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)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' COMBINED [1] OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND [2] DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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Pursuant to Fed. R. Civ. P. 56 and LCvR 7(a), (b), and (c), Defendants Alex M. Azar, Secretary of Health and Human Services, *et. al.*, by and through the undersigned counsel, respectfully submit this memorandum in support of Defendants' Motion for Summary Judgment and in opposition to Plaintiff's Motion for Summary Judgment. A proposed order is attached.

Introduction

This case concerns a "final offer" submitted by Plaintiff, Jamestown S'Klallam Tribe, seeking additional funds under its Indian Self-Determination and Education Assistance Act ("ISDEAA") funding agreement with the Secretary. ISDEAA authorizes the Secretary, acting through the Indian Health Service ("HIS"), to reject a final offer that requests a level of compensation exceeding the "applicable funding level" to which the Tribe is entitled under ISDEAA. 25 U.S.C. § 5387(c)(1)(A)(i). The method for identifying the applicable funding level for an ISDEAA lease, the funding mechanism at issue in the final offer, was established by this Court in *Maniilaq Association v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016) (*Maniilaq II*). In relevant part, *Maniilaq II* held that the Secretary may reject a lease proposal that is not reasonable and that lease compensation must be based on the regulatory elements at 25 C.F.R. Part 900, Subpart H. *Id*. at 255. Citing *Maniilaq II* and other controlling law, IHS timely rejected Jamestown's final offer seeking to compel IHS to enter into a lease of its Jamestown Family Health Clinic. Ex. A. Jamestown's Motion for Summary Judgment contends that the IHS final offer rejection is not lawful because it is not compliant with *Maniilaq II*. Pl. MSJ Mem. at 30. However, IHS has fully complied with *Maniilaq II* because the rejected portion of compensation proposed by Jamestown is patently unreasonable and the method applied by IHS to establish lease compensation is based on the leasing regulations. *See Maniilaq II* at 255. Jamestown's Motion for Summary Judgment also argues that the IHS final offer rejection is unlawful because IHS must

provide lease compensation associated with Jamestown's provision of services to the general public because they are carried out "under" ISDEAA. Pl. MSJ Mem. at 17. The controlling law and evidence presented by the government here and in its rejection letter, however, demonstrate that Jamestown's services to the general public are not carried out under ISDEAA and that IHS is not required to fund costs associated with services to the general public.

Because IHS has completely discharged its obligations under ISDEAA, Defendants respectfully request that summary judgment be entered in their favor.

Legal Background

IHS's principal mission is to provide primary health care for American Indians and Alaska Natives (IHS beneficiaries) throughout the United States. *See* S. Rep. No. 102-392, at 2-3 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3943. IHS's authority to provide health care services derives primarily from two statutes. The first, the Snyder Act, 25 U.S.C. § 13, is a general statutory mandate authorizing IHS to "expend such moneys as Congress may from time to time appropriate for the benefit, care, and assistance of the Indians," for the "relief of distress and conservation of health." 25 U.S.C. § 13, *see also* 68 Stat. 674 (transferring health-related functions of the Snyder Act from the Department of Interior to Health, Education, and Welfare, the predecessor to HHS). The second, the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. §§ 1601 - 1683, establishes numerous programs specifically created by Congress to address particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes prevention and treatment, medical training, and urban Indian health. In 1975, Congress passed the ISDEAA, which allows Tribes and tribal organizations to contract with the Secretary of HHS, through IHS, to take over operation of many of the Federal programs that IHS is operating for the benefit of Indians. Thus, IHS delivers health care to IHS Beneficiaries in two primary ways: (1) providing health care

services directly through its own facilities; and (2) contracting with Tribes and Tribal organizations pursuant to ISDEAA to allow those Tribes to independently operate health care delivery programs previously provided by IHS.

I. Indian Self-Determination and Self-Governance

The ISDEAA authorizes three types of funding to ISDEAA contractors: the "Secretarial amount," section 105(*l*) lease compensation, and CSC funding. These funds are transferred to Tribes and tribal organizations pursuant to a Title I Contract and Annual Funding Agreement for Tribes participating in the Title I self-determination program, or through a Title V Compact and Funding Agreement for Tribes participating in the Title V self-governance program.

A. The Secretarial Amount

The "Secretarial amount" are funds "for direct program costs" associated with carrying out the federal program transferred by the Secretary to the Tribe under ISDEAA. 25 U.S.C. § 5388(c). The Secretarial amount "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract." 25 U.S.C. § 5325(a)(1). "By requiring that the federal government provide no less than this amount, the ISDEAA ensures that the tribes receive funding equal to what the government would have spent if it provided the services at issue itself." *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 104 (D.D.C. 2019) (citing 25 U.S.C. § 5325(a)(1)). The Secretarial amount also functions to limit the amount of money that a Tribe may obtain to the amount that the government is currently spending on the program the Tribe is seeking to operate. *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025, 1033 (9th Cir. 2013). While Congress, through S. Rep. 103-374, described this parity as "the original intent of the Act," Congress has since added funding

entitlements to ISDEAA that in some cases turn the Secretarial amount from a funding ceiling into a funding floor. *See Maniilaq II* at 249.

B. Section 105(*l*) Lease Compensation

Congress added section 105(*l*) to ISDEAA in 1994 to provide alternative cost principles allowing contractors to recoup facility costs associated with carrying out IHS Programs. Formal ISDEAA negotiation policies, developed jointly with Tribes and tribal organizations, were established in 1999. Ex. B. Those policies specify that section 105(*l*) leases are funded from resources currently available under the existing Funding Agreement, or are to include a token sum to formalize the relationship between the Tribal facility and the IHS programs operated therein. However, responding to the ruling in *Maniilaq II* in 2016, the IHS began negotiating and executing section 105(*l*) leases with compensation exceeding the Secretarial amount already provided under the existing ISDEAA Funding Agreement. Since 2016 IHS has negotiated and executed hundreds of compensated section 105(*l*) leases totaling over $100 million in additional ISDEAA compensation for Tribes. Ex. C.

