UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY
RELIEF ON ENTITLEMENT GRANTED: December 12, 2013

CBCA 3042

VSE CORPORATION,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Richard J. Webber of Arent Fox LLP, Washington, DC, counsel for Appellant.

Jonathan D. Tepper, Office of Chief Counsel, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **STEEL**.

VERGILIO, Board Judge.

On October 5, 2012, VSE Corporation timely filed a notice of appeal concerning its contract, TOS-11-C-001, with the Internal Revenue Service, Department of the Treasury (agency). The contractor was a bailee for various seized property. Sixty-six vehicles stored and held by the contractor were damaged as a result of Hurricane Irene. The contractor disputes a contracting officer's decision holding the contractor liable for damages of $987,622, plus interest. The contractor contends that the agency was a self-insurer under the contract.

Each party seeks summary relief. The Board makes findings based on uncontested facts and concludes that the contractor is liable for damages, the amount still a matter of dispute. The contract required the contractor to store items so that their overall condition was maintained as it was at the time of acceptance. The vehicles were not so maintained. The

contract did not require the contractor to purchase liability insurance to cover damage arising from an event such as the hurricane. However, the contract did not prohibit the contractor from purchasing such insurance. Absent specific direction from the contracting officer to purchase insurance, the cost of insurance was not reimbursable under the contract. The contract does not identify the agency as a self-insurer. The contractor was liable, as a bailee, under the contract for items under its control. That the vehicles were damaged by a hurricane does not affect the liability of the contractor.

While the parties contend that the language of contract is clear, should one go beyond the language of the contract, the negotiations leading to the contract evince an agreement consistent with the contractor assuming liability. When negotiating the contract (an extension to a cost reimbursement, firm fixed-fee contract), the contractor sought an increase in its fee based upon its recognition that it assumed greater risks under a sentence inserted into an insurance clause that stated the contractor would be liable, and not be reimbursed, for costs of the Government associated with the loss or damage of general property within the care, custody, or control of the contractor. The contractor obtained the greater fee. Despite the views of the contractor to the contrary, this demonstrates a mutual understanding of the parties that the contractor assumed the risks knowingly.

Regarding the interpretation of the contract, the Board grants the agency's motion for summary relief and denies the contractor's motion. The dollar value of the contractor's liability remains in dispute.

Findings of Fact

1. With an award date of September 28, 2010, the agency and contractor entered into a cost-plus-fixed-fee contract. The contract amount was $25,873,201.11, reflecting an estimated cost of $24,697,097.95 and a fixed fee of $1,234,903.16 (approximately 5% of the estimated costs). Exhibit 1 at 1 (¶ 28) (all exhibits are in the appeal file). The contractor was to provide nationwide services for the receipt, possession, custody, management, and disposition of seized, blocked, and forfeited personal property on behalf of various agencies. Exhibit 1 at B-1 (¶ B.1), C-1 to -2 (¶¶ C.1, C.2). The contract was inclusive of all allowable costs and a fixed fee. Exhibit 1 at B-1 (¶¶ B.2, B.3).

2. The contract designated vehicles--such as the automobiles involved in this dispute--to be general property. Exhibit 1 at C-1 (¶ 2). The contract required the contractor to store general property "in the most cost-effective method available to preclude any deterioration of the property, so that the overall condition of the property is maintained as it was at the time of acceptance." The contract noted that vehicles valued at or greater than $50,000 were to be provided indoor storage from the time of consignment until final

disposition. Vehicles were to be stored in contractor-operated facilities, absent specific direction from the contracting officer or his representative. Exhibit 1 at C-8 (¶ C.3.2.5). Further, the contractor was required to maintain and preserve general property as necessary to ensure that it retained its overall condition from the time of acceptance until disposition. Exhibit 1 at C-9 (¶ C.3.3, Maintenance). The contractor was to ensure that adequate security and protection of general property was provided at any contractor-furnished facility. Exhibit 1 at C-25 (¶ 3.11.8).

