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 RYAN ZINKE, in his official capacity as Secretary, U.S. Department of the Interior, Defendants.	)	Civil Action No. 1:14-CV-01909 (TSC)

REPLY MEMORANDUM REGARDING ENTRY OF JUDGMENT

Plaintiff's Response to Defendants' Memorandum provides no detailed explanation, no evidence, and no financial accounting to explain to this Court why a proposed funding level that was more than 13 times ($17,055,517/$1,292,532) the Secretarial amount could be deemed facially reasonable. Plaintiff does not justify that windfall because it cannot. Instead, Plaintiff asks this Court to decide, as a legal matter, that a "deemed approved" contract necessarily entitles the requester to the full amount of funds requested, no matter the level of funding or its lack of connection to the services that Navajo Nation seeks to perform. In Plaintiff's view, then, it could have requested any amount, and this Court would be entitled to award it simply because the Defendants, relying on Navajo Nation's acquiescence, did not respond to the proposal within 90 calendar days.

Nothing in the D.C. Circuit's decision or D.C. Circuit precedent requires such a result. In order to effectuate the D.C. Circuit's decision that judgment should be entered for Plaintiff and

that the award amount is not limited to the Secretarial amount for the contract, *Navajo Nation v. U.S. Dep't of Interior*, 852 F.3d 1124, 1128-30 (D.C. Cir. 2017), the Navajo Nation's CY 2014 AFA contract must be deemed approved. But this Court is free to decide what amount, above the existing Secretarial amount, should be awarded as damages to the Plaintiff.

In making that remedy determination, this Court should determine a reasonable damages award using the proposed funding levels that Navajo Nation submitted for this ISDEAA contract in years when those proposals were not hand-delivered during a lapse in federal appropriations—proposed funding levels of $3,422,609 in CY 2012 and $2,072,950 in CY 2013. These proposed funding levels are free of the "gamesmanship" demonstrated by Plaintiff in CY 2014, *see* Mem. Opinion at 15 (ECF No. 30), and are thus more reasonable benchmarks for an appropriate damages award for the deemed approved contract.

I. This Court Is Not Required to Award Damages for Breach of the Deemed Approved Contract Based on the Proposed Funding Level.

The parties agree that in order to effectuate the D.C. Circuit's decision, this Court should enter a judgment granting summary judgment to Plaintiff, denying Defendants' motion for summary judgment, and declaring that Navajo Nation's CY 2014 AFA proposal is deemed approved as of January 3, 2014. Defs.' Mem. at 7-9 (ECF No. 37); Pl.'s Resp. at 2-3 (ECF No. 38). The parties also agree that Plaintiff is entitled to the Secretarial amount for the deemed approved contract, which was $1,292,532 for CY 2014, and that the D.C. Circuit's decision cited *Yurok* and *Seneca Nation* for the proposition that the government's argument "seek[ing] to transform the funding floor into a ceiling" "has been oft rejected." *Navajo Nation*, 852 F.3d at 1130 (citing *Yurok Tribe v. U.S. Dep't of Interior*, 785 F.3d 1405, 1412 (Fed. Cir. 2015), and *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945, F. Supp. 2d 135, 150-51

(D.D.C. 2013)).[1] However, in recognizing that the Secretarial amount is not a "ceiling" for an award, the D.C. Circuit did not hold, as Plaintiff suggests, that the proper award is the full amount of the contract proposal. *See id.* That question remains an open one for this Court to decide.

The ISDEAA similarly does not specify what amount should be awarded as damages to Plaintiff because deemed approved contracts are a remedy created by regulation, not statute. As Plaintiff notes, the D.C. Circuit's decision cites 25 C.F.R. § 900.18, which provides that 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 [ISDEAA]." Pl.'s Reply at 3, 4 (citing *Navajo Nation*, 852 F.3d at 1130; 25 C.F.R. § 900.18) (emphasis added). The regulations therefore provide that the remedy for the Secretary's failure to timely decline a proposal is to "deem[]" it "approved" and to provide the "full amount of funds" required by Section 106(a) of the ISDEAA, *i.e.*, the appropriate Secretarial amount. *See* 25 U.S.C. § 5325(a); *see also Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1037 (9th Cir. 2013) (defining the applicable funding level under Section 106(a) of the ISDEAA as an amount that would have been required for the program *but for* the ISDEAA

[1] Plaintiff also cites *Yurok* and *Seneca Nation* for the proposition that the damages award for the deemed approved contract should be based on Plaintiff's proposed funding level, Pl.'s Reply at 3, but neither case requires this Court to enter such a judgment. *See* Defs.' Mem. at 11-12. The Federal Circuit in *Yurok* had no occasion to decide the amount the Secretary must award a deemed approved proposal. *Yurok*, 785 F.3d at 1413-14 (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). In *Seneca Nation*, the court awarded the deemed approved contract at the proposed level as a "consequence[] of IHS's [complete] failure to respond to the Nation"—facts not present here—but did so while noting that the proposed amount was "facially reasonable." *See Seneca Nation*, 945 F. Supp. 2d at 145, 151-52.

contract). Thus, Plaintiff is incorrect in suggesting that the regulatory language answers the very question that it poses, *i.e.*, what amount of funds is required pursuant to Section 106(a).[2] It would run contrary to the statutory and regulatory scheme governing contracts between the BIA and tribes if *any* proposed 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. *See* Defs.' Mem. at 9-12.

