STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. Case No. 16-2843

ZFI ENGINEERING AND
CONSTRUCTION, INC.,

Respondent.
_____/

RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this case on July 18 and 19, 2016, by video teleconferencing at sites in Lakeland and Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard E. Shine, Esquire
Department of Transportation
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For Respondent: April A. Atkins, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent's construction activities violated Department standards and created an unsafe road

condition, as alleged in the Department's Amended Violation and Notice to Show Cause - Non-Compliance with Permit Conditions (Notice to Show Cause) issued on March 1, 2016.

PRELIMINARY STATEMENT

The Notice to Show Cause alleges Respondent, an engineering firm, violated the terms of two construction permits and created an unsafe road condition while performing work on State Road 655 in Polk County (County). It further alleges Respondent's construction activities violated in nine respects Florida Administrative Code Rules 14-96.007(8) and 14-96.011(1)(b). The Notice to Show Cause requires that Respondent demonstrate satisfactory progress of the road construction within 60 days or Department action will be initiated to require the Construction Performance Bond insurance company to complete the work. Respondent timely requested a hearing and the matter was transmitted by the Department to DOAH to schedule a formal hearing.

At the hearing, the Department presented the testimony of two witnesses. Department Exhibits 1 through 6, 7-1, 7-2, 7-6, 7-8, 7-9, 8, 9, 11, and 12 were accepted in evidence. Respondent presented the testimony of five witnesses. Respondent's Exhibits A1, A2, A4 through A7, B1 through B6, C1, C3, D1 through D6, and Rebuttal Exhibits 1 through 3 were accepted in evidence.

A four-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law (PROs) were filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. The Department is the state agency responsible for regulating access to the state highway system. See § 335.182, Fla. Stat. To ensure that the motoring public is safe, the Department has adopted and incorporated by reference design standards, standard specifications, and a Plans Preparation Manual (PPM) that must be adhered to by contractors when working on state roads. See Fla. Admin. Code R. 14-96.008.

2. Respondent is an Orlando engineering firm whose principal is Zhi "George" Guo, a registered professional engineer. The Guo family is the fee simple owner of a 37-acre tract of land located at 5615 Recker Highway (State Road 655) in an unincorporated part of the County.

3. Around eight years ago, Mr. Guo began the process of developing the family property as a business park to be known as the Recker Highway Business Park Development. To provide access to the property from State Road 655, Mr. Guo was required to construct turn lanes, widen from two lanes to four lanes around 1,700 feet of roadway, construct paved and unpaved shoulders,

and install guardrails and sod. The Department considers road widening to be a major project. Because all work was within the Department's right-of-way, a driveway connection permit and drainage connection permit were required. The project begins at Station 594.00 and ends at Station 611.00 on State Road 655.

4. On October 16, 2008, Mr. Guo submitted to the Department an Access Application for a driveway connection permit.

5. Among other things, the Access Application identifies the engineer of record (EOR), general contractor (GC), and certified engineer inspector (CEI) on the project. The EOR signs the plans and verifies that all work will be in accordance with Department standards. The GC is essentially the manager of the project and is responsible for its overall coordination. The CEI is responsible for making all inspection work on the project to ensure that the GC is performing work according to the permitted plans. This requires that the CEI be on the job site to observe and verify work done by the GC. The CEI must also submit daily reports to the Department documenting activities that take place each day while work is being performed. When all work is completed, the CEI requests that the Department make a final inspection and issue a final acceptance of the work. Although the CEI is normally one person, the CEI can be a combination of multiple people if they

have a Construction Training and Qualification Program (CTQP) certification required to complete the components of the work, e.g., earthwork, asphalt, and maintenance of traffic (MOT).

