ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Sarang-National Joint Venture | ) | ASBCA No. 54992 |
| | ) | |
| Under Contract No. N68950-02-C-0055 | ) | |

APPEARANCE FOR THE APPELLANT: Matthew J. Hughes, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TING

Sarang Corporation (Sarang) and National Wrecking Company (National) entered into a joint venture – Sarang-National Joint Venture (the Joint Venture) – under the Small Business Administration (SBA) Section 8(a) Mentor-Protégé Program to perform a demolition contract for the Department of the Navy (the Navy). National was authorized to take this appeal on behalf of the Joint Venture pursuant to an arbitration award. We have previously held that we have jurisdiction of the appeal. *See Sarang-National Joint Venture*, ASBCA No. 54992, 06-1 BCA ¶ 33,232. At issue is whether the Navy changed the contract after award by specifying that the percentage of the cost of the contract to be self-performed by the Joint Venture should be at least 25 percent.

FINDINGS OF FACT

1. By letter dated 2 October 2002, the SBA Chicago District Office notified the contracting officer at the Naval Public Works Center in Great Lakes, Illinois, that the SBA had accepted the Navy's offer for phased demolition of multiple recruit barracks buildings at Great Lakes Naval Training Station (the Navy Project). SBA's letter stated that:

> Our preliminary analysis indicates that this requirement meets the criteria for competition in the 8(a) program. You have designated the NAICS Code for this project as 235940.

(Ex. No. 1)

2. The Navy Project was being administered through the SBA as a Section 8(a) small business set-aside contract. The SBA has a Section 8(a) program entitled the Mentor-Protégé Program. Under this program, larger businesses that are not considered disadvantaged can perform portions of a Section 8(a) small business set-aside contract if the larger business qualifies as a mentor under the program and enters into a joint venture agreement with the small business contractor. (Award of Arbitrator dated 23 November 2004 (Arbitration Award) at 3)

3. Part 19 of the Federal Acquisition Regulation (FAR) (48 C.F.R. Part 19 (2002)) relates to Small Business Programs. FAR Subpart 19.3 relates to "DETERMINATION OF SMALL BUSINESS STATUS FOR SMALL BUSINES PROGRAMS." FAR 19.303 relates to "Determining North American Industry Classification System (NAICS) codes and size standards." It provides that the contracting officer "shall determine the appropriate NAICS code and related small business size standard and include them in solicitations above the micro-purchase threshold." FAR 19.303(a). FAR 19.303(c) provides that the contracting officer's determination is final unless appealed to the SBA's Office of Hearings and Appeals (OHA) within 10 calendar days after the issuance of the initial solicitation. FAR 19.303(c)(1).

4. FAR Subpart 19.10 pertains to "SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM." The purpose of this program is to "[a]ssess the ability of small businesses to compete successfully in certain industry categories without competition being restricted by the use of small business set-asides." This portion of the program is limited to the industry groups listed in FAR 19.1005 (48 C.F.R § 19.1003 (2002)). At the relevant time, FAR 19.1005 (48 C.F.R. § 19.1005 (2002)) listed "Special Trade Contractors" as "Subsector 235." Among the "Special Trade Contractors" listed was NAICS Code "23594[0] – Wrecking and Demolition Contractors." We find those in the business should be familiar with "Subsector 235" and with NAICS Code 235940. It is undisputed in this appeal that NAICS Code 235940 refers to a "Special Trade Contractor."

5. On 4 December 2002, the Department of the Navy issued Solicitation No. N68950-02-R-0055 seeking bids for the demolition of a number of buildings at Great Lakes Naval Training Center, Great Lakes, Illinois. Bidders were to submit bids for the demolition of the above and below ground structures of five buildings and for the

demolition of the above and below ground structures of five other buildings as an option. (R4, tab 1 at 1, 45-46 of 50)

6. The solicitation incorporated by reference in Section 00700, "CONTRACT CLAUSES," FAR 52.219-18, NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8(a) CONCERNS (JUN 1999) but did not include FAR 52.219-14, LIMITATIONS ON SUBCONTRACTING (DEC 1996). (R4, tab 1 at 31-34 of 50)

7. Had the Navy incorporated FAR 52.219-14 into the solicitation, that clause would have provided:

> (a) This clause does not apply to the unrestricted portion of a partial set-aside.
>
> (b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for --
>
> (1) *Services (except construction).* At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.
>
> (2) *Supplies (other than procurement from a nonmanufacturer of such supplies).* The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.
>
> (3) *General construction.* The concern will perform at least 15 percent of the cost of the contract, not including the costs of materials, with its own employees.
>
> (4) *Construction by special trade contractors.* The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

(R4, tab 11 at 4) For set-asides for small business, FAR 15.508(e) mandated the inclusion of this clause in "solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed $100,000."

