively with [Sage] to exchange relevant documents and discuss the claims prior to issuing its response." Sage has never responded to Mr. Dayish's request for further documentation. *See* Dayish Decl., ¶ 20.

Despite the fact that the CO had expressly set a date (October 21, 2015) as a reasonable amount of time by which a decision letter would be issued, Sage has asked this Court to compel an earlier decision on CSC CDA claim in its First Amended Complaint filed on November 24, 2014. In its First Amended Complaint, Sage alleged that the date selected by Mr. Dayish "is unreasonable because the claim and its exhibits provide all information necessary for the IHS to decide the claim forthwith." First Amended Complaint, ¶ 71. In its Motion for Summary Judgment, Sage alleged that whether the time period is unreasonable is a question of law that should be answered in favor of Sage, and it requested that the Court grant summary judgment on its Fourth Claim for relief and order Defendant Dayish to decide Sage's CSC Claim by January 30, 2015 or some other "reasonable date certain." Sage Motion, p. 13.

DEFENDANTS' RESPONSE TO SAGE'S STATEMENT OF MATERIAL FACTS

Defendants respond as follows to Sage's "Statement of Material Facts As to Which There Is No Genuine Issue."

1- 3. For purposes of responding to Sage's Motion for Summary Judgment, Defendants do not dispute Statements 1 through 3.

4. Defendants provide the following clarification to Sage's statement that "As Contracting Officer, Dayish has exercised the authority to decide initially disputes arising under ISDEAA contracts" to the extent that it does not acknowledge the Agency-wide effort to resolve all CSC claims in a fair and consistent manner and to do so in collaboration with tribes. With regard to CDA claims filed against IHS alleging underpayment of CSC, including Sage's, the IHS has followed the following process. Upon receipt of a claim, the IHS CO sends a letter acknowledging the claims, requests additional documentation and explanation of the claims that are not available to IHS and are necessary to complete its analysis, and sets forth a date for responding to the claims. *See* Blair Decl., ¶¶ 13, 15; Dayish Decl., ¶¶ 17-19. Due to the complexity of the CSC claims, as well as IHS's goal to ensure consistency in the analysis of all claims, the claims are then analyzed by an IHS team that includes financial analysts and staff from the appropriate IHS Area Office, including the CO. *See* Blair Decl., ¶ 13; Dayish Decl., ¶7. After IHS completes its analysis of the tribal contractor's claims, it notifies the tribal contractor of the results of the analysis or reaches out to the tribal contractor and typically its legal counsel and financial expert to discuss the claims. *See* Blair Decl., ¶16. The IHS's legal counsel, financial experts, and frequently IHS Area Office staff participate in these meetings. *See* Blair Decl., ¶¶ 13, 16. Most of the time, IHS and the tribal contractor are able to reach an understanding about the eligible costs actually incurred by the tribal contractor but not paid by

the IHS as CSC under the tribal contractor's ISDEAA contract and annual funding agreement, allowing the parties to quickly settle the claims at the next step of the CDA process. *See* Blair Decl., ¶ 16. As set forth in IHS's October 23, 2014 letter to Sage, it is the IHS's goal to work cooperatively with tribal contactors to exchange relevant documents and discuss the claims prior to issuing its final decision. *See* Blair Decl., ¶ 17.

5. Defendants do not dispute Statement of Material Fact No. 5. For further clarification, Defendants note that Sage submitted approximately 270 pages of documents with its CDA claims letter for $62,569,681, including Sage's audited financial statements for fiscal years (FYs) 2009-2013. *See* Sage's Motion, Exhibit 2. Further, Defendants would note that the documentation provided did not include the information specifically requested by Mr. Dayish in his October 23, 2014 letter acknowledging the claims and requesting additional funding. *See* Dayish Decl. ¶¶ 19-20.

6. Defendants dispute that the claims are supported by the documentation submitted by Sage. *See* Blair Decl. ¶¶ 13, 15; Dayish Decl., ¶¶ 18-19. To enable IHS to evaluate Sage's CSC underfunding claims, Mr. Dayish specifically requested that Sage submit documentation relevant to analyzing the amount of actual CSC incurred in the years at issue, including:

1) Documents showing actual expenditures for direct costs associated with operation of the ISDEAA programs for each fiscal year at issue.
2) Documents showing the Tribe's indirect costs for each fiscal year at issue.
3) Documents showing the Tribe's actual capital expenditures, pass-through amounts, and other exclusions associated with the operation of the ISDEAA programs for each fiscal year at issue.
4) Any additional documentation in Sage's possession that will assist IHS in determining which of Sage's expenditures meet the ISDEAA definition of CSC in section 106(a)(2) and do not duplicate costs funded in the section 106(a)(1) amount.

