STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

FLORIDA DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. DOT Case No. 16-022

ZFI ENGINEERING AND CONSTRUCTION, INC.,

Respondent.
_____/

FINAL ORDER

The Department issued a Notice to Show Cause to Respondent ZFI Engineering and Construction, Inc., to demonstrate satisfactory progress for completion of an access connection to State Road 655. (Pet. Ex. 1, RO at 2.) ZFI timely requested a hearing and this case was referred to the Division of Administrative Hearings. (RO at 2.) Pursuant to notice a hearing was conducted before the assigned Administrative Law Judge, Hon. D. R. Alexander, in July 2016. The ALJ entered a Recommended Order on October 12, 2016, which recommended that the Department enter a final order (1) sustaining the charges in the Notice to Show Cause, (2) requiring ZFI to demonstrate satisfactory progress in completing construction within 60 days, and (3) if ZFI does not demonstrate satisfactory progress within 60 days, allowing the Department to initiate action to effect the satisfactory completion of the work at Respondent's expense. (RO at 22.) A copy of the Recommended Order is attached.

ZFI filed exceptions to the Recommended Order on October 27, 2016. The Department responded to ZFI's exceptions on November 4, 2016.

Rulings on Exceptions

Where a party files exceptions to a recommended order within 15 days of its entry, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.; see also Fla. Admin. Code R. 28-106.217(1) ("Exceptions shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.").

The Department may not reject or modify a finding of fact unless the Department first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings did not comply with essential requirements of law. § 120.57(1)(*l*), Fla. Stat. "Competent, substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred or such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Bill Salter Adver., Inc. v. Dep't of Transp., 974 So. 2d 548, 550-551 (Fla. 1st DCA 2008) (citations and internal quotations omitted). "Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact." Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. § 120.57(1)(*l*), Fla. Stat.

The Department may reject or modify conclusions of law over which it has substantive jurisdiction. § 120.57(1)(*l*), Fla. Stat. When rejecting or modifying such conclusion of law, the Department must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Id.

Preliminary Statement: Before raising its enumerated exceptions, ZFI asserts it "was refused to permit discovery" (Exceptions at 1) and that the ALJ denied its motion for continuance, id. at 2. The Department correctly notes these assertions are developed in Exception 14. (Response at 1.) The Department rules on Exception 14 below.

Exception 1: ZFI takes exception to "the improper use of a personal name, Mr. GUO, instead of RESPONDENT, implicitly or explicitly, at multiple locations in the Recommended Order." (emphasis in original) ZFI asserts the name "Mr. Guo" is "used to describe his personal presentations and connections under specific circumstances" but "Mr. Guo is not personally liable as the Respondent in this case."

This exception does not clearly identify the disputed portion of the recommended order by page number or paragraph, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. The Department therefore need not rule on this exception. § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1).

On the merits, the Recommended Order does refer to Guo individually in some cases. E.g. RO ¶ 2 (finding Guo is the principal of Respondent), RO ¶ 6 (finding Guo served as engineer of record [EOR] and general contractor [GC], and does not deny serving as certified engineer inspector [CEI], for the project), RO ¶ 11 (finding Guo attended a meeting). The Recommended Order does not recommend Guo be found personally liable. The Department is

able to use context to determine whether the Recommended Order refers to Guo individually or ZFI, but as demonstrated in the ruling on Exception 2 below, ZFI and Guo did not consistently make this distinction.

Exception 1 is rejected.

Exception 2: ZFI takes exception to Paragraph 2's finding of fact that Guo's family owns a 37-acre tract at State Road 655 in Polk County. ZFI asserts there was no evidence that Guo's family owns the tract, and that the tract is instead owned by an independent multi-member LLC.

This exception does not include appropriate and specific citations to the record. The Department therefore need not rule on this exception. § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1).

On the merits, competent substantial evidence supports Paragraph 2. Originally, ZFI was the Petitioner.[1] When ZFI was designated as the Petitioner, ZFI stipulated the tract is owned by a family member of the "Petitioner." ZFI is a corporation; it obviously has no family members. The ALJ apparently found that in context, the term "Petitioner" in the relevant pre-hearing stipulation referred to Guo. A witness testified that the permit application named Guo as the owner. Guo agreed he was the GC, CEI, EOR, and owner.