It thus falls to this Court to determine whether Plaintiff should be awarded an additional $15,762,985 above the previously awarded Secretarial amount as damages in this case for a program that was funded nation-wide in CY 2014 with a total budget request of only approximately $24 million, and where the average payout to Tribes across the nation was only $129,729.[3]

II. This Court Should Determine a Reasonable Funding Level to Award as Damages for Breach of the Deemed Approved Contract.

Plaintiff has still not provided any detailed explanation as to why the proposed funding level for CY 2014 is a facially reasonable increase over the contract's prior funding levels determined by the Secretary pursuant to 25 U.S.C. § 5325(a)(1), or even why it is a facially reasonable increase over Plaintiff's own prior proposed funding levels for the contract. *See* Defs.' Mem. at 13-14. The proposed funding in CY 2014 for the deemed approved contract was

---

[2] The procedures set forth in the Department of Interior's ISDEAA handbook similarly do not answer this question, as they provide no more guidance than the regulation. *See* Pl.'s Resp. at 2-3 (citing United States Department of the Interior & Department of Health & Human Services, Internal Agency Procedures Handbook for Non-Construction Contracting under Title I of the Indian Self-Determination and Education Assistance Act, *available at* https://www.ihs.gov/ihm/dsp_folder/pc/p6c1/IAP_Handbook_Under_Title%20I_ISDEAA.pdf).

[3] *See* United States Department of the Interior, Budget Justifications and Performance Information, Fiscal Year 2014, Indian Affairs ("Greenbook"), at IA-PSJ-20, *available at* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ocfo/ocfo/pdf/idc1-021730.pdf (proposed funding for 185 tribal courts).

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. But the caseload for the Navajo Nation's District Courts and Supreme Court decreased between 2012 and 2014, and the scope of services provided under the contract did not grow over time. Pl.'s Opp'n MSJ Ex. B ¶¶ 8, 11 (ECF No. 21); Stipulations ¶ 19 (ECF No. 17); Defs.' MSJ Ex. A, Att. A – Fiscal Year 2012 Scope of Work at 1-2 (ECF No. 18); Compl. Ex. B, Att. A – Fiscal Year 2014 Scope of Work at 2 (ECF No. 1).

Plaintiff asserts that "urgent maintenance needs were going unaddressed for lack of funding," Pl.'s Resp. at 6, but operation and maintenance of justice services facilities are not funded through this contract's funding agreement. *See* Defs.' MSJ Ex. D at 1; Compl. Ex. J at 1. Instead, operation and maintenance costs are handled by BIA's Office of Justice Services and Office of Facilities and Maintenance, and funding requests for these costs must be submitted separately. *Id*. Even if Navajo Nation's increase in proposed funding in CY 2014 was in part attributable to the requested operation and maintenance costs, Plaintiff has not provided any evidence of how much those costs increased from prior years (when Navajo Nation did not include operation and maintenance costs in its funding proposals, *see* Defs.' MSJ Ex. A, Att. B; Defs.' Reply MSJ Ex. C (ECF No. 23)) or whether the increase in its funding request is reasonably tied to such costs.[4] Plaintiff also argues that the Secretarial amount covered "less than 10% of the actual cost" of the program in CY 2014. Pl.'s Resp. at 6. The Navajo Nation is

[4] As former Chief Justice Yazzie noted in his declaration in support of Navajo Nation's proposed funding for CY 2014, "$13,323,358 [of the proposed total budget] was to pay personnel and provide fringe benefits for Judicial Branch employees." Pl.'s Opp'n MSJ Ex. B ¶ 5 (ECF No. 21). Navajo Nation proposed $1,364,662 in its CY 2014 funding proposal "[t]o provide for repairs and maintenance of equipment, buildings and IT related services." Compl. Ex. B, Att. B – Fiscal Year 2014 Tribal Court Program Budget Summary.

not limited in the amount it spends (or would like to spend) on its Tribal Courts Program, but the "actual cost" of the ISDEAA contract 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. § 5325(a)(1). If the Navajo Nation retroceded the Tribal Courts Program back to the Secretary, *see* 25 U.S.C. § 5324(e); 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.

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, and as such it should be rejected. This Court should look to the proposed funding levels that Navajo Nation submitted in years when those proposals were not hand-delivered during a lapse in federal appropriations for guidance as to a reasonable award level for the deemed approved contract. Plaintiff proposed a budget of $3,422,609 in CY 2012 and a budget of $2,072,950 in CY 2013 for this ISDEAA contract. Defs.' MSJ Ex. A, Att. B – Fiscal Year 2012 Tribal Court Program Budget Summary; Defs.' Reply MSJ Ex. C – Fiscal Year 2013 Tribal Court Program Budget Summary. In the alternative, the Court should require Navajo Nation to provide a reasonable basis for the Court to calculate damages above the floor set by the Secretarial amount. Or, if further fact finding at the administrative level would be useful in the Court's determination of a reasonable damages level here, the Court could remand this case back to the BIA.

CONCLUSION

For the above stated reasons and the reasons set forth in Defendants' Memorandum Regarding Entry of Judgment, to effectuate the decision of the Court of Appeals, the Court should enter a judgment granting summary judgment in favor of Plaintiff, denying Defendants'

motion for summary judgment, declaring that Navajo Nation's CY 2014 AFA proposal is deemed approved as of January 3, 2014, and awarding damages for breach of contract by Defendants at a level this Court determines to be reasonable.

DATED: September 21, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ERIC R. WOMACK
Assistant Branch Director

/s/ Elizabeth L. Kade
ELIZABETH L. KADE
(D.C. Bar No. 1009679)
Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 616-8491
Facsimile: (202) 616-8470
E-mail: Elizabeth.L.Kade@usdoj.gov

Counsel for Defendants