

DR 715-1-10
1 April 1990

DEPARTMENT OF THE ARMY
Wilmington District, Corps of Engineers
PO Box 1890
Wilmington, North Carolina 28402

CESAW-EN-DG

1 April 1990

DISTRICT REGULATION
No. DR 715-1-10

Engineering and Design
ARCHITECT-ENGINEER (A-E) RESPONSIBILITY MANAGEMENT

1. Purpose. The purpose of this regulation is to establish policy, procedures, and define responsibilities for investigating, pursuing, and reporting performance deficiencies of architect-engineer (A-E) firms/individuals having contracts with the Wilmington District Corps of Engineers.

2. Applicability. This regulation is applicable to all organizational elements of the Wilmington District that have administrative responsibilities for civil and/or military construction projects.

3. References.

- a. FAR 33.2.
- b. FAR 36.608.
- c. FAR 36.609-1.
- d. FAR 36.609-2.
- e. ER 715-1-10.

4. Policy.

a. A-E firms under contract with the Wilmington District are responsible for providing professional quality work, i.e., work that meets the standards of care, skill, and diligence that one in the profession would ordinarily exercise under similar circumstances. If an A-E fails to meet such a standard, or any other contractual duty, the Contracting Officer shall review the circumstances involved, including the resulting damages to the Government. Action shall be taken in accordance with procedures that follow.

This regulation supersedes DR 715-1-10 dated 11 September 1986

b. The District A-E Responsibility Management Program shall be conducted in a fair, consistent, and reasonable manner, and in an atmosphere of professional respect and trust. 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) and action by the Contracting Officer. A reasonable effort shall be made to resolve claims against the A-E without litigation (i.e., prior to making a formal claim by issuance of a Contracting Officer's Decision (COD) under the contract "Disputes" clause).

c. This regulation is applicable to all contracts for A-E services, including those for professional surveying and mapping services. Further, to the extent applicable, the procedures outlined herein shall be applied to in-house designs for the purpose of monitoring organizational performance and generating lessons-learned.

5. Objectives. The objectives of this regulation are to:

a. Provide administrative procedures for determining A-E responsibility under a contract and provide procedures for enforcing A-E responsibility.

b. Motivate A-E contractors to improve quality of construction documents by creating an awareness of professional quality required and expected.

c. Obtain corrective action or recover monetary damages resulting from A-E design deficiencies.

6. Definitions.

a. Construction Change. Any procurement action that changes planned construction by replacement or addition. Usually, these are modifications to the original construction contract(s) but, within the context of this regulation, may be new contracts, supplemental agreements, purchase orders, etc.

b. Design Deficiency. A condition in the designs, drawings, specifications, or other services furnished by the A-E necessitating corrective action and/or resulting in additional cost to the Government.

c. Professional Negligence. Failure of an A-E to use the care ordinarily exercised in similar cases by average members of the profession acting in the locality, or failure to use reasonable diligence and judgment in the exercise of skill, and application of learning, in an effort to accomplish the purpose for which employed.

d. Potentially Recoverable Damages. Costs which may be incurred by the Government as a result of performance or design deficiency that are in excess of what the costs would have been had the deficiency not occurred.

Examples are:

-identifiable items of cost in the construction change order that would not have been included in the construction price had the design been correct.

Examples of such costs are:

- .tearout/demolition
- .scrap material
- .restocking charge
- .premium for expedited delivery
- .reinstallation
- .difference in new and salvage value of unused/removed material or equipment
- .delay and impact
- .extended overhead

-liquidated damages (for construction contract time extension)

-construction supervision and administration (S&A) costs of the additional construction costs

-administrative costs to process the change order

-in-house costs for the corrective design

-general administrative costs, including: investigation, preparation of documents for review and action by the AERRB and Contracting Officer, correspondence, etc.

-cost of reprocurement of A-E services, including the associated in-house administrative costs

-lessened value

There are many potential categories of damages. In each instance where liability will be pursued, care should be taken to include all additional costs to the Government in the damages assessed the A-E.

7. Appointment of an Administrator. A senior level manager will be responsible for the overall administration of the A-E Responsibility Management Program for the District. The Chief, Engineering Division, will serve as the Administrator of the A-E Responsibility Management Program.

8. Design Within Funding Limitation. The responsibility of the A-E to design within funding limitations is covered by FAR 36.609-1. Failure by an A-E to perform satisfactorily in this area may result in damage to the Government. If so, the liability of the A-E shall be considered and acted upon in accordance with the provisions of this regulation. Note that FAR 36.609-1 requires the contract file to be appropriately documented, if the A-E fails to meet the construction cost limitation and is not required to redesign the project.

