



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: December 18, 2020

CBCA 5866

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

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Tenley A. Carp and Sara M. Lord 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.

immixTechnology, Inc. (Immix), appellant, alleges that the Small Business Administration (SBA) breached various software licensing terms in a contract modification issued by the Department of the Interior (DOI), respondent, under a General Services Administration (GSA) Federal Supply Schedule (FSS) contract, entitling appellant to a damages award of approximately \$14 million. The DOI contracting officer issued a final decision denying the claim. Immix, on behalf of Software AG, the firm that developed the software at issue here, has appealed the claim to the Board. We conclude that Immix is entitled to \$1,024,184 in compensation resulting from the overdeployment of Software AG's webMethods software beyond the contract terms.

Background

This dispute concerns the terms of the January 28, 2014 contract modification GS-35F-0265X (“Mod 1”) of a March 26, 2013 contract. Mod 1 was for the purchase of new licenses for webMethods software having virtualization capabilities to be used in accordance with the SBA’s infrastructure improvement plan, called the “hardware refresh.” The SBA has an extended history of using prior versions of the webMethods software under licenses purchased by SBA in 2003 and 2006. One of the key issues in the appeal is whether Mod 1 provided for licensing of the webMethods software according to the number of server central processing units (CPUs) or by the number of server processor cores.

On April 1, 2003, Systems Research and Applications Corporation (“SRA”), a separate contractor for the SBA, purchased directly from webMethods, Inc., on behalf of the SBA, two perpetual licenses for “webMethods Integration Platform CPUs” for use in the SBA’s production environment, and one license for its use in the development environment. A CPU, also called processor, is the component of a computer system that performs the basic operations (such as processing data) of the system, that exchanges data with the system’s memory or peripherals, and that manages the system’s other components. The contract contained an additional line item for the purchase of software support. Later that year, on September 16, 2003, webMethods entered into a Government Reseller Agreement with Immix, making Immix a non-exclusive reseller of webMethods software to government entities. SRA assigned the 2003 webMethods software licenses to the SBA on August 31, 2004.

In 2006, the SBA issued a purchase order amending the 2003 agreement that purchased an additional ten webMethods licenses for the production environment, bringing the total number of licensed production platforms to twelve. The SBA also purchased an equivalent amount of licenses for use in three other software environments: development, testing/staging, and backup/disaster recovery. The line item description for the ten licensed CPUs states: “SOFTWARE, WEBMETHODS, INTEGRATION PLATFORM (10 CPU).” The licenses were priced at \$85,390.43 each, and the total contract price was \$2,384,614. The 2006 purchases also included line items for software maintenance and support—not broken down by quantity—totaling \$865,688. Software AG acquired webMethods in 2007. From 2008 through 2010, SBA continued to procure from Software AG annual maintenance and software support for the webMethods software.

In March 2011, Immix and the General Services Administration (GSA) entered into a schedule contract, which included pricing for webMethods software licenses and software support services. The SBA ordered \$452,696.80 in annual software support services for its webMethods software directly from Software AG on April 30, 2012, and

did not use the FSS contract. The support services were procured for the period May 1, 2012 through April 30, 2013. No new licenses were purchased in 2012.

On March 26, 2013, DOI purchased from Immix, this time using the FSS contract, the annual software support services needed by SBA for its webMethods products for a base year from May 1, 2013, through April 30, 2014, and four option years. Pricing ranged from \$475,000 in the base year, to \$526,939.55 in option year 4. Support services are defined in the contract to include telephone, email, and web-based support, and software maintenance and new version updates.

The DOI contract included line items for the software support across the four environments: production [part number: PID], development [EPD-PID], testing/staging [EPT-PID], and backup/disaster recovery [EPD-PID]. The contract also included line items for additional support, adapters, and training, each with their own part numbers. While some of the line items referenced the part numbers of the underlying GSA schedule contract, other line items were open market and did not correspond with items on the schedule contract. At the time of the 2013 purchase, SBA ran the webMethods software on Oracle Sun Fire servers, all of which employed Ultra SPARC IIIi single processors. The software under the existing licenses was licensed per-processor, as the preceding contracts were, because the existing SBA servers contained single processors.

In late 2012 and early 2013, the SBA began reviewing its technical hardware infrastructure. Expected upgrades to the infrastructure included changes from the current single processors running webMethods to more up-to-date servers with multi-core processors. SBA reviewed its webMethods licensing in anticipation of the hardware refresh and obtained input from Software AG as part of its licensing review. SBA noted that the current version of the webMethods software would “[come] to an end of sustained support” on December 31, 2013, and that the base year of the webMethods support services contract would end on April 30, 2014. Additionally, the existing webMethods software did not contain important new functionality such as “virtualization,” which includes the ability for one server to run on multiple operating systems on a single device. The webMethods software version being used by SBA was also not supported on the new servers that would be installed in its hardware upgrade.

In the latter half of 2013, SBA finalized its server upgrade plan and worked with Software AG on the associated upgrades to webMethods licensing and support. The new servers would contain two processors, each processor with eight processor cores for a total of 16 processor cores per server. This was a significant change from the single core processors SBA was previously using. The prior contracts and licensing agreements did not anticipate or differentiate between the older single core processor servers that SBA

was using and the multi-core architecture of the newer servers that SBA would be acquiring as part of the hardware refresh.

Contemporaneous evidence from the planning process indicates that SBA and Software AG intended to use a per-processor core software licensing structure for the hardware/software upgrade. An email from Aaron Mazzatenta (an account manager for Software AG) to Steve Stine (SBA contracting officer representative) on October 23, 2013, included a chart of the intended software structure. The chart provided the unit of measure for the number of needed licenses as “Per Processor Core Type B.” On October 31, Sri Gopalakrishna of SRA, SBA’s third-party software contractor, who assisted in the webMethods planning for the hardware refresh, sent an installation schematic to various parties involved in the process, including Steve Stine and Aaron Mazzatenta. This schematic indicated the number of processor cores in each new T4-2 server that would have webMethods software licensed and installed, showing that the webMethods installation and licensing was to be based on processor cores. The schematic shows licensed processor cores totaling twelve for the development environment, ten for testing, twelve for production, and ten for disaster recovery. Various numbers of processor cores were associated with each T4-2 server to be acquired by SBA. Sri Gopalakrishna sent out an additional schematic on November 15, which showed an architecture installation structure containing not only webMethods but also several other non-webMethods applications and utilities that would be running on the T4-2 servers in each of the environments. On November 21, 2013, Sri Gopalakrishna again emailed detailed configuration documents showing the intended per-processor core licensing and installation schematic.

The parties planned for a direct contract between SBA and Software AG to purchase the new webMethods licenses and software support. On December 3, 2013, Software AG submitted a proposal to SBA. This proposal provided for licensing by processor core across the production, test, development, and backup environments; using virtual technology to run the software in a virtual environment as long as the licensee was capable of restricting the total number of processor cores assigned to the virtual operating system on which the software is installed; and including software support and maintenance. The proposal’s product description listed “Integration Platform Processors” and an associated “JDBC Adapter” for each of the four different environments, with “Processor Core Type B” processors, and a quantity of twelve. Thus, the proposal based its pricing on licensing by server processor cores, consistent with the earlier communications between SBA and Software AG regarding the licensing and architecture scheme for the hardware refresh. The pricing was not individually listed for each of the product description items, extended virtualization rights, or software support and maintenance but instead was listed in totals for the entire licensing and software support

package for the base year and each option year. The proposal also included a provision called “Processor Cores” stating:

With regard to the Software licensed herein on a per Processor Core basis, a Processor means a central processing unit or other integrated circuit that executes the instructions provided by the Software through a specified number of Cores and a Core means a collection of one or more processor threads and a set of shared execution resources. (For clarity, a single-core CPU is a Processor with one Core, a dual-core CPU is a Processor with two Cores, etc.)

The proposal also stated that the licensed webMethods software would run on “Processor Core Type B” servers and the “Solaris Ultra SPARC” operating systems. The new SPARC T4-2 servers, however, used type C cores according to Software AG’s terminology. On December 12, 2013, Sri Gopalakrishna emailed Kerry Vance (a contractor working with SBA on this project) the earlier schematic detailing the anticipated per-processor core licensing and usage structure by server and by environment.

