

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMESTOWN S'KLALLAM TRIBE,

Plaintiff,

v.

ALEX M. AZAR, in his official capacity as
Secretary, U.S. Department of Health &
Human Services, *et al.*,

Defendants.

Civil Action No. 19-2665 (JEB)

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR
CROSS-MOTION FOR SUMMARY JUDGMENT**

In response to new evidence introduced by Plaintiff in its Combined Opposition and Reply, Defendants have filed a Motion for Relief under Federal Rule of Civil Procedure 56(d) (“Rule 56(d) motion”). That motion requests that the Court either order discovery and supplemental briefing prior to ruling on the cross-motions for summary judgment, or in the alternative, that the Court disregard the new evidence introduced by Plaintiff. Should the Court deny Defendants’ Rule 56(d) motion, Defendants submit this reply in support of their cross-motion for summary judgment.

INTRODUCTION

Maniilaq Association v. Burwell, 170 F. Supp. 3d 243, 251 (D.D.C. 2016) established that facilities used by tribes for the delivery of services under the Indian Self-Determination and Education Assistance Act (“ISDEAA”) must be provided with a reasonable amount of lease compensation by the government. Plaintiff has failed to demonstrate that the entirety of its health services are carried out under the ISDEAA. Rather, the record evidence establishes that Plaintiff’s

services to the general public at the Health Clinic do not fall under the ISDEAA compact and funding agreement. Even assuming those services are deemed to be provided under the ISDEAA funding agreement, it is not reasonable for the Indian Health Service (“IHS”) to fund Plaintiff’s services to the general public. Accordingly, Defendants fully discharged their statutory duties when they rejected Plaintiff’s final offer and awarded, using the regulatory elements of compensation at 25 C.F.R. § 900.70, a level of lease compensation directly tied to the user population of American Indians and Alaska Natives that may seek care at the Health Clinic.

ARGUMENT

Plaintiff’s Combined Opposition and Reply (ECF Nos. 23-25) raises a number of arguments seeking to undo the Secretary’s decision in the final offer rejection. Plaintiff’s keystone argument, however, is that its services to the general public are carried out under its ISDEAA funding agreement, and therefore, it is entitled to compensation for space used to carry out those services under ISDEAA section 105(*l*). Put conversely, and in the nomenclature of the ISDEAA, if Plaintiff’s services to the general public are not provided under its ISDEAA funding agreement, its proposal for lease compensation associated with those services exceeds “the applicable funding level” it is entitled to under law. Defendants, therefore, need only to establish that Plaintiff’s services to the general public are *not* carried out under its ISDEAA funding agreement to prevail in this matter.

There are two compelling reasons the Court should find for Defendants on this threshold issue. First, Plaintiff’s own evidence demonstrates that Plaintiff is contravening federal law and its own authorizing resolution by failing to recoup payment from the general public “in an amount not less than the actual costs of providing such services.” And second, Plaintiff has not established that it is using its Health Clinic revenues in accordance with 25 U.S.C. § 1680c(c)(3). The Court

should therefore find that those services are not deemed to be provided under the ISDEAA funding agreement.

Even assuming the Court finds that Plaintiff's services to the general public are deemed to be carried out under the ISDEAA funding agreement, it is self-evident that Plaintiff's proposal is not reasonable—and therefore not permissible under ISDEAA section 105(*l*). Plaintiff seeks to compel Defendants to compensate Plaintiff for services to the general public. Contrary to Plaintiff's recitation of irrelevant legislative history and speculative arguments regarding “the policies underlying the ISDEAA,” Congress clearly established IHS to provide health care to American Indians and Alaska Natives. There is no evidence in the ISDEAA, legislative history, or elsewhere demonstrating that Congress mandated that IHS appropriations be used to support services to the general public. Plaintiff's contorted view of the ISDEAA and its implementing regulation therefore does not overcome the common-sense proposition that it is unreasonable for IHS to support Plaintiff's health care operation, which primarily benefits the general public.

I. It Is Not Reasonable for IHS to Support Services to the General Public.

a. IHS Funds Are Not Available to Support Health Care to the General Public.

Plaintiff seeks to expand 25 U.S.C. § 1680c into a funding entitlement. But Congress clearly instituted legal requirements that contradict Plaintiff's view of the law. Section 1680c requires that payment be recouped from the general public in an amount not less than the actual cost of providing those services. 25 U.S.C. § 1680c(3). Further, Congress annually acts to underscore that requirement by passing into law appropriation acts that condition the provision of care to the general public on the recoupment of expenses associated with that care from the patient – not the IHS. *See, e.g.*, Consolidated Appropriations Act, 2019, Pub. L. 116-6. Plaintiff seeks to overcome these clear legal requirements in its Combined Opposition and Reply by citing to

legislative history and “policies underlying the ISDEAA.” With respect to the policies underlying the ISDEAA, Plaintiff provides no support or explanation for its assertion, nor does it explain how those policies can be reconciled with the plain statutory language.

Plaintiff’s reference to legislative history is equally unconvincing. Plaintiff argues that changes to the language of § 1680c indicate that Congress intended for Tribes be able to generate income from the provision of services to the general public. Defendants do not disagree, but they view that history in light of the legal mandates that Tribes recoup all costs of those services. Given the legislative history and the plain language of the law, Congress clearly did not intend services to the general public to be supported by IHS appropriations. It is therefore not reasonable for IHS to support the entirety of Plaintiff’s Health Clinic facility costs.

b. The Final Lease Compensation Awarded Was Based on the Regulations and Is Therefore Within the Ruling in *Maniilaq II*.

