ARMED SERVICES BOARD OF CONTRACT APPEALS

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

APPEARANCES FOR THE APPELLANT: Mr. Joseph F. Naumes
Chicago, IL

J. Cobbie de Graft, Esq.
Herndon, VA

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
Audrey J. Van Dyke, Esq.
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Naval Facilities Engineering Command
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND TO DISMISS PENDING SUBMISSION OF AN EQUITABLE ADJUSTMENT CLAIM AND ON JOINT VENTURER SARANG'S MOTION TO DISMISS

In this appeal, we are presented with an unusual situation where one member of a joint venture that is a party to a Navy contract wants to appeal a contracting officer's failure to issue a decision on a claim it submitted on behalf of the joint venture pursuant to an arbitration award, and the other member of the joint venture objects to the appeal. J. Cobbie de Graft, Esq. represents the Sarang Corporation side of Sarang-National Joint Venture. Mr. Joseph F. Naumes, Vice President of National Wrecking Company, represents the National Wrecking Company side of Sarang-National Joint Venture. In light of the arbitrator's decision that National is permitted to proceed on behalf of the Joint Venture on this appeal, further participation on the part of Sarang's counsel is not necessary (*see* finding 25). The government moves to dismiss on the ground that the Board has no jurisdiction unless both members of the joint venture agree to appeal, and on the ground that the appeal, seeking declaratory relief, is really a claim for money, and the Board has discretion in this instance to dismiss the appeal pending submission of an equitable adjustment claim.

FINDINGS OF FACT

1. In December 2002, the Department of the Navy (the Navy or the government) issued Solicitation No. N68950-02-R-0055 seeking bids for the demolition of a number of buildings at Great Lakes Navy 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 (the Navy Project). The solicitation included 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) (*see* finding 19). (R4, tab 1 at 1, 31 and 45-46 of 50)

2. Sarang Corporation is an Illinois corporation certified as a Section 8(a) contractor by the United States Small Business Administration (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. (Award of Arbitrator dated 23 November 2004 (Arbitration Award) at 2)

3. 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)

4. The Navy Project was being administered through the SBA as a Section 8(a) small business set-aside contract. Sarang Corporation was eligible to bid on the Navy Project as a Small Disadvantaged Business. (Arbitration Award at 3)

5. 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. (Arbitration Award at 3)

6. 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)

7. On 10 January 2003, the Navy issued Amendment No. 02 to its 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)

8. 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)

9. Article 5 of the Joint Venture Agreement relating to "Management of Partnership Affairs," provides in relevant part, the following:

> A. Executive Committee. The Partners of JOINT VENTURE will select the Executive Committee. Managing venture parner [sic] will report to Executive committee. The Executive Committee will consist of two members each from SARANG and NATIONAL. "[sic] The Executive Committee shall be composed of Bineet Sarang and Sarv Singh of SARANG and Sheldon Mandell and Joe Naumes, of NATIONAL. The Executive Committee shall have exclusive and complete control over the management of the JOINT VENTURE's business and affairs. No action affecting the JOINT VENTURE'S business and affairs shall be taken without the approval of a majority of the members of the Executive Committee. The Executive Committee shall have the authority to delegate to the Managing Venture [Partner] such authority as a majority of the members of the Executive Committee deems appropriate. 8(a) participant "SARANG" shall act as a Managing Ventures partner for this project, and Bineet Sarang of "Sarang" will act as Project Manager responsible for the performance of the 8(a) contract.

(R4, tab 3 at 2 to 3 of 14)

10. 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)

11. Article 10 of the Joint Venture Agreement relating to "Dispute Resolution" provides, in relevant part, as follows:

> 10. Dispute Resolution. Disputes will be settled by arbitration selected by SARANG & NATIONAL company representatives. Beyond this, if disputes or controversies between the parties arising out of or relating to the Joint Venture Agreement including, without limitation, a dispute or controversy relating to the construction of any provision or the validity or enforceability of any term or condition (including this paragraph) or of the entire Agreement, or any claim that all or any part of this Agreement (including this provision) is void or voidable, then it shall be submitted to arbitration in accordance with the commercial rules of arbitration of the American Arbitration Association in Chicago, Illinois. Each Partner shall bear its own costs in any such proceedings and the Partners shall equally share the cost of the arbitrator. *The decision of the arbitrator shall be final and binding upon the parties* and may be enforced in any court of competent jurisdiction. Both parties agree that continued performance of the Contract and/or JOINT VENTURE agreement terms shall not be excused by either party during the time the parties are engaged in arbitration of any dispute as provided here."

(Emphasis added) (R4, tab 3 at 9 of 14)

12. On 16 April 2003, the Navy awarded the Joint Venture the contract based on its Alternate A bid (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)

13. 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)

14. 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)

15. 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 pre-approved by the SBA, provides that the joint venture must perform 15% of the work which is in accordance with federal regulations." (R4, tab 13)

16. 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 future 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)

17. 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 had ignored the contract documents and petitioned 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)

18. 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 *Limitations 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)

19. 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 text of FAR 52.219-14:

> (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) S*upplies (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)

20. Modification No. P00002 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% requirement applies strictly to general construction. The referenced clause goes on cover the 25 percent, as applicable to construction by special trade contractors.

(R4, tab 11 at 4)

21. 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)

22. 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 52.219-4 [sic]"[1] (Arbitration Award at 1).

23. 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)

24. 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.

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

> Because Sarang Corporation's actions 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 applicable. In the event it is determined that subprovision

[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)

> (b)(3) is applicable, the applicable provision with respect to the National subcontract will be reduced to 15%.

(Arbitration Award at 24-25)

26. Consistent with its findings, the Arbitration Award ordered:

> 5. National, on behalf of the Joint Venture, may, at National's sole expense, challenge the October 31, 2003 decision by the contracting officer of the Navy unilaterally modifying the Navy Contract. The challenge may include petitioning the contracting officer or pursuing such other remedies as National may in its discretion determine. Sarang Corporation's participation, if any, in this dispute with the Navy shall be limited to acting on its own behalf at its own expense to the extent such participation is permitted by applicable law.

(Arbitration Award at 27-28)

27. On 1 December 2004, National filed an application for confirmation of the arbitration award in the Circuit Court of Cook County. Sarang responded with its answer, in which it sought to vacate and/or modify the arbitration award. The Circuit Court affirmed the arbitration award. Sarang Corporation then appealed the Circuit Court order to the Appellate Court of Illinois, First Judicial Circuit. In an order issued on 20 December 2005, the Appellate Court of Illinois affirmed the judgment of the Circuit Court confirming the arbitrator's award. *See National Wrecking Company v. Sarang Corporation*, No. 1-05-0637, *slip op*. at 1, 20.

28. On 3 December 2004, Naumes resubmitted the 14 January 2004 claim to the CO for a decision (compl., ex. H).

29. 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. In his 22 April 2005 COMPLAINT/NOTICE OF APPEAL, Naumes requested that "the Armed Services Board of Contract Appeals issue a ruling (1) vacating the October 31, 2003 unilateral modification, (2) holding that self-performance requirement is 15 percent, and (3) granting such other relief as the Board deems appropriate" (compl. at 2). The appeal requested that the Board process the case under its "Small Claims (Expedited) and accelerated Procedures." The Board docketed the appeal as ASBCA No. 54992 on 25 April 2005.

30. On 5 May 2005, the Board wrote Naumes at the joint venture's address stating that it was not clear from his submission whether the appeal met the dollar threshold for expedited procedure ($50,000 or less) or accelerated procedure ($100,000 or less). Naumes was instructed to submit evidence of the amount in dispute and to specify which procedure -- expedited or accelerated -- it wanted to elect. Naumes notified the Board by letter dated 1 July 2005 that he elected to proceed under the expedited procedure without a hearing pursuant to Rule 11. In his subsequent letter dated 29 September 2005, Naumes advised the Board that he never received the Board's 5 May 2005 letter, and that "this appeal does not involve a dollar amount and so I view the claim as being for less than $50,000, making it eligible for the expedited procedures." On 7 November 2005, the Board advised Naumes that it would defer acting on the request for expedited procedure pending clarification of the amount in dispute.

31. On 29 August 2005, the government filed a motion to dismiss. Naumes responded to that motion in his 29 September 2005 letter.

DECISION

I.

Does the Joint Venture Agreement's "Dispute Resolution" Provision Authorize a Claim and Subsequent Appeal to This Board Pursuant to an Arbitration Award Decision by One of the Joint Venture Partners Over the Objection of the Other?

As its first ground for dismissal for lack of jurisdiction, the government contends that there was no accord between the partners of the Joint Venture whether to file a claim and appeal (gov't mot. at 1). The government argues that the Navy did not enter into a contract with National; that it entered into a contract with Sarang-National Joint Venture. The government says that without the signature of the Managing Partner, Sarang, and lacking support by the Joint Venture Executive Committee, there is no proof that the Joint Venture filed a claim. The government argues that "without a claim, appeal and complaint filed by the Joint Venture, there can be no jurisdiction by the ASBCA over this proceeding." (Gov't mot. at 6[2])

National's 29 September 2005 response argues that any disagreement between the joint venture partners was resolved by arbitration, and the arbitration award authorized National to proceed with the claim on its own "on behalf of the Joint Venture without any signature or other approval by Sarang." National also argues that "[a]lthough Sarang's

[2] The government's motion to dismiss is not page-numbered. For ease of reference, we have numbered the 11-page motion.

approval is not required because of the [Arbitration] Award, Sarang has clearly given such approval by not objecting"[3] (resp. at 2-3).

National's response also argues that the claim it advanced does not present a monetary issue. But it went on to say that would be the case only "if it is ultimately decided that the terms of the contract can not be modified unilaterally and the correct percentage is 15%." (Resp. at 5) Elsewhere in its response, National contends that unilaterally incorporating FAR 52.219-14(b)(4) requiring 25% self performance "dramatically alters the terms of the contract. . . . [I]f the Joint Venture is required to self-perform a certain percentage of the contract, the Joint Venture will have to alter the manner in which it performs this contract by reducing its subcontracts, hiring more of its own employees to perform the work, and other administrative and supervisory matters," and the unilateral modification would have a "wide spread impact on the Joint Venture's performance of this project." (Resp. at 3-4)

After its initial silence, Sarang finally retained counsel. Sarang's counsel responded to the government and National's submissions by letter dated 6 January 2006. The letter raised three points. First, Sarang argues that the arbitrator's opinion regarding National's authority to proceed on behalf of the Joint Venture was non-binding because nothing was raised before the arbitrator on the standing of National to proceed on behalf of the Joint Venture before the Navy or any other federal agency regarding the dispute. Second, Sarang argues that as the 8(a) participant, it was required by law to serve as the managing venturer of the Joint Venture in accordance with the SBA regulations. Sarang argues that it cannot relinquish its obligation to act as the managing venturer, nor can the opinion of an arbitrator force relinquishment of his legal obligation under the 8(a) regulations. Third, Sarang argues that given that dispute over whether Sarang or National should be deemed as representing the Joint Venture turns on the interpretation of the Joint Venture agreement itself, and not the contract between the Navy and the Joint Venture, this Board does not have jurisdiction to issue a ruling on this matter. We treat the points Sarang raised as its motion to dismiss.

We address first the Navy's first ground for dismissal on the basis that there is no accord between the joint venture partners to take this appeal, and Sarang's bases for

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[3] At the time National filed its response dated 29 September 2005, Sarang had not objected to the appeal. On 12 October 2005, J. Cobbie de Graft, Esq., entered an appearance as counsel for Sarang Corporation. Mr. de Graft filed a response on 6 January 2006 stating that "Mr. Bineet Sarang, the principal of Sarang and rightful officer of the Joint Venture with the requisite legal authority, has not and does not intend to sign the claim filed by National on behalf of the Joint Venture. There is, therefore, to date no formal complaint by the Joint Venture before the Board" (letter of 6 January 2006 at 3).

dismissal to the effect that Sarang, as the managing partner of the Joint Venture, could not relinquish its legal authority not to authorize the filing of this appeal by National on behalf of the Joint Venture, and that the arbitrator had no authority to force Sarang to relinquish that authority. These are similar arguments.

These arguments are not well taken in the context of this case. By invoking the "Disputes Resolution" provision of the Joint Venture Agreement, Sarang relinquished its right to stop this appeal because Sarang had agreed, in advance and unqualifiedly, with SBA approval, that "[t]he decision of the arbitrator shall be final and binding upon the parties" (findings 11, 22). In this case, the arbitrator found that Sarang Corporation breached the Joint Venture Agreement because it caused the Navy to change the applicable FAR provision from subprovision (b)(3) to subprovision (b)(4) without Executive Committee approval. Because Sarang Corporation's action in this regard was unauthorized, the arbitrator decided that "National must have the opportunity to endeavor to change the percentage" by permitting National to proceed on behalf of the Joint Venture to contest the Navy's decision. The arbitrator did so because he believed the dispute must be resolved by the Navy and the SBA which imposed the regulation, and that he was without authority to resolve the dispute. (Arbitration Award at 23)

We also reject Sarang's argument to the effect that the arbitrator's opinion regarding National's authority to proceed on behalf of the Joint Venture was non-binding because nothing was raised before the arbitrator on the standing of National to proceed on behalf of the Joint Venture. The subject matter which gave rise to the arbitrator's decision was clearly before him. In his decision, the arbitrator wrote, "The parties have spent a great deal of time arguing which provision applies: Subprovision (b)(3) with its requirements that 15% of the cost of work must be self-performed; or subdivision (b)(4) with its requirement that 25% of the total cost of the work must be self-performed." (Arbitration Award at 22-23) In this regard, the "Dispute Resolution" provision of the Joint Venture Agreement did not limit the nature of the remedy the arbitrator could order, only that his decision shall be "final and binding." We believe that the remedy the arbitrator prescribed in this instance – authorizing National, the aggrieved partner, to contest the Navy's unilateral decision instigated by Sarang – was one within the arbitrator's authority and discretion to grant.

Sarang also argues that given that the dispute over whether Sarang or National should be deemed as representing the Joint Venture turns on the interpretation of the Joint Venture agreement itself, and not the contract between the Navy and the Joint Venture, this Board has no jurisdiction to issue a ruling on the matter. We disagree. We may evaluate our own jurisdiction at any time by interpreting the Joint Venture Agreement. *See Marshall N. Dana Constr., Inc. v. United States*, 229 Ct. Cl. 862, 865 (1982); *Berdick v. United States*, 612 F.2d 533, 536 (Ct. Cl. 1979) (*vacated and modified on other grounds*, 231 Ct. Cl. 993 (1982)); *Rosinka Joint Venture*, ASBCA No. 48143,

97-1 BCA ¶ 28,653 (interpreting joint venture agreement to authorize the general director of a multinational joint venture to initiate legal proceedings); *American Export Group International Services, Inc./Zublin Delaware, Inc., A Joint Venture,* ASBCA No. 42616, 93-1 BCA ¶ 25,373 (interpreting joint venture agreement to permit managing partner to conduct business on behalf of the joint venture without the authorization of the other partner).

Because Sarang agreed in advance in the "Dispute Resolution" provision of its Joint Venture Agreement with its joint venture partner, National, that once their dispute was submitted for arbitration, the arbitrator's decision would be final and binding, we hold that, in view of the arbitrator's decision, National is not now required to obtain Sarang's agreement to appeal on behalf of the Joint Venture the CO's failure to issue a decision on its claim to this Board.

II.

Do We Have Discretion to Retain Jurisdiction on What is Essentially a Legal Interpretation Issue?

