IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SANTEE SIOUX NATION,

Plaintiff,

v.

ROSELYN TSO, in her official capacity as Director of the Indian Health Service;

INDIAN HEALTH SERVICE;

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services;

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; and

UNITED STATES OF AMERICA,

Defendants.

No. 8:23-cv-530

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN PART

INTRODUCTION

This case concerns who should bear certain depreciation costs of a wellness center constructed by Plaintiff, the Santee Sioux Nation (the "Tribe") under a joint venture agreement with the Indian Health Service ("IHS"). The Tribe mistakenly charged these costs to IHS, and the agency mistakenly paid them. But in a later settlement agreement, the Tribe acknowledged that it was liable for these costs and had been overpaid, and it agreed to negotiate to repay IHS the funds at issue. When those negotiations faltered, IHS exercised its right to file a claim under the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101, 7103(g), a process that the Tribe has used before.

IHS sent its CDA claim to the Tribe via certified mail on June 23, 2017. Under the CDA, the Tribe had twelve months to challenge that claim in federal court. *See id*. § 7104. But the Tribe did not file this lawsuit until November 29, 2023, more than five years past the appeal deadline. *See* Compl., ECF No. 1.

The Tribe alleges that it has repaid IHS in various ways so the agency's CDA claim should now be nullified. To be clear, IHS has no intention of over-collecting on the debt owed to it, and the extent to which the Tribe may have repaid its debt, if at all, can be sorted out later. But the Tribe's time to challenge the CDA claim itself or the validity of the debt it owes to the United States has long since run out. This Court should thus dismiss the portions of Plaintiff's Complaint challenging IHS's CDA claim or the validity of its debt owed to the United States.

BACKGROUND

I. STATUTORY BACKGROUND

IHS delivers heath care to more than two million American Indians and Alaska Natives directly through IHS facilities, indirectly through Indian Self Determination and Education Assistance Act ("ISDEAA") contracts, or by funding contracts and grants to organizations operating health programs for urban Indians. *See* Snyder Act, 25 U.S.C. § 13; Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1601 *et seq*.; ISDEAA, 25 U.S.C. § 5301 *et seq*.; 25 U.S.C. §§ 1652-1654.[1] The Snyder Act provides a broad, general statutory mandate to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for, among other things, the "relief of distress and conservation of health." 25 U.S.C. § 13. The IHCIA establishes numerous programs to address particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes treatment, medical training, and urban Indian health, and provides for IHS to provide health care to eligible persons pursuant to certain requirements. *See* 25 U.S.C. §§ 1601–83. Among other

[1] In 1954, Congress transferred the health-care related functions of the Snyder Act from the Department of the Interior to Health, Education, and Welfare, the predecessor of the Department of Health and Human Services ("HHS"). *See* Pub. L. No. 83-568, 68 Stat. 674 (1954) (codified at 42 U.S.C. § 2001).

things, the ICHIA allows IHS and a tribe to enter a joint venture demonstration project. *See id*. § 1680h(e)(1). In such a joint venture, the tribe must expend tribal, private, or other nontribal funds, including loan guarantees, for the acquisition and construction of a health care facility. *See id*. In return, IHS agrees to provide equipment, supplies, and staffing for the operation and maintenance of such a health facility. *Id*. Additionally, the tribe agrees that it is liable to the United States for any breach of its agreement. *Id*. § 1680h(e)(3).

The ISDEAA allows a tribe or tribal organization to contract with the Secretary of HHS (the "Secretary"), through IHS, to take over operation of a federal health care program, service, function, or activity (collectively referred to as the "federal program"), or a portion thereof, that IHS would otherwise operate for the tribe's benefit. *See* 25 U.S.C. §§ 5321, 5387. After the parties enter into a contract, IHS transfers to the tribal contractor on an annual basis the amount of appropriated funds the agency would have allocated for its continued operation of the federal program. *Id*. § 5325(a)(1). This is commonly known as the "Secretarial amount" because it is the amount the Secretary, through IHS, would have otherwise allocated from the annual lump-sum appropriation for IHS's continued operation of the federal program.[2]

The ISDEAA additionally requires IHS to add "an amount" to the contract to reimburse the tribal contractor for its contract support costs ("CSC"). *See id*. § 5325(a)(2), (a)(3)(A). The ISDEAA provides that CSC includes the cost of reimbursing each tribal contractor for the 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

[2] IHS pays the Secretarial amount is paid at the beginning of each contract performance period and an estimated amount for CSC. After the end of the contract performance period, IHS conducts a final reconciliation to determine the contractor's actual costs and reconcile any over- or under-payments that IHS made based on the pre-performance estimates.