9. Appointment of an A-E Responsibility Coordinator. The A-E Responsibility Coordinator will be the Chief, General Engineering Section, Engineering Division, and will be responsible for monitoring, administering, and documenting the A-E Responsibility program. All District elements will advise and assist the A-E Responsibility Coordinator as required.

10. Establishment of an A-E Responsibility Review Board. The A-E Responsibility Review Board is comprised of the Chief, Engineering Division, Chief, Construction-Operations Division, and the District Counsel or their designated representatives. The Chief, Engineering Division, or a designated representative will serve as the Chairperson of the Board.

11. Procedures and Responsibilities.

a. The point at which the A-E is notified of a design deficiency will vary depending on the particular circumstances of the case. As a general rule, the A-E should be involved immediately and offered an opportunity to review the design deficiency and propose its correction. If the A-E is not given early notice, the reasons must be clearly documented and the Government must make every reasonable effort to minimize the damages for which the A-E may be liable. In any case the A-E must be informed when an investigation of potential liability is started.

b. It is the duty of the A-E Responsibility Coordinator to ensure that all construction contract changes attributed to a design deficiency or error by the initiator of the change, are investigated by Engineering Division.

c. The Engineering Division will expeditiously accomplish a preliminary review of all contract changes forwarded by the coordinator. The preliminary review will be aimed at determining that the change was potentially associated with a design deficiency or error. If the preliminary review indicates no connection between the change and a design deficiency or error, the Engineering Division shall document the basis for its conclusion and forward in writing to the Coordinator. If a design deficiency or error is found to be potentially present by the preliminary review, Engineering Division, in coordination with Counsel and Construction Division, will initiate a more thorough review. This review shall be directed toward formulating a recommendation as to the basis for asserting A-E liability and the extent of the Government damage. This recommendation will be provided in writing, through the Coordinator, to the board.

d. The Chairperson of the Board shall convene the Board when needed to review those cases forwarded by the Coordinator. In considering preliminary Engineering Division reviews which have concluded that a design deficiency or error is not present, the case will be filed in the construction contract file with no further action if the Board is in unanimous agreement on the position. If there is not unanimous agreement, the case will be referred through the

Coordinator to the Engineering Division for more detailed review or resolution of Board member concerns. On matters which have received a detailed review by Engineering Division, the object of the Board's review will be to determine if all conditions for pursuing A-E liability are satisfied. After completing its review of these matters, the Board will make a recommendation in writing to the Contracting Officer on whether an A-E liability recovery action should be pursued. Board member disagreements on the issue of liability or pursuit of recovery action will be addressed in the Board's recommendation to the Contracting Officer.

e. The Contracting Officer will review all cases forwarded by the Board. If the Contracting Officer concurs in the absence of a design deficiency or error, such determination will be returned to the Coordinator for filing in the construction contract file. If the Contracting Officer decides not to pursue A-E Liability recovery even though the A-E is responsible for the design deficiency or error, such determination shall be documented and returned to the Coordinator for filing in the A-E and construction contract files. In such cases, the A-E must be informed of the determination and advised that even though we are not seeking damages at this time, the cumulative effect of the deficiencies will be considered for possible future collection of damages and in future selection actions. If the decision is to pursue recovery, such determination will be routed through the Coordinator to the Office of Counsel for preparation of a "Demand" letter for the Contracting Officer's signature.

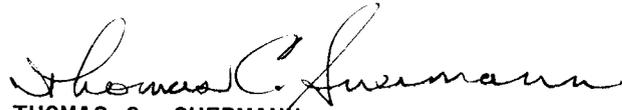
f. The Office of Counsel will prepare, with the assistance of the A-E Responsibility Coordinator and Engineering Division, a letter for the Contracting Officer's signature to the A-E, stating the Government's position, furnishing an estimate of damages and inviting the Architect-Engineer's comment. The objective of this demand letter process is to reach a fair and reasonable settlement with the A-E. The A-E Responsibility Coordinator, with the assistance of the Engineering Division, the Office of Counsel and Construction-Operations Division will conduct negotiations with the A-E. The demand letter should also state that interest will be added to the damages in accordance with the interest clause of the contract.

g. In the event negotiations are unsuccessful, the A-E Responsibility Coordinator, with the support of the Engineering Division and the Construction-Operations Division, will provide the Office of Counsel the factual documentation. The Office of Counsel will prepare the final decision for approval of the Contracting Officer and subsequent transmittal to the A-E.

h. The above procedures are graphically illustrated in Attachment 1 to this regulation. Attachment 2 provides District standard procedures for A-E Responsibility Management.

