UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: December 20, 2018

CBCA 5866

IMMIXTECHNOLOGY, INC. ON BEHALF OF SOFTWARE AG GOVERNMENT SOLUTIONS, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Tenley A. Carp, Sara M. Lord, and Samuel M. Shapiro of Arnall Golden Gregory, LLP, Washington, DC, counsel for Appellant.

Murphy H. Peterson, Jr., Office of the Solicitor, Department of the Interior, Herndon, VA; and Sam Q. Le, Office of General Counsel, Small Business Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **HYATT**, and **ZISCHKAU**.

ZISCHKAU, Board Judge.

This appeal involves a claim by appellant, immixTechnology, Inc. (immix), that the Small Business Administration (SBA) breached various software licensing terms in a task order issued by the Department of the Interior (DOI) under a General Services Administration (GSA) Federal Supply Schedule (FSS) contract. The DOI contracting officer issued a final decision denying the claim. Immix appealed. Respondent filed a motion to dismiss the appeal for lack of jurisdiction, arguing that immix's breach claim is really a copyright infringement claim not subject to our jurisdiction. In addition, respondent argued that the DOI contracting officer was not authorized to render a

decision on the immix claim because only a GSA contracting officer is authorized to render a decision over a dispute relating to the terms and conditions of a FSS contract.[1]

Based on the record before us, we conclude that the dispute involves the terms of mod. 1 and does not involve any disputed terms of the FSS contract. Therefore, we conclude that the DOI contracting officer was authorized to issue a final decision and that CBCA 5866 is properly before us. We also reject respondent's argument that the breach of contract claims raised by immix under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), are preempted by the Copyright Act of 1976, 17 U.S.C. §§ 101-810. We deny respondent's motion.

Background

On March 26, 2013, under a FSS contract, DOI issued to immix an order, on behalf of SBA, for software support services and software licenses. According to the DOI contracting officer, not long after performance on the order began, SBA began planning for an IT infrastructure update, which is commonly known as a "hardware refresh." Recognizing that the hardware refresh would require different software licenses, the SBA engaged in discussions with immix's software vendor, Software AG Government Solutions (Software AG), to determine exactly what software and maintenance SBA would need for the hardware refresh. These discussions led to Software AG submitting to SBA a "Budgetary Cost Proposal" on December 3, 2013, identifying "all of the software/maintenance items needed by the SBA along with the associated processor core types and operating system." The price for the new items totaled $474,000 for each of the first three years and $284,000 for the last year. According to the DOI contracting officer, obtaining these items "was accomplished via modification to the existing Order with Immix" issued on January 28, 2014, and incorporated a quote from immix. The contracting officer claims that "while the quote contains the same items, it made no reference to the Budgetary Cost Proposal, specific processor core types or operating systems . . . [and that] the items in the Immix quote

[1] During proceedings here, immix submitted substantially the same claim to a GSA contracting officer as a protective measure. A GSA contracting officer issued a decision concluding that the claim in dispute did not implicate the FSS terms and conditions, but rather the terms and conditions found in modification no. 1 (mod. 1) of the DOI task order. The GSA contracting officer stated that, "to the extent that DOI breached [immix's] Schedule 70 Contract, the GSA contracting officer denies [immix's] claim." Immix's appeal of the GSA final decision was docketed here as CBCA 6317.

were expressly identified as being licensed on a 'CPU' [central processing unit] basis." Immix contests this interpretation of mod. 1.

Immix claims that SBA representatives admitted to exceeding the software licenses contained in mod. 1. When negotiations between the parties to resolve the matter failed, immix submitted its certified claim to DOI on April 12, 2017, alleging that the SBA exceeded the number of software licenses purchased and used the software on unlicensed servers, on an unlicensed operating system, and in unlicensed system environments. The DOI contracting officer issued a final decision denying the claim on August 14, 2017, and that decision was appealed to us.

On August 6, 2018, respondent filed a motion to dismiss the appeal for lack of jurisdiction and moved to stay discovery. Thereafter, immix submitted substantially the same claims to a GSA contracting officer. The issues raised by respondent's motion have been fully briefed by the parties. In its briefs, respondent asserts that (1) our jurisdiction is preempted by the Copyright Act, and (2) the DOI contracting officer should have referred the claim to a GSA contracting officer for a final decision.[2]

The Board now addresses the jurisdictional issues raised by respondent in CBCA 5866.

1. **The Applicability of the Copyright Act's Preemption Provision**

Although immix did not raise any copyright infringement claims in its claim submissions to the DOI contracting officer, respondent argues that the preemption provision of section 301(a) of the Copyright Act prevents the Board from exercising its CDA jurisdiction to review immix's breach claim. Under the CDA, the Board has jurisdiction "to decide any appeals from a decision of a contracting officer of any executive agency . . . relative to a contract made by that agency." 41 U.S.C. § 7105(e)(1)(B).

Nothing in the Copyright Act supports respondent's position, which mischaracterizes immix's claim. The Copyright Act contains two provisions relating to preemption. The first states: "[A]ll legal or equitable rights that are equivalent to any of

[2] On October 26, 2018, immix received the GSA contracting officer's final decision under the GSA schedule contract, which concluded that immix's claims are based on the terms and conditions of mod. 1 and do not implicate any conflicting terms and conditions of immix's FSS contract with GSA. Immix appealed the GSA final decision.

the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title . . . [and] no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." 17 U.S.C. § 301(a). The second relevant provision reads: "Nothing in this title annuls or limits any rights or remedies under any other Federal statute." *Id*. § 301(d).