However, instead of contracting directly with Software AG based on the December 3 proposal, SBA learned that its contracts over \$150,000 needed to go through the Department of the Interior. Therefore, the SBA pursued a modification of the 2013 DOI support services task order under the federal supply schedule contract to facilitate the new software licenses purchase. Aaron Mazzatenta indicated that Software AG was “fine doing a contract modification” instead of a direct purchase by SBA. Another proposal was prepared for this purpose, QUO-443962-P6K2Q2, dated December 27, 2013. This December 27 proposal was ultimately incorporated into Mod 1. Because this proposal intended to use a contract modification as the contract vehicle for the acquisition, the proposal used product descriptions from the underlying federal supply schedule contract, which did not precisely match those found in the December 3 proposal. For example, the December 3 proposal referred to the production webMethods licenses as:

Product Description[:] Integration Platform Processors
Operating Environment[:] Production
Type[:] Processor Core Type B
Quantity[:] 12

The December 27 proposal listed the same license as:

Product Description[:] webMethods Integration Platform CPUs*
Platform Production CPU Includes:-webMethods Integration Server-
webMethods Broker** Trusted Product **
Qty[:] 12

Although the product descriptions in the December 27 proposal use the term “CPUs” while the December 3 proposal uses the term “Processors,” those terms are generally synonymous, and there is no evidence that the parties had negotiated a different licensing or pricing structure for the December 27 proposal. The product description differences are attributable to the decision to use a modification of the existing schedule contract to make the purchases.

The December 27 terms and conditions confirm the conclusion that the parties had not changed their per-processor core licensing approach. The December 27 proposal contained an essentially identical processor core licensing clause to the one contained in the December 3 proposal:

Processor Cores: With regard to the Proposal Software licensed on a per Processor Core basis, a Processor means a central processing unit or other integrated circuit that executes the Instructions provided by the Proposal Software through a specified number of Cores and a Core means a collection of one or more processor threads and a set of shared execution resources. (For clarity, a single-core CPU is a Processor with one Core, a dual-core CPU is a Processor with two Cores, etc.)

Further, the proposal contained the clause on virtualization which provided:

Virtualization: Licensee may use the Proposal Software on a physical machine using virtual technology to run the Proposal Software in a virtual environment, provided that the virtual technology used by Licensee is capable of restricting the total number of Processor Cores . . . assigned to the virtual operating system on which the Proposal Software is installed and the total number of Processor Cores so assigned does not exceed the total number of Processor Cores licensed. Under no circumstances shall the Proposal Software be used (in a virtual environment or otherwise) in excess of the total number of Processor Cores licensed. Licensee shall monitor daily peak usage of the Software Licensee agrees that it will provide Software AG with quarterly reports documenting daily peak usage that specifically highlight

Processor Core utilization for all Processor Cores to which the Proposal Software is assigned.

Further, the December 27 quotation contains essentially identical pricing as the December 3 proposal (there is a twelve dollar difference in the final option year).

The proposal also included processor core type restrictions. The pertinent paragraph of the proposal provides: “Processor Core Performance Types are used to differentiate processor technologies with regard to their performance. The Proposal Software may be used only on licensed processor cores in their designated Processor Core Performance Type, which designations are subject to change.” The current processor core performance type table was posted at a webpage listed in the proposal. According to the performance table at the end of the webpage link, SPARC T4 processors—those to be used by SBA—had type C processor cores. While the December 3 proposal had specifically mentioned type B cores in the quotation, Aaron Mazzatenta, the Software AG representative, knew that SBA intended to use the SPARC T4 type C processors in the hardware refresh. During testimony, Mr. Mazzatenta admitted that he was in a meeting where T4-2 servers were discussed and that he had received an email that SBA was intending to use T4-2 servers.

On January 28, 2014, DOI and Immix entered into Mod 1. Mod 1 incorporated the December 27, 2013 proposal with all its terms and conditions. Thus, Mod 1 included the December 27 line items for the webMethods software, JDBC adapters, and software support for each of the software items. Each line item specified a quantity of twelve units, but each item type and environment was priced independently. Mod 1 maintained the Base Year (5/1/2013-12/30/2014) software support for the prior webMethods licensed software at \$475,000, and changed the pricing of the underlying 2013 task order contract option years to now include the new software licenses and the new software support as follows: Option Year 1 (1/28/2014-12/30/2014) \$474,000, Option Year 2 (12/31/2014-12/30/2015) \$474,000, Option Year 3 (12/31/2015-12/30/2016) \$474,000, Option Year 4 (12/31/2016-12/30/2017) \$284,412. The December 27 proposal lists as the “Base Year” the 1/28/2014-12/31/2014 period while the Mod 1 cover pages continue to refer to that period as Option Year 1. The period 1/28/2014-12/31/2014 covers the line items for purchasing the software licenses, and smaller line item amounts for software support priced at about 17% of the license price, while the subsequent options years only contain line items for software support. Through this contract, SBA was able to meet its goal of lowering its total costs. The total value of the contract was \$2,181,412, a \$326,229.94 decrease from the underlying 2013 contract.

Other rights and obligations were also included in the underlying 2013 contract and are relevant to Mod 1. During performance, the contract required that SBA monitor

the software usage and provide quarterly reports, but SBA did not send any reports. Conversely, the contractor was entitled to request usage information. The 2013 contract provided that if the licensee breached its obligations under the scope of use clause, and the breach was uncured for an unreasonable period of time, the parties would “work to true-up the account per this Agreement.”

Over the course of 2014, after the effective date of Mod 1, SBA began installing the webMethods software and adapters on the new T4-2 servers. Although Mr. Vance, the project manager running the installation, had been privy to the earlier communications that had planned on a per-processor core installation, SBA failed to install the webMethods software according to the number of licensed processor cores. As a result, SBA and its contractor SRA installed webMethods onto the eight new T4-2 servers without restricting the installation to individual cores within the servers. By the end of the installation process, SBA had installed webMethods software onto 128 different processor cores (8 servers with 16 cores per server), spread across the four different environments. We find that SBA was only licensed to run webMethods on 48 cores, that is, four environments times 12 cores per environment. The production servers became live in September 2014.

Two years after the software deployment, on November 15, 2016, Software AG contacted government representatives for a meeting regarding webMethods upgrades and the future of the relationship. During the meeting which was held on November 30, 2016, Mr. Vance, who was no longer a contractor but an SBA employee, viewed a PowerPoint presentation by Software AG which described SBA’s per-processor core licensing structure. Mr. Vance, who understood the installation of the software, recognized that this was not how SBA had deployed webMethods. After internally confirming the extent of the installation and contacting DOI contracting personnel, Immix was informed by the agency of the possible over-deployment. In December 2016, SBA determined that it had installed and was running webMethods on 128 different cores, well beyond the 48 cores for which it was licensed. The eight servers supported all four software environments: “Production” (two servers), “Disaster Recovery” (two servers), “Test” (one server); “Development” (one server); and “Staging” (two servers). The “staging” environment identified by SBA served a similar function as a “test” environment.

Because of the extent of the installation of the webMethods software without limiting the number of processor cores per server with the webMethods installed on it, the contracting officer indicated that SBA would not be exercising option year 4 of the agreement. Option Year 3 was instead extended for a period of 2.5 months until March 15, 2017. In early 2017, SBA began trying to limit the deployment of the webMethods software to the compliance limits found in Mod 1. The agency claims that the cores in the testing, staging, training, and development environments were limited to

eight cores each on January 23, 2017, and that the cores in the production and disaster recovery environments were restricted to eight cores each by March 1, 2017. The earliest screenshot of the software restriction is dated July 3, 2017.

Discussion

Severin

As a preliminary issue, SBA argues that Immix's claim is barred through application of the *Severin* doctrine. "[T]he *Severin* doctrine, first articulated in *Severin v. United States*, 99 Ct.Cl. 435 (1943), *cert. denied*, 322 U.S. 733, 64 S.Ct. 1045, 88 L.Ed. 1567 (1944), holds that a prime contractor cannot recover on behalf of a subcontractor unless the prime contractor has reimbursed the subcontractor or is liable to make such reimbursement." *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1552 at n.8 (Fed. Cir. 1983). "The *Severin* doctrine can only bar the prime contractor's pass-through suit against the government if the government first asserts at trial, and then proves, that the prime contractor is not liable to the subcontractor for the costs in suit." *E.R. Mitchell Constr. Co. v. Danzig*, 175 F.3d 1369, 1371 (Fed. Cir. 1999) (citing *George Hyman Constr. Co. v. United States*, 30 Fed.Cl. 170, 177 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir.1994)).

