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

NAVAJO HEALTH FOUNDATION - SAGE MEMORIAL HOSPITAL, INC.,	)	
	)	**NO. 1:14-cv-958-JB-GBW**
PLAINTIFF,	)	
	)	**PLAINTIFF'S REPLY**
v.	)	**MEMORANDUM IN SUPPORT**
	)	**OF MOTION FOR PARTIAL**
SYLVIA MATHEWS BURWELL, *et al.*,	)	**SUMMARY JUDGMENT ON**
	)	**THE ISSUE OF ALLOCATION**
DEFENDANTS.	)	**(Doc. 199)**
	)	

A. THE GOVERNMENT'S ALLEGED MATERIAL FACTS TELL ONLY PART OF THE STORY.

Pursuant to Local Rule 56.1(b), Defendants assert two additional facts allegedly relevant to disposition of Sage's Allocation Motion.[1] Sage responds as follows:

A. Undisputed, except to clarify that Defendants *instructed* Sage to use a ratio to allocate its administrative costs. *See* Ex. A, Pfanner Dep. at 70:18-71:1 ("Q. Did you tell Sage it had to allocate costs to each funding source?", "A. Yes. The contract support cost policy requires an allocation plan and not -- not always, but generally what we do is we negotiate the requirement for the operation of the combined program and then allocate that requirement in proportion to revenue sources. And we did – we definitely did that in the 2009 negotiation."). Sage complied because it was required to do so.

B. Sage disputes the government's assertion that IHS funds account for approximately 55% of Sage's "expenditures in each year." The cited document states that "IHS funds account

[1] *See* Doc. 222 (Gov't Opp.) at 7 (Defs.' Fact II-A (concerning prior Sage proposals) and II-B (concerning Sage's annual health expenditures)).

for approximately 55% of Sage's *revenue*," not expenditures. Doc. 180 (Second Am. Compl. with Supp. Claim) ¶ 31 (May 3, 2016) (emphasis added).

B. A CONTRACTOR MAY RECEIVE CSC PAYMENTS TO THE EXTENT REQUIRED TO CARRY OUT ALL PORTIONS OF A CONTRACTED PROGRAM, INCLUDING THE PORTION FUNDED WITH NON-APPROPRIATED THIRD-PARTY REVENUE FUNDS.

Sometimes it is best to return to basics. The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-458ddd-2 (ISDEAA), expansively commands the Secretary to transfer over to a Tribe any of the Secretary's "programs or portions thereof . . . [that are] for the benefit of Indians because of their status as Indians." § 450f(a)(1)(E).[2] All Indian Health Service (IHS) programs fit that description and are therefore contractable under the ISDA. On the face of the Act, the source of the funding used by the agency to operate its programs is irrelevant.

When it comes to funding a program that is being contracted to a Tribe, the Act similarly instructs the Secretary to transfer to the Tribe the so-called "Secretarial amount," an amount of funds that is "not … less than [the amount] the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof" being contracted. § 450j-1(a)(1). Again, the *source* of the funds the Secretary would have used, *i.e.*, "otherwise provided" to operate the program, is irrelevant.

But here the government argues otherwise, and the linchpin to its entire opposition is the assertion that the only monies the Secretary "otherwise provide[s]" to operate the agency's

[2] Unless otherwise specified, all statutory citations are to Title 25 of the United States Code (25 U.S.C. § ---).

programs, and thus the only monies she must therefore transfer to a contracting Tribe, are "appropriated" funds.[3]

That is not true. The Secretary routinely collects and spends third-party revenues (*i.e.*, Medicare, Medicaid and other third-party collections) to operate IHS programs. Doc. 199 (Sage Mot.) at 23. Sage does too, when operating the same programs. Yet the government insists here that the "Secretarial amount" described in § 450j-1(a)(1) does not include that revenue and therefore the government has no obligation to pay contract support costs on the portion of Sage's programs funded with that revenue.

