



West Virginia Department of Transportation Policy: **Errors and Omissions**

Issued by the Secretary of Transportation

Policy No: DOT.05.08

Issue Date: 02/04/2026

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1.0 PURPOSE

The purpose of this policy is to establish procedures for pursuing reimbursement from design/construction engineering consultants caused by design or construction errors or omissions.

2.0 SCOPE

In accordance with West Virginia Code of State Rules Title 157, Series 1, Sections 7.15, 7.16, and 7.17, the "*Commissioner of Highways will establish guidance for the creation and composition of the Error and Omissions Committee*". Additionally, for projects with federal funding, 23 CFR 172.5(c)(16) states the contracting agency shall have written procedures for "*Determining the extent to which the consultant, which is responsible for the professional quality, technical accuracy, coordination of services, may be reasonably liable for costs resulting from errors and omissions in the work furnished under its contract*". The guidance provided in this document has been developed to comply with these requirements.

3.0 DEFINITIONS

- 3.1 **Consultant:** Professional services of an architectural or engineering nature as well as incidental services that members of those in their employ may logically or justifiably perform. A professional qualified and registered to engage in the practice of architecture or engineering under West Virginia Code §§ 30-12 and 30-13, respectively.
- 3.2 **Contractor:** Any person meeting the definition of "Contractor" under West Virginia State Code § 30-42-3.
- 3.3 **Standard of Care:** The degree of care, knowledge, and skill, ordinarily exercised by reputable professionals in the same field providing similar services in similarly situated circumstances.
- 3.4 **Professional Negligence:** Conduct that falls below the standard of behavior established by law for the protection of others against unreasonable risk or harm, or failure to act in a manner consistent with the Standard of Care.
- 3.5 **Error:** Plan or specification details or contract administration actions that are incorrect, conflicting, or ambiguous (items are shown incorrectly) in deviation from the Standard of Care. Damages due to comparative negligence may reduce damages by a party's percentage of fault in the error enabling a partial recovery even if one party is only partially responsible, and principles of comparative negligence shall apply so long as the total amount of damages payable to the WVDOH is not reduced below a total of 100%. Notwithstanding the foregoing, the 100% damage total may be reduced to the extent that the WVDOH is proved to be comparatively negligent.

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- 3.6 **Omission:** 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) in deviation from the Standard of Care. Damages due to comparative negligence may reduce damages by a party's percentage of fault in the omission enabling a partial recovery even if one party is only partially responsible, and principles of comparative negligence shall apply so long as the total amount of damages payable to the WVDOH is not reduced below a total of 100%. Notwithstanding the foregoing, the 100% damage total may be reduced to the extent that the WVDOH is proved to be comparatively negligent.
- 3.7 **Recoverable Costs:** The amount that would not have been incurred had the plans been correct, and consistent with the Standard of Care. 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 had the Error or Omission not occurred, are not included in the restitution sought from the Consultant. The costs to be recovered should be based on actual cost to the WVDOH.

4.0 RESPONSIBILITIES

4.1 CONSULTANT ERRORS AND OMISSIONS:

The Errors and Omissions Committee "Committee" shall consist of the following members or designee:

- Special Programs Engineer (Chairperson)
- Deputy State Highway Engineer – Development
- Deputy State Highway Engineer – Construction
- State Bridge Engineer (who may elect not to participate if a structure is not involved)
- Director - Legal Division
- Director – Engineering Division
- Director – Contract Administration Division
- Other advisory, non-voting member(s) as assigned by the State Highway Engineer

5.0 DISCOVERY OF DESIGN ERRORS OR OMISSIONS

5.1 Prior to Advertisement or After Advertisement Prior to Bid

If an Error or Omission of comparative negligence of the Consultant is found prior to advertising or after advertising but prior to bidding on a contract, the matter will be brought to the attention of the Director of the Engineering Division to determine if further investigation is warranted. If further investigation is warranted, the Director of Engineering Division shall notify Consultant that the WVDOH has identified a potential Error and Omission. The workflow is as follows:

- A. The Consultant shall be notified and allowed to make corrections within a given timeframe dependent upon project and established by the Director of Engineering Division.

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- B. The corrections shall be made at no cost to WVDOH, subject to Article 6.0 of this Policy.
- C. If additional costs are incurred by WVDOH, the Director of Engineering Division shall confer with the Deputy State Highway Engineer-Development to determine if they are recommended to be Recoverable Costs.

