

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

D. J. HAYCOOK CONSTRUCTION)
COMPANY,)
)
Petitioner,)
)
vs.) Case No. 03-4001BID
)
VOLUSIA COUNTY SCHOOL BOARD,)
)
Respondent.)
)
)
_____)

RECOMMENDED ORDER

This cause came on for hearing pursuant to notice on December 11 and 12, 2003, in Deland, Florida, before P. Michael Ruff, duly-designated Administrated Law Judge. The appearances were as follows:

APPEARANCES

For Petitioner: S. LaRue Williams, Esquire
Kinsey, Vincent, Pyle, L.C.
150 South Palmetto Avenue, Box A
Daytona Beach, Florida 32114

For Respondent: Theodore R. Doran, Esquire
Michael G. Dyer, Esquire
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STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner, D. J. Haycook Construction Company

(Haycook) was the lowest responsive bidder for an elementary school procurement project known as Elementary School "X," let by the Volusia County School Board and whether the Petitioner should have been awarded the contract.

PRELIMINARY STATEMENT

This cause arose upon the issuance of "an advertisement for bid" by the Volusia County School Board (Board) seeking sealed bids from contractors for the construction of a new elementary school for Volusia County, Elementary School "X." The bids were to be submitted on or before 2:00 p.m., August 6, 2003, at which time all bids would be publicly opened and read aloud. The advertisement for bid was issued on July 16, 2003, and the Board received eleven proposals in response to it. It opened and read all bids for Elementary School "X" on August 6, 2003, and determined that Haycook was the lowest bidder. Haycook's base bid was in the amount of \$7,599,000.00. The firm of Clancy and Theys Construction Company, Inc. (Clancy and Theys) was the third lowest bidder with a base bid of \$7,840,000.00. The second lowest bidder, Mark Construction Company, failed to extend its bid bond after the bid opening and during the pendency of this protest and therefore effectively withdrew its bid and is no longer in contention.

The selected bidder would serve as a general contractor responsible for the construction of the school with an

established project budget of \$8,000,000.00. The bids were opened and read on August 6, 2003, and after the bids were opened the Board, through its project architect Philip Daimwood, of Daimwood, Derryberry, Pavelchak Architects, P.A. (architect or Daimwood), began an investigation of the low bidder, in accordance with the Board's interpretation of the advertisement and solicitation specifications wherein the Board reserved the right to use sufficient time to investigate the bids and qualifications of the bidders. In this investigatory process the Board, through its architect, solicited information from the low bidder, Haycook, in order to ascertain that Haycook had the capability, based in part upon information from its earlier jobs or projects, to self-perform work in four areas: earthwork, structural steel, masonry, and concrete. A number of letter exchanges and at least one meeting between representatives of Haycook and the Board occurred in this regard.

Ultimately the Board took the position that Haycook's bid was not responsive because of failure to comply with all requirements of the solicitation advertisement and addenda. The Board thus awarded the contract to the third lowest bidder, Clancy and Theys, on October 14, 2003. Haycook timely protested the proposed award and the cause was forwarded to the Division of Administrative Hearings and ultimately to the undersigned administrative law judge. Upon waiver of the relevant time

period for setting of the hearing, the parties agreed to set the hearing on December 11 and 12, 2003, and the hearing proceeded as scheduled on those dates.

In its formal written protest Haycook questioned the school Board's authority to verify Haycook's experience and capability to, in effect, serve as its own subcontractor ("self-performing") in the work areas of structural steel, concrete, masonry, and earthwork. Haycook protested on grounds that the school board failed to follow its own rules and the bid documents in determining the lowest responsive bidder, and that Section 120.57(3)(f), Florida Statutes, prohibits consideration of submissions after the bid opening which amend or supplement a bid or proposal. Haycook also maintains that the rejection of its bid was grossly arbitrary and unfair by applying evaluation criteria not set forth in the school board's rules or bid documents, and that the Board improperly delved into Haycook's means, methods, and procedures of self-performing its work, misapplied the definition of "self-performed," and that the Board's inability to verify to its satisfaction prior self-performed work by Haycook on other past projects is not a legal criteria for rejection. Haycook maintains that the bid documents do not define "self-performance," nor do they require pre-qualified bidders to prove to the school board architect's satisfaction that the bidder has self-performed work on similar

school projects in the past, by proving the use of only salaried employees on Haycook's own payroll. Haycook takes issue with the school board's definition of "self-performance" and contends that its means, methods, and procedures for self-performing the work were not prohibited by the bid documents or any rules or regulations of the Board that relate to bidding of school board projects.

The school board maintains that it could not verify that Haycook had "self-performed" earthwork, structure steel, concrete, and masonry on prior school projects and that, based upon the Board's interpretation of self-performance, that Haycook's self-performance on its earlier projects really amounted to the use of "subcontractor" relationships and not self-performance. Because it did not list subcontractors in these four areas on the relevant bid document, and did not establish to the Board's architect's satisfaction that it would self-perform these areas of work with its own labor, supervision, and material resources, that Haycook had been non-responsive as to these four areas of work on its bid.

Haycook called four witnesses to testify at the hearing: Jack Dunlap, Reed Hadley, Harold Goodemote, and Dennis Haycook. Mr. Goodemote was presented as an expert witness. The parties agreed that Petitioner's Exhibits 1 through 9 and the Respondent's Exhibits 1 through 28, some of which Haycook also

used for its own exhibits, would be jointly offered and received into evidence. The Board called witnesses Patricia Drago, Philip Daimwood, Carl Gerken, Scott Stegall, Allen Green, Gary Parker, Steve Eckman, and Gary Ehrlich as its witnesses. Witnesses Stegall, Parker, Eckman, Green, Daimwood, and Gerken were presented as expert witnesses on behalf of the school Board.

Prior to the hearing the parties filed a Joint Pre-Hearing Stipulation setting forth contested and uncontested issues of fact and law. The school board also filed a Memorandum of Law prior to hearing. Upon conclusion of the hearing the parties ordered a transcript thereof which was submitted along with the parties' timely submitted Proposed Recommended Orders. The Transcript, the Proposed Recommended Orders, and the notes of the undersigned have been carefully read and considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. On June 13, 2003, the School Board of Volusia County authorized the issuance of a request for proposal for the construction of a new elementary school known as Elementary School "X." The proposed new school would be located in Orange City, Florida.

2. The school board issued an advertisement for the construction of Elementary School "X" and had it published. The

project architect for the Board prepared the solicitation documents constituting a "Phase III specifications" manual and three addenda.

3. The advertisement stated that "the school board expressly reserves the right to reject any and all bids and to waive informalities therein, and to use sufficient time to investigate the bids and the qualifications of the bidders."

4. Section 00430 of the solicitation required that all bidders list the name of the subcontractor for each type of the 12 areas of construction work for Elementary School "X" as follows:

'For each type of work' below, list the name of the subcontractor. List only one name on each line and only one subcontractor for each type of work. Various 'type of work' sub-contracts may have more than one subcontractor (re: roofing; metal roofing and membrane roofing), list each subcontractor accordingly. Use additional sheets, if required.

Additionally, Section 00430 provided:

The term subcontractor as used herein shall be defined in 2001, Florida Statute 713.01(27) - subcontractor means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract.

The deadline for submission of proposals in response to the solicitation was August 6, 2003. On August 6, 2003, Haycook's bid proposal and that of the second and third lowest bidders

were opened and read by the members of the school board's staff. Haycook listed itself as performing or "self-performing" in areas of earthwork, masonry, concrete, and structural steel on the required list of subcontractors form pursuant to section 00430 of the solicitation.

5. Subsequently, the project architect began to investigate the bids for the project. This was done through correspondence and direct contact between Haycook, the project architect, Mr. Daimwood, and the school board staff. This process began on August 8, 2003. As part of the evaluation process the architect verbally requested documentation from Haycook to verify its past and present abilities to self-perform in the four areas of earthwork, concrete, masonry, and structural steel, as well as by letters dated August 12, August 15, and August 25, 2003. Haycook responded to these information requests by letters of August 11, 13, and 28, 2003.

6. The bid documents for the school project included the bidding and contractual conditions, general conditions, technical specifications, and the drawings listed on pages 10D-1 to 10D-2. In order to have a responsive bid a bidder was required to comply with the bid documents when submitting its bid. The relevant bid documents at issue in this dispute are Section 0020, "invitation to bid," Section 00100, "instruction

to bidders," Section 00300, "bid form," and Section 00430, "list of subcontractors."

7. The bid documents also required each bidder to deliver a bid bond in the amount of five percent of its bid to accompany the proposal. After acceptance of the lowest responsive bid, and issuance of the contract award, a bidder was required to deliver a payment and performance bond in the amount of 100 percent of the contract price. There is no dispute that Haycook has a bonding capacity of 18 million dollars for a single project and 35 million dollars for aggregate projects and the bonding capacity is not in dispute.

8. The invitation to bid documents require that bidders be required to hold a current Certificate of Pre-Qualification issued by the school board at the time of bid opening. Haycook at all material times hereto held a Certificate of Pre-Qualification and was licensed to perform all work called for by the bid documents including, among others, self-performance of earthwork, concrete work, masonry, and structural steel.

9. The three bids received were in the amounts as follows:
(1) D. J. Haycook Construction Company: a base bid of \$7,599,000.00; Alternate One, \$189,000.00; Alternate Two, \$48,800.00; Alternate Three, \$21,000.00; (2) Mark Construction Company of Longwood, Florida: base bid of \$7,657,000.00, Alternate One, \$221,000.00; Alternate Two, \$50,000.00; Alternate

Three, \$20,000.00; (3) Clancy and Theys Construction Company of Orlando, Florida: base bid of \$7,840,000.00; Alternate One, \$230,000.00; Alternate Two, \$50,000.00; Alternate Three, \$21,000.00.

10. Section 00430 required each bidder to furnish a list of subcontractors defined as quoted above in the bid form. Section 00430 of the bid form also permitted a bidder to list itself as a subcontractor. The form provides: "A contractor may not list himself as performing a type of work unless he is self-performing and is a Florida licensed contractor for that type of work". Haycock was properly licensed at the time of bidding, and at all relevant times, to self-perform in the four areas of earthwork, structural steel, masonry, and concrete at issue in this case.

11. After the bids were opened and examined, Mr. Daimwood, the architect evaluating bids for the school board, requested that Haycock furnish a list of past projects where it had self-performed earthwork, structural steel, masonry, and concrete work. Haycock provided a list of examples of prior projects for which it had self-performed work in those areas on August 11, 2003. The list included five projects for earthwork, four projects for structural steel, seven projects for masonry, and seven projects for concrete. Thereafter, on August 12, 2003,

the architect requested additional information regarding self-performance of work in the four areas at issue.

12. Haycook provided the architect with the requested additional information on August 13, 2003, including a list of each project, the total cost of each project, the completion dates, as well as contact persons with their telephone numbers and including copies of qualifications of the subcontractors listed on Haycook's subcontractor list.

13. On August 25, 2003, the architect requested Haycook payroll records and workers compensation information for two of the listed projects of those Haycook had provided, that for Goldsboro Elementary School and Eustis Elementary School.

14. On August 28, 2003, Haycook sent a letter to the architect explaining that on the Goldsboro job the earthwork was self-performed by a combination of supervising and directing the work with salaried employees, with leasing of labor from an employment service, and hiring of labor by the cubic yard with a cap on the activity. Haycook also explained that structural steel work on the projects was self-performed by a combination of supervising and directing the work with salaried employees, leasing of labor from an employment service, hiring of labor paid by the foot to erect specific components of the job, as well as using salaried employees for the performance of specific activities, and including purchasing of fabricated materials and

then hiring crew labor and equipment on an hourly basis to erect them.

