

Chapter 6 Consultant Errors & Omissions

6.1 Introduction

The Indiana Department of Transportation (INDOT) enters in good faith into contracts with Consultants to provide professional services to deliver transportation projects. Deliverables of these contracts include but are not limited to environmental documents and studies, right-of-way acquisition, construction plans and contract documents.

INDOT expects Consultants to deliver technical accuracy and quality work; however, project *errors and/or omissions* (E&O) and intentional acts may occur. Some E&O may be within an acceptable level of care while others are not. Depending on their significance, E&O may result in increased design, construction, and maintenance costs thereby affecting INDOT's ability to deliver projects on time and within budget. As a result, INDOT prioritizes controlling E&O and recovering from E&O that occur.

INDOT's treatment of an E&O may depend on when the E&O is discovered. INDOT and the Consultant typically resolve an E&O discovered during a pre-construction conference more quickly and at a lower cost than one discovered during construction and at a major point in the project's critical path. The Consultant should correct an E&O identified prior to project construction at the Consultant's expense with no additional cost to INDOT if the E&O is caused by the Consultant's Negligence as defined herein. When an E&O is identified during construction, INDOT emphasizes finding a solution to correct the E&O as quickly as possible to avoid or minimize construction delays. In most cases, finding an early solution to the E&O will reduce costs resulting from the E&O. Although finding a solution is the most immediate concern, INDOT may seek to recover costs due to the E&O after the solution is found.

Resolving an E&O discovered during construction may require a change to the original construction contract. Modifying the original contract not only adds to a project's cost but also places an administrative burden on INDOT.

This chapter provides guidance on how INDOT will evaluate a potential E&O and seek to recover costs attributed to an E&O. Notwithstanding the procedures outlined in this chapter, INDOT reserves the right to determine whether an E&O affects a Consultant's ability to perform work on future INDOT contracts.

This chapter applies to Consultant contract services where E&O may have occurred. INDOT staff can contact the Office of Contract Administration regarding questions about the contract or these procedures.

6.2 Objective

To set forth a consistent procedure for INDOT staff to process and document contract E&O.

To present clear guidelines for recovering premium costs to a project or damages to INDOT that may be attributable to contract document E&O.

6.3 Standard Definitions

Consultant: The person, firm, entity or professional corporation under contract with INDOT to

provide professional design and other such professional services to INDOT.

Engineer of Record (EOR): The Indiana professional engineer who is responsible for the preparation, signing, dating, sealing, and issuing of engineering documents. If the professional engineer who was responsible for the documents has left the Consultant under contract with INDOT, the Consultant will assign another professional engineer to serve as the EOR.

Errors: Plan or specification details or other contracted services that are incorrect, conflicting, insufficient, or ambiguous.

E&O: Means Errors and/or Omissions as described herein,

Negligence: The failure to meet the "Standard of Care" that a professional would ordinarily exercise under similar circumstances or, if applicable, failure to meet the "Standard of Care" with respect to any skill, competency or duty Consultant represents it has or will discharge in its contract with INDOT.

Omissions: Cases in which the plans, specifications, or other contracted services are silent on an issue that should otherwise be addressed in the documents.

Premium Cost: The additional cost of a construction contract change that would not have been incurred if the work had been included in the original contract. More specifically, premium costs are dollar amounts paid for non-value added work that is required to correct a Consultant's E&O. Non-value added work includes, but is not limited to, delays, inefficiencies, rework, or extra work as shown below, other than costs caused by the contractor and/or his subcontractors or suppliers or by other parties not under the control of the Consultant. Non-value added work can occur in three distinct situations:

- 1) Work delays or inefficiencies. The premium costs are costs INDOT paid or will pay to the contractor for delays or inefficiency damages caused by E&O.
- 2) Rework. The premium costs are the dollar amount of the original items of work that have to be removed and the costs to remove these items.
- 3) Extra Work. The premium costs are the net difference between the final prices INDOT agrees to pay to the contractor and the cost INDOT would have incurred had the extra work been included in the original bid at letting.

Project Engineer/Supervisor (PE/S): The INDOT or certified LPA construction personnel responsible for oversight of construction contract services.

Project Manager (PM): The INDOT or LPA Employee in Responsible Charge (ERC) responsible for oversight of project development services.

Solution: An appropriate course of action to resolve project issues.

Standard of Care: The Consultant shall perform all services in accordance with the degree of skill and care ordinarily used by competent professionals of the same discipline, providing services of a similar nature.

6.4 Discovery, Development of a Project Solution and Notification

To establish the appropriate lines of communication, the PM and EOR (or their representatives) shall attend the project's pre-construction conference. Compensation of the EOR for attendance at the pre-construction conference through post-design services will be in accordance with the Consultant Contract. When necessary, the PE/S shall coordinate with the PM and EOR for their participation in project meetings. INDOT shall compensate the EOR for attendance at project meetings through post-design services unless INDOT determines through the process outlined in this Chapter that the meetings resulted from an E&O due to Consultant's Negligence.

Upon discovery of a potential E&O, the PE/S shall advise the PM of the specific project problems. The PM then must promptly notify the EOR of the potential E&O. The EOR must acknowledge receipt of the PM notification within one business day. With this acknowledgement, the EOR must develop a potential Solution or define a timeframe to expeditiously develop a Solution.

The PM, with input from the EOR, may be able to clarify the project problems by reviewing the plans and specifications, the EOR's original scope of work, and any specific requirements that INDOT imposed on the EOR. The EOR typically provides revised drawings, calculations, and specification changes as the Solution. The EOR may not bill the costs it incurs for site visits and additional engineering services as post-design services when these visits or services are caused by a potential E&O. The EOR shall track such costs separately for potential compensation, which will be evaluated in the E&O Assessment phase.

After consultation with the PE/S and the EOR, the PM will determine the Solution to be used to address problems on the project. The PE/S will track the costs of the proposed Solution, and the EOR will track any of its costs associated with the proposed Solution. The PE/S will negotiate any additional cost and time required to implement the Solution with the construction contractor. The PE/S will document any project issue Solution through a change order with the construction contractor and provide a copy to the PM and EOR. If not included in the change order, the PE/S will provide the PM with a summary of all costs associated with the Solution. Along with a copy of the change order, the PM will provide the EOR with notification (substantially in the form of Exhibit 1 – Early Notification Letter) if the project problem appears to have been caused by an E&O due to Consultant's Negligence. The EOR will acknowledge receipt of such notice within one business day.

Unless otherwise noted, all notifications and acknowledgments of receipt between the PM and the EOR as described in Section 6.4 of this Chapter may be verbal; however, the PM and EOR must follow these verbal communications with an email or written documentation.

6.5 Assessment

When the project problems appear to have been caused by an E&O, the PM must review the Consultant's scope of work, project specific information provided to the Consultant, any INDOT instructions and policies, any specific contract language and any other information (including the professional engineering standards in effect when the contract was executed) the PM might consider to be relevant to better determine the Consultant's responsibility for the possible E&O. The PM also will consider the costs to INDOT caused by the potential E&O. The PM may consult with other INDOT personnel, such as the PE/S, subject matter experts and the Legal Services Division, to assist in evaluating potential Consultant Negligence and the likelihood for recovery of damages. The PM will make an initial written determination of whether an E&O

occurred due to the Consultant's Negligence and what, if any, premium costs INDOT seeks to recover from the Consultant.

The PM must provide the EOR with written notification if INDOT seeks to recover costs from the Consultant for the E&O (Exhibit 1 – Early Notification Letter). The notification will include a copy of the PM's written determination that an E&O occurred, that it was a result of Consultant Negligence and what, if any, premium costs INDOT seeks to recover from the Consultant. The PM's notification also will provide the Consultant and its representatives an opportunity to attend an Assessment Review Meeting with the PM. The EOR shall acknowledge receipt of the PM's notification letter in writing within three (3) business days of its receipt and indicate whether it is requesting an Assessment Review Meeting with the PM. If the EOR does not request an Assessment Review Meeting in its acknowledgment letter, INDOT will consider the opportunity to request a meeting waived. Regardless of whether the EOR requests an Assessment Review Meeting and the outcome of such a meeting, the EOR may request a Staff Review in accordance with Section 6.7 of this chapter.

If the EOR requests an Assessment Review Meeting, the PM will schedule a meeting before taking further action on the potential E&O. At the meeting, the PM will report to the Consultant its findings, including the premium costs and assessment of responsibility. The PM will provide the Consultant an opportunity to respond to the findings during this meeting, including its evaluation of the associated costs of the Solution by the EOR. The PM may choose to alter its original written determination and issue a new determination based on the discussions at the Assessment Review Meeting. The PM will follow up this meeting with a letter summarizing the discussion, providing the options available to the Consultant, and giving the Consultant fifteen (15) calendar days to respond. The Consultant shall respond in writing within fifteen (15) calendar days of receipt of the PM's letter with concurrence of the assessment findings in the letter or request a Staff Review meeting as described in Section 6.7 of this Chapter.

6.6 Recovery

INDOT's policy is to pursue the recovery of any premium costs that are the result of Consultant E&O; however, the extent of INDOT's recovery effort may be guided by the anticipated recovery amount and the likelihood of a successful recovery effort. If at any point in the process, INDOT decides not to pursue recovery, the PM shall document the decision in the project file and notify the EOR.

The Consultant may, as a result of early notification, accept responsibility for E&O and offer to settle with INDOT. In these instances, the PM will initiate a request to the Legal Services Division, in consultation with the applicable Production Management Division Director and Contract Administration Division, to prepare a settlement agreement and release of claims should INDOT decide to accept the settlement terms. The PM and Contract Administration Division will process the agreement for execution.

If the PM and the Consultant agree that a Consultant E&O exists and that a certain cost amount is due to INDOT, then the PM will notify INDOT's Accounting Division to begin Collection under Section 6.8 of this Chapter.

6.7 Staff Review

If the Consultant disagrees with the decision of INDOT's PM after the Assessment Review Meeting or after waiving its opportunity for an Assessment Review Meeting, then the Consultant can submit a request for a Staff Review. To request a Staff Review, the Consultant must prepare

and submit a written summary of the issues to INDOT's Chief Legal Counsel within fifteen (15) calendar days of either: 1.) the PM's early notification letter if the EOR chooses not to request an Assessment Review Meeting; or 2.) the PM's letter following the Assessment Review Meeting. At a minimum, the summary must include a description of the alleged E&O, an assessment of the responsibility for the alleged E&O, and an assessment of cost attributable to the alleged E&O, if any.

INDOT's Legal Division will oversee and facilitate the Staff Review process. After receiving a request for a Staff Review meeting, INDOT's Legal Division will notify the PM of the request and schedule a Staff Review meeting for the Consultant Staff Review Team to consider the issues. The Staff Review meeting must be scheduled within thirty (30) calendar days of receipt of the Consultant's request for a Staff Review meeting, unless the parties agree otherwise. The Staff Review notification letter will provide the PM with an opportunity to respond in writing to the Consultant's request for a Staff Review meeting. The Legal Division's notice to the PM must give the PM at least fifteen (15) calendar days to provide a written response to the Consultant's request for a Staff Review meeting.

INDOT's Legal Division will copy the PM on the Staff Review Meeting notification letter, and the PM must notify the Consultant Selection Committee that there is an Outstanding Unresolved Agreement Dispute. The Consultant Selection Committee shall consider its notification from the PM as Day 1 of the Dispute for purposes of selection scoring. The PM also will notify the Chair of INDOT's Prequalification Committee of the pending review. Any action taken by the Prequalification Committee will follow applicable rules and policies governing the Committee.

The following three offices will appoint one individual each to serve on the Staff Review Team: INDOT's Chief Legal Counsel, INDOT's Deputy Commissioner for Highway Management, and INDOT's Deputy Commissioner for District Operations. Team members will be appointed on a case by case basis. The members appointed to the Staff Review Team should not have had involvement in the possible E&O at issue prior to the start of the Staff Review process.

At the date and time specified by INDOT's Legal Division, the Staff Review Team will hold a review meeting to consider the issues. The Team will review the PM's decision and may consider any new information brought before it by either the Consultant or the INDOT PM. At a minimum, the Team will review the written request for a Staff Review meeting, the response to the request by the PM, any related construction change order, and prior written notifications outlined in this Chapter. At the Staff Review meeting, both parties will have an opportunity to be heard by the Staff Review Team.

The Team will make a recommendation to the Commissioner on whether an E&O occurred, to what extent the Consultant's Negligence is responsible for an E&O and what the Consultant owes to INDOT for corresponding premium costs, if applicable. The Team must submit a recommendation to the Commissioner within fifteen (15) calendar days of the Staff Review Team meeting. The Commissioner will review the Team's recommendation and make a decision with respect to some or all the matters involved. The Legal Services Division will provide the Consultant, the PM and the appropriate INDOT Division or District Director a copy of the Commissioner's decision.

The Legal Services Division will send the EOR a letter notifying the EOR of INDOT's intent to pursue recovery if applicable under the Commissioner's decision. The Legal Services Division also will inform INDOT's Accounting Division of the Commissioner's decision. If appropriate

the Accounting Division will invoice the Consultant per the Commissioner's decision. If the Consultant does not remit payment within thirty (30) calendar days of receipt of the invoices, INDOT may pursue further action.

If the Consultant decides not to pursue the Staff Review at any point, if the Staff Review Team finds no responsibility for the E&O on the part of the Consultant, or if the Consultant elects not to appeal the Commissioner's decision, the PM shall immediately notify the Consultant Selection Committee and request that the Committee remove the Consultant's Outstanding Unresolved Agreement Dispute status. The effective date of such removal shall be the date of notification.

6.8 Collection

The PM shall copy the Director of the Contract Administration Division on all notification letters involving possible E&O. The Contract Administration Division will maintain a database of identified E&O along with record of the final disposition of each, including disposition on appeal by Consultant, if applicable. The Accounting Division will invoice the Consultant for the amount indicated in the Commissioner's order if applicable or for the amount agreed upon by INDOT and the Consultant in a settlement agreement if applicable. The Accounting Division will notify Project Finance of any collections on federal-aid projects. INDOT will include any costs associated with post letting work attributed to the E&O that has been paid to the Consultant in the invoiced amount for reimbursement. The Consultant will reimburse the State within thirty calendar days.

6.9 Enlargement of Time

INDOT in its sole discretion either at the request of the Consultant or on its own initiation may extend any time period or deadline identified in this Chapter 6.

6.10 Commissioner's Authority not Waived/Failure to Participate

This Chapter 6 describes an INDOT process to address potential or actual E&Os by a Consultant to reduce delay and eliminate, reduce or recover any costs to the taxpayers. This Chapter 6 in no manner diminishes the Commissioner of INDOT's authority or ability to act granted by Indiana or other law. Should a Consultant elect not to or fail to participate in this Chapter 6 process, the appropriate INDOT staff will draft a recommendation to the Commissioner for his decision, with a copy to INDOT Legal.