Section 105(*l*) of ISDEAA requires the Secretary to enter into a lease at the request of a Tribe or Tribal Organization. 25 U.S.C. § 5324(*l*)(1). The Tribe must hold title to or have a leasehold or trust interest in the facility. *Id*. The facility must be used for the administration and delivery of services under the ISDEAA. *Id*. Section 105(*l*) requires that each contractor entering into a lease be compensated for the use of the facility leased for administration and delivery of services under the ISDEAA. 25 U.S.C. § 5324(*l*)(2). Compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and other reasonable expenses identified by regulation. *Id.* Implementing regulations at 25 C.F.R. Part 900, Subpart H establish additional requirements for

section 105(*l*) leases. Contractors may propose leases based on fair market rental, a list of elements of compensation identified at 25 C.F.R. § 900.70, or a combination of fair market rental and a portion of the listed elements of compensation. 25 C.F.R. § 900.74. Contractors are not permitted to receive compensation for the same item twice. *Id*.

Section 105(*l*) has been analyzed in two federal district court cases: *Maniilaq Association v. Burwell*, 72 F. Supp. 3d 227 (D.D.C. 2014) (*Maniilaq I*) and *Maniilaq II*, and in one case decided by the Interior Board of Appeals ("IBIA"): *Hannahville Indian Community v. Minneapolis Area Education Officer and Area Supervisory Contract Specialist, Bureau of Indian Affairs*, 37 IBIA 35, 2001 WL 34373280 (Nov. 13, 2001) (*Hannahville*). *Maniilaq I* established that a section 105(*l*) lease may be incorporated into a Funding Agreement and therefore may be rejected by the Secretary using the statutory rejection grounds. *Maniilaq I* at 240. *Maniilaq I* also clarified that section 105(*l*) lease funds are an additional way for Tribes to receive program funds otherwise transferred as part of the Secretarial amount. *Id.* at 238. Jamestown contends that the court in *Maniilaq I* "rejected the IHS's argument that an ISDEAA contractor must utilize the IHS Lease Priority System . . . ." Pl. MSJ Mem. at 9-10. But this assertion, which Jamestown relies upon as the basis of much of its argument, is not accurate. The *Maniilaq I* court clearly expressed the narrow scope of its ruling stating that "[b]ecause this Court finds that the lease is incorporated into Maniilaq's funding agreement due to IHS's failure to respond during the statutory period, it need not decide whether IHS could have otherwise compelled Maniilaq to seek a [section 105(*l*)] lease through the LPS." *Maniilaq I* at 241, fn.4. The decision also did not address the applicable level of funding due under section 105(*l*). *Id.* This question was taken up two years later in *Maniilaq II*.

Maniilaq II analyzed the interplay between section 105(*l*) lease funds and Secretarial amount funds, ultimately finding that section 105(*l*) *may* entitle a Tribe to funds in excess of those provided as the Secretarial amount. *Maniilaq II* at 254-255. Following receipt of a section 105(*l*) lease proposal far in excess of the Secretarial amount provided to lease the relevant clinic, IHS rejected the final offer arguing that the text of section 105(*l*) and its implementing regulations grant the Secretary with full discretion to determine the level of funds due to a Tribe. *Id*. at 252. Under this theory, the Secretary argued that she could not be compelled to provide funds in excess of the Secretarial amount. *Id*. at 255. This theory was rejected by the Court, which held that "the regulations at 25 C.F.R. § 900.69 - 900.74 determine the . . . applicable funding level" under section 105(*l*). *Id*. at 255. The Secretarial amount, under the facts presented in that case, could not be used to determine the funding level because the Secretarial amount was not "based on any of the regulatory cost elements or expenses." *Id*. at 256, fn.8.

The *Maniilaq II* court established a framework under which the entitlement to section 105(*l*) lease funds was not limitless. According to the court, funds provided under section 105(*l*) must not duplicate funds already provided by the Secretary. *Id.* at 256, fn.8 ("the proper course for the Secretary would have been to reduce Maniilaq's proposal by the amount of the overlap . . . ."). And funds proposed by a Tribe and compensated by IHS must also be reasonable. *Id.* at 255 ("Using her statutory declination rights, the Secretary was permitted to decline compensation requests that were 'duplicative,' . . . or not 'reasonable,' . . . ."). Thus, the *Maniilaq II* court established a negotiation scheme allowing the Secretary "to push back" on the amount proposed by a Tribe if the amount is not reasonable or is duplicative. *Id.* at 251.

Finally, the *Hannahville* decision establishes that there is no statutory authority for a Tribe to enter into a section 105(*l*) lease for facilities used to carry out a program outside ISDEAA — in

that case a Tribally Controlled Schools Act grant. *Hannahville* at 45. Relying on the plain language of section 105(*l*), the IBIA in *Hannahville* held that a section 105(*l*) lease must solely support federal programs transferred to a Tribe or Tribal organization "under [ISDEAA]." *Id.* at 50 ("This literal interpretation of the language of the statutes does not thwart congressional intent [to encourage maximum tribal self-determination] or lead to an absurd result."). Put another way, *Hannahville* stands for the proposition that the government is not required to support non-ISDEAA programs through section 105(*l*) leases.

C. CSC Funding

Not at issue in this matter, CSC funding is authorized in addition to the Secretarial amount and section 105(*l*) lease compensation. CSC is reimbursement for the additional, reasonable costs for activities that ISDEAA contractors must carry out to ensure contract compliance and prudent management, but that were not activities funded as part of the Secretarial amount—either because the costs are for activities that the Secretary does not normally carry out, or because the Secretary provided for those activities from resources other than those transferred under the contract. *Id.* § 5325(a)(2). To be CSC, the costs must be actual, reasonable costs and cover activities that "must be carried on . . . as a contractor to ensure compliance with the terms of the contract and prudent management." *Id.* § 5325(a)(2). CSC only incudes costs directly attributable to the Federal program assumed from IHS and does not include additional costs that stem from non-IHS programs. *Id.* §§ 5325(a)(2)-(3), 5326.