3. The contract required the contractor to provide and maintain particular insurance, none applicable here. Exhibit 1 at H-1 (¶ H.1, Required Insurance clause). The contract also contained an Other Required Insurance clause:

> The Contracting Officer (CO) may, at his/her discretion, require the Contractor to provide and maintain greater insurance liability for loss or damage to Government property or General Property. In these instances, the Contractor shall obtain "other required insurance" for property including but not limited to: (1) Aircraft; (2) Vessels; (3) Vehicles; (4) General Property; and (5) Artifacts/Fine Art on a case-by-case basis upon approval of the CO. After Contract award, and throughout the duration of the Contract, the Contractor shall survey all Government property and General Property in its custody and make recommendations as to whether greater insurance should be obtained and if so, what kind of additional amounts. During the Transition/Phase-In Period, the Contractor shall furnish to the CO a plan or methodology for obtaining any such additional required insurance. FAR 52.228-5, entitled "Insurance--Work on a Government Installation" which is incorporated by reference in Section I of the Contract, shall apply to any such additional required insurance. General Property shall be considered "property in the care, or control of the contractor" for purposes of FAR 52.228-7, entitled "Insurance -- Liability to Third Persons[.]" Furthermore, the Contractor shall be liable and will not be reimbursed for costs (including costs of the Government) associated with the loss, damage, theft, or improper destruction of General Property within the care, custody or control of the Contractor.

Exhibit 1 at H-1 (¶ H.2).

4. Effective April 22, 2011, the agency unilaterally issued a no-cost contract modification, extending the period of performance of the contract through the end of September 2011. The modification required the contractor to submit a cost estimate for the five-month period of May through September 2011. The terms and conditions of the contract

remained the same. Exhibit 4 at 1. In a proposal for the extension, dated May 20, 2011, the contractor sought a fixed fee of 7%. Exhibit 6 at 1-2.

5. The agency response dated May 23, 2011, identified two items for discussion: one regarding costs of $1890.06 related to materials and other direct costs, and the other relating to the fee. The agency noted the 5% fee negotiated for the underlying contract, and requested a reduction of the fee to 5% for the extension. Exhibit 7.

6. In a response dated June 2, 2011, the contractor explained the proposed costs of $1890.06 as the premium for the annual software support, and stated that it stood by the proposed 7% fee, which it maintained was reasonable based on identified considerations allowed under regulation. It specified contractor effort as one factor. A second factor involved contractor cost risks. As to this, it noted that although this was a cost-reimbursement contract, the contract created cost risks by imposing indirect rate ceilings and by language in clause H.2, the Other Required Insurance clause. Specifically, as to this latter risk,

> The language in the last sentence of H.2 creates significant cost risk to VSE. It reads:
>
> > "Furthermore, the Contractor shall be liable and will not be reimbursed for costs (including costs of the Government) associated with the loss, damage, theft, or improper destruction of General Property within the care, custody or control of the Contractor."
>
> VSE's previous contract (TOS-06-052) did not contain this language. In addition, the Government eliminated the requirement for general property insurance (see Modification 39); therefore, VSE dropped the policy which covered general property in its warehouses. To be frank, it was an oversight on the part of VSE that this risk was not addressed when negotiating Contract TOS-11-C-001. Again, the proposed fixed fee will recognize the cost risk associated with this clause.

Exhibit 8 at 3.

7. The agency accepted the proposed costs and the 7% firm, fixed fee; a bilateral contract modification, effective June 15, 2011, increased the funding and the fixed fee accordingly. Exhibits 10, 11.

8. As a result of Hurricane Irene in late August 2011, sixty-six vehicles under the care of the contractor were damaged. The contractor notified the agency of the damage on October 26, and, in an interim report, estimated the total value of the vehicles damaged at $987,622.50, and the value in the damaged condition at $193,014.79. Exhibits 14-18.

9. By letter dated April 26, 2012, based upon the plain language of clause H.2 and due to the contractor billing and receiving a 2% increase in its fixed fee throughout the life of the extension contract, the contracting officer concluded that the contractor was liable for the damage sustained by the sixty-six vehicles stored by the contractor. The letter also referenced clause C.3.2.5, which required the contractor to properly maintain stored property in its possession, and references a regulatory clause not shown to be part of the contract. Exhibit 26. The contractor submitted a reply, dated May 9, 2012, disagreeing with the analysis and conclusions of the contracting officer. Exhibit 29.

10. In a decision dated July 11, 2012, the contracting officer concluded that the contractor was liable for the damage to the vehicles, and demanded payment of the appraised amounts of the damaged vehicles and the excess cost to the Government based on the performance failure of the contractor. The agency sought $987,622, and interest of $38.63. Exhibit 34. On October 5, 2012, the contractor filed an appeal with the Board contesting the decision. Exhibit 36.