6. Mr. Guo's Access Application indicated he would serve as EOR and GC. It did not identify who would be the CEI, but Mr. Guo does not deny that he served as CEI. Notably, Mr. Guo submitted daily reports and assumed the duties and responsibilities normally associated with that position. Mr. Guo has never managed a highway construction project such as this, although he has done design work on several highway projects, mainly related to drainage-improvement work. As the GC, Mr. Guo signed and sealed the permitted drawings.

7. As a general rule, different individuals serve as the EOR, GC, and CEI. If the CEI is also the GC, there are no checks and balances to ensure the project is built according to the permitted plans. According to the Department's expert, it is unethical for one person to serve as GC, EOR, and CEI on the same project. However, the expert had no explanation as to why the Department issued a permit to Mr. Guo under these circumstances, and the Department cited no rule or statute that prohibits this arrangement. The charging document does not allege any wrongdoing in this respect.

8. Mr. Guo was concerned about an apparent conflict of interest created by him being the owner of the property, EOR,

GC, and CEI. Accordingly, he hired two outside laboratories to perform materials testing, and he used two of his employees, one certified in earthwork and the other in MOT, but neither in asphalt, to act in his stead. There is no evidence that Mr. Guo informed the Department that he had delegated any CEI inspection responsibilities to other individuals. Although he asserts a request was made for the Department to inspect the paving progress as it was installed, there is no record of such a request. Indeed, Mr. Guo had no reason to assume, as he did, that the Department permit inspector would "fully perform the inspection work." If this were so, there would be no need for the CEI to perform any inspections on asphalt work.

9. After being informed by the Department that a drainage construction permit was required, on January 28, 2009, Mr. Guo filed a second application for that type of permit.

10. After additional information was provided by the applicant, on December 14, 2012, or around four years later, the Department issued to Mr. Guo Driveway/Connection Permit No. 2008-A-190-0071 and Drainage Connection Permit No. 2009D-190-0003. The permit conditions required, among other things, that all work be performed in accordance with current Department standards, specifications, and permit provisions; the driveway connection not be used until final acceptance was given by the Department; the applicant be totally responsible for the cost of

all work performed inside the Department's right-of-way; and the applicant accept all conditions of the permit, once work began. At hearing, Mr. Guo agreed that he must comply with all permit conditions.

11. A pre-construction meeting was conducted on January 2, 2014. Mr. Guo attended the meeting and acted as the EOR, GC, and CEI for the applicant. Among other things, the purpose of a pre-construction meeting is to discuss the conditions in the permit and to answer any questions that an applicant may have before work begins. See also Fla. Admin. Code R. 14-96.003(2). At the meeting, Mr. Guo was given a copy of the construction guidelines, which spell out exactly what a contractor must do before, during, and after construction. He was also given a copy of "Minimum CEI On Site Inspections and Notifications," which identifies the specific duties of the CEI. These documents are also attached to his permits.

12. At the heart of this controversy is a dispute over the actions taken by the Department's permit inspector while monitoring the project. A permit inspector is assigned to monitor the work on all state highway projects. The Department's Bartow District Office has only one permit inspector, Steve Logan, who is responsible for 400 lane miles of road in the County. Mr. Logan must drive through all the jobs that are under construction in the County and bring matters to

the attention of the CEI on each project to ensure compliance with the Department's permitted plans, including items such as traffic control, lane closures, and spot slope measurements. He must also observe and verify the work done by the CEI, accept and review the daily reports submitted by the CEI, forward those reports to the permits director at the District Office, and work as the Department's communication contact with the contractor. He also receives asphalt mix designs from the CEI and forwards them to the Materials Department for approval.

13. Mr. Logan replaced another permit inspector in February 2015, or just before the friction course of asphalt was placed on the roadway. The friction course is the third and final layer of road surface. When he assumed the position, Mr. Logan understood the Department had previously inspected the first two layers of road surface, i.e., the installation of an eight-inch lime rock base and a one and one-half inch structural asphalt layer. However, he knew that no final acceptance had been given since all work was not yet completed.

