UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NAVAJO NATION, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	)	Civil Action No. 20-1093 (DLF)

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

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Dated: November 4, 2020

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Defendants United States Department of the Interior and its Secretary, David L. Bernhardt, respectfully submit this Memorandum of Law in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment.

INTRODUCTION

This case involves a dispute between the tribe and the agency about the terms of an annual funding contract for forestry management services under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301 *et seq*. Under the process set forth in the regulations, the agency declined Plaintiff's proposed contract and Plaintiff requested a conference to informally resolve the dispute. That conference resulted in recommendations concerning funding and contract terms that were not appealed and are now final. Plaintiff brought this case to compel the funding award, but Defendants since have provided the funding, and that issue is moot.

That leaves the parties with a disagreement over the terms of the annual contract for 2020. The informal conference resulted in a finding that the terms of the 2019 contract should remain in place until the parties negotiate a settlement of their differences and approve an amended contract.

Instead of negotiating, Plaintiff is pursuing its claims in this litigation, asking the Court to "approve" its proposed contract language. Plaintiff asks the Court to enjoin BIA's initial decision to decline the tribe's proposed 2020 contract. But that decision is moot because the informal conference requested by Plaintiff resulted in recommendations that are now final and binding on the parties. In the alternative, Plaintiff requests that the Court enjoin the now-final recommendation that the parties negotiate their differences, but that claim is not raised in the

Complaint. In any event, Plaintiff is not entitled to any relief because none of the challenged actions are contrary to the ISDEAA or its regulations.

For the reasons set forth below, the Court should deny Plaintiff's request to "approve" its proposed contract. The Court should grant summary judgment in favor of Defendants.

STATUTORY FRAMEWORK

Congress created the ISDEAA to effect "an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 5302(b); *see also id.* § 5304(j) (requiring the Bureau of Indian Affairs ("BIA") to enter into contracts with tribes "for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members"). Upon the request of a tribe by tribal resolution, the ISDEAA requires BIA to enter into a self-determination contract with the tribe or a tribal organization to administer any program, function, service or activity that BIA currently provides for the benefit of the tribe. 25 U.S.C. § 5321(a)(1). BIA may decline a tribe's request to contract in certain specified circumstances. *See id*. § 5321(a)(2).

The Contract here requires the parties to negotiate certain agreements called "successor annual funding agreements" ("SAFAs") each year, which are defined as the "negotiated agreement of the Secretary to fund, on an annual basis, the programs, services, activities and functions transferred to an Indian tribe or tribal organizations under [ISDEAA]," 25 C.F.R. § 900.6. By regulation, annual funding agreements are distinct from ISDEAA "contracts." The latter term refers to the "contract . . . entered into . . . between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." 25 U.S.C. §

5304(j); *see* 25 C.F.R. § 900.6 (incorporating this definition of "contract"). Separate AFAs negotiated each year are incorporated into the Contract and determine the level of funding provided to tribes under the Contract in a particular year. *See* Model Agreement § (f)(2)(B) at 25 U.S.C. § 5329(c).

Under the annual funding agreement process, the tribe makes a funding proposal prior to the year in question and BIA may decline that proposal on various grounds authorized by law. In general, the agency may decline all or a portion of an ISDEAA proposal in only five circumstances, including if "[t]he proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract." 25 U.S.C. § 5321(a)(2)(C); *see also* 25 C.F.R. § 900.32 (providing that these declination criteria are applicable to negotiation of annual funding agreements). These circumstances further include if "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract" as determined under section 5325(a) of the ISDEAA. 25 U.S.C. § 5321(a)(2)(D); *see also* 25 C.F.R. § 900.32. BIA's regulations implementing the ISDEAA separately deal with declination of annual funding agreements. *See* 25 C.F.R. § 900.20 (providing that "[f]or annual funding agreements, see § 900.32"). Section 900.32 provides that BIA may not decline a "successor annual funding agreement" if it is "substantially the same" as a prior annual funding agreement. 25 C.F.R. § 900.32. If the SAFA is not "substantially the same" as a prior agreement, however, the declination criteria applicable to self-determination contracts apply. *Id.* Such declinations, however, are ineffective "if a proposal is not declined within 90 days after it is received by the Secretary." *Id*. § 900.18. In that case, the proposal "is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act." *Id.*

If the agency declines an ISDEAA proposal, the agency must "state any objections in writing to the tribal organization" and "provide assistance to the tribal organization to overcome the stated objections." 25 U.S.C. § 5321(b)(1)-(2). The agency must also provide the tribal organization a hearing on the record and "the opportunity for appeal" under BIA's regulations implementing ISDEAA. *Id.* § 5321(b)(3). However, in lieu of appealing a declination decision to the Interior Board of Indian Appeals ("IBIA"), the tribal organization may "exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 5331(a)[.]" *Id.*; *see also* 25 C.F.R. § 900.158 (providing that the tribe may appeal a declination decision to the IBIA and request a hearing on the record).

BIA regulations additionally provide the tribe the option of requesting an informal conference instead of appealing the declination decision to the IBIA or filing suit in district court. 25 C.F.R. § 900.153. The purpose of the informal conference is "to resolve issues as quickly as possible, without the need for a formal hearing." *Id.* If the tribe requests an informal conference, representatives of both the tribe and BIA make presentations to a designated representative of the Secretary who conducts the conference. *Id.* § 900.155(c)-(d). Within 10 days of the informal conference, the designated representative issues a written report of the informal conference and a recommended decision. *Id.* § 900.156. The tribe may still appeal BIA's initial declination decision to the IBIA within 30 days of receiving the recommended decision if the tribe "is dissatisfied with the recommended decision[.]" *Id.* § 900.157. If the Indian tribe or tribal organization does not file a notice of appeal with the IBIA within 30 days or before the expiration of any time extension requested under 25 C.F.R. § 900.159, the recommended decision becomes final.

FACTUAL BACKGROUND

Among the many aspects of the relationship between the parties is Contract No. A18AV00262 (the "Contract"), which covers Plaintiff's Forestry Management Program. While the Contract's performance period ends on December 31, 2022, funding is implemented for the Program through AFAs and SAFAs.

On September 30, 2019, Plaintiff submitted to BIA its proposed Calendar Year 2020 SAFA and Statement of Work ("SOW") for the Contract. Compl. Ex. A. On October 21, 2019, BIA informed Plaintiff that the proposed SOW was not substantially the same as the prior year's SOW, and requested that Plaintiff resubmit a revised SOW. *See id.* at 1-2. On November 15, 2019, Plaintiff disagreed with the agency's characterization and refused to change the SOW language back to that of the 2019 SOW. *See id.* at 2.

On December 19, 2019, BIA's Navajo Regional Director declined Plaintiff's proposed 2020 SAFA for two reasons. Compl. Ex. B. First, BIA found that "the proposed project or function to be contracted cannot be properly completed or maintained by the proposed contract," concluding that the proposal would not comply with the National Indian Forest Resources Management Act of 1990 and General Forestry Regulations. *Id.* at 2 (relying on 25 U.S.C. § 5321(a)(2)(C) and 25 C.F.R. § 900.22(c)). Second, BIA concluded that the amount of funds proposed under the contract was in excess of the applicable funding level for the contract, as Plaintiff's proposed budget of $737,745 was in excess of the funds immediately available. *Id.* at 3 (citing 25 U.S.C. § 5321(a)(2)(D) and 25 C.F.R. § 900.22(d)).

Plaintiff timely requested an Informal Conference to raise objections to BIA's declination, and the conference was conducted by the Secretary's Designated Representative, Benjamin H. Nuvamsa, on February 18, 2020, pursuant to 25 C.F.R. § 900.153. Compl. Ex. C.

