UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TANANA CHIEFS CONFERENCE, Plaintiff, v. XAVIER BECERRA, Secretary of Health and Human Services, *et al.* Defendants.	Civil Action No. 20-2902 (RDM)

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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Pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1), Defendants Xavier Becerra, Secretary of the United States Department of Health and Human Services (the "Department"), Elizabeth Fowler, Acting Director of the Indian Health Service ("IHS"), and the United States (collectively, "Defendants"), respectfully move to dismiss Plaintiff Tanana Chiefs Conference's Complaint (ECF No. 1) for lack of jurisdiction. The Tanana Chiefs Conference's claims were improperly presented to the IHS under the Contract Disputes Act, and the Tanana Chiefs Conference's attempt to cure that improper presentment in its federal civil complaint only highlights the extent to which any claim it is currently trying to state in this Court is not based on the same grounds as those submitted at the presentment phase. Therefore, this Court does not have jurisdiction to review this action, and the Complaint should be dismissed with prejudice.

BACKGROUND

A. The Indian Self-Determination and Education Assistance Act

IHS's principal mission is to provide health care to more than two million American Indians and Alaska Natives. *See* S. Rep. No. 102-392, at 2-3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943; *Lincoln v. Vigil*, 508 U.S. 182, 185 (1993). In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDEAA"), which allows tribes to contract with the Secretary of Health and Human Services ("Secretary"), through IHS, to operate federal health care programs, services, functions, and activities (collectively, "Programs") that IHS would otherwise operate for the benefit of American Indians and Alaska Natives. *See* 25 U.S.C. §§ 5301, 5302, 5321, 5387.[1] The ISDEAA provides a framework to transfer the administration

[1] IHS's authority to provide health care services to American Indians and Alaska Natives derives primarily from two statutes: (1) the Snyder Act, which authorizes it to "expend such moneys as Congress may from time to time appropriate" for the conservation of the health of Indians, 25 U.S.C. § 13 (providing that the Department of the Interior (Interior) will expend funds as appropriated for, among other items, the "conservation of health" of Indians), 42 U.S.C. § 2001(a) (transferring health care related functions of the Snyder Act from the Department of the

and operation of traditionally Government-run Programs to ISDEAA contractors. The ISDEAA directs the Secretary, upon the request of a tribe, to enter into such a contract unless the request must be rejected under one or more statutory criteria. *See id*. §§ 5321(a)(2), 5387(b)-(c).

Tribes and tribal organizations contract with IHS under Title I of the ISDEAA, 25 U.S.C. §§ 5321-5332, and may also enter "self-governance compacts" under Title V of the ISDEAA, *id.* §§ 5381-5399. Title I defines the term "self-determination contract" and provides a model agreement, the terms of which must be contained in or incorporated by reference into any such contract. *See generally* 25 U.S.C. § 5329; 25 U.S.C. § 5304(j). A "compact" under Title V is a more advanced form of contracting. *See* 25 U.S.C. § 5383(c); 42 C.F.R. § 137.18. A Title V compact sets forth the general terms of the government-to-government relationship between the tribe or tribal organization and the Secretary and is accompanied by an annual or multi-year funding agreement, which generally identifies the Programs to be performed or administered by the ISDEAA contractor, the financial terms and conditions, and the responsibilities of the Secretary. There is no model compact, but the ISDEAA requires mandatory provisions. *See* 25 U.S.C. §§ 5384-5385; § 5387; 42 C.F.R. §§ 137.30-46.

After entering an agreement either under Title I or Title V, IHS transfers to the contractor the amount of appropriated funds IHS would have allocated for its continued operation of the Programs. 25 U.S.C. § 5325(a)(1); *see also* § 5388(c) (applying funding provisions of § 5325(a) to Title V agreements). This sum is commonly known as the "Secretarial Amount." *See* 25 U.S.C. § 5325(a)(1); *see also* § 5388(c); *Swinomish Indian Tribal Cmty. v. Azar*, 406 F. Supp. 3d 18, 21 (D.D.C. 2019), *aff'd*, No. 19-5299, 2021 WL 1376986 (D.C. Cir. Apr. 13, 2021).

Interior to the Department of Health, Education, and Welfare, the predecessor to the Department of Health and Human Services.); and (2) the Indian Health Care Improvement Act, which allows IHS to provide a wide range of health care programs, 25 U.S.C. §§ 1601-1683.

The ISDEAA, however, requires IHS to add "an amount" to the contract to reimburse the tribal contractor for its reasonable and necessary Contract Support Costs. 25 U.S.C. § 5325(a)(2), (a)(3)(A). IHS is required to pay reasonable costs for activities necessary to ensure contract compliance and prudent management:

> an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor 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 contracted program from resources other than those under contract.

