

DEPARTMENT OF THE ARMY
Omaha District, Corp. of Engineers
215 North 17th Street
Omaha, Nebraska 68102-4978

OM 1180-1-6

CENWO-ED-D

Memorandum
No. 1180-1-6

23 March 2001

Contracts
DESIGN ERROR MODIFICATION AND
ARCHITECT-ENGINEER RESPONSIBILITY
(RCS: CEEC-E-10)

History. This Omaha District Office Memorandum (OM) establishes a revision of the original District Memorandum (DM) written October 1990.

Summary. This document will be used by all applicable elements when determining Architect Engineer (AE) responsibility.

1. **Purpose.** Establish responsibilities and a procedure for the administration of the Architect-Engineer Responsibility Management Program (AERMP). Determination of AE responsibility is required for all construction modifications which result from AE design errors or omissions.
2. **Applicability.** This memorandum is applicable to Construction Division (CENWO-CD), Engineering Division (CENWO-ED), Office of Counsel (CENWO-OC), Contracting Division (CENWO-CT), and all other elements involved in investigating and taking action on design deficiencies of Architect-Engineer (A-E) firms/individuals having contracts with the U.S. Army Corps of Engineers, Omaha District (CENWO).
3. **References:**
 - a. FAR 36.608
 - b. FAR 36.609-1
 - c. FAR 36.609-2
 - d. FAR 52.236-23
 - e. EP 715-1-7, "Architect-Engineer Contracting", dated 31 May 1999

This memorandum supercedes DM 1180-1-6, dated 1 October 1990.

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4. Policy. It is the policy of the Omaha District to conduct the AERMP in a fair, consistent, and professional manner. No demand for recovery of damages shall be made to an A-E without a review of all facts and circumstances by the A-E Responsibility Review Board (AERRB).
5. General. The Architect-Engineer Responsibility Management Program has been established to implement this policy. Actions shall be in accordance with ER 715-1-20. (Appendix A is a Flow Chart for Architect-Engineer Liability Action).
6. Responsibilities. To implement this Architect-Engineer Responsibility Management Program, the following responsibilities will be assigned:
 - a. Administrator. The Commander shall designate a senior level manager to be responsible for the overall administration of the AERMP. In the Omaha District the Chief, Engineering Division will be assigned as the Administrator of the AERMP.
 - b. A-E Responsibility Coordinator (AERC). The Administrator will appoint an Architect-Engineer Responsibility Coordinator (AERC) who shall monitor and coordinate the program, coordinate preparation of cases for the Architect-Engineer Responsibility Review Board, work closely with A-E firms in negotiation settlement, and coordinate and submit quarterly reports to HQUSACE, Attn: CEEC-EB, RCS: CEEC-E. The Assistant Chief of Design Branch, Engineering Division is designated as the AERC.
 - c. A-E Responsibility Review Board (AERRB). The Commander shall establish an AERRB to review all deficiencies in A-E performance and advise the Contracting Officer on actions to be taken. Board members shall include the Chief of Engineering Division, Chief of Construction Division, and Office of Counsel or their designee. The Architect-Engineer Responsibility Coordinator and the Project Manager (PM) will serve as non-voting members. Additional persons may serve at the Commander's discretion. See Comm 99-05, 28 July 1999, Memorandum "Board/Committee/Council Appointment" (Appendix B).
 - d. Office of Counsel. Any liability cases which require a Contracting Officer's Decision (COD) as set forth in the contract "Disputes" clause, shall be handled through the Office of Counsel. The AERC will remain responsible for monitoring progress of the case and will provide support to Office of Counsel as required.
 - e. Contracting Division. Shall be responsible for filing documentation of design deficiency modifications in contract files. CENWO-CT shall be available for consultation as needed concerning overhead, profit, etc. in regards to calculation of construction damages.

f. Planning, Programs, and Project Management Division. The PM shall be responsible for assisting the AERC in preparation of cases, evaluation of recommendations, customer coordination and representation, and establishment of labor cost codes as necessary or required

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related to development of a liability case. The PM is also responsible for documentation of design errors on the final performance appraisal of the design Architect-Engineer.

