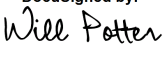


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Department of Transportation

RESOLUTION OF ERRORS, OMISSIONS, AND CONTRACTUAL BREACHES BY PROFESSIONAL ENGINEERS ON DEPARTMENT CONTRACTS

AUTHORITY:

Sections 20.23 (3)(a), and 334.048(3), Florida Statutes (F.S.)

REFERENCES:

- (a) Procedure No. 350-060-303: Accounts Receivable
- (b) Procedure No. 350-080-300: Receipt Processing
- (c) Procedure No. 700-000-000: Construction Project Administration Manual (CPAM)
- (d) Sections 95.11(4)(a), 287.055, 287.057, 337.015(3), and 471.033(1)(g), Florida Statutes (F.S.).
- (e) Rule 61G15-18.011(1), Definitions. Rule 61G15-19.001(4), Grounds for Disciplinary Proceedings. Rule 61G15-30.002 (1), Definitions Common to All Engineer's Responsibility Rules, Florida Administrative Code.
- (f) Federal Aid Policy Guide 23, Section 635.120, Code of Federal Regulations.
- (g) Errors and Omissions – Benefit/Cost Analysis Evaluation Guidelines; Errors and Omissions Guidelines and Forms (from the Production Support Office SharePoint)

PURPOSE:

To establish a procedure related to Consultant errors, omissions, and contractual breaches (collectively referred to as “E&O”) that addresses the following activities:

- (a) Identify, investigate, and document E&O in Consultant-prepared construction plans and contract documents, or in the performance of Consultant Construction Engineering and Inspection (CEI) services on Department contracts;
- (b) Determine and document the extent of Consultant responsibility for the premium cost of plan revisions and certain added construction costs or claims resulting from Consultant E&O; and,
- (c) Recover premium costs resulting from Consultant E&O.

SCOPE:

The principal users of this procedure include the following:

- Department’s Chief Engineer
- Director of Transportation Development (DTD)
- Director of Transportation Operations (DTO)
- District Consultant Project Management Engineer (DCPME)
- District Design Engineer (DDE)
- Design Project Manager (DPM)
- District Errors and Omissions Liaison (EOL)
- District Construction Engineer (DCE)
- Construction Project Manager (CPM)
- Construction Engineering and Inspection (CEI) Personnel
- Office of Comptroller (OOC)
- Office of General Counsel (OGC) Legal Counsel

DEFINITIONS:

Avoidability Code: Construction changes are designated (coded) as Unavoidable and Avoidable. This procedure addresses the designations Avoidable 1 (Production Consultant), and Avoidable 3 (Consultant CEI).

Construction Change Tracking System (CCTS): A function within the SiteManager Construction Management System that contains information on all contract changes such

as type of change (e.g., Supplemental Agreements, Work Orders, Time Extensions) cost of change, responsible party, and premium cost.

Construction Plans and Contract Documents: Consultant-prepared plans and contract documents as contracted by the Department and defined in the professional services agreement.

Contractual Breach: Failure to perform or comply with contractual obligations.

Cost Claim: The claim against the Consultant for premium cost recovery. The Cost Claim is based on the Consultant's premium cost responsibility as determined by the Project Manager in the Stage 3 Assessment (E&O Premium Cost). The Cost Claim may later be modified by the Director or the Chief Engineer based on their evaluation.

Engineer's Estimate: The estimate of the cost and time impacts to the Contractor caused by a contract change without regard to whose fault the contract change is or the percentage of those cost and time impacts the Contractor may be entitled to recover. For each contract change issue, the Engineer's Estimate will show the pay items involved along with quantities, unit prices, any time impacts, and the basis for the estimate.

Entitlement Analysis: A document, signed and dated by the preparing Project Administrator or Engineer, containing statements as to each issue of a contract change, detailing the reasons (with specific contract references when appropriate) why the Contractor is or is not entitled to recover the time and cost impacts identified in the Engineer's Estimate. If some of the time or cost impacts determined in the Engineer's Estimate are the responsibility of the Contractor, the Entitlement Analysis for each issue must include a numeric percentage of those cost and time impacts for which the reasons previously detailed justify the Contractor's entitlement. Each contract change issue must include all the pay items associated with that issue.

Errors and Omissions (E&O): Acts of negligence committed by the EOR in the performance of engineering design service or creative work, and acts of negligence committed by CEI in the performance of construction engineering inspection services. For this procedure, the term "E&O" also includes contractual breaches.