8. Section 00100, "INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS," incorporated by full text, a number of clauses, among them, Clause 52.219-1 "SMALL BUSINESS PROGRAM REPRESENTATIONS (APR 2002) ALTERNATE I (APR 2002)." This clause provided:

> (a)(1) The North American Industry Classification System (NAICS) code for this acquisition is 235940.

(R4, tab 1 at 24 of 50)

9. Sarang Corporation is an Illinois corporation certified as a Section 8(a) contractor by the SBA. Bineet Sarang (Sarang) is President of Sarang Corporation, Sarv Singh (Singh) is an estimator employed by Sarang Corporation, and Tanweer Mallik is the quality control manager employed by Sarang Corporation. (Arbitration Award at 2) National Wrecking Company (National) is an Illinois corporation. Allen Mandell is the President of National; Sheldon Mandell (Mandell) is Chairman of the Board of National; and Joseph F. Naumes (Naumes) is Vice President of National. (Arbitration Award at 3)

10. Neither Sarang nor National appealed the NAICS Code 235940 designation by the CO.

11. The record shows that on 20 December 2002, Gary Barth of Colfax Corporation (Colfax), which would ultimately perform a part of the Sarang-National Joint Venture contract, sent an e-mail to Marla Littlefield (Littlefield), a contract specialist at the Navy's Engineering Field Activity, Midwest (EFA Midwest). The e-mail asked a number of questions, among them: "If the successful 8A SBA bidder hires a subcontractor to perform certain work, does that subcontractor also need to be 8A SBA certified?" The e-mail said to refer to "Mr. Joe Naumes (Naumes) at National Wrecking Company" if there are any comments or questions. (Ex. No. 1) The relationship between Colfax and National Wrecking and that between Barth and Naumes are not clear on the record.

12. Forwarding Barth's questions to Bob Olson (EFD South) with a copy to Janis Kaiser (Kaiser) (EFA Midwest), Littlefield said in her 23 December 2002 e-mail, "Please help me answer these questions." The e-mail referenced the solicitation for the contract eventually awarded to Sarang-National Joint Venture. With respect to the question posed, Kaiser provided the following answer by e-mail on 2 January 2003:

> Subcontractors to an 8(a) Prime Contractor do not have to be 8(a) certified concerns. However, the 8(a) Prime must meet the Limitations in Subcontracting clause (FAR 52.219-14)

> and be able to perform at lease [sic] 15% of the cost of the contract.

(Ex. No. 2)

13. A sign-in sheet in the record shows that the Navy conducted a pre-proposal conference and site walk on the work which was the subject of the solicitation on 7 January 2003. Among the 38 attendees were Gary Barth and Alexander E. Tenant of Colfax, Arthur Mandell and Joe Naumes of National Wrecking Company, and Sarv Singh, project manager of Sarang Corporation. (Ex. No. 4)

14. In late December 2002, Sarang asked National to form a joint venture to perform the Navy Project. At that time Mandell informed Sarang that National would not be interested unless it were to perform all of the demolition work and Sarang agreed. Sarang presented National with a proposed joint venture agreement which provided for at least 15% self-performance of the cost of the contract pursuant to the requirements of FAR 52.219-14. (Arbitration Award at 3-4)

15. On 10 January 2003, the Navy issued Amendment No. 02 to the solicitation. The amendment answered a number of questions posed by potential bidders. Question No. 14 and its answer are as follows:

> 14. If the successful 8a SBA bidder hires a subcontractor to perform certain work, does that subcontractor also need to be 8a SBA certified? Subcontractors to an 8(a) Prime Contractor do not have to be 8(a) certified concerns. However, the 8(a) Prime must meet the Limitations in Subcontracting clause (FAR 52.219-14) and be able to perform at least 15% of the cost of the contract.

(R4, tab 5 at 5)

16. Sarang on behalf of Sarang Corporation and Naumes on behalf of National executed the "Joint Venture Agreement Between Sarang Corporation And National Wrecking Company" (the Joint Venture Agreement) on 16 and 17 January 2003 respectively. The Joint Venture Agreement was effective as of 1 January 2003. (R4, tab 3 at 1 of 14 and 14 of 14)

17. Article 22 of the Joint Venture Agreement states that "[t]he JOINT VENTURE will perform at least 15% of the cost of the contract per requirements of FAR 52.219-14" (R4, tab 3 at 12 of 14).