7. Determination of Architect-Engineer Responsibility. A determination of Architect-Engineer responsibility requires affirmative answers to each of the following questions:

- a. Is the construction modification attributable to a design deficiency;
- b. Does the design deficiency stem from an act or omission of the architect-engineer?
- c. Does the error or omission by the architect-engineer result from the architect-engineer's failure to meet the standard of care required by a member of the architect-engineer profession; and
- d. Has the Government suffered damage as a result of the breach of the standard of care?

The standard of care for which the architect-engineer is responsible has evolved through the development of case law. The architect-engineer is required to exercise the ordinary and reasonable skill, care and diligence of an average member of the architect-engineer profession. Once architect-engineer responsibility has been established, a determination should be made whether expected recovery justifies the administrative costs which will likely be incurred in pursuing a recovery. Ordinarily, a decision to pursue architect-engineer liability should be made when it is expected that dollar recovery will exceed the administrative costs anticipated in the recovery action. However, there may be circumstances surrounding a given determination of architect-engineer responsibility that favor pursuing a judgment against an architect-engineer even though it is not clearly cost-effective. The AERC, with the concurrence of the Chief, Design Branch, has the authority to determine whether damages should be pursued against a negligent architect-engineer.

8. Procedures.

a. For all construction modifications, Construction Division will make an initial determination of the classification of the modification. By memorandum titled "Notification of Modification Classification" (Appendix C), Construction Division will notify the AERC of its initial determination and ask for the AERC's recommendation.

b. The AERC will enter his/her recommendation on the 1st Endorsement to the "Notification of Modification Classification" memorandum and send the 1st Endorsement to the PM. If the AERC determines that the data available shows that a modification initially classified as a design deficiency is

not the result of a design error, the AERC will include justification for reclassification in the 1st Endorsement.

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c. The PM will obtain input from the A-E and enter the A-E's and their own recommendation on the 2nd Endorsement to the "Notification of Modification Classification" memorandum and send the 2nd Endorsement to Construction Division, Attn: CD-CA.

d. Construction Division (CD-CA) will make a final determination of the modification classification, will enter that decision on the 3rd Endorsement to the "Notification of Modification Classification" memorandum, and will send this 3rd Endorsement to the PM, AERC, and the appropriate Area Engineer.

e. The Field Office or office responsible for preparation of the Price Negotiation Memorandum on a construction contract will note on all design deficiency modifications whether or not the Government incurred damages. If damages were incurred, the responsible Field Office will prepare a memorandum titled "Supplemental Information for Design Error/ Design Deficiency Modification" (Appendix D) documenting the damages which have occurred. The responsible Field Office will send the completed form to the AERC.

f. The AERC will send a copy of the 3rd Endorsement to the "Notification of Modification Classification" memorandum along with a copy of the "Supplemental Information for Design Error/ Design Deficiency Modification" to the A-E and request the A-E's response.

g. If, after reviewing the A-E's response, the AERC believes there is potential A-E liability, the AERC will determine if a potential A-E liability settlement would justify the cost of pursuing A-E liability. The AERC will then document his/her recommendations in a memorandum titled "Review of Architect-Engineer Responsibility" (Appendix E) and will send this memorandum to the PM.

h. The PM will evaluate the AERC's recommendation and provide his or her own recommendation back to the AERC in the 1st Endorsement to the "Review of Architect-Engineer Responsibility" memorandum.

9. Board Actions. The Architect-Engineer Responsibility Review Board will convene at the request of the AERC to review design deficiency modifications which have resulted in damages to the Government. The AERC will prepare the agenda for these meetings and act as the recorder. Minutes shall be prepared documenting, as a minimum, the attendees, the cases considered, and the AERRB's recommendations. The AERRB will review each case and make a recommendation to the Contracting Officer on action to be taken relative to the A-E's liability. The Board's recommendation to pursue or not to pursue liability and the Contracting Officer concurrence/non concurrence will be documented by the AERC on the 2nd Endorsement to the "Review of A-E Responsibility" memorandum. The AERC

will forward this 2nd Endorsement to Contracting Division for inclusion in the contract files. If the Board's recommendation is to pursue liability, and the Contracting Officer concurs, the following actions will be taken:

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a. The AERC will prepare a letter and send it to the Architect-Engineer signed by the Contracting Officer outlining the decision of the AERRB and making a demand for damages incurred.

b. The AERC will prepare an ENG Form 4858A-R (Active A-E Liability Cases) (see Appendix F) for each liability case. A case may be initiated for recovery of damages arising out of one or more deficiencies and amended to add additional charges. This form is the basis for the quarterly reports and will be updated as negotiations progress. A case will only be terminated when action against the Architect-Engineer is completed or the Contracting Officer has dropped action on a particular liability case.

10. Settlement. The AERC shall work closely with the A-E in negotiating settlement. Settlement offers made by the Architect-Engineer shall be presented to the A-E Responsibility Review Board.

11. Disposition of Funds. In accordance with Comptroller General's Decision (B-220210), funds recovered for a particular year appropriation may be used for purposes and projects that are still being funded from that year's funds. If this appropriation is not active, or if recovery of S&A funds is above the allowed percentage, the overage must be returned to the Treasury.

12. Contracting Officer's Decision (COD). If reasonable efforts have been pursued and settlement cannot be negotiated within a reasonable time, a Contracting Officer's Decision (COD) shall be issued by CENWO-OC claiming the right to such recovery. CENWO-OC shall be responsible for seeing that the claim is prosecuted as expeditiously as possible.

13. Cumulative Design Errors. While it is recognized that an individual claim for a design error should not be pursued because the cost would exceed the gain, it is possible for a situation to exist where a series of minor design errors occur in a single contract. When this occurs, the costs of pursuing a consolidated claim for cumulative errors could be outweighed by the anticipated returns to the Government. The AERC will monitor contracts to determine if cumulative design errors have occurred. If it is determined that the probable return to the Government would exceed the estimated cost of pursuing the claim, the matter should be referred to the Architect-Engineer Responsibility Review Board for a final determination and possible legal action. In any case, the extent of design errors on a specific project will be reflected in the performance appraisal of the design Architect-Engineer.

14. In-house Funding for Investigations. In accordance with EP 715-1-7, Chapter 7-6, planning and design funds for military construction projects, and appropriate project funds for other types of projects will be used to investigate and pursue A-E liability actions which occur during planning or

design. For projects under construction, the initial investigation and documentation of A-E liability and damages by Construction Division will be charged to the S &

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A account. Thereafter, project contingency funds will be used to investigate and pursue A-E liability. Cost records must include all costs associated with investigation, deliberation and prosecution of the case, including support costs incurred by Office of Counsel such as travel, expert witnesses, and deposition expenses. Further details can be found in EP 715-1-7.

15. Reporting Requirements. The AERC will prepare and submit the following report annually to HQUSACE Attn: Engineering and Construction Division:

- a. Report Title. Architect-Engineer Liability Status Report.
- b. Purpose and Scope. This report is required by HQUSACE to monitor the District's performance in the conduct of the AERMP and management of the liability cases.
- c. Forms. The report shall be prepared on ENG form 4858-R, Status of A-E Liability (see Appendix G), and ENG form 4858A-R, Active A-E Liability Cases, in accordance with instructions on reverse side of each form. A separate ENG Form 4858-R is required for civil works and military activities.

FOR THE COMMANDER:

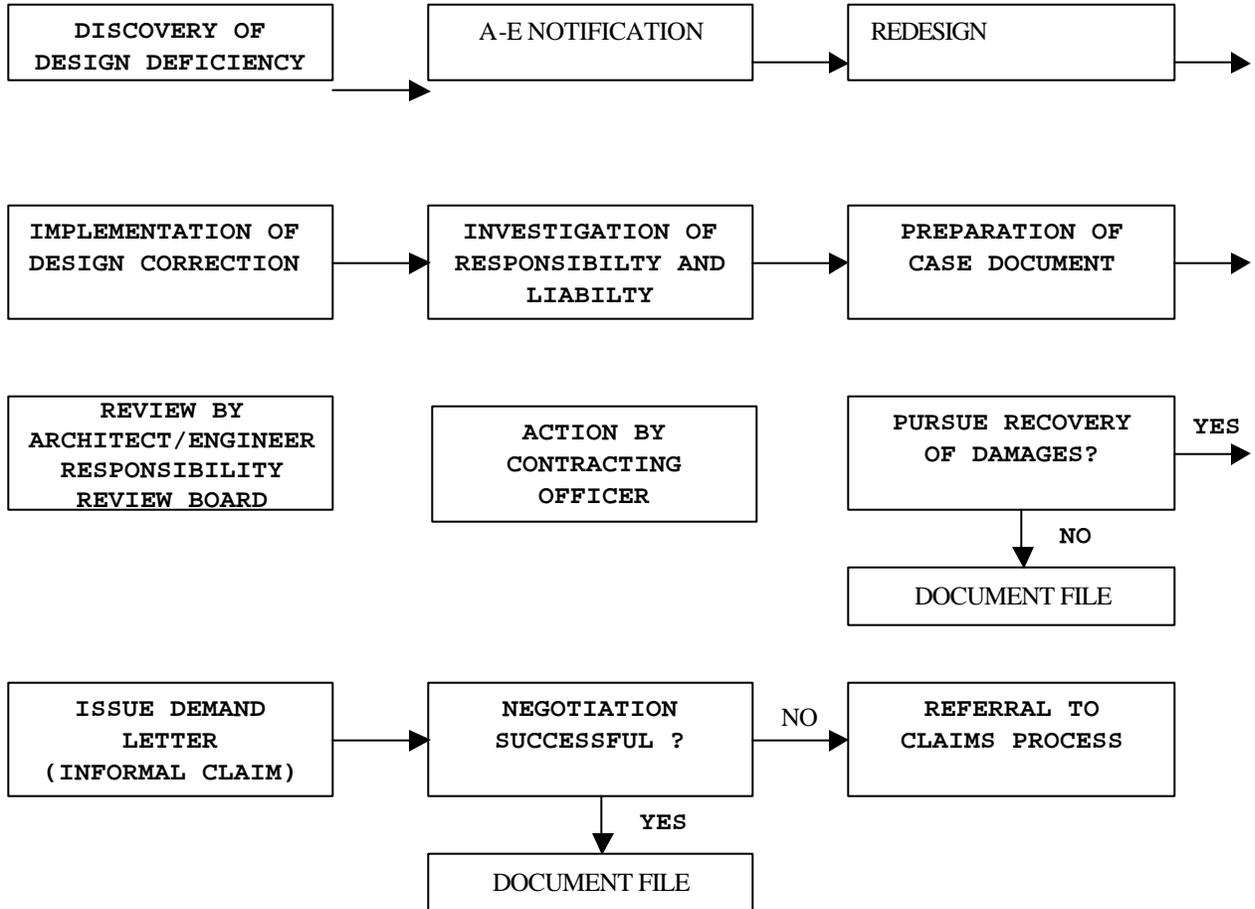
Bryan L. Vulcan
LTC, EN
Deputy Commander

Appendices:

- A. Flow Chart for Architect-Engineer Responsibility Review
- B. Comm 01-08
- C. Memorandum "Notification of Modification Classification"
- D. Memorandum "Supplemental Information for Design Error/Design Deficiency Modification – 191C"
- E. Memorandum "Review of A-E Responsibility"
- F. ENG Form 4858A-R Active A-E Liability Cases
- G. ENG Form 4858-R Status of A-E Liability

DISTRIBUTION: <http://w3.nwo.usace.army.mil/im-c/rcrdsmgt/html/pdf/m1180-1-6.pdf>

APPENDIX A
FLOW CHART FOR A-E RESPONSIBILITY ACTION



CENWO-RM-B (15-1a)

14 February 2001

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: BOARD/COMMITTEE/COUNCIL Appointed

1. Effective 1 February 2001 the following BOARD/COMMITTEE/COUNCIL is appointed, subject to call of the PRESIDENT/ CHAIRPERSON thereof, and will consist of members as follows in the positions indicated.