5.2 After Bid, Prior to Contract Award

If an Error or Omission, of comparative negligence of the Consultant, is found after the bid opening, but prior to contract award, the Director of Contract Administration or designee shall notify the Director of Engineering Division, and they shall confer to determine if the issue warrants further investigation. If further investigation is warranted, the Director of Engineering shall notify the Consultant that WVDOH has identified a potential Error or Omission. The workflow shall be as follows:

- A. The Director of Engineering shall coordinate with the WVDOH Project Manager on the project in question to verify that all design decisions, revisions, and recommendations have been properly reviewed, approved, and documented. This coordination shall ensure that no design actions, omissions, or interpretations could reasonably be construed as design Errors or Omissions.
- B. The Consultant will be notified and allowed to make corrections to the plans at no cost to the WVDOH, subject to Article 6.0 of this Policy, within a reasonable timeframe dependent upon project deadlines, consistent with the orderly progress of services and the Standard of Care, and established by the Director.
- C. The Contractor, who is the lowest responsible bidder, will be allowed to review the modifications to determine if the plan modifications materially affect their bid on the project or to determine if the plan modifications increase the cost, time, or both cost and time to complete the project.
- D. After consultation with the low bidder, the project may or may not be awarded depending on the discussions.
- E. If additional costs are incurred by WVDOH, the Director of Engineering Division and the Director of Contract Administration shall confer with the Deputy State Highway Engineers for Construction and Development to determine if they are recommended to be Recoverable Costs.

5.3 After Construction Contract is Awarded

If an Error or Omission, of comparative negligence of the Consultant, is found after the contract is awarded, the District Director of Engineering or Construction Engineer shall notify the Director of Contract Administration or their representative. The Director of Contract Administration shall then confer with the Director of Engineering Division, and they shall determine if the issue warrants further investigation. If further investigation is warranted, the Director of Engineering shall notify the Consultant that WVDOH has identified a potential Error or Omission. The workflow shall be as follows:

- A. The Director of Engineering shall coordinate with the WVDOH Project Manager on the project in question to verify that all design decisions, revisions, and recommendations have been properly reviewed, approved, and documented. This coordination shall ensure that no design actions,

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omissions, or interpretations could reasonably be construed as design Errors or Omissions.

- B. The Consultant will be notified and allowed to make corrections to the plans at no cost to the WVDOH, subject to Article 6.0 of this Policy, within a given timeframe dependent upon project deadlines, consistent with the orderly progress of services and the Standard of Care and established by the Director.
- C. The Contractor shall review the modifications to determine if the plan modifications will increase the cost, time, or both cost and time to complete the project.
- D. If additional costs are incurred by WVDOH, the Director of Engineering Division and the Director of Contract Administration shall confer with the Deputy State Highway Engineers for Construction and Development to determine if those costs are recommended to be Recoverable Costs.

5.4 After Construction Contract is Awarded (Construction Engineering)

If an Error or Omission is found by a Consultant Construction Engineer (CEI), the District Director of Engineering or Construction Engineer shall notify the Director of Contract Administration or their representative. The Director of Contract Administration shall confer with the Deputy State Highway Engineer – Construction to determine if the issue warrants further investigation. If further investigation is warranted, the Director of Contract Administration shall notify the Consultant that WVDOH has identified a potential Error or Omission. The workflow shall be as follows:

- A. The Consultant will be notified and allowed to make corrections at no cost to the WVDOH, subject to Article 6.0 of this Policy, within a given timeframe dependent upon project deadlines, consistent with the orderly progress of services and the Standard of Care and established by the Director.
- B. If additional costs are incurred by WVDOH for review, construction corrections or delay, the Director of Contract Administration shall confer with the Deputy State Highway Engineer-Construction to determine if those costs are recommended to be Recoverable Costs.

6.0 RESOLUTION

If the alleged Error or Omission results in Recoverable Costs, the District Director of Engineering or Construction Engineer will transmit a copy of the change order to the Director of Contract Administration with notification of the Error or Omission. The workflow is as follows:

- 6.1 Any necessary Change Order shall be processed under normal procedures, regardless of the status of any claim against the Consultant.
- 6.2 For Errors or Omissions by the design Consultant, the Director of Engineering shall prepare a letter to the Consultant for signature by the Deputy State Highway Engineer – Development. This letter will detail the alleged Error or Omission and associated costs. The Consultant will have thirty (30) days from receipt of the letter to respond.
 - A. **Concurrence** – If the Consultant accepts responsibility, the Director of Engineering Division will request the appropriate method of payment with the Finance Division.

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- B. **Non-Concurrence** – If the Consultant disputes or denies responsibility for the alleged Error or Omission, the Engineering Division will re-evaluate the Consultant's liability, considering the response received. Consultant shall not be responsible for any payment for any alleged Error or Omission that Consultant disputes or for which Consultant denies responsibility.
- 6.3 For Errors or Omissions by the Consultant Construction Engineer, the Director of Contract Administration will prepare a letter to the Consultant for signature by the Deputy State Highway Engineer – Construction. This letter will detail the alleged Error or Omission and associated costs. The Consultant shall have thirty (30) days to respond after receiving the letter.
 - A. **Concurrence** – If the Consultant accepts responsibility, the Director of Contract Administration will request the appropriate method of payment with the Finance Division.
 - B. **Non-Concurrence** – If the Consultant disputes or denies responsibility for the alleged Error or Omission, the Contract Administration Division will re-evaluate the consultant's liability considering the response received. Consultant shall not be responsible for any payment for any alleged Error or Omission that Consultant disputes or for which Consultant denies responsibility.
- 6.4 After receiving a response from the Consultant, the appropriate Director shall make a recommendation to the appropriate Deputy State Highway Engineer on the validity of the response received, using the following procedures:
 - A. If the Consultant response is accepted, payment, if any, will be requested.
 - B. If the Consultant response is not accepted, the Consultant will be notified in writing. The appropriate Division Director will prepare the notification letter for signature by the appropriate Deputy State Highway Engineer
 - C. The Consultant shall have thirty (30) days to respond upon receipt of the letter.
 - D. The consultant's failure to respond within the allotted timeframe will result in a claim for payment being issued.
- 6.5 The Consultant's response may include an admission of liability, a denial, or a request that the matter be forwarded to the Consultant Errors and Omissions Committee.
- 6.6 If the consultant requests that the matter be forwarded to the Committee, the workflow is as follows:
 - A. The Special Programs Engineer will convene a meeting of the Committee. Both the Consultant and the WVDOH will be permitted to present their respective positions and information related to the matter.
 - B. After hearing all the relevant information, the Committee will meet privately to vote to determine whether some or all the recommended Recoverable Costs will be sought from the Consultant. At least five (5) Committee members will constitute a quorum to conduct a meeting and simple majority is needed to pass a recommendation. The Committee will then issue a written summary of the findings to Consultant, WVDOH, and all other concerned parties. The opinion of the Committee will not be legally binding.
 - C. If the Consultant confirms in writing that it agrees with the opinion reached by the Committee, either the State Highway Engineer or the appropriate

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- Deputy State Highway Engineer will proceed in collecting the funds from the Consultant or consider the matter closed if no funds are due.
- D. If the Consultant confirms in writing that it does not agree with the opinion of the Committee, the appropriate Deputy State Highway Engineer will prepare a notice of claim against the Consultant. The notice requires concurrence by the State Highway Engineer. The Legal Division Director shall be consulted as necessary concerning the content of the notice of claim prior to concurrence by the State Highway Engineer. The notice will include a request that the Consultant reimburse the WVDOH within thirty (30) days.
 - E. If the Consultant fails to respond or refuses to comply with the notice of claim, the appropriate Division Director will coordinate the issuance of a final decision by the appropriate Deputy State Highway Engineer. The final decision will identify methods by which the WVDOH will seek the Recoverable Costs from the Consultant including, if necessary, legal action. However, it is acknowledged that the final decision is not legally binding on Consultant and does not mean, and shall not be construed to mean, that Consultant is liable or responsible for any of the Recoverable Costs.
 - F. Consultant and WVDOH reserve all rights and remedies, at law or in equity, during the process set forth in Articles 5.0 and 6.0 of this Policy.

7.0 DIVISIONS WITHIN THE DEPARTMENT OF TRANSPORTATION

This policy applies only to Consultant procurements managed by the West Virginia Division of Highways of the West Virginia Department of Transportation.

8.0 COMPLIANCE

The policy complies with all applicable federal and West Virginia state laws, as well as relevant codes.

9.0 RELEVANT MATERIALS/DOCUMENTS

- W.Va. Code [§17-2A-8](#). Powers, duties, and responsibilities of commissioner (State Regulations regarding errors and omissions).
- Federal Highway Administration [§172.5 Program management and oversight](#). (regulations regarding errors and omissions)
- The [West Virginia Division of Highways Consultant Services Manual](#)

10. CHANGE LOG

February 4, 2026 –

- New policy issued.

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Approved by:

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Stephen T. Rumbaugh, P.E.
Secretary of Transportation/
Commissioner of Highways
2/20/2026

Date

*The Secretary of the West Virginia Department of Transportation or the Commissioner of Highways may, pursuant to the authority vested with the Secretary and Commissioner in W. Va. Code §5F-2-2, §17-2A-1 *et seq.*, and §17-2-1 *et seq.*, waive the requirements of this policy if the circumstances, in the Secretary or Commissioner's sole discretion, warrant such action.