UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SEMINOLE TRIBE OF FLORIDA, 6300 Stirling Road Hollywood, Florida 33024 PLAINTIFF, v. **ALEX M. AZAR**, in his official capacity as Secretary, U.S. Department of Health & Human Services 200 Independence Ave, S.W. Washington, DC 20201 **RADM MICHAEL D. WEAHKEE**, in his official capacity as Acting Director, Indian Health Service 5600 Fishers Lane Rockville, MD 20857 DEFENDANTS.	)	**Civil Action No. 1:18-cv-00776**

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

Defendants, Alex M. Azar, Secretary of the U.S. Department of Health and Human Services ("HHS") and RADM Michael D. Weahkee, Acting Director of the U.S. Indian Health Service ("IHS"), by and through undersigned counsel, hereby oppose Plaintiff Seminole Tribe of Florida's motion for summary judgment. Furthermore, Defendants respectfully move this Court for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure ("Defendants' Cross Motion for Summary Judgment"). In support of this opposition and Defendants' Cross Motion for Summary Judgment, the Court is respectfully referred to the attached memorandum of points and authorities, exhibits, and statement of material facts not in dispute. A proposed order is attached.

Respectfully Submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Defendants, Alex M. Azar, Secretary of the U.S. Department of Health and Human Services ("HHS") and RADM Michael D. Weahkee, Acting Director of the U.S. Indian Health Service ("IHS"), by and through undersigned counsel, respectfully submit this memorandum in opposition to Plaintiff's Motion for Summary Judgment and in support of Defendants' Cross Motion for Summary Judgment.

I. INTRODUCTION

This case concerns a final offer submitted by Plaintiff, Seminole Tribe of Florida, a

federally-recognized Indian Tribe located in the state of Florida, for additional funds under its Indian Self-Determination and Education Assistance Act ("ISDEAA") funding agreement ("FA") with the IHS. Pursuant to the FA, Plaintiff operates a health care program that IHS would otherwise provide to Plaintiff's members and other eligible beneficiaries. Despite IHS's numerous attempts to reach compromise on the reasonable amount representing Plaintiff's contract support costs ("CSC"), Plaintiff submitted a final offer demanding more CSC funding for costs that are not CSC under the ISDEAA, and thus the IHS rejected that offer. *See* Pl.'s Statement of Material Facts at Exs. A, B (June 14, 2018) (ECF Nos. 9-1, 9-2) ("Pl.'s Ex. A" & "Pl.'s Ex. B").

The dispute involves which of Plaintiff's costs are CSC under the ISDEAA and, more specifically, the appropriate method of calculating the "direct cost base" used for the purpose of identifying the amount of such costs. As Plaintiff admits, the funding at issue in this dispute covers its indirect CSC, which is determined in part by applying Plaintiff's indirect cost rate to the "direct cost base." *See* Pl.'s Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. at 1 (June 14, 2018) (ECF No. 9) ("Pl.'s MSJ Mem."). However, Plaintiff's final offer attempts to inflate the direct cost base for the purpose of inflating the calculation of indirect CSC. The resulting request for an increased amount of funding is inconsistent with the ISDEAA; it would have IHS provide CSC funding for costs other than those contemplated to be CSC by the statute, since it would require IHS to compensate Plaintiff for indirect costs not associated with the program transferred in the ISDEAA agreement.

Thus, Defendants awarded an amount for all of Plaintiff's costs that are CSC, thereby meeting the requirements of the ISDEAA. Plaintiff attempts to distract this Court by claiming that the Agency is restricting its right to run its health care program as it chooses pursuant to the statutory authority of 25 U.S.C. § 5386(e) (known as the "redesign" or "rebudget" authority). IHS

does not claim, and the Plaintiff cannot show, this to be the case. Instead, this case concerns only the "direct cost base" to be used for calculating indirect CSC, not how the Plaintiff ultimately decides to budget its IHS funding. Nothing in the redesign authority that Plaintiff points to suggests that an ISDEAA contractor can rely on that authority for the purpose of inflating its CSC and compelling IHS to provide additional funds for that purpose. Ultimately, the IHS properly determined that Plaintiff's request for CSC funding is in excess of the amount required under the ISDEAA.

II. LEGAL AND FACTUAL BACKGROUND

A. IHS and the ISDEAA

The IHS's principal mission is to provide primary health care for American Indians and Alaska Natives throughout the United States. *See* S. Rep. No. 102-392, at 2–3 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3943. IHS's authority to provide health care services derives primarily from two statutes. The first, the Snyder Act, 25 U.S.C. § 13, is a general statutory mandate authorizing IHS to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for the "relief of distress and conservation of health." 25 U.S.C. § 13; *see also* 68 Stat. 674 (transferring the health-related functions of the Snyder Act from the Department of Interior to Health, Education, and Welfare, the predecessor of HHS). The second, the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. §§ 1601–1683, establishes numerous programs specifically created by Congress to address particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes prevention and treatment, medical training, and urban Indian health.

In 1975, Congress passed the ISDEAA, which allows Tribes to contract with the Secretary of HHS, through the IHS, to take over operation of many of the Federal programs that the IHS is operating for the benefit of Indians. Thus, the IHS delivers health care to American Indians and

Alaska Natives in two primary ways: (1) providing health care services directly through its own facilities; and (2) contracting with Tribes and Tribal organizations pursuant to the ISDEAA to allow those Tribes to independently operate health care delivery programs previously provided by IHS.