14. Mr. Logan holds an asphalt level 1 CTQP certification, is currently an engineer intern, and is scheduled to take the professional engineer examination in April 2017. The certification means that Mr. Logan is qualified to perform acceptance tests for asphalt work on highways.

15. Mr. Logan does not have authority to accept or reject any of the roadway construction on a permitted project. Authority to issue a final acceptance letter lies with the permits director in the District Office. A letter is normally issued after the permits director, permit inspector, CEI, contractor, and Department maintenance team jointly inspect the project after all work is completed. Mr. Logan himself made no final inspection.

B. The Work To Date

16. The asphalt paving work began in March 2014, the final course was laid in March 2015, and the last corrective work was completed in July 2015. Mrs. Asphalt, LLC, was the paving contractor used on the job. Although a final inspection was never performed, one of Respondent's employees made final payment and released Mrs. Asphalt after the July 2015 corrective work was completed. A release and final payment are normally given after all paving work has been approved and accepted by the Department. Although he was not on the site in July 2015, Mr. Guo contends Mr. Logan gave final approval for the work at that time.

17. In April, May, October, and November 2015, the Department sent a punch list of items to Mr. Guo to be completed by his firm. A punch list identifies deficiencies that need to be corrected before a final inspection is made. It does not

inform the CEI on how to resolve the deficiencies, and it places the permittee on notice that final acceptance will not be given until the items on the list are corrected. Slope deficiencies were not noted until several months after the corrective work was completed when a Department project administrator happened to be driving on the road after a heavy rain and observed ponding on many sections of the roadway.

18. Mr. Guo met with the Department in early December 2015 in an effort to address not only the items in the punch lists but also the sloping concerns. On December 11, 2015, he submitted an alternative solution of spot repair. The Department rejected this proposal, as the proposed repairs would negatively impact surrounding asphalt that was constructed at a different slope. Mr. Guo submitted a second alternative solution, which would allow him to mill out (remove) 1.5 inches of pavement and overlay the friction course at 1.5 inches with a two percent slope. The Department rejected this proposed solution, as the best solution was to "remove what was out there."

19. The Department has never issued a final acceptance letter for the project.

20. The Notice to Show Cause, as amended, was issued on March 1, 2016.

C. The Charges

21. The Department is authorized to initiate an enforcement action whenever work on a state road does not conform to the permitted plans or violates the PPM. See Fla. Admin. Code R. 14-96.007(8). The Notice to Show Cause alleges that "the majority of paved areas, paved and unpaved shoulders, slopes, guardrail and other items" do not comply with Department standards or abide by the permitted plans. It further alleges this creates "an unsafe road condition" and constitutes a violation of Department rules. The Department estimates the cost to correct these violations is between $430,000.00 and $650,000.00. Although Respondent disputes this amount, it is unnecessary to resolve that issue at this time.

22. State Road 655 is an undivided, two-lane arterial highway probably built around 100 years ago when different design standards applied. According to current PPM standards, a two-lane state highway must have a minimum eight-foot-wide shoulder that includes a minimum five-foot-wide paved section constructed with a two percent negative slope for the turn lane and a six percent negative slope for the paved shoulder area. See Dep't Ex. 8. The negative slopes allow water to drain off the road. A construction tolerance of no more than .2 percent is allowed. Id. To conform to these standards, Respondent's

permitted plans call for the same slopes on travel lanes and shoulders.

23. Although State Road 655 probably had a slope of one to one and one-half percent when it was first built, and paving slopes on the pre-existing lanes being widened are not exactly two percent, any current overlaying of the road requires a two percent slope. Mr. Guo contends he was told by two permit inspectors, "Chris" and Steve, that a slope of two percent or less was acceptable. Mr. Logan denies this assertion.