Negligence: As stated in **Rule 61G15-19.001(4), Florida Administrative Code:** "A professional engineer shall not be negligent in the practice of engineering. The term negligence set forth in **Section 471.033(1)(g), F.S.**, is herein defined as the failure by a professional engineer to utilize due care in performing in an engineering capacity or failing to have due regard for acceptable standards of engineering principles."

Premium Costs: The additional cost of a 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. Delays, inefficiencies, rework, or extra work as follows, other than those caused by the Department, the Contractor and/or subcontractors or suppliers, will be considered as non-value-added work. Non-value-added work can occur in three distinct situations:

- (1) Work delays or inefficiencies. The premium costs are the total delay/inefficiency damages paid to the Contractor.
- (2) Rework. The premium costs are the dollar amount of the original items of work that must be removed and the costs to remove these items.
- (3) Extra work. The premium costs are computed as the net difference between the final agreed prices paid to the contractor and the Engineer's Estimate — what the cost would have been had the extra work been included in the original bid at letting.

Premium costs associated with EOR and CEI E&O are Federal-aid Non-Participating. Determination of Federal-aid participation in changes to the Department's construction contracts must be in accordance with the [Federal Aid Policy Guide 23, Section 635.120, Code of Federal Regulations](#)

Project Suite Enterprise Edition (PSEE): A web-based Enterprise Application developed for project management.

Request for Information (RFI): A written document initiated by the Contractor that is submitted to the Project Administrator for coordination with the Department and others on a response to any of the following issues:

- Interpretation of a contract document provision
- Error, omission, or conflict in the contract documents
- Pay adjustment or entitlement

Resolution Tracking Module (RTM): A module of PSEE used to track and document the resolution of project E&O issues.

Responsible Charge: As stated in **Rule 61G15-18.011(1), Florida Administrative Code:** "Responsible Charge" shall mean that degree of control an engineer is required to maintain over engineering decisions made personally or by others over which the engineer exercises supervisory direction and control authority."

Services In Kind: Services provided by a consultant, in lieu of money, as restitution for premium costs resulting from an E&O Issue.

RESPONSIBILITIES:

Construction Engineering and Inspection (CEI): All references to CEI within this procedure refer to a consulting engineering firm, holding a certificate of qualification, and under contract with the Department to perform CEI services on a construction project.

Construction Project Manager (CPM): The Department employee who manages the Consultant CEI contract for a construction project.

Consultant: Engineering entity under contract with the Department to provide engineering services.

Consultant Project Administrator (CPA): The Consultant employee who manages more than one aspect of the construction or is responsible for administration of the project CEI.

Contractor: The individual, firm, joint venture, or company contracting under contract with the Department to perform the work.

Department: The Florida Department of Transportation (FDOT).

Department Project Manager (PM): The Department employee serving as the Design Project Manager (DPM) for Design Consultant (EOR) E&O issues or the Construction Project Manager (CPM) for Construction Consultant (CEI) E&O issues.

Design Project Manager (DPM): The Department employee who manages the Consultant design or post-design services contract related to a construction project.

Director: The District Director of Transportation Development (DTD) for Design Consultant (EOR) E&O issues or the District Director of Transportation Operations (DTO) for Construction Consultant (CEI) E&O issues.

Engineer of Record (EOR): As stated in **Rule 61G15-30.002 (1), Florida**

Administrative Code: “A Florida professional engineer who is in responsible charge for the preparation, signing, dating, sealing and issuing of any engineering document(s) for any engineering service or creative work.” All references to the EOR within this procedure refer to a professional consulting engineer under contract with the Department to provide design or post-design services.

Errors and Omissions Liaison (EOL): The District employee who is responsible for coordinating with DPM and CPM in tracking and resolution of E&O issues.

Project Administrator (PA): The Department employee who is responsible for the everyday construction activity of the project under the direction of the Resident Engineer/Senior Project Engineer.

PROCEDURE:

1. GENERAL

The Department employs professional consulting engineering firms to provide design or CEI services (collectively referred to as “Consultant”). These Consultants are accountable for the technical accuracy and quality of their work. As a result of Errors and Omissions (E&O) in Consultant-prepared construction plans, contract documents, or during CEI project administration, cost and time overruns may occur on a construction project resulting in contract modifications, premium costs and a claim against the Consultant.

When further evaluation indicates that the project issue may be due to Consultant E&O, it becomes a potential E&O issue. Such issues may require design revisions, contract modifications or result in financial losses to the Department. Use of this procedure begins upon Discovery of a project issue that is a potential Consultant E&O issue. Discovery begins the E&O process and starts the clock for the Statute of Limitations.

