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, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF MOTION FOR IMMEDIATE INJUNCTIVE RELIEF OR IN THE ALTERNATIVE A PRELIMINARY INJUNCTION (ECF NO. 29)

A. IHS HAS FAILED TO CARRY ITS BURDEN TO CLEARLY DEMONSTRATE THAT IT LAWFULLY DECLINED FDIHB'S CONTRACT PROPOSAL.

The Indian Health Service ("IHS") advances three arguments to support its assertion that the Fort Defiance Indian Hospital Board ("FDIHB") is not entitled to the protective automatic renewal set forth in 25 C.F.R. § 900.33: (1) FDIHB sought significantly more in indirect contract support cost funding than the parties agreed to under the preceding contract, taking the contract proposal outside the scope of § 900.33, (2) the longer contract term that FDIHB proposed also took the contract proposal outside the scope of § 900.33, and (3) regardless of § 900.33, IHS cannot be compelled to fund a contract at a level in excess of what IHS concludes is required under the ISDA. All three arguments fail.

1. The Record is Clear That The Proposed FY 2022 Indirect Contract Support Costs—Calculated *By IHS*—Were Virtually The Same As They Were In FY 2021.

First, IHS asserts that FDIHB's renewal contract for FY 2022 proposed indirect contract support cost funding of $19,486,709, and that this was a material and substantial increase over the $18,279,615 that IHS asserts the parties agreed to for FY 2021 (the last year of the preceding contract). IHS Opp'n 7, ECF No. 35 (citing and discussing Ex. 5 at 11).[1] Both IHS numbers are incorrect.

What FDIHB actually proposed for FY 2022 indirect contract support cost funding was $18,515,007, as IHS acknowledges in its declination letter. Tom Decl. Ex. 21 at 6, ECF No. 39-1. The older documentation that IHS relies upon to suggest a higher number included an accompanying comment cautioning that the number was a *placeholder* and "subject to change based on updated FY-2022 Funding Tables, when provided." Tom Decl. Ex. 5 at 11. Once FDIHB reviewed the additional funding tables provided by agency staff, FDIHB agreed to *IHS's* calculated number of $18,515,007 for indirect contract support costs (putting aside the alleged duplication deduction IHS later raised). *See* Tom Decl. Exs. 8 at 1 (indirect CSC totaling $18,405,910, as initially calculated by IHS on Aug. 4, 2021), 11 at 1 (indirect CSC totaling $18,515,007, as recalculated by IHS on Aug. 30, 2021); Second Adkins Decl. ¶ 9 (Apr. 22, 2022). This explains why IHS's December 1 declination was based on the correct finding that "FDIHB calculates its total indirect CSC need as $18,515,007 for FY 2022." Tom Decl. Ex. 21 at 6 (emphasis added). In short, even taking IHS's starting point of $18,279,615 as accurate for FY 2021, the proposed FY 2022 amount of $18,515,007—*calculated by IHS based on FY 2021 data and agreed upon by FDIHB*—was indisputably not a "material and substantial" increase in the funding amount from FY 2021 such that § 900.33 would not apply.[2]

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[1] IHS alleges FDIHB sought to increase indirect contract support cost funding "from $15,250,622 (a 10-month proration from an annual amount of $18,279,615) in FY 2021 to $19,486,709 in FY 2022, equivalent to a 6.6% annual increase." IHS Opp'n 7.

[2] Having come from IHS, it also was not a number that FDIHB "proposed"—yet another reason why 25 C.F.R. § 900.33 remains applicable here.