Reading these two provisions together, the Copyright Act does not preempt other federal rights-conferring statutes such as the CDA, which creates a statutory right for contractors to appeal the final decisions of contracting officers. *Brisbin v. United States*, 629 F. App'x 1000, 1005 (Fed. Cir. 2015) ("[T]he district court's error effectively denied Plaintiff of his statutory right to judicial review of the [contracting officer's] denial of at least one of his claims."); *Judkins*, GSBCA 6164, 81-2 BCA ¶ 15,350, at 76,041 (The CDA "is an exclusive statutory scheme creating both a right (the statutory right of appeal to an agency board) and a limitation on its exercise (the ninety-day appeal period)."), *overruled on other grounds by Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *Warren Beaves*, DOT BCA 1324, 83-1 BCA ¶ 16,232, at 80,647 (Under 41 U.S.C. § 7104(a), a contractor "has the statutory right to appeal to the Board.").

Further, the Copyright Act could not preempt the CDA because Congress' power to "preempt" a law is based on the Supremacy Clause of Article VI of the United States Constitution, *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368 (1986), and "one federal statute does not preempt another." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004). Accordingly, we have jurisdiction under the CDA to resolve immix's breach of contract claim.

2. **Whether the Board Requires a GSA Contracting Officer's Final Decision**

This Board has jurisdiction over appeals from a final decision of a contracting officer relative to a contract made by that agency. 41 U.S.C. § 7105(e)(1)(B). Respondent claims that the final decision of the DOI contracting officer was inadequate to grant jurisdiction. Under respondent's theory, the ordering agency should have forwarded the dispute to the GSA contracting officer for a final decision under procedures outlined in 48 CFR 8.406-6(b) (2016) (FAR 8.406-6(b)). Those procedures apply to disputes involving task orders under schedule contracts:

> (a) *Disputes pertaining to the performance of orders under a schedule contract*.
>
> (1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may–

> (i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or
> (ii) Refer the dispute to the schedule contracting officer.
>
> . . . .
>
> (b) *Disputes pertaining to the terms and conditions of schedule contracts*. The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

FAR 8.406-6(a)–(b). Respondent asserts that this dispute pertains to the terms and conditions of the schedule contract, and that the DOI contracting officer was obligated to comply with the referral requirement under 8.406-6(b).

Under the provision cited by respondent, "all disputes requiring interpretation of the schedule contract go to the schedule [contracting officer], even if those disputes also require interpretation of the order, or involve issues of performance under the order." *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1373 (Fed. Cir. 2013). If any of immix's claims involve a disputed interpretation of the schedule contract, the Board requires a final decision from the schedule contracting officer to maintain jurisdiction. FAR 8.406-6(b); *Sharp Electronics*, 707 F.3d at 1373; *Consultis of San Antonio, Inc. v. Department of Veterans Affairs*, CBCA 5458, 17-1 BCA ¶ 36,701; *Xerox Corp. v. General Services Administration*, CBCA 3964, 15-1 BCA ¶ 36,052. An ordering activity contracting officer, however, may apply provisions of the schedule contract when the meaning of the provisions is undisputed. *Sharp Electronics*, 707 F.3d at 1374.

Based on our review of the record, including the GSA contracting officer's final decision dated October 26, 2018, we disagree with respondent's characterization of this dispute as one involving contested interpretations of the schedule contract. In its decision denying the claim, the GSA contracting officer observed that "[a]ll the items in dispute relate to DOI's delivery order, not immixTechnology's Schedule 70 contract." We conclude that the terms of mod. 1 will guide our resolution of the appeal. The schedule contract is silent regarding the following issues at the core of the dispute: (1) the number of licenses granted to the ordering agency, (2) the environments in which the licenses allowed the software to be run, (3) the processor types covered by the licenses, and (4) the operating systems covered by the licenses.

The number of software licenses and the licensed environments are both indicated in mod. 1. The schedule contract merely includes a "Scope of Use" provision that requires the ordering agency to comply with the specifications of mod 1. The schedule contract only mentions an operating system and licensed environments in the context of the agency's requirement to provide notice if either changes. In this case, the license-conferring document is mod. 1. Restrictions regarding processor types also do not appear on the schedule contract; however, they are referenced in mod. 1.

A central issue in this dispute is whether the licenses granted to DOI/SBA are on a per-CPU (central processing unit) or per-processor core basis. The definition of "processor core" and "CPU" are stated in a section of mod. 1 called "License Restrictions/Notes." "Operating system" is also discussed in the same document:

> The proposal Software set forth above is restricted to use on the designated operating system(s) specified above; provided, however, that if the specified operating system(s) is not identified in the Documentation for a specific product (or product component) as a supported operating system then the product (or product component) in question is restricted to use on the operating system(s) specified its [sic] Documentation.

The schedule contract terms, which are general in scope, do not address whether the software was licensed for installation on a CPU or core processor basis.

Respondent also cites appellant's reference to provisions of the schedule contract as sufficient to require a final decision from a GSA contracting officer. In its notice of appeal and initial claim, appellant cites the following provision from the Scope-of-Use provision of the schedule contract: "At no time will Ordering Activity permit the Software to be used in excess of the usage specified under these terms, including, without limitation, the task or delivery order." The fact that appellant includes a provision from the schedule contract in its claim does not raise a jurisdictional problem under *Sharp Electronics*, since the ordering agency contracting officer is capable of applying undisputed provisions of the schedule contract without being required to refer the dispute to the schedule contracting officer. *See Sharp Electronics*, 707 F.3d at 1374. The schedule contract is not entirely irrelevant to items purchased under it; however, there are no terms of the schedule contract that are implicated in the disputes at issue in this appeal or that conflict with the terms of mod. 1.

Decision

Accordingly, respondent's motion to dismiss CBCA 5866 for lack of jurisdiction is **DENIED**.

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge