UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 31, 2008

CBCA 547-ISDA

FORT MOJAVE INDIAN TRIBE,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Lloyd Benton Miller of Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, AK, and Colin Cloud Hampson of Sonosky, Chambers, Sachse, Endreson & Perry, LLP, San Diego, CA, counsel for Appellant.

Lana Choi and Michael Shachat, Office of Regional Counsel, Department of Health and Human Services, San Francisco, CA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **POLLACK**, and **STEEL**.

DANIELS, Board Judge.

The Fort Mojave Indian Tribe (Tribe) claims that pursuant to section 106(a)(1) of the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638 (as amended), 25 U.S.C. §§ 450 *et seq.* (ISDEAA), it is entitled to more money than was provided for in a self-determination contract it entered into with the Indian Health Service (IHS). Both parties have submitted motions for summary relief. We grant the motion of the Department of Health and Human Services (the department of which IHS is a part) and deny the motion of the Tribe. Accordingly, we deny the Tribe's appeal of an IHS contracting officer's decision.

Background

The Tribe is a federally recognized Indian tribe. Appellant's Amended Statement of Uncontested Facts (ASUF)[1] ¶ 1; Respondent's[2] Statement of Uncontested Facts (RSUF) ¶ 1. Its reservation is located within Arizona, California, and Nevada. *See Arizona v. California*, 439 U.S. 419, 423, 428, 435-36 (1979). The IHS is an agency of the Department of Health and Human Services. RSUF ¶ 2. It provides health care services to American Indians and Alaska Natives. S. Rep. No. 102-392 at 1-4 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3943-46; 25 U.S.C. § 13 (Snyder Act); 25 U.S.C. §§ 1601 et seq. (Indian Health Care Improvement Act).

This Tribe and four other Indian tribes -- the Chemehuevi Tribe, the Colorado River Indian Tribe, the Hualapai Tribe, and the Havasupai Tribe -- are served by IHS through the agency's Colorado River Service Unit (CRSU). The service unit is part of IHS's Phoenix Area. Its headquarters are located in Parker, Arizona. ASUF ¶¶ 5-6, 8-9; RSUF ¶ 3.

IHS has not established a clinic on the Fort Mojave Reservation. ASUF ¶ 15. Beginning in the late 1980s and until approximately 2002, the CRSU used contract health services (CHS) funds to secure primary outpatient care, emergency room care, and prescription drugs for Tribal patients from local physicians in Needles, California. ASUF ¶ 16. In about 1995, the Tribe entered into a contract with IHS under the ISDEAA to operate the portion of the IHS CHS program directed at securing care from local physicians in Needles. ASUF ¶ 18. In October 2000, the Tribe hired a physician's assistant to provide direct care in a clinic which the Tribe established in its administrative offices. ASUF ¶ 19. In 2001, the Tribe, using funds secured from sources other than IHS, began construction of the Fort Mojave Health Center (the Center) on its own reservation. ASUF ¶ 30. The Center opened in November 2003. ASUF ¶ 31; RSUF ¶ 7.

With these actions, the Fort Mojave Tribe became the only one of the five tribes in the CRSU to provide its own medical services; all of the other four tribes were served only by IHS facilities. The Center was an outpatient clinic; for inpatient services, the IHS facility in Parker, about seventy-five miles away, remained available to individuals who used the Center. ASUF ¶¶ 7, 10; RSUF ¶ 7.

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[1] In citing to statements of uncontested facts, we refer only to statements which were not contested by the opposing party.

[2] The Department of Health and Human Services styles itself "appellee" in this case. The Board styles agencies as respondents in cases such as this one which are brought under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613.

The ISDEAA directs the Secretary of Health and Human Services, upon the request of an Indian tribe by tribal resolution, to enter into a self-determination contract with a tribal organization. 25 U.S.C. § 450f(a)(1) (2000). A self-determination contract is "a contract . . . for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." *Id.* § 450f(a)(1).

By letter dated January 28, 2002, the Tribe wrote to IHS of its intent to "contract under [the ISDEAA] for most of its share of the resources of the Colorado River Service Unit." The Tribe wrote that a full share of funding was "necessary if we are to have a firm resource base for the operation of the Fort Mojave Health Center now under construction." ASUF ¶¶ 32-33.

