ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Falmouth Scientific, Inc.	)	ASBCA No. 60776
	)	
Under Contract No. N00039-06-C-0060	)	

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MAJORITY OPINION BY ADMINISTRATIVE JUDGE PROUTY

In this matter, appellant, Falmouth Scientific, Inc. (Falmouth) challenges the application of indirect cost rates to which it and the government bilaterally agreed. We consider a series of motions for summary judgment. We grant summary judgment to the government upon the bilateral contract modification, as it requests,[1] and deny Falmouth's cross-motion,[2] which is largely based upon a fundamentally flawed understanding of the government's claim accrual, which is relatively straightforward.

Somewhat more problematic is a different government motion for summary judgment (which was filed before the motion which we grant, thus we refer to it as the government's first motion for summary judgment[3]) which is premised upon a promissory note that Falmouth signed after initiating this litigation. To the government and Judges Kinner and McIlmail, the promissory note, which was executed as part of a standard agreement between Falmouth and the government to

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[1] The government's motion for summary judgment based upon the bilateral rate agreements is referred herein as the government's "second motion for summary judgment," or "gov't second mot." because it was the second motion for summary judgment submitted by the government in this appeal. This filing also includes its opposition to appellant's cross-motion for summary judgment.

[2] "App. compl. and mot." refers to appellant's cross-motion for summary judgment, which is confusingly combined with its complaint.

[3] Also referenced as "gov't first mot."

permit the government to recoup the overpayment of indirect costs through an installment plan, constitutes a settlement of the dispute, mooting the appeal before us (*see* gov't first mot.). It was, however, intended as no such thing by either party. Moreover, execution of the promissory note while pursuing the appeal is consistent with longstanding law that allows contractors to challenge government contracting directions with which they have already complied. Thus, we deny the government's first motion for summary judgment, which permits us to consider and grant its second.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

I. The Contract

The United States Navy Space and Naval Warfare Systems Command (the government) awarded the above-captioned contract (the contract) to Falmouth, pursuant to the Small Business Innovation Research program on August 31, 2006 (R4, tab 1 at 1-2). The contract included the standard Disputes Clause, found in Federal Acquisition Regulation (FAR) 52.233-1 (JUL 2002) (R4, tab 1 at 15). The Defense Contract Management Agency (DCMA) managed the contract on behalf of the government. Falmouth and its subcontractors apparently successfully conducted the research and technical work of the contract from 2007 until completion in 2011 (Vander Schel aff. ¶¶ 2, 7[4]; app. compl. and mot. ¶ 14).

The contract was primarily a cost-reimbursement contract, and included the standard clause from the FAR, which governed payment for incurred costs (*see* R4, tab 1 at 10, 15 (incorporating FAR clause 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002), into the contract). As a consequence of its being a cost-reimbursement contract, the government essentially agreed to pay Falmouth based upon both the direct and indirect costs that it incurred in performance. As we have described at length in prior decisions, in cost contracts, the contractor invoices an estimated amount for indirect costs (what would generally be understood to be overhead) and gets paid that amount (with some exceptions) by the government as it performs the contract, so long as the contracting officer (CO) is generally satisfied that the estimates appear appropriate. The contractor subsequently submits an incurred cost proposal (ICP) to the government after the conclusion of each contract year to document its actual indirect costs for the year and to establish final indirect cost rates. Upon agreement by the parties upon the proper indirect cost rates, the parties reconcile the final rates with the estimate that was paid, and the parties make payment adjustments, as appropriate. *See, e.g., Technology Systems, Inc.*, ASBCA No. 59577, 17-1 BCA ¶ 36,631 at 178,379; FAR 52.216-7. If the parties do not come to agreement on the final

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[4] "Vander Schel aff." refers to a paragraph of the affidavit of Jay Reed Vander Schel attached to the government's second motion for summary judgment. "Vander Schel aff., ex." refers to an exhibit attached to that affidavit.

indirect cost rates, the government may determine and impose an incurred cost rate upon the contractor, subject to appeal. *Id.*

II. Problems With Falmouth's Indirect Cost Rates

In its proposal for the contract, Falmouth had not included general and administrative (G&A) costs for its three subcontractors (app. compl. and mot. ¶ 20). In 2007, the Defense Contract Audit Agency (DCAA), which was involved in the review of Falmouth's proposed indirect cost rates, informed the company that it was required to apply G&A to its subcontractors and it would have to redo the invoices it had submitted on the contract to that point (*id.* ¶ 23). Falmouth worked with DCAA to revise its prior payment requests (*id.* ¶¶ 24-30).

The parties executed contract Modification No. P00004 (Mod. 4) on September 24, 2009 which, among other things, approved the retroactive change by Falmouth of its accounting methodology, including exclusion of subcontract costs in the G&A base (Vander Schel aff. ¶ 8; Vander Schel aff., ex. 4 at 147; *see also* Vander Schel aff., ex. 3 at 131 (Falmouth correspondence stating that it had received Mod. 4)). Mod. 4 also capped Falmouth's G&A rate at 36.56 percent (Vander Schel aff. ¶ 8; Vander Schel aff., ex. 4 at 147).

III. Negotiations Between the Government and Falmouth Over The ICPs

Falmouth submitted five final ICPs to DCMA. The first two, for fiscal years 2007 and 2008, were both submitted on June 25, 2009, about three months prior to execution of Mod. 4 (R4, tab 9 at 112, 114). The ICP for fiscal year 2009 was submitted on September 15, 2010 (*id.* at 123); the ICP for fiscal year 2010 was submitted on July 31, 2011 (*id.* at 120); and the one for fiscal year 2011 (the last for the contract) was submitted on May 29, 2012 (*id.* at 122).

Beginning September 30, 2013, Mr. Jay Reed Vander Schel was assigned as the administrative contracting officer (ACO) for Falmouth's contract (Vander Schel aff. ¶ 2). In that capacity, he negotiated the settlement of the ICPs that Falmouth had submitted to DCMA (*id.* ¶ 7). DCAA reviewed Falmouth's ICPs and provided its evaluation to Mr. Vander Schel in January 2014 (*id.* ¶ 4).

