



# Errors & Omissions

## 2023 PEPS Conference

Dan Neal II, P.E., P.G. and John Lamb, P.E.

December 5, 2023



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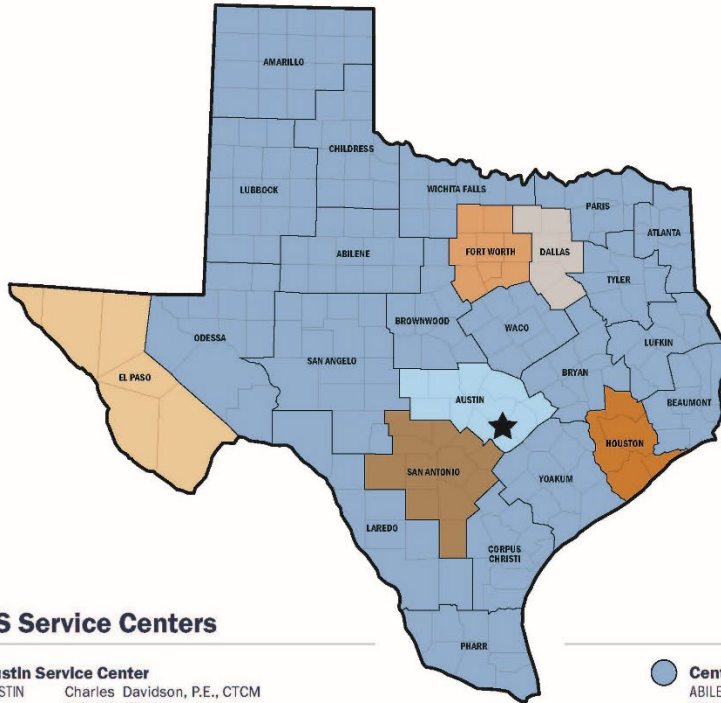
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# Background

*Dan Neal*



## MEMORANDUM

**TO:** District Engineers  
Division Directors  
Office Directors  
Directors of TP&D  
Janice Mullenix, OGC-CSS  
Lea Burnett, OGC-CSS

**DATE:** August 10, 2007

**FROM:** Michael W. Behrens, P.E. *M.W.B.*

**SUBJECT:** Errors and Omissions Policy Statement

It is Texas Department of Transportation (TxDOT) policy to enforce its contracts with engineering, architectural, and surveying consultants to ensure the delivery of quality professional services, the prudent expenditure of public funds, and the preservation of cooperative business relationships. To that end, TxDOT will devote the necessary resources to negotiating clear and fair professional services contracts. Even with the best of contracts, however, services will sometimes contain errors or omissions. When a dispute arises under one of those contracts regarding apparent errors or omissions in the work provided to TxDOT, every effort will be made to resolve that dispute in a way ensuring that the public receives the services for which it has paid and that the consultant is treated with respect and fairness.

When an apparent error or omission is identified in work provided by a consultant, the first step must be to notify the consultant of the problem and to involve the consultant in efforts to resolve it. These efforts must include consideration of the totality of relevant facts, including the level of services provided, the consultant's overall performance, the cost to TxDOT of the services provided and of the apparent error or omission, and the value of the services provided. If these efforts do not succeed, the consultant must be given an opportunity to raise the issue with TxDOT's Administration before any effort is made by TxDOT to institute legal proceedings to collect damages.

To implement this policy, the Design Division is directed to issue procedural guidelines to the districts for handling claims arising out of apparent errors and omissions. These procedural guidelines must include instructions for coding construction change orders that will make clear when a change order results from an error or omission and when it does not; whether an error or omission resulted from work performed by a consultant, by a TxDOT employee, or from some other cause; and a process for determining the cost of an error or omission. These procedural guidelines may be updated from time to time in accordance with this policy.

This policy is in compliance with Senate Bill 924. Procedural guidelines, developed by the Design Division in support of this policy, will be forthcoming.

