



SUBJECT: Infrastructure Design Directive
IDD-2018-13
Errors and Omissions Policy

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TO: Office of Infrastructure Divisions
District Offices
Transportation Design Community

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FILE REFERENCE:
PSESHARE:Design Directives

The following IDD shall be used to ensure consistency in the development of all projects to be let by the NMDOT in relation to Errors and Omissions (E&O). This IDD will complement the Operations Division Directive (ODD) 2016-05.

Please see attachment A.

Attachment A

Errors & Omissions (E&O) Policy and Procedures

Policy

Engineers are accountable for the technical accuracy and quality of their work. In the New Mexico Department of Transportation (NMDOT) Contracts for Engineering Services contain a clause that makes the Engineer fully responsible for their design. This responsibility extends to the entire scope of work, including but not limited to, the physical representation of the design including the Plans and related data.

The NMDOT recognizes that minimal E&O may be inherent in a design. Nonetheless, all E&O negatively impact the NMDOT in terms of cost, time or other administrative burdens. These impacts may differ depending on when the E&O is discovered.

Current Federal Highway Administration (FHWA) philosophy and policy guidance is to participate in E&O costs provided that the E&O is not the result of gross negligence or carelessness and that the NMDOT did not contribute to the E&O through carelessness, negligence, incompetence or understaffing. Proper use of these policies and procedures are aimed to assure the NMDOT receives the full amount of federal-aid participation.

The NMDOT and FHWA are actively engaged in an agreement to document the process by which federal-aid participation will be determined and implemented for E&O situations.

Procedures

The NMDOT will use the following procedures when identifying, documenting, tracking, determining responsibility for E&O, and recovering E&O costs.

E&O can be discovered at any phase in the Project design or Project construction process (i.e. Pre-Award of Contract or Post-Award of Contract). The NMDOT evaluates each E&O on a case by case basis to determine responsibility and recover costs associated with the E&O.

Pre-Award

Identification and Notification

When the Project Development Engineer (PDE) discovers a potential E&O the PDE will notify the Engineer in writing. The Engineer is responsible for responding with corrections or explanation to the potential E&O to the PDE within three (3) Days, unless the Project is currently being advertised. If the Project is currently being advertised then the Engineer's response to the PDE is due within twenty-four (24) hours.

If the Engineer does not respond to the PDE in the timeframe under the Identification and Notification section then the NMDOT will take action to address the potential E&O.

Reimbursement

The Engineer's E&O identified before award of the Contract shall be corrected at the Engineer's sole expense. This means that the Contract for Engineering Services will not be amended to add additional time or compensation for deliverables due to the Engineer's E&O.

When the Engineer does not respond, the Engineer is solely responsible for the NMDOT's costs to address the E&O. If payments are due from the NMDOT to the Engineer under its Contract for Engineering Services then the NMDOT will withhold its costs from the payment due to the Engineer. If payments are not due from the NMDOT to the Engineer under its Contract for Engineering Services then the NMDOT will request reimbursement in writing. The Engineer shall reimburse the NMDOT within thirty (30) Days from the date of the NMDOT's request for reimbursement.

Post-Award

Identification and Notification

When the Project Manager (PM) identifies a potential E&O the PM will notify the Engineer in writing. The PM will provide a summary of the potential E&O and include the documentation such as Request for Information (RFI), Plans, Specifications, etc. The Project Development Engineer, Design Region Manager, Assistant District Engineer (ADE) of Construction and Construction Liaison Engineer (CLE) shall be copied on the notification.

Within twenty-four (24) hours of the PM's notification the Engineer shall provide to the PM a written response including a summary of the solution to the potential E&O including documentation such as response to the RFI, revised Plans, revised Specification, etc.. To the extent that the Engineer requires specific assistance from the NMDOT, the Engineer shall request the same in the response to the PM.

If the potential E&O situation is determined by the PM to affect the safety of the public then the PM is not required to notify the Engineer in writing of the potential E&O. The PM may take any immediate action necessary to protect the safety of the public. In this situation, the PM will notify the Engineer and follow the procedures in this section when the potential E&O no longer affects the safety of the public.

If the Engineer does not respond to the PM in the timeframe under the Identification and Notification section then the NMDOT will take action to address the potential E&O.

Determination

After review of the Engineer's response the PM will make a determination as to whether the issue constitutes an E&O. E&O generally refer to design deficiencies in the Contract which must be corrected in order for the Project to function or be built as intended. Errors are generally referred to as items in the Contract documents that are shown incorrectly. Omissions are generally referred to as items in the Contract documents that should be, but are not, included.

The PM may consider, but is not limited to the following, in their determination as to whether an issue constitutes an E&O:

1. Specific direction provided by the NMDOT during the Project's design;
2. Engineer's areas of direct charge;
3. NMDOT provided design information;
4. Applicable Standards and Specifications in effect during design;
5. Change in site condition after the satisfactory delivery of Phase I and Phase II services;
6. The relationship of the potential E&O to previous Change Orders (CO) approved during construction; and
7. Redesigns or changes initiated by the NMDOT that could not have been reasonably anticipated by the Engineer.

When the PM determines that the issue is an E&O, then the PM will initiate a CO per the NMDOT's established CO procedures. The PM will provide written direction to the Contractor for the corrective action and document such action on a Site Manager Type One (1) CO.

When the PM determines that the issue is not an E&O, then the PM may initiate, when necessary a CO. Contract revisions requested by the NMDOT, that are unrelated to an E&O, will be paid for as Phase III services or by amendment to the Contract for Engineering Services. When contract revisions, unrelated to an E&O, and Phase III or amendment to the Contract for Engineering Services cannot be achieved then the Engineer may invoice the NMDOT directly.

Reimbursement

The NMDOT may request reimbursement from the Engineer for all costs associated with an Engineer's E&O. These costs may be in excess of the COs processed to resolve the E&O.

Quarterly, the NMDOT will review and examine all E&O COs and determine whether to seek reimbursement from the Engineer. The NMDOT will request reimbursement from the Engineer in writing. The request may contain any documentation supporting the request for reimbursement. The Engineer shall have thirty (30) Days from the date of the NMDOT's request to make the reimbursement or request a meeting with the Secretary or designee. The meeting shall be limited to the assignment of responsibility to the Engineer and the request for reimbursement.

If the meeting results in a resolution other than the reimbursement originally requested by the NMDOT then the same shall be memorialized in a settlement agreement.

If reimbursement or a request for meeting is not timely made then the NMDOT may initiate collection procedures or litigation for the E&O.

Credit of Reimbursement

Once an Engineer has reimbursed the NMDOT for an E&O, the NMDOT will credit the reimbursement to the appropriate federal-aid Project as determined in the agreement between the NMDOT and FHWA.