IHS responded to the Tribe that regarding this matter, it was "required to consult with all tribes that will be affected by the [Tribe's] assumption" of services. ASUF ¶ 38. In July 2002, IHS scheduled a meeting with all five tribes in the CRSU to discuss funding allocation issues and supplied the tribes with draft funding allocation tables setting forth IHS's calculations of the money available to the Tribe for its share. ASUF ¶¶ 42-43. The tables included categories designated as "contractible but not divisible," "contractable" [sic], and "historical funds." ASUF ¶¶ 44, 48, 51. At a subsequent meeting in August 2002, IHS presented alternative options for calculating the funding available to the Tribe; these options included variations on the categories used in July. ASUF ¶¶ 56-60. According to IHS, the four tribes other than the Fort Mojave Tribe embraced one option, and the Fort Mojave Tribe objected to it. Respondent's Brief in Support of Motion for Summary Relief (Respondent's Motion) at 12; *see also* Appellant's Exhibit 20 at 2.

In September 2002, the Tribe renewed its request for a contract. ASUF ¶ 83. IHS rejected the Tribe's proposal as non-compliant with self-determination contracting regulations and cited the ongoing consultations with the other four tribes. ASUF ¶ 86. Another meeting with the five tribes took place in November 2002. At this meeting, the CRSU executive director and the Tribe both presented proposed methodologies for allocating funds. ASUF ¶¶ 88-89.

In December 2002, the Tribe submitted a proposal to contract its share of the service unit. ASUF ¶ 102. According to IHS, this was the Tribe's "first proposal that was minimally complete pursuant to the ISDEAA." Respondent's Statement of Genuine Issues ¶ 9. The Tribe later made two requests for ninety-day extensions of the statutory ninety-day period for

IHS to approve or decline the Tribe's proposal.[3] *Id.* ¶ 10 (referencing Appellant's Exhibit 1 ¶ 21). According to the deposition testimony of an IHS official, the agency did not accept this proposal primarily because of "scope and access 106(a)1 amount." Appellant's Exhibit 36 at 52-53 (cited in Appellant's Reply Brief at 20-21). The official was concerned that the Tribe had not proposed a "106(a)1 budget that corresponded with the available funds." *Id.*

On July 10, 2003, the Tribe sent to IHS a proposal to contract for certain programs, functions, services, and activities (PFSAs). This proposal included the "final versions" of the scope of work, program budget, and contract support cost budget and justification. The Tribe stated that "[t]hese documents replace all other draft documents you may have received prior to this date." RSUF ¶ 4; *see also* ASUF ¶ 106. The Tribe proposed in its program budget a funding amount, exclusive of contract support costs,[4] of $1,060,356. RSUF ¶ 5.

Representatives from the Tribe and IHS met on August 5 and 6, 2003, to negotiate regarding this proposal. RSUF ¶ 9. Following completion of the negotiations, the Tribe and IHS executed a contract which was effective on September 1, 2003, and had a term of three years and one month. RSUF ¶ 10; *see also* ASUF ¶ 110.

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[3] *See* 25 U.S.C. § 450f(a)(2): "[A] tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4) [authorizing the Secretary to approve any severable portion of a contract proposal that does not support a declination finding], the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that [one of five situations is present]. . . . Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified . . . if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period."

[4] "The [ISDEAA] defines 'contract support costs' as other 'reasonable costs' that a federal agency would not have incurred, but which nonetheless 'a tribal organization' acting 'as a contractor' would incur 'to ensure compliance with the terms of the contract and prudent management. [25 U.S.C. § 450j-1(a)(2).] . . . Most contract support costs are indirect costs generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 635 (2005).

At the same time, the Tribe and IHS also executed an annual funding agreement (AFA) covering the period from September 1, 2003, through September 30, 2004. Pursuant to this AFA, the Tribe agreed to provide various services at the Center. These services included nursing services, dental care, pharmacy services, electrocardiograms, primary medical care, laboratory services (stated twice), social services, nutritional services, facilities management, housekeeping, mental health services, public health nursing, quality assurance, property and supply, patient business office, and medical records. RSUF ¶ 11; *see also* ASUF ¶ 107. Community health representative and alcohol services were inadvertently omitted from the scope of work but were added later. RSUF ¶ 12. The Tribe requested that the subsequent AFAs, for fiscal year (FY) 2005 (October 1, 2004, through September 30, 2005) and FY 2006 (October 1, 2005, through September 30, 2006), address the same scope of services, and those AFAs did so. ASUF ¶ 108; RSUF ¶¶ 18-20, 24-26.