SBA's allegation is based on a clause within Immix and Software AG's contractual agreement: "Neither party shall be liable to the other party for consequential, punitive, incidental or special damages, including but not limited to lost profits, even if such party has been apprised of the likelihood of such damages coming." Respondent's Post-Hearing Brief at 11 (citing Exhibit 67 at DOI-11979). SBA has not made any significant evidentiary showing besides this clause. This clause comprehends collateral liabilities incidental to the contractual agreement rather than discharging liability for contractual disputes. Even lost profits, a theory of damages advanced by Immix in this case, are direct damages if a natural result of the breach. *See Ramsey v. United States*, 101 F. Supp. 353, 357 (Ct. Cl. 1951); *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 109 (2d Cir. 2007). SBA has not proven that Immix would not be liable to Software AG for damages arising under a breach of the contract. Thus, the *Severin* doctrine is inapplicable here.

Entitlement

Immix alleges entitlement to damages for the webMethods installations that exceeded the 48 licenses purchased in Mod 1 and the value of upgrading all licensing from type B to type C processors. SBA alleges *inter alia* that it did not overdeploy because Mod 1 licensed webMethods on a per CPU basis, and SBA had already obtained webMethods 9.0.1 under the prior maintenance and support plan. For the reasons discussed below, we conclude that SBA overdeployed webMethods onto 80 unlicensed core processors but that Software AG is not entitled to recover for webMethods being installed on type C processor cores.

Immix's entitlement to compensation depends upon the interpretation of Mod 1. Contract interpretation begins with the terms of the contract itself. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). "The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created." *Noaa Maryland, LLC*, CBCA 5269, 19-1 BCA ¶ 37,458 (quoting *Belle Isle Investment Co. v. General Services Administration*, CBCA 4734, 16-1 BCA ¶ 36,416) (citation omitted); see also *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971). The Federal Circuit has held that extrinsic evidence should not be used to interpret a contract unless there is an ambiguity in the contract language. *City of Tacoma, Dep't of Pub. Utilities v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994). A contract provision is not ambiguous merely because the parties disagree on the meaning. *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 751 (Fed. Cir. 1999). Both interpretations must be reasonable. *Premier Office Complex of Parma, LLC v. United States*, 916 F.3d 1006, 1011 (Fed. Cir. 2019) (citing *Metric Constructors*, 169 F.3d at 751 (Fed. Cir. 1999)) (citation omitted).

Mod 1, when considered in its totality, provides for licensing of the webMethods software on a per processor core basis, not on a per CPU basis. Although the term CPU is referenced in the product descriptions of the software in the December 27 proposal incorporated into Mod 1, those product descriptions are taken from the FSS contract and were used to facilitate a modification of the 2013 contract to purchase the new licenses. The terms and conditions of Mod 1 point clearly to licensing on a per processor core basis. The incorporated proposal states that "[u]nder no circumstances shall the Proposal Software be used (in a virtual environment or otherwise) in excess of the total number of Processor Cores licensed." The modification also states that virtual software—a main feature of this procurement—must be restricted to the number of processor cores licensed. None of the clauses in Mod 1 suggest that the software is being licensed on a per-CPU basis. The Federal Circuit has held that contracts should be "considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004) (citing *McAbee*

Constr., Inc. v. United States, 97 F.3d 1431, 1434–35 (Fed. Cir. 1996)). When applying this standard to Mod 1, the terms of the agreement are clear. The per processor core licensing clauses are new to Mod 1 and show the parties' intent to license the new software by processor core, entirely consistent with the parties' plan for licensing the new software in connection with SBA's hardware refresh. The technical discussions uniformly indicate the parties' intention to license webMethods on a per processor core basis. The installation schematics circulated by Sri Gopalakrishna between the SBA contracting office and SBA's third party contractors indicated that the software installation was going to be restricted to a subset of the processor cores of each server. This same structure was reflected in the December 3 proposal. The December 27 proposal does not indicate any change from the per processor core licensing approach, and the pricing of the December 27 proposal as incorporated into Mod 1 mirrors the pricing agreed upon in the December 3 proposal. Steve Stine, the contracting officer's representative involved with the licensing negotiations, knew that the new licensing scheme would be by processor cores, not by CPU.