On February 28, 2020, Mr. Nuvamsa issued his Recommended Decision, finding that BIA should immediately approve and award funding of $717,736.77 to fund the forestry management services set forth in the Contract for 2020. *Id.* at 5-6. Mr. Nuvamsa further recommended that the existing SAFA and SOW (for 2019) "must continue to remain in place through [Calendar Year] 2020, or until such time as the [Contract] is properly amended to reflect a new or revised, and approved SAFA." *Id.* at 6. The Recommended Decision directed the parties to work together, in good faith, to perfect the 2020 agreement so that it complies with Sec. 108(f)(2) of the Act. *Id.* at 7. Plaintiff did not appeal the Recommended Decision within 30 days, so it became final on March 30, 2020. Compl. ¶ 16; 25 C.F.R. § 900.159.

On April 27, 2020, Plaintiff commenced this action by filing the Complaint. ECF No. 1. The Complaint alleges that Defendants did not comply with the Recommended Decision because they had not provided the funding to which Plaintiff was entitled. Compl. ¶ 18. Plaintiff asserted two claims under the ISDEAA, alleging that it is entitled to a declaration that the 2020 SAFA and SOW that it proposed on September 28, 2019, "are approved" and seeking an injunction compelling Defendants "to approve the 2020 SAFA and Statement of Work as proposed by the Nation on September 28, 2019 and to immediately award and provide applicable funding of at least $717,736.77." Compl. ¶¶ 23, 26.

On June 10, 2020, in accordance with the Recommended Decision, BIA issued a unilateral modification to the contract in which the agency advised Plaintiff that it was immediately awarding all available 2020 funding for Plaintiff's Forestry Management Program. Pl.'s Statement[1] Ex. 1. BIA further advised that the 2019 SAFA and SOW "shall continue to

[1] Citations to "Pl.'s Statement" refer to the Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment, filed September 25, 2020. ECF No. 12.

remain in place through CY 2020, or until such time as the Contract is properly amended to reflect a new or revised, and approved SAFA." *Id.* at 2. On June 30, 2020, Plaintiff communicated to BIA that it "objects to, and does not agree with" the agency's position concerning the effectiveness of the 2019 SAFA and SOW. Pl.'s Statement Ex. 2. This was the first time that Plaintiff raised its objection to proceeding under the 2019 AFA and SOW as provided in the February 28, 2020, Recommended Decision.

On July 29, 2020, BIA responded that its position is consistent with the Recommended Decision. The agency further noted that Plaintiff had drawn down the entire amount of 2020 funds for the Contract and invited Plaintiff to begin negotiations to resolve the parties' differences concerning the contract terms. Pl.'s Statement Ex. 3.

On September 25, 2020, Plaintiff moved for summary judgment, arguing that the "Court should declare that the Nation's proposed 2020 SAFA and SOW are approved, and compel the Defendants to approve the 2020 SAFA and SOW, except for the funding amount which has become moot since the filing of this action." ECF No. 12 at 1. Plaintiff further argues that the Recommended Decision "fashioned an improper remedy" by directing the parties to negotiate their differences. *Id.* at 9.

APPLICABLE LEGAL STANDARD

Rule 56(a) provides that summary judgment shall be granted "if 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the overall design of the rules of civil procedure, which is to secure the just,

speedy, and inexpensive determination of every action. *Celotex Corp.*, 477 U.S. at 327. Indeed, the "very mission" of Rule 56 is "to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56(e) (advisory committee note).

Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson*, 477 U.S. 242. A genuine issue of material fact is one that could change the outcome of the litigation. *Id*. at 247. The party moving for summary judgment need not prove the absence of an essential element of the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. "The burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party's case." *Id*. Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

To avoid summary judgment, the plaintiff must present some objective evidence that would enable the court to find an entitlement to relief. "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *Potter v. District of Columbia*, 558 F.3d 542, 549 (D.C. Cir. 2009) ("[M]erely colorable or not significantly probative evidence . . . is insufficient to defeat a summary judgment motion." (internal quotation marks and citation omitted)). Unsupported speculation is not enough to defeat a summary judgment motion; the existence of specific material evidentiary facts must be shown. *See, e.g., David v. Dist. of Columbia*, 246 F. Supp. 3d 647 (D.D.C. 2017) (non-moving party's opposition "must consist of more than mere unsupported allegations or denials").