Id. § 5325(a)(2). The eligible Contract Support Costs 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 incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract [.]

Id. § 5325(a)(3)(A).[2] These two expense categories are respectively known as "direct" Contract Support Costs and "indirect" Contract Support Costs. *See* Compl. ¶ 17. Direct Contract Support Costs covers costs incurred to operate a specific program, such as workers' compensation, while indirect Contract Support Costs covers overhead that benefits more than one program, such as information technology systems. *See* Compl. ¶¶ 17, 19, 33; *Swinomish*, 406 F. Supp. 3d. at 21. Indirect Contract Support Costs is often calculated by multiplying a negotiated indirect cost rate

[2] Section 5325(a)(5)–(6) describes Contract Support Costs for pre-award and start-up costs that are not at issue in this case.

by the amount of the direct cost base. *See* Compl. ¶¶ 27-29. The ISDEAA further provides that both types of Contract Support Costs "shall not duplicate any funding provided under" the Secretarial amount in subsection (a)(1). 25 U.S.C. § 5325(a)(3)(A)(ii).

B. The Contract Disputes Act

The Contract Disputes Act, 41 U.S.C. §§ 7101 *et seq*., establishes a comprehensive framework for resolving contract disputes between executive branch agencies and government contractors, helping to ensure fair and equitable treatment to contractors and Government agencies. *See Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 753 (2016); *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 521 (D.C. Cir. 2010); *Am. Pac. Roofing Co. v. United States*, 21 Cl. Ct. 265, 267 n.2 (1990) (internal citations and quotations omitted). The ISDEAA provides that the Contract Disputes Act shall apply to Indian self-determination contracts. 25 U.S.C. §§ 5331(a), (d); *see also* 25 C.F.R. § 900 Subpart N (Post-Award Contract Disputes); 42 C.F.R. § 137.412 (Post-Award Disputes); *Menominee*, 136 S. Ct. at 753-54; *Tuba City Reg'l Health Care Corp. v. United States*, 39 F. Supp. 3d 66, 69 (D.D.C. 2014); *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 442 (D.N.M. 2007).

The Contract Disputes Act provides a mandatory administrative process, referred to as "presentment," which is applicable to contract disputes between government contractors and the United States. *Zuni*, 243 F.R.D. at 442; *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1107-1108 (D.N.M. 2006) (presentment under Contract Disputes Act is a jurisdictional requirement); *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 408 (D.D.C. 2008) (adhering to law of case that plaintiff's compliance with presentment requirement of Contract Disputes Act to be jurisdictional prerequisite).

Under the Contract Disputes Act, all claims by a contractor shall be in writing and shall be submitted to the contracting officer for decision. *Zuni*, 243 F.R.D. at 442 (internal citations

omitted); 41 U.S.C. § 7103(a); 25 C.F.R. §§ 900.15-900.30. A contractor must "submit a proper claim—a written demand that includes (1) adequate notice of the basis and amount of a claim and (2) a request for a final decision[,]" *Tuba City*, 39 F. Supp. 3d at 69 (quoting *M. Maropakis*, 609 F.3d at 1328).

The requirement that the contractor provide notice of the amount of the claim means only that "the amount claimed must be stated in a manner which allows for reasonable determination of the recovery available at the time the claim is presented and/or decided by the contracting officer." *Tunica-Biloxi*, 577 F. Supp. 2d at 410 (quoting *Metric Constr. Co. v. United States,* 1 Cl. Ct. 383, 391 (1983)). A contractor need not actually spell out the amount of damages arising from its claim if the amount of the claim would be easily determinable through "simple arithmetic." *Id.* (internal citation omitted). Under 25 C.F.R. § 900.218(a)(1), however, a claim is a written demand by one of the contracting parties, asking for "(1) Payment of a specific sum of money under the contract" or another of the remedies enumerated in the regulation.[3] *See also* 42 C.F.R. § 137.412 (stating that 25 C.F.R. 900.215 *et seq*. applies to compacts, funding agreements, and construction project agreements entered into under Title V).

For Contract Disputes Act claims under $100,000, the contracting officer shall issue a decision within 60 days; for claims over $100,000, the contracting officer shall issue a decision within 60 days or notify the contractor when a decision will be issued (and it must be within a reasonable time, given the nature of the claim)). *See* 41 U.S.C. § 7103(f). The Contract Disputes Act further explains that failure by a contracting officer to issue a decision on a claim within the

[3] The other remedies—adjustment or interpretation of contract terms or other claim relating to the contract—are not applicable here.

required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim. 41 U.S.C. § 7103(f)(5).

