

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

Fort Defiance Indian Hospital Board, Inc.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	
Xavier Becerra, Secretary, U.S. Department of)	COMPLAINT
Health and Human Services; Elizabeth A. Fowler,)	
Acting Deputy Director, Indian Health Service;)	
Roselyn Tso, Area Director, Navajo Area Indian)	
Health Service; Marquis Yazzie, Agency Lead)	
Negotiator/Director, Office of Indian Self-)	
Determination, Navajo Area Indian Health)	
Service,)	
)	
and)	
)	
United States of America,)	
)	
Defendants.)	
)	

I. INTRODUCTION

1. This action is brought to secure immediate injunctive relief compelling the Indian Health Service (“IHS”) to reverse a declination finding and to fully award and fund the renewal contract of the Fort Defiance Indian Hospital Board, Inc. (“FDIHB”) under the Indian Self-Determination and Education Assistance Act (“ISDA”), 25 U.S.C. §§ 5301-5423.

2. On December 1, 2021, IHS belatedly issued a “partial declination” of a renewal contract proposal FDIHB submitted to IHS on August 3, 2021. This declination was improper for four reasons. First, IHS is required to approve or decline a renewal contract proposal within 90 days of its submission; otherwise, the proposal in its entirety is “deemed approved” by operation of law. 25 U.S.C. § 5321(a)(1); 25 C.F.R. § 900.18. This 90-day contract review period can be

extended only with the tribal organization's "written consent." 25 C.F.R. § 900.17. IHS did not accept or decline FDIHB's renewal contract proposal within 90 days of its submission, and accordingly the proposal is "deemed approved" in full. Second, IHS is required by law to award a renewal contract in its entirety that does not propose a "material and substantial change" to the scope or funding of the contracted program covered by the preceding contract, 25 C.F.R § 900.33, yet, IHS has refused to do so. Third, IHS did not provide FDIHB with required technical assistance to avoid declination of FDIHB's renewal contract proposal and the accompanying funding agreement. Further, IHS's actions unlawfully reduced FDIHB's contract funding "in subsequent years," in violation of 25 U.S.C. 5325(b)(2). Finally, even if IHS's actions had been timely, even if the regulatory prohibition excepting the contract renewal proposal from the declination process did not exist, even if the absent technical assistance had been furnished, and even if there were no prohibition on reducing FDIHB's contract from one year to the next, IHS failed to meet its high burden of proof to demonstrate the validity of its decision to cut FDIHB's contract payments by \$16,627,268 based on alleged duplication of funds.

3. "Immediate injunctive relief," as expressly provided by statute, 25 U.S.C. § 5331(a), is required so that FDIHB can continue providing the same level of health care to 47,000 people—virtually all of whom are members of the Navajo Nation—at a moment of particular risk as the Omicron variant prolongs and exacerbates the COVID-19 pandemic; to protect FDIHB from the loss of \$1.4 million per month in operating revenue; and to protect FDIHB's patients from the reduction in services that the loss of this revenue would necessitate. Congress gave the District Courts the power to impose strong and immediate remedies where, as here, IHS's refusal to award a renewal contract in full is contrary to the ISDA and its implementing regulations.

II. JURISDICTION

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1362 and 25 U.S.C. § 5331(a).

5. Venue is proper pursuant to 28 U.S.C. § 1391(e)(1)(A) because the hospital campus spans the Arizona/New Mexico border and because some of the Defendants reside in New Mexico.

III. PARTIES

6. Plaintiff FDIHB is a tribally chartered, 501(c)(3) nonprofit healthcare organization that owns and operates a hospital campus in Fort Defiance, Arizona, on the Arizona/New Mexico border, and a health clinic in Sanders, Arizona, serving approximately 47,000 people, most of whom are members of the Navajo Nation and reside within the 16 Navajo communities in the Fort Defiance service area (formerly known as the Fort Defiance Service Unit). The Navajo Nation is a federally recognized Indian Tribe and has designated FDIHB as a “tribal organization,” 25 U.S.C. § 5304(l), for purposes of contracting with IHS under the ISDA. Since 2010, FDIHB has provided health care services to members of the Navajo Nation pursuant to a contract with IHS under Title I of the ISDA, 25 U.S.C. §§ 5301-5332.

7. Xavier Becerra is the Secretary of the U.S. Department of Health and Human Services (“HHS”). Secretary Becerra exercises limited responsibilities designated to him by Congress pursuant to the ISDA and other applicable law.