The ISDEAA authorizes two types of funding to ISDEAA contractors: the "Secretarial amount" and CSC funding. The Secretarial amount, along with a negotiated estimate of CSC funding, is determined prior to award of the compact. The "Secretarial amount" or "section 106(a)(1) amount" "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . without regard to any organizational level within [HHS], . . . including supportive administrative functions . . . ." 25 U.S.C. §§ 5325(a)(1), 5396(a). Thus, the Secretarial amount explicitly includes funding for all activities, including administrative activities that the IHS also carried out in its operation of the contracted portion of the Federal program, service, function, and activity ("PSFA").

At their option, ISDEAA contractors may provide increased health care services, either separate from or in addition to the PSFAs from IHS under an ISDEAA agreement. For example, some ISDEAA contractors provide health care services using their own funds, such as gaming revenues. Also, as with IHS, ISDEAA contractors may collect reimbursements from third-party payers such as Medicare, Medicaid, and private insurance that they can then use to provide additional services. 25 U.S.C. §§ 1621f, 1641. The ISDEAA characterizes such collections as "program income" that is "supplemental funding to that negotiated in the funding agreement." 25 U.S.C. § 5388(j). The ISDEAA prohibits IHS from reducing the federal funding awarded under the ISDEAA agreement as a result of such collections by the ISDEAA contractor. *Id*. §§ 5325(m), 5388(j).

B. CSC Funding

The ISDEAA also authorizes CSC funding, in addition to the Secretarial amount, to

reimburse the additional, reasonable costs for activities that ISDEAA contractors must carry out to ensure contract compliance and prudent management, but that were not activities funded as part of the Secretarial amount—either because the costs are for activities that the Secretary does not normally carry out, or because the Secretary provided for those activities from resources other than those transferred under the contract. *Id*. § 5325(a)(2). Thus, the ISDEAA explicitly prohibits providing CSC funding for activities already funded in the Secretarial amount. *Id*. §§ 5325(a)(2)–(3). The statute also explicitly requires that, to be CSC, the costs must be actual, reasonable costs and cover activities that "must be carried on . . . as a contractor to ensure compliance with the terms of the contract and prudent management." *Id*. § 5325(a)(2). Furthermore, CSC only includes costs directly attributable to the Federal program assumed from the IHS and does not include additional costs that stem from other programs. *Id.* §§ 5325(a)(2)–(3), 5326.

The statute provides CSC funding to cover two general categories of costs: direct CSC, which include eligible contract administration expenses related directly to the operation of the transferred PSFAs (and is not at issue in this dispute), and indirect CSC, which include eligible administrative or other contract administration expenses related to the overhead incurred by an ISDEAA contractor. *Id*. §§ 5325(a)(3)(A)(i)–(ii). Of course, each category must be consistent with the primary definition of CSC in § 5325(a)(2). Section 5325(a)(3) also emphasizes that CSC is for costs related to the "operation of the Federal program" under contract. *Id.*[1]

For all types of CSC funding, the negotiations occur prior to the start of contract performance, which means the parties must rely on data available prior to contract performance to

[1] The term "Federal program" is defined by applicable cost guidance to mean, in pertinent part, "all Federal awards to non-Federal entities from the same agency made for the same purpose must be combined and considered one program." 2 C.F.R. § 200.42. "Federal award", in turn, means "[t]he Federal financial assistance that a non–Federal entity receives *directly* from a Federal awarding agency . . . ." 2 C.F.R. § 200.38 (emphasis added).

estimate the amount of CSC that will be incurred (and, therefore, funded) during the period of performance. The actual costs incurred by a contractor cannot be known until additional data is available, at which point it may be necessary to reconcile the estimate with the actual costs to determine if any additional amount is owed or an overpayment was made (a process that IHS refers to as "reconciliation").

The ISDEAA itself does not provide any specific formula or methodology for calculating which costs are CSC, so IHS developed the IHS CSC Policy, in consultation with Tribes, to guide negotiations on the amount of an individual ISDEAA contractor's CSC. *See* Indian Health Manual, pt. 6, ch. 3, Contract Support Costs (Oct. 26, 2016), as amended by the December 21, 2017 Dear Tribal Leader Letter, *available at* https://www.ihs.gov/ihm/pc/part-6/p6c3, attached hereto as Ex. 1 ("Ex. 1"). The methodologies set out in the IHS CSC Policy incorporate the requirements of the ISDEAA and cost principles that are applied to all Federal awards. Indirect CSC, which is the type of CSC at issue in this dispute, typically is negotiated based in part on an indirect cost rate (IDC rate), which the ISDEAA contractor negotiates separately with its federal cognizant agency (not IHS) for use in all government contracts and grants. However, the approach is not as simple as applying the IDC rate. The negotiation of CSC starts with an ISDEAA contractor's "plan for the allocation of IDC," which must be "supported by accounting records that substantiate the propriety of the IDC . . . ." Ex. 1. at § 6-3.2(E). The allocation plan should cover all IDC—not just the requested indirect CSC—of the ISDEAA contractor and explain, for example, "the nature and extent of services provided and their relevance to the awardee's program; the item of expense to be included in the IDC pool; and the methods to be used in distributing costs." *Id*. IHS will then review the cost allocation plan when determining the appropriate amount for indirect CSC to ensure that all costs are eligible under the statutory requirements discussed above and are consistent with general cost principles. *Id*. §§ 6-3.2(B), 6-

3.2(E)

In addition to considering the IDC rate and the cost allocation plan, the calculation of indirect CSC requires identifying the appropriate "direct cost base" funded in the Secretarial amount and as direct CSC. This evaluation is necessary because, as noted above, funding for "administrative" costs is included in the Secretarial amount. 25 U.S.C. § 5325(a)(1). Such funding, therefore, is not part of the "direct cost base" used to calculate indirect costs generally or indirect CSC specifically. Similarly, IHS must evaluate the Secretarial amount in light of the type of direct cost base that an ISDEAA contractor uses when negotiating its IDC rate. While some negotiate based on "total direct costs," others such as Plaintiff use a direct cost base that is limited to "[t]otal direct salaries and wages, including fringe benefits." Pl.'s Statement of Material Facts at Ex. C (ECF No. 9-3) ("Pl.'s Ex. C") (emphasis removed). As with the IDC, IHS must evaluate the direct cost base to ensure that applying the IDC rate to that base: (a) does not result in including costs for activities for which IHS transferred its resources in the Secretarial amount, as such costs are not CSC; (b) as required by the ISDEAA, only includes the costs are reasonable and necessary costs for compliance with the ISDEAA agreement and prudent management; and (c) as also required by the ISDEAA, only includes IDC in support of the *Federal* program directly awarded by IHS (i.e, the transferred PSFAs and associated Secretarial amount) and does not include costs of any other program that the ISDEAA contractor may choose to operate. *Id.* §§ 6-3.2(B), 6-3.2(E), Ex. 6-3-A.

C. The ISDEAA Title V Process

The Title V process begins with a planning phase when a Tribe begins "preparation relating to the administration of health care programs." 25 U.S.C. § 5383(d). Prior to entry into the Self-Governance program, the Tribe must have "demonstrated, for 3 fiscal years, financial stability and financial management capability." 25 U.S.C. § 5383(c)(1)(C). Once approved for

participation in Self-Governance program, the Tribe is eligible for planning grants and may begin negotiating a Self-Governance compact and FA with IHS. *See* 25 U.S.C. §§ 5383(e), 5384, 5385. A Tribe can choose to compact for any portion of a PSFA administered at any level by the IHS, including the headquarters ("HQ") level, the Area level, and the local or service unit level. *See, e.g.*, 25 U.S.C. § 5321(a) (providing that the PSFAs "shall include administrative functions of [HHS] that support the delivery of services"). A Tribe's portion of a PSFA is typically referred to as its HQ, Area, or service unit "Tribal share." Tribes that enter into self-governance under Title V of the ISDEAA are mature contractors who assume comprehensive responsibility for planning, conducting, consolidating, administering, and even redesigning all health care PSFAs previously provided by IHS. *See* Indian Health Amendments of 1992, Pub. L. No. 102-573, tit. VIII, § 814, 106 Stat. 4590 (1992). Plaintiff is a Self-Governance contractor under Title V of the ISDEAA, but many of the Title I provisions of the ISDEAA—including those governing CSC funding, § 5325(a)(2), (3), (5), (6)—apply to its compact and associated funding agreements. *See* 25 U.S.C. § 5396.

Tribes must negotiate and enter into a written FA with IHS that identifies the PSFAs (or portions thereof) to be performed as an ISDEAA contractor and sets forth various terms related to each PSFA including the amount of funds to be provided (which is the "Federal award"). 25 U.S.C. § 5385. As described above, the amount of funds required under a FA, both for the Secretarial amount and CSC, is determined by Section 106(a) of the ISDEAA. 25 U.S.C. § 5325; s*ee also* 42 C.F.R. § 137.79. Should negotiations concern the terms or funding amounts of the FA reach impasse, a Tribe may present the IHS with a proposal that is labeled a "final offer." 25 U.S.C. § 5387(b). Within 45 days of receipt of a final offer, IHS must either accept or reject the Tribe's proposal. *Id*. IHS is permitted to reject a final offer by providing written notification containing a specific finding supported by controlling legal authority that the Tribe's final offer

falls within one of the following "rejection criteria":

> (1) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter;
> (2) the [PSFA](or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;
> (3) the Indian tribe cannot carry out the [PSFA] (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or
> (4) the Indian tribe is not eligible to participate in self-governance under section 5383 of this title.

25 U.S.C. § 5387(c)(1)(A)(i–iv). The IHS must also offer technical assistance to help the Tribe overcome the Agency's objections to the final offer. *Id*. § 5387(c)(1)(B). As it did here, IHS must provide the ISDEAA contractor "with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions." 25 U.S.C § 5387(c)(1)(D).

D. Factual Background

Plaintiff first started contracting with IHS under Title I of the ISDEAA in 1976 and then transitioned to compacting under Title V in fiscal year ("FY") 2001. Plaintiff's current ISDEAA agreement includes a compact and a FA.

On August 31, 2017, IHS and Plaintiff met at IHS's Nashville Area Office and engaged in negotiations regarding Plaintiff's FY 2018 FA. *See* Decl. of Ashley Metcalf, ¶ 12, attached hereto as Ex. 3 ("Ex. 3"). The parties were able to reach agreement on the majority of the FA, but after considerable efforts, the parties were unable to reach agreement on Plaintiff's request for an increased amount of indirect CSC funding for FY 2018. *Id*. at ¶ 11.