1.1 E&O PROCESS OVERVIEW

All references to E&O within this procedure include errors, omissions, and contractual breaches.

As stated in [Section 337.015\(3\), F.S.](#), “the department shall vigorously pursue claims against contractors and consultants for time overruns and substandard work products”. Recovery of E&O Premium Costs must be pursued regardless of dollar amount. The Department Project Manager (PM) may also consult the Office of General Counsel (OGC) to assist with prosecuting the recovery of these costs. If it is determined that a project issue was caused by a Consultant E&O, the Department must not compensate the Consultant for consultant services associated with the project issue (even if there were no Premium Costs).

At any time during this process, the Consultant may accept responsibility for an E&O issue and offer to settle with the Department. In these cases, the Department and the Consultant will enter settlement negotiations. If the terms of the settlement are agreed upon by both parties, the OGC in consultation with the DDE (for EOR issues) or DCE (for CEI issues), will prepare and execute the **Settlement Agreement**. The **Settlement Agreement** must be signed by the Department (Director level or above, or authorized signature authority) and the Consultant (Officer designated in SunBiz.org or authorized signature authority).

At any time after the **E&O Notification Letter** is sent to the Consultant, the Department may determine that the Consultant is not responsible for an E&O issue, or the Consultant may decide to settle the dispute by issuing payment. In these cases, the PM must document the resolution by completing the **E&O Closeout Letter** explaining the reasoning for the Department’s determination. Include complete documentation to fully substantiate the Department’s position.

If it is determined that a project issue was caused by Consultant E&O, any Department decision to not pursue recovery of those E&O Premium Costs must be justified and documented by conducting a **Benefit/Cost (B/C) Analysis** ($B/C \geq 1$). The **Errors and Omissions – Benefit/Cost Analysis Evaluation Guidelines** have been developed for use in these cases. If after an issue is evaluated by the Director or Chief Engineer, and the decision is made to not pursue recovery on the issue any further, a **B/C Analysis** is not required (however, the Department PM must still document the decision in the **E&O Closeout Letter**).

If recovery efforts are terminated by the Department, and the issue was determined to not be due to Consultant E&O, the Department will compensate the Consultant for consultant

services associated with resolving the project issue. If recovery efforts are terminated by the Department, but the issue was determined to be caused by Consultant E&O, the Department will not compensate the Consultant for consultant services associated with the E&O issue.

All actions assigned to specific Department personnel by this procedure are required to be conducted by or otherwise reviewed and approved by a Professional Engineer (PE) in responsible charge of the non-PE who was assigned the action.

1.2 TRACKING AND DOCUMENTATION

To ensure communication among disciplines and provide prompt response to management inquiries, each DDE must establish a central point of contact – the District E&O Liaison (EOL) – to be responsible for the resolution status of E&O issues. Each EOL must coordinate with the Department PM to ensure that such issues are entered, updated, and resolved in the Resolution Tracking Module (RTM) in PSEE. The EOL must be copied in all correspondence associated with an E&O issue. The Department PM must:

- **Document every stage of the E&O resolution process in RTM** with sufficient detail to fully inform future audits or inquiries
- Utilize RTM to track and record all information related to the E&O issue
- Keep the E&O issue data in RTM current by entering new information when available and updating fields when necessary

The District may elect for the EOL to assist in managing E&O issue documentation and tracking in RTM.

All formal documents, which are specifically referred to in this procedure by title (e.g., **E&O Notification Letter, Premium Cost Demand Letter**) and sent to an Officer at the Consulting Firm, must be transmitted in a way in which receipt of delivery is acknowledged (e.g., DocuSign, Certified Mail).

The E&O Recovery files must include the Consulting Firm Name, the Financial Project Identification Number, the Construction Contract Number, and the applicable Consultant Contract Number.

2. DESIGN CONSULTANT (EOR) ERRORS AND OMISSIONS

During the construction phase, project issues may occur that require clarification or evaluation of the construction plans or contract documents. Project issues are generally resolved through a **Request for Information (RFI)**. When further evaluation indicates that a project issue may be due to an error or omission by the Design Consultant (EOR), design revisions or contract modifications may be required. This section applies to E&O related to contract documents produced by a Design Consultant.