An ISDEAA contractor may appeal a contracting officer's decision to: (1) the Civilian Board of Contract Appeals (within 90 days of the decision), § 7104(a), 25 U.S.C. § 5331(d); (2) the United States Court of Federal Claims (within 12 months of a decision), *see* 41 U.S.C. § 7104(b)(1), (3); or (3) a federal district court (within 12 months of a decision), *see* § 7104(b)(3), 25 U.S.C. § 5331(a). The Tanana Chiefs Conference in this case has chosen the third type of appeal available for denied claims. *See* Compl.¶ 53. But only claims that a contractor presents to the contracting officer may be brought in federal court. *See Santa Fe Eng'rs, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987); *Tunica-Biloxi*, 577 F. Supp. 2d at 409-13. In the absence of a valid claim, the federal courts lack jurisdiction. *See Santa Fe Eng'rs*, 818 F.2d at 859-60; *Tunica-Biloxi*, 577 F. Supp. 2d at 413; *Zuni*, 467 F. Supp. 2d at 1111-12.

C. The Tanana Chiefs Conference's ISDEAA Agreements For FY 2013

In FY 2013, the Tanana Chiefs Conference had two contracts with the IHS: a Title I contract (Contract No. 243-96-6015, "Title I Contract") and a Title V compact (Compact No. 58G950032), the latter of which consists of both a Compact (ECF No. 1-1, "Title V Compact") and the Funding Agreement for Fiscal Years 2011-2013 (ECF No. 1-2, "Title V FY 2011-2013 Funding Agreement"). During FY 2013, the Tanana Chiefs Conference received Contract Support Costs under both the Title I Contract and the Title V Compact and FY 2011-2013 Funding Agreement. *See* ECF No. 1-4 at 5-6; Defs' Exs. A, B, discussed *infra*, Sec. II.

Under its Title V Compact and the FY 2011-2013 Funding Agreement, the Tanana Chiefs Conference operated various healthcare programs, including: clinical care, hospital-based services, Community Health Aide program, dental services, nutritional services, among others. Compl. ¶¶ 7, 8 & 11; ECF No. 1-1, ECF No. 1-2 § 3.

During FY 2013, the Tanana Chiefs Conference also operated under its Title I Contract. Compl. ¶ 12. The Title I scope of work identifies: Community Health Development, Health Records maintenance, business office, field medical services, clinical and community nursing services, pharmacy services, among other activities. Defs' Ex. B.[4] In the Complaint, the Tanana Chiefs Conference alleges that it provided village-based health care services for one of its member Tribes (the Native Village of Tanana) under the Tanana Chiefs Conference's Title I agreement, but also maintains that the Tanana Chiefs Conference served as a pass-through entity for funds while providing "operational support." Compl. ¶ 12.

D. The Tanana Chiefs Conference's Contract Disputes Act Claims

In a September 30, 2019 letter submitted to IHS, the Tanana Chiefs Conference demanded "immediate payment of $12,153,793, plus interest, due and owing to [the Tanana Chiefs Conference] under the provisions of the above-referenced Title V Compact and associated funding agreements, as amended, in effect between the parties for fiscal year 2013." Pl's Ex. D (ECF No.

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[4] Defendants' Exhibit B is Plaintiff's Title I Contract (Contract Number 243-96-6015), Scope of Work, and Modification No. 63 and Alaska Area Native Health Service Operating Resource Detail Ord. # 4 (dated September 19, 2013). As discussed below, the Court can consider facts outside the pleadings in deciding a motion to dismiss under Rule 12(b)(1). The exhibits attached hereto, however, would be incorporated by reference even under a Rule 12(b)(6) motion because the agreements between the Tanana Chiefs Conference and IHS that were operative for FY 2013 are referenced in the Complaint and its appendices. "'[W]here a document is referred to in the complaint or is central to the plaintiff's claims, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.'" *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999) *aff'd*, 38 F. App'x 4 (D.C. Cir. 2002); *see also EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-25 (D.C. Cir. 1997); *Doe 2 v. Trump,* 319 F. Supp. 3d 539, 541 (D.D.C. 2018). "Moreover, a document need not be mentioned by name to be considered 'referred to' or 'incorporated by reference' into the complaint. Otherwise, 'a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied.'" *Alston v. Johnson*, 208 F. Supp. 3d 293, 298 (D.D.C. 2016) (quoting *Strumsky v. Wash. Post Co.,* 842 F.Supp.2d 215, 217–18 (D.D.C. 2012) (citations omitted)).

1-4, "Claims Materials") at 1; *see also* Compl. ¶ 43. The letter with the Tanana Chiefs Conference's Claims Materials asserted that its claims were "supported by the originals of all contracts, contract modifications, funding agreements, amendments thereto, indirect cost rate agreements, and audits[.]" ECF No. 1-4 at 2.

