# NCHRP LEGAL RESEARCH DIGEST 74: LIABILITY OF STATE DEPARTMENTS OF TRANSPORTATION FOR DESIGN ERRORS

## APPENDIX F—DOCUMENTS PROVIDED BY TRANSPORTATION DEPARTMENTS

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Design-Build Package
107.13 Responsibility for Damage Claims:

The Design-Builder shall indemnify, defend, and hold harmless the State of Arizona, acting by and through the Arizona Department of Transportation, from any and all claims, demands, suits, actions, proceedings, loss, cost and damages of every kind and description, including any attorneys' fees and/or litigation expenses, which may be brought or made against or incurred by the Department on account of loss of or damage to any property or for injuries to or death of any person, to the extent caused by, arising out of, or contributed to, by reasons of any alleged act, omission, professional error, fault, mistake, or negligence of the Design-Builder, its employees, agents, representatives, or subcontractors, their employees, agents, or representatives in connection with or incident to the performance of the work, or arising out of Workmen's Compensation claims, Unemployment Compensation claims, or Unemployment Disability Compensation claims of employees of the contractor and/or its subcontractors or claims under similar such laws or obligations. The Design-Builder's obligation under this subsection shall not extend to any liability to the extent caused by the negligence of the Department, or its employees, except the obligation does apply to any negligence of the Design-Builder which may be legally imputed to the Department by virtue of its ownership or possession of land.

The Design-Builder shall indemnify, defend, and hold harmless any county or incorporated city, its officers and employees, within the limits of which county or incorporated city work is being performed, all in the same manner and to the same extent as provided above.

107.14 Insurance:

Prior to the execution of the contract, the Design-Builder shall file with the Department a certificate or certificates of insurance evidencing insurance as required by this contract has been placed with an Insurer authorized to transact Insurance in the State of Arizona pursuant to ARS Title 20, Chapter 2, Article 1, or with a surplus lines Insurer approved and identified by the Director of the Department of Insurance pursuant to ARS Title 20, Chapter 2, Article 5.

All Insurers shall have an "A.M. Best" rating of A- VII or better.

The State of Arizona in no way warrants that the above-required minimum Insurer rating is sufficient to protect the Design-Builder from potential Insurer Insolvency.

The Design-Builder's submission of the required insurance certificates constitutes a representation to the Department that:

1. The Design-Builder has provided a copy of these specifications to every broker who has obtained or filed a certificate of insurance and has communicated the necessity of compliance with these specifications to the broker; and

2. To the best of the Design-Builder's knowledge, each certificate of Insurance and each insurance coverage meets the requirements of these specifications.
Attachment F

4.20 INSURANCE

The Consultant and all Subconsultants shall provide their insurance agent/producer with a copy of the insurance requirements within this section.

The Consultant and all Subconsultants shall procure and maintain until all of their obligations have been discharged, including any warranty periods under this Contract, are satisfied, insurance against claims for injury to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Consultant, his agents, representatives, employees or Subconsultants.

The insurance requirements herein are minimum requirements for this Contract and in no way limit the indemnity covenants contained in this Contract. The State of Arizona in no way warrants that the minimum limits contained herein are sufficient to protect the Consultant from liabilities that might arise out of the performance of the work under this Contract by the Consultant, its agents, representatives, employees or Subconsultants, and the Consultant is free to purchase additional insurance.

The Consultant may purchase an excess or umbrella policy to secure these limits. If the Consultant or Subconsultant uses any excess or umbrella insurance to meet the required limits then this excess or umbrella insurance must be “follow form” equal to or broader in coverage than the underlying insurance requirements, including but not limited to, additional insured endorsements and waiver of subrogation endorsements.

A. MINIMUM SCOPE AND LIMITS OF INSURANCE: The Consultant shall provide coverage with limits of liability not less than those stated below.

1. Commercial General Liability – Occurrence Form

The policy shall include bodily injury, property damage, personal injury and broad form contractual liability coverage.

- General Aggregate $2,000,000
- Products – Completed Operations Aggregate $1,000,000
  Products and completed operations coverage shall be maintained for three (3) years after completion of design
- Personal and Advertising Injury $1,000,000
- Blanket Contractual Liability – Written and Oral $1,000,000
- Damage to Rented Premises $50,000
- Each Occurrence $1,000,000

<table>
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<th>Contract Value</th>
<th>Required Insurance</th>
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<tr>
<td>$0 to $5,000,000</td>
<td>$1,000,000 Each Occurrence; $2,000,000 Aggregate</td>
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<tr>
<td>$5,000,001 to $15,000,000</td>
<td>$5,000,000 Each Occurrence; $5,000,000 Aggregate</td>
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<td>$15,000,001 to $50,000,000</td>
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<tr>
<td>$50,000,001 &amp; up</td>
<td>$25,000,000 Each Occurrence; $25,000,000 Aggregate</td>
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a. The Consultant shall be responsible for monitoring the Contract value as it increases and the Consultant shall be responsible for purchasing additional insurance to be in compliance with this Contract should the increase in Contract value require a higher limit of insurance. The
Consultant shall provide a new certificate of insurance that reflects the increase in limits as required in 4.20 (E) below.

b. The policy shall be endorsed to include the following additional insured language: "The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Consultant."

c. Such additional insured shall be covered to the full limits of liability purchased by the Consultant, even if those limits of liability are in excess of those required by this Contract. The policy shall contain a waiver of subrogation endorsement in favor of the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Consultant.

2. Business Automobile Liability

Bodily Injury and Property Damage for any owned, hired, and/or non-owned vehicles used in the performance of this Contract.

Combined Single Limit (CSL) $1,000,000

If work is performed on the active roadway then Consultant or Subconsultant shall provide a minimum of $5,000,000 Combined Single Limit coverage.

a. The policy shall be endorsed to include the following additional insured language: "The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Consultant, involving automobiles owned, leased, hired or borrowed by the Consultant." Such additional insured shall be covered to the full limits of liability purchased by the Consultant, even if those limits of liability are in excess of those required by this Contract.

b. The policy shall contain a waiver of subrogation endorsement in favor of the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Consultant.

c. Policy shall contain a severability of interest provision.

3. Worker's Compensation and Employers' Liability

- Workers' Compensation Statutory
- Employers' Liability
  - Each Accident $1,000,000
  - Each Disease
  - Employee $1,000,000
  - Disease
  - Limit $1,000,000

Policy
a. The policy shall contain a waiver of subrogation endorsement in favor of the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Consultant.

b. This requirement shall not apply to: Separately, EACH Consultant or Subconsultant exempt under A.R.S. §23-901, AND when such Consultant or Subconsultant executes the appropriate waiver (Sole Proprietor/Independent Consultant) form.

4. Professional Liability (Errors and Omissions Liability)

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<tr>
<th>Each Claim</th>
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<tr>
<td>Annual Aggregate</td>
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<td>$25,000,000 Each Occurrence; $25,000,000 Aggregate</td>
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</tbody>
</table>

a. The Consultant shall be responsible for monitoring the Contract value as it increases and the Consultant shall be responsible for purchasing additional insurance to be in compliance with this Contract should the increased value of the Contract require a higher limit of insurance. The Department reserves the right to request that the Consultant provide proof of increased insurance coverage corresponding to increased contract value. The Consultant shall provide a new certificate of insurance that reflects the increase in limits as required in 4.20 (E) below.

b. In the event that the liability insurance required by this Contract is written on a claims-made basis, the Consultant warrants that any retroactive date under the policy shall precede the effective date of this Contract; and that either continuous coverage will be maintained or an extended discovery period will be exercised for a period of three (3) years beginning at the time work under this Contract is completed.

c. The policy shall cover professional misconduct or lack of ordinary skill for those positions defined in the Scope of Work (APPENDIX A) of this Contract.

d. Consultant is required to carry professional liability insurance regardless of the type of contract or the scope of work and it shall not be waived without prior approval from Risk Management.

5. Aircraft Liability – Per Occurrence Form (if applicable)

If the Consultant or their Subconsultant will be using aircraft to perform any portion of this Contract then aircraft liability shall be provided. The policy shall include bodily injury, property damage, personal injury and broad form contractual liability.

- Products – Completed Operations
  Aggregate $1,000,000

- Personal and Advertising
  Injury $1,000,000
- Hangarkeepers Liability $1,000,000
- Per Seat Limit $1,000,000
- Blanket Contractual Liability – Written and Oral $1,000,000
- Fire Legal Liability $50,000
- Each Occurrence $5,000

a. The policy shall be endorsed to include the following additional insured language: "The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Consultant." Such additional insured shall be covered to the full limits of liability purchased by the Consultant, even if those limits of liability are in excess of those required by this Contract.

b. The policy shall contain a waiver of subrogation endorsement in favor of the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Consultant.

6. Valuable Papers Coverage

Valuable papers insurance shall be included in the policy for a minimum of $25,000 or in a higher amount sufficient to assure the restoration of any document, memoranda, plans, specifications, drawings, media, computer files, data or other information related to the work of the Consultant in the completion of this Contract.

B. ADDITIONAL INSURANCE REQUIREMENTS: The policies shall include, or be endorsed to include, the following provisions:

1. The Consultant’s policies shall stipulate that the insurance afforded the consultant shall be primary Insurance and that any insurance carried by the Department, its agents, officials, employees or the State of Arizona shall be excess and not contributory Insurance, as provided by A.R.S. § 41-621 (E).

2. Coverage provided by the Consultant shall not be limited to the liability assumed under the indemnification provisions of this Contract.

C. NOTICE OF CANCELLATION: With the exception of the 10-day notice of cancellation for non-payment of premium, any changes material to compliance with this Contract in the insurance policies above shall require a 30-day written notice to the State of Arizona. Such notice shall be sent directly to ECS and shall be sent by certified mail, return receipt requested.

D. ACCEPTABILITY OF INSURERS: Consultants Insurance shall be placed with companies duly licensed in the State of Arizona or hold approved non-admitted status on the Arizona Department of Insurance List of Qualified Unauthorized Insurers. Insurers shall have an "A.M. Best" rating of not less than A-VII or duly authorized to transact Workers' Compensation Insurance in the State of Arizona. The
State of Arizona in no way warrants that the above-required minimum insurer rating is sufficient to protect the Consultant from potential insurer insolvency.

E. **VERIFICATION OF COVERAGE:** The Consultant shall furnish the Department (ECS) with certificates of insurance (ACORD form or equivalent approved by the State of Arizona) as required by this Contract. The certificates for each insurance policy shall be signed by an authorized representative.

All certificates and endorsements shall be received and approved by the Department (ECS) before work commences. Each insurance policy required by this Contract shall be in effect at or prior to commencement of work under this Contract and remain in effect for the duration of this Contract. Failure to maintain the insurance policies as required by this Contract, or to provide evidence of renewal, is a material breach of Contract.

All certificates required by this Contract shall be sent directly to ECS. The ECS Contract number and project description shall be noted on the certificate of insurance. The Department reserves the right to request that the Consultant provide proof that its Subconsultants have the required insurance coverage at any time.

F. **SUBCONSULTANTS:** The Consultant is responsible for ensuring and/or verifying that all Subconsultants have current, valid, and collectable certificates of insurance that are consistent with the minimum requirements within the Consultant Contract. This is applicable to all lines of insurance within the Contract. The Department reserves the right to request that the Consultant provide proof that its Subconsultants have the required insurance coverage at any time.

G. **EXCEPTIONS:** Requests for exceptions to insurance requirements for Subconsultant(s) shall be provided in writing to ECS and the ADOT Risk Manager prior to the start of work and will be reviewed for any risks to the Department. No work by the Involved Subconsultant shall proceed until ADOT makes a decision regarding the request.
GEORGIA

GDOT Publications, Policies & Procedures, Errors and Omissions Cost-Recovery Procedure
General

This document outlines the procedure, and the responsibilities of employees and offices within the Department, to recover costs following discovery of potential errors or omissions (E&O) in plan sets prepared by consultants. The procedure focuses specifically on issues discovered during the construction phase and should be read with Policy 4020-4 for understanding of the Department’s policy and with the E&O Cost-Recovery Process Chart in hand.

Discovery of Potential E&O

A potential E&O will, most often, be identified by the Department’s Field personnel who are responsible for managing a construction project.

Immediate Action

If a problem encountered in the field requires immediate, corrective action, the Department will initiate a response notwithstanding any other section of this procedure. An immediate, corrective action is appropriate where lack of response may lead to: exposure of the public or the work force to bodily injury; damage to property or harm to the environment; severe operational impacts; or further loss. A determination that an immediate, corrective action is required shall be made at the Area Office level and approved by the District Engineer (or his representative). Following the determination, the Department will utilize its resources and authorities to provide direction to the contractor to make all necessary corrections.

Simultaneously, the Area Construction Office (ACO) will notify the Office of Program Delivery (OPD) Project Manager (PM) of the action and, in-turn, the PM will notify the Consultant. The State Design Policy Engineer and the District Engineer shall be copied on the letter; FHWA shall be copied on FOS projects. (See standard letter NOTIFICATION LETTER – IMMEDIATE CORRECTIVE ACTION TAKEN). The Consultant may be requested to prepare red-line plans showing the required design changes to document work associated with the immediate, corrective action or clarify construction detail. The process thereafter follows the procedures outlined herein.

Identification

Upon identification of a problem encountered in the field, the ACO shall make an assessment to determine if the problem is the result of an E&O and initiate the cost-recovery process. In order for the process to be initiated, the assessment must find that the problem may be attributed to gross negligence or carelessness and which will potentially create substantial impact. A problem is considered to have substantial impact if it is expected to significantly increase construction-related costs or result in significant construction delays.

Procedure: 22-6 - Errors and Omissions Cost-recovery Procedure
Without imputing blame, the ACO will work with the Consultant, the PM, the Contractor, the Department’s Design Office staff (e.g., subject matter experts), and FHWA on FOS projects to complete the assessment. The ACO is responsible for initiating the assessment and for fully documenting the problem.

After the assessment has been completed and a solution identified, it is the ACO’s responsibility to implement and track all costs associated with the solution.

**Construction Resolution**

The PM proceeds with expediting the necessary changes to the construction project by working with the Consultant to develop plan changes for use by the Contractor, negotiating a Supplemental Agreement (SA) - if required, and routing the SA for approval. Plan revisions required as a result of a consultant’s possible E&O shall be initially made at no cost to the Department. Revisions shall be completed as quickly as possible to avoid or minimize construction delays. See Appendix H of the Plan Development Process (PDP) for plan revision procedures.

It is of highest importance the work, cost negotiations with the Contractor, participation by the Consultant, effort spent by Departmental staff, and the final agreed-upon scope is fully documented by the PM. This documentation is needed by the District Construction Estimator to make a fair assessment of the total additional costs. In addition, this documentation is needed to properly consider “betterment” in formulating an opinion on the costs attributable to gross negligence or carelessness. At the completion of the construction work, rework, or at the time a SA is executed, the District Construction Office submits this detailed history to the PM including DOT Form 357.

**Early Notification**

The PM initiates a Cost Recovery Process by opening the E&O file. It is the PM’s responsibility to advance the E&O cost-recovery process and for maintaining the E&O file. If it is determined there is no basis for cost recovery, the E&O cost-recovery process is terminated and documented by the PM.

All decisions are made on a project-by-project basis. Recoverable costs are costs which would not have been incurred had the E&O never happened. Examples of recoverable costs include but are not limited to the following:

1. costs related to construction delays or inefficiencies;
2. resulting fines and other penalties;
3. time and resources expended by GDOT to address the problem and cost recovery;
4. rework by the contractor;
5. required supplemental engineering by a third party design firm; and/or
6. any additional costs for construction which would have been part of the original contract had the E&O not occurred.

The E&O file should include:

1. a brief timeline of E&O activities;
2. detailed documentation as to the nature of the problem and its impacts;
3. the role of others and the consultant in resolving the problem;
4. supporting material for all related costs;

**Procedure: 22-6 - Errors and Omissions Cost-recovery Procedure**

**Date Last Reviewed:** [Date Last Reviewed]
5. minutes of all meetings;
6. all formal correspondence; and
7. any other information, findings or documents relevant to the E&O claim.

The documentation effort will be ongoing and shall be available to the Office of Legal Services (OLS) for periodic review.

The PM will request a meeting with the ACO and SME to review the E&O case file. This group will make a preliminary determination to continue the cost recovery process. Specifically, the group must determine if the Consultant failed to achieve the required Standard of Care and delivered a work product that shows gross negligence or carelessness which created a substantial impact on the project. Furthermore, the group should consider the role of the Department in possibly contributing to- or exacerbating the problem. The PM documents the findings of the group in the E&O file.

Immediately following a decision to continue the E&O cost-recovery process, the PM shall mail to the Consultant an early notification letter which includes the nature and scope of project design issues and request the Consultant’s involvement. The State Construction Engineer, the State Design Policy Engineer, and the District Engineer shall be copied on the letter; FHWA shall be copied on FOS projects. A timeframe for response shall be included. (See standard letter NOTIFICATION LETTER – POTENTIAL ERRORS AND OMISSIONS COST-RECOVERY CLAIM).

Decision

The PM continues the E&O cost-recovery process by receiving input from the Consultant and through the continuous input of the interested parties. The PM will initiate meetings, as necessary, to provide an opportunity for all parties to express opinions. After meeting with the Consultant and receiving input from Department personnel, the PM will submit a detailed memorandum to the State Design Policy Engineer with a recommendation to proceed with- or abandon the E&O cost-recovery effort. Any decision to pursue E&O cost recovery shall be approved by the State Design Policy Engineer after consultation with OLS.

For a decision that cost recovery is warranted, the PM sends a notification letter informing the Consultant of GDOT’s decision to correct project issues with the contractor, provides an assessment of estimated costs and the Consultant’s financial responsibility, and requests a written response. The Director of Construction, Director of Engineering, the Department’s General Counsel, the State Construction Engineer, the State Design Policy Engineer, and the District Engineer shall be copied on the letter; FHWA shall be copied on FOS projects. (See standard letter NOTIFICATION LETTER – DECISION TO PURSUE ERRORS AND OMISSIONS COST RECOVERY).

If GDOT elects not to pursue cost recovery, the decision will be noted along with a statement that GDOT reserves the right to pursue cost recovery at a later date. For a decision that cost recovery is not warranted, the PM sends a notification letter informing the Consultant that increased project costs and/or delays were determined to be caused by factors other than a deficiency in the Consultant’s design. The State Construction Engineer, the State Design Policy Engineer, and the District Engineer shall be copied on the letter; FHWA shall be copied on FOS projects. (See standard letter NOTIFICATION LETTER – DECISION NOT TO PURSUE ERRORS AND OMISSIONS COST RECOVERY).

Consultant Performance Review Committee (CPRC) Review

The CPRC will be comprised of the Director of Construction, Director of Engineering, and the Department’s General Counsel.

Procedure: 22-6 - Errors and Omissions Cost-recovery Procedure
Date Last Reviewed: [Date Last Reviewed]
If the Consultant does not agree with a recommendation to seek cost recovery, the PM will forward the issue to the CPRC for further investigation of the claim. The CPRC will review the case to evaluate the consultant design for compliance with GDOT policies and procedures and determine the extent of the Consultant’s responsibility. As part of the evaluation, the CPRC may request all consultant project QC documents and a copy of the Consultant’s GDOT-approved QC/QA Procedures in force the time the design work was performed. The CPRC will conduct an interview with the Consultant at which time the Consultant will be given an opportunity to explain its position.

The CPRC will render an opinion on the issue and (1) confirm the recommendation to seek cost recovery or (2) instruct the PM to terminate the process. If the CPRC decides to continue with cost-recovery, it will attempt to reach a negotiated settlement with the Consultant. The CPRC will maintain detailed documentation of their work, including meeting minutes and provide the documentation to the PM for inclusion into the E&O file.

Negotiation and Settlement

The Department and the Consultant may agree to settle at any time during the process. Any negotiated settlement offer will be forwarded by OPD to the Chief Engineer for review and acceptance. GDOT may elect to accept services in-kind (i.e., in lieu of money) as restitution for damages caused by the E&O. Conversely, GDOT may choose to drop the claim if findings made during the process prompt the Department to do so.

If the Consultant and the Department are unable to negotiate a settlement, the matter shall be submitted to non-binding mediation. The Department and the consultant will agree on a mediator and shall equally share the costs and expenses of mediation. The Mediator shall be qualified by the State of Georgia Office of Dispute Resolution. The Mediator shall be required to have at least six (6) years experience in the design and/or construction process. Both parties will support the mediation effort so it proceeds expeditiously.

Upon conclusion of the mediation effort (if no settlement has been reached), the Department will consider litigation. At this point all settlement discussions shall be handled through OLS in conjunction with the Office of the Attorney General.

Documentation

Documentation of all occurrences of plan errors/omissions, including meeting minutes, correspondence, findings, and settlement terms, shall be the responsibility of the PM (unless otherwise noted). Furthermore, the PM will ensure all documentation is uploaded to SharePoint.

References:

***

History:

moved from Program Delivery: 08/04/15;
copied to GDOT Publications v.02.00.00: 02/16/12;
reviewed: 11/15/10;

Procedure: 22-6 - Errors and Omissions Cost-recovery Procedure
Date Last Reviewed: [Date Last Reviewed]
copied to P&P: 10/03/08;  
added to MAP: 08/10/07
GDOT Publications, Policies & Procedures, Errors and Omissions, Consultants/Service Contracts
GDOT Publications
Policies & Procedures

Policy: 4020-4 - Errors and Omissions
Section: Consultants/Service Contracts
Office/Department: Division of Engineering

Reports To: Chief Engineer
Contact: 404-631-1000

1. General

This policy establishes the Department’s requirement to determine the extent to which the consultant may be reasonably liable for costs resulting from errors or omissions in design furnished under its contract, and to seek recovery of those costs when appropriate.

2. Background to Policy

Title 23 of the Code of Federal Regulations (23 CFR 172.9(a)(6)) requires that the Department have written procedures that cover determining the extent to which the consultant, who is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors or deficiencies in design furnished under its contract.

The Federal Highway Administration’s view of this requirement may be summarized as:

- FHWA’s general policy is that each errors-and-omissions issue should be considered on its own merits. In general, a consultant should not be held responsible for additional construction costs resulting from such errors, so long as they are not the result of gross negligence or carelessness.
- Unless the agency-consultant agreement holds otherwise, federal-aid participation may be justified for the type of consultant errors that might occasionally occur despite the exercise of normal diligence if:
  - The error is not due to gross negligence or carelessness; and
  - Carelessness, negligence, incompetence, or understaffing by the state agency are not contributing factors.
- Assignment of financial responsibility to the design consultant for additional, E&O-related construction costs is not FHWA’s philosophy (subject to the qualifications above).
- The FHWA does encourage contract provisions that require the following:
  - The consultant shall perform additional work to correct design deficiencies promptly and at no additional cost to the owner agency; and
  - Acceptance of design documents by the state agency does not relieve the consultant of responsibility to correct errors that are subsequently found in its work.

It is generally understood that a government agency should not be over zealous in pursuing claims based upon consultant liability issues. The US Army Corps of Engineers opinion is summarized as:

It is not in the government’s best interest, however, “to be overly zealous” in pursuing claims based on consultant liability. This guideline is particularly true if relatively small damages would not be judged by a board or court to result from negligence. The adverse effects of such an overly stringent approach would likely be a) an increase in the cost of design services as the consultant...
community interprets these claims as the "cost of doing business" with the agency; b) a diminishing of the agency's professional image; and c) a decline in the number of firms willing to do business with the agency.

3. Policy:

It is acknowledged that it is technically and financially impractical to prepare or obtain completely error or omission free design documents, and that errors may occasionally occur in design documents that meet the accepted standard of care of the industry. However, design consultants should be held accountable for the increased project costs that result from, at a minimum, their gross negligence or carelessness. Accordingly, it is the policy of the Department to take action to determine the extent to which the consultant may be reasonably liable for costs resulting from errors or omissions in design furnished under its contract, and to seek recovery of those costs when they are due to the consultant's gross negligence, carelessness, or failure to perform in accordance with the applicable contract. Further the Department will publish, maintain and follow Procedures that control the actions of the Department in pursuing possible cost recovery in accordance with this policy as outlined in Section 5) below.

4. Definition:

Errors: Plan or specification detail that is incorrect, conflicting, insufficient, or ambiguous.

Extraordinary diligence and slight negligence: In general, extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons exercise under the same or similar circumstances. As applied to the preservation of property, the term "extraordinary diligence" means that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property. The absence of such extraordinary diligence is termed slight negligence.

Omissions: Instances in which the plans or specifications are silent on an issue that should otherwise be addressed in the documents.

Ordinary diligence and ordinary negligence: In general, ordinary diligence is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. As applied to the preservation of property, the term "ordinary diligence" means that care which every prudent man takes of his own property of a similar nature. The absence of such diligence is termed ordinary negligence.

Slight diligence and gross negligence: In general, slight diligence is that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances. As applied to the preservation of property, the term "slight diligence" means that care which every man of common sense, however inattentive he may be, takes of his own property. The absence of such care is termed gross negligence.

Standard of care: As applied to the performance of consultant services for the Department, standard of care means the duty to exercise the degree of skill and care ordinarily used by competent practitioners of the same professional discipline under similar circumstances, taking into consideration the contemporary state of the practice and the project conditions.

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5. Procedure

The Department has published and will maintain and use procedures for determining the extent to which the consultant may be reasonably liable for costs resulting from errors or omissions in design furnished under its contract that result from, at a minimum, their gross negligence or carelessness, and for seeking recovery of those costs. These procedures are found at GDOT Manual of Administrative Procedures (MAP) at clause 22-6 and include language that, together with the consultant design contract language:

- Focuses the Department effort on the recovery of costs from projects where gross negligence is apparent, and where there is likelihood of significant monetary return from cost recovery effort.
- Requires that the consultant be involved in the early resolution of design errors and recognizes the consultant’s duty to correct such design errors at his cost.
- Requires that the consultant be involved throughout any cost recovery effort for costs associated with the gross negligence of the consultant in developing design products containing errors and omissions.
- Establishes a fair, open and equitable process for evaluating the issues associated with any possible cost recovery effort.
- Recognizes the principle of “betterment” by which the Department may recover construction costs associated with Error or Omission due to the gross negligence of the consultant only when such construction costs are in excess of the construction costs that would have been realized to the Department had the original design contained no such defect.
- Establishes the principles that the Department will follow in documenting evidence of error and omission attributable to a consultant so that these may be considered as part of future evaluation of past performance for any future assignments.
- Recognizes the role of the Department (and possibly the FHWA) in occasionally directing the work of the consultant and the impact such direction may have on the validity and fairness associated with any decision to pursue cost recovery efforts and the likelihood of success of such efforts.

References:

None.

History:

copied to GDOT Publications v.02.00.00: 02/21/12; added Procedure section: 11/17/10; copied to P&P: 09/25/08; added to TOPPS: 08/10/07

Policy: 4020-4 - Errors and Omissions

Date Last Reviewed: [Date Last Reviewed]
KANSAS

Consultant Standard of Care Policy
KANSAS DEPARTMENT OF TRANSPORTATION

CONSULTANT STANDARD OF CARE POLICY

I. DEFINITIONS

A. Construction Contract. A written agreement between the Secretary and a Construction Contractor, requiring the Contractor to construct or reconstruct a Construction Project for which the Consultant is performing Services.

B. Construction Contractor. The individual, partnership, corporation, joint venture, or other legal entity performing a Construction Contract for the Secretary.

C. Consultant. The Consultant firm, its employees, subconsultants, and any other Consultant-retained agents that will be performing services for the Secretary.

D. KDOT. The Kansas Department of Transportation.

E. Negligence. Those acts, errors, or omissions in the Consultant’s services that fail to meet the degree of care, skill, and diligence ordinarily exercised by members of the same profession in the same locality under similar circumstances.

F. Problem. The Consultant’s negligence, the Consultant’s alleged negligence, or the Consultant’s failure to comply with its obligations under an agreement with the Secretary.

G. Secretary. The Secretary of Transportation of the State of Kansas.

H. State Transportation Engineer. The KDOT Deputy Secretary of Engineering & State Transportation Engineer of the State of Kansas.

I. Chief of Design. The KDOT Director of the Division of Engineering and Design, or his or her designee.

J. Solution. Corrective action(s) to overcome a Problem, including without limitation: 1) the Consultant revising reports, technical data, special provisions, plans, or a combination thereof; 2) the Secretary hiring a third party to make revisions to final reports, technical data, special provisions, plans, or a combination thereof; 3) the Secretary using the Construction Contractor or retaining a third party to repair, remove, or remove and replace work performed on the Construction Contract.
II. KDOT'S AND CONSULTANT'S OBLIGATIONS UPON ENCOUNTERING A PROBLEM

A. If a Problem presents an immediate danger to persons or property, the KDOT personnel shall take those steps necessary to fulfill the Secretary's obligations for public safety.

1. The KDOT personnel shall notify the Consultant and furnish information to the Consultant as provided in Section II.B; however, the Consultant may not be given time to investigate the Problem or assist in determining the Solution.

2. If the Chief of Design determines the Solution without the Consultant's input and the Consultant disagrees with the Solution, cost, or both, the Consultant may appeal to the State Transportation Engineer the Chief of Design's decision of the Solution, costs, or both. The Consultant shall file this appeal within 15 calendar days after the Chief of Design furnishes the Consultant a written decision on the Solution, cost, or both. The State Transportation Engineer will hold a formal, administrative hearing as provided in Section III below.

B. If KDOT personnel believe that a Problem may cause or has caused KDOT to incur economic or other damages and does not present an immediate danger to persons or property, the KDOT personnel will:

1. Notify verbally both the Consultant and the Chief of Design of the Problem upon discovering the Problem. Follow the verbal notice with written notice that identifies the Problem and the nature of the potential economic and other damages that may result from the Problem. Furnish a monetary estimate of the potential damages if possible.

2. Furnish to the Consultant and Chief of Design all relevant information KDOT personnel have on the Problem as soon as the information is obtained; and

3. Give the Consultant, in the written notice, a designated time to investigate the Problem and assist in determining the best Solution. KDOT will determine this time based on the nature of the Problem, the severity of the Problem, the Consultant's ability to respond, and the traveling public's needs, among other things. The Consultant's responsibility to mitigate damages is not restricted or controlled by the designated response time.

