UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Civ. No. 4:20-cv-04142-LLP **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS THE COMPLAINT**

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INTRODUCTION

The Flandreau Santee Sioux Tribe ("the Tribe") seeks damages resulting from the government's failure to pay statutorily mandated administrative costs to the Tribe for fiscal years 2011 through 2013.

The United States Department of Health and Human Services, Indian Health Service ("IHS" or "Agency") relies on third-party program dollars received primarily from Medicare and Medicaid (with some from private insurance) to support health care services. *E.g.* U.S. DEP'T OF HEALTH & HUMAN SERVS., IHS FY 2011 CONGRESSIONAL JUSTIFICATION ("2011 CJ"), at CJ-155, available at https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/documents/FY2011CongressionalJustification.pdf.[1] IHS reports that such collection "is essential to maintaining facility accreditation and standards of health care," and that third-party revenue "represents up to 50 percent of operating budgets at many facilities." *Id.*

When IHS runs the health care program, other federal agencies, for example the General Services Administration ("GSA"), pay for building maintenance and overhead costs supporting that program, allowing IHS to put all its third-party dollars into providing health care services to patients. IHS does not have to divert those dollars to pay for its overhead costs. When the Tribe runs the same program and collects that same program dollar, however, IHS would require it to use a percentage of that dollar for its overhead, thereby decreasing the amount of indirect and direct contract support costs ("CSC") the Agency claims is owed to the Tribe under its contract entered into pursuant to the Indian Self Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5325(a).

[1] *E.g.,* 2011 CJ at CJ-155 ("The collection of third party revenue is essential to maintaining facility accreditation and standards of health care . . . . Third party revenue represents up to 50 percent of operating budgets at many facilities.")

IHS's position does not comport with the law. After the United States Supreme Court held that the government is obligated to pay full CSC to tribes on contracts entered under the ISDEAA, and after at least one federal court held that the full amount of CSC owed includes CSC on third-party program income, the Tribe filed its claims with the contracting officer pursuant to the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101, *et seq.* After extensive negotiations including one in-person meeting at IHS headquarters, the contracting officer denied the Tribe's claims and alleged a counterclaim.

The Tribe now seeks appeal of this denial pursuant to ISDEAA § 5331(a) and (d). The government tries to avoid judicial review of Counts II ("IDC on Program Income"), III ("Expectancy Damages"), and VI ("Breach of Statute") of the Tribe's Complaint by arguing that such Counts were raised "[w]ithout even presenting" them to the contracting officer. Def's Mem. Supp. Mot. to Dismiss 1, ECF 16. In essence, the government's argument as it relates to Counts II and III is that the Tribe did not present these Counts in the manner most convenient to the government's affirmative defense and that, in any event, the amount claimed in damages by the Tribe may not change after its claim is submitted. Nothing in the law supports this novel position, the Tribe's claims were properly presented, and the partial motion to dismiss should be denied.

JURISDICTION AND LEGAL STANDARD

Defendants have moved to dismiss Counts II, III, and VI of the Complaint for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(1), the allegations of the complaint must be construed favorably to the Plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *rev'd on other grounds Davis v. Scherer*, 468 U.S. 183 (1984). "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one."

Id. "The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Id.*

In determining subject-matter jurisdiction, the court has authority to look beyond the pleadings. *Osborn v. United States*, 918 F.2d 724, 728 n.4 (8th Cir. 1990) (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Satz v. ITT Fin. Corp.*, 619 F.2d 738, 742 (8th Cir. 1980)); *see also, Buckler v. United States*, 919 F.3d 1038, 1044 (8th Cir. 2019). The government acknowledges as much in asking the Court to review the Tribe's CDA claims letters to determine whether they were properly presented and exhausted. Def's Mem. 10. *See also,* Compl. Ex. 3, ECF 1-3 (CDA Claims Letters for FY 2011–2013); Roche Decl. Ex. 1, ECF 17-1 (Calculation and Information Charts) (the CDA Claims Letters for FY 2011-2013 and the Calculation and Information Charts are referenced collectively herein as "Claims Letters").

In the alternative, Defendants claim Plaintiffs fail to plead sufficient facts to plausibly state a claim for relief under Fed. R. Civ. P. 12(b)(6). Def's Mem. 13, n.5. Under Fed. R. Civ. P. 12(b)(6) the complaint and attached exhibits alone must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Warmington v. Bd. of Regents of Univ. of Minnesota*, No. 20-1907, 2021 WL 2065172, at *1 (8th Cir. May 24, 2021).

STATUTORY FRAMEWORK

The ISDEAA, as amended, 25 U.S.C. §§ 5301–5423, authorizes the government to enter contracts with Indian tribes to provide for tribal performance of an activity, such as tribal health services, that the government would otherwise provide. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 634 (2005). Unlike other government contracts, the ISDEAA mandates the amount of funds provided to tribal contractors. 25 U.S.C. § 5325(a). The statute is designed to tightly constrain the discretion of the government in funding tribal contracts. *See Navajo Health Found.-Sage Mem'l*

Hosp., Inc. v. Burwell ("*Sage I*"), 256 F. Supp. 3d 1186, 1223 (D.N.M. 2015). *See also,* 25 U.S.C. § 5325(b) (authorizing reductions in funding only under narrow circumstances) and (d) (directing that shortfalls in recoveries shall not result in any adverse adjustment in future years' payments).