In support of its demand, the Tanana Chiefs Conference included the following table on the first page of its letter included with the Claims Materials:

Fiscal Year	**Total Direct [Contract Support Costs] Due**	**Total Indirect [Contract Support Costs] Due**	**Expectancy Damages from Additional IDC on Unfunded IDC & DCSC[5]**	**Expectancy Damages from Lost Third-Party Revenue**	**Total**
FY 2013	$3,347,642	$4,085,965	$1,767,329	$2,952,857	$12,153,793

Compl. ¶ 44; ECF No. 1-4 at 1.

Appended to the letter in the Claims Materials were two additional schedules labeled "Tanana Chiefs Conference – [Contract Support Costs] Claim Calculations." ECF No. 1-4 at 5-6. Both schedules listed the contract numbers for both the Title I Contract and Title V FY 2013 Funding Agreement at the top of their first column, which described the nature of each line item. *See id.* Both schedules also listed "Title I & V Agreements" at the top of their second column, which contained the dollar figures associated with each line item for FY 2013. *See id.*

IHS responded to the Tanana Chiefs Conference's demand in correspondence dated November 26, 2019: one letter pertaining to the Title V Funding Agreement (Number 58G950032) and a second pertaining to the Title I Contract (Number 243966015). *See* ECF No. 1-5. Both

[5] As used in Plaintiff's Claims Materials, Defendants understand "IDC," to mean Indirect Costs and "DCDC" to mean Direct Contract Support Costs.

letters stated that IHS had determined that the Claims Materials did not constitute a proper claim under the Contract Disputes Act. *Id.* The IHS letters explained that the Contract Disputes Act and its implementing regulations set forth mandatory requirements for presenting a claim, including the requirement in 25 C.F.R. § 900.218(a)(1) that a claim ask for payment of a specific sum of money under the contract. *Id.* IHS explained further:

> [The Tanana Chiefs Conference] does not specify which contract has been breached for what amount; rather it asserts claim(s) for breaches of two contracts and/or funding agreements and compact for a total of $12,153,793, without information regarding the amount at issue under either contract. The letter and attachments did not state a sum certain under the contract in accordance with the law.

ECF No. 1-5.

E. The Tanana Chiefs Conference's Federal Civil Complaint

On October 9, 2020, the Tanana Chiefs Conference filed its Complaint in this action. ECF No. 1. Plaintiff states that the action is "for damages for the failure of [IHS] to pay [the Tanana Chiefs Conference] certain [Contract Support Costs] that were due under [the Tanana Chiefs Conference's] Compact with IHS in Fiscal Year (FY) 2013," and alleges that the claim letter in its Claim Materials "alleged a claim only under [the Tanana Chiefs Conference's Title V] Compact and related Funding Agreements." Compl. ¶¶ 1, 43. The Complaint also alleges, among other things, that the Tanana Chiefs Conference's Claims Materials asserted a "sum certain" for $12,153,793, plus interest, supported by the table found on the first page of the letter in the Claims Materials. Compl. ¶ 44 (citing Ex. D (ECF No. 1-4) at 1).

However, the Complaint's Prayer For Relief seeks a money judgment of $10,386,464, which Count V explains represents the original claim of $12,153,793, less the "expectancy damage claim for additional indirect costs on underfunded contract support costs." Compl. ¶ 78 n.4. In other words, the Tanana Chiefs Conference's civil complaint does not seek the $1,767,329 of

"Expectancy Damages from Additional IDC on Unfunded IDC & DCSC" listed in the table on the first page of the letter in its Claims Materials:

Fiscal Year	Total Direct [Contract Support Costs] Due	Total Indirect [Contract Support Costs] Due	Expectancy Damages from Additional IDC on Unfunded IDC & DCSC	Expectancy Damages from Lost Third-Party Revenue	Total
FY 2013	$3,347,642	$4,085,965	$1,767,329	$2,952,857	$12,153,793

See ECF No. 1-4 at 1. Counts I, II, and V of the Complaint allege damages for the $3,347,642 listed as "Total Direct [Contract Support Costs] Due" in the Claims Materials. *See* Compl. ¶¶ 59, 62, 76.[6] Counts I, II, III, and V also allege damages for the $4,085,965 listed as "Total Indirect [Contract Support Costs] Due" in the Claims Materials. *See* Compl. ¶¶ 60, 63, 70 n.3, 76. Count V also appears to allege damages for the $2,952,857 listed as "Expectancy Damages from Lost Third-Party Revenue" in the Claims Materials. Compl. ¶¶ 75, 77. Again, the Complaint alleges that its Claim Materials "alleged a claim only under [the Tanana Chiefs Conference's Title V] Compact and related Funding Agreements." Compl. ¶¶ 1, 43.