C. The Consultant and the Chief of Design will attempt to agree upon a Solution except when an immediate danger situation prevents such an attempt. The Consultant and the Chief of Design will attempt to agree upon the costs necessary to implement the Solution. The Chief of the Bureau of Design may hold an informal meeting to discuss potential Solutions, costs, or both.

1. If the Consultant does not offer a Solution(s) within the time KDOT designates in Section II.B or within a different time the parties have agreed upon and KDOT needs to minimize delay to third parties and minimize other damages (personal injury, property, or economic damages), the Chief of Design may determine the Solution without the Consultant's input. The Consultant waives the right to challenge the Solution the Chief of Design selects when the Consultant has
failed to offer its input timely although the Consultant does not waive the right to challenge the amount of the damages incurred.

2. If the Consultant offers a Solution(s) within a reasonable time and the Consultant and Chief of Design agree upon that Solution, their agreement will bind the Consultant and Secretary. KDOT’s agreement to the Solution is not an undertaking of the Consultant’s responsibility for the Solution.

3. If the Consultant and Chief of Design are unable to agree upon a Solution, the cost of the Solution, or both, the Consultant may appeal to the State Transportation Engineer the Chief of Design’s decision of the Solution, cost, or both. The Consultant shall file this appeal within 15 calendar days after the Chief of Design furnishes the Consultant a written decision on the Solution, cost, or both. The State Transportation Engineer will hold a formal, administrative hearing as provided in Section III below.

D. KDOT will endeavor to comply with Section II.B; however, KDOT field personnel may authorize the Construction Contractor or a third party to repair, remove, or remove and replace work performed on the Construction Contract without complying with Section II.B. KDOT’s failure to give the Consultant notice, time to investigate the Problem, the opportunity to assist in determining the Solution, or a combination thereof is not a breach of contract or breach of good faith and fair dealing. KDOT’s failure to give the Consultant notice, time to investigate the Problem, the opportunity to assist in determining the Solution, or a combination thereof does not excuse the Consultant’s obligation to design the Solution and pay for the economic damages or other damages KDOT incurs because of the Problem. Yet, nothing in Section II prevents the Consultant from asserting that the Solution is arbitrary or the damages are excessive.

E. Nothing in this Section II prevents the Secretary from requiring the Consultant to design a particular Solution. If KDOT orders a particular Solution and the Solution is unsuccessful through no fault of the Consultant, the Secretary will bear the costs incurred in developing and implementing the unsuccessful Solution.

III. FINAL ADMINISTRATIVE HEARING AND APPEAL RIGHTS

A. For Problems the Chief of Design and Consultant were unable to resolve under Section II of this Policy, the State Transportation Engineer will hold a formal, final administrative hearing or will appoint another hearing officer or a hearing panel to hold a formal, final administrative hearing.

1. The State Transportation Engineer has sole discretion to conduct the final administrative hearing or appoint another hearing officer or a panel for this purpose. Any hearing officer may be a KDOT employee or a non-KDOT employee. Any panel may consist of KDOT employees, non-KDOT employees, or a combination thereof.
2. If the Consultant requests a non-KDOT hearing officer or panel and the State Transportation Engineer grants this request, both parties will share equally the expense of the outside hearing officer or panel.

B. **Time Period for Filing Appeals; Waiver.** The Consultant shall file its appeal within 15 calendar days after the Chief of Design furnishes the Consultant a written decision on the Solution, cost, or both. Alternatively, the Consultant may obtain the Chief of Design's approval to file the appeal outside the 15-calendar day period. If the Consultant fails to file the appeal within the required 15 calendar days or fails to obtain a time extension, the Consultant waives the right to appeal the claim and accepts the Chief of Design's decision.

C. **Hearing Procedure.** The final administrative hearing will take the following form unless the Consultant and Secretary agree otherwise in writing.
   - Before the hearing, the Consultant shall submit a written statement identifying the issues in dispute (questions of law and questions of fact);
   - A court reporting service will record the hearing. A party may request a written transcript of the proceeding at that party's expense;
   - All witnesses will testify under oath;
   - A party may have Legal Counsel present. Counsel has the right to examine all witnesses;
   - Formal rules of evidence do not apply. While hearsay is admissible generally, the hearing officer may require further substantiation or authentication of hearsay evidence;
   - Legal Counsel may present a party's arguments; however, these arguments are not evidence. Thus, for the hearing officer to consider these arguments, Counsel's arguments must be supported by witness testimony, documentation provided to the hearing officer, or both; and
   - The agency record will consist of the hearing transcript, all documentation submitted to the hearing officer or panel at the hearing, and all documentation the hearing officer or panel and State Transportation Engineer considered in reaching a decision.

D. **Final Agency Decision.** The State Transportation Engineer will issue a final agency decision whether the State Transportation Engineer conducts the hearing or appoints a hearing officer or panel to conduct the final administrative hearing. If a hearing officer or a panel conducted the final administrative hearing, the State Transportation Engineer will issue the Agency’s final decision after:
   - reviewing the hearing officer’s or panel’s decision with the agency record; and
   - concurring in the decision or modifying the decision as the State Transportation Engineer deems best.

E. The State Transportation Engineer's decision under this Consultant Standard of Care Policy represents KDOT final agency action under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA) K.S.A. 77-601 et seq.

[Signature]
Jarome T. Younger, P.E.
Deputy Secretary for Engineering and
State Transportation Engineer

DATE

Consultant Standard of Care Policy
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Affinis; On Call; 2015
12 INSURANCE

12.1 General Insurance Requirements

12.1.1 Evidence of Insurance
The Design-Builder shall obtain insurance and provide evidence of such insurance as proof of compliance for all insurance requirements contained in this Section 12. These insurance requirements are applicable to the Design-Builder only. When the Design-Builder requires a Subcontractor to obtain insurance coverage, the types and minimum limits of coverage may be different than those required in this Section 12. The Design-Builder’s insurance shall cover all of the Work under this Contract, whether the Work is performed by the Design-Builder or its Subcontractors. The Design-Builder’s insurance shall cover the entire Project. The evidence of insurance shall provide for 45 Days written notice of any material change in coverage or cancellation for any reason, including non-renewal. The Design-Builder shall delete the phrase “will endeavor to” preceding all references to provisions of notice by the insurance company in the evidence of insurance. The Design-Builder shall provide a Certificate of Insurance to the Department indicating that coverage complying with this Section 12 is in effect at least 15 Days prior to the date anticipated for NTP1. The Department reserves the right to request a complete certified copy of one or more of the policies, at the Department’s sole discretion. If the insurance required by this Section 12 become no longer commercially reasonable, as determined by the Department at its sole discretion, the Department will work with the Design-Builder to find commercially reasonable alternatives to the required coverages that are acceptable to the Department.

12.1.1.1 A.M. Best Rating
All insurance companies providing policies obtained to satisfy the insurance requirements must have an A.M. Best rating of (A-) or better.

12.1.1.2 Full Force and Effect
The commercial general liability, excess (umbrella) liability, Design-Builder’s pollution liability and professional liability insurance coverage requirements will remain in full force and effect until Final Acceptance at which time the Design-Builder shall maintain completed operations insurance throughout the term of all warranties or as otherwise required by the Contract Documents, whichever is greater.

12.1.1.3 No Recourse
There shall be no recourse against the Department for payment of premiums or other amounts with respect to the insurance provided by the Design-Builder, or for deductibles under these policies. This provision does not affect any rights the Design-Builder is entitled to pursuant to Sections 15 (Change Order Risk Allocation) and 16 (Changes in the Work).

12.1.1.4 Indemnification
The insurance coverage provided hereunder shall support, but is not intended to limit, the Design-Builder’s indemnification obligations under Section 21 (Indemnification).

12.1.1.5 Insurance No Limit of Liability
Any requirement for insurance imposed upon the Design-Builder is not intended to be construed as any limit of liability of the Design-Builder under this Contract.

12.2 Design-Builder Provided Insurance
The Design-Builder shall procure insurance acceptable to the Department, as identified in this Section 12 and as described in the Contract Documents. The Design-Builder shall include all insurance costs in its
Contract Amount. When through one or more claims or pending claims, the remaining coverage or potential remaining coverage of any insurance policy required in this Section 12.2 (Design-Builder Provided Insurance) and its subsections is or may be reduced to $1 million or less in any policy period, the Design-Builder shall provide written notice to the Department of such remaining coverage or potential remaining coverage. The Design-Builder shall provide this notice within 15 Days after the Design-Builder has knowledge of the claim that reduces or may reduce the remaining coverage or potential remaining coverage to $1 million or less.

12.2.1 Workers’ Compensation and Employer’s Liability Coverage
The Design-Builder shall furnish evidence to the Department that, with respect to the Work, the Design-Builder carries workers’ compensation insurance, or is qualified to by the Kansas Division of Workers’ Compensation as self-insured, and carries insurance for employer’s liability sufficient to comply with all obligations under State laws relating to workers’ compensation and employer’s liability. The Design-Builder shall require each Subcontractor on the Project to make the same evidence available to the Department at the Department’s request. This evidence shall be furnished to and Approved by the Department prior to the time the Design-Builder commences Work on the Site or furnished and Approved by the Department at the time it is requested for a Subcontractor.

12.2.2 Commercial General Liability Insurance
The Design-Builder shall obtain and maintain a policy of commercial general liability broad form coverage for bodily injury, death, property damage, personal injury and advertising liability written on an occurrence form that shall be no less comprehensive or more restrictive than the coverage provided by Insurance Services Office (ISO) for CG 00 01 10 01.

(1) Limits of liability. General liability:
   a. $2 million - each occurrence.
   b. $4 million - general aggregate (annually).
   c. $2 million - personal injury.
   d. $2 million - products/completed operations liability.

(2) Such insurance shall include, by its terms or appropriate endorsements, bodily injury, death, property damage, legal liability, personal injury, blanket contractual, independent Design- Builders, premises, operations and products, and completed operations. Such insurance shall also include blanket coverage for explosion, collapse, and underground (XCU) hazards.

(3) Products and completed operations coverage shall be continued for a minimum of five years from Final Acceptance.

(4) The Department shall be an additional insured with respect to liability arising out of acts or omissions of the Design-Builder or its Subcontractors, whether on or off the Site.

The commercial general liability insurance shall be primary and non-contributory coverage, rather than excess coverage or contributing to any insurance maintained by any other Person. The limits of the commercial general liability insurance may be satisfied with a practice policy, or a combination of a practice policy and Project specific policy that is also primary and non-contributory.

12.2.3 Automobile Liability Insurance
The Design-Builder shall obtain and maintain occurrence-based commercial automobile liability insurance covering all owned/leased, non-owned, and hired vehicles used in the performance of Work, both on and off the Site, including loading and unloading.

The following limits of liability and other requirements shall apply:

(1) $2 million combined single limit for bodily injury and property damage liability.
(2) Coverage shall be provided on ISO form number CA 00 01 10 01 or equivalent.
(3) The policy shall be endorsed to include Motor Carrier Act endorsement – Hazardous Materials Cleanup (MCS-90), if applicable.

The limits of the commercial automobile liability insurance may be satisfied with a practice policy, or a combination of a practice policy and Project specific policy.

12.2.4 Excess (Umbrella) Liability Insurance
The Design-Builder shall obtain and maintain a policy of umbrella or excess liability insurance with limits of not less than $25 million per occurrence and $25 million annual aggregate which will provide bodily injury, death, personal injury and property damage liability at least as broad as the primary coverages set forth above, including employer’s liability, commercial general liability, and commercial automobile liability, as set forth in Sections 12.2.1, 12.2.2, and 12.2.3. The excess (umbrella) liability insurance shall be primary and non-contributory coverage, rather than excess or contributing, to any insurance maintained by any other Person.

12.2.5 Design-Builder’s Pollution Legal Liability Coverage
The Design-Builder shall obtain and maintain pollution legal liability coverage. The following limits and conditions shall apply:

(1) The limit of liability per occurrence shall be $5 million and the total Project aggregate shall be $10 million. The limits of the pollution legal liability coverage may be satisfied with either a Project specific policy or a combination of a practice policy and Project specific excess endorsement to the practice policy.
(2) The Department shall be named as an additional insured (to the extent commercially available as determined by the Department).
(3) The policy form shall be written on an occurrence based form.

12.2.6 Additional Insureds
Each policy of commercial general liability insurance, commercial auto liability and excess liability (umbrella) insurance shall name the State of Kansas, the Department, the City of Lenexa, the City of Olathe, the City of Overland Park, and their officials, agents and employees as additional insureds and furnish a waiver of subrogation in favor of each. Each of such policies shall also contain a separation of insureds condition. The insurance afforded by the Design-Builder shall be primary and non-contributory insurance.

12.2.7 Professional Liability Insurance
The Lead Designer shall maintain professional liability insurance coverage for the Lead Designer’s operations on the Project, as follows:

(1) Limits of Liability will be $10 million per claim and a Project aggregate of $10 million.
(2) The policy will have a five-year extended reporting period from Final Acceptance with respect to all events that occurred, but were not reported, during the term of the policy.
(3) The policy shall protect against any negligent act, error or omission arising out of the Designer’s design or engineering activities with respect to the Project.
(4) The policy shall have a retroactive date of no later than NTPI.

Each entity that performs design or engineering activities with respect to the Project (other than the Lead Designer) shall maintain professional liability insurance coverage for its operations on the Project, with limits of liability of $1 million per claim and an annual aggregate of $1 million. The contract with each such entity shall require the entity to renew the policy annually for five years following Final Acceptance, or provide a new policy with a retroactive date of the date the entity first performed design or other
engineering activities on the Project, or a combination of the two types of policies to ensure that a professional liability policy is in place to cover that professional’s liability on the Project during the Project and for five years following Final Acceptance. Any entity (other than the Lead Designer) may be relieved from providing a professional liability insurance policy if that entity is insured under another entity’s professional liability policy.

12.2.8 Railroad Protective Insurance
The Design-Builder shall obtain railroad protective liability insurance in the amounts required by BNSF in accordance with Part 4 (Agreements).

12.2.9 Builder’s Risk
The Design-Builder is not required to carry a builder’s risk insurance policy; however, the Design-Builder shall be responsible for all builder’s risk claims and the Department shall have no responsibility for any item for which the Design-Builder could have obtained coverage under a builder’s risk policy.

13 Risk Of Loss
Until the Department issues the applicable Notice of Completion, the Design-Builder bears any and all risk of physical loss or damage to the Work and the Project associated with such Notice of Completion.

13.1 Site Security
The Design-Builder shall provide appropriate security for the Site, including securing any buildings from entry, and shall take all reasonable precautions and provide protection to prevent damage, injury or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at the Site, whether owned by the Design-Builder, the Department, or any other Person.

13.2 Maintenance and Repair of Work and On-Site Property

13.2.1 Responsibility of Design-Builder
The Design-Builder shall maintain, rebuild, repair, restore, replace, or otherwise correct all Work (including improvements constructed in whole or in part and including goods, materials, equipment, and supplies which are purchased for permanent installation in, or for use during construction of or maintenance of the Project, regardless of whether the Department has title thereto under the Contract Documents) that is lost, injured or damaged from the date of NTP until the date of acceptance of maintenance liability by the Department or third parties as specified in Section 13.2.2, after which time care, custody and control of the improvements constructed under the Project shall pass to the Department. Additional requirements regarding maintenance during construction are set forth in Part 3, Section 17 (Maintenance During Construction).

13.2.2 Relief from Liability for Maintenance
With the exception of College Boulevard, responsibility for maintenance of improvements constructed under the Project shall be transferred to the Department as of the date on which the Department issues the Last Notice of Completion. For College Boulevard, responsibility for maintenance of improvements constructed under the Project shall be transferred to the Department as of the date on which the Department issues the Notice of College Boulevard Completion. Nothing in this Section 13 shall be construed as waiving the Department’s rights to enforce Warranties and other obligations for the Project Work (including Design Documents) that survive any Notice of Completion and/or Notice of Final Acceptance and that are unrelated to maintenance of the Project or Force Majeure. Notwithstanding the foregoing, all elements of the Work that will be owned by Persons other than the Department (such as
LOUISIANA

Change Order Reason(s) Code Chart
# CHANGE ORDER REASON(S) CODE CHART (Rev 3/14/2008)

| 1. Plan Quantity Errors | 1A. Incorrect Quantities (LA DOTD District design).  
| 1B. Incorrect Quantities (LA DOTD Headquarters design).  
| 1C. Incorrect Quantities (Consultant design).  
| 1D. Other (including final plan changes & Contractual Obligations)  |
| 2. Differing Site Conditions (unforeseeable) | 2A. Dispute resolution (expense caused by conditions and/or resulting delay)  
| 2B. Unavailable material.  
| 2C. New development (conditions changing after Plans, Specifications and Quantities completed).  
| 2D. Environmental remediation.  
| 2E. Miscellaneous difference in site conditions (unforeseeable).  
| 2F. Site conditions altered by an act of nature.  
| 2G. Unadjusted utility (unforeseeable).  
| 2H. Unacquired Right-of-Way (unforeseeable).  
| 2I. Additional safety needs (unforeseeable).  
| 2J. Other.  |
| 3. LA DOTD Convenience | 3A. Dispute resolution (not resulting from error in plans or differing site conditions).  
| 3B. Public relations improvements.  
| 3C. Implementation of a Value Engineering finding.  
| 3D. Achievement of an early project completion.  
| 3E. Reduction of future maintenance.  
| 3F. Additional work desired by LA DOTD.  
| 3G. Compliance requirements of new laws and/or policies.  
| 3H. Cost savings opportunity discovered during construction.  
| 3I. Implementation of improved technology or better process.  
| 3J. Price adjustment on finished work (price reduced in exchange for acceptance).  
| 3K. Addition of stock account or material supplied by state provision.  
| 3L. Revising safety work/measures desired by LA DOTD.  
| 3M. Other.  |
| 4. Third Party Accommodation | 4A. Failure of a third party to meet commitment.  
| 4B. Third party requested work.  
| 4C. Compliance requirements of new laws and/or policies (impacting third party).  
| 4D. Other.  |
| 5. Contractor Convenience | 5A. Contractor exercises option to change the traffic control plan.  
| 5B. Contractor requested change in the sequence and/or method of work.  
| 5C. Payment for Partnering workshop.  
| 5D. Additional safety work/measures desired by the Contractor.  
| 5E. Other.  |
| 6B. Right-of-Way not clear (LA DOTD responsibility for ROW).  
| 6C. Utilities not clear.  
| 6D. Other.  |
| 7. Design Error & Omissions | 7A. Design Error (LA DOTD District Design)  
| 7B. Design Error (LA DOTD Headquarters Design)  
| 7C. Design Error (Consultant Design)  |
Errors and Omissions Policy and Procedure
Construction plan errors and omissions have a direct correlation to plan quality and therefore to the QC/QA efforts on the project and to the diligence of the Engineer of Record (EOR). LA DOTD has a separate document, *Construction Plans Quality Control / Quality Assurance Manual*, to address internal plan quality procedures. No policies, efforts or lack thereof absolve the EOR from responsibility for quality construction plans.

1 Purpose:
The purpose of this Errors and Omissions (E&O) Policy is to reinforce design accountability and recover added project costs due to carelessness or negligence on the part of design consultants.

In contracting for design services by consultant professionals, and as a recipient of federal funds for highways, each state DOT must have written procedures, approved by the FHWA, for determining the extent to which the consultant, which is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from E&O in the work furnished under its contract. [23 CFR 172.5 (c) (16)]

2 Definitions:
The following definitions will apply to this policy:

Errors: Plan or specification details or contract administration actions that are incorrect, conflicting, insufficient, or ambiguous (items are shown incorrectly).

Omissions: Cases in which the plans, specifications or contract administration actions are silent on an issue that should otherwise be addressed in the documents (items are missing, not shown or not included).

Errors and Omissions: Design deficiencies in the plans and specifications, which must be corrected in order for the project to function or be built as intended.

Standard of Care: The consultant will perform all services in accordance with the degree of skill and care ordinarily used by competent practitioners of the same professional discipline under similar circumstances, taking into consideration the contemporary state of the practice and the project conditions. The consultant will perform the required quality control and quality assurance (QC/QA) for each project and document that the QC/QA has been performed.

Other Design Flaws:
- Breaches of contract administration caused by untimely review of submittals and untimely and inadequate responses to requests for information.
- Problems in cost estimates and in conduct of construction inspections.
LA DOTD Errors & Omissions Policy and Procedures

Recoverable Costs: The amount of the recoverable cost is that which would not have been incurred had the plans been correct. These costs result from factors such as delays in construction and any premium on costs of items that had to be added to the project after the original bid. The cost of items that would have been part of the project anyway, had the error or omission not occurred, are not included in the restitution sought from the design consultant. The costs to be recovered should be based on actual costs to DOTD. The consultant must reimburse these costs in cash; in-kind services by the consultant are not acceptable as payment.

Before, during and after construction, E&O can result in additional costs that DOTD would not have incurred if the construction plans had been correct. Under contract law, the resulting additional costs are considered damages that DOTD is entitled to collect. E&O identified prior to project construction should be corrected at the consultant’s expense with no additional cost to DOTD. These errors could also result in below average or poor consultant performance ratings. E&O discovered prior to letting, resulting in real costs to DOTD, such as additional utility relocation or real estate costs, will generally be resolved following the same procedures as described below for errors discovered during construction, except that 3.1 and 3.2 will be handled by the Project Manager (PM) and technical experts.

The process for identifying, addressing and recovering costs associated with E&O is outlined below.

3 Process and Steps:
It is the DOTD’s intent to communicate to the Design consultant, as soon as possible, when a potential E&O or design issue is discovered. Early involvement is needed to minimize potential costly delays to the Project, to provide the consultant the earliest opportunity to participate in determining a solution (in an effort to resolve issues and mitigate damages), and to provide a process that is fair to the Department and to the consultant. The steps involved in the full process of resolving issues relating to E&O during construction are as follows:

3.1 Discovery, Evaluation, and Early Notification
Normally, E&O found during construction comes to the attention of the Engineer through the Contractor as an issue. The Engineer will immediately notify the Design Project Manager of the problem. The Project Manager will notify the appropriate Task Manager so that a solution can be developed.

The Project Manager and Task Manager must quickly initiate an internal review of the circumstances to assess whether the issue is likely (a) design-related, (b) construction-related, or (c) due to other causes that are not the responsibility of the design consultant or the contractor. If there is any chance that the issue could be due to a consultant error or omission, the Project Manager or the Task Manager will notify the design consultant immediately and request their
involvement in preparing a solution to the issue. Responsiveness by the consultant is crucial to this process and the DOTD will provide a deadline for required responses. The consultant will respond and advise the Task Manager on proposed solutions to the problem. The consultant shall perform additional work to correct design deficiencies promptly and at no additional cost to the Department and the consultant is afforded the opportunity to mitigate potential damages. Regular communication should be maintained between the Task Manager and the consultant until an acceptable solution is provided to the Engineer. Detailed documentation of all communication with the consultant should be maintained by the Project Manager.

There are instances whereby either due to the nature of the error or in the interest of time, that the Engineer may direct a field change to correct an error without consulting the Project Manager. This will not absolve the consultant of responsibility for the error. Errors may still be discovered through other reviews (i.e., review of project change orders by the Project Manager) later in the project life cycle and financial responsibility may be assigned to the consultant.

3.2 Investigation
After a potential E&O is identified, the Project Manager, in coordination with the Engineer and the Task Manager, shall investigate the issue and will identify any apparent violation of Standard of Care by the consultant as well as additional costs incurred by DOTD. This investigation will take into account all factors influencing the consultant’s liability and the extent of potential damages due to DOTD by the consultant. The consultant should not be responsible for the direct cost that DOTD would have incurred during construction had the error or omission not occurred. The Project Manager will document the findings of the investigation. If recoverable damages are identified, the Project Manager will forward a recommendation to the Chief Engineer’s designee to collect recoverable costs.

3.3 Decision Notification
If the Chief Engineer’s designee agrees with the recommendation of the Project Manager that costs attributable to E&O are due to the consultant’s neglect, then the Chief Engineer’s designee will notify the consultant of the costs, methods of payment of such costs, and options for review of the decision. All communication between DOTD and the consultant shall be in writing. The consultant may accept the determination, appeal the decision to a Review Panel, or litigate the matter.

3.4 Review Panel Meeting
The consultant may choose to have the findings of the investigation reviewed by the E&O Review Panel. At the request of the consultant, DOTD will convene the Review Panel, consisting of:
   - Chief Engineer, Chair
   - Chief Construction Engineer
   - Chief of Project Development
   - Contract Services Administrator
LA DOTD Errors & Omissions Policy and Procedures

The consultant will have the opportunity to present information relative to the E&O findings to the Review Panel. DOTD Technical Staff may also be asked to present and DOTD may engage outside technical experts, if needed. The Panel will consider the information presented at the Review Panel Meeting and will render a decision on consultant liability and recoverable costs. The Chief Engineer will communicate the decision to consultant and will include options for settling the matter.

Based on these findings, the consultant may choose to pay costs associated with their E&O, or may refuse to pay these costs. If the dispute remains unresolved, litigation by DOTD may be the only remaining option. If the dispute is resolved or if the Department prevails in litigation, the claim is collected from the consultant.

3.5 Recovery and Collection
At the conclusion of step 3.3 or 3.4, DOTD may issue a request for damages to the consultant. At any step in the process, the consultant may opt to pay the costs of E&O. Once a tentative agreement is set, DOTD prepares a settlement agreement. The agreement is then executed and payment is made to DOTD.

3.6 Litigation
If at the conclusion of step 3.5 the consultant disagrees with the findings of the Review Panel, the only recourse for DOTD may be litigation. In these cases, the Project Manager will provide all information relative to the matter, including the Investigation, Notification and Review Panel findings to the DOTD Legal Section for further action.

The consultant, through payment of restitution for damages, and/or DOTD may agree to resolve the issue or at any step in the process, in which case the process moves directly to its conclusion.
Consultant Contract Services Manual

Revised May 2007
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CHAPTER 1 - INTRODUCTION

1.0 Purpose

This manual outlines the State of Louisiana, Department of Transportation and Development (DOTD) policies and procedures necessary to:

A. Identify consulting firms interested in providing engineering and other professional services

B. Evaluate and select such Consultants

C. Negotiate the Scope of Services to be provided, develop the contract documents, and process and execute the applicable documents with the selected Consultant(s)

D. Administer the contractual documents

1.1 Target Audience

The audiences targeted by this manual are:

A. Consultants wishing to offer their professional consultant services to DOTD

B. DOTD personnel involved in the consultant contract process

1.2 Suggested Reading Order

The reader should begin by reading the Table of Contents prior to reading each chapter contained in the Manual. It will also be advantageous to remember that DOTD uses both pre-determined (non-negotiated) and negotiated type scope of services and compensation contracts as covered by the following:

Chapter 2: Contains information on all types of contracts.

Chapter 3: Contains information on non-negotiated type contracts; where DOTD defines the scope of services and determines the compensation

Chapter 4: Contains information on negotiated type contracts; where a scope of services is solicited from the Consultant resulting in a negotiated agreed to scope of services, and then the submission of a work assessment that is negotiated to determine the contract compensation

Chapter 5: Contains information pertinent to administration of contracts.
CHAPTER 2 - CONSULTANT CONTRACTS

2.0 Introduction

This chapter contains information concerning topics relative to several types of contracts with particular emphasis upon the method of determining compensation and payments. The following types of contracts are primarily used by DOTD:

A. Non-negotiated Contracts (Pre-determined compensation): either lump sum or actual cost plus fixed fee with a maximum compensation limitation;

B. Negotiated Contracts: either lump sum or actual cost plus fixed fee with a maximum compensation limitation;

C. Retainer Contracts: with a maximum compensation limitation and the Task Orders being either of the above Type A or B or, Type D (below); typically Retainer Contracts are chosen due to their flexibility to perform like kind services statewide or regionally for projects which may require urgency; Retainer Contracts are also well suited to maximize the use of limited resources.

D. Other Types of Contracts: either non-negotiated or negotiated with a maximum compensation limitation can occasionally involve:

1. Cost per unit of work; or

2. Specific rates of compensation.

2.1 Decision Factors for Different Types of Contracts

The most important consideration in determining the choice of contract type is the degree of confidence that DOTD has to reasonably determine the project scope and compensation, involving such elements as:

A. Complexity

B. Project/Contract scope of services and/or compensation size

C. DOTD experience

D. Potential for encountering unknowns during the prosecution of the work

Contracts for smaller projects that are low to moderate in complexity and for which the scope is well defined would typically be non-negotiated. This type of contract is generally lump sum, but may also be cost plus fixed fee with a
maximum compensation limitation. Contracts for projects that are more complex, larger, and particularly where the scope of services is difficult to determine or precisely develop, would be negotiated. This type of contract is generally cost plus fixed fee with a maximum compensation limitation, but may also be lump sum.

2.2 Consultant Procurement Process

Louisiana Revised Statutes 48:285-294 and 39:1481-1526 establish DOTD’s Consultant Procurement Policy. This Procurement Process is used for:

A. Pre-construction Engineering
B. Construction Engineering Services
C. Research
D. Planning
E. Environmental & related activities
F. Other engineering related services
G. Professional Services (other than engineering)

For large and complex projects, a two-tiered selection with an interview and work plan in the second tier of the evaluation may be considered. A cost proposal may also be a factor which is considered in the second tier of evaluation for state-funded projects.

2.2.1 Justification for Consultant Procurement

Three conditions that justify employment of a Consultant by DOTD are:

A. The magnitude of work involved would place a demand upon DOTD’s available work force if DOTD staff performs the contemplated work, to the extent that it would be necessary to defer other routine or essential work.

B. The contemplated project is determined to be of such a specialized nature that DOTD would be required to go outside of its own staff for expertise in the appropriate field(s) to accomplish the work.

C. The time frame within which the contemplated work must be completed is determined to be such that DOTD cannot undertake the work and maintain its current program on schedule.

Whenever a DOTD Section believes that Consultant services are needed, the Section Head must submit a written request through the appropriate Assistant Secretary or the Chief Engineer for permission to procure Consultant services.