Discussion

In its motion for summary relief, the contractor posits that the issue is straightforward: which party bears the contractual responsibility for the flood damages to the general property (vehicles) that the contractor was storing for the agency pursuant to the contract?

> Under Clause H.2 of the contract, the Department had the discretion to direct VSE to purchase insurance covering General Property--and reimburse VSE for the cost of the insurance--or to be a self-insurer. The Department chose the latter course. . . . [The agency's] interpretation renders the remainder of Clause H.2 meaningless.

Contractor's Motion for Summary Relief at 1. The agency, in its motion for summary relief, agrees that the issue is who is liable for the damages to the general property, but looks beyond the insurance provision. It asserts that the contract required the contractor to care for property within its control, thereby making the contractor liable. It would not limit analysis to the insurance clauses, but notes that clause H.2 expressly makes the contractor liable for the damage.

Contract Interpretation

The contractor was responsible for maintaining the general property in the condition as received. The contractor did not satisfy this basic contract requirement. Under the contract, the contractor was liable for the damage to the vehicles.

The insurance clauses do not alter the responsibilities of the contractor or shift liability away from the contractor. Rather, the clauses provide a means for the contractor to be paid, as a reimbursable cost, for insurance. Under this contract, the cost of liability insurance for general property was not an expressly reimbursable cost (unless the contracting officer required such insurance, which did not here happen). The agency was not a self-insurer. The contractor received payment under the contract for costs and fees; those payments reflected the liabilities and obligations of the parties. The final sentence of clause H.2 emphasized that the contractor, not the agency, would be liable for damage.

Looking Outside the Contract

Beyond the plain language, the discussions leading to the increase in the fixed fee for the contract in question serve as further evidence that the contractor interpreted the contract as making it liable for damage to the general property. It is inconsistent for the contractor to have obtained the greater fixed fee in light of its potential liabilities and now contend that those liabilities were other than it described upon entering into the contract.

Contractor Contentions

The contractor does not accurately pose the question when it states, "Under Clause H-2 of the contract, the Department had the discretion to direct VSE to purchase insurance covering General Property--and reimburse VSE for the cost of the insurance--or to be a self-insurer." Those are not the only options available. An assumption in the phrasing is that the contractor had no liability for the general condition of the property. That is an incorrect assumption. The contract does not state that the agency was a self-insurer for general property within the control of the contractor. The agency did not have to direct the contractor to purchase insurance. Absent specific direction by the contracting officer to purchase insurance, the contractor would not be reimbursed the cost directly under the contract. The contractor had the choice to purchase insurance or become a self-insurer. It opted for the latter. The increased fees it received were paid expressly in recognition of the increased risks.

Contrary to the views of the contractor, this interpretation permits the contract to be read consistently as a whole. The first sentence of clause H.2 discusses requiring the

contractor to provide and maintain greater insurance liability for loss or damage to general property without specifically identifying to what the "greater insurance liability" refers. The contractor states that if the contractor always was liable for loss or damage to general property there would never be a need for the agency to require insurance. However, the contract placed the initial burden on the contractor to demonstrate to the agency why further insurance was required. The situation of the contractor's coverage and the value of any particular item or items, whether general property or Government property, could dictate the need for insurance, additional or initial. Moreover, the contract recognized transitional periods when property would be stored at contractor-operated facilities and then at Government-operated facilities. What is here material is that the general property was under the control of the contractor when it was damaged, with the result that the property was not maintained, and could not be returned or sold, in the condition received. This made the contractor liable under the contract.

References to the predecessor contract, TOS-06-052, under which the agency issued a modification requiring the contractor to acquire and maintain property insurance and later issued a modification deleting the requirement for insurance, have not been shown to be material here. This contract required the contractor to maintain the condition of the property, did not identify the agency as a self-insurer, and included the final sentence in clause H.2. The contractor assumed the risks of damage to the property, whether or not it purchased insurance.

Decision

The Board **GRANTS** the agency's motion for summary relief on the issue of entitlement. The dollar amount of the liability remains in dispute.

JOSEPH A. VERGILIO
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

CANDIDA S. STEEL
Board Judge