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**Part IV.**  
**Identification of Consultant Negligence**

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# CHAPTER 11

## Consultant Negligence

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### Consultant Negligence - Identification and Procedures

#### Purpose

The purpose of this Chapter is to provide, for the use of those charged with administration of agreements, guidelines for identifying errors, omissions and negligent acts by consultants, and procedures for dealing with each situation.

#### Identification of Consultant Negligence

Negligence by a consultant is contractually defined in Section 2.12 (Errors and Omissions) of Specifications for Consulting Services, as follows:

“Services provided by the consultant under this agreement shall be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.”

This definition obviously does not define every error by a consultant as a negligent act that must be pursued for reparation of damages, but in all cases of consultant error the consultant must:

1. Respond promptly to the Department’s request for clarification/correction.
2. Prepare any plans or data needed to correct the negligent act, error or omission without additional compensation.

The “negligent acts, errors or omissions” will in most cases be identified during a subsequent phase of the work. Detection of errors, even major errors, during the review process would not normally fall within the negligent standard that is the subject of this Chapter. Such errors and other review comments must be corrected by the consultant at no cost and later considered in rating the consultant’s performance.

“Negligent acts, errors or omissions” as discussed herein will generally consist of harm to the State based on the Department’s use of the consultant’s completed work. The most

common occurrence will be design errors discovered during bidding or construction, but the Department relies on the completed work product of nearly all consultant agreements and may be harmed by an error of any type. Some additional examples are: wetlands not identified during an environmental investigation that are discovered during later design or construction; failure to identify dangerous conditions during a bridge inspection; or acceptance of a contractor's work such as bridge painting based on a consultant inspector's report and later the work is proven clearly deficient.

### **Procedures for Dealing with "Negligent Acts, Errors or Omissions"**

Upon discovery of an alleged error by a consultant during the Department's reliance on the consultant's work product (see above), the ODOT Project Manager shall be notified immediately. The Project Manager shall carry out the following procedures:

1. Notify the consultant of the problem either by telephone or in writing, a telephone call will be sufficient in most cases. This is the beginning of a "discovery phase" of investigation that is intended to fully identify the problem (or possibly determine that a problem does not exist).

#### **Do:**

- a. Ask for clarification of the discrepancy.
- b. Agree to a deadline for response.
- c. Fully document the call in writing.
- d. Direct the consultant to maintain separate cost accounting specific to their efforts to resolve the problem. We want to ensure that we do not inadvertently pay the consultant to correct an error, or the services could be compensable under certain circumstances. In either case the costs must be tracked.
- e. Begin to segregate and track ODOT labor costs (TMS) directly attributable to the problem.

#### **Do not:**

- a. Characterize the discrepancy as an error.
  - b. Negotiate, reach agreement or sign any document relative to the consultant's responsibility for the problem.
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2. Fully investigate the discrepancy to determine the extent, impacts (harm to the Department) and source of the discrepancy. Notify other ODOT personnel as appropriate including the Contract Manager, the District Production Administrator, District Construction Engineer, Administrator of the Office of Environmental Services, or others as appropriate. The consultant's response to the Department's initial contact should be obtained and considered in completing the investigation. The Consultant's scope of services must be considered in reaching any conclusions regarding responsibility for any error or omission.

Relevant facts may include:

- a. A determination that the project was constructed in accordance with plans and specifications and the problem did not result from contractor error.
- b. Reasonable assurance that the project was inspected properly.
- c. Cost analysis of damages including determination of:
  - 1) Work performed to correct the error.
  - 2) Lost work - work performed by the contractor that must be discarded, and original design costs for the work that must be redesigned.
  - 3) Soft costs incurred such as delay and home office overhead.
  - 4) Extra work that needed to be done in any case including "betterments" of deficient designs, and quantity increases etc.
  - 5) Work that would not have been needed "but for" the error
  - 6) Alternate designs that would have solved the problem but are precluded by the current situation.
  - 7) Potential costs mitigated by ODOT actions.
4. Fully document the investigation in writing including conclusions reached concerning responsibility for the error or omission, including a determination that in the opinion of the District the consultant committed negligence. All communications with the Consultant shall be documented.
5. Notify the Administrator, Office of Consultant Services immediately upon any preliminary determination of consultant negligence, and provide a memorandum documenting the investigation and conclusions.

Upon receipt of a memorandum documenting possible consultant negligence, the Administrator, Office of Consultant Services will review the report and, if advisable, involve ODOT's Chief Legal Counsel and the Attorney General's office. After review and discussion, the Administrator will advise the Consultants Committee of the matter, notify the Consultant in writing with a copy to the consultant's professional liability insurance company, and at the direction of the Consultants Committee, pursue remedies as prescribed by Section 2.12 of the Specifications for Consultant Services.

#### **Procedures for Corrective Actions**

Upon agreement with the Consultant and/or the consultant's professional liability insurance company that a negligent act was committed and corrective actions are required, the following procedures will be initiated.

1. The Office of Contracts will enter into negotiation with the consultant and/or the Consultant's insurer.
2. Corrective plans (or other documents) will be completed by the consultant or another consultant chosen by the insurer. Any payment to a third party consultant will be made by the insurer. The Department will not enter into agreement with any other consultant for the corrective plans.
3. The Department will review and approve the corrective plans.
4. All plans, once accepted, must be constructed by an ODOT pre-qualified contractor. The cost of corrective construction may be negotiated by the insurer or may be let competitively through the Department's bid letting process. All payment will be made by the consultant or insurer either directly or indirectly (through ODOT).