IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVAJO NATION,
a federally recognized Indian tribe,
Navajo Nation Department of Justice,

Plaintiff,

v.

DEPARTMENT OF THE INTERIOR,

and

S.M.R. JEWELL, in her official capacity as
Secretary, U.S. Department of the Interior,

Defendants.

Civil Action No. 1:14-CV-01909 (TSC)

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq*. ("ISDEAA"), and its implementing regulations provide a 90-day period for the agency to act on a contract proposal submitted by a tribe. This period is one in which the agency works with the submitting tribe in an attempt to reach an agreement that would allow the contracted-for programs and services to be performed by the tribe in lieu of the agency without impacting agency services to other tribes.

In this lawsuit, Plaintiff seeks to turn this 90-day period for negotiation into a legal trap for the agency, which begins to run no matter the agency's ability to act on the proposal and, if it should lapse, results in a financial windfall for the requester. That claim is unsupported by principles of equity or legal interpretation. The ISDEAA's statutory and regulatory scheme provides that the 90-day statutory clock does not begin to run until the proposal is received by the Secretary. In the present case, such receipt could not occur until annual appropriations were restored on October 17, 2013. Until that date, the Bureau of Indian Affairs ("BIA") Navajo Regional Office did not have any positions designated as excepted or exempted from the prohibitions of the Anti-Deficiency Act which would authorize an employee to act on Plaintiff's proposal during the shutdown. A determination that the 90-day period begins to run when an agency's office is prohibited by law from operating in the normal course with employees authorized to act on such a proposal would create absurd results and would create perverse incentives for tribal organizations and the BIA which run contrary to intent of the ISDEAA.

Furthermore, Plaintiff should not be entitled to claim that the Navajo Nation's Calendar Year ("CY") 2014 Annual Funding Agreement ("AFA") proposal was statutorily "received by the Secretary" for purposes of the 90-day clock on October 4, 2013. The BIA reasonably relied

on the Navajo Nation's silence in the face of the agency's repeated, good faith attempts to negotiate as demonstrating the Navajo Nation's agreement that the 90-day approval period began on October 17, 2013. Failure to estop Plaintiff here would allow Plaintiff to use the unique circumstance of a lapse in appropriations as a weapon to avoid negotiations over areas of disagreement in an attempt to reap a financial windfall to which it would not otherwise be entitled.

Even if the Court determines that the Navajo Nation's CY 2014 AFA proposal was deemed approved—a result that Defendants believe is contrary to law—the proposed CY 2014 funding amount which exceeds the Secretarial amount for Contract No. A12AV00698 (the "Contract") should be rejected. This is consistent with a plain reading of the statutory and regulatory scheme, and the rationale for this interpretation is particularly clear where, as here, an ISDEAA proposal includes a funding level which is facially unreasonable.

Accordingly, this Court should deny Plaintiff's motion for summary judgment, grant Defendants' cross motion for summary judgment, and enter judgment for Defendants.

ARGUMENT

I. The Appropriations Clause, the Anti-Deficiency Act, and the ISDEAA's Statutory and Regulatory Scheme Preclude Receipt of a Proposal by the Secretary When an Agency's Office Is Not Operating in the Normal Course with Employees Authorized to Accept Such a Proposal

A. The Navajo Nation's CY 2014 proposal should not be deemed "received by the Secretary" until October 17, 2013.

As explained in Defendants' cross motion and opposition brief, it would be inconsistent with the statutory and regulatory scheme to hold that Mr. Slim's acceptance of the hand-delivered proposal constituted receipt by the Secretary, thereby initiating the 90-day approval period, despite the lapse in agency appropriations in October 2013. Def. MSJ at 16–22. Plaintiff continues to assert that, in making this argument, the BIA is attempting to "extend" the 90-day

statutory period. Pl. Opp. at 11–13. Rather than an extension of that period, however, Defendants argue that, as a matter of law, receipt by the Secretary did not occur until the lapse in appropriations ended on October 17, 2013.[1] Def. MSJ at 16–22.

Plaintiff's contention that the ISDEAA is immune to the effects of a lapse in annual appropriations for the BIA, when the agency is prohibited from operating in the normal course due to limitations imposed by the Appropriations Clause and the Anti-Deficiency Act, is untenable. Pl. Opp. at 13–16. In contrast to those cases on which Plaintiff relies, Defendants do not assert that the Anti-Deficiency Act affects the substance of Plaintiff's contract proposal, which distinguishes this case from those upon which Plaintiff relies. Pl. Opp. at 13–14. Instead, the Appropriations Clause and the Anti-Deficiency Act preclude receipt of the proposal by the Secretary for purposes of the 90-day clock at a time when it was impossible for a responsible official authorized to act on the proposal to be available to receive it.

Plaintiff also argues that Defendants' application of the Anti-Deficiency Act is inconsistent with the underlying intent of the statute because "[i]n receiving the Nation's ISDEAA contract proposal, [Mr.] Slim did not purport to create or impose any contractual or

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[1] Plaintiff also challenges Defendants' argument that if the Court determines that the Navajo Nation's CY 2014 AFA proposal was received by the Secretary on October 4, 2013, the statutory 90-day deadline should be equitably tolled until January 15, 2014. *See* Pl. Opp. at 30–31; Def. MSJ at 20 n.4. "In seeking to give effect to the provisions of the ISDEAA, as with any statute, the Court must treat the 'object and policy' of that statute as its polestar." *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 142 (D.D.C. 2013) (citing *BlackLight Power, Inc. v. Rogan,* 295 F.3d 1269, 1273 (Fed. Cir. 2002) (internal quotation marks and citation omitted)). The BIA's actions here were consistent with the statutory objective behind the 90-day negotiation period, which is to resolve obstacles to contracting and, even after declination, to provide technical assistance to overcome objections to contracting. *See* 25 U.S.C. § 450f(b)(2). Finding that the Navajo Nation's CY 2014 AFA proposal was "received by the Secretary" for purposes of the 90-day statutory clock on October 4, 2014, would create perverse incentives for government agencies reviewing ISDEAA proposals, as it would place form over function in prioritizing speedy denials over good faith negotiations.

other monetary liability on the Government." Pl. Opp. at 15–16.[2] However, if this Court finds that Mr. Slim's acceptance of the hand-delivered proposal during the lapse in appropriations constituted receipt by the Secretary and began the 90-day approval period, such "receipt" of the proposal would potentially create a contractual liability for the government. *See* 25 C.F.R. § 900.18. That is, after all, the very liability that Plaintiff seeks to impose through this lawsuit. Compl. ¶ 37.

The Navajo Regional Office did not have any designated excepted or exempted positions which would authorize an employee to act on the Navajo Nation's proposal during the lapse in appropriations, in accordance with the Appropriations Clause and the Anti-Deficiency Act. Def. MSJ at 16–22. Accordingly, the Secretary could not have received the Navajo Nation's CY 2014 AFA proposal as a matter of law until October 17, 2013, when annual appropriations were restored. Plaintiff conflates "exempt" employees like Mr. Slim who may be employed during a lapse in appropriations where they are working under a multi-year or indefinite (*i.e.*, non-lapsing) appropriation with employees who the BIA deemed excepted from furlough to, among other things, "provide for limited financial management, contracting, human resources, and IT support functions … in situations where health or safety would otherwise be jeopardized." *See* Pl. Opp. Ex. G at 7; Def. MSJ Ex. C (defining excepted and exempted programs and employees); Compl. Ex. I (defining excepted and exempted employees and noting Mr. Slim was an exempt employee funded from non-lapsing appropriations relating to roads construction contracts); Def. MSJ Ex.

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[2] Plaintiff also cites *United States v. US Airways Group, Inc.*, 979 F. Supp. 2d 33 (D.D.C. 2013) as a "reject[ion] of the Government's position that its attorneys were prohibited from working in emergency situations" during the lapse in appropriations. However, the *US Airways* court simply concluded that a stay during the shutdown would be inappropriate due to the specific facts of that case which necessitated speedy disposition. *Id.* It did not hold that federal government employees in non-excepted, non-exempted positions could generally work during a lapse in appropriations.

B, Declaration of Jeanette Quintero ¶¶ 9–10 ("Quintero Decl.") (same). Regardless, there were no excepted or exempted employees in the Navajo Regional Office authorized to act on the Navajo Nation's proposal during the shutdown. Compl. Ex. I; Quintero Decl. ¶¶ 9–10. Plaintiff also makes much of the fact that the BIA issued a letter regarding a forestry contract on October 1, 2013—the first day of the lapse in appropriations. Pl. Opp. at 5, 22, 25. As with employees throughout the federal government, BIA employees reported to work on October 1, 2013, unless otherwise notified by their supervisors, in order to implement an orderly shutdown. *See* Pl. Opp. Ex. G at 2-3 (describing shutdown implementation). These activities were expected to be completed within four hours. *Id*. After this four-hour window on the morning of October 1, 2013, there were no excepted or exempted employees authorized to act on the Navajo Nation's CY 2014 AFA proposal for the Tribal Courts Program during the lapse in appropriations.[3] *See* Compl. Ex. I; Quintero Decl. ¶¶ 9–10.

Although the BIA's shutdown plan included 1,112 BIA personnel nationwide (including 666 law enforcement and 446 "other employees") excepted "to protect life and property," including a "limited number" of deemed "excepted" management and administrative personnel, *see* Pl. Opp. Ex. G at 7, no BIA Navajo Regional Office employee was designated as "excepted" to act on ISDEAA contracts during the October 2013 lapse in appropriations. Compl. Ex. I; Quintero Decl. ¶ 9. In addition, although the BIA planned to "exempt" 473 employees nationwide from furlough as being funded by a non-lapsing source, *see* Pl. Opp. Ex. G at 7, no BIA Navajo Regional Office "exempt" employee was authorized to act on the Navajo Nation's

[3] Although there were employees in the BIA's Navajo Regional Office during the October 2013 lapse in appropriations who were either excepted or exempted for certain specified purposes, including Mr. Slim and Ms. Pinto, none of these employees were authorized by the agency to act on ISDEAA contracts during the lapse. Compl. Ex. I; Supplemental Declaration of Jeanette Quintero ¶ 4, attached hereto as Exhibit A; Quintero Decl. ¶¶ 9–10.

CY 2014 AFA proposal for the Tribal Courts Program. Compl. Ex. I; Quintero Decl. ¶¶ 9–10. Mr. Slim was exempted from furlough during the lapse in appropriations to work on road construction project contracts, but his authorization did not include work on contracts such as the CY 2014 AFA proposal for the Tribal Courts Program. Compl. Ex. I; Quintero Decl. at ¶ 10.