Congress included a model agreement in the ISDEAA and directed that each tribal self-determination contract shall contain or incorporate it by reference. 25 U.S.C. § 5329(a)(1). The model contract states that each provision of the ISDEAA and tribal contracts "shall be liberally construed for the benefit of the Contractor . . . ." *Id.* at § 5329(c) (model agreement § 1(a)(2)).

Upon deciding to contract for federal health care services, tribal contractors enter into a model agreement with the government providing for two categories of funding. The first "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs" contracted. *Id.* at § 5325(a)(1). This is referred to as the "Secretarial amount." *Sage I*, 256 F. Supp. 3d at 1207.

It soon became clear that the Secretarial amount was insufficient to account for the full costs to tribes of providing services. *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012). It did not, for example, include funds necessary "to ensure compliance with the terms of the contract and prudent management, but which . . . (A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contract program from resources other than those under contract." *Id.* at 186 n.1 (citing 25 U.S.C. § 5325(a)(2)).

As such, and out of concern that the government continuously underfunded tribal contracts, *id.* at 186, Congress amended the ISDEAA to require the government to pay the "full amount" of "contract support costs" related to the operation of the Federal program. *Id.* (citing 25 U.S.C. § 5325(a)(2), (g) (formerly codified at 25 U.S.C. § 450j-1). CSC are defined in the statute as follows:

> The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—
>
> (i) direct program expenses for the operation of the Federal program that is the subject of the contract, and
>
> (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract.

25 U.S.C. § 5325(a)(3)(A).

As explained by the Supreme Court, direct CSC are those costs attributable to a single program, such as worker's compensation insurance. *Cherokee Nation*, 543 U.S. at 635. Indirect CSC ("IDC") generally include administrative costs benefiting more than one program. *Id.*

As is common in other federal contract settings, indirect CSC are calculated by reference to an indirect cost rate. *See, e.g. Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1363 (Fed. Cir. 2003). These shared administrative costs include such items as personnel management, accounting systems, internet service systems, facilities, insurance, and procurement activities. Compl. ¶ 27, ECF 1. The indirect cost rate is calculated by pooling these shared administrative costs into an overarching "indirect cost pool" and then dividing that pool by the total amount of direct program costs supported by the pool. 2 C.F.R. pt. 200, App'x VII, at §§ B.6–7. The resulting ratio is the indirect cost rate. *Id.* The indirect cost pool is audited each year to ensure it contains reasonable and allowable costs. 2 C.F.R. § 200.504.

Finally, the indirect cost rate is applied to the direct cost base amount of each program to calculate the indirect CSC owed. Indian Health Manual ("Manual"), § 6-3.2(E)(1), available at https://www.ihs.gov/ihm/pc/part-6/p6c3/. For IHS, this direct cost base amount consists of funds spent for the operation of the programs pursuant to the IHS contract ("IHS direct cost base"). As discussed below, what is meant by the IHS direct cost base is a source of disagreement between the parties.

A tribe operating a contract with IHS receives appropriated dollars to fund the services provided under the contract. In addition, tribes are required to bill Medicaid, Medicare, and private insurance for services provided under the contract.[2] *See* 25 U.S.C. §§ 1621(e)–(f), 1641(d), 5325(m). Reimbursements under these programs are referred to as "program income." *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell ("Sage II"),* 263 F. Supp. 3d 1083, 1145 (D.N.M. 2016) (quoting S. Rep. No. 103-374 at 10 (1994)). The ISDEAA directs that tribes must spend these funds "to further the general purpose of the contract." 25 U.S.C. § 5325(m)(1). *See also* 25 U.S.C. §§ 1621f, 1641(d)(2)(A).

This is the same manner by which the Secretary bills, collects, and spends program income if IHS itself runs the tribal healthcare program. When IHS collects program income, it does not spend it on overhead. Instead, IHS overhead for administering its federal programs comes from a separate budget component known as "Direct Operations." *See, e.g.,* 2011 CJ at CJ-145–47 (2011). "Direct Operations" supports the "overall management of the IHS" including "oversight of financial, human, facilities, information and support resources and systems." *Id.* at CJ-146.

IHS uses a single administrative cost structure for its "Direct Operations" on both appropriated dollars and third-party revenues. Congressional budget justifications show that "Direct Operations" cover the entire program, with no separate allocation for overhead on third-party revenue. 2011 CJ at CJ-10. At the same time, IHS's centralized administrative costs come entirely from federally appropriated dollars. IHS does not use third-party revenue to cover administrative costs. On this point, too, the 2011 CJ makes clear that 100 percent of third-party revenue is put back into services, with none going to "Direct Operations." *Id.*

[2] Because IHS is the payer of last resort, 25 U.S.C. § 1623(b), tribal contractors, like IHS, are required to bill and collect from Medicaid, Medicare, and private insurance if available before utilizing their appropriated funding. In fact, IHS relies heavily on third-party income in forming its budget justifications for Congress. *Supra* note 1, at 1.

If IHS fails to pay the full funding owed to tribes for the operation of its healthcare programs under the ISDEAA, section 5331(d) authorizes the Tribe to file a claim with the Agency under the procedures established by the CDA 41 U.S.C. §§ 7101–7109. *See* 25 U.S.C. § 5331(a). If the CDA claim is denied, the ISDEAA authorizes a tribe to appeal directly to the appropriate federal district court. *Id.*

FACTUAL BACKGROUND AND LITIGATION HISTORY

I. The Contract

For many years, the Tribe has operated health care services within its jurisdictional area. Compl. ¶ 10. These services are preformed pursuant to an ISDEAA contract with IHS (the "Contract"). Compl. ¶ 10. The Contract requires the government to "transfer the funding" and services, "including all related administrative functions, from the Federal government to the Contractor . . . ." Compl. ¶ 13. For its part, the Tribe is obligated to provide services to Tribal members and eligible beneficiaries. Compl. ¶ 10.