If you have any questions concerning this policy, contact Mark A. Marek at (512) 416-2576 or Camille Thomason at (512) 416-2263.

cc: Mark A. Marek, P.E., DES  
Camille Thomason, P.E., DES

TxDOT policy issued regarding errors and omissions on August 10, 2007

Policy references S.B. 924, 80st Leg., effective Sept 7, 2007

Codified in Tex Gov Code Chapter, 2252, Section 2252.905



## PEPS Contracting: Contract Management for the Project Manager



December 2022

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Outlined in Chapter 9 of the  
PEPS Contract Management for  
the Project Manager Manual

# Basic Definitions



Error: something on the PS&E that is incorrect on bid day



Omission: something on the PS&E that is missing or incomplete on bid day

# Contractual Responsibility



Contract No. \_\_\_\_\_  
and regulations, and the orders and decrees of any court, or administrative bodies or tribunals in any manner affecting the performance of this contract, including, without limitation, worker's compensation laws, minimum and maximum salary and wage statutes and regulations, nondiscrimination, and licensing laws and regulations. When required, the Engineer shall furnish the State with satisfactory proof of its compliance therewith.

#### ARTICLE 17. INDEMNIFICATION

**A. Indemnification.** The Engineer shall indemnify the State and the State's officers and employees against liability for damage to the extent that the damage is caused by or results from an act of negligence, intentional tort, intellectual property infringement, or failure to pay a subcontractor or supplier committed by the Engineer, the Engineer's agent, or another entity over which the Engineer exercises control.

**B. Attorney Fees.** The Engineer shall reimburse, in proportion to Engineer's liability, the State's reasonable attorney's fees incurred defending the State against a claim based wholly or partly on the negligence of, fault of, or breach of contract by Engineer, Engineer's agent, or another entity over which Engineer exercises control.

#### ARTICLE 18. ENGINEER'S RESPONSIBILITY

**A. Accuracy.** The Engineer shall be responsible for the accuracy of work and shall promptly make necessary revisions or corrections resulting from its errors, omissions, or negligent acts without compensation.

**B. Errors and Omissions.** The Engineer's Responsibility for all questions arising from design errors or omissions will be determined by the State. All decisions shall be in accordance with the State's "Consultant Errors & Omissions Correction and Collection Procedures" and Texas Government Code §2252.905. The Engineer will not be relieved of the responsibility for subsequent correction of any such errors or omissions or for clarification of any ambiguities until after the construction phase of the project has been completed.

**C. Professionalism.** The Engineer shall perform the services it provides under the contract: (1) with the professional skill and care ordinarily provided by competent engineers practicing under the same or similar circumstances and professional license and (2) as expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer.

**D. Seal.** The responsible Engineer shall sign, seal and date all appropriate engineering submissions to the State in accordance with the Texas Engineering Practice Act and the rules of the Texas Board of Professional Engineers and Land Surveyors.

**E. Resealing of Documents.** Once the work has been sealed and accepted by the State, the State, as the owner, will notify the party to this contract, in writing, of the possibility that a State engineer, as a second engineer, may find it necessary to alter, complete, correct, revise or add to the work. If necessary, the second engineer will affix his seal to any work altered, completed, corrected, revised or added. The second engineer will then become responsible for any alterations, additions or deletions to the original design including any effect or impacts of those changes on the original engineer's design.

#### ARTICLE 19. NONCOLLUSION

**A. Warranty.** The Engineer warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the Engineer, to solicit or secure this contract and that it has not paid or agreed to pay any company or engineer any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this contract.

**B. Liability.** For breach or violation of this warranty, the State shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or compensation, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

#### ARTICLE 20. INSURANCE

The Engineer certifies that it has insurance on file with Contract Services of the Texas Department of Transportation in the amount specified on Texas Department of Transportation Form 1560-CS Certificate of Insurance, as required by the State. No other proof of insurance is acceptable to the State. The Engineer