Plaintiff's argument would turn the Anti-Deficiency Act on its head, as it would assume that any exempted or excepted employee is authorized during a lapse in appropriations to act on all agency business, no matter the extensive time and concurrent obligation that would ensue on the part of the government as a result of such work. *See* OMB Memorandum M-13-22, *Planning for Agency Operations during a Potential Lapse in Appropriations*, Att. 1 at 11–12 (Sept. 17, 2013), attached hereto as Exhibit B (noting that a non-furloughed employee may remain at work and perform non-"excepted" functions during brief intervals between performing their "excepted" support functions as long as the agency minimizes the number of employees performing such intermittent "excepted" functions); *see also Participation in Congressional Hearings During an Appropriations Lapse*, 19 Op. O.L.C. 301, n.1 (1995) ("During [any brief intervals during the day when the officer or employee is not engaged in an excepted function], officers and employees may perform non-excepted functions, because the need for the officer or employee's availability would justify the Department in keeping the officer or employee in the close vicinity of his or her duty station to await the onset of the excepted function."). Mr. Slim could engage in the *de minimis* non-exempt functions of answering the bell at the receptionist's desk and marking the CY 2014 AFA proposal for intra-office mail delivery, but he did not have the authority to "receive" the proposal on behalf of the Secretary—which would trigger the Secretary's additional duty to respond to the tribe within two days to indicate receipt and the duty to respond in 15 days with a request for additional information, 25 C.F.R.

§ 900.15(a)-(b)—because neither Mr. Slim nor anyone else in the BIA Navajo Regional Office was authorized to act on the Navajo Nation's CY 2014 AFA proposal for the Tribal Courts Program during the lapse in appropriations as a matter of law. *See* Compl. Ex. I; Quintero Decl. ¶ 9.

The ISDEAA's statutory and regulatory scheme contemplates more than simple "receipt," as it requires "receipt by the Secretary." *See, e.g.,* 25 U.S.C. § 450f(a)(2) ("[T]he Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract . . . ."); 25 C.F.R. § 900.16 ("The Secretary has 90 days after receipt of a proposal to review and approve the proposal and award the contract or decline the proposal . . . ."); 25 C.F.R. § 900.18 ("What happens if a proposal is not declined within 90 days after it is received by the Secretary?") (emphasis added); 25 C.F.R. § 900.21 ("[A] proposal can only be declined within 90 days after the Secretary receives the proposal . . . ."). Otherwise Plaintiff's argument, extended to its logical end, would mean that Plaintiff could have simply slipped the envelope under the agency's door, dropped it through a mailslot when the office was closed, or handed it to a BIA law enforcement officer, with the same binding consequences.[4] Plaintiff draws analogies to cases where parties failed to open an envelope, overlooked a bid, or otherwise delivered papers to an office during business hours when the person authorized to receive them

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[4] Under Plaintiff's logic, if a lapse in appropriations lasted longer than 90 days, any proposals "received" at offices without excepted or exempt employees authorized to decline them could be automatically "deemed approved" during the lapse, despite the government's wholesale inability to respond. This would be an absurd result and could produce countless contractual liabilities for the government. In the instant case, the lapse in appropriations lasted longer than two days after physical delivery of the contract proposal to the BIA Navajo Regional Office. Because there were no excepted or exempt employees authorized to act on the proposal in the BIA Navajo Regional Office during the lapse, Plaintiff's argument that physical delivery is the same as "receipt by the Secretary" precludes the agency from being able to meet the requirement of 25 C.F.R. § 900.15(a) to respond to the tribe within two days to indicate receipt.

had stepped away from the counter. Pl. Opp. at 20–22. However, in the case at issue here, the agency did not ignore or misplace the Plaintiff's proposal, in which case the agency would bear responsibility for its own oversight. To the contrary, the BIA responded to the proposal as soon as it was received to acknowledge receipt and begin negotiations. In addition, the October 2013 lapse in agency appropriations was an extraordinary event, *see Best Key Textiles Co. v. United States*, 942 F. Supp. 2d 1367, 1374 (Ct. Int'l Trade 2013), which is unlikely to create the slippery slope that Plaintiff warns against.

The Secretary's Internal Agency Procedures Handbook for Non-Construction Contracting Under the [ISDEAA] ("Handbook") does not provide otherwise. It instructs that "[w]hen a contract proposal arrives in any office," it shall be date stamped "immediately upon receipt," the Designated Management Official[5] shall be immediately notified, and the proposal shall be immediately forwarded "to the appropriate person designated by the agency to be in charge of agency review." Pl. Opp. Ex. D at 5-2. As with the explicit regulatory requirements requiring agency action after receipt, *see* 25 C.F.R. § 900.15(a)-(b); Pl. Opp. Ex. D at 5-3, "receipt by the Secretary" when agency officials are prohibited by congressional command from operating in the normal course with employees authorized to accept or act on such a proposal would render these Handbook requirements meaningless.[6] In addition, the Handbook contemplates receipt at an

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[5] For the BIA, the Designated Management Official is "[t]he Area Director or Superintendent with the authority to approve or decline a contract proposal within their respective jurisdiction." *See* Handbook App. F at 1, attached hereto as Exhibit D.

[6] Plaintiff suggests that Mr. DeAsis could have provided Plaintiff with the required notifications for this proposal. Pl. Opp. at 22. As noted *supra*, BIA employees reported to work on October 1, 2013, unless otherwise notified by their supervisors, in order to implement the shutdown. *See* Pl. Opp. Ex. G at 2-3. After this approximately four-hour window on the morning of October 1, 2013, there were no excepted or exempted employees authorized to act on the Navajo Nation's CY 2014 AFA proposal for the Tribal Courts Program during the lapse in appropriations. *See* Compl. Ex. I; Quintero Decl. ¶¶ 9–10.

incorrect office, Pl. Opp. Ex. D at 5-3, not submission of a proposal at the correct agency office during a lapse in appropriations. Indeed, the Navajo Nation's CY 2014 AFA proposal could not be "immediately forwarded" to an "office which has the authority to process that proposal" because the appropriate office was not in operation with someone with authority to process the proposal until October 17, 2013, when annual appropriations were restored.

B. There are no genuine issues of material fact which would preclude summary judgment for Defendants.

Plaintiff contends that the facts in Plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue should be considered admitted, that the facts set forth in Ms. Quintero's declaration concerning Mr. Slim cannot provide the basis for a grant of summary judgment, and that if Mr. Slim's authority is a genuine issue of material fact Plaintiff should be entitled to discovery. Pl. Opp. at 4–5, 23–26. Each of these arguments must fail.

As an initial matter, LCvR 7(h) requires an opposition to a motion for summary judgment to "be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement." Defendants do not believe there is a dispute over a genuine issue of material fact in this case. Defendants respectfully submitted a Response to Plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue ("Response"), which was designed solely to respond to the Plaintiff's Statement by identifying which of the statements therein are actually "material facts." The Response either (i) noted that a factual ground for Plaintiff's Motion for Summary Judgment was undisputed, *see* Response ¶¶ 1–7, 12, 21, (ii) noted that a paragraph in Plaintiff's Statement

contained legal conclusions and opinions to which no response was required,[7] *see* Response ¶¶ 8, 15–17, 19, 22–27, 30, (iii) disagreed with Plaintiff's characterization of a letter or other document in the record which the Court could reference for a full and accurate statement of its contents,[8] *see* Response ¶¶ 9–11, 13–14, 16–20, 22–24, 28–31, or (iv) admitted facts which were previously admitted as characterized in the Answer or set forth in the Joint Statement of Stipulated Facts, *see* Response ¶ 14. As the Court is no doubt aware, such responses are routinely submitted in the courts of this Circuit. *See, e.g., Davis v. Billington*, 51 F. Supp. 3d 97, 103 n.1 (2014) (noting the Court considered such a response in reaching its decision); *Westcott v. McHugh*, 39 F. Supp. 3d 21, 23 n.1 (2014) (same); *Stehn v. Cody*, 962 F. Supp. 2d 175, 176 n.1 (2013) (same). Plaintiff's overly technical waiver argument should therefore be rejected as meritless.

Plaintiff also argues that that the facts set forth in Ms. Quintero's declaration concerning Mr. Slim cannot provide the basis for a grant of summary judgment. Pl. Opp. at 4–5, 23–25. Plaintiff asserts that "many of [Ms. Quintero's] factual assertions concerning Mr. Slim are based on inadmissible hearsay or are legal conclusions asserted by a different [BIA employee.]"[9] Pl. Opp. at 4–5. This complaint appears to hinge on the fact that Ms. Quintero's declaration is

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[7] Defendants disputed these legal conclusions and opinions, to the extent a response was required.

[8] In the event that Defendants responded to Plaintiff's characterization of a document in the record, and respectfully referred the Court to that document for a full understanding of its contents, that document had already been referenced and cited in Plaintiff's Statement. Plaintiff cannot reasonably contend that Defendants' lack of citation to these materials was somehow confusing or burdensome.

[9] Plaintiff repeatedly describes Ms. Quintero's declaration as "conclusory" and based on "hearsay" without further explanation than the assertion quoted here. Pl. Opp. at 23–25. These descriptions are thus presumed to be based on this same objection.

based in part on information provided to the declarant in her official capacity, and therefore allegedly fails to establish the declarant's personal knowledge as required by Fed. R. Civ. P. 56. Ms. Quintero made the statements in her declaration based upon her personal knowledge, which in turn is based on a personal review of her records and upon information furnished to her in the course of her official duties, as well as the background of this case with which she has become familiar through the exercise of her official duties. Quintero Decl. ¶ 1. Her testimony is thus based on personal knowledge regarding matters within her professional experience, and is in full compliance with the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the precedent and practice of this District and the D.C. Circuit.

As courts routinely recognize, government declarants satisfy the "personal knowledge" requirement of Rule 56 when they testify to information provided them in their official capacity—something they routinely and, of necessity, do.[10] *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 375 n.5 (D.C. Cir. 2007); *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir. 1986); *Blunt-Bey v. U.S. Dep't of Justice*, 612 F. Supp. 2d 72, 74 (D.D.C. 2009). These cases make clear that, by allowing such declarations, courts have not granted the government an exception to Rule 56's "personal knowledge" requirement. Rather, courts have recognized that government declarants can "acquire[]" personal knowledge "through the performance of their official duties and their review of the official files." *Blunt-Bey*, 612 F. Supp. 2d at 74; *see Wolf*, 473 F.3d at 375 n.5 (noting that

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[10] If there are any statements in Ms. Quintero's declaration that the Court determines are improper, the Court may simply exclude them from consideration. *See, e.g.*, *MCI Commc'ns Corp. v. United States*, 26 F. Supp. 2d 6, 10 n.6 (D.D.C. 1998); *see also Bowyer v. Dist. of Columbia*, 910 F. Supp. 2d 173, 196 n.17 (D.D.C. 2012) ("[P]laintiffs' request to strike these three declarations in their entirety is denied because all three declarations contain a number of facts that are not based on hearsay and that are relevant to deciding the defendants' motions.").

affidavit "reflects personal knowledge, obtained in [affiant's] official capacity"); *Inst. for Policy Studies v. CIA*, 885 F. Supp. 2d 120, 134 (D.D.C. 2012) (noting that "a declaration met the standard for personal knowledge because it was based, in part, on declarant's review of official files and records" (quotation marks and citation omitted)); *see also Ridenour v. Collins*, 692 F. Supp. 2d 827, 846 (S.D. Ohio 2010) ("Personal knowledge is not strictly limited to actions in which the affiant directly participated, but may be derived from reviewing the content of files and records."). Thus, government declarants may testify based on information provided to them in their official capacity because review and consideration of such material gives them the type of "personal knowledge" required by Rule 56. *See Hainey v. U.S. Dep't of the Interior*, 925 F. Supp. 2d 34, 40–41 (D.D.C. 2013) (rejecting "personal knowledge" challenge when declarant "expressly confirm[ed] that all of the information set forth in his declaration [wa]s based upon his personal knowledge or upon information furnished to him in his official capacity." (quotation marks, citation and alterations omitted)).

If Plaintiff's view of the "personal knowledge" requirement were correct, any number of declarants within the agency with "first-hand" knowledge would be required to describe the sources and limits of Mr. Slim's authority during a lapse in appropriations—an undertaking Ms. Quintero summarizes in two paragraphs. *See* Quintero Decl. ¶¶ 9–10. If the Executive Branch could not submit declarations based on information provided to declarants in their official capacity, significant undue burdens would be imposed on government litigation, which constitutes a significant portion of this Court's docket. Government litigants would be forced to introduce, and courts would be forced to review, multiple declarations filed by different individuals who obtained each piece of the information first-hand. This is not, and should not be, the rule of this Court.

Plaintiff does not present any evidence contradicting the facts set forth in Ms. Quintero's declaration.[11] Ms. Quintero's explanation of Mr. Slim's authority is consistent with the BIA's letters to the Navajo Nation dated February 7 and March 13, 2014, *see* Compl. Exs. I, L, with the BIA's Contingency Plan Q&A Document, Def. MSJ Ex. C, and with the DOI's Contingency Plan for Operations in the Absence of FY 2014 Appropriations, Pl. Opp. Ex. G. The legal scope of excepted or exempt employees' positions during a lapse in appropriations is circumscribed by the Appropriations Clause and the Anti-Deficiency Act, and Ms. Quintero is fully qualified to describe the BIA's official designation of excepted or exempted positions in the Navajo Regional Office during the October 2013 lapse in appropriations.

Lastly, Plaintiff requests the opportunity to conduct discovery regarding Mr. Slim's authority to act on behalf of the Secretary on this matter during the lapse in appropriations if the Court determines that Mr. Slim's authority is a genuine issue relevant to either party's request for summary judgment. Pl. Opp. at 24–26. Indeed, Plaintiff has even submitted what appears to be a Rule 56(d) affidavit, asserting that, should the Court reject Plaintiff's legal theory, it should first provide Plaintiff with the opportunity for discovery before entering judgment. This

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[11] As described *supra*, Plaintiff conflates "exempt" and "excepted" employees in its reading of the DOI's contingency plan. *See* Pl. Opp. Ex. G. In addition, Plaintiff notes that the BIA sent the Navajo Nation a letter dated October 1, 2013, but as explained *supra*, BIA employees reported to work on October 1, 2013, unless otherwise notified by their supervisors, in order to implement the shutdown. *See* Pl. Opp. Ex. G at 2-3. After this four-hour window on the morning of October 1, 2013, there were no excepted or exempted employees authorized to act on the Navajo Nation's CY 2014 AFA proposal for the Tribal Courts Program during the lapse in appropriations. *See* Compl. Ex. I; Quintero Decl. ¶¶ 9–10. Plaintiff also disagrees that there was a "closed" sign on the front door of the federal building. Pl. Opp. at 25. Ms. Quintero's statement in ¶ 9 of her declaration that "a sign was placed on the front doors of the Gallup Federal Building noting that the building was closed due to the lapse in appropriations" was based on Ms. Quintero's personal knowledge of the content and placement of this sign at the commencement of the October 2013 lapse in appropriations. Regardless, this fact is not material to Defendants' request for summary judgment.

application of Rule 56(d), which suggests that discovery is needed, not because Plaintiff "cannot present facts essential to justify its opposition" but rather because discovery is Plaintiff's preferred option to the entry of judgment in favor of Defendants, should be rejected. *See Klute v. Shinseki*, 840 F. Supp. 2d 209, 214 n.3 (D.D.C. 2012) (rejecting plaintiff's request for further discovery because he did not show he could not present facts essential to justify his opposition as required by Rule 56(d)); *see also Cheyenne Arapaho Tribes of Okla. v. United States*, 558 F.3d 592 (D.C. Cir. 2009) (affirming district court's denial of the tribes' motion for a continuance to permit discovery because they "failed to specify how the requested discovery would alter the court's determination").

As Plaintiff noted in its Complaint, the BIA has consistently contended "that receipt of the Nation's [CY] 2014 Proposal by Mr. Slim did not constitute receipt within the meaning of" the statute. Compl. ¶ 29. The BIA detailed the limits of Mr. Slim's authority during the lapse in appropriations via letters to the Navajo Nation dated February 7 and March 13, 2014, which Plaintiff included as Exhibits to its Complaint. Compl. Exs. I, L. If Plaintiff believed that discovery on the limits of Mr. Slim's authority was necessary, Plaintiff had the opportunity to request such discovery on multiple occasions, including before the submission of its motion for summary judgment on January 30, 2015, and as part of the joint proposed schedule for case management following the denial of its motion without prejudice on February 9, 2015. Instead, the parties submitted a joint proposed briefing schedule based on the understanding "that the issues involved in this case can be decided based upon the parties' exchange of motions for summary judgment and oral argument, should the Court choose to hear argument," and the parties ultimately agreed to a joint stipulation of facts. Joint Proposed Briefing Schedule and Status Report at 1 (ECF No. 16); Joint Statement of Stipulated Facts (ECF No. 17)

("Stipulations"). The "course of proceedings in this litigation" was of Plaintiff's own making, and Plaintiff is not entitled to delay this proceeding in the final hour to engage in a Hail Mary fishing expedition for additional support for its arguments. "Rule 56[(d)] is not a license for a fishing expedition in the hopes that one might find facts to support its claims." *Painsolvers, Inc. v. State Farm Mut. Auto. Ins. Co.,* 732 F. Supp. 2d 1107, 1125 (D. Haw. 2010).

In the event the Court decides to provide Plaintiff the opportunity to conduct discovery at this late juncture, Defendants respectfully request that both parties be provided a limited opportunity to uncover additional factual support for their arguments, with the ability to supplement their motions for summary judgment as appropriate. After all, Defendants believe that the actions and representations by Plaintiff's employees regarding the due date for the agency's response to its proposal would, at a minimum, likely be relevant to the government's estoppel argument.

II. Plaintiff Is Equitably Estopped from Asserting that the Navajo Nation's CY 2014 AFA Proposal Was "Received by the Secretary" on October 4, 2013

As Defendants argued in their cross motion and opposition brief, even if this Court does not agree that the date upon which Plaintiff's proposal was received by the Secretary was October 17, 2013, principles of equity should prohibit Plaintiff from asserting otherwise. Def. MSJ at 22–28.

Plaintiff opposes judgment on this ground based on a series of cases which declined to estop the federal government in an action against a private litigant. *See* Pl. Opp. at 27–30 (citing *International U., United Gov. Sec. Officers of Am. v. Clark*, 704 F. Supp. 2d 54, 60 (D.D.C. 2010) (United States Marshals Service not estopped in action against federal employees' union); *United States v. Philip Morris, Inc.*, 300 F. Supp. 2d 61, 71 (D.D.C. 2004) (United States not estopped in action against cigarette manufacturers); *Morris Commc'ns, Inc. v. FCC*, 566 F.3d

184, 191–92 (D.C. Cir. 2009) (Federal Communications Commission not estopped in action against private communications service provider); *Elect. Privacy Info. Ctr. v. Nat'l Sec. Agency*, 795 F. Supp. 2d 85, 93 (D.D.C. 2011) (National Security Agency not estopped in action against public interest research organization); *Genesis Health Ventures, Inc. v. Sebelius*, 798 F. Supp. 2d 170, 184 (D.D.C. 2011) (Department of Health and Human Services not estopped in action against private nursing facilities); *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59 (1984) (Department of Health and Human Services not estopped in action against non-profit corporation)).

These cases applied the more difficult burden of proof applicable to private litigants attempting to assert equitable estoppel against the federal government. The Supreme Court has long recognized that "equitable estoppel will not lie against the Government as it lies against private litigants" because "'the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.'" *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990) (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408–09 (1917)); *see also Heckler*, 467 U.S. at 60 ("[T]he Government may not be estopped on the same terms as any other litigant" because "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.").

Plaintiff incorrectly attempts to apply this more difficult burden of proof to the case at hand, including the additional requirement to show that the government "engaged in affirmative misconduct." Pl. Opp. at 27 (quoting *Keating v. FERC*, 569 F.3d 427, 434 (D.C. Cir. 2009) (setting forth the burden of proof for "[a] party attempting to apply equitable estoppel against the

government" and finding the Federal Energy Regulatory Commission was not estopped in action against private licensee)); *see also Morris Commc'ns*, 566 F.3d at 191; *LaRouche v. Fed. Election Comm'n*, 28 F.3d 137, 142 (D.C. Cir. 1994) ("A private party asserting estoppel against the United States Government must demonstrate, however, that the latter has engaged in affirmative misconduct.") (internal quotations and citations omitted). However, Defendants are not aware of any cases in which this standard has been applied against the United States. After all, the rationale that justifies the application of a higher standard in such cases—that estoppel could prevent the United States from being able to enforce the laws to the detriment of the interests of the citizenry as a whole—weighs in favor of estoppel in this case because it would prevent Plaintiff from reaping a financial windfall to the detriment of the public treasury.

In addition, contrary to Plaintiff's contention, Pl. Opp. at 27–28, a "definite representation" is not always required to establish equitable estoppel; "a person may be precluded by his act or conduct, or silence if it is his duty to speak." *Britamco Underwriters, Inc. v. Nishi, Papagjika & Assocs., Inc.*, 20 F. Supp. 2d 73, 77 n.2 (D.D.C. 1998) (citing *Black's Law Dictionary* 538 (6th ed. 1990)); *see also Tech 7 Sys., Inc. v. Vacation Acquisition, LLC*, 594 F. Supp. 2d 76, 86 (D.D.C. 2009) (same, quoting *Marshall v. Wilson*, 175 Or. 506, 154 P.2d 547, 551–52 (1944)). Creation of a duty to speak requires that "the party maintaining silence knew that some one else was relying upon that silence, and either acting or about to act as he would not have done, had the truth been told." *Wiser v. Lawler*, 189 U.S. 260, 272 (1903). The Navajo Nation had a duty to speak here because it was aware that Defendants believed the Navajo Nation's CY 2014 AFA proposal was received by the Secretary on October 17, 2013, and that the BIA was relying on that receipt date for its calculation of the 90-day statutory deadline. Compl. Ex. D; *see also* Stipulations ¶¶ 21–22. The Navajo Nation was also aware that the BIA

intended to partially decline its CY 2014 AFA as proposed, but that the BIA would wait to issue its formal decision until it heard back from the Navajo Nation. Stipulations ¶¶ 24–25; Def. MSJ Ex. D. Navajo Nation remained silent until January 27, 2014, Stipulations ¶¶ 23, 26; Compl. Ex. G, despite the fact that Navajo Nation knew the BIA was relying on that silence because the BIA was actively attempting to negotiate with Plaintiff. Plaintiff had a duty to speak because it maintained its silence while knowing that Defendants were relying upon that silence and that Defendants would have acted differently had Plaintiff spoken.

