

North Dakota Department of Transportation
Consultant Administration Section

August 2007

Errors and Omissions Procedures

**PROCEDURES FOR PURSUING REIMBURSEMENT
FROM DESIGN/CONSTRUCTION ENGINEERING CONSULTANTS
RESULTING FROM DESIGN/CONSTRUCTION ENGINEERING ERRORS
AND/OR OMISSIONS**

INTRODUCTION

- 1) It is the goal of the North Dakota Department of Transportation (NDDOT) to develop engineering documents that are complete, accurate, and are of the highest standards. However, despite this conscious effort, circumstances can and do arise concerning the quality of design/construction engineering consultant services. The NDDOT recognizes that professional services are based on reasoned judgment and that there is no one correct course of action. The NDDOT also recognizes that exactness is not possible because of the unique characteristics of each project and the latitude allowed for the application of professional skill and experience to each project. Due to the recognized uncertainty associated with these services using a known standard of care is required to provide an objective measurement of the professional's services. The NDDOT may seek to recover costs that are a result of a consultant performing services that do not meet the established standard of care.
- 2) To address those circumstances, the NDDOT has developed procedures for the evaluation of alleged errors and omissions and pursuing reimbursement of costs from design/construction engineering consultants.
- 3) NDDOT managers will investigate any alleged error and/or omission. If a design/construction engineering error and/or omission occurred, NDDOT will make every reasonable effort to recover the associated costs from the design/construction engineering consultant. It is the desire and intent that many of these circumstances can and will be resolved through informal actions.

DEFINITIONS

- 1) Errors and/or omissions are defined as "Deficiencies from the standard of care on the part of a design/construction engineering consultant in the performance of professional services under contract with NDDOT".
- 2) The "standard of care", applied to the performance of consultant services for the NDDOT, shall be the "*duty to exercise the degree of learning and skill ordinarily*

possessed by a reputable design professional practicing in the same or similar locality and under similar circumstances.”

- 3) An alleged error or omission will be considered “alleged” until either the consultant acknowledges, or the Errors and Omissions Review Board determines, that it is an error or omission.

DISCOVERY

- 1) **Prior to Advertisement** - If an alleged error and/or omission is found prior to advertisement of a specific contract, the technical representative will immediately notify the division engineer. If the division engineer’s determination warrants further evaluation, he will contact the appropriate office director who will form a team to further evaluate the alleged error and/or omission. The office director will notify the Deputy Director for Engineering (DDE), the consultant and the Consultant Administration Section of the alleged error and/or omission.

The consultant shall correct such errors and/or omissions, at no cost to NDDOT. Consultant liability may include all NDDOT and consultant costs to prepare revisions.

- 2) **After Advertisement, Prior to Bid** - If an alleged error and/or omission is found after advertisement, but prior to bid opening, the technical representative will immediately notify the division engineer. If the division engineer’s determination warrants further evaluation, he will contact the appropriate office director who will form a team to further evaluate the alleged error and/or omission. The office director will notify the DDE, the consultant and the Consultant Administration Section of the alleged error and/or omission.

The consultant may be responsible for the associated cost of preparing the addendum. Consultant liability may include all NDDOT and consultant costs to prepare revisions.

- 3) **After Bid, Prior to Construction Contract Award** - If an alleged error and/or omission is found after the bid opening, but prior to contract award, the technical representative will immediately notify the division engineer. If the division engineer’s determination warrants further evaluation, he will contact the appropriate office director who will form a team to further evaluate the alleged error and/or omission. The office director will notify the DDE, the consultant and the Consultant Administration Section of the alleged error and/or omission.

The error and/or omission may be reviewed for consultant liability. Consultant liability may include:

- a) Fiscal Impact (all costs incurred above that expected had the original plans been correct);

- b) Cost of preparing the revision; and,
 - c) Delay costs determined to be caused directly by an error or omission of the design engineering consultant.
- 4) **After Construction Contract is Awarded** - If an alleged error and/or omission (design or construction engineering) is found during construction, the project manager will immediately notify the district engineer.
- a) If the district engineer's determination warrants further evaluation, he will contact the appropriate office director who will form a team to further evaluate the alleged error and/or omission.
 - b) The office director will notify the DDE, the consultant and the Consultant Administration Section of the alleged error and/or omission.
 - i) The consultant will be given the opportunity to participate in the determination of the solution. Consultant participation in this process is not an admission of any liability.
 - ii) The consultant shall make every effort to resolve the alleged error and/or omission and make the revisions in a timely fashion.

RESOLUTION OF ERROR

- 1) **Resolution of Cost Process** - If the alleged error and/or omission results in additional costs, the District Engineer will transmit a copy of the change order (CO) to the construction division along with notification of the apparent error or omission.
- a) Any necessary CO will be processed under normal procedures, regardless of the status of any claim against the consultant.
 - b) The appropriate division will prepare a letter to the consultant for signature by the Director of the Office of Project Development. This letter will detail the alleged error and/or omission and associated costs and specify a response date of thirty (30) days after receipt of same. The Director of the Office of Project Development (or his designee) will coordinate the review of the response from the consulting firm.
 - i) **Concurrence** - If the consultant accepts responsibility, the Director of the Office of Project Development will request payment and coordinate the appropriate method of payment with the Finance Division.
 - ii) **Non-Concurrence** - If the consultant disputes or denies responsibility for the alleged error and/or omission, the appropriate division will re-evaluate the

consultant's liability in light of the response received. The appropriate office director shall make a recommendation to the DDE on the validity of the response, using the following procedures:

- 1) If the consultant response is accepted, payment, if any, will be requested.
- 2) If the consultant's response is not accepted the consultant will be notified in writing.

The appropriate division will prepare the notification letter for the signature of the Director of the Office of Project Development.

The consultant will be required to respond within thirty (30) days of receipt of this determination. The consultant's failure to respond will result in a claim for payment being issued.

The consultant's response can be an admission of liability or a request that the matter be forwarded to the Errors and Omissions Review Board (EORB).

- 3) If the consultant requests that the matter be forwarded to the EORB:
 - (a) The Director of the Office of Project Development will convene a meeting of the board. Both the consultant and the NDDOT will present all issues regarding the matter.
 - (b) The EORB will issue an opinion report to all concerned parties. The opinion report of the EORB, while not binding, will be evidenced in any subsequent proceedings between NDDOT and the consultant.
 - (c) If the parties agree with the opinion reached by the EORB, the Director of the Office of Project Development will proceed in collecting the appropriate funds from the consultant, or consider the matter closed with no funds due.
 - (d) If the parties do not agree with the opinion of the EORB, the Director of the Office of Project Development will prepare a notice of claim against the consultant. This notice of claim requires DDE concurrence. The Legal Division shall be consulted as necessary concerning the content of the notice of claim prior to concurrence by the DDE. The notice will include a request that the consultant reimburse the State within thirty (30) days.

If the consultant fails to respond or refuses to comply with the notice of claim, the Director of the Office of Project Development will coordinate the issuance by the Director of a final decision. The final decision will

identify methods by which NDDOT will recover associated costs from the consultant.

ERRORS AND OMISSIONS REVIEW BOARD (EORB)

- 1) The EORB will be comprised of four (4) members and a committee chair:
 - a) All of the board will be professional engineers.
 - b) The Director of the Office of Project Development shall chair the committee.
 - c) Two (2) members shall be from the NDDOT.
 - d) Two (2) members shall be from the American Council of Engineering Companies (ACEC).
- 2) The two NDDOT committee members shall be appointed by the DDE. These two members will not include NDDOT employees with direct involvement in the project or the chain of review preceding the EORB referral.
- 3) The two ACEC committee members shall be appointed by the ACEC Transportation committee chair and co-chair, after receiving appropriate notification from the Director of the Office of Project Development. These two members will not include employees from the firm being reviewed or anyone with direct involvement in the project or the chain of review preceding the EORB