In its complaint, National seeks a Board ruling "(1) vacating the October 31, 2003 unilateral modification, (2) holding that the self-performance requirement is 15 percent, and (3) granting such other relief as the Board deems appropriate" (compl. at 2). As its second ground for dismissal, the Navy argues that National is, in essence, seeking a declaratory judgment from the Board. The Navy argues that while the Board has authority to determine matters of contract interpretation, where the real issue is money, it is more appropriate to require the contractor to file a claim and certify the claim before taking jurisdiction (mot. at 10).

As for National's request for us to vacate the unilateral modification, the Navy points out it is important to distinguish between whether the Board is being asked to require the government to "back off of the 25% requirement and permit the contractor to perform only 15% of the work, or whether the Board is being asked to rule that the 25% requirement is a change to the contract, requiring that the contractor be reimbursed for the difference in cost between performing 25% of the work and 15% of the work" (mot. at 9). The Navy contends that the real question at issue is "whether the contractor is entitled to be reimbursed for any additional costs in performing 25% of the work itself as opposed to 15%" (mot. at 2).

We agree with the Navy that we are not empowered to order the Navy to vacate the 31 October 2003 unilateral modification. *Pemco Aeroplex, Inc.,* ASBCA No. 47402, 95-2 BCA ¶ 27,853 at 138,889 (Board has no authority to order CO to issue a modification); *Municipality of Anchorage, Wastewater Utility,* ASBCA No. 35492, 88-2

BCA ¶ 20,696 (Board has no authority to order the CO to amend the contract); *Maria Manges*, ASBCA No. 25350, 81-2 BCA ¶ 15,398 (Board may not grant relief in the nature of mandamus).

We address next the question of whether we should issue a declaratory judgment decision or dismiss this appeal and wait for an equitable adjustment claim. In this case, the arbitrator has decided what was to occur between the joint venture partners in the event that FAR 52.219-14(b)(4) were determined to be applicable. The Arbitration Award ordered that "[u]nless or until the Navy contracting officer grants the January 16 [sic] 2004 claim made by Naumes on behalf of the Joint Venture or an order is entered by a court or tribunal with appropriate jurisdiction modifying the Navy's unilateral modification of October 31, 2003, the Joint Venture shall take all steps reasonably required to assure that at least 25% of the cost of the Navy Contract, not including the cost of materials, is performed by Sarang Corporation or the Joint Venture" (Arbitration Award at 26, ¶ 4).

All that is left for us to decide in connection with the appeal authorized by the arbitration award is the legal question of whether FAR 52.219-14(b)(3) or FAR 52.219-14(b)(4) should apply. Under *Alliant Techsystem, Inc. v. United States*, 178 F.3d 1260, 1271, *rehearing denied*, 186 F.3d 1379 (Fed. Cir. 1999), we are given certain discretion to issue a declaratory judgment decision in situations "involving a fundamental question of contract interpretation or a special need for early resolution of a legal issue." In this case, we have no jurisdiction to overturn the CO's NAICS code determination. FAR 19.303 provides that the CO's NAICS code designation is final unless timely appealed to SBA's Office of Hearing and Appeals (OHA) within 10 days after the issuance of the initial solicitation. Our jurisdiction is therefore limited to the application of the NAICS code 235940 in terms of whether such application constitutes a compensable change under the circumstances of this case. This boils down to determining whether, when the original solicitation and resulting contract were issued under the 1997 NAICS code 235940[4], the issuance of unilateral Modification No. P00002 to clarify the application of that code in light of the confusion generated from Question/Answer No. 14 (finding 7) constituted a change. Under the unique circumstances here, we see no reason for dismissing the appeal to wait for the submission of an equitable adjustment claim.

[4] Unilateral Modification No. P00002 states that "[t]he 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" (R4, tab 11 at 4).

CONCLUSION

For reasons stated, the government's motion to dismiss for lack of jurisdiction on the basis that there was no agreement by the Joint Venture to appeal is denied. The government's motion to dismiss pending the submission of an equitable adjustment claim is also denied.

Dated: 10 March 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