2.1 DISCOVERY

When a project issue is discovered, the CEI (or CPA when there is no CEI for the project) must promptly notify the CPM. The date the issue is discovered is the **Discovery Date**. If the project issue is ultimately determined to be an EOR E&O issue, the **Discovery Date** is entered in RTM. The CPM must notify the DPM of the project issue discovery within one business day of the CPM being notified of discovery. Although the notification of discovery to the DPM may be initiated by verbal communication, the notification must be promptly documented in writing.

The DPM must notify the EOR and EOL of the project issue discovery within two business days of the DPM being advised of discovery with a response deadline indicated. Alternatively, the CPM may include the EOR and EOL in the initial notification of discovery to the DPM. Although this initial notification of discovery to the EOR may be initiated by verbal communication, that verbal communication must be promptly documented in writing to the EOR. The initial written notification of discovery must describe the nature and scope of the project issue, and advise the EOR to separately track their time expended on the resolution of the issue so they may later be compensated for their services if the Department determines the issue was not caused by an EOR E&O.

2.2 STAGE 1 ASSESSMENT

The Stage 1 Assessment is the DPM's initial assessment of the project issue to determine if the EOR may have potential liability for any portion of the issue. This may include a review of the issue details with consideration to the Consultant's original design scope and any relevant correspondence with the Consultant.

If it is unclear whether a project issue is a potential EOR E&O, the DPM should consult the DDE and the OGC to assist in this assessment.

If it is determined that the project issue does not appear to have been caused by EOR E&O, or if it is unclear, the DPM will further assess the issue during the Stage 2 Assessment.

2.3 DEVELOP AND IMPLEMENT SOLUTION

The Department and EOR must continue to collaborate on the project issue, and the CPM and DPM must determine an appropriate course of action for the solution. The EOR may need to provide revised drawings, cost estimate, calculations, and specification changes to resolve the project issue.

With DDE, DPM, and CPM approval, the EOR may work directly with the CEI and Contractor to resolve the project issue, provided the Department incurs no premium economic or time costs as a result. If approval is given, the EOR, CEI, and Contractor must include the DDE, DPM, and CPM in all correspondence relating to the project issue.

The DPM must not approve any Consultant invoices for post-design services that include the EOR's time associated with resolving a project issue that is a potential EOR E&O (e.g., site visits, design changes). Such services may only be compensated if it is determined the issue is not an EOR E&O.

Implementation of the solution often results in a construction contract modification through the execution of a Supplemental Agreement (SA), a Work Order (WO), or a Unilateral Payment (UP). The CEI negotiates additional cost and time required to implement the proposed solution with the Contractor. For each SA and WO, the CEI must determine the premium costs associated with resolving the project issue and perform an **Entitlement Analysis**.

To ensure an accurate assessment of premium costs, the CEI should prepare the SA, WO, or UP with input from the CPM, OGC, and the Contractor. **Topic No. 700-000-000, Construction Project Administration Manual (CPAM), Section 7.3**, defines the Department's method to initiate, document, and execute SA, WO, and UP documents.

For each SA and WO, the CEI must enter the premium cost amount and assign the initial Avoidability Code in CCTS (with input from the CPM and DPM). For an explanation of the codes involved in a contract modification, see the attachment to [Construction Project Administration Manual Section 7.3](#) on the State Construction Office website.

2.4 STAGE 2 ASSESSMENT AND E&O NOTIFICATION

The Stage 2 Assessment is the DPM's in-depth assessment of the project issue to determine what degree of responsibility or liability the EOR has for the issue and related premium costs. This assessment takes place after contract modifications have been made and premium costs have been calculated, and includes reviewing the following:

- Contract modification coding
- Entitlement Analysis
- Plans and specifications
- Consultant's original design contract and scope of services
- Relevant correspondence and project-specific information
- Specific requirements or instructions the Department imposed on the EOR
- Department procedures, standards, and criteria in effect when the contract was executed

A project issue may initially appear to be an EOR E&O but subsequently determined to be beyond the EOR's contractual obligations. The DPM should seek legal advice from the OGC and input from the DDE, DCPME, CPM, and CEI, in assessing the EOR E&O premium cost responsibility.

If the DPM determines that the project issue appears to have been caused by EOR E&O, the DPM must provide the EOR with a formal written notification that describes the following:

- Discovery Date
- Nature and scope of the project issue
- Contract modifications executed to correct the issue
- Department's assessment of EOR E&O premium cost responsibility
- A response deadline

This formal written notification is communicated using the **E&O Notification Letter**. The **E&O Notification Letter** also reminds the EOR to separately track their time expended on the resolution of the issue so they may later be compensated for their services if the Department determines the issue was not caused by an EOR E&O.

