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

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

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS FOURTH CLAIM FOR RELIEF, WITH MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

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Plaintiff Navajo Health Foundation - Sage Memorial Hospital, Inc. ("Sage") hereby moves for an Order granting it summary judgment on its Fourth Claim for Relief. As grounds for this motion, Sage states that there are no genuine issues of material fact and that Sage is entitled to judgment as a matter of law on its Fourth Claim for Relief.

Sage supports this motion with the following Memorandum of Supporting Points and Authorities.

I. INTRODUCTION

Defendants have failed to pay Sage all of its Contract Support Costs ("CSC") to which Sage is entitled under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450, 450a *et seq*. *See* 25 U.S.C. § 450j-1; *Cherokee Nation v. Leavitt*, 543 U.S. 631, 637-38, 641 (2005) (Indian Health Service ("IHS") is obligated to pay tribal contractors full amount of CSC). The ISDEAA and the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101 *et seq.*, provide a remedy for such underpayments and procedures for a tribal contractor to seek reimbursement. *See* 25 U.S.C. §§ 450m-1(a), (d) (making CDA applicable to Indian self-determination contracts).

Sage filed its CDA claim with IHS' contracting officer on August 25, 2014.[1] The CDA and applicable regulations impose on the IHS a requirement that the contracting officer respond to such claims within a reasonable time. 41 U.S.C. § 7103(f)(3); 25 C.F.R.

[1] Defendants, through counsel, consented to the filing of the Claim as an exhibit, which exceeds 50 pages in length. *See* D.N.M. LR-Civ. 10.5.

§ 900.223(c).[2] However, in this case the contracting officer notified Sage that he intended to issue his decision on October 21, *2015*. That is clearly unreasonable, and Sage's Fourth Claim for Relief seeks an Order directing IHS' contracting officer to make a decision by January 30, 2015 or other reasonable date certain.

II. STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to D.N.M.LR-Civ. 56.1(b), Sage sets out the following statement of the material facts as to which Sage asserts no genuine issue exists.

1. Sage is a Navajo tribal organization for purposes of contracting with IHS under the ISDEAA that operates a health care facility in Ganado, Arizona, within the exterior boundaries of the Navajo Reservation. Mot. for Immed. Inj. Relief ("Inj. Mot."), Dkt. 17, at Ex. A ¶ 3, Ex. B ¶ 2.

2. Defendant IHS is an agency within the Department of Health and Human Services and is responsible for providing federal health services to American Indians and Alaska Natives. Pl. Opp. to Mot. to Dismiss or Transfer, Dkt. 14, at Ex. A; Indian Health Service, "About IHS," http://www.ihs.gov/aboutihs/ (visited Jan. 22, 2015).

3. Since 2004, Sage has contracted with IHS under the ISDEAA to provide health services to a largely Navajo patient population. Inj. Mot. Ex. C ¶ 6.

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[2] The regulations in 25 C.F.R. part 900 bind IHS, a part of the Department of Health and Human Services, as well as the Bureau of Indian Affairs. 25 U.S.C. § 450k(a)(1); 25 C.F.R. § 900.1.

4. Defendant Dayish is the Contracting Officer for the Navajo Area IHS. Ex. 1 (El-Meligi Decl.) ¶ 4. As such, Dayish is responsible for ISDEAA contracts and funding agreements for IHS programs, functions, services and activities undertaken by ISDEAA contractors within the Navajo Area of IHS, including Sage. *Id*. Dayish has exercised the authority to sign ISDEAA contracts and funding agreements with Sage for such IHS programs and to award funds pursuant to those agreements. *Id*. As Contracting Officer, Dayish has exercised the authority to decide initially disputes arising under ISDEAA contracts. *Id*. ¶ 5.

5. By letter dated August 25, 2014 to Defendant Dayish, Sage submitted to IHS a CSC claim for FY 2009 through FY 2013 for a total of $62,569,681 (the "Claim"). *Id*. ¶ 3. Exhibit 2 attached hereto is a true and correct copy of the Claim, consisting of Sage's letter dated August 25, 2014 and its Exhibits A-G. *Id*.

6. The Claim specifies, for each of those years, the CSC shortfall based on the full amount of CSC incurred by Sage minus the amount of CSC paid by IHS, the expectancy damages from lost billings, and the total claim for each such year. Ex. 2 at 1. The Claim is supported by contracts and funding agreements between Sage and IHS in the custody of IHS, a Schedule of Attachments A and B prepared by Sage showing details of the CSC shortfalls, expectancy damages, and total claim (*id*. Ex. A); and Sage's audited financial statements for FY 2009 through 2013 (*id*. Ex. B-F). The Claim clearly explains the expectancy damages

claim for lost third-party revenues and the manner of calculating them. *Id*. at 2-3.

