UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SEMINOLE TRIBE OF FLORIDA,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	**Civil Action No. 1:18-cv-00776 (RC)**
	)	
ALEX M. AZAR, **et al.,**	)	
	)	
DEFENDANTS.	)	
	)	

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

Plaintiff's proposal to increase its indirect contract support costs (CSC) funding cannot be supported under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). The Indian Health Service ("IHS" or "Agency") properly rejected Plaintiff's proposal for increased funding because it is inconsistent with the ISDEAA's definition of CSC, which only recognizes the reasonable costs associated with certain activities performed in the operation of the ISDEAA contract. *See* 25 U.S.C. § 5325(a)(2).[1]

I. The Standard of Review

In their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, Defendants properly identified that the ISDEAA provides no standard of review and cited case law recognizing that this Court has applied both the Administrative Procedures Act's (APA) arbitrary and capricious and the *de novo* standards of

[1] Plaintiffs cite to this Court's Minute Order of July 18, 2018 for the contention that this Court did not authorize Defendants' cross motion for summary judgment or a reply to Plaintiff's response to Defendants' motion. However, the Local Rules for United States District Court for the District of Columbia Rule 7 provides for a reply and respectfully request that this Court consider this Reply in making its decision.

review but requested that this Court apply the APA standard in this case. Defs.' Mem. in Opp. to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. at 13 (Sept. 5, 2018) (ECF Nos. 13 and 14) ("Defs.' Opp.").

II. The Plaintiff's proposal is inconsistent with the ISDEAA.

a. While Plaintiff has discretion to rebudget its IHS funds to run its program as it sees fit, doing so does not increase the costs that meet the definition of CSC.

Plaintiff continues to acknowledge that it is reallocating nearly all of its IHS funds to salaries, wages, and fringe benefits in order to increase the direct cost base and, in doing so—so they claim—increase its CSC funding. Pl.'s Resp. in Opp. to Defs.' Cross-Mot. for Summ. J. and Rep. in Supp. of Pl.'s Mot. for Summ. J. at 5-6 (Sept. 25, 2018) (ECF No. 15) ("Pl.'s Resp."). If Plaintiff wanted to include the total direct costs of performing its ISDEAA agreement in its direct cost base, it had the option of negotiating an indirect cost ("IDC") rate based on total direct costs with the IDC rate-making agency. Instead, Plaintiff chose to limit its direct cost base to salaries, wages, and fringe benefits. Plaintiff now invokes the reallocation authority of the ISDEAA, 25 U.S.C. § 5386(e), to claim that it is proper for it to pay for other direct costs of performing its ISDEAA agreement from other funds so that it can use 98.93% of IHS funds for salaries, wages, and fringe benefits, in order to increase its base and ultimately its CSC. Again, the Agency recognizes and supports Plaintiff's ability to redesign and reallocate funds that is in the "best interest of the health and welfare" of the community served as the provision does allow. 25 U.S.C. § 5386(e). Nothing in the ISDEAA, though, authorizes the use of this authority in a way that is contrary to the ISDEAA definition of CSC or the costs principles for allocating costs. CSC includes only "the reasonable costs for activities which must be carried on" to ensure contract compliance, and only if the Secretary does not normally carry on those activities or does

so with resources not transferred in a contract. 25 U.S.C. § 5325(a)(2). The amount of salaries, wages, and fringe benefits that Plaintiff has allocated to IHS, which comprise 98.93% of IHS's Secretarial funding, are neither reasonable nor necessary for performing the ISDEAA agreement, both of which are required for the related indirect costs to be CSC. *Id*. Since the costs do not meet the definition of CSC, Plaintiff's request for indirect CSC funding must be denied under the ISDEAA.

b. IHS has never sought to disregard Plaintiff's IDC rate agreement.

In its Response, Plaintiff accuses Defendants of disregarding its IDC rate agreement. Defendants have never sought to do so. Instead, throughout negotiations, Defendants have consistently asked that Plaintiff follow its own IDC rate agreement by accurately identifying the salaries, wages, and fringe benefits that compose Plaintiff's direct cost base, as instructed by the agreement, as opposed to its total direct costs (i.e. all of its IHS ISDEAA funding).