2. Name of BOARD/COMMITTEE/COUNCIL: A-E Responsibility Review Board

3. Authority: ER 715-1-10

4. Members:

Chief, CENWO-ED, Chairperson or alternate
Chief, CENWO-CD, or alternate
District Counsel or alternate
A-E Responsibility Review Coordinator, nonvoting
Project Manager - ex officio, nonvoting

5. Period: Until determined no longer needed by the Commander.

6. Purpose: Review potential A-E liability cases presented by the A-E Responsibility Review Coordinator and recommend action to be taken by the Contracting Officer.

7. Special instructions: Meetings of the Board may be called by the Chairperson or Coordinator when necessary. Professional registration is required for all technical persons serving as voting members. This rescinds COMM 99-05, dated 28 July 1999.

FOR THE COMMANDER:

BRYAN S. VULCAN
LTC, EN
Deputy Commander

DISTRIBUTION:

Each member
CENWO-XA

MF - 175, 1 Jan 89 Replaces DF - 175, 1 Mar 84 which is obsolete.

FROM: CENWO-CD-CA (415-10C)
FOR: CENWO-ED-D
CF: CENWO-CD-Q, CENWO-PM-M, CENWO-ED-VE

DATE:

SUBJECT: Notification of Modification Assignment

ACTION: Please review the initial classification of the proposed contract modification described below and provide your recommendation on the classification.

CONTRACT NO.:
PROJECT:
LOCATION:
MODIFICATION NO.:
ESTIMATED COST:

INITIAL CLASSIFICATION:

_____ DD	- Design Deficiency	_____ VE	- Value Engineering
_____ CCL	- Criteria Change – New Law	_____ A	- Administration
_____ CC	- Changed Criteria	_____ USR	- Using Service Request
_____ USC	- Unforeseen Site Conditions	_____ GFE	- Gov. Equip. Deficiency
_____ DSC	- Differing Site Conditions	_____ Other	- Specify _____

Chief, CD-CA

FROM: ED-D 1st End
FOR: Project Manager, PM-M
CF: CENWO-CD-CA, CENWO-CD-Q

DESIGNED BY:

_____ In-House
_____ AE _____ Name of Firm

CLASSIFICATION:

_____ Concur with recommendation in Basic.
_____ Defer to AE's recommendation.
_____ Recommend classification be _____ based on the following:

Chief, Design Branch

FROM: CENWO-PM 2nd End
FOR: CENWO-CD-CA
CF: CENWO-CD-Q, CENWO-ED-D

1. AE's Recommendation (Explain if different than in Basic): _____

2. PM's Recommendation (Explain if different than in Basic): _____

Project Manager's Signature

FROM: CENWO-ED-CA 3rd End

FOR: CENWO-PM, CENWO-ED-D, CENWO-CD-Q, Area Engineer (_____ Area)

Final Determination of modification classification is _____.

Chief, CD-CA

C-2

Appendix D

FROM: CENWO-CD-() DATE: _____

FOR: CENWO-CD-C, CENWO-ED-D, CENWO-PM-M

SUBJECT: Supplemental Information for Design Error/Design Deficiency Modification – 191C

1. Installation:
Contract Title:
Contract No. Modification No.:
2. Total Cost of Mod:
3. Description of Mod: _____

4. Damages Incurred: *Yes (If yes, complete below) No
5. Damage Analysis:
Rework:
Delay Costs:
Other:

*Detailed explanation on how the government incurred damages.

Area Engineer

Appendix E

FROM: CENWO-ED-D (AERC) DATE: _____
FOR: CENWO-PM-M (Project Manager)
CF: CENWO-CD-CA, CENWO-CD-Q, CENWO-ED-(LTO), Area Engineer (_____ Area)

SUBJECT: Review of Architect-Engineer Responsibility

CONTRACT NO.:
PROJECT:
LOCATION:
MODIFICATION NO.:
ARCHITECT-ENGINEER NAME:
ARCHITECT-ENGINEER CONTRACT NO.:

1. This modification resulted from a Design Deficiency (See Attachment 1 – Notification of Mod Assignment).
2. See Attachment 2 (Form 191C) for estimated cost of Mod including damages.
3. See Attachment 3 for initial AE response.
4. Possible A-E negligence – Yes _____ No _____.
5. Cost to pursue A-E Responsibility is justified. Yes _____ No _____.
6. Recommend pursuing A-E Responsibility – Yes _____ No _____.