7. IHS responded to the Claim by an inapplicable form letter dated October 23, 2014 signed by Defendant Dayish ("IHS' Letter"). Ex. 1 ¶ 5. Ex. 3 is a true and correct copy of IHS' Letter. Ex. 1 ¶ 5. IHS' Letter states that IHS would make its decision by October 21, *2015*. Ex. 3 at 1.

8. It appears that IHS failed to either read or comprehend the Claim, because IHS predicated the supposed need for the extra year on its statements that the Claim is improperly based on the "shortfall report" method rather than the "incurred cost" method, that the Claim lacks sufficient accounting and financial detail, and that Sage failed to explain the way it arrived at its claimed expectancy damages. *Id.* at 1-2.

9. IHS' Letter overlooks that (1) the Claim is expressly based on the incurred cost method for determining CSC shortfalls, and not the "shortfall report" method referred to in IHS' Letter; (2) the Claim is fully supported by a Schedule of Attachments A and B prepared by Sage and by Sage's audited financial statements from FY 2009 through 2013; and (3) the Claim properly explains the expectancy damages claim for lost third-party revenues and the calculation thereof. *See* Ex. 2 at 1-3 and Ex. A-G. The "incurred cost" approach employed by Sage is the approach favored by IHS. Ex. 4 at 1.

10. IHS' action in giving itself approximately one year and two months to decide a Claim that it either did not read or comprehend violates ISDEAA's requirement that

decisions on such claims be made within a reasonable time period because – contrary to the incorrect assumption underlying IHS' Letter – the Claim and its Exhibits provide all information necessary for IHS to decide the Claim promptly. Ex. 2; *cf.* 25 C.F.R. § 900.223(a) (stating presumptive time limit of 60 days for deciding claims for more than $100,000). The proposed 14-month time for reaching a decision also violates Defendant Roubideaux's commitment to provide redress for such CSC underpayments fairly and efficiently. Ex. 4.

III. ARGUMENT

A. This Court Has Subject Matter Jurisdiction over Sage's Fourth Claim.

This Court has jurisdiction to adjudicate this dispute. *See* 25 U.S.C. § 450m-1(a) ("The United States district courts shall have original jurisdiction over any civil action or claim against [IHS] arising under this subchapter . . . for money damages arising under contracts authorized by this subchapter."); 25 C.F.R. § 900.222(e) (response to CDA claims must include the statement that "you may bring an action in the . . . United States District Court within 12 months of the date you receive this notice"). Sage's Fourth Claim for Relief was timely raised here, having been included in the First Amended Complaint filed November 24, 2014, less than 12 months from Defendant Dayish's letter dated October 23, 2014.

B. The ISDEAA Favors Prompt Resolution of Claims and Provision of Necessary Funds to Tribal Organizations.

The ISDEAA reflects the political vision articulated by President Nixon, who urged a profound shift in Indian affairs from federal domination of Indian service programs to operation of programs benefitting Indians by the Indians themselves. 25 U.S.C. § 450(a)(1); *see* S. Rep. No. 100-274 at 2-3 (1987) ("Senate Report") (citing President Nixon's Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564 (1970)). The ISDEAA was intended to transfer to tribal organizations the responsibility for performing the services, and, with that responsibility, the funds required to perform the services.

The ISDEAA thus puts federal bureaucrats in the awkward position of being responsible for contracting themselves out of jobs and resources. *See* Senate Report at 6. So the two agencies, the IHS and the Bureau of Indian Affairs ("BIA"), created new positions for federal employees who had been providing the services. "The federal *service* bureaucracy that was supposed to be reduced as tribes assumed control of programs has been replaced by a *contract monitoring* bureaucracy." *Id.* at 7 (emphases added). In turn, the new "contract monitoring bureaucracy" imposed reporting requirements on tribal contractors that were not required by federal law, thereby making the contracting process more burdensome and expensive. *Id.* Tribal contractors were forced to fill out and submit lengthy reports, which were "essentially . . . useless." *Id.* Because the tribal contractors were not reimbursed for these additional costs, services were necessarily compromised. *Id.* at 7 ("the failure of

Federal agencies to reimburse tribes for the cost of program operation has resulted in a tremendous drain on tribal financial resources"), 8-9 (tribal contractors struggling to meet requirements imposed by the agencies' contract monitoring bureaucracies had to divert property derived from trust resources needed for community and economic development to pay for the indirect costs associated with programs that are a federal responsibility).

So, "[p]erhaps 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." Senate Report at 8. In response, Congress amended the ISDEAA in 1988 to require that CSCs be fully funded in ISDEAA contracts. 25 U.S.C. § 450j-1. The 1988 amendments to the ISDEAA were "designed to require the . . . Indian Health Service to comply with the requirement of the Act that indirect costs be added to the amount of funds available for direct program costs" so that "indirect costs of tribes be fully funded." Senate Report at 12. Thus, in *Cherokee Nation*, the Supreme Court rejected IHS' arguments that the federal Government's obligation to pay indirect costs is limited to appropriations specifically made for that purpose. *See also Salazar v. Ramah Navajo School Bd.*, 567 U.S. __, 132 S. Ct. 2181 (2012) (CSC must be paid in full notwithstanding "caps" in appropriations acts); *Arctic Slope Native Ass'n v. Sebelius*, No. 2010-0013, 501 Fed. Appx. 957, 2012 WL 3599217 (Fed. Cir. Aug. 22, 2012) (remanding to Civilian Board of Contract Appeals for calculation of CSC due to tribal

contractor in light of *Salazar*); *Crownpoint Inst. of Tech. v. Norton* ("*CIT*"), Civ. No. 04-531 JP/DJS, Dkt. No. 86 at 25 (D.N.M. Sept. 16, 2005) (awarding, *inter alia*, contract support costs to tribal organization for three years in amounts to be determined); *Ramah Navajo School Bd. v. Sebelius*, No. CV 07-0289 MV, Dkt. No. 143 (D.N.M. May 9, 2013) (observing that IHS' failure to provide CSCs "def[ied] the will of Congress and even stifl[ed] the objective of IHS itself"), *cross appeals filed*, Nos. 14-2051 and 14-2055 (10th Cir. Apr. 4 and 10, 2014).

In addition, Congress learned that existing law in 1987 did not provide strong enough remedies for tribal contractors damaged by agency recalcitrance. Additional and robust remedies were therefore provided in the 1988 amendments. *See* 25 U.S.C. § 450m-1. Those remedies were determined "necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in [the 1988] amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law." *Id.* at 37.

The new remedies include the following, relevant to Sage's Fourth Claim for Relief. The ISDEAA amendments apply the CDA to all ISDEAA contracts, 25 U.S.C. § 450m-1(d), including the CDA's requirement that decisions on claims be made in a reasonable period of time, 41 U.S.C. § 7103 (f)(3); 25 C.F.R. § 900.223(c). The amendments confer original

jurisdiction on the federal district courts to adjudicate all claims for money damages against IHS arising under an ISDEAA contract. 25 U.S.C. § 450m-1(a). The 1988 amendments expressly permit the district courts to "order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under [the ISDEAA]." *Id.* The Senate Report "leaves no doubt that Congress intended exactly what it wrote." *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (*quoting* Senate Report at 37).

Finally, to the extent this motion seeks injunctive relief (including an order mandating Defendant Dayish to issue a decision by a date certain), the ISDEAA, as amended in 1988, provides that this Court may issue an order of "mandamus to compel [the agency] to perform a duty provided under [the ISDEAA]." 25 U.S.C. § 450m-1(a). That express authorization, coupled with Congress' clear intention to guide the exercise of the courts' discretion "relieves [the tribal contractor] of proving the usual equitable elements including irreparable injury and absence of an adequate remedy at law" in seeking such relief. *CIT*, Dkt. 86 at 26 (*citing, inter alia, Star Fuel Marts, LLC v. Sam's East, Inc.*, 362 F.3d 639, 651-52 (10th Cir. 2004); *Susanville Indian Rancheria v. Leavitt*, No. 2:07-cv-259-GEB-DAD, 2008 WL 58951 at *11 (E.D. Cal. Jan. 3, 2008); *Pyramid Lake Paiute Tribe v. Burwell*, No. 1:13-cv-01771

(CRC), __ F.Supp. 3d __, 2014 WL 5013206 at *7 (D.D.C. Oct. 7, 2014).

C. The Year and Eight Weeks that IHS Gave Itself to Decide the Claim Is Unreasonable.

The CDA provides that contracting officers must issue decisions on claims "within a reasonable time, in accordance with regulations prescribed by the agency, taking into account such factors as the size and complexity of the claim and adequacy of information in support of the claim provided by the contractor." 41 U.S.C. § 7103(f)(3). The applicable regulation provides that "[i]f the claim is for more than $100,000, the awarding official shall issue the decision within *60 days* of the day he or she receives the claim. If the awarding official cannot issue a decision that quickly, he or she shall tell you when the decision will be issued." 25 C.F.R. § 900.223(a) (emphasis added). This Court, as a "tribunal" under ISDEAA and the CDA, has the authority to order Defendants to "issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer." 41 U.S.C. § 7103(f)(4).

Because the Claim and its exhibits provided all information necessary for IHS to decide the Claim, IHS' action in giving itself one year and eight weeks to decide the Claim is unreasonable and therefore violates the ISDEAA. Defendant Dayish has already had five months to decide the Claim – three months more than the presumptive 60-day limit.

