

Construction plan errors and omissions have a direct correlation to plan quality and therefore to the QC/QA efforts on the project and to the diligence of the Engineer of Record (EOR). LA DOTD has a separate document, *Construction Plans Quality Control / Quality Assurance Manual*, to address internal plan quality procedures. No policies, efforts or lack thereof absolve the EOR from responsibility for quality construction plans.

1 Purpose:

The purpose of this Errors and Omissions (E&O) Policy is to reinforce design accountability and recover added project costs due to carelessness or negligence on the part of design consultants.

In contracting for design services by consultant professionals, and as a recipient of federal funds for highways, each state DOT must have written procedures, approved by the FHWA, for determining the extent to which the consultant, which is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from E&O in the work furnished under its contract. [23 CFR 172.5 (c) (16)]

2 Definitions:

The following definitions will apply to this policy:

Errors: Plan or specification details or contract administration actions that are incorrect, conflicting, insufficient, or ambiguous (items are shown incorrectly).

Omissions: Cases in which the plans, specifications or contract administration actions are silent on an issue that should otherwise be addressed in the documents (items are missing, not shown or not included).

Errors and Omissions: Design deficiencies in the plans and specifications, which must be corrected in order for the project to function or be built as intended.

Standard of Care: The consultant will perform all services in accordance with the degree of skill and care ordinarily used by competent practitioners of the same professional discipline under similar circumstances, taking into consideration the contemporary state of the practice and the project conditions. The consultant will perform the required quality control and quality assurance (QC/QA) for each project and document that the QC/QA has been performed.

Other Design Flaws:

- Breaches of contract administration caused by untimely review of submittals and untimely and inadequate responses to requests for information.
- Problems in cost estimates and in conduct of construction inspections.

Recoverable Costs: The amount of the recoverable cost is that which would not have been incurred had the plans been correct. These costs result from factors such as delays in construction and any premium on costs of items that had to be added to the project after the original bid. The cost of items that would have been part of the project anyway, had the error or omission not occurred, are not included in the restitution sought from the design consultant. The costs to be recovered should be based on actual costs to DOTD. The consultant must reimburse these costs in cash; in-kind services by the consultant are not acceptable as payment.

Before, during and after construction, E&O can result in additional costs that DOTD would not have incurred if the construction plans had been correct. Under contract law, the resulting additional costs are considered damages that DOTD is entitled to collect. E&O identified prior to project construction should be corrected at the consultant's expense with no additional cost to DOTD. These errors could also result in below average or poor consultant performance ratings. E&O discovered prior to letting, resulting in real costs to DOTD, such as additional utility relocation or real estate costs, will generally be resolved following the same procedures as described below for errors discovered during construction, except that 3.1 and 3.2 will be handled by the Project Manager (PM) and technical experts.

The process for identifying, addressing and recovering costs associated with E&O is outlined below.

3 Process and Steps:

It is the DOTD's intent to communicate to the Design consultant, as soon as possible, when a potential E&O or design issue is discovered. Early involvement is needed to minimize potential costly delays to the Project, to provide the consultant the earliest opportunity to participate in determining a solution (in an effort to resolve issues and mitigate damages), and to provide a process that is fair to the Department and to the consultant. The steps involved in the full process of resolving issues relating to E&O during construction are as follows:

3.1 Discovery, Evaluation, and Early Notification

Normally, E&O found during construction comes to the attention of the Engineer through the Contractor as an issue. The Engineer will immediately notify the Design Project Manager of the problem. The Project Manager will notify the appropriate Task Manager so that a solution can be developed.

The Project Manager and Task Manager must quickly initiate an internal review of the circumstances to assess whether the issue is likely (a) design-related, (b) construction-related, or (c) due to other causes that are not the responsibility of the design consultant or the contractor. If there is any chance that the issue could be due to a consultant error or omission, the Project Manager or the Task Manager will notify the design consultant immediately and request their

involvement in preparing a solution to the issue. Responsiveness by the consultant is crucial to this process and the DOTD will provide a deadline for required responses. The consultant will respond and advise the Task Manager on proposed solutions to the problem. The consultant shall perform additional work to correct design deficiencies promptly and at no additional cost to the Department and the consultant is afforded the opportunity to mitigate potential damages. Regular communication should be maintained between the Task Manager and the consultant until an acceptable solution is provided to the Engineer. Detailed documentation of all communication with the consultant should be maintained by the Project Manager.

There are instances whereby either due to the nature of the error or in the interest of time, that the Engineer may direct a field change to correct an error without consulting the Project Manager. This will not absolve the consultant of responsibility for the error. Errors may still be discovered through other reviews (i.e., review of project change orders by the Project Manager) later in the project life cycle and financial responsibility may be assigned to the consultant.

3.2 Investigation

After a potential E&O is identified, the Project Manager, in coordination with the Engineer and the Task Manager, shall investigate the issue and will identify any apparent violation of Standard of Care by the consultant as well as additional costs incurred by DOTD. This investigation will take into account all factors influencing the consultant's liability and the extent of potential damages due to DOTD by the consultant. The consultant should not be responsible for the direct cost that DOTD would have incurred during construction had the error or omission not occurred. The Project Manager will document the findings of the investigation. If recoverable damages are identified, the Project Manager will forward a recommendation to the Chief Engineer's designee to collect recoverable costs.

3.3 Decision Notification

If the Chief Engineer's designee agrees with the recommendation of the Project Manager that costs attributable to E&O are due to the consultant's neglect, then the Chief Engineer's designee will notify the consultant of the costs, methods of payment of such costs, and options for review of the decision. All communication between DOTD and the consultant shall be in writing. The consultant may accept the determination, appeal the decision to a Review Panel, or litigate the matter.

3.4 Review Panel Meeting

The consultant may choose to have the findings of the investigation reviewed by the E&O Review Panel. At the request of the consultant, DOTD will convene the Review Panel, consisting of:

- Chief Engineer, Chair
- Chief Construction Engineer
- Chief of Project Development
- Contract Services Administrator

The consultant will have the opportunity to present information relative to the E&O findings to the Review Panel. DOTD Technical Staff may also be asked to present and DOTD may engage outside technical experts, if needed. The Panel will consider the information presented at the Review Panel Meeting and will render a decision on consultant liability and recoverable costs. The Chief Engineer will communicate the decision to consultant and will include options for settling the matter.

Based on these findings, the consultant may choose to pay costs associated with their E&O, or may refuse to pay these costs. If the dispute remains unresolved, litigation by DOTD may be the only remaining option. If the dispute is resolved or if the Department prevails in litigation, the claim is collected from the consultant.

3.5 Recovery and Collection

At the conclusion of step 3.3 or 3.4, DOTD may issue a request for damages to the consultant. At any step in the process, the consultant may opt to pay the costs of E&O. Once a tentative agreement is set, DOTD prepares a settlement agreement. The agreement is then executed and payment is made to DOTD.

3.6 Litigation

If at the conclusion of step 3.5 the consultant disagrees with the findings of the Review Panel, the only recourse for DOTD may be litigation. In these cases, the Project Manager will provide all information relative to the matter, including the Investigation, Notification and Review Panel findings to the DOTD Legal Section for further action.

The consultant, through payment of restitution for damages, and/or DOTD may agree to resolve the issue or at any step in the process, in which case the process moves directly to its conclusion.