ARGUMENT

The issue in the case is Plaintiff's request that the Court declare that the terms of the 2020 SAFA and SOW that it proposed are "approved." Plaintiff also asks the Court to compel Defendants to "approve" Plaintiff's proposed contract. For the following reasons, Plaintiff's claim has no merit.

I. PLAINTIFF'S CLAIMS REGARDING FUNDING ARE MOOT.

As an initial matter, the Court should dismiss Plaintiff's First and Second Claims for Relief to the extent that they ask the Court to compel Defendants to "immediately award and provide applicable funding of at least $717,736.77" to Plaintiff. Compl. ¶ 23. There is no dispute that Defendants have provided the funding and that this claim is moot. *See* Mot.[2] at 1 (stating that the funding amount "has become moot since the filing of this action"); 6 ("The Nation subsequently drew down the $740,341, resolving the funding dispute.").

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS TO PLAINTIFF'S CLAIM THAT ITS PROPOSED CONTRACT IS OR SHOULD BE "APPROVED."

Plaintiff raises two alternative theories to support its request for declaratory and injunctive relief that its proposed 2020 SAFA and SOW is, or should be, "approved." In the Complaint, Plaintiff argues that BIA's initial declination of Plaintiff's proposed contract was inconsistent with statutory and regulatory provisions and that the Court should enforce the Recommended Decision. On summary judgment, however, Plaintiff has added a new (and inconsistent) argument alleging that the Recommended Decision is contrary to the statute and regulations. Both of these arguments are meritless.

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[2] Citations to "Mot." refer to Plaintiff's Motion for Summary Judgment, filed September 25, 2020. ECF No. 12. Page references refer to the pagination generated by the Court's CM/ECF system at the top of the page.

A. Plaintiff Is Not Entitled to Relief Based on BIA's Declination of Plaintiff's Proposed SAFA and Statement of Work.

The Complaint alleges that BIA improperly declined Plaintiff's proposed 2020 SAFA and SOW. Compl. ¶¶ 14-21. Plaintiff argues that the agency cannot decline a SAFA if it is substantially the same as the prior annual funding agreement. On December 19, 2019, BIA determined that Plaintiff's 2020 SAFA was not substantially the same as the prior year's agreement and therefore was subject to the declination criteria of 25 C.F.R. § 900.32. The Recommended Decision disagreed with BIA's position—that Plaintiff's proposal was not "substantially the same" as the prior agreement—which Plaintiff interprets to mean that "there was no valid statutory reason to decline the proposed 2020 SAFA and SOW." Mot. at 9. Plaintiff therefore asks the Court to enforce the Recommended Decision to enjoin BIA's initial declination decision and "approve" Plaintiff's proposed SAFA and SOW. *Id.*

Plaintiff presents its claim for declaratory and injunctive relief[3] under 25 U.S.C. § 5331(a), which states, in pertinent part, as follows:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this chapter . . . . In an action brought under this paragraph, the district courts may order appropriate relief including . . . injunctive relief against any action by an officer of the United States or any agency thereof contrary to this chapter or regulations promulgated thereunder . . . .

25 U.S.C. § 5331(a)

Plaintiff seeks injunctive relief against the initial declination decision by BIA's Navajo Regional Director based on the allegedly incorrect conclusion that the 2020 SOW was not substantially different from the 2019 version. But that cannot be a basis for relief under the ISDEAA because BIA's December 19, 2019, decision is no longer effective. Plaintiff objected

[3] Plaintiff is not seeking money damages or mandamus relief in this action.

to that initial BIA decision in an informal conference requested by Plaintiff and conducted by the Secretary's Designated Representative. Compl. ¶ 11; 25 C.F.R. §§ 900.153, 900.155. Mr. Nuvamsa issued a Recommended Decision, which became final after 30 days because Plaintiff chose not to file an administrative appeal. 25 C.F.R. § 900.157.

There is no basis for this Court to enjoin BIA's initial declination decision (even if the Court were to conclude that the 2020 SOW was not substantially different from the 2019 SOW). BIA's initial decision, including its rationale, is no longer effective to the extent that it conflicts with Mr. Nuvamsa's Recommended Decision, which is now final for the agency. 25 C.F.R. § 900.158. Defendants can no longer rely on that decision in light of the finality of the Recommended Decision, which supersedes and renders ineffective the initial decision.

Importantly, Mr. Nuvamsa's decision notified the Nation of its appeal rights (*see* § 900.156(b)), and advised Plaintiff that the Recommended Decision would become final after 30 days. Compl. Ex. C at 9. Plaintiff therefore forfeited its ability to challenge the initial decision once the Recommended Decision became final.

Accordingly, because BIA's December 19, 2019 initial declination decision is no longer effective and Defendants are bound by the Recommended Decision, there is no basis for the Court to impose injunctive relief against Defendants based on BIA's initial action.

B. Plaintiff Is Not Entitled to Relief Based on the Designated Representative's Recommended Decision.

Plaintiff's alternate theory for injunctive relief under Section 5331(a) also is unpersuasive. Plaintiff argues that Mr. Nuvamsa "fashioned an improper remedy" by maintaining the 2019 SAFA and SOW in place and directing the parties to negotiate their differences with respect to the 2020 agreements. Mot. at 9. The Recommended Decision, according to Plaintiff, conflicts with a section of the ISDEAA, 25 U.S.C. § 5321(a)(2),and a

regulation promulgated under the statute, 25 C.F.R. § 900.18. Mot. at 9-10. Plaintiff's argument is meritless.

As an initial matter, Plaintiff did not raise this claim in the Complaint, and the Court should grant summary judgment in favor of Defendants on that basis. The Complaint alleged only that BIA's December 19, 2019, initial declination was improper. Plaintiff did not challenge the validity of, or seek to enjoin, the Recommended Decision. To the contrary, the Complaint confirms that the Recommended Decision became final on March 30, 2020. Further, Plaintiff asks the Court to *enforce* the Recommended Decision by awarding it the funding that the Recommended Decision says Plaintiff was due. *See* Compl. ¶ 17 ("The BIA has not complied with the Decision of the Secretary's Designated Representative after it became final for the Department on March 30, 2020."). Plaintiff should not be able to represent that an agency action is final and enforceable in the Complaint, only to advance the opposite position and seek an injunction against the same agency action in a summary judgment motion.

Now that the funding issue is moot, Plaintiff has reversed its position. Instead of arguing that BIA's initial decision was wrong because the Designated Representative disagreed with it, *see* Compl. ¶ 14, Plaintiffs have pivoted to the inconsistent position that the Recommended Decision is invalid because it purportedly does not comply with a statute and a regulation, Mot. at 9-10. But Plaintiff cannot use summary judgment briefing to press claims not raised in the Complaint. *Quinn v. District of Columbia*, 740 F. Supp. 2d 112, 130 (D.D.C. 2010) ("It is well established that plaintiffs may not, through summary judgment briefs, raise new claims where such claims were not raised in the complaint") (internal quotation marks and alterations omitted); *Winder v. District of Columbia*, 555 F. Supp. 2d 103, 108 (D.D.C. 2008); *Sharp v. Rosa Mexicano, D.C., LLC*, 496 F. Supp. 2d 93, 97 n.3 (D.D.C. 2007) ("[A] plaintiff may not, through

summary judgment briefs, raise the new claims[.]"). The Court should reject Plaintiff's alternative argument on this basis.

Even if Plaintiff had appropriately pleaded its challenge to the validity of Mr. Nuvamsa's decision, the Court should deny Plaintiff's request for injunctive relief against the Recommended Decision. Under Section 5331(a), injunctive relief is appropriate "against any action by an officer of the United States or any agency thereof contrary to this chapter or regulations promulgated thereunder." Here, Plaintiff alleges that the Recommended Decision "directly conflicts with the requirements of 25 U.S.C. § 5321(a)(2) and 25 C.F.R. § 900.18," Mot. at 10, although Plaintiff fails to identify the alleged "direct conflict" between the decision and the statute or regulation.