II. Use of Program Revenue Under ISDEAA

ISDEAA contractors often provide increased health care services, either in conjunction with or under an ISDEAA agreement. Some ISDEAA contractors provide health care services using their own funds, such as gaming revenues. Or, ISDEAA contractors may collect

reimbursements from third-party payers such as Medicare, Medicaid, and private insurance that must be used to supplement funds provided under the ISDEAA agreement. 25 U.S.C. § 1621f, 1641. The ISDEAA characterizes such revenue as "program income" that is "supplemental funding to that negotiated in the funding agreement." 25 U.S.C. § 5388(j). Program income must be used by both IHS and Tribes "to make improvements in facilities necessary to comply with the Social Security Act, to provide additional health care services, or for another health care-related purpose consistent with the IHCIA and the ISDEAA." *Swinomish Indian Tribal Community v. Azar*, 406 F. Supp. 3d 18, 21-22 (D.D.C. 2019) (citing 25 U.S.C. § 1641(c)(1)(B), (d)(2)(A)).

III. Health Care Services to Non-Beneficiaries under ISDEAA

While IHS operates as the federal agency responsible for the provision of health care to American Indians and Alaska Natives, Congress has authorized IHS and Tribes to provide care to non-beneficiaries. 25 U.S.C. § 1680c. This authorization is contingent upon several factors. First, the provision of care to non-beneficiaries must not result in the denial or diminution of services to eligible Indians. 25 U.S.C. § 1680c(c)(1), (2). Second, IHS and Tribes are required to obtain full recovery of costs associated with the provision of services to non-beneficiaries. 25 U.S.C. § 1680c(c)(3); Consolidated Appropriations Act, 2018, Pub. Law No. 115-141, 132 Stat. 679 (Mar. 23, 2018). And third, "[n]otwithstanding . . . any other provision of law, amounts collected under [25 U.S.C. § 1680c], including Medicare, Medicaid, or children's health insurance program reimbursements . . . shall be credited to the account of the program providing the service and shall be used for the purposes listed in [25 U.S.C. §] 1641(d)(2) of this title . . . ." 25 U.S.C. § 1680c(c)(3). In other words, ISDEAA program revenues generated through services to non-beneficiaries must remain within the health program. *See* 25 U.S.C. § 1641(d)(2)(A).

IV. ISDEAA Title V Funding Agreements and Final Offers

Tribes, such as Jamestown, that participate in the ISDEAA Title V Self-Governance program must negotiate and enter into a written Funding Agreement with IHS that identifies the Federal programs to be performed and sets forth various terms related to each program including the amount of funds to be provided. 25 U.S.C. § 5385. As described above, the amount of funds required in the Secretarial amount under a Funding Agreement is determined by section 106(a) of the ISDEAA. To the extent the costs are reasonable and not duplicative, Tribes and Tribal organizations furnishing facilities to carry out a Funding Agreement may also negotiate lease compensation under section 105(*l*) of the ISDEAA and incorporate the lease and associated funds into the Funding Agreement. *Maniilaq I* at 238; 25 U.S.C. § 5324, 5325; *see also* 42 C.F.R. § 137.79; *Maniilaq II* at 255.

Should negotiations concerning the terms of funding amounts of the Funding Agreement reach impasse, a Tribe may present IHS with a proposal that is labeled a "final offer." 25 U.S.C. § 5386(b). Within 45 days of receipt of a final offer, IHS must either accept or reject the Tribe's proposal. *Id.* IHS is permitted to reject a final offer by providing written notification "containing a specific finding supported by controlling legal authority" that the Tribe's final offer falls within one of the four statutorily enumerated grounds for rejection:

> (i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter;
> (ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;
> (iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or
> (iv) the Indian tribe is not eligible to participate in self-governance under section 5383 of this title.

25 U.S.C. § 5387(c)(1)(A)(i-iv).

IHS must offer technical assistance to help the Tribe overcome the Agency's objections to the final offer. *Id.* § 5387(c)(1)(B). And as it did here, IHS must offer the ISDEAA contractor the option of entering into the severable portions of a proposed Compact or Funding Agreement, that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provision. 25 U.S.C. § 5387(c)(1)(D).

Factual Background

Jamestown is a federally recognized Tribe located in the State of Washington. Pl.'s SOMF ¶ 1. Jamestown receives funds from IHS for the provision of health care to IHS beneficiaries through a Title V ISDEAA Compact and Funding Agreement. Ex. D, Ex. E. Jamestown is also a community health provider, providing services to the general population of Sequim, Washington in conjunction with Olympic Medical Center, a separate community health provider, operating in Sequim and throughout the Olympic peninsula of Washington. Ex. F. Jamestown operates a number of for-profit businesses within the State of Washington, including but not limited to Jamestown Seafood, Seven Cedars Casino, Longhouse Market and Deli, Jamestown Excavating, Point Whitney Shellfish, the Jamestown Dental Clinic, and the Jamestown Family Health Clinic. *See* https://jamestowntribe.org/enterprises/. Ex. G. These businesses are open to and used by Jamestown members and members of the general public. *Id.* According to an annual report published by Jamestown, the Health Clinic has more than 17,000 registered patients and conducts more than 52,000 patient visits per year. Ex. H. However, the Health Clinic's active user population of IHS beneficiaries for fiscal year (FY) 2018 was just 460 individuals. Ex. I. The Health Clinic is 34,632 square feet with an operating budget of approximately $18 million. Ex. J at 17. IHS funding associated with the operation of programs for the 460 American Indians and Alaska Natives served by Jamestown was around $1.6 million in FY 2018. Ex. K.

