

Errors and Omissions

Contents

Errors and Omissions.....	1
1. Policy	2
2. Consultant Contract Administration	3
3. Error and Omission Identification and Communication	3
4. Error and Omission Correction.....	3
PS&E Development.....	4
Project Construction	4
<i>PS&E Revision by the Provider</i>	4
<i>PS&E Revision by TxDOT</i>	4
5. Change Orders	5
Overview	5
Reason Codes	5
Reason Codes 1A (TxDOT design) and 1B (Consultant design)	6
Reason Codes 1D (TxDOT design) and 1E (Consultant design).....	6
Reason Code 1C	6
Recoverable Additional Cost	7
<i>PS&E Provided by a Donor or Local Government</i>	7
Actual Cost	8
When to Identify and Finalize Additional Costs	8
When to Request Payment.....	8
6. Notification Letter and Meeting.....	8
Notification Letter	8
Meeting Requested.....	9
No Meeting Requested	9
In-kind Services.....	9
7. Contractor Claims Following Construction	9
8. Post-Construction Design Error.....	9
9. Cost Recovery Procedures	10
Overview	10
Request for Payment Letter	10
Payment Received	11
Request for Consideration by TxDOT Administration.....	11
No Response	11
10. Consideration by TxDOT Administration	11
Process	11
Notification of Decision	11
Payment Received	12
No Response	12
11. Statute of Limitations.....	12
12. Remittance of Payment	12
13. Credit of Recovered Funds	12

14. Settlement Agreement	13
Overview of the Release and Settlement Agreement.....	13
Review Requirements.....	13
Signature Authority	13
<i>Partial Execution</i>	13
<i>Full Execution</i>	13
15. TxDOT Responsibility.....	13
16. Contact Information	14

1. Policy

It is TxDOT policy to enforce its contracts with engineering, architectural, and surveying providers 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, it is likely that 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 provider is treated with respect and fairness.

When an apparent error or omission is identified in work completed by a provider, the first step must be to notify the provider of the problem and to involve the provider in efforts to resolve it. These efforts must include consideration of the totality of relevant facts, including the level of services provided, the provider'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 provider must be given an opportunity to raise the issue with TxDOT Administration before any effort is made by TxDOT to institute legal proceedings to collect damages.

To implement this policy, the Professional Engineering Procurement Services (PEPS) Division has been directed to issue procedural guidelines to the districts for handling claims arising out of apparent errors and omissions. The procedural guidelines, included in subsequent sections of this document and in the internal manual *PEPS Contracting: Contract Management for the Project Manager*, 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 provider, by a TxDOT employee, or from some other cause; and a process for determining the cost of an error or omission. The procedural guidelines defined in this document may be updated from time to time in accordance with this policy.

This policy complies with Government Code §2252.905. Procedural guidelines in support of this policy are provided in subsequent sections of this document. In a situation where these procedures do not seem applicable, or if there is any question about the appropriate steps to take, the District or Division (D/D) must contact the Construction Division (CST), Contract Services Division (CSD), or the PEPS Division for guidance (see section 16 Contact Information of this document). In this document, the terms consultant and provider are used interchangeably to identify the party with whom TxDOT partners in the PEPS contracting process. The purpose of the following procedures is to provide TxDOT employees with internal guidance and does not create any legal rights or obligations.

2. Consultant Contract Administration

TxDOT engineering, architectural, and surveying contracts include standard provisions that address the provider's responsibility for errors and omissions. Providers are subject to these provisions before, during, and after construction of a project, as well as before and after contract termination.

Errors and omissions identified prior to project construction must be corrected at the provider's expense with no additional cost to TxDOT. During and after construction, errors and omissions can result in additional costs that TxDOT would not have incurred if the construction plans had been correct. Under contract law, the resulting additional costs are considered damages that TxDOT is entitled to collect.

These procedures are written to address engineering contracts involving the development of construction plans, specifications, and estimates (PS&E), typically at the district level. They can be adapted and applied to other engineering, architectural, and surveying services where errors and omissions are an issue at the D/D level.

The phrase error and omission is used throughout this document to mean an error, an omission, or a combination of error and omission.

3. Error and Omission Identification and Communication

Even with the best of contracts, it is likely that services will sometimes contain errors and omissions. A problem resulting from an error and omission may be identified during the development of the PS&E, as well as before, during, or after construction. Errors and omissions identified during PS&E development are corrected at the provider's expense with typically no or negligible additional cost to TxDOT. Errors and omissions identified during construction, however, can potentially result in significant additional cost to TxDOT. When an apparent error and omission is identified, TxDOT must notify the provider and give the provider an opportunity to assist in addressing the problem in the event the provider will be held responsible for additional cost over and above what TxDOT would have paid had there not been an error and omission. TxDOT must maintain documentation of any notifications to the provider.

It should become common practice, when practical, for TxDOT to keep the PS&E provider contract active through the construction phase. A best practice is for TxDOT to routinely include the provider and TxDOT Project Manager (TxDOT PM) for the design phase in the pre-construction meeting.

The D/D and provider contacts must be identified prior to construction in case the need for communication arises during construction. The TxDOT personnel managing the construction project must know the plan for making contact and communicating with the appropriate staff within TxDOT and with the provider. If the professional services contract is no longer active, TxDOT must still contact an appropriate person at the provider firm rather than contacting the engineer responsible for the design directly.

4. Error and Omission Correction

Providers are responsible for promptly correcting errors and omissions without compensation. In the situation of a dispute concerning whether or not the work is compensable, the provider is not in a position to delay the work. The professional services contract specifically addresses disputes and must be referenced in the event of a potential delay by the provider.

PS&E Development

During the development of the PS&E, the provider submits plans for TxDOT review. The provider is expected to develop the design and the plan set correctly. In addition, the provider is expected to conduct quality control reviews prior to each interim and final submittal. A certain level of mark-ups and changes are expected at each stage. Routine mark-ups and design changes identified at the request of TxDOT or due to a D/D preference are not the result of provider errors and omissions and must be paid for accordingly.

If an apparent error and omission is identified in the provider submittal, such as an incorrect design or unacceptable plan sheet preparation, the TxDOT PM for the design phase must clearly identify and communicate the error and omission to the provider and indicate what is required to be revised at the provider's expense. The communications must be documented for consideration in the provider's evaluation and in case problems occur during construction. The TxDOT PM must be clear and coordinate, as appropriate, to address any questions.

Project Construction

Project construction is the responsibility of area and project offices. The TxDOT PM for the construction phase is responsible for coordinating with the construction contractors and design providers, as needed. One standard procedure cannot identify every error and omission situation and the specific outcome. There will always be steps in the process where judgment is required. To the extent possible, districts must strive for consistency among area offices in the identification and evaluation of provider errors and omissions.

When an apparent error and omission is identified, TxDOT must notify the provider and give it an opportunity to assist in addressing the problem. TxDOT must maintain documentation of any notifications to the provider.

If TxDOT requires revisions to the PS&E to correct the error and omission, the TxDOT PM from the design phase must be consulted to determine if there are other factors that should be considered in determining responsibility for the error and omission. The TxDOT PM for the construction phase must identify and communicate the errors and omissions to the provider and indicate what is required to be revised at the provider's expense.

Adequate internal coordination and communication is important to avoid acting on a potential error and omission that is later found to be the responsibility of TxDOT. For example, identifying the elimination of a particular item as a provider error and omission, only to find out later that TxDOT specifically directed the provider to eliminate the item during design process.

PS&E Revision by the Provider

In most cases, the provider is available to make the requested revisions. Revisions requested and made unrelated to an error and omission must be paid for as construction phase services or by supplemental agreement to the professional services contract, depending on the magnitude of the revision.

PS&E Revision by TxDOT

For a revision resulting from an error and omission, the provider will be given the first opportunity to make the revision. If it is not possible for the provider to make the revision or TxDOT determines it is in its best interest to make the revision, a TxDOT engineer can revise the plans. The TxDOT *PS&E Preparation Manual* provides specific guidance on a one-time notification step to provide for TxDOT revision of provider plans. If this notification was not made, then the TxDOT engineer making the

revisions is responsible for following the notification requirements of the Texas Board of Professional Engineers and Land Surveyors.

5. Change Orders

Overview

Change orders should be completed according to the guidance in the *Construction Contract Administration Manual*, Chapter 7 and Chapter 16.

When an apparent error and omission is identified that may result in a change order, the TxDOT PM for the construction phase must notify the provider and give the provider an opportunity to assist in addressing the problem. TxDOT must maintain documentation of any notifications to the provider. Necessary revisions to the PS&E must be addressed as indicated in Section 4 of this document.

Before selecting a change order code, such as 1B or 1E, to designate a problem as a provider error and omission, adequate communication must occur between the TxDOT PM responsible for the design phase and the TxDOT PM responsible for the construction phase to make an informed initial assessment of responsibility for the change order. Examples of appropriate factors to be considered include:

- specific direction provided by TxDOT during design
- provider design scope of work
- design information provided to the provider
- the type of project and necessity for assumptions when detailed design is not applicable
- applicable standards and specifications in effect when the work was done
- changes to department policy, standards, and specifications that occurred during design
- changes in site conditions after the project was let (i.e., new development, re-development)
- the relationship of the problem to previous changes approved in the construction contract
- the decision by TxDOT or the contractor to re-design, move, extend, or change something because of field conditions that could not have been reasonably anticipated by the design provider
- the construction contractor's use of applicable plan sheets and their responsibility to comply with the construction contract and notify the department of a potential conflict or problem
- any other design coordination issues that may have affected the development of the plans

The intent is to be reasonable by considering appropriate factors in determining distribution of responsibility for the change order among the design provider, TxDOT, and the construction contractor. There are cases where the responsibility will be shared.

Reason Codes

There are seven categories which include over 40 change order reason codes. The Error and Omission category includes five reason codes. These codes should be used only if the change results from an error and omission.

- 1A –Incorrect PS&E (TxDOT design)
- 1B –Incorrect PS&E (Consultant design)
- 1C –Other

- 1D –Design error or omission that resulted in delay, rework, or inefficiencies (TxDOT design)
- 1E –Design error or omission that resulted in delay, rework, or inefficiencies (Consultant design)

These Error and Omission codes are described in greater detail in the following paragraphs.

Reason Codes 1A (TxDOT design) and 1B (Consultant design)

These reason codes should be used when the error and omission change order does not include additional cost to TxDOT as described below in the discussion of recoverable additional cost in this Section. Incorrect PS&E is generally defined as PS&E developed by TxDOT or a provider including for example, a design error, incorrect items or quantities, missing bid items, incorrect methods of payment, incorrect elevations or references, or other forms of incorrect information. Incorrect PS&E (Reason Codes 1A or 1B) should be used if the error and omission change order has not or will not result in a contractor delay or is not associated with rework by the contractor. Rework refers to work in the field that has to be removed in order to perform reconstruction correctly. If the change order includes additional cost to TxDOT, as described below in the discussion of recoverable additional cost in this Section, reason code 1E should be used instead of 1B.

Reason Codes 1D (TxDOT design) and 1E (Consultant design)

These reason codes should be used when the error and omission change order does include additional cost to TxDOT that would not have been incurred had the construction plans been correct. These costs are considered recoverable additional costs and they are described in the discussion of recoverable additional cost below in this Section. This also includes incorrect PS&E developed by TxDOT or a provider that does result in a contractor delay, rework, or inefficiencies that contribute to the additional cost. Rework refers to work in the field that has to be removed in order to perform reconstruction correctly.

Reason Code 1C

This reason code should be used when there is an error and omission in the PS&E, but the other codes are not appropriate. This can occur when the PS&E was prepared by TxDOT, but the fault (all or partial) cannot be assigned to TxDOT, which results in reason codes 1A and 1D being inapplicable. It can also occur when the PS&E was prepared by a provider under contract to TxDOT, but the fault (all or partial) cannot be assigned to the provider, which results in reason codes 1B and 1E being inapplicable. Finally, it can occur when the PS&E was provided to TxDOT by a third party, such as a donor or a local government as described later in this Section.

Assignment of fault in determining distribution of responsibility for the change order must take into consideration the appropriate factors as identified above.

The change order must not be delayed because of a dispute or complications associated with determining the recoverable additional cost component. These issues must be addressed separately with the provider within a reasonable time after change order execution.

Reason code 1C must not be used simply to avoid the process of pursuing the recovery of costs.