The contract states, under the heading "Funding Amount," "Subject to the availability of appropriations and other applicable law, the Secretary [of Health and Human Services] shall make available to the Tribe the total amount specified in the AFA incorporated by reference in Article VII, Section 2.[5] Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j-1)." Appeal File, Exhibit A at 0005 (incorporating language at 25 U.S.C. § 450l(c) made mandatory by 25 U.S.C. § 450l(a)(1)).

Section 106(a)(1) of the ISDEAA states:

> The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable [sic], is operated.

25 U.S.C. § 450j-1(a)(1). The amount described by this section is sometimes referred to as the "Secretarial amount." *Arctic Slope Native Association, Ltd. v. Department of Health &*

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[5] Article VII, "Attachments," paragraph 2, "Annual Funding Agreement," includes this statement: "The AFA is hereby incorporated in its entirety in this contract and attached to this Contract as Attachment 2." Appeal File, Exhibit A at 0016.

Human Services, CBCA 190-ISDA, et al., 08-2 BCA ¶ 33,923, at 167,869, *appeal docketed*, No. 2008-1532 (Fed. Cir. Aug. 21, 2008).

The AFA for the period from September 1, 2003, through September 30, 2004, provided that IHS would pay to the Tribe an ISDEAA section 106(a)(1) amount of $92,243 for the period from September 1 to September 30, 2003. RSUF ¶ 14. IHS paid this amount to the Tribe. RSUF ¶ 15. This AFA also provided that IHS would pay to the Tribe an ISDEAA section 106(a)(1) amount of $1,106,912 for FY 2004 (October 1, 2003, through September 30, 2004). RSUF ¶ 16. IHS paid to the Tribe an ISDEAA section 106(a)(1) amount of $1,411,925 -- $305,013 more than agreed to -- for FY 2004.[6] RSUF ¶ 17.

In September 2004, the Tribe submitted to IHS a proposed program budget for FY 2005. This budget proposed a section 106(a)(1) amount of $1,437,689. RSUF ¶ 18. The AFA executed by the Tribe and IHS for that FY provided for payment of that amount. RSUF ¶ 21. IHS paid to the Tribe an ISDEAA section 106(a)(1) amount of $1,479,227 -- $41,538 more than agreed to -- for FY 2005. RSUF ¶ 22.

In September 2005, the Tribe submitted to IHS a proposed program budget for FY 2006. This budget proposed a section 106(a)(1) amount of $1,426,362. RSUF ¶ 24. The AFA executed by the Tribe and IHS for that FY provided for payment of a section 106(a)(1) amount of $1,436,993. RSUF ¶ 28. IHS paid to the Tribe an ISDEAA section 106(a)(1) amount of $1,523,820 -- $86,827 more than agreed to -- for FY 2006. RSUF ¶ 29.

The contract provided that "each provision of this Contract shall be liberally construed for the benefit of the Tribe to transfer the funding and the following related programs, functions, services and activities ('PFSAs'), or portions thereof, that are otherwise contractible under section 102(a) of the Act." ASUF ¶ 110.

Each of the AFAs described above contained a paragraph entitled "Memorializing Disputes." This paragraph states:

> The parties to this AFA may have failed to reach agreement on certain matters that remain unresolved and in dispute. Such matters are set forth in

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[6] Section 2(D) of the AFA provides that in certain circumstances, IHS shall make payments additional to those specified. Section 5 allows IHS to unilaterally add funds to the AFA during the fiscal year. Appeal File, Exhibit B at 2, 3. The parties have not explained whether the funds which are additional to those specified were provided under section 2(D), section 5, or some other authority.

> Attachment C to this AFA, which shall be identified as "Memorialization of Matters Remaining in Dispute." This attachment shall not be considered a part of this AFA, but is attached for the purpose of recording matters in dispute for future reference, discussion and resolution as appropriate. The Tribe does not waive any remedy the Tribe may have under the law with regard to these issues and any others not listed herein.