8. Elizabeth A. Fowler is the Acting Deputy Director of the Indian Health Service (“IHS”). Deputy Director Fowler exercises authority delegated to her by the Secretary to carry out the Secretary’s responsibilities under the ISDA and other applicable law. As used throughout this Complaint (and unless context commands otherwise), the terms “Secretary,” “HHS,”

“Director,” and “IHS” are used interchangeably.

9. Roselyn Tso is the Area Director of the Navajo Area Indian Health Service (“NAIHS”). Director Tso carries out the functions, authorities, and duties of IHS within the Navajo Nation service area, including contracting with Indian tribal organizations under the ISDA. On information and belief, Director Tso resides in Albuquerque, New Mexico.

10. Marquis Yazzie is the Agency Lead Negotiator and Director of the Office of Indian Self-Determination within the NAIHS. Mr. Yazzie is the main agency contact for the negotiation of contracts under Title I of the ISDA and has communicated with FDIHB on behalf of the agency regarding the fiscal year 2022 contract renewal. Mr. Yazzie resides in Gallup, New Mexico.

IV. BACKGROUND

A. Brief Overview of the ISDEAA

11. The purpose of the ISDA is to ensure “maximum Indian participation” in the provision of services to Indian communities. 25 U.S.C. § 5302(a). The Act seeks to achieve this purpose through the “establishment of a meaningful Indian self-determination policy,” which provides for the transition of federal programs serving Indian Tribes from IHS operation to tribal operation. *Id.* § 5302(b).

12. The ISDA authorizes Tribes and tribal organizations to contract with IHS to provide federally funded healthcare services that IHS would otherwise provide directly. A Tribe may designate a tribal organization, *id.* § 5304(l), to contract with IHS on the Tribe’s behalf.

13. A tribal organization may choose to contract for any portion of a health care program, function, service, and activity (hereinafter “programs”), including administrative activities, that IHS carried out in its operation of the federal healthcare program. *Id.* § 5321(a).

14. The ISDA requires that IHS fund a tribally-contracted Federal program at levels prescribed by statute, beginning with a base amount of funding no less than what IHS would have otherwise spent on the program. *Id.* § 5325(a)(1). This is commonly referred to as “the Secretarial amount.”

15. Because Tribes do not have access to the same administrative resources and economies of scale as IHS, the ISDA requires the Secretary to add “contract support costs” to each Tribe’s contract. *Id.* § 5325(a)(2)–(3). These costs reimburse the Tribe’s fixed overhead costs necessary to carry out the contract, broadly defined as “the reasonable costs for activities which must be carried on by a tribal organization . . . to ensure compliance with the terms of the contract and prudent management.” *Id.* § 5325(a)(2).

16. The ISDA establishes two types of contract support costs. “Direct” contract support costs are defined as “direct program expenses for the operation of the Federal program that is the subject of the contract.” *Id.* § 5325(a)(3)(A)(i). “Indirect” contract support costs—also known as “administrative” and “overhead” costs—are defined as “any additional administrative or other expense . . . and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract.” *Id.* § 5325(a)(3)(A)(ii).

17. Contracts under Title I of the ISDA generally must be renewed every three years. 25 U.S.C. § 5324(c)(1)(A). The contracting tribal organization and IHS must also negotiate annual funding agreements (“AFAs”) that are incorporated into each contract and may be amended throughout the year to add funds the agency makes available. *See* 25 U.S.C. § 5329(c) (model agreement).

18. The proposal content requirements for a renewal contract and successor AFA are not the same as for an initial contract proposal. *Compare* 25 C.F.R. § 900.12 (renewal contract and successor annual funding agreement), *with id.* § 900.8 (initial contract proposal). A renewal proposal need only provide funding information and identify any proposed changes. *Id.* § 900.12.

19. A contract renewal proposal must be approved or declined by IHS within 90 days of its submission to IHS. 25 U.S.C. § 5321(a)(2); *see also* 25 C.F.R. § 900.18. The 90-day deadline for approving or declining a contract renewal proposal can be extended only with the express written consent of the tribal organization that made the proposal. 25 U.S.C. § 5321(a)(2); 25 C.F.R. § 900.17. If IHS does not approve or decline the proposal within 90 days, the proposal is deemed approved in full, and the Secretary must award any such renewal and the full amount of funds proposed. 25 C.F.R. § 900.18. *See also Navajo Nation v. Dep't of the Interior*, 852 F.3d 1124 (D.C. Cir. 2017).

