

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

Fort Defiance Indian Hospital Board, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:22-cv-00098-JB-CG
	)	
Xavier Becerra, Secretary, U.S. Department of	)	
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.	)	
	)	

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**FIRST AMENDED COMPLAINT**

**I. INTRODUCTION**

1. This action is brought to secure immediate injunctive relief compelling the Indian Health Service (“IHS”) to reverse a partial declination decision 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 issued a “partial declination” of a renewal contract proposal FDIHB submitted to IHS on August 3, 2021. This declination was improper for three reasons. First, 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, but IHS has refused to do so. Second, 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 the regulatory prohibition excepting the contract renewal proposal from the declination process did not exist and there were no prohibitions 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 501(c)(3) nonprofit healthcare organization, incorporated under the Navajo Nation Non-Profit Corporation Act, 5 N.N.C. §§ 3301-3332, that operates a hospital campus in Fort Defiance, Arizona, on the Arizona/New Mexico border, and a health clinic in Sanders, Arizona. FDIHB provides health care services to 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 IHS 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 contracts 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 Director of the Indian Health Service (“IHS”). 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 ISDA**

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, or 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 that are incorporated into the contract and may be amended throughout the year to add funds the agency makes available. *See* 25 U.S.C. § 5329(c) (Model Agreement, Section 1(f)(2)(B)).

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

19. 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. Instead, such renewal contracts must be automatically approved. This regulation must be liberally construed for the benefit of tribal organizations. *Id.* § 900.3(b)(11); *see infra* ¶ 23.

20. The ISDA requires that IHS fund a tribally contracted Federal program at the levels prescribed by 25 U.S.C. § 5325. The ISDA *only* permits IHS to reduce this funding level in subsequent years if one (or more) of five enumerated criteria are met, namely: (1) a reduction in appropriations from the previous fiscal year for the program or function to be contracted; (2) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution; (3) a tribal authorization; (4) a change in the amount of pass-through funds needed under a contract; or (5) completion of a contracted project, activity, or program. 25 U.S.C. § 5325(b)(2).

21. The ISDA provides 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)(1). 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).

22. 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).

23. 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 that 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) (“[R]egulations [must] be liberally construed for the benefit of Indian tribes and tribal organizations . . . .”).

#### **B. Background, Initial Contract, and Subsequent Renewals**

24. On August 3, 2009, the Intergovernmental Relations Committee of the Navajo Nation Council sanctioned and approved FDIHB as a tribal organization, empowered by the ISDA to enter into contracts with IHS. The Navajo Nation Council has continued to sanction and approve FDIHB as a tribal organization at all times since.

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

26. During this period, FDIHB has continued to manage and operate health services to eligible beneficiaries within the former IHS Fort Defiance Service Unit under successive three-year ISDA contracts with IHS.

27. To enter into these successive ISDA contracts, in accordance with IHS regulations

and standard practice, FDIHB periodically submits contract renewal proposals to IHS, which incorporate a proposed 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.

28. 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. Each AFA is incorporated into the contract and thereby made a part of the contract. Once finalized, the AFA is signed by IHS and transmitted to FDIHB.

29. Tribal organizations that submit contract renewal proposals are required to estimate the indirect contract support costs associated with the proposal. IHS guidance generally provides tribal organizations with two options for estimating these costs. First, the organization can begin with the most recent indirect cost rate (“IDC rate”) agreement negotiated separately by the organization with its cognizant agency, and apply the rate to the direct cost base. Alternatively, the organization can negotiate a lump sum for indirect contract support costs. (Occasionally, but not here, both options are employed together).

30. 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 contract support costs associated with a contract routinely changes from year to year.

31. On August 14, 2018, FDIHB submitted a contract renewal proposal to IHS that incorporated a Fiscal Year (“FY”) 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.

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

33. During development of the proposed FY 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.

34. In an October 16, 2020 email regarding the proposed FY 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.

35. The finalized FY 2021 AFA was signed and transmitted to FDIHB on December 23, 2020. The amount of indirect contract support costs included in the fully executed AFA—\$15,250,622 for a ten-month period—was consistent with the proposal of \$18,279,615 for a twelve-month period previously calculated by agency staff.

**C. FDIHB Submits 2021 Contract Renewal Proposal and Incorporated FY 2022 AFA**

36. 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” for the purposes of ISDA contracts with IHS. The Naabik’íyáti’ Committee, which acts as the executive committee of the Navajo Nation Council, passed a resolution on August 31, 2021 granting FDIHB authority to contract with IHS for a 15-year term.

37. On August 3, 2021, FDIHB submitted a contract renewal proposal to IHS that incorporated a proposed FY 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 15-year term for the contract.

38. The proposed renewal contract and incorporated AFA submitted on August 3, 2021, related to the same agency programs, services, functions, and activities as those covered by the prior FDIHB self-determination contract and AFAs. The proposed contract did not add programs, services, functions, and activities, or include any new types of costs not already included in prior year contracts.

39. Like the prior contract renewal proposal, the FY 2022 proposed renewal contract included no material changes to the contract. It proposed only minor amendments to update the renewal contract for the new term and to clarify language and program implementation descriptions used in the previous award documents.

40. The proposed renewal contract did not contain a material and substantial change to the scope or funding of the program, functions, services, or activities covered by FDIHB's prior contract. *See* 25 C.F.R. § 900.33.

41. For the proposed FY 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.

42. 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.

43. The proposed FY 2022 AFA incorporated into the contract renewal proposal was substantially the same as the prior FY 2021 AFA.