The underlying point of disagreement, and subject of the subsequent final offer, was over the size of the direct cost base attributable to the Federal award transferred in the FA. As noted above, any non-Federal awardee may negotiate an indirect cost rate with the appropriate cognizant

agency, which rate can then be used to help determine the indirect costs attributable to specific Federal awards. Plaintiff chose to negotiate a rate based on "total direct salaries and wages, including fringe benefits," which requires that indirect costs attributable to each Federal award must be determined by applying the rate to the sum of direct salaries, wages, and fringe benefits (the "direct cost base") in that award. Pl.'s Ex. C at 1 (emphasis removed). Plaintiff's rate would be different (i.e., lower) if it had chosen to negotiate a rate based on total direct costs instead because that would necessarily mean allocating the indirect costs across a larger direct cost base.

The Federal award consists of a specific amount that the Secretary would otherwise spend on salaries, wages and fringe benefits, but the Plaintiff operates a much larger program than the Secretary would otherwise provide, using other revenue sources to operate that program. In addition, Plaintiff has, since it began contracting in 1976, rebudgeted the Secretarial amount. This rebudgeting can distort the direct cost base allocable to IHS, by increasing it, and thereby artificially increasing the costs Plaintiff can claim are CSC.

The distortion issue first arose with Plaintiff during negotiations in 2013, though the parties successfully negotiated the direct cost base and agreed upon a corresponding amount of indirect CSC each year (including periodic mid-year and post-performance reconciliations) until the FY 2018 negotiations. During the FY 2018 negotiations, Plaintiff proposed using a direct cost base of $7,301,116, which was approximately one million dollars more than the year before, and accounted for nearly 99% of its entire IHS Secretarial award, for calculating indirect CSC. Since IHS had not increased Plaintiff's Secretarial amount, this request prompted IHS to engage in further discussions with Plaintiff over why the direct cost base increased. Ex. 3 at ¶ 11. Through discussions, IHS then learned that Plaintiff operates a very large health program, totaling approximately $76.8 million, and the ISDEAA agreement is only a small portion of that program, with funding of $7,389,718 (not including CSC funding). *Id.* at ¶ 12. Therefore, the IHS

Secretarial amount makes up only about 10% of Plaintiff's total health program.[2] *Id*. at ¶ 13.

Upon learning this, IHS proposed multiple approaches to resolve the CSC issue before formal negotiations, during negotiations, and afterwards. *Id.* at ¶ 15. Plaintiff rejected all approaches and indicated that it would only agree to the increase of CSC it originally proposed, even though IHS explained that, under the ISDEAA, it could not agree to calculate CSC using this distorted direct cost base. The Plaintiff indicated that pursuant to 25 U.S.C. § 5387(b), a final offer would be forthcoming. IHS subsequently received the final offer on January 4, 2018. Pl.'s Ex. A.

On February 16, 2018, IHS timely responded to the Plaintiff's final offer with a partial rejection letter in accordance with the statutory requirements set forth at 25 U.S.C. § 5387(c). Pl.'s Ex. B. IHS awarded the Plaintiff indirect CSC funding for the full amount of costs the Agency believes are CSC under the statute, rejecting the increase of $159,483 proposed by the Plaintiff, on the grounds that this additional amount of funds would be for costs that are not CSC and, therefore, the amount "exceeds the applicable funding level to which the [Plaintiff] is entitled." *Id.* (citing 25 U.S.C. § 5387(c)(1)(A)(i)).

III. STANDARD OF REVIEW

A. Summary Judgment

"Summary judgment procedure is properly regarded . . . as an integral part of the Federal

[2] Until Plaintiff had provided this information, IHS was under the mistaken impression that the ISDEAA agreement funding was 80% of the total health program and that other funding made up only 20% of the total health program. *Id*. at 13. IHS often has difficulty obtaining such information about tribally-operated programs unless it is voluntarily provided by the ISDEAA contractors. During negotiations between 2013 and 2018, IHS misunderstood the size of Plaintiff's total health program, including what proportion of the total health program was attributable to the Secretarial amount, since Plaintiff did not provide this information to IHS. *See* Ex. 3 at ¶ 13.

Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1); *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (describing "central purpose" of summary judgment as to "weed out those cases insufficiently meritorious to warrant . . . trial"). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex*, 477 U.S. at 322; *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id*. at 248. In determining whether a genuine issue of material fact exists, the trier of fact must view all facts, and reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–58 (1986). Once the moving party has met its burden, the burden shifts to the nonmoving party who "'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Id*. at 586 n.11 (quoting Fed. R. Civ. P. 56(e)). Moreover, mere conclusory allegations are not enough to survive a motion for summary judgment. *See, e.g.*, *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993); *Rowland v. Riley*, 5 F. Supp. 2d 1, 3 (D.D.C. 1998); *Benn v. Unisys Corp.*, 176 F.R.D. 2, 6 (D.D.C. 1997). As the Supreme Court has instructed: "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

B. Burden of Proof

Under the ISDEAA, when a Tribal contractor appeals the Agency's rejection of a final

offer, the Secretary "shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) . . . ." 25 U.S.C. § 5387(d).