20. If a tribal organization submits a proposal to renew a term contract “where no material and substantial change to the scope or funding of a [program] has been proposed,” then IHS may not review the renewal proposal for declination issues. *Id.* § 900.33; *cf. id.* § 900.22 (describing declination criteria that are only applicable to initial contracts). Instead, such renewal contracts must be automatically approved.

21. Similarly, if a tribal organization submits a successor AFA that “is substantially the same as the prior [AFA] . . . the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor [AFA].” *Id.* § 900.32.

22. Upon receiving a proposal to renew a term contract, IHS must “provide any

necessary requested technical assistance to . . . [the] tribal organization, and shall share all relevant information with the Indian tribe or tribal organization, in order to avoid declination of the proposal.” *Id.* § 900.28. Pursuant to this regulation, whenever IHS’s review of a proposal indicates that “a declination may occur,” IHS must “inform the [tribal organization] and provide the [tribal organization] with any necessary requested technical assistance to avoid the declination.” DOI/HHS Internal Handbook, at ch. 6 (1999 draft).

23. If IHS declines to renew a term contract, IHS must “provide technical assistance . . . to develop modifications to any proposal for a self-determination contract which the Secretary has declined to approve.” 25 U.S.C. § 5322; *see* 25 C.F.R. § 900.30. IHS must provide such technical assistance regardless of whether such assistance is requested by the tribal organization. *See* 25 C.F.R. § 900.30 (IHS must “provide additional technical assistance to overcome the stated objections . . . and shall provide any necessary requested technical assistance to develop any modifications to overcome the Secretary’s stated objections” (emphasis added)); *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 256 F. Supp. 3d 1186, 1245 (D.N.M. 2015).

24. The ISDA limits the Secretary’s authority to decline a contract in several additional ways. Among these, the Act demands that in making a decision to decline to award a contract in whole or in part, the Secretary must make “a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that” one of five permitted bases for a declination decision are established. 25 U.S.C. § 5321(a)(2). Similarly, in any appeal (including a civil action), “the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).” 25 U.S.C. § 5321(e). Further, the Act commands that “[i]n the negotiation of contracts and funding

agreements, the Secretary shall (1) at all times negotiate in good faith to maximize implementation of the self-determination policy; and (2) carry out this Act in a manner that maximizes the policy of Tribal self-determination” 25 U.S.C. § 5321(f).

25. The ISDA provides a comprehensive range of remedies when IHS violates the Act, including the right to obtain immediate injunctive relief and money damages. 25 U.S.C. § 5331(a).

26. The ISDA and each provision of an ISDA contract “shall be liberally construed for the benefit of the Contractor.” 25 U.S.C. § 5329(c)(Model Agreement, Section 1(a)(2)). The Supreme Court has explained this means, “[t]he Government, in effect, must demonstrate that its reading is clearly required by the statutory language.” *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012); *see also* 25 U.S.C. § 5321(g) (the ISDA and its regulations must be construed for the benefit of the Indian Tribe); 25 C.F.R. § 900.3(b)(11) (regulations must be liberally construed for the benefit of Indian tribes and tribal organizations”).

B. Background, Initial Contract, and Subsequent Renewals

27. On August 3, 2009, the Intergovernmental Relations Committee of the Navajo Nation Council sanctioned and approved FDIHB as a tribal organization, empowered by the Self-Determination Act (P.L. 93-638) and recognized by the Internal Revenue Service as a 501(c)(3) non-profit organization. The Navajo Nation Council has continued to sanction and approve FDIHB as a tribal organization at all times since FDIHB entered into this first ISDA contract.

28. Pursuant to that authority, FDIHB entered into a three-year ISDA contract with IHS to manage and operate health services to eligible beneficiaries within the former IHS Fort Defiance Service Unit beginning in 2010.

29. Since 2010, FDIHB has continued to manage and operate health services to eligible

beneficiaries within the former IHS Fort Defiance Service Unit under successive three-year ISDEAA contracts with IHS.

30. To enter into these successive ISDA contracts, in accordance with IHS regulations and standard practice, FDIHB periodically submits contract renewal proposals to IHS, accompanied by an Annual Funding Agreement (AFA) specifying both parties' obligations with respect to funding for the first year of the proposed contract term. IHS then determines whether to approve or decline the contract renewal proposal.

31. In addition to submitting an AFA with each contract renewal proposal, FDIHB and IHS jointly propose and develop AFAs annually during the term of an ISDA contract. Once finalized, the AFA is signed by IHS and transmitted to FDIHB.