DCAA's evaluation, again, identified numerous problems with Falmouth's financial management of its G&A and subcontract costs (Vander Schel aff. ¶ 10-11; app. compl. and mot. ¶ 94). After a second iteration, DCAA's analysis concluded that Falmouth received overpayment of $118,810 for its indirect costs for the contract (Vander Schel aff. ¶ 12; app. compl. and mot. ¶ 105). Mr. Vander Schel provided DCAA's memorandum to Falmouth for comment in March 2014, and Mr. John Baker,

president of Falmouth, provided Mr. Vander Schel a response to DCAA's evaluation on April 25, 2014 (Vander Schel aff. ¶¶ 5-6).

Further DCAA analysis of the allowable cost limits in Falmouth's contract reduced its allegation of overpayment to $100,611.88 (Vander Schel aff. ¶ 13). Mr. Vander Schel conducted extensive negotiations of the final indirect cost rates for 2007-2011 with representatives of Falmouth beginning in June 2015 (*id.* ¶ 9). In one email, he noted to Ms. Janet Zaffini, Falmouth's accounting manager, that Falmouth would not have to reimburse the government in one payment: "Bear in mind, that you can make payment terms and arrangements for the money with the DFAS [Defense Finance and Accounting Service]. It is not an all or nothing type of situation for the repayment." (Vander Schel aff. ¶ 14; Vander Schel aff., ex. 5 at 151)

On June 19, 2015, Mr. Baker sent Mr. Vander Schel Falmouth's proposal to compromise the final rates with a payment to the government of $77,772 (Vander Schel aff. ¶ 21; Vander Schel aff., ex. 11). Mr. Vander Schel responded the same day by email with a counterproposal that he characterized as the best he could do for Falmouth and as his final position: payment to the government of $83,294.88 (Vander Schel aff. ¶¶ 22-25; Vander Schel aff., ex. 13 at 181; app. compl. and mot. ¶ 113). This figure was created by applying a newly calculated G&A rate to contract costs to yield allowable costs of $1,417,121, which were reduced to $1,295,361 in accordance with authorized funding limitations on the contract (Vander Schel aff. ¶ 24). Since the proper fee for Falmouth's work was $39,521, the total properly owed by the government to Falmouth was set at $1,334,882. The government having already paid Falmouth $1,418,176.88, the difference owed to the government summed to the $83,294.88 noted above. (Vander Schel aff. ¶ 25; Vander Schel aff., ex. 13 at 180-81)

On June 22, 2015, Mr. Baker communicated to Mr. Vander Schel that Falmouth would agree to the government's June 19 offer (Vander Schel aff. ¶ 27; Vander Schel aff., ex. 15). Mr. Vander Schel then forwarded indirect cost rate agreements for each of the five years of the contract to Mr. Baker with an instruction to execute them and return them to Mr. Vander Schel (Vander Schel aff. ¶ 26; Vander Schel aff., ex. 14). These agreements included the exact same newly calculated G&A rates that yielded the $83,294.88 obligation to the government that was explained in Mr. Vander Schel's June 19, 2015 email (*compare* Vander Schel aff., ex. 13 at 181 to Vander Schel aff., ex. 14 at 188, 192, 196, 200, 204). Mr. Baker executed the agreements and forwarded them to Mr. Vander Schel before the end of the day (Vander Schel aff. ¶ 27; Vander Schel aff., ex. 15). Mr. Vander Schel sent an email to Mr. Baker less than an hour after receiving the agreements, informing him that he would execute them and return them to Mr. Baker the next morning (Vander Schel aff., ex. 17). Mr. Vander Schel, in fact, executed the agreements that same day (June 22, 2015) (Vander Schel aff. ¶ 30; Vander Schel aff., ex. 16 at 231, 235, 239, 243, 247), although

he neglected to immediately forward copies of the fully signed agreements to Falmouth (Vander Schel aff. ¶ 32).

The agreements make no reference, whatsoever, to the results of the DCAA audits (*see* Vander Schel aff., ex. 16). They are premised upon the authority of the FAR's final indirect cost rates/contracting officer determination procedure (FAR 52.216-7) and other provisions of the FAR (Vander Schel aff., ex. 16 at 230, 234, 238, 242, 246). FAR 52.216-7(d)(3) (which is incorporated into the contract as noted above) provides in relevant part that, "a written understanding setting forth the final indirect cost rates...is incorporated into this contract upon execution." It does not require that the agreed-upon final indirect cost rates set forth the monetary consequences of applying the rates, nor does it require provision of copies of the executed agreement to the contractor to be effective.

IV. Actions Taken After the Parties Agreed to the Incurred Cost Rates

On July 8, 2015, Mr. Baker wrote to Mr. Vander Schel to inquire if he had missed any emails or inadvertently missed any payments since the June 22, 2015 communications (app. opp'n/reply, ex. A-40[5]). Mr. Vander Schel assured Mr. Baker that he had not missed any deadlines or emails, explaining that his (Mr. Vander Schel's) "actions are currently under review by management to ensure I've not unduly damaged the government through my concessions through our efforts." (*Id.*)

The next communication between the parties in the record came on April 28, 2016, when Mr. Vander Schel sent Mr. Baker a request for payment of the $83,294.88 agreed upon in the rate agreements (Vander Schel aff., ex. 19). The request took the form of a standard form 1034 public voucher sent by email (*id.*). In his email, Mr. Vander Schel explained that instructions could be provided "to amortize this through DFAS" if Falmouth could not pay the agreed amount in a single payment (*id.*).

Mr. Baker responded by email on May 3, 2016:

> [Falmouth] is not able to pay this settlement in one payment and we request a payment plan that has minimal

[5] Appellant attached extensive exhibits to its original complaint and motion for summary judgment, its opposition to the government's first motion for summary judgment, and its combined opposition to the government's motion for summary judgment and reply in support of its original motion. We will refer to exhibits from appellant's opening motion as "app. compl. and mot. ex.__," exhibits from its opposition to the government's first motion as "app. opp'n ex.__," and those attached to its final responsive filing as "app. opp'n/reply ex. __".