18. At some point, the Joint Venture submitted its Joint Venture Agreement to the SBA for approval. On 9 April 2003, the SBA in Washington, D.C., approved the agreement. The approving letter stated:

> The request by Sarang Corporation to enter into a joint venture agreement with National Wrecking Company has been approved. The approval grants authority for the firms doing business as the joint venture to enter into a contract to perform the terms of RFP NO. N68950-02-R-0055 Demolition of Multiple Barracks and miscellaneous Buildings, at the RTC Great Lakes, Illinois.

(Ex. No. 5)

19. On 16 April 2003, the Navy awarded the Joint Venture the contract based on its Alternate A bid in the amount of $2,796,000.00 (R4, tab 6). Shortly after the contract was awarded, on 22 April 2003, Naumes prepared and sent to Sarang by facsimile a one-page chart identifying the portions of work that were the responsibility of Colfax Corporation, National and the Joint Venture. The document showed National as the party responsible for contaminated soils at the price given by National and included in the Alternate A bid. (Arbitration Award at 9-10)

20. In August 2003, Sarang first told National that Sarang did not believe that the contaminated soils were to be part of National's subcontract. At that time, two buildings had been demolished. On 15 August 2003, four months after the Navy contract was awarded, Sarang instructed Tanweer Mallik to draft a subcontract for National that did not provide for the remediation of contaminated soils. Naumes reviewed and marked up the National subcontract to include remediation of contaminated soils and fixed the price to include that work. The only dispute regarding the two drafts of the National subcontract was whether the agreement should include the remediation of contaminated soils at the price Naumes submitted for that work and included in the Alternate A bid. (Arbitration Award at 11-12 of 14)

21. Apparently, National believed that it had the right to be a subcontractor to the Sarang-National Joint Venture, and that scenario could only occur if the Joint Venture was required to perform only 15% of the cost of the contract, not any cost exceeding 15%.

22. By letter dated 29 September 2003, on Sarang-National letterhead, Sarang forwarded to the Navy Resident Officer in Charge of Construction (ROICC) its subcontractor plan for approval. The plan showed that, excluding overhead and profit,

75.59% of the contract amount would be subcontracted and 24.41% of the contract amount would be performed by the Joint Venture. Sarang's letter went on to say:

> Since this contract is awarded under NAICS code 235940 we would also like clarification on the percentage of work to be performed by the JV with its own employees to ensure compliance with the right percentage. We interpret that to be 25%.

(R4, tab 12)

23. There is no evidence that Sarang did not know the solicitation was issued under NAICS Code 235940, or that Sarang did not know NAICS Code 235940, Wrecking and Demolition Contractors, designated a specialty trade, which would invoke FAR 52.219-14(b)(4) not FAR 52.219-14(b)(3).

24. After receiving Sarang's letter to the ROICC, Naumes on behalf of the Joint Venture partner National wrote the ROICC the same day, 29 September 2003. His letter stated that "Sarang did not consult with National Wrecking prior to sending the letter and, as a partner in a joint venture, Sarang had no authority to send such a letter without National Wrecking's approval." Naumes' letter went on to say that National disagreed with Sarang's conclusion that the Joint Venture must perform 25% of the work. The letter stated that "the joint venture agreement dated January 16, 2003, which was preapproved by the SBA, provides that the joint venture must perform 15% of the work which is in accordance with federal regulations." (R4, tab 13)

25. The contracting officer's (CO) 2 October 2003 reply advised that "[t]he intricacies and details of the joint venture agreement should be discussed with the SBA. Any further inquiries regarding a clarification or a determination about the percentage of work to be performed by the members of the Sarang-National Joint Venture should be directed to the SBA." (R4, tab 14)

26. Naumes' letter of 21 October 2003 to the CO questioned why there was any discussion regarding the percentage of work to be performed by the Joint Venture. The letter pointed out that Item No. 14, Amendment No. 0002 to the solicitation, and the Joint Venture Agreement approved by the SBA both required the Joint Venture to self-perform 15% of the work. The letter charged Sarang with ignoring the contract documents and petitioning for an increase in the percentage of self-performance "in order to further his agenda with regards to subcontractor work items in dispute between the partners." (R4, tab 15)