The problem with the government's assertion is that it doesn't square with the Act. Section 450j-1(a)(1) states in full:

> The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall *not be less than the appropriate Secretary would have otherwise provided for the operation of the programs* or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(Emphasis added.) Notably, the statute doesn't say ". . . shall not be less than the appropriate Secretary would have otherwise provided <u>from appropriated funds</u> for the operation of the programs . . . ." So, too, the ISDEAA's contracting section doesn't refer to the Secretary contracting "programs or portions thereof <u>funded with appropriated dollars</u>." § 450f(a)(1). In short, *nothing* in the ISDEAA supports the government's assertion that the Act does not cover programs funded with both appropriated *and* non-appropriated dollars. And if that is the case,

[3] *See* Gov't Opp. at 9 ("the Government's payment obligation is circumscribed by the appropriated funds that would have been used for the operation of the PFSAs"); 33 ("the plain language of 25 U.S.C. § 450j-1(a)(1) limits the Secretarial amount to appropriated funds").

nothing in the ISDEAA supports the government's further assertion that it is not required to pay CSC for the portion of a contractor's program that is funded with third-party revenues. To imply that limitation engrafts on the Act a restriction Congress never conceived and certainly never stated.[4]

C. THE GOVERNMENT CANNOT MAKE UP FOR THE ABSENCE OF ANY LIMITING PROVISION IN THE ISDEAA BY INVOKING OTHER ARGUMENTS NOT ROOTED IN THE STATUTORY TEXT.

With no language in the Act to support its position, the government runs far afield in search of support elsewhere, but to no avail.

1. First, the government repeatedly invokes *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), a case involving the Bureau of Indian Affairs (BIA). *See* Gov't Opp. at 9-10, 33. But the BIA doesn't collect third-party revenues on the programs it operates—there is no equivalent to Medicaid in the law enforcement business—and so the statutory status of appropriated-versus-non-appropriated-dollars was never an issue in that case. Listing cases that cite *Babbitt* for entirely different purposes (*id*. at 9-10) hardly advances the government's cause here.

2. Second, the government launches into an elaborate discussion of an optional system for allocating costs (usually indirect costs) between contracted IHS programs (on the one hand), and other contracts and programs that Tribes operate in arrangements with other federal or state agencies (on the other). Gov't Opp. at 26-30. For this discussion the government features two

[4] Elsewhere, IHS similarly asserts that "the allocation approach is required by the statute," Gov't Opp. at 31, and that "allocating Sage's indirect costs across its various revenue streams is consistent . . . with the letter of the law . . . ," *id*. at 32. But the government never points to where in the statute or "the letter of the law" this allocation is to be found. While the government may insist that CSC is due only on the appropriations-supported portion of IHS's contracted programs, it is perfectly clear that Congress never said that.

cases, both of which dealt with whether the BIA or IHS could be compelled to fund indirect costs associated with some *other* agency's operations—*i.e.*, costs *not* associated with the IHS's programs or the BIA's programs. *Id*. at 27-28 (discussing *Ramah Navajo Chapter v. Lujan*, 112 F. 3d 1455 (10th Cir. 1997), and *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382 (D.D.C. 2008)).

In *Ramah*, the Tribe there sought to increase the amount the BIA owed for indirect CSC because the Tribe was barred from collecting a share of its general overhead from two contracts with the State of New Mexico that were funded by the U.S. Department of Justice. 112 F.3d at 1458-59. The Tribe proposed to increase its indirect CSC from the BIA by excluding the State contracts from the rate calculation base, resulting in a higher indirect cost rate payable by the BIA. *Id*. The Tenth Circuit agreed that all of the Tribe's indirect costs were "associated with" the BIA contract within the meaning of § 450j-1(d)(2), and that the BIA therefore owed the funds generated by the higher rate. *Id*. at 1461, 1463 (ruling it was unlawful for the BIA's share of the Tribe's overhead to be calculated as if the Justice Department were likewise contributing a share).