> impact on our operations. As you know FSI is a small company and cash flow is a significant issue for us. In previous discussion [sic] between you and I when I agreed to accept the rate settlement you indicated that a long term penalty and interest free payment plan was possible in this kind of situation. This was one of the main reasons I agreed to accept the settlement and not contest it further. [Falmouth] requests that the payment be amortized over 5 years. Please call me to discuss or let me know what we need to do.

(Vander Schel aff., ex. 20 at 2)

Mr. Vander Schel testified in his affidavit that, contrary to Mr. Baker's email, he did not make any representations to Mr. Baker regarding a long term interest-free payment plan (Vander Schel aff. ¶ 37), and there is no evidence before us supporting a finding that he did. In one of his own affidavits, executed on December 7, 2018, to oppose the government's motions, Mr. Baker wrote:

> On . . . June 19, 2015, ACO Vander Schel and I had one more conversation. During the call, I recollect telling the ACO that FSI would have difficulty paying any amount and that the only hope would be to have the ability to pay any penalty over a long period of time. My understanding from our conversation was that DFAS can negotiate payment terms and the payments can be stretched out to 5 or more years in some cases.

(App. opp'n/reply, ex. L ¶ 29) What is notable about this statement in the affidavit is what it does not say. It states nothing about an interest-free payment plan; it states nothing about how Mr. Vander Schel responded to Mr. Baker's statement that his hope was to pay the penalty over a "long period of time." And Mr. Baker does not specify what Mr. Vander Schel said that led to his "understanding" about what "DFAS can negotiate." Moreover, nothing in this statement provides that Mr. Baker was made any promises about what DFAS *would* negotiate.[6]

On May 24, 2016, Mr. Vander Schel issued a demand for payment of debt and final decision to Falmouth via certified mail (Vander Schel aff., ex. 1). It was received by Falmouth on June 2, 2016 (notice of appeal, att. 1-2). The demand sought $83,294.88

[6] In any event, Falmouth does not press the matter in the body of its motion, and it presents no argument that it should be subject to different terms for its deferment request as a result of anything allegedly promised by Mr. Vander Schel.

premised upon "the final negotiated rates as executed on 22 June 2015" (Vander Schel aff., ex. 1 at 97). Mr. Baker contacted Mr. Vander Schel on June 22, 2016 to inform him that he was seeking deferment of the debt and to ensure that he was filing the proper paperwork to do so (app. opp'n/reply, ex. A-44 at 285). Mr. Vander Schel informed Mr. Baker that he should deal with DFAS on his deferment request (*id.* at 284). That was confirmed on June 24, by Ms. Gina Brown from DCMA, who handled communications with Falmouth in Mr. Vander Schel's absence. She elaborated that Mr. Baker should follow the instructions in the most recent letter from Mr. Vander Schel regarding submission of a request for an installment plan.[7] (*Id.* at 282-83) On June 29, Ms. Brown confirmed to Mr. Baker that the government had received his deferment request, but noted that it required several levels of review. She encouraged him to continue with his request for an installment payment plan, noting that the debt was still valid while the decision was being made regarding the deferment. (*Id.* at 279) On July 1, among other things, Mr. Baker informed Ms. Brown that he was considering filing an appeal with the Board (*id.* at 278-79).

Although Mr. Baker followed DCMA's directions by reaching out to DFAS in an email on July 5, 2016, DFAS responded to him on July 25 telling him to deal with Mr. Vander Schel (app. opp'n/reply, ex. A-45 at 287-88). Apparently straightening out the confusion at some point, on August 19, 2016, Mr. Baker sent a request to DFAS for an installment payment plan over a five to seven year period (app. opp'n/reply, ex. A-46).

On August 30, 2016, Falmouth filed its notice of appeal with this Board. The notice of appeal states that it is appealing the May 24, 2016 demand for payment and final decision by the DCMA ACO. Falmouth's notice states its dispute arises from the allegation that it was employing an inadequate accounting system from FY 2007-2011, but the ACO's decision is based upon faulty assumptions and calculations.

> [Falmouth] believes much of the confusion and errors in the contract costing and billing was caused by untimely, inconsistent and erroneous guidance from DCAA auditors during the contract performance periods.
>
> ....
>
> Without better information as to why the ACO applied the G&A rates to certain costs and not others, as well as applying what DCAA described in its Incurred Cost Audit Report as a 'DCAA-wide decrement factor of 20 percent for application to claimed contract costs,' the government

[7] An installment plan is different than a deferment.

> claim is unclear as to its basis and seems to be somewhat arbitrary in application.

(Notice of appeal at 2)

Mr. Baker continued to engage with DFAS officials regarding Falmouth's request for a payment plan. On August 31, 2016, Mr. Emmanuel S. Leigh, an accountant in the DAFS debt management offices, provided Mr. Baker an amortization schedule for a 36 month installment payment agreement (IPA), an IPA letter, and a promissory note for his signature (R4, tab 25 at 237-38). He was informed of the strict terms of an IPA and that DFAS would refer the debt for collection by the Department of the Treasury if Falmouth did not execute the IPA (*id.* at 238). Mr. Baker sent an email to his new DCMA contact, Ms. Gwendolyn Perry, the same day, noting that Falmouth "intends to sign the IPA with DFAS," and requested further information about the status of the deferment request "[i]n light of this and the pending appeal" (app. compl. and mot., ex. A-47 at 292).

The promissory note that Mr. Baker received from Mr. Leigh states that Falmouth "will pay" DFAS $83,294.88 plus interest at 1.875%[8] and a penalty on its "indebtedness under" the contract (R4, tab 26 at 241-43). It further provides that "[t]he indebtedness is the result of Post Payment Price Adjustment" (*id.*). The note provides for an initial payment by Falmouth on September 30, 2016, and payments on the 15th of each succeeding month for 35 months (*id.*). The note describes the interest accumulated on the principal and the government's remedies if Falmouth fails to make the promised payments (*id.*). The note is utterly silent on the litigation before us, neither explicitly reserving Falmouth's rights to challenge the CO's decision nor waiving any rights of Falmouth to pursue its appeal (*id.* at 241-42). It includes no release of any sort (*id.*).

Mr. Baker signed the promissory note with DFAS on September 9, 2016 (R4, tab 25 at 236, 240). In his email conveying the executed promissory note to Mr. Leigh, Mr. Baker stated that the promissory note contains the "installment plan agreement" (*id.* at 236). He reminded Mr. Leigh that Falmouth was waiting for a decision on its request for a deferment of payment pursuant to a deferment package submitted in July (*id.* at 236-37). Mr. Baker also noted that Falmouth's appeal to the

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[8] The language of the promissory note sloppily provides that interest would be paid at ".01875 percent" annually (R4, tab 26 at 241), while the attached amortization schedule reflects a 1.875 percent annual interest rate (*id.* at 243). It is plain to us that the hundred fold difference in interest rate reflects a misapplication of the word "percent" in the text of the note and that the parties intended the annual percentage rate to be 1.875 %, rather than a commercially insignificant .01875 %.

Board had been given a case number and that government counsel had been assigned (*id.* at 237).

V. Additional Allegations Made in Falmouth's Affidavits

In support of its motion for summary judgment and in opposition to the government's, Falmouth submitted to the Board two affidavits each from Mr. Baker (app. opp'n, ex. G; app. opp'n/reply, ex. L) and from Mr. William Vendt, a former DCAA auditor hired to assist Falmouth (app. compl. and mot, ex. F; app. opp'n/reply, ex. N). Falmouth also submitted an affidavit by Ms. Zaffini, Falmouth's accounting manager during the time relevant to the dispute (app. opp'n/reply, ex. M). As described later in this opinion, they provide no basis for material disputes of fact precluding summary judgment. Nevertheless, we note their primary allegations here so that we may address them below.

Mr. Baker's first affidavit explained the facts and circumstances beginning with the demand for payment by the government on June 2, 2016, leading to execution of the promissory note (app. opp'n, ex. G). He noted that he expected that his signing of the promissory note during the pendency of his appeal would allow payments to the government to be put on hold pending the decision (*id.* ¶ 19). He further explained in general terms that facing a forced collection of the money by the government if he did not sign the promissory note would have imposed a "considerable financial hardship" on Falmouth (*id.* ¶ 21).

In addition to the section quoted above, in which Mr. Baker discussed his desire to have an extended payment agreement, Mr. Baker's second affidavit delves deeply into the weeds of the negotiations between the parties relating to the indirect cost rates (app. opp'n/reply, ex. L). For reasons discussed in the "Decision" section below, we find this immaterial and will not tax the reader by going into detail in describing it here. We note, however, that Mr. Baker appears to be particularly upset by the fact that he did not have a face-to-face meeting with Mr. Vander Schel to discuss the audit (*see, e.g.,* app. opp'n/reply, ex. L ¶¶ 6-8, 17, 20-24). Moreover, Mr. Baker also explained that he felt the need to come to an agreement because he could not afford the cost of bringing an appeal to the Board (*id.* ¶¶ 28-29).

Mr. Vendt's two affidavits (app. compl. and mot., ex. F; app. opp'n/reply, ex. N), were largely about the merits of DCAA's audits. The first affidavit explained Mr. Vendt's role in responding to DCAA's critiques of Falmouth's accounting system and DCAA's (wrongful, in Mr. Vendt's opinion) use of agency-wide decrements (*see generally* app. compl. and mot., ex. F). The second of Mr. Vendt's affidavits added little to the first. In addition to repeating much of what was in his first affidavit, Mr. Vendt opined that the negotiations between the government and Falmouth were not "meaningful" and that the government "adopted a one sided 'Take it' or 'Leave it'

strategy." (App. opp'n/reply ex. N ¶ 5) He also opined that Mr. Baker signed the agreement with the government on June 22, 2015 "under extreme pressure to either accept the offer or face a much higher adjustment" (*id.* ¶ 8).

Ms. Zaffini's affidavit is complementary to Mr. Vendt's two affidavits in the sense that it discusses Falmouth's interactions with DCAA and generally takes issue with the DCAA's challenges to Falmouth's accounting system (app. opp'n/reply, ex. M).

DECISION

I. The Standards for Summary Judgment

The standards for summary judgment are well established and need little elaboration here. Summary judgment should be granted if it has been shown that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A non-movant seeking to defeat summary judgment by suggesting conflicting facts "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)).

II. We Deny the Government's First Motion for Summary Judgment Because the Promissory Note Did Not Moot This Action

A longstanding tenet of government contracting is that when the government orders the contractor to take certain actions on the contract, the contractor is generally obliged to comply with the government's direction or the contracting officer's final decision, pending the results of procedures contained within the contract's Disputes clause if it feels it was wronged. *Cf. Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1265-66 (Fed. Cir. 1999); *see also* FAR 52.233-1, which is a part of the contract.

To that end, it has long been the practice of the courts and boards of contract appeals to allow challenges of government claims even after they have been paid in full by the contractor. *E.g. Ruhnau-Evans-Ruhnau Associates v. United States*, 3 Cl. Ct. 217 (1983); *Lockheed Martin Corp.*, ASBCA Nos. 50566, 51351, 51784, 02-2 BCA ¶ 31,907 ("*Lockheed Martin II*"); *Roy E. Buhl, Leonard E. Fagan, John G. Fiala, Eugene P. O'Neil, Jr., William V. Tompson*, ASBCA No. 45818 *et al.*, 94-2 BCA ¶ 26,805 at 133,293 (rejecting government defense that payment of money by contractor mooted appeal). We have also done so in appeals in which the appellant paid the government claim by promissory note, just as in the circumstances presented here. *See, e.g., MDG Contractors*, ASBCA No. 21166, 1976 WL 2036; *Lockheed Martin Corporation d/b/a Sanders*, ASBCA Nos. 50464, 51350, 02-1 BCA ¶ 31,784

("*Lockheed Martin I*"). Neither the government nor the dissent point to any contrary decision in which we or any tribunal whose decisions are binding upon us have ruled that payment of a government demand, either directly or through promissory note, without more, moots an appeal. Thus, following *Lockheed Martin I*, we could deny the government's motion as a simple matter of *stare decisis*.