Prior to 2012, the government took the position that it was not obligated to pay full CSC under ISDEAA contracts through a broad interpretation of language in the statute making funding "subject to the availability of appropriations." *See* 25 U.S.C. § 5325(b). In 2012, the United States Supreme Court rejected this interpretation, holding that the Bureau of Indian Affairs "must pay each tribe's contract support costs in full." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012). *See also*, *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 501 F. App'x 957, 959 (Fed.Cir.2012), *on remand from* 133 S. Ct. 22 (2012) (extending the *Ramah* decision to IHS).

After it was established that IHS must pay the full amount of tribal CSC, many tribes filed claims against the Agency for underpayment. In resulting litigation there arose an issue as to the appropriate amount to include in the direct cost base, *i.e.* the costs of operating the "Federal

program," to arrive at the amount of CSC owed. 25 U.S.C. § 5325(a)(3)(A)(i)–(ii). *See also*, *supra*, at 5–7. Tribal contractors understand that their "operation of the Federal program" includes the *total* base amount of health care services provided, including third-party program income. *See supra,* at 7. IHS, on the other hand, has argued that the "Federal program" operated by tribes does not include program income but is limited to costs and functions supported by federally appropriated dollars. These differences are summarized in the IHS Manual. *See* Manual § 6-3.2, Ex. G n.3.[3]

In 2016, the United States District Court of the District of New Mexico determined that the tribes' interpretation on this issue is the correct one, finding that the "Federal program" operated by the tribes under the ISDEAA and subject to CSC includes third-party funding. *Sage II*, 263 F. Supp. 3d at 1162. *Contra., Swinomish Indian Tribal Cmty. v. Becerra ("Swinomish")*, 993 F.3d 917, 920 (D.C. Cir. 2021); *San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932 (D. Ariz. 2020). While IHS may disagree with the *Sage II* court's decision as to the full scope of the Agency's liability under the law, it abandoned its appeal from that decision. *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Azar*, No. 18-2043, 2018 WL 4520349, at *1 (10th Cir. July 11, 2018).

II. The Claims

In 2017, the Tribe timely filed its claims for FY 2011–2013 for underpayment of CSC and related damages. *See* Claims Letters. The claims presented two categories of CSC shortfalls, one

[3] This footnote in the Manual provides as follows:

> Tribal representatives take the position that CSC funding is due on all Federal funds used to carry out a contract/compact and that Federal funds include funds paid by Medicaid, Medicare, and other third-party payors. The IHS position is that to be eligible for CSC, an awardee's costs must be related to the PFSA transferred and supported directly from Federally appropriated dollars transferred in the Section 5325(a)(1) amount. For example, in the Agency's view, fringe benefit costs for employees supported with Medicaid, Medicare, and other third-party resources are not eligible for DCSC.

Manual § 6-3.2, Ex. G n.3.

for indirect and one for direct. *Id*. The claims also set forth three categories of consequential damages. *Id*. One alleged wrongful carryforward adjustments—that the government unlawfully moved the Tribe's CSC shortfalls into an arbitrary "shortfall column" instead of accounting for them in the rate negotiation process. The second alleged that IHS failed to pay indirect CSC on unpaid direct CSC. The third was for expectancy damages—that, due to the CSC shortfalls, the Tribe was unable to provide (and bill third parties for) additional services. *Id.*

The September 17, 2017 claim for FY 2011 sought "immediate payment of $278,739.00 plus interest" and contained a chart setting out and assigning a number to each claim as follows:

Fiscal Year	Failure to Pay/Underpayment of Indirect Contract Support Costs	Wrongful Carryforward Adjustments (average effect on IDC Rate of tribal wrongful carryforward adjustments for second cycle of double dipping (.89%) and restoration of shortfall dollars in carryforward template (.78%) x direct costs)	Failure to Pay Direct Contract Support Costs	Failure to Pay Indirect Costs on Direct Contract Support Costs	Expectancy and Other Damages
2011	$242,255	$34,042	$1,705	$737	$0

Id. at 2. The November 3, 2017 claim for FY 2012–2013 sought immediate payment of "$900,896.00, plus interest" and incorporated a spreadsheet breaking out each element of each count alleged in the Complaint. *Id.*at 6.

For claim 1, Underpayment of NBC[4] Awarded Rate (Shortfall Claim) (Counts I and II of the Complaint), the Tribe claimed as follows:

> NBC Approved Indirect Cost Rate
>
> IHS Contract Award (Direct Base Only)
>
> Rate multiplied by base equals amount of Indirect Costs due to the Tribe
>
> Amount of Indirect Costs paid to the Tribe
>
> Amount of shortfall claimed by the Tribe

Claims Letters, Roche Decl. Ex. 1 at 1, ECF 17-1.

For claim 7, Expectancy (Count III of the Complaint), the Tribe claimed as follows:

> Amount of unpaid direct contract support costs and indirect costs paid from direct cost funding that should have been available for additional program services.
>
> Amount of third-party revenues that would have been generated from the unpaid direct contract support costs and indirect costs paid from direct cost funding based upon the % of third-party revenues compared to the direct cost award. (% multiplied by $=amount of expectancy claim.)

Claims Letters, Roche Decl. Ex. 1 at 2.