Instead, Plaintiff's chief complaint about the Recommended Decision is that it "fashioned an improper remedy." Mot. at 9. The statute and regulation referenced by Plaintiff do not relate to the remedy that the Secretary's Designated Representative may recommend after an informal conference requested by a tribe. Indeed, Plaintiff has not cited any ISDEAA provision that limits the nature and extent of the relief that could be recommended following an informal conference requested by a tribe.[4] There is no basis to conclude that Mr. Nuvamsa's recommendations are contrary to the statute or associated regulations.[5]

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[4] Mr. Nuvamsa made clear that his recommendation, if it became final, would supersede BIA's initial declination. He wrote that the recommendations "will eliminate" the agency's declination "that the services proposed to be contracted for could not be properly completed or maintained by the proposed contract." *Id.* When it became final, the Recommended Decision thus superseded BIA's initial justification and directed "the parties to work together, in good faith, to perfect the CY2020 AFA" to comply with the applicable statutory provisions. *Id.* Defendants agree that the parties should be dedicating their resources to negotiating a resolution to their differences regarding the terms of the Contract.

[5] Plaintiff characterizes as "nonsense" Mr. Nuvamsa's recommendation that the parties negotiate a resolution to their differences, but provides no authority for this assertion. Mot. at 9. If Plaintiff objected to any aspect of the Recommended Decision, it had the right to appeal that

The authorities cited by Plaintiff have little to do with Mr. Nuvamsa's recommendations, but instead point back to BIA's initial declination decision, which is now moot. Section 5321(a)(2) requires that the Secretary, "within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that it supported by a controlling legal authority," stating one of five reasons in subparagraphs (A) through (E). 25 U.S.C. § 5321(a)(2). The Secretary complied with the requirement of Section 5321(a). Plaintiff submitted its proposal on September 28, 2019, and BIA declined the proposal on December 19, 2019. Compl. ¶¶ 9-10. Because the agency's declination took place 83 days after Plaintiff submitted its proposal, BIA's Navajo Regional Director acted timely under the regulation.

Defendants also complied with the requirement that its notification contain a specific finding that the statutory criteria were satisfied. BIA's December 19, 2019, decision declined Plaintiff's proposal based on 25 U.S.C. § 5321(a)(2)(C) and 25 C.F.R. § 900.22(c) because "[t]he proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract." Compl. Ex. B. at 2. That initial decision explained the basis for the agency's position. It is true that the Designated Representative subsequently disagreed with the Navajo Regional Director's rationale. But the agency complied with Section 5321(a) by providing Plaintiff with the basis for its decision within the time period required by the statute.[6] There is no basis to enjoin the Designated Representative's action as contrary to 25 U.S.C. § 5321(a)(2) or 25 C.F.R. § 900.22(c).

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decision before it became final.

[6] There is no merit to Plaintiff's argument that the Designated Secretary's decision conflicts with 25 C.F.R. § 900.18. That regulation addresses the situation when a proposal is not declined within 90 days after it is received by the Secretary. This regulation is inapplicable to this case because BIA declined Plaintiff's proposal within 90 days.

The Recommended Decision is now a Final Decision. BIA has fully complied with that decision. Plaintiff must now also follow that decision and accept BIA's invitation to resolve the differences regarding the terms of the contract.

* * *

Plaintiff has not identified any action by a federal official or agency that was contrary to the ISDEAA or regulations promulgated thereunder. There is no factual or legal basis, therefore, for the Court to impose injunctive relief in this case under the ISDEAA.

CONCLUSION

For the reasons set forth above, the Court should grant this motion and enter judgment in favor of Defendants and against Plaintiff.

Dated: November 4, 2020

Respectfully submitted,

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