Nevertheless, we do recognize that there are some differences between that case and the circumstances in the appeal here – notably, the promissory note in *Lockheed Martin I* was plainly drafted by the contractor's attorneys and included language stating that the contractor would be repaid if it prevailed on appeal, and, in that appeal, the government challenged not the promissory note, but the contractor's paying off the note. *Lockheed Martin I*, 02-1 BCA ¶ 31,784 at 156,934, 156,942. Neither difference changes the analytic calculus.

First and foremost, the fact that the Disputes Clause requires payment by Falmouth until that demand is either stayed by the government or overturned by an appeal, means that Falmouth's compliance with the CO's demand constitutes no waiver: the terms of the contract gave it no choice. The fact that, to avoid financial hardship, Falmouth complied with the demand by agreeing to an installment plan with a promissory note likewise constitutes no waiver of Falmouth's appeal rights, especially since the promissory note was silent on such rights. The government and dissent appear to argue that the promissory note constitutes an independent obligation to pay the government mooting the appeal. It does not. The promissory note would never have been executed but for the installment payment plan which only came about because of the government's claim. To put a finer point to it: if we can order the return of money paid by appellant to the government in satisfaction of the government claim because we determine the claim to have been unfounded, we may order the setting aside of a promissory note executed in satisfaction of such an unfounded claim when we review the claim pursuant to the Disputes clause. *Cf. MDG Contractors*, ASBCA No. 21166, 1976 WL 2036.

Perhaps for these self-evident reasons, the government has not made such arguments in the past and has previously confined itself to arguing that agreeing to payments constituted a waiver.[9] In *Lockheed Martin II*, we explained that we were not impressed by such arguments:

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[9] Indeed, the government generally "gets" this as an institution. The Department of Defense (DoD) Financial Management Regulation, DOD 7000.14-R, (attached to the government's reply brief for its first motion for summary judgment as ex. A), discusses collections undertaken when a matter is in dispute and, in ¶ 050601, notes that appeals to the Board do not suspend collection actions, though money collected when there is such an appeal are accounted for differently so that they are not considered "settlement" of a debt. *See* ¶ 050602.

> Appellant appealed the final decision of the contracting officer...to this Board. It requested deferment of collection of monies to pay that claim both before and after its appeal was taken and until the appeal was decided by this Board. The government denied the deferment request and threatened appellant with various collection actions unless immediate payment was made either in cash or by promissory note with installment payments.
>
> Appellant paid the Government's claim by permitting offset against other contract payments.
>
> We are forced to reject the Government's estoppel and waiver arguments. The surrounding circumstances including the fact that the final decision asserting the claim had been appealed to this Board and appellant had made numerous protests about being forced to pay the claim before the appeal was concluded make it impossible for us to conclude that appellant admitted liability in making the payment. Thus, we reject the Government's contention that appellant admitted liability.

02-2 BCA ¶ 31,907 at 157,631-32 (citations to record omitted). Here, Falmouth filed its notice of appeal to the Board shortly before signing the promissory note. The promissory note included no release and nothing in any of the communications between the parties gives us any reason to believe that a final settlement was expected or intended by anyone. In the email forwarding the executed promissory note, Falmouth made clear that it was continuing to pursue its request for deferment and reminded the recipient of the note of the pending appeal before the Board. To us, it is evident that, even as Falmouth was executing the promissory note to minimize the damage of government collection actions, it was making clear that it intended to maintain its appeal, even if it did not say so quite as explicitly as the contractor in *Lockheed Martin I.*

The government's first motion for summary judgment is denied.

This suggests a recognition by DoD that it may collect on debts without the contractor agreeing that it owes the money.

III. We Grant the Government's Second Motion for Summary Judgment and Deny Falmouth's Cross Motion for Summary Judgment Because the Parties Bilaterally Agreed What the Contract Rates Would Be and Did so Less Than Six Years Before the Government's Claim

Falmouth's motion for summary judgment is somewhat scattered and has evolved between the filing of its opening motion and the combined opposition to the government's second motion for summary judgment and reply in support of its motion. Falmouth's original motion made three arguments: first, that the government's claim was time-barred by the Contract Disputes Act's (CDA's) statute of limitations, 41 U.S.C. §§ 7103 (a)(4)(A) (app. compl. and mot. at 51); second, that the "dispute arises...as a result of the erroneous calculations made by DCAA auditors, DCMA ACOs, and Falmouth" (*id.* at 61); and third, that DCAA's use of a decrement factor was unsupported by evidence of its reasonableness (*id.* at 66).

The government's second motion for summary judgment rested upon the simple notion that the government claim appealed here rested upon the bilateral agreement which effectively established an agreed-upon figure owed to the government – a contractual agreement that the government sought to enforce long before the statute of limitations would have precluded it (gov't second mot.). Falmouth's combined opposition to the government's motion and reply in support of its motion (app. opp'n/reply) presents a number of new arguments that, as will be explained below, we do not find persuasive. First, Falmouth contends that the government's alleged untimeliness in determining final indirect cost rates was harmful to it during the 2015 negotiations (app. opp'n/reply at 27). This, Falmouth argues, prejudiced it because the cancellation of government funds was imminent (*id.*), and the government delay was a breach of the duty of good faith and fair dealing (*id.* at 31). Second, Falmouth alleges that there was no meeting of the minds between the parties when executing the bilateral modification because the government failed to "close the deal" by forwarding the countersigned agreements and summaries to Falmouth at the time they were executed (*id.* at 36); and because the figures agreed to were allegedly imprecise (*id.* at 43). Third, Falmouth argues, the government's alleged mischaracterization of a January 2, 2014 document as a "memorandum" as opposed to an "audit report" poses problems with respect to the timeliness of the government's claim (*id.* at 47).

A. The Bases of the Government's Claim That Falmouth Is Appealing Are the Parties' June 22, 2015 Bilateral Agreements on the Indirect Cost Rates

A great deal of the confusion sown by Falmouth's filings may be cleared up by explicating what is before us today. As noted above, Falmouth's appeal is of the May 24, 2016 final decision of CO Vander Schel. That final decision, in turn was premised upon the parties' "final negotiated rates." Though the negotiations began because of the DCAA audits and were informed by them, the agreements do not rest

upon them. Instead, they are a product of the negotiations of the parties as contemplated by FAR 52.216-7, which is incorporated into the contract.[10]

B. The Bilateral Agreements Are Valid

Falmouth makes two primary arguments attacking the validity of the bilateral pricing agreements: first, that the government's delays in negotiations placed it at a disadvantage; and second, that the government failed to "close the deal" by timely forwarding the signed contract modifications to it and because the agreements did not explicitly specify exactly how much money would be owed by it to the government. Neither is persuasive.

In its brief, Falmouth touts the alleged expiration of the funds on the contract as the government's "Achilles heel" (app. opp'n/reply at 3). This is not consistent with the evidence regarding the negotiations. First, despite submitting two affidavits by Mr. Baker, two by Mr. Vendt, and one by Ms. Zaffini, Falmouth has presented no evidence that the alleged expiration of the funds entered into the negotiations at all. This is exactly as we would expect because the net result of the negotiations was that Falmouth owed money to the government (which is what is being appealed). Put another way, the undisputed facts are that any delay in the negotiations effectively delayed the time that Falmouth would be required to pay money to the government, not when it would get money from the government. Thus, Falmouth has not shown any conceivable way that the alleged expiration of funds *could* have been to its detriment when it negotiated with the government, nor did its negotiators allege that it was so detrimental – either contemporaneously or in their affidavits submitted with Falmouth's filings. Accordingly, Falmouth's argument that the government's alleged delays constituted a breach of the duty of good faith and fair dealing is a *non sequitur*.[11]

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[10] By contrast, nothing in the promissory note that is the subject of the government's first motion for summary judgment rests upon a contractual mechanism for final resolution of the contract's cost rates, nor were the terms of the promissory note incorporated into the contract as these rate agreements were by operation of FAR 52.216-7(d)(3).

[11] Falmouth makes another argument about timing that we find difficult to follow, which appears to be that the government's payment of $22,451.07 to Falmouth in April 2015 before seeking the $83,294.88 from Falmouth in June 2015 was a breach of the duty of good faith and fair dealing (app. opp'n/reply at 32-33). Without more, this argument makes no sense, and we fail to see how such a brief period of overpayment by the government could have been to the detriment of Falmouth much less, a breach of the duty of good faith and fair dealing. For a government delay to constitute a breach of the duty of good faith

To the extent that Falmouth complains that the government presented it with a "take it or leave it" proposition, we note that nothing in the contract precludes "hard nosed" negotiations on the part of the CO, and Falmouth has presented no law stating as much. Moreover, the evidence was that there was give and take in the negotiations. The government's final offer (which Falmouth accepted) was less than $6,000 higher than Falmouth's last offer of $77,772. We do not see any evidence supporting a finding that the negotiations were a breach of the duty of good faith and fair dealing, as alleged by Falmouth. *See Metcalf Const. Co. v. United States*, 742 F.3d 984, 990-91 (Fed. Cir. 2014); *see also Relyant*, 18-1 BCA ¶ 37,085 at 180,539. Nor do we see any other legal basis to set aside the agreements based upon the government's conduct of the negotiations.

With respect to Falmouth's argument that the agreements are invalid because the government did not "close the deal" by mailing copies of the executed agreements to it or provide final cost figures within the executed agreements, these arguments lack support and misunderstand the FAR.

Though it would have been the better practice for Mr. Vander Schel to have mailed copies of the rate agreements to Falmouth after he executed them, that mailing was not a prerequisite to their being effective. FAR 52.216-7(d)(3) provides that they were effective upon their execution and includes no provision requiring their receipt by the contractor to be effective. Falmouth argues that the government failed to comply with FAR 42.706, Distribution of Documents, because the government did not promptly distribute executed copies of the final indirect cost rate agreements to Falmouth as required by that FAR provision (*see* app. opp'n/reply at 41; FAR 42.706(a)), but nothing in this provision makes the final distribution of the executed documents a prerequisite to their effectiveness. *Cf. Parsons Evergreen LLC*, ASBCA No. 61784, 18-1 BCA ¶ 37,135 at 180,726 (discussing, in part, "housekeeping regulations"); *MPR Associates, Inc.*, ASBCA No. 54689, 05-2 BCA ¶ 33,115 at 164,111 (form does not triumph over substance for rate settlement agreements).

Falmouth's generalized argument that there was no meeting of the minds between the parties because the rate agreements did not include the bottom-line number of the amount owed (*see* app. opp'n/reply at 38-44) fails because the agreements specified what was required (the rates) and Falmouth well knew what the exact consequences of agreeing to those rates would be.

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and fair dealing, the delay must have been to the detriment of the contractor. *E.g.*, *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,540.

First, as to the meeting of the minds required for the rate agreements: the agreements specified in plain language, what the final indirect cost rates would be for each of the five years of the contract. That is what both parties agreed to by executing the agreements and they contain no ambiguity. They thus tracked the requirements of FAR 52.216-7(d)(3) and needed nothing more to be effective. To the extent that Falmouth is arguing that it did not know the ultimate consequences of its agreements, that contention is belied by the June 19, 2015 email sent by Mr. Vander Schel to Mr. Baker which not only included the $83,294.88 figure, but also the G&A rates that would be in the final agreements (which were those that were executed) and explanation of how the $83,294.88 figure derived from the modified G&A rates. To put it directly: the undisputed material facts demonstrate that Falmouth knew exactly what it was getting into when it executed the final rate agreements.

We need not incorporate parol evidence for interpreting the contracts to rule, as we do, that Falmouth effectively agreed to pay the government $83,294.88. The terms of the agreements are unambiguous: Falmouth and the government established final indirect cost rates. The factual consequences of those agreements (for which no rule of law prohibits consideration of parol evidence) are that applying the agreed-upon rates to the undisputed monetary figures associated with the contract (*e.g.*, direct costs claimed, money already paid to Falmouth, etc.) yields the $83,294.88 figure which Mr. Vander Schel explained in the June 19, 2015 email and in the affidavit accompanying the government's motion, as discussed above.[12] Notably, Falmouth makes no effort to dispute the math.

We note that, though Falmouth somewhat obliquely raises the issue of Mr. Vander Schel's authority to enter the agreements, based upon his email stating that his actions were under review by his superiors to ensure that he had not "unduly damaged" the government through his concessions to Falmouth (app. opp'n/reply at 39-40), it presents no evidence calling into question Mr. Vander Schel's authority to enter into the rate setting agreements. Whatever he meant in that email, by itself, it does not call into question the authority of Mr. Vander Schel, as ACO, to agree to final rates, as set forth in the contract and consistent with his statement in his affidavit. Indeed, had Mr. Vander Schel attempted to disavow his agreements with Falmouth, we would have no basis for permitting such an action based upon lack of authority.

C. The Government's Claim Upon the Agreements Is Timely

Falmouth argues extensively that the government's claims were brought outside of the CDA's 6-year statute of limitations (app. compl. and mot. at 51). This argument

[12] Given the information provided to Falmouth in the June 19, 2015 email, its complaints about the "spreadsheets" not provided by the government in June 2015 (*e.g.*, app. opp'n/reply at 39) are simply immaterial.

misconceives the basis of the government's claim. It is not that the government is challenging the ICPs for the first two years of contract performance that Falmouth submitted on June 25, 2009 and arguing that we should re-evaluate them; rather, the basis of the government's claim is the differential between what Falmouth received for indirect costs and what the indirect costs were under the final indirect cost rates that the parties agreed to on June 22, 2015. The CDA's statute of limitations begins running from when the claims accrue, and a claim accrues "when all events, that fix the alleged liability of...the contractor and permit assertion of the claim, were known or should have been known." *DRS Global Enterprise Solutions, Inc.*, ASBCA No. 61368, 18-1 BCA ¶ 37,131 at 180,696 (quoting FAR 33.201). Thus, June 22, 2015 is the date that the government's entitlement to the $83,294.88 was fixed and from whence the statute of limitations should run.[13] The government made its claim less than one year later, on May 24, 2016, well within the 6-year statutory period.

D. Falmouth's Defenses on the Merits of the DCAA Audits Are Inapplicable to the Claim Before Us

Falmouth makes a number of attacks upon the conduct of the DCAA audits which are simply irrelevant to the appeal before us. As we have explained above, the bases for the government's entitlement in this appeal are the bilateral agreements executed by the parties, not the conclusions – right or wrong – of the DCAA's audits. Thus, the portions of the affidavits submitted by Falmouth about the difficulties encountered during the audits, the allegations in Falmouth's filings that DCAA acted unfairly, as well as the allegations that the decrement imposed by DCAA was unsupported, are all immaterial to the motion before us.

CONCLUSION

Having held that the execution of the promissory note by Falmouth does not deprive us of jurisdiction to consider the merits of this appeal, we find that the undisputed material facts demonstrate that Falmouth agreed with the government to the indirect cost rates included in the five agreements executed by both parties on June 22, 2015. These undisputed facts also demonstrate that these agreed-upon rates

[13] The June 22, 2015 date, in turn, was less than 6 years after the parties' agreement to Mod 4 on September 24, 2009, which changed the calculations in its ICPs. Thus, there is no argument to be made that Falmouth's agreements with the government in 2015 were over already-time-barred ICPs.

led to the debt owed to the government that was set forth in the government's May 24, 2016 claim. We thus grant summary judgment in favor of the government upon the grounds of its second motion and deny Falmouth's cross-motion. This appeal is denied.

Dated: July 3, 2019

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent (see separate opinion)

DONALD E. KINNER
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent and join in Judge Kinner's opinion

TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

DISSENT BY ADMINISTRATIVE JUDGE KINNER

The DCMA administrative contracting officer's final decision demanded Falmouth make payment of $83,294.88 to the government, based upon the final indirect rate agreement executed by Mr. Baker and the ACO (R4, tab 15). Mr. Emmanuel S. Leigh, an accountant in the Defense Finance and Accounting Service (DFAS) debt management office, provided Mr. Baker an amortization schedule for a 36 month installment payment agreement (IPA), an IPA letter and a promissory note for his signature (R4, tab 25; app. compl. and mot. ¶ 132). Mr. Baker executed all three documents. He could have chosen not to execute the promissory note. But Mr. Baker instead chose to commit Falmouth to pay the amount of the government's claim "to avoid any further adverse financial consequences or worse brought on by the Government, as indicated in both the ACO's Demand Letter, and Mr. Leigh's E-mail of August 31, 2016." (App. opp'n at 6) Where a party concedes all of the relief requested in the claim on appeal, the appeal has been rendered moot and the Board should dismiss it with prejudice since there is no longer a dispute between the parties on the appealed claim. *Lasmer Industries, Inc.*, ASBCA Nos. 56946, 56966, 11-1 BCA ¶ 34,671 at 170,801.

Falmouth satisfied all of the government's demand by promissory note. Falmouth's binding commitment to pay the DCMA demand for $83,294.88 forecloses the Board's consideration of any remaining concerns Falmouth may have with that contracting officer's final decision. By executing the promissory note, Falmouth effectively aligns itself with the government's position. Accordingly, the appeal must be dismissed as moot. *See Avant Assessment, LLC*, ASBCA Nos. 58986, 59713, 16-1 BCA ¶ 36,505 at 177,863 ("If the parties no longer advocate opposing positions, a case is moot and must be dismissed.")

Dismissal is also appropriate because there is no further relief this Board can provide to Falmouth. Its commitment by promissory note to satisfy the government's claim is an accord and satisfaction that now defines the parties' relationship. If Falmouth could achieve complete success in this appeal, the result would not alter that relationship. A decision by this Board that the ACO final decision is somehow invalid would not abrogate Falmouth's unconditional promise in the promissory note that it will pay the contracting officer's demand.