24. There are nine items in the charging document, which identify necessary changes to reduce the hazardous roadway conditions and correct the improper construction. Items one, two, four, and seven relate to improper pavement slopes and improper paved and unpaved shoulder slopes on both the east and west sides of the roadway. Item three identifies a missing paved shoulder on the west side of the roadway. Items five and six identify the absence of a stabilized shoulder (material placed adjacent to a paved shoulder) on the east side of the roadway and the lack of any sod on the same shoulder. Item eight alleges the guardrail in front of the cross drain is deficient. To avoid flooding, item nine alleges the shallow ditch on the east side of the roadway should be relocated closer to the Department's right-of-way line and the roadside slopes should be modified, as shown in the permitted drawings. While

not containing a specific charge, a tenth item warns Respondent that other issues may arise before final acceptance is given.

25. The more persuasive evidence supports a finding that the slopes and shoulders identified in items one, two, four, and seven do not conform to the plans or PPM. Mr. Guo's own daily reports for the friction course corroborate this finding. Those reports reflect the slopes are two percent or less for the travel lanes and four percent for the shoulder slopes. This is contrary to the plans, which call for a two percent slope for travel lanes and a six percent slope for shoulders, with not more than a .2 percent deviation. The absence of appropriate negative slopes can create dangerous ponding conditions on the highway. Therefore, the charges in items one, two, four, and seven have been proven.

26. The more persuasive evidence supports a finding that the work described in items five, six, and eight has not been performed. If not completed, these deficiencies can create a safety hazard and cause soil erosion. Therefore, the charges in these three items have been proven. At hearing, Respondent admitted that this work has not been performed and agrees to complete the work after the paving dispute is resolved.

27. The more persuasive evidence supports a finding that the charge in item nine has been proven. When a roadway is widened, and a drainage ditch is located adjacent to the

original roadway, to avoid possible flooding, the ditch must be relocated closer to the Department's right-of-way and roadside slopes must be modified. Although Mr. Guo contends otherwise, this work is an integral part of any road construction project. Mr. Guo has proposed an alternate design to address this item.

D. Respondent's Contentions

28. Respondent first contends that sections of other nearby state roads are not built to current standards and therefore the exact standards required by the PPM should not apply. Respondent identified various locations on State Road 655 and other state roads within a five-mile radius of the project that do not have an exact two percent slope. See Resp. Ex. C1, pp. 1-6; Resp. Rebut. Ex. 2. Because of this slope variation, Respondent asserts strict compliance with the PPM and plans should not be required. Consistent with this argument, Respondent admits that any pre-existing travel lanes on State Road 655 with slopes of 1.6 to 1.8 percent were overlaid with new asphalt using the same slope measurements. But this concern should have been raised at the pre-construction meeting before work began, and not after the paving was completed and a Notice to Show Cause issued. The contention is rejected, as the evidence supports a finding that a permittee is required to build to current standards, regardless of the condition of the existing roadway.

29. In its PRO, Respondent argues the Department is equitably estopped from enforcing the requirement that the final paved surface have a slope of exactly two percent; the Department waived the requirement that the final paved surface have a slope of exactly two percent through representations made by Department employees; its liability, if any, was extinguished because Mr. Logan accepted the work; and the actions and representations of Mr. Logan render the Department liable for the as-built conditions.[1/] These contentions are based mainly on the premise that Mr. Logan made representations to the subcontractor and/or Respondent's employees regarding the quality of the paving work and gave final approval after the corrective work was completed in July 2015.

30. The friction course was installed over a three-day period during the week of March 18, 2015. The asphalt was installed by Mrs. Asphalt. On the first day, Mr. Guo arrived on site two hours after work began and on the other days he was not on site at all times. However, James Bearden, who is Respondent's foreman, and one other employee, Kerry Bearden, were on site at all times. Neither is certified to inspect asphalt. Except for the afternoon of the second day, Mr. Logan was present at all times.