Based on the per-processor core licensing structure of the agreement, SBA overdeployed webMethods software onto the T4-2 servers. Under Mod 1, SBA paid for twelve licenses of webMethods for each of the four environments, for a total of forty-eight licensed processor cores. The record demonstrates that SBA had been running the webMethods software on an additional twenty processor cores in each environment, for a total of eighty additional processor cores. The evidence thus shows that SBA had been running webMethods software on 128 cores (forty-eight licensed processor cores plus eighty unlicensed processor cores) until SBA applied restrictions in 2017 to limit the deployment of webMethods to the forty-eight licenses paid for in Mod 1. Although Immix argues SBA overdeployed on an additional 52 processor cores, we do not agree. Four of the cores belonged to a personal work laptop used by Sri Gopalakrishna, discussed earlier, and were included in the Mod 1 pricing. Immix argues that another 48 processor cores had webMethods running in the development and testing environments, but we are not convinced of that from the record.

Immix's claim also includes damages for SBA's over-deployment of JDBC adapters which are associated with the webMethods software. JDBC adapters have been a part of webMethods software purchases from the beginning. The 2003 software license agreement for webMethods software includes a line item for a JDBC adapter, but the pricing is included in a lump sum total. Adapters are also included in the 2006 purchase order, where the pricing for the adapters is similarly included in the total price, rather than individually priced (though none of the line items contain individual prices). JDBC adapters are present in individual quantities in the 2013-14 GSA schedule pricing list, as well as in Mod 1, the December 27 proposal, and the December 3 proposal. In Mod 1 and the December 2013 proposals, the JDBC adapters are consistently licensed and used

in the same quantity as their associated webMethods software. The overdeployment of webMethods software in this case, therefore, also reflects a corresponding overdeployment of the JDBC adapters.

SBA argues that prior perpetual licenses from the 2003 and 2006 webMethods agreements carry over to their current usage. In other words, because SBA had perpetual webMethods licenses from prior contracts, SBA argues that the current Mod 1 licensed quantities of webMethods software should be viewed cumulatively with those earlier licenses. This argument is inconsistent with the actions of the parties and the context of the webMethods licensing rights. Perpetual licenses for a particular software product do not necessarily grant unlimited technical support or updates from the owner or manufacturer. *See Software AG, Inc. v. Consist Software Solutions, Inc.*, No. 08 Civ. 389(CM)(FM), 2008 WL 563449, at *7 (SDNY Feb. 21, 2008). Perpetual licenses are subject to and limited by the terms of the contract in which they were assigned. *See Software Design, Inc.*, ASBCA 23616, 82-2 BCA ¶ 16,073 at 79,742 (“The Perpetual License clause must be read in the light of other provisions which contemplated updating of the software.”). Disputes related to perpetual licenses rely on traditional principles of contract interpretation. *See Geoscan, Inc. of Texas v. Geotrace Technologies, Inc.*, 226 F.3d 387 (5th Cir. 2000) (reversing summary judgment for alleged breach of contract where terms surrounding specific CPU usage for software licenses were deemed ambiguous); *Software Design, Inc.*, 88-1 BCA ¶ 20,487 at 103,637 (holding summary judgment inappropriate where perpetual license and modifications “seemingly conflict” with contract terms, including expiration term and use restriction terms).

SBA’s argument for cumulative perpetual licenses contradicts a fundamental purpose of Mod 1: the procurement of new licenses on a per processor core basis for new webMethods software that had virtualization capabilities. A parallel for the limitation of perpetual licenses is found in typical computer software purchases:

[A] familiar example of a perpetual license is the license offered for the Microsoft Windows operating system prior to Windows 10: one might purchase a license for Windows 98 or Windows 7 and continue to use that version of Windows long after its developer, Microsoft, has moved on to development of a later version of Windows.

PTC Inc., B-416863, 2019 CPD ¶ 48 (Dec. 20, 2018) (internal citations omitted). While SBA might be entitled to continued use of existing licenses under prior agreements, SBA is not necessarily entitled to continued support, the newest software versions, or increased functionality (virtualization)—just as a perpetual license for Windows 95 does not entitle a user to the benefits associated with a Windows 10 licencing agreement. *Id.*

In a related position, SBA also argues that Software AG had already sent SBA product keys in September 2013, well before Mod 1 was signed, for the webMethods version (9.0.1) that was used throughout the overdeployment and that SBA was therefore entitled to use this webMethods version under the 2013 contract. When the parties were planning the hardware refresh, SBA was running software version 7.1.2. Version 9.0.1 was the licensed version used on the virtual SBA servers after the contract was signed in January 2014. Use of webMethods version 9.0.1 on the new T4-2 servers began after Mod 1 was executed notwithstanding the date of delivery of the product keys.