See Dayish Decl., ¶ 19. Sage did not respond to the request for additional documentation. *See* Dayish Decl., ¶ 20.

Defendants dispute that Sage is entitled to expectancy damages, and that its claim letter "clearly explain[s] the expectancy damages claim for lost-third party revenues and the manner of calculating them" and that the documentation provides any support for those claims. *See* Blair Decl., ¶ 19.

7. Defendants dispute that IHS responded to Sage's CDA claims with an "inapplicable form letter." For claims over $100,000, the CDA requires the CO to issue a decision within 60 days or notify the contractor when a decision will be issued. 41 U.S.C. § 7105(f)(2); 25 C.F.R. § 900.223(a). As Sage admits in its Statement No. 7, the IHS's October 23, 2014 response letter notified Sage it would issue a decision by October 21, 2015. *See* Sage Motion, Exh. 3 at 1. Further, while based on a template designed to ensure consistent responses to all tribes with CSC claims, the letter was tailored to respond to the information required to analyze Sage's claims; for example, IHS did not request documents on its template list that Sage had already provided (such as its annual audit reports) and instead tailored the request to information that was not apparent from the information already received from Sage. *See* Sage Motion, Exhibit 3; Dayish Decl. ¶¶18-19.

8. Defendants dispute that "IHS failed to either read or comprehend" Sage's CDA claims. Frank Dayish reviewed Sage's claim letter and responded in writing. *See* Dayish Decl., ¶ 17. Furthermore, IHS has analyzed and extended settlement offers on over 1,200 of such claims and has settled 888 of those claims. *See* Blair Decl., ¶ 10.

Defendants further dispute Sage's characterization of the response letter and reasoning for additional time to analyze the claim. The letter speaks for itself:

> At this time, the IHS has not had an opportunity to adequately review and make a final decision on your claim for a variety of reasons, including the size, complexity, age, and lack of specificity of your claim and the inadequacy of supporting documentation submitted with the claim. In

> addition, the IHS would like to work cooperatively with [Sage] to exchange relevant documents and discuss the claims prior to issuing its response. In consideration of these factors and based upon the anticipated cooperation of [Sage], I will issue a contracting officer's decision by October 21, 2015.

See Sage Motion, Exh. 3. As noted above, the letter also requested additional documentation that, based on its review of the information already provided, was still needed by the IHS. The letter also stated that "the IHS would like to work cooperatively with [Sage] to exchange relevant documents and discuss the claims prior to issuing its response." *Id.*

9. Defendants dispute that the documents provided by Sage are sufficient to support its claims or for IHS to conduct its costs-incurred analysis of the claims. *See* Blair Decl., ¶¶ 13 and 15; Dayish Decl. ¶¶ 18-20. Defendants further dispute that Sage's claim letter and exhibits properly explain or document the expectancy damages claim for lost third-party revenues and the calculation thereof. *See* Blair Decl., ¶ 19.

10. Defendants dispute that IHS "either did not read or comprehend" Sages CDA claims. The IHS has analyzed and extended settlement offers on over 1,200 of such claims and has settled 888 of them. *See* Blair Decl., ¶ 10. The CO Mr. Dayish reviewed Sage's claim letter and responded in writing to Sage's claims. *See* Dayish Decl., ¶ 17; Plaintiff's Motion, Exh. 3 at 1. Defendants dispute that Sage's claim letter and its exhibits "provide all the information necessary" for IHS to decide the claims. *See* Blair Decl., ¶¶13 and 15; Dayish Decl., ¶¶ 18-20. The information requested by IHS was based on the Agency's experience of evaluating more than 1,200 claims and what has been needed to both complete the analysis and engage in discussions with the tribes to reach a mutually agreeable resolution.

More importantly, Defendants dispute that the date chosen for responding – October 21, 2015 – is not reasonable, particularly in view of the volume of CSC claims facing IHS generally

and its experience in addressing those claims, both of which informed IHS's determination of the time necessary to issue a decision on Sage's CSC claims. Over 1,600 CSC CDA claims have been presented to IHS. *See* Blair Decl., ¶ 4. To respond, IHS hired an outside financial accounting firm, Cotton & Co., additional staff in its Office of Finance and Accounting (OFA), and new attorneys in the HHS Office of the General Counsel, to assist in handling the claims. *See* Blair Decl., ¶ 5. In addition, numerous staff in IHS's twelve Area Offices, thirty attorneys in the HHS Office of General Counsel, as well as numerous attorneys in the U.S. Attorney's Office, are assisting in tracking, evaluating, and resolving the CSC CDA claims. *See* Blair Decl., ¶¶ 6-7.

Extensive documentation is needed to evaluate the claims, and the analysis is complex. *See* Blair Decl., ¶¶ 13-15. In addition, IHS is attempting to resolve the claims expeditiously and in cooperation with tribal contractors, without resorting to litigation. *See* Blair Decl., ¶¶ 8-10 and 17. Indeed, information needed is not readily apparent from financial statements and other documents and, instead, requires in-depth conversations between the financial experts for both the tribe and IHS in order for the parties to reach an understanding. *See* Blair Decl., ¶¶ 14-16. Such a collaborative process is time consuming and resource intensive, and the time required to respond to each claim is only heightened due to the complexity of each claim, the total number of claims being addressed by IHS, and the time needed to meet with and discuss the claims with tribal contractors. *See* Blair Decl., ¶¶ 14 and18. Based on IHS's experience with the CSC CDA claims to date, one to two years is a reasonable amount of time to allow for the necessary exchange of documentation and information to resolve the claims. *See* Blair Decl., ¶ 18; Dayish Decl., ¶¶14, 17, 22. As IHS continues to make progress in resolving the claims, the majority of which have already been resolved, IHS does anticipate that the time required to reach resolution will be shortened. *See* Blair Decl., ¶ 18.

In addition, in an effort to treat all tribal contractors fairly, IHS made a policy decision, which has been communicated to all tribal contractors (and agreed upon by many tribal contractors whose claims were pending before the Civilian Board of Contract Appeals (CBCA)), to attempt to review and resolve the claims in the order they were received; i.e., the earliest or oldest claims first, followed by the claims received more recently. *See* Blair Decl., ¶ 9. Sage's claims are the most recently filed CSC CDA claims in the Navajo Area IHS. *See* Dayish Decl., ¶ 21.

Finally, all of the tribal contractors in the Navajo Area IHS with ISDEAA contracts have filed CSC CDA claims against the IHS, and IHS's determination on the time required to respond to Sage's claims was informed by the Area's experience with resolving those other claims. *See* Dayish Decl., ¶¶ 8-12, 14, 17. In general, it has taken approximately two years to resolve such claims with the Navajo Area ISDEAA contractors. *See* Dayish Decl., ¶ 14. The CO informed Sage that he would issue a final decision by October 21, 2015, based on his good faith estimate of the amount of time that would reasonably be needed evaluate and assess the claims, based on this prior experience in the Navajo Area and throughout IHS. *See* Dayish Decl., ¶¶ 14, 17. In addition, Sage's claims for $62 million are larger than the majority of CSC CDA claims filed against the IHS. *See* Dayish Decl., ¶ 16. The evaluation and assessment of Sage's CSC claims likely will take longer than for other CSC claims because of the separate (but related) issue of the significant offset and counterclaims that IHS will likely need to assert against Sage due to significant misuse and mismanagement of IHS funds, as disclosed by the forensic audit conducted by an outside contractor, Moss Adams. *See* Dayish Decl., ¶¶ 22-23.

LEGAL ARGUMENT

A. Sage Has the Burden to Show Undue Delay and that the Date Designated by the Contracting Office for Issuing a Decision Was Unreasonable

As the moving party, Sage has the burden of proof to demonstrate there has been undue delay on the part of the CO and that the date designated by the CO for issuing a decision is unreasonable, "taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor." 41 U.S.C. § 7103(f)(3)-(4); 25 C.F.R. § 900.224. Sage failed to carry this burden of proof and, for the purpose of summary judgment, failed to show there is no genuine issue of material fact on this issue.

In *Design One Building Systems, Inc. v. Dept. of Veterans Affairs*, CBCA 2423 (May 27, 2011), the contractor, Design One, requested that the CBCA direct the Veterans Administration (VA) CO to issue a decision on its claims sooner than the date selected by the CO. Design One, as Plaintiff does here, cited the CDA in support of its request. Design One had submitted its claims, which totaled more than $34 million, to the VA at the end of November, 2010. On December 21, 2010 (within the sixty day time period for responding), the CO responded, and indicated that due to the complexity and amount of the claims, the VA would have to hire a claims consultant. The CO stated that the earliest a decision would be issued was November 15, 2011, almost a year after the claims had been filed. In response, Design One requested that the CBCA shorten the time for the CO to issue a decision. The CBCA denied the request. In denying the request, the Board held:

> The party making a claim bears the burden of proof. Here, Design One is the party asking the Board to direct the contracting officer to issue a decision earlier than November 15, 2011. If CS [the VA's claims consultant] is correct in thinking that a consultant would need six months to evaluate the contractor's claims, the decision soon would be in hand if the contracting officer had, after

> receiving the claims, promptly hired a consultant. Nevertheless, Design One has not provided any evidence that beginning on that date on which it filed its petition, the agency's estimate of time needed to perform an evaluation is unreasonable. Consequently, we do not prescribe a date earlier than November 15, as requested by the contractor.

Design One, CBCA 2423 (May 27, 2011). Sage likewise bears the burden of proof here as the party asking the Court to direct the CO to issue a decision earlier than October 21, 2015. Similar to the contractor in Design One, Sage failed to provide any evidence that the Agency's informed estimate of time needed to perform an evaluation and issue a decision on the claims is unreasonable.

B. The Court Must Look to the Specific Facts of This Case to Determine Undue Delay and Whether the Decision Date Is Reasonable

The Court must look to the specific facts of each case to determine whether there has been undue delay and whether the time chosen by the CO for responding to the claim is reasonable.

> By not specifying a certain number of days within which a contracting officer must issue a decision and instead allowing the contracting officer a reasonable time, Section [7103(f)(3)] provides the contracting officer with flexibility to handle large claims which vary considerably in size and complexity, and hence, when the contractor can proceed with a suit. The lack of a specific and uniform statutory deadline, however, leaves some ambiguity as to precisely when the time period allowed for a contracting officer decision has expired. Section [7103(f)(3)] addresses this ambiguity by specifying factors that should be considered when determining what constitutes a reasonable time.

L & D Services, Inc. v. United States, 34 Fed. Cl. 673, 677 (1996) (analyzing 41 U.S.C. § 605(c)(3), where 7103(f)(3) was previously codified; for many years the CDA was codified at 41 U.S.C. 601 *et seq.*).

Furthermore, "[w]hether the time a CO needs to issue a decision is reasonable must be determined on a case by case basis." *Public Warehousing Company, KSC.*, ASBCA Nos. 56888 (2009); *see also Eaton Contract Services, Inc.*, ASBCA Nos. 52686 and 52796, 00-2 BCA ¶

31,039 (finding eight months reasonable given the volume of documentation, number of issues and time needed to gather information due to relocation of personnel); *Defense Systems Company, Inc.*, ASBCA No. 50534, 97-2 BCA ¶ 28,981 (finding nine months reasonable when claimed amount exceeded $71 million and narrative portion of the claim alone exceeded 162 pages).

Moreover, if "the claim is substantial and will require a long period of time to address, then the contracting officer's only option is to fix a date far enough into the future to assure complete evaluation. . . ." *Eaton Contract Services, Inc.*, citing *Defense Systems Company, Inc.*, *Aerojet General Corp.*, ASBCA No. 48136, 95-1 BCA ¶ 27470; and *Boeing Co. v. United States*, 26 Cl. Ct. 257, 259 (1992).

C. Sage Has Not Met Its Burden of Showing Undue Delay or that the Date Set for Responding Was Unreasonable

Sage failed to provide any support for its position that the CO has unduly delayed in making a decision with regard to Sage's claims or that the time the CO set for responding to the claims was unreasonable. Sage submitted as exhibits its three page claim letter (Exhibit 2) and the attachments to the letter (approximately 275 pages). It also submitted a declaration from Sage's CEO, Christi El-Meligi. However, Ms. El-Meligi's declaration does not address the complexity of Sage's $62 million dollar claim, the process followed by IHS (and other tribes) for resolving CDA claims for unpaid CSC, or the reasonableness of October 21, 2015 as the date on which the CO would issue his decision with respect to Sage's claims given the complexity of the case and the process outlined above.

On the contrary, Sage's "evidence" consists only of unverified blanket statements by its legal counsel that "the Claim is expressly based on the incurred cost method for determining CSC shortfalls"; "the Claim and its Exhibits provide all the information necessary for IHS to

decide the Claim promptly"; and the claim "is not lengthy or complex from a government contracting perspective." (Motion, pp. 4, 5 and 11.) Clearly, Sage has not met its burden.

D. IHS Has Clearly Shown That the Date Chosen by the CO to Respond to Sage's Claims Is Reasonable and There Has Been No Undue Delay

The IHS, in stark contrast to Sage's unsupported allegations, has provided ample support for its position that there has been no undue delay. First, IHS did not delay in responding to the claim letter, immediately issuing a letter acknowledging the claim, asking for Sage's cooperation in resolving the claim, and identifying a date by which the IHS CO would issue a decision. Second, in choosing the date by which the CO would respond, IHS was reasonable and based the determination on the very unique circumstances of the CSC claims against the IHS, generally, how those general circumstances impacted IHS's ability to respond to Sage's specific claims in the specified period, and how factors unique to Sage's claims specifically further impacted the time required for IHS to respond. In support of its Opposition to Sage's Motion, Defendants have provided the Declarations of Sue Blair, the Acting Director of IHS's Division of Audit in the Office of Finance and Accounting, and Frank Dayish, the IHS CO for the Sage ISDEAA contract.

As explained by both Ms. Blair and Mr. Dayish, IHS is attempting to resolve the CSC claims expeditiously, as well as consistently and in cooperation with tribal contractors, without resorting to litigation if possible. As a general matter, the process is time consuming and resource intensive, due to the complexity of the claims, the total number of claims presented to IHS, the time required for IHS team to evaluate the claims, and the time needed to meet with and discuss the claims with tribal contractors to discuss the claims. Based on IHS's experience with the CSC claims to date, one to two years is a reasonable amount of time to take all of the necessary steps to resolve a tribal contractor's CSC claims. The IHS CO Mr. Dayish informed

Sage that he would issue a final decision by October 21, 2015, based on his good faith estimate of the amount of time that would reasonably be needed to evaluate and assess Sage's claims, based on his prior experience with the process for resolving CSC claims and the nature of Sage's particular CSC claims. In addition, issues involving Sage's use of its ISDEAA funding generally are likely to impact the resolution of the CSC claims because, for example, those issues could give rise to potential offsets or counterclaims of any amount of CSC underfunding that IHS identifies.

The IHS's collaborative approach with tribal contractors in resolving the multitude of CSC claims, and the great success to date in settling the majority of claims, is fully consistent with the purpose and intent of Congress of establishing the CDA's administrative requirements:

> I. PURPOSE
>
> The Contract Disputes Act of 1978 provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims. *The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation;* equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; *and insure fair and equitable treatment to contractors and Government agencies.*

S. Rep. No. 1118, 95th Cong., 2d Sess. 1 (1978), 1978 U.S.C.C.A.N. 5235 (emphasis in original).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Sage's Motion, and deny Sage's request that the Court order Mr. Dayish to issue a decision on Sage's claims on a date earlier than the date Mr. Dayish has already set (October 21, 2015).

Respectfully submitted.

DAMON P. MARTINEZ
United States Attorney

KAREN GROHMAN
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico
(505) 346-7274; Fax (505) 346-7205
Karen.Grohman@usdoj.gov

Of counsel
/s/ filed electronically on 2/26/2015
Paula R. Lee
Assistant Regional Counsel
Office of General Counsel
U.S. Dept. of Health and Human Services, Region IX
90 7th Street, Suite 4-500
San Francisco, CA 94103
(415) 437-7673
paula.lee@hhs.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2015, Defendant filed through the United States District Court CM/ECF System the foregoing document, causing it to be served by electronic means on all counsel of record.

/s/ *filed electronically on 2/26/2015*
KAREN F. GROHMAN
Assistant United States Attorney