



# ***Errors and Omissions***

***Sid Kamath. P.E.***

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# *Situation*

EOR fails to identify the power source and connection details for a new signal. Contractor requests instruction on where to locate the power source for the signal. CEI documents that contractor is delayed 18 days while waiting on direction from the EOR. Contractor files a claim for delay damages and is paid.

# Objectives

- Understand why FDOT pursues recovery of Errors and Omissions (E&O)
- Understand importance of communication in resolving E&O
- Understand the process for resolving and recovering E&O cost
- Understand how EOR responsibility is determined

# Statistics

## Errors and Omissions History

- ❑ Issues Resolutions: tracked since 2003
- ❑ Number of Issues: over 1900
- ❑ Majority: Design
- ❑ Minimum recovery: \$12.38
- ❑ Maximum recovery pursued: \$2.49M
- ❑ Average Recovery: **\$13,000 (estimate)**

# Glossary

- CO Change Order
- E&O Error and Omission
- EOR Engineer of Record
- CPM Construction Project Manager
- CCEI Consultant CEI
- CEI Construction Engineering and Inspection
- DPM Design Project Manager

# *Authority*

*Florida Statute, Section 337.015 (3):*

*To protect the public interest, the department shall vigorously pursue claims against contractors and consultants for time overruns and substandard work products.*

# E&O Procedure

- Identify, Investigate, and Document E&O
- Assess EOR Responsibility
  - ✓ Consultant Design Engineer
  - ✓ Consultant Construction Engineering and Inspection Engineer
- Pursue Recovery for Damages

Topic No.: **375-020-010** Errors, Omissions, and Contractual Breaches by Professional Engineers on Department Contracts

# Definitions

## Error and Omission:

- Acts of negligence committed by EOR in performance of engineering design service or creative work
- Acts of negligence committed by EOR in performance of construction engineering and inspection services

Breach: Failure to fulfill contractual requirement

# Definitions

## Engineer of Record (EOR):

“A Florida professional engineer who is in responsible charge for the preparation, signing, dating, sealing and issuing of any engineering document(s) for any engineering service or creative work.” For this procedure only, the EOR is a professional consulting engineer retained by the Department to provide said services.

# Definitions

## Negligence:

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

# *Definitions*

## **Premium Cost:**

Additional cost of a contract change that would not have been incurred if the work had been included in the original [construction] contract.

# Process



- Discovery
- Resolution
- Recovery
- Tracking / Reporting

# *Statutes of Limitation*

**Florida Statute 95.11** has two subsections regarding statute of limitation periods of two (2) years (**FS 95.11(4)(a)**), and four (4) years (**FS 95.11 (3)(a)(c)**), which may be applicable to claims for premium costs against a designer for professional malpractice, negligence, or breach of contract. Each section provides that the statute of limitations period “shall run from the time the cause of action/defect is discovered or should have been discovered with the exercise of due diligence”.

# *Statutes of Limitation*

Due to a relatively short statute of limitations period from “when a cause of action/defect” should have been discovered it is imperative that the Chief of Litigation, Office of General Counsel (OGC), be consulted as soon as possible to provide an analysis/opinion of the applicable limitation period and when a lawsuit must be filed to comply with the statute in order to preserve claims for premium costs.

# *Communication*

- Person-to-Person
- Telephone
- Written / E-mail
- Team Meetings

# Design E&O

## □ Focus on the Fix

- ✓ Minimize interruptions to construction contract.
- ✓ Involve legal to establish E&O.

## □ Establish partnership

- ✓ Construction (CEI/CPM)
- ✓ Design Project Manager (DPM)
- ✓ EOR

# *Design E&O*

DPM is responsible for resolution.

## Discovery

- CEI/CPM: Promptly notify DPM.
- DPM: Promptly notify EOR.
  - ✓ Telephone call; Written confirmation (e-mail)
  - ✓ Issue Early Notification Letter.
  - ✓ Initiate Post-Design Services.
- Evaluate issue.

# *Design E&O*

## Coordination and Communication

- CEI prepares CO with input from DPM & EOR.
- DPM reviews CEI assessment of responsibility and premium costs and investigates EOR liability based on scope of work, standards, and Department instructions.
- DPM seeks advice from General Counsel regarding determination of EOR negligence and likelihood of recovery.
- Construction and Design personnel agree on assessment of EOR liability for premium costs.

# *Design E&O*

## Construction Engineer Actions

- Initial Assessment
- Preparing Engineer's Estimate
- Assessing Schedule Impacts and Cost
- Entitlement Analysis
- Premium Cost Analysis
- Preparing Contract Modification

# *Premium Cost*

Assessed during Construction Contract Modification

Additional cost of a contract change that would not have been incurred if the work had been included in the original [construction] contract.

More specifically, premium costs are dollar amounts paid for non-value added work. Delays, inefficiencies, rework, or extra work, will be considered non-value added work.

# *Design E&O*

## Construction Contract Modification

- DPM & EOR Participation:
  - ✓ Solve Problem / Fix Plans
  - ✓ Assess Responsibility
  - ✓ Review Cost & Time Calculations
  - ✓ Agree on Contract Change
- E & O Notification Letter

# CCEI E&O

## CPM is responsible for resolution.

- Focus on the Fix
- CPM issues Notification Letters to EOR
- CPM & EOR Participation:
  - ✓ Solve Problem
  - ✓ Assess Responsibility
  - ✓ Review Cost & Time Calculations
  - ✓ Agree on Resolution

# Recovery

- Premium Cost - No Threshold
- Professional Judgment
  - ✓ Negligence
  - ✓ Business Decision
  - ✓ Likelihood of Recovery
- Escalation
  - ✓ **Project Level - Desirable**
  - ✓ Litigation – Last resort



# *Collecting and Reporting*

- Recovered funds - returned to Districts
- “In Kind” Services
- District Liaisons
- Tracking System

# *Summary*

- E&O Resolution - statutory requirement
- E&O Costs - Resolution and Recovery
- Communication - Importance in process
- E&O Resolution – Tracking and Documentation

# Questions



# THANK YOU!

Sid Kamath

Ph. (850) 414-4343

[Siddhartha.Kamath@dot.state.fl.us](mailto:Siddhartha.Kamath@dot.state.fl.us)