If the DPM determines that the project issue was not caused by an EOR E&O, the project issue is resolved. The DPM must provide the EOR a written notification of the Department's determination that the EOR is not responsible for the project issue and that the EOR may invoice applicable post-design services. If the issue is being tracked in RTM, the DPM must mark the issue as "Resolved" and document the issue resolution.

2.5 STAGE 3 ASSESSMENT

The Stage 3 Assessment is the DPM's final assessment of the project issue to conclude what degree of responsibility or liability the EOR has for premium costs.

The EOR's response to the **E&O Notification Letter** should state their position and provide any supporting documentation. The DPM, CPM and CEI should meet with the EOR to discuss the response to the **E&O Notification Letter** and gain a better understanding of the EOR's position. If the EOR accepts full or partial responsibility for the project issue, or agrees to discuss settlement, the Department and the EOR will begin settlement discussions and negotiations. For partial settlements, be careful not to compromise the Department's position on the balance of the issue.

With consideration of the facts and information received from the EOR, the DPM will make a final determination of EOR E&O premium cost responsibility. When determining the premium cost responsibility, the following additional costs may be included:

- Administrative costs incurred by the Department to process the SA, WO, or UP
- Additional CEI costs
- Any post-design services related to the project issue that were invoiced and paid prior to the determination that the issue was due to an EOR E&O.

If it is determined that the EOR is only partially responsible for the premium costs, the DPM must determine a lower amount which will be the basis for negotiation with the EOR. The DPM should seek legal advice from the OGC and input from the DDE, DCPME, CPM and CEI, in assessing the EOR's premium cost responsibility.

The DPM must enter the EOR's premium cost responsibility into RTM as the **E&O Premium Cost**. This is the basis for the Cost Claim.

If the EOR does not accept responsibility for the project issue or does not agree to negotiate a settlement, or if negotiations were attempted but a settlement could not be reached, the DPM (with input from the OGC, DDE and DCPME) must decide whether to continue pursuing the recovery of premium costs.

If the DPM determines that the project issue was not caused by an EOR E&O, or if the Department decides not to pursue recovery (supported by a **B/C Analysis**), the DPM will close the issue and document the project issue resolution in RTM. The DPM must also notify the EOR of the issue resolution using the **E&O Closeout Letter**. The Department may reopen the project issue, and reevaluate the EOR's premium cost responsibility, if new facts or information become available indicating an increased responsibility for the premium costs.

2.6 SETTLEMENT

If the EOR accepts responsibility for the project issue or is willing to discuss settlement, the Department and the EOR will begin negotiations. If the Department and EOR agree on terms for a settlement, preparation of the **Settlement Agreement** will be coordinated with the OGC. If the Department and EOR are unable to agree on terms for a settlement, the Department must decide whether to continue pursuing recovery of premium costs.

3. CEI CONSULTANT ERRORS & OMISSIONS

During the construction phase, a project issue may occur that may be due to an error or omission by the Consultant CEI as part of its contract administration and inspection. This section applies to E&O related to Consultant CEI contract administration and inspection.

3.1. DISCOVERY

The discovery of a project issue typically occurs during periodic reviews of the CEI's work products (e.g., Supplemental Agreements, time extensions, project records). Inspection issues may also be discovered if contractor workmanship or material issues are overlooked and then later identified.

When a project issue is discovered, and that project issue is a potential CEI E&O issue, the CEI or CPA must promptly notify the CPM. The date the project issue is discovered is the **Discovery Date**. If the project issue is ultimately determined to be a CEI E&O issue, that **Discovery Date** is entered in RTM. Although the notification of discovery to the CPM

may be initiated by verbal communication, the notification must be promptly documented in writing.

3.2 STAGE 1 ASSESSMENT

The Stage 1 Assessment is the CPM's initial assessment of the project issue to determine if the CEI may have potential liability for any portion of the issue, determine the appropriate corrective action, and establish a reasonable time frame to implement the solution.

If it is unclear whether a project issue is a CEI E&O issue, the CPM should consult the DCE and the OGC to assist in this assessment.

If it is determined that the project issue appears to have been caused by CEI E&O, the CPM must notify the EOL, and may begin tracking the issue in RTM.

If it is determined that the project issue does not appear to be caused by CEI E&O, or if it is unclear, the CPM will further assess the project issue during the Stage 2 Assessment.

3.3 DEVELOP AND IMPLEMENT SOLUTION

The Department and CEI must continue to collaborate on the project issue, and the CPM must determine an appropriate course of action and the solution.