A-E Responsibility Coordinator

FROM: CENWO-PM-M (Project Manager) 1st End
FOR: CENWO-ED-D (AERC)
CF: CENWO-ED, CENWO-CD, CENWO-OC, CENWO-CT, CENWO-CD-CA, CENWO-CD-Q, CENWO-ED-___(LTO),
Area Engineer (_____ Area)

_____ Concur – Recommend pursuing A-e Reliability.

_____ Non-Concur – Do not pursue A-E Reliability for following reasons: _____

Project Manager

FROM: CENWO-ED-D (AERC) 2nd End DATE: _____

Appendix F

1. COMMAND:	QUARTERLY A-E LIABILITY CASE REPORT				3. FISCAL YEAR:
2. CASE NUMBER:	(ER 715-1-20) RCS: CEMP-E-32 (SEE REVERSE FOR INSTRUCTIONS)				4. QUARTER:
5. A-E NAME AND ADDRESS:		6. PROJECT TITLE AND LOCATION:		7. A-E CONTRACT NUMBER:	
				8. CONSTRUCTION CONTRACT NUMBER:	
9. DESCRIPTION OF DEFICIENCIES:					
DISCIPLINE(S) INVOLVED: CIVIL___ ARCH. ___ STRUCT. ___ HVAC ___ PLUMBING ___ FIRE PROTECT. ___ ELECT. ___ OTHER _____					
10. A-E POSITION/REBUTTAL:					
11. A-E NOTIFICATION:	12. LETTER OF INTENT:	13. DEMAND LETTER:	14. CONTRACTING OFFICER DECISION:	15. DATE OF APPEAL:	17. FINAL ACTION: ___ DROPPED ___ SETTLED DATE:
				16. DOCKET NO.:	
18. CONSTRUCTION DAMAGES, \$:	19. ANCILLARY COSTS, \$:	20. INVESTIGATION & RECOVERY COSTS, \$:	21. TOTAL DAMAGES (18 + 19 + 20), \$:	22. SETTLEMENT AMOUNT, \$:	23. EFFICIENCY RATIO, 20/(18 + 19):
					24. RECOVERY RATIO, 22/21:
25. SUMMARY OF EVENTS AND STATUS, INCLUDING CHANGES AND PROGRESS FROM LAST QUARTER:					
26. PREPARED BY (AERC):		27. OFFICE SYMBOL:		28. TELEPHONE NO.:	

Appendix G

1. COMMAND:	ANNUAL A-E RESPONSIBILITY MANAGEMENT PROGRAM REPORT <i>(ER 715-1-20)</i> RCS: CEMP-E-32 <i>(SEE REVERSE FOR INSTRUCTIONS)</i>		2. FISCAL YEAR:
3. LIABILITY CASES CARRIED OVER FROM LAST FISCAL YEAR	a. NUMBER OF CASES		
4. LIABILITY CASES INITIATED IN THIS FISCAL YEAR	a. NUMBER OF CASES		
5. LIABILITY CASES DROPPED IN THIS FISCAL YEAR	b. TOTAL DAMAGES, \$		
6. LIABILITY CASES SETTLED IN THIS FISCAL YEAR	b. TOTAL DAMAGES, \$		
7. LIABILITY CASES CARRIED FORWARD TO NEXT FISCAL YEAR	a. NUMBER OF CASES		
8. EFFICIENCY RATIO	b. INVESTIGATION & RECOVERY COSTS, \$		
9. RECOVERY RATIO	c. TOTAL DAMAGES, \$		
10. REMARKS:	d. SETTLEMENT, \$		
11. PREPARED BY (AERC):	12. OFFICE SYMBOL:	13. TELEPHONE NO.:	