Further, indirect costs and indirect CSC are not the same.[2] For example, indirect costs for activities that IHS normally performs and transfers with its resources in the ISDEAA contract are not CSC. 25 U.S.C. § 5325(a)(2). For that reason, Plaintiff and Defendants have consistently agreed that a portion of Plaintiff's Secretarial amount covers indirect costs. For the same reason, once an awardee's total indirect costs are identified, "costs must be analyzed to ensure they meet the definition of CSC in 25 U.S.C. § 5325(a)(2)-(3)." Defs.' Ex. 1, at § 6-3.2E. Plaintiff suggests that the calculation to determine indirect CSC is as simple as applying the IDC rate to the appropriate direct cost base. Pl's Resp. at 6. However, as noted, such an approach would

[2] " '[I]ndirect costs' means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved." 25 U.S.C. § 5304(f).

violate the ISDEAA by identifying Plaintiff's indirect costs without regard to whether IHS already transferred resources for the related activity in the Secretarial amount. Moreover, the CSC policy, to which Plaintiff has agreed to be bound by, describes this and other factors necessary to determine indirect CSC consistent with the statute. Defs.' Ex. 1, at § 6-3.2E.

c. IHS's award in response to Plaintiff's proposal is reasonable

Plaintiff attempts to equate Defendants' method for calculating the direct cost base with a Bureau of Indian Affairs (BIA) penalty that was overturned by the Court. *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996). Nothing about Plaintiff's methodology imposes a penalty. To the contrary, Defendants seek to pay the full amount of Plaintiff's CSC. To that end, Defendants seek to accurately capture Plaintiff's direct cost base for purposes of calculating its indirect CSC, which, among other limits, at all times must be the "reasonable" costs to "ensure compliance with the terms of the contract." 25 U.S.C. § 5325(a)(2). While Plaintiff half-way concedes that it may only seek CSC funding on the Federal award made directly by IHS, Plaintiff has nonetheless leveraged external sources of funding, including program income, to cover other direct costs required to perform the ISDEAA agreement in order to shift more IHS funding into the direct cost base, simply to drive up IHS's share of indirect costs. Pl's. Resp. at 5.[3] IHS contends that such actions to increase the direct cost base produce

[3] Plaintiff cites the decision regarding program income in *Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, 263 F. Supp. 3d 1083, 1164 (D.N.M. 2016) for support to leverage external sources of funding, including program income, to shift more direct IHS funding into the direct cost base for the purpose of assigning indirect costs (and calculating CSC). The *Sage Memorial* court improperly applied the Indian canon of construction, which applies only if a statute is ambiguous. *See, e.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (noting that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" (emphasis added)); see also *Nation v. Dalley*, 896 F.3d 1196, 1208 (10th Cir. 2018) (applying canons of statutory construction to determine the statute at issue was unambiguous and, accordingly, also finding that the Indian canon did not

facially unreasonable costs with regard to the ISDEAA agreement.

The 80% methodology that IHS proposed to Plaintiff and ultimately awarded was only one of several reasonable options presented during the parties' negotiations. *See* Defs.' Ex. 3 at ¶ 11. This methodology was developed carefully by the Agency in order to develop a profile to determine reasonableness based on how IHS carries out its actual health programs. Defs.' Ex. 3 at ¶¶ 17-19. The IHS CSC policy describes other situations where profiles developed by IHS are used as a tool to determine reasonableness. *See, e.g.*, Defs.' Ex. 1 at Manual Exhibit 6-3-G, Section C (instructing the agency to develop a profile of a program if a Tribe seeks to contract for a new or expanded program that the Agency did not provide directly). IHS is directed by the ISDEAA to ensure that CSC are reasonable: here it created a profile of the actual federal program in order to develop a reasonable method by which to do so. *See* Defs.' Ex. 3 at ¶¶ 17-19.