32. Tribal organizations that submit contract renewal proposals are required to estimate the indirect contract support costs associated with the proposal. IHS guidance provides tribal organizations with two options for estimating these costs. First, the organization can begin with the most recent indirect cost (IDC rate) agreement negotiated separately by the organization with its cognizant agency, and apply the rate to the direct cost base. Alternatively, or in addition to applying the rate, the organization can negotiate a lump sum for indirect contract support costs.

33. The direct cost base and the IDC rate negotiated by the organization with its cognizant agency both vary from year to year. Accordingly, for organizations that elect to estimate indirect contract support costs by applying the IDC rate, the amount of indirect support costs associated with a contract routinely changes from year to year.

34. On August 14, 2018, FDIHB submitted a contract renewal proposal to IHS accompanied by a Fiscal Year 2019 AFA. To estimate indirect contract support costs associated

with the proposal, FDIHB proposed to apply its negotiated IDC rate to the IHS direct cost base. IHS accepted this proposed calculation and negotiated a three-year renewal contract with FDIHB for February 1, 2019 through September 30, 2021.

35. FDIHB and IHS jointly developed annual AFAs during the term of this 2019-2021 contract. In 2020, FDIHB and IHS jointly developed a proposed Fiscal Year 2021 AFA.

36. During development of the proposed Fiscal Year 2021 AFA, IHS staff proposed that \$18,279,615 of indirect contract support costs be included in the AFA. This amount was included in the proposed AFA.

37. In an October 16, 2020 email regarding the proposed Fiscal Year 2021 AFA, Mr. Yazzie stated that the “only issue raised by the IHS” concerned a reference in the AFA to a policy considered by IHS to be obsolete. IHS did not identify any issue with the indirect contract support costs proposed in the AFA.

38. The finalized Fiscal Year 2021 AFA was signed and transmitted to FDIHB on December 16, 2020. The amount of indirect contract support costs included in the fully executed AFA was consistent with the proposal of \$18,279,615 previously calculated by agency staff.

C. FDIHB Submits 2021 Contract Renewal Proposal and 2022 AFA

39. On August 2, 2021, the Health, Education and Human Services Committee of the Navajo Nation (“HEHSC”) passed a resolution approving and recommending that FDIHB be designated as a tribal organization “for a period of fifteen (15) years, beginning December 29, 2021, and ending December 28, 2036,” for the purposes of ISDA contracts with the IHS. The Navajo Nation Council passed a resolution on August 31, 2021 enacting the HEHSC’s recommendation.

40. On August 3, 2021, FDIHB submitted a contract renewal proposal to IHS, accompanied by a Fiscal Year 2022 AFA. Consistent with its practice for prior contract renewal proposals, FDIHB proposed a contract term that matched the term of authority that would be included in the Navajo Nation's authorizing resolution. Accordingly, FDIHB proposed a term for the contract of October 1, 2021 to September 30, 2036.

41. The proposed renewal contract submitted on August 3, 2021 related to the same programs as those contained in the prior FDIHB self-determination contract and related AFAs. The proposed contract did not add staff or include any new types of costs not already included in prior year contracts.

42. The proposed renewal contract was materially identical to the contract renewal proposal accepted by IHS in 2018. It proposed only minor amendments to update the renewal contract for the new term and to clarify language used in the previous award documents.

43. The proposed renewal contract did not contain a material and substantial change to the scope or funding of FDIHB's programs. *See* 25 C.F.R. § 900.33.

44. For the proposed Fiscal Year 2022 AFA, FDIHB proposed to estimate indirect contract support costs associated with its contract renewal proposal using the same methodology used for previous contract renewal proposals and related AFAs—by applying its negotiated IDC rate to the IHS direct cost base amount.

45. Using this methodology, IHS agency staff developed and on August 5, 2021, proposed indirect contract support costs for 2022 of \$18,405,910—an increase of \$126,295, or 0.7%, over the amount previously proposed and approved by IHS staff for the prior year's AFA.

46. The proposed FY 2022 AFA was “substantially the same” as the prior FY 2021

AFA. 25 C.F.R. § 900.32.

D. Period for Approving or Declining Proposal Expires Without IHS Decision

47. IHS acknowledged receipt of the contract renewal proposal and Fiscal Year 2022 AFA documents on August 3, 2021. The agency further acknowledged that its approval or declination of the proposed contract and AFA was due within 90 days of August 3, 2021.

48. Accordingly, pursuant to 25 U.S.C. § 5321(a)(2) and 25 C.F.R. § 900.18, IHS was required to either approve or decline FDIHB's contract renewal proposal no later than November 1, 2021—90 days after FDIHB submitted the proposal. In the absence of an IHS decision, the proposal would be “deemed approved” by operation of law.

