



CONSULTANT ERRORS AND OMISSIONS

POLICY FM004, EFFECTIVE 2013-01-07

POLICY STATEMENT

It is the policy of MnDOT to hold consultants (including design-builders) who perform architecture, engineering and design-related services accountable for the quality and accuracy of deliverables provided to the department. The department will take appropriate action to address the impacts of a consultant error or omission on a MnDOT project.

REASON FOR POLICY

This policy is for MnDOT internal use to provide guidance to MnDOT staff on how to proceed if they believe they have identified errors, omissions, or contractual breaches in work performed under contract to the department.

WHO NEEDS TO KNOW THIS POLICY?

- Employees and supervisors of employees who are responsible for negotiating, preparing, or managing contracts, including contract administrators, project managers, consultant coordinators, and employees who work with consultants or program coordinators.
- Employees and supervisors of employees (with delegated authority) who are responsible for executing contracts on behalf of MnDOT
- Commissioner and Deputy Commissioners

DEFINITIONS

Commissioner

The Commissioner of Transportation or the duly appointed Deputy Commissioner, or other designee of the Commissioner

Construction Engineer

The Director of the Office of Construction and Innovative Contracting, or the Director's designee

Consultant

A person or business entity that performs architecture, engineering and design-related services under a contract with MnDOT, including a design-builder or design-build team that performs such services

SENIOR OFFICER

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POLICY HISTORY

2011-11-08, Established

2013-01-07, Revision 1

[MnDOT Policy Website](#)

Design Engineer

The MnDOT architect or engineer responsible for managing design of a project, including managing the contract of any consultant hired to perform such work.

Error or Omission

An error or omission is a negligent or wrongful act in which a consultant fails to meet the applicable Standard of Care in the performance of its work under contract with the department, or fails to meet a duty imposed by the contract.

Negligence

Negligence is conduct that falls below the standard of behavior established by law for the protection of others against unreasonable risk or harm, failure to act in a manner consistent with the Standard of Care.

Resident Engineer

The MnDOT employee designated as “Resident Engineer” (or the Resident Engineer’s designee) and who is responsible for managing a construction project.

Standard of Care

Standard of Care is the degree of care, knowledge and skill ordinarily exercised by reputable professionals in the field under like circumstances.

PROCEDURES

Insurance Requirements

- Each MnDOT contract with a consultant for architecture, engineering and design-related services must require the consultant to provide proof that it has, and will maintain, insurance protecting against professional errors and omissions in the performance of its work.
- The insurance policy must have minimum limits commensurate with project risk.
- Insurance required by MnDOT should generally provide for minimum coverage limits and maximum deductibles according to the guidelines established by the Department of Administration’s Risk Management Division.
- When such insurance is on a “claims made” basis, a suitable extended reporting period must be required.
- MnDOT employees have a duty to provide information to the Risk Management Division as necessary to determine appropriate insurance coverage.

When MnDOT reasonably believes that a consultant has made an error or omission on a MnDOT project, MnDOT will consider the nature, extent, and circumstances of the error or omission, the resulting damages (if any), the likelihood of recovering such damages, and the potential efficacy of other possible responsive actions.

MnDOT will then determine whether to seek recovery of the damages from the consultant or take other appropriate action. Upon reaching a determination, the department will take steps to implement its plan. When MnDOT reasonably believes that such an error or omission has occurred, MnDOT will also use reasonable efforts to notify the consultant of the problem and allow the consultant a reasonable involvement in efforts to mitigate possible damages.

Consultant Plan Errors Review Committee Established

The Consultant Plan Errors Review Committee is responsible for conducting reviews of identified potential consultant plan errors and omissions, and for making recommendations to the Commissioner as to whether or not to seek a remedy. The remedy could include monetary recovery or non-monetary measures from a consultant deemed responsible for such Errors and Omissions. The Committee will consist of the following personnel, or their designees:

- State Design Engineer (Chair)
- State Construction Engineer
- State Bridge Engineer (who may elect not to participate if a bridge or structure is not involved)
- Chief Counsel
- Audit Director
- Director of Consultant Services (Ex-officio as advisor)

- Assistant Chief Counsel, Construction and Contract Management (Ex-officio as advisor)
- Such other members as may be designated by the Commissioner or Deputy Commissioner from time to time

Measures of Damages

MnDOT will determine damages it believes are attributable to a consultant error or omission on a case-by-case basis. The measure of damages will depend on whether the consultant error or omission was identified before or after a construction contract was let and awarded for the affected project. Damages should generally include all of the costs resulting from the error or omission, including any additional staff or consultant costs and any additional peer review costs.