27. On 31 October 2003, the Navy CO unilaterally issued Modification No. P00002, effective 16 April 2003. The modification stated that its purpose was to "further clarify the application of the clause at FAR 52.219-14 *Limitation in Subcontracting* to this contract and incorporate attached (FAR Clause 52.219-14 Limitations in Subcontracting) into this contract N68950-02-C-0055." (R4, tab 11 at 3-4)

28. Modification No. P00002 provided that FAR 52.219-14, LIMITATIONS ON SUBCONTRACTING (DEC 1996), was being inserted as prescribed in FAR 19.508(e) or 19.811-3(e). The modification set out the full text of FAR 52.219-14, and provided the following explanation for the change:

> The clause states that in the case of General Construction the concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees. However, the clause goes on to state that in the case of construction by special trade contractors the concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.
>
> The solicitation and resulting contract were issued under the 1997 NAICS code 235940 Wrecking and Demolition Contractors, which is a specialty trade as categorized by North American Industry Classification System. **Therefore, the requirement for at least 25 percent of the cost of the contract, not including the cost of materials, must be performed by Sarang/National Joint Venture.**
>
> This amendment should provide further clarification to Amendment 0002 in which the Navy responded that in accordance with FAR 52.219-14 *Limitation in Subcontracting* the 8(a) prime be able to perform at least 15% of the cost of the contract. The 15 percent requirement applies strictly to general construction. The referenced clause goes on [to] cover the 25 percent, as applicable to construction by special trade contractors.

(R4, tab 11 at 4)

29. Upon receiving unilateral Modification No. P00002, Naumes by letter dated 7 November 2003 to the CO reiterated that both the Navy's contract with the Joint Venture and the Joint Venture Agreement, pre-approved by the SBA, required the Joint Venture to self-perform 15% of the work. The letter said that if the contract was

modified to require 25% self-performance, "such a modification will result in additional cost to the Joint Venture." The letter went on to request that the CO please advise "if the Navy still . . . wishes to modify the contract to require 25% so that the Joint Venture can submit its proposed modification to the contract price." (R4, tab 16)

30. On 1 December 2003, Sarang filed with the American Arbitration Association a Demand for Arbitration against its joint venture partner National. Sarang's demand stated that the nature of the dispute is "what work will be performed by the Joint Venture to comply with FAR 52.219 [sic]"[1] (Arbitration Award at 1).

31. By letter dated 14 January 2004, Naumes, purporting to represent Sarang-National Joint Venture, and on Sarang-National Joint Venture letterhead, filed a claim with the CO challenging the Navy's 31 October 2003 unilateral modification. The claim contended that the Joint Venture's contract with the Navy as well as the Joint Venture Agreement pre-approved by the SBA prior to award only required the Joint Venture to self-perform 15% of the cost of the contract. The "claim" also asserted that "[t]he Navy has no authority to change the percentage on a unilateral basis." The letter asked for a ruling from the CO "within the next 60 days." (R4, tab 17)

32. After holding hearings and considering the evidentiary record, briefs and arguments of the joint venture partners, the arbitrator issued his "AWARD OF ARBITRATOR" on 23 November 2004.

33. With respect to the issue pertinent to this appeal, the arbitration decision found:

> Because Sarang Corporations's action which caused the Navy to change the applicable FAR provision from subprovision (b)(3) to subprovision (b)(4) were not approved by the Executive Committee in breach of the Joint Venture Agreement, and because that change materially affected one of the Joint Venture partners, National must have the opportunity to endeavor to change the percentage. For that reason, the Arbitrator finds that National should be permitted to proceed on behalf of the Joint Venture to contest this decision by the Navy and seek the determination that subprovision (b)(3) rather than subprovision (b)(4) is

[1] Through a preliminary hearing, the arbitrator clarified the scope of arbitration. Among the matters clarified was that "the proper regulatory citation was FAR 52.219-14 rather than the erroneous citation in the Demand for Arbitration" (Arbitration Award at 1-2).

> applicable. In the event it is determined that subprovision (b)(3) is applicable, the applicable provision with respect to the National subcontract will be reduced to 15%.

(Arbitration Award at 24-25)

34. On 3 December 2004, Naumes resubmitted the 14 January 2004 claim to the CO for a decision. Lacking a decision from the CO, Naumes appealed its 14 January 2004 claim in the name of the Joint Venture on the basis that the CO had failed to issue a decision. The Board docketed the appeal as ASBCA No. 54992 on 25 April 2005.