C. Other Standards and Considerations

Plaintiff brought this action pursuant to the ISDEAA, which provides *no* standard for review. *See Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1254 (E.D. Okla. 2001), *aff'd*, 311 F.3d 1054 (10th Cir. 2002), *rev'd on other grounds*, 543 U.S. 631, *and vacated on remand*, 404 F.3d 1263 (10th Cir. 2005); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1313 (D. Or. 1997). When a statute provides for judicial review but fails to set forth the standards for that review, as is the case in the ISDEAA, generally a court looks to the Administrative Procedures Act ("APA") for guidance. *See United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); *Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995) (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983)); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982). This Court has applied the APA standard in many cases involving the Agency's interpretation and application of the ISDEAA. *See, e.g.*, *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 109 (D.D.C. 2009) (reviewing under the APA a decision issued by the Interior Board of Indian Appeals and applying the arbitrary and capricious standard); *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 149 (D.D.C. 1999) (same); *Feezor v. Babbitt*, 953 F. Supp. 1 (D.D.C. 1996) (same); *contra Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (applying the "Indian canon of construction"); *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 542 (D.D.C. 2014). Defendants request that this Court apply the APA standard in this case..

Plaintiff urges this Court to apply the "Indian canon of construction." Where, as here, the language of the statute is clear, courts should enforce the statutory requirements as-written; in

order for this Court to apply this canon, it must first determine that the statute is ambiguous. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Avco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 623 (D.C. Cir. 1989) ("'Where the language of a statute is clear in its application, the normal rule is that we are bound by it.'") (quoting *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring)); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988). Upon a finding of ambiguity, the Court then must find that Plaintiff's construction of the statute is reasonable. *See Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 424 (D.D.C. 2008) (rejecting Indian Tribe Plaintiffs' interpretation of the statute as "unreasonable"). Indeed, canons of construction, including the Indian canon, "are not mandatory rules" and can be overcome. *Id*. (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (explaining that Indian "canons do not determine how to read this statute")).

IV. ARGUMENT

A. Plaintiff's Proposal to Increase Indirect CSC Is Contrary to the ISDEAA and, Therefore, Not Reasonable.

In its partial final offer rejection, IHS properly determined that Plaintiff's final offer demanded funding that was unreasonable and unsupportable by the statute. *See* Pl.'s Ex. B.

Plaintiff operates a large health care program, and the PSFAs that are transferred and funded under the ISDEAA agreement are only a small fraction of Plaintiff's total health program. Because of its other resources, Plaintiff is able to rebudget its IHS funding to allocate nearly all of those funds towards salaries, wages, and fringe benefits and use the other resources to contribute to other necessary expenses to run its health program, including the transferred PSFAs. Plaintiff then claims that because it can lawfully rebudget, and is fortunate to have the resources to do so, it

is entitled to leverage that rebudget authority to inflate the direct cost base attributed to the ISDEAA agreement. In turn, by applying its IDC rate to the inflated direct cost base, Plaintiff unnecessarily increases the amount of indirect costs that it claims are CSC and argues IHS must fund those costs under the law. Pl.'s MSJ Mem at 21. This scheme, as laid out in Plaintiff's final offer, blatantly ignores the clear definition of CSC in the ISDEAA.

CSC, as clearly defined in the statute, consists of "the reasonable costs for activities which *must be carried on* by a Tribal organization as a contractor to *ensure compliance with the terms of the contract* and prudent management…". 25 U.S.C. § 5325(a)(2) (also requiring in subparagraphs (A)–(B) that the activities must be activities IHS normally does not carry on or that IHS carries on but transferred to the ISDEAA contractor without also transferring the resources for that activity) (emphases added). CSC only includes costs that support the contracted Federal program, which under applicable cost guidelines include only the Federal award made directly by IHS. *See supra* note 1. Plaintiff's proposal unlawfully shifts indirect costs of its expanded health program to IHS in an attempt to characterize such costs as CSC and obtain CSC funding, even though the costs are unnecessary for performing the transferred PSFAs. *See* 25 U.S.C. §§ 5325(a)(2), (3), 5326. As stated clearly in the statute, CSC only includes costs necessary to support the transferred PSFAs, not costs of other programs an ISDEAA contractor opts to operate.

Further, while the statute does not provide for a specific methodology or formula for doing so, the ISDEAA clearly establishes principles for calculating CSC. The plain language of the statute authorizing CSC funding states that costs are eligible as CSC are only those that:

> . . . reimburs[e the Tribe] for reasonable and allowable costs of—(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor *in connection with the operation of the Federal program . . . pursuant to the contract.*

25 U.S.C. § 5325(a)(3)(A) (emphases added); 25 U.S.C. § 5396(a) (mandatory application of 25

U.S.C. § 5325(a) to Title V).

The plain language of the statutory text is consistent with Congress's explanation that CSC funding was added to the ISDEAA in 1988 "to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation. In the absence of [CSC funding] a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid." 140 Cong. Rec. H11140-01, H11144 (daily ed. Oct. 6, 1994). Congress could have simply made CSC funding a percentage of the Secretarial amount, or mandated a clear equation to calculate CSC funding, but it did not. Instead, Congress articulated the purposes of CSC funding, which are to reimburse the costs of a limited set of activities associated with performing the transferred PSFAs. Congress then defined those limited activities in the statute, making clear that only the costs of those activities are CSC. *See* 25 U.S.C. § 5325(a)(2); *see also* 25 U.S.C. § 5326. Yet Plaintiff's request does just the opposite; it requires IHS to fund indirect CSC for costs not necessary for performing the transferred PSFAs. Such a request is unreasonable given that it directly contradicts the plain language of the ISDEAA.

Plaintiff seeks to distinguish *Tunica-Biloxi*, where this Court held that the ISDEAA prevents IHS from paying more than its pro-rata share of indirect expenses incurred by an ISDEAA contractor. *Tunica-Biloxi Tribe of La.*, 577 F. Supp. 2d at 418 ("[T]he only plausible interpretation of § [5326] is . . . that the statute prevents the IHS from paying more than its *pro rata* share of the [IDC] incurred by contracting tribes and tribal organizations."). Plaintiff claims that here, it is not seeking any separate or supplemental funding and, therefore, the case is not applicable. Pl.'s MSJ Mem. at 17. Yet, Plaintiff shifting nearly all of the IHS award into its direct cost base (by putting all IHS funds towards salaries, wages, and fringe benefits) is precisely the type of cost-shifting that the *Tunica-Biloxi* court held was prohibited pursuant to 25 U.S.C. §

5326. That provision of the ISDEAA states that IHS funds may only be expended for costs "directly attributable" to the ISDEAA agreement. 25 U.S.C. § 5326. Here, Plaintiff is relying on its other health programs to shift costs and inflate the direct cost base it attributes to IHS in order to claim that the IDC associated with the inflated base is CSC that IHS must fund. Plaintiff does not deny that the IDC it now claims is CSC is more than it sought in prior years and certainly more than would be attributable to salaries, wages, and fringe benefits that IHS would otherwise provide with the Secretarial amount. Indeed, Plaintiff's Secretarial amount funding accounts for only about 10% of its total health care program. In stark contrast, 2015 documents[3] underlying the Plaintiff's 2017 IDC rate agreement show that Plaintiff has allocated approximately 50% of the salaries and fringe benefits that comprise its direct cost base to IHS. *See* Plaintiff's 2017 Indirect Cost Proposal and underlying documents, attached hereto as Ex. 2, at 3 ("Ex. 2"). It follows, then, that Plaintiff is charging IHS 50% of the indirect costs of all of its health programs (yet, IHS is contributing only 10% of the total funds for the health programs[4]). These figures clearly show that allowing Plaintiff to distort the direct cost base as it has done results in IHS paying much more than its pro rata share of indirect costs, which the *Tunica-Biloxi* court held to be illegal. In essence, by allocating all of its IHS funding towards salaries, wages, and fringe benefits, Plaintiff is essentially applying the IDC rate (which is calculated using a direct cost base limited to salaries, wages, and fringe benefits) not to those limited direct costs but to the total direct costs of the transferred PSFAs; that is inconsistent with Plaintiff's decision to negotiate its IDC rate based on salaries, wages, and fringe benefits, rather that its total direct costs. Plaintiff also tries to question *Tunica-Biloxi*'s holding by citing to *Navajo Health Foundation—Sage*

[3] Plaintiff has not provided and IHS does not have similar documents from more current years. That documentation would be illuminating to show actual expenditures for 2018.
[4] Plaintiff does not dispute that the Secretarial amount meets the requirements of the ISDEAA.

Memorial Hospital, Inc. v. Burwell, 263 F. Supp. 3d 1083, 1164 (2016) ("*Sage*"), yet admits that *Sage* "did not explicitly repudiate *Tunica-Biloxi*." Pl.'s MSJ Mem. at 18 n.5. Moreover, *Sage* did not involve the issue here of how to determine the size of the direct cost base for the purposes of calculating CSC. *See Sage*, 263 F. Supp. at 1083.[5]

In addition to directly contradicting the statutory language defining CSC, Plaintiff's interpretation must also be found unreasonable because of the inherent unfairness and inequity it would foster amongst ISDEAA contractors. For example, an ISDEAA contractor that receives the exact same Secretarial amount as Plaintiff but that does not have the resources to operate health programs beyond what IHS funds would be unable to rebudget its PSFAs the way Plaintiff proposes, since it would be impossible for such a contractor to carry out all of the required PSFAs while putting nearly 99% of the IHS funding towards salaries, wages, and fringe benefits. Thus, that contractor's direct cost base would necessarily be lower, as would the indirect costs that are CSC. In fact, IHS would have to reject a final offer from a contractor without additional resources because, without Tribal resources or program income to carry out all PSFAs required for the transferred health program, such as basic medical supplies, proceeding in the proposed manner (putting all of its funds towards salaries, wages, and fringe benefits) would jeopardize the health and safety of the intended beneficiaries and require a rejection on this additional statutory ground. *See id.* § 5387(c)(1)(A)(iii). Surely, Congress did not intend a result that would penalize ISDEAA

[5] For similar reasons, the decision in *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 535 (D.D.C. 2014), is not instructive. In that case, the issue on appeal was the appropriate Secretarial amount (§ 5325(a)(1)) for a new contract, not CSC. *See id.* at 539. Plaintiff admits that it does not challenge its Secretarial amount funding. The *Pyramid Lake* court found that, in the case of an initial contract proposal under Title I (not Title V), the appropriate funding level under § 5325(a)(1) "is determined based on what *the Secretary* otherwise would have spent, not on the source of the funds *the Secretary uses*," at the time the initial proposal was submitted. *Id.* at 544 (emphasis added).

contractors that are unable to expand their health programs while awarding extra funds to those with the means to operate health programs in excess of the funding IHS would otherwise provide. Those Tribes that already are able to add additional funds to their health programs are already at an advantage over those that are unable to do so. Providing additional Federal funds based on this advantage would only widen the disparity between wealthier Tribes and less fortunate Tribes. Such a disparity would be especially egregious where, as here, the health program is primarily a Tribal health program funded, at the Plaintiff's option, by its own resources.

