

**MINNESOTA DEPARTMENT OF TRANSPORTATION
POLICY MANUAL SUBMITTAL APPROVAL AND ROUTING FORM**



Instructions: Complete form from Date Prepared through Comments. Forward completed form and proposed policy to responsible Division Director.

Date Prepared:	Aug 16, 2011	
Policy Number:		Date First Adopted:
Title:	Policy on Consultant Errors and Omissions	
Manual Division:	Financial Administration	
Last Revision Date:		Current Revision Date:
Responsible Office Director:	Sue Stein, Office of Administration	
Originator:	Jim Cowie, Contract Management Section	
Is this a New Policy?	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
Is this Policy being deleted?	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
Are there changes to this Policy?	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
Comments (briefly describe proposed change):	Adopt a new policy to guide Staff who dealing with consultant errors and omissions. Creates a new review committee	

Assigned Additional Reviewers: Division Director, Approved 10/18/11

Reviewer Signature: _____ Date: _____

Reviewer Signature: _____ Date: _____

REQUIRED ROUTED APPROVALS:

Division Director Responsible

Deputy Commissioner of Transportation

October 18, 2011
Date Approved

10-28-11
Date Approved

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MnDOT POLICY

Date:
[Revised Date(s)]:

Reference:

Position Statement: It is the policy of the Minnesota Department of Transportation 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. This policy is intended for MnDOT's 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.

Guideline:

- I. **Definitions.** As used in this document, the following terms will have the definitions assigned here, unless the context clearly indicates otherwise.
 - A. **Commissioner.** The Commissioner of Transportation or the duly appointed Deputy Commissioner, or other designee of the Commissioner.
 - B. **Construction Engineer.** The Director of the Office of Construction and Innovative Contracting, or the Director's designee.
 - C. **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.
 - D. **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.
 - E. **Error or Omission.** A negligent or wrongful act in which a Consultant fails to meet the applicable standard of care in the performance of its work under a contract with the department, or fails to meet a duty imposed by the contract.
 - F. **Negligence.** Conduct that falls below the standard of behavior established by law for the protection of others against unreasonable risk of harm; the failure to act in a manner consistent with the Standard of Care.
 - G. **Resident Engineer.** The MnDOT employee designated as "Resident Engineer" (or the Resident Engineer's Designee) and who is responsible for managing a construction project.
 - H. **Standard of Care.** The degree of care, knowledge and skill ordinarily exercised by reputable professionals in the field under like circumstances.

II. **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 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 will be provided on "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.

III. **Cost Recovery and Remedial Action.** 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 or not 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 responsive plan. When MnDOT reasonably believes that such an error or omission has occurred, M/DOT 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.

IV. **Consultant Plan Errors Review Committee Established.** The Consultant Plan Errors Review Committee will be 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 (which 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)
- Director of Contract Management (Ex-officio as advisor)
- Such other members as may be designated by the Commissioner or Deputy Commissioner from time to time

V. **Measure of Damages.** MnDOT will determine damages MnDOT 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. In all cases, 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.

- A. **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 effectuate the correction. This cost will also include any additional MnDOT staff time to manage this additional consultant work and to review additional submissions.
- B. **Error or Omission Discovered Post-Letting, but Pre-Award.** 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 the department elects to proceed with award of the contract notwithstanding the error or omission, then the measure of damages covered in paragraph C below will apply.
- C. **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 or not to pursue such recovery.
- D. **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.

Procedure:

I. Discovery of Potential Error or Omission; Initial Analysis; Reporting

- A. When a MnDOT employee (or a consultant working for MnDOT) has reason to believe (1) that a Consultant's deliverables contain an Error or Omission, and (2) that the 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.
- B. 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 as a result of that Error or Omission, then the Design Engineer will proceed to the next step in this Procedure.
- C. 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.
- D. 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.

II. Correction of Error by Consultant

- A. 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.
- B. 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.
- C. 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 at 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 correction of the Error or Omission.

III. Review by Consultant Plan Errors Review Committee

- A. 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 (1) determine if there is reason to believe that an Error or Omission has occurred, (2) make an assessment of the damages to MnDOT, and (3) make recommendations to the Commissioner regarding pursuing cost recovery or other remedial measures.
- B. The Committee will gather and review written documents and such other information as 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.
- C. 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, using Section V of the "Guideline" Section of this policy (entitled "Measure of Damages") as a guide. 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.

IV. Recommendations by Consultant Plan Errors Review Committee

- A. 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;

- Seeking other 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 "pre-qualified 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.
- Pursuing other claims that may be available to the department as a result of the Error or Omission, such as a claim under the False Claims Act.

B. 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.

V. Remediation

- A. Following action 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 as a result of an Error or Omission, it is not anticipated that construction personnel will generally be designated to lead cost recovery efforts.
- B. Staff responsible for implementing the approved course of action should confer with the Chief Counsel to develop MnDOT's approach. Draft correspondence should be submitted to the Chief Counsel for review before distribution to the Consultant, unless otherwise specified by the Chief Counsel.
- C. 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.

VI. 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.

- A. If implementing the approved course of action results in reaching a settlement or other agreement with the Consultant, the draft agreement will be submitted to the Chief Counsel and Contract Management for review prior to execution.

- B. If it appears that approved remedial action cannot be successfully implemented, the individual responsible for its implementation will so advise 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.

VII. Variance from Procedure

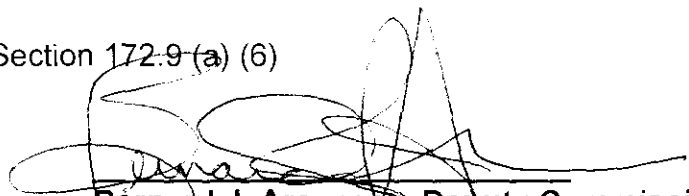
While there are not set dollar amounts or thresholds, the department reserves the right to vary the procedures set forth herein as it deems prudent based on the circumstances. For example, more informal procedures may be used in cases where the potential damages to the department are relatively minor. 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.

Background:

Best Practices in the Management of Design Errors and Omissions; AASHTO Standing Committee on Highways, March 2009

Statutory or Other References:

23 Code of Federal Regulations Section 172.9(a) (6)



**Bernard J. Arseneau, Deputy Commissioner
and Chief Engineer**

Any questions regarding this policy should be directed to: Director, Contract Management Section, Mail Stop 130, (651) 366-3024