Defendants have cross-referenced the original Claims Materials table with those values included in the Complaint and note that the difference is the removal of "Expectancy Damages from additional IDC on Unfunded ICD & DCSC":

[6] Paragraph 76 cites damages of $7,433,607, which is the sum of "Total Direct [Contract Support Costs] Due" and "Total Indirect [Contract Support Costs] Due" listed in the Claims Materials table.

Fiscal Year	Total Direct [Contract Support Costs] Due	Total Indirect [Contract Support Costs] Due	~~Expectancy Damages from Additional IDC on Unfunded IDC & DCSC~~	Expectancy Damages from Lost Third-Party Revenue	Complaint Total
FY 2013	$3,347,642 *See* Compl. ¶¶ 59 & 62	$4,085,965 *See* Compl. ¶¶ 60 & 63 plus 70 & n. 3.	~~$1,767,329~~ *See* Compl. ¶ 78 & n.4	$2,952,857 *See* Compl. ¶72	$10,386,464 *See* Compl. ¶ 78

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(1) presents a threshold challenge to the Court's jurisdiction, and requires that the Court determine whether it has subject matter jurisdiction in the first instance. *Taylor v. Clark*, 821 F. Supp. 2d 370, 372 (D.D.C. 2011). Federal courts are courts of limited jurisdiction and the law presumes that a cause lies outside this limited jurisdiction. *Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A 12(b)(1) motion imposes on the court a duty to dismiss "whenever it becomes apparent that [the court] lack[s] jurisdiction." *Al Janko v. Gates*, 831 F. Supp. 2d 272, 278 (D.D.C. 2011) (a court may give a plaintiff's factual allegations in the complaint closer scrutiny under 12(b)(1)) (citations omitted).

Where a factual challenge is made, a district court may consider materials outside the pleadings to determine whether it has subject matter jurisdiction, and plaintiff bears the burden of establishing factual predicates of jurisdiction by a preponderance of the evidence. *Tunica-Biloxi*, 577 F. Supp. 2d at 398 (citing *Jerome Stevens Pharm. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005), and *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006)); *see also Tuba City*, 39 F. Supp. 3d at 69.

The Contract Disputes Act is "a statute waiving sovereign immunity." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1329 (Fed. Cir. 2010). It therefore "must be strictly construed in favor of the sovereign" and courts accordingly "enforce[] the strict limits of

the [Contract Disputes Act] as jurisdictional prerequisites to any appeal." *Id*. (quotation marks omitted). Where a request fails to satisfy the Contract Disputes Act's presentment requirement, a court lacks jurisdiction to review the matter. *See M. Maropakis*, 609 F.3d at 1327-28; *Tunica-Biloxi*, 577 F. Supp. 2d at 409-13 (finding that because the Contract Disputes Act's presentment requirement is jurisdictional and "inflexible" new claims that were not presented to the contracting officer required dismissal).

ARGUMENT

This Court does not have jurisdiction to hear Plaintiff's claim because the Tanana Chiefs Conference did not properly present its claims to the IHS contracting officer, as required under the Contract Disputes Act. The Contract Disputes Act requires contractors to submit their claims in writing to a contracting officer for decision. In this case, although the Tanana Chiefs Conference did file claims with IHS, (a) Plaintiff's Claims Materials did not clearly delineate the bases for the Tanana Chiefs Conference's claims or the pertinent amounts attributable to either of two unique contracts in effect during the timeframe at issue (which resulted in issuance of IHS's response letters), and (b) the "claims" the Tanana Chiefs Conference presented to the IHS differ from the claim now articulated in its civil complaint. The Tanana Chiefs Conference cannot avail itself of the Contract Disputes Act's waiver of sovereign immunity because the Tanana Chiefs Conference did not comply with the administrative requirements for the claim articulated in the Complaint and, therefore, this Court does not have jurisdiction over this case. As such, the Complaint must be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

I. The Tanana Chiefs Conference Did Not Properly Present Its Claim to IHS

The Contract Disputes Act is a statute that waives sovereign immunity, allowing the United States to be sued—and it must be strictly construed in favor of the sovereign. *M. Maropakis*, 609 F.3d at 1329 (quotation marks omitted). Under the Contract Disputes Act, each claim a plaintiff

seeks to litigate must have been presented to the appropriate contracting officer, *see* 41 U.S.C. § 7103(a), and only claims that a contractor presented to the contracting officer may be brought in federal court, *see Santa Fe Eng'rs*, 818 F.2d at 858;[7] *Tunica-Biloxi*, 577 F. Supp. 2d at 409-13; *see also*, *e.g.*, *Reliance Ins. Co. v. United States*, 931 F.2d 863, 866 (Fed. Cir. 1991); *Zuni*, 467 F. Supp. 2d at 1109-12; *Keweenaw Bay Indian Cmty. v. Sebelius*, 291 F.R.D. 124 (W.D. Mich. 2013).