With DCE and CPM approval, the CEI may work directly with the Contractor to resolve the project issue, provided the Department incurs no premium economic or time costs as a result. If approval is given, the CEI and Contractor must include the CPM in all correspondence relating to the project issue.

The CPM must not approve any Consultant invoices for services that include the CEI's time associated with resolving a project issue that is a potential CEI E&O. Such services may only be compensated if it is determined the issue is not a CEI E&O.

Implementation of the solution often results in a construction contract modification through the execution of a Supplemental Agreement (SA), a Work Order (WO), or a Unilateral Payment (UP). The District Construction Office negotiates additional cost and time required to implement the proposed solution with the Contractor. For each SA and WO, the CPM must determine the premium costs associated with resolving the project issue and perform an Entitlement Analysis.

To ensure a fair and accurate assessment of premium costs, the CPM should prepare the SA, WO, or UP with input from the CEI, DCE, OGC, and the Contractor. **Topic No. 700-000-000, Construction Project Administration Manual (CPAM), Section 7.3** defines the Department's method to initiate, document, and execute SA, WO, and UP documents.

For each SA and WO, the CPM must enter the premium cost amount and assign the initial Avoidability Code in CCTS. For an explanation of the codes involved in a contract

modification, see the attachment to [Construction Project Administration Manual](#) **Section 7.3** on the State Construction Office website.

3.4 STAGE 2 ASSESSMENT AND E&O NOTIFICATION

The Stage 2 Assessment is the CPM's in-depth assessment of the project issue to determine what degree of responsibility or liability the CEI has for the issue and related premium costs. This assessment takes place after contract modifications have been made and premium costs have been calculated, and includes reviewing the following:

- Contract modification coding
- Entitlement Analysis
- Plans and specifications
- Consultant's contract
- Relevant correspondence and project-specific information
- Specific requirements or instructions the Department imposed on the CEI
- Department procedures and standards in effect when the contract was executed.

A project issue may initially appear to a CEI E&O but subsequently determined to be beyond the CEI's contractual obligations. When determining CEI E&O premium cost responsibility, the CPM should seek legal advice from the OGC and input from DCE.

If the CPM determines that the project issue appears to have been caused by CEI E&O, the CPM must provide the CEI with a formal written notification that describes the following:

- Discovery Date
- Nature and scope of the project issue
- Contract modifications executed to correct the issue
- Department's assessment of CEI E&O premium cost responsibility
- A response deadline

This formal written notification is communicated using the **E&O Notification Letter**. The **E&O Notification Letter** also reminds the CEI to separately track their time expended on the resolution of the issue so they may later be compensated for their services if the Department determines the issue was not caused by an CEI E&O.

If the CPM determines that the project issue was not caused by a CEI E&O, the project issue is resolved. The CPM must provide the CEI a written notification of the Department's determination that the CEI is not responsible for the project issue. If the project issue is being tracked in RTM, the CPM must mark the issue as "Resolved" and document the issue resolution.

3.5 STAGE 3 ASSESSMENT

The Stage 3 Assessment is the final assessment of the project issue to conclude what degree of responsibility or liability the CEI has for premium costs. This assessment is conducted by the DCE with input from the CPM.

The CEI's response to the **E&O Notification Letter** should state their position and provide any supporting documentation. The DCE and CPM should meet with the CEI to discuss the response to the **E&O Notification Letter** and gain a better understanding of the CEI's position. If the CEI accepts full or partial responsibility for the project issue, or agrees to discuss settlement, the Department and the CEI will begin settlement discussions and negotiations.

With consideration of the facts and information received from the CEI, the DCE will make a final determination of the CEI E&O premium cost responsibility. When determining the premium cost responsibility, administrative costs incurred by the Department to process the SA, WO, or UP may be included.

If it is determined that the CEI is only partially responsible for the premium costs, the DCE must conclude a lower amount which will be the basis for negotiation with the CEI. The DCE should seek legal advice from the OGC, and input from the CPM in assessing the CEI's premium cost responsibility.

The CPM must enter the CEI's premium cost responsibility into RTM as the **E&O Premium Cost**. This is the basis for the Cost Claim.

If the CEI does not accept responsibility for the project issue or does not agree to negotiate a settlement, or if negotiations were attempted but a settlement could not be reached, the DCE (with input from the OGC and CPM) must decide whether to continue pursuing the recovery of premium costs.