49. On August 18, 2021, Mr. Yazzie sent a letter to FDIHB requesting information regarding FDIHB's indirect cost rate. This letter did not indicate that there were any concerns with the methodology FDIHB had proposed for estimating indirect contract support costs, and which IHS used to calculate FDIHB's 2022 contract support costs. The letter also did not mention any alleged duplication of costs included in the contract support costs calculated by IHS.

50. IHS's initial review of FDIHB's renewal documents was sent to FDIHB on September 3, 2021. This review acknowledged that the correct indirect cost rate for FDIHB should be 34.5%, and indicated that “Current-Year Indirect CSC Need” was \$18,515,007—greater than the \$18,405,910 amount IHS earlier proposed for the Fiscal Year 2022 AFA.

51. IHS proposed that an initial negotiation meeting between IHS and FDIHB take place on September 15, 2021. Then, on September 10, 2021, IHS proposed that the negotiation instead take place on “September 22 or 24.” The agency subsequently cancelled these dates as well. Finally, in a September 29, 2021 email, IHS confirmed that negotiations would take place

on October 6, 2021.

52. In its September 29 email, IHS acknowledged that its approval or declination of the proposed contract and AFA was due no later than November 1, 2022.

53. In its September 29 email, IHS also requested an extension of the current self-determination contract and the FY 2021 AFA, which was due to expire on September 30. The purpose of this requested extension was to avoid a lapse in funding due to expiration of the existing contract.

54. The September 29 email included for FDIHB's signature a document drafted by the IHS extending the term of the existing self-determination contract and the FY 2021 AFA. However, this document did not address the November 1 contract review period deadline, and the email did not include any other document extending the contract review period deadline.

55. On September 30, 2021, FDIHB signed and returned the document extending the term of the existing self-determination contract. FDIHB did not agree to any extension of the deadline for approval or declination of the proposed contract and AFA.

56. On October 5, 2021, the IHS sent updated contract and AFA documents for discussion in the October 6, 2021 negotiation. In these documents, IHS again calculated the indirect contract support costs for the 2022 AFA as \$18,515,007. IHS did not indicate that there were any issues with the contract support cost amount and raised no issues regarding any duplication of costs.

57. The documents IHS sent to FDIHB on October 5, 2021 also included a FY 2022 Funding Table Proposal that had been developed by FDIHB staff. Applying the same methodology as the IHS but using slightly updated underlying data, FDIHB had now calculated

the indirect contract support costs for the 2022 AFA as \$18,774,229.

58. The following day, at the October 6 negotiation, IHS asserted—for the first time—that the Indirect CSC funding amounts IHS had calculated and proposed, and which FDIHB had updated, included duplicative costs. IHS did not say how much they believed was duplicated and continued using the \$18,515,007 number during this negotiation.

59. On October 12, 2021, the IHS requested an extension of the declination period from November 1, 2021 to December 1, 2021. IHS repeated this request on October 14, 2021. For the first time, IHS's October 14 request also asserted that \$11,132,625 of the funding amount previously proposed by IHS constituted duplicative funding.

60. On October 14, 2021, FDIHB informed IHS that it would not grant an extension of the November 1, 2021 contract review period deadline.

61. On October 20, 2021, IHS sent an email to FDIHB threatening several consequences that would result from the denial of IHS's request for an extension of the contract review period deadline, and reiterated IHS's request for an extension.

62. IHS's October 20, 2021 email was the first time IHS indicated that the agency might decline the FDIHB contract renewal and proposed FY 2022 AFA. IHS did not offer technical assistance to FDIHB or inform FDIHB of its right to receive technical assistance to overcome potential declination issues pursuant to 25 C.F.R. § 900.28 and the DOI/HHS Internal Handbook.

63. The following day, on October 21, 2021, FDIHB verbally suggested to IHS that FDIHB would be willing to grant an extension on the contract review period deadline.

64. On October 22, 2021, IHS requested a “written confirmation of that extension” to December 1, 2021, per the requirements of 25 U.S.C. § 5321(a)(2) and 25 C.F.R. § 900.17.

65. FDIHB did not provide a signed, written extension of the contract review period following receipt of this request.

66. On October 27, 2021, FDIHB signed a second extension of the existing FDIHB self-determination contract and the Fiscal Year 2021 Annual Funding Agreement through November 21, 2021. This document did not extend the declination period for the FY 2022 renewal contract and AFA. FDIHB did not sign any other document purporting to constitute a written extension of the declination period.

67. Another meeting between FDIHB and IHS was held on November 19, 2021. FDIHB did not agree to extend the contract review period deadline prior to or as a condition of this meeting. Prior to this meeting, on October 21, 2021, FDIHB had informed IHS that the agency's analysis of alleged duplicative funding in the indirect CSC amounts violated the restrictions of 25 CFR § 900.33. FDIHB reiterated this position at the November 19 meeting.

68. IHS did not approve or decline FDIHB's contract renewal proposal by the November 1, 2021 deadline. The proposal was thus deemed approved by operation of law. 25 U.S.C. § 5321(a)(2); 25 C.F.R. § 900.18.

E. IHS Illegally Issues Partial Declination of Proposal

69. Pursuant to 25 C.F.R. § 900.33, the IHS is required to approve any renewal contract that does not propose a "material and substantial change" from the preceding contract. FDIHB's proposal contained no material and substantial change to the scope or funding of the contract approved by IHS in 2018.

70. On December 1, 2021, 30 days after the expiration of the declination period, the IHS sent FDIHB a purported partial declination of its contract renewal proposal. This

correspondence indicated that the IHS was “awarding the portions of the contract and [FY] 2022 [AFA] that, pursuant to the ISDA, the IHS considers severable.” However, the IHS declined to award almost all of the indirect contract support costs sought by FDIHB, and approved by IHS in prior years.¹ Specifically, IHS announced that it would fund only \$1,887,739 of these costs, declining the remaining \$16,627,268. This reduction represents a 90% reduction from the \$18,515,007 in indirect contract support costs IHS proposed in September 2021 (*supra* ¶49), and a 91% reduction from the \$18,279,615 in indirect contract support costs IHS had paid in fiscal year 2021 under the preceding contract and annual funding agreement.

71. Before issuing this “partial declination,” IHS never offered technical assistance to FDIHB or informed FDIHB of its right to receive technical assistance to overcome potential declination issues.

F. Impact of IHS’s “Partial Declination” of the Renewal Contract

72. The amount of indirect contract support costs requested by FDIHB is in line with the amount it has requested and received in the past—including in its most recent contract with IHS. The amount was calculated using an approved methodology that FDIHB had previously employed without objection. But IHS has now argued that the method FDIHB used to determine its indirect contract support costs is flawed, and the amounts previously awarded to FDIHB were overstated. Accordingly, IHS has elected to decrease FDIHB’s contract support costs funding by 90%.

73. IHS’s refusal to provide the requested costs has already begun to impact FDIHB.

¹ IHS also declined the FDIHB’s proposed 15-year term, notwithstanding that the proposed 15-year term accorded with the grant of authority provided by the Navajo Nation’s governing body.

As of January 27, 2022, IHS has provided \$1,887,339 in reimbursable indirect costs for Fiscal Year 2022. If IHS had not issued its partial declination, FDIHB would have received \$18,515,007 for this period. Accordingly, IHS's partial declination has already reduced funds available to FDIHB by \$16,627,268.

74. IHS's refusal to provide the requested costs will have a catastrophic effect on FDIHB's ability to provide essential health services to its patients and community members, especially in the midst of the COVID-19 pandemic.

75. The annual funding that FDIHB receives from IHS is directly applied to cover the salaries of permanent staff members. Because of the reduction in funding for FDIHB's indirect contract support costs, FDIHB will need to re-allocate funds to the employment of full time, permanent administrative staff in order to make up the shortfall. This in turn will require FDIHB to reduce the number of locums tenens (contract) nurses and providers it utilizes to fill vacant positions. Contract staff costs approximately 40% more overall than a permanent employee, and the cost to employ contract staff has increased by over 300% from pre-pandemic costs. The cost of hiring contract staff during the pandemic has imposed severe financial difficulties on FDIHB.

76. Nursing and physician contractors hired by FDIHB have helped manage the extremely high number of COVID-19 patients seeking care at FDIHB facilities. FDIHB has also hired contract nurses to assist with COVID-19 screening and testing as well as providing COVID-19 vaccinations at large scale community vaccination events. These contract nurses and physicians have been critical in FDIHB's delivery of care and have backfilled for staff members who are out due to illness and in departments that have high nurse to patient ratios during the pandemic.

77. A reduction in FDIHB's ability to hire these contractors, due to the funding

shortfalls proposed by the IHS, will make it impossible to provide the necessary level of care to the Navajo Nation community and to the sickest patients throughout the COVID-19 pandemic.

78. Community members who are unable to seek care at FDIHB, due to a reduction in services secondary to staffing shortages, will need to be transferred to hospitals in other areas of the western United States where an open bed may be found. This will add to the already overwhelmed and overburdened challenges that community members face in receiving medical care in an underserved area.

79. The significant funding reduction will also impact FDIHB's ability to hire needed additional Contact Tracers, Public Health Nurses, and Infection Control and Occupational Health staff. These staff members are critical to FDIHB's efforts to address the impacts of the COVID-19 pandemic. FDIHB's contact tracing team is struggling to stay on top of the current positive COVID-19 patient case load due to the sheer number of cases, and has had to reduce the amount of information gathered from patients and the number of times patients are contacted in order to reach all patients being tracked. The ability to hire additional contract personnel would help to mitigate these issues. Finally, contract personnel are critical to FDIHB's ability to remain in compliance with the CMS conditions of participation, which indicate that FDIHB must have a robust Infection Control and Occupational Health program with staff positions filled in order to keep its employees and patients safe and free from exposure to the COVID-19 virus.

80. The decrease in funding will also require FDIHB to re-evaluate and eliminate patient services that result in low patient revenue. These programs include FDIHB's Denture Program for elders, the Hearing Aid Program, Durable Medical Equipment Program, the HEAL Fellowship program that hires physicians who are specially trained to manage rural health cases,

FDIHB's Mobile Unit Program that provides vaccines and basic care in remote communities, and Wellness Program initiatives that serve patients in the community by providing exercise programs and education to combat hypertension, diabetes, and obesity.

81. In sum, by issuing a partial declination of FDIHB's contract renewal proposal, IHS has imposed a massive funding cut at Fort Defiance that will lower health care services for patients in the Navajo Nation community, thereby endangering the health and well-being of those patients.

COUNT I

(Failure to approve or decline the renewal contract and successor AFA submitted on August 3, 2021 within 90 days, as required by the ISDA)

82. FDIHB incorporates all previous allegations of fact and law into this Cause of Action.

83. FDIHB submitted a valid renewal contract and successor AFA on August 3, 2021. By law, IHS was required to either approve or decline FDIHB's proposal within 90 days of this date. 25 U.S.C. § 5321(a)(1); 25 C.F.R. § 900.18.

84. FDIHB did not provide an express written consent to extend this deadline. 25 U.S.C. § 5321(a)(1); 25 C.F.R. § 900.17.

85. IHS did not issue a decision on FDIHB's proposal within the 90-day contract review period.

86. Because IHS did not approve or deny FDIHB's contract renewal proposal within 90 days, the proposal is "deemed approved." FDIHB is entitled to immediate injunctive relief to compel the Secretary to award and fund in full the renewal contract submitted by FDIHB on August 3, 2021. 25 U.S.C. § 5331(a).

COUNT II

(Failure to fully award and fund a renewal contract and successor AFA that does not differ materially from the preceding contract, as required by the ISDA)

87. FDIHB incorporates all previous allegations of fact and law into this Cause of Action.

88. FDIHB submitted a valid renewal contract and successor AFA on August 3, 2021. By law, IHS was required to award this contract because FDIHB did not propose a “material and substantial change” from the preceding contract. 25 C.F.R. §§ 900.33, 900.22.

89. Despite the fact that the IHS cannot deny a proposal in the absence of a material and substantial change, IHS declined to fully award FDIHB’s renewal contract and successor AFA as required by the ISDA.

90. Because IHS violated the ISDA, FDIHB is entitled to immediate injunctive relief to compel the Secretary to award and fund in full the renewal contract submitted by FDIHB on August 3, 2021. 25 U.S.C. § 5331(a).

COUNT III

(Failure to provide technical assistance to avoid declination of the renewal contract and successor AFA, as required by the ISDA)

91. FDIHB incorporates all previous allegations of fact and law into this Cause of Action.

92. FDIHB submitted a valid renewal contract and successor AFA on August 3, 2021. By law, IHS was required to inform FDIHB if a declination of the renewal contract and successor AFA might occur. IHS was also required to share relevant information with FDIHB to avoid declination of the proposal and to provide necessary requested technical assistance to avoid the declination. 25 C.F.R. § 900.28; DOI/HHS Internal Handbook, at ch. 6 (1999 draft).

93. IHS did not inform FDIHB of the possibility of declination until October 20, 2021—well after FDIHB submitted its renewal contract and successor AFA. IHS did not provide technical assistance to avoid a declination at this time.