Exception 2 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 3: ZFI takes exception to Paragraph 6's findings of fact that Guo "has never managed a highway construction project such as this" and that Guo signed and sealed the permitted drawings as the general contractor.

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[1] The ALJ realigned the parties to reflect that the Department carried the burden of proof. (Tr. I at 15.)

ZFI asserts that Guo "had performed many construction projects" and cites an excerpt of the testimony of James Bearden in support. In this excerpt, Bearden was testifying to his own experience in roadway projects. In any event, the ALJ specifically found GUO has "done design work on several highway projects . . . ." The record substantiates this finding, but this finding is not inconsistent with the challenged finding.

ZFI also argues that no competent substantial evidence supports the finding that Guo signed and sealed the permitted drawings as the general contractor. There are two findings here: (1) Guo signed and sealed the permitted drawings (2) in his capacity as general contractor. It is unclear which of these findings Guo challenges. If the former, there is competent substantial evidence that Guo signed and sealed the permitted drawings. If the latter, the Department agrees there is no competent substantial evidence that he did so in his capacity as a general contractor. There is, however, competent substantial evidence that Guo signed and sealed the permitted drawings in his capacity as a professional engineer. ZFI does not challenge the ALJ's finding that Guo is a professional engineer. (RO ¶ 2.)

The Department accordingly modifies Paragraph 6 of the Recommended Order as follows:

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~~EOR, Mr. Guo signed and sealed the permitted drawings.

The remainder of Exception 3 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 4: ZFI takes exception to Paragraph 7's finding that different people generally fill the roles of EOR, GC, and CEI, because if the CEI is also the GC, there are no checks and balances to ensure the project is built according to the plans. Paragraph 7 also finds the Department's expert testified that it is unethical for one person to serve as EOR, GC, and CEI.

ZFI asserts "[n]o evidence" supports the ALJ's finding, but does not include appropriate and specific citations to the record. The Department therefore need not rule on this exception. § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1). If a ruling is required, competent, substantial evidence supports the findings in Paragraph 7.

Exception 4 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 5: ZFI takes exception to Paragraph 8, which finds there is no evidence Guo informed the Department that he delegated any CEI inspection responsibilities. Paragraph 8 also finds that Guo/ZFI had no reason to assume the Department's permit inspector would "fully perform the inspection work" because if this were so, "there would be no need for the CEI to perform any inspections on the asphalt work."

ZFI maintains that the evidence shows the Department's permit inspector, Steve Logan, would handle access and drainage inspections. It also maintains Logan had the authority to reject work and order corrections, so "therefore he had the same authority to approve work."

ZFI is correct that an email from the Department says Logan would handle access and drainage inspections, but that is not the same thing as undertaking the duties of a CEI. Logan testified that he does not have the authority to accept or reject work on the project. Competent

substantial evidence supports the finding that Guo was the CEI. Guo admitted that assigning Logan to inspect the work to ensure compliance with permitting requirements did not absolve Guo of his responsibilities as CEI.

Although Exception 5 does not specifically argue for this, ZFI asks that "owner of the property" be stricken from the first sentence, apparently drawing on Exception 2. At the hearing, Guo testified that he was the CEI, the EOR, the GC, and the property owner.

Exception 5 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 6: ZFI takes exception to Paragraph 16, arguing it is "incorrect and is not supported by testimony by all people working on July 8, 2015 with Mr. Logan." This exception does not include appropriate and specific citations to the record. The Department therefore need not rule on this exception. § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1).

On the merits, ZFI seeks to interlineate new findings, but the Department cannot do so. Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) ("Florida courts are in agreement that when competent substantial evidence in the record supports the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, **or make new findings**.") (citation and internal quotations omitted, emphasis supplied).

ZFI seeks to strike the findings that a final inspection was never performed, that payment is made after approval and acceptance, and that although Guo was not on site in July 2015, he contends Logan gave final approval for the work at that time. Competent substantial evidence supports these findings.

Exception 6 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 7: ZFI takes exception to Paragraph 18's finding that the Department rejected a spot repair proposal. It contends that the Department never responded to the proposal, but does

not include appropriate and specific citations to the record. The Department therefore need not rule on this exception. § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1).

On the merits, competent substantial evidence supports the finding that the Department rejected the spot repair proposal. ZFI seeks to interlineate new findings, but the Department cannot do so. Walker, 946 So. 2d at 605.