On September 28, 2018, the IHS received a section 105(*l*) lease proposal from Jamestown for the total facilities costs associated with Jamestown's operation of the Health Clinic for FY 2018. Ex. L. In its proposal, Jamestown requested $981,402 in lease compensation per year. *Id*. As a first step in assessing the reasonableness of the proposal, IHS and Jamestown worked collectively to review and validate operational costs. Pl.'s SOMF ¶ 6. Through this process, IHS and Jamestown reduced the proposed amount from $981,402 to $514,826. *Id*. IHS then identified $38,703 in duplicative costs claimed by Jamestown that are already funded through the Jamestown's Funding Agreement. *Id*. Finally, and as a second step in assessing the reasonableness of the proposal, IHS reviewed the nature and extent of services provided by Jamestown to non-beneficiaries. Because the Health Clinic is much larger than necessary for the operation of IHS programs, serves almost entirely non-beneficiaries, and is operated as a Tribal enterprise, IHS proposed that each element of lease compensation provided under § 900.70 reflect only that space allocable to IHS beneficiaries. Ex. M.

To establish the portion of the facility allocable to IHS beneficiaries for purposes of calculating lease compensation, IHS proposed use of the supportable space methodology. *Id*. Among other things, the supportable space methodology relies upon the active user population of IHS beneficiaries to be served at the facility to generate the square footage necessary to carry out the transferred IHS programs. Ex. N. Using the supportable space methodology, IHS identified a total of 7,060 square feet necessary to operate IHS programs for the 460 IHS beneficiaries. Ex. O. Because 7,060 square feet is only 20.4 percent of the 34,632 square foot Health Clinic, IHS proposed applying a pro-rata factor of 79.6 percent to the total of $514,826 to arrive at total reasonable costs of $100,464 under § 900.70. Ex. M. A final reduction of agreed-to duplicative

costs already provided to Jamestown through its Funding Agreement resulted in total reasonable lease compensation under § 900.70 of $66,322. *Id.*

While IHS proposed use of the supportable space methodology to establish reasonable lease compensation under § 900.70, it invited Jamestown to furnish additional information regarding use of the Health Clinic by ineligible individuals so that alternative approaches could be considered as part of the negotiation. *Id.* Jamestown did not provide IHS with any further data regarding the Health Clinic, ceased negotiations, and submitted a final offer on May 30, 2019, which proposed total lease compensation of $476,123. Ex. P. IHS responded within 45 days on July 11, 2019 by issuing a rejection of the final offer pursuant to 25 U.S.C. § 5387(c)(1)(A)(i). Ex. A. In its rejection letter IHS offered to enter into a lease reflecting the IHS proposal pending appeal of the IHS rejection. *Id.* Jamestown agreed and that lease has moved forward. Ex. Q. IHS contends that no additional funds are due and that its rejection letter is fully compliant with IHS's rights and responsibilities under ISDEAA.

Standard of Review

I. Under ISDEAA

While ISDEAA does not identify any applicable standard of review, the recent trend in this court is to apply the *de novo* standard of review to ISDEAA cases that have been brought solely pursuant to ISDEAA or solely present questions of law. *See e.g., Pyramid Lake Pauite Tribe v. Burwell*, 70 F. Supp. 3d 534, 542 (D.D.C. 2014); *Seminole Tribe of Florida* at 108; *Maniilaq I* at 234. Because this case has been filed pursuant only to ISDEAA, Defendants acquiesce to *de novo* review.

II. Summary Judgment

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id*. at 248. In determining whether a genuine issue of material fact exists, the trier of fact must view all facts, and reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–58 (1986). Once the moving party has met its burden, the burden shifts to the nonmoving party who "'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Id*. at 586 n.11 (quoting Fed. R. Civ. P. 56(e)). Moreover, mere conclusory allegations are not enough to survive a motion for summary judgment. *See, e.g., Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993); *Rowland v. Riley*, 5 F. Supp. 2d 1, 3 (D.D.C. 1998); *Benn v. Unisys Corp.*, 176 F.R.D. 2, 6 (D.D.C. 1997). As the Supreme Court has instructed: "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

III. Burden of Proof and Deference

Jamestown contends that the final offer rejection letter must prove by clear and convincing evidence that the level of funding proposed in the final offer exceeds the applicable funding level to which Jamestown is entitled. Pl. MSJ Mem. at 3. Jamestown has conflated the procedural

requirements the final offer rejection letter must meet, 25 U.S.C. § 5387(c), with the burden of proof the Secretary must meet at "any hearing or appeal or civil action conducted pursuant to 25 U.S.C. § 5387] . . ." under 25 U.S.C. § 5387(d). The framework for judicial review under ISDEAA is unique and distinguishable from the framework typically applied to federal agency decisions under the Administrative Procedures Act ("APA"). *See Maniilaq I* at 233. Under the APA the agency is statutorily bound to the administrative record supporting the relevant agency action and courts apply a deferential level of review. *See e.g., Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (citing 5 U.S.C. § 706). But under ISDEAA, the court reviews the Agency's rejection of a final offer *de novo* and the government carries the burden of proving the validity of the grounds for rejection of the final offer (i.e. the applicability of 25 U.S.C. § 5387(c)(1)(A)(ii)). In other words, contrary to Jamestown's framing of ISDEAA, the rejection letter itself is not at issue, but rather the underlying basis of the rejection. Under the clear and convincing evidentiary standard, Defendants are not required to prove their case to an absolute certainty. *See Samra v. Shaheen Business and Investment Group, Inc.*, 355 F. Supp. 2d 483, 494 (D.D.C. 2005) (quoting *United States v. Montague*, 40 F.3d 1251, 1255 (D.C.Cir.1994)). Rather, Defendants are required only to offer proof enabling the trier of fact to reach a "firm conviction" or a "reasonable certainty" of the truth on the evidence about which it is certain. *Id*.