**D. IHS Alleges FDIHB Funding Includes Duplicative Costs and Issues Partial Declination of FDIHB’s Contract Renewal Proposal and Incorporated AFA**

44. IHS acknowledged receipt of the contract renewal proposal and FY 2022 AFA documents on August 3, 2021.

45. 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.

46. 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 FY 2022 AFA.

47. An initial negotiation meeting between IHS and FDIHB was scheduled for October 6, 2021.

48. On October 5, 2021, IHS sent updated contract and AFA documents to FDIHB for discussion in the October 6, 2021 negotiation. In these documents, IHS again calculated the indirect contract support costs for the FY 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.

49. The following day, at the October 6 negotiation, IHS asserted—for the first time—that the indirect contract support costs IHS had calculated and proposed included duplicative costs that would need to be removed. IHS did not say how much it believed was duplicated and continued using the \$18,515,007 number during this negotiation.

50. On October 14, 2021, IHS asserted for the first time that \$11,132,625 of the funding amount previously proposed by IHS constituted duplicative funding.

51. On October 21, 2021, FDIHB informed IHS that the agency’s analysis of alleged duplicative funding violated the restrictions of 25 CFR § 900.33. FDIHB reiterated this position on November 19, 2021.

52. On December 1, 2021, IHS sent FDIHB a partial declination of its contract renewal proposal. This correspondence indicated that IHS was “awarding the portions of the contract and [FY] 2022 [AFA] that, pursuant to the [ISDA], the IHS considers severable.” However, IHS declined to award almost all of the indirect contract support costs sought by FDIHB, and approved by IHS in prior years.<sup>1</sup> Specifically, IHS announced that it would fund only \$1,887,739 of these costs, declining the remaining \$16,627,268. This represents an almost 90% reduction from the \$18,515,007 in indirect contract support costs IHS proposed in September 2021. *See supra* ¶¶ 46, 48.

#### **E. Impact of IHS’s Partial Declination of the Renewal Contract**

53. The amount of indirect contract support costs requested by FDIHB is in line with

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<sup>1</sup> 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.

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 almost 90%.

54. IHS's refusal to provide the requested costs has already begun to impact FDIHB. As of January 27, 2022, IHS had provided \$1,887,339 in reimbursable indirect costs for FY 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.

55. 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.

56. 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 permanent employees, 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.

57. 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 unfavorable nurse to patient ratios during the pandemic.

58. A reduction in FDIHB's ability to hire these contractors, due to the funding shortfalls caused by the partial declination, 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.

59. 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 overwhelming challenges that members of the Navajo Nation face in receiving medical care in an underserved area.

60. 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.

61. 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.

62. 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 fully award and fund a renewal contract and incorporated AFA that does not differ materially from the preceding contract, as required by the ISDA)**

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

64. FDIHB submitted a valid renewal contract with an incorporated 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, concerning either the scope or funding of the agency program, functions, services, or activities covered by the contract. 25 C.F.R. §§ 900.33.

65. Despite the fact that IHS is prohibited by regulation from declining a renewal contract proposal in the absence of a material and substantial change to either the scope or funding of the agency program, functions, services, or activities covered by the contract, IHS declined to fully award FDIHB's renewal contract as required by the ISDA.

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

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

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

68. 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.

69. FDIHB received \$15,250,622 in indirect contract support costs for a ten-month period in its FY 2021 contract, the equivalent of \$18,279,615 in indirect contract support costs for a full fiscal year. IHS's declination impermissibly reduced that amount to \$1,887,339 in FY 2022.

70. 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 III**

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

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

72. FDIHB submitted a valid renewal contract and incorporated AFA on August 3, 2021. As required by ISDA, FDIHB calculated indirect contract support costs associated with its proposal. IHS also calculated indirect contract support costs, using the same approved methodology it had used to calculate costs in the past.

73. IHS declined to fully award FDIHB's renewal contract and incorporated AFA as required by the ISDA, instead reducing FDIHB's indirect contract support costs by \$16,627,268 to \$1,887,739.

74. 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 any actual amounts included in the overall FY 2022 Secretarial amount that are alleged to be duplicative of costs in FDIHB's FY 2022 indirect cost pool. Instead, IHS's Declination Letter asserts that it may take the FY 2010 amounts it now claims were allegedly duplicative amounts, and enhance those amounts by reference to the extent by which FDIHB's overall FY 2022 Secretarial amount exceeds FDIHB's original FY 2010 Secretarial amount. There is no basis in fact or law supporting this methodology for identifying allegedly duplicated amounts contained in FDIHB's FY 2022 Secretarial amount, and then using such enhanced amounts to reduce IHS's contract support cost reimbursements in FY 2022.

75. Because IHS did not make a finding that clearly demonstrates the validity of its determination that FDIHB's contract proposal and incorporated FY 2022 AFA duplicated funding in FDIHB's indirect cost pool in the amount of \$16,627,268, 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 the incorporated FY 2022 AFA;
- (b) Immediate injunctive relief ordering IHS to award and fund FDIHB according to the terms of FDIHB's contract renewal proposal and incorporated 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 31st day of March 2022.

SONOSKY, CHAMBERS, SACHSE, MILLER &  
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*Counsel for Fort Defiance Indian Hospital Board,  
Inc.*

**CERTIFICATE OF SERVICE**

I CERTIFY that on the 31st day of March 2022, I filed the foregoing using CM/ECF and caused counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Kimberly Bell, Assistant United States Attorney  
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/s/ Lloyd B. Miller  
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