> 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,
>
> except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

Id. § 5325(a)(3)(A). Funds paid pursuant to subsection 5325(a)(3)(A)(i) are known as "direct CSC" and funds paid pursuant to subsection 5325(a)(3)(A)(ii) are known as "indirect CSC." Direct CSC is negotiated with IHS. Indirect CSC is typically paid by IHS based on application of a tribal contractor's indirect cost rate to the Secretarial amount and Direct CSC. However, a tribe negotiates its indirect cost rate with the Interior Business Center ("IBC"), not with IHS. *See* Interior Business Center, Customer Central, Indirect Cost Rate Negotiation Services, https://perma.cc/SBF9-XMXQ ("We review, negotiate and approve (or countersign) indirect rate agreements for non-federal entities on behalf of our client agencies to ensure the United States government pays indirect or incurred costs that are legally reasonable, allocable, and allowable.").

Once the parties have entered into an ISDEAA contract, the ISDEAA expressly provides that the CDA "shall apply to self-determination contracts[.]" 25 U.S.C. § 5331(a), (d); *see also Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250 (2016) (applying the CDA and its deadlines to tribal contractors). The CDA provides a comprehensive statutory system of legal and administrative remedies for resolving government contract claims. *See, e.g., Am. Pac. Roofing Co. v. United States*, 21 Cl. Ct. 265, 267 (1990) (citing S. Rep. No. 95–1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5256). The CDA's provisions help to ensure fair and equitable treatment of contractors and Government agencies. *Id*.

An essential part of the CDA is its mandatory presentment requirement for contract disputes between government contractors and the United States. The first step in the CDA

process provides that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3); *see also* 25 C.F.R. §§ 900.215–30 (explaining the process and exhaustion requirements for contract dispute claims presented under the ISDEAA). The CDA further provides that, "[t]he contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter," 41 U.S.C. § 7103(e), and the contracting officer "shall mail or otherwise furnish a copy of the decision to the contractor," *id*. § 7103(d). CDA regulations provide that the contracting officer "shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt." 48 C.F.R. § 33.211(b). This requirement applies to decisions on claims initiated by or against the contractor. *See id*. The CDA provides for interest to accrue based on the date on which a contracting officer receives a contractor's claim or a contractor receives the decision of a contracting officer. *See* 41 U.S.C. § 7109.

A tribal contractor then has the option of appealing a contracting officer's decision to: (i) the Civilian Board of Contract Appeals (within 90 days of the decision), *id*. § 7104(a), 25 U.S.C. § 5331(d); (ii) the United States Court of Federal Claims (within 12 months of a decision), 41 U.S.C. § 7104(b)(1), (3); or (iii) a federal district court (within 12 months of a decision), *id*. § 7104(b)(3); 25 U.S.C. § 5331(a). Finally, the CDA provides that "[t]he contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by [the CDA]." 41 U.S.C. § 7103(g). In the case of a claim brought by the United States, a contractor-defendant who fails to timely appeal a contracting officer's

decision is foreclosed from challenging that decision in litigation. *See United States v. Ulvedal*, 372 F.2d 31, 34 (8th Cir. 1967).

After a debt has been established, an agency can refer an unpaid debt to the Department of the Treasury ("Treasury"), Fiscal Management Service ("FMS") to be offset against other federal funds to be paid to the debtor via the Treasury Offset Program ("TOP"). *See* 26 U.S.C. § 6331(h); 31 U.S.C. § 3716; *see also* Bureau of the Fiscal Service, Treasury Offset Program, https://perma.cc/4TV8-B3HN. However, certain payments are exempt from TOP offsets, including IDEAA contract payments. *See* 31 U.S.C. § 3716(c)(3)(B); Treasury Offset Program, Payments Exempt from Offset by Disbursing Officials, https://perma.cc/T2EF-UTS9. Thus, a debt owed by a tribal contractor must be offset against federal tax refunds or other federal financial assistance provided to a tribal contractor, not against ISDEAA contract payments.

II. FACTUAL BACKGROUND

The Santee Sioux Nation is a federally-recognized tribe located in Knox County, Nebraska. In 2008, IHS entered into a joint venture with the Tribe to construct a new health and wellness center (the "Project") on the Santee Sioux Reservation pursuant to § 1608h of the IHCIA. *See* Jt. Venture Construction Program Agreement Between the Santee Sioux Nation & IHS, ECF No. 1-1 ("JVCP Agreement"); 25 U.S.C. § 1680h(e). The JVCP Agreement provided for the Tribe to construct the facility and provide the initial equipment. *See* JVCP Agreement at art. IV, ¶ A. In return, IHS would lease the facility at no cost for 20 years and, as required by § 1680h, provide the supplies and staffing during that time to operate an IHS health care program. *See id*. at art. VIII, ¶ A. The JVCP Agreement acknowledged that the Tribe had the right under the ISDEAA to enter into a contract to take over operation of the IHS program at the facility. *See id*. at art. XXIV.

The JVCP Agreement expressly provided that the Tribe would be liable to the United States for any breach of the agreement, *id*. at art XV, ¶ A; *see also* 25 U.S.C. § 1680h(e)(3), and expressly provided that "IHS is not liable for any depreciation costs" or "debt service … generated by the Tribe." JVCP Agreement at art. XVII, ¶¶ C-D.