Plaintiff argues that IHS has rewritten the leasing regulations and is therefore not in compliance with the ruling in *Manillaq Association v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016) (*Maniilaq II*). However, the Court need only reference the final lease entered into by the parties to determine that Plaintiff’s assertion is false. ECF No 21-18. Attachment A to the lease contains a spread sheet clearly delineating the level of funding for each element of compensation provided under the lease. Column 1 of Attachment A to the lease identifies the regulatory provision (from 25 C.F.R. § 900.70(a)-(h)). Column 2 of Attachment A to the lease provides the narrative description of the regulatory element. Finally, Column 3 of Attachment A to the lease provides the awarded amount of funds for that regulatory element. *Maniilaq II* requires that IHS provide compensation “based on” the regulatory elements. *Maniilaq II* at 251. This is precisely what IHS has done.

c. Defendants Have Met Their Burden in Defending the Final Offer Rejection.

Without clearly articulating the applicability of its argument, Plaintiff highlights Defendants' high burden and cites a case finding that IHS may not make post hoc arguments not raised in its final offer rejection letter. Although Plaintiff does not identify any particular argument it considers to be post hoc, it is important to note what ISDEAA actually requires of IHS. The agency's burden is to "demonstrate[e] by clear and convincing evidence *the validity of the grounds for rejecting*" the final offer. 25 U.S.C. § 5387(d) (emphasis added). The grounds on which IHS relies here are the same grounds articulated in the final offer rejection letter. The letter explained that "[n]o funds are due for the portion of the JST's Tribal enterprise serving ineligible individuals even if that Tribal enterprise is operated in conjunction with an ISDEAA agreement." ECF 21-2. Moreover, IHS explained that "pursuant to [§ 1680c and the annual appropriations act], all costs associated with the provision of services to non-beneficiaries must be recouped from the individual extended services." *Id.* Ultimately, the final offer rejection letter concluded, based on these and other reasons, that "[t]he JST is only entitled to a reasonable level of lease compensation under section 105(/) of the ISDEAA." *Id.* Defendants have established by clear and convincing evidence the validity of the grounds cited in the final offer rejection letter.

II. Plaintiff's Evidence Does Not Establish that the Entirety of the Health Clinic Is Operated Under the ISDEAA Compact and Funding Agreement.

a. The Gange Declaration Is Unsubstantiated and Does Not Overcome the Strong Evidence Relied Upon by Defendants.

Included in the record are several of Plaintiff's audited financial statements. As explained in greater detail in Defendants' Combined Opposition and Cross-Motion for Summary Judgment, those financial statements demonstrate that Plaintiff has firewalled its IHS program (and funds) from the Health Clinic enterprise it also operates. Plaintiff seeks, through the Declaration of Diane

Gange and Exhibit 1 to that Declaration, to provide some explanation for otherwise self-explanatory documents. *See* ECF Nos. 24-1 and 24-2. Ms. Gange contends that the numerous and repeated transfers from the Health Clinic enterprise are above-board and permissible under the ISDEAA.

Yet Ms. Gange provides no support whatsoever for those assertions. Her Declaration fails to explain why, in 2018, Plaintiff suddenly changed its auditing practice by only submitting its Grants Fund for auditing without also including the government-wide information provided in each of its prior audits. It provides no documentation corroborating the validity of the amounts or objects of the transfers from the Health Clinic to the Tribal General Fund. Finally, the Declaration contains impermissible hearsay in the form of an assertion that the “auditors were satisfied” with the information they were purportedly provided. ECF No. 24-1 ¶ 8. There is no evidence that the auditors ever reviewed Exhibit 1 to the Declaration, which is not included or referenced in Plaintiff’s fiscal year 2018 audit. Accordingly, this Court should not consider the Declaration, and should instead look to the audits in the record, which were reviewed and relied upon by IHS in reaching its decision to reject Plaintiff’s final offer.

b. The Evidence Demonstrates that Plaintiff Is Not Compliant with Section 1680c(2) and Is Not Compliant with Its Own Authorizing Resolution.

For services to the general public to be “deemed” to be carried out under the ISDEAA, those services must: (1) be carried out in conformance with the determination made by the governing body of the relevant tribe authorizing such services, and; (2) the cost of such services must be recouped from the individual receiving services. *See* 25 U.S.C. § 1680c(2); Consolidated Appropriations Act, 2018, Pub. L. 115-141. Plaintiff has not complied with this mandate. It is therefore not reasonable for IHS to fund costs associated with these services.

The Jamestown S’Klallam Tribe has determined by Tribal Resolution that its services to the general public are conditioned upon charging for those services “in an amount not less than the actual costs of providing such services” ECF 21-19. Ms. Gange’s Declaration states that Plaintiff charges an amount that “roughly” recoups the cost of providing services. *See* ECF No. 24-1 ¶ 6. Without question, this falls short of the statutory mandate and the mandate of Plaintiff’s own Tribal Resolution. The ISDEAA does not permit Plaintiff to bill for some of its services to the general public and recoup the rest of the cost of those services from Defendants.

Conclusion

As IHS expressed in its final offer rejection letter, it is not reasonable for IHS to subsidize Plaintiff’s services to the general public, which IHS provides through its Health Clinic enterprise. Accordingly, if the Court does not grant Defendants’ Rule 56(d) motion, it should grant summary judgment in favor of Defendants and uphold the Secretary’s lawful final offer rejection letter.

Dated: July 17, 2020

Respectfully submitted,

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