If the DCE determines that the project issue was not caused by a CEI E&O, or if the Department decides not to pursue recovery (supported by a **B/C Analysis**), the CPM will close the project issue and the issue resolution in RTM. The CPM must also notify the CEI of the project issue resolution using the **E&O Closeout Letter**. The Department may reopen the project issue and reevaluate the CEI's premium cost responsibility if new facts or information become available indicating an increased responsibility of premium costs.

3.6 SETTLEMENT

If the CEI accepts responsibility for the project issue or is willing to discuss settlement, the Department and the CEI will begin negotiations. If the Department and CEI agree on terms for a settlement, the OGC will prepare the **Settlement Agreement** and oversee its execution. If the Department and CEI are unable to agree on terms for a settlement, the Department must decide whether to continue pursuing the recovery of premium costs.

4. DIRECTOR LEVEL

This section applies to both EOR and CEI E&O, and occurs when a Settlement Agreement cannot be reached, and a decision is made to continue pursuing the recovery of premium costs.

The term Director refers to the Director of Transportation Development for EOR issues, or the Director of Transportation Operations for CEI issues.

The term Department PM refers to the DPM for EOR issues, or the CPM for CEI issues.

The term Consultant refers to the design firm responsible for the EOR E&O, or the CEI firm responsible for the CEI E&O.

4.1 DIRECTOR EVALUATION

The Department PM must provide the Director (or Designee) a Claim Package containing all pertinent supporting documentation for evaluation. For evaluation of the Claim Package, the Director may be assisted by a group of advisors (Director Group). The Director Group is typically made up of the following participants: Director, DPM, CPM, DDE, DCPME, and DCE. The Director should also consult the OGC and the EOL regarding the liability of the Consultant for the premium costs (Cost Claim).

4.2 CLAIM MEETING

The Director should schedule a Claim Meeting with the Director Group and the Consultant to discuss resolution of the Cost Claim. If the Consultant declines to attend or participate in the Claim Meeting, then the Director may conduct the Claim Meeting without the Consultant.

If attending the Claim Meeting, the Consultant may include personnel, attorneys, consultants, and experts it deems necessary to represent its interests at the Claim Meeting. The Department, Consultant and their representatives must agree that all discussions, representations, and documents made and utilized in the Claim Meeting are deemed settlement discussions and therefore subject to applicable privileges set forth by law. Attendees must sign the **Notice of Attendance at Claim Meeting and Acknowledgement of Privileged Discussions**.

4.3 FINAL DETERMINATION

If the Consultant does not participate in the Claim Meeting or does not reach a settlement with the Department as a result of the meeting, then the Department will make a determination on whether or not to pursue recovery of the Cost Claim. If the Cost Claim is \$100,000 or less, the Director has final decision authority for the resolution of all pending issues with the Consultant. If the Cost Claim is greater than \$100,000, the Director has initial authority to approve the proposed resolution, which is subject to approval by the Chief Engineer, who has final authority. The decision of the Chief Engineer is final.

If it is determined not to pursue recovery of the Cost Claim, the Director will inform the Department PM to notify the Consultant of the decision using the **E&O Closeout Letter**. The Department PM must mark the issue as “Resolved” and document the issue resolution in RTM.

If it is determined to pursue the recovery of the Cost Claim, the Director will notify the Consultant using a **Premium Costs Demand Letter**. The letter must summarize the following:

- Nature and scope of the project issue
- Premium Costs and any additional terms for settlement
- The Department’s intent to pursue recovery through litigation

The Consultant may resolve the Cost Claim by written acceptance of the terms of the **Premium Costs Demand Letter** within 15 calendar days of the date of the letter. If the Consultant accepts the terms within the 15-day period, the OGC will prepare a **Settlement Agreement** and oversee its execution. The **Settlement Agreement** must be signed by authorized representatives of the Department and the Consultant. The proposed resolution must resolve all pending issues and provide for a full release by both parties. Each party must bear its own attorney’s fees and costs related to the resolution of the Cost Claim.

5. LITIGATION

If the Consultant does not respond to the **Premium Costs Demand Letter** within the 15-day period or does not accept the terms for settlement, the offer expires and the Department may pursue recovery through litigation. Once litigation is initiated, all settlement discussions should be handled through the OGC. The District will designate its representative with authority to settle all pending matters.

If litigation is initiated, the Department PM must continue maintaining the issue in RTM and provide available documents to the OGC upon request. This includes all correspondence and documentation pertaining to each E&O Cost Claim.