ISDEAA includes a "liberal construction" clause incorporating the common law "Indian canon." 25 U.S.C. § 5394(f). The Agency, therefore, is not ordinarily afforded the heightened level of deference applied under the APA and, to the extent the relevant provisions of ISDEAA are deemed ambiguous, the Court will interpret those provisions in favor of the Tribe. *See Maniilaq II* at 256, n.4. However, the court will nevertheless apply "careful consideration" to the

Agency's interpretation of ISDEAA. *See Seminole Tribe of Florida* at 108 (citing *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988)). Here, Jamestown acquiesces that the statutory scheme at issue is unambiguous. Pl. MSJ Mem. at 30. Defendants agree there are no ambiguous provisions for the Court to construe and accordingly, the Court should offer no deference to Jamestown.

Summary of the Argument

In its final offer rejection letter IHS supported its application of § 5387(c)(1)(A)(i) with several arguments supported by factual findings and controlling law.[1] The following non-inclusive list of provisions of the IHS final offer rejection are explained and supported by the explanation and analysis below.

- Jamestown operates two programs: the IHS program and its Health Clinic enterprise. *See* Ex. A at 5 ([I]t is clear that the provision of those services is not part of the IHS Programs transferred to the Tribe . . . .").
- As demonstrated by the bifurcated accounting for the two programs, the Health Clinic enterprise is not carried out "under" the Funding Agreement. *Id.*
- American Indians and Alaska Natives are less than 3% of the Health Clinic patient population. *Id.* (460 IHS beneficiaries served out of 17,000 registered patients).
- IHS is prohibited from providing lease compensation to support such a tribal enterprise. *Id.*
- Programs and funds transferred under ISDEAA must be for Indians because of their status as Indians and Indian tribes or Indians must be the primary or significant beneficiaries. *Id*. (citing

[1] In support of the final offer rejection letter, IHS provided Jamestown with over forty exhibits relied upon in making its determination.

Navajo Nation v. Dep't of Health and Human Servs., Sec'y, 325 F.3d 1133, 1138 (9TH Cir. 2003) (discussing 25 U.S.C. § 5321(a)(1)); 25 U.S.C. § 5385(a)(b)(2)).

- IHS funds are not available to support health care for non-beneficiaries. Ex. A at 6.
- § 1680c(c)(3)(A) requires Jamestown to recoup the costs of providing services to non-beneficiaries and to return those revenues to the ISDEAA program. *Id.*

While IHS is compelled to enter into a section 105(*l*) lease at the request of a contractor furnishing a facility to carry out an ISDEAA agreement, compensation provided under that lease is not limitless and must comply with the ISDEAA and its implementing regulations. Those controlling laws require, among other things, that lease compensation be reasonable. *Maniilaq II at* 251, 255. Jamestown's proposed FY 2018 lease compensation, as embodied in its final offer, is unreasonable and was therefore properly rejected by IHS. Jamestown's Motion for Summary Judgment is built on 25 U.S.C. § 1680c. Pl.'s MSJ Mem. at 2. But 25 U.S.C. § 1680c does not, "as a matter of law" cover any and all heath care activities carried on by a Tribe. Jamestown may not avail itself of the benefits of 25 U.S.C. § 1680c when Jamestown has not met any of the requirements of that statutory provision. Even assuming Jamestown's services to non-IHS beneficiaries are determined to be provided under its ISDEAA agreement, IHS is not required by ISDEAA to provide funds to Jamestown to support its provision of health care to non-beneficiaries. *Maniilaq II* interpreted the applicable law as providing a framework for negotiation, not a one sided arrangement in which a Tribe can propose a lease that the Secretary must accept—no questions asked.

Argument

I. Jamestown's Proposed Compensation is not Reasonable and was therefore Properly Rejected by the Secretary

A. The Secretary's Lease is Permissible because it is "Based on" the Leasing Regulations and Provides "Reasonable" Compensation

Using the framework set forth in *Maniilaq II*, the government has negotiated reasonable compensation for hundreds of section 105(*l*) leases. Ex. C. Through these negotiations, IHS has identified—and Tribes have agreed to reduce, nearly $18 million in unreasonable costs. Jamestown does not disagree with this framework, it has stated that it believes the statutory and regulatory scheme, including the reasonableness requirement, is unambiguous. Pl. MSJ Mem. at 24. Through negotiations Jamestown and IHS reduced the amount of its proposed lease compensation by $466,576 in costs the parties agreed were not reasonable. Pl.'s SOMF ¶ 6. In light of this undisputed requirement that lease compensation be reasonable, the question here is whether it is reasonable for IHS to pay for 100% of a health clinic that serves less than 3% American Indians and Alaska Natives. Because the answer to this question is 'no,' IHS properly rejected the proposal.

The Secretary is authorized to reject any final offer that "exceeds the applicable funding level to which the Indian tribe is entitled under [ISDEAA]." 25 U.S.C. § 5387(c)(1)(A)(i). The "applicable funding level" for section 105(*l*) leases was addressed by this court in *Maniilaq II*. *Id.* at 251, 255. Under *Maniilaq II* the applicable funding level is determined by section 105(*l*) and its implementing regulations. *Id.* at 251. First, the regulations establish which elements of compensation *must* be included in a lease. *Id.* § 900.74 creates three options for section 105(*l*) leases. *Id.* To the extent a Tribe's proposal is based on one of those options, the elements of compensation must be included in the lease. *Id.* And second, once a lease is based on one of the

options allowed by § 900.74, the element(s) included in the chosen option dictate the amount of compensation to be provided. *Id.* Finally, *Maniilaq II* observed that to the extent the proposed compensation is duplicative or not reasonable, the Secretary may "push back." *Id.* at 255.