94. Because IHS violated the relevant regulation and guidelines, FDIHB is entitled to immediate injunctive relief to compel the Secretary to award and fund in full the renewal contract submitted by FDIHB on August 3, 2021. 25 U.S.C. § 5331(a).

COUNT IV
(Illegal reduction of contract funds in violation of the ISDA)

95. FDIHB incorporates all previous allegations of fact and law into this Cause of Action.

96. The ISDA, § 5325(b), prohibits the Secretary from reducing the amount of funds provided for the contract “in subsequent years” except for a few specific reasons not applicable here.

97. FDIHB received \$18,279,615 in indirect contract support costs in its FY 2021 contract. IHS’s declination impermissibly reduced that amount to \$1,887,339 in FY 2022.

98. IHS’s declination impermissibly reduces the amount provided under § 5325(a) in a subsequent year in violation of § 5325(b). Because IHS violated the ISDA, FDIHB is entitled to immediate injunctive relief to compel the Secretary to award and fund in full the renewal contract submitted by FDIHB on August 3, 2021. 25 U.S.C. § 5331(a).

COUNT V
(Failure to fully award and fund the renewal contract and successor AFA submitted on August 3, 2021, as required by the ISDA)

99. FDIHB incorporates all previous allegations of fact and law into this Cause of

Action.

100. FDIHB submitted a valid renewal contract and successor AFA on August 3, 2021. As required by ISDA, FDIHB calculated indirect contract support costs associated with its proposal. FDIHB estimated these costs using the same approved methodology it had used to calculate costs for its prior contract.

101. IHS declined to fully award FDIHB's renewal contract and successor AFA as required by the ISDA, instead reducing FDIHB's indirect contract support costs by \$16,886,490 to \$1,887,739.

102. This reduction violated the ISDA.

- a. First, IHS's Declination Letter fails to clearly demonstrate the validity of its assertion that it has included \$12,666,506 in secretarial amount dollars being paid to FDIHB for activities also identified in FDIHB's indirect cost pool. No evidentiary support was offered to establish the basis for this assertion. On information and belief, however, amounts IHS contends it transferred to FDIHB as part of the secretarial amount in 2010 and subsequent years were, in fact, never paid to FDIHB. For instance, no portion of the secretarial amount transferred to FDIHB in 2010 was ever spent by IHS on hospital security. The IHS letter falsely and without any evidentiary support asserts that the secretarial amount includes \$1,614,435.53 for "security." The same is true of other categories of expenditures itemized in the IHS Declination Letter.
- b. Second, IHS's Declination Letter fails to clearly demonstrate the validity of its assertion that amounts IHS claims it transferred in FY 2010 are properly adjusted

to some higher numbers in FY 2022. The Letter fails to analyze the amounts of any alleged sums included in the secretarial amount in FY 2022 and alleged to be duplicative of costs in FDIHB's FY 2022 indirect cost pool. Instead, IHS's Declination Letter asserts that it may enhance amounts it identified in FY 2010 by reference to the extent to which FDIHB's overall contract increased from FY 2010 to FY 2022. There is no basis in fact or law supporting this methodology for increasing the deduction to FDIHB's FY 2022 contract support cost reimbursements by amounts IHS alleges were paid to FDIHB in FY 2010.

103. Because IHS did not make a finding that clearly demonstrates the validity of its determination that FDIHB's FY 2022 contract proposal and annual funding agreement duplicated funding in the amount of \$16,886,490, IHS cannot sustain its burden of proof to clearly demonstrate the validity of its declination, and FDIHB is entitled to immediate injunctive relief to compel the Secretary to award and fund in full the renewal contract submitted by FDIHB on August 3, 2021. 25 U.S.C. § 5331(a).

V. PRAYER FOR RELIEF

WHEREFORE, FDIHB prays that this Court grant the following relief:

- (a) A declaratory judgment that the Secretary acted in violation of the ISDA by failing to award FDIHB's renewal contract and successor AFA;
- (b) Immediate injunctive relief ordering IHS to award and fund FDIHB according to the terms of FDIHB's contract renewal proposal and proposed FY 2022 AFA;
- (c) Damages in an amount to be proven at trial;

- (d) Costs and attorneys' fees incurred in pursuing these claims, as provided for under the Equal Access to Justice Act, 5 U.S.C. § 504; 28 U.S.C. § 2412; the ISDA, 25 U.S.C. § 5331(c), and other applicable law; and
- (e) Such other monetary, declaratory, and equitable relief as this Court may find to be just.

Respectfully submitted this 11th day of February 2022.

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