For claim 6, Failure to Pay Indirect Costs on Unpaid Direct Contract Support Costs (Count IV of the Complaint), the Tribe claimed as follows:

> Amount due for indirect costs on unpaid direct contract support costs. (Sum of the IDC rate in claim 1 adjusted by the increase in claim 2 for a total rate of 0% + 0% or 0% multiplied by $0 from claim 5).

Claims Letters, Roche Decl. Ex. 1 at 2.

For claim 4, Wrongful Carryforward Adjustments, Restore Shortfall Dollars in Carryforward Template (Count V of the Complaint), the Tribe claimed as follows:

> Amount of shortfall dollars in calculating the approved IDC Rate

[4] NBC stands for the Interior Department's National Business Center and is the agency with which the Tribe negotiated its indirect contract support cost rate until 2012 when it became known as the Interior Business Center ("IBC").

> Effect on Indirect Cost Rate (Add back the $ shortfall deduction from the IDC pool in calculating the rate divided by corrected direct cost base of $0 from Claim 2 above.)
>
> IHS Contract Award (Direct Base Only)
>
> Amount claimed due to failure to restore shortfall dollars in carryforward template (% multiplied by $).

Claims Letters, Roche Decl. Ex. 1 at 2.

The Claims Letters were certified as required under the CDA to "accurately reflect the amount the [Tribe] believes the Government is liable" and stated that the amount claimed is "subject to adjustment should it be determined, based upon additional information, that the amount or the scope of the claim is larger." Claims Letters at 3, 7.

On September 30, 2019, IHS issued a denial of the Tribe's claims. Compl. Ex. 4, ECF 1-4. The Tribe then filed this appeal, specifying that it was appealing "both the denials of its claims and IHS's counterclaims." Compl. ¶ 48. The Tribe's Complaint states that "[t]he IHS and Tribe have engaged in settlement negotiations and exchanged informal discovery in an effort to resolve these claims without litigation." Compl. ¶ 49. The Complaint set forth the legal underpinnings of each claim and provided an updated estimate of damages for each claim. Compl. ¶¶ 50–56 (direct CSC); ¶¶ 57–63 (indirect CSC); ¶¶ 64–65 (lost third-party revenue); ¶¶ 66–68 (indirect CSC on unpaid direct CSC); ¶¶ 69–74 (wrongful carryforward adjustment). This memorandum addresses the government's partial motion to dismiss as it relates to Count II (indirect CSC shortfall), Count III (expectancy damages/lost third-party revenues), and Count VI (statutory violation).

ARGUMENT

I. The Tribe Exhausted Its Administrative Remedies By Timely Presenting All Of Its Claims To The Contracting Officer

The central issue at this stage of the litigation is whether the Tribe adequately presented its claims for lost indirect CSC, lost third-party revenue, and violation of the statute to the Contracting

Officer by submitting the Claims Letters seeking a sum certain for each claim year and outlining the legal theories underpinning that sum. IHS argues that Count II fails because the Tribe did not break out the calculations in the claim letter in a manner that fits the Agency's theory of the case. It also argues that Count III fails because the Tribe updated the estimated expectancy damages in the Complaint. Finally, IHS misconstrues Count VI as raising a new claim for a statutory violation.

In setting up its arguments, the Agency misrepresents the Tribe's claims as presented. First, it omits the expectancy damages in the Tribe's FY 2011 claim. *Compare* Def's Mem. 10 *with* Compl. Ex. 3 at 2. It also omits the detailed walkthrough of each element of the Tribe's FY 2012–2013 claims and ignores the documentation provided at the request of the contracting officer and in support of the Claims Letters, including the amount of CSC owed on the Tribe's third-party program income pursuant to *Sage II*.[5] In so doing, the government appears to argue for a heightened CDA claim presentment bar over and above what the law requires.

Nothing in the CDA requires a claimant to anticipate an affirmative defense raised by the government or formulate its claims to match up with the government's theory of its liability. The Tribe claimed that the government failed to pay CSC on the entire amount of its direct cost base. That amount, according to the Tribe and as put into practice by the IHS, *see supra*, at 6–7, includes

[5] Fed. R. Evid. 408 only excludes proof of compromise that goes to the issue of liability of the offeror. *Crues v. KFC Corp.*, 768 F.2d 230, 234–35 (8th Cir. 1985). Rule 408 does not preclude evidence introduced for another purpose, e.g., the allocation damages. *EEOC v. Air Line Pilots Ass'n, Int'l*, 489 F. Supp. 1003, 1010 n.8 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981). *Cf. Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) (holding a successively dated letter increasing the estimate of damages constituted part of a claim under the CDA). Applying the "another purpose" exception to Rule 408, courts should "weigh the need for such evidence against the potentiality of discouraging future settlement negotiations." *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 293 (2d Cir. 1999). Here, the liability of the government is premised on breach of contract. *See Salazar,* 567 U.S. at 189 ("[T]he Government's obligation to pay contract support costs should be treated as an ordinary contract promise….") (citation omitted). The amount of CSC on the Tribe's third-party program income does not go the Tribe's (or the government's) liability on contract, but rather the allocation of damages owed and hence should not be excluded. Further, excluding such material here would discourage future negotiations under the CDA as claimants would resist providing information that the Agency would disregard or attempt to use against the claimant. Regardless, even if subsequent letters are held to not be part of the Tribe's claims, the Claims Letters themselves are complete as they seek full CSC on the full base amount.

third-party revenue. That the Agency would have the Tribe's indirect cost rate apply solely to IHS appropriated dollars, thereby putting the Tribe at a severe disadvantage in running its own health care program in violation of the ISDEAA and the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. §§ 1601–1683, does not go to the adequacy of the Tribe's presentment, but rather to the government's defense.

