

NTTA Projects	Original Issue Date: 06/05/2008	FD-11
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Title: Errors and Omissions		

1.0 PURPOSE:

To document steps to identify, evaluate, and deal with possible Consultant errors and omissions in the provision of services to the NTTA.

2.0 RESPONSIBILITIES:

AED: Assistant Executive Director for Project Delivery shall be responsible to review and determine if a consultant is responsible for errors and omissions resulting in premium costs to the NTTA.

E&O Review Committee (the committee): The committee that collects and assess the responsibility of a consultant for, and potential consequences of, estimated premium costs resulting from consultant generated errors and omissions.

Consultant: Review and respond to inquiries regarding possible errors and omissions as determined by the NTTA.

NTTA Legal: Act in an advisory capacity regarding inquiries to possible consultant generated errors and omissions, preparation of Settlement Documentation and, when determined by the AED, engage in litigation to recover premium costs from a consultant when a satisfactory agreement to the NTTA cannot be agreed by other methods.

3.0 SCOPE/APPLICABILITY:

This procedure shall apply to all NTTA corridor and projects.

4.0 DEFINITIONS AND ACRONYMS:

AED: Assistant Executive Director for Project Delivery; provided, that any or all duties of the AED under this process may be delegated by the AED to another NTTA employee.

E&O Review Committee (the Committee): The committee that reviews change order requests for contracts administered by the NTTA's Project Delivery department. Unless otherwise specified by the AED, the C5 Committee shall perform the duties of the E&O Review Committee for Project Delivery.

Consultant: A firm or individual with whom the NTTA contracts for engineering and related services, including, but not limited to, the preparation of plans, specifications, and estimates for construction projects, management and review of engineering services or the inspection of ongoing construction; the term "consultant" also includes any sub-consultant providing services to the NTTA as part of a prime consultant's services.

Contract: The agreement between the NTTA and the consultant for the provision of the consultant's services.

Errors and Omissions: A failure by the consultant to perform its obligations under the contract in accordance with the standard of care specified in the contract, or if no such standard of care is specified, the consultant's performance of its obligations in a manner that constitutes negligent performance under applicable law.

Premium costs: Costs or losses that the NTTA would not have incurred but for the consultant's errors and omissions. Premium costs include, but are not limited to, costs or losses resulting from increased fees, increased unit prices, delays, inefficiencies, rework, or extra work that would not have been incurred but for the consultant's failure to perform in accordance with the contract. By way of example only, and without limiting premium costs, premium costs may be incurred in the following situations:

- Delays or inefficiencies. Premium costs include delay damages paid to the general contractor that would not have been incurred if the consultant's work had not been subject to errors and omissions.
- Rework. If either (a) work performed by contractors or other persons pursuant to plans, specifications, or other work-product prepared by the consultant, or (b) work performed by the consultant itself, must be removed, replaced, or redone due to the consultant's errors and omissions, the costs the NTTA incurs to remove, replace, and/or redo such work are premium costs to the extent they would not have been incurred but for the consultant's errors and omissions.

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- Extra work. If due to the consultant's errors and omissions, work required for a project is not included in a general contractor's bid at letting, premium costs are the added costs to obtain such extra work over and above what the cost for such work would have been if it had been included in the general contractor's bid.

Services in Kind:

- Services provided by a consultant in lieu of money as restitution for premium costs chargeable to the consultant.

5.0 PROCEDURE:

5.1 General:

This procedure shall not relieve a consultant from responsibility to provide services in accordance with the requirements of the contract, applicable professional standards, and applicable law; nor shall this procedure relieve the consultant from verifying that its performance satisfies such requirements, standards, and laws.

5.2 Direct Discussions with the Consultant:

- 5.2.1 If an NTTA Corridor Manager, Construction Manager, or other person employed by or acting on behalf of the NTTA determines that a consultant may be responsible for errors and omissions in the performance of its work under a contract, it shall inform the AED of the issue.
- 5.2.2 The AED may seek advice of NTTA legal counsel regarding potential legal claims against the consultant with respect to a consultant's possible errors and omissions, including, but not limited to, whether a legal claim is subject to upcoming time limitations.
- 5.2.3 Unless otherwise instructed by the AED, the NTTA's Construction Manager or Corridor Manager (as determined by the AED) may engage in direct discussions with the consultant to attempt to resolve the issue in a manner satisfactory to NTTA.
- 5.2.4 If the issue cannot be resolved to the NTTA's satisfaction in a timely manner through direct discussions with the consultant, the issue shall be referred to the Committee for review.

5.3 E&O Review Committee Evaluation:

- 5.3.1 The Committee shall collect information regarding the possible errors and omissions and may confer with any person having knowledge of the possible errors and omissions and/or their consequences.
- 5.3.2 In consultation with NTTA legal counsel, the Corridor Manager, Construction Manager, and other appropriate personnel representing the NTTA, the Committee shall attempt to assess the responsibility of the consultant for, and potential consequences of, possible errors and omissions, including estimated premium costs resulting from the consultant's errors and omissions.
- 5.3.3 The chair of the Committee shall confer with NTTA legal counsel regarding the possible errors and omissions and the NTTA's possible courses of action.
- 5.3.4 Unless otherwise advised by NTTA legal counsel or the AED, the Committee Chair shall advise the consultant in writing that the possible errors and omissions have been referred to the Committee for review and evaluation.
(Form FD-11-F1 provides a template for this notice)
- 5.3.5 The E&O Log (form FD-11-F4) shall be used by the committee to record and track the status of information regarding the specific errors and omissions issue.
- 5.3.6 The Committee shall report to the AED regarding its review of the consultant's possible errors and omissions.

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5.4 Assistant Executive Director Review

- 5.4.1 The AED shall evaluate the committee's report regarding potential consultant generated errors and omissions.
- 5.4.2 The NTTA generally shall make demand to recover for errors and omissions that the AED reasonably determines result or may result in more than minimal premium costs to the NTTA when considered in light of the total project cost, the total amount payable under the consultant's contract, and any other factors the AED considers relevant. However, the AED's decision to seek recovery shall be guided by the anticipated recovery amount, the likelihood of a successful recovery effort, foreseeable administrative costs, the expense of litigation, and the consultant's performance history.
- 5.4.3 If the AED determines that the consultant is responsible for errors and omissions that have resulted, or are reasonably likely to result, in premium costs to the NTTA, the AED, in consultation with NTTA legal counsel and such other NTTA staff and/or personnel representing the NTTA as the AED deems advisable, shall determine whether the NTTA shall make formal claim on the consultant to recover those premium costs.
- 5.4.4 If the NTTA intends to make formal claim on the consultant, the AED shall notify the Consultant in writing of the amount of the NTTA's claim, summarize the issues supporting the claim, and request the consultant satisfy the claim and/or confer with the AED regarding the consultant's response to the claim. The AED shall confer with NTTA legal counsel regarding the notice to the consultant.
(Form FD-11-F2 provides a template for this notice)
- 5.4.5 If the AED determines that it is in the NTTA's best interest not to pursue recovery of premium costs from the consultant, the AED shall advise NTTA Executive Director in writing of the rationale for that determination.
- A decision not to pursue premium costs that are reasonably estimated to exceed \$50,000 shall require approval by the NTTA Executive Director. This amount shall be calculated as cumulative premiums costs for all errors and omissions under the Contract.
- 5.4.6 If the consultant does not respond to the AED's notice in a manner satisfactory to the NTTA, the AED shall instruct NTTA legal counsel to make formal demand to the consultant for payment of the NTTA's claim and advise the consultant that the NTTA intends to pursue all available remedies it has against the consultant.
(Form FD-11-F3 provides a template for this notice)

5.5 Consultant Review and NTTA Response:

- 5.5.1 If the consultant agrees to pay all sums required by the NTTA and otherwise comply with the NTTA's terms regarding the claim (as those sums and requirements may be modified through negotiation with the consultant), the AED shall request NTTA legal counsel to prepare a settlement agreement or other appropriate documentation setting forth the consultant's and NTTA's agreements.
- At the NTTA's sole discretion, a settlement with the consultant may include the NTTA's receipt of services in kind from the consultant.
- 5.5.2 At any time, the AED may terminate negotiations with the consultant and either proceeds toward litigation in accordance with Section 5.6 or elect not to pursue recovery in accordance with paragraph 5.4.5.

5.6 Litigation

- 5.6.1 If a satisfactory resolution cannot be reached between the NTTA and the consultant, the AED may authorize litigation to recover premium costs from the consultant.
- Litigation to recover premium costs that are reasonably estimated to exceed \$300,000 shall require approval by the NTTA Executive Director.

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- 5.6.2 NTTA legal counsel shall review the report of the Committee and all other available documentation and other information concerning the NTTA's claim, and shall advise the AED concerning litigation issues, possible outcomes, and other possible courses of action.
- 5.6.3 The AED shall support NTTA legal counsel to promptly identify, obtain, or generate documentation and information requested by NTTA legal counsel, and the NTTA shall otherwise cooperate with NTTA legal counsel in connection with the legal action regarding the claim against the consultant.
- 5.6.4 NTTA legal counsel shall keep the AED informed of the status of the claim.
- 5.6.5 If NTTA legal counsel believes recovery is unlikely, it shall so advise the AED.
- 5.6.6 At any time, the AED may direct NTTA legal counsel to terminate or suspend attempts to recover premium costs through litigation.
 - A decision not to pursue premium costs against the consultant must comply with paragraph 5.4.5.
- 5.6.7 Nothing in this procedure shall prohibit the NTTA from attempting to reach a settlement with the consultant that is satisfactory to the NTTA, regardless of whether litigation regarding the errors and omissions is ongoing.