The BIA reasonably relied on Navajo Nation's silence to establish the Navajo Nation's tacit agreement with Defendants' determination that the 90-day approval period began on October 17, 2013. The BIA waited until the last day of this 90-day approval period to decline the Navajo Nation's CY 2014 AFA proposal because there had been a history of good faith negotiation between the parties when, as here, the Nation had proposed substantial changes to an AFA from the previous year, and because the statutory and regulatory scheme contemplates negotiations between the parties in an attempt to resolve any funding disputes. Def. MSJ at 24–26; Quintero Decl. ¶¶ 14, 15, 22. While Defendants believe a determination that the 90-day approval period began on October 4, 2013, is contrary to law, the BIA could have issued its formal declination by January 2, 2014, if it knew that negotiations beyond that date would be futile in the eyes of Navajo Nation in order to eliminate any potential issues.[12] Plaintiff is equitably estopped from asserting that the Navajo Nation's CY 2014 AFA Proposal was "received by the Secretary" on October 4, 2013, because the BIA reasonably relied on the

[12] It is not clear why Plaintiff contends that the BIA would have issued its declination after January 15, 2014, if Mr. Shortey had not called the BIA on that date. Pl. Opp. at 30. The BIA repeatedly referenced the January 15, 2014, deadline in correspondence with the Navajo Nation. Compl. Exs. D, E.

Navajo Nation's silence in the face of the agency's repeated, good faith attempts to negotiate based upon an understanding that the 90-day statutory deadline began on October 17, 2013, and that the BIA was waiting on a response from Plaintiff before issuing a partial declination by that deadline.

III. Even if the Navajo Nation's CY 2014 AFA Proposal Is Deemed Approved, the Nation Should Only Be Entitled to an Award that Does Not Exceed the Secretarial Amount

As explained in Defendants' cross motion and opposition brief, even if an ISDEAA contract proposal is "deemed approved" by operation of law, the funding level awarded pursuant to the contract may not exceed the Secretarial amount. Def. MSJ at 28–32. Pursuant to the regulations, if a proposal is not declined within 90 days after it is received by the Secretary, it "is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act." 25 C.F.R. § 900.18 (emphasis added). The regulations are clear that the remedy for the Secretary's failure to timely decline a proposal is that it is "deemed approved" and the Secretary must provide only the "full amount of funds" required by Section 106(a) of the ISDEAA, *i.e.*, the appropriate Secretarial amount. While the BIA is obligated to pay the applicable amount determined pursuant to Section 106(a)(1) to tribes carrying out ISDEAA contracts, the BIA is not legally obligated to pay a tribe an amount in excess of that funding level. *See* 25 U.S.C. §450f(a)(2)(D); *see also Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1037 (9th Cir. 2013). In fact, declining a self-determination contract proposal pursuant to 25 U.S.C. § 450f(a)(2)(D) because the amount of funds proposed exceeds the "Secretarial amount" for the contract is one of the limited bases set out in 25 U.S.C.

§ 450f(a)(2) under which the BIA may decline a contract. *See Hopland Band of Pomo Indians v. Norton,* 324 F. Supp. 2d 1067, 1077 (N.D. Cal. 2004); *cf.* 25 U.S.C. § 450f(a)(4)(B).[13]

Plaintiff's response to this legal argument is brief, but it primarily amounts to an argument that the requested amount of funding was reasonable because it is the amount required to perform the 15 tasks and objectives in the Contract, and the Contract must be funded at no less than the amount the Secretary would be required to spend. Pl. Opp. at 6–8, 32–33. Although Plaintiff asserts that the Navajo Nation "in effect subsidize[] the Secretary by providing over 90% of the money needed to perform [the contract] tasks," Pl. Opp. at 32 (citing Ex. B ¶¶ 4, 21), and that it accepted the final 2012 and 2013 AFAs "under protest," Pl. Opp. Ex. B ¶ 22, the amount that a tribal organization is spending (or would like to spend) on a program is not the same as the amount that the BIA is required to fund for that program.[14] The ISDEAA is clear that the funding provided pursuant to a self-determination contract "shall not be less than the appropriate [agency] would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract," 25 U.S.C. § 450j-1(a)(1), and if a proposal exceeds the funding amount allowed by the statute, the Secretary may "approve a level

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[13] The BIA also cannot be required to reduce funding for programs and activities provided for one tribe in order to make funds available for a self-determination contract with another tribe. 25 U.S.C. § 450j-1(b).

[14] Even if this Court were to accept the Navajo Nation's budget proposal numbers as the amount of funds that the BIA would otherwise have expended on the tribal courts program and thus the applicable funding level for the tribal courts contract, 25 U.S.C. § 450f(a)(2)(D), Plaintiff only proposed a budget of $3,422,609 in CY 2012 and a budget of $2,072,950 in CY 2013. Def. MSJ Ex. A, Att. B; Contract No. A12AV00698, Att. B – Fiscal Year 2013 Tribal Court Program Budget Summary, attached hereto as Exhibit C. The Navajo Nation proposed funding in CY 2014 that was approximately 5 times ($17,055,517/$3,422,609) the level of funding that the Navajo Nation proposed in CY 2012 and more than 8 times ($17,055,517/$2,072,950) the level of funding that the Navajo Nation proposed in CY 2013. The Navajo Nation's proposed $17,055,517 funding level for CY 2014 grossly exceeds even its own prior proposed funding levels for the Contract.

of funding authorized under section 450j-1(a) of this title" as part of the Secretary's power to approve any severable portion of a contract proposal. 25 U.S.C. § 450f(a)(4). The Navajo Nation is not limited by statute or regulation in the amount it may spend on its tribal courts program, but such amount cannot serve as the benchmark for the Secretarial amount for the tribal courts contract. The statutory benchmark is the amount that the BIA would have otherwise provided for the program in CY 2014—the $1,292,532 Secretarial amount determined pursuant to 25 U.S.C. § 450j-1(a)(1).[15]

Plaintiff briefly cites *Yurok* for the proposition that the Secretary must award a contract "based on the terms of the proposal." Pl. Opp. at 32 (citing *Yurok Tribe v. Dep't of the Interior*, 2015 WL 2146614 at *1 (May 8, 2015)). This is unsupported *dicta*. The *Yurok* court affirmed dismissal of the case as a pre-award dispute and did not analyze the amount the Secretary must award a deemed approved proposal. *Yurok* at **7–8 (finding that under the ISDEAA, there are two steps to creating a contract—approval and award—and a deemed approved contract is not awarded by operation of law). Moreover, the *Yurok* court engaged in an analysis of the scope of the deemed approved proposal to determine if it included programs that the Secretary is authorized to administer. *Yurok* at **4–6. The *Yurok* court thus did not accept that anything included in a deemed approved proposal must be included in the contract; such a proposal must still be consistent with the ISDEAA in order to be deemed approved.

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[15] The ISDEAA provides a mechanism for tribes to request an increase in the Secretarial amount, *see* 25 U.S.C. § 450j-1(a)(3)(B); 25 U.S.C. § 450j-1(b)(5), and a tribal organization is always free to return all or part of a contracted program to the Secretary through retrocession. *See* 25 U.S.C. § 450j(e); 25 C.F.R. §§ 900.240–900.245. If the Navajo Nation retroceded the Tribal Courts Program, the Secretary would use the Secretarial amount that was retroceded and would not receive additional funding to run the Tribal Courts Program.

As Defendants explained in their cross motion and opposition brief, it would be inconsistent with the statutory and regulatory scheme if a proposal containing any proposed funding amount, even if it grossly exceeds the Secretarial amount, could be deemed approved by the BIA's failure to properly respond to a proposal within 90 days. Def. MSJ at 29–30. Pursuant to the ISDEAA, the required amount of funding for a contract may increase only at the request of a tribal organization and after a determination by the Secretary that additional funds are necessary to carry out the ISDEAA or to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the contractor's control. 25 U.S.C. §§ 450j-1(a)(3)(B), 450j-1(b)(5). A "deemed approved" contract is a regulatory remedy not contemplated in the ISDEAA, and it is not an appropriate vehicle for challenging a tribal organization's statutory Secretarial funding amount or skewing the allocation of such funding in favor of one tribal organization's program by any proposed amount.

The rationale for this reading of the plain language of the statute and regulations is particularly clear where, as here, an ISDEAA proposal includes a funding level which grossly exceeds the Secretarial amount for the Contract and is facially unreasonable. Former Chief Justice Yazzie submitted a declaration[16] in support of the Navajo Nation's proposed $17,055,517 funding level for CY 2014 that suffers the same fatal flaw as the summary budget submitted with the Navajo Nation's CY 2014 AFA proposal—they both simply increased the amounts in each budget category dramatically without an explanation of why such an increase from prior years is necessary. *See* Pl. Opp. Ex. B; Def. MSJ Ex. A, Att. B – Contract No. A12AV00698, Fiscal Year 2012 Tribal Court Program Budget Summary; Compl. Ex. B, Att. B – Fiscal Year 2014

[16] Mr. Yazzie stepped down from his position as Chief Justice effective May 15, 2015. *See Chief Justice Herb Yazzie Retires May 15*, Navajo-Hopi Observer, May 19, 2015, available at http://nhonews.com/main.asp?SectionID=1&SubSectionID=795&ArticleID=16896.

Tribal Court Program Budget Summary; *see also* Def. MSJ at 31–32. In fact, former Chief Justice Yazzie notes that the caseload for the Navajo Nation's District Courts and Supreme Court has decreased between 2012 and 2014. Pl. Opp. Ex. B ¶¶ 8, 11. The Navajo Nation's proposed $17,055,517 funding level for CY 2014 was more than 13 times the Secretarial amount for the Contract and is facially unreasonable. *See* Def. MSJ at 30–31 (comparing the amount proposed here to the amount proposed in *Seneca Nation*, which was only 1.4 times over the Secretarial amount and included a per-patient formula as a basis for its increase). This is an additional reason why the Navajo Nation's proposed $17,055,517 funding level for CY 2014 should be rejected, as reading the statute and regulations to require such a windfall would produce an absurd result.

CONCLUSION

Based on the foregoing and Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, Defendants respectfully request that the Court deny Plaintiff's motion for summary judgment, grant Defendants' cross motion for summary judgment, and enter judgment for Defendants.