2. The Record Is Clear That IHS Understates The Indirect Contract Support Costs That Were Due in FY 2021.

Further, IHS's starting number of $18,279,615 is also wrong. When IHS calculated that number for the FY 2021 annual funding agreement, IHS did not (and could not) include any indirect contract support costs that would become due as a result of program increases eventually paid to FDIHB as a result of the subsequently-enacted Consolidated Appropriations Act of 2021.[3] Nor did IHS calculate any indirect costs due FDIHB on the expenditure of funds IHS eventually added to FDIHB's FY 2021 contract for "Equipment" ($404,415), "Maintenance & Improvement" ($1,759,058), "Services (prior year)" ($290,214), "OEHE support" ($44,848), and certain Area-wide Reserves included within the "Hospitals & Clinics" ($381,109) and "Purchased/Referred Care" ($65,484) program line items (totaling $2,945,128). Second Adkins Decl. ¶ 4. For these reasons, the $18,279,615 amount IHS points to in its opposition brief seriously understates the total indirect contract support costs FDIHB was entitled to in FY 2021.[4]

3. The Parties Purposefully Sought To Employ The Same Methodology To Calculate Indirect Contract Support Costs Due In FY 2022 As Was Used In FY 2021.

When negotiating new funding agreements in a status quo environment (as was the case here), the parties (1) use the best estimates of prior-year numbers that they have for program

[3] *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, 134 Stat. 1182 (Dec. 27, 2020). The parties' FY 2021 Annual Funding Agreement was executed December 17, 2020. Tom Decl. Ex. 3 at 13.

[4] By the time the parties executed year-end Modification No. 14 to the FY 2021 Annual Funding Agreement, IHS had reimbursed FDIHB the sum of $20,520,058 in FY 2021 indirect contract support cost requirements. Even still, this did not yet include any of the indirect costs associated with the additional $2,945,128 in program funds described in Dr. Adkins's Second Declaration (addressing indirect costs associated with "Equipment," "Maintenance & Improvement," "Services (prior year)," "OEHE support," and two Area-wide (AW) Reserves. Second Adkins Decl. ¶¶ 4-5 & Ex. 23 (Modification No. 14). That alone accounts for an estimated additional $1,012,975 in unpaid indirect contract support costs for FY 2021 (excluding additional contract support due in connection with certain COVID-19 funds). Second Adkins Decl. ¶ 5.

payments, but (2) exclude (at IHS's insistence) certain anticipated program payments that IHS labels "non-recurring" because the precise amount of these payments (and thus the associated indirect costs) cannot always be reliably predicted in advance, and (3) exclude routine program increases that cannot be reliably predicted because the congressional appropriations or agency apportionment/allocation processes have not yet occurred.[5] Second Adkins Decl. ¶¶ 6-7.

And that is what occurred here. FDIHB worked with IHS to arrive at an agreed-upon indirect contract support cost number and methodology for FY 2022 that mirrored what the parties had initially proposed for FY 2021.[6] Of necessity then (and putting the duplication issue aside), the $18,515,007 in FY 2022 indirect contract support costs the parties agreed to was essentially *the same as*—and certainly not a "material and substantial" increase from—the comparable indirect contract support costs the agency agreed to pay at the beginning of FY 2021.

In sum, FDIHB's proposed indirect contract support costs for FY 2022—the $18,515,007 that IHS reviewed in its declination letter—was not materially and substantially different from the amount FDIHB was due and paid in FY 2021.

4. The Longer Term That FDIHB Proposed Did Not Remove The Contract Renewal Proposal From The Protection Of § 900.33.

IHS next asserts that the longer contract term FDIHB proposed took the renewal contract proposal outside the protective scope of § 900.33. IHS Opp'n 7-8. But § 900.33 does not speak to *any* proposed change, but rather only a "material and substantial change to the *scope* or *funding* of a program, functions, services, or activities [PFSA]." The new term FDIHB proposed

[5] At the end of the fiscal year, the parties then go through a reconciliation process to determine the indirect contract support costs actually incurred. The parties began this reconciliation process for FY 2021 in March 2022, but it is not yet complete. Second Adkins Decl. ¶ 8.

[6] FDIHB "did not include any new types of costs not included in the IDC pool associated with IHS programs that were not already included in prior year contracts." Tom Decl. ¶ 9.

was not a change to the *scope* of a PFSA, nor to the *funding* of a PFSA. Since proposed changes to the *term* of a renewal contract are not covered by § 900.33, *see* FDIHB Mot. 10, ECF No. 29, the longer term which FDIHB proposed did not take the proposal outside the protective provisions of § 900.33.

This understanding of § 900.33 is reinforced by the mandatory rule of interpretation contained in the Secretary's regulations at § 900.3(b)(11).[7] Under that provision, IHS must demonstrate that its broader reading of the regulation is "clearly required" by the regulatory language, *cf. Salazar v. Ramah Navajo Ch.*, 567 U.S. 182, 194 (2012) (interpreting similar language in 25 U.S.C. § 5329(c)), a showing IHS cannot make here.

Further, IHS's interpretation would permit a variation in the term of a contract to serve as a pretext for a do-over of IHS's original § 900.22 contract review/declination undertaken over a decade earlier. Under IHS's view of the matter, once a tribe or tribal organization proposes any change to any part of a renewal contract, IHS is empowered to review and decline any other part (or even all) of the renewal contract. That defies the self-evident purposes of § 900.33: to prohibit IHS do-overs in subsequent years and give tribes and tribal organizations long term stability in contract funding and operational matters. Thus, a change that takes a contract proposal out of the protective provision of § 900.33 still only permits IHS to decline *that changed portion* of the proposed new contract, *see* 25 C.F.R. §§ 900.24-.26, 900.33; it would not provide IHS a pretext to conduct a wholesale review of every other term and line-item of the

[7] "The Secretary's commitment to Indian self-determination requires that these regulations be *liberally construed for the benefit of Indian tribes and tribal organizations* to effectuate the strong Federal policy of self-determination *and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization* so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act." (Emphasis added.)

contract, much less authorize IHS to decline parts of the renewal contract that have nothing to do with the changed term.

5. IHS Must Fully Fund A Contract Renewal Proposal When It Has No Authority To Decline It.

Finally, IHS argues that even if § 900.33 would otherwise entitle FDIHB to a renewal contract, awarding the contract as proposed would violate the ISDA, and IHS should therefore be relieved of any duty to fully fund such a contract. IHS Opp'n 8. But courts have consistently rejected that argument, forcing the Secretary to fund contract renewals at their proposed levels once IHS (or BIA) declinations have failed. *Navajo Nation v. U.S. Dep't of Interior*, 852 F.3d 1124, 1126, 1130 (D.C. Cir. 2017); *Seneca Nation of Indians v. U.S. Dep't of Health & Hum. Servs.*, 945 F. Supp. 2d 135, 152 (D.D.C. 2013).

B. IHS HAS FAILED TO CARRY ITS BURDEN TO PROVE THAT IT MAY REDUCE CONTRACT PAYMENTS FROM ONE YEAR TO THE NEXT NOTWITHSTANDING THE PROHIBITIONS SET FORTH IN 25 U.S.C. § 5325(B).

Rather than try to invoke one of the permitted bases for a contract reduction set forth in 25 U.S.C. § 5325(b)(1)-(4), IHS boldly asserts that the ISDA's anti-reduction provisions simply do not apply. IHS Opp'n 5-7. But these are critical provisions which tightly cabin the circumstances under which IHS may reduce contract payments from one year to the next. They cannot simply be swept aside.

IHS reasons that because (as it now sees it) "[t]he funding in dispute here was not required by [§ 5325(a)]"—even though it is basically the same funding amount IHS approved for several prior years—IHS is now permitted to reduce FDIHB's funding despite § 5325(b)'s prohibitions. *Id.* at 5-6. Put differently, IHS would engraft onto § 5325(b)(1)-(4) a new basis for contract reductions, authorizing IHS to reduce contract amounts in later years whenever IHS decides that its original determination may have been flawed. Such an implicit right to reduce contract amounts would drill an enormous loophole into § 5325(b) and undermine the overall architecture of the contract review and approval/declination process established in § 5321(a)-(b). Nothing in the ISDA suggests that Congress authorized the Secretary to reduce contract amounts years later whenever IHS decides that its original calculations and agreements with a tribe or tribal organization were mistaken or ill-conceived.

C. FDIHB IS ENTITLED TO AN INJUNCTION REQUIRING FULL FUNDING OF FDIHB'S RENEWAL CONTRACT PROPOSAL.

The foregoing discussion establishes that IHS's actions here violated the ISDA and its implementing regulations, entitling FDIHB to an "immediate injunction" as provided in 25 U.S.C. § 5331(a). IHS's response does not address any aspect of § 5331(a), focusing instead on the equitable standards applicable to preliminary injunctions. *See* IHS Opp'n 1-4, 8. But when, as here, a case concerns a *statutory* injunction at law, traditional equitable principles do not apply. *See Star Fuel Marts, LLC v. Sam's E., Inc.*, 362 F.3d 639, 652 (10th Cir. 2004); *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 256 F. Supp. 3d 1186, 1222 (D.N.M. 2015); *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 545 (D.D.C. 2014). Further, Congress's decision to authorize not just a statutory "injunction," but an "*immediate* injunction," suggests strongly that Congress expected swift injunctive relief if a sufficient showing was made regarding a tribal organization's likelihood of success.[8]

[8] To be clear, the injunctive remedy Congress provided in 25 U.S.C. § 5331(a) is not just available at the summary judgment stage, where the contractor seeks a permanent injunction; it is also available at the earliest stages of a case (of course, appropriately fashioned so as not to equate to a permanent injunction). This is because Congress deliberately employed the word "immediate"—meaning "instant" and "without delay." *Immediate*, Black's Law Dictionary (11th ed. 2019).

As for FDIHB's alternative request for a preliminary injunction (in the event the Court should conclude an "immediate injunction" is not appropriate), IHS's argument falls short.

IHS argues that FDIHB will not be harmed by the loss of over $16.6 million—which equates to an indirect contract support cost funding reduction of approximately 90%, or 30% of FDIHB's monthly direct IHS program expenditures, First Adkins Decl. ¶ 12 (Mar. 22, 2022)—by relying on an eighteen-month-old excerpt of FDIHB's FY 2020 audit. Yazzie Decl. Ex. B, ECF No. 35-2. But IHS both overstates and misconstrues FDIHB's assets by including non-liquid assets such as capital assets, long-term investments, and assets limited as to use. Second Adkins Decl. ¶ 10. And these numbers do not tell the whole story. As a result of the IHS declination, the impact of which is compounded by pandemic-driven cost increases for professional services and medical supplies, FDIHB projects a net operating loss of $22 million in FY 2022. *Id.* ¶ 11. Further, the FDIHB Board has planned for critically needed capital investments and delayed maintenance on its physical plant and buildings. *Id.* ¶ 13. These projects—that are preliminarily estimated to cost approximately $78.4 million—will need to be deferred if FDIHB is required to reallocate funds to cover the current IHS budget shortfall. *Id.*