31. Using a four-foot calibrated smart level, Mr. Logan performed spot checks on the slopes while the asphalt was being

laid, while James Bearden made slope checks every 25 feet or so. Mr. Bearden confirmed that Mr. Logan did not "check it as often" as he did. Although the spot checks he made appeared to be "acceptable," Mr. Logan did not perform any spot checks after the rolling was completed, and he did not write down any measurements that he took. At one point, Mrs. Asphalt's foreman requested information regarding the target slope. Mr. Logan informed him he should check with the client to obtain that information. Mr. Logan did not advise anyone that the work would pass final inspection.

32. During the March paving work, Mr. Guo took no measurements, but after the paving was completed, he was observed making a few sloping measurements. Normally, the CEI will make numerous checks while the paving is being laid to ensure that the subcontractor is providing quality work and the equipment is adequate to perform the job.

33. Respondent asserts, unpersuasively, that by allowing Mr. Logan to inspect the asphalt paving, function as the asphalt inspector on site, and give final approval, the Department interfered with the road construction. The facts belie this contention. At no time did Mr. Logan interfere with, or prevent, the contractor from taking slope or depth measurements. Although Mr. Logan would sometimes tell the subcontractor that work was not acceptable, he did not order the subcontractor to

fix the unacceptable work. This is the responsibility of the CEI.

34. Mr. Logan told Mrs. Asphalt's foreman that the July 2015 corrective work looked "good," but he was not asked by anyone if the subcontractor could be paid and released, or if his characterization of the work as "good" constituted final acceptance of the work. Contrary to Respondent's assertion, no representation was made by Mr. Logan that he was giving final approval. In fact, there has never been a request by the CEI for the Department to make a final inspection.

35. It is evident from Mr. Guo's testimony that he either misunderstood the type of oversight provided by a permit inspector, or he never sought clarification on that issue before the work began. It is the CEI's responsibility to be present on the job site to observe and verify the GC's work. This means that Mr. Guo, or his certified designees, if any, and not the Department, are responsible for all inspections and to provide daily reports documenting the work activities that take place each day.

36. Mr. Guo believed the subcontractor "only listen[s] to Steve," and the subcontractor "report[ed] directly to Mr. Logan" for "quality [control] decisions" rather than the CEI. As to the July 2015 corrective work, Mr. Guo instructed "the subcontractors [to] completely follow the instruction[s] from

Steve" in making the necessary corrections to the slopes. He also believed, incorrectly, that all asphalt inspection work had been delegated to Mr. Logan and assumed that Mr. Logan was essentially supervising the project. In other words, he turned over all responsibility for inspecting the asphalt to the permit inspector. But as the record shows, Mr. Logan only made sporadic measurements, he had no authority to approve the work, and he did not direct the subcontractor's performance, reject its work, or put a stop work order on the project.

37. James Bearden attended a meeting with Department personnel in November 2015. He recalled telling John Hayes, a Department construction engineer, that he paid and released the subcontractor after Mr. Logan "okayed the work." Mr. Hayes responded that "Steve didn't have authority to authorize that asphalt." Mr. Hayes did not testify, and Mr. Bearden's representation to Mr. Hayes that the work had been approved is incorrect.

CONCLUSIONS OF LAW

38. The Department has the burden of proving by a preponderance of the evidence the violations in the Notice to Show Cause should be sustained. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981)(as the party asserting the affirmative of the issue, DOT has burden of proving its entitlement to the requested relief).

39. The Department has developed and adopted uniform minimum standards and criteria for the design and construction of public roads, including standards, specifications, and a PPM. See § 334.044(10)(a), Fla. Stat.; Fla. Admin. Code R. 14-96.008. Respondent has agreed to abide by these standards and criteria.

40. The Department alleges in its charging document that Respondent has violated in nine respects rules 14-96.007(8) and 14-96.011(1)(a),(b) and (c).

41. Rule 14-96.007(8) provides in pertinent part as follows:

> (8) Failure by the applicant to abide by the conditions that are applicable after permit issuance shall be just cause for the Department to order alteration of the connection, or to revoke the permit and close the connection at the expense of the applicant, subject to the provisions of this rule chapter, or for the Department to have the necessary modifications made and seek payment from the applicant. The permit requirements shall be binding on the applicant, the applicant's successor's heir, and assigns . . . .