DATED: June 17, 2015

Respectfully submitted,

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Counsel for Defendants

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVAJO NATION, a federally recognized Indian tribe, Navajo Nation Department of Justice, Plaintiff, v. DEPARTMENT OF THE INTERIOR, and S.M.R. JEWELL, in her official capacity as Secretary, U.S. Department of the Interior, Defendants.	)	Civil Action No. 1:14-CV-01909 (TSC)

SUPPLEMENTAL DECLARATION OF JEANETTE QUINTERO

I, JEANETTE QUINTERO, hereby declare and state:

1. I am an Indian Self-Determination Level 1 Awarding Official for the Navajo Region of the Bureau of Indian Affairs ("BIA"), an agency of the United States Department of the Interior. I have held this position since February 1, 2013, when I received the Awarding Official Certification BIA-2013-L1-000098, but I have been an Indian Self-Determination Specialist since August 2011. I am responsible for making award and declination decisions for Navajo Nation contracts under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). I make the following statements based upon my personal knowledge, which in turn is based on a personal review of my records and upon information furnished to me in the course of my official duties. Through the exercise of my official duties, I have also become familiar with the background of this case.

2. In my capacity as an Indian Self-Determination Level 1 Awarding Official for the Navajo Region of the BIA, I am familiar with and can identify the document attached as Exhibit C to Defendants' Reply Memorandum In Support of Defendants' Cross Motion for Summary Judgment ("Defendants' Reply MSJ").

3. Exhibit C to Defendants' Reply MSJ is a true and correct copy of the Navajo Nation's Fiscal Year 2013 Tribal Court Program Budget Summary proposal for Contract No. A12AV00698 for the Tribal Courts Program.

4. In Paragraph 11 of my Declaration submitted as Exhibit B to Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, I asserted: "During the lapse in appropriations, I was furloughed, as were the other employees in my office except for Mr. Slim." This is accurate; Mr. Slim was the only non-furloughed employee in the Self-Determination Office of the BIA's Navajo Regional Office during the October 2013 lapse in appropriations. There was at least one other excepted employee—Ms. Sharon Pinto, Regional Director for the Navajo Region of the BIA—in the Regional Director's Office of the BIA's Navajo Regional Office during the October 2013 lapse in appropriations. However, there were no excepted or exempt employees in the BIA's Navajo Regional Office authorized to receive or act on ISDEAA contracts during the lapse in appropriations, including Ms. Pinto.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of June 2015.

Jeanette Quintero
Indian Self-Determination Awarding Official
Bureau of Indian Affairs, Navajo Region
Branch of Indian Self-Determination Services

EXHIBIT B

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

September 17, 2013

M-13-22

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Sylvia M. Burwell
Director

SUBJECT: Planning for Agency Operations during a Potential Lapse in Appropriations

Appropriations provided under the Consolidated and Further Continuing Appropriations Act, 2013 (P.L. 113-6) expire at 11:59 pm on Monday, September 30. The Administration does not want a lapse in appropriations to occur. There is enough time for Congress to prevent a lapse in appropriations, and the Administration is willing to work with Congress to enact a short-term continuing resolution to fund critical Government operations and allow Congress the time to complete the full year 2014 appropriations. However, prudent management requires that agencies be prepared for the possibility of a lapse. To that end, this guidance reminds agencies of their responsibilities to plan for agency operations under such a contingency.

At this time, agencies should be updating their plans for operations in the absence of appropriations, consistent with Section 124.2 of OMB Circular A-11 (which is available at http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s124.pdf). In doing so, agencies should refer to relevant legal opinions issued by the Attorney General and the Office of Legal Counsel of the Department of Justice, which set forth the legal requirements imposed by the Antideficiency Act (Act) during a lapse in appropriations and the guiding standards agencies should use in making decisions under the Act during a lapse in appropriations.

In updating contingency plans, agency leaders should ensure that only those activities that are "excepted" pursuant to applicable legal requirements would continue to be performed during a lapse in the appropriation for those activities (unless the agency has a separate funding source for an activity that will remain available during a lapse and that the agency would use for the activity's continued performance). Also, agency leaders should carefully review determinations regarding which employees would be necessary for the agency's continued performance of those "excepted" functions, to ensure that these case-by-case determinations are consistent with the applicable legal requirements.

In addition, agencies should consult the attached Frequently Asked Questions (FAQ) documents, which address technical questions about particular matters related to agency operations during a lapse in appropriations. OMB previously issued these FAQ documents in April 2011 and December 2011 (in conjunction with OMB Memoranda M-11-13 and M-12-03), and they provide an overview of relevant legal principles that apply to all government operations, address particular issues with contracts and grants, and answer questions relating to information technology, travel, orderly shutdown, and payment for excepted work. Also, the Office of Personnel Management (OPM) previously issued FAQs to assist agencies and employees on personnel issues associated with a funding lapse, which can be found on OPM's website.

Agencies should continue the process of updating their plans until further guidance is provided. Should it prove necessary, OMB will provide additional information on planning efforts at a later date, including regarding external outreach to stakeholders and the release of updated plans.

Agency leaders with questions on the contents of this Memorandum or about the process for updating plans for the orderly shutdown of operations should contact Joseph Jordan, OMB's Administrator for Federal Procurement Policy, or Geovette Washington, OMB's General Counsel. Your staff should direct queries to your OMB Resource Management Office or your agency's Office of General Counsel.

We greatly appreciate your cooperation. We will continue to be in close contact with you as developments unfold.

Attachments

Attachment 1

Frequently Asked Questions on Contracting, Grant Administration, and Payment Processing During a Lapse in Appropriations

As agencies update plans for an orderly shutdown in the event of an absence of appropriations, there are a number of cross-cutting issues that apply to all agencies. The below FAQ is meant to address these issues in a way that is understandable, accessible, and convenient to agencies. If you have further questions, please consult your agency counsel or your appropriate points of contact within OMB.

Normally, routine, ongoing operational and administrative activities relating to contract or grant administration (including payment processing) cannot continue when there is a lapse in funding. Therefore, agency employees who are paid with annual appropriations and who perform an activity associated with contract or grant administration (including oversight, inspection, payment, or accounting) should generally not continue work during a funding hiatus.

Below is an outline of the general principles that govern an agency's operations during a lapse in appropriations. Following this outline is a set of Q&As, based on these principles, for agencies to use in addressing contract and grant situations that arise during a lapse in appropriations.

The outline and Q&As are based on the legal opinions issued by the Justice Department (DOJ), and the guidance issued by the Office of Management and Budget (OMB), regarding agency operations during a lapse in appropriations (see, generally, OMB Circular A-11, Section 124). To the extent that agency staff need further guidance regarding the situations addressed below, or on other situations involving contracts and grants, the staff should consult with the agency counsel, which may in turn consult with OMB and DOJ.

I. Basic Principles of Agency Operations during a Lapse in Appropriations.

The Antideficiency Act prohibits agencies from incurring obligations that are in advance of, or that exceed, an appropriation. Thus, with certain limited exceptions, an agency may not incur obligations when the funding source for the obligation is an appropriation that has lapsed.

A. Excepted activities under the Antideficiency Act (express statutory authorizations, emergency circumstances, and the President's constitutional authorities).

As DOJ has explained in its opinions, an agency may incur an obligation in the absence of an appropriation in certain "excepted" situations:

1. A statute or other legal requirement expressly authorizes an agency to obligate funds in advance of appropriations.

In very rare situations, Congress has granted an agency the statutory authority to incur obligations in advance of appropriations. The best known example, in the contracting realm, is the Civil War-era Feed and Forage Act (41 U.S.C. § 6301), which provides authority to the Defense Department to contract for necessary clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies in advance of appropriations. Other examples are the authorities provided by 25 U.S.C. § 99 (Bureau of Indian Affairs contracts for goods and supplies) and 41 U.S.C. § 6302 (Army contracts for fuel).

2. The function addresses emergency circumstances, such that the suspension of the function would imminently threaten the safety of human life or the protection of property.

As DOJ has explained, the emergency exception applies when both of the following exist:

(a) a reasonable and articulable connection between the obligation (in this case, involving a contract or grant) and the safety of life or the protection of property,

and

(b) some reasonable likelihood that either the safety of life or the protection of property would be compromised in some significant degree by failure to carry out the function in question -- and that the threat to life or property can be reasonably said to be near at hand and demanding of immediate response.

As the Antideficiency Act states, the emergency exception does not authorize the continuation of ongoing, regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property.

3. The function is necessary to the discharge of the President's constitutional duties and powers (e.g., Commander-in-Chief or conducting foreign relations).

B. Activities that an agency must continue, in the absence of appropriations, because their continuation is "necessarily implied" from the authorized continuation of other activities.

In addition, as DOJ has explained, there are a limited number of government activities which an agency must otherwise continue despite a lapse in their appropriations because the lawful continuation of other funded or excepted activities "necessarily implies" that these additional activities will continue as well. A "necessary implication" can arise when an agency needs to incur obligations, even though there has been a lapse in the appropriation against which those obligations would be charged, in order to implement:

1. An "orderly shutdown" when there has been a lapse in appropriations (as DOJ has explained, "authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies"),

2. One of the "excepted" activities in I.A. above, or

3. A congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse (including funds already obligated from the current fiscal year), where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of the statutory authorization or appropriation. The touchstone of the analysis is determining whether execution of the terms of the statutory provision – not the terms of the funded contract or grant pursuant to that statute – would be significantly damaged in the absence of immediate performance of the unfunded, related activity.

As DOJ has explained, an example of a "necessarily implied" activity, for which obligations can continue to be incurred despite a funding lapse, are the administrative activities (funded out of annual appropriation) that are necessary to disburse benefit payments under entitlement programs, such as social security benefits, for which an indefinite appropriation provides the funding for the benefits (and for which there is a congressional authorization to make regular payments to beneficiaries).

However, as DOJ has also explained, a "necessary implication" may not ordinarily be inferred from the kind of broad, categorical authority that often appears in the organic statutes of government agencies.

Moreover, the fact that an agency has unobligated balances (appropriated in a prior fiscal year on a multi-year or no-year basis) that continue to remain available for funding a program does not, in itself, demonstrate that the incurring of obligations for related activities (for which there has been a lapse in appropriations) is necessarily implied. In this regard, it is often the case that agencies possess discretion with respect to when, during the period of availability, the agency engages in activities for which Congress has provided funding. Furthermore, in those cases when Congress has provided funding on a multi-year or no-year basis, the agency may often possess substantial discretion with respect to the timing of when the agency carries out these funded activities. In such situations, where an agency is not otherwise compelled by the terms of a statute to engage in a funded activity during a period in which there is a lapse in appropriations, there is not a "necessary implication" that the agency must incur obligations for related activities for which the appropriation has lapsed.

II. Questions and Answers on Contracts and Grants.

The following Q&As address principally the impact on contract and grant activity of a lapse of appropriations, with respect to an agency incurring obligations for the contract or grant itself as well as for the administrative activities in support thereof.

Of course, in the situation in which performance under an already-issued contract or grant is not impacted by such a lapse, the contractor or grantee may continue to proceed with its work during

the lapse period. An example is the situation where an agency has already obligated funds representing the entire price under a contract or task order before the funding lapse began, or where the agency may use multi-year or no-year funds to incur new obligations for the contract or grant. This assumes there is no problem with funding for any necessary related activities, for example, by federal employees overseeing the contract or grant. The question of what to do if necessary activities related to the contract or grant are funded out of lapsed appropriations is addressed in Question 5 below.