Exception 7 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 8: ZFI takes exception to Paragraph 21's finding that the Department estimates the cost to correct the violations stated in the Notice to Show Cause is between $430,000 and $650,000. ZFI contends this estimate is not supported by competent, substantial evidence. ZFI is incorrect.

Exception 8 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 9: ZFI takes exception to Paragraph 23's finding that "any current overlaying of the road requires a two percent slope."

Competent, substantial evidence supports this finding. In its response to ZFI's exceptions, the Department correctly notes that Exception 9 amounts to an argument that the ALJ should have found the Department waived the 2% slope requirement. The ALJ concluded waiver is a question of fact, (RO ¶ 47), and found no waiver, (RO ¶ 49). ZFI does not challenge these conclusions, and therefore a ruling on whether Paragraphs 47 and 49 are correct is not required. § 120.57(1)(k), Fla. Stat. If a ruling is required: (1) the Department could not reject or modify these conclusions because the law of waiver is not an issue over which the Department has substantive jurisdiction, § 120.57(1)(*l*), Fla. Stat., and (2) the Department would not reject or modify these conclusions because the Department agrees whether it waived the 2% slope requirement is a question of fact, and agrees that competent, substantial evidence supports the

ALJ's finding of no waiver. The Department cannot re-weigh or otherwise interpret evidence to fit ZFI's desired conclusion of waiver. Bill Salter Adver., 974 So. 2d at 551 ("In reviewing the record, neither the agency nor this court is permitted to re-weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion.").

Exception 9 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 10: ZFI takes exception to Paragraphs 24 and 27. Paragraph 24 describes the nine items in the Notice to Show Cause. Paragraph 27 finds that the "more persuasive evidence supports a finding that the charge in item nine [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 per the permitted drawings – see RO ¶ 24] has been proven."

Paragraphs 24 and 27 are supported by competent, substantial evidence. The Department cannot reweigh evidence. Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995) ("By stating he was not persuaded, the hearing officer engaged in the act of ascribing weight to the evidence."); Strickland v. Fla. A&M Univ., 799 So. 2d 276, 278 (Fla. 1st DCA 2001); Bill Salter Adver., 974 So. 2d at 551. ZFI seeks to interlineate new findings, which the Department cannot do. Walker, 946 So. 2d at 605.

Exception 10 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 11: ZFI takes exception to Paragraphs 34, 44, and 46. Paragraph 34 is a finding of fact that Logan told a subcontractor that the July 2015 corrective work looked good, but that Logan was not asked whether the subcontractor could be paid and released, or if his characterization constituted final acceptance. Paragraph 34 also finds Logan did not represent that he was giving final approval and that the CEI has never requested a final inspection.

Competent substantial evidence supports these findings. The exception to Paragraph 34 is rejected. § 120.57(1)(*l*), Fla. Stat.

Paragraphs 44 and 46 are conclusions of law on ZFI's argument that the Department is equitably estopped from requiring a correction to the paving slope because Logan said the paving looked "good" in July 2015. Paragraph 44 introduces the argument, and Paragraph 46 finds ZFI failed to present clear and convincing evidence[2] that Logan gave final acceptance or represented the work would pass final inspection.

Estoppel is a question of fact. Garcia v. Abbey Found., Inc., 567 So. 2d 522, 523 (Fla. 3d DCA 1990). The Department is unable to reweigh the evidence to fit ZFI's desired conclusion of estoppel. Bill Salter Adver., 974 So. 2d at 551. Competent, substantial evidence supports the ALJ's finding that the Department is not estopped.

Exception 11 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 12: ZFI takes exception to Paragraphs 31-36, which make findings of fact relating to the friction course paving. The exception to Paragraph 34 is ruled on above.

ZFI seeks interlineation of new findings throughout Paragraphs 31-36. The Department cannot do so. Walker, 946 So. 2d at 605.

ZFI seeks to strike other findings. The findings ZFI seeks to strike in Paragraphs 31, 32, 35, and 36 are supported by competent, substantial evidence. ZFI seeks to strike Paragraph 33's observation that ZFI "unpersuasively" asserted that the Department interfered with construction and to replace Paragraph 33's finding that the facts "belie" this contention with a finding that the "facts supports" [sic] this contention. The Department cannot reweigh evidence to support a

[2] ZFI does not take exception to Paragraph 45, which concludes estoppel must be proven by clear and convincing evidence and that the state may be estopped only under "exceptional circumstances."

desired conclusion that the evidence should have persuaded the ALJ to make a different factual finding. Goin, 658 So. 2d at 1138; Strickland, 799 So. 2d at 278; Bill Salter Adver., 974 So. 2d at 551.

Exception 12 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 13: ZFI takes exception to the ALJ's recommendation that ZFI must demonstrate satisfactory progress within 60 days. Specifically, ZFI asserts that "satisfactory progress" is vague and that 60 days is not enough time. ZFI seeks to modify the recommendation to recommend a final order "reconsidering" the charges in the Notice to Show Cause, and ordering that ZFI must complete the project within 60 days of a "reasonable proposal being agreed upon." While the order now recommends that if ZFI fails to show satisfactory progress within 60 days, the Department may effect satisfactory completion at "Respondent's" expense, ZFI seeks to strike the word "Respondent's," so that the recommendation will read "the Department may initiate action to effect satisfactory completion of the work at expense based on evaluated responsibilities."

While the Department is empowered to reduce or increase a recommended penalty, it cannot do so "without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record justifying the action." § 120.57(1)(*l*), Fla. Stat.

The Department declines to reduce or otherwise modify the recommended penalty.

Exception 14: ZFI takes exception to an endnote to Paragraph 29, which describes certain contentions in ZFI's proposed recommended order. The endnote states these contentions were not stated in "legalistic form" until the PRO was filed. It finds that Guo prepared the request for a hearing and pre-hearing statement "[a]pparently without benefit of counsel," and

states that Guo requested a continuance to conduct discovery three working days before the hearing. The endnote states the continuance was denied because no emergency was shown and because the Department was concerned that corrective work should be completed as quickly as possible. It states a former employee was authorized to appear as a qualified representative the next day, and that counsel for ZFI noticed her appearance later that day.

Exception 14 asserts ZFI "was not given the rights to develop and prepare for the hearing." ZFI contends it was not able to conduct discovery, that it was permitted to appear pro se, and that the Department's handling of punch list inspections do not "support the claim that [sic] 'Department's concern that corrective work should be completed as quickly as possible."

While Exception 14 could be read broadly to claim that due process was not afforded, the only modification to the endnote it seeks is to strike the statement about the Department's concern that corrective work should be completed as quickly as possible. On the narrow issue of the request to strike this statement, the Department finds the statement is supported by competent, substantial evidence.

On the broad issue of whether due process was afforded, the Department may reject or modify a finding of fact if it determines from a review of the entire record, and states with particularity in the order, that the proceedings did not comply with the essential requirements of law. § 120.57(1)(*l*), Fla. Stat. ZFI does not expressly contend these proceedings did not comply with the essential requirements of law, and therefore a ruling on whether they did or did not comply with the essential requirements of law is not required. § 120.57(1)(k), Fla. Stat. If a ruling is required, the Department does not find these proceedings did not comply with the essential requirements of law. § 120.57(1)(*l*), Fla. Stat.

Exception 14 is rejected. Id.

Findings of Fact

Except as modified above, the Findings of Fact set forth in paragraphs 1-37 of the Recommended Order are supported by competent, substantial evidence and the Department adopts the Findings of Fact set forth in paragraphs 1-37 of the Recommended Order and incorporates them by reference. Where paragraphs 1-37 contain findings of ultimate fact that are matters of opinion infused by policy considerations for which the Department has special responsibility, the Department declines to reverse or modify paragraphs 1-37.

Conclusions of Law

The Conclusions of Law set forth in paragraphs 38-50 of the Recommended Order are supported by law and the Department adopts the Conclusions of Law set forth in paragraphs 38-50 of the Recommended Order and incorporates them by reference. Where paragraphs 38-50 contain findings of ultimate fact that are matters of opinion infused by policy considerations for which the Department has special responsibility, the Department declines to reverse or modify paragraphs 38-50.

Order

Based on the foregoing Findings of Fact and Conclusions of Law, the charges in the Notice to Show Cause are sustained. Respondent shall, within 60 days of the date this order is rendered, demonstrate satisfactory progress in completing the road construction. If Respondent does not demonstrate satisfactory progress within 60 days of rendition, the Department may initiate action to effect the satisfactory completion of the work at Respondent's expense.

DONE and ORDERED this 15th day of November, 2016.

Jim Boxold
Secretary
Florida Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
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NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, MS 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN 30 DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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