2.2.2 Notice/Advertisement Process

After approval has been obtained to procure Consultant services, the Project Manager designated by the appropriate Assistant Secretary, or the Chief
Engineer develops a scope of work for the Consultant Contract Services Unit for the subject project. Once completed, the Project Manager transmits the scope of services and estimate of work-hours required to perform the services to the Consultant Contract Services Unit. At a minimum, the scope of services includes the following:

A. Project description
B. Source and type of funding
C. Scope of services and complexity
D. Work elements
E. Additional services required
F. Items to be provided by DOTD
G. Contract time and the estimated compensation
H. Specialty and level of experience required
I. Project limits and a vicinity map on 8½” X 11” format

There are basically two types of notices, differing somewhat in their content, and described as follows:

A. Notice/Advertisement for Non-Negotiated Contracts: In general, these notices contain more information than notices for negotiated contracts. The additional information (i.e., the estimated number of plan sheets) is provided so that prospective Consultants may make their own assessment of DOTD’s estimate of the contract compensation. Respondents to notices for non-negotiated compensation contracts are assumed to have evaluated the compensation in relation to the scope of services, and found it acceptable. Should it be found unacceptable, the Consultant should contact the Consultant Contract Service’s Administrator for further action.

B. Notice/Advertisement for Negotiated Contracts: These types of contracts will contain information necessary for a Consultant to best structure their own response.

All Notice/Advertisements will contain pertinent information such as:

A. DOTD’s consultant rating process, including evaluation criteria
B. Instructions on how to respond to an Advertisement
C. Deadline date and time for receipt of responses
D. Disadvantaged Business Enterprises (DBE) participation requirements and/or encouragements (if applicable)

E. When appropriate, instructions on obtaining packets for additional information

F. Minimum personnel requirements

G. Project limits and vicinity map (if applicable)

H. Where to mail or deliver responses

Once the Notice/Advertisement has been prepared; the Consultant Contract Services Unit will transmit to the Chief Engineer or the appropriate Assistant Secretary and FHWA (if required) for review and approval.

A brief synopsis of the Notice/Advertisement is sent to “The Advocate” and the “Daily Journal of Commerce” for publication. The Notice/Advertisement is then posted on the Consultant Contracts Services (CCS) Website. The Internet access site is http://www.dotd.louisiana.gov. The consulting firms will have a minimum of fourteen days to respond before the deadline date.

All Notice/Advertisements will require a completed, and current DOTD “Professional Engineering and Related Services”, Standard Form 24-102. Any consulting firm failing to submit any of the required information will be considered non-responsive. Name(s) of the Consultant/Team listed on the SF24-102 must precisely match the names filed with the Louisiana Secretary of State, Corporate Division, and the Louisiana State Board of Registration for Professional Engineers and Land Surveyors.

2.2.3 Competitive Selections

The DOTD uses a shortlist selection process for competitive selection of consultants. The Consultant Evaluation Committee reviews the responses, applies a numerical rating system, and provides a shortlist containing the three highest scoring consulting firms/teams (if there are 3) to the DOTD Secretary for his consideration and selection of one consulting firm/team from the shortlist. All respondents will be notified via the CCS Website as to the DOTD Secretary’s final selection of the Consultant for a project. The Internet access site is http://www.dotd.louisiana.gov. Respondents can obtain information regarding the shortlist via a written request or a debriefing meeting with the Consultant Contract Services Administrator.

2.2.4 Non-Competitive Selections

In special and rare circumstances, non-competitive selections may be utilized. These circumstances include:
A. Specialty contracts where the necessary expertise is available only from a single, or possibly a few, source(s)

B. A particular project for which the contract has been satisfactorily completed and closed out at an earlier date, and which may require additional services by the Prime Consultant and/or, if applicable, the Prime’s Sub-consultant

C. Contracts requiring immediate action

Whenever the need for a non-competitive selection is ascertained, the appropriate DOTD Section Head will submit justification to the Consultant Contract Services Unit. The justification will be reviewed and submitted through the appropriate Assistant Secretary or Chief Engineer to the Secretary for approval. The request will be in a written form and contain:

A. Justification for this type of selection

B. The recommended firm

C. Reasons for recommending the selected firm

D. Type of contract

E. Estimated compensation

F. Source of funding

The Federal Highway Administration (FHWA) must approve non-competitive selections on all projects involving Federal Aid.

2.2.5 Contract Execution

After the selection of a Consultant has been made on non-negotiated type contracts or after the selection and negotiations have been completed, and the compensation provisions have been approved on negotiated type contracts; DOTD will send the selected Consultant a contract for review. If found acceptable, the Consultant is required to sign the contract with the approved signature as certified by a Board Resolution for Corporations or a Power of Attorney for Sole Proprietorships, and return the contract within ten days of receipt.

Forms required for proper and precise contract execution are:

A. For Corporations and Companies: Corporate/Company Certified Board Resolution, clearly authorizing and designating an officer of the consulting firm, by name, to sign contracts for the firm. Also, a Disclosure of Ownership Certificate from the Secretary of State’s Office. Corporations
domiciled outside Louisiana are required to submit a Certificate of Authority issued by the Louisiana Secretary of State.

B. For Sole Proprietorships: A Power of Attorney/Affidavit is required.

C. For Federally funded contracts; these additional forms are required to be signed by the authorized signatory:

1. Certification of Consultant
2. Certification of Non-procurement Debarment and Suspension
3. Consultant’s Statement of Sub-contractor Participation

D. Certification of Professional Liability Insurance

After all necessary approvals, signatures, and forms are obtained; a copy of the executed contract will be returned to the Consultant with a transmittal letter. The transmittal letter will usually contain a Notice-to-Proceed date, FHWA authorization date (if applicable), and the name of the DOTD Project Manager. Occasionally, the letter will state that a Notice-to-Proceed will be issued at a later date and by whom.

2.2.6 Joint Ventures

The Department will not consider joint ventures for Consultant services, except in rare cases and only with approval of a written request with justification prior to award.

2.2.7 Prime Consultants and Sub-Consultants

DOTD contracts only with Prime Consultants. It is the responsibility of the Prime and its sub-consultant(s) to contract with each other. Primes and their sub-consultants should present a reasonably accurate description of duties and percentage of total work for each in their respective responses to the Notice/Advertisement. At no time may the portion of the work to be performed by the sub-consultant exceed the portion of work to be performed by the Prime. This is necessary for the rating process, as each team member is rated individually. The individual scores are weighted; based on the percentage each team member will perform, and added to arrive at a team rating. For non-negotiated type contracts, it is desirable for the team members to reach their respective contractual agreements early, since the chosen Consultant (Prime) has only ten days to execute and return the contract to DOTD.

Occasionally, after the execution of the contract, the Prime Consultant may request the use of a sub-consultant or the replacement of an existing sub-consultant. A request must be submitted in writing to the Consultant Contract Services Administrator with justification. This justification will be reviewed and submitted to the Chief Engineer for a recommendation and DOTD’s Secretary for approval.
In order to insure the stability of a selected consultant team, no substantial or significant changes in teaming partners and compensation can occur after the award has been made. DOTD requires that all sub-consultants shown on Standard Form 24-102 remain on the selected consultant team in the manner in which their role was described, since their qualifications were used in the selection process. However, since the successful completion of the project is the Prime Consultant's responsibility, the Prime has the option of changing a sub-consultant if the sub-consultant is in default. Under all circumstances, any proposed changes to the consultant team, after the selection has been made, must be submitted in writing to the Consultant Contract Services Administrator; with justification. The Consultant Contract Services Administrator will review this justification with the Chief Engineer for approval.

2.2.8 Staffing Plan

DOTD requires that the key personnel shown on the Staffing Plan submitted with Standard Form 24-102 remains unchanged during the course of the project. Major changes to the Staffing Plan or key personnel assigned to the project must be submitted to the Project Manager and the Consultant Contract Services Administrator for approval.

2.3 Audits

DOTD requires that all consultants conducting business with the Department allow the DOTD's Audit Section to perform an annual overhead audit of their books, or provide an independent Certified Public Accountant's (CPA) audited overhead rate of their firm. This rate must be developed using Federal Acquisition Regulation System (FARS) and guidelines provided by the DOTD’s Audit Section. Audited field overhead rates may also be developed and used for field services when appropriate.

Consultants are also required to submit labor rate information twice a year to the DOTD's Audit Section. Newly selected firms must have audited salaries and overhead rates on file with the DOTD's Audit Section before starting any additional stage/phase of their contracts. All Qualification Statements submitted to DOTD will be considered non-responsive if the consultant is not in compliance with the above audit requirements.

Firms will be required to report audited overhead rates on their qualification response form (Standard Form 24-102). On projects with an estimated total contract compensation amount of $1M and larger, the contract overhead rate for the selected firm may be subject to negotiation by the Consultant Contract Services Administrator. An unusually high overhead may cause DOTD to select another firm from the shortlist. When negotiated or self-imposed overhead rates are used as the contract overhead rate, the contract overhead rate will remain the same for the duration of that specific contract. At no time during the life of the contract can the contract overhead (negotiated or self-imposed) exceed the
audited overhead rate. In the absence of a current audited overhead rate, an
overhead rate of 100% or self-imposed lower rate will be used when preparing
compensation packages.

DOTD uses audit information in many ways. Prospective consultants can assist
in making the audit process timely and accurate. An understanding of the ways
in which audit information is gathered and used will facilitate the coordination
between the consultant and DOTD.

2.3.1 Role of audit information in Contracts

Due to certain professional standards and various Federal and State Directives,
DOTD is required to assess the reasonableness of contract compensation
provisions (See Chapters 3 and 4 for further information relative to the two types
of contracts).

For Negotiated Contracts, this is a two-step process:

A. The first step is to negotiate fair and reasonable work efforts (work-hours)
   and direct expenses.

B. The second step is to set salary and overhead rates used in compensation
   computations to reasonable values. To accomplish this, it is necessary to
define “reasonable and fair salary and overhead rates”, as well as to audit
   the proposed values.

For Non-Negotiated Type Contracts, DOTD determines fair and reasonable
work-hours, and applies statewide average salaries and overhead rates to
determine compensation, for the initial work. Compensation for supplements will
be computed using the selected firm’s reasonable average salary and overhead
rates.

Consultant Contract Services Unit will use the running average of the last three
audits (if three available) for all lump sum contracts as the contract overhead rate
to reduce the effects of annual fluctuation of overhead rates. Overhead audits
older than five years will not be used in the running average computation.
Supplements will use the latest audit information to revise the contract overhead
rate.

The running average of the last three audits (if three available) will also be used
as the provisional contract overhead rate for all cost plus fixed fee contracts. The
contract overhead rate will be adjusted during the course of the contract, as
necessary, to reflect the Consultant’s latest approved rate. Consultants will be
allowed to invoice a lower overhead rate than the provisional rate if they know
that their overhead rate is going to be lower during a certain period of the
contract to avoid owing a large sum of money at the end.
The DOTD's Audit Section will make all overhead adjustments to invoices during the Interim Audit on a yearly basis through their annual review of open contracts or the Post Audit at the end of the contract.

2.3.2 Average Salaries and Overhead Rates

The DOTD continuously gathers audit information by means of:

A. Pre-Award and Post Audits on specific projects, and Annual Audits comprise the database used to define average salaries, and field and office overhead rates.

B. Each calendar year, audit information on overhead rates is obtained from consulting firms not previously on record, to add to this database. Then the statewide average overhead rate is calculated and posted on the CCS Website.

C. Salary information obtained from consultants is used to calculate the statewide average salaries for various classifications. Statewide average salaries are also posted on the CCS Website.

D. DOTD statewide salary and overhead rates may be used to determine lump sum compensation, fixed fees, and maximum compensation limitation for contracts.

Consultants may bill at their actual salary and overhead rates. Lump sum compensation provisions, fixed fees, and maximum compensation limitations will not change as a result of differences between actual rates and the reasonable rates used in the compensation calculation. In the case of excessive time delays beyond the control of the Consultant, the fees may be adjusted to account for salary escalation. DOTD's standard contract language contains a clause concerning "Delays and Extensions".

2.3.3 Specific Project Audits

A specific project pre-award report, from the DOTD's Audit Section, will be required for negotiated contracts under the following circumstances:

A. When DOTD does not have sufficient knowledge of the Consultant's accounting system; to be assured that proper cost segregation will occur

B. When the proposed negotiated lump sum compensation, or the maximum compensation limitation is greater than $250,000

C. When there is a history of unfavorable experience regarding the reliability of the Consultant's accounting system
D. When the contract involves procurement of new equipment, supplies, and/or technology for which cost experience is lacking

Specific project post-audits are required for a cost plus fixed fee with a maximum compensation limitation contract; for the purpose of adjusting payment. If necessary, post-audits may be required for lump sum compensation contracts. The purpose of these audits is to provide data for negotiating future contracts.

2.3.4 Future Hires

The salary information submitted in a proposal may include future hires. The proposed rate will be used if the identity of the hire is known, and a reasonable salary rate has been agreed to and can be documented. Suitable documentation is a “letter of intent” signed by both the Consultant and the proposed new hire, and must be included in the proposal. If the rate has not been agreed to, or is not documented, then the statewide average rate will be used.

2.3.5 Designated Personnel

Direct salary costs are normally computed using the Consultant’s reasonable average audited salary rate for each required classification. If it is known that a specific employee will be performing task elements identified in the proposal, the Consultant may choose to designate such personnel for the related element of work. The Prime Consultant should submit a statement identifying all personnel to be designated, their classifications, and the work elements for which they are to be designated. Costs for the identified tasks will be computed using the audited rate for the designated person(s). Post audits will confirm actual costs.

2.4 Standard Contract Stages and Parts

DOTD standard contracts are usually divided into the following stages and parts:

Stage 0: Feasibility Studies
- Part I: Feasibility Study
- Part II: Environmental Inventory

Stage 1: Planning/Environmental
- Part I: Corridor Study
- Part II: Line and Grade Study
- Part III: Environmental Evaluation
  (a) Categorical Exclusion
  (b) Environmental Assessment (EA)
  (c) Environmental Impact Statement (EIS)

- Part IV: Conceptual Design
- Part V: Scope and Budget Development

Stage 3: Design
- Part I: Surveying Services
  (a) Topographic Survey
(b) Title Work
(c) Property Survey
(d) Title Updates
(e) Right-of-Way (R/W) Maps
(f) Title Take-Off

Part II: R/W Acquisition and Utility Relocation
Part III: Preliminary Plans
Part IV: Final Plans
Part V: Operational Services
Part VI: Inspection Services
Part VII: Construction Proposal
Part VIII: Phase II Environmental Site Assessment

Stage 5: Construction Engineering Service

Part I: Construction Support
Part II: Shop Drawings
Part III: Construction Engineering and Inspection (CE&I)

Although it is possible that a contract could have all of the above parts, a typical design contract will likely have only two or three parts.

Usually, only the compensation provisions for the first part of the contract will be set or initially negotiated. Whenever this first part of work is nearing completion, the scope and compensation for the next part will be determined and/or negotiated. The Notice/Advertisement will describe all Stages and Parts that are anticipated to be included in the contract. The original contract will also describe all anticipated Stages and Parts, and explain that Supplemental Agreement(s) will include compensation and contract time for subsequent work, upon satisfactory completion of the prior Stages and Parts.

The contract will segregate compensation according to the Stages and Parts. In cost plus fixed fee with maximum compensation limitation contracts, a separate maximum limit will be set for each Part of each Stage. Funds shall not be transferred from one Stage or Part to another without prior approval of Consultant Contract Services Administrator. The Consultant’s accounting system must segregate costs by Stage and Part, as well as by Supplemental Agreement or Extra Work Letter.

2.5 Escalation

Salary escalation is the practice of anticipating that salary rates will increase during the performance of a contract; and basing the compensation structure on an average of the current rate and the estimated future rate. No escalation is applied if the contract midpoint is a year or less from the current salary survey date.

Contracts with midpoints more than one year beyond the salary survey date, but whose total duration is not greater than three years, will be escalated to the
contract midpoint. Escalation for contracts with durations greater than three years will be computed annually and applied to the remainder of the contract amount.

The proposed escalation percentage is limited to DOTD's maximum. Maximum percentages are calculated annually based on Consumer Price Index (CPI-U), published by the United States Department of Commerce/Bureau of Economic Analysis. The escalation rate will be limited to a minimum of 0% and a maximum of 5%.

2.6 Profit/Fixed Fee Calculation

In the following discussions the word “profit” should be understood to be synonymous with “fixed fee”. DOTD’s standard profit/fixed fees are used for all forms of contracts. The term “profit” is used for lump sum compensation contracts. The term “fixed fee” is used for cost plus fixed fee with maximum compensation limitation contracts. Despite the differences in terms, the computation is exactly the same.

Separate profit calculations are performed for the Prime and each sub-consultant, for each applicable Stage or Part thereof. A particular Prime or each sub-consultant may respectively have several profit calculations in a proposal.

Factors considered in determining profit percentages are:

A. Type of project (Engineering or Field Services)

B. Magnitude of the consulting firm’s overhead rate

C. Magnitude of the total estimated project cost

The profit percentage calculation consists of applying a base profit percentage, and multiplying it by two modifying factors, which are referred to as:

A. Overhead factor (see Section 2.6.2 for more details)

B. Compensation size factor (see Section 2.6.3 for more details)

The resultant profit percentage is then applied to the sum of direct salary costs, escalation provisions, and the overhead cost, excluding direct expenses, to determine the profit amount in dollars.

2.6.1 Base Profit Percentage

The base profit is based upon the type of work to be performed. The base profit percentage is 15% for general engineering/related services and 12% for construction support/inspection and other field services.
2.6.2 Overhead Factor

Absent a self-imposed or negotiated overhead, the contract overhead used in the profit calculation (OH) will be the smaller of the proposed rate (by the Consultant) and the running average of the last three audits (if available). The Overhead Factor used in the profit computation is based upon the comparison of the overhead used (OH) to the Statewide Average Overhead. The overhead factor is $C^2$, where $C$ is the ratio of statewide average overhead to contract overhead. The maximum value of the Overhead Factor, $C^2$, is 1.15.

2.6.3 Compensation Size Factor

The same compensation size factor is used for all profit calculations for the Prime and each sub-consultant. The contract compensation Size Factor is based on the magnitude of the total estimated project cost. For compensation up to $100,000, the factor is unity. For compensation higher than $100,000:

\[
\text{Compensation Size Factor} = 1.5X^{-0.036}
\]

Where $X$ is the total estimated project cost. The compensation size factor may be negotiated for contracts larger than $10,000,000.00.

2.7 Contingencies

DOTD includes contingencies in cost plus fixed fee with maximum compensation limitation contracts, when appropriate. Contingencies are included in larger and more complex contracts to compensate for lack of precision in estimating the work efforts to accomplish all tasks within the specified project scope. The contingency percentage varies from a minimum of 5 to a maximum of 20, with incremental mid-values of 5’s (i.e. 5, 10, and 15).

2.8 Contract Amendments

The Consultant will make minor revisions in the described work without additional compensation as the work progresses. Considerations for minor revisions have been included in the compensation computations. If DOTD requires more substantial revisions or additional work which the Consultant believes to warrant additional compensation, the Consultant will notify DOTD in writing within thirty days of being instructed to perform such work. If DOTD agrees that the required work is necessary and warrants additional compensation, the contract will be augmented by one of the following methods:

**Extra Work Letter** - An extra work letter may be issued for additional work that does not constitute a change in scope, and for which the estimated compensation plus the compensation for all previous extra work letters does not exceed ten percent of the cumulative value of all contract compensation (exclusive of all extra work letters) to date. The Consultant Contract Services Administrator will issue extra work letters.
Supplemental Agreement – A supplemental agreement will be issued for the additional services required for the project. A supplemental agreement will be required when the additional work represents a change in the original scope of the contract, or when the estimated compensation for the additional work plus the compensation for all previous extra work letters exceeds ten percent of the cumulative value of all contract compensation (exclusive of all extra work letters) to date.

The Consultant shall not commence any additional work requiring extra compensation until one of the contract changes described above has been executed, and authority to proceed has been given in writing by the DOTD.

2.8.1 Proposal Format for Contract Amendments

The formats to be used for contract amendment proposals are described as follows:

A. Non-Negotiated Type Contracts: The Consultant may submit a detailed scope of services description and a list of appropriate descriptive line items for work-hour estimations (work-hours and compensation are not included). DOTD will review the proposal, reconcile any differences in perception of the scope of services, estimate the required work effort, and calculate the compensation. Usually, the Consultant’s reasonable average salary and overhead rate information will be used in preparation of the compensation package.

B. Negotiated Type Contracts: The proposed format differs from the above in that the Consultant supplies a scope of services, work-hours, direct expenses, and compensation calculations (see Chapter 4 for additional information).

C. Extra Work Letters: Similar to A and B.

Proposals will:

1. Be typed on 8½” X 11” paper
2. Have all pages numbered consecutively
3. Have all documents dated
4. Bear the original signature of a Principal of the firm

Upon the request of the Project Manager, all contract proposals must be submitted to the Consultant Contract Services Administrator, for further distribution.
2.9 Overtime

Unless considered in negotiations, and/or included in the compensation calculations, and specifically approved in writing in advance, overtime charges will not be allowed on any contracts. However, overtime charges may be allowed for construction inspection projects where the consultant is required to adhere to the contractor’s schedule.

2.10 Claims

DOTD’s general definition of a claim is a request for additional compensation submitted after the work has been completed. These requests are for work performed, but not covered by the contract compensation provisions. Claims generally result from an initial unawareness that the work is additional and/or a reluctance to request additional compensation. As explained in Section 2.8 (Contract Amendments), it is the Consultant’s responsibility to provide a written request for an amendment, if, in their opinion, significant additional work is required by the DOTD. Furthermore, this amendment must have prior approval, and a written Notice-to-Proceed issued by the Consultant Contracts Services Unit; before work can begin.

Occasionally, a Consultant and DOTD’s Project Manager may, at some point during the contract, disagree that additional compensation is warranted. It is the Consultant’s responsibility to continue the work, but it should be formally documented that additional compensation was requested. Under no circumstances should a Consultant proceed with the intention of making recovery through a claim without such documentation.

A claim must be filed with the Consultant Contract Services Administrator. The DOTD’s Consultant Contracts Claims Committee will review the claim, and determine if the claim has merit in principle, and if so, how much additional compensation is warranted. The Consultant will be notified in writing of the Committee’s recommendation. If accepted by the Consultant, and approved by the Chief Engineer and FHWA (for projects with federal funds), a supplemental agreement is drafted, and sent to the Consultant for signature.

The Consultant may appeal the Committee’s recommendations to the Chief Engineer in writing. The decision of the Chief Engineer will be final, and the Consultant will be notified in writing.

The following is a diagram of the complete claims process:
Claims should be avoided if possible; because of possible problems with personnel changes during or after the work is completed, misplaced information, recollection of pertinent facts, and other “mishaps”, that make it difficult to reconstruct events.

The format of a formal claim is similar to a proposal for a supplemental agreement. A detailed justification narrative is very important and required. The narrative should include:

A. Reasons for believing that the claimed work is eligible for additional compensation

B. Name of the Department representative authorizing the additional work

C. A description of the work

D. Time period in which the work was done

E. Dated copies of supporting correspondence
Compensation calculations should be referenced in the narrative. Following are
detailed descriptions of the acceptable reasons for claims and other
miscellaneous information.

2.10.1 Claims Based On Additional Work

DOTD's standard contract includes the following under the contract changes
paragraph:

“The Consultant will make minor revisions in the described
work without additional compensation as the work
progresses. Considerations for minor revisions have been
included in the compensation computation. If DOTD
requires more substantial revisions or additional work which
the Consultant believes to warrant additional compensation,
the Consultant will notify the DOTD in writing within thirty
days of being instructed to perform such work.”

It is normal for a project to require minor revisions as the work progresses. The
accumulation of many small revisions over the life of a contract may, in
aggregate, be greater than that which could reasonably be considered normal. If
this is the case, the “thirty day rule” may have been violated for the first
instance(s), and a claim may be justified.

2.10.2 Claims Based on Underestimation

DOTD recognizes underestimation as a potentially valid basis for a claim.
Overestimation can also occur for a part or parts of the estimated work effort.
Therefore, a complete accounting must be made for all lump sum type contracts
for which a claim for underestimation is filed. An accounting report may also be
required for a cost plus fixed fee with a maximum compensation limitation
contract. This accounting report can normally be prepared only after a project is
completed. A post audit will also be required. The results of the audit are used
to determine if further investigation of the claim is warranted.

2.10.3 Claims Based on Time Delays

The “Delays and Extensions” clause of DOTD’s standard contract includes
language indicating that compensation provisions may be reviewed if contract
time is exceeded by twelve months, if the delays are not the fault of the
Consultant. It further states that it is the Consultant’s responsibility to request in
writing additional compensation, and that no compensation adjustment will be
made for work performed prior to such a request. All requests for additional
compensation must be submitted to the Consultant Contracts Services
Administrator. The Consultant Contracts Services Administrator will also resolve
questions regarding the responsibility for time delays. If this procedure is
followed, and if adjustments are warranted, a supplemental agreement is
executed to account for predicted salary and overhead fluctuation for the
remaining work to be performed after the twelve-month delay period and the date of the request. Claims made for compensation adjustments due to salary or overhead increases for time periods before a formal request was made will not be considered.

2.10.4 Role of Post Audits, Payroll Records, and Sheet Counts

Post Audits, payroll records, and sheet counts are sometimes presented as proof of the worthiness and/or reasonableness of the compensation claimed. DOTD does not necessarily consider these types of information to be “proof” of the worthiness or reasonableness of the requested compensation. They may be useful as “indicators”.

2.11 Equal Employment Opportunity/Affirmative Action

It is the policy of DOTD to ensure that all transportation activities are free from any discriminatory elements or practices, and that affirmative actions are taken to foster the participation of Disadvantaged Business Enterprises in all such activities.

Specific programs are established to facilitate compliance with Federal and State Laws, Rules and Regulations pertaining to non-discrimination and affirmative action. These programs are administered by the DOTD Compliance Programs Section and are described below:

A. Disadvantaged Business Enterprise (DBE) Program – concerned with locating, certifying, educating, assisting, and awarding DBE with a percentage of work financed all or in part by federal funds.

B. Title VI – concerned in general with the social, economic, and environmental impact of DOTD’s activities that are federally funded.

C. Contract Compliance – concerned with enforcing the Equal Employment Opportunity (EEO) provisions included in all federal-aid contracts.

D. Local Government Compliance – concerned with monitoring those Louisiana governmental entities that are subject to civil rights responsibilities as a result of acceptance of federal transportation funding.

E. Internal Personnel Practices – concerned with the treatment and effect of personnel practices on DOTD and prospective DOTD employees.

Each of these program areas may have a potential impact on any contract awarded to a Consultant. Therefore, it is beneficial to be aware that additional information and program manuals can be obtained from:

Department of Transportation and Development
Attn: Consultant Contract Services Administrator
2.11.1 Disadvantaged Business Enterprise Requirements

It is the policy of DOTD and a requirement of the Federal Department of Transportation (DOT) that DBE firms as defined in Title 49, Code of Federal Regulations, Part 26 (49 CFR 26), shall have the maximum opportunity to participate in contracts awarded which are financed in whole or part with federal funds. In this regard, Consultants shall take all necessary and reasonable steps in accordance with 49 CFR 26 to ensure that DBE firms have the maximum opportunity to compete for and perform services relating to contracts.

Furthermore, Consultants shall not discriminate on the basis of race, color, national origin, or sex in the performance of contracts. Consultants found to be in non-compliance with these regulations may be subject to sanctions.

2.11.2 DOTD Minority Goal

The Federal Agency of the Office of Small and Disadvantaged Business Utilization (OSDBU) USDOT DBE Program, states that USDOT-assisted agencies evaluate their USDOT-assisted contracts throughout the year, and establish contract specific DBE subcontracting goals where these goals are needed, to ensure nondiscrimination in federally-assisted procurements. To comply with this directive, the Louisiana Department of Transportation's Consultant Contract Services Section will be using the following procedure to review contracts that are being advertised for applicability of minority goals.

In order for small disadvantaged firms, including those owned by minorities and women, to participate in the DBE program, they must apply for and receive certification as a DBE. The firms should contact the DOTD Compliance Section, if further information on certification is required. The website for the DOTD's Compliance Section is: www.dotd.louisiana.gov/administration/compliance. A complete list of those firms registered as DBE with their specialties can be found at: www.dotd.louisiana.gov/cgi-bin/construction.asp. A list by work type can be found at: www.dotd.louisiana.gov/lettings/subsdbed/dbhq20070530.asp

Contracts which are greater than or equal to $250,000 will be reviewed for minority goals. The work types with percentages will be identified by the Project Manager prior to the request being submitted to the Consultant Contract Services Section. The Compliance Section will gather the number of available DBE firms in the project area and the firms with specialties in the identified work categories, to assist in setting the goal.
This information will be presented to the evaluation committee. The Evaluation Committee will be comprised of the following positions: Consultant Contract Engineer; Representative from DOTD’s Compliance Section; Representative from Design/Project Manager; FHWA’s Area Engineer; and DOTD’s Project Development Division Chief. The committee will discuss the projects and set the goals for the contract. Once the goals are established, DOTD’s Consultant Contract Services Section will advertise the project.

2.12 Standard Contract Language

Sections 2.12.1 through 2.12.4 excerpt certain portions of the current standard contract language for the benefit of those who are not familiar with DOTD contracts. The topics as excerpted address the items that are of most interest to the Consultant. This language is not negotiable for routine engineering, planning, management and related services. The language may be varied for specialty or unusual contracts.

2.12.1 Insurance Requirements

The following is the clause entitled “Insurance Requirements”:

“During the term of this Agreement the Consultant shall carry Professional Liability Insurance in the amount of $1,000,000. This insurance shall be written on a “claims-made” basis. The Consultant shall provide, or cause to be provided, a Certificate of Insurance to DOTD showing evidence of such Professional Liability Insurance.”

2.12.2 Indemnity

The following is the clause entitled “Indemnity”:

The Consultant agrees to indemnify and save harmless the DOTD against any and all claims, demands, suits, and judgments of sums of money (including attorney’s compensation and cost for defense) to any party for loss of life or injury or damage to persons or properties arising out of, resulting from, or by reason of, any negligent act, or omissions by the Consultant, its agents, servants, or employees while engaged upon or in connection with the services required or performed by the Consultant hereunder.