Engineering IndefDelWA

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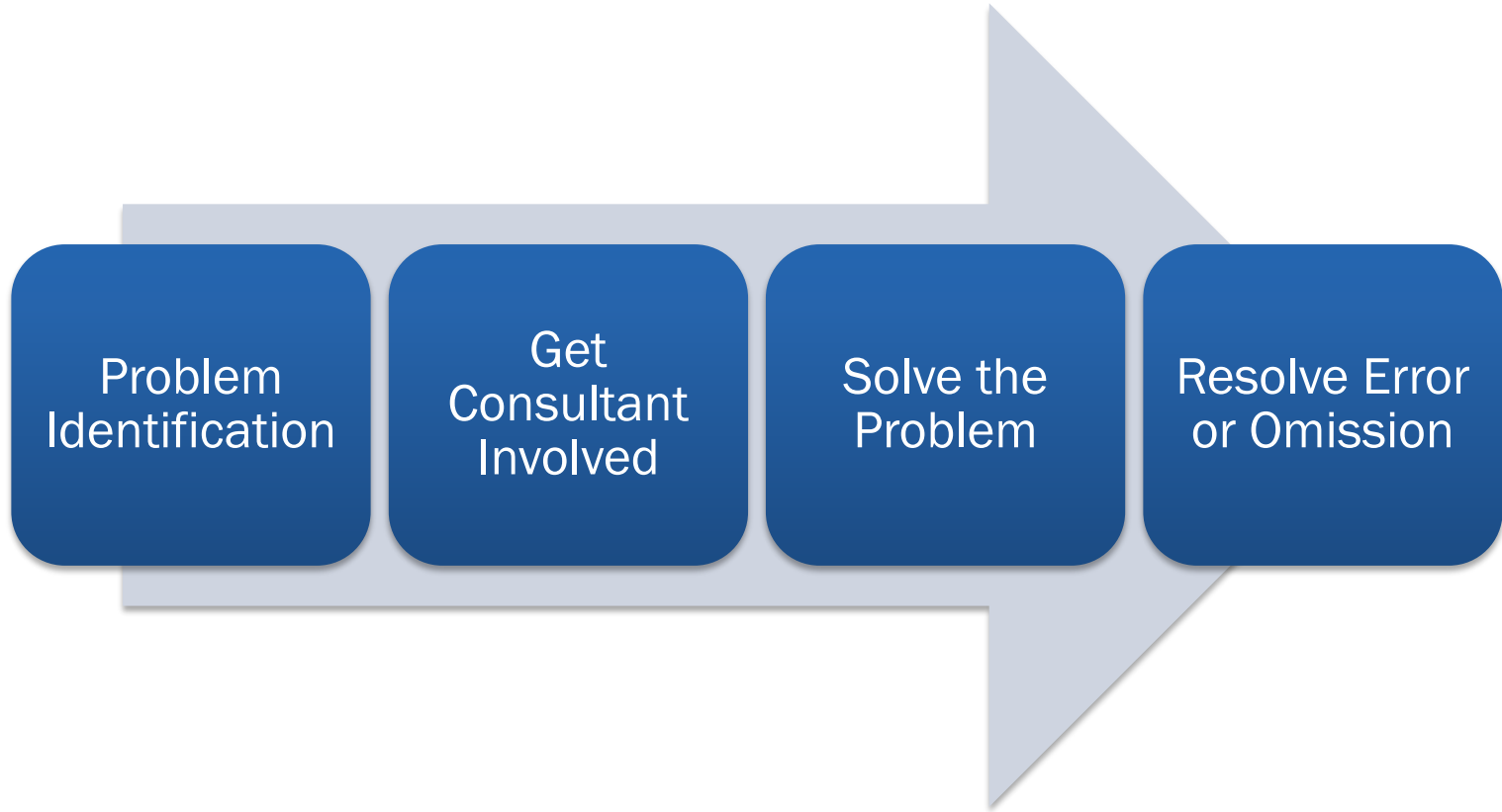
Attachment A

- Errors and Omissions. The Engineer's Responsibility for all questions arising from design errors or omissions will be determined by the State. All decisions shall be in accordance with the State's "Consultant Errors & Omissions Correction and Collection Procedures" and Texas Government Code §2252.905. The Engineer will not be relieved of the responsibility for subsequent correction of any such errors or omissions or for clarification of any ambiguities until after the construction phase of the project has been completed.



# **Key Steps in the Process (TxDOT)**

*Dan Neal and John Lamb*



# Engage with TxDOT

- ❑ Design kick-off
  - Structure: Scope; Changes; Key Contacts
  - Documentation: Meeting notes; decisions
- ❑ Post Design:
  - Key Contacts
  - No one ever leaves here... 😊
  - Notify your TxDOT partners

# Engage with TxDOT

## Post Letting:

- Everyone is doing more with less
- Phone calls:
  - » Never assume, “I’ll remember this later...”
  - » Follow-up calls with an email. I promise, everyone will be grateful
  - » Get out and see the project



# What is the problem?



It is important to gather as much information about the problem quickly, such as:

- the type and nature, severity, and urgency of the problem.
- Will the solution potentially require a design fix?
- Is it a potential error or omission?