Appeal File, Exhibits B at 3-4 (Sept. 1, 2003, to Sept. 30, 2004, AFA), C at 3 (FY 2005 AFA), D at 3 (FY 2006 AFA).[7]

None of the AFAs contains an Attachment C. Each of the AFAs does, however, contain an Attachment D which is entitled "Memorialization of Disputes." In briefing the motions, both parties implicitly acknowledge that these attachments labeled "D" are the attachments referenced in the AFAs. Each of these attachments states that as to the Phoenix Indian Medical Center, IHS transfer schedule, Title I retained shares, CRSU historical set-aside funds, CRSU contractible but not divisible funds, and funding for the new Parker health facility, the Tribe disagrees with IHS's determinations, including the rationale for and calculation of allocation of funds. Each Attachment D states further, as to the matters among these which involve allocation of funds, "The Tribe retains any rights under the law it may have to challenge what it believes to be an improper and illegal retention of funds." Appeal File, Exhibits B at 21-22 (Sept. 1, 2003, to Sept. 30, 2004, AFA), C at 25-26 (FY 2005 AFA), D at 25-26 (FY 2006 AFA).

In June 2006, the Tribe submitted to IHS a proposal to renew the contract for a new three-year term beginning after September 30, 2006. ASUF ¶ 122. In negotiating the renewal, IHS agreed to the Tribe's position as to the allocation of formerly "contractible but not divisible" funds and funds allocated with regard to active users of the Center who lived in five nearby towns. ASUF ¶¶ 124-27. The funding for the contract increased by 106 percent from FY 2006 to FY 2007, reaching $2,969,412 in the latter year. ASUF ¶¶ 128-29.

By letter dated June 29, 2006, to an IHS contracting officer, the Tribe --

> claim[ed] the right to immediate payment of SIX MILLION FOUR THOUSAND, ONE HUNDRED NINETY ($6,004,190), plus interest, due and owing to the Fort Mojave Tribe under the provisions of the above-referenced contract, as amended, in effect between the parties for fiscal years 2003, 2004, 2005 and 2006 . . . . This claim is . . . for all damages arising out of the failure

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[7] The word "not" is underlined in only the first of the three AFAs.

> of the Indian Health Service to pay the full Secretarial amount due under 25 U.S.C. § 450j-1(a)(1).

Appeal File, Exhibit E at 1. The claim asserted that the contract had been underfunded by $125,818 for FY 2003, $1,805,311 for FY 2004, $2,078,249 for FY 2005, and $1,994,812 for FY 2006. *Id.* at 8. The claim was reasserted, as to the FY 2006 amount, by letter dated October 6, 2006. *Id.*, Exhibit G. The contracting officer denied these claims, except for $17 for FY 2003. *Id.*, Exhibit H.

Discussion

Each party has asked the Board to resolve this appeal by granting its own motion for summary relief and denying the opposing party's motion. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The mere fact that the parties have cross-moved for summary relief does not impel a grant of one of the motions; each motion must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

According to the Tribe, IHS acted "unlawfully" in failing to pay the Tribe "full funding required by the provisions of the . . . contract." Appellant's Motion at 1. The alleged unlawful action was failing to pay the Tribe "'not . . . less than the . . . Secretary would have otherwise provided' for the benefit of the Tribe's service community," as required by section 106(a)(1) of the ISDEAA. *Id.* In particular, the Tribe charged, IHS "refused to provide funding for (1) patient populations from nearby communities served by the Fort Mojave Health Center, (2) the Tribe's full share of Colorado River Service Unit funding unlawfully designated by IHS as 'contractible but not divisible funding,' and (3) the Tribe's full share of other Colorado River Service Unit funding designated by IHS as 'historical' funding." *Id.*

As to all three of the specific areas implicated by the Tribe, the parties are in vehement disagreement. People from communities near the Center might have used the Center as the nearest health care facility (as maintained by the Tribe) or continued to use other facilities

with which they were familiar (as maintained by IHS). The "contractible but not divisible funding" was associated with IHS's Parker, Arizona, facility, which provided both inpatient and outpatient services, and which even after the opening of the Center provided the only nearby IHS inpatient services for individuals who used the Center. The allocation of funds for the inpatient portion of the Parker facility might have been appropriate (as maintained by IHS) or inappropriate (as maintained by the Tribe). The "historical" funds, which were allegedly allocated on the basis of previous use patterns, similarly might have been appropriately divided or not. The Tribe's motion for summary relief would have to be denied even if we concluded that some sort of additional funding could be provided, simply because the facts on which specific amounts could be calculated are highly contested.[8] Furthermore, the Tribe has contended in its motion that it is entitled to different amounts of money from those specified in its claim, *see* Appellant's Motion at 41-42, and has provided no basis for finding that any amounts are the correct ones.[9]

We also note that some of the Tribe's case is not properly before us. The appeal is as to the contracting officer's virtually complete denial of a claim "for all damages arising out of the failure of the Indian Health Service to pay the full Secretarial amount due under 25 U.S.C. § 450j-1(a)(1)." In its motion, however, the Tribe also seeks "unpaid contract support

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[8] If we were to address these matters, we would also have to deal with internal inconsistencies in the Tribe's argument. For example, with regard to "historical" funds, the Tribe says that it "is entitled to a recalculation of funding due under the contract based exclusively on the Tribe's share of the user population on the Service Unit." Appellant's Motion at 39. The Tribe finds support for this conclusion in *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980). In *Rincon*, however, the court said that it was "not suggesting" that funds are required to be allocated on a per capita basis. Instead, the fact that a certain percentage of individuals resided in a particular area "is significant, but it is only one of several significant factors which must be assessed" in formulating a program. *Id.* at 573 n.4.

[9] We note that IHS faced a complex task in determining which funds it would have provided for the operation of the programs sought to be operated by the Fort Mojave Tribe, had the self-determination contract not been in place. The Tribe is one of five tribes served by a single IHS service unit. Because some of the services encompassed by those programs may have been previously administered for the benefit of other tribes as well as the Fort Mojave Tribe, the agency was required by statute to ensure that services provided to the other tribes were not reduced as a consequence of entering into this contract. 25 U.S.C. § 450j(i); *see also Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (the Federal Government "does have a fiduciary obligation to the Indians; but it is a fiduciary obligation that is owed to *all* Indian tribes" (quoting *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986)).

costs" in the amount of $1,373,736. Appellant's Motion at 41-42. Because the Tribe never submitted a claim to the contracting officer for unpaid contract support costs, we have no jurisdiction to consider this matter. *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1312 (Fed. Cir. 2000); *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858-60 (Fed. Cir. 1987); *Clark Concrete Contractors, Inc. v. General Services Administration*, GSBCA 14340, 99-1 BCA ¶ 30,280, at 149,771.

We would address the matters raised by the Tribe as to the Secretarial amount only if we were to deny IHS's motion. The agency contends, looking to the contract between the parties, that we should not even consider whether it paid the Tribe an appropriate amount. According to IHS the matter is very simple: The Tribe asked to be paid under the contract, in the annual funding agreements for each of the three years and one month in question, a particular amount in return for providing specified services. The agency agreed to pay at least the amount requested, and did actually pay at least the amount agreed to, for each of the relevant periods. The Tribe provided the services specified and no other services in exchange for these payments. Therefore, the contract has been fulfilled.

We agree with this position. The Supreme Court has explained, "Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the [ISDEAA] and ordinary contractual promises (say, those made in procurement contracts)." *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 639 (2005). There can be no more straightforward application of this principal than to this situation: where an offer and acceptance were freely made, an agreement was entered into, and each party has fulfilled its promise, nothing remains to dispute.

IHS is not free to impose on an Indian tribe which desires a self-determination contract whatever amount the agency selects as the Secretarial amount. Congress has required the agency to act promptly on proposals for such contracts, and to decline to approve a proposal or a part thereof only for any of five specified reasons, one of which is that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract." 25 U.S.C. § 450f(a)(2). If the Secretary declines to enter a contract, he or she must, among other things, provide the applicant with the opportunity for an appeal, including an administrative hearing, conducted after "full discovery relevant to any issue raised in the matter." *Id.* § 450f(b). In lieu of proceeding administratively, an applicant whose proposal is declined may "initiate an action in a Federal district court." *Id.* In establishing these limitations on the agency's ability to impose amounts it selects, Congress explained that its intent was "to insure that denials of requests for self-determination contracts are handled only through the declination process." S. Rep. No. 100-274, at 24 (1997), *as reprinted in* 1988 U.S.C.C.A.N. at 2520, 2643.

When IHS did not accept the amount the Tribe initially wanted, the Tribe did not take advantage of the declination process. Instead of asking for a determination on its proposal, and pursuing an administrative appeal or initiating an action in district court, the Tribe twice requested extensions of time for IHS to approve or decline the proposal and then replaced that proposal with a new one which included a funding amount which was lower than the one the agency eventually approved. According to a former IHS officer who served as a consultant to the Tribe during the negotiations that led to this contract, the Tribe made a conscious decision not to request additional moneys and receive a declination decision from the Secretary; its objective was to get funds to set up the program promptly. Respondent's Motion, Exhibit N at 134-35. Whether for this reason or another, the fact is that the Tribe withdrew its request for more money than was specified under the contract and asked for a determination on a request for a smaller sum. The Tribe thereby chose to avoid the sort of dispute that the declination process is designed to resolve.