The Claim consists of a narrative of three pages; Schedules of Attachments A and B prepared by Sage of one and thirteen pages, respectively; Sages' audited financial statements

for FY 2009 through FY 2013, inclusive; and a Schedule of Agreed Upon Procedures for Contract Support Costs for FY 2009-2013 of one page. Ex. 2. It is not lengthy or complex from a government contracting perspective. *Cf. Appeal of Defense Systems Co., Inc.*, 97-2 BCA ¶ 28981, ABSCA No. 50534, 1997 WL 217392 (1997) (concerning $71 million claim under CDA consisting of 162 page narrative and a volume containing 49 exhibits). And, in this case, the IHS had already studied Sage's financial and other records for over six months. *See* Lodging, Dkt. 21, at 322-475; *see also id*. at 90-245, 273-321 (Sage's submissions of financial information to IHS at IHS' request); Inj. Mot., Dkt 17, Ex. D ¶¶ 4-6.

Nonetheless, Sage's Claim is for more than $100,000 so the IHS contracting officer may take a "reasonable" time to decide it. As the IHS states in its regulations, "[w]hat is 'reasonable' depends upon the size and complexity of [the] claim, and upon the adequacy of the information . . . given to the awarding official in support of your claim." 25 C.F.R. § 900.223(c); *accord* 41 U.S.C. § 7103(f)(3). The requirement that the official act within a reasonable time limits his discretion when notifying the contractor of the time within which the official will issue a decision. *L&D Services, Inc. v. United States*, 34 Fed. Cl. 673, 676-77 (1996). IHS claims to need approximately fourteen months to decide the Claim, but that is not reasonable. In fact, in *Appeal of Kelly-Ryan, Inc.*, 11-1 BCA ¶ 34629, ASBCA No. 57168, 2010 WL 5071059 (2010), the Board of Contract Appeals observed that "[w]e have found *no Board cases*, nor have we been cited to any by the parties, that *have held more than*

9 months to be a reasonable period of time within which to issue a [Contracting Officer's] final decision." (Emphasis added). Illustrative cases follow.

The official deciding the complex claim in *Appeal of Defense Systems*, *supra*, needed only nine months to decide that matter, and the Board of Contract Appeals upheld that as reasonable. In another complex claim, the contractor sought $35,582,600 and supported that claim with a 28-page narrative, a 54-page cost impact analysis, and an Appendix of one volume. *Appeal of Fru-Con Constr. Corp.*, 02-1BCA ¶ 31729, ASBCA No. 53544, 2002 WL 75878 (2002). In that case, the Board of Contract Appeals determined that the lack of a decision by the responsible official in 7 1/2 months was *not* reasonable, and that a "reasonable period for issuance of the decision has passed." *Id.* *See Appeals of Dillingham/ABB-SUSA, a Joint Venture*, 98-2 BCA ¶ 29778, ASBCA No. 51195, 1998 WL 258456 (1998) ("no justification at all" for 14-month period for issuing decision on small, straightforward construction claim, and 16-month period for deciding more complex $71,000,000 claim was also unreasonable).

Sage, like other government contractors, must have a prompt remedy for the Government's contractual breaches, and the five months period from the date of Sage's submission of the Claim until today is ample time for a competent official to make a decision on it.

D. Sage Is Entitled to Summary Judgment on its Fourth Claim for Relief.

Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56(a); *see generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *J. H. ex rel J. P. v. Bernalillo County*, No. CIV 12-0128 JB/LAM, __ F.Supp. 3d __, 2014 WL 6612060 at *27-*28 (D.N.M. Nov. 19, 2014) (Browning, J.) (explaining purposes and application of Rule 56). In this case, there are no genuine issues of fact. Sage submitted its Claim on August 25, 2014. The Claim is reproduced in its entirety as Ex. 2, and its content cannot be reasonably disputed. Similarly, IHS' response to Sage's Claim is not in dispute, and it stated that a decision on the Claim could not be expected until October 2015, approximately one year and two months after Sage submitted its Claim. Ex. 3. The question of whether such a time period, which exceeds the 60-day presumptive regulatory requirement for IHS to respond to a claim by about one year, is unreasonable is a question of law that should be answered in favor of Sage.

IV. CONCLUSION

For the above reasons, Plaintiff Navajo Health Foundation - Sage Memorial Hospital, Inc., respectfully request entry of an Order granting it summary judgment on its Fourth Claim for Relief, ordering Defendant Dayish to decide Sage's CSC Claim by January 30, 2015 or some other reasonable date certain.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2015 I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

s/ Paul E. Frye
Paul E. Frye