

TO: ALL COUNTY PERSONNEL

**FROM: VERDENIA C. BAKER
COUNTY ADMINISTRATOR**

PREPARED BY: FACILITIES DEVELOPMENT & OPERATIONS

**SUBJECT: EVALUATING, RECOVERING AND RECORDING
ERRORS/OMISSIONS BY A DESIGN PROFESSIONAL**

PPM #: CW-F-067

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ISSUE DATE
June 15, 2017
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EFFECTIVE DATE
June 15, 2017
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PURPOSE:

To set forth consistent procedures for implementing the County's policy to assess whether an Error and/or Omission has been made by a Design Professional; to record the same for the purpose of recovery of Premium Costs; to evaluate whether reimbursement of Premium Costs is appropriate; and for evaluating consultant performance for consideration in future project selection processes.

UPDATES:

Future updates to this PPM are the responsibility of the Director of Facilities Development and Operations ("FDO").

AUTHORITY:

- Palm Beach County Purchasing Code 2-51 – 2-58 ("Purchasing Code"), as may be amended.
- Palm Beach County PPM# CW-F-050, "Change Order and Consultant Services Authorization Authority for Construction, Engineering and Architectural Contracts", as may be amended.
- Florida Statutes Section 287.055, "Consultant Competitive Negotiation Act" ("CCNA"), as may be amended.

SCOPE:

This PPM applies to the Construction Departments as defined by the **Purchasing Code** and will be implemented by their directors which include: the County Engineer; the Department of Airports ("Airports") Director; the Environmental Resources Management Department ("ERM") Director;

the FDO Director; and the Water Utilities Department (“WUD”) Director. Nothing in this PPM modifies the terms and conditions of any contract with a Design Professional.

DEFINITIONS:

Definitions as used in this PPM, are as follows:

1. **Change Order.** Any contract amendment which increases or decreases the value, or duration of a contract, when approved by the Board of County Commissioners (“BCC”) or its designee, pursuant to **PPM# CW-F-050**.
2. **Consequential Damages.** Damages which do not flow directly and immediately from the acts of a party, but can flow indirectly from the acts of a party, or from some of the consequences or results of such acts, and may include the cost of providing extended project support and loss of use damages.
3. **Delay Damages.** The costs which the County may have to pay a contractor or vendor/supplier as the result of Design Professional caused delays. These damages can include increased labor and material costs, extended home and field office overhead, lost productivity and lost opportunity damages.
4. **Department or Construction Department.** For purposes of this PPM, “Department” or “Construction Department” means the Department of Engineering and Public Works; Airports; ERM; FDO; and WUD.
5. **Department Director.** “Department Director”, for purposes of this PPM, means the County Engineer; the Airports Director; the ERM Director; the FDO Director; and the WUD Director.
6. **Design Professional.** Any consultant governed by the CCNA. This policy applies to the entire design team including all sub-consultants hired by a Design Professional who is in direct contract with Palm Beach County.
7. **Division Director.** For purposes of this PPM, “Division Director” means a Department Director’s direct report who is responsible for the design and construction activities of the Department.
8. **Error.** An act that through ignorance, negligence, deficiency or accident departs from or fails to achieve what should be done. This definition is for the purposes of characterizing the acts which constitute an Error.
9. **Insurance Carrier.** The provider of the Professional Liability Insurance coverage carried by the Design Professional.

10. **Omission.** An item of design or contract work task which was neglected or left undone. This definition is for the purposes of characterizing the acts which constitute an Omission.
11. **Premium Costs or Premium Value.** Consist of the increased cost to the County of having items of work added to a project after the contract has been bid and awarded and construction started. When the Error and/or Omission is discovered after bid, some portion of the cost of redoing the work or adding the item frequently represents the increased cost which a contractor incurs in constructing the added work out of sequence. In addition, the County loses the benefit of having the improvement competitively bid. Premium Costs do not include Value Added Costs but do include Delay Damages and Consequential Damages.
12. **Professional Liability Insurance.** Insurance which indemnifies against damages caused by Errors and/or Omissions of the Design Professional.
13. **Project Manager.** The County employee assigned to administer the contract of a Design Professional.
14. **Standard of Care.** The expected level of professional skill, knowledge, expertise, experience, and performance set forth in the Design Professional's contract.
15. **Unforeseen Site Condition.** An actual physical characteristic which was not known or is different from the characteristic described in the construction contract documents. The responsibility for Unforeseen Site Conditions is described in the contract documents and may vary from contract to contract.
16. **Value Added Costs.** If work is added because of an Error and/or Omission by the Design Professional, Value Added Costs are the part of the costs for additional work that add value to the project or are for items that are required for the project to function or would have been included in the project if the Error and/or Omission had not occurred, but do not include the Premium Costs of those items.