The Tribe suggests that IHS's position is overcome by an attachment to each of the AFAs entitled "Memorialization of Disputes." This attachment states that the Tribe disagrees with IHS's determinations, including the rationale for and calculation of allocation of funds, and additionally states that as to the matters involving allocation, "The Tribe retains any rights under the law it may have to challenge what it believes to be an improper and illegal retention of funds." The parties made clear, however, that this attachment "shall not be considered a part of [the] AFA." Each AFA was itself incorporated by reference into the contract, so by excluding the attachment from the AFA, the parties also excluded it from the contract. The attachment does nothing more than recite what is a fact with respect to virtually every contract: the seller wishes that he had gotten a better price for the goods or services he is providing, and he retains whatever rights he may have to get more money for them later. We have concluded that although the Contract Disputes Act "shall apply to self-determination contracts," 25 U.S.C. §450m-1(d), there is no right under that Act for a party which freely entered into a government contract to seek additional sums under that contract once both sides have fulfilled their promises. The Tribe did not request amounts it now pursues in the manner contemplated by the ISDEAA. The Contract Disputes Act is not a vehicle for circumventing the procedures established in that Act.

We recognize that the contract states that each of its provisions "shall be liberally construed for the benefit of the Tribe to transfer the funding and the following related programs, functions, services and activities ('PFSAs'), or portions thereof, that are otherwise contractible." This statement does not help the Tribe in this case, however, because the Tribe has not asked us to consider a question involving construction of the contract. It does not, for example, ask us to consider whether IHS properly transferred funding for a particular program, function, service, or activity specified in one of the relevant AFAs, or whether an activity performed by the Tribe falls within one of those PFSAs. We also recognize that

when a renewal of this contract was negotiated in 2006, IHS agreed to the Tribe's position on allocations of money which are challenged by the Tribe here. The fact that IHS agreed to the Tribe's position in 2006 does not mean, however, that the contract entered into in 2003 was "unlawful." The agency's changed stance may reflect different circumstances, a better presentation by the Tribe of its position, a mistake on the agency's part (the 2003 determination may have been more accurate), or some other factor or factors. In any event, it cannot alter the fact that in 2003, 2004, and 2005, IHS agreed to pay the Tribe and did pay the Tribe at least as much money as the Tribe requested under the contract.

In searching for additional support for its position, the Tribe refers us to many cases which are inapposite to this one because they involve challenges to the Secretary's declination decisions as to applications for self-determination contracts, allocations of contract support costs under existing self-determination contracts, or both. *See, e.g., Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997), 58 F. Supp. 2d 1191 (D. Or. 1999). Here, of course, events did not result in a declination decision and contract support costs are not the subject of the claim whose denial led to the appeal.

Two decisions cited by the Tribe contain language which might be thought to be supportive of that party's stance, but we do not find that these decisions are applicable to our case, either. In *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995), the court wrote, "In cases in which a breach of law is inherent in the writing of the contract, reformation is available despite the contractor's initial adherence to the contract provision later shown to be illegal." But *LaBarge* involved a situation in which the contractor had objected strenuously to the Government's decision not to award it a contract in response to its initial, higher-priced offer, whereas here, the Tribe voluntarily withdrew its proposal and freely submitted a lower-priced one. And in *LaBarge*, no statutorily-provided remedy like the ones the ISDEAA authorizes -- an administrative hearing or court action as to a declination determination -- was available.

The other case cited by the Tribe which deserves mention is *Menominee Indian Tribe of Wisconsin v. United States*, 539 F. Supp. 2d 152, 155 (D.D.C. 2008), where the court wrote, "The Secretary is not free to negotiate hard and require the Tribe to accept less than full funding if, as seems likely, the Secretary has more money available." *Menominee* involved an existing contract, however, and the question before the court was (similarly to *Ramah Navajo School Board*) whether the Secretary had complied with contractual obligations to provide full contract support costs in light of limited appropriations. The instant case involves a challenge to the Secretary's exercise of his statutory obligations in

entering into a contract, rather than actions under an existing contract. It does not involve contract support costs.

Decision

The appellant's motion for summary relief is **DENIED**. The respondent's motion for summary relief is **GRANTED**. The appeal is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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HOWARD A. POLLACK
Board Judge

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CANDIDA S. STEEL
Board Judge