After completing the Project and taking over operation of the IHS health program pursuant to an ISDEAA contract, on September 12, 2012, the Tribe presented CDA claims to IHS that sought reimbursement for unpaid CSC for Fiscal Years ("FY") 2006 through 2011. *See* Ltr. from Chairman Roger Trudell, Santee Sioux Nation, to Carol Diaz, IHS Contracting Officer (Sept. 12, 2012), ECF No. 1-3 ("Tribal CDA Claim"). Although the Tribe primarily sought payment for unpaid CSC arising from statutory caps placed on total IHS appropriations for CSC, *see id*.; *see also generally Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012) (hereafter known as "*Ramah Navajo* claims"), it also sought payment for CSC based on depreciation costs associated with construction of the Project, *see* Tribal CDA Claim at 4 of 7. The Tribe filed similar claims for FYs 2012 through 2013 on or about November 6, 2014. IHS denied the Tribal CDA Claims, in part because the Tribe sought unpaid CSC for "depreciation that … the Nation itself was legally obligated to fund pursuant to the 2008 JVCP Agreement." Ltr. from Carol Diaz to Chairman Trudell, at 6-7 of 7 (May 17, 2016), ECF No. 1-4 ("IHS Denial"). The Tribe timely appealed the IHS Denial to the Civilian Board of Contract Appeals. *See* Appeal of IHS Denial to Civilian Bd. of Contract Appeals (Aug. 2, 2016), ECF No. 1-5.

On September 26, 2016, the parties settled the Tribe's claims for unpaid CSC for FY 2006 through 2014. *See* Settlement Agreement (Sept. 26, 2016), ECF No. 1-6 ("2016 Settlement Agreement"). IHS agreed to pay the Tribe $951,833 plus interest pursuant to the CDA to resolve the Tribe's claims for unpaid CSC based on its *Ramah Navajo* claims. *See id*. ¶ 2. The Tribe,

however, expressly agreed that the ISDEAA does not authorize payment of CSC for JVCP Agreement depreciation costs and that the Tribe is responsible for those costs. *See id*. ¶ 7. The Tribe further agreed to negotiate for the repayment of any overpayment of CSC under its FY 2015 ISDEAA agreement "that resulted from the inclusion of the JVCP costs in the [Tribe]'s indirect cost pool." *Id*.

Pursuant to the 2016 Settlement Agreement, IHS notified the Tribe on November 16, 2016, that the agency had overpaid the Tribe $3,244,061 for indirect CSC for FY 2015 based on the Tribe's improper inclusion of depreciation associated with the JVCP Agreement. *See* Ltr. from Jerome Bearheels, IHS Chief Financial Officer, to Chairman Trudell, at 1-2 of 2 (Nov. 16, 2016), ECF No. 1-7 ("Bearheels Letter"). IHS requested that the Tribe sign a bilateral modification to its FY 2015 ISDEAA contract acknowledging this overpayment and sought repayment by the Tribe no later than January 15, 2017. *See id*. at 2. On December 8, 2016, the Tribe signed the contract modification acknowledging that it was entitled to less indirect CSC for FY 2015 than it had already been paid. *See* Self Determination Agreement between the Secretary of Health and Human Services and the Santee Sioux Nation, Modification. No. 33 (Dec. 16, 2016), ECF No. 1-8 ("Modification No. 33").

Unfortunately, however, the parties were unable to reach agreement on the repayment of the $3,244,061 for indirect CSC for FY 2015. As a result, on June 19, 2017, IHS presented a CDA Claim to the Tribe via Certified Mail alleging breach of the Tribe's FY 2015 ISDEAA contract and seeking repayment of $3,782,216. *See* Ltr. from Carol Diaz to Chairman Trudell, at 1-8 of 8 (June 19, 2017), ECF No. 1-9.[3] IHS explained that the Tribe had improperly included

[3] IHS explained that the CDA claim was larger than the amount that it originally sought because the agency now had a copy of the Tribe's more recent, 2017 indirect cost rate

depreciation associated with the JVCP Agreement in its 2013 indirect cost rate proposal that was used to determine the indirect CSC owed to the Tribe for FY 2015, *see id*. at 3 of 8, and noted that the United States is entitled to the return of money paid by mistake to a contractor. *See id*. at 6 of 8. IHS notified the Tribe of its appeal rights under the CDA, including its right to seek an appeal in federal district court within twelve months of the date of receipt of the CDA claim. *See id*. at 8 of 8. On June 23, 2017, Deb Castillo, a representative of the Tribe, signed the USPS Certified Mail Receipt. *See* Decl. of Daniel Davis ¶ 6, *attached as* Ex. 1 ("Davis Decl."); USPS Mail Receipt, attached as Ex. 1A to Davis Decl.