# Contact the Consultant



Contact the consultant to:

- inform them that a problem was identified
- get them involved in the solution to the problem
- put the consultant on notice of a potential error or omission

# Solving the Problem

- Be responsive: Ignorance is not bliss.
- It's never personal, but it is like compound interest (like a credit card balance)
- Documentation. Again?
  - Facts, Data, & Decisions
- Get out and observe for yourself



# Working to Solve the Problem

Work with the consultant to:

- Identify reasonable options to solve the problem
- Select the best option to solve the problem



# Resolve the Error or Omission

- Meet with the consultant to determine the potential cause of the E&O
- Review the departments documentation and the directions that were given to the consultant and share that with the consultant
- Review the documentation provided by the consultant to support their assertions
- Determine responsibility for the E&O - consultant, TxDOT, or both

# Resolve the Error or Omission

- You've been notified...
- Listen
- Documentation. Yes, again.
- You may have some info they don't and vice-versa
- The clock is ticking
- Learn and move on



# Resolve the Error or Omission



Communicate the determination to the consultant



If there is liability on the consultant's part, then estimate the cost to TxDOT above what it should have cost had the plans been correct



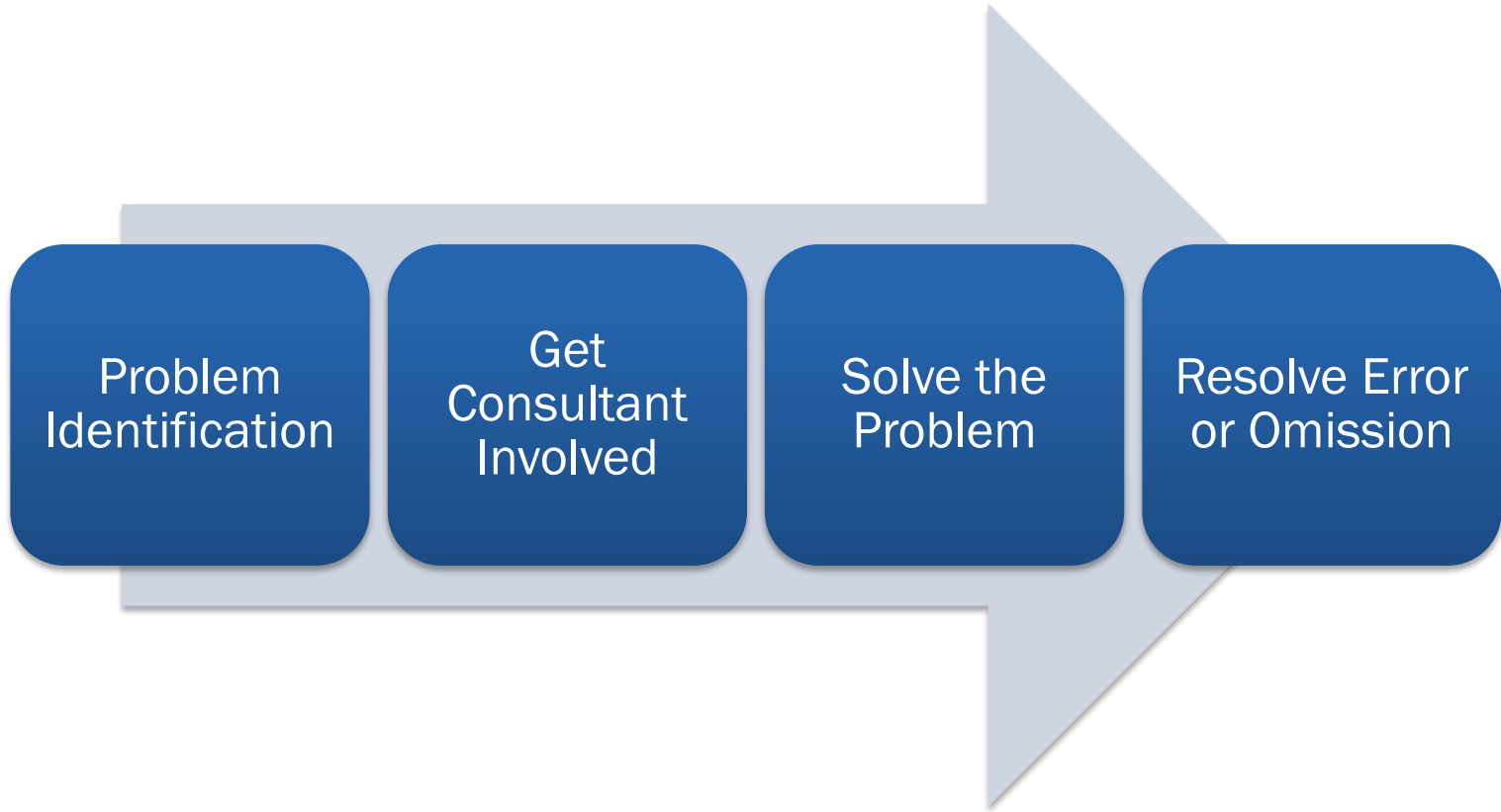
The District can consider all the factors that may have led up to the E&O in determining the consultants liability