15. In the August 28, 2003, letter Haycook also explained, with respect to the self-performed masonry work on both the Eustis and Goldsboro jobs, that those areas of work were self-performed by purchasing fabricated material, supervising and directing the work with salaried employees, hiring labor by the unit price (for instance by the block) to lay the block, and hiring labor from an employee leasing service for specific activities as to those jobs.

16. Haycook also explained in the August 28, 2003, letter that a combination of the methods and means of performing delineated above and in that letter would be used for the activities listed on the subcontractor list on the relevant bid form for Elementary School "X". Haycook explained that it had priced and used its own costs for the activities listed on the bid form to arrive at the bid price for Elementary School "X".

17. Enclosed with the August 28, 2003, letter from Haycook were copies of its purchase orders and cost journals for the Goldsboro School, concerning earthwork, masonry, and structural steel activities and its vendor purchase orders and cost journals for the Eustis Elementary School's masonry work done by Haycook. The enclosures with the August 28, 2003, letter showed that Haycook had purchased the materials, performed the work

with its own employees, and performed work using additional outside labor in the areas of structural metals, prefabricated structures, earthwork, cast-in-place concrete, structural steel erection, and masonry work. Haycook also provided its proposals used on the Goldsboro project which consisted of concrete labor and structural steel labor.

18. The architect interpreted the term "self-performance" to mean labor with the contractor's own employees only. Based upon that restrictive interpretation, he concluded that he had not found adequate information demonstrating Haycook's having "self-performed" these types of work previously. Additionally, the architect opined that Haycook's intended self-performance on Elementary School "X" project at issue, in the four work areas in dispute, "is in our opinion, a subcontractor format."

19. Uncontroverted evidence adduced at hearing established that Haycook has extensive public school construction experience. The Petitioner's President, Dennis Haycook, has built more than 35 public schools and Haycook's project manager, Reed Hadley, who is assigned to the Elementary School "X" project, has built over 25 school projects. Dennis Haycook was also a principal of Mark Arnold Construction Company in the past, which was one of the largest public school contractors in Florida. In the past 10 years, with his own company, the Petitioner, Haycook, has built numerous school projects

including the Goldsboro school which was a \$7,000,000.00 project. The Goldsboro, Eustis, and other Haycook-built schools referenced during the hearing and in the evidence were all projects that were built within the authorized budget, were timely, and were of quality construction.

20. The Board ultimately rejected Haycook's bid on Elementary School "X" because of the architect's interpretation concerning "self-performance," i.e. that all work must be performed by employees on Haycook's payroll. The bid documents did not define "self-performance," nor do the bid documents require that labor used must be on the contractor's payroll in order for his performance to constitute "self-performance."

21. Haycook's witnesses were consistent in their testimony as to the definition of "self-performance": "self-performance," as customarily used in the construction industry, includes the contractor's purchasing of materials, performing part of the work with its own labor force, providing other labor not on the contractor's payroll, and directly supervising the work with the contractor's supervisory personnel. The term "subcontractor" is defined in the custom and usage of the construction industry, however, to mean someone or an entity that provides all labor, material, and equipment necessary to do the complete operation, as well as all supervision. It is more of a "total turn key operation." A subcontractor provides everything necessary to

finish the work, including supervision, and then merely answers to the general contractor in terms of responsibility for the quality of the job and its timeliness.

22. The school board's witnesses, expert and otherwise, gave interpretations of the concept of self-performance which were somewhat conflicting. Mr. Daimwood, the architect, opined that self-performance requires the contractors to use employees on its own payroll and make direct payment of workers' compensation for such employees. His opinion was that anything else would be a subcontractor relationship and not self-performance. He later testified, however, that paying labor not actually on Haycook's payroll could still constitute self-performance. Patricia Drago, of the school board staff, testified that if a contractor uses 10 employees on his payroll and uses 10 non-employees, this would be self-performance. If such a contractor has 10 employees and uses 11 non-employees, she was not sure whether this would constitute self-performance. Allen Green testified that self-performance of an area of work requires the majority of that work to be performed by the contractor's own employees, while other work could be performed by contract labor. He later changed his definition to require a contractor to have all employees on the payroll in order to self-perform. In other testimony, however, Mr. Green opined that if a contractor supplemented his labor with a couple of

additional masons and paid them by the piece, then he would no longer be self-performing. At still another point in his testimony he added that it would be dependent upon the stage of the project as to whether the contractor's use of contract labor is self-performing or subcontracting. He felt that if the contractor adds some additional masons near the end of a job, as opposed to the beginning, then he could still be self-performing.

23. Gary Parker is the Director of Facilities for the Lake County School Board. He testified that from his perspective, self-performance required the use of employees on the contractor's payroll. This definition, however, was not consistent with Lake County's course of conduct with the job that Haycook performed. Mr. Parker acknowledged that there had been no complaints by the architect or anyone else associated with the Eustis school project where Haycook listed itself as self-performing for masonry work, even though Haycook had retained a different entity to perform masonry labor (although not supply materials or supervision).

24. Scott Stegall, the Director of Capital Outlay for the Seminole County School Board, testified that self-performance would require a contractor to perform all work without the use of outside contractors, including labor. Yet Mr. Stegall acknowledged that Haycook listed itself as self-performing

masonry work on the Goldsboro school project and used a firm or entity known as Webber and Tucker to perform some masonry work, and that the Seminole County School Board had no dispute with this approach. Mr. Stegall's evaluation form for Haycook had stated that Haycook did not improperly substitute any subcontractors from the submitted list in that project. He later changed his definition of self-performance to acknowledge that a contractor could bring in laborers individually to perform without a "formal contract"; these informal labor contracts would not take it out of the self-performance category according to Mr. Stegall.