But a claim must also be adequately clear, and the Claims Materials the Tanana Chiefs Conference submitted to the IHS were anything but clear. To meet the Contract Disputes Act's requirements, a claim must contain "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987); *see also, e.g., M. Maropakis*, 609 F.3d at 1327. If simply alleging a breach were all that was required to present a claim, then presentment would be strictly *pro forma*, requiring no calculation or analysis by the tribal contractor. A claim also cannot be so opaque that it cannot be discerned—it is a written demand by one of the contracting parties, asking for payment of a specific sum of money under the contract. 25 C.F.R. § 900.218(a)(1); *see also* 42 C.F.R. § 137.412.

As explained in IHS's November 26, 2019 denial letters, the Claims Materials did not constitute proper claims under the Contract Disputes Act. ECF No. 1-5. The denial letters state: the Tanana Chiefs Conference "d[id] not specify which contract ha[d] been breached for what amount." *Id.* Though the Claims Materials "assert[ed] claim(s) . . . for a total of $12,153,793," the Tanana Chiefs Conference did not explain what amount was at issue under each contract and "did not state a sum certain under the [specific] contract in accordance with the law." *Id.* At the

[7] The Court of Federal Claims, and its reviewing court, the Federal Circuit, interpret and apply the Contract Disputes Act almost exclusively. *See* 41 U.S.C. § 7104(b)(1); 28 U.S.C. § 1295. Consequently, its decisions are cited herein.

presentment stage, the Tanana Chiefs Conference bore the burden of proving its affirmative claims against the government by a preponderance of the evidence, and it did not do so. *See J.C. Equip. Corp. v. England*, 360 F.3d 1311, 1317-18 (Fed. Cir. 2004).

Though Plaintiff's Complaint now argues that the Claims Materials only sought to state a claim under its Title V Compact and FY 2013 Funding Agreement (Compl. ¶ 43), the plain language of the letter in the Tanana Chiefs Conference's Claims Materials references multiple contracts, and its schedules included as support for the $12,153,793 demand reference the Title I agreement. Indeed, the language of the letter included with the Claims Materials was explicit:

> These claims seek the sums set forth above and, without limitation, all other damages arising out of IHS's failure to pay full contract support costs as required by the ISDEAA and [the Tanana Chiefs Conference's] contracts, including contract support costs due on portions of [the Tanana Chiefs Conference 's] health program supported by third-party revenues. These claims are supported by the originals of all contracts, contract modifications, funding agreements, amendment thereto, indirect cost rate agreements, and audits, all of which are in the custody of the Government.

ECF No. 1-4 at 2. Further, the headings for Column 1 of the supporting schedules also cite the identifying contract numbers for both the Title I Contract and the Title V Compact and FY 2013 Funding Agreement, and the headings for Column 2 state that the FY 2013 amounts listed in the column are for "Title I & V Agreements." ECF No. 1-5 at 5-6.

Because the Tanana Chiefs Conference failed to properly present its claims to a contract officer, this Court does not have jurisdiction over the Complaint and it should be dismissed pursuant to Rule 12(b)(1).

II. The Tanana Chiefs Conference Cannot Cure the Presentment Defect in Its Civil Complaint

The Tanana Chiefs Conference's Complaint attempts to argue that its five counts are based solely on the Tanana Chiefs Conference's Title V Compact and FY 2011 – 2013 Funding Agreement. As explained above, however, the claims the Tanana Chiefs Conference presented to

the contracting officer in its Claims Materials were not based solely on the Title V agreement. The Tanana Chiefs Conference cannot cure the defects in the claims presented at the contracting officer level by now changing its claim in its federal civil pleadings.

As noted, the Contract Disputes Act provided a limited waiver of sovereign immunity for suits against the government. *M. Maropakis*, 609 F.3d at 1329; *SMS Data Prods. Grp., Inc. v. United States*, 19 Cl. Ct. 612, 614 (1990) (citations omitted). As a prerequisite to filing a suit pursuant to the Contract Disputes Act, "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision," and each claim relating to a contract "shall be in writing." 41 U.S.C. § 7103(a)(1)-(2). That claim must also seek payment of a specific sum of money under the contract. 25 C.F.R. § 900.218. "Compliance with these requirements is a jurisdictional prerequisite to the filing of a complaint under the [Contract Disputes Act]." *Foley Co. v. United States*, 26 Cl. Ct. 936, 944-45 (Cl. Ct. 1992) (citations omitted), *aff'd* 11 F.3d 1032 (Fed. Cir. 1993); *see also Tunica-Biloxi Tribe of La.*, 577 F. Supp. 2d at 408; *SMS Data*, 19 Cl. Ct. at 615 ("The [Contract Disputes Act's] limitations on the waiver of sovereign immunity necessarily restrict the jurisdiction of this court.").

The administrative filing requirement serves an important purpose: "Congress required contractors to file all claims with the contracting officer to provide the Government with an opportunity to settle the case or otherwise avoid unnecessary litigation." *SMS Data*, 19 Cl. Ct. at 614 & 616 (discussing 41 U.S.C. § 605(a): "The Act does not permit claims discovered after an initial decision to escape contracting officer review. The Act exempts no claims from contracting officer review. Upon discovery of a new claim, a contractor must submit it to the contracting officer."); *see also Johnson Controls World Servs., Inc. v. United States*, 43 Fed. Cl. 589, 592

(1999) ("A valid final decision by the contracting officer is thus 'a "jurisdictional prerequisite" to further legal action thereon.'") (citation omitted).

If the Complaint brought in this Court is based on the same set of operative facts underlying the claim presented to the IHS, then this Court has jurisdiction under the [Contract Disputes Act], but the critical test for determining whether two or more claims are "based on the same set of operative fact[s]" is whether the scheme of adjudication prescribed by the Contract Disputes Act is undermined by the plaintiffs' claim. *Tunica-Biloxi*, 577 F. Supp. 2d at 409 (quotations and citations omitted). Separate Contract Disputes Act claims are based on the same "operative facts" if they seek the same relief under different legal theories, but claims are not based on the same "operative facts" if they apply the same legal theories to different facts in pursuit of separate requests for relief. *Id.*

Plaintiff's attempt to amend the claims it presented to IHS by alleging in federal court that the damages it seeks derive solely from its Title V Compact and FY 2011-2013 Funding Agreement would clearly undermine the scheme of adjudication prescribed by the Contract Disputes Act. At the administrative level, though the Tanana Chiefs Conference demanded a global rather than specific sum, its Claims Materials were too vague as to which contract obligations supported the demand (i.e. what the operative facts underlying the claims were). *See* ECF No. 1-4. Now the Tanana Chiefs Conference argues that it is clear that the claims were based only on the Title V Compact and FY 2013 Funding Agreement, but that assertion is belied by the express contents of the Tanana Chiefs Conference's Claims Materials, which refer to all "contracts" and make explicit reference to the Title I agreement. The "operative facts" underlying the federal civil complaint are necessarily different from those at the administrative level because it is not clear what the operative facts even were at the presentment stage—and to the extent the

underlying facts were discernable, they appeared to cover both Title I and Title V agreements. The Tanana Chiefs Conference cannot proceed in federal district court by amending, either legally or factually, its claims to now assert that they were based solely on an alleged breach of the Title V agreement. Doing so would allow the Tanana Chiefs Conference to circumvent the Contract Disputes Act's adjudication process and presentment requirement.

Furthermore, the Tanana Chiefs Conference's efforts to cure its presentment defect cannot withstand scrutiny. In the Complaint, the Tanana Chiefs Conference repeatedly refers the Court to the schedules it submitted to IHS, including by specific line. *See* Compl. ¶¶ 59, 62 (citing Ex. D at 6), 63 (citing Ex. D at 6), 70 (citing Ex. D at 5-6), 72 (citing Ex. D at 5 lines 45-46), n.3 (citing Ex. D at 5 (line 18) and Ex. D at 6 (line 9)). It does so while attempting to minimize the importance of schedules by asserting that they were provided to "facilitate the agency's review of these claims" and "for discussion purposes only." Compl. ¶ 47. Nonetheless, these schedules appear to derive their values from both the Title I Contract and Title V FY 2013 Funding Agreement, as highlighted by the cumulative funding report and Title I funding materials contained in Defendants' Exhibit B.

For example, the top two line-items on the first supporting Contract Support Costs "Claim Calculations" schedules included with the Claims Materials, respectively titled "Total Contract / Compact Award" and "Total IHS Expenses per SEFA," both list the dollar amount of $53,322,680. ECF No. 1-4 at 5. This figure ($53,322,680) is higher than the Title V funding amount for Fiscal Year 2013 of $52,617,909, (*see* Defs' Ex. A); however, it appears equal to the Title V funding amount, plus the Title I funding amount of $704,771 (*see* Defs' Ex. B).[8]

[8] In terms of funding, the Cumulative Funding Report for the Title V Compact shows total FY 2013 funding of $52,617,909 (minus $1,604,660 in retained services). Defs' Ex. A. In general, retained services may include funding which is eligible to be contracted, but for which the awardee has chosen not to contract; it may also include certain buyback services. The FY 2013 funding total under the FY2011-2013 Funding Agreement included $1,871,568 in direct Contract Support

Further, the second supporting Contract Support Costs "Claim Calculations" schedule also lists $53,322,680 as the amount for "Total Funding Awarded" item found on line 11 of the table. ECF No. 1-4 at 6. In addition, in the Direct Contract Support Costs "Shortfall Calculation" in the second schedule, it includes a deduction for "DCSC PAID" on line 21 for $1,871,851. ECF No. 1-4 at 6. But this sum is greater than the Direct Contract Support Costs amount under the Title V Compact and FY 2013 Funding Agreement ($1,871,568). *See* Defs' Ex. A. This sum is, however, the sum of the Title V amount of Direct Contract Support Costs ($1,871,568) plus the Title I amount ($283). *See* Defs' Ex. B.

A final example, in the Indirect Contract Support Costs "Shortfall Calculation" in the first and second schedules, there appears a deduction for "IHS IDC Funding Awarded" on line 15 (Schedule 1), and "IDC per Negotiated IDC Rate" on Line 6 (Schedule 2), both of which total $7,126,709. Again, however, the sum of $7,126,709 is greater than the amount under the Title V Compact and FY 2013 Funding Agreement ($6,999,836), *see* Defs' Ex. A, but is consistent with the Title V amount of Indirect Contract Support Costs ($6,999,836) plus the Title I amount ($126,873). *See* Defs' Ex. B. Thus, the schedules included with the Claims Materials appear to indicate combined (Title I and Title V) sums across the Tanana Chiefs Conference's proffered Direct Contract Support Costs, Indirect Contract Support Costs, and Totals calculations.

In short, the Complaint's attempt to waive away any presentment issues is unavailing. To the contrary, the issue of presentment is compounded by the Tanana Chiefs Conference's request that this Court award damages equivalent to fundamentally the same sums that the Tanana Chiefs

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Costs (i.e. direct program expenses) and $6,999,836 in indirect Contract Support Costs (i.e. any additional administrative or other expenses related to the overhead incurred by the tribal contractor in connection with the operation contracted Programs). *Id.* Under its Title I Contract in FY 2013, the Tanana Chiefs Conference received $704,771, including $283 in direct Contract Support Costs and $126,873 in indirect Contract Support Costs. Defs' Ex. B, *see also* Compl. ¶¶ 43, 47.

Conference sought at the presentment stage, but which were not then specific to the Title V agreement. The Tanana Chiefs Conference seeks these damages while, on the one hand, attempting to minimize the import of its Claims Materials but, on the other hand, citing those same sources to support the damages it seeks in this lawsuit now exclusively under its Title V agreement. Plaintiff suggests that its Claims Materials were sufficient because the "letter expressly included all four components of the certification found in 41 U.S.C. § 7103(b)(3)" and sought a "sum certain." *See* Compl. ¶¶ 45, 4850. Yet this argument only highlights the ambiguity of the actual per-contract claims value contained in the Claims Materials submitted to IHS. And, as discussed above, to present a proper Contract Disputes Act claim, Plaintiff was required to seek a specific sum of money under a specific contract. *See* 25 C.F.R. § 900.218.

Presentment is not a *pro forma* exercise and a claim must contain "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning*, 811 F.2d at 592. A claim is a written demand by one of the contracting parties, asking for payment of a specific sum of money under the contract. 25 C.F.R. § 900.218; 42 C.F.R. § 137.412. A review of the Tanana Chiefs Conference's Claims Materials, particularly the table in the Tanana Chiefs Conference's letter, demonstrates that it made no attempt to identify which contract it believed to be the source of the "Total Direct [Contract Support Costs] Due," "Total Indirect [Contract Support Costs] Due," "Expectancy Damages from Additional IDC on Unfunded IDC & DCSC," or "Expectancy Damages from Lost Third-Party Revenue" that the Tanana Chiefs Conference claimed that the $12,153,793 demanded from IHS comprised. *See* ECF No. 1-4 at 1. The Tanana Chiefs Conference's Claims Material did not offer adequate notice of the bases and amount for its claims—i.e. seek a specific sum of money by unique contract—and that deficiency cannot be cured by now asserting that a single contract was the foundation for those claims in a

federal civil complaint. As a result, Congress has not waived sovereign immunity for the Tanana Chiefs Conference's civil action and this Court does not have jurisdiction over it.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint, as it lacks subject matter jurisdiction.

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Washington, DC

Respectfully submitted,

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