

CEPOH-EC-M

DEPARTMENT OF THE ARMY
Honolulu District, Corps of Engineers
Fort Shafter, Hawaii 96858-5440

POHR 1110-1-4

Regulation
POHR 1110-1-4

4 September 2003

Engineering and Construction
ARCHITECT-ENGINEER (A-E) RESPONSIBILITY MANAGEMENT PROGRAM
(AERMP)

1. PURPOSE. This regulation implements PODR 1110-1-4 dated 31 March 1998 for the U.S. Army Corps of Engineers, Honolulu Engineer District (CEPOH). This regulation establishes organizational responsibilities and provides supplemental guidance.
2. APPLICABILITY. This regulation is applicable to all staff elements of CEPOH.
3. REFERENCES.
 - a. EP 715-1 -7, Architect-Engineer Contracting, Chapter 7.
 - b. Federal Acquisition Regulation (FAR) Part 36.608 Liabilities for Government Costs Resulting from Design Errors or Deficiencies.
 - c. Federal Acquisition Regulation (FAR) Part 36.609-2 Redesign Responsibility for Design Errors or Deficiencies.
 - d. PODR 1110-1-4, Architect-Engineer (A-E) Responsibility Management Programs (AERMP), 31 Mar 98.
4. POLICY. It is the policy of the Honolulu Engineer District to:
 - a. Conduct the A-E Responsibility Management Program in a timely manner consistent with the guidelines and criteria established in references 3.a. through 3.d.
 - b. Make reasonable efforts to resolve A-E responsibility issues with A-Es to the extent possible without litigation and in a fair, consistent, reasonable, and professional manner.
5. RESPONSIBILITIES.
 - a. Commander.
 - (1) Implement the AERMP within CEPOH in a manner consistent with cited references, establish supplemental guidance, and assign responsibilities to the

appropriate organization in the District.

(2) Establish an A-E Responsibility Management Review Board (hence called Board) to review deficiencies in A-E performance and advise on appropriate AERMP actions. The A-E Responsibility Administrator (AERA) shall chair the Board. Other voting members shall include at least one representative each from Construction Branch, Programs and Project Management, Office of Counsel, and Contracting Division.

b. Engineering and Construction Division (E&C)

(1) A-E Responsibility Administrator (AERA). The Chief or Deputy Chief of Engineering & Construction Division (CEPOH-EC) shall be the AERA. The AERA is responsible for the timeliness, cost-effectiveness, reasonableness and fairness of the Board, and compliance with this regulation.

(2) A-E Responsibility Coordinator (AERC). The AERA will appoint an AERC in the Engineering organization. The AERC is responsible for day-to-day management of the AERMP and will be the District point of contact with Pacific Ocean Division.

(3) Construction Branch (CEPOH-EC-C). A senior representative of Construction Branch will participate in the Board meetings and policy/procedural decisions as a voting member. Resident Offices (Construction Branch Field Offices) will provide comment through the Resident Engineer for each design deficiency identified during the project construction involving alleged A-E responsibility.

(4) Technical Support Branch (CEPOH-EC-Q). Technical Support Branch will provide technical review of design deficiencies to advise the Board in its deliberation of issues, and will provide technical review or corrective design when requested by the Resident Office or Project Manager (PM) on A-E responsibility issues.

c. Programs and Project Management Division (CEPOH-PP). A senior representative of Programs and Project Management Division shall participate in the Board meetings and policy/procedural decisions as a voting member. Project Managers will provide support as follows:

(1) Provide program and project information to the Board upon request to enable the Board to determine A-E liability.

(2) Distribute available funds to investigate alleged A-E responsibility issues.

(3) Keep the customer informed of A-E responsibility actions.

(4) Maintain detailed project cost records upon request from the AERC.

d. Office of Counsel (CEPOH-OC). A senior representative from the Office of Counsel will participate in the Board meetings and policy/procedural decisions as a voting member. As determined by the Board, Counsel will prepare "Demand Letters" to A-E firms for Contracting Officer signature approval as required in reference 3.a., para 7-7 I. (1).

e. Contracting Division (CEPOH-CT). A senior representative from Contracting Division shall participate in the Board meetings and policy/procedural decisions as a voting member.

f. Resource Management Office (CEPOH-RM). Upon receipt of A-E settlement payments, provide appropriate disposition for damages received from A-E firms as described in reference 3.a. RM also prepares appointment memorandums for Board membership.

6. FUNDING.

a. General administration for the AERMP, such as meetings and reporting will be funded by Departmental Overhead (DOH). Appropriate DOH accounts will also be used to investigate and pursue A-E liability for completed projects where project funds are no longer available.

b. For projects under construction, the initial investigation and documentation of A-E responsibility items by Construction Branch will be charged to the S&A account. Following the initial investigation, project contingency funds or additional funds requested from the customer by the PM will be used to investigate and pursue A-E liability.

7. NOTIFICATION, INVESTIGATION, AND SETTLEMENT.

a. Initial Identification, Notification, and Documentation. During construction, the Resident Engineer or Project Engineer may conclude that there are A-E design deficiencies, which rise to the level of A-E responsibility. The initial determination and identification of A-E responsibility items are defined by affirmative answers to the following three questions per reference 3a, paragraph 7-4.c (page 7-3):

- Did the firm make an error or omission?
- Did the error or omission result from the firm's negligence, or from a breach of contractual duty?
- Has the Government suffered damages as a result of the error or omission?

(1) Additional construction costs resulting from implementing technical solutions of design deficiencies are not A-E responsibility items, IF the costs of the solutions

would have been otherwise included in the original construction cost of the project. If the Resident Engineer requires assistance for the initial determination for A-E responsibility, Engineering Services Branch (CEPOH-EC-M) may be requested for assistance.

(2) Notification of the A-E for its responsibility items must be accomplished in order to allow the A-E the opportunity to mitigate its potential liability. With the intent to resolve issues at the lowest level, informal notification may occur by the Contracting Officer Representative (COR) for the A-E contract as requested by the RE. [Prior to the A-E COR involvement, at the discretion of the RE, informal contact may occur by the field office (PE or above) or Project Manager due to partnering, established Request for Information (RFI) procedures, and prior good working relationships established.]

(3) If informal notification of the A-E responsibility item is unsuccessful, formal notification letter(s) shall be written for COR signature with documentation forwarded to the AERC for Board consideration.

(4) Documentation of all pertinent information will be accomplished. This includes a detailed description of the deficiency-turned-responsibility item, record of contact with the A-E firm and its responses, names of those involved, actions taken, photographs, etc.

b. Investigation of Liability. The AERC will coordinate the investigation of potential instances of A-E liability to include technical review and opinion by qualified professionals from Technical Support Branch.

(1) If the investigation finds that the evidence will not support a finding that the A-E firm failed to exercise reasonable care, or finds that the Government did not sustain damage, the AERC will document the findings-of-fact, forward them to the Board for concurrence, and insert them into the contract file.

(2) If the investigation finds, by a preponderance of the evidence, that the A-E work product failed to meet the standard of care ordinarily exercised by a reasonably prudent A-E, and that such failure caused harm to the Government, the AERC should prepare a finding that the A-E breached the contract. This finding must be fully documented with specific and verifiable facts. The documentation is considered adequate only if the facts set forth by the AERC are sufficient to compel an impartial and objective third party (board or court) to reach the same conclusion as the AERC (i.e., that the A-E breached the contract). The AERC will include the supporting data in the Case Document and meet with the Board. Depending on the size of damages and strength of the evidence, the Board will determine whether a letter of intent or a demand letter should be sent to the A-E.

(3) Action against the A-E firm for small errors or deficiencies on a particular project, which individually result in damages less than \$5,000, may be deferred by the

Board until the total damages warrant recovery. The AERC will forward a letter notifying the A-E of each deferred issue.

(4) The Government has 6 years from the date it knew, or should have known, of the existence of a design defect to initiate a claim, i.e., file an action in court. If the Government fails to initiate a claim within the prescribed period, it is forever barred. As a general rule, the 6-year period will start when the A-E submits its completed work, but could occur later.

c. Non-pursuit of liability due to lack of in-house funding. If the PM is unable to secure the necessary funding from the customer to pursue liability claims and the customer does not benefit from further liability action, the Contracting Officer may decide not to pursue A-E liability due to funding constraints. A recommendation by the Board to the Contracting Officer outlining the amount of damages, likelihood of recovery, and benefit to the customer will be forwarded to the Contracting Officer for his final determination.

d. Settlement. A liability case is closed when final payment is received from the A-E firm or when the Government sends a letter to the firm notifying them that the Government is dropping its claim.

8. PERFORMANCE EVALUATION AND CONTRACT CLOSEOUT.

a. The AERC will prepare a revised A-E evaluation if a liability case is settled after the final performance evaluation has been previously completed.

b. A-E contracts should not be closed out until the firm's performance evaluation has been completed and all liability actions have been resolved.

9. REPORTING. The AERC is responsible to prepare and submit quarterly and annual District reports to the Division AERC in accordance with reference 3.a.

FOR THE COMMANDER:

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SHARON M. I. FREITAS
Acting Chief, Info Mgmt Office

DISTRIBUTION (POH List 02-1):
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CF:
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