Neither does the CDA require each line of a claimant's "sum certain" be accounted for to satisfy the presentment requirement, *see H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995), nor does it lock claimants into the amount initially presented—a claimant may adjust the initial estimate of damages. *J.F. Shea Co. v. United States*, 4 Cl. Ct. 46, 55 (1983). For these reasons, the Tribe respectfully requests that the government's partial motion to dismiss be denied.

A. The Tribe Properly Presented its Claims

The CDA's presentment requirement is designed to provide the contracting agency with "adequate notice of the basis and amount of the claim," nothing more. *See Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987); *see also Metric Constr. Co. v. United States*, 1 Cl. Ct. 383, 391 (1983) ("[T]he amount claimed must be stated in a manner which allows for reasonable determination of the recovery available at the time the claim is presented…."). The Federal Circuit identifies three elements of this requirement: (1) the claim must be submitted in writing to the contracting officer, (2) it must be submitted as a matter of right under the relevant contract, and (3) it must include a demand for a "sum certain." *See, e.g., H.L. Smith*, 49 F.3d at 1565; *Bruhn Newtech, Inc. v. United States*, 129 Fed. Cl. 656, 662 (2016). IHS regulations reflect these requirements. 25 C.F.R. § 900.218–219. Additionally, claims exceeding $100,000 must be accompanied by a certification pursuant to 41 U.S.C. § 7103(b), but they are *not* required to include additional supporting information. *E.g., H.L. Smith*, 49 F.3d at 1566 ("Invoices, detailed cost

breakdowns, and other supporting financial documentation need not accompany a CDA claim as a jurisdictional prerequisite.").[6]

Courts and appeals boards generally hold that the CDA presentment requirements are to be interpreted leniently to uphold the purpose of these requirements, which is "to avoid or reduce frivolous claims, not to impose purely mechanical requirements on the contract disputes process." *Appeal of A&J Constr. Co. Inc. Application for Attorney Fees*, 88-2 B.C.A. P 20525, I.B.C.A. 2376-F (CCH), 1988 WL 44299 (Feb. 4, 1988). A CDA "claim need not take any particular form or use any particular wording." *Northrop Grumman Computing Sys., Inc. v. United States*, 709 F.3d 1107, 1112 (Fed. Cir. 2013) (internal citation omitted). *See also Contract Cleaning*, 811 F.2d at 592 (holding that a claim may take the form of several documents). Additionally, although a "sum certain" is required when the claim is first submitted, that requirement is satisfied so long as the claim is "stated in a manner which allows for reasonable determination of the recovery available at the time the claim is presented." *Metric Constr.*, 1 Cl. Ct. at 391. Still further, the amount claimed may change after the claim is submitted. *See J.F. Shea*, 4 Cl. Ct. at 54. *See also AAI Corp. v. United States,* 22 Cl. Ct. 541, 544 (1991); *Glenn v. United States*, 858 F.2d 1577, 1580 (Fed. Cir. 1988) ("It would be most disruptive of normal litigation procedure if any increase in the amount of a claim based on matters developed in litigation before the court [or board] had to be submitted to the contracting officer before the court [or board] could continue to final resolution of the claim.") (citations omitted) (alterations in original).[7]

[6] IHS appears to argue that the Tribe was required to establish the full amount of its damages when presenting its claim by providing documentation on such matters as how much it collects from third parties and how those funds are used. Def's Mem. 11. This ignores the statutory restrictions on use of third-party program income in the ISDEAA, *see* 25 U.S.C. § 5325(m), and is certainly not what is required in a claim under the CDA.

[7] Although the presentment requirement is strictly construed to the extent that courts will not waive it, *e.g., M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1329 (Fed. Cir. 2010), that does not change the fact that presentment under the CDA is measured under a low, notice-based threshold. *Contract Cleaning*, 811 F.2d at 592 (requiring "adequate notice of the basis and amount of the claim.").

Here, the Tribe met these presentment requirements for each of the claims asserted. The Tribe asserted separate claims for (1) indirect CSC, (2) wrongful carryforward adjustment, (3) direct CSC, (4) indirect CSC on unpaid direct CSC, and (5) a claim for expectancy damages from lost third-party revenues. Claims Letters. As noted in the chart reproduced *supra* at 9–10, the Tribe attributed a specific dollar amount to each claim.[8] The Tribe set out the statutory entitlement for each claim. Claims Letters at 2, 6. The Tribe certified that its claims were made in good faith, setting forth the amount for which the Tribe "believes the Government is liable." *Id.* at 4, 8. Thus, a plain reading of the Claims Letters indicates that the Tribe met all three of the presentment requirements under the CDA.

B. The Tribe's Representation of its Claims Was Proper

IHS argues that the Tribe's representation of its CDA claims for direct and indirect CSC does not properly line up with its theory of defense. Nothing in the CDA, however, mandates such a representation. In fact, the Tribe's claims for direct and indirect CSC shortfalls mirrored exactly the structure used in the ISDEAA, which forms the statutory entitlement of the Tribe's claims.

Section 5325(a)(3) splits eligible CSC into two categories as follows: "(i) direct program expenses for the operation of the Federal program that is the subject of the contract," *i.e.* direct CSC, "and (ii) any additional administrative or other expenses related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract," *i.e.*, indirect CSC. 25 U.S.C. §§ 5325(a)(3)(A)(i)–(ii). IHS's manual mirrors this structure by providing separate sections for guidance on "Direct CSC" and

[8] The government asserts without authority that expectancy damages in the amount of $0 is "far too vague" to provide adequate notice. Def's Mem. 12. That, however, is not the law. *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1109–10 (D.N.M. 2006) ("The CDA does not bar a plaintiff from seeking an amount of damages that exceeds the quantum in the claim to the contracting officer."). *See also, AAI Corp.,* 22 Cl. Ct. at 544 (recognizing jurisdiction over a claim the amount of which increased "from zero to $504,875.75").