Congress in 1999 responded to the *Ramah* decision by enacting two provisions commanding that CSC was not legally available to cover costs attributable to any contract other than a contract with the BIA or IHS. *See* §§ 450j-2 (IHS), 450j-3 (BIA). Subsequently the district court in *Tunica* rejected a claim by the Tunica Tribe seeking a rate adjustment similar to the adjustment approved by the Tenth Circuit in *Ramah*. *See* 577 F. Supp. 2d at 390-91 (the Tunica claim was that its indirect cost rate was "miscalculated . . . [because] other federal agency programs [were included] in the direct cost base . . . which 'cause[d] the indirect[] cost rate to go

down.'"). The court concluded that the Tunica claim was barred by the intervening legislation, holding "Section 450j-2 explicitly prohibits the funding of indirect costs 'associated with' non-IHS entities." *Id*. at 418.

How any of this helps the government here is a mystery. Even the government acknowledges that, unlike these cases and unlike the focus of § 450j-2, "Sage does not complain that IHS should provide CSC for revenue streams it obtains from other government awards[.]" Gov't Opp. at 28. And while the government may try to argue that "the analysis from *Tunica-Biloxi* still applies" (*id*.), that is an impossible leap when *Tunica* (like *Ramah*) involved "other federal agency programs," while this case does not. Instead, this case involves two revenue streams—appropriated funds and third-party revenues—that provide funding for one agency's programs that are contracted by Sage.

Indeed, once the issue of funding for the indirect costs of other agencies is taken out of the mix, the Tenth Circuit's *Ramah* decision becomes fatal for the government. While Congress legislatively overruled the Tenth Circuit's holding that the Secretary could be compelled to fund the indirect costs associated with *other agencies'* contracts, nothing in § 450j-2 detracts from the proposition that under the ISDEAA the Secretary must pay full indirect costs associated with operating *her own agency's contracts*. And on the Secretary's responsibility, the Tenth Circuit was clear:

> [T]he 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts. Although this directive gives defendants discretion to determine which contract support costs are reasonable and necessary to carry out a particular contract, it does not give defendants discretion to deprive a tribe of the full amount of contract support costs which are deemed reasonable and necessary.

112 F.3d at 1463. Just as was the case in *Ramah*:

> Not only does [the Secretary's] interpretation not benefit tribes that have chosen to enter into self-determination contracts, it harms them by depriving them of funds necessary to carry out those contracts. Contrary to the entire purpose of the Act, defendants' interpretation of the indirect costs funding provision does nothing to "assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities," or to "[enhance] the development and perception of Indian tribes as self-government entities." S. Rep. No. 274, 100th Cong., 1st Sess. 1-2.

Id. at 1462.

This Circuit has instructed that "'if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way.'" *Id*. (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988)). Nothing in the government's presentation reveals where in the statutory text Congress barred the payment of CSC associated with the third-party revenue portion of Sage's contracted IHS programs—revenues that Sage's contract with IHS commands Sage must spend to carry out the contract's purposes. Doc. 199-9, Ex. I (2008-2010 Contract) at 3; Doc. 199-10, Ex. J (2011-2013 Contract) at 3 ("All program income collected by Sage shall be treated as additional supplemental funding to that negotiated in the AFA and Sage may retain all such income pursuant to section 106(m) of the [ISDEAA] to be used to further the general purposes of the Contract.").

3. Next, the government charges that Sage should lose because at one time Sage submitted allocation proposals that computed IHS's CSC payment obligation in the manner the government now champions. Gov't Opp. at 28-29. The government makes some form of waiver or estoppel argument, contending Sage must have once agreed with the government's position here. But that is surely not the case—the IHS negotiator *instructed* Sage to prepare its CSC documents in this manner. *Supra* at 1. This instruction was clearly wrong, and the government

has now abandoned its defenses of estoppel, waiver, and accord and satisfaction. Doc. 220. The Court should reject the same argument here.