25. The evidence concerning the Lake County District's and Seminole County District's experience as to the Eustis school project and the Goldsboro school project with Haycook's performance, including Haycook's approach to self-performance, was satisfactory in terms of pricing and the quality and timeliness of the work performed. The perceived fear by the Respondent that Haycook's performance might be substandard or that it might "bid shop" amongst potential subcontractors, after the bid opening, if Haycook did not list all subcontractors on the bid response, and self-performed in the manner Haycook described in its evidence, has not been shown to have occurred with regard to any of Haycook's past projects. There has been no demonstration by preponderant evidence that the use of only

subcontractors listed or named in the bid response has resulted, in itself, in a lower price or better performance for the public by a contractor situated as Haycook.

26. The architect testified that one method of defining "self-performance" is to determine whether the entity performing work was a subcontractor as defined by the bid documents. If the work is not being performed by a subcontractor, then it is being performed by the general contractor or self-performance. As the term is used in the construction industry, a subcontractor generally furnishes materials, installs the work, and supervises its own work.

27. The bid documents define subcontractor as follows: "subcontractor means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract."

28. Preponderant, credible, and substantial evidence was presented by Haycook to show that Haycook's use of the term "subcontractor" was an entity that furnishes the materials, provides the labor, and the supervision, and undertakes the entire responsibility for that type or phase of the work. When a general contractor hires contract labor only, this excludes what is occurring from the definition of subcontractor, since the definition of subcontractor prevailing in this proceeding based upon the bid documents, takes out of that subcontractor

definition "a materialman or laborer." The preponderant credible evidence shows that when Haycook purchases materials and provides the labor, whether or not the labor is on Haycook's payroll, which Haycook then directly supervises, this, by definition, is not a subcontractor situation under the definition of that concept in the bid documents themselves.

29. The bid documents provide no definition for self-performance, but simply contain the following requirements: "a contractor may not list himself as performing a type of work unless he is self-performing and is a Florida licensed contractor for that type of work." Therefore, if a contractor meets these two requirements, he is responsive to this specification concerning when subcontractors should be listed or need not be listed in the bid response.

30. Haycook meets both of the two requirements for self-performing. Haycook's definition of self-performing work is consistent with and does not conflict with the definition of "subcontractor," which excludes materialmen and laborers.

31. Haycook's expert witness, Mr. Harold Goodemote, is a general contractor with 20 years experience, including 8 years as a project engineer and chief estimator for Foley and Associates Construction Company for many public school projects in the Orlando, Melbourne, and Daytona Beach area. Mr. Goodemote is also Vice-President of "Coleman-Goodemote"

which has been in existence for approximately 10 years and has built projects worth multi-millions of dollars for Daytona Speedway related entities.

32. It was established through Mr. Goodemote's testimony that it is customary in the construction industry to self-perform work by the contractor's purchasing of materials and using the contractor's own employees, along with "third party labor," to complete work under the direct supervision and control of the general contractor. The testimony of Mr. Reed Hadley and Mr. Haycock likewise establishes that it is common practice in the construction industry to self-perform work in the manner in which Haycock has performed it in the past. For example, both the Lake County and Seminole County School Boards allowed Haycock to list itself as self-performing where Haycock purchased masonry materials and used contract labor to install the masonry materials and components.

33. "Bid shopping" is a practice whereby a contractor submits a bid for a project and, after winning the bid, goes to its subcontractors or even to new subcontractors, not considered in the bid process, and attempts to get lower prices from them, versus the prices the contractor had when it submitted its bid. This allows more profit to be built into the job for the contractor or, if the contractor artificially bid low in order to get the job, tends to allow the contractor to restore profit

to the job for itself. The school board's rationale for requiring pre-bid opening listing of subcontractors is to prevent bid shopping after the bid is awarded in order to protect the competitive integrity of the bidding process. The listing of subcontractors is a practice of the Volusia County School Board and some other school boards in Florida.

34. Ms. Drago, in her testimony, acknowledged that a substantial number of school boards in Florida do not require a list of subcontractors to be provided with bid proposals, and she acknowledged that this does not mean that those school boards' bid processes lack credibility and competitive integrity. She was unaware of any examples in the Volusia County School Board's experience where a contractor listed itself as self-performing and then shopped subcontractors after the bid opening to obtain a better price.

35. The preponderant evidence of record does not establish that this has been the case with Haycook or other contractors on past Volusia County School Board jobs. This is in accord with Mr. Haycook's testimony, who described the detrimental effects such a practice could have on future relationships between a contractor and subcontractors in terms of having them available for later jobs, if a contractor became known for "beating down" subcontractors' prices. If a contractor had a reputation for engaging in that practice, in the future subcontractors' bids to

that general contractor would likely be higher, if he could get their bids, and this might result in that contractor having difficulty rendering bid proposals that were low enough to have a chance of being successful.

36. The bid documents give the school board the right to determine if each subcontractor listed by the bidders is qualified to perform the work and if not, to reject that subcontractor and require a replacement subcontractor. It is noteworthy that neither the architect nor the school board rejected Haycook as being unqualified to perform the work in any of the areas in which Haycook, in effect, listed itself as the subcontractor.

37. The bid documents do not provide that the school board may reject "sub-subcontractors" engaged by a subcontractor, nor does the school board examine the history and capabilities of sub-subcontractors that a subcontractor intends to use. Once a subcontractor is acceptable to the Board, there is no further review to determine what means, methods, and procedures the subcontractor uses to perform the work. The subcontractor can contract out all of the work to sub-subcontractors who are actually performing the work, and the Board might not even be aware of it. Therefore, its method or rationale of listing subcontractors and then investigating the subcontractors is no guarantee of ensuring quality of work. In fact, the more areas

of work that the general contractor does itself, the more direct control over performance the school board would have.

38. The school board apparently uses a different approach in the instance where a general contractor lists itself as a subcontractor for one or more types of work, i.e. is self-performing. The Board's practice in that situation requires the general contractor to list each contractor who may perform parts of the work. Therefore, the general contractor must list each contractor who will perform the work in each area while this standard is not applied to listed subcontractors.