III. Plaintiff's proposal is unreasonable

Plaintiff argues that since there is an "indefinite" CSC appropriation that allows IHS to expend "such sums as may be necessary" for CSC, then Plaintiff's increased amount of CSC funding is harmless to other Tribes that do not receive the benefit of an inflated direct cost base. Pl's. Resp. at 10 (citing to the 2018 Appropriations Act). The lack of harm to other contractors

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apply); *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (explaining that the Indian "canons do not determine how to read this statute"). The *Sage Memorial* court failed to consider applicable definitions in OMB regulations, which effectively exclude external sources of funding, including program income, from the agency's direct cost base, and also failed to acknowledge that Medicare and Medicaid funding must "not be considered in determining appropriations for the provision of health care and services to Indians." 25 U.S.C. § 1641. Thus, contrary to the *Sage Memorial* court's analysis with respect to program income, there is no ambiguity with respect to how such funding may be treated.

does not render Plaintiff's proposal reasonable. Congress, through the ISDEAA, clearly mandates the Agency to pay full CSC but limits CSC to reasonable costs associated with the ISDEAA contract that otherwise meet the statutory definition. *See* 25 U.S.C. § 5325(a)(2). Plaintiff's funding request far exceeds the costs that meet this statutory mandate. Thus, Plaintiff suggests that IHS should pay costs that are not CSC, using an appropriation that is authorized only for CSC, simply because that appropriation is unlimited.

Defendants are similarly surprised by Plaintiff's characterization of Defendants' efforts to resolve the issue before, during, and after negotiations as anything but sincere. Defendants offered three written options to determine an acceptable direct cost base even prior to formal negotiations, asked Plaintiff for any supporting documentation it could provide to justify its position, and only offered a final methodology after Plaintiff rejected all offers by the Agency. Defs.' Ex. 3 at ¶¶ 15-16. Plaintiff does not refute these facts and only ever presented the Agency with one offer for resolving this issue. *Id*. at ¶ 11-12. Further, Plaintiff claims in its response that it only agreed to a resolution of the issue in previous years because it "sought to avoid conflict." Pl.'s Response at n.5. The ISDEAA and its implementing regulations clearly describe the avenues available to Plaintiff for dispute resolution, including the final offer process, to address any disputes that arise between the parties during negotiations. *See* 25 U.S.C. § 5387(b); 42 C.F.R. part 137, subpart H.

IV. Proper remedy is remand

Irrespective of the Court's decision in this case, Defendants maintain that the appropriate remedy is remand to the Agency. Plaintiff's final offer should not be deemed approved should the Court find in favor of Plaintiff. A deemed approval is only warranted where the Agency

issues an insufficient final offer response. 25 U.S.C. § 5387(b) (providing that the Secretary's determination must be "timely" and "made in compliance with subsection (c)"). The "sufficiency" of the response is determined by whether the Agency met the procedural requirements, e.g., by identifying the final offer criteria. *See, e.g.*, *Susanville Indian Rancheria v. Leavitt*, No. 2:07-cv-259-GEB-DAD, 2008 WL 58951 (E.D. Cal. 2008) (finding that the final offer rejection did not satisfy 25 U.S.C. § 5387(c) because it did not contain a specific finding that one of the four rejection criteria was met); *see also Northern Arapaho Tribe v. LaCounte*, No. 16-cv-11-BLG-BMM, 2017 WL 2728408 (D. Mont. 2017) (finding that the government made a post-hoc justification in the declination of the Tribe's Title I proposal and, because of that fact, ordered remand to the Agency for reconsideration of the Tribe's proposal). In this case, Defendants' response was sufficient.

Should the Court find that neither parties' offer is reasonable under the ISDEAA, remand is necessary for the parties to negotiate in line with the Court's holding. Throughout negotiations, the Agency has been flexible in offering an appropriate figure that accurately represents Plaintiff's CSC according to the requirements of the ISDEAA. Defs.' Opp. at 23.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court grant Defendants' Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment and hold that the Secretary properly partially rejected Plaintiff's final offer proposal under the ISDEAA.

Respectfully Submitted,

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