B. IHS's Methodology for Determining the Direct Cost Base is Reasonable.

Because the statute does not provide for a specific methodology or formula to do so, the parties must negotiate indirect CSC using the framework of the ISDEAA. The IHS CSC Policy similarly provides some guidance for the parties to negotiate which costs are CSC but does not cover every situation. Thus, as the IHS CSC Policy does instruct, when the direct cost base used to determine CSC is based on a specific category of costs—salaries, wages, and fringe benefits in Plaintiff's case—the parties must determine the size of that base attributable to the transferred PSFAs in order to determine CSC. Ex. 1. Over the course of negotiations with Plaintiff, IHS attempted to determine the size of Plaintiff's direct cost base that was attributable to the transferred PSFAs in order to accurately determine the amount of Plaintiff's indirect costs that are CSC.

As discussed above, in determining the appropriate amount to use for Plaintiff's direct cost base, IHS has successfully negotiated that amount (and the related CSC amount) with Plaintiff for several years. That negotiation failed in FY 2018, largely because IHS understood—for the first time—that the Secretarial amount accounts for only 10% of Plaintiff's total health care program. *See* Ex. 3 at ¶ 13. Until that point, IHS believed the Secretarial amount represented 80% of Plaintiff's total costs. *Id*. Accordingly, IHS had agreed that 80% of the direct cost base of

Plaintiff's total costs for its health programs would be used as the direct cost base associated with the ISDEAA agreement. *Id*. However, as previously described, in 2018 IHS received Plaintiff's 2015 financial information, which makes clear that while Plaintiff allocates its IHS funds to account for nearly 50% of the total salaries, wages, and fringe benefits of its health program, the IHS funding only accounts for 10% of the total costs of Plaintiff's total health program. Ex. 2 at 3.

Upon learning this new information, IHS agreed to be flexible and sought a new compromise in FY 2018 that would be consistent with the underlying facts and the statute. Ultimately, IHS proposed an approach (one that it had used in negotiations with other ISDEAA contractors), using the amount, on average, that the Agency expends on salaries, wages, and fringe benefits when it directly operates a health program. Ex. 3 at ¶ 18. Since Plaintiff began contracting with IHS in the 1970s, it would be impossible to determine the exact nature of the transferred PSFAs if IHS were still operating them today. As a proxy, IHS determined that it typically spends approximately 71% on salaries, wages, and fringe benefits by compiling data from its FY 2014 IHS service unit expenditures. *Id*. While IHS acknowledges that expenditures can fluctuate from year to year and from program to program, it has determined that this comprehensive data represents a reliable average. *Id*. at ¶ 19. It follows that approximately 71% of Plaintiff's Secretarial amount represents the salaries, wages, and fringe benefits in the transferred PSFAs. In Plaintiff's case, this would be $5,246,700 and would fairly represent the salaries, wages, and fringe benefits that comprise Plaintiff's direct cost base for the ISDEAA agreement. Yet, IHS increased that amount further, up to 80%, to attempt to reach compromise out of respect for Plaintiff's individual circumstances and right to self-determination. Pl.'s Ex. B at 9. Indeed, IHS approaches negotiations with each ISDEAA contractor individually, although always in confines with the law, as each negotiation represents a government-to-government

discussion.

Thus, in negotiating with Plaintiff, IHS was willing to deviate from the previously agreed-upon approach and discuss legally supportable options for calculating CSC, in an effort to reach an amount close to Plaintiff's proposal. In fact, IHS offered to include not only the Secretarial amount but also Plaintiff's direct CSC when calculating the direct cost base attributable to the transferred PSFAs. Negotiations between the parties for FYs 2014-2017 resulted in calculations that allocated between 73% and 84% of IHS funds (Secretarial amount plus direct CSC) toward Plaintiff's direct cost base in those years. Although Plaintiff claims that IHS was inconsistent since these numbers fluctuated, IHS maintains that its flexibility in the negotiations was based on a respect for the Plaintiff's operation of its health program as it saw fit and willingness to find a compromise supportable under the ISDEAA. Plaintiff further claims that IHS set an arbitrary cap in negotiations, but IHS's history of successfully negotiating with Plaintiff clearly refutes this point. IHS continues to seek a way to provide stable funding to Plaintiff for FY 2018 but must do so within the confines of the law's definition of which costs are CSC. Plaintiff has refused to present IHS with any other proposal, and the one proposal at issue in this litigation simply cannot be supported under the law, as discussed above.

Plaintiff points out and IHS does not refute that the approach IHS proposes for determining its direct cost base is not articulated in the IHS CSC Policy and has not been formally communicated to ISDEAA contractors as an option. IHS has raised this approach in individual negotiations with ISDEAA contractors and has discussed the approach with the IHS Federal-Tribal CSC Workgroup. Although the IHS CSC Policy provides some guidance on how to calculate indirect CSC funding, it does not provide a solution for every situation, including this one.

Therefore, IHS, tasked by Congress with negotiating which costs are legally considered

CSC, properly determined that IHS could not legally agree to Plaintiff's proposal to increase the amount of indirect CSC funding, in excess of the costs that are CSC and, therefore, the amount of CSC funding owed.