4. Fourth, the government insists that an allocation among funding sources is required by the rules controlling the issuance of indirect costs rates. Gov't Opp. at 29-30. But Sage doesn't have an indirect cost rate, so this cannot possibly be relevant. In any event, the assertion begs the question: if (as Sage asserts), third-party revenues are allocable to the IHS contract because they derive from that contract, are in furtherance of that contract, and carry out that contract, then no separate allocation is warranted or appropriate. The situation would be different if Sage's health care programs were also supported by state or private foundation contracts, but they are not.

5. The government next urges that Sage's position is just "not reasonable." *Id*. at 30. But the issue isn't the reasonableness of Sage's position; instead it is the words Congress chose in the ISDEAA to define the Secretary's obligation. If IHS believes the Act's provisions are unreasonable, its complaint is to Congress, not this Court.

In truth, Sage's position is eminently reasonable. Sage points to the provisions of its contracts with IHS, and to the ISDEAA's statutory provisions incorporated therein, because it is in those provisions that the parties contemplated that Sage would collect third-party program income from Medicare, Medicaid and private insurers in carrying out its contracts with IHS. The government concedes, as it must, that the contracted operations include "salaries for personnel that actually process collections" from third parties, *id.* at 28 n.11, and the contracts all address how those funds may be used and what impact those funds will have on the remainder of Sage's contract funding. *Supra* at 7. The government agrees with all this. *Id*. at 31. Again, this is not a

case where Sage is providing distinct health care programs under a separate contract with the State of Arizona. All of Sage's third-party collections operations are part and parcel of, and dependent upon, the services provided under its IHS contract.

6. Next, the government appears to suggest that if IHS was required to provide third-party revenue funding to Sage under its contract, rather than contract provisions that require Sage to collect such funding from third-party payers itself, then perhaps the result would be different. *Id*. at 34. But this misses the point, which is that CSC is due for the reasonable and necessary costs of carrying out Sage's contract with IHS, and those costs include the overhead and other costs of running all of Sage's contracted programs—both the portion of the contracted programs funded with appropriated dollars and also the portion of the contracted programs funded with third-party revenues. It is, after all, a single health care program, just as it would be a single health care program if IHS took over operations.

Thus, whether dental care (for instance) is funded just with IHS appropriated dollars or a combination of appropriated dollars and Medicaid dollars, that single dental program is the "Federal program, function, service, or activity" that Sage is operating "pursuant to a contract." § 450j-1(a)(3)(B). Sage is thus entitled to reimbursement of its "administrative or other expense related to the overhead [it] incurred . . . in connection with the operation of [that] Federal program . . . ." § 450j-1(a)(3)(A)(ii).

7. The government next calls attention to the fact that program income in the form of third-party revenue is addressed in other statutes, including 25 U.S.C. §§ 1621e, 1621f, 1641, and 42 U.S.C. §§ 1395qq, 1396j. Gov't Opp. at 35. But it is also addressed in the ISDEAA and

in Sage's contracts with IHS.[5] After all, Sage *must* bill Medicaid and other third-party payers because a health program operated by IHS or a Tribe is a "payer of last resort." 25 U.S.C. § 1623(b).

It is difficult here to see what the government's point is. The fact that these and many other provisions of diverse federal laws govern Sage's delivery of health care does not bear on whether Sage is entitled to reimbursement of its overhead costs associated with its operation of IHS programs funded by appropriated and third-party monies. To the contrary, compliance with laws governing the delivery of health care is at the heart of the overhead that Tribes incur in operating health care programs, and is thus at the heart of what Tribes need CSC funding for. Indeed, the "prudent management" that drives contract support costs (§ 450j-1(a)(2)) and that the government invokes (Gov't Opp. at 11, 32, 35) demands that contracting Tribes comply with all manner of applicable federal laws.[6] A health care provider like Sage, operating on a fixed budget, is confronted with the need to comply with a daunting array of federal health care requirements and to meet the severe health care needs of its client population. Surely there is no more "prudent" thing it can do than bill responsible third parties, like Medicaid and private insurance companies, to raise additional revenues and then use those revenues to expand its health care programs. That is what IHS does when running its own programs (Sage Mot. at 23), and that is what Sage is doing as well.