2.12.3 Delays and Extensions

The following is the entire clause entitled “Delays and Extensions”:

The Consultant shall be given an extension of time for delays beyond its control or for those caused by tardy
approvals of work in progress by various official agencies. If the contract time for any individual Stage/Phase of the contract is exceeded by twelve (12) months due to delays beyond the Consultant's control or for those caused by tardy approvals of work in progress by various official agencies; shall be cause for review of the contract compensation. If, in the opinion of the DOTD's Chief Engineer, circumstances indicate a need for additional compensation, the compensation stipulated herein for work accomplished after the delay period shall be addressed. Subsequent Stages/Phases shall also be considered as delayed. It shall be the responsibility of the Consultant to request additional compensation promptly in writing. **No compensation adjustment shall be made for work performed prior to such request.**

2.12.4 Errors and Omissions

It is understood that the preparation of Preliminary and Final Plans, specifications and estimates, and all other work required of the Consultant under Contract shall meet the standard requirements as to general format and content, and shall be performed to the satisfaction and approval of the DOTD. The DOTD's review, approval, acceptance of, or payment for the services required under this Contract shall not be construed to operate as a waiver of any of the DOTD's rights or of any causes of action arising out of or in connection with the performance of this Contract.

The Consultant shall be responsible for the professional quality and technical accuracy of all designs, drawings, specifications, and other services furnished by the Consultant. Ideally, errors or substandard work shall be revealed during normal work reviews. In such cases, the work should be returned for correction and payments withheld until delivery of an acceptable product. The Consultant shall, without additional compensation, also correct or revise any deficiencies discovered subsequent to final acceptance by the DOTD in its designs, plans, drawings, specifications or other services, resulting from any negligent act, or omissions by the Consultant. If the project schedule requires that the DOTD's staff make corrections due to oversight, errors or omissions by the Consultant, the Consultant shall be responsible for reasonable cost incurred by the DOTD to make the corrections. The Consultant shall be charged the actual payroll cost for making such corrections plus the applicable overhead cost not to exceed the allowable overhead for the Consultant's firm for this Contract. In addition to costs that may be necessary to make corrections to the plans, the Consultant (or his insurer) shall be responsible for costs to correct design errors during construction. This cost to be recovered shall include the administrative cost of processing the Change Order due to design errors and omissions.
A cost recovery process to assess the administrative costs associated with moving the letting date or issuing addenda to the plans/proposal for oversights, errors and or omissions, caused by the Consultant shall be charged to the Consultant. This cost shall cover the actual payroll cost, cost of a new advertisement and applicable overhead cost not to exceed the allowable overhead for the Consultant’s firm for this Contract.

2.13 Information on Contract Action Status

A. Information about the Notice/Advertisement, composition of shortlist, and project award are posted on the Internet site: http://www.dotd.louisiana.gov.

B. Information about the status of negotiations, Contracts, Supplemental Agreements and Extra Work Letters can be obtained by contacting the Consultant Contract Services Unit.

2.14 FHWA Review/Approval

Advertisements, compensation proposals, contracts and supplemental agreements utilizing federal funds will require approval and authorization of FHWA for all non-exempt projects.

2.15 Requirements for Contract Time Extensions and Closures

All contract extensions must be requested, with proper justification, through the Project Manager prior to termination of each phase or part of the contract. The contract expiration date is shown on the NTP letter and is the NTP date plus the contract time for that phase/part as stated in the contract. When a contract is not extended prior to the expiration date, costs incurred by the Consultant within the time gap between the contract expiration date and the NTP for the new supplement cannot be invoiced.

A suspension of work should be requested from the DOTD Project Manager for the time period that no work is being performed on the project to stop the contract time, as stated in the contract, from running out. DOTD Project Managers, upon their approval, will forward this request to the Consultant Contract Services Unit.

Upon the satisfactory completion of the project, the Project Manager will request closure of the contract from the Consultant Contract Services Unit. The Consultant Contract Services Unit will close the contract, notify the Project Control and the Construction Audit Units, and request a post audit from the Audit Section when necessary.

2.16 Procurement of Consultant Services by Other Entities

DOTD will select consultants for all engineering and design related service contracts financed with state or federal aid highway funds. Metropolitan Planning
Organizations (MPOs) with consultant selection procedures approved in advance by the DOTD and by the FHWA may procure consultants for federally funded planning, environmental, and research type projects only. A copy of the procedures along with a description of the policies to be used in advertising and selecting a consultant shall be submitted to the Consultant Contract Services Unit for approval. The policies and procedures should follow closely those that are utilized by DOTD as outlined in the Consultant Contract Services Manual. These procedures will be reviewed periodically to ensure compliance with applicable state and federal laws and regulations.

MPOs that desire to procure consultants for a particular project must obtain written approval from the Chief Engineer, DOTD Secretary, and the FHWA (if federal funds will be used) prior to initiation of selection procedures. When PL funds are used, procurement of consultants requires approvals from the DOTD office of Planning and Programming and Consultant Contracts Services only. The MPO shall comply with the previously approved consultant selection procedures when selecting consultants. The MPO will submit the selection documentation and other relevant materials to the Consultant Contract Services Administrator for final approval by DOTD and FHWA prior to contract negotiation with the consultant.

2.17 Requirements for the Procurement of Professional Services

All requests for procurement of professional services should be submitted to the Consultant Contract Services Unit for processing and contract preparation. Procurement of professional services (other than professional engineering services) are regulated by Louisiana Revised Statute 39:1481-1526 and are subject to the requirements of the Division of Administration (DOA), Office of Contractual Review (OCR) as defined in the LA Administrative Code, Title 34, Part V. A Request For Proposal (RFP) is required for contracts over $50,000. A cost proposal must be submitted with all proposals. DOTD may enter into non-competitive professional services contracts with the appropriate justification (see Section 2.2.4). For contracts less than $50,000, no DOA/OCR approval is required but the contracts are submitted to DOA/OCR for review. Professional services of $20,000 or less are considered Small Purchase Contracts and are not subject to DOA/OCR review but they are required to be reported quarterly. For additional information please visit the DOA Website: http://www.doa.louisiana.gov/ocr.
CHAPTER 3 – NON-NEGOTIATED CONTRACTS

3.0 General Description

For non-negotiated (pre-determined) scope and compensation contracts, DOTD defines the scope of services, and determines the compensation. The Notice/Advertisement for the original contract will:

A. Describe the project
B. Define the scope of services
C. State the compensation
D. Define the method of payment

Consultants are encouraged to examine the scope and compensation to see if, in their judgment, the scope is correct, and the compensation commensurate with such scope. If they agree that all is satisfactory, their signed response Standard Form 24-102 indicates acceptance of the compensation and terms in the Notice/Advertisement.

The firm that receives the award is expected to execute the contract and return it within ten days of receipt to DOTD. For this reason, it is suggested that preliminary agreements between Prime and Sub-consultant (if applicable) be relatively detailed at the time of response. (See Section 2.2.5 for more details).

Pre-determined (non-negotiated) contracts are simpler and faster to process and execute than negotiated compensation contracts. When their use is appropriate, pre-determined type contracts are preferable to negotiated contracts. There are limitations to the use of pre-determined contracts (see Section 2.1 for additional details on decision factors for different types of contracts).

3.1 Compensation for Original Contract

DOTD maintains a large database relative to work effort (work-hours) required to perform various types of engineering design and related professional consulting services. This is also true of salary and overhead rates (see Section 2.3 for more details). The Consultant Contract Services Unit uses the specified work effort, work-hours, and rate information to prepare the compensation package.

A step-by-step description for computing the total compensation is:

A. By using DOTD's work-hour database and statewide salaries, the direct salary costs are computed.
B. Direct salary costs are escalated, if applicable (see Section 2.5).

C. The contract overhead is established.

D. The appropriate overhead rate (statewide average overhead rate) is applied to the escalated salary costs.

E. The total estimated cost is the sum of:

   1. Direct salary costs
   2. Escalation
   3. Overhead

F. The standard profit calculation is made (see Section 2.6 for more details).

G. The direct expenses are calculated.

H. If the contract type is cost plus fixed fee with a maximum compensation limitation, contingencies are computed by multiplying the appropriate contingency percentage (see Section 2.7) by the total estimated costs.

I. The sum of the total estimated costs, profits (or fixed fee), direct expenses, and contingencies (if appropriate), yields the lump sum compensation or the maximum compensation limitation.

3.2 Initial Meeting

As soon as possible after the award, the Project Manager will schedule an initial meeting with the selected Consultant, the Consultant Contract Services Unit, and appropriate personnel. The purpose of this meeting is to transfer data and materials from DOTD to the Consultant and discuss in detail the scope of the project. A guideline will be given to the Consultant, consisting of a list of references and miscellaneous information relative to invoicing, such as maximum percent payable at different “milestones” in the project development (see Section 5.2.1 for more details) and consultant performance rating criteria. The Consultant will be required to read these guidelines and return a signed copy to the Project Manager.

3.3 Contract Amendments for Pre-Determined Type Contracts

Contract amendments for pre-determined type contracts are also non-negotiated. Pre-determined type contract amendments are simpler and faster to process and execute than negotiated type contract amendments. The compensation calculation for extra work letters, supplemental agreements, and Task Orders issued under a retainer contract is the same as for the original contract, except that the Consultant’s salary and overhead rate information will be used. The DOTD Consultant Contract Services Unit will confer with the Consultant on the calculated compensation. Contract amendments will be sent to FHWA for
approval, if required. For further information about pre-determined type contracts, supplemental agreements and extra work letters, see Section 2.4 “Standard Contract Stages and Parts”, Section 2.8 “Contract Amendments”, and Section 2.8.1 “Proposal Format For Contract Amendments”.

3.4 Post Audits for Pre-Determined Cost Plus Fixed Fee Contracts

A post audit may be performed on pre-determined cost plus fixed fee with maximum compensation limitation contracts. The purpose of this audit is to:

A. Establish the Consultant's actual salary and overhead rates
B. Establish the amount of work-hours expended
C. Adjust the total amount paid
D. Obtain documentation of direct expenses

The fixed fee and maximum compensation limitation are not changed as a result of differences in the actual rates and the rates used in the compensation calculations.
CHAPTER 4 – NEGOTIATED CONTRACTS

4.0 Introduction

The two types of negotiated contracts normally used by DOTD are lump sum compensation and cost plus fixed fee with a maximum compensation limitation. There are many similarities between the two, as shown below:

A. Pre-award audits may be required for both types (see Section 2.3 Audits for more details)

B. Proposal format is identical

C. Negotiation procedures are similar

D. Profit/fixed fee calculation is similar

E. Calculation procedure for the total estimated cost is identical

Negotiated cost plus fixed fee with a maximum compensation limitation contracts vary from negotiated lump sum compensation contracts in that:

F. Post audits are required to determine the actual cost for negotiated cost plus fixed fee with a maximum compensation limitation contracts

G. Contingencies may be added in the compensation computation for negotiated cost plus fixed fee with a maximum compensation limitation contracts

H. The amount paid for the negotiated cost plus fixed fee with a maximum compensation limitation contract is the actual documented cost up to the negotiated maximum contract limitation while the amount paid for the negotiated lump sum compensation contract is the entire lump sum compensation, based on:

   a. Work-hours

   b. Salary and overhead rates

   c. Direct expenses

Fixed fee and maximum compensation limitation amounts are not adjusted because of the post audit, (i.e. these amounts are not changed as a result of differences between the actual values, and those used to determine compensation for the contract).
DOTD maintains a database that is used to define work efforts and costs for future projects. A post audit may be performed on a lump sum compensation contract for the purpose of adding to this database. Lump sum compensation is not adjusted because of the post audit results.

4.1 Initial Meeting

Within fifteen days after the award, the DOTD Project Manager will schedule a meeting with the selected Consultant, the Consultant Contract Services Unit, and appropriate DOTD personnel. The purpose of this meeting is to transfer data and material from DOTD to the Consultant and discuss the scope of the project. A guideline will be given to the Consultant, consisting of a list of references and miscellaneous information relative to invoicing and project milestones. The Consultant will be required to read these guidelines and return a signed copy to the Project Manager.

The Consultant should initiate contact with the DOTD’s Audit Section as soon as possible after receipt of the Notice of Award if the Department has not previously established an overhead rate. Failure to do so may delay the negotiation process.

4.2 Scope of Services Proposal

A scope of services proposal will be solicited at the initial meeting by the Project Manager. The proposal must not include work-hours or proposed compensation. DOTD and any other affected parties will review the scope and reconcile differences with the Consultant.

The proposal will be typed on 8½”X11” papers, with the pages numbered consecutively, and contain the following:

A. A transmittal letter, signed by the Principal of the Prime firm

B. A proposal index (optional)

C. A detailed narrative describing the scope of services

D. A list of line items which include:

1. A description of the work to be performed by the Prime Consultant and each subconsultant, to which work-hours will be distributed at a later date, with each line item specifically and logically tied to the narrative. The personnel or salary classification shall be shown for each line item. The line item scope is developed for the purpose of estimating work efforts. However, the narrative scope will become the “Scope of Services” for the contract.
2. The proposed work divided into logical parts with the magnitude and number that facilitate the future estimation of work-hours. Caution should be exercised to make certain that work does not overlap between line items.

4.3 Compensation Proposal

After an agreement is reached on the scope of services, an independent work-hour estimate will be prepared by the Project Manager and other appropriate DOTD personnel (when warranted) and submitted to the Consultant Contract Services Unit. The Project Manager will then request in writing from the Consultant to submit a price proposal directly to the Consultant Contracts Services Unit. The Consultant is cautioned not to submit the price proposal until the Project Manager requests it, as the FHWA requires DOTD to develop an independent estimate prior to receiving an estimate prepared by the Consultant.

The Consultant's proposal will be typed on 8½"X11" papers, with pages numbered consecutively, and contain the following:

A. A transmittal letter, signed by a Principal of the Prime firm, showing a summary of the proposed compensation

B. A proposal index (optional)

C. Previously agreed to scope of services

D. Previously agreed to list of line items, with each item showing the estimated work-hours required for each appropriate salary classification

E. A separate sheet of calculations, showing the:

1. Total work-hours for each salary class multiplied by the appropriate reasonable salaries
2. Sum of the amounts for each salary class (direct salary costs)
3. Overhead percentage and amount
4. Profit/fixed fee (see Section 2.6 for more details)
5. Estimated direct expenses (in detail)
6. Contingencies (Cost Plus Fixed Fee with a Maximum Compensation Limitation Contracts, see Section 2.7 for more details)
7. Maximum limitation (Sum of Items 2, 3, 4, 5, and 6)

Items E1 through E7 are shown separately for each Phase and Part, and for each discipline such as Road Design or Bridge Design. When there are to be Sub-consultants, items E1 through E7 are shown separately for each Sub-consultant. A separate summary sheet for the Firm/Team is required. This sheet
shows the individual and total for lump sum(s), or fixed fee(s) and maximum limitation(s).

F. A sheet showing the profit calculation

G. A description of the method used to determine the salary rates in all salary classes, including those personnel to be used in each class, their salaries, and the computed averages in all classes (weighting is permissible)

4.4 Negotiation Procedure

The Consultant's proposal(s) are distributed to all reviewers and other interested parties by the Consultant Contract Services Unit. The Project Manager is responsible for integrating the input from all reviewers. The Consultant Contract Services Unit is responsible for:

A. Comparing DOTD's estimate with the Consultant's by comparing the direct salary costs of the Department's work-hours to the Consultant's work-hours. Direct salary costs are computed using the total work-hours by salary class multiplied by the Consultant's reasonable salary rate for each class and summing the amounts.

B. If negotiations are successful, a final compensation package is prepared that includes:

   1. The Consultant's compensation proposal
   2. Audit report (optional)
   3. The comparison of the Consultant's and the Department's work-hours
   4. Other miscellaneous information

The final compensation package is then:

C. Submitted for approval to the Chief Engineer or the appropriate Assistant Secretary, and, if required, to the FHWA

D. If approved, the final compensation package is the basis for the preparation of the contract

In general, DOTD's theory of negotiation is that the work effort (work-hours) is negotiated. The final compensation will be the lesser of the Consultant's proposed final compensation or the final compensation calculated by the Consultant Contract Services Unit. The final compensation calculated by the Consultant Contract Services Unit is derived using the Consultant's work-hours, the latest reasonable salary rate information, the smaller of the proposed overhead rate (by the Consultant) and the current contract overhead rate, profit, direct expenses subject to maximums, and contingencies. A "step-by-step" description of the negotiation process follows:
E. The scope of services proposal is reviewed and any differences reconciled. It may be necessary to revise the proposal, depending on the extent of the changes required.

F. A second independent review of work-hours may be requested by the Consultant Contract Services Administrator for contracts and supplements with the proposed price of $250,000-$500,000, or when warranted for multi-disciplinary projects. A second independent review of work-hours will be required for all contracts and supplements with the proposed price of larger than $500,000.

G. DOTD's direct salary cost estimate is calculated as:
   1. Compute the overall total of all DOTD work-hours in the various salary classes. (For each Stage, Phase)
   2. The work-hours are then multiplied by the Consultant's reasonable proposed salary rates. This yields the estimated direct salary costs for each salary class.
   3. The total direct salary costs are then calculated.

H. DOTD's estimated direct salary costs are compared to the Consultant's direct salary costs. Phases, Parts, disciplines, and Sub-consultants may partition a proposal. The total direct salary costs for the DOTD and the Consultant are compared. Such costs include everything contained in the proposal. If the difference is within DOTD's allowed tolerance, and if agreement is reached on direct expenses, the negotiations are concluded and the Consultant's work-hours are accepted.

I. If the difference is not within the allowed tolerance, the Consultant Contract Services Unit will advise the Project Manager or other reviewers on the Consultant's of areas of disagreement and will recommend a negotiation plan.

J. The Project Manager and all other reviewers estimate the work effort required to accomplish the scope of services agreed upon.

K. Ensuing evaluations and discussions may result in the submittal of a revised proposal from the Consultant. If the Consultant annotates the proposal to reflect suggested revisions, it is so noted.

L. The above steps are repeated until DOTD's and the Consultant's estimate of direct salary costs is within the allowed tolerance. At this point, the Consultant's work-hours estimates are accepted.

M. Once the negotiations are completed, the Consultant will submit a final compensation proposal. The Consultant Contract Services Unit will compute the final compensation and file the Consultant's proposal along with the independent work-hour estimate (revised if necessary); an audit
report (optional); the comparison of the Consultant's and the Department's direct salary costs; and any other pertinent information.

N. If, after several unsuccessful efforts to reach agreement within 10 days, the Consultant Contract Services Administrator's opinion is that further negotiations would be ineffective, a final offer will be made to the selected Consultant. This offer will consist of DOTD's estimated compensation based on DOTD's estimated work effort, and the Consultant's audited rates. If the Consultant accepts, the Project Manager will finalize and transmit the final compensation package. If the Consultant declines the final offer, the Consultant Contract Services Administrator will make a written recommendation for termination of negotiations. Then a new Consultant will be chosen from the project short list, and negotiations will begin with the new Consultant.

4.5 Contract Amendments for Negotiated Type Contracts

Contract amendments for negotiated type contracts are also negotiated. The compensation calculation for extra work letters, supplemental agreements, and Task Orders issued under a retainer contract is the same as for the original contract. Contract amendments will be sent to FHWA for approval, if required. For further information about negotiated type contracts, supplemental agreements and extra work letters, see Section 2.4 "Standard Contract Phases and Parts", Section 2.8 "Contract Amendments", and Section 2.8.1 "Proposal Format For Contract Amendments".
CHAPTER 5 - INVOICES AND PROJECT SCHEDULES

5.0 Introduction

Prompt, equitable and accurate payment for Consultant services is a DOTD goal. The consultant is jointly responsible for the attainment of this goal. An understanding of DOTD requirements will assist the Consultant in providing the necessary information and timely services.

5.1 Progress Schedules

The following is found in the General Requirement Section of the DOTD Standard Contract. It is being repeated herein for the convenience of those who are not familiar with DOTD standard contracts. The language is basically the same for all forms of contracts.

Immediately upon receiving authorization to proceed with work, the Consultant will prepare and submit to the Project Manager a proposed progress schedule in the form of a bar chart, which shows in particular:

A. Appropriate items of work
B. Times for beginning and completion by calendar periods
C. Other data pertinent to each schedule
D. The chart shall be arranged so that the actual progress can be shown as each item of work is completed
E. The schedule shall be in a form and arrangement, and include data required and approved by DOTD
F. It shall be revised monthly and submitted with other required monthly data
G. One original and two copies of this schedule shall be submitted to the Project Manager

DOTD has various review/checkpoints for services provided by consultants for engineering and other related activities. At these points, there are defined tasks that must be accomplished before a certain percent-complete status is acknowledged by DOTD.

These standard review/checkpoints and their defined tasks are not applicable to all projects. In such cases, the Consultant and the Project Manager should mutually agree upon applicable review/checkpoints before work begins. They should be incorporated into the progress schedule.
5.2 Invoices

A standard certified correct invoice should be submitted separately for each project or Task Order. A cost breakdown summary should also be submitted and must be approved by Consultant Contracts Services Unit any time funds are moved within parts or stages. DOTD's standard payment clauses are repeated here for the convenience of those who are not familiar with the standard contract.

I. For Lump Sum Compensation Contracts:

A. Payments (on undisputed amounts) to the Consultant for services rendered by the Consultant and/or sub-consultant will be made monthly based on a standard certified correct invoice directly proportional to the percentage of completion of work as shown in the monthly progress schedule as approved by the Project Manager.

B. The monthly progress schedule shall show in detail the status of work and shall be of a form and with a division of items as approved by DOTD.

C. The allowable costs shall be in accordance with the cost principles and procedures set forth in 48 CFR 31 of the Federal Acquisition Regulations System (FARS), as modified by DOTD's audit guidelines regarding maximum Consultant compensation and state travel regulations in effect on the date of the annual audit.

D. The Consultant shall submit a standard certified correct monthly invoice (see samples posted on the CCS Website), reflecting the amount and value of work accomplished to the date of such submission, less 5% for retainage, directly to the Project Manager.

E. The retainage will be released following completion of the work or upon written authorization of Consultant Contract Services' Administrator.

F. The standard certified correct invoice shall show the total of previous payments on account for this contract, plus the amount due and payable as of the date of the current invoice plus the Prime's Federal Tax Identification Number.

G. The standard certified correct invoice shall show the Notice to Proceed (NTP) and expiration date of the contract.

H. A principal member of the Prime Consulting Firm to whom the contract is issued must sign and certify the invoice for correctness. An original and three copies of each invoice shall be submitted to the DOTD's Project Manager.
I. Sub-consultants must be shown on the standard certified correct invoice with a breakdown of their portion of the work. Each sub-consultant's Federal Tax Identification Number is required.

J. Upon receipt of each invoice, the DOTD shall check the invoice for correctness and return if required; upon acceptance and approval of a standard certified correct invoice the DOTD shall pay the amount shown to be due, and payable, within thirty days.

II. For Cost Plus Fixed Fee with Maximum Compensation Limitation Contracts: (Contracts differ somewhat from Lump Sum Compensation Contracts)

A. Payments (on undisputed amounts) to the Consultant for services rendered by the Consultant and/or sub-consultant will be made monthly based on a standard certified correct and itemized invoice, detailed to show:

Names of employees

Classification and rates of pay

Time worked (as outlined on the website)

Approved Audited overhead rate (%) to cover the costs of payroll additives and overhead

Detailed summary of direct expenses with a copy of the backup.

The date the audit of Overhead was performed, and the name of who developed the Overhead rate

The Prime and their sub-consultants Federal Tax Identification Numbers are required. Sub-consultants must also be shown on their own separate invoice with a breakdown of their portion of the work

B. Consultants cannot use overhead rates higher than their latest approved audited overhead rate on their invoices. Consultants will be allowed to invoice at a lower overhead rate than their latest approved audited rate, if they know that their overhead rate is going to be lower during a certain period of the contract, to avoid owing a large sum of money upon completion of the contract. Negotiated or self-imposed overhead rates remain the same during the course of the contract. At no time during the life of the contract can the contracts (negotiated or self-imposed) overhead exceed the latest approved audited overhead rates.
C. Any charges for approved services other than labor shall be detailed to include vendor name, cost, and description. Final payment for these costs will be adjusted after Project completion to reflect the actual work performed and the direct expenses incurred by the Consultant during the course of this Contract; as determined by the DOTD's Audit Section following the post audit of this Contract.

D. In no event shall such an adjustment allow the total contract cost to exceed the reasonable limitation imposed thereon.

E. The allowable costs shall be in accordance with the cost principles and procedures set forth in 48 CFR 31 of the Federal Acquisition Regulation System (FARS), as modified by DOTD’s audit guidelines regarding reasonable Consultant compensation and state travel regulations in effect on the date of the annual audit.

F. The standard certified correct invoice shall be directly related to the monthly progress schedule. The DOTD will not approve any invoice in which the proportional amount of the total contract compensation exceeds the percentage of project completion by more than five percent.

G. Payments (on undisputed amounts) will be made monthly for direct expenses chargeable and identifiable to this specific contract, provided such charges are substantiated by documentation subject to audit.

H. The direct expenses will be disallowed if subsequent audits reveal that the Consultant has not maintained adequate bookkeeping.

I. It is understood that the Consulting firm’s entire books must segregate direct expense items out of general overhead costs.

J. The standard certified correct invoice will show the total amount earned to the date of submission and the amount due and payable as of the date of the current correct invoice as well as the pro-rata share of the fixed fee and direct expenses.

K. The standard certified correct invoice shall reflect a five percent deduction of the total sum, exclusive of direct expenses, as an amount to be retained by DOTD until satisfactory completion of the work required, or upon written authorization of the DOTD’ s Consultant Contract Services Administrator.
L. A principal member of the Prime Consulting Firm to whom the contract is issued must sign and certify the invoice for correctness. An original and three copies of each invoice shall be submitted to the DOTD Project Manager.

M. Upon receipt of each invoice, the DOTD shall check the invoice for correctness and return if required; upon acceptance and approval of a standard certified correct invoice, the DOTD shall pay the amount shown to be due and payable within thirty days.

III. For Billable Rates Compensation Contracts:

A. Payments (on undisputed amounts) to the Consultant for services rendered by the Consultant and/or sub-consultant shall be made monthly based on a standard certified correct and itemized invoice (see samples posted on the CCS Website) showing the line item costs incurred plus their Federal Tax Identification Number.

B. Any labor charges for other approved services shall include the names of the employees, their classification, and the time worked. These shall be reimbursed at the approved contract billable rate for that classification.

C. Any charges for approved services other than labor shall be detailed to include vendor name, cost, and description. Final payment for these costs will be adjusted after Project completion, to reflect the actual work performed and the direct expenses incurred by the Consultant during the course of this Contract, and as determined by the DOTD’s Audit Section following the post audit of this Contract. However, in no event shall such an adjustment allow the contract cost to exceed the maximum limitation imposed thereon.

D. The allowable costs shall be in accordance with the cost principles and procedures set forth in 48 CFR 31 of the Federal Acquisition Regulations System (FARS), as modified by the DOTD’s audit guidelines regarding reasonable Consultant compensation and state travel regulations in effect on the date of the audit, which are incorporated herein by reference as if copied in extenso, and available for inspection or copying in the office of the DOTD’s Audit Director.

E. The invoice shall be directly related to the monthly progress schedule, if applicable.

F. The DOTD shall not approve any invoice in which the proportional amount of the total contract compensation exceeds the percentage of project completion by more than five percent.
G. Payments shall also be made monthly for direct expenses chargeable and identifiable to this specific Contract; provided such charges are substantiated by documentation subject to audit.

H. Direct expenses shall be disallowed if subsequent audits reveal that adequate bookkeeping has not been maintained. It is understood that the firm's entire books must segregate these items out of general overhead figures.

I. The standard certified correct invoice will show the total amount earned to the date of submission and the amount due and payable as of the date of the invoice.

J. The Prime and their sub-consultants' Federal Tax Identification Numbers are required. Sub-consultants must also be shown on their own separate invoice with a breakdown of their portion of the work.

K. The standard certified correct invoice shall reflect a five percent deduction on the total sum, exclusive of direct expenses, as an amount to be retained by the DOTD until satisfactory completion of the work required or upon written authorization of the DOTD's Consultant Contract Services Administrator for the release of the retainage. As the Contract is completed and accepted by the DOTD, the retainage shall be released.

L. The standard certified correct invoice shall also show the total of previous payments on-account to this Contract and the amount due and payable as of the date of the current correct invoice.

M. A principal member of the Prime Consulting Firm to whom the contract is issued must sign and certify the invoice for correctness. An original and three copies of each invoice shall be submitted to the DOTD Project Manager.

N. Upon receipt of each invoice, the DOTD shall check the invoice for correctness and return if required, upon acceptance and approval of a standard certified correct invoice, the DOTD shall pay the amount shown to be due and payable within thirty days.

5.3 Department Review/Checkpoints

After the Consultant has been selected and prior to the Notice to Proceed, the Project Manager will issue a letter notifying the Consultant and all applicable DOTD personnel of a meeting being scheduled to discuss the project scope, and to dispense data and pertinent information in DOTD's possession. Project review milestones, consultant evaluation, and other coordination efforts pertinent to successful completion of the project will be discussed during this meeting.
5.4 Consultant Evaluation

On a continuous basis, the Project Manager will electronically complete a Consultant Rating Form at various project milestones. A report is then transmitted to the Consultant Contracts Services Administrator to be used as the past performance evaluation rating in the consultant selection process. Consultant Rating Forms for various project types are posted on the CCS Website. Consultants past performance grades on DOTD projects will remain in the CCS database for a period of three years for use by the Consultant Evaluation Committee.
MAINE
Insurance
110.3 Insurance The Contractor shall provide signed, valid, and enforceable certificate(s) of insurance complying with this Section. All insurance must be procured from insurance companies licensed or approved to do business in the State of Maine by the State of Maine, Department of Business Regulation, Bureau of Insurance. The Contractor shall pay all premiums and take all other actions necessary to keep required insurances in effect for the duration of the Contract obligations, excluding warranty obligations.

110.3.1 Workers' Compensation For all operations performed by the Contractor and any Subcontractor, the Contractor and each Subcontractor shall carry Workers' Compensation Insurance or shall qualify as a self-insurer with the State of Maine Workers' Compensation Board in accordance with the requirements of the laws of the State of Maine. If maritime exposures exist, coverage shall include United States Long Shore and Harbor Workers coverage.
110.3.2 Commercial General Liability With respect to all operations performed by the Contractor and any Subcontractors, the Contractor and any Subcontractors shall carry commercial general liability insurance in an amount not less than $1,000,000.00 per occurrence and $2,000,000.00 in the Aggregate. The coverage must include products, completed operations, and Contractual liability coverages, and Insurance Services Office (ISO) form #CG2503185 or equivalent. The Contractual liability insurance shall cover the Contractor’s obligations to indemnify the Department as provided in this Contract including Section 110.1 - Indemnification. The coverage shall also include protection against damage claims due to use of explosives, collapse, and underground coverage if the Work involves such exposures.

When the work to be performed entails the use of barges, tug boats, work boats, supply boats, etc., Protection and Indemnity coverage shall be provided at the limits called for under Commercial General Liability insurance.

110.3.3 Automobile Liability The Contractor shall carry Automobile Liability Insurance covering the operation of all motor vehicles including any that are rented, leased, borrowed, or otherwise used in connection with the Project. The minimum limit of liability under this Section shall be $1,000,000.00 per occurrence.

110.3.4 Professional Liability Contractors and Subcontractor(s) who engage in design Work, preliminary Engineering Work, and environmental consulting Work for the Department shall maintain a Professional Liability policy for errors and omissions that provides a minimum liability of $1,000,000 per claim and annual aggregate. “Design Work” includes the design of temporary Structures and all other Work that requires design computations. This policy shall cover "Wrongful Acts," meaning negligent acts, errors or omissions by the Contractor, or any entity for whom the Contractor is legally liable, arising out of the performance of, or failure to perform, professional services. The Department reserves the right to adjust liability coverage on a project-by-project basis as it deems appropriate.

110.3.5 Owners and Contractors Protective Liability If required by Special Provision, the Contractor shall carry an Owners and Contractors Protective (OCP) Policy covering all operations performed by the Contractor and any Subcontractor, in an amount not less than $1,000,000.00 per occurrence and $2,000,000.00 in the Aggregate, naming the Department as the sole insured party under the policy.

110.3.6 Builders Risk Unless required by Special Provision, the Department does not require the Contractor to carry Builders Risk Insurance. However, the Contractor is advised of its risks for damage to the Work as provided in Section 104.3.10 - Responsibility for Damage to the Work. The Contractor is responsible for managing and insuring these risks as it deems appropriate.

110.3.7 Pollution Liability If required by Special Provision, the Contractor shall carry Pollution Liability insurance to cover the risk of sudden or accidental discharge of pollutants during the prosecution of the Work. The limits of liability for this coverage shall be in the amount of $1,000,000.00 per occurrence and $2,000,000.00 in the Aggregate. Regardless of
whether such insurance is carried by the Contractor, the Contractor is responsible for managing these risks as it deems appropriate.

110.3.8 Railroad Protective Liability When working adjacent to a railroad, the Contractor and Subcontractors shall carry Railroad Protective Liability Insurance as required by the Railroad.

110.3.9 Administrative & General Provisions

A. Additional Insured Each policy with the exception of Workers' Compensation and Professional Liability insurance shall list the Department of Transportation as an additional insured.

B. Defense of Claims Each insurance policy shall include a provision requiring the carrier to investigate, defend, indemnify, and hold harmless all named insureds against any and all claims for death, bodily injury, or property damage, even if groundless.

C. Primary Insurance The insurance coverage provided by the Contractor shall be primary insurance with respect to the State, its officers, agents, and employees. Any insurance or self-insurance maintained by the State for its officers, agents, and employees is in excess of the Agent's insurance and shall not contribute with it.

D. Reporting Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the State, its officers, agents, and employees.

E. Separate Application The insurance provided by the Contractor shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

Nothing in this document constitutes a waiver of any defense, immunity or limitation of liability that may be available to the Department, or its officers, agents or employees under the Maine Tort Claims Act (Title 14 M.R.S.A. 8101 et seq.), and shall not constitute a waiver of other privileges or immunities that may be available to the Department.
MONTANA

Claims Involving Breach of Warranty
Response to Question 12

Claims involving breach of warranty regarding plans or design in past 5 years

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NEW MEXICO

Certificates of Liability Insurance
CERTIFICATE OF LIABILITY INSURANCE

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFER NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER: Midwest Agencies, Inc.
3555 Farnam Street
Omaha, NE 68131

CONTACT NAME: Traci Sutton
PHONE (INC. Ext.): FAX (INC. Ext.):
EMAIL ADDRESS: Traci.Sutton@MidwestAgenciesInc.com
INSURERS AFFORDING COVERAGE:

INSURER A: Zurich American Insurance Company
INSURER C: American Zurich Insurance Company
INSURER D: XL Insurance America, Inc. (50%)
INSURER E: Lloyd's Syndicate 3824 (35%)
INSURER F: Ace American Insurance Company (15%)

INSURED: Kiewit New Mexico Co.
5130 Masthead NE
Albuquerque NM 87109

COVERAGE

CERTIFICATE NUMBER: 17446861
REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

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DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

I-25/Paseo del Norte interchange Reconstruction

General Liability coverage provided under the policy is primary over any other valid and collectible insurance with respect to Contractor's operations.

CERTIFICATE HOLDER

New Mexico Department of Transportation
District 3 Office - Attn: Timothy L. Parker
7500 Pan American Blvd
Albuquerque NM 87119

AUTHORIZED REPRESENTATIVE

Philip G. Dehn

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CERTIFICATE OF LIABILITY INSURANCE

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE IssUING INSURER(s), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER
Lockton Companies
444 W. 47th Street, Suite 900
Kansas City MO 64112-1906
(816) 960-9000

CONTACT
NAME: 
PHONE: 
FAX: 
E-MAIL: 

INSURER(S) AFFORDING COVERAGE NAIC #
INSURER A: Liberty Insurance Corporation 42404

INSURED
1319114 PARSONS BRINCKERHOFF, INC.
ONE PENN PLAZA
NEW YORK NY 10119

INSURER B :
INSURER C :
INSURER D :
INSURER E :
INSURER F :

COVERAGE S PAIBR02 CERTIFICATE NUMBER: 13419741 REVISION NUMBER: X

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

<table>
<thead>
<tr>
<th>INSURER'S NAME</th>
<th>TYPE OF INSURANCE</th>
<th>ADDED SUB LIMITS</th>
<th>POLICY NUMBER</th>
<th>POLICY EFF (MM/DD/YYYY)</th>
<th>POLICY EXP (MM/DD/YYYY)</th>
<th>LIMITS</th>
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<tr>
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<td>COMMERCIAL GENERAL LIABILITY</td>
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<td>Y</td>
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DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required) (PB13729) SW ON-CALL GENERAL ENGINEERING SERVICES, 13900290. NEW MEXICO DEPARTMENT OF TRANSPORTATION IS AN ADDITIONAL INSURED AS RESPECTS GENERAL LIABILITY, AS REQUIRED BY WRITTEN CONTRACT.

CERTIFICATE HOLDER
13419741
NEW MEXICO DEPARTMENT OF TRANSPORTATION
CONTRACT MANAGEMENT UNIT, PO BOX 1149, ROOM 207
SANTA FE NM 87504-1149

CANCELATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

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# NMDOT CLAIMS BREAKDOWN

As of 06/22/2015

<table>
<thead>
<tr>
<th>Project</th>
<th>Contractor</th>
<th>District</th>
<th>Claim Amount</th>
<th>Status</th>
</tr>
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<tbody>
<tr>
<td>CN3787</td>
<td>David Montoya Construction, Inc.</td>
<td>5</td>
<td>$29,376.67 ($28,942.53 + 1.5% interest) (Late Payment Claim)</td>
<td>03/17/2015 – Claim filed 04/06/2015 – Denied by Cabinet Secretary No further action from DMCI as of 06/22/2015</td>
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<tr>
<td>CNG3a92</td>
<td>FNF Construction, Inc.</td>
<td>2</td>
<td>$622,342.30 + late payment charges</td>
<td>05/08/2015 – Claim filed 05/22/2015 – Cabinet Secretary offers of $115,636.20</td>
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<td>CN4046</td>
<td>Sterling Brothers Construction, Inc.</td>
<td>5</td>
<td>$136,491.07 (Value Engineering &amp; PCCP)</td>
<td>01/26/2015 – Claim filed 02/05/2015 – Cabinet Secretary offers settlement 03/04/2015 – Complaint filed Case active</td>
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<td>CN1100361R</td>
<td>La Calarita Construction, LLC</td>
<td>1</td>
<td>$389,077.83 (5 claims for HMA)</td>
<td>01/26/2015 – Five Claims filed 02/05/2015 – Cabinet Secretary denies claims 03/05/2015 – Complaint filed Case active</td>
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<td>Total Claims</td>
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1
# NMDOT CLAIMS BREAKDOWN

As of 06/22/2015

<table>
<thead>
<tr>
<th>Project</th>
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<td>CN1C0001</td>
<td>James Hamilton Construction Company</td>
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<td>$72,855.24 (Late Payment Claim)</td>
<td>09/13/2014 – Claim filed&lt;br&gt;10/28/2014 – Cabinet Secretary concurs with DE; JHCC entitled to $8,886.30&lt;br&gt;No further action from JHCC as of 06/22/2015</td>
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<td>CNA300072A</td>
<td>David Montoya Construction, Inc.</td>
<td>3</td>
<td>$63,418.31 (Alternate Final Estimate Claim)</td>
<td>09/22/2014 – Claim filed&lt;br&gt;10/07/2014 – Cabinet Secretary denies claim&lt;br&gt;No further action from DMCI as of 06/22/2015</td>
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<tr>
<td>CNA300072A</td>
<td>David Montoya Construction, Inc.</td>
<td>3</td>
<td>$221,791.83 (Additional Time &amp; Increase Contract Price Delays Claim)</td>
<td>10/13/2014 – Claim filed&lt;br&gt;10/31/2014 – Cabinet Secretary – denies majority of claims with exceptions&lt;br&gt;12/05/2014 – Complaint filed&lt;br&gt;07/08/2015 – 3-day Arbitration begins</td>
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<td>CNA301220</td>
<td>FNF Construction, Inc.</td>
<td>3</td>
<td>$5,624,457.60 (Claim for Adjustment)</td>
<td>12/30/2014 – Claim filed&lt;br&gt;01/14/2015 – Cabinet Secretary denies claim and concurs with District Engineers response to certain entitlements&lt;br&gt;No further action from FNF as of 06/22/2015</td>
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<tr>
<td>CND1018</td>
<td>James Hamilton Construction Company</td>
<td>3</td>
<td>$146,680.88 (Additional Compensation Claim)</td>
<td>09/12/2014 – Claim filed&lt;br&gt;10/28/2014 – Cabinet Secretary offers payment of $5,694.38&lt;br&gt;No further action from JHCC as of 06/22/2015</td>
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<td>CNLC00080</td>
<td>Fisher Industries</td>
<td>1</td>
<td>$342,501.06 (Additional Compensation Claim)</td>
<td>05/29/2014 – Claim filed&lt;br&gt;06/13/2014 – Cabinet Secretary denies claim&lt;br&gt;No further action from Fisher as of 06/22/2015</td>
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<tr>
<td>CN3973</td>
<td>Reiman Corporation Southwest</td>
<td>5</td>
<td>$165,981.13 (Price Escalation, delays Claims)</td>
<td>02/11/2014 – Claim filed&lt;br&gt;03/21/2014 – Cabinet Secretary denies claim&lt;br&gt;09/01/2014 – Three day arbitration scheduled</td>
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<tr>
<td>CN1100320</td>
<td>Star Paving Co.</td>
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<td>$56,155.64 (Utility Delay Claim)</td>
<td>04/08/2014 – Claim filed&lt;br&gt;05/16/2014 – Cabinet Secretary denies claim&lt;br&gt;06/12/2014 – Complaint filed&lt;br&gt;In Discovery process</td>
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# NMDOT CLAIMS BREAKDOWN

As of 06/22/2015

<table>
<thead>
<tr>
<th>Project</th>
<th>Contractor</th>
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<td>CN1100360</td>
<td>El Terrero Construction</td>
<td>1</td>
<td>$225,380.44 (Final Staining &amp; Rebar Quality Claims)</td>
<td>11/25/2014 – Claims filed 12/10/2014 – Cabinet Secretary denies claims 01/23/2015 – Complaint filed Case active</td>
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<td>CN3100250R</td>
<td>Star Paving Co.</td>
<td>3</td>
<td>$294,173.77 (Additional Compensation Claims)</td>
<td>04/17/2014 – Claim filed 05/16/2014 – Cabinet Secretary grants 16 calendar days and additional compensation of $9,775.00 06/12/2014 – Complaint filed 03/11/2015 – Settled for $79,665 + GRT</td>
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<tr>
<td>CNA300383</td>
<td>Albuquerque Asphalt</td>
<td>3</td>
<td>$118,331.92 (HMA Disincentive – QLA v. Non-QLA Claims)</td>
<td>05/20/2014 – Claim filed 06/04/2014 – Cabinet Secretary denies claim 09/22/2014 – 3-day Arbitration begins</td>
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<td>CNE1000050</td>
<td>James Hamilton Construction Corp.</td>
<td>1</td>
<td>$6,834.42 (Late Payment Charges Claim)</td>
<td>08/23/2014 – Claim filed 09/16/2014 – Cabinet Secretary decision – JHCC entitled to $3.88 additional compensation 10/30/2014 – Complaint filed 05/13/2015 – Court files Notice of Inactivity</td>
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<td>CNG2a13</td>
<td>FNF Construction, Inc.</td>
<td>3</td>
<td>$1,355,598.09 (Adjustment Claims)</td>
<td>08/27/2014 – Claim filed 09/11/2014 – Cabinet Secretary denies claims 03/27/2015 – Complaint filed Case active</td>
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<td>CNG1975</td>
<td>AUI, Inc.</td>
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<td>$465,860.62 (Adjustment Claim)</td>
<td>09/08/2014 – Claim filed 09/26/2014 – Cabinet Secretary denies claim 01/23/2015 – Complaint filed In Discovery process</td>
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<td>CNLC0070</td>
<td>Morrow Enterprises, Inc.</td>
<td>1</td>
<td>$101,550.79 (Delay of Costs &amp; Liquidated Damages Claims)</td>
<td>12/29/2014 – Claim filed 01/14/2015 – Cabinet Secretary offers partial settlement 02/23/2015 – Complaint filed In Discovery process</td>
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</tbody>
</table>

| Total Claims | 15 |
# NMDOT CLAIMS BREAKDOWN

*As of 06/22/2015*

<table>
<thead>
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<th>Project</th>
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<td>CN5100270</td>
<td>El Terrero Construction, LLC</td>
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<td>$502,951.34 (Suspension of Work Claim)</td>
<td>05/02/2013 – Claim filed 05/05/2013 – Cabinet Secretary denies claim due to untimely filing claim</td>
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<td>CND6111</td>
<td>A.S. Horner</td>
<td>6</td>
<td>$6,428.42 (Additional Compensation Claim)</td>
<td>10/31/2013 – Claim filed 11/13/2013 – Cabinet Secretary denies claim. No further action from A.S. Horner as of 06/22/2015</td>
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<td>CN1C00003</td>
<td>James Hamilton Construction Co.</td>
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<td>$295,391.32 (WMA Claim)</td>
<td>10/03/2013 – Claim filed 10/16/2013 – Cabinet Secretary denies claim 11/15/2013 – Complaint filed 11/02/2015 – Trial begins</td>
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<td>CN3787</td>
<td>David Montoya Construction, Inc.</td>
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<td>$1,444,091.95 (Utility Delay Claim)</td>
<td>10/11/2013 – Claim filed 10/22/2013 – Cabinet Secretary refers to Claims Board 01/31/2014 – Cabinet Secretary denies Claims Board recommendations 06/17/2014 – Complaint filed 10/13/2015 – Trial begins</td>
</tr>
<tr>
<td>Total Claims</td>
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## NMDOT CLAIMS BREAKDOWN
### As of 06/22/2015

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<td>CN1100400</td>
<td>Apache Construction/Valley Fence</td>
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<td>$212,966.27 - original amount</td>
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<td>(Pass through claim)</td>
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<td>$198,420.08 - reduced amount after Claims Board Hearing</td>
<td>06/19/2012 – Cabinet Secretary refers claim to Claims Board</td>
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<td>(Liquidated Damages Claim)</td>
<td>01/23/2013 – Cabinet Secretary adopts Board’s recommendations</td>
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<td>CNA300361</td>
<td>Fisher Sand &amp; Gravel</td>
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<td>$69,853.11 (Incorrect QLA Analysis Claim)</td>
<td>05/16/2012 – Claim filed</td>
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<td>$5,448.98 (Bonus Claim)</td>
<td>06/01/2012 – Cabinet Secretary refers claim to Claims Board</td>
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<td>CABINET SECRETARY DECISION UNKNOWN</td>
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<td>CND1018</td>
<td>James Hamilton Construction</td>
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<td>$69,391.25 (Adjustment Claim)</td>
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<td>Company</td>
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<td>10/16/2012 – Cabinet Secretary denied claim. Referred to district for initial review</td>
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<td>CND1038</td>
<td>Smith &amp; Aguirre Construction</td>
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<td>Amount not disclosed (Claim for Additional Days)</td>
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<td>05/08/2012 – Cabinet Secretary denies claim</td>
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<td>CND2019</td>
<td>Constructors, Inc.</td>
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<td>$51,474.77 (QLA and HMA Claim)</td>
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<td>06/01/2012 – Cabinet Secretary denies claim</td>
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<td>CND6111</td>
<td>A.S. Horner</td>
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<td>Amount not disclosed (Glare Shield Claim)</td>
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<td>02/10/2012 – Cabinet Secretary referred claim to district for initial review</td>
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<td>CNES03966</td>
<td>El Terrero Construction, LLC</td>
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<td>$421,865.00 (Additional Compensation Claim)</td>
<td>01/02/2012 – Claim filed</td>
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<td>01/20/2012 – Cabinet Secretary refers to Claims Board</td>
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<td>CABINET SECRETARY DECISION UNKNOWN</td>
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<td>CNES31130</td>
<td>FNF Construction, Inc.</td>
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<td>$14,461.90 (Additional Compensation Claim)</td>
<td>01/13/2012 – Claim filed</td>
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<td>01/30/2012 – Cabinet Secretary denied claim.</td>
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<td>03/28/2012 – Public Works Mediation</td>
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<td>10/12/2012 – Claim dismissed</td>
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<td>$127,782.99 (Claim for Adjustment)</td>
<td>02/03/2012 – Claim filed</td>
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<td>03/28/2012 – Public Works Mediation</td>
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<td>10/12/2012 – Settled at mediation</td>
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<td>CNG3AD2</td>
<td>FNF Construction, Inc.</td>
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<td>Amount not specified (Cost and Delays Claim)</td>
<td>07/27/2012 – Claim filed</td>
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<td>08/20/2012 – Cabinet Secretary referred claim to district for initial review</td>
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# NMDOT CLAIMS BREAKDOWN

As of 06/22/2015

<table>
<thead>
<tr>
<th>Project</th>
<th>Contractor</th>
<th>District</th>
<th>Claim Amount</th>
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<tr>
<td>CNG18A3</td>
<td>JAR Construction</td>
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<td>$1,008,280.00 (Compensation Claim)</td>
<td>05/07/2012 – Claim filed&lt;br&gt;05/23/2012 – Cabinet Secretary referred claim to Claims Board&lt;br&gt;04/22/2013 – Cabinet Secretary concurs with Claims Board recommendations</td>
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<td>CNG3131</td>
<td>Fisher Sand &amp; Gravel</td>
<td>1</td>
<td>$21,608.89 (Compensation Claim)&lt;br&gt;$86,400.00 (Liquidated Damages Claim)</td>
<td>01/23/2012 – Two claims filed&lt;br&gt;06/25/2012 – Cabinet Secretary referred claims to Claims Board&lt;br&gt;CABINET SECRETARY DECISION UNKNOWN</td>
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<td>CNES31130B</td>
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<td>Amount not specified (Additional Compensation Claim)</td>
<td>01/13/2012 – Claim filed&lt;br&gt;01/30/2012 – Cabinet Secretary Denies Claim</td>
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<td>CN1C0003</td>
<td>James Hamilton Construction Co.</td>
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<td>$283,437.70 (Construction Delay of Claim)</td>
<td>09/13/2012 – Claim filed&lt;br&gt;10/01/2012 – Cabinet Secretary Denies Claim&lt;br&gt;04/02/2013 – JHCC files complaint&lt;br&gt;01/02/2015 – Offer of Settlement to JHCC; accepted. Awaiting Notice of Dismissal from Judge.</td>
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</table>

**Total Claims**: 14
# NMDOT CLAIMS BREAKDOWN

As of 06/22/2015

<table>
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<th>Project</th>
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<td>08/31/2011 – Cabinet Secretary denies claim due to failure to initially filing claim at district level</td>
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<td>$834,436.60</td>
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<td>(Adjustment Claim)</td>
<td>06/14/2012 – Claim settled for $230,188.46 + GRT</td>
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<td>CN6100280</td>
<td>FNF Construction, Inc.</td>
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<td>$106,338.58</td>
<td>05/25/2011 – Claim filed</td>
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<td>04/28/2011 – Cabinet Secretary Denies Claim</td>
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<td>07/07/2011 – Contractor requests mediation</td>
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<td>06/09/2011 – DE files Change Order #8 for negotiated settlement amount from mediation (amount unknown)</td>
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<td>CN6100280</td>
<td>FNF Construction, Inc.</td>
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<td>$196,866.84</td>
<td>02/16/2011 – Claim filed</td>
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<td>(Smoothness Claim)</td>
<td>02/22/2011 – Cabinet Secretary Refers to Claims Board</td>
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<td>06/07/2011 – Cabinet Secretary concurs with Claims Board recommendations</td>
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<td>CN6S41250</td>
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<td>$18,400.00</td>
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<td>01/27/2011 – Cabinet Secretary denies claim</td>
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<td>$126,510.64</td>
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<td></td>
<td>(Pavement Smoothness Claim)</td>
<td>02/21/2011 – Cabinet Secretary refers claim to Claims Board</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>07/01/2011 – Cabinet Secretary concurs with Claims Board recommendations</td>
</tr>
<tr>
<td>CNG4044BR</td>
<td>David Montoya Construction, Inc.</td>
<td>4</td>
<td>Amount not specified</td>
<td>11/21/2011 – Claim filed</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(Additional Days Claim)</td>
<td>11/28/2011 – Cabinet Secretary Denies Claim</td>
</tr>
<tr>
<td>CN5100070</td>
<td>FNF Construction, Inc.</td>
<td>5</td>
<td>$527,599.78</td>
<td>02/18/2011 – Claim filed</td>
</tr>
<tr>
<td></td>
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<td>(Incorrectly calculated WMA Price Claim)</td>
<td>03/04/2011 – Cabinet Secretary Denies Claim</td>
</tr>
<tr>
<td>CN6100100B</td>
<td>FNF Construction, Inc.</td>
<td>6</td>
<td>$76,241.64</td>
<td>01/11/2011 – Claim filed</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>(HMA and QLA Claim)</td>
<td>01/26/2011 – Cabinet Secretary Denies Claim</td>
</tr>
<tr>
<td>CND4057</td>
<td>Fisher Sand &amp; Gravel, NM, Inc.</td>
<td>4</td>
<td>Amount not specified</td>
<td>01/18/2011 – Claim filed</td>
</tr>
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<td></td>
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<td></td>
<td>(Smoothness Claim)</td>
<td>02/08/2011 – Cabinet Secretary Denies Claim due to untimely filing</td>
</tr>
</tbody>
</table>

<p>| Total Claims | 10 |</p>
<table>
<thead>
<tr>
<th>Project</th>
<th>Contractor</th>
<th>District</th>
<th>Claim Amount</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>CN1533B</td>
<td>David Montoya Construction, Inc.</td>
<td>6</td>
<td>$118,942.00 (Unpaid Compensation Claim)</td>
<td>05/13/2010 – Claim filed 05/20/2010 – Cabinet Secretary denied claim due to claim not timely filed.</td>
</tr>
<tr>
<td>CN3311</td>
<td>AUI, Inc.</td>
<td>1</td>
<td>Amount not specified (Late Payment Claim)</td>
<td>04/23/2010 – Claim filed 05/10/2010 – Cabinet Secretary denied claim</td>
</tr>
<tr>
<td>CNES61250</td>
<td>FNF Construction, Inc.</td>
<td>6</td>
<td>$27,920.09 (Claim for Adjustment)</td>
<td>11/05/2010 – Claim filed 11/16/2010 – Cabinet Secretary refers claim to Claims Board 04/11/2011 – Cabinet Secretary concurs with Claims Board recommendations</td>
</tr>
<tr>
<td>CN4082</td>
<td>Relman Corporation</td>
<td>1</td>
<td>$1,379,266.85 (Multiple Claims: Borrow Pit Delay, Roadway Template &amp; Earthwork Delays, Survey Related Days, SWPP Management, Additional Water, Liquidated Damages, Interest Charges)</td>
<td>05/06/2010 – Claim filed 05/11/2010 – Cabinet Secretary refers claim to Claims Board 11/16/2010 – Cabinet Secretary concurs with Claims Boards recommendations with modifications 07/03/2012 – Complaint filed 07/27/2015 – Scheduled trail date</td>
</tr>
<tr>
<td>CNG1036C</td>
<td>FNF Construction, Inc.</td>
<td>6</td>
<td>Amount not specified (Asphalt Binder Price Adjustment Claim)</td>
<td>09/19/2010 – Claim filed 09/27/2010 – Cabinet Secretary denies claim</td>
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<tr>
<td>CNG1036C</td>
<td>FNF Construction, Inc.</td>
<td>6</td>
<td>Amount not specified (QLA Claim)</td>
<td>10/13/2010 – Claim filed 10/28/2010 – Cabinet Secretary denies claim</td>
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<tr>
<td><strong>Total Claims</strong></td>
<td></td>
<td></td>
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<td></td>
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# NMDOT CLAIMS BREAKDOWN

As of 06/22/2015

<table>
<thead>
<tr>
<th>Project</th>
<th>Contractor</th>
<th>District</th>
<th>Claim Amount</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>CN3455</td>
<td>Relman Corporation/ Pace Ironworks (Pass through claim)</td>
<td>1</td>
<td>$88,808.43 (Additional compensation, contract extension, and liquidated damages)</td>
<td>01/18/2009 – Claim filed 02/04/2009 – Cabinet Secretary refers claim to Claims Board 09/14/2009 – Cabinet Secretary denies Board recommendations but provides 15 additional working days.</td>
</tr>
<tr>
<td>CNG1026</td>
<td>A.S. Horner, Inc.</td>
<td>6</td>
<td>$146,280 (Repair Costs Claim)</td>
<td>06/19/2009 – Claim filed 07/06/2009 – Cabinet Secretary refers claim to Claims Board 05/05/2010 – Cabinet Secretary concurs with Claims Board’s recommendations</td>
</tr>
</tbody>
</table>

| Total Claims | 2 |


SOUTH CAROLINA

Georgetown Drainage Project Summary
Georgetown Drainage Project Summary

**Project description:** This $14M project was undertaken jointly by South Carolina Department of Transportation (SCDOT) and the City of Georgetown (City). The Project includes upgrades to roadway structures along US 17 (Frasier Street), Dozier Street, and Front Street and additional drainage structures to alleviate flooding within the 182-acre High Market District in Downtown Georgetown. It also includes the design and construction of a wet well/pump station at the corner of Front Street and Dozier Street along with a new 84-inch force main into the Sampit River.

**Contractor:** Construction contract was between SCDOT and Contractor.

**Engineer of Record:** Design contract was between the City and Engineer of Record – Scope of work includes providing construction plans and specifications for the project.

**CE&I Consultant:** Contract was between SCDOT and same Engineering Firm that was the Engineer of Record.

**Contract Completion Date:** March 31, 2013

**Formation of Sinkholes:** In the Fall of 2011, sinkholes were identified in proximity to the project and on November 17, 2011, a collapse occurred along US 17 damaging a UPS store and other properties.

**Contractor Delay Claim:** Contractor submitted a contract claim for delay costs associated with the sinkholes and revised plans.

**Errors & Omission:** SCDOT is pursuing an errors & omission claim in regards to the sinkholes. All parties have agreed to hold off on the errors & omission claim until all of the lawsuits are settled as any information produced is potentially admissible.

**Additional Costs associated with the sinkholes and repairs:**
- 289 additional days granted
- $897,415 (construction contract change orders – sealing & concrete capping)
- $122,110 (3rd party review & investigation)
- $130,934 in additional CE&I costs
- $1,029,719.56 Contractor Delay Claim
Total - $2,180,178

**Third Party Lawsuits:**
There have been 13 claims and 11 lawsuits filed to date, involving 20 different properties, asserting that the landowners sustained damages to their property by reason of the failure of SCDOT, the City, the Contractor and the Engineer of Record to properly design and construct and manage the project. SCDOT has crossclaimed against the Contractor and Engineer of Record for indemnification should they be found negligent. No lawsuits have gone to trial, but one lawsuit has been settled as a result of mediation.
South Carolina Department of Transportation  
Engineering Directive Memorandum

Number: 38

Primary Department: Preconstruction

Referrals: None

Subject: Architect-Engineer Plan Errors and Omissions

I. OBJECTIVE

To set forth a consistent procedure for Department staff to process and document plan errors and omissions.

To present clear guidelines for recovering additional costs to a project or damages to the Department that may be attributable to plan errors or omissions.

II. DEFINITIONS

Department – South Carolina Department of Transportation.

Errors and Omissions – Mistakes, inaccuracies, or the failure to incorporate all items necessary into a set of design plans.

A-E – An individual, firm, corporation, or other organization that provides professional consultant services relative to the preparation of architectural or engineering plans under contract to the Department.

Contract Manager – Individual responsible for the day-to-day administration and management of an A-E or consultant contract.

Additional Costs – An increase in cost to a project that can be attributed to errors or omissions that may include but are not limited to delay, additional work or materials, or premium costs associated with the inability to competitively bid added work or material.

III. POLICY

Preliminary Engineering Phase

Upon discovery of an apparent plan error or omission, the contract manager shall be notified and provided as much information as is available at that time. The contract manager shall then notify the consultant providing all information available at the time.
If a plan error or omission is identified and can be corrected without delay and without additional cost to the Department, the contract manager shall be responsible for ensuring the consultant performs all work as necessary to correct errors or omissions as required under the A-E’s contract, Engineer Certification for Project Plans and Specifications.

Construction Phase

Upon discovery of an apparent plan error or omission, the resident construction engineer (RCE) shall be notified and shall in turn notify the contract manager and district engineering administrator (DEA), providing as much information as is available at that time. The contract manager shall then notify the consultant, providing all information available at the time.

If a plan error or omission is identified and can be corrected without delay and without additional cost to the Department, the contract manager shall be responsible for ensuring the consultant performs all work as necessary to correct errors or omissions as required under the A-E’s contract, Engineer Certification for Project Plans and Specifications.

Evaluation of Value of Errors or Omissions

The Department’s deputy secretary for engineering reserves the right to immediately make corrections and negotiate construction contract modifications, change orders (CO), or supplemental agreements (SA) in the event it is determined to be in the best interest of the Department or the public.

In any event an error or omission is identified that may substantially increase a project’s cost (a substantial increase in project cost is defined for this directive as being more than $25,000 per occurrence or a cumulative total of $50,000 per project) the contract manager shall establish and direct a team to investigate the plan error or omission. The team shall include a representative of the A-E firm and may include representatives of the director of construction, the district engineering administrator, Federal Highway Administration, Contract Services Office, Preconstruction, Capital Improvements, the construction contractor, and other parties as may be determined necessary.

The team shall evaluate factors that may have contributed to the error or omission and evaluate impacts to the project associated with the identified factors. Impacts to the project may include but are not limited to contract delay, additional contract cost, utility agreement modifications, construction work occurring out of sequence, and cost of work or materials that the Department would have incurred even if the original design was correct. The team shall provide a written recommendation to the Department’s deputy secretary for engineering that must include the following elements: a proposed solution, a proposed schedule, factors contributing to the error or omission, any change in contract value, and specific costs the Department may incur that are assignable and attributable to the A-E error or omission, including any subconsultant errors or omissions.

The deputy secretary for engineering may concur or modify the recommendation in making a determination. The determination of the deputy secretary for engineering shall be sent to the contract manager and the Contract Services Office. The contract manager shall be responsible
for ensuring the consultant performs any and all work as necessary to correct errors or omissions at the A-E’s expense. The Contract Services Office shall initiate any cost recovery according the determination.

The amount owed the Department shall be invoiced from the Contract Services Office by initiating Form 3025A through the Department’s Finance Division. If some or all of the increased costs due to an error or omission are owed to a third party, i.e. a contractor, the A-E may, with written approval from the Department, negotiate with and pay the contractor directly. All work added due to an error or omission must be negotiated through the Department to be sure the additional work is included in the construction contract by CO or SA.

Final Settlement

If the A-E accepts responsibility and settles for the amount owed the Department, all final documents shall be forwarded to and maintained by the Contract Services Office, with copies to all involved offices, including FHWA if appropriate. The matter shall then be considered closed.

If the A-E accepts responsibility but offers a settlement less than the determined amount owed the Department, or if the A-E denies responsibility, the A-E must notify the contract manager, who shall forward the proposed settlement and a recommendation to the deputy secretary for engineering. The final determination of the deputy secretary for engineering shall be sent to the contract manager and the Contract Services Office. The contract manager shall be responsible for ensuring the consultant performs any and all work as necessary to correct errors or omissions at the A-E’s expense. The Contract Services Office shall initiate any cost recovery according the determination. If the A-E accepts the final decision of the deputy secretary for engineering and pays the requested amount, all final documents shall be forwarded to and maintained by the Contract Services Office, with copies to all involved offices, including FHWA if appropriate. The matter shall then be considered closed.

If the A-E fails to respond and/or refuses to accept responsibility, the matter shall be turned over to the Legal Division for consideration of further action. At such time, the contract manager shall prepare a memorandum to the Contract Services Offices, stating the nature of the error or omission, the Department’s determination, the recoverable cost due the Department, and that the matter has been turned over to the Legal Division. This memorandum is to remain with the contract file until the matter is resolved.

Submitted by: Robert I. Pratt  
Director of Preconstruction  
Recommended by: John V. Walsh  
Chief Engineer for Planning, Location, and Design
Submitted by: D. R. Shealy  
Director of Construction  
Recommended by: J. C. Watson  
Chief Engineer for Operations
Approved by: Tony L. Chapman, P.E.  
Deputy Secretary for Engineering
Effective Date: April 7, 2008

Original signed by Deputy Secretary for Engineering Tony L. Chapman, P.E. April 7, 2008. All original engineering directives maintained by the Office of the Deputy Secretary for Engineering.
Design-Build Consultant Insurance
# CERTIFICATE OF LIABILITY INSURANCE

**Date:** 4/25/2014

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder.

**Important:** If the certificate holder is an additional insured, the policyholder must be endorsed. If subrogation is waived, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsements.

**Producer:** Lockton Companies
444 W. 47th Street, Suite 900
Kansas City, MO 64112-1906
(816) 950-9000

**Insured:** HOR Engineering, Inc. of The Carolinas
8404 Indian Hills Drive
Omaha, NE 68114-4048

**Coverages:**

<table>
<thead>
<tr>
<th>Type of Coverage</th>
<th>Limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial General Liability</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>Umbrella Liability</td>
<td>$2,000,000</td>
</tr>
<tr>
<td>Professional Liability</td>
<td>$1,000,000</td>
</tr>
</tbody>
</table>

**Certificate Number:** 12900316
**Revision Number:** XXXXXXX

**Certificate Holder:**

**Address:**

**Contact:**

**Authorized Representative:**

**CANCELLATION:**

Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.

**Authorized Representative:**

[Signature]

**ACORD 26 (2014/01)**

© 1998-2014 ACORD Corporation. All rights reserved.
Design-Build Insurance
ACORD
CERTIFICATE OF LIABILITY INSURANCE

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFER NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsements.

PRODUCER
Turner Surety & Ins. Brokerage, Inc.
650 From Road, Suite 295
Mack Cal Centre II
Paramus, NJ 07652

INSURED
Flatron-Zachry, a Joint Venture
c/o Flatron Constructors, Inc
385 Interbrook Crescent Blvd, Suite 900
Broomfield, CO 80021

DATE (MM/DD/YYYY)
06/28/2015

COVERAGES
CERTIFICATE NUMBER:

COVERAGE
A GENERAL LIABILITY
COMMERCIAL GENERAL LIABILITY
X CLAIMS-MADE
X OCCUR

A AUTOMOBILE LIABILITY
X Any Auto
X Scheduled Auto
X Towed Auto
X Non-Owned Auto

A WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY

A PROFESSIONAL LIABILITY

C PROFESSIONAL

DESCRIPTION OF OPERATIONS
Project Name: Interstate 85/385 Interchange Improvement
Project Location: Greenville County, South Carolina
Project Owner: South Carolina Department of Transportation
SCDOT File Number: 23.03811

(Certificate Holder)
South Carolina Department of Transportation
Post Office Box 181
Columbia, SC 29202-0191

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

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DESCRIPTIONS (Continued from Page 1)

The following are Additional Insureds as respects to Commercial General Liability and Umbrella Liability but only if required by written contract and/or written agreement and coverage applies only as respects work to be performed by the Named Insureds.

The following are Additional Insureds on the Automobile Liability only to the extent they meet the definition of an Insured in the policy, which provides in pertinent part that an Insured includes anyone liable for the conduct of an Insured but only to the extent of that liability.

Additional Insured: South Carolina Department of Transportation including its affiliates, directors, officials, officers, employees, agents and any other party as required by contract.

All coverages, terms, conditions and exclusions of the policies apply.

General Liability does not exclude work to be performed within 50 Feet of a Railroad. Umbrella Liability is follow form for Railroad coverage.

No Exclusion for Explosion, Collapse and Underground Hazard (XCU Coverage).

This Certificate of Insurance represents coverage currently in effect and may or may not be in compliance with any written contract and/or written agreement.

The General Liability coverage applies on a Primary and Non-Contributory basis per the policy terms and conditions but only if required by written contract and/or written agreement.

The General Liability, Automobile Liability and Workers Compensation policies include a Waiver of Subrogation in favor of the Additional Insureds but only if required by written contract and/or agreement.

Policies currently in effect will be renewed on the applicable Expiration Dates as required with the current terms and conditions unless cancelled.

* The following cancellation conditions always apply: - Ten (10) Days for Non-Payment of Premium - if policy shown, Ten (10) days for Workers’ Compensation for fraud; material misrepresentation; Non-Payment of Premium; other reasons approved by the Commissioner of Insurance. All other Notices of Cancellations Thirty (30) Days apply.
Endorsement – Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

<table>
<thead>
<tr>
<th>Name Of Additional Insured Person(s) Or Organization(s)</th>
<th>Location(s) Of Covered Operations</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Carolina Department of Transportation including its affiliates, directors, officials, officers, employees, agents and any other party as required by contract.</td>
<td>Project Name: Interstate 85/385 Interchange Improvement Project Location: Greenville County, South Carolina Project Owner: South Carolina Department of Transportation SCDOT File Number: 23.038111</td>
</tr>
</tbody>
</table>

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

In the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.
Endorsement – Additional Insured – Owners, Lessees or Contractors – Completed Operations
**POLICY NUMBER:** GLO593970707

**COMMERCIAL GENERAL LIABILITY**

**CG 20 37 04 13**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**
**PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART**

**SCHEDULE**

<table>
<thead>
<tr>
<th>Name Of Additional Insured Person(s) Or Organization(s)</th>
<th>Location And Description Of Completed Operations</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Carolina Department of Transportation including its affiliates, directors, officials, officers, employees, agents and any other party as required by contract.</td>
<td>Project Name: Interstate 85/385 Interchange Improvement</td>
</tr>
<tr>
<td></td>
<td>Project Location: Greenville County, South Carolina</td>
</tr>
<tr>
<td></td>
<td>Project Owner: South Carolina Department of Transportation</td>
</tr>
<tr>
<td></td>
<td>SCDOT File Number: 23.038111</td>
</tr>
</tbody>
</table>

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

**A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".**

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

**B. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.
Other Insurance Amendment – Primary and Non-Contributory
Other Insurance Amendment – Primary And Non-Contributory

<table>
<thead>
<tr>
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<td>06/01/2015</td>
<td>06/01/2016</td>
<td>06/01/2015</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured: Flatiron-Zachry, A Joint Venture
Address (including ZIP Code): C/O Flatiron Constructors, Inc.
385 Interlocken Crescent Boulevard – Suite 900
Firestone, CO 80504

This endorsement modifies insurance provided under the:
Commercial General Liability Coverage Part

1. The following paragraph is added to the Other Insurance Condition of Section IV – Commercial General Liability Conditions:
   This insurance is primary insurance to and will not seek contribution from any other insurance available to an additional insured under this policy provided that:
   a. The additional insured is a Named Insured under such other insurance; and
   b. You are required by a written contract or written agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

2. The following paragraph is added to Paragraph 4.b. of the Other Insurance Condition of Section IV – Commercial General Liability Conditions:
   This insurance is excess over:
   Any of the other insurance, whether primary, excess, contingent or on any other basis, available to an additional insured, in which the additional insured on our policy is also covered as an additional insured on another policy providing coverage for the same "occurrence", offense, claim or "suit". This provision does not apply to any policy in which the additional insured is a Named Insured on such other policy and where our policy is required by written contract or written agreement to provide coverage to the additional insured on a primary and non-contributory basis.

All other terms and conditions of this policy remain unchanged.
TENNESSEE

Policy Memo – Errors and/or Omissions in Consultant Prepared Plans
RESPONSIBLE OFFICE:  Design Division

AUTHORITY:  TCA 4-3-2303. If any portion of this policy conflicts with applicable state or federal laws or regulations, that portion shall be considered void. The remainder of this policy shall not be affected thereby and shall remain in full force and effect.

PURPOSE:  To establish a procedure for identifying errors or omissions in consultant prepared plans and for determining the extent of responsibility for added construction costs or claims resulting from such errors or omissions.

APPLICATION:  During construction, there are often valid changes required to accomplish the satisfactory completion of any project. These changes are covered by supplemental agreements to the construction contract in accordance with adopted procedures. Some of these changes may be due to errors or omissions in the plans and contract documents, resulting in cost increases to the project. In this event, an assessment must be made to determine whether the design consultant should be held accountable for the additional cost.

In using this procedure, Department personnel must keep in mind that plans and other contract documents will normally contain minor variances that do not significantly affect the cost of the project. This procedure is intended for those cases where Department personnel have reason to believe that a design consultant did not adhere to recognized professional standards of care in the performance of their duties.

DEFINITIONS:

Added or Additional Cost – A general term used to describe a premium or extra cost incurred by the State to correct the plans error or omission.

Design Consultant - The corporation, partnership, or individual having a contract with the Department and responsible for preparing the plans and other contract documents used for the construction of a project. As used in this procedure, the design consultant is the Engineer of Record and is fully responsible for work performed by any and all of their subconsultants.

Errors and/or Omissions - A general term used to describe deficiencies in the plans or contract documents prepared by the consultant.
**Substandard Design** - A technical aspect of the design which does not meet the standards and criteria established by the Department and referenced in the scope of services, or other normally accepted principles and/or practices of the professional engineering discipline contracted for by the Department.

**Deficient Site Investigation** - An investigation that does not adequately identify all features, including subsurface features, and adversely impacts the design or construction of the project.

**Plan Conflict** - Information presented in the plans or other contract documents which does not agree or is incompatible with other aspects of the contract requirements.

**Plan Error** - Mistakes in the information presented in the plans or other contract documents, such as incorrect dimensions and miscalculations.

**Plan Omission** - Information not included in the plans or other contract documents which is necessary for completion of the specified work.

**Construction Engineering and Inspection (CEI) Personnel** - The personnel responsible for the administration of a construction contract, including the maintaining of necessary project records and files, to ensure the requirements specified in the plans and other contract documents are obtained. This includes both Department-related and consultant-related CEI services.

**Design Manager** - The Department's employee responsible for administering and managing the design consultant contract which produced the construction plans or other documents required by the contract scope of services.

**POLICY:** It is the policy of the Tennessee Department of Transportation to monitor plans errors or omissions and to pursue recovery of additional costs incurred by the Department to correct errors or omissions in consultant prepared plans.

**PROCEDURE:**

1. **Identification**

   The initial identification of a potential error and/or omission in consultant prepared plans during the construction phase of a project is the responsibility of the CEI personnel. When a potential error and/or omission is identified, CEI personnel shall notify the Design Manager as early as possible so that any necessary coordination with the consultant to assist in resolving the issue can begin. Even if the Design Manager's assistance is not required to resolve an error and/or omission, CEI personnel must inform the Design Manager of the deficiency so that the extent of consultant responsibility can be investigated. An e-mail notification will be sufficient. The CEI personnel are responsible for the construction contract administration and will take appropriate measures to resolve contract changes in an expeditious manner. As such, there may be instances when the action needed to resolve an error and/or omission has already been taken when the Design Manager is notified.
2. Initial Assessment

Most errors and/or omissions will be brought to the attention of the design manager by CEI personnel; however, design managers are also responsible for substantiating any errors and/or omissions on their projects that may come to their attention from any source. As soon as practical after becoming aware of an alleged error or omission, the Design Manager must review the consultant’s scope of work, the standards in effect when the work was done, design information provided to the consultant, and directions provided by the Department to determine the consultant’s degree of responsibility.

In making the initial assessment, the Design Manager must consider a problem may appear as substandard design work when the issue could have been due to restrictions in the consultant’s scope of work or due to information and direction provided by the Department. For example, a construction change may be necessary due to unexpected subsurface soil conditions, and may be initially categorized as a deficient site investigation. However, if the consultant performed the investigation in accordance with standards and criteria established by the Department and adhered to those standards, the consultant cannot be held accountable for the resulting change.

3. Consultant Notification

Based on the initial assessment findings, if the Design Manager determines that the consultant may be partially or fully responsible for the alleged plan error, the firm shall be notified in writing and advised they may be held accountable for corrective actions required. The notification shall include a deadline for the firm to refute the Department’s initial assessment in writing.

4. Additional Cost Determination

To determine the additional cost to the Department, the Design Manager must consider the consultant’s written response and any information from Department personnel to obtain all points of view. Assistance from CEI personnel will usually be necessary in performing alternate cost analyses and assigning cost responsibility.

The cost of correcting an error and/or omission should be compared to the estimated first-time cost that would have occurred if the contract documents had been correct to begin with. For example, the omission of a pay item that has to be included will cause an increase in the construction cost, but the cost would also have been higher if the pay item was originally included. In this case, the cost of the omission is how much more, if any, it costs to include the item during construction. Generally, these first-time costs associated with an error and/or omission, as well as routine variations in estimated quantities, should not be considered recoverable costs from the consultant. The cost the Department incurs to process a supplemental agreement, resolve changes in the contract documents, or additional engineering and inspection costs can be included if supportable.

If the Design Manager finds that the consultant had no responsibility for an error and/or omission, the findings shall be documented in a memo to the appropriate Civil
Engineering Director so that it can be included with other supporting documentation related to the construction change or supplemental agreement.

If the expected recoverable costs will not exceed the estimated administrative costs of the Department, the Design Manager can recommend, in writing, to the appropriate Civil Engineering Director that it is not cost effective to recover the additional costs from the consultant. A concurrence in the recommendation from the Chief Engineer will be required. The concurrence determination shall be documented in a memo to the appropriate Civil Engineering Director and Regional Director.

If the Design Manager believes that an error and/or omission was caused or contributed to by the consultant, and that the consultant should be held accountable for any portion of the increased costs, the Design Manager must then notify the appropriate Civil Engineering Director for further action and follow up.

5. Recovery Recommendation

A committee will review the Design Manager's evaluation and to make the final determination regarding the extent of responsibility for the error or omission. The Civil Engineering Director is responsible for notifying the Assistant Chief Engineer of an error or omission requiring evaluation by the committee.

The committee members will be the Chief Engineer; Assistant Chief Engineer, Design; Assistant Chief Engineer, Operations and the Civil Engineering Director(s) as appropriate for the error and/or omission under consideration. The Chief Engineer, will serve as the chairperson for the evaluation committee. As deemed appropriate by the committee chair, the evaluation committee may include representatives from the legal office, Regional Director's office, and the Design Manager's office.

The Civil Engineering Director is responsible for furnishing the committee a written evaluation by the Design Manager. Included in the evaluation will be a description of the error and/or omission and a summary of the increased costs associated with correcting the error and/or omission, including the portion suitable for a claim against the design consultant. The committee must also be provided any written response received from the design consultant, which states the consultant's position on the error and/or omission.

The committee will take whatever action it deems necessary to complete their evaluation and to arrive at a final recommendation, which may include meetings or interviews with the design consultant. A decision to pursue the recovery of added costs will generally be made only when it is expected that the recovery will exceed the administrative costs involved in the recovery action. A recommendation of any cost to be recovered from a design consultant should not exceed the amount of professional liability insurance coverage required in the consultant contract. The appropriate Civil Engineering Director is responsible for recording the actions of the committee and preparing the final recommendations.
Letter re Trinity and Attachment
October 28, 2014

Mr. Greg Mitchell, President
Trinity Highway Products, LLC
2525 N. Stemmons Freeway
Dallas, TX 75207

RE: Removal of Trinity Highway Products LLC, with ET-plus® system end terminals

Dear Mr. Mitchell,

This letter is to inform you of the temporary removal of ET-Plus end terminals from the Tennessee Department of Transportations (TDOT) Qualified Products List (QPL) as shown in Attachment A.

In a letter dated October 21, 2014, the Federal Highway Administration (FHWA) requested Trinity Highway Products, LLC to provide a crash testing plan and additional information for the ET-Plus guardrail end treatment. The ET-Plus products will remain off the QPL until the conclusion of the FHWA review and evaluation. At that time, TDOT will assess all information available and make a decision to reinstate the ET-Plus products on the QPL or not.

If you have any further questions please feel free to contact me at 615-350-4101.

Sincerely,

[Signature]

Brian K. Egan, P.E.
Tennessee Department of Transportation
Director, Materials and Tests Division

BKE/dll
### SECTION B: TANGENTIAL GUARDRAIL END TERMINALS (TL-3)

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<td>Bryson Products, Inc.</td>
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UTAH

Section 5: Liability Insurance (pages 47-53)  

23
SECTION 5: LIABILITY INSURANCE

UDOT, like all contracting agencies, requires Consultants to be covered by insurance. Consultants must furnish UDOT Consultant Services a “Certificate of Insurance” for each type of required insurance, approved by UDOT, before the Consultant begins work. The Consultant’s insurer must be authorized to do business in Utah and must meet the specified A.M. Best rating or better. Insurance must be maintained in force until all activities under contract with UDOT are completed and accepted by UDOT. The following guidelines may be changed and updated from time to time to meet the demands of the changing insurance market.

Please note these insurance guidelines do not apply to Design/Build projects. For a Design/Build project, the Consultant will need to follow the requirements outlined in the RFQ/RFP for the project.

GUIDELINES

GENERAL INSURANCE REQUIREMENTS FOR ALL POLICIES

Any insurance coverage required herein written on a “claims made” form rather than on an “occurrence” form will:

- Provide full prior acts coverage or have a retroactive date effective before the date of a contract; and,

- Be maintained for a period of at least three (3) years following the end of the term of a contract or contain a comparable “extended discovery” clause. Evidence of current extended discovery coverage and the purchase options available upon policy termination will be provided to UDOT.

All policies of insurance will be issued by insurance companies licensed to do business in the state of Utah and must be either:

- Currently rated A- or better by A.M. Best Company and have an A.M. Best Company financial size category rating of not less than VIII; OR

- Listed in the United States Treasury Department’s current Listing of Approved (Department Circular 570), as amended.

In the event any work is subcontracted, the Consultant will require its subconsultant, at no direct cost to the project, to secure and maintain all minimum insurance coverages required of the Prime Consultant.

In the event that governmental immunity limits are subsequently altered by legislation or judicial opinion, Consultants must provide a new certificate of insurance within thirty (30) days after being notified thereof in writing by UDOT certifying coverage in compliance with the modified limits or, if no limits are specified, in an amount acceptable to UDOT.

All required certificates and policies will provide that coverage there under will not be canceled or modified without providing 30 days prior written notice to UDOT in a manner approved by the Assistant Attorney General for UDOT, either by the insurance carrier or the named insured.
STANDARD REQUIRED INSURANCE POLICIES

Consultants, at no direct cost to the project, will secure and maintain the following minimum insurance coverage:

COMMERCIAL GENERAL LIABILITY

Consultants will secure and maintain commercial general liability (CGL) insurance in the minimum amount of $1,000,000 per occurrence with a $2,000,000 general aggregate. These limits can be covered either under a CGL insurance policy alone, or a combination of a CGL insurance policy and an umbrella insurance policy and/or a CGL insurance policy and an excess insurance policy. The policy will protect UDOT, Local Government (if applicable), the consultant, any subconsultant from claims for damages for personal injury, including accidental death, and from claims for property damage that may arise from the consultant’s operations under a contract, whether performed by the consultant themselves, and subconsultant, or anyone directly or indirectly employed by either of them. Such insurance will provide coverage for premises operations, acts of independent consultants, products and completed operations.

UDOT, the State of Utah, and Local Government (if applicable) should be an additional insured for CGL. See a completed Certificate of Insurance example for specific required language.

COMMERCIAL AUTOMOBILE LIABILITY

Consultants will secure and maintain commercial automobile liability insurance that provides coverage for owned, hired, and non-owned automobiles in the minimum amount of a combined single limit of $1,000,000 per occurrence OR $500,000 Liability per person, $1,000,000 Liability per occurrence, and $250,000 Property Damage. These limits can be reached either with a commercial automobile liability insurance policy alone, or with a combination of a commercial automobile liability insurance policy and an umbrella insurance policy and/or a commercial automobile liability insurance policy and an excess insurance policy.

UDOT should not be an additional insured for commercial automobile liability insurance.

WORKER’S COMPENSATION AND EMPLOYER’S LIABILITY

Consultants will secure and maintain worker’s compensation and employer’s liability insurance sufficient to cover all of the Consultant’s employees pursuant to Utah law. If covered by Workers Compensation Fund of Utah, then an A.M. Best rating is not required in this area.

- Including Coverage B. Employer’s Liability
- $100,000 limit each accident
- $100,000 limit per disease—each employee
- $500,000 limit per disease—policy limit
This requirement includes those who are doing business as an individual and/or as a sole proprietor as well as corporations and partnerships. In the event any work is subcontracted, the Consultant will require its subconsultant(s) similarly to provide worker’s compensation insurance for all of the latter’s employees, unless a waiver of coverage is allowed and acquired pursuant to Utah law.

UDOT should not be an additional insured for worker’s compensation insurance.

PROFESSIONAL LIABILITY

(aka: Architect & Engineers Insurance, Errors & Omissions Insurance, Malpractice Insurance) Consultants will secure and maintain professional liability insurance having an A.M. Best rating of A-class VIII or better. If this coverage is written on a claims-made basis, the certificate of insurance will so indicate. The Consultant represents that as long as commercially available the insurance will remain in effect such that claims reported up to three (3) years beyond the date of substantial completion of UDOT contracts are covered (on construction contracts or modifications for construction engineering management the insurance, will remain in effect for one (1) year after completion of projects). The required minimum limits are $1,000,000 per claim and $2,000,000 aggregate.

UDOT should not be an additional insured for professional liability insurance.

VALUABLE PAPERS

Valuable Papers and Records Coverage and/or Electronic Data Processing (Data and Media) is coverage for the physical loss or destruction of the work product including drawings, plans, specifications and electronic data and media. The contract states that a Consultant must carry a sufficient amount of Valuable Papers coverage to “… protect the CONSULTANT, its sub-consultants, the Local Authority, and the DEPARTMENT from the loss of said information.”

UDOT should not be an additional insured for valuable papers insurance.

INCREASED INSURANCE REQUIREMENT

If the minimum insurance coverage is insufficient for a specific project, UDOT may require a consultant to obtain additional insurance. The UDOT Project Manager and the Consultant will perform a UDOT Consultant Services Professional Liability Risk Assessment.

INSURANCE REPORTING PROCESS

Consultants are required to submit certificates of insurance as proof of insurance to UDOT Consultant Services and the certificates will remain on file. A new Certificate of Insurance for UDOT Consultant Services contracts will not be required until the one “on file” with UDOT expires, has a change in coverage, is cancelled, or the specific project requires insurance over and above the minimum standard coverage required.
INSURANCE REPORTING FORMS

All insurance is required to be shown on an Acord 25 Certificate of Liability Insurance Reporting Form for all coverage except worker’s compensation. Worker’s compensation coverage may be shown on an Acord 25 Form but may also be shown for example on Workers Compensation Fund of Utah letterhead.

- The ADD’L INSRD box for General Liability should be checked.
- An attention line or any individual’s name should not be indicated in the CERTIFICATE HOLDER’s box.
- A generic description of work performed by the insured/consultant for UDOT should be included in the DESCRIPTION OF OPERATIONS box. For example, “Environmental and design services”. Nothing specific to a contract should be included; i.e., contract number, project number/location, project-specific description, PIN number.
- The statement “Utah Dept. of Transportation, State of Utah, and Local Government (if applicable) additional insureds” should be included in the DESCRIPTION OF OPERATIONS box.
- A signature in the AUTHORIZED REPRESENTATIVE BOX is required.

UDOT CONSULTANT SERVICES PROFESSIONAL LIABILITY RISK ASSESSMENT

UDOT and the Consultant should determine the appropriate Professional Liability Coverage during negotiation of the engineering services contract based on the specific project/work being negotiated. The minimum insurance coverage required is $1,000,000 per occurrence and $2,000,000 aggregate. It is expected that these limits will be sufficient for the majority of consultant contracts. However, occasionally the project or work being considered may involve abnormal risk components, which may justify obtaining a Project-Specific Rider, increasing the Professional Liability Insurance Coverage for the work being considered. If it is determined that a Project-Specific Rider is justified, then the cost to obtain this additional insurance will become an eligible direct expense to the project.

The following questions are intended to assist the UDOT Project Manager and Consultant to determine whether there may be abnormal risks, which would warrant further discussion concerning whether the minimum Professional Liability Coverage is adequate or not. UDOT Risk Management is a resource to the UDOT Project Manager and the Consultant.
UDOT RISK MANAGEMENT QUESTIONS

GENERAL

- Is the construction cost estimate over $50,000,000?
- Does the contract require an accelerated schedule?

STRUCTURES

- Does the design involve unusually complicated structures?
  - Bridges with piers in water ways
  - Complicated bridge types
  - Complicated retaining structures

- Does the design involve Accelerated Bridge Construction?
  - Super-structure
  - Carrier beams
  - Precast elements

- Are there unusual slope stability issues?
  - Canyon Project
  - Landslides

GEOTECHNICAL

- Are there unusual foundation issues?
  - Unusual settlement

HYDROLOGY/HYDRAULICS

- Are there unusual hydrology/hydraulic issues?
  - River hydrology
  - Scour
  - Above grade canal flow line

- Is there an unusual pavement design?

- Are there significant hazardous materials or wastes on the project, do they include lead, asbestos, PCBs, mercury, or radioactivity and/or does the project include remediation of these hazardous materials or waste?

OTHER ISSUES

- Is this a federal-aid local government project?
- Are there any risks not identified above that could potentially cause a claim of over the minimum insurance coverage amount?
LIABILITY INSURANCE WAIVER REQUEST

If a Consultant performs work that in their opinion does not present a liability risk for UDOT, the Consultant may request a waiver to the minimum liability insurance coverage required.

The waiver request should contain the following information and be forwarded to the UDOT Project Manager and the Consultant Services Contract Administrator during negotiation of the Consultant contract:

- What liability insurance coverage(s) is the Consultant requesting a waiver for?
- If a Consultant has some liability insurance coverage, but not at the minimum required, the Consultant will need to explain and provide a Certificate of Insurance.
- The Consultant will provide a brief description of the work in the contract.
- The Consultant will explain why the services being provided do not present a risk for UDOT or why they don't present a risk that would warrant coverage at the minimum level required.
- If there will not be any vehicle operations; i.e., the Consultant will not operate a vehicle in connection with any services rendered under a contract with UDOT AND the consultant agrees not to operate a vehicle in connection with services rendered under a contract with UDOT, the Consultant may state such in a waiver request for the Commercial Automobile Liability insurance coverage requirement.

NON-STANDARD INSURANCE POLICIES

The following insurance coverages are non-standard coverages that may be required for specific contracts on a case-by-case basis:

UMBRELLA AND/OR EXCESS INSURANCE

These insurance policies provide additional limits on underlying insurance policies. They can be excess over as many types of insurance as the insurance company wants them to. For example, you will see an Umbrella Insurance policy over commercial general liability and commercial auto. When added to the underlying insurance policy, the limits must be at least at UDOT’s requirements, and it must state that it follows the underlying insurance or follows form.