6. RECOVERED AMOUNTS

The OGC must advise the Department PM of the amounts recovered through litigation to be entered into the RTM. The Department PM must provide documentation to the Office of Comptroller (OOC), General Accounting Office (GAO), Accounts Receivable Section (ARS) and Cashier’s Office for all funds recovered or Services In-Kind rendered.

6.1 RECEIVED PAYMENTS

The Department must collect moneys from Consultants in accordance with the following:

- Procedure No. 350-060-303, Accounts Receivable
- Procedure No. 350-080-300, Receipt Processing
- Federal Aid Policy Guide 23, C.F.R.

The Department PM must submit received payments to the Office of Comptroller (OOC), Cashier's Office via the Department's Receipt Processing System (RPS) in accordance with **Procedure No. 350-080-300, Receipt Processing**.

6.2 SERVICES IN-KIND

The Department may accept Services In-Kind (SIK) when requested by the Consultant, in lieu of money, as restitution for damages caused by E&O. Such services must be equivalent to the value of the damages incurred by the Department and stipulated in a Settlement Agreement (describing the services to be provided, including the proposed consultant personnel and their compensation rates). SIK agreements must be completed, approved, and monitored in accordance with **Procedure No. 350-060-303, Accounts Receivable**. The Department PM must provide the Deputy Comptroller and the Accounts Receivable Section (ARS) a copy of the settlement agreement using the **Reporting, Collection, and Cash Received (Services In-Kind)** letter (or through another means which conveys the same information as the letter).

The DDE (for EOR issues) or DCE (for CEI issues) must determine the scope of equivalent services that will satisfy the Consultant's obligation to reimburse the Department. With input from the District Professional Services Unit (PSU) or Procurement Office, the DDE or DCE must also determine the appropriate Consultant personnel (number, level, compensation rate) to accomplish the scope of equivalent services.

Acceptance of SIK is completely at the discretion of the Department and should only be considered when the District has an appropriate contract already in place with the Consultant. Services In-Kind may not be used to circumvent the **Consultants' Competitive Negotiation Act (CCNA) (Section 287.055, F.S.)** or to provide an advantage to the Consultant in **CCNA** selection for services on future projects. Refer to **Errors and Omissions Guidelines and Forms** for additional information on using SIK.

6.3 TRACKING RECOVERY

The Department PM must monitor and document the receipt of Services In-Kind and provide quarterly updates to the ARS. When the Consultant's obligation to provide services has been satisfied, the Department PM must notify the Consultant and the OOC-GAO and mark the issue as "Resolved" in RTM.

The ARS must maintain a system to document and track recovery of all funds received from Consultants for E&O. This is handled through the RPS. Reimbursement may be received in a lump sum or through a set schedule of payments, when approved by the Deputy Comptroller (or delegate). For lump-sum payments, initial recovery efforts are handled at the District level. If payment is not timely, the Department PM must notify the ARS, who will continue the collection effort. This can be done using the **Reporting, Collection, and Cash Received (Request for Assistance to Recover Funds)** letter (or through another means which conveys the same information as the letter). If further collection efforts are not successful, the account may be turned over to the State's contracted collection agency.

The ARS must coordinate and collect any approved series of payments. The Department PM must notify the Deputy Comptroller to request approval of the recovery payment schedule, and the ARS to track payment and report recovery. This can be done using the **Reporting, Collection, and Cash Received (Request for Assistance to Recover/Track a Series of Payments)** letter (or through another means which conveys the same information as the letter). Refer to **Procedure No. 350-060-303, Accounts Receivable** for more detailed information.

6.4 REPORTING

In July of each year, the OOC, Cashier's Office must report the amount collected for E&O Cost Claim in the previous fiscal year, by District, to the Program and Resource Allocation Office. In mid-September, the Program and Resource Allocation Office must allocate in **Schedule A** the collected amount back to each respective District and statewide program, as appropriate.

TRAINING:

The Production Support Office, with assistance from the State Construction Office and the Office of General Counsel, will provide training in the application of this procedure.

FORMS:

This procedure requires use of the following forms contained in the **Errors and Omissions Guidelines and Forms**:

- (a) E&O Notification Letter
- (b) Premium Costs Demand Letter
- (c) Notice of Attendance at Claim Meeting and Acknowledgement of Privileged Discussion
- (d) E&O Closeout Letter

Use of the following forms is optional, however the information contained within them must still be submitted:

- (a) Reporting, Collection and Cash Received - (Request for assistance to recover funds)
- (b) Reporting, Collection and Cash Received - (Request for assistance to recover/track a series of payments)
- (c) Reporting, Collection and Cash Received - (Services In-Kind)