POLICY:

It is the policy of the BCC to fairly and consistently review and evaluate the performance of its Design Professionals against the applicable contract standards. In the event that performance meets or exceeds the contract requirements, it is the policy of the County to record the performance in an objective manner for use in future selection processes. In the event that performance falls short of the contract requirements, the County policy is to recover the Premium Costs resulting from the Design Professional's failure to perform to the level required by the contract as well as record it in an objective manner for use in future selection processes.

A Design Professional is obligated to perform services in a manner consistent with the contractually required standard of care. Contractual standards of care do not require perfection.

Therefore, some level of performance short of perfection is anticipated. The County accepts the risk that some level of inaccuracy will occur on its projects, with the attendant costs associated with such imperfection. Therefore, in each project where the County has costs associated with Errors and/or Omissions, the County should determine if those costs reflect a level of performance less than that required by the applicable standard of care. If so, then the County should expect to be reimbursed by the Design Professional for those costs.

Generally, the County may expect Change Order costs related to Errors and/or Omissions to total 1% - 5% of the construction budget for a project, depending on the complexity and/or novelty of the project. On projects where the costs of the Errors and/or Omissions exceed the normally expected amounts, other factors to consider would be whether the County contributed to any of the Errors, whether factors such as Unforeseen Site Conditions or any other factor, unique to the project, caused the project to be more difficult than would ordinarily be expected. If no contributing factors exist, then a claim should be made for compensation for the Premium Costs.

If, however, there are factors which explain the unexpected increase in costs, an assessment should be made by the Project Manager to determine the impact of such factors so that any County claim can be fairly adjusted. Such a determination would be made on a case-by-case basis by the County or consultants engaged for this purpose.

PROCEDURES:

1. General

Each project must be assessed on its own. No one standard can determine whether the County should expect reimbursement for Error and/or Omission expenditures. Some Errors and/or Omissions may, standing alone, evidence a lack of care sufficient to warrant reimbursement. A series of minor Errors and/or Omissions may or may not be indicative of a lack of care. In determining whether to seek compensation from the Design Professional, the County should first calculate the amount of Premium Costs. In the event that the standard of care has not been met, the Design Professional will be responsible for Premium Costs.

Secondly, the Change Order costs need to be compared to an applicable standard of care to determine if the Change Order costs exceed the amount normally expected on a project where the Design Professional was conducting itself in accordance with the standard of care contained in its contract.

2. Design Professional's Contract Language

Each contract with a Design Professional shall contain standard of care language. The language shall be consistent with the language which currently represents the County's position as approved by the County Administrator. Department Directors may recommend a higher standard of care for contracts which warrant the same. This revised standard of

care language must be approved by the County Attorney's Office. In any event, the individual contract language shall take precedence over the terms of this PPM.

The Design Professional's performance will be recorded and in part evaluated according to the provisions of this PPM.

Project Managers shall provide a copy of this PPM to all professionals: 1) who have not previously performed work for the County, and 2) who are short-listed for professional architectural and/or engineering services, as well as any person who requests it.

3. Change Order Administration

a. Construction Administration Services

The Design Professional shall be immediately notified in writing of any change which may be considered an Error and/or Omission by the County so that the Design Professional can evaluate the condition and participate in mitigating the impact of the Error and/or Omission.

- 1) If construction administration services are included in the Design Professional's contract, the construction contract will include language directing requests for information and change proposals to the Design Professional with a simultaneous copy to the County, or simultaneous notification to both the County and the Design Professional.
- 2) If construction administration services are not included, the Project Manager will notify the Design Professional of any condition which may be an Error and/or Omission. This notification shall be in writing via email notification or other written notification and will be sent by the Project Manager by 5p.m. on the next business day after the Project Manager becomes aware of any condition which may be an Error and/or Omission. Notification must be to a person employed by the Design Professional holding a position at least of engineer.

b. Change Order Brief

Pursuant to **PPM# CW-F-050**, a Change Order brief is required for all Change Orders prior to County approval. The Change Order brief contains a field to identify whether the Change Order, or each change item contained within a Change Order (if there are multiple change items within a single Change Order) was a result of an Error and/or Omission. The Project Manager must identify whether the change or individual change item is a result of an Error and/or Omission.

This Change Order brief shall be provided to the Design Professional upon approval

of the Change Order. The Change Order brief shall not be provided to the Contractor as an attachment to the Change Order, however, it must be provided to the Contractor if requested.

c. Evaluation of the Value of Error/Omission

Within 30 days of the approval of a Change Order, any change item which has been identified as an Error and/or Omission will be evaluated to identify the Premium Costs. The Premium Costs should include all costs identified in the definition of Premium Costs above. Independent consultants may be used to assist the Project Manager in determining the Premium Costs.

d. Contract Payments to the Design Professional

To the extent possible, the Project Manager shall ensure that sufficient funds are available based on the unpaid contract balance to the Design Professional to cover the value of the Premium Costs identified and transmitted to the Design Professional. This provision may be waived with the approval of the Department Director. This provision is not intended to provide for the implementation of a "retainage" provision.

e. File

The Project Manager will maintain a file which contains the Change Order documents, all related correspondence and work papers, the evaluation identified in c above, the Design Professional's response to the evaluation, and any other materials related to the Error and/or Omission.

4. End of Construction Evaluation and Assessment

a. Cumulative Review

Upon completion of construction, the Project Manager will compile the results of all Error and/or Omission evaluations for the purpose of determining whether the standard of care identified in the contract has been met. This compilation will be referred to as the cumulative review.

If determined to be warranted, the Project Manager can initiate an interim cumulative review at any time during the contract term.

b. Assessment Against Standard of Care

The Project Manager will compare the cumulative review to the standard of care in the contract of the Design Professional to determine whether the contract

requirements have been met. This comparison is to be performed on a case-by-case basis considering the items set forth earlier in this PPM.

c. Review of Final Evaluation and Recommendation

- 1) If the Project Manager's evaluation indicates that the standard of care has been met, the Project Manager can recommend final payment. Final payment and recordation of the Design Professional's performance shall be made in accordance with 4d and 4e of this PPM.
- 2) If the Project Manager's evaluation indicates that the standard of care has not been met, a copy of the evaluation shall be sent concurrently to the Division Director as well as the Design Professional. The Division Director shall review the evaluation and schedule a meeting with the Design Professional prior to concurring with the recommendation of the Project Manager and sending the same to the Department Director.

Should the Department Director agree with the evaluation of the Project Manager and Division Director that the standard of care has not been met, the cumulative review along with the Department's recommendation shall be forwarded to the County Attorney's Office.

- 3) The review of the recommendation of the Department by the County Attorney's Office will be for validation of the Department's assessment against the standard of care contained within the contract.
- 4) Upon securing the concurrence of the County Attorney's Office, the Project Manager will notify the Design Professional of the cumulative review and the County's position relating to the standard of care.

In the event that the recommendation is that the standard of care has not been met, the notification shall include a request to set up a meeting between the County and the Design Professional. At this point, the Project Manager, the Division Director and the Department Director will determine whether the Professional Liability Insurance Carrier needs to be notified of the meeting, and/or copied on the minutes of it.


d. Final Payment of the Design Professional's Contract

- 1) If the Department Director concurs with the Project Manager that the standard of care has been met, the Project Manager may process the final payment in accordance with the terms of the contract.

- 2) If the County Attorney's Office concurs with the Department Director's recommendation that the standard of care has not been met, the Project Manager shall hold the final invoice for services, if a contract balance remains. The amount withheld from final payment will be in an amount equal to or less than the estimated Premium Costs. If there are insufficient funds remaining in the contract balance, the Department Director and the County Attorney's Office will determine the most appropriate manner to recover it from the Design Professional and/or their Professional Liability Insurance Carrier.
- 3) If the matter proceeds to negotiations for resolution, the final invoice for services shall be processed upon conclusion of the negotiations and in accordance with the agreements resulting from it.

e. Recordation of Performance Evaluation Form

The information contained in the cumulative review shall be permanently recorded on the Department's "Design Professional Performance Evaluation Form" which is one of the factors considered for future selection.


VERDENIA C. BAKER
COUNTY ADMINISTRATOR

Supersession History:

1. PPM CW-F-067, issued 2/4/99
2. PPM CW-F-067, issued October 26, 2007
3. PPM CW-F-067, issued May 1, 2012