"Indirect CSC." Manual §§ 6-3.2(D), (E). The Tribe followed this format in presenting its claims to the contracting officer, thus complying with the CDA requirement that it present a written demand "as a matter of right." *See, e.g., Bruhn Newtech*, 129 Fed. Cl. at 662.

Notwithstanding these statutory distinctions, IHS now attempts to divide these claims along an entirely different axis, lumping the direct and indirect CSC into one sum and then breaking that amount into two pieces—one calculated against the amount of program income funded with federal appropriations and the other calculated against the amount of program income funded with third-party revenue. But this method of dividing the claims is only relevant to the Agency's defense that it is not required to pay CSC on third-party revenue. Because IHS claims that third-party program dollars are not eligible for CSC, it attempts to break up the Tribe's indirect CSC shortfall claim as presented to the contracting officer into two pieces to meet its defense.

As for proper presentment of a claim under the CDA, this distinction does not make sense. A simple example helps establish this. If a manufacturer contracts with the federal government to provide 100 widgets and is only paid for 50, it would bring a claim for the amount owed on 50 widgets. If the government then raises the defense that 25 of the widgets not paid for were defective and 25 were non-conforming, the contractor's claim will not be dismissed for lack of subject-matter jurisdiction on appeal because it did not claim damages on these two different types of widgets in its CDA claim.

The facts here are similar but even more compelling. Nothing in the ISDEAA or the CDA compels or requires this distinction. In fact, the ISDEAA fully integrates third-party funding into the contracting framework: the ISDEAA and the IHCIA expressly authorize tribes operating ISDEAA contracts to bill Medicaid, Medicare, and private insurers (as IHS would if it were running the program). *Supra* at 6–7. In fact, as IHS is the payer of last resort, IHS (and tribes operating IHS

health programs) relies heavily on third-party program income to operate. *Supra* note 1, at 1. Meanwhile, the ISDEAA makes no distinction between different types of indirect and direct CSC, certainly not along the lines IHS does here in distinguishing CSC on appropriated funds from those on third-party program income earned in carrying out the contract. The ISDEAA merely distinguishes between direct CSC and indirect CSC, and that is exactly how the Tribe framed its CDA Claims.

IHS's affirmative defense does not accurately reflect the statutory provisions on which the Tribe's CDA claims are based "as a matter of right," statutory provisions on which the Tribe relied in presenting its claims to the Agency. Neither does it comport with *Sage II*, which the Tribe was cognizant of when it filed its claims. The question in *Sage II* was whether "expenditures made with third-party revenues in support of the programs under contract with the IHS are spent on the federal program and are therefore eligible to be reimbursed as CSC." *Sage II*, 263 F. Supp. 3d at 1091. The court reviewed the entire backdrop of the provision of health care in Indian Country, including the text and history of the ISDEAA and the IHCIA. *See generally id*. The court measured the tribal programs, functions, services, or activities ("PFSAs") provided under an ISDEAA contract against that backdrop to hold that Medicare and Medicaid funding is "within the PFSAs' scope under ISDEAA" and that third-party funding is thus "part of federal programming for the purposes of reimbursement under the ISDEAA." *Id.* at 1164.

Sage II is directly on point, as here, too, the Tribe's PFSAs operated pursuant to 25 U.S.C. § 5325(a) are provided with third-party revenue, which IHS puts entirely back into the PFSAs it runs. *Supra* at 6–7. IHS must place the Tribe on the same footing as if IHS had been running the Tribe's health care program. 25 U.S.C. § 1602(7). *See also* 25 U.S.C. § 5325(n). In other words, IHS's withholding CSC on third-party program dollars earned by the Tribe (but not earned by IHS)

means that less money is available to program beneficiaries served by the Tribe as compared to those served directly by IHS in direct violation of the ISDEAA and the IHCIA.

IHS will likely try to avoid the holding in *Sage II* by relying on *Swinomish.* Unlike *Sage II*, however, *Swinomish* ignored the presumption in favor of tribal contractors, *see* 25 U.S.C. § 5329(c) (model agreement § 1(a)(2), failed to acknowledge the fact that IHS-provided PFSAs rely heavily on third-party revenue (without distinguishing a Medicaid dollar from an appropriated dollar when it comes to overhead), *see supra* note 2, at 6; *cf.* 25 U.S.C. § 1641(c) (stating that 100 percent of Medicaid and Medicare collections are to be put back into the program), and did not address the legal requirement that tribes must be placed on the same footing as the IHS with regard to administrative costs. 25 U.S.C. §§ 1602(7) and 5325(n). Thus, ignoring both the foundational principles underlying the application of federal law related to tribal health care and the facts on the ground, the *Swinomish* court held that the ISDEAA does not require IHS to pay CSC on insurance money spent on the health program. *Swinomish*, 993 F.3d at 922.[9]