On September 14, 2022, the HHS Program Support Center ("PSC") Debt Collection Center sent the Tribe a notice of the debt owed by the Tribe to the agency. *See* Ltr. from HHS PSC Debt Collection Center to Santee Sioux Nation (Sept. 14, 2022), ECF No. 1-10. That same day, the Tribe's Chief Financial Officer ("CFO") exchanged emails with the Debt Collection Center and acknowledged receipt of the notice. *See* Email from Jerry Noonan, Contracted CFO for Santee Sioux Nation, to Doreen Dawkins, HHS PSC, at 2-3 of 3 (Sept. 14, 2022), ECF No. 1-11 ("Noonan-Dawkins Emails"). The CFO later forwarded that email exchange to the Tribe's lawyers on October 3, 2022. *See id*. at 1 of 3. The Tribe's lawyers then exchanged correspondence with IHS agency counsel, and IHS agency counsel confirmed that the Tribe's debt had not been offset against other payments owed to the Tribe. *See* Email Exchange b/t Ben Fenner, Counsel for the Tribe, and Jamie Whitelock, *et al*., IHS Agency Counsel, at 1-3 of 4 (Oct. 18, 2022), ECF No. 1-12.

IHS then referred the Tribe's debt to the Department of the Treasury, and, unfortunately,

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agreement, which in turn was based on the Tribe's *actual* costs for FY 2014 through 2017. *See id*. at 4 of 8.

mistakenly omitted an indication that the Tribe's debt could not be offset against ISDEAA contract payments due to the Tribe. *See* U.S. Dep't of the Treasury, FMS, TOP Notice (Nov. 14, 2022), ECF No. 1-13. Consequently, the Tribe's debt was incorrectly offset against ISDEAA contract payments. However, IHS recalled the debt from Treasury and refunded those offsets in March 2023. IHS again referred the Tribe's debt to Treasury in October 2023, and, despite following guidance from Treasury about how to prevent the improper offsets against ISDEAA contract payments, again mistakenly omitted an indication that the Tribe's debt could not be offset against ISDEAA contract payments due to the Tribe, prompting the present lawsuit. IHS refunded these offsets to the Tribe as quickly as possible. *See infra*, at 12.

III. PROCEDURAL BACKGROUND

The Tribe initiated this lawsuit on November 29, 2023. *See* Compl. Among other things, the Tribe challenges the validity of the IHS's 2017 CDA Claim for overpayments made to the Tribe for its FY 2015 ISDEAA contract and the validity of the debt it owes to the United States. *See id*. ¶ 1. The Tribe admits that it signed the 2016 Settlement Agreement, *see id*. ¶¶ 47–49, in which the Tribe acknowledged that "'[g]oing forward, … the ISDEAA does not authorize payment of [CSC] for JVCP costs in the [Tribe]'s [indirect] cost pool,'" and in which the Tribe agreed to "'negotiate a separate agreement with IHS for the repayment of any overpayment of CSC under its FY 2015 … ISDEAA agreements that resulted from the inclusion of JVCP costs in the Contractor's indirect cost pool,'" *id*. ¶ 49 (quoting the 2016 Settlement Agreement ¶ 7). The Tribe alleges that, instead of negotiating a separate agreement with IHS, it instead negotiated a reduced indirect cost rate agreement with IBC beginning at the end of 2016 and continuing into 2017. *See id*. ¶ 50. The Tribe further alleges that, as a result of that reduced indirect cost rate agreement, it experienced "shortfalls in indirect cost reimbursements" for FY 2015 through

2018. *Id*. It additionally alleges that "[r]emoving these funds from the Tribe's Indirect Cost Pool resulted in an effective repayment by the Tribe to IHS in fiscal years 2015-2018 in the amount of $2,357,787.00." *Id*. ¶ 51.[4]

The Tribe thus alleges that all further efforts on the part of IHS to seek repayment are invalid and that it did not receive notice of any IHS correspondence, including the IHS CDA Claim. The Tribe attaches a copy of the Bearheels Letter to its Complaint, in which IHS stated that it was seeking repayment in the amount of $3,244,061 for indirect CSC for FY 2015 based on the Tribe's improper inclusion of depreciation associated with the JVCP Agreement, *see* Bearheels Letter, but alleges that it never received the letter (and does not otherwise explain how the letter came into the Tribe's possession), *see* Compl. ¶ 52. Plaintiff admits that it signed Modification No. 33 to its FY 2015 ISDEAA contract (an attachment to the Bearheels letter), *see id*. ¶ 57, but nevertheless alleges that Modification No. 33 was unilateral, *see id.* ¶ 54, and that signing the Modification (which simply acknowledged that the Tribe was entitled to less money than it had already been paid) somehow reduced the Tribe's ISDEAA contract amounts paid for FY 2017 and 2018, *see id*. ¶ 57. The Tribe further alleges that because of Modification No. 33, it effectively paid IHS an additional $3,244,061 for FY 2017 and 2018. *See id*. ¶ 58. The Tribe also attaches a copy of IHS's CDA Claim to its Complaint, *see* IHS CDA Claim, but alleges that IHS's CDA Claim "was never received by the Tribe." Compl. ¶ 59. The Tribe further alleges that its attorneys did not "receive notice" of IHS's CDA Claim until October 3, 2022. *See id*. ¶ 60.

[4] Notably, the Tribe does not explain how removing depreciation associated with the JVCP Agreement from its indirect cost pool somehow effected a repayment of money owed for FY 2015 instead of resolving the overpayment problem "going forward" as required by the 2016 Settlement Agreement. *See id*.

The Tribe brings six claims for relief, alleging that IHS violated: (i) the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*., because the Tribe did not receive the IHS CDA Claim and because IHS did not carbon copy the Tribe's attorneys, *see* Compl., First Claim for Relief, ¶¶ 82–89; (ii) the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq*., by "over-collecting" on the debt the Tribe owed to IHS, *see* Compl., Second Claim for Relief, ¶¶ 90–95; (iii) the APA and the 2016 Settlement Agreement by failing to "negotiate" for FY 2015 through 2018 and instead presenting the IHS CDA Claim to the Tribe, *see* Compl., Third Claim for Relief, ¶¶ 96–102; (iv) the APA by refusing to terminate the Tribe's debt, *see* Compl., Fourth Claim for Relief, ¶¶ 103–11; (v) due process by failing to notify the Tribe of IHS's CDA Claim, *see* Compl., Fifth Claim for Relief, ¶¶ 112–19; and (vi) 25 C.F.R. § 900.217 by not attempting to first resolve IHS's CDA Claim "at the awarding official's level" before submitting the CDA Claim to the Tribe, *see* Compl., Sixth Claim for Relief, ¶¶ 120–27.

Each count either challenges the validity of the Tribe's debt owed to the United States or asserts that the Tribe's debt has already been paid in full. The Tribe thus seeks: (i) a declaratory judgment that IHS's CDA Claim is "null and void as the result of prior full performance;" (ii) an injunction "that enjoins the Defendants from any further collection actions against the Tribe relating to the alleged debt;" (iii) an "Order compelling Defendants to terminate the alleged debt;" and (iv) other relief. *See* Compl., Prayer for Relief at 30–31.

At the start of this case, the Tribe also challenged the October 2023 TOP offsets and filed a motion for a temporary restraining order ("TRO") seeking repayment of those offsets. *See* Pl.'s Mot. for Emergency TRO, ECF No. 2. Shortly thereafter, the Tribe agreed to withdraw its TRO motion without prejudice in return for Defendants' agreement, during the pendency of this litigation, to recall the debt from Treasury and repay the Tribe for now. *See* Jt. Stip. to Withdraw

Emergency Mot. for TRO & Prelim. Inj., ECF No. 13; Order on Jt. Stip., ECF No. 17. Additionally, Plaintiff dismissed without prejudice the Treasury defendants from this case. *See* Not. of Dismissal, ECF No. 14; Order, ECF No. 15.

With the issues involving the Treasury offsets resolved, Defendants now seek to dismiss one of the primary remaining issues—any and all parts of the Tribe's Complaint that challenge IHS's CDA Claim or the validity of the Tribe's debt owed to the United States. Accordingly, this Court should dismiss the First, Fifth, and Sixth Claims for Relief. And this Court should dismiss the Second, Third, and Fourth Claims in part to the extent they challenge IHS's CDA Claim or the validity of the Tribe's debt owed to the United States.

STANDARDS OF REVIEW

Defendants move to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(b)(1). Suits are subject to dismissal when the court lacks subject matter jurisdiction to hear the matter. *See id*. Subject matter jurisdiction determines whether a court has the power to entertain a particular claim, which is a condition precedent to reaching the merits of a legal dispute. *See Haywood v. Drown*, 556 U.S. 729, 755 (2009). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998).

In a Rule 12(b)(1) motion, the party asserting jurisdiction bears the burden of proof that jurisdiction does in fact exist. *Great Rivers Habitat All. v. Fed. Emergency Mgmt. Agency*, 615 F.3d 985, 988 (8th Cir. 2010). "[F]actual allegations in the complaint … will bear closer scrutiny in resolving a 12(b)(1) motion" than in resolving a 12(b)(6) motion for failure to state a claim. 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1350 (4th ed.

2019). Moreover, a court deciding a motion under Rule 12(b)(1) must distinguish between a "factual attack" and a "facial attack." *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015). When a defendant makes a factual attack, the court may consider matters outside of the pleadings that relate to the existence of subject matter jurisdiction. *See Osborn v. United States*, 918 F.2d 724, 729-30 n.6 (8th Cir. 1990). In doing so, "the court may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). When a court reviews a complaint under a factual attack, "'the non-moving party does not have the benefit of 12(b)(6) safeguards.'" *Carlsen v. GameStop, Inc*., 833 F.3d 903, 908 (8th Cir. 2016) (citation omitted). A court must dismiss the action if it determines, at any time, that it lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).

Alternatively, Defendants move to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See id*. 12(b)(6). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim for relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and must plead those facts with enough specificity "to raise a right to relief above the speculative level." *Id*. at 555; *see also Glick v. W. Power Sports, Inc*., 944 F.3d 714, 717 (8th Cir. 2019) (court should disregard conclusory allegations or legal conclusions). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In contrast, where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate. *Benton v. Merrill Lynch & Co., Inc*., 524 F.3d 866, 870 (8th Cir. 2008).

In evaluating Defendants' 12(b)(6) motion, moreover, this Court should not only consider the well-pleaded factual allegations in Plaintiff's Complaint but should also "consider documents attached to the complaint and matters of public and administrative record referenced in the complaint." *Great Plains Tr. Co. v. Union Pac. R.R. Co*., 492 F.3d 986, 990 (8th Cir. 2007); *Mehner Fam. Tr. v. U.S. Bank Nat'l Ass'n*, No. 8:16-cv-367, 2017 WL 823552, at *1 (D. Neb. Mar. 1, 2017) (court "may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings.").[5] The Court may also "judicially notice a fact that is not subject to reasonable dispute." *Mehner Fam. Tr.*, 2017 WL 823552, at *2 (quoting Fed. R. Evid. 201(b)); Fed. R. Evid. 201(b)(2) (court can take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). Finally, courts are not required to accept as true legal conclusions "couched as … factual allegations[s]." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. PLAINTIFF'S CHALLENGE TO THE VALIDITY OF THE DEBT ASSESSED AGAINST IT BY THE UNITED STATES IS BARRED BY THE STATUTE OF LIMITATIONS

This Court should dismiss all portions of the Tribe's Complaint challenging the validity of the debt assessed in IHS's CDA Claim because the time for the Tribe to appeal the IHS contracting officer's decision in federal court has passed.

[5] *See also, e.g*., *Tobey v. Chibucos*, 890 F.3d 634, 648 (7th Cir. 2018) (court may rely "on documents that are critical to the complaint and referred to in it as well as information properly subject to judicial notice" to resolve Rule 12(b)(6) motion); *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (court may rely on "documents central to plaintiffs' claim[]" to resolve Rule 12(b)(6) motion.); *In re Domestic Airline Travel Antitrust Litig*., 221 F. Supp. 3d 46, 54 (D.D.C. 2016) (to resolve Rule 12(b)(6) motion "court may consider 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,' or 'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss'") (quoting *Ward v. D.C. Dep't of Youth Rehab. Servs*., 768 F. Supp. 2d 117, 119 (D.D.C. 2011)).

The CDA contains two statutes of limitations—one limiting the time by which a contractor must present a claim to a contracting officer within six years after the accrual of the claim, *see* 41 U.S.C. § 7103(a)(4)(A), and a separate one limiting the time by which a contractor can appeal the decision of a contracting officer, *see id*. § 7104. "With few exceptions, those clocks stop for no one." *J. Star Enter., Inc. v. United States*, 167 Fed. Cl. 434, 436 (2023).

With respect to the second limitations period, the CDA allows a contractor, like the Tribe here, to appeal a contracting officer's decision on a CDA claim "either to the appropriate board of contract appeals or the Court of Federal Claims." *Guardian Angels Med. Serv. Dogs, Inc. v. United States*, 809 F.3d 1244, 1247 (Fed. Cir. 2016). Specifically, the CDA allows a tribal contractor "90 days from the date of receipt of a contracting officer's decision" to appeal to an agency board, 41 U.S.C. § 7104(a); *see also id*. § 7105, or "within twelve months from the date of receipt of a contracting officer's decision" to proceed in federal court, *see id*. § 7104(b)(3); 25 U.S.C. § 5331(a) (vesting United States district courts with original jurisdiction concurrent with the Court of Federal Claims over CDA claims arising under the ISDEAA). Absent a timely appeal, a contracting officer's decision on a claim "is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by [41 U.S.C. Chapter 71]." 41 U.S.C. § 7103(g).

The CDA's strict time limitations were adopted as part of comprehensive effort to create a balanced system of administrative remedies regarding government contract claims. *See Kasler/Cont'l Heller/Fruin Colnon v. United States* ("*Kasler*"), 9 Cl. Ct. 187, 190 (1985). The need for the CDA became apparent after the Commission on Government Procurement issued the results of its study of the procurement process and its recommendations to improve efficiency. S. Rep. No. 95–1118, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238. This

study prompted the enactment of the CDA, which was intended to eliminate the complex "disputes clause" remedies for government contracts and to streamline the adjudication process in order to make dispute resolutions less expensive and time consuming. *Kasler*, 9 Cl. Ct. at 190. The CDA's twelve-month limitations period for appealing a contractor's decision in federal court was enacted to implement these goals. *See id*. (citing S. Rep. 95–1118, at 10; *see also* 1978 U.S.C.C.A.N. at 5244 ("Testimony at the public hearings convinced the committees that a maximum of 12 months is sufficient for a contractor to make a decision on whether to commence action in court … . [P]rolonging of the decision-making period would not be consistent with objectives of the act.").

It is well settled that a contractor's receipt of a contracting officer's decision is determined "in terms of the receipt date, not the date of actual notice of the contractor's decision. Therefore, the [] Court must focus its inquiry on the date of receipt by the contractor, not the date of actual notice to the contractor." *Borough of Alpine v. United States*, 923 F.2d 170, 172 (Fed. Cir. 1991). The CDA provides that the contracting officer "shall mail or otherwise furnish a copy of the decision to the contractor." 41 U.S.C. § 7103(d). CDA regulations further provide that the contracting officer "shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt." 48 C.F.R. § 33.211(b). The USPS return receipt provides the "objective indicia of receipt by the contractor" required to establish receipt under the CDA. *Borough of Alpine*, 923 F.2d at 172. "By linking the limitations period to receipt by the contractor, the CDA eliminates disputes about … the internal mail procedures of various contractors." *Id*. As a result, the government need not prove that any particular employee or agent of the contractor actually had the decision in-hand, or that the contractor had any actual notice or knowledge of the decision. *See id*. at 172–73. In

other words, the CDA only requires that a written decision be accepted on the contractor's premises by a party authorized to do so. *See id.*; *see also Riley & Ephriam Const. Co., Inc. v. United States*, 408 F.3d 1369, 1373 (Fed. Cir. 2005) (noting that, to demonstrate evidence of receipt of a contracting officer's decision, "[t]he contracting officer is obliged by 48 C.F.R. § 33.211(b) to send the final decision via 'certified mail, return receipt requested, or by any other method that provides evidence of receipt.'"). Moreover, a standard that requires receipt but not necessarily actual notice serves an important function. It prevents "[a] plaintiff [from] circumvent[ing] the statute of limitations by inserting a buffer between itself and the Government, choosing when the limitations period will run according to when it sees fit to retrieve its mail from the buffer." *Policy Analysis Co., Inc. v. United States*, 50 Fed. Cl. 626, 631 (2001).

By any measure, the Tribe has simply "failed to meet the CDA's … provision allowing twelve months to appeal a final decision" in federal court. *J. Star Enterprises*, 167 Fed. Cl. at 439; *see also* 41 U.S.C. § 7104(b)(3). Although the Tribe alleges that it never received the IHS's CDA Claim, *see* Compl. ¶ 59, the USPS Certified Mail Receipt shows that the Tribe received the IHS contracting officer's CDA Claim on June 23, 2017. *See* Davis Decl. ¶ 6; Ex. 1A, USPS Mail Receipt; *accord Borough of Alpine*, 923 F.2d at 172; *Riley & Ephriam Constr. Co. Inc. v. United States*, 61 Fed. Cl. 405, 409 (2004) ("We find that 'receipt' also occurred on November 30, 2001, when the CO's certified letter arrived at Plaintiff's business address."), *rev'd & remanded on other grounds*, 408 F.3d 1369 (Fed. Cir. 2005). As a result, the Tribe's opportunity to challenge the IHS's CDA Claim has long since passed. *See W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994) ("West Coast received the CO's decision denying its gas line claim on April 28, 1989.… The appeal period thus commenced April 28, 1989.… Under the

CDA, West Coast could no longer appeal after April 1990. Thus, the Board properly dismissed West Coast's March 20, 1992, appeal."). Here, the Tribe's time to file suit ran out after June 23, 2018, and its present challenge in a lawsuit filed more than five years later is time barred. *See* 41 U.S.C. § 7104(b)(3).[6]

But even if the CDA contained an actual notice requirement, as the Tribe seems to suggest, the Tribe's claim would still be defeated by the allegations contained in its Complaint and the documents attached to it. The Tribe attaches to its Complaint an email exchange between the Tribe's CFO and the HHS PSC that shows the Tribe received actual notice of the debt on September 14, 2022. *See* Noonan-Dawkins Emails at 2-3. Additionally, the Tribe alleges that its attorneys did not "receive notice" of IHS's CDA Claim until October 3, 2022. *See* Compl. ¶ 60; *see also* Noonan-Dawkins Emails at 1 of 3. Yet, the Tribe still waited more than twelve months after receiving actual notice of the debt to commence this lawsuit, on November 29, 2023. *See generally* Compl. As a result, the Tribe's claim is time-barred under any theory, *see* 41 U.S.C. § 7104(b)(3), and the IHS contracting officer's decision has become "final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency," *id*. § 7103(g), including by this Court. *See Renda Marine, Inc. v. United States*, 71 Fed.

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[6] Nor is there any basis to the Tribe's claim that the Fair Debt Collection Practices Act, *see* Compl. ¶¶ 82–89, First Claim for Relief, changes that result. That Act's purpose is to "eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). By its terms, however, the Act does not apply to "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." *Id*. § 1692a(6)(C).

The Tribe's due process claim similarly fails. *See* Compl. ¶¶ 103–11, Fourth Claim for Relief. *See Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 318 (1950) ("[W]ithin the limits of practicability notice must be such as is reasonably calculated to reach interested parties."); *Poursina v. U.S. Citizenship & Immigr. Servs*., 936 F.3d 868, 876 (9th Cir. 2019) (notice was sent to the proper address and was "reasonably calculated" to ensure that Plaintiff received it).

Cl. 782, 792 (2006) ("The plain language of the CDA clearly confers finality and unreviewability on a [contracting officer]'s decision that is not properly appealed within the statutory period provided.").

Moreover, this Court can resolve Defendants' motion to dismiss without deciding whether § 7104(b)(3) is jurisdictional, making the Tribe's claims subject to dismissal under Rule 12(b)(1), or may allow for equitable tolling in certain circumstances, making those claims subject to dismissal under Rule 12(b)(6). While Defendants continue to believe that the statute's timing requirements are best understood to be jurisdictional, they acknowledge that some recent decisions of the Federal Circuit, where the vast majority of CDA claims are litigated, have questioned—although not overruled—that court's earlier resolution of the question. *Compare, e.g., Brisbin v. United States*, 629 F. App'x 1000, 1004 (Fed. Cir. 2015) ("each final decision of the [contracting officer] … started a new 12–month clock running on the time to file an appeal with the Court of Federal Claims under 41 U.S.C. § 7104(b)(3). It is this latter deadline that Plaintiff missed, and which deprives the Court of Federal Claims of jurisdiction to hear his complaint."); *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1365 (Fed. Cir. 2002) ("Although characterized as a statute of limitations, the filing period[ ] established by … the CDA [is] 'jurisdictional in nature,' for [it] operate[s] as [a] limit[ ] on the waiver of sovereign immunity by the Tucker Act, which otherwise entitles a contractor to sue the government in the Court of Federal Claims[.]" (citations omitted)); *Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982) ("The ninety day deadline is thus part of a statute waiving sovereign immunity, which must be strictly construed, … and which defines the jurisdiction of the tribunal, here the board."), *with Guardian Angels Med. Serv. Dogs, Inc.*, 809 F.3d at 1252 ("Nor need we decide whether compliance with the twelve-month filing period set out in section 7104(b)(3) is a

jurisdictional requirement.").[7] Regardless, the Tribe does claim that it is entitled to equitable tolling, much less allege facts suggesting that it could satisfy the strict prerequisites of such relief. *See generally* Compl. Accordingly, there is no need to resolve this question to grant Defendants' motion. *See Bowman Constr. Co. v. United States*, 154 Fed. Cl. 127, 136 (2021); *see also Frazer v. United States*, 288 F.3d 1347, 1354 (Fed. Cir. 2002) (noting that a statute of limitations will be equitably tolled only when the government has misled a plaintiff into waiting to file its suit).[8] At bottom, the dispositive issue in this case is not whether the twelve-month appeal period set out in § 7104(b)(3) is a jurisdictional prerequisite, but instead when that appeal period began to run. *See Stone v. INS*, 514 U.S. 386, 395 (1995) (explaining that "[f]inality is the antecedent question" in assessing the timeliness of an appeal).

As a result of being barred from challenging IHS's CDA Claim or the debt that the Tribe owes to the United States, this Court should dismiss the First, Fifth, and Sixth Claims for Relief

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[7] The Supreme Court has assumed, but not decided, that the CDA's six-year limitation for presenting a claim is not jurisdictional and therefore potentially subject to equitable tolling. *See Menominee*, 577 U.S. at 255–60 (holding that the tribe in that case failed to establish that it was entitled to equitable tolling under 41 U.S.C. § 7103(a)(4)(A)). The Eighth Circuit has not ruled on whether the CDA's twelve-month limitations period for appealing the decision of a contracting officer set out in § 7104(b)(3) is jurisdictional, but recently held that a statutory limitations period is jurisdictional when Congress has expressed an intent to preclude a court from considering equitable tolling. *See N. Dakota Retail Ass'n v. Bd. of Govn'rs of the Fed. Reserve System*, 55 F.4th 634, 642 (8th Cir. 2022), *cert. granted sub nom. Corner Post, Inc. v. Bd. of Govn'rs of the Fed. Reserve System*, 144 S. Ct. 478 (2023).

[8] As the Supreme Court explained in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990):

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

498 U.S. at 96.

of the Tribe's Complaint. And this Court should dismiss the Second, Third, and Fourth Claims in part to the extent they challenge IHS's CDA Claim or the validity of the debt owed to the United States.

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' Complaint in part because any challenge to IHS's CDA Claim or the validity of Plaintiff's debt owed to the United States is barred by the applicable statute of limitations.

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CERTIFICATE OF COMPLIANCE

Pursuant to NECivR 7.1(d)(3), I hereby certify this brief complies with the requirements of NECivR 7.1(d)(1). Relying on the word-count function of Microsoft Word for Office 365 MSO, this document contains 7,494 words. The word-count function was applied to all text, including the caption, headings, footnotes, and quotations.

s/ James D. Todd, Jr.
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