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[5] *See* § 450j-1(m); *see also* Doc. 199, Exs. C, D, E, F & G (Annual Funding Agreements), § 12 ("Any funds recovered by Sage through filing, litigating, or settling a claim against a third party to pay for services previously provided to IHS-eligible beneficiaries by Sage, or for such services previously provided by the IHS through a PFSA now operated by Sage, shall be considered program income to be utilized by Sage in support of the PFSAs contracted herein.").

[6] *See, e.g.*, the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 100 Stat. 1936 (1996), and its implementing regulations including the Privacy, Security, and Breach Rules (collectively "HIPAA"); the Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-005, div. A, title XIII, 123 Stat. 226 (2009), and its implementing regulations (collectively the "HITECH Act").

8. Finally, the government tries to marginalize *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D.D.C. 2014). Gov't Opp. at 36-38. As the government would have it, the case was poorly briefed and even more poorly understood by Judge Cooper. *Id*. at 37-38. Not so. The case involved the contracting of an emergency medical services (EMS) program. 70 F. Supp. 3d at 537. According to IHS's own Statement of Facts, the "total operating costs for the EMS program were $502,611, while its revenues were only $102,711." *Id*. at 538. "The agency explained that it had been making up the difference with *revenues from the clinic* and IHS discretionary funds." *Id*. at 538-39 (emphasis added). Clearly, the case concerned the contractability of an IHS program funded with non-appropriated dollars. *Id*. The Tribe requested that IHS fund the contract with the entire $502,611 program amount, plus $332,878 of associated CSC. *Id*. at 539 (requesting $196,739 in start-up costs and $136,139 in indirect CSC). In declining to award the requested contract, IHS (among other things) argued "that the amounts IHS had been transferring from the clinic to the EMS program to make up the shortfall in operating revenues were not within the base funding under 450f(a)(2)(D) because those funds were not themselves a 'program, function, service, or activity available for contracting.'" *Id*. at 543-44. Similar to the situation here, IHS argued that the status of the funds as non-appropriated funds—"revenues from the clinic" paid by third parties, *id*. at 538—placed these funds outside the scope of the ISDEAA. Judge Cooper properly rejected that assertion, holding that:

> the applicable funding level for a contract proposal under sections 450f(a)(2)(D) and 450j[-]1(a)(1) is determined based on what the Secretary otherwise would have spent, *not on the source of the funds the Secretary uses*. If the Secretary chooses to augment its spending on a program with other funds available to her, nothing in the Act permits her to deduct those amounts from the tribe's funding under an otherwise acceptable ISDEAA contract.

Id. at 544. While the district court's well-reasoned decision is not binding, it is persuasive for the proposition that the ISDEAA's contracting mandate, and its concomitant directive to add contract support costs, applies equally to appropriated IHS dollars and to third-party revenues that also fund IHS health care programs. The government's attempt to relitigate its loss in *Pyramid Lake* gets it nowhere.

CONCLUSION

For the foregoing reasons and those set forth in Sage's opening memorandum (Doc. 199), Sage is entitled to judgment as a matter of law holding that the portion of Sage's programs funded in part by third-party revenues is part of Sage's "Federal program" that is eligible for CSC funding under § 450j-1(a)(3)(A), that third-party revenues may not be used as a basis for reducing the amount of funds otherwise obligated to the ISDEAA contract, and that for purposes of determining the contract support costs owed by the government, no allocation of funding between Sage's program supported by appropriated funds and Sage's program supported by third-party revenues is permissible.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2016 I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

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