C. The IHS Does Not Dispute Plaintiff's Ability to Allocate Funding Under 25 U.S.C. § 5386(e).

Plaintiff characterizes this dispute as IHS's refusal to allow Plaintiff to redesign and rebudget its Secretarial amount funding as it sees fit, pursuant to 25 U.S.C. § 5386(e). However, in IHS's partial rejection of Plaintiff's final offer, IHS explicitly acknowledges Plaintiff's right to rebudget and emphasizes that the need to determine the direct cost base is for the purpose of *calculating CSC* only. Pl.'s Ex. B at 9. The rebudget provision gives ISDEAA contractors broad discretion on how to budget for and operate their health program but it does not speak to, nor instruct, IHS on how to properly calculate CSC. Indeed, the parties are tasked by Congress to determine the reasonable costs for activities that ISDEAA contractors must carry out to support costs directly attributable to PSFAs assumed from IHS and that otherwise meet the statutory requirements for CSC. 25 U.S.C. §§ 5325(a)(2), 5326. The fact that § 5386(e) provides flexibility—though not without limits—for ISDEAA contractors to determine how to expend Secretarial amount funding has nothing to do with how to ensure the parties are negotiating CSC consistently with an entirely separate set of statutory requirements.

IHS does not seek to dictate how Plaintiff chooses to run its health program. However, the parties must negotiate a direct cost base (and CSC) that comports with the statute.

D. The Appropriate Relief is Remand for Further Negotiation.

Even if this Court finds in favor of Plaintiff's motion, the appropriate relief is to remand to negotiate the FY 2018 FA in accordance with the Court's holding since Plaintiff does not dispute that IHS issued a timely rejection of the final offer. *See* 25 U.S.C. § 5387(b).

ISDEAA final offers are "deemed agreed to by the Secretary" only: (1) in the absence of a timely rejection of the offer; or (2) if the rejection fails to meet the required criteria. 25 U.S.C. §§ 5387(b), (c)(1)(A). The required criteria are that the Secretary provides: (1) a written notification that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that a ground for rejection exists; (2) technical assistance to overcome objections; (3) a hearing on the record and the opportunity for appeal (or the contractor may proceed to Federal District Court); and (4) the option to enter into the severable portions of the proposed compact, FA, or provision thereof. *Id.* § 5387(c). The applicable regulation states that, "if the agency *takes no action* within the 45 day review period (or any extensions thereof)," the final offer "is accepted automatically by operation of law." 42 C.F.R. § 137.136 (emphasis added).

The IHS did not issue an insufficient final offer rejection. To the contrary, IHS properly relied on one of the four applicable criterion to partially reject the final offer within the 45 days required by the ISDEAA and included all required criteria. *See* Pl.'s Ex. B. Even if this Court ultimately finds in favor of Plaintiff's motion, the statute is unambiguous that this does not negate IHS's proper response.

Courts that have considered Plaintiff's argument, both in the Title I and Title V contexts, have determined that remand is the appropriate remedy in similar circumstances. *Compare N. Arapaho Tribe v. LaCounte*, 2017 U.S. Dist. LEXIS 97525, 2017 WL 2728408 (D. Mont. June 22, 2017) (ordering remand when the Bureau of Indian Affairs was required to "explain more accurately and fully any reasons for its declination"); *with Maniilaq Ass'n v. Burwell*, 72 F. Supp. 3d 227 (D.D.C. 2017), *Seneca Nation of Indians v. United States*, 945 F. Supp. 2d 135 (D.D.C. 2013) (both cases in which the court found that IHS did not respond at all within the statutory deadlines).

E. Plaintiff's Claims for Costs and Attorney's Fees Are Inappropriate.

Plaintiff also seeks an award for costs and attorneys' fees incurred in pursing these claims, as provided for under the Equal Access to Justice Act (EAJA). A party seeking relief under EAJA is required to submit an application for fees and other expenses "within thirty days of final judgment in the action." 28 U.S.C. §2412(d)(1)(B). Since there is no final judgment in this matter, this request is not ripe for review. Additionally, Plaintiff is likely not able to demonstrate financial eligibility for an EAJA award. The statute at 28 U.S.C. § 2412(d)(2)(B) defines eligible parties in pertinent part as businesses with no more than five hundred (500) employees and a net-worth that did not exceed $7,000,000 at the time the civil action is filed. Based on publically available information, the IHS has reason to believe that Plaintiff is not able to meet the basic eligibility requirements of the statute. Therefore, Plaintiff would not be entitled to costs or monetary damages under the EAJA.

F. Plaintiff Is Not Entitled to Interest under the Prompt Payment Act.

Plaintiff contends that it is entitled to interest pursuant to the Prompt Payment Act ("PPA"). Section 4(c) of Plaintiff's ISDEAA agreement makes it clear that the PPA applies to "all payments due under this Compact and *any FA executed hereunder*." Pl.'s Ex. A (emphasis added). Therefore, Plaintiff is not entitled to interest payment since the current FA was executed pursuant to the parties' agreement, notwithstanding the outstanding dispute. In addition, the PPA does not apply when the contract payment "is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract." 31 U.S.C. § 3907(c). There is very clearly a dispute here and thus the PPA does not apply.

V. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court grant this Motion for Summary Judgment in favor of Defendants and deny Plaintiff's Motion for Summary

Judgment, because the Secretary properly partially rejected Plaintiff's final offer proposal under the ISDEAA.

Respectfully Submitted,

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