39. The bid documents do not disclose to bidders the school board's unwritten definition and interpretation of "self-performance." They do not reveal that under the Board's interpretation a contractor must self-perform only with employees on its payroll; that a pre-qualified contractor licensed to perform work in a given area must prove that it has self-performed such work in the past with its own employees only; that general contractors will be treated differently from subcontractors on the subcontractors list, as to the listing of contract labor, and that even though the term "subcontractor" in the bid documents excludes "materialmen" and "laborers," the school board still considers contract labor as a subcontractor or subcontracting, that must be listed for self-performance work.

40. Haycook has substantial experience in bidding and performing work on public school projects, as does Mr. Haycook himself, with both Haycook and a prior company with which he was associated. Haycook had prepared a bid three or four months earlier on a prototype school project similar to Elementary School "X" and had extensive cost information obtained from its work on that project and from subcontractors, including those "bidding" Elementary School "X." Haycook maintains a large database of subcontractors and suppliers experienced in performing work and portions of the work necessary for the Elementary School "X" project, including cost information. It has a database of over 3,000 names useful in obtaining and providing labor for use on parts and subparts of any self-performed work. Prior to the bid, Haycook received the plans and specifications enabling it to determine the quantities of materials needed and the costs per unit for installing the materials and performing the necessary work.

41. Haycook had received subcontractor bids in each of the four areas that it later determined it would self-perform (earthwork, structural steel, concrete, and masonry). Because Haycook's "takeoffs," historical pricing information and recent bid information from another Volusia County prototype school indicated that it could self-perform the work at less cost than using the bids of subcontractors in those four work areas,

Haycook elected to self-perform the work and listed itself as the subcontractor in those four work areas. This was not a case where Haycook simply ran out of time to get subcontractors' bids in those four work areas and therefore simply listed itself as performing in the four work areas at issue due to time expediency. It was also not because Haycook intended listing itself as performing in the four subject work areas so that it would create an opportunity to get lower bids from unknown subcontractors after bid opening, in order to enhance its profitability and support a low bid, in terms of putting enough money in the job for itself.

42. As general contractor for the entire project, Haycook intended to provide general supervision of the entire project including subcontractors. With respect to self-performed work, Haycook intended to supply materials and components and to directly supervise and control the means, methods, and procedures of the self-performed work with contract labor.

43. Haycook's definition of "self-performance" for earthwork involved Haycook's renting equipment, retaining contract laborers to clear the site, place the fill (paid by the hour or by the yard), compact the fill, and grade the site. Haycook directly supervises self-performed work and schedules and manages it with Haycook's project manager and on-site superintendent.

44. The testimony of Reed Hadley and Dennis Haycock on behalf of Haycock established that Haycock had self-performed earthwork on other projects in the same manner as described above, satisfactorily for the owners. Specific project names and other project information showing earthwork self-performance by Haycock was provided to the architect as referenced above. Mr. Haycock established that Haycock had "self-performed" earthwork on 50 to 60 percent of its projects in the past.

45. Haycock's definition of self-performance of structural steel included engaging a licensed fabricator, as required by the bid specifications in this instance, hiring experienced labor erection crews, purchasing the materials and component parts, and directly supervising and managing the work, including scheduling of the labor crews. Haycock had performed structural steel on 10 to 15 percent of its past projects. Four examples of projects, self-performed in structural steel, were provided to the architect along with related detailed information.

46. Haycock's self-performance of concrete work included its purchasing of materials, hiring contract labor for footings, paid by the lineal foot, and concrete slabs paid by the square foot, and directly supervising, coordinating, and scheduling the concrete work activities with Haycock's own project managers and superintendent. Haycock has self-performed concrete work on approximately 80 percent of its past projects. The architect

was provided a project listing of self-performed concrete work and detailed information showing Haycook's experience in this area. Concrete work is the area of work most commonly self-performed by general contractors in the construction market area in and around Volusia County.

47. Haycook's self-performance of masonry includes Haycook's purchasing of concrete blocks, and reinforcing steel placed within the block, hiring labor on a unit price basis to install it (as, for instance, paid by the block laid), directly supervising the work, and coordinating and scheduling the masonry work activities with Haycook's project manager and superintendent. Haycook has self-performed masonry on approximately 70 percent of its past projects. The architect was provided examples of projects listing self-performed masonry work by Haycook, as well as detailed information depicting Haycook's experience in this work area.

48. Mr. Goodemote, as referenced above, is a local general contractor with school board project experience and is Haycook's expert witness. He established that it is common practice in the construction industry in the Volusia County area for contractors to self-perform work in the manner that Haycook had self-performed it in the past and proposes to do on Elementary School "X." He established with reference to the Board's definition of "subcontractor," which excludes "materialmen" and

"laborers," that a contractor's purchase of materials and the hiring of contract labor to install the materials does not come within the definition of "subcontractor" or "subcontracting." He established that a subcontractor is the one who provides all labor, material, equipment, and supervision necessary to complete a work operation. "It's a total turnkey operation. They provide everything to finish the work." Mr. Goodemote's opinion establishes that "self-performance" of the subject work includes a general contractor hiring contract labor to perform a part of the work, because many times there are multiple vendors associated with a portion of the work, and the contractor is still directing and supervising the work and assuming all the risks associated with the work. Mr. Goodemote himself has self-performed as a general contractor and observed other contractors self-perform earthwork, masonry, concrete work, and structural steel work. He demonstrated that if a general contractor uses contract labor to perform a portion of the work, it still remains a "self-performance" by the general contractor, and that the laborers do not have to be on the contractor's payroll in order for the work to constitute self-performance, according to the general practice and usage in the construction industry.