## DECISION

National argues that the Joint Venture "had a contractual right to expect the self performance requirement to be 15 percent." This right is said to have been derived from Amendment No. 02 and from SBA's approval letter of the Joint Venture Agreement. National contends that the Navy and the SBA having made an error in approving the 15 percent self-performance requirement, could not unilaterally by Modification No. 00002 "change the requirement to 25 percent." (App. br. at 2) National contends that "the change in percentages dramatically impacts how Sarang National performs the Work and also exposes Sarang National to potential adverse consequences if it does not meet the self-performance requirement." It contends that "the Modification should be treated as a change to the Contract for which Sarang National should be compensated." (App. br. at 3)

We understand it is in National's interest to limit the percentage of self-performance by the Joint Venture to no more than 15 percent of the cost of the contract. We also understand that it is National's position that if the Joint Venture's self-performance could be so limited, then it would be entitled to perform the remediation of contaminated soils portion of the contract work as a subcontractor and not as a part of the Joint Venture. This is an issue between Sarang and National. In this appeal, we decide only whether Sarang and National could rely on only a part of Amendment No. 2 in formulating their bid and then claim Modification No. 00002 constituted a change to the contract.

We note that FAR 52.219-14 referenced in Amendment No. 02 covers four types of contracts: (1) Services, (2) Supplies, (3) General construction, and (4) Construction by special trade contractors. Subprovision (b)(3), General construction, requires "at least 15 percent of the cost of the contract" not including the costs of materials to be self-performed. Subprovision (b)(4), Construction by special trade contractors, requires "at least 25 percent of the cost of the contract" not including the cost of materials to be self-performed. (Finding 7)

Although the Navy referred generally to FAR 52.219-14, the Limitations on Subcontracting clause in Amendment No. 02, we believe the Navy mistakenly referred to performing "at least 15% of the cost of the contract," which was the self- performance requirement for General construction under FAR 52.219-14(b)(3). For Construction by special trade contractors, Amendment No. 02 should have referred to performing "at least 25% of the cost of the contract" as required under FAR 52.219-14(b)(4). The source of the mistake was the e-mail answer received from EFA Midwest on 2 January 2003 (finding 12). The mistake was compounded when Sarang and National incorporated the Amendment No. 02 language that the Joint Venture will perform "at least 15% of the cost of the contract per requirement of FAR 52.219-14" into Article 22 of the Joint Venture Agreement (finding 17).

Notwithstanding the mistakes and SBA's approval letter, however, we believe that both Sarang and National should have known better. It is undisputed that the solicitation included Clause 52.219-1 which provides in (a)(1) that "[t]he North American Industry Classification System (NAICS) code for this acquisition is 235940" (finding 8). This NAICS Code was set forth in the FAR and the C.F.R. We have found that those in the business, such as Sarang and National, should be familiar with NAICS Code 235940. It is also undisputed that NAICS Code 235940 designated "Wrecking and Demolition Contractors" as one of the "Special Trade Contractors." (Finding 4)

While Amendment No. 02 stated that the prime contractor must be able to perform "at least 15% of the cost of the contract," it also required compliance with the Limitations on Subcontracting clause at FAR 52.219-14 (finding 15). We believe exercise of due care would require Sarang and National to understand the limitations in FAR 52.219-14 before they bid. Upon reading FAR 52.219-14, it would have been clear that NAICS 235940 – Construction by special trade contractors – required at least 25 percent self-performance. When interpreting the language of a contract, we must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983)

Notwithstanding the Navy's mistakes, we conclude that exercise of due care on the part of National should have discovered that FAR 52.219-14(b)(4) (at least 25 percent self-performance) rather than FAR 52.219-14(b)(3) (at least 15 percent self-performance) should apply to the procurement. While National has maintained that it relied on Amendment No. 02 in concluding that the Joint Venture was to self-perform 15 percent of the cost of the contract, we note that Sarang, on the other hand, has not asserted that it did not know that self-performance for the prime contractor -- the Joint Venture -- would be at least 25 percent. The subcontractor plan Sarang forwarded to the ROICC in

September 2003 suggests that it may have known all along that self-performance would be at least 25 percent (finding 22).

For the foregoing reasons, National's appeal on behalf of the Joint Venture is denied.

Dated: 17 July 2006

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
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. 54992, Appeal of Sarang-National Joint Venture, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals