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

NAVAJO HEALTH FOUNDATION - SAGE MEMORIAL HOSPITAL, INC.,	)	
	)	**NO. 1:14-cv-958-JB-GBW**
PLAINTIFF,	)	
	)	**PLAINTIFF'S REPLY**
v.	)	**MEMORANDUM IN SUPPORT**
	)	**OF MOTION FOR PARTIAL**
SYLVIA MATHEWS BURWELL, *et al.*,	)	**SUMMARY JUDGMENT ON**
	)	**THE ISSUE OF DUPLICATION**
DEFENDANTS.	)	**(Doc. 200)**
	)	

The government's opposition brief goes to considerable lengths to craft a litigating position that is squarely at odds with decades-long agency practice. Worse yet, it makes a mess of the statutory text. It is the kind of extreme argument that, if accepted, would gut the entire system for funding contracts under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 450-458ddd-2. For the reasons that follow, the Court should reject the government's arguments and grant Sage's motion.[1]

A. IHS'S NEW LITIGATING POSITION ON THE DUPLICATION ISSUE IS CONTRARY TO DECADES OF AGENCY PRACTICE AS REFLECTED IN THE IHS MANUAL.

At the heart of IHS's opposition is the assertion that contract support cost (CSC) funding and Secretarial amount funding are "primarily distinguishable by the types of activities that they are intended to cover," Doc. 222 (Gov't Opp.) at 2, and that the two types of activities do not overlap at all. But as a matter of practice, that is simply not so. To the contrary, in significant measure contract support costs cover the exact *same* types of costs that are covered by the

[1] Pursuant to Local Rule 56.1(b), Defendants assert one additional fact relevant to this Motion. *See* Doc. 222 (Gov't Opp.) at 7 (Defs.' Fact II-C (quoting Section 5 of Sage's contracts)). Sage does not dispute the quotation.

Secretarial amount. Three brief examples from IHS's own CSC Manual place this beyond reasonable debate.

First, there are so called "direct" contract support costs. When IHS itself operates a given health care program, it incurs retirement costs, heath insurance costs, facility costs and training costs, just like any federal agency. Depending on the program being contracted, all of these costs may be contained in the Secretarial amount when the program is transferred to a tribal contractor. Doc 200-6, Ex. F (Indian Health Manual, Part 6, Ch. 3, Contract Support Costs (IHS Manual)), at 5-6.

Yet according to the IHS Manual each of these costs is also eligible to be funded as "direct" contract support costs to a tribal contractor so long as there is no double payment of costs that are already being paid to the contractor as part of the Secretarial amount. *See* IHS Manual, at 3-4. IHS's longstanding position—until this litigation—could not be clearer, and it is particularly well expressed when it comes to personnel-related "direct" CSC: "To the extent the budgeted Tribal costs are determined to be reasonable and necessary *and these costs exceed the amounts the Agency provides for these costs in the Section 106(a)(1) [Secretarial] amount*, the *difference* is allowed as a DCSC [direct contract support cost] requirement for the [programs] transferred." *Id*. at 7 (emphasis added). Obviously, the CSC costs could not "exceed" the costs in the Secretarial amount if by law (as IHS asserts here) CSC is not available to pay for any type of cost contained in the Secretarial amount or to supplement any category of Secretarial amount funding.[2]

[2] The IHS Manual's mathematical illustration is to the same effect, showing CSC allowable for the precise *same* types of personnel costs as those already funded in the Secretarial amount, subject to an appropriate credit adjustment to avoid any double payment. *Id*. at 8.

Second, there are the so-called "indirect" contract support costs. Necessarily, when IHS itself runs a clinic, a hospital or any other health program, IHS incurs costs for central, regional and local "management and planning," for "personnel management," for "financial management," for "records management" and for "property management." *Id*. at 4. Like any other agency or business, IHS also incurs "data processing" costs, "building rent" costs, "utilities" costs, "housekeeping" and "janitorial" costs, and "repairs," "maintenance" and "equipment" costs. *Id*. Because these are costs which IHS incurs in operating a program, all of these costs are often contained in the Secretarial amount when IHS turns over its program to a tribal contractor. Yet all of these types of costs are nonetheless allowable indirect CSC costs. *Id*. Again, the government's assertion here that any type of activity funded by the Secretarial amount is ineligible for CSC funding is belied by decades of agency practice to the contrary.

And third, the IHS Manual provides a convenient formula for calculating a credit adjustment to the CSC costs that the agency will pay for overhead costs associated with agency Area and Headquarters funds that are part of the Secretarial amount. This is necessary to ensure that there is no actual duplication of dollars when CSC is to be paid for these types of costs. The formula states that when regional Area and central Headquarters overhead activities are transferred to a tribal contractor, 20% of the Area and Headquarters funding will be applied as a credit (*i.e.*, a deduction) against the amount of indirect CSC funding the Tribe will receive. *Id*. at 4. In other words, IHS assumes that 20% of the Area and Headquarters costs that are being transferred in the Secretarial amount are for overhead costs, and it is agreeing to pay more overhead in the form of CSC only if a contractor's overhead costs exceed what was transferred in the Secretarial amount. Once again, there would be no occasion for a credit adjustment from the

Secretarial amount if the CSC funding were not covering some of the *same* types of costs that are funded with Secretarial amount dollars.[3]

In short, it is simply not true that CSC costs and Secretarial amount costs are "primarily distinguishable by the types of activities that they are intended to cover." Gov't Opp. at 2. In fact, and as the preceding examples well illustrate, if CSC were limited to types of activities which receive no funding through the Secretarial amount, most of the IHS Manual would have to be rewritten and CSC costs would be paid only for the rare costs that IHS itself never incurs in administering a program and that are unique to tribal contractors. The government's litigating position here is contrary to fundamental premises of the ISDEAA contracting system and decades of agency practice.

B. IHS'S NEW LITIGATING POSITION ON THE DUPLICATION ISSUE IS CONTRARY TO THE ACT.

Nor does the controlling statute support IHS's extreme litigating position here. Even though the Act specifically commands that the Secretarial amount shall include "supportive administrative functions," *see* § 450j-1(a)(1)[4], those very same types of overhead (or "indirect") costs are also identified in the Act's CSC provisions. *See* § 450j-1(a)(3)(A)(ii) (CSC shall be paid for "any *additional* administrative or other expense related to the overhead incurred by the tribal contractor" (emphasis added)). The two central funding provisions of the Act, one for the

[3] Given these examples, it is nothing short of disingenuous for the government to assert that the Manual's treatment of fringe benefits is a "lone exception" (Gov't Opp. at 25) to the supposed rule that the same activity is never jointly funded by CSC dollars and Secretarial amount dollars. The Manual demonstrates repeatedly that joint funding of many activities is the *rule*, not the exception. And Sage's CSC costs are to be calculated according to the Manual, *see* Section 5(C) of Sage's AFAs, attached hereto as Exhibit D.

[4] Unless otherwise specified, all statutory citations are to Title 25 of the United States Code (25 U.S.C. § ---).

Secretarial amount and one for contract support costs, are in large part describing the *same* types of costs, not different costs.

And when it comes to indirect CSC, the Act is particularly directive, commanding elsewhere that "[n]othing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract." § 450j-1(d)(2). Neither this subsection nor subsections 450j-1(a)(3)(A)(i) and (ii) add language like "except for types of costs funded in the Secretarial amount" or "except for types of costs funded as 'supportive administrative functions,' under section 450j-1(a)(1)." Yet that is precisely the gloss the government would have this Court read into the Act's central contract support cost provisions.

And indeed, it is precisely because the two types of funding *do* overlap that the 'no duplication' provision in subsection 450j-1(a)(3)(A) is necessary. It guards against any double payment by assuring that when computing the contractor's CSC requirement, the government is given a dollar-for-dollar credit for amounts already being paid as part of the Secretarial amount. *See* § 450j-1(a)(3)(A) ("such funding shall not duplicate any funding provided under subsection (a)(1) of this section").

The government leans heavily on subsection 450j-1(a)(2) to argue that a type of cost already funded in the Secretarial amount is, by the terms of that subsection, categorically ineligible as CSC costs. Gov't Opp. at 11-12. For the government, the issue is really not about *duplication* of costs, but about *eligibility* for CSC funding in the first place: if a type of cost is included in the Secretarial amount, the government says, it is "no longer eligible for CSC." *Id*. at 12 (using mail, phone and printing costs as an example). The problem with that cramped view of

subsection 450j-1(a)(2) is that it largely ignores subsection (a)(3)(A) and the relevant legislative history.

The government has a difficult time with (a)(3)(A), because it is that provision, not (a)(2), which actually defines "*eligible* costs for the purposes of receiving [CSC] funding under this subchapter" (emphasis added).[5] So the government concocts a story that Congress enacted the 1994 amendments, including subsection (a)(3)(A), simply to clarify that CSC can be accounted for as either "direct" costs or "indirect" costs, Gov't Opp. at 13, 17-18, leaving subsection (a)(2) as the only relevant provision for determining the kinds of CSC costs that are due.

But this limited narrative ignores the broader context of what actually occurred in 1994, and the state of affairs that was in place immediately before those 1994 amendments. The earlier 1988 amendments had added the contract support cost language that appears today in subsection (a)(2). Pub. L. 100-472, title II, § 205, 102 Stat. 2285, 2292 (1988). But the 1988 amendments did not revise subsection (a)(1) to command the Secretary to include in the Secretarial amount administrative functions typically housed in regional Area or centralized Headquarters offices. *Id*. So as of 1988, the only way a Tribe could secure funding for such administrative functions was through the Act's CSC provision, namely subsection (a)(2)(B)'s reference to "costs … provided by the Secretary in support of the contracted program *from resources other than those under contract*" (emphasis added).

[5] As the Senate Indian Affairs Committee noted, subsection 450j-1(a)(3)'s provisions "more fully define the meaning of the term 'contract support costs' as presently used in the Act." Ex. A, S. REP. NO. 103-374, at *9 (1994).

Once Congress in 1994 expanded the types of costs the Secretary was required to turn over as a part of the Secretarial program amount—by amending subsection (a)(1) to include her "supportive administrative functions," Pub. L. No. 103-413, § 102(14)(A), 108 Stat. 4250, 4257 (1994)—this automatically raised the question whether the expansion of the Secretarial amount to include "administrative functions" meant that administrative functions would no longer be eligible to be funded as contract support costs under subsection (a)(2)(B). That is, by adding administrative costs to (a)(1), would (a)(2)(B) now bar those types of costs as CSC? Had subsection (a)(3)(A) not been added, the Act might have lent itself to that interpretation.

But Congress added subsection (a)(3)(A) precisely to make clear that administrative and other overhead functions would continue to be funded as eligible CSC even if the *same* type of costs were included in the Secretarial amount—but only to the extent the Secretarial amount paid under subsection (a)(1) was insufficient to fully fund the contractor's reasonable needs.

Contrary to the limited narrative IHS offers in its brief (Gov't Opp. at 11-13), subsection (a)(3)(A)'s legislative history places beyond a shadow of a doubt Congress's understanding that the *same* types of costs would be funded through these two distinct vehicles.[6] There, Congress was perfectly clear:

> [I]n the event the Secretarial amount under [§ 450j-1(a)(1)] *for a particular function* proves to be *insufficient* in light of a contractor's needs for prudent management of the contract, contract support costs are to be available to supplement such sums.

[6] This Court looks to the ISDEAA's legislative history to enlighten the meaning of the Act's provisions. *See e.g. Navajo Health Found.-Sage Memorial Hosp. v. Burwell*, 100 F. Supp. 3d 1122, 1178-1180, 1183 (D.N.M. 2015) (Doc. 62) (addressing congressional concern with agency malfeasance).

Ex. A, S. REP. NO. 103-374, at *9 (emphasis added).[7] At Committee Chairman John McCain's request, the no-duplication phrase was added to "assure against any inadvertent double payment of contract support costs which duplicate the Secretarial amount already included in the contract," Ex. B, 140 CONG. REC. 28,326 (Oct. 6, 1994) (comments of Sen. McCain regarding proposed amendment of S. 2036), and the amended provision then passed the House as part of the parallel House bill. *See* Ex. C, 140 CONG. REC. 28,640, 28,646 (Oct. 6, 1994).

So damning is this history to the government's argument that IHS urges the Court simply to ignore it, either because it is allegedly contrary to the plain language of the statute (Gov't Opp. at 22), or because it is an outlier (*id.* at 23), or because it accompanied the Senate bill instead of the House bill, *id.* at 23 (although on this score the enacted House bill was identical to the amended Senate bill), or simply because the explanations offered in the Senate and the House are all inconsistent with the government's narrative of how the ISDEAA should operate. *Id*. at 15-16.

None of this is right. If any "plain meaning" can be discerned from Congress's statement in subsection (a)(3)(A) that both "direct program expenses" and "any additional administrative or other expense related to the overhead incurred by the tribal contractor" are "eligible costs for" the reimbursement of CSC, except that such "funding shall not duplicate any [Secretarial

[7] The full relevant passage from the Senate Indian Affairs Committee report states as follows: "The amendments to sections 106(a) (2) and (3) more fully define the meaning of the term "contract support costs" as presently used in the Act, defining it to include both funds required for administrative and other overhead expenses and "direct" type expenses of program operation. In the event the Secretarial amount under section 106(a)(1) for a particular function proves to be insufficient in light of a contractor's needs for prudent management of the contract, contract support costs are to be available to supplement such sums. The amendment also mandates the negotiation of such funding needs with the Secretary, including the optional periodic renegotiation of such funding needs as circumstances may warrant. The amendment does not alter the process employed by many tribal contractors for negotiating indirect cost agreements with the appropriate cognizant agency for purposes of cost-recovery accounting under the Act." Ex A, S. REP. NO. 103-374, at *8-9. Identical language appears in the House report on the parallel bill, Ex. C, 140 CONG. REC. 28,631 (notes to Committee amendment of H.R. 4842).

amount]" funding, it is that the two types of costs do overlap, and precisely for this reason the Secretary needs to guard against double payments. This is subsection (a)(3)(A)'s "plain" meaning, and it means the additional costs for an administrative function will be reimbursed as CSC if the Secretarial amount for that item is insufficient.

Indeed, if the government's position were right, the Secretarial amount and contract support costs would never cover the same type of costs, so there could never be any possibility of duplicated payments. In that event, the no-duplication language would be unnecessary and meaningless. In other words, the government's interpretation would render the duplication provision in subsection (a)(3)(A) a nullity. It would also make subsection (a)(3) surplusage to subsection (a)(2), because the government insists that subsection (a)(2) already limits CSC to types of costs that are not funded in the subsection (a)(1) Secretarial amount. In short, the Government's reading makes a hash of the statutory text. It is also contrary to a cardinal rule of statutory construction that:

> If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (footnote omitted); *see also id*. at 176 ("If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred").

In sum, the statutory text is plain that a given type of cost may be reimbursed by a combination of Secretarial funds *and* CSC funds, so long as no double payment occurs. And the

legislative history unquestionably supports this reading. But to the extent the matter is not plain enough, the special rule of construction that applies to the ISDEAA requires that "if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011) (quoting *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997)), *aff'd sub nom Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012). Indeed, for the government to prevail here it "must demonstrate that its reading [of the ISDEAA] is *clearly required by the statutory language*." *Salazar v. Ramah*, 132 S. Ct. at 2191 (emphasis added). And that is simply not possible here. After all, the government's assertion that its reading of relevant provisions is the "only plausible reading" of the Act is belied by the fact that the agency has for decades recognized CSC requirements which *supplement* Secretarial funding amounts for the *same* activities and the *same* types of costs covered in the Secretarial amount. *Supra* at 1-4. Not only is Sage's interpretation "plausible," it is embedded in nearly every page of the agency's CSC Manual.[8]

Finally, the government faults Sage for having developed a more successful program than the agency itself ever operated. Gov't Opp. at 15, 23-24. Of course, that is the whole point of the Act, and the ISDEAA's rebudgeting and redesign authorities (*see* §§ 450j(j), 450j-1(o)) are geared precisely to maximizing the ability of Tribes to better meet the needs of their citizens. A

[8] The government's opposition takes Sage's argument to absurd lengths, suggesting Sage's interpretation would permit it to "expand the Secretarial amount" and demand CSC for any item, such as additional doctors or dentists funded through the Secretarial amount. Gov't Opp. at 20. Nothing in Sage's CSC claim nor in the arguments advanced here suggests that CSC is appropriate for such program purposes. For similar reasons, the "limitation of cost" clause (Gov't Opp. at 21) is irrelevant to arguments about a Tribe's entitlement to CSC, as the Supreme Court made perfectly clear in *Cherokee Nation v. Leavitt*, 543 U.S. 631, 639-640 (2005). This is not a matter of a Tribe running out of money and curtailing contract operations.

Tribe's success in better martialing the agency's resources provides no excuse, either by statute or by logic, for reimbursing a Tribe less than the full amount of the contract support costs it incurred to carry out those services.

CONCLUSION

For the foregoing reasons and those set forth in Sage's opening brief, Sage is entitled to judgment as a matter of law holding that the ISDEAA's duplication provision prohibits duplication of funding as between CSC amounts and the Secretarial amount, but does not prohibit overlapping categories of costs, and is satisfied so long as a dollar-for-dollar credit is applied to any amounts that were actually transferred to Sage as part of the Secretarial amount.[9]

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[9] The government never defends against Sage's assertion that any duplication offset is limited to the Secretarial amount dollars the agency *actually transferred* for a given type of cost. *See* Doc. 200 (Sage Mot.) at 16-18. Sage's point is that the duplication offset does not expand to some theoretical amount the agency asserts it "would have" spent were it operating the program today. *Id*. The government has therefore conceded the point. *See Plant Oil Powered Diesel Fuel Sys., Inc. v. ExxonMobil Corp.*, 2012 WL 1132527, at * 16 (D.N.M. Mar. 22, 2012) ("[A] party may not hold a specific argument in reserve until it is too late for the other side to respond." (citations and citation marks omitted)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2016 I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

s/ Lloyd B. Miller