Moreover, this Board does not possess jurisdiction to undo Falmouth's binding commitment in the promissory note. Contrary to the majority's discussion regarding the disputes clause, the promissory note is not part of this, or any other CDA contract that the Board may adjudicate. Moreover, Falmouth's claim does not contain a request for damages or any basis for payment to it from the government. Accordingly, Falmouth's unequivocal binding commitment to pay all of the government's demand by promissory note has eliminated the dispute in Falmouth's appeal.

The majority nonetheless concludes that "nothing in any of the communications between the parties gives us any reason to believe that a final settlement was expected or intended by anyone." The majority's basis for overlooking the "final settlement" created by the explicit binding language of the promissory note is that "even as Falmouth was executing the promissory note to minimize the damage of government collection actions, it was making clear that it intended to maintain its appeal...." By the majority's logic, if Mr. Baker intended to only pay $50,000 when executing the promissory note that would have reduced Falmouth's liability below the $83,294.88 it is bound to pay by the terms of that note. The majority does not offer authority to support its theory that Mr. Baker's subjective intent may nullify the promissory note.

In fact, the majority fails to confront the binding nature of the Falmouth promissory note. Instead, it argues the unremarkable, and undisputed point that a party can pay a debt while pursuing litigation to challenge that debt. Thus, the majority cites *Ruhnau-Evans-Ruhnau Associates v. United States*, 3 Cl. Ct. 217, 218 (1983), because that case proceeded after the plaintiff had paid the government's claim under protest. These citations do not address whether this case is moot because they do not consider a debtor who has executed a document binding it to pay the entire government claim. The other cases cited by the majority are similarly inapposite.

In *MDG Constructors*, ASBCA No. 21166, 1976 WL 2036, the parties reached a settlement in which the government waived the balance of its claim and agreed not to pursue payments under a promissory note. The available description of the case does not contain any explanation or specifics of the promissory note involved. Without any indication of the nature of that document that case cite is of little value beyond the notion, that I do not dispute, that a party may litigate against a debt upon which it has made payment.

In *Roy E. Buhl, Leonard E. Fagan, John G. Fiala, Eugene P. O'Neil, Jr., William V. Tompson*, ASBCA No. 45818 *et al.*, 94-2 BCA ¶ 26,805, after the Board's denial of their prior appeals, appellants paid government claims related to the overpayment of monies allocated for the payment of social security taxes. Mr. Tompson paid the amount requested by the contracting officer plus interest saying he retained the "rights to any monies." *Id.* at 133,291. Mr. Fiala paid the requested amount but later claimed he did so under coercion. *Id.* at 133,292. The individuals appealed the contracting officer's determination of interest due and the Board found it could consider the subsequent appeal of the calculation of interest because the payments had not been an accord and satisfaction. *Id.* at 133,292-93. That decision does not support Falmouth's position. First, it was not the payments in that case that were challenged, rather the interest determination which, in part, resulted from a court decision issued after the Board's prior decision and filing of the new appeal. Second, the payments in that case could not be construed as a binding commitment to satisfy

the government's claims as Falmouth made here. Quite the opposite of the case cited, Falmouth's promissory note is a separate agreement ensuring its payments to the government. That agreement has established an accord and satisfaction of the government's claim.

The majority relies upon *Lockheed Martin Corporation d/b/a Sanders*, ASBCA No. 50566 *et al.*, 02-2 BCA ¶ 31,907 (*Lockheed II*). Yet that appeal proceeded after the government collected the amount of its claim by offset against other payments due to the contractor. *Id.* at 157,623-24. There is nothing in the facts of that case to support the characterization that the appellant permitted the government to recoup that payment. To the contrary, the government executed its collection action without the contractor's agreement. *Id.* at 157,631. Indeed, the contractor did not agree, yet the government collected the funds ("appellant advised Government counsel that the payment by offset was made after coercion and under protest"). Of course the appellant's "payment" in that case did not render the matter moot. This case, like the other cases cited by the majority, fails to address the issue presented by Falmouth's promissory note.

Alternatively, the majority asserts it could deny the government's motion as a simple matter of *stare decisis*. It makes that assertion on the basis of authority it finds in *Lockheed Martin Corporation d/b/a Sanders*, ASBCA Nos. 50464, 51350, 02-1 BCA ¶ 31,784 (*Lockheed Martin I*). That case, however, provides no firmer support for the majority than the other cases it cites. In that case, the appellant paid the government's claim with a promissory note, but that instrument required the government to repay appellant if appellant succeeded in its appeal before this Board. *Id.* at 156,934. On those facts, the Board found that the appellant had paid the Government claim under protest. *Id.* at 156,941-42. However, the payment was essentially contingent on the results of appellant's appeal. *Id.* at 156,942. Of course, the promissory note in that case did not eliminate the dispute or render the case moot. Falmouth's promissory note has no such limitations.

Unfortunately, the majority's basis for its reliance upon *stare decisis* reflects Justice Brandeis' description of the doctrine that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2409 (2015) (*quoting Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting opinion)). As the Supreme Court

explained in *Kimble*, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. *Id.* In this case it is easy for the Board to avoid that consequence.

Dated: July 3, 2019

DONALD E. KINNER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 60776, Appeal of Falmouth Scientific, Inc., rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

SEPARATE OPINION BY ADMINISTRATIVE JUDGE MCILMAIL

I dissent from the majority's opinion, and join Judge Kinner's opinion. From the moment appellant signed the promissory note, promising to pay the amount that the government demanded, this appeal was moot, and it became impossible for us to grant any effectual relief whatever to appellant. *See generally Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669-71 (2016) (explaining mootness). We've had other cases like this. *E.g.*, *Combat Support Associates*, ASBCA No. 58945, 16-1 BCA ¶ 36,288 at 176,974 (contracting officer withdrew payment demand, mooting appeal). What gives us the jurisdiction to "set aside" the promissory note, as the majority seems to say it has done? Given that the promissory note includes two, multi-section paragraphs containing government reservations, isn't it even more telling that the promissory note includes no appellant's reservations? And why is the majority willing to hold appellant to the final rate agreements ("Falmouth knew exactly what it was getting into") but not the promissory note? Finally, would the majority find the appeal moot if the promissory note had preceded the notice of appeal?

Dated: July 8, 2019

TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 60776, Appeal of Falmouth Scientific, Inc., rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals