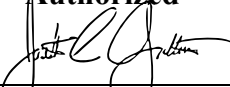


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I. PURPOSE

The Massachusetts Department of Transportation Highway Division (“MassDOT”) shall follow a formal Cost Recovery Procedure to improve the quality of its projects. This procedure builds upon the 1997 Cost Recovery Procedure developed by the Project Liability/Cost Recovery Task Force of the MassHighway/ACEC-MA Partnership and is intended to strengthen the relationships between MassDOT, design consultants and contractors.

The MassDOT Cost Recovery Procedure is designed to:

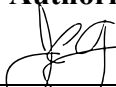
- Expand the role of the designer in the construction of a project
- Increase the level of communication between the designer and MassDOT field personnel
- Provide the designer an opportunity to address and resolve design-related problems as soon as they are recognized in the field
- Require MassDOT to examine why extra work orders are occurring in an effort to avoid similar problems in the future
- Take all factors into consideration before determining responsibility for problems in the field
- Increase the designer’s professional and financial accountability for the quality of their design work
- Provide the MassDOT Architects & Engineers Review Board with additional information regarding the quality and constructability of consultant designs
- Provide consultants with feedback regarding the quality of their designs

For the purposes of the Cost Recovery Procedure, the term “design professional” will refer to any entity performing professional services in connection with the design of MassDOT projects (including construction phase services) and shall include any professional consultants or subconsultants supporting the design effort.

II. ESTABLISHMENT OF COST RECOVERY ADMINISTRATOR, STANDING COMMITTEE AND REVIEW PANEL

1. Cost Recovery Administrator

The Chief Engineer will designate a Cost Recovery Administrator who will be responsible for tracking cost recovery issues through the Cost Recovery Procedure. The Cost Recovery Administrator will also schedule meetings, prepare agendas and

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minutes, maintain records, and perform other duties as described in Sections III, IV and V.

2. Cost Recovery Standing Committee

The Cost Recovery Standing Committee (“Standing Committee”) will consist of the following members:

- Deputy Administrator and Chief Engineer
- Assistant Chief Engineer
- Deputy Chief Engineer of Project Development
- Director of Project Management
- Director of Major Projects
- Deputy Administrator/Chief of Construction Engineering
- Construction Engineer
- General Counsel (or designee) (non-voting member)
- FHWA Division Administrator (or designee) for Federally-aided projects, at the option of FHWA

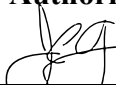
The Chairperson of the Standing Committee will be the Assistant Chief Engineer. The Chief Engineer may designate other members as required to fill vacant seats, add relevant expertise or replace members to support agency needs.

The Standing Committee shall meet monthly or as required, and shall perform other duties as described in Sections III, IV and V.

3. Cost Recovery Review Panel

The Cost Recovery Review Panel (“Review Panel”) for each Cost Recovery Issue will consist of the following members:

- Construction Engineer and/or designated staff members. For most issues, the relevant Construction Area Engineer will serve in this capacity.
- Responsible MassDOT Design Manager (e.g. Highway Design Engineer, Bridge Engineer, Director of Project Management, Director of Major Projects, District Projects Engineer) and/or designated staff members. For most issues, the relevant Design Project Manager will serve in this capacity.
- MassDOT Owner’s Representative (if applicable to the project).

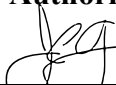
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The Chairperson of the Review Panel will be the responsible MassDOT Design Manager or other such designated person. The Review Panel Chairperson will be responsible for ensuring compliance with the Cost Recovery procedures and criteria described in Sections III and IV.

III. **COST RECOVERY PROCEDURES**

1. **Initial Identification of Potential Cost Recovery Issues**

- a. Potential cost recovery issues can be identified for review (i) each time a construction Extra Work Order (“EWO”) or other construction contract amendment is processed, (ii) if a significant event (e.g. structural failure) occurs, or (iii) if a construction contractor or other third party makes a claim involving design professional performance. For projects that employ an Owner’s Representative, the Resident Engineer shall review each EWO with the Owner’s Representative and shall obtain concurrence from the Owner’s Representative prior to processing. EWOs determined to be caused by Design Errors and valued \$20,000 or greater shall be identified as potential cost recovery issues.
- b. The following types of issues shall not be identified as potential cost recovery issues:
 - EWOs determined to be caused by Design Errors and valued less than \$20,000, due to the administrative costs associated with processing and reviewing cost recovery issues and to the low expected returns to the Commonwealth, except as described in subsection c., below.
 - EWOs determined to be caused by Item Omissions, regardless of value, based on the premise that Item Omissions do not add cost to the project because MassDOT would have had to pay for the work whether or not the item was included in the original contract documents. However, Item Omissions may be identified as potential cost recovery issues if it is determined that they added cost to the project due to extraordinarily high administrative costs, additional engineering fees, construction time delays and other similar, measurable costs that can be attributed directly to the Item Omission(s).
 - Issues on projects for which MassDOT is the designer of record (in-house designs). For these projects, Resident Engineers shall follow all other standard procedures regarding EWOs and other contract modifications, including contacting the designer to help resolve issues during construction and indicating the cause of the EWO (reason code) on the CSD-683 Form.
- c. The decision to not initiate cost recovery on issues valued less than \$20,000 will not preclude MassDOT from pursuing cost recovery on those issues at a later time

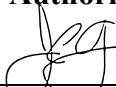
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during construction or after construction is complete. MassDOT shall initiate cost recovery and review all issues determined to be caused by Design Errors valued less than \$20,000 for a particular project when the aggregate sum of those issues is \$100,000 or greater.

- d. If a potential cost recovery issue is identified, the initiator (MassDOT District Office, MassDOT Headquarters, or Claims Committee) shall contact the design professional promptly through the MassDOT Design Manager. The design professional will have the opportunity to resolve the issue or to mitigate the costs associated with the issue by recommending alternate procedures, providing necessary information, or other means. For cost recovery issues identified during construction, the Resident Engineer shall prepare a Cost Recovery Inquiry Form (“CRI Form”), and attach any relevant back-up documentation (e.g. copies of EWOs, modifications, correspondence, reports, etc.) already on file. District Construction personnel and the Owner’s Representative (if applicable) will then review the cost recovery issue and will forward all approved issues to the District Highway Director (“DHD”) for further review. If the DHD concurs with the findings, they will sign and date the original CRI Form and will forward the original CRI Form and related EWO/amendment documents to the Construction Engineer for further review.
- e. If the Construction Engineer concurs with the findings of the District Office, they will forward the original CRI Form and a copy of the EWO/amendment documents to the Cost Recovery Administrator. The Cost Recovery Administrator will send a copy of the CRI Form and the associated EWO/ amendment to the responsible MassDOT Design Manager (e.g. Highway Design Engineer, Bridge Engineer, Director of Project Management, Director of Major Projects, District Projects Engineer).

2. Cost Recovery Review Panel

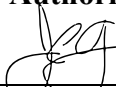
- a. The responsible Design Manager will have the lead in reviewing the cost recovery issue with the Cost Recovery Review Panel consisting of the Construction Engineer (or designee), the responsible MassDOT Design Manager (or designee) and the Owner’s Representative (if applicable). The Review Panel is authorized to request information from the design professional(s) as required to make a preliminary determination whether the cost recovery issue warrants further review.
- b. The Design Project Manager shall send a copy of all cost recovery issue materials to the design professional and shall request a written initial response from the design professional within 10 business days. The Design Project Manager shall provide a copy of this letter to the Owner’s Representative (if applicable).

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- c. The Review Panel shall use all known information to make a recommendation. At the conclusion of the review process, the Review Panel will retrieve the original CRI Form from the Cost Recovery Administrator, indicate its recommendation on the form, sign the form, and return the form to the Cost Recovery Administrator. All members of the Review Panel shall sign the CRI Form.

3. Cost Recovery Standing Committee

- a. The Standing Committee will meet as necessary as described in Section II to review each cost recovery issue and Review Panel recommendation submitted. The Chairperson of the Standing Committee will be responsible for running the meetings and ensuring that the cost recovery issues are processed in a timely manner. If requested, at least one member of the Review Panel will attend the Standing Committee meeting to answer any questions regarding the Panel’s review and recommendation. District Construction personnel and other MassDOT personnel familiar with the project and with the cost recovery issues should also be invited to and attend the Standing Committee meeting, as necessary, to answer questions and to help describe the problems encountered during the construction process that led to the cost recovery issues.
- b. The Standing Committee will determine whether the potential cost recovery issue warrants further cost recovery analysis. In making this determination, the Standing Committee may consider the criteria and cost/benefit analysis described in Section IV.
- c. If the Standing Committee determines that no further cost recovery analysis is warranted, the determination and any reason(s) given will be indicated on the original CRI Form and the matter shall be forwarded to the Chief Engineer for concurrence. The Cost Recovery Administrator will forward copies of all completed CRI Forms to the Design Manager and to the Architects and Engineers Review Board. The Design Manager shall forward copies of all completed CRI Forms to the design professional.
- d. If the Standing Committee determines that further cost recovery analysis is warranted, the Standing Committee will decide either to analyze the issue itself or to designate a Cost Recovery Evaluation Committee (“Evaluation Committee”) consisting of two or more staff members with at least one representative each from MassDOT Design and MassDOT Construction, as well as the Owner’s Representative (if applicable). The Standing Committee may select the members of the original Review Panel to serve on the Evaluation Committee. The Cost Recovery Administrator will provide each Committee member with a copy of the cost recovery issue materials and will schedule a meeting to brief Committee

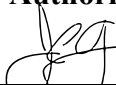
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members and to initiate further Committee actions, as necessary. See Part 4 of this Section for further detailed procedures of the Cost Recovery Evaluation Committee.

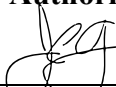
- e. As an alternative to designating an Evaluation Committee, the Standing Committee may conduct further analysis by meeting directly with the design professional and/or MassDOT employees familiar with the project and with the cost recovery issues. In these cases, MassDOT shall provide the design professional with a written preliminary determination of cost recovery and an invitation to meet with the Standing Committee to discuss the cost recovery issues and potential methods of resolution. Following this meeting, the Standing Committee will either conduct further analysis, determine that cost recovery is not warranted, or determine that cost recovery is warranted for all or a portion of the EWO cost.
- f. Whenever appropriate (e.g. highly complex or technical issues), the Standing Committee is encouraged to utilize the services of engineers outside MassDOT, based on a listing of qualified engineers in specialized technical disciplines maintained by the Architects and Engineers Review Board. The Standing Committee may either seek the advice of the engineer directly or instruct the Evaluation Committee to contact the engineer for advice prior to completing its review.
- g. As a general rule, the Standing Committee will defer cost recovery procedures until substantial completion of the project so that all issues may be reviewed on a consolidated basis. At its discretion, however, the Standing Committee may proceed directly with further proceedings. Reasons for this include, but are not limited to, extenuating circumstances such as where the value of errors/omissions exceeds a certain percentage of the estimated construction cost (the level to be determined by the Standing Committee).

4. Cost Recovery Evaluation Committee

- a. The Cost Recovery Evaluation Committee (“Evaluation Committee”) will appoint a Chairperson to administer the cost recovery procedure.
- b. The Evaluation Committee Chairperson shall promptly send a letter, through the Chief Engineer, to the design professional containing the following: a general description of the potential cost recovery issue, the scope of the inquiry, and a request for a written response and related information and documentation from the design professional within such time as the Evaluation Committee shall set, but no fewer than 14 calendar days and no greater than 60 calendar days.

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- c. The Evaluation Committee may request MassDOT staff to provide information and technical assistance in reviewing the cost recovery issue and may request assistance from the MassDOT General Counsel.
- d. Upon written request or in its discretion, the Evaluation Committee will meet with representatives of the design professional to discuss the cost recovery issue. The Evaluation Committee shall have the discretion to determine the time, place, format, and agenda for the meeting with the design professional.
- e. The Evaluation Committee will consider the design professional's response and available information/documentation regarding the cost recovery issue using the criteria and cost benefit analysis described in Section IV.
- f. Within 30 calendar days after receipt of the design professional's response or any meeting with the design professional, the Evaluation Committee shall prepare a Draft Report setting forth its findings and recommended disposition on the cost recovery issue.
- g. The Evaluation Committee shall transmit a copy of the section of the Draft Report dealing directly with the facts of the case to the design professional. The design professional will have up to 14 calendar days to respond in writing.
- h. The Evaluation Committee will consider the comments of the design professional and then prepare a Final Report within 14 calendar days after receipt of comments. The Evaluation Committee will submit the Final Report to the Cost Recovery Administrator for subsequent review and approval by the Standing Committee. If the Standing Committee approves the Final Report it will submit the report to the Chief Engineer.
- i. The Chief Engineer shall review the Final Report and, within 21 calendar days after receipt, decide whether to accept the Evaluation Committee's recommendation or to pursue some other course of action. The Chief Engineer's decision shall be recorded on the original CRI Form. The Cost Recovery Administrator will forward copies of all completed CRI Forms and Final Reports to the Design Manager and to the Architects and Engineers Review Board. The Cost Recovery Administrator shall also promptly forward copies of all completed CRI Forms and Final Reports to the design professional.
- j. With the Chief Engineer's approval, the Evaluation Committee may revise the procedures and timing described above if deemed necessary to meet MassDOT priorities, requirements, or schedules. The Evaluation Committee shall notify the

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design professional if it makes any such revisions that would affect the design professional.

5. Reporting and Record Keeping

- a. The Cost Recovery Administrator will prepare and submit a quarterly report to the Standing Committee and to the Chief Engineer summarizing the nature and status of all cost recovery issues under review, including all those being held until a later date at the request of the Standing Committee.
- b. The Chair of the Standing Committee will prepare and submit an annual report to the Chief Engineer, the Highway Administrator, the FHWA Division Administrator and other MassDOT senior staff as directed by the Chief Engineer. The annual report will summarize the cost recovery actions initiated and completed during the most recently ended calendar year, including cost recovery restitution payments received.
- c. The Cost Recovery Administrator will monitor all cost recovery issues through completion. This includes ensuring that affected design professionals make restitution payments in a timely manner. The Cost Recovery Administrator shall refer all cost recovery matters involving non-responsive or uncooperative design professionals to the MassDOT General Counsel for appropriate action.
- d. The Cost Recovery Administrator shall retain all completed CRI Forms and accompanying documents.

IV. CRITERIA TO BE APPLIED IN COST RECOVERY INQUIRY

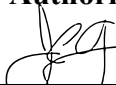
1. General Objective

The general objective of the cost recovery inquiry is to make a determination whether there is a sufficient basis to pursue recovery of costs or damages that the Commonwealth has incurred or will incur because of deficient performance by design professionals in connection with MassDOT projects.

2. Criteria to be Applied to Inquiry

In reviewing a potential cost recovery issue, each Panel/Committee should consider the following criteria:

- The terms of the applicable contract, including the Scope of Services, the deliverables, design standards, warranty, and indemnification.

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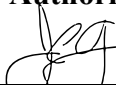
- The professional standard of care that the design professional is expected to adhere to.
- Any extenuating or mitigating factors in relation to the cost recovery issue being analyzed, such as value-added or betterment principles, limitations on fee and scope of services, time constraints for performance of services, unforeseen or changed conditions, third party requirements, responsibility and comparative fault of other parties, or other circumstances or constraints affecting the design professional's performance.
- An estimate of the costs or damages, if any, that the Commonwealth has incurred or will incur due to the deficient performance and an analysis of the cost/benefit considerations of seeking recovery of such costs or damages. The cost/benefit consideration may include the type and amount of costs or damages, the likelihood of recovery, the costs of recovery (including potential litigation expenses), the needs and priorities of the MassDOT project schedule and budget, and any other factors that the Panel/Committee deems relevant to the recommended disposition.

3. Alternate Methods of Recovery

The Panel/Committee may make recommendations of the method by which such costs or damages may be recovered, including without limitation any contractual remedies. The Panel/Committee also may propose alternate methods of recovery that will be substantially equivalent to the costs or damages incurred by the Commonwealth, including without limitation correcting the deficient services, re-performing the services, or providing other needed services.

4. Confidentiality

All communications, reports, and recommendations made by any persons involved in a cost recovery inquiry shall be considered privileged and confidential. All circulation of work products shall be limited to those with a need to know. The free exchange of information and ideas within Panel and Committee meetings is encouraged and, to that end, detailed meeting minutes will not be kept. The Cost Recovery Administrator shall maintain all completed CRI Forms, Committee reports and work papers whether a cost recovery issue is pursued or not. Release of this privileged and confidential material shall occur only with the written recommendation of the MassDOT General Counsel and the written approval of the Chief Engineer.

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V. RESOLUTION OF COST RECOVERY CLAIMS

1. Notification of Design Professional

If the Chief Engineer determines to pursue a cost recovery claim, MassDOT shall send a notice letter to the design professional and shall confirm receipt. The notice letter shall contain a brief description of the claim, the recovery sought and options for making restitution payment or disputing the findings. Prior to sending the notice letter to the design professional, the Chief Engineer will consult with the MassDOT General Counsel to ensure that the claim is processed appropriately.

2. Concurrence of MassDOT Decision by Design Professional

If the design professional agrees with the cost recovery determination made by MassDOT, they shall make restitution payment to the Commonwealth in one of the following methods, with the approval of the Chief Engineer:

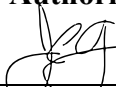
- Making direct payments to the Commonwealth
- Correcting the deficient services
- Re-performing the deficient services
- Forfeiting payments for other services on other MassDOT Contracts
- Providing in-kind services at no cost to the Commonwealth
- Other methods acceptable to both parties

3. Alternate Dispute Resolution Process

If the design professional does not agree with the cost recovery determination made by MassDOT, they may pursue the Alternative Dispute Resolution (“ADR”) Process described herein to attempt to resolve the cost recovery claim without resorting to litigation. The Cost Recovery ADR Process will replace any existing dispute resolution mechanism provided in the applicable contract(s), but will not affect or modify any rights or remedies that MassDOT may have under the applicable contract or otherwise. The Cost Recovery ADR Process will consist of the following:

- a. **Negotiation Phase:** MassDOT, through representatives designated by the Chief Engineer, will confer with the designated representatives of the design professional to attempt to resolve the claim through a negotiated settlement. Before initiating negotiations, the participating parties will agree on the timing and format of the negotiation.

For claims with a value of \$25,000 or less, it is presumed that the parties will not be represented by legal counsel in the negotiations; provided, however, either

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party may choose to be represented by legal counsel, in which event the party so choosing shall notify the other party in writing at least 10 days before any conference scheduled to negotiate a resolution of the claim.

The negotiation phase shall begin within 10 days of the written notification to the design professional. The negotiation phase shall last 60 days, unless concluded earlier or extended by mutual agreement of the participating parties. If the claim is not resolved within 60 days (or as otherwise extended by the parties), MassDOT and the design professional shall proceed to the mediation phase of the ADR Process.

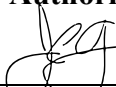
- b. **Mediation Phase:** The claim shall be submitted to non-binding mediation. Within 20 days after expiration of the negotiation phase, MassDOT and the design professional will agree on a mediator. MassDOT and the participating design professional(s) will share the costs and expenses of the mediator on a pro rata basis. The mediator shall be required to (i) have at least six years of experience in dispute resolution of claims involving the design and/or construction process and (ii) meet the requirements set forth in MGL c. 233, s. 23C, second paragraph. Within 10 days after appointment of the mediator, MassDOT and the design professional will agree on the ground rules for, and scope of, the mediation phase.

The mediation phase will begin upon expiration of the negotiation phase and will last 120 days, unless concluded earlier or extended by mutual agreement of MassDOT and the design professional. Upon expiration of the 120-day period (or as otherwise extended by mutual agreement), MassDOT and the design professional shall be authorized to pursue whatever remedies are available, including judicial litigation.

Any negotiations, discussions, or offers of settlement in the negotiation and mediation phases of the ADR Process shall be considered confidential for settlement purposes only and may not be used for any reason in subsequent legal proceedings.

In the event the representatives of MassDOT and the design professional agree to resolve the cost recovery claim, the agreement shall be reduced to writing; provided, however, the agreement shall not be binding on MassDOT until it has been approved in writing by the Federal Highway Administration (if a Federally-aided project), the Chief Engineer, the General Counsel and, if necessary, the Highway Administrator.

Any restitution payments from the design professional shall be made in accordance with the methods described in Part 2 of this Section.

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4. Federal-Aid Construction Projects

All cost recovery restitution payments from design professionals on Federally-aided construction projects will be credited back to the Federal Highway Administration by MassDOT through a procedure agreed to by MassDOT and the Federal Highway Administration. In general, this will involve money being credited to the Federally-aided construction project, which in turn will create additional obligational authority for MassDOT to apply to other Federally-aided projects.

5. Remedies for Non-Responsive or Uncooperative Design Professionals

In the event that a design professional is non-responsive or uncooperative regarding cost recovery matters, MassDOT may pursue legal action against the design professional by any means permitted under law.

Attachments

Cost Recovery Inquiry Form

MassDOT Highway Division Cost Recovery Inquiry Form (CRI Form)

1. Initial Cost Recovery Review

City or Town: _____ Project File No.: _____
Location: _____ Contract No.: _____
Contractor: _____ CR Issue No.: _____
Resident Engineer: _____ EWO No.: _____
Design Professional: _____ EWO Amount: _____
MassDOT Project Manager: _____ Federal Aid No.: _____
Owner's Representative: _____ Design Contract No.: _____

Briefly describe the potential cost recovery issue. Use additional sheets if necessary.

Date Designer contacted: _____
District Highway Director signature: _____ Date: _____
Date received by Cost Recovery Administrator: _____

2. Review Panel

Date Designer contacted: _____ Date response received from Designer: _____

_____ No further analysis. Not caused by design error.

_____ Caused by design error. May warrant cost recovery.

Signatures/Titles: _____ Date: _____
_____ Date: _____
_____ Date: _____

3. Standing Committee

_____ No further analysis. Not caused by design error.

_____ No further analysis. Caused by design error. Forward to Chief Engineer.

_____ Needs further analysis. Forward to CR Administrator with names of Evaluation Committee members.

_____ Needs further analysis. Meet with Designer. Meeting Date: _____

_____ No further analysis. Not caused by design error.

_____ No further analysis. Caused by design error. Forward to Chief Engineer.

Chairperson signature: _____ Date: _____

4. Evaluation Committee

Committee Members: _____ Date Established: _____

Date Designer notified: _____

Date Final Report approved by Standing Committee: _____

Date forwarded to Chief Engineer: _____

5. Final Disposition

_____ Cost Recovery not warranted.

_____ Cost Recovery warranted.

Recommended amount of Recovery: _____

Recommended method of Recovery (if determined): _____

Approved by Chief Engineer: _____ Date: _____

Final Restitution Payment Amount: _____ Date Received: _____

Payment Method/Comments: _____