42. Rule 14-96.011 provides in relevant part as follows:

> (1) Validity of existing permits. All connection permits issued by the Department after July 1, 1988, remain valid until modified pursuant to the criteria set forth in this rule chapter. The Department will initiate action to modify any permit or existing permitted connection if any of the following occurs:
>
> (a) A significant change.

(b) The connection was not constructed at the location or in accordance with the design specified in the permit.

(c) Permit conditions are not met by the permittee.

43. By a preponderance of the evidence, the Department has proven the charges in the Notice to Show Cause.

44. Respondent contends, however, that the Department is equitably estopped from requiring a correction to the paving slope because Mr. Logan represented that the paving looked "good" when it was completed in July 2015.

45. In order for the doctrine to apply, three elements must be present: (a) a representation as to a material fact that is contrary to a later asserted position; (b) reliance on that representation; (c) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. See, e.g., Hoffman v. Dep't of Mgmt. Servs., 964 So. 2d 163, 166 (Fla. 1st DCA 2007). These elements must be proven by clear and convincing evidence. Castro v. E. Pass Enterprises, Inc., 881 So. 2d 699, 700 (Fla. 1st DCA 2004). Equitable estoppel will apply against a governmental entity only in rare instances and under exceptional circumstances. Ass'd Indus. Insur. Co. v. Dep't of Labor & Emp. Sec., 923 So. 2d 1252, 1255 (Fla. 1st DCA 1994).

46. The evidence shows that after the last corrective work was completed in July 2015, Mr. Logan informed Respondent that the paving looked "good," based upon some spot checks made before the new asphalt was rolled. There is no evidence, much less clear and convincing evidence, that Mr. Logan gave final acceptance for the project, or represented that the work would pass final inspection at a later time. Because no representation was made, the doctrine does not apply.

47. Respondent also argues that the Department waived the right to require the final paved surface to have a slope of exactly two percent slope. Waiver is commonly defined as the intentional or voluntary relinquishment of a known right, or conduct giving rise to an inference of the relinquishment of a known right. Sentry Ins. v. Brown, 424 So. 2d 780, 784 (Fla. 1st DCA 1982). The question of waiver is an issue of fact. Davis v. Davis, 123 So. 2d 377, 381 (Fla. 1st DCA 1960).

48. Respondent argues that waiver applies because the Department failed to maintain a two percent slope on pre-existing lanes of traffic on State Road 655, Mr. Logan gave final approval for all paving work, two permit inspectors allegedly told Mr. Guo that slopes of two percent or less would be acceptable, and the Department failed to enforce the two percent requirement on several nearby roadway projects.

49. The facts previously found support a conclusion that the Department did not intentionally or voluntarily waive its right to require that all work be performed in accordance with the plans and PPM. The argument is rejected.

50. All other arguments not specifically addressed have been considered and rejected.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Transportation enter a final order sustaining the charges in the Notice to Show Cause and requiring Respondent, within 60 days, to demonstrate satisfactory progress in completing the road construction. Otherwise, the Department may initiate action to effect the satisfactory completion of the work at Respondent's expense.

DONE AND ENTERED this 12th day of October, 2016, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 2016.

ENDNOTE

[1/] These contentions were not stated in legalistic form until the PRO was filed. Apparently without the benefit of counsel, Mr. Guo prepared and filed both his request for a hearing and a unilateral pre-hearing statement. Three working days before the hearing, he requested a continuance in order to initiate discovery. Because no emergency was shown, and given the Department's concern that the corrective work should be completed as quickly as possible, the request was denied. The next day, a former employee, Yanling "Caroline" Wang, was authorized to appear as a qualified representative on behalf of Respondent. Later that day, Respondent's counsel filed a notice of appearance.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.