Finally, Immix argues that it is entitled to license fees for software installed onto all four cores of the Windows laptop of the lead webMethods developer for SBA. Again, we turn to the December 3, 2013 proposal. The proposal contained a single Windows license for the use of webMethods in each of the four different environments. The Windows user line items were not limited by processor core type, instead indicating a license for “Unlimited Users.” According to this proposal, the software running on the lead webMethods developer’s SBA computer was an anticipated aspect of the contract and was priced into the total contract price, which was already fixed as of the December 3 proposal. SBA is not liable for the Windows licensing.

Processor Core Types

Immix argues that it is entitled to damages related to an upgrade in the processor core “type” licensing that SBA was using. Excluding the Windows environment that was running webMethods, Immix claims that SBA was running webMethods on type C processor cores when SBA was only licensed to run the software on type B processor cores. Immix argues for additional damages associated with upgrading the licensing in all webMethods server environments to type C pricing.

Although the proposals and Mod 1 indicate that the software was licensed according to the processor core performance, the processor core performance types were a creation of Software AG rather than an industry standard. Additionally, while the performance types were based on general processor performance, Immix did not indicate specific performance type criterion that would give SBA notice that their servers were subject to a higher pricing designation. This designation, found in a chart referenced by a webpage address listed in the proposal, was further subject to change at Software AG’s discretion. We find that Software AG understood that the SBA was obtaining T4-2 servers that had type C processors and thus the parties intended that the proposals provided the type of licensing needed by SBA to run the new webMethods software on the new servers. Immix has not established entitlement to damages for the core type upgrade. Mod 1 contains no characterization of the type of processor core licensed under the agreement. A contracting party’s “unexpressed, subjective belief is insufficient to

bind the opposing party.” *Western States Const. Co. v. United States*, 26 Cl. Ct. 818, 825-26 (1992).

Quantum

To fully understand Immix’s damage calculation, this panel directed both parties to address the calculation of damages in this case with a supplemental filing. Immix’s total claim in this case exceeded \$14 million, many times the full value of Mod 1 with all option years exercised. Even after removing the additional quantum calculation for processor core type upgrades, the damages calculation still exceeds reasonable pricing under the contract. For example, the Mod 1 pricing per-processor core of the production webMethods environment was \$17,160.15, yet appellant argues that it should be reimbursed \$93,094.64 per processor core (the GSA schedule rate) for the corresponding overdeployment. The GSA schedule rate is the maximum that a contractor can charge an agency for products/services on a schedule contract, but agencies are permitted to negotiate lower rates. In this case, SBA and DOI did just that, negotiating a lower value for Mod 1. *See Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348, 1357 (Fed. Cir. 2001) (“It is not the duty of courts to second-guess the terms of a bargained-for exchange.”) (citing *Aero Spacelines v. United States*, 530 F.2d 324, 354 (Ct. Cl. 1976)). “The non-breaching party should not be placed in a better position through the award of expectancy damages than if there had been no breach.” *Cuyahoga Metro. Hous. Auth. v. United States*, 65 Fed. Cl. 534, 543 (2005). In our view, the GSA schedule pricing is not a reasonable measure of the value of the licenses here.

In support of its argument for the higher FSS contract rate, Immix argues that Mod 1 was not a purchase of new licenses but rather a purchase of upgraded licenses, and thus the overdeployment instances are “new” licenses. We do not agree. The December 3 and December 27 proposals, as well as Mod 1 which incorporates the December 27 proposal, make no mention that the Mod 1 licenses are anything but new licenses with new license terms. Mod 1 effected a purchase of new software licenses to replace the older, soon-to-be unsupported licenses. SBA’s prior licenses were coming to the end of sustained support in 2014, and SBA was pursuing licenses that would match with the functionality of its new servers in the hardware refresh. This difference is clearly shown in the text of Mod 1, in the new virtualization rights SBA was obtaining in its licenses and subject to the per processor core limitations specified in Mod 1.

To determine the appropriate compensation due Immix for the overdeployment, we first look to the terms of the contract. The 2013 contract merely states that the parties will “true up” any breaches of the scope of use. This language does not equate to a “fair and reasonable attempt[] to fix just compensation for anticipated loss.” *Northern Mgmt.*

Servs., Inc. v. Department of Agriculture, CBCA 1009, 2009 WL 2762523 (citing *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947)).