6.0 REGULATORY REQUIREMENTS:

- N/A

7.0 RELATED BOARD POLICY:

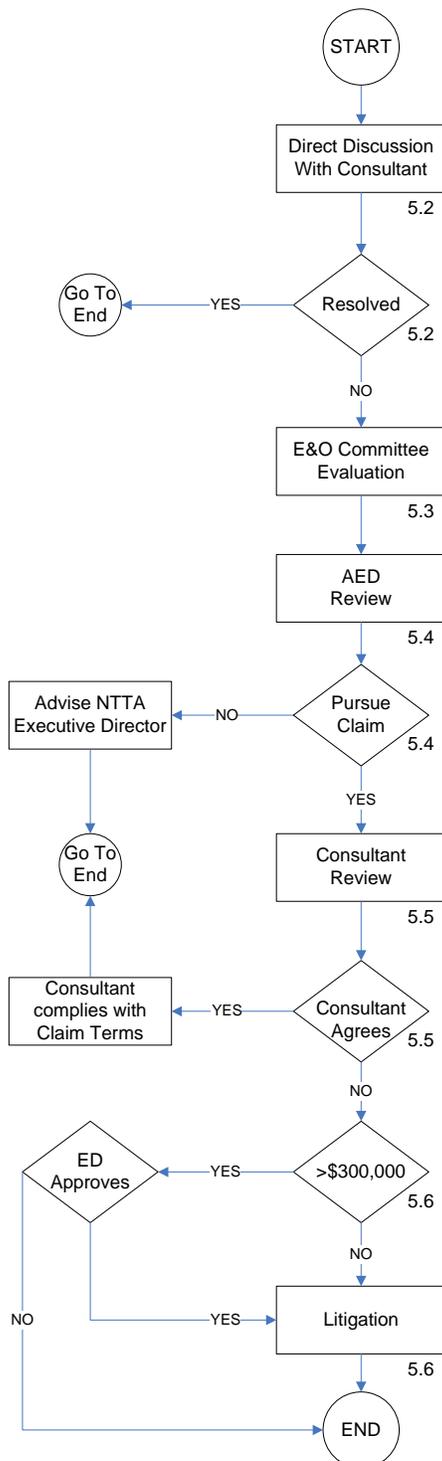
- [3.12: Recovery of Damages Related to Consultant Errors & Omissions](#)

8.0 COMPONENT DOCUMENTS:

- [FD-11-F1: Referral Letter - Template](#)
- [FD-11-F2: Claim Letter - Template](#)
- [FD-11-F3: Demand Letter – Template](#)
- [FD-11-F4: Errors and Omissions Log](#)
- [FD-11-F5: Errors and Omissions Analysis Summary Worksheet - Template](#)

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9.0 FLOWCHART:



Corridor Manager or Construction Manager:

- Determines that a consultant may be responsible for errors and omission in the performance of its work under a contract
- Communicates possible E&O to the AED
- If the issue cannot be resolved to the satisfaction of the NTTA, then it is referred to the E&O Review Committee for further evaluation

E&O Review Committee:

- Collects, reviews and assess the responsibility of the consultant for, and potential consequences of, possible errors and omissions
- Generate E&O Report
- Advises the consultant in writing using form FD-11-F1

Assistant Executive Director:

- Reviews E&O Committee report regarding the consultant's possible errors and omissions
- Determines if the consultant is responsible for errors and omissions and advises the consultant in writing using form FD-11-F2
- Advises the NTTA Executive Director of the rationale not to pursue if premium cost are estimated to exceed \$50,000
- If the consultant does not respond to the AED's initial notice in a satisfactory manner, generates second notice using form FD-11-F3

Consultant:

- Consultant reviews claim and agrees to comply with the NTTA terms or determines to proceed with litigation

Assistant Executive Director:

- If the consultant agrees with the NTTA's assessment, the AED requests NTTA Legal to prepare a Settlement Letter
- If the consultant does not agree, the AED authorizes litigation to recover premium costs
- If litigation to recover premium costs is estimated to exceed \$300,000 dollars, approval by the NTTA Executive Director is required

Legal Counsel:

- Pursue litigation to to recover premium costs from the consultant

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REVISION HISTORY:

Revision	Revised by:	Date Issued	DRN Number	Reason for Revision
0	Micki Ellis	06/05/2008		Original Issue
1	Floyd Martinez	09/18/2008		Minor clarifications throughout document
2	Peter Claypool	07/13/2009	10015	Major rewrite to coordinate with new NTTA Administrative Procedure Number 3.12 for Errors and Omissions