The *Swinomish* decision is also distinguishable on another important ground. A motivating factor in *Swinomish* was that a holding requiring CSC on tribal program income would place IHS "on the line for unlimited contract support costs based on . . . unlimited sources of outside-the-contract funding. . . ." *Id*. at 921. Third-party program income, however, is unique under the law, a fact which *Sage II* analyzed at length and relied upon. *See Seminole Tribe of Florida v. Azar*, 376 F. Supp. 3d 100, 113 (D.D.C. 2019) (finding that "the source of the supplemental funding was critical in [*Sage II*]; because the money had been 'earned in the course of carrying out' the self-

[9] As with *Swinomish*, *San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932 (D. Ariz. 2020), ignored the fact that tribes must be placed on the same footing as IHS in the operation of its program and that 100 percent of program income earned by IHS is placed back into the program.

determination contract, it could not be excluded from the CSC calculation") (quoting 25 U.S.C. § 5325(m)). The fears underlying the *Swinomish* court's holding are thus unfounded.[10]

Regardless, the fact that federal courts have reached opposite conclusions on the issue of whether CSC is owed on third-party program income shows that an ambiguity exists, an ambiguity that must be interpreted in favor of the Tribe. *See* 25 U.S.C. § 5329(c) (model agreement § 1(a)(2)). *See also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (noting that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.")

Finally, IHS's proposed splitting of the Tribe's CSC shortfall claims into those funded by appropriated dollars and those funded by third-party dollars is not in keeping with the Agency's own practice of paying overhead for the facilities it alone operates. Just like tribal contractors, IHS bills and collects third-party revenue and uses that revenue, along with appropriated funds, to provide health care services. *See* 25 U.S.C. §§ 1621(e)–(f). IHS, however, uses one administrative cost structure to support the administration of its entire program, including those aspects covered by third-party revenues—in short, IHS pays one air conditioning bill from one account. By asking the Tribe to split off its CSC costs into two separate categories, those funded by appropriated dollars and those funded by third-party dollars, IHS asks the Tribe to do something that it does not (and feasibly cannot) do itself.

Additionally, IHS may rely on third-party program income for so much of its base program amount only because it receives its buildings and most of their long-term upkeep from GSA, many personnel services from the Office of Personnel Management, attorney services from the Department of Justice, vehicles partially funded by the GSA vehicle pool, and a variety of services

[10] Also irrelevant: the Tribe seeks CSC solely on federally appropriated and third-party program income.

from other divisions of HHS. These are valuable services that the Tribe does not receive. This was the very reason Congress amended the ISDEAA to provide for CSC. *Salazar*, 567 U.S. at 186. *See also* S. Rep. No. 100-274, at *8 (1987) ("Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of . . . the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts.") Thus, allowing the Agency to avoid paying "administrative or other expense[s] related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program" by now strategically reorganizing its health care services budget into federally appropriated and third-party program dollars to dictate the minimum funding amount for tribes violates the letter and spirit of the law. 25 U.S.C. §§ 5325(a)(3)(A)(ii), 1602(7). *See also Sage I*, 256 F.Supp.3d at 1223 ("The [ISDEAA] is designed to circumscribe as tightly as possible the discretion of the Secretary") (quotations omitted).

The Tribe presented claims for underpayment of the two statutorily defined categories of CSC, and it met the presentment requirements under the CDA by presenting a sum certain for each claim and certifying the claims to the contracting officer. The Tribes presentment was not only supported by the statutory structure, but also IHS's own manual, practice, and caselaw. The Agency may not now alter the CDA standards by requiring the Tribe to provide additional calculations or claim breakdowns that are not supported by the statutory authority or mandated by the CDA presentment requirement.[11]

C. *IHS's Arguments Regarding the Contours of a Claim are Unavailing.*

[11] The Agency's discussion of whether the exhausting CDA presentment requirements may be excused, Def's Mem. 8, is inapposite for the same reason—the Tribe did exhaust those procedures in presenting each of its claims.

The Agency also argues that the third-party revenue portion of the Tribe's CDA claim was not properly presented because it arises from different "operative facts" from the underlying indirect CSC shortfall claim. This argument fails for several reasons.

When a contractor "has not presented its claims to the CO in the exact terms of the complaint," the contractor has nevertheless established subject-matter jurisdiction when its claims "arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery when compared with its claim presented to the CO." *M.A. DeAtley Constr., Inc. v. United States*, 75 Fed. Cl. 575, 579 (2007) (internal quotations omitted); *see also Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417–18 (1987). This standard "does not require ridged [sic] adherence to the exact language or structure of the original administrative CDA claim." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). Instead, the purpose is "to allow the CO to receive and pass judgment on the contractor's entire claim." *Id.* at 1366.

The grounds for relief pled in the Complaint represent the Tribe's legal argument, not the items specifically claimed. *Cerebronics*, 13 Cl. Ct. at 419. Knowing that IHS would continue to dispute its liability on third-party program income (*see, e.g., Sage II; Swinomish*), the Tribe characterized its shortfall claim on those amounts as Count II in its Complaint.

The relief sought in this Court under the Complaint, however, is the same as that claimed before the contracting officer: "damages arising out of the failure of the Indian Health Service . . . to pay Claimant no less than the full amount of contract support costs . . . ." Compl. Ex. 3 at 2, 6–7. The operative facts underlying that claim are the negotiated indirect cost rate and the Tribe's direct cost base against which that rate is measured. *See, e.g.*, Manual § 6-3.2(E)(1). The rate times the base gives the amount owed on the contract. *Id.* These are the same operative facts as underlie

the Complaint. *See, e.g.,* Compl. ¶¶ 20–34 (describing the CSC calculation methodology on which the government's liability hinges).

The contracting officer responded to the Tribe's Claims with an acknowledgment of receipt under 41 U.S.C. § 7103(f)(2) and requested further information on "CSC that the Tribe actually incurred" to establish the additional amount of CSC the Tribe claims it is owed under the contract. Ex. 1 (Claims Acknowledgement Letters) at 1–2 (FY 11), 4-5 (FYs 12-13). After responding with additional data showing CSC incurred on the full base amount, including appropriated dollars and third-party program income, the contracting officer determined that the Tribe was not entitled to the relief sought under the contract, holding in part that "IHS met the Government's contractual responsibilities to the Tribe in FYs 2011–2013 by paying the full amount of CSC incurred by the Tribe for those years. . . ." Compl. Ex. 4 at 6, ECF 1-4.

The "new operative facts" cases relied on by the Agency are unavailing as each address instances when a claimant asserted new facts on appeal either for the first time or to establish entirely new theories of liability. In one case, the court explained that "differing site conditions" and "breach of a duty of good faith and fair dealing" raise different claims as each turns on different theories of liability under the contract. *Walsh Constr. Co. v. United States*, 132 Fed. Cl. 282, 291 (2017); *see also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1111 (D.N.M. 2006) (finding that claims alleging failure to adjust the indirect cost rate to account for non-fully funded agencies arise from different operative facts than claims alleging failure to pay the full amount of CSC). In another case, the court found it lacked jurisdiction over a new claim raised for the first time on appeal when "nothing in the claim would even remotely suggest to the contracting officer that [the contractor] was making such a request." *J.C. Equip. Corp. v. England*, 360 F.3d 1311, 1318 (Fed. Cir. 2004); *see also* Def's Mem. 9 (citing *Santa Fe, Inc. v. United States*, 818 F.2d 856,

858–60 (Fed. Cir. 1987); *Cerberonics*, 13 Cl. Ct. at 418; *SMS Data Prods. Grp., Inc. v. United States*, 19 Cl. Ct. 612, 615 (1990)).

These cases are inapposite as here the Tribe is asserting nothing new on appeal. The theory of liability in both the CSC shortfall claims as presented to the contracting officer and in Count II of the Complaint is breach of contract based on the government's failure to pay the full amount of CSC owed on that contract. The facts underlying this theory are that the government failed to apply the full amount of the negotiated indirect cost rate to the full amount of the direct cost base. This is far from the "new operative facts" line of cases relied on by the Agency where "nothing in the claim would even remotely suggest" the basis of the claims. *J.C. Equip.*, 360 F.3d at 1318. Since the Tribe's claims to the Agency gave IHS full notice of the legal and factual basis for the very same request the Tribe makes on appeal, the cases addressing new issues raised for the first time on appeal have no relevance here.[12] Thus, Count II neither presents an entirely new theory of liability nor rests on different facts.

The argument that a claimant may not change its estimated amount of damages, Def's Mem. 12, fares no better. After claims certification is complete, "a contractor is not precluded from changing the amount of the claim or producing additional data in support of increased damages." *J.F. Shea*, 4 Cl. Ct. at 54. *See also AAI Corp.*, 22 Cl. Ct. at 544 (allowing increase in claim from "zero to $504,875.75"). This rule is common sense as it would be most disruptive to the normal litigation process if a claimant were required to file a new claim each time additional facts develop

[12] Even if these cases were applicable, the supposedly distinct "operative facts" that the Agency asserts it needs to understand the scope of the third-party revenue portion of the claim, *see* Def's Mem. 11, are all available in the documents that support the entirety of the Tribe's underpayment claim: the Tribe's annual financial audits. These audits are all in the Agency's possession because the Tribe is required to submit them to the Agency each year. *See* 25 U.S.C. § 5386(c). The facts forming the basis of the Tribe's claim are the total health program cost figures supplied in these audits, including both the program costs supported by appropriated funds and the program costs supported by third-party revenues.

which may increase or decrease the amount claimed. *J.F. Shea*, 4 Cl. Ct. at 54; *see also Tecom, Inc. v United States,* 732 F.2d 935, 937 (Fed. Cir. 1984) (same).

The Tribe presented its claims under the structure of the ISDEAA with a sum certain presented for each fiscal year. It certified each claim as required. Nothing in the CDA requires the tribe to split its claims along the lines of the Agency's failed *Sage II* defense. Since the Tribe's claims met the presentment requirements and were subsequently denied, the Tribe fully exhausted its administrative remedies and this court has subject-matter jurisdiction over this appeal.

II. IHS Mischaracterizes The Tribe's Claim Alleging Breach of Statutory Right

The Agency mischaracterizes Count VI, breach of statutory right, by arguing that the Tribe failed to provide a statutory basis or sum certain for this claim. Def's Mem. 13. This claim is not a new claim, but rather reiterates the violation of the contract and hence the statute (ISDEAA) containing the model agreement and payment requirements alleged in the Tribe's CSC shortfall, wrongful carryforward, and expectancy claims presented in FYs 2011–2013. *See supra*, at 9–12.

CONCLUSION

The Tribe presented its claims for CSC on the full amount of the base contract amount, including third-party program dollars, in writing to the contracting officer as a matter of right under its Contract. The claims demanded a sum certain and were properly certified. The contracting officer subsequently denied those claims. The Tribe has therefore exhausted its administrative remedies and this Court has subject-matter jurisdiction. IHS may not be allowed to demand a heightened presentment standard by requiring the Tribe's claims to match up with an affirmative defense that has no basis under the ISDEAA and IHS's own policy and practice. Accordingly, and the Agency's partial motion to dismiss pursuant to Rule 12(b)(1) should be denied.

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Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

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