- **Error or Omission Discovered Pre-Letting**
In general, damages will consist of the cost to correct the plans and to prepare and publish any addenda necessary to make the correction. This cost will also include any additional MnDOT staff time to manage this additional consultant work and to review additional submissions.
- **Error or Omission Discovered Post-Letting, but Pre-Awarded**
In general, damages should reflect MnDOT's costs to correct the plans. If the department elects to reject bids for the project and re-solicit bids, then the damages will also include any additional costs incurred by MnDOT to re-let the project. MnDOT's damages may also include the cost of responding to and defending against bid protests and lawsuits brought by bidders challenging MnDOT's decision to award or not award the construction contract. If MnDOT elects to proceed with award of the contract notwithstanding the error or omission, then the measure of damages covered in the following paragraph (**Error or Omission Discovered Post-Letting, Post-Award**) will apply.
- **Error or Omission Discovered Post-Letting, Post-Award**
In general, damages should reflect the premium costs of construction due to a design error or omission. These premium costs are the additional costs of construction that would not have been incurred by MnDOT had the consultant performed the work without making the error or omission.

Premium costs generally should not reflect additional project work that would have been included in the construction contractor's price if the original deliverables were correct, particularly if the department received a fair and equitable price from the construction contractor to perform the work.

There is, however, no set formula for determining damages, and MnDOT reserves all rights to include all relevant factors (including but not limited to costs related to project delay) in its calculation of damages. There is no minimum or threshold amount of damages required to trigger efforts to recover such damages, however, the department should consider the cost of obtaining a recovery of damages when deciding whether to pursue such recovery.

- **Other Situations**
There may be cases where a consultant error or omission will have an impact on MnDOT even though no specific construction project is affected. In those cases, damages should generally reflect the cost to MnDOT to correct the consultant's deliverables, as well as any additional MnDOT staff time to manage this additional consultant work and to review additional submissions. In all situations, MnDOT should assess as damages all of those costs that MnDOT would not have incurred "but for" the error or omission.

Action Steps

- **Discovery of Potential Error or Omission, Initial Analysis, Reporting**
When a MnDOT employee (or a consultant working for MnDOT) has reason to believe:
 - Consultant's deliverables contain an error or omission, and
 - Error or omission will or may have an adverse impact on MnDOT; the employee must report the situation to the employee's supervisor or other appropriate personnel, such as the Design Engineer or the Resident Engineer. If the potential error or omission cannot be easily remedied or if the remedy would result in more than nominal cost or damages, it must be reported to the Design Engineer.
- The Design Engineer, in conjunction with the Resident Engineer if the project has been let or awarded, must make an initial analysis of the report, to assess whether there is reason to believe the consultant's deliverables contained an error or omission. The Resident Engineer will provide information and assist with analyzing the plans and specifications as requested by the Design Engineer. If the Design Engineer determines that it is more probable than

not that an error or omission has occurred, and that MnDOT may incur significant additional costs or suffer other adverse effects because of that error or omission, the Design Engineer will proceed to the next step in this Procedure.

- The Design Engineer will report the initial assessment of the error or omission to the Resident Engineer (if appropriate) and the Chair of the Consultant Plan Errors Review Committee. The Design Engineer will provide all relevant documentation as part of such report.
- The Design Engineer will notify the consultant of the identified potential error or omission and will provide the consultant with a reasonable opportunity to assist in the assessment and correction of the error or omission and the mitigation of resulting damages.

Correction of Error by Consultant

- MnDOT consultant contracts generally require the consultant to correct Errors and Omissions in their deliverables on a timely basis and without charge to MnDOT. The consultant who prepared the deliverables should, whenever practical, be given notice of the potential error or omission, be directed to correct the error or omission, and be afforded the opportunity to have input into MnDOT's plan to mitigate damages resulting from such error or omission. The Design Engineer should initiate this process upon discovery of the potential error or omission.
- Communication between the Design Engineer and the consultant regarding the potential error or omission must be carefully documented, and such documentation made available to the Consultant Plan Errors Review Committee.
- The Design Engineer should not enter into any agreement or understanding with the consultant that would bar further action against the consultant by MnDOT. There may be additional remedies, including monetary damages, available to MnDOT by contract and by law based on the consultant's failure to meet contract requirements and failure to meet the "Standard of Care." Therefore, the Design Engineer should not make any agreement or arrangement, or issue any documents, that could be construed as limiting the consultant's obligation to correct the error or omission.

Review by Consultant Plan Errors Review Committee

- Upon receipt of notice from the Design Engineer, Resident Engineer, other MnDOT staff, or upon its own initiative, the Consultant Plan Errors Review Committee will meet at the call of the Chair. The committee will review the facts and circumstances surrounding the potential error or omission, and
 - Determine if there is reason to believe that an error or omission has occurred,
 - Make an assessment of the damages to MnDOT,
 - Make recommendations to the Commissioner regarding pursuing cost recovery or other remedial measures.
- The Committee will gather and review written documents and such other information it deems useful and necessary. The committee may seek information and invite input from the consultant, MnDOT technical, audit, contract, and other staff, persons outside MnDOT and any other entity with relevant information. The consultant that is the subject of the inquiry may provide information to the committee. The committee may also invite the consultant and its representatives to meet with the committee.
- If the Committee believes that an error or omission has occurred, the committee will make an initial assessment of the nature and magnitude of damages to MnDOT. The committee may consult with staff from the Office of the Attorney General for assistance in determining the likelihood of establishing liability as well as the damages that may be recoverable.

Recommendations by Consultant Plan Errors Review Committee

- Based on its review of the information available to it, and on its assessment of the nature and magnitude of damages to MnDOT, the committee will make a recommendation to the Commissioner. The committee may recommend actions such as, but not limited to, the following:
 - Not pursuing the matter further;
 - Accepting correction of the deliverables as a suitable remedy if the nature and magnitude of the damages is minor;
 - Requesting monetary reimbursement from the consultant;
 - Turning the matter over to Attorney General staff to assess whether it would be reasonable and prudent to pursue legal action.

- The committee may recommend that MnDOT seek non-monetary remedies or imposing non-monetary sanctions on the consultant. Non-monetary remedies could include (without limitation) entering into a stipulation whereby the consultant agrees to provide services to MnDOT at no cost; restricting the number, type, or value of contracts which the consultant may be awarded; or taking the consultant off a “prequalified list” or “certified list” for a period of time. Due consideration will be given to suspending or debarring the consultant as a state vendor when circumstances merit such action and when permitted by law.
- The committee may recommend pursuing other claims that may be available to the department because of the error or omission, such as the Minnesota Statutes, Chapter §15C, the False Claims Act.
- Because each claim will be unique in its facts and circumstances, MnDOT’s course of action and any decision as to the outcome will be determined at the discretion of the Commissioner.

Remediation

- Following a decision by the Commissioner or Deputy Commissioner on the committee’s recommendations, the committee will designate an individual or team responsible for carrying out the approved course of action. It is anticipated that the committee will generally designate personnel who were responsible for oversight of the consultant contract, such as the Design Engineer or the Design Engineer’s supervisor, Office Director, or an Assistant District Engineer for Program Delivery. While construction staff will need to supply documentation concerning the costs incurred because of an error or omission, it is not anticipated that construction personnel will generally be designated to lead cost recovery efforts.
- Staff responsible for implementing the approved course of action should confer with the Chief Counsel to develop MnDOT’s approach. Submit draft correspondence to the Chief Counsel for review prior distributing to the consultant, unless otherwise specified by the Chief Counsel.
- Since all claims are governed by a statute of limitations, MnDOT personnel must implement the approved course of action promptly and handle all related tasks and correspondence in a timely manner.

Conclusion of Remedial Action, Litigation

The individual or team responsible for implementing the approved course of action will be responsible for providing regular updates to the Consultant Plan Error Review Committee.

- If implementing the approved course of action results in reaching a settlement or other agreement with the consultant, the draft agreement must be submitted to the Assistant Chief Counsel, Construction and Contract Management Section, for review prior to execution.
- If it appears that approved remedial action cannot be successfully implemented, the individual responsible for its implementation must tell the Consultant Plan Error Review Committee. The Committee will meet to consider making further recommendations to the Commissioner, for example, recommending that litigation be considered.

Variance from Procedure

While there are not set dollar amounts or thresholds, the department reserves the right to vary the procedures set forth herein as it deems prudent based on the circumstances. For example, procedures that are more informal may be used in cases where the potential damages to the department are relatively minor. In the case of a minor error or omission where the intent of the deliverables can be readily discerned, the department reserves the right to correct the deliverables rather than requiring the consultant to do so.

RESPONSIBILITIES

All MnDOT Employees

- Report potential design errors and omissions
- Take appropriate actions as directed by the Consultant Plan Errors Review Committee

Commissioner

- Review recommendations of the Consultant Plan Errors Review Committee

Consultant Plan Errors Review Committee

- Meet as required to review potential errors and omissions and make recommendations to Commissioner

Design Engineer

- Perform an initial analysis of reported potential errors and omissions
- Coordinate with Resident Engineer as needed
- Serve on Consultant Plan Errors Review Committee

Resident Engineers

- Assist Design Engineer as needed in performing initial analysis of reported potential errors and omissions

RELATED INFORMATION

[Best Practices in the Management of Design Errors and Omissions](#) *AASHTO Standing Committee on Highways, March 2009*
[23 Code of Federal Regulations Section 172.9 \(a\) \(6\)](#) *Administration of Engineering and Design Related Service Contracts*
[MnDOT False Claims against the State Policy](#)

POLICY OWNERSHIP AND AUTHORIZATION

Policy Owner



Sue Stein
Director, Office of Administration

Date Signed 12-14-12

Internal Control & Accountability Governance Board has reviewed this policy and recommends approval



Tracy Hatch (*on behalf of the Board*)
Board Chair and Chief Financial Officer

Date Signed 1.4.2013

Responsible Senior Officer



Bernard J. Arseneau
Deputy Commissioner and Chief Engineer

Date Signed 1-7-13