

Cost Recovery Policy Issues for Departments of Transportation

Introduction

The transportation consulting engineering community recognizes the obligations of state departments of transportation and the FHWA to be good stewards of public funds, and thus the need for a process to recover non-value-added costs resulting from the negligent performance of professional design engineering services. We believe that any such process should be fair and equitable and, to the extent possible, be consistent from state-to-state. The process should strive to embrace the principles of a sincere partnering relationship. In addition, it is our desire to effectively utilize the time and resources of both the state departments of transportation and the design engineering community as each state develops its policy and process.

To facilitate the achievement of those goals, we have prepared the attached list of elements that we believe should be considered in the formation of a fair cost recovery policy.

Version 1.3

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	Issue	Reason / Talking Points
1.	Purpose/Scope/Foundation Principles	It is important to state the purpose and scope of the policy. It is also important to mention some foundation principles embodied by the policy including: a “teamwork” approach in analyzing and correcting errors and omissions efficiently; the recognition that all design and construction projects contain some errors and omissions; the design engineer should be expected to perform to the standard of care applicable to the services provided; and that the cost recovery policy applies to errors and omissions that breach the standard of care, i.e., negligence.
2.	Definitions	It is important to define various terms used in the policy.
When a problem is detected:		
3.	Immediate notification to design engineer of problems.	This is important to ensure that the design intent is properly interpreted and that recommended changes are consistent with the design approach. The design engineer should provide timely input to find the most effective and efficient solutions.
4.	Provide opportunity for the design engineer to participate in the solution	All members of the project team bring different skills and experience to the project. It is essential for the design engineer to work with the owner and the construction contractor to resolve project issues and mitigate the damages.
Process of evaluation and assessment:		
5.	Recognize betterment	”Betterment” refers to the principle that the design engineer is not responsible for materials or construction that are required and/or desired by the owner regardless of whether they were omitted or mis-quantified on the design documents. This is because they would be required on the project and the additional costs are part of the inherent project costs; that is, had they been identified initially, the costs would have been borne by the owner.
6.	Totality of the project and services must be taken into consideration	Final resolution of cost recovery should be decided at the end of the project where the totality of the services can be taken into consideration. It is out of context in many cases to look at individual issues without an appreciation for the level of quality, performance, and value provided over the course of the entire project.
7.	Tie to negligence	In order to ensure that the procedures established are fair and consistent with long-standing legal interpretations, the evaluation of potential errors and omissions should be based on “negligence”, which is the failure to adhere to the standard of care applicable to the services provided.

8.	Weigh recovery costs vs. damages	As a matter of fiscal responsibility it is important to evaluate the resources needed to pursue recovery vs. the amount being pursued and the likelihood of recovery.
9.	Design engineer compensation for services to address project issues if such issues are not the result of consultant's negligence	As a matter of principle, services rendered by the design engineer on behalf of the owner should be properly compensated. Likewise, when it is determined that there is negligence by the design engineer, there should not be compensation to the design engineer for time spent in addressing those project issues.
10.	Include an appeals process	To maintain integrity and confidence in the policy there should be an appeals process that provides for an independent review and opinion.
11.	When a consultant accepts responsibility for an issue and pays, it should be released from any future liability for that problem	To encourage proactive participation and the timely closure of issues by all parties, the participating parties should be released from future liabilities regarding that issue when fair participation leads to resolution.
<p>Other considerations, not necessarily part of the actual cost recovery policy:</p>		
12.	No percentage thresholds should be established to determine cost recovery against design engineers	<p>It is not appropriate to assign a percentage of construction threshold for all projects to trigger cost recovery. There are many factors impacting construction projects such as:</p> <ul style="list-style-type: none"> • Schedule • Project Complexity • Level of subsurface investigation • Subsurface conditions • Owner directed changes • Contractor desired changes • Field betterment and constructability issues • Consistent funding • Bidding process • Project execution efficiencies • Consultant's scope and budget <p>Factors like these make it impractical to have any meaningful percentage for general use.</p>
13.	Contingency Planning	It is recommended that owners have a contingency budget in place to account for minor issues and project changes that are common on every project. This provides the owner the flexibility to address project changes in an appropriate and fair manner.
14.	Design engineer participation for post-design services	The owner benefits by active participation of the design engineer by providing real-time input on design intent. While procurement practices differ greatly from location to location and project to project, having some meaningful level of design engineer participation during construction is highly beneficial and desirable.