49. When requested by the architect to provide examples of past projects that it had self-performed in the four subject work areas, Haycook listed five projects as to earthwork; four

projects in structural steel; seven projects as to masonry; and seven projects as to concrete. In consideration of his restrictive view of what self-performance means (i.e. that self-performance can only mean performance of work by salaried employees on the general contractor's own payroll), the architect (evaluator) requested payroll records and workers' compensation information on two projects only, the Goldsboro Elementary School and Eustis Elementary School.

50. The bid documents do not provide unbridled discretion in the architect/evaluator, or in the school board, to define self-performance in a manner not provided for or inconsistent with the bid documents or to define "subcontractor," to include contract labor and thus require the labor to be listed as a subcontractor on the bid response. There was no notice to any of the bidders that such a restrictive definition would be employed, nor that a contractor listing itself as self-performing, and therefore standing in same position as other subcontractors as to the areas of work it would self-perform, would be treated differently from other subcontractors by, in effect, having to list such persons or entities as those providing contract labor as "sub-subcontractors." There was no evidence that the architect was provided sole discretion to verify self-performance experience as to the two projects only

and ignore verification information of self-performance as to the other listed projects provided by Haycook.

51. Although the architect and the Board contended that Haycook's listing of itself as self-performing in the four work areas at issue might allow Haycook to "buy out" subcontractors or to "bid shop," there was no evidence offered to substantiate that this was Haycook's intent or that Haycook or any other identified contractor in Volusia County or the surrounding area had ever attempted to "buy out" subcontractors on Volusia County school projects. Contrarily, Mr. Haycook testified that he does not engage in a practice of "buying out" subcontractors after he has obtained contracts with a winning bid. He explained, as referenced above, that subcontractors and the business relationships that he has with them are crucial to the success of his business. If Haycook made a practice of engaging in such inappropriate operational and pricing conduct when bidding for projects, or entering into related contracts, then subcontractors would either elect not give bids to Haycook at all when Haycook was, in the future, attempting to formulate bid responses, or would not give Haycook their lowest or best price because of their knowledge of such a practice, if Haycook engaged in it. This would obviously have an adverse effect on Haycook's ability in the future to be successful in competitive bid procurements or projects.

52. Haycook has self-performed in the manner intended as to Elementary School "X" for years, as have his competitors. Although the Board apparently feared that Haycook's listing itself as self-performing in the areas of work in question gave it a competitive advantage over other bidders, the evidence does not bear out that fear. The competing bidders had the same opportunity to look at their past cost knowledge and experience, their knowledge of materialmen and suppliers in the area, their knowledge of the labor market and available labor and other data by which they might arrive at an independent evaluation of what a particular area of the work should cost, as well as the methods and means necessary to perform it. They had the same opportunity to evaluate any such knowledge base they have and elect to self-perform one or more areas of the work, as did Haycook. Since they had the same opportunity to do so, the evidence does not show there is any competitive advantage gained by Haycook in this situation which was not available to other bidders as well.

53. As addressed above, the architect's recommendation to reject the Haycook bid was based upon his interpretation that "self-performance" required all work to be accomplished by employees on Haycook's payroll. Using that restrictive definition, the architect concluded that Haycook did not demonstrate, as to the Goldsboro and Eustis projects only, that

Haycook had self-performed work with its own employees in the past and therefore that Haycook would self-perform with its own employees on the project at issue. The architect concluded that Haycook's subsequent engagement of contract labor in lieu of using his own payroll employees "could potentially give D. J. Haycook Construction Company an unfair advantage over the other bidders." Neither the architect's testimony nor the Board's other evidence explained, however, how that would give the Petitioner an unfair advantage over other bidders who, as found above, were free to engage in the same proposed self-performance as Haycook. The evidence did not establish how it would harm the public's strong interest in getting the best possible price for a quality construction effort that was completed on time, within the authorized budget, and in accordance with all the contractual terms. The architect's and Board's conclusion in this regard is based upon incorrect and unreasonable interpretations of what is meant by "subcontractor" and the concept of "self-performance." The rationale for finding that Haycook's putative self-performance would give Haycook an unfair advantage, vis a vis, other bidders or would promote bid shopping or buy-out of subcontractors has been shown by the evidence to be based upon speculation and conjecture.

54. Haycook's bid response has been shown to be responsive to the specifications as they were stated, published and

furnished to the bidders, including Haycook, in the bid documents at issue. The definition of self-performance employed by the architect and the Board is not supported by the language of the bid documents and has been shown by the preponderant, most credible evidence of record to be an unreasonable definition and manner of evaluating the bids and particularly Haycook's bid. Haycook has been shown to be responsive to the specifications and the relevant portions of the bidding documents and to have the lowest bid by a significant amount, some \$241,000.00 dollars as to the base bids of Haycook versus that of Clancy and Theys.

CONCLUSIONS OF LAW

55. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), Fla. Stat. (2003).

56. Section 120.57(3)(f), Florida Statutes, provides pertinently as follows:

. . . Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceeding shall be whether the proposed agency action was

clearly erroneous, contrary to competition,
arbitrary, or capricious. . . .

Thus the Petitioner protestant must sustain its burden of proof by preponderant evidence. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609, (Fla. 1998).

57. The Petitioner must thus demonstrate that the agency's proposed action is contrary to governing statutes, the agency's rules or polices, or the bid or proposal specifications. Put another way, it must be determined whether the agency was in error in applying a governing principle, as for instance, its interpretation or application of bid specifications. In making a determination on the above issue objective facts, historical or present reality must be found. Objective facts are those which would depict, for example, how a bidder has operated in the past with regard to past projects and how it proposes to operate and perform with regard to the specifications its bid and the construction at issue. The determination of such objective facts, which lead to a determination of whether the bidder has complied with the relevant specifications, and, if not, whether its deviation is material or non-material, involves a weighing of probative testimony and other evidence which is conflicting to some degree and maybe hotly contested. This

factual determination is the province of the Administrative Law Judge; to weigh and make determinations concerning the candor, credibility, and creditability of the testimony and documentary evidence, the relative competency of the witnesses, in terms of their experience with the subject matter at issue, their relative opportunity to observe as to contested factual matters, the internal logical consistency of their testimony and its relative level of consistency with that of other witnesses as to contested factual matters. Judgments must thus be made as to credibility and the relative weight to be ascribed to the testimony and evidence offered by each party as to the contested factual matters. Such objective facts are thus susceptible to proof by ordinary and conventional methods.

Because a bid protest is fundamentally a de novo proceeding, it is concluded that the agency is entitled to no deference in connection with the resolution of disputes involving objective facts. It is exclusively the judge's job, as the trier of fact, to ascertain from the competent substantial evidence in the record what actually happened in the past or what reality presently exists, as if no decision previously had been made.

See R.N. Expertise Inc., v. Miami-Dade County School Board and Preventive Medical Testing Center, Inc., d/b/a Global MRO, Intervenor, 2002 WL 185217 (Florida Division of Administrative Hearings Case No. 01-2663BID, 2002).

58. The purpose of competitive bidding is to secure the lowest responsible offer. Minor irregularities in bids, vis a vis, specifications can be waived, effectuating that purpose. See Air Support Services International Inc., v. Metropolitan Dade County, 614 So. 2d 583, 584 (Fla. 3rd DCA 1993); Tropabest Foods, Inc., v. State of Florida, Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986). Although a bid containing a material variance from the specifications is not acceptable, Glatstein v. City of Miami, 399 So. 2d 1005 (Fla. 3rd DCA 1981), rev. denied, 407 So. 2d 1102 (Fla. 1981), not every deviation from the invitation is material.

59. The court in Robinson Electrical, Inc., v. Dade County, infra., stated:

In determining whether a specific non-compliance constitutes a substantial and hence a non-waivable irregularity, the courts' have applied two criteria-first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

In application of the general principles above discussed, sometimes it is said that a bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance,

however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition.

See Robinson Electrical Company v. Dade County, 417 So. 2d 1032 (Fla. 3rd DCA 1982).

60. In the case at hand the Respondent Board, in essence, contends that the Petitioner's bid was not responsive to the specification. Although the specification at issue permits the bidder, Haycook, to list itself as self-performing in lieu of listing subcontractors for the areas of work in question, which Haycook did, the Respondent contends that Haycook did not establish to the satisfaction of the architect/evaluator and the Board that it had self-performed on past projects or would do so on this one, Elementary School "X." Therefore, the Board believes that the Petitioner will actually use subcontractors whose bids will be obtained after bid opening, supportive of its lower bid price and thereby to obtain a competitive advantage over other bidders; contending, in essence, that its claiming of self-performance is a subterfuge.

61. The architect/evaluator interpreted the self-performance concept to mean that the bidder should do so only with its own resources, meaning employees on its own payroll, largely using as a measure whether Haycook had paid workers' compensation coverage for those employees. The evaluator

focused on only two past projects, the Goldsboro School job and the Eustis Elementary School job out of all the information purportedly probative of past self-performance furnished him by Haycook in the information gathering-bid evaluations process, in deciding that Haycook did not have a record of self-performance. Notably, however, the Board's witness concerning the Eustis School project, Gary Parker, who is employed by the Lake County School District, was not employed by the Lake County District during that project and had no role in its development or oversight. He testified that he had seen an entry in the minutes of a meeting concerning that project in which the architect had referenced Haycook's "masonry subcontractor." His overall testimony on direct and cross-examination shows, however, that he had no direct personal knowledge of that masonry work arrangement, the context in which the note was made by the architect (who did not testify), and Parker could not state definitively whether a masonry subcontractor relationship existed with Haycook on that project or not.

62. In any event, the preponderant weight of the credible, most logical testimony and evidence shows, as found above, that self-performance can include the use of contract labor, as was done in part on those jobs. Moreover, there is no clear reason or rationale for the architect/evaluator to essentially only consider two of the Petitioner's past projects in arriving at

his conclusion that the Petitioner had not self-performed in the past; extrapolating from that determination the decision that Haycook would not really self-perform as to the subject project and that therefore his bid in this regard was not responsive, responsible, or bona fide, and instead was a subterfuge for post-tabulation "bid shopping."

63. The architect/evaluator's decision (and therefore the Board's) was based on his view that self-performance can only be done with the contractor's own employees, salaried on its own payroll, and for whom the contractor is paying workers' compensation coverage costs. That narrow interpretation is not based upon or supported by statute, rule, or any persuasive decisional law of which the undersigned has been made aware. Moreover, it represents a departure from the bid specification, which does not contain it and does not even define self-performance. Thus that interpretation of the term, as carried out herein in determining that Haycook, in the Board's view, is unresponsive and not a responsible bidder, in effect, given the preponderant evidence culminating in the above germane Findings of Fact, does not accord with facts, logic, and reason and is therefore arbitrary. See Agrico Chemical Company v. Department of Environmental Regulation, 356 So. 2d 759, 763 (Fla. 1st DCA 1978).

64. This is especially so given the preponderant evidence, supportive of the above related Findings of Fact, which shows that, even if Haycook had not self-performed on past projects, it is thoroughly capable from an operational, staff, experiential, and financial standpoint to do so on the present project. There is no preponderant, persuasive evidence to show that Haycook intends to do otherwise. The testimony as to the Board's fear that anti-competitive activity such as bid shopping or "buyout" of subcontractors will occur does not rise above speculation and conjecture.

65. Moreover, the Board has a policy and practice, and is authorized by the terms of the bid documents, to investigate subcontractors listed by bidders to determine if they are reputable and will likely do quality work. The Board can require substitution of a subcontractor it believes is not reliable. Once the inquiry is over, the Board does not look further at how the subcontractor performs, leaving that to the supervision of the general contractor. The subcontractor is free to "sub-subcontract" out parts of its work, as is commonly done, without objection or inquiry under the Board's practice. The general contractor, however, when listing itself, in effect, as a subcontractor on its bid, because, as here, it is self-performing, would be precluded from "sub-subbing" out part of the work to a sub-subcontractor. This is because of the Board's

interpretation of the concept of self-performance to mean that it can only be done by salaried employees actually on the general contractor's payroll. The Board does not require that stricture of others who are in the posture of subcontractors and are not the general contractor. Thus, in effect, the Board would require the listing as a subcontractor of each entity providing any portion of the work to the general contractor who is not such a salaried employee of the general contractor, while not applying this standard to listed subcontractors. This unequal application of the Board's interpretation of self-performance is, in itself, also not supported by the terms of the specification nor the above found facts. It is illogical under the circumstances and therefore arbitrary.

66. The preponderant, credible testimony and evidence shows that self-performance by a contractor may be accomplished by the purchase of materials and employing, directing, and supervising labor in performing the work. Self-performance does not mean that a bidder or contractor must only perform with persons or employees on its own payroll, so long as the bidder controls the means of performance, as well as the results. This is the manner of self-performance proposed by Haycook. It would still supervise and direct even contract labor (not employing supervision by some intervening subcontractor).

67. Employees can be such without actually being on the contractor's salaried payroll. Webster's Dictionary defines "employee" as a person who works for another in exchange for financial compensation. Thus compensation can be accomplished by paying by the hour, by the lineal foot, the square foot, or by the piece. Black's Law Dictionary defines employee as:

A person in the service of another under any contract for hire, express or implied, oral or written, where the employer has the power or right to control or direct the employee in the material details of how the work is to be performed. . . .

Generally, when a person for whom services are performed has the right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an 'employee.'

68. In summary, the Petitioner was shown by the preponderant evidence and above found facts to have complied with the bid specifications which allow it to propose self-performance of the work areas in question. The facts found show that it intends to and will self-perform in a manner responsive to the bid specification and that its operational capability, experience, and past record of performing similar projects with quality work, within budget and on time, will conform to the

Board's and public's interest in having such performance at the lowest possible price. It has thus established its bid to be responsive.

69. Even assuming, arguendo, that Haycook was less than fully responsive to the specification, in terms of how it proposed to self-perform, the preponderant, direct, and circumstantial evidence and the above facts do not show any deviation to be material. The courts do not favor the disqualification of a low bidder for non-responsiveness where a bid irregularity does not impart an unfair competitive advantage to the low bidder. In the case of Intercontinental Properties v. DHRS, 606 So. 2d 380 (Fla. 3rd DCA 1992) the court, in reversing a hearing officer's finding of unresponsiveness on the part of a bidder, discussed at length the well-known case of Liberty County v. Baxter's Asphalt and Concrete Inc., 421 So. 2d 505 (Fla. 1982) concerning principles applicable to competitive bidding. The Intercontinental court enunciated the principle from the Baxter's opinion that:

A minor irregularity is a variation from the bid invitation or proposal terms and conditions which does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders, or does not adversely impact the interest of the department. . . .

There is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public

interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission. . . .

In either event, there is a strong public policy in favor of awarding contracts to the low bidder, and an equal strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another. Id. at 387. (Emphasis supplied).

See also ESP Security and Satellite Engineering, Inc., v. University of Florida, Physical Plant Division, Architecture/Engineering Department, (Case No. 94-2035BID, Division of Administrative Hearings, April 12, 1995).

70. In the case at hand the Petitioner was the low bidder by the substantial amount of approximately \$241,000.00 on the base bid. Its preponderant evidence shows it has in the past and will on this school project intend to and perform in a way that will result in quality work, accomplished on time and within budget. Such has been its record in the projects in the past, evidence of which is in the record of this proceeding. The Board will be able to enforce the price and terms of the Petitioner's bid through the terms of the resulting contract. Therefore there is no irregularity in responsiveness which would adversely impact the interest of the Board and the taxpayers. The Petitioner did not derive any unfair competitive advantage

over the other two original and higher bidders, because, under the specifications they were all free to consider their experience on similar projects, any data base of costs, suppliers, and labor identity information and to also propose self-performance in the subject work areas or in others, if they so chose.

71. Accordingly, in consideration of the preponderant, credible evidence underlying the above-found facts, and in view of the above discussion and conclusions, it is determined that Haycook's bid is responsive, responsible, and the lowest bid. It has been demonstrated that the Respondent's bid evaluation and intended award is factually and legally flawed. Therefore, under the circumstances found and concluded above, the failure to award the subject contract to Haycook would be arbitrary, contrary to competition, and clearly erroneous. § 120.57(3)(f), Fla. Stat. (2003).

72. Finally, the Petitioner asserts that if an agency action determines the substantial interest of a party based upon an un-adopted rule, then the agency action shall not be presumed valid or invalid, but the agency must prove that the un-adopted rule meets the standards enunciated in Section 120.57(1)(e), Florida Statutes. The Petitioner asserts that the definition of "self-performance" is not contained in the bid documents or any written rules of the school board. The Petitioner asserts that

Ms. Drago testified that the interpretation at issue is based on the Board's practice, which is not in writing. It asserts then that this interpretation by the Board's staff architect and the Board itself is an un-adopted rule which the Board must "prove-up" in the manner envisioned in the above statute. The evidence in this case however, does not clearly demonstrate that the interpretation of the specification as to "self-performance," clearly meets the definition of a rule embodied in Section 120.52, Florida Statutes, (2003). Moreover, to the extent that the challenge to the interpretation of the specification as an unpromulgated rule might be deemed to be an attack on the specifications in the bid documents, clearly the 72 hour period, during which an attack on the specifications in an invitation to bid or request for proposals can be mounted, long since elapsed before the bids or offers were submitted and thus is not timely. §120.57(3)(b), Fla. Stat.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the School

Board of Volusia County awarding the contract for Elementary School "X" to the Petitioner, D. J. Haycock Construction Company, Inc.

DONE AND ENTERED this 8th day of March, 2004, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.