A. Incurring New Obligations for Contracts or Grants.

Q1. When an appropriation has lapsed, may an agency incur a new obligation – by signing a new contract or grant, or by extending a contract or a grant, or by exercising a renewal option – when the funding source for that obligation would be the lapsed appropriation?

A1: No – except in very limited circumstances.

The Antideficiency Act prohibits agencies from incurring obligations that are in advance of, or that exceed, an appropriation. Thus, except in certain limited circumstances, an agency may not incur obligations when the funding source for the obligation would be an appropriation that has lapsed. As outlined above in I.A.-B., these limited circumstances are when:

1. A statute expressly authorizes an agency to obligate funds in advance of appropriations.

2. The function addresses emergency circumstances, such that the suspension of the function would imminently threaten the safety of human life or the protection of property.

3. The function is necessary to the discharge of the President's constitutional duties and powers.

4. The agency must continue the function, in the absence of appropriations, because its continuation is "necessarily implied" from the continuation of other authorized activities.

In these limited circumstances, an agency may incur the obligation (e.g., by awarding a contract to support an emergency activity, such as the minimal necessary guard services to protect a facility), but the agency cannot pay the contractor until appropriations are enacted. Agency staff should work with agency counsel to establish if such an exception may be appropriately invoked.

Q2. May an agency incur a new contractual or grant obligation in order to address emergency circumstances, even though the annual appropriation, against which the obligation would be charged, has lapsed?

A2: Yes, if the new obligation is necessary to address emergency circumstances that imminently threaten the safety of human life or the protection of property. See I.A.2., above, and the DOJ

opinions that address the emergency exception.

Q3. May an agency incur a new contractual or grant obligation – even though the appropriation for this obligation has lapsed – as part of the agency carrying out a program that is separately funded through an appropriation that remains available?

A3: That depends on whether the authority to incur the obligation during the lapse is a "necessary implication" of the program (see I.B. above).

Q4: May an agency incur a new contractual or grant obligation that would be charged against an appropriation that remains available for obligation if the agency would not incur any related obligations (such as for administrative activities by agency employees) for which the appropriation has lapsed?

A4: Yes. In this situation, the agency may incur the new contractual or grant obligation, since both the contract or grant obligation itself, as well as the obligations for necessary related activities (e.g., the administrative actions that are needed in order for the agency to incur the contract or grant obligation), may be charged against an available appropriation.

B. Continued Performance of Administrative, Supervisory, or Support Activities, During a Funding Lapse, In Connection With a Previously-Awarded Contract or Grant.

Q5: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. If there has been a lapse in the appropriation that funds the Federal employees who supervise or support the performance of the contract or grant, can the Federal employees continue these activities during the funding lapse?

A5: In most cases, the absence of appropriations would prevent the continuation of such supervision or support. Routine ongoing activities, related to the agency's contract and grant administration, would not usually be authorized to continue when there has been a lapse in the appropriation that funds the contract and grant administration activities. In other words, during a funding lapse, the performance – by contracting officers, contracting officer technical representatives, contract administration personnel, and grants management specialists – of routine oversight, inspection, accounting, administration, payment processing, and other contracting or grant management activity would generally not continue.

There are very limited circumstances under which such work may continue, notwithstanding the lapse in appropriations. As is further explained in I.B. above, these limited circumstances are when the continued performance of the contract or grants administration is "necessarily implied" for carrying out:

1. An "orderly shutdown" when there has been a lapse in appropriations,

2. One of the "excepted" activities in I.A. above (i.e., express statutory authorizations, emergency circumstances, and the President's constitutional authorities), or

3. A congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse, where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of the statutory authorization or appropriation.

For example, in the situation where an agency has awarded a contract to provide services that are necessary to address emergency circumstances that pose an imminent threat to life or property, some contract administration might well be necessary in order to enable this "excepted" activity to accomplish its objective (e.g., where a contractor cannot perform an emergency service unless the contractor receives direction from the contracting officer regarding how and where to proceed). In that situation, that direction by the contracting officer would be a "necessarily implied" activity, and thus could occur even though there has been a lapse in the appropriation that funds contract administration.

Another example might be a grant program that cannot proceed to the next milestone, under the previously-awarded grant, unless the grant administrator provides approval to the grantee for its continued performance. If the grant program is one that is mandated by Congress, and if failing to proceed to that next milestone – during the period of the funding lapse – would violate a statutory timetable, then in that case the review and approval by the grant administrator would be a "necessarily implied" activity, and thus could occur even though there has been a lapse in the appropriation that funds grant administration. Again, the touchstone of the analysis is determining whether execution of the terms of the statutory authorization or appropriation for which funding remains available – not the terms of the funded contract or grant pursuant to that statute – would be significantly damaged in the absence of performance of the unfunded activity.

These situations are expected to be very limited ones, and the employee may be excepted from furlough only for the bare minimum of time necessary to carry out the review and approval.

Q6: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. In addition, the agency has determined that, due to a lapse in the appropriation that funds the Federal employees who supervise or support the performance of the contract or grant, those Federal employees cannot continue these activities during the funding lapse. In the absence of such supervision or support, may the contractor or grantee nevertheless continue performance?

A6: If the continued supervision or support, during the lapse period, is not critical to the contractor's or grantee's continued performance during that period, then the contractor or grantee may continue to proceed with its work. This is the case, for example, if an agency had obligated funds representing the entire price for a good or service under a contract or task order before the funding lapse began. In that example, the agency would not have to issue an affirmative direction to the contractor or grantee to continue performance, such as a notice to proceed. Instead, the

contractor or grantee could continue to engage in performance. (It is always prudent to be in communication with the contractor or grantee to avoid a misunderstanding.)

However, depending on the duration of a funding lapse, the absence of available Federal employee oversight may lead an agency to reconsider whether the contract or grant activity should continue to be performed. In particular, if the continued supervision or support, during the lapse period, is critical to the contractor's or grantee's continued performance during that period, then – where consistent with law and the terms of the contract or grant – the agency should instruct the contractor or grantee to suspend performance.

The same would be true if continued performance depends on the participation of other Federal agencies or the availability of other Federal facilities that would be precluded by the lapse of appropriations.

Q7: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. In addition, the agency has determined that the continued performance of the contract or grant, during a lapse in appropriations, does not require the supervision or support of Federal employees who may not continue to perform these activities during the funding lapse. In that case, should performance of the contract or grant always continue during the funding lapse?

A7: The first consideration is whether continued performance of the contract or grant is required in order for the agency to comply with its authorization or appropriations statute.

If it is the case that continued performance is statutorily required, then performance should proceed.

If continued performance is not statutorily required, then the agency should consider whether having the contract move forward is a sensible use of taxpayer funds in light of the lapse of appropriations. In this regard, there might be situations in which the continued performance of a contract would be wasteful due to the impact that the funding lapse is having on other agency activities. For example, if a Federal building is closed due to the funding lapse, it might be wasteful to have a contractor perform its normal duties of emptying trash cans every day in the building's offices. In that situation, the agency should consider whether to have the contractor suspend performance.

If an agency decides that continued performance would be wasteful and thus should be suspended during the funding lapse, the agency should take appropriate contractual action (which would be part of the agency's orderly-shutdown activities). Contracting staff will need to work closely with agency counsel in making and implementing these decisions to minimize costs to the government.

Q8: Is the duration of a funding lapse a factor in the analysis in Q&As 5-7?

A8: Yes. In evaluating whether, and to what extent, Federal employee activities – and contractor or grant performance – should continue during a lapse in appropriations, agencies should consider whether these activities or the performance can be postponed until after appropriations are enacted.

In some cases, activities and performance would not qualify for continuation during a very brief funding lapse (under the analysis in Q&As 5-7), but they would qualify if the duration of the funding lapse became longer.

In other cases, the opposite conclusion should be reached, namely, that activities or performance which would qualify for continuation at the outset of a funding lapse, or at some point during a funding lapse, become unnecessary – having been discharged – and thus should be discontinued (e.g. in the case of an agency's initial shutdown activities, or in the case of the one-time, grant-administrator approval that is discussed in the answer to Question 5).

Another situation in which the duration of a funding lapse can have a significant impact on the analysis is where the agency had previously awarded a contract or grant, and – under the analysis in Q&As 5-7 – the contractor or grantee could continue to perform during the initial period of the funding lapse. However, if the funding lapse extended for a sufficiently long period, a situation might arise in which continued performance could occur only if the agency obligated additional funds to the contract or grant. Whether the agency could obligate such additional funds would depend on whether the lapse of appropriations includes the funding for the contract or grant payments, and/or for the contract or grants administration, and whether the continued performance would be wasteful because of the impact of the funding lapse on other agency activities. The agency would therefore need to undertake the analysis under Q&As 2-8 to determine how to proceed in that situation. If the agency determines that the contract or grant performance should discontinue due to the funding lapse, then the agency would not obligate additional funds to the contract or grant, and the contactor or grant would cease work when the previously-obligated funds run out. (Agencies would be well advised to communicate with contractors to avoid any misunderstanding.)

C. Making Payments to Contractors and Grantees during a Lapse in Appropriations

Q9: In the case of a contract or grant that has been previously awarded (and thus for which available funds were obligated), can Federal employees be excepted from furlough in order to make timely payments to the contractor or grantee in accordance with the contract or grant?

A9: No – except in very limited circumstances.

During a lapse in appropriations, the activity of making contract and grant payments on a timely basis does not, by itself, qualify as one of the limited circumstances for which obligations can be incurred under the Antideficiency Act (as outlined in I.A.-B., above). In this regard, the fact that the government would incur interest penalties under the Prompt Payment Act or other law, due to

the delay in payment caused by a funding lapse, does not provide a legal justification under the Antideficiency Act for an agency to continue to make payments during a funding lapse.

An exception would exist in the very limited situation in which making the payment to a contractor or grant – during the funding lapse – is "necessarily implied" under the analysis outlined in I.B., above. There may be very limited circumstances where making a payment, during the funding lapse, is necessary because the agency's failure to make the payment – during the funding lapse – itself would result in an imminent threat to life or property, or would critically impair the President's constitutional functions, or would prevent or significantly damage the execution of a congressionally authorized and funded function. In that latter situation (applying the analysis in I.B.3., above), the agency must determine that (1) the continuation of the program during the funding lapse has been contemplated by Congress in authorizing or appropriations legislation, (2) the agency's failure to make the payment during the funding lapse would delay contract or grant performance, and (3) this delay in payment would significantly damage the execution of the terms of the authorizing or appropriations legislative provision.

Q10: Can an agency pay a contractor or grantee, during a funding lapse, for performance under a contract or grant that the agency awarded during the funding lapse under one of the exceptions to the Antideficiency Act (see Q&As 1-2)?

A10: No. As is the case with federal employees who are excepted from furlough to perform authorized activities during a funding lapse, the agency will incur obligations for the excepted work that a contractor or grantee is authorized to perform during a funding lapse. However, as with the pay of the excepted federal employees, the agency cannot liquidate those contract and grant obligations until an appropriation is enacted.