Contrary to IHS's assertions, FDIHB is not required to prove "imminent bankruptcy or the imminent complete demise of [its] business" to show an "injury acute enough to justify injunctive relief." *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1544 (10th Cir. 1994). As the Tenth Circuit concluded in an analogous Medicaid case, "We do not believe the fact that many facilities can subsidize Medicaid under reimbursement should undermine plaintiffs' claim of injury from such under reimbursement." *Id.* at 1544 n.15 (cleaned up). This is because, "[u]nder that analysis, a wealthy individual would never be able to prove monetary injury, on the theory that such an individual could always in fact subsidize any such injury through his or her other sources of wealth." *Id.*[9] Similarly, simply because FDIHB has exercised prudent financial management in planning for and developing a reserve fund—to manage lapsed appropriations, government shutdowns, incremental and often delayed payments by IHS, or other potential catastrophic events, *see* Second Adkins Decl. ¶ 12—does not diminish the harm FDIHB experiences from IHS's wrongful declination. IHS's declination greatly destabilizes FDIHB's ability to operate its existing programs and to plan for the future. For example, FDIHB has already had to eliminate new hiring and defund 187 positions for FY 2022, and is confronting significant pressure to raise salaries to retain existing personnel. *Id.* ¶ 14. IHS's arguments also ignore the real harm to FDIHB's patients if an injunction is denied. *See* First Adkins Decl. ¶¶ 15-17. And importantly here, the failure of IHS to perform its duties under the ISDA is statutorily defined to be the very kind of irreparable harm for which an injunction may issue. 25 U.S.C. § 5331(a).

IHS also argues that even a short delay in seeking relief means that an injury is not irreparable. IHS Opp'n 4. But in the case IHS relies on for that proposition, the plaintiff waited three *years* before bringing suit, not three months. *See GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984); *cf. Kansas Health Care Ass'n, Inc.*, 31 F.3d at 1544 (three-month delay in commencing action after failing to reach a negotiated settlement did not undermine claim of irreparable injury). In any event, "delay is only one factor to be considered among others, and there is no categorical rule that delay bars the issuance of an injunction." *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016) (citation omitted). "The question instead is whether the delay was reasonable, was not a decision by the party to 'sit on its rights,' and did not prejudice the

[9] Although *Kansas Health Care* is distinguishable because "the Eleventh Amendment bar[red] a legal remedy in damages," the Court concluded that this fact "simply indicates irreparability, but does not, in itself, establish harm." 31 F.3d 1536 at 1543.

opposing party." *Id.* (rejecting delay argument where defendant failed to show how plaintiff's thirty-month delay prejudiced him); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1212 (10th Cir. 2009) (multi-year delay as plaintiff attempted to resolve dispute "was not unreasonable and did not alter the irreparable harm analysis"). IHS has not explained why it thinks a three-month delay was "unreasonable" here, nor has it made any attempt to show prejudice from such a short delay.

IHS also claims that FDIHB is unlikely to succeed on the merits of its claims. IHS Opp'n 5-8. But quite to the contrary, FDIHB has established that IHS violated the ISDA and its implementing regulations because (1) it unlawfully applied the declination process to a contract renewal proposal that did not propose a material and substantial change to the scope or funding of the contracted programs, 25 C.F.R § 900.33; and (2) it reduced FDIHB's funding from one year to the next contrary to the narrow and limited reductions authorized in 25 U.S.C. § 5325(b). This factor weighs heavily, if not decisively, in FDIHB's favor.

Finally, IHS asserts without explanation that "it would contravene the public interest to require IHS to award funding that Congress specifically prohibited in 25 U.S.C. § 5325(a)(2)-(3)." IHS Opp'n 8. But to the contrary, the public interest is not served by reducing FDIHB's indirect contract support cost funding by nearly 90% in the middle of a pandemic, nor is it served by permitting the agency's misconduct to go unaddressed. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action.").

In sum, IHS's assertion that it can invoke the declination process here is contrary to § 900.33 and to the controlling interpretive commands set forth by statute and regulation. FDIHB is thus entitled to an immediate injunction, regardless of the balancing of equities, although the balance of those equities also favors FDIHB.

D. CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's opening memorandum, immediate injunctive relief is warranted and FDIHB respectfully requests that the Court issue an order compelling IHS to award and fund FDIHB according to the terms of the proposed renewal contract and FY 2022 AFA.

Respectfully submitted this 22nd day of April 2022.

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CERTIFICATE OF SERVICE

I CERTIFY that on the 22nd day of April 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:

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