Despite the holding of *Maniilaq II*, which Jamestown agrees is controlling authority, Jamestown contends that IHS must "fully fund" the lease and is not permitted to negotiate a reasonable allocation of costs between Jamestown and IHS. Pl. MSJ Mem. at 19. But *Maniilaq II* did not read any "full funding" requirement into ISDEAA. In fact, *Maniilaq II* does not use the phrase "fully fund" at all in describing the compensation due under section 105(*l*). Rather, *Maniilaq II* notes that under the statute and regulations the Secretary may negotiate reasonable amounts and has authority to outright reject an unreasonable proposal using its statutory rejection rights. *Id.* at 255. The intent of the *Maniilaq II* court is further evident in its chosen remedy. First, the *Maniilaq II* court opted not to award the Tribe's proposal. *Id.* at 256 ("The court will vacate the Secretary's [rejection] but will stop short of requiring the other specific relief that [plaintiff] requests."). Then, the court ordered the parties to meet and confer "regarding the proper amount of compensation for the . . . clinic lease . . . and also regarding the manner in which the appropriate amount of lease compensation shall be determined in subsequent years . . . ." 1:15-CV-00152-JDB, Doc. 21, Filed Mar. 22, 2016. The court ultimately issued an order awarding the amount of funds negotiated by the parties. 1:15-CV-00152-JDB, Doc. 27, Filed Mar. 22, 2016.

Here, Jamestown submitted a lease proposal totaling $981,402 based on the elements of compensation identified at § 900.70. Ex. L. Through an initial review of the reasonableness of the proposal with the Tribe, that amount was reduced to $514,826. Pl.'s SOMF ¶ 6. Once the Tribe's total costs had been established, IHS proposed applying "a pro-rata factor" to allocate costs associated with Jamestown's services to non-beneficiaries to Jamestown and costs associated with

Jamestown's services to IHS-beneficiaries under the Funding Agreement to IHS. Ex. M. The pro-rata factor proposed by IHS was the IHS supportable space amount determined for Jamestown. *Id.* Facilities supportable space is an amount determined by application of a formula developed through consultation with Indian Tribes that is intended to ensure there is equity in the distribution of IHS funds between IHS and Tribal facilities — a statutory requirement under 25 U.S.C. § 1680a. Essentially, the supportable space amount is a quantification of the facility square footage necessary to carry out IHS programs for IHS beneficiaries. Ex. N.

Using the supportable space for Jamestown, IHS compared the total square footage operated by Jamestown—34,632 sq. ft., to the amount necessary to carry out IHS programs for IHS beneficiaries—7,060 sq. ft. to determine that Jamestown is operating a facility 79.6% larger than necessary. Ex. M. Accordingly, IHS proposed applying this percentage to each of the categories of compensation proposed by Jamestown. *Id.* IHS then applied an agreed upon offset of duplicative funds already received by Jamestown through its Funding Agreement. *Id.* In total Jamestown has received $108,025 (Secretarial amount and section 105(*l*) lease funds) for fiscal year 2018 for: depreciation pursuant to § 900.70(a); principal and interest pursuant to § 900.70(d); electric pursuant to § 900.70(e)(2); insurance pursuant to § 900.70(e)(4); janitorial salary and supplies pursuant to § 900.70(e)(6); site maintenance pursuant to § 900.70(e)(8); and monitoring and preventive maintenance pursuant to § 900.70(e)(11). Ex. Q.

Thus, the lease awarded by IHS includes each of the elements proposed by Jamestown pursuant § 900.74, and the compensation included in that lease is for the reasonable and non-duplicative amount claimed by Jamestown for each element. *Id*. The lease and its compensation are therefore compliant with the framework set forth in *Maniilaq II*.

B. It is Not Reasonable for IHS to Provide Compensation for Space Used to Provide Services to the General Public

Jamestown argues that IHS is using the reasonableness requirement of section 105(*l*) as a backdoor to impermissibly "cap" its lease funds. Pl. MSJ Mem. at 23. But as discussed below, Jamestown is required by law to recoup all costs associated with the provision of services to non-beneficiary from non-IHS sources. Providing funds to support those services through a lease would result in an impermissible windfall for Jamestown and defeat the purpose of each legal provision requiring Jamestown to obtain full cost recovery. Accordingly, applying IHS's proposed method to allocate the negotiated costs between the parties is fully compliant with ISDEAA and a sound method for identifying reasonable compensation under 25 C.F.R. § 900.70 et seq.

IHS does not fund services to non-beneficiaries and does not include services to non-beneficiaries in its allocation of funds for facilities expenses, including those proposed by Jamestown. *See* Ex. A at 6 ("2. IHS Funds are Not Available to Support Health Care to Ineligible Individuals"). Prior to providing services to non-beneficiaries, a Tribe must determine whether those services will result in a denial or diminution of services to eligible Indians. 25 U.S.C. § 1680c(c)(2). Further, Congress annually reaffirms the legal requirement that Tribes must recoup the costs of providing services to non-beneficiaries by including a requirement in the annual appropriations act providing IHS with appropriations. *See, e.g.*, Consolidated Appropriations Act, 2019, Pub. L. 116-6 (". . . non-Indian patients may be extended health care at tribally administered . . . facilities, subject to charges . . . ."). This statutory full cost recovery mandate is also incorporated into the Tribal Resolution authorizing the Jamestown to extend services to non-beneficiaries. Ex. R (" . . . the Tribe has determined that the provision of health services on a fee-for-service basis to non-beneficiaries, in an amount not less than the actual costs of providing such services, will not result in a denial or diminution of services to beneficiaries . . . ."). Since IHS

and Tribes must recoup costs from non-beneficiaries and 25 U.S.C. § 1680a requires parity in the provision of funds to facilities operated by IHS and by Tribes, reasonable compensation may only be arrived at by allocating the cost of each regulatory element of compensation between IHS and Jamestown to account for the non-beneficiaries. *See* 25 U.S.C. § 1680a ("The Service shall provide funds for . . . facilities operated by tribes . . . under [ISDEAA] . . . on the same basis as such funds are provided to . . . facilities operated directly by the Service."). Accordingly, IHS proposed the supportable space methodology, which IHS uses to allocate funds to facilities operated directly by the Service. Ex. M. IHS also requested data from Jamestown that could be used to explore other methodologies that may permissibly be used to identify "reasonable" lease compensation. *Id.*

As explained by IHS in its final offer rejection letter, the above identified provisions of law require Jamestown to recoup all costs associated with the provision of services to the general public. Ex. A. Jamestown's use of an ISDEAA lease to recoup these costs from IHS not reasonable and contrary to controlling law.

II. Jamestown Cannot Avail Itself of the 25 U.S.C. § 1680c Because It Has Not Met Any of Its Requirements

Jamestown relies on the bare assertion that because it is permitted to provide services to non-beneficiaries under 25 U.S.C. § 1680c, all of its services at the Health Clinic are "deemed to be provided under the ISDEAA agreement." Pl. MSJ Mem. at 8. But Jamestown has presented no evidence that its services to non-beneficiaries are actually provided pursuant to the Compact or Funding Agreement. In the final offer rejection letter, IHS explained that "while IHCIA authorizes [Jamestown] to serve ineligible individuals, it is clear that the provision of those services is not part of the IHS Programs transferred to the Tribe and no funds are due from the IHS in support of those services." Ex. A at 5. This is because the evidence demonstrates that Jamestown is not

providing those services under its Funding Agreement and the Health Clinic is not a program for the benefit of Indians because of their status as Indians. *See Navajo Nation v. Dep't of Health & Human Servs., Sec'y*, 325 F. 3d 1133, 1138 (9th Cir. 2003). Whether a Tribe's services to non-beneficiaries are carried out under § 1680c appears to be a question of first impression for any court. However, whether Tribes carrying out ISDEAA contracts are deemed part of the federal government for purposes of the Federal Tort Claims Act (FTCA) has been analyzed extensively. *See e.g.*, *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999 (9th Cir. 2014). These cases provided some direction for the Court in that they demonstrate that the terms of an ISDEAA agreement are only the first step in determining whether the activity at issue is encompassed within ISDEAA. *Id.* at 1006-1007. The second step here, is that the Court should look to whether the Tribe is actually carrying out its operations in accordance with the contract and statutory requirements. Because Jamestown is not, it may not avail itself of § 1680c.

A. Jamestown's Treatment of its Health Clinic Funds as "Unrestricted" Supports the Conclusion that it is Operating its Health Clinic Outside ISDEAA

The 2016 audited financial statement, attached to the IHS final offer rejection letter as Exhibit gg, displays Jamestown's routine accounting practices.[2] Ex. S. Jamestown tracks funds transferred by IHS under the Funding Agreement in a special revenue fund. Ex. S at 35 (Combining Statement, Special Revenue Funds - "Health Services"). A special revenue fund is intended to report specific revenue sources that are limited to being used for a particular purpose. *See* Ex. T. In contrast, Jamestown tracks the Health Clinic as a business-type activity through an enterprise fund, also known as a proprietary fund. Ex. S at 10 (Statement of Revenues, Expenses

[2] Jamestown has not submitted fiscal year 2018 government-wide audited financial statements to the Federal Audit Clearinghouse. However, Jamestown's accounting practices are consistent from year to year and the fiscal year 2016 audited financial statements are exemplar of Jamestown's accounting practices.

and Changes in Net Position - Proprietary Funds). Enterprise funds are used to track activities financed primarily by revenues generated by the activities themselves. *See* Def. Ex. U. In other words, funds transferred by IHS to Jamestown are treated as restricted, whereas funds associated with the Health Clinic are considered unrestricted by Jamestown (i.e. not subject to federal requirements). Additionally, it appears from Jamestown's audited financial statements that funds are flowing from Jamestown's Health Clinic enterprise to its special revenue fund and its general fund, rather than the reverse. Ex. S at 4, 21.

B. Jamestown is Not Expending Program Income for Health Care Purposes

With respect to program income generated through services to non-beneficiaries, Jamestown has not identified any program income generated by the federal award. Ex. S at 4, 35. However, the separately tracked and unrestricted Health Clinic reported $11,309,970.09 in "Cash Received from Customers." Ex. S at 11. While program income generated under the Funding Agreement must be used by Jamestown for health care purposes pursuant to 25 U.S.C. § 1641(d)(2)(A), Jamestown is using its Health Clinic profits for the short term cash needs of its other Tribal enterprises and to increase the Tribe's general fund. Ex. S at 4, 7, 10, 21. The Health Clinic enterprise gained $1,760,815 in operating income, the Dental Clinic enterprise gained $940,466.96 in operating income, and Jamestown's other enterprises lost $164,230.16 in operating income. Ex. S at 10. Jamestown then transferred $164,230.16 from the Health Clinic enterprise and the Dental Clinic enterprise to its other Enterprise Funds that had lost operating income, resulting in a net gain of $2,537,051.80. Ex. S at 10. Those revenues were then eliminated in Jamestown's government wide statement of activities (i.e., combined with other revenues and expenses) resulting in a total net position for Jamestown of $29,366,793.43. Ex. S at 4. This demonstrates that Jamestown is not providing services to non-beneficiaries pursuant to 25 U.S.C.

§ 1680c. If Jamestown was providing these services under its Funding Agreement, it has been violating federal law requiring it to return those funds to the federal health care program. *See* 25 U.S.C. § 1680c(c)(3)(A). But Jamestown has not been providing services to non-beneficiaries under its Funding Agreement. As demonstrated by the audited financial statements, it has been operating its Health Clinic enterprise separately as a revenue generating enterprise for the Tribe.

III. Jamestown's Proposed Award of Prompt Payment Act Interest is Unsupported by Law

Jamestown seeks "an award of interest on the amount of the award in accordance with the Prompt Payment Act." Plaintiff's Proposed Order. Despite Jamestown's claim, the Prompt Payment Act ("PPA") is inapplicable to the disputed amount and Jamestown is not entitled to any such award.