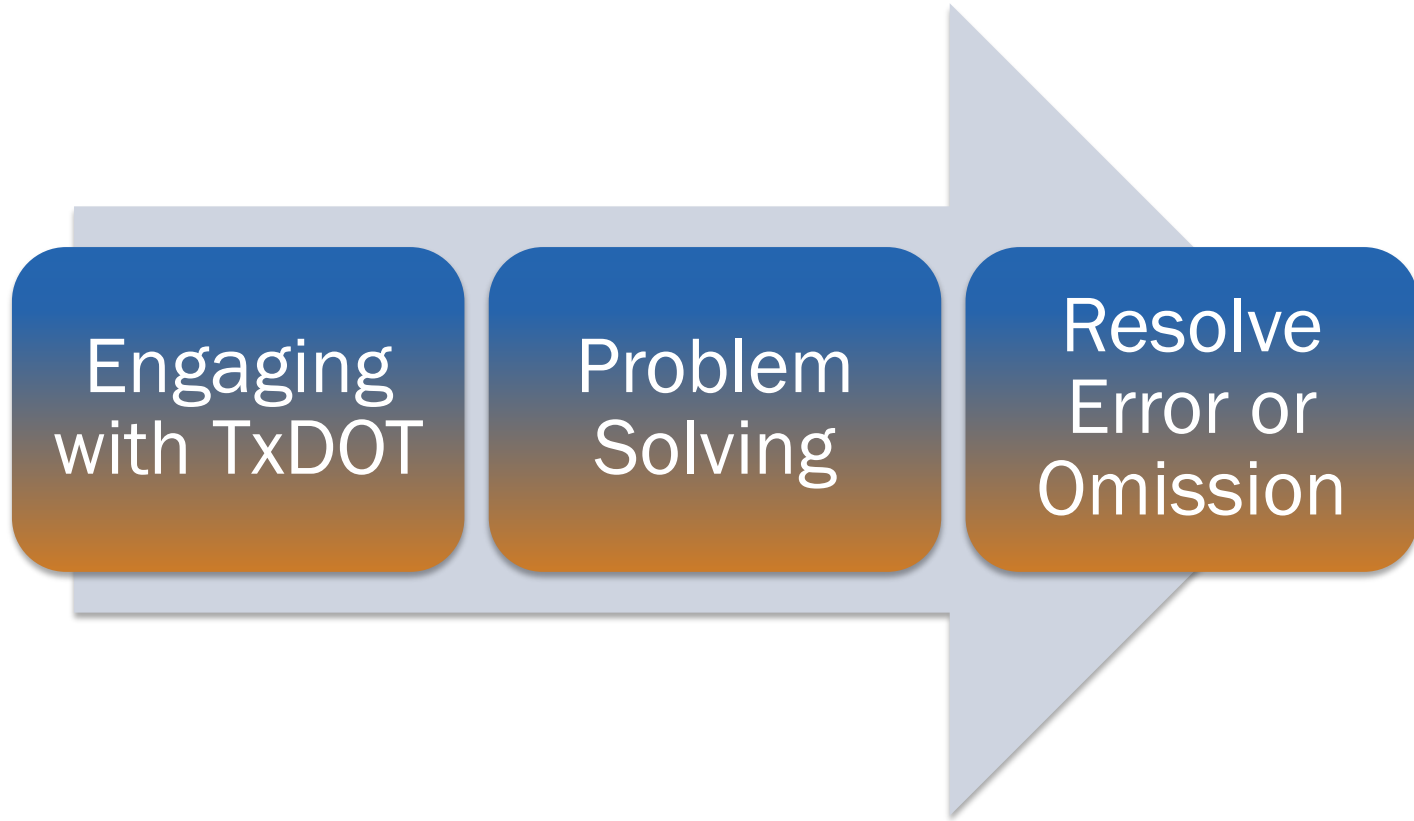


The consultant has the option to appeal the District's determination to the Administration.

# Summary

*Dan Neal & John Lamb*







# HELP #EndTheStreakTX

End the streak of daily deaths on Texas roadways.

[TxDOT.gov](https://www.txdot.gov) (Keyword: #EndTheStreakTX)



#EndTheStreakTX Toolkit






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