DR 715-1-10
1 April 1990

12. Reporting Requirements. The A-E Responsibility Coordinator will prepare and submit the quarterly A-E Liability Status Report in accordance with paragraph 8 of reference 3e.



THOMAS C. SUERMANN
LTC, Corps of Engineers
Commanding

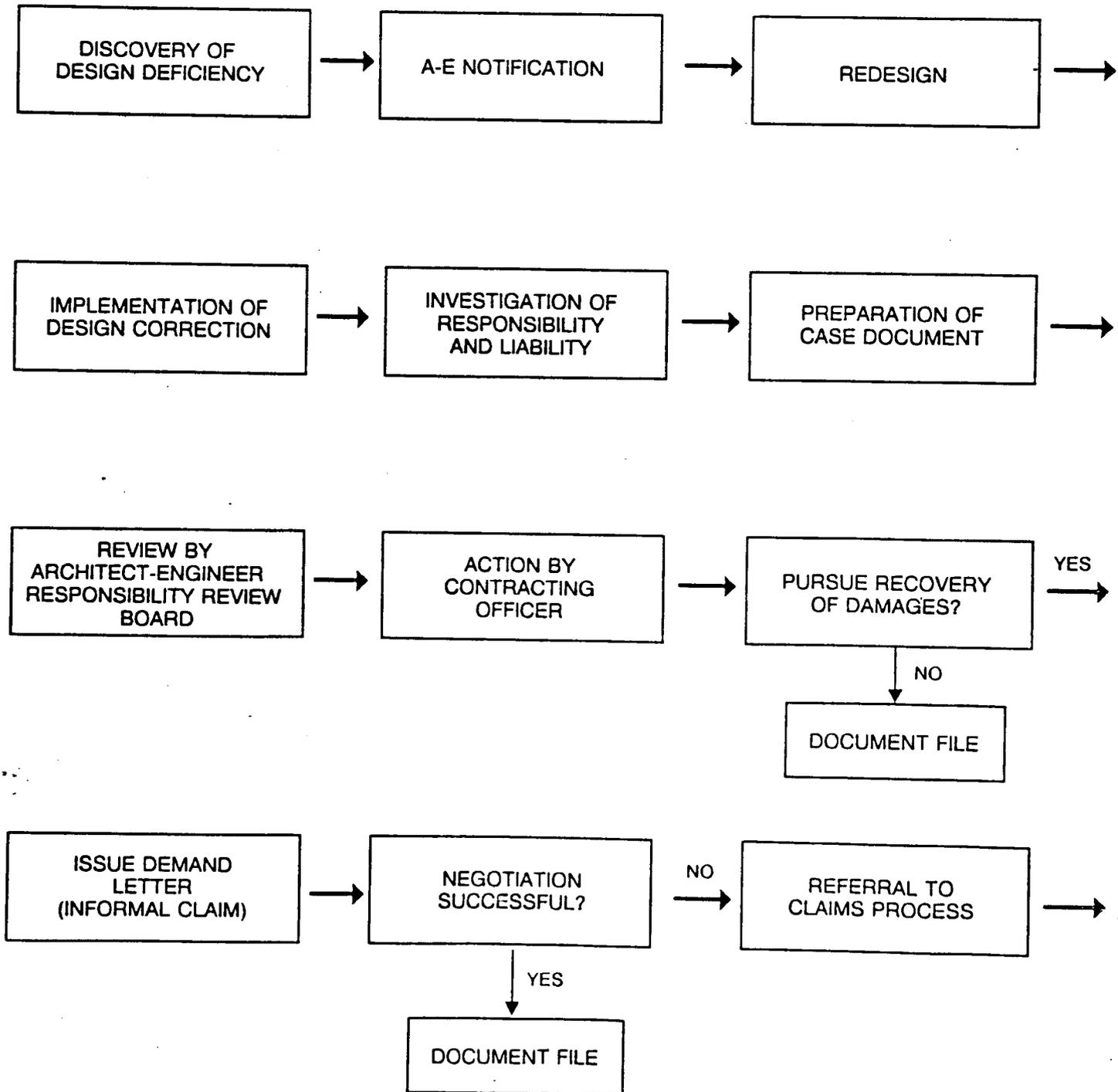
2 Attachments

DISTRIBUTION B

ATTACHMENT 1

FLOW CHART FOR ARCHITECT-ENGINEER LIABILITY ACTION

NOTE: This is a generalized depiction of the A-E liability process and should not be interpreted as modifying the provisions in the basic ER or the other annexes.



ATTACHMENT 2

STANDARD OPERATING PROCEDURE
A-E RESPONSIBILITY MANAGEMENT

Initiator: (Normally the Project Design Engineer following discovery of error requiring contract modification to correct).

If it is obvious that the modification does not involve A-E liability, the initiator sends MEMO to A-E Responsibility Coordinator stating nature of the the change and the reason A-E liability is not a factor.

If the initiator suspects that required construction change may be result of A-E design error or omission, proceeds as follows:

1. Notifies A-E by phone with follow up in writing of design deficiency and investigation of potential liability.

a. A-E is given opportunity to review the deficiency and propose its correction.

b. If the A-E is notified, but does not respond within a reasonable amount of time, the initiator should document this non-response and when conditions warrant proceed with the construction change and the liability investigation. The A-E should be notified of this action and advised that he is potentially liable for the cost of the construction change and all related Government administrative costs.

c. If the A-E is not given early notice (for example, when faulty work is already in place), the reasons must be clearly documented and the Government must make every reasonable effort to minimize the damages for which the A-E may be liable.

d. In some cases the A-E may decide with Government approval to work directly with the construction contractor to correct the problem. In those cases, there is no change order issued, but the Government must be satisfied that the solution is acceptable.

e. In all cases, the initiator shall keep a record of costs incurred by the Government relevant to the construction change and/or administrative costs in correcting the problem.

2. Sends MEMO to A-E Responsibility Coordinator (Carmen) stating facts of the case and requesting investigation.

A-E Responsibility Coordinator:

Ensures that key personnel in the Engineering Division investigate the construction change attributed to design error or omission. Engineers involved are requested to keep accurate record of costs involved in making the investigation and costs pertinent to the construction change.

Engineering Division:

1. Exeditously accomplishes preliminary review aimed at determining that the construction change was or was not due to A-E design deficiency or error.

a. If preliminary review indicates change was not due to design deficiency, Engineering Division shall document the basis for its conclusion and forward in writing to the Coordinator.

b. If a design deficiency or error is found during preliminary review, Engineering Division, in coordination with Counsel and Construction Division initiates a more thorough review. This review substantiates basis for asserting A-E liability and the extent of the Government damage.

2. Forwards written recommendation through the Coordinator to the A-E Responsibility Review Board based on (a) or (b) above.

A-E Responsibility Review Board:

1. Reviews cases forwarded by Coordinator.

a. When preliminary Engineering Division review concludes that design deficiency or error is not present and Board unanimously agrees, the case is filed in the construction contract file with no further action required. If there is not unanimous agreement, the case is referred through the coordinator to the Engineering Division for more detailed review aimed at resolving Board member concerns.

b. Cases which have received detailed review by Engineering Division are analyzed by the Board to determine if all conditions for pursuing A-E liability are satisfied.

2. After reviews are made, Board makes recommendation in writing to the Contracting Officer on whether A-E liability recovery action should be pursued. Board member disagreements on the issue of liability or pursuit of recovery are addressed in the Board's recommendation.

Contracting Officer:

1. Reviews all cases forwarded by Board.
 - a. If Contracting Officer concurs in the absence of a design deficiency or error, returns case to the Coordinator for filing in the construction contract file.
 - b. If Contracting Officer decides not to pursue recovery even though A-E is responsible for the design deficiency or error, such decision is documented and returned to the Coordinator for filing in the A-E and construction contract files. The A-E is advised that even though we are not seeking damages at this time, the cumulative effect of the deficiencies will be considered for possible future collection of damages and in future selection actions.
 - c. If the Contracting Officer decides to pursue recovery, such determination will be routed through the Coordinator to the Office of Counsel for preparation of a "Demand" letter to be signed by the Contracting Officer.

Office of Counsel:

Prepares "Demand" letter with the assistance of the Coordinator and Engineering Division stating the Government's position, furnishing an estimate of damages and inviting A-E's comment. The objective of the demand letter process is to reach a fair and reasonable settlement with the A-E.

A-E Responsibility Coordinator:

Assisted by Engineering Division, Construction-Operations Division and Office of Counsel, conducts negotiations with the A-E. If negotiations are unsuccessful, the Coordinator provides Office of Counsel with factual documentation for final decision.

Office of Counsel:

Prepares final decision for approval of the Contracting Officer and subsequent transmittal to the A-E.