The determination of quantum thus must be measured by the evidence presented in the record. Relatively few cases have addressed contract damages of software over-deployment. Our predecessor board addressed an issue of damages in software overdeployment in *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 15607, 04-1 BCA ¶ 32,539. “Determining the amount of damages to award is not an exact science, and the methodology of assessing and computing damages is committed to the sound discretion of [the] court.” *Energy Northwest v. United States*, 641 F.3d 1300, 1309-310 (Fed. Cir. 2011). The appellant must meet its burden to provide sufficient evidence to allow us to make a “fair and reasonable approximation.” *Universal Development Corp. v. General Services Administration*, GSBCA No. 11252-R, 93-2 BCA ¶ 25,845 (quoting *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991)). If an appellant can prove the probability of damages, “uncertainty as to the amount will not preclude recovery.” *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000) (quotation omitted). When contract damages are to reimburse a promisee for a breach by the promisor, the goal is to put the injured party in as good of a position as that party would have been in if performance had been rendered as promised. 24 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 64:1 (4th ed. 2020); see also 11 Joseph M. Perillo & Helen Hadjiyannakis Bender, *Corbin on Contracts* § 55.3 (2020).

Immix argues that expectancy damages, calculated based on webMethods’ market value, is the correct measure of damages in this case. In order to determine the fair market value, Immix applies a “hypothetical license” test. “To calculate the ‘market value’ of the injury to the plaintiff based on a hypothetical-license theory, we look to ‘the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by [the infringer] of the plaintiff’s work.’” *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014) (citing *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 786 (9th Cir. 2006) (internal quotation marks omitted)); see also *Gaylord v. United States*, 678 F.3d 1339, 1343 (Fed. Cir. 2012) (“When, as in this case, the plaintiff cannot show ‘lost sales, lost opportunities to license, or diminution in the value of the copyright,’ many circuits award actual damages based on the ‘fair market value of a license covering the defendant’s use.’”).

SBA argues that because its use of the software as a percentage of total processor utilization was so low, it gained no benefit by having the software installed on 128 cores versus the 48 licensed cores that it paid for under Mod 1. SBA further contends that the Mod 1 prices for the licenses are a more reasonable measure of damages for overdeployment than the pricing found in the FSS contract claimed by Immix.

Immix and Software AG have not persuaded us with record evidence that the schedule contract prices they are claiming in fact represent fair market valuations. We believe the Mod 1 license prices are a reasonable measure of the pricing the parties would have agreed upon had the parties included the additional use of the software in Mod 1. The licenses were negotiated by the parties and the pricing in Mod 1 was current pricing and reflected the collective valuation placed on the software by the contracting parties given Software AG's pricing goals, SBA's needs, the parties' agreement on a cost savings for SBA, market conditions, and the history of the parties' dealings.

Mod 1 addresses the two types of pricing: the pricing of the webMethods licenses and the pricing for the accompanying software support services for webMethods. We determine that based on the Mod 1 pricing of the software licenses for the overdeployment by 20 additional cores for each of the four environments, appellant is entitled to recover \$674,184. This amount is based on the contracted individual rates for each webMethods license for each of the four environments (including the JDBC adapter licenses), multiplied by the twenty instances of overdeployment for each environment. We cannot conclude from the record that the SBA derived no benefit from the overdeployment of the software, and even if SBA had, the practical administration of software license damages and the policy considerations in copyright-related breaches favor the remuneration of the injured party. *See Oracle Corp.*, 765 F.3d at 1088 ("In our view, as between leaving the victim of the illegal taking with nothing, and charging the illegal taker with the reasonable cost of what he took, the latter, at least in some circumstances, is the preferable solution.") (quoting *On Davis v. The Gap, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001)).

Appellant is also entitled to additional software support costs in the amount of \$350,000. This amount is calculated based on the individual support costs for the webMethods environments and JDBC adapters for 2014, multiplied by the twenty instances of overdeployment in each of the four environments, accrued over the approximate three year period of the overdeployment. Although appellant claims a far higher software support rate, we find the "base year" pricing at about 17% of the license prices reflects a reasonable annual support services rate as a percentage of the value of the licenses.

We have considered the other contentions of the parties and determine that they do not change our findings and conclusions above.

Decision

We grant the appellant's claim in part in the total amount of \$1,024,184 plus applicable interest.

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