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

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| **NAVAJO HEALTH FOUNDATION - SAGE MEMORIAL HOSPITAL, INC.** | ) | |
| **PLAINTIFF,** | ) | |
| **v.** | ) | |
| **SYLVIA MATHEWS BURWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT McSWAIN, ACTING DIRECTOR OF INDIAN HEALTH SERVICE;[1] JOHN HUBBARD, JR., AREA DIRECTOR, NAVAJO AREA INDIAN HEALTH SERVICE; and FRANK DAYISH, CONTRACTING OFFICER, NAVAJO AREA INDIAN HEALTH SERVICE,** | ) | **NO. 1:14-cv-958-JB-GBW** |
| **DEFENDANTS.** | ) | |

**REPLY TO DEFENDANTS' OPPOSITION TO**

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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[1] Robert McSwain replaced Yvette Roubideaux as Acting Director of IHS in February 2015 and is automatically substituted for her pursuant to *Fed. R. Cir. P.* 25(d).

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

On August 25, 2014, Plaintiff Navajo Health Foundation - Sage Memorial Hospital, Inc. ("Sage") submitted a claim under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §§ 450, 450a *et seq*., and the Contract Disputes Act ("CDA") incorporated therein, *see* 25 U.S.C. § 450m-1(d), for unpaid contract support costs ("CSC") owed to Sage by the Government. *See Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); *Salazar v. Ramah Navajo Sch. Bd.*, 567 U.S. __, 132 S. Ct. 2181 (2012). The ISDEAA requires that the agency decide such claims within a reasonable time. *See* 41 U.S.C. § 7103(f)(3); 25 C.F.R. § 900.223(c). Defendant Frank Dayish, as Contracting Officer ("CO"), replied by a form letter dated October 23, 2014, conditionally stating that he would issue his decision by October 21, *2015*, about 14 months after he received Sage's claim. Sage then added a fourth claim for relief in its First Amended Complaint alleging that such delay in making this initial decision is unreasonable, and the present Motion for Summary Judgment asserts that such delay is unreasonable as a matter of law.

In response, Defendants assert generally that CSC claims like Sage's are complex, describe the process that the Indian Health Service ("IHS") would prefer to take in resolving CSC claims, provide national statistics regarding Defendants' success in resolving claims, state that claims generally take one to two years to resolve completely, and provide information about the status of CSC claims arising in the Navajo Area IHS. Even if all this information were accurate and complete, Defendants' various contentions do not raise any *genuine* issue of *material* fact precluding the grant of summary judgment. The crux of

Defendants' argument is that Dayish needs more documentation from Sage. However, as a recent decision involving Dayish himself holds, this contention, even if true, is not *material*: "The CDA provides *no exception* to the [41 U.S.C.] § 7103(f) timing requirements for claims that the contracting officer later determines to be insufficiently supported by documentation." Memorandum Op., *Tuba City Reg. Health Care Corp. v. United States*, No. 1:13-cv-00639-RC (D.D.C. Apr. 25, 2014), Dkt. 32 slip op. at 2 (reproduced as Exhibit E hereto) (emphasis added),[2] nor does the CDA provide any exception to its timing requirements for assertedly "complex" claims, *id.*, slip op. at 6. Under the CDA, "'[a]ll that is required is that the contractor submit . . . a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.'" *Id.* at 7 n.4 (*quoting Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)); *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289, 1295 (Fed. Cir. 2012); 25 C.F.R. § 900.218(a).

And even if the purported fact dispute over the sufficiency of Sage's documentation were material, IHS has not presented a *genuine* dispute as to those facts. Regardless of how many months or years Dayish spends assessing Sage's claim, he must ultimately deny it on the ground that appropriations for past CSC have been exhausted, making Defendants' claim of insufficient documentation "particularly inapt." *Tuba City*, slip op. at 8; Ex. G, I. *Every* CSC claim is and must be denied by the CO on the principal ground that IHS has no money

[2] Sage learned of the unreported *Tuba City* decision in consulting with other attorneys for this reply brief. Defendants obviously knew of this decision, but did not mention it in their Opposition.

legally available to pay the claims, regardless of their merit. Mot. for Sum. J. Ex. 4 at 2; Ex. I. These denials are followed by routine appeals, decided *de novo*, *see* 41 U.S.C. § 7104(b)(4). Only after the appeals are filed may meritorious claims be settled and paid from the Treasury Department's Judgment Fund.

In any event, Sage provided more than adequate information supporting its claim. *See* Mot. for Sum. J. Ex. 2; 25 C.F.R. § 900.223(c) (what is a "reasonable" time depends on the size and complexity of the claim and the adequacy of the information provided to the CO). IHS has not requested a single document from Sage in the more than six months since Sage filed its claim although, since late 2014, Sage's claim has been the only one awaiting analysis by the Navajo Area IHS. And with the exception of one inapposite case cited by Defendants (discussed *infra* at 16 n.10), no decision has held that a period greater than nine months was reasonable for a CO to issue an initial decision, even for the most complex claims submitted under the CDA. Dayish's proposed 14-month schedule is unreasonable as a matter of law.

## II. SAGE EXPRESSLY EMPLOYED IHS' PREFERRED "INCURRED COST" METHODOLOGY.

Sage's CSC claim covers fiscal years 2009 through 2013. IHS has underpaid most tribal contractors, including Sage, during all of these years. IHS admitted as much in its so-called "shortfall reports" submitted to Congress and required by 25 U.S.C. § 450j-1(c).[3] *See Cherokee Nation v. United States*, 199 F.R.D. 357, 359 (E.D. Okla. 2001) (describing

[3] The last such report, sent to Speaker Boehner on May 22, 2013, covers FY 2011. For 2009 to 2011, these reports show a "shortfall" to Sage of $1,656,774, $3,853,745, and $2,702,059, respectively, for a total of $8,212,578 for those three years. Ex. A at 8, 13, 15.

shortfall reports). However, and notwithstanding IHS' apparent confusion on this point, Sage's claim was expressly prepared in accordance with IHS' instructions to use the "incurred cost" method and is not based in whole or in part on IHS' shortfall reports provided to Congress. Mot. for Sum. J. Ex. 2 at 2 and Ex. A thereto; *cf. id.* Ex 3 at 2 (Dayish's form letter asserting the contrary twice).

Many tribal organizations rely almost exclusively on IHS funding to run their programs. So when IHS fails to pay for CSC, these organizations have no other source of funds to cover the unpaid CSC and must either reduce health care services to make up for the shortfall or divert money from other programs to "subsidize federal programs." S. Rep. No. 110-274 (1987) at 7. And because IHS' shortfalls caused most tribal organizations to spend less, IHS has now renounced its reports to Congress and taken the position that it is obligated to pay a contractor only the amount of CSC the contractor had actually spent, less CSC paid by IHS. *See* Ex. B (letter to Navajo Nation); Mot. for Sum. J. Ex. 4 at 1-2. IHS' new approach thus reduces its liability to many contractors.

However, Sage actually did incur costs to cover CSC in excess of what IHS paid, and it maintained records of those expenditures. Therefore, consistent with IHS instructions and in contrast with many other contractors' claims, Sage's CSC claim does not rely on IHS' shortfall reports but rather details its incurred CSC. Mot. for Sum. J. Ex. 2 and Ex. A thereto. The difference between Sage's incurred costs and IHS CSC payments totals $36,258,493 for the five years from 2009 to 2013. *Id.* Ex. 2 at 1; *see* 25 U.S.C. § 450j-1(a)(3)(A) (eligible CSC shall include both direct program expenses and "any additional administrative or other

expense related to the overhead incurred by the tribal contractor"). That is Sage's core claim.

In addition, "[d]amages for breach of contract are designed to make the non-breaching party whole. One way to accomplish that objective is to award 'expectancy damages.'" *Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1361 (Fed. Cir. 2010). Thus, Sage's claim also seeks $26,311,188 for the third-party revenues Sage lost as a result of the CSC underpayments, and Sage explained how this sum was computed. Mot. for Sum. J., Ex. 2 at 2-3 and Ex. A thereto at 1; *see* Ex. F ¶ 7.

This is Sage's claim. It is straightforward, uses IHS' preferred "incurred cost" methodology, and provides considerable detail about the basis and manner of calculating the damages asserted.

## III. DEFENDANTS PRESENT NO GENUINE ISSUE AS TO A MATERIAL FACT.

### A. Applicable Standards

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). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is 'genuine' if a rational jury could find in favor of the nonmoving party on the evidence presented." *Ortiz v. Norton*, 254 F.3d 889, 893 (10th Cir. 2001) (citations omitted). Once the moving party has made a properly supported motion for summary judgment, the nonmoving party must provide evidence that would require a jury to resolve genuine disputes as to material facts; the mere fact that there are disagreements about immaterial facts or even about material facts (if those disagreements are not genuine)

does not preclude a grant of summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

If a rational trier of fact could not find for the nonmoving party on the record as a whole, summary judgment is appropriate. *E.g.*, *United States v. Hopkins*, 927 F.Supp. 2d 1120, 1155 (D.N.M. 2013) (Browning, J.). If the evidence provided by the nonmoving party is merely colorable or not sufficiently probative, summary judgment is proper. *Hopkins, supra* (*citing Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986)). Factual disputes that are irrelevant, unnecessary, or spurious do not count. *Anderson*, 477 U.S. at 247-48; *Bolack v. Underwood*, 340 F.2d 816, 819 (10th Cir. 1965).

**B. Alleged Insufficient Documentation Is Not a Valid Basis for An Extended Period for a CO to Decide a Claim, and Any Additional Time Needed to Fully Settle a Claim Is No Basis for Violating the CO's Duty to Decide It Initially Within a Reasonable Amount of Time.**

Defendants' account of IHS' settlement with Tuba City omits mention of the federal court decision underlying that settlement and key judicially noticeable facts. Tuba City filed its first claim with Dayish on September 17, 2012 and filed five more on November 5, 2012. *Tuba City, supra*, Ex. E, slip op. at 2. Dayish responded to the September 17 letter on November 16, 2012 stating "I anticipate that I will issue a final contracting officer's decision by March 16, 2013" and responded to the November 5 letters on January 2, 2013 with letters requesting, *inter alia*, "contract support costs *actually* incurred by [Tuba City] during the relevant time period." *Id.* at 2-3 (emphasis in original). The letters stated, "If you submit sufficient information to issue [*sic*] a final decision on your claims as requested above, the IHS anticipates that it will issue a final decision on the claims by May 3, 2013." *Id*. at 3.

On February 11, 2013, Dayish sent a letter to Tuba City that "purported to grant himself a second extension of the deadline" for the first claim, to May 3, 2013. *Id.* at 3. On April 26, 2013, Dayish sent another letter to Tuba City purporting to grant himself additional extensions for all six claims, saying he "'anticipated' that the IHS would make a decision by October 22, 2013." *Id*. at 3. Tuba City then sued so that it could pursue its claims without further delay, asserting that its claims had been "deemed denied" as a matter of law by IHS' failure to decide the claims within a reasonable amount of time. *Id*.

As in Sage's case, IHS argued to the district court that Tuba City "ha[d] not provided the documents that 'it needs to evaluate the claims being made and engage in settlement discussions.'" *Id*. at 7. The court ruled that this was *irrelevant*, because "[t]he CDA provides no exception to the [41 U.S.C.] § 7103(f) timing requirements for claims that the contracting officer later determines to be insufficiently supported by documentation." *Id*. at 7. *See, e.g., Orbas & Assoc. v. United States,* 26 Cl. Ct. 647, 650 n.3 (1992).

Just as in Sage's case, the Government also argued that "the purpose of the CDA is 'to induce resolution of more contract disputes by negotiation prior to litigation.'" *Id*. at 7 & n.4; *see* Opp. at 13 (stating the same). The court found IHS' invocation of that statutory purpose "particularly inapt" because – again, as in Sage's case – "the only way settlement can occur is if the litigation proceeds; otherwise, the Government cannot pay judgments out of the Judgment Fund." *Tuba City*, *supra*, slip op. at 8; *see* Mot. for Sum. J. Ex. 4 at 2; Ex. G (examples of form letter from IHS Contracting Officers denying claims, as follows: "[b]ecause IHS may not reprogram other funds from its appropriation to pay CSC, and

because IHS has obligated the entirety of the . . . appropriations, IHS is barred from paying [the tribal organization's] claims."). The court ruled that Tuba City's claims should be deemed denied by Dayish's self-granted extensions. In so ruling, the court assumed without deciding that Dayish's equivocal and conditional letters did not violate the CDA requirement that the agency commit to issue a final decision by a specific date, such that the claims could be deemed denied for that reason, also. *Id*. at 6 & n.2.

Neither alleged insufficient documents nor IHS' preferred means of settling claims provides a valid basis for an extended period for a CO to decide a claim under the CDA.

### C. Defendants Therefore Present No Issue of *Material* Fact; the Documentation Issue Is Irrelevant under the ISDEAA and the CDA.

Defendants have not met their burden to show the existence of any issue of *material* fact. Much of Defendants' Opposition is plainly irrelevant to whether the Navajo Area Contracting Officer's proposed 14-month delay in issuing his decision on Sage's claim is unreasonable. And IHS' principal ground, that Sage needs to provide more documentation to support its claim – even if that were true – would not present an issue of material fact.

Dayish's "good faith," *vel non,* is immaterial to whether the proposed 14-month period for making his initial CO decision is reasonable. *Cf.* Opp. at 14, 19. Defendants' statements regarding the time to *resolve in full* CSC claims, either nationwide or at the Navajo Area, *see id.* at 13, 18 (one to two years nationally); 14 (two years at Navajo Area), are immaterial to the time it should take for Dayish to make an *initial CO decision* denying Sage's CSC claim. IHS' policy preferences regarding the manner of settling cases with tribes and tribal

organizations, *see id*. at 5, 8, 9-10, 13, 14, 18, and generalities regarding settlements and pending settlements over the past several years, *see id.* at 11 ¶ 8, 12-13 ¶ 10, 19, are also irrelevant to a determination of whether a year and eight weeks is an unreasonable time for *this* Contracting Officer to issue his initial decision denying *this* claim. Defendants' "clarifications" of Sage's assertions of fact do not create genuine issues, either. *See* D.N.M.LR-Civ. 56.1(b) ("All material facts set forth in the Memorandum [in support of motion for summary judgment] will be deemed undisputed unless specifically controverted."); *see Canning v. United States Dep't of Defense*, 499 F.Supp. 2d 14, 16 (D.D.C. 2007) (construing similar local rule and deeming admitted Plaintiff's factual assertions, where Defendant blended its responses with argument).

Without the fluff, the purported issues of fact asserted by IHS boil down to its assertions that Sage's claims are not supported by sufficient documentation, that Dayish specifically requested that Sage submit documentation relevant to analyzing the amount of actual CSC incurred in the years at issue (referring to the four categories of documents set forth in Dayish's letter, Mot. for Sum. J. Ex. 3 at 2), and that Sage did not clearly explain and provide documentation for its expectancy damages claim. Opp. at 10-11 ¶ 6. Even assuming for the sake of argument that Defendants' statements were correct, any such fact issue is not material. As explained in the *Tuba City* decision, assertions of insufficient documentation are irrelevant to the issue of the timeliness of a CO's decision under the CDA. *Tuba City*, slip op. at 7. Rather, "'[a]ll that is required is that the contractor submit . . . a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and

amount of the claims.'" *Id.*, slip op. at 7 & n.4 (*quoting Contract Cleaning,* 811 F.2d at 592; *and citing Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 410 (D.D.C. 2010)). The same principle applies to Sage's claim for expectancy damages, even if IHS had not already determined that such damages must be denied "[a]s a matter of law." Opp. Ex. 2 ¶ 19; *see* Mot. for Sum. J. Ex. 2 at 2-3 and Ex. A thereto (setting forth basis and amount of the claim for such damages).

**D. Even if IHS Raised Disputes over Material Facts, Those Disputes Are Not Genuine, where Sage Provided Ample Documentation, IHS Has Not Asked for Any Documents, Sage's Claim Has Been the Only One Awaiting a CO Decision Since "Late 2014," and the Decision Must Be a Denial.**

Even if IHS' invocation and repetition of the boilerplate in Dayish's letter regarding his possible need or desire for additional documentation concerned a material fact, IHS' position that it lacks sufficient documentation for the CO to make a decision on Sage's CSC claim presents no *genuine* issue. No reasonable trier of fact could find for IHS on the record as a whole on the documentation issue. The following facts are unrebutted:

1. Sage submitted its CSC claim to Defendant Dayish on August 25, 2014, a true and correct copy of which is attached as Exhibit 2 to Sage's Motion for Summary Judgment. Statement of Material Facts ("SOMF") no. 5; Opp. at 7, 10 ¶ 5.

2. About 60 days later,[4] *see* 25 C.F.R. § 900.223(a) (setting 60-day deadline for contracting officer to render initial decision or to state when a decision will be made), on October 23, 2014 Dayish responded to Sage's claim, and gave himself until October 21, *2015*

[4] Certainly not "immediately," as stated by Defendants. Opp. at 18.

to issue his decision. SOMF no. 7; Opp. at 11 ¶ 7.