The PPA, 31 U.S.C. 3901, et seq., awards an interest penalty (established by the Secretary of the Treasury) in situations where an agency acquires property or services from a "business concern," defined as a person carrying on a trade or business or a nonprofit entity operating as a contractor, and does not pay the business concern for each completed delivered item of property or service by the required payment date. 31 U.S.C. § 3902(a). The PPA has been made applicable to ISDEAA Title V by 25 U.S.C. § 5388(g), which provides that "[the PPA] shall apply to the transfer of funds due under a compact or funding agreement authorized under this subchapter."

However, 31 U.S.C. § 3901(d)(5) states that "this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract." 31 U.S.C. § 3907(c) states "[e]xcept as provided in section 3904 of this title, this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency

and a business concern over the amount of payment or compliance with the contract."[3] Finally, the PPA also directly states that disputed claims are subject to the CDA: "A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to chapter 71 of title 41 [41 U.S.C. § 7103, the CDA]." 31 U.S.C. § 3907(a); see also 5 C.F.R. § 1315.10 (noting that interest penalties are not required when payment is delayed because of a dispute between a Federal agency and a vendor over the amount of the payment or other issues concerning compliance with the terms of a contract, and that disputed claims "will be resolved in accordance with the provisions in the Contract Disputes Act.").

Accordingly, the PPA is not applicable to funds that have not been paid due to the rejection of a final offer. IHS's rejection and Jamestown's subsequent appeal of that rejection constitute a bona fide dispute between the government and a contractor regarding the amount of payment due under the contract and the proposed award of PPA interest is therefore unsupported by law.

IV. Remedy

In considering the Agency rejection of a Title V final offer, ISDEAA grants this Court with authority to grant "appropriate relief including money damages, injunctive relief . . ., or mandamus upon finding a violation of the Act or its regulations." *Maniilaq II* at 256 (quoting 25 U.S.C. § 5331). Jamestown requests that this Court issue injunctive and mandamus relief "to reverse the IHS's rejection of the Tribe's May 30, 2019, final offer and to compel the Defendants to enter into the FY 2018 lease as proposed by the Tribe . . . ." Ps MSJ Doc 13 p. 1. In other words, Jamestown seeks to have its final offer "deemed approved" by the Court.[4] However, under ISDEAA, final

[3] 31 U.S.C. § 3904 does not apply to this claim because this claim does not concern discount payments applicable only when a discount is available when a payment is made within a specified time.

[4] The reverse and award of the lease "as proposed" by Jamestown would result in the award of funds that Jamestown has admitted it is not entitled to. See Pl.'s SOMF ¶ 6. Further, during

offers are "deemed agreed to by the Secretary" only: (1) in the absence of a timely rejection of the offer; or (2) if the rejection fails to meet the required criteria." 25 U.S.C. § 5387(b). The regulation states that, "if the agency takes no action within the 45 day review period (or any extensions thereof)," the final offer "is accepted automatically by operation of law." 42 C.F.R. § 137.136 (emphasis added). Nothing in the ISDEAA or the regulations extend the same remedy once IHS issues a timely response to the final offer.

To the extent this Court finds in favor of Jamestown, remand is the appropriate remedy. *Compare N. Arapahoe Tribe v. LaCounte*, No. CV-16-11-BLG-BMM, 2017 WL 2728404, at *5 (D. Mont. June 22, 2017) (ordering remand when the Bureau of Indian Affairs was required to "explain more accurately and fully any reasons for its declination"), *and Pyramid Lake*, 70 F. Supp. 3d at 545 (the Court "will direct the Secretary to negotiate with the Tribe over what the Secretary 'would have otherwise provided' for the EMS program . . ., plus [CSC]"), *and Aleutian Pribilof Island Ass'n v. Kempthorne*, 537 F. Supp. 2d 1, 12-13 (D.D.C. 2008) (finding that, even though a failure to issue a written ISDEAA declination (the Title I version of a final offer rejection) was arbitrary and capricious under the APA, the proper remedy was remand to issue that decision), *and Ramah Navajo Sch. Bd., Inc. v. Sebilius*, No. 07 CV 0289 MV, 2014 WL 12798378, at *3 (D.N.M. Jan. 29, 2014) ("While determining that IHS's asserted reason for declining the contract . . . was illegitimate, the Court nonetheless specifically determined that IHS's response was within [the statutory] window meant that the contract was not 'deemed approved.' . . . . Under these circumstances, the very reasoning of *Seneca Nation* would foreclose [the plaintiff] from receiving the full contract amount."), *with Maniilaq Ass'n v. Burwell*, 72 F. Supp. 3d 227 (D.D.C. 2014),

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negotiations Jamestown did not disclose that it leases space within the Health Clinic to an outside entity. Jamestown has since acknowledged that it is not entitled to lease compensation for that space and accordingly should not be awarded any funds for that space. Ex. V.

and Seneca Nation of Indians v. U.S. Dep't of Health and Human Servs., 945 F. Supp. 2d 135 (D.D.C. 2013) (both cases in which the courts found that IHS did not respond at all within the statutory deadlines).

Conclusion

The Court should rule against Jamestown and in favor of the Defendants for four reasons. First, in accordance with its statutory rights and responsibilities, IHS timely issued a final offer rejection letter clearly demonstrating through undisputed facts and controlling law that the proposed level of funding exceeds the amount Jamestown is entitled to under ISDEAA. Second, this Court in *Maniilaq II* rejected the statutory scheme and remedy proposed by Jamestown. *See Maniilaq II* at 255 ("Using her statutory declination rights, the Secretary was permitted to decline compensation requests that were 'duplicative' see id. § 900.74, or not 'reasonable,' see [25 U.S.C. § 5324(*l*)]."). The *Maniilaq II* framework, as applied by IHS here and in over 100 successful lease negotiations with other Tribes, provides a legally sound approach to section 105(*l*) and should not be disturbed. Third, Jamestown has failed to demonstrate that it is in compliance with § 1680c and should not benefit from its application. Finally, adopting Jamestown's proposed scheme would lead to the absurd result that IHS would be compelled to accept and award a lease proposal for *any* amount as long as the claimed costs were for compensation elements identified in the regulations. Congress could not have intended this outcome.

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