D. Can Non-furloughed Employees Perform Other Work?

Q11: The agency has excepted, from furlough, employees who are performing necessary contract or grant support functions for an "excepted" activity or under the "necessarily implied" standard. Can these employees also continue to perform other work (that is not for an excepted activity and is not "necessarily implied") during the remaining hours of the workday?

A11: If the non-furlough ("excepted') support function can be performed in less than an entire day, the employee is required to resume furlough status after completing the function.

However, there may be cases in which an employee is required to perform this "excepted" support function intermittently throughout the course of the day, and the intervals in between are too short to enable the employee to be furloughed and then recalled in time to perform the function. In such cases, the employee may remain at work, and may perform non-"excepted" functions during these intervals. In such situations, agencies must minimize the number of employees who are performing "excepted" functions on an intermittent basis, by consolidating the "excepted" functions, to the extent possible, for performance by a smaller number of employees (e.g., agencies

should not except, from furlough, multiple employees in order to perform intermittent "excepted" work, when instead the agency could have fewer employees perform the "excepted" work on more of a full-time basis). In this way, the agency properly minimizes its reliance on the Antideficiency Act to incur obligations for which the appropriation has lapsed.

Attachment 2

Supplement to Frequently Asked Questions Concerning Contingency Planning for Lapse in Appropriations

The FAQs below are designed to respond to additional questions posed by agencies in preparation for prior potential lapses in appropriations concerning IT, travel, orderly shutdown, and entitlement to payment for excepted work, and build upon the Basic Principles of Agency Operations During a Lapse in Appropriations that were set forth in the FAQs on Contracting, Grant Administration, and Payment Processing During a Lapse in Appropriations.

A: Information Technology

Q1: What is the controlling consideration for the continuity or suspension of IT operations for an agency during a lapse in appropriations?

A1: The consideration governing all determinations concerning continuity or suspension of Federal activities funded through lapsed appropriations is that such activities, including IT operations, may continue only if they are excepted activities under the Antideficiency Act, or where their continuation is necessarily implied from a congressional authorization or appropriation of other continued functions.

Q2: How should agencies determine what systems, including linked interoperable systems, are to be maintained and operated during an appropriations lapse?

A2: If a single system must operate to avoid significant damage to the execution of authorized or excepted activities, only this system should maintain operations, and support for continued operation of the single system (whether by agency IT staff or by a contractor) should be the minimum necessary to maintain functionality and ensure the security and integrity of the system during the period of the lapse. If the integration of that system with other systems makes it infeasible to maintain operation of the single system without maintaining others with which it is integrated, an agency must provide guidance on operations consistent with avoiding any imminent threat to Federal property (including avoiding any permanent disruption to agency IT systems and ensuring preservation of agency electronic records). Given that websites represent the front-end of numerous back-end processing systems, agencies must determine whether the entire website can be shut down or components of the website will be shut down.

Q3: What is the guidance on keeping Government websites up during a lapse in appropriations if the costs of maintaining the website are funded by a lapsed appropriations source?

A3: The same standards described above would apply. The mere benefit of continued access by the

public to information about the agency's activities would not warrant the retention of personnel or the obligation of funds to maintain (or update) the agency's website during such a lapse. However, if maintenance of the website is necessary to avoid significant damage to the execution of authorized or excepted activities (e.g., maintenance of the IRS website may be necessary to allow for tax filings and tax collection, which are activities that continue during an appropriations lapse), then the website should remain operational even if its costs are funded through appropriations that have lapsed. If it becomes necessary to incur obligations to ensure that a website remains available in support of excepted activities, it should be maintained at the lowest possible level. For example, in the IRS case above, the IRS website would remain active, but the entire Treasury Department website would not, absent a separate justification or a determination that the two sites cannot not feasibly be operated separately.

Q4: What notice should agencies provide to the public regarding the status of their websites during a lapse of appropriations?

A4: If an agency's website is shut down, users should be directed to a standard notice that the website is unavailable during the period of government shutdown. If any part of an agency's website is available, agencies should include a standard notice on their landing pages that notifies the public of the following: (a) information on the website may not be up to date, (b) transactions submitted via the website might not be processed until appropriations are enacted, and (c) the agency may not be able to respond to inquiries until appropriations are enacted.

Q5: What if the cost of shutting down a website exceeds the cost of maintaining services?

A5: The determination of which services continue during an appropriations lapse is not affected by whether the costs of shutdown exceed the costs of maintaining services.

Q6: If websites are down, will agencies be able to extend deadlines for applications that would otherwise have been due during the lapse in appropriations?

A6: To the extent permitted by law, agencies may extend deadlines for activities, as necessary to compensate for the period of the lapse in appropriations and the unavailability of the website.

Q7: What is the guidance regarding the use of mobile devices such as Blackberries, or home access to work email through Secure ID?

A7: Furloughed employees should be given clear guidance that the prohibitions of the Antideficiency Act extend to work performed from outside of the office, including via mobile devices or remote computer connections. Orderly shutdown procedures should not rely on mobile devices or home access to work email for providing notices of when to return to work. Agencies have discretion to enforce these access restrictions in light of their own particular needs. Some may choose, for example, to include in orderly shutdown activities a requirement that furloughed employees turn in their Blackberries until they return to the office; others may determine that circumstances warrant a different approach.

B. Orderly Shutdown

Q8: How long should "orderly shutdown" take?

A8: Ordinarily, furloughed employees should take no more than three or four hours to provide necessary notices and contact information, secure their files, complete time and attendance records, and otherwise make preparations to preserve their work. OMB Circular A-11 requires agencies to provide OMB with written justification for the conduct of orderly shutdown activities in excess of a half-day. While it may be appropriate in limited circumstances for some employees to take longer to assist in shutdown activities (e.g., seeking court continuances or stop-work orders on pending contracts), these may not be necessary in the event that a very short period of a lapse in appropriations is anticipated. Agencies should make every effort to prepare for these needs in advance of a lapse so that orderly shutdown activities are minimized.

Q9: In the event of a lapse on a Friday, when would employees whose schedule is a normal Monday-Friday work week and who are funded by annual appropriations be expected to conduct orderly shutdown activities?

A9: They should be directed to return to work on the following Monday morning to conduct such activities.

Q10: Does this mean that they can continue to work remotely over the preceding weekend?

A10: No. Following a lapse in appropriations, the Antideficiency Act bars nonexcepted work by such employees other than to perform orderly shutdown activities.

C. Travel

Q11: If employees funded through appropriations that have lapsed are on temporary duty assignments away from their normal duty stations at the time of an appropriations lapse, can they make arrangements to return home sooner than planned?

A11: They are encouraged to do so wherever reasonable and practicable. However, agencies should make a determination of reasonableness and practicality based on the length of the assignment and the time required for return travel, compared to the anticipated length of the lapse, so as to minimize the burdens of doing so.

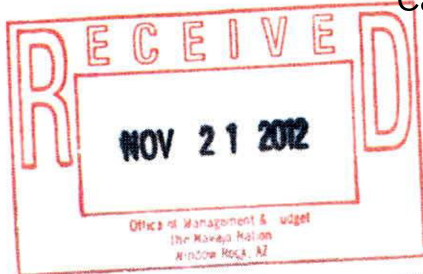
D. Entitlement to Payment for Excepted Work

Q12: How will excepted employees be paid for excepted work required during the lapse in appropriations?

A12: Without further specific direction or enactment by Congress, all excepted employees are

entitled to receive payment for obligations incurred by their agencies for their performance of excepted work during the period of the appropriations lapse. After appropriations are enacted, payroll centers will pay all excepted employees for time worked.

EXHIBIT C



THE NAVAJO NATION
Budget Summary on
Fiscal Year 2013 P.L 93-638 BIA Funding

Part 1. - Program Information:

A. Program / Division: Judicial - Tribal Courts

B. Contract No.: A12AV00698

Part II. - Budget Information:

A	B	C	D
Major Category	**Description**	**Explain or give example on purpose of the budget.**	**Budget Amount**
2001	Personnel Salary	To fund 22 full time positions for 17 business units	$1,112,391.00
2900	Fringe Benefit	To provide Fringe Benefits for Judicial Branch employees.	$659,036.00
3000	Travel	To provide for fleet, mileage meals and travel expenses related to court operations.	$61,000.00
3500	Meeting	To provide for meals, mileage, stipend, trainings & other travel expenses related to peacemakers.	$7,000.00
4000	Supplies	To provide for ofc, general operating supplies, postage, custodial, printing, photocopying & etc.	$34,523.00
5000	Lease & Rental	To provide for office and media equipment rental for program use and building rental.	$48,000.00
5500	Communication & Utilities	To provide services for basic telephone, energy, data conv-utilities , and internet connectivity.	$53,000.00
6000	Repairs & Maintenance	To provide for repairs building, furniture & Equip., computer, and hardware upgrade.	$55,000.00
6500	Contractual Service	To provide for technical services exp., Transcription & Interpretation, security services & etc.	$0.00
7000	Special Transactions	To provide expenses for advertising, training, (insurance premiums for - equipment property, tribal vehicles and general liability for personnel expenses).	$43,000.00
8000	Assistance		
9000	Capital Outlay	To provide for replacement of equipment and furniture.	$0.00
9720	Indirect Cost		
		Total Budget	$2,072,950.00

Part III. - Signatures:

[signature] 11/13/12
Program Manager / Date

[signature] 11/13/12
Division Director / Date

EXHIBIT D

APPENDIX F

DESIGNATION OF DMO, DAE, CDFO, AND AWARDING OFFICIALS - DOI

Description	Organization	
	Bureau of Indian Affairs	**Bureau of Land Management**
Designated Management Official (DMO)	The Area Director or Superintendent with the authority to approve or decline a contract proposal within their respective jurisdiction.	The State Director (or designee) is authorized to approve, negotiate, and administer Title I, Indian Self-Determination Act contracts.
Designated Agency Employee (DAE)	Program official, management official, or contracting officer (will probably be different for each contract).	
Contract Designated Federal Official (CDFO)		Program official, management official, or contracting officer will probably be different for each contract.
Awarding Official (AO)	The obligation (award) of funds for 638 contracts is in accordance with existing State director procurement delegations. In most cases, the Awarding Official will be a Contracting Officer (CO). BLM State Office COs can award contracts up to $100,000. Contracts above this amount must be awarded by the CO at BLM's National Business Center in Denver.	

APPENDIX F

DESIGNATION OF DMO, DAE, CDFO, AND AWARDING OFFICIALS - DOI (continued)		
Description	**Organization**	
	Minerals Management Service	**Bureau of Reclamation**
Designated Management Official (DMO)	The Associate Director for Royalty Management or his/her designee.	Regional Director or his designee, which could be the Deputy Regional Director, the American Affairs Program Manager, or other individual, as appropriate.
Designated Agency Employee (DAE)	Will be designated on a case-by-case basis, but typically will be the program's Self-Governance Coordinator.	Area Office Manager or his/her designee, which could be the Area Office Native American Affairs Coordinator, the Area Office Contracting Officer, or other individual, as appropriate.
Contract Designated Federal Official (CDFO)	Will be designated on a case-by-case basis, appropriate to the program being contracted.	
Awarding Official (AO)	The Associate Director for Royalty Management or his/her designee. The function may be further delegated.	Regional Director or his/her designee, which could be an Area Office Manager, an Area Contracting Officer, or other individual, as appropriate.

DESIGNATION OF DMO, DAE, CDFO, AND AWARDING OFFICIALS - DOI (continued)

Description	Organization	
	Fish and Wildlife Service	**National Park Service**
Designated Management Official (DMO)	The Regional Director (or designee) is authorized to approve, negotiate and administer Title I, Indian Self-determination Act contracts.	The Regional director (or designee) is authorized to approve, negotiate, and administer Title I, Indian Self-Determination Act contracts.
Designated Agency Employee (DAE)	Program official, management official, or contracting officer (will probably be different for each contract).	Program official, management official, or contracting officer (will probably be different for each contract).
Contract Designated Federal Official (CDFO)		
Awarding Official (AO)	The obligation (award) of funds for 638 contracts is in accordance with existing Regional director procurement delegations. In most cases, the Awarding Official will be a Contracting Officer (CO).	The obligation (award) of funds for Indian Self-Determination contracts is in accordance with existing Regional Director procurement delegations. In most cases, the Awarding Official will be a Contracting Officer (CO).

APPENDIX F

DESIGNATION OF DMO, DAE, CDFO, AND AWARDING OFFICIALS - IHS	
Description	**Organization**
	Indian Health Service
Designated Management Official (DMO)	The IHS Area Directors.
Designated Agency Employee (DAE)	The Area CPLO, Executive Officer, Administrative Officer, Contracting Officer, or other person as designated by the appropriate IHS Area Director.
Contract Designated Federal Official (CDFO)	The Area CPLO, Executive Officer, Administrative Officer, Contracting Officer, or other person as designated by the appropriate IHS Area Director. This could also be a Senior Program Official, if so designated by the Area Director.
Awarding Official (AO)	The Contracting Officer who is authorized to award and sign ISDA contracts.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVAJO NATION, a federally recognized Indian tribe, Navajo Nation Department of Justice,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:14-CV-01909 (TSC)
DEPARTMENT OF THE INTERIOR,	)	
and	)	
S.M.R. JEWELL, in her official capacity as Secretary, U.S. Department of the Interior,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S
STATEMENT OF ADDITIONAL MATERIAL FACTS

The United States Department of the Interior and S.M.R. Jewell, in her official capacity as Secretary of the Interior ("Defendants"), object to Plaintiff's Statement of Additional Material Facts As to Which There Is No Genuine Issue ("Plaintiff's Additional Statement") as contrary to the plain language of LCvR 7(h). "Quite clearly, the rule does not permit a party to file an additional statement of material facts after the principal briefing on a party's motion for summary judgment has been completed and an opposition has already been filed." *Sloan ex rel Juergens v. Urban Title Servs., Inc.*, 652 F. Supp. 2d 51, 55 (D.D.C. 2009). Any facts Plaintiff needs to oppose Defendants' cross-motion for summary judgment should be contained in Plaintiff's response to Defendants' Statement of Material Facts, and any facts Plaintiff needs to support Plaintiff's motion for summary judgment should have been contained in Plaintiff's original Statement of Material Facts. "Such [an additional statement of material facts] not only

contradicts the plain language of this rule, but also violates the principal intent behind the requirements of LCvR 7(h) to ensure that all parties are aware of and work from the same set of material facts in discussing and responding to the merits of the relevant motion(s) for summary judgment." *Id*.

In the event this Court permits Plaintiff to file the Additional Statement, Defendants, by and through undersigned counsel, respectfully submit this Response to Plaintiff's Additional Statement ("Response"). This Response is designed solely to respond to the Plaintiff's Additional Statement by identifying which of the factual grounds for Plaintiff's Motion for Summary Judgment are disputed. These disputes relate only to facts Plaintiff proffers, and have no bearing on Defendants' Motion for Summary Judgment or the factual support for that Motion. Defendants maintain that there are no genuine issues of material fact with respect to the grounds entitling Defendants to summary judgment.

The paragraph numbers for this Response refer to the corresponding numbers in Plaintiff's Additional Statement:

1. Paragraph 1 of Plaintiff's Additional Statement constitutes Plaintiff's characterization of an October 1, 2013, letter, to which the Court is respectfully referred for a full and accurate statement of its contents.
2. Defendants are without sufficient information to form a belief as to the truth of Paragraph 2 of Plaintiff's Additional Statement.
3. Paragraph 3 of Plaintiff's Additional Statement constitutes Plaintiff's characterization of an October 1, 2013, letter, to which the Court is respectfully referred for a full and accurate statement of its contents.

4. Paragraph 4 of Plaintiff's Additional Statement constitutes Plaintiff's characterization of an October 1, 2013, letter, to which the Court is respectfully referred for a full and accurate statement of its contents.

5. Paragraph 5 of Plaintiff's Additional Statement constitutes Plaintiff's characterization of an October 3, 2013, letter, to which the Court is respectfully referred for a full and accurate statement of its contents.

6. Defendants are without sufficient information to form a belief as to the truth of Paragraph 6 of Plaintiff's Additional Statement.

7. Undisputed, except to the extent that Paragraph 7 of Plaintiff's Additional Statement contains legal conclusions and opinions, to which no response is required.

8. Defendants are without sufficient information to form a belief as to the truth of Paragraph 8 of Plaintiff's Additional Statement.

9. Defendants are without sufficient information to form a belief as to the truth of the first three sentences of Paragraph 9 of Plaintiff's Additional Statement. Defendants do not dispute that Mr. Ronald Duncan signed the sign-in sheet provided by the uniformed officer at the BIA's Navajo Regional Office at approximately 3:00 p.m. on October 4, 2013, and Mr. Duncan handed Plaintiff's proposed CY 2014 AFA for the Navajo Nation's Tribal Courts program to Indian Self-Determination Specialist Raymond Slim, an employee of the BIA. *See* Stipulations ¶ 15; Compl. Ex. I; Answer ¶ 15; Quintero Decl. ¶ 11. Defendants dispute the materiality of the remainder of Paragraph 9 of Plaintiff's Additional Statement. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("As to materiality, the substantive law will identify which facts are material.").

10. Defendants dispute the materiality of Paragraph 10 of Plaintiff's Additional Statement. Paragraph 10 is otherwise undisputed.

11. Defendants dispute the materiality of Paragraph 11 of Plaintiff's Additional Statement. Paragraph 11 is otherwise undisputed.

12. Defendants dispute the materiality of Paragraph 12 of Plaintiff's Additional Statement. Paragraph 12 is otherwise undisputed.

13. Defendants dispute the materiality of Paragraph 13 of Plaintiff's Additional Statement. Paragraph 13 is otherwise undisputed.

14. Defendants dispute the materiality of Paragraph 14 of Plaintiff's Additional Statement. Paragraph 14 is otherwise undisputed.

15. Defendants dispute the materiality of Paragraph 15 of Plaintiff's Additional Statement. Paragraph 15 is otherwise undisputed.

16. Defendants dispute the materiality of Paragraph 16 of Plaintiff's Additional Statement. Paragraph 16 is otherwise undisputed.

17. Defendants dispute the materiality of Paragraph 17 of Plaintiff's Additional Statement. Paragraph 17 is otherwise undisputed.

18. Defendants dispute the materiality of Paragraph 18 of Plaintiff's Additional Statement. Paragraph 18 is otherwise undisputed, as of the date of former Chief Justice Yazzie's declaration. Defendants note that Mr. Yazzie stepped down from his position as Chief Justice effective May 15, 2015. *See Chief Justice Herb Yazzie Retires May 15*, Navajo-Hopi Observer, May 19, 2015, available at http://nhonews.com/main.asp?SectionID=1&SubSectionID=795&ArticleID=16896.

19. Defendants dispute the materiality of Paragraph 19 of Plaintiff's Additional Statement. Paragraph 19 is otherwise undisputed.

20. Defendants dispute the materiality of Paragraph 20 of Plaintiff's Additional Statement. Paragraph 20 is otherwise undisputed.

21. Defendants dispute the materiality of Paragraph 21 of Plaintiff's Additional Statement. Paragraph 21 is otherwise undisputed.

22. Defendants dispute the materiality of Paragraph 22 of Plaintiff's Additional Statement. Paragraph 22 is otherwise undisputed.

23. Defendants dispute the materiality of Paragraph 23 of Plaintiff's Additional Statement. Defendants note that the operation and maintenance of multi-purpose justice complexes is addressed by the BIA's Office of Justice Services and Office of Facilities and Maintenance, and such funding requests should be submitted as a separate proposal for operation and maintenance costs rather than as part of an AFA proposal. *See* Compl. Ex. J at 1; Def. MSJ Ex. D at 1.

24. Defendants dispute the materiality of Paragraph 24 of Plaintiff's Additional Statement. Defendants note that the operation and maintenance of multi-purpose justice complexes is addressed by the BIA's Office of Justice Services and Office of Facilities and Maintenance, and such funding requests should be submitted as a separate proposal for operation and maintenance costs rather than as part of an AFA proposal. *See* Compl. Ex. J at 1; Def. MSJ Ex. D at 1.

25. Paragraph 25 of Plaintiff's Additional Statement contains legal conclusions and opinions to which no response is required. To the extent a response is required, it is disputed. Defendants note that if the Navajo Nation retroceded the Tribal Courts Program pursuant

to 25 U.S.C. § 450j(e) and 25 C.F.R. §§ 900.240–900.245, the Secretary would use the Secretarial amount that was retroceded and would not receive additional funding to run the Tribal Courts Program.

26. Paragraph 26 of Plaintiff's Additional Statement constitutes Plaintiff's characterization of Plaintiff's CY 2014 AFA budget proposal and the Contract's Scope of Work, to which the Court is respectfully referred for a full and accurate statement of their contents. *See* Stipulations ¶ 19; Def. MSJ Ex. A, Att. A at 1-2; Compl. Ex. B, Att. B.

27. Defendants do not dispute that the annual funding levels proposed by tribal organizations, including Navajo Nation, for self-determination contract programs have historically exceeded the available funding for such programs. The remainder of this paragraph is disputed. *See* Stipulations ¶¶ 11-14 (describing negotiations surrounding the CY 2013 AFA); Quintero Decl. ¶¶ 14-18 (describing history of negotiation between the parties).

28. Defendants dispute the materiality of Paragraph 28 of Plaintiff's Additional Statement. Defendants note that the statutory benchmark (*i.e.*, the amount that the BIA would have otherwise provided for the program in CY 2014) is the $1,292,532 Secretarial amount determined pursuant to 25 U.S.C. § 450j-1(a)(1).

29. Defendants dispute the materiality of Paragraph 29 of Plaintiff's Additional Statement. Defendants are otherwise without sufficient information to form a belief as to the truth of Paragraph 29 of Plaintiff's Additional Statement.

DATED: June 17, 2015

Respectfully submitted,

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ERIC R. WOMACK
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/s/ Elizabeth L. Kade
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