3. Dayish's letter is a form letter, which IHS prefers to call "a template designed to ensure consistent responses to all tribes." Opp. at 11 ¶ 7; Ex. H (examples of same form letter sent to other ISDEAA contractors).[5]

4. Dayish's letter speaks for itself. That his form letter was sent without any real consideration of Sage's claim is shown by the letter itself, Mot. for Sum. J. Ex. 3.

A. Dayish states with no support that "[a]t least part of your claim appears to be based on the annual IHS CSC report to Congress," *id*. at 1, and repeats that statement with more certitude on the second page of his letter, *id*. at 2 ("For example, the 'shortfall' claim appears to be based directly on the annual report to Congress."). Those unsupported boilerplate statements are incorrect; Sage did not rely on IHS' reports to Congress, and Sage's claim expressly states that Sage "has used the method of calculating the shortfall preferred by IHS, namely, full amount of CSC incurred minus amount of CSC paid." Mot. for Sum. J. Ex. 2 at 2 and Ex. A thereto; Ex. F (McGee Decl.) ¶ 3.

B. Dayish then identifies what was already provided, namely "that [Sage] submit information of actual CSC incurred in the years at issue." Mot. for Sum. J. Ex. 3 at 2; *cf*. *id.* Ex. A of Ex. 2 (summary and 13-page detailed spread sheets showing "CSC incurred"); Ex. F ¶ 4(A&B).

C. Having ignored what Sage actually submitted, Dayish proceeds to state that

[5] Notably, the COs in these instances predicted decisions in an average of five months.

"[r]elevant documentation *may include*" four categories of documents. Mot. for Sum. J. Ex. 3 at 2. Stating what additional documentation "may include" is not a request for any document or category of documents. At any rate:

i. The first category is "[d]ocuments showing actual expenditures for direct costs associated with operation of the ISDEAA programs for each fiscal year at issue." That information was provided by Sage, Mot. for Sum. J. Ex. A of Ex. 2 at Att. A and Att. B pt. B; Ex. F ¶ 4(A&B), and attested to by Sage's independent auditor in conjunction with the claim, Mot. for Sum. J. Ex. 2 at 3 and Ex. G thereto.[6]

ii. The second category of documents identified in Dayish's form letter as documents that "may" be relevant is "[d]ocuments showing *the Tribe's* indirect costs for each fiscal year." Mot. for Sum. J. Ex. 3 at 2 (emphasis added). Sage is not a "tribe."[7] At any rate, documentation showing *Sage's* indirect costs *was* provided by Sage, *id*. Ex. A of Ex. 2 at Att. A and Att. B pt. A; Ex. F ¶ 4(A&B), and attested to by Sage's auditor, Mot. for Sum. J. Ex. 2 at 3 and Ex. G thereto.

iii. The third category of documents identified in Dayish's form letter as potentially relevant similarly reveals his careless use of the IHS form letter and is likewise

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[6] Defendants' statement that "Sage's 'evidence' consists only of unverified blanket statements by its legal counsel," Opp. 17, quotes statements in Sage's brief but overlooks the references to the record evidence accompanying those statements, namely Exhibit 2 to the Motion for Summary Judgment at 1-3 and Exhibits A-G thereto. *See* Mot. for Sum. J. at 4 ¶ 9 and 5 ¶ 10. Defendants concede that these exhibits were submitted with Sage's claim to IHS. Opp. at 7.

[7] *See* 80 Fed. Reg. 1942 (Jan. 14, 2015) (listing all federally recognized Indian tribes).

inapposite, *i.e.*, "[d]ocuments showing *the Tribe's* actual capital expenditures, pass-through amounts, and other exclusions associated with the operation of the ISDEAA programs." Mot. for Sum. J. Ex. 3 at 2 (emphasis added). In any event, Sage's claim did not rely on any such expenditures or amounts. Ex. F ¶ 4(C); *see* Mot. for Sum. J. Ex. A of Ex. 2. Attachment B to that Exhibit A specifies all of Sage's indirect and direct CSC for 2009-2013, none of which is a capital expenditure, pass-through, or other exclusion from CSC. Ex. F ¶ 4(C); *see* Mot. for Sum. J. Ex. G of Ex. 2 items 2 ("We will compare the classification of the general ledger accounts for each of the indirect cost groupings on Attachment B to the categories listed on the table in part 6-3.2 E on pages 12 and 13 of the IHS Manual Part 6 Chapter 3") and 4 (similar statement to item 2 but regarding direct cost groupings).

iv. The fourth category of documents is so imprecise that it cannot reasonably be characterized as a description of documents at all: "[a]ny 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." Mot. for Sum. J. Ex. 3 at 2. Notwithstanding the vagueness of this phrase, Sage provided ample documentation to assist IHS in determining which of Sage's expenditures meet the ISDEAA definition of CSC, and the claim is based on actual expenditures utilizing the general ledger trial balance accounts such that no account duplicated any other. Ex. F ¶ 4(D).

5. At no time during the over six months since Sage submitted its CSC claim has IHS asked for a single additional document from Sage. Ex. F ¶ 4.

6. While arguing that Sage has not explained its method of computing expectancy damages, Opp. at 11 ¶ 6, 12 ¶ 9, IHS paradoxically states that "[a]s a matter of law, IHS has taken the position that the expectancy damages claims are invalid because, among other reasons, they are too speculative and remote," Opp. Ex. 2 ¶ 19. Thus even assuming for the sake of argument that Sage did not explain fully its method of computing expectancy damages, *but see* Mot. for Sum. J. Ex. 2 at 2-3 and Ex. A thereto at 1; Ex. F ¶ 7, that would be irrelevant to the time it should take Dayish to issue his initial CO decision denying Sage's claim "as a matter of law."

7. The only claim pending before Dayish is Sage's, and Dayish has had Sage's claim, and no other, before him for analysis since "late 2014." In contrast with most IHS Area offices, the IHS Navajo Area Office has only six ISDEAA contractors. *See* Ex. A at 8. Of those six, it settled Tuba City's and Winslow's claims in September 2014, it has apparently settled and certainly analyzed Fort Defiance Hospital's CSC claim,[8] and it has engaged in settlement negotiations with the Navajo Nation since "late 2014" and with Utah Navajo since "early to mid-2014." Opp. Ex. 1 ¶¶ 8-12. Therefore, the *only* claim that the *Navajo Area Office* has needed to analyze for settlement purposes, since "late 2014," is *Sage's*. *See* Opp. at 5 (describing IHS' settlement procedures and stating that "[*a*]*fter 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") (emphasis added).

[8] Fort Defiance was one of the first to file a claim and urged, with others, more than two years ago that President Obama speed up the resolution of its claim. Ex. D.

8. Dayish's decision as CO must necessarily be a denial of Sage's claim. Although IHS is statutorily required to cover CSC, 25 U.S.C. § 450j-1; *Leavitt*, 543 U.S. at 634, IHS has no money in its budget to pay CSC claims and long ago exhausted the limited appropriations for CSC. So the decisions of the COs must be rejections of all claims, after which the tribal organizations may appeal and any settlements or judgments achieved thereafter may be paid from the Judgment Fund. Mot. for Sum. J. Ex. 4 at 2; Ex. G, I.[9] Following IHS' process, *all* of the settlements have followed CO claim denials and subsequent appeals, and they were all paid from the Judgment Fund. Ex. I.

In sum, Defendants' repeated intonation of the boilerplate in Dayish's form letter cannot negate the language of Dayish's letter itself, where no request for any additional documents was actually made and Dayish merely identified document categories as examples of what "relevant documentation may include." IHS has not requested any particular document or category of documents during the six-plus months since Sage presented its claim on August 25, 2014, and Sage's claim is the only one awaiting Dayish's action, which will necessarily be a denial. At any rate, Sage's August 25, 2014 claim employed IHS' preferred "incurred cost" methodology and provided more than enough information for Dayish to make the initial CO decision. Thus, even if fact disputes regarding the sufficiency of documents and IHS' preferred means of settling CSC claims were material, IHS presents

[9] As of December 2014, IHS reported that 90% of all of the more than 1300 CSC claims have been analyzed or are in analysis, IHS has extended offers to 88% of all claims, and 63% of all claims have been finally settled. Ex. C.

no genuine issue as to even these factual assertions.

## IV. SAGE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

With the exception of one inapposite case allowing about 11 months for a CO to issue a decision,[10] no case decided by the Board of Contract Appeals has ruled that a period of over nine months was a reasonable period for a CO to issue a decision on a CDA claim. *See Appeal of Kelly-Ryan, Inc.*, 11-1 BCA P 34629, ABSCA No. 57168, 2010 WL 5071059 (2010). The Board of Contract Appeals is the entity that decides the most complex claims of defense contractors and others. *See, e.g., Appeal of Defense Systems Co., Inc.*, 97-2 BCA P 28981, ABSCA No. 50534, 1997 WL 217392 (1997).

Sage provided Dayish with a clear and unequivocal statement that gave him ample notice of the basis and amount of Sage's claim – all that is required under the CDA and the ISDEAA. In addition, Sage's claim was expressly based on IHS' preferred "incurred cost"

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[10] The only case cited by Defendants for the proposition that a delay in excess of nine months was reasonable is *Design One Building Systems, Inc. v. Department of Veterans Affairs*, 11-1 BCA P 34766, CBCA 2423, 2011 WL 2165863 (2011), where the CO received claims "in early December" of 2010 and committed to issue a decision by November 15, 2011, a little over eleven months from the officer's receipt of the claims. That case is distinguishable because that contractor hired its consultant to evaluate its own claims three months *after* it had submitted them, did not specify a length of time by which the deadline should be shortened, provided no evidence to support a shorter time frame, and waited nearly five months after receiving the CO's letter to file its petition to shorten the time for a decision. Here, Sage engaged its auditor to independently evaluate the claim *before* it was submitted, *see* Mot. for Sum. J., Ex. 2 at 3 and Ex. G thereto; Sage has provided ample evidence supporting its position that a fourteen-month delay is unreasonable, *see supra* at 3-5, 10-14; Sage amended its Complaint to challenge the fourteen-month delay just one month after receiving Defendant Dayish's letter; and the amended complaint provided a date certain (January 31, 2015) that Sage averred was sufficient for Dayish's decision.

methodology, provided line item details of both direct and indirect CSC, contained no exclusions or duplicate entries associated with the operation of its ISDEAA programs, and explained fully how Sage calculated its expectancy damages.

As in *Tuba City*, the purported factual issues asserted by IHS in this case are not material. But even if they were, no reasonable jury could find in favor of IHS regarding the supposed failure of Sage to provide ample documentation and to explain its calculations, or, in any event, could find that IHS needs 14 months to issue an initial CO decision on Sage's relatively straightforward claim, a decision that – regardless of the particular facts – must be a denial because of exhausted appropriations. Therefore, Sage is entitled to summary judgment holding that the proposed 14-month delay is unreasonable and mandating Defendant Dayish to issue his decision by April 15, 2015 or such other reasonable date certain as determined by this Court.

Alternatively, under the CDA, a CO must commit unequivocally to issue a decision by a date certain, without conditioning that commitment on other factors. Therefore, because IHS' decision is contingent on Sage's provision of documents, this Court should deem Sage's claim *already* denied under the CDA and ISDEAA. Mot. for Sum. J. Ex. 3 at 1 ("*based on the anticipated cooperation* of [Sage], I will issue a final [CO] decision by October 21, 2015") (emphasis added); *see Tuba City*, slip op. at 6 & n.2*; Orbas*, 26 Cl. Ct. at 650 n.3; *Appeal of Aerojet General Corp.*, 95-1 BCA P 27470, ABSCA No. 48136, 1995 WL 44259 (1995).

## V. CONCLUSION

For the reasons stated above and in Sage's Motion for Summary Judgment, Sage respectfully requests entry of an Order granting Sage summary judgment on its Fourth Claim for Relief and ordering Defendant Dayish as Contracting Officer to issue his decision on Sage's CSC claim forthwith or, in the alternative, ruling that the claim is deemed denied.

Respectfully submitted,

FRYE LAW FIRM, P.C.

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## CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2015 I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

s/ Paul E. Frye

**EXHIBITS**

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|---|---|
| A | IHS Shortfall Reports with data for FY 2009, 2010, and 2011 (excerpts) |
| B | Letter from IHS to Navajo Nation (May 22, 2013) (partially redacted) |
| C | IHS CSC Settlement Status Report (March 3, 2015) |
| D | Letter to President Obama (February 28, 2013) |
| E | Memorandum Opinion, *Tuba City Reg. Health Care Corp. v. United States*, Case 1:13-CV-00639-RC, Dkt. 32 (D.D.C. April 25, 2014) |
| F | Declaration of Todd McGee |
| G | IHS Contracting Officer denial letters (partially excerpted and redacted) |
| H | IHS Contracting Officer form letters acknowledging receipt of CSC claims (partially redacted) |
| I | Declaration of Lloyd B. Miller |