UDOT should not be an additional insured on umbrella and/or excess insurance, only on the underlying policy.

AIRCRAFT LIABILITY

Aircraft Liability in the amount of $1,000,000 per occurrence is required if aircraft are utilized. Aircraft Liability is required to be endorsed naming UDOT, the State of Utah, and the Local Authority as Additional Insureds and indicate they are primary and not contributing coverage.
DATA INTEGRITY INSURANCE

Data Integrity insurance specifically covers privacy liability and network security liability for any personal information stolen from any computer or network and used against that individual in any way. The minimum amount of $2,000,000 with UDOT as an additional insured is required.

This insurance is required for any company that has access to or has on its computer system any sensitive personal or financial information regarding UDOT employees or any party doing business with UDOT.

PRODUCT LIABILITY

Product Liability insurance in the minimum amount of $1,000,000 per occurrence with a $2,000,000 general aggregate and UDOT as an additional insured is required when full Commercial Liability coverage is not needed but Product Liability coverage is still called for.
Errors and Omissions on Projects
Effective: May 24, 2010

UDOT 08-07
Revised: July 18, 2013

Purpose
To establish the policy, procedure, and responsibility for the Utah Department of Transportation (Department) for processing errors and omissions on consultant projects found during design, advertising, or construction and to make recommendations for resolution with the consultant design company or recommendations for settlement to the Department’s Deputy Director.

Policy
The Department expects engineering consultants designing transportation projects to exercise an appropriate standard of care and to provide quality services to the Department. The Department will provide or make available in hard copy or through the Department’s Web site all Department manuals, specifications, drawings, and policies and procedures needed in support of the consultant contract. Additionally the Department will develop and maintain a Quality Control/Quality Assurance (QC/QA) program and checklist that provides for the review of plans and specifications throughout the Design Process.

The Department will take steps to address the defective designs, plans, or specifications, identify corrective action, and resolve the consequences. The Project Manager will take appropriate steps once notified of an alleged error or omission to decide if the error or omission is the result of negligence or gross negligence. The Project Manager will partner with the consultant team in order to resolve the issue at the lowest level possible and in the best interests of all concerned parties in the shortest and least costly method possible.

The Department will take action to recover costs for errors and omissions attributed to the negligence or gross negligence of a consultant in accordance with the procedures outlined in this policy.

The Errors and Omissions Claims Review Board made up of the following will convene when required:

a. Project Development Director as chair
b. Risk Management Representative
c. American Council of Engineering Companies (ACEC) representative as determined by Consultant Services Manager (ACEC representative can not be associated with the Consultant Firm involved in this review.)
d. Engineer for Preconstruction (Secretary, non-voting)
Background

On occasion, errors and omissions are the result of negligence or gross negligence. Errors and omissions are normally identified during construction, but could also be identified during the design and advertising phases.

The discovery of an error or omission triggers the gathering of information on the scope of the problem, actions and responsibilities of the various parties, and the potential validity and extent of any claims that may arise.

"The Federal Highway Administration’s (FHWA) general policy is that each error-and-omissions issue should be considered on its own merits. In general, a consultant should not be held responsible for additional construction costs resulting from such errors, so long as they are not the result of gross negligence or carelessness. Unless the agency-consultant agreement holds otherwise, ‘federal-aid participation may be justified for the type of consultant errors that might occasionally occur despite the exercise of normal diligence’ if: 1) The error is not due to gross negligence or carelessness; and 2) Carelessness, negligence, incompetence, or understaffing by the state agency are not contributing factors.” (Best Practices in the Management of Design Errors and Omission, Chapter 2, Federal Highway Administration Policy and Data, Philosophy and Policy Guidance as prepared by Michael J. Markow, P.E., Consultant, Teaticket, MA, March 2009.)

Title 23 of the Code of Federal Regulations requires State DOTs to have written procedures “in determining the extent to which the consultant, who is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors or deficiencies in design furnished under its contract.” (§23 CFR 172.9(a)(6))

Definitions

Consultant
A professional retained by the Department to provide services.

Error
An incorrect or insufficient design detail; a mistake in judgment.

Gross Negligence
A conscious and voluntary failure to meet the standard of care, which is likely to cause foreseeable grave injury or harm to persons, property, or both.

Negligence
Failure of a professional to meet the standard of care in the performance of professional services.
Omission
A failure to include an element, feature, system, or equipment necessary to the complete function of a project; a failure to perform.

Standard of Care
The degree of attentiveness, caution, and prudence that a reasonable professional would exercise in the circumstances.
Procedures
Discovery, Mitigation, and Resolution of Errors and Omissions in Consultant Projects

Responsibility: Department, Consultant, or Contractor Personnel

Actions

1. Notify the Department Project Manager (PM) of a design conflict, problem, or alleged error or omission if discovered in the Design Phase or post-construction.

or

2. Notify Department Resident Engineer (RE) of a design conflict, problem, or alleged error or omission if in the Advertising or Construction Phase.

3. Provide as much supporting information and documentation as appropriate.

Responsibility: PM or RE

4. PM and RE coordinate regarding the design conflict, problem, or alleged error and omission issue taking into account all information and documentation available.

5. Determine the magnitude of the issue and whether engaging the Consultant in the resolution of the issue is required.

Responsibility: PM

6. Notify the Consultant of the issue and provide all information and documentation received in writing.

7. Work with Consultant to resolve design problems.

8. Discuss financial responsibility with the Consultant.
**Responsibility:** Consultant

9. Determine if the issue will be corrected or escalated for resolution and notify the PM that the Consultant will:
   a. Take actions to correct the issue and will negotiate financial responsibility with the PM.
   
or
   b. Not accept responsibility for the issue.

**Responsibility:** PM

10. Discuss the issue with Consultant and resolve.
11. Escalate to the Region Director.

**Responsibility:** Region Director

12. Determine urgency of the issue and whether to fix regardless of responsibility.
13. Facilitate resolution of the issue.
14. Send formal notification of claim if resolution unsuccessful.
15. Contact Engineer for Preconstruction and request the Errors and Omissions Claims Review Board be convened.

**Responsibility:** Errors and Omissions Claims Review Board

16. Schedule meeting and invite PM and Consultant and others as appropriate, to attend the informal review.
17. Hear the Department’s claim and the Consultant’s response. Present all supporting documentation regarding the claim to the Board in writing on the day of the hearing.
18. Determine recommendation for resolution of the claim in a separate meeting and submit to the Deputy Director of Transportation within 30 calendar days of the claim hearing.
Responsibility: Department Deputy Director

19. Notify Consultant of the decision of the Department within 15 calendar days of the Errors and Omissions Claim Review Board decision.

20. Notify internal parties and determine if legal action required if issue not resolved.
Attachment - Errors and Omissions Process

Error & Omissions Policy Flowchart

1. Design Conflict or Problem Identified
   - Advertising or Construction Phase? (Yes)
   - Notify & send supporting documentation of Design Conflict or Problem
   - PM reviews Design Conflict or Problem
     - Does magnitude of issue require involving the Consultant? (Yes)
     - PM notifies and sends supporting documentation of Design Conflict or Problem
     - PM & Consultant work to resolve Design Conflict or Problem
       - Consultant takes action to correct issue
         - End
       - Resolution of Financial Responsibility
         - Yes
           - Deputy Dir. determines if legal action is required
             - No
             - Legal action started
           - Yes
             - Deputy Dir. notifies Consultant of Department decision
               - CRB submits recommendation to Deputy Director and Consultant
               - RD facilitates resolution of issue with PM & Consultant
                 - No
                   - Issue unresolved?
                     - Yes
                       - Direct PM & Consultant to address issue.
                     - No
                       - PM completes formal letter of proposed action to Consultant
                         - Yes
                           - Issue urgent: Justifying immediate action?
                             - Yes
                               - PM sends issue to Region Director
                             - No
                               - Deputy Dir. requests Errors & Omissions Claims Review Board be convened
                                 - No
                                   - Reg Dir. requests Errors & Omissions Claims Review Board be convened
                                     - Yes
                                       - PM sends issue to Region Director
PART 2, APPENDIX B – INSURANCE
APPENDIX B – INSURANCE PROGRAM

1. DESIGN-BUILDER/SUBCONTRACTOR-PROVIDED COVERAGE

The Design-Builders agree, and shall require all Subcontractors to agree, to provide certain insurance coverages.

A. For any Work under this Contract, and until Contract Completion, the Design-Builders, at its own expense, must promptly furnish to the Department certificates of insurance giving evidence that the certain coverages identified below are in force. The Design-Builders is also responsible for ensuring Subcontractor compliance with this Section 13 and provision of appropriate certificates for Subcontractor policies.

B. Prior to entry on Work Site, the Design-Builders agrees to obtain the insurance set out below, at no expense to the Department, from a company or companies acceptable to the Department, as follows:

1. Workers Compensation Insurance:
   a. Provide Workers Compensation Insurance to cover full liability. Comply with the statutory limits defined by the State of Utah as a minimum.
   b. The Design-Builders shall require all parties, including subcontractors, to obtain Workers Compensation Insurance as described in this section prior to their entry on the Work Site.

2. General Liability and Excess Liability Insurance:
   a. Provide General Liability insurance with the minimum limits of liability specified below.
      i. $10 million Bodily Injury and Property Damage – Each Accident
      ii. $10 million General Aggregate
      iii. $10 million Products and Complete Operations Annual Aggregate
   
   This can be accomplished through either a stand alone General Liability policy or a combination of a General Liability policy and an Excess/Umbrella policy adding up to $10 Million.

3. Automobile Liability Insurance:
   a. Provide Automobile Liability Insurance for claims arising from the ownership, maintenance, or use of motor vehicles involved in project work with the following minimum limits of liability.
      i. $1 million combined single limit bodily injury and property damage per occurrence

4. Provide the following for all required liability insurance policies:
   a. Where and when applicable, name as additional insured, only in respect to Work to be performed under this Contract, the State of Utah and the Department;
   b. Coverage for the above insured is primary and not contributing; and
   c. Incorporate into the insurance policy this statement: “Insurance coverage is extended to include claims reported up to one year beyond the date of Substantial Completion of this Contract.”

5. Provide the Department with certificates of insurance in accordance with this Section.
6. Regardless of the Design-Builder insurance requirements required in this section, insolvency, bankruptcy, or failure of any insurance company to pay all claims accrued does not relieve Design-Builder of any obligations.

7. Endorse all policies to include waivers of subrogation in favor of the Department.

8. The Department gives the Design-Builder written notice that the certificates need to be modified so as to give the Department the required endorsements if the Department discovers that the Design-Builder’s policies are not endorsed to the Department:
   a. Complete within 10 Calendar Days;
   b. Provide new certificates to the Department at that time; and
   c. The Department may terminate the Design-Builder for default as defined in Part 2 (General Provisions), if certificates are not obtained.

9. Excess General Liability Insurance:
   Not Used.

10. Design-Builders Pollution Liability Insurance:
    Not Used.

11. Builders Risk Insurance:
    a. Provide Builder’s Risk Insurance in the amount of $5 Million.

12. Railroad Protective Insurance:
    Not Used.

13. Professional Errors and Omission Liability Insurance:
    b. Insured: Design-Build Entities performing professional services.
    c. Limits:
       i. $5,000,000, each claim, and
       ii. $5,000,000, aggregate;
    d. The Design-Builder shall provide professional liability coverage with a minimum combined single limit of $5 million per claim and $5 million aggregate. This policy may be provided by the Design-Builder or its lead engineering Subcontractor. The policy must have a retroactive date no later than the date on which the Request for Proposals (RFP) was issued and must have at a minimum 6 years extended reporting period with respect to events which occurred but were not reported during the term of the policy. The policy must protect against any negligent act, error, or omission arising out of the professional services of the Design-Builder. The Design-Builder will require its Lead Design Subcontractor, and all other parties providing professional services, to carry professional liability insurance. The Department and the State of Utah shall not be named insured under the policy, but the policy shall include an endorsement adding the Department an Indemnified Party on said policy. Any and all deductibles and self-insured retentions in the above described insurance policy(ies) shall be assumed by and be at the sole risk of the insured parties.

14. Aircraft Liability Insurance:
2. CERTIFICATES OF INSURANCE

Prior to entry on the Work Site, the Design-Builder agrees, and shall cause all Subcontractors to agree, to provide to the Department Project Director a certificates of insurance setting out the coverages described in Section 1 (Design-Builder/Subcontractor-Provided Coverage) and the applicable policy limits, and shall also provide to the Department Project Director any amendments to the certificates necessitated by changes to the Work to be performed under the Contract, until the date of Final Acceptance.

A. Said certificate shall state that the policies required have been endorsed to provide that the insurers issuing said policies shall give the Department and the State not less than 30 Calendar Days prior written notice of cancellation, nonrenewal or material change in coverage thereunder.

B. All policies required shall be endorsed to include a waiver of subrogation in favor of the Department and the State of Utah.

C. All insurance required shall be maintained, without interruption, from the date of commencement of the Work throughout the warranty periods set forth in Part 9 (Warranty Provisions).

D. The Design-Builder and Subcontractors shall provide copies of any policies and/or endorsements that Department may request.

3. OTHER INSURANCE

A. Any type of insurance or any increase of limits of liability not described above which the Design-Builder or any Subcontractor requires for its own protection or on account of any statute shall be its own responsibility and at its own expense.

B. The Design-Builder and Subcontractors are responsible for making sure their insurance programs fit their particular needs, and for arranging for and securing any insurance coverage which they deem advisable, whether or not specified above.

C. Any fees, costs, or charges related to requirements of this Appendix B, e.g., additional insured endorsement and waiver of subrogation, are to be borne by the Design-Builder and the Subcontractors.

4. NO RELEASE

The carrying of the above-described insurance shall in no way be interpreted as relieving the Design-Builder of any other responsibility or liability under the Contract Documents or any applicable Law.

5. APPROVAL OF FORMS AND COMPANIES

All Design-Builder-provided insurance described in this Appendix B shall be written by an insurance company or companies satisfactory to the Department and licensed to do business in the State, and shall have a form and content that are satisfactory to the Department. Insurance must be placed with carriers having a Best’s Guide Rating of A-VII or better. No party subject to the provisions of this Contract shall violate, or knowingly permit to be violated, any of the provisions of the policies of insurance described herein.
6. SAFETY PERSONNEL

The Design-Builder shall employ a full time, project dedicated safety professional. Its subcontractors shall designate an on the job safety administrator that may include a supervisor / foreman with safety knowledge. These will be UDOT's contacts for safety concerns.
PART 2, APPENDIX B – OCIP INSURANCE
OWNER CONTROLL ED INSURANCE PROGRAM (OCIP)

1. GENERAL

The Department will implement an Owner-Controlled Insurance Program (OCIP) on this Project. The Design-Build er shall enroll in and comply with all OCIP requirements. The OCIP requirements are not intended to create any contract between Subcontractors and the Department. The Design-Build er shall ensure that all eligible Subcontractors enroll in and comply with all OCIP requirements, and shall be responsible for enforcing any OCIP provisions that relate to Subcontractors.

The OCIP shall minimally provide the following types of insurance coverage for the Design-Build er and all eligible Subcontractors of every tier enrolled in the OCIP and performing Work at the Project site. As used in this Appendix B, the term “eligible Subcontractor” shall mean Subcontractors of every tier enrolled in the OCIP that have employees working on the Work Site. The term “eligible Subcontractor” specifically excludes suppliers, materialmen, vendors, haulers, truckers and "owner/operators" whose employees perform no work on the Work Site or are engaged solely in loading, unloading, stocking, testing, or hauling equipment, supplies or materials.

For purposes of this Appendix B, the term “Work Site” shall not include any locations outside of the Project Right-of-Way that have not been specifically identified by the Design-Build er and Approved in writing by the Department and the insurer(s) for addition to the OCIP.

The OCIP shall minimally provide the following types of insurance coverage: workers' compensation, employer's liability, general liability, contractor's pollution liability, railroad protective (as required), excess liability, and builder's risk. The Department agrees to pay all premiums associated with the OCIP, including deductibles or self-insured retentions, except as otherwise stated in the Contract Documents.

A. The Design-Build er and eligible Subcontractors will not be allowed to commence performance of Work without enrolling in the OCIP.

B. The OCIP carriers are as follows:

1. **Workers' Compensation and Employer's Liability:** Zurich American Insurance Company;

2. **General Liability:** Zurich American Insurance Company;

3. **Contractor's Pollution Liability:** American International Specialty Lines Ins. Co.;

4. **Excess Liability Coverage:** Underwriters at Lloyds of London;

5. **Railroad Protective Liability:** Underwriters at Lloyds of London; and

6. **Builder’s Risk:** To be determined.

C. Ineligible and eligible contractors, at their own expense, shall be required to maintain their own insurance of the types and with the limits as set forth in Section 13 (Design-Build/ Subcontractor-Provided Coverage), with such coverage acknowledging the Work Site, and shall promptly furnish to Department certificates of insurance giving evidence that all required insurance is in force.

D. The Design-Build er shall enroll in the OCIP by completing the attached OCIP Enrollment Form and submitting it to the Department along with the required certificate(s) per Section 14 (Certificates of Insurance) at the time it returns the executed Contract to the Department or prior to commencement of any Work, whichever occurs first. The Design-Build er shall require that each of its eligible Subcontractors of every
tier enroll in the OCIP by submitting the OCIP Enrollment Form to the Department prior to the Subcontractor entering the Work Site. By submitting the OCIP Enrollment Form and required certificate(s) to the Department, the Design-Builder and each Subcontractor warrants that all insurance information is correct. (See Section 14 (Certificates of Insurance)).

E. It is understood and agreed that the Department is providing designated insurance coverages as identified in this Appendix B, to the Design-Builder and Subcontractors, following enrollment. All costs associated with said coverage will be paid for by the Department except for the assessed amounts payable by the Design-Builder and/or Subcontractors. If the Design-Builder or any Subcontractor that begins Work without completing the enrollment process, its Work will be stopped and/or it will be removed from the Work Site until the enrollment requirement is satisfied. The Design-Builder will be held solely responsible for the timely enrollment of all eligible Subcontractors. Failure to do so will result in the Design-Builder being issued a notice of noncompliance, and Work may be stopped, at the expense of the Design-Builder, until compliance with this requirement is met.

F. The Design-Builder's represents and warrants that the Contract Amount excludes conventional insurance costs for the OCIP coverages identified in Paragraphs B through G and that Change Orders will not include such costs. Further, Design-Builder shall ensure that its conventional insurance carriers exclude the OCIP Project from its policies, in accordance with Section 13 (B).

G. An auditor or auditors from the insurance companies providing OCIP coverage will audit the payroll and contract revenue of the Design-Builder and each enrolled Subcontractor after the Department submits notice to the Department's appointed OCIP Administrator (Wells Fargo) of each such entity's completion of Work.

The purpose of this Appendix B is solely to provide a general understanding of the coverage provided by the OCIP. The Design-Builder acknowledges and agrees that it reviewed the terms of the OCIP policies prior to delivery of its Proposal. The Design-Builder agrees that the specific terms thereof are incorporated by reference herein and deemed part of the Contract Documents and that the specific terms thereof shall govern in the event of any conflict with the general description of the OCIP contained herein, except that the terms of this Appendix B shall control with respect to deductibles and assessments to be made by the Design-Builder and/or Subcontractors in connection with OCIP claims.

1.1. Subcontractors

The Design-Builder shall include all of the provisions of this Appendix B in every subcontract with an eligible Subcontractor, and shall ensure that Subcontractors include such provisions for lower tier subcontracts, so that such provisions will be binding upon each eligible Subcontractor.

1.2. Audit of Design-Builder's Payroll

For purposes of the OCIP, the Design-Builder agrees, and will require all tiers of enrolled Subcontractors to agree, to keep and maintain accurate records of its payroll for operations at the Work Site. The Design-Builder further agrees, and will require all enrolled Subcontractors to further agree, to furnish to the State, it's appointed OCIP Administrator (Wells Fargo), and the insurance carrier(s) full and accurate payroll data and information in accordance with the requirements of the OCIP. The Design-Builder and enrolled Subcontractors shall permit the Department, its OCIP Administrator, and its insurance carrier(s) to examine and/or audit their books and records. The Design-Builder and enrolled Subcontractors shall also provide any additional information to the Department or its OCIP Administrator as may be required.
1.3. Coverage provided in OCIP

A. The OCIP will provide coverage to the Design-Builder and eligible Subcontractors, following enrollment, that have employees on the Work Site. Such coverage applies only to Work performed under this Contract at the Work Site. The Design-Builder and Subcontractors must provide their own insurance for activities outside of the Work Site. However, areas that are 100% dedicated to the Project may be added to the OCIP in accordance with UDOT OCIP Manual.

B. The OCIP policies are available for review by the Design-Builder during business hours, upon advance written request to the Department. The terms of such policies or programs, as such policies or programs may be from time to time amended, will be incorporated by reference herein. The Design-Builder hereby agrees to be bound by the terms and conditions of coverage as contained in such insurance policies and/or self-insurance programs.

C. While the OCIP is intended to provide broad coverages and high limits, the OCIP is not intended to meet all the insurance needs of the Design-Builder or Subcontractors. The Design-Builder and each Subcontractor shall ensure that other proper coverages are maintained. See Section 13 (Design-Builder/Subcontractor-Provided Coverage).

1.4. Withholding from Contract amount

With respect to each claim under the OCIP policies caused by the Design-Builder or one or more enrolled Subcontractors, as determined by the insurance carrier, the Department shall have the right to withhold from the Design-Builder the applicable assessed amount set forth herein, but not to exceed the amount of the covered loss. The assessed amount shall be deducted from payments owing to the Design-Builder, and shall become the property of Department. The Design-Builder may pass the assessment through to the responsible Subcontractor.

2. WORKERS’ COMPENSATION AND EMPLOYER’S LIABILITY INSURANCE

Workers’ Compensation and Employer’s Liability insurance provides coverage for injury to employees arising out of and in the course of their employment.

2.1. Scope of Coverage

A. Covers: Injury to employees of insured entities performing Work at the Work Site.

B. Insured: Design-Builder and eligible Subcontractors, following enrollment (the Design-Builder and each Subcontractor will be issued a policy).

C. Limits:

1. Workers’ Compensation—Statutory;

2. Employer’s Liability:
   a. $1,000,000, each Employee—Bodily Injury by Accident;
   b. $1,000,000, each Employee—Bodily Injury by Disease; and
   c. $1,000,000—Bodily Injury by Accident or Disease—Any one Accident or Disease;
D. **Design-Build Assessment**: $200 per claim, or the actual cost of the claim, whichever is less.

### 2.2. Effect on Future Experience Modifications

All premiums and losses experienced by each enrolled Design-Build and Subcontractor will be reported to the National Council on Compensation Insurance (NCCI) or other appropriate authority. The Department anticipates that loss experience for the Project will be used in the normal manner for calculating individual future experience modifiers.

### 3. COMMERCIAL GENERAL LIABILITY

Commercial General Liability insurance provides coverage for Bodily Injury, Property Damage, Personal Injury, and Products and Completed Operations. (Completed Operations has a 5-year extension.)

#### 3.1. Scope of Coverage

A. **Operations**: Work of any insured entities performed at the Work Site.

B. **Insureds**: The Department, State of Utah, the Design-Build and eligible Subcontractors following enrollment.

C. **Limits**:
   1. $2,000,000, Bodily Injury and Property Damage, Combined Single-Limit;
   2. $10,000,000, General aggregate; and
   3. $6,000,000, Products and Completed Operations, aggregate.

D. **Design-Build Assessment**: $5,000 per claim or the actual cost of the claim, whichever is less.

### 4. RAILROAD PROTECTIVE LIABILITY (AS REQUIRED)

Railroad Protective Liability insurance provides liability coverage for railroad companies.

#### 4.1. Scope of Coverage

A. **Operations**: Work of the Design-Build or Subcontractor performed on the Work Site.

B. **Insured**: All railroads affected.

C. **Limits**:
   1. $5,000,000, each occurrence; and
   2. $10,000,000, aggregate.

D. **Assessment**: None.

### 5. EXCESS GENERAL LIABILITY INSURANCE

This insurance covers liability in excess of Primary Commercial General Liability, Employer's Liability, and Railroad Protective Liability.

#### 5.1. Scope of Coverage

A. **Operations**: Work of insured entities performed at the Work Site.
B. **Insured:** For the general liability and employer’s liability policies, the Department, State of Utah, and Design-Builders and eligible Subcontractors following enrollment. For the railroad protective liability, all railroad affected.

C. **Limits:**
   1. $25,000,000, each occurrence for all Insureds;
   2. $25,000,000, aggregate for all Insureds; and

D. **Design-Builder Assessment:** $200 per claim or the actual cost of the claim, whichever is less.

### 6. PROFESSIONAL ERRORS AND OMISSIONS LIABILITY

This insurance is Liability coverage for Negligent Acts, Errors, or Omissions of the Insureds who have provided professional services for the Department OCIP.

#### 6.1. Scope of Coverage

A. Not Applicable.

### 7. DESIGN-BUILDERS POLLUTION LIABILITY

This coverage is for liability arising from pollution releases during construction or remediation Work.

#### 7.1. Scope of Coverage

A. **Operations:** Work of the Design-Builder and eligible Subcontractors performed at the Work Site, following enrollment.

B. **Insureds:** The Department, the State of Utah (as defined in the policy), the Design-Builder and eligible Subcontractors following enrollment.

C. **Limits:**
   1. $10,000,000, each occurrence; and
   2. $10,000,000, aggregate.

D. **Design-Builder Assessment:** $5,000 per claim or the actual cost of the claim, whichever is less.

### 8. BUILDERS’ RISK

This insurance provides “All Risk” coverage to protect against physical loss or damage to real and personal property or any part thereof, including during transit.

#### 8.1. Scope of Coverage

A. **Operations:** Property insurance for the Project, including
   1. The interest of the insured in roads, bridges, and rest stops (including buildings) included in the Project, including ancillary property that will become a permanent part of the roads, bridges, and rest stops.
   2. Certain property of others in the care, custody or control of an insured.
3. Temporary structures meaning scaffolding, construction forms, cribbing, falsework, construction trailers and similar items used in construction of the Project.

B. **Insured:** The Department, State of Utah, the Design-Builder and eligible Subcontractors, following enrollment.

C. **Limits:**
   1. $20,000,000, each occurrence; and
   2. $20,000,000, each flood or earthquake occurrence.

D. **Design-Builder Assessment:** $25,000 per occurrence.

9. **CERTIFICATES AND POLICIES**

All OCIP insurance coverage shall be either written by insurance companies approved by the Department or self-insured. The Department or its OCIP Administrator (Wells Fargo) shall provide the enrolled Design-Builder and Subcontractors with appropriate certificates of insurance or self-insurance evidencing the coverage outlined above.

10. **TERMINATION AND MODIFICATION OF THE OCIP**

The Department reserves the right to terminate or to modify the OCIP or any portion thereof. To exercise this right, Department shall provide 90 Calendar Days advance written notice to the Design-Builder. The Design-Builder and enrolled Subcontractors shall immediately be required to obtain appropriate replacement insurance coverage acceptable to the Department. The reasonable cost of such replacement insurance will be reimbursed by the Department. The Design-Builder shall provide written evidence of such insurance to the Department prior to the effective date of the termination or modification of the OCIP.

11. **DESIGN-BUILDER RESPONSIBILITIES**

A. The Design-Builder is required to cooperate with the Department and its OCIP Administrator (Wells Fargo) regarding the administration and operation of the OCIP. The Design-Builder's responsibilities shall include, but are not limited to:

1. Complying with the terms and conditions of Construction Safety Program(s); UDOT OCIP Manual, and UDOT Construction Safety and Health Manual, as outlined in the respective manuals setting forth the administrative procedures required of contractors;

2. Providing necessary contract, operations, and insurance information;

3. Immediately notifying the Department of all eligible Subcontractors of upon award, and notifying the Department upon satisfactory completion of Work by each eligible Subcontractor;

4. Maintaining and providing payroll records and other records as necessary for NCCI reporting;

5. Cooperating with any insurance company and OCIP Administrator with respect to requests for claims, payroll, and other information required under the OCIP;
6. Immediately notifying the Department that any Design-Builder-provided or Subcontractor-provided coverage has been canceled, materially changed, or not been renewed; and

7. Completing and submitting, and ensuring that Subcontractors complete and submit, the following administrative form within the time frames specified:
   a. Design-Builder: OCIP Enrollment Form upon execution of the Contract (include certificates of insurance as per Section 14 (Certificates of Insurance); and
   b. Subcontractor: OCIP Enrollment Form and required certificate (these will be sent to Subcontractors).
   c. Subcontractor: Form 4 (Contract Completion Form), upon completion of Work by the Subcontractor.

B. Failure of the Design-Builder or any eligible Subcontractor to follow the procedures outlined in the UDOT OCIP Manual and UDOT Construction Safety and Health Manual may result in forfeiture of coverage, fines, and/or penalties assessed against the Design-Builder. The Department shall deduct from monies due or to become due under the Contract any applicable fines or penalties that are assessed, and will exercise any other legal remedies available to the Department which remedies may be cumulative.

12. ASSIGNMENT OF RETURN PREMIUMS

The Department will be responsible for the payment of all premiums associated solely with the OCIP and will be the sole recipient of any dividend(s) and/or return premium(s) generated by the OCIP. In consideration of the Department providing said coverage:

A. The enrolled Design-Builder agrees to irrevocably assign to the Department, all return premiums, premium refunds, premium discounts, dividends, retentions, credits, and any other monies due the Department in connection with the insurance which the Department herein agrees to provide, and to evidence same by a formal instrument of assignment, if requested, to be promptly executed in the form prepared by the Department.

B. Design-Builder shall require each eligible Subcontractor to execute similar assignments for the benefit of Department.

13. DESIGN-BUILDER/SUBCONTRACTOR-PROVIDED COVERAGE (EVEN IF OCIP PROVIDES COVERAGE)

The Design-Builder agrees, and shall require all Subcontractors to agree, to provide certain insurance coverages, even if the OCIP provides coverage.

A. For any Work under this Contract, and until Final Acceptance, the Design-Builder, at its own expense, must promptly furnish to the Department certificates of insurance giving evidence that the certain coverages identified below are in force. The Design-Builder is also responsible for ensuring Subcontractor compliance with this Section 13 and provision of appropriate certificates for Subcontractor policies.

B. The Design-Builder and all enrolled Subcontractors shall cause their Workers’ Compensation and Employer’s Liability policy to be endorsed with a Designated Workplace Exclusion Endorsement (see Exhibit A) and its Commercial General Liability Policies to be endorsed with an Exclusion-Designated Work Endorsement (see Exhibit B) to exclude operations on the Work Site from its coverage.
C. Prior to entry on Work Site, the Design-Builder agrees, and shall cause all Subcontractors to agree, to obtain the insurance set out below, at no expense to the Department, from a company or companies acceptable to the Department, as follows:

1. **Workers' Compensation Insurance:** Workers' compensation insurance covering full liability under the workers' compensation laws of the State, at the statutory limits;

2. **Employer's Liability Insurance:** Employer's liability insurance with the following minimum limits of liability:
   a. $100,000, each Accident;
   b. $500,000, Disease, policy limit; and
   c. $100,000, Disease, each Employee;

3. **Commercial General Liability Insurance:** Commercial general liability insurance, on an "occurrence basis", including insurance for operations, independent contractors, products and completed operations. Such insurance must be endorsed with a Broad Form Property Damage Endorsement (including Completed Operations) and afford coverage for explosion, collapse, and underground hazards. The insurance required by this subparagraph (C)(3) shall have limits not less than the following:
   a. $2,000,000, General Aggregate;
   b. $1,000,000, Products—Completed Operations Aggregate;
   c. $1,000,000, Personal and Advertising Injury;
   d. $1,000,000, each occurrence;
   e. $50,000, Fire Damage (any one fire); and
   f. $5,000, Medical Expense (any one person).

The certificate of insurance shall state that the policy required by this subparagraph (C)(3) has been endorsed to name the Department and the State as additional insureds. See item (B) above and 16 (Subcontractor Participation) for waiver of subrogation requirements;

4. **Automobile Liability (insurance coverage not provided in OCIP):** Automobile liability insurance for claims arising from the ownership, maintenance, or use of a motor vehicle in connection with the Work at, upon, or away from the Work Site. The following minimum limits of liability apply:
   a. $1,000,000, Combined Single Limit Bodily Injury and Property Damage, each occurrence.

The certificate of insurance shall state that the policy required by this subparagraph 13.C.4 has been endorsed to name the Department and the State as additional insureds;

5. **Aircraft Liability (insurance coverage not provided in OCIP):** For each entity using its own aircraft or employing aircraft in connection with the Work, aircraft liability insurance with a combined single limit of not less than $1,000,000 per occurrence.

The certificate of insurance shall state that the policy required by this
subparagraph 13.C.5 has been endorsed to name the Department and the State as additional insureds; and

6. Valuable Papers and Records and/or Electronic Data Processing (Data and Media) Coverage (insurance coverage not provided in OCIP): Coverage for the physical loss of or destruction of their work product, including drawings, specifications, and electronic data and media, as necessary.

D. The Design-Builders shall provide professional liability coverage with a minimum combined single limit of $10 million per claim and $10 million aggregate during the period starting on the date of NTP! and ending on the Final Acceptance of the Work. This policy may be provided by the Design-Builders or the Designers. The policy must have a retroactive date no later than the date on which the Request for Proposals (RFP) was issued and must have at a minimum 6 years extended reporting period with respect to events which occurred but were not reported during the term of the policy and be maintained for a period of not less than 6 years beyond the date of Final Acceptance. The policy must protect against any negligent act, error, or omission arising out of the professional services provided. The policy(ies) shall apply to the activities of all design, engineering, and construction management professionals assigned to the Project and professional services provided by or on behalf of the Design-Builders or the Designers. Any and all deductibles and self-insured retentions in the above described insurance policy(ies) shall be assumed by and be at the sole risk of the insured parties.

14. CERTIFICATES OF INSURANCE

Prior to entry on the Work Site, the Design-Builders agree, and shall cause all Subcontractors to agree, to provide to the Department a certificates of insurance setting out the coverages described in Section 13 (Design-Builders/Subcontractor-Provided Coverage) and the applicable policy limits, and shall also provide to the Department any amendments to the certificates necessitated by changes to the Work to be performed under the Contract, until the date of Final Acceptance.

A. Said certificate shall state that the policies required have been endorsed to provide that the insurers issuing said policies shall give the Department and the State not less than 30 Calendar Days prior written notice of cancellation, nonrenewal or material change in coverage thereunder.

B. All policies required shall be endorsed to include a waiver of subrogation in favor of the Department and the State of Utah.

C. All insurance required shall be maintained, without interruption, from the date of commencement of the Work throughout the warranty periods set forth in Part 9 (Warranty Provisions).

D. All insurance policies shall be excess of insurance provided under the OCIP and shall not contribute with such insurance.

E. The Department will forward such certificates to the OCIP Administrator at the following address:

Wells Fargo
Attn: OCIP Administrator
601 Union Street, Suite 1300
Seattle, WA 98101

F. The Design-Builders and Subcontractors shall provide copies of any policies and/or
endorsements that Department may request.

15. OTHER INSURANCE

A. Any type of insurance or any increase of limits of liability not described above which the Design-Builder or any Subcontractor requires for its own protection or on account of any statute shall be its own responsibility and at its own expense.

B. The OCIP is not an attempt to provide the Design-Builder and enrolled Subcontractors with complete insurance programs. The Department shall not be responsible for providing any insurance coverage not specified above. The Design-Builder and Subcontractors are responsible for making sure their insurance programs fit their particular needs, and for arranging for and securing any insurance coverage which they deem advisable, whether or not specified above.

C. Any fees, costs, or charges related to requirements of this Appendix B, e.g., additional insured endorsement and waiver of subrogation, are to be borne by the Design-Builder and the Subcontractors.

16. SUBCONTRACTOR PARTICIPATION

The Design-Builder shall cause Subcontractors to cooperate fully with the Department and its insurance companies with respect to the administration of the OCIP. The Design-Builder agrees, and shall cause all Subcontractors to agree, to cooperate in the safety and accident prevention program and claim handling procedures as established for the Project by Department. In accordance with this Section 16, the Design-Builder shall not permit any eligible Subcontractor of any tier to enter the Work Site prior to enrolling in the OCIP.

17. WAIVER OF SUBROGATION

The Design-Builder waives all rights of subrogation and recovery against the Department and the State, including its designees(s), construction managers, other general contractors, and all Subcontractors to the extent of any loss or damage that is insured under the OCIP. The Design-Builder waives its rights of subrogation and recovery for damage to any property or equipment against the Department and State of Utah, its designee(s), construction managers, other general contractors, and Subcontractors. The Design-Builder shall require all Subcontractors to similarly waive their rights of subrogation and recovery in each of their respective construction contracts with respect to their Work.

18. NO RELEASE

The carrying of the above-described insurance shall in no way be interpreted as relieving the Design-Builder of any other responsibility or liability under the Contract Documents or any applicable Law.

19. APPROVAL OF FORMS AND COMPANIES

All Design-Builder-provided insurance described in this Appendix B shall be written by an insurance company or companies satisfactory to the Department and licensed to do business in the State, and shall have a form and content that are satisfactory to the Department. Insurance must be placed with carriers having a Best’s Guide Rating of A-VII or better. No party subject to the provisions of this Contract shall violate, or knowingly permit to be violated, any of the provisions of the policies of insurance described herein.
20. OCIP MANUAL, CONSTRUCTION SAFETY AND HEALTH
MANUAL, AND CLAIMS PROCEDURES

The Design-Builder and eligible Subcontractors shall adhere to and perform all reporting and
administrative requirements as detailed in the UDOT OCIP Manual and UDOT Construction Safety and
Health Manual.

If any construction requires pile driving, the Design-Builder and eligible Subcontractors will perform
baseline seismic/vibration monitoring. They will also perform periodic monitoring as well as surveying
of surrounding buildings which could be affected.

The Design-Builder will mandate 100% fall protection for all trades at elevations of six feet and greater.
Failure to follow the procedures outlined in the OCIP Manual and OCIP Safety and Health Manual may
result in assessment of fines by the Utah Labor Commission or other Governmental Persons and/or a
judgments against Department, the Design-Builder and/or Subcontractor. The Design-Builder is
responsible for paying any fines or judgments arising out of failure to follow these procedures. In such
event, if the fine is not promptly paid and evidence of payment provided to the Department, the
Department may deduct the amount of any such fine from monies due or to become due under this
Contract. The foregoing remedy is in addition to and cumulative of any other remedies which may be
available to the Department.

The Department will establish an OCIP Management Team consisting of members from the Department
Project Team, Risk Management, the Design-Builder, the insurance providers, and the OCIP
Administrator. The team will partner and meet regularly to review general liability claims, workers’
compensation issues, safety matters, property damage matters, and customer concerns potentially
resulting in legal liability. Trends reported and concerns addressed will be shared by all members in order
to control and manage the OCIP.

The following is an overview of the required Design-Builder OCIP Safety and Health Program.

21. SAFETY PERSONNEL

The Design-Builder shall employ a full time, project dedicated safety professional. Its subcontractors
shall designate an on the job safety administrator that may include a supervisor / foreman with safety
knowledge. These will be the UDOT / OCIP team’s contacts for safety concerns.
OCIP SAFETY OVERVIEW

Following is a brief overview of the UDOT Construction Safety and Health Manual.

**Conflicts.** In the event of a conflict between the provisions of this overview, the OCIP Manual, applicable Laws concerning safety and health, the other Contract Documents, or the Design-Builder’s Safety Plan, the most stringent requirement shall apply.

**Responsibility.** The effectiveness of Design-Builder’s OCIP Safety and Health Program will depend upon the active participation and personal cooperation of all individuals working on the Project. Project cooperation and coordination of efforts toward carrying out the overall safety responsibilities are needed for an effective program. The Design-Builder shall be held responsible for its own and its Subcontractors’ compliance with the Project safety requirements.

**Administration.** The Design-Builder and its Subcontractors shall designate an on-the-job Safety Administrator who will be the Department's contact for safety concerns. This may be a supervisor or foreman with safety knowledge. The Design-Builder and its Subcontractors shall ensure that a qualified Competent Person, as defined in __________, is provided at Work locations where required by the U.S. Occupational Safety and Health Administration (OSHA). The Design-Builder and its Subcontractors shall ensure that all applicable forms (confined space permit, hot work permit, lockout/tagout, critical lift checklist, Job Safety Advisory (JSA), excavation permit, etc.) are provided at Work locations where required by OSHA. The Design-Builder and its Subcontractors shall establish and enforce effective disciplinary measures to enforce the OCIP Safety and Health Program.

**Training and Orientation.** All Design-Builder and Subcontractor supervisory personnel must attend supervisor safety training produced by the insurance carrier(s), an approximately three-hour course. All employees (of the Design-Builder, Subcontractors, engineers, etc.) working on the Project must attend a construction safety orientation produced by the insurance carrier(s) that includes a video presentation and a three-page written statement of Project rules and questions. This orientation must be completed before an individual may begin Work at the Work Site. The Design-Builder and its Subcontractors shall conduct (at a minimum, weekly) safety meetings with all employees. All employees (of the Design-Builder, Subcontractors, engineers, etc.) shall have the proper training for the job task they are performing, such as confined-space entry and work, fall protection, use of powder-actuated tools, traffic control, and equipment operation.

**Personal Protective Equipment.** All employees (of the Design-Builder, Subcontractors, engineers, etc.) working on the Project shall have the proper Personal Protective Equipment (PPE) for the job task they are performing. At a minimum, an individual’s PPE shall include a hard hat, safety glasses, safety vest, long pants, a shirt with minimal 4-inch sleeve, and work boots.

**Drug-Free Work Zone.** The Design-Builder and Subcontractor shall adhere to a 100% drug- and alcohol-free work zone. At a minimum, pre-employment and post-accident testing are required. The Design-Builder shall bear the cost and expenses of pre-employment testing. The insurance carrier(s) will bear the cost of the post-accident testing.
OCIP EXHIBIT A:
DESIGNATED WORKPLACES EXCLUSION ENDORSEMENT
Original Printing, Effective April 1, 1984; WC 00 03 02 Standard

The policy does not cover Work conducted at or from_____________________________________.

Source: Designated Workplaces Exclusion Endorsement, WC 00 03 02, National Council on Compensation Insurance, effective April 1, 1984.

This endorsement excludes from coverage injuries incurred at Workplaces described in the endorsement. It is often used when the insured is a Design-Builder who is Working on a large construction project subject to a wrap-up plan, a single consolidated insurance plan covering all parties to a construction contract. It may also be used when the employer has more than one Workers' Compensation policy to exclude Workplaces covered under the other policy; in such cases, the endorsement is filled out with a notation such as "any Workplace covered by policy #_____ issued by _____Insurance Company."
OCIP EXHIBIT B:
EXCLUSION–DESIGNATED OPERATIONS COVERED BY A
CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM

Commercial General Liability Cg 21 54 01 96

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description and Location of Operation(s):

(List the OCIP project you are working on.)

(If no entry appears above, information required to complete this endorsement will be shown in the
Declarations as applicable to this endorsement.)

The following exclusion is added to Appendix B, Section 1(D), Exclusions of COVERAGE A—BODILY
INJURY AND PROPERTY DAMAGE LIABILITY (Section I—Coverages):

This insurance does not apply to "bodily injury" or "property damage" arising out of
either your ongoing operations or operations included within the "products-completed
operations hazard" at the location described in the Schedule of this endorsement, as a
consolidated (wrap-up) insurance program has been provided by the Design-
Builder/Project Manager or owner of the construction project in which you are involved.

This exclusion applies whether or not the consolidated (wrap-up) insurance program:

(1) Provides coverage identical to that provided by this Coverage Part;

(2) Has limits adequate to cover all claims; or

(3) Remains in effect.
DEPARTMENT OCIP ENROLLMENT FORM

PROJECT INFORMATION:

Project Name
Awarding Contractor
Design-Builder
Type of Work To Be Done
Start Date
End Date

CONTRACTOR INFORMATION:

Your Company’s Name


Your Company’s Federal Employer Identification Number

Does your company fall under  MBE?   WBE?   DBE?

Your Address

Office Contacts
Tel. No.   Fax No.
E-Mail Address(es)

Site Contact
Tel. No.   Fax No.
E-Mail Address(es)

Safety Contact
Tel. No.   Fax No.
E-Mail Address(es)

Payroll Contact
Tel. No.   Fax No.
E-Mail Address(es)
CONTRACT INFORMATION:

Contract Value ($)  ________________  Dept. Project No.  ________________
Estimated Project Payroll  ____________  Job Class Codes  ________________
% Self Performed Work  ______  % Subcontracted Work  ______
Estimated Number of Subcontractors  ______

CURRENT INSURANCE INFORMATION:

*Design-Builder's Worker's Compensation and General Liability Insurance Broker or Agent:*

Company  _______________________________________________________
Address  _______________________________________________________
Contacts  Tel. No.  ________________  Fax No.  _________________________

*Certificate of Insurance, including wording as required by Contract, must accompany this form.*
*This form must be submitted to the Department.*
*This Enrollment Form must be received prior to starting Work on the Project.*
WISCONSIN

Complaint - Wisconsin v. CBS Squared, Inc.
STATE OF WISCONSIN
17 West Main Street
Madison, WI 53703,

Plaintiff,

v.

CBS Squared, Inc.
770 Technology Way
Chippewa Falls, WI 54729

Defendants.

Case No.

THE

AMOUNT CLAIMED IS
GREATER THAN THE AMOUNT
CLAIMED UNDER WIS. STAT.
§ 799.01(1)(d).

COMPLAINT

The State of Wisconsin ("the State"), on behalf of its Department of Transportation ("DOT"), by its attorneys, Attorney General Brad D. Schimel and Assistant Attorney General F. Mark Bromley, for its complaint alleges:

1. The State is one of the fifty sovereign states of the United States of America, with its seat of government located in Madison, Dane County, Wisconsin. The State brings this action on behalf of DOT.

2. Defendant is a Wisconsin corporation having its principal place of business at the captioned address.
3. Plaintiff contracted with the defendant for the engineering and construction of a well and pump-house as part of a DOT construction project on Highway 29 at 120th Avenue in Marathon County, Wisconsin.

4. Defendant agreed to construct the well and pump-house on DOT-owned land at the site.

5. Defendant breached the contract by siting the well and pump-house on adjacent land that DOT did not own.

6. As a consequence of the defendant’s breach, DOT was compelled to delay a portion of its construction project, and to have its contractors leave and return to the site to complete the construction project.

7. As detailed on Exhibit A, attached, the cost attributable to delay and remobilization was $42,538.32.

8. As a consequence of defendant’s breach, DOT incurred additional costs itemized as follows:

<table>
<thead>
<tr>
<th>PAID TO</th>
<th>SERVICE PROVIDED</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>CBS Squared/sub consultant</td>
<td>Vogel water hook-up</td>
<td>$12,536.00</td>
</tr>
<tr>
<td>CBS Squared/sub consultant</td>
<td>Final topsoil/grading/fill</td>
<td>$ 5,726.00</td>
</tr>
<tr>
<td>Single Source</td>
<td>Appraisal for WisDOT</td>
<td>$ 3,396.05</td>
</tr>
<tr>
<td>Eugene Vogel (Scott Williams)</td>
<td>Owner’s appraisal</td>
<td>$ 2,200.00</td>
</tr>
<tr>
<td>Eugene Vogel</td>
<td>Acquisition for parcel 123</td>
<td>$ 4,200.00</td>
</tr>
</tbody>
</table>

**TOTAL** $28,058.05

9. As a further consequence of defendant’s breach, DOT incurred incidental internal costs of $38,390.25.

Wherefore, the State demands judgment against the defendant in the amount of its contractual damages, which are not less than $108,986.62, plus its costs and disbursements herein.
Dated this _____ day of May, 2015

BRAD D. SCHIMEL
Attorney General

F. MARK BROMLEY
Assistant Attorney General
State Bar #1018353
Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6201
(608) 267-8906 (Fax)
bromleyfm@doj.state.wi.us
# Wisconsin DOT - Insurance Table

<table>
<thead>
<tr>
<th>Type of Insurance</th>
<th>Minimum Limits required *</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Commercial General Liability Insurance; shall be endorsed to include completed operations and blanket contractual liability</td>
<td>$1 Million Combined Single Limits per Occurrence, may be subject to an Annual Aggregate Limit of not less than</td>
</tr>
<tr>
<td>(b) Worker’s Compensation and Employer’s Liability Insurance</td>
<td>Worker’s Compensation: Statutory Limits Employer’s Liability: Bodily Injury by Accident - $100,000 Each Accident Bodily Injury by Disease $500,000 Each Accident $400,000 Each Employee</td>
</tr>
<tr>
<td>(c) Commercial Automobile Liability Insurance; shall cover all CONSULTANT owned, non-owned and hired vehicles used in carrying out the contract.</td>
<td>$1 Million - Combined Single Limits per occurrence</td>
</tr>
<tr>
<td>(d) Architect [sic] and Engineer [sic] Professional Liability Insurance **</td>
<td>$1 Million - Each Claim, may be subject to an Annual Aggregate Limit of $1</td>
</tr>
</tbody>
</table>

* These requirements may be satisfied either through primary insurance coverage or through excess/umbrella insurance policies.

**This insurance requirement applies only to engineering services and is waived for non-engineering services. Engineering services are defined as project management, construction management and inspection, feasibility studies, preliminary engineering, design engineering, surveying and mapping and architectural related services.
Power Point – Is Governmental Immunity Still Available for Wisconsin Contractors?
Assistant General Counsel
Cameron E. Smith

Assistant General Counsel
Carrie L. Cox

Presented by:

Wisconsin Department of Transportation

Wisconsin Contractors: Is Governmental Immunity Still Available for
Disclaimer

Transportation. This discussion consists solely of the presenters' own understanding of the material presented and does not represent the policies or positions of the Department of Transportation.
Relationship with Sovereign Doctrine

Immunity considerations in government contracts

Practice considerations

2 lower court cases after Showers

Showers Appraisals, LLC

Estate of Lyons

Key recent cases in Governmental Agency Immunity Law

Overview Immunity Law in Wisconsin

Overview Overview
Public Officer Immunity

Governmental Immunity

Sovereign Immunity

Overview of the Immunity Defense
municipal corporations. See Sullivan.

- But not to agencies with independent proprietary powers, such as
- State and its "arms and agencies" Lister.

Applies to

- the state. Lister.

"Procedural" - denies a court personal jurisdiction over

may be brought against the state.

"The legislature shall direct by law in what manner and in what courts suits

Rooted in Wis. Const. art. 1, § 27:

Sovereign Immunity

Immunity Overiew:
Roots in common law

Governmental Immunity

Immunity Overview:

- And common law adopted by Wis. Const. art. XIV, § 13:

  "Substantive" – provides a defense of non-liability

  "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

- Liability is the rule, immunity is the exception (Holitz)

  But commenters argue exceptions from cases swallow after Holitz the rule... (Bollard, Comment (2014 Wis. L. R. 801))
Governmental Immunity: Overview

- Substantive Governmental Immunity to avoid liability
  - Municipality does not have sovereign immunity, so must establish sovereign immunity as a procedural defense
  - Where state has no governmental immunity, it may still have municipal governmental immunity

Differences between state governmental immunity and
No immunity for conduct that is malicious, willful, and intentional.


Most Common Exceptions:

Kimp’s 200 Wis. 2d at 10. Acts performed within the scope of their official duties. Immune from personal liability for injuries resulting from General Rule: public officers, agents and employees are

Public Officer/Discretionary Immunity

Immunity Overview:
Immunity Overview:

Public Officer/Discretionary Immunity

- Conceptually linked to governmental immunity, but distinct from governmental immunity because of who is eligible (officers, agents, employees) and for what (avoid personal liability).
Public Officer (or "Discretionary") Immunity

Governmental Immunity

Sovereign Immunity

When is a contractor eligible for immunity?
Discretionary Immunity

Conceptual and statutory overlap with governmental immunity, which has
Contractors may only qualify for

Public Officer (or "Discretionary") Immunity

Governmental Immunity

Sovereign Immunity

When is a contractor eligible for immunity?

Immunity Overview:
Governmental Immunity: A Brief History...
better public policy

invited legislature to reinstate immunity if thought immunity was

to be the rule for "all public bodies"

Court expanded its ruling (sometimes called "dicta")—that liability is

case deal with liability of a city for a tort

immunity

Holitz (1962) — abrogated common law governmental

Governmental Immunity: A Brief History...
quasi-judicial, quasi-legislative, or quasi-judicial functions.

or employees for acts done in the exercise of legislative,
volunteer fire company or against its officers, officials, officers,
brought against such corporation, subdivision or agency or
officials, agents, or employees not may any suit be
orgанизed under ch. 213, political corporation, governmental
subdivision or any agency therefor for the intentional torts of its
No suit may be brought against any volunteer fire company

Wis. Stat. § 893.80(4)

- Originally Wis. Stat. § 331.43 (L. 1963, c. 198)
becomes Wis. Stat. § 893.80

In light of Holtyz, Legislature passes what eventually

Governmental Immunity: A brief history...
Did statute provide a new canvas to work on?

- Professors concurrence in HumanSky
- Cases post-Holitz

See Bollard, Comment, 2014 Wis. L. Rev. 801. For summary of WSC Holitz’s no-Governmental-Immuniny rule.

Wisconsin Supreme Court seems to have abandoned immunity

Many cases interpreting different facets of governmental immunity

Governmental immunity: A brief history...
Wis. Stat. § 893.80(4)

Wisconsin Legislative, Judicial or Quasi-Judicial Functions.

or employees for acts done in the exercise of legislative,
volunteer fire company or against its officers, officials, agents
brought against such corporation, subdivision or agency or
officers, officials, agents or employees nor may any suit be
subdivision or any agency thereof for the intentional torts of its
organized under ch. 213, political corporation, governmental
No suit may be brought against any volunteer fire company

Wis. Stat. § 893.80(4) (provides immunity for "agents"

Contractor immunity arises under common law and Wis.

Agent Immunity - § 893.80(4)
Agent Immunity Key Cases

- Showers Appraisal, LLC (2014)
- Estate of Lyons (CT App. 1997)
Agent Immunity Key Cases

Estate of Lyons

Facts

- Driver killed when second driver failed to stop at intersection
- Claim - bridge design was deficient to ensure stop would be made

Analysis

- Bridge design had changed over time
- Rational for extending to contractor
- Common law protections do apply to state
- Statute on its face does not apply to state
Following governmental directives – but that contractors are not unfairly burdened by lawsuits when
professional design assistance

Ensures Government and public is able to make use of

Government – Contractor warned of possible danger known to them but not to
Contractor informed to those specifications

Contractor provided reasonably precise specifications

Three part test

Estate of Lyons
Agent Immunity Key Cases
excavation caused damage

Claim — improper drainage, design, maintenance,

- Heavy rain ensued and flooding to showers property occurred
- Decision on how to proceed with work was contractor's
- Showers drainage connected to city system
- Work via contract
- Contractor was responsible for damages to property resulting from
  WSDOT oversaw bidding and was onsite during construction
- WSDOT street improvement included city sewer work

Facts

Showers Appraisal LLC
Agent Immunity Key Cases:
provided extended beyond that which Government itself would be New requirement ensures Governmental Immunity is not met

- Both Lyons three part test and decision afforded immunity must be contracted Immunity
- Only decisions which would accord Government Immunity can accord
- Supreme Court review of appeals decision Granting Immunity

Analysis

Showers Appraisal, LLC
Agent Immunity Key Cases:
Disposition: Remanded; Issue of fact remained as to Manning’s standing

- Contract construction
- Flood damage and, reasonably precise specification is a matter of legal
  Insufficient record support for distinct acts that may have led to
  Showers prevents immunity under means and methods

Analysis

- Means and methods: "Do not submit detailed plans."

- Sewer
  Spec: Contractor must provide continuous control of the existing
  Torrrential rain, appx. 4' of sewer water in Manning’s basement
  Village sanitary sewer improvement project

- Facts

2014 WI App 110 (unpub., not p.c.)

Manning v. Viton Const. Co. Cases after Showers
Analysis - Application of Showers

- Sewer lateral was severed during installation, causing flooding
- Sp ecs called for size of the base, exact location, and "excavated by use of circular auger"
- Base for traffic light
- WISDOT contract for signal work, including the installation of concrete

Facts

Melcher v. Pro Elec. Contractors

Cases after Showers

2015 WI App 37 (unpub., not p.c.)

Type of decision? Yes - Project design (where light base should go)

Elig. knew of any danger. Lyons: Reasonably precise specifications, and no allegation that Pro

- Plaintiff alleged negligent construction, but not supported by record
Relationship with Sparring Doctrine

Immunity in government contracts (WisDOT specifically)

Other thoughts and considerations
Injury

There could be an aspect of a project that would give rise to § 893.80(4) immunity, but it is fact intensive for each.

- Public officer employee immunity declaration (§ 107.15)
- Contractor negligence/torts (inter alia) Std. Spec. § 107.12
  - But also look to specific item for more precise specs (Melcher)
  - "Means and methods" Std. Spec. § 105.5.1(4)
- Showers

Imunity in Government Contracts
only way to provide some avenue of relief for potential injured

Hopefully ignorance ("do not provide specific plans") is not the

- Immunizing the potential risks of the work
- Developing means & methods
do not provide specific plans

- Realize project cost reduction by allowing contractor ingenuity to
  - Controlling work

- For Governments: Must balance:

  means and methods

  contractor to price items to include the risk of its own

  For contractors: WISDOT standard specs ask contractors the

  immunity in government contracts
Procedural Considerations

- Off-decision pleadings within Showers framework (Lyons test and type)
  
- Showers: Independent contractor must make specific by omission (Anderson v. City of Milwaukee)

§ 893.80(4) is an affirmative defense and may be waived
Immunity under § 898.80(4).

contractors to avoid liability, instead of or in addition to contractor
If owner is responsible, Spearin may provide another route for

Then owner should be responsible if work or design causes injury.

• Specific design criteria (Spearin)
• Precise work specifications (contractor immunity)

Taken together, courts seem to say if state owner has control over

Relationship to Contractor Immunity

provided to the contractor. (Zimolong 2012)
results solely from defects in the plan, design, or specifications
A contractor will not be liable to an owner for loss or damage that

Spearin Doctrine

Relationship to Spearin Doctrine
Questions?
Judicial functions.

(4) A suit may be brought against any volunteer fire company or corporation, subdivision or agency, or any volunteer for acts against such corporation, subdivision or agency, or any suit brought against such corporation, subdivision or agency, or any suit brought against any employee of the corporation, subdivision or agency.
omissions regarding public nuisance

State Agency and Agent Immunity for Certain Acts or
acts or fails to act to provide a notice to a property owner that a public
official, agent or employee of any of those entities who, in good faith,
governmental subdivision or agency thereof or against any officer,
§ 893.80 (7) No suit may be brought against the state or any
* * * * *

(1) Purpose. The claims board shall receive, investigate, and make recommendations on all claims of $10 or more presented against the state. No claim or bill relating to such a claim shall be considered by the legislature until a recommendation thereon has been made by the claims board.

16.007 Claims Board — Wis. Stat. § 16.007
Citations - Cases


Umansky v. ABC Ins. Co., 2009 WI 82, 319 Wis. 2d 622, 769 N.W.2d 1, 797 N.W.2d 214 (2013).

Sullivan v. Bd. of Regents, 209 Wis. 2d 242, 244 N.W. 2d 226 (1979).


Lister v. Bd. of Regents, 72 Wis. 2d 282, 240 N.W. 2d 610 (1976).

Lif浅 v. Raymond, 80 Wis. 2d 503, 259 N.W. 2d 537 (1977).

Kimes v. Hill, 200 Wis. 2d 1, 546 N.W.2d 151 (1996).


Holitz v. City of Milwaukee, 17 Wis. 2d 26, 273 N.W.2d 618 (1979).


Anderson v. City of Milwaukee, 208 Wis. 2d 18, 569 N.W.2d 563 (1997).

available at


Workmanshship Claims, ABA Construction Litigation Section (Apr. 11, 2012)


Nicholas J. Bollard, Comment, Pushing the Reset Button on Wisconsin’s Without Consent — Scope and Implications, 1971 WIS. L. REV. 879.


Gabe Johnson-Karp, Returning to First Principles? Governmental Immunity in

Citations - Commentary