A change order may initially be coded and executed as something other than reason code 1E, such as 1B or 1C. If it is determined later that the change order includes recoverable additional costs as described in the discussion of recoverable additional cost later in this Section, the change order must be treated as a 1E change order. Currently, change order codes cannot be changed after execution. This does not, however, prohibit TxDOT from pursuing the recovery of additional costs, as appropriate.

Table 1 provides a summary of error and omission reason codes applicable to TxDOT provider plans.

Table 1: Reason Codes Applicable to TxDOT Provider Plans

Reason Code	No Additional Cost	Recoverable Additional Cost	Responsibility cannot be identified and no basis for negotiating distribution of responsibility
1B Incorrect PS&E	X		
1E Delay/rework		X	
1C Other			X

Inconsistent or inappropriate identification of reason codes can affect statewide numbers that are subject to internal and external audits,

Recoverable Additional Cost

All change order costs resulting from an error and omission are not automatically the responsibility of the provider. Development of the change order cost may reveal two different cost categories. There can be costs that TxDOT would have incurred if the plans had been correct, and there can also be costs that TxDOT would not have incurred had the construction plans been correct, which are the additional costs to be recovered. In some cases, the entire change order may be considered additional cost.

Back-up documentation for a change order coded 1E must show the estimated additional cost to be recovered. If the estimate is adjusted after coordination with the provider, the documentation must be updated to show the estimate revisions and the considerations for adjusting the estimate, such as:

- the level of services provided
- the cost to TxDOT of the services provided and of the apparent error or omission
- the value of the services provided
- the provider's overall performance
- other appropriate errors and omissions considerations referenced above
- any negotiation or compromise with the provider

If a change order is identified as including recoverable additional cost to TxDOT (Reason code 1E), the resulting additional cost must be pursued according to the procedures described later in this section.

PS&E Provided by a Donor or Local Government

Sometimes PS&E is provided by a donor or local government. An error in that PS&E may result in a change order with costs to TxDOT that are in addition to the costs that would have been incurred if the PS&E had been correct. This is not a professional services contract issue because there is no direct contract between TxDOT and a professional services provider. Rather, TxDOT's rights and responsibilities will be governed by the contract between TxDOT and the donor or local government. This contract is usually in the form of a donation agreement, advance funding agreement, or interlocal agreement. The D/D must contact the Contract Services Division (CSD) to request information about

these agreements and to ask questions about whether to proceed or how to proceed in recovering these additional costs.

Actual Cost

The additional cost to be recovered should represent actual cost to TxDOT as included in the change order. Engineering & Contingency (E&C) are not to be included as a component of the amount to be recovered from the provider.

When to Identify and Finalize Additional Costs

During project construction there may be one or more change orders involving provider errors and omissions. If additional costs are incurred, the documentation, evaluation of responsibility, and quantification of additional cost for each change order should occur while knowledgeable staff is available and accurate recollection of relevant information is possible. The TxDOT PM from the design phase must be consulted, as needed.

When to Request Payment

TxDOT preference is to request payment for each change order as it occurs. Within a reasonable time after creation of each change order, the D/D will forward 1E-coded and 1B- but potentially 1E-coded change orders to the D/D Errors and Omissions (E&O) Committee for review. The D/D must coordinate with the provider to verify and finalize the additional cost to be recovered and complete any necessary documentation. A *Notice of Potential Errors and Omissions* letter template is posted on the PEPS website and may be used by the D/D to start discussions with the provider regarding a potential errors and omissions-related change order. If there is a genuine disagreement, TxDOT must look for a way to resolve the disagreement through negotiation and compromise. Resolution may not be possible if the provider does not agree with the identification of fault, its identified share of responsibility, or the determination of the amount to be requested.

A *TxDOT Error and Omissions Collection Procedures* flow chart is posted with this document that shows the process used to identify, verify, and resolve errors or omissions for TxDOT change orders. The process outlined in Section 6 of this document must be used to document the communication with the provider during the formal resolution of the errors and omissions.

6. Notification Letter and Meeting

The TxDOT Project Manager and other D/D staff will confirm the coding described in Section 5 of this document. The D/D will then forward the coded change orders to the D/D E&O Committee. If the Committee concurs with the coding, the Committee will determine the dollar amount of the provider liability. If the reimbursable amount is greater than zero, the D/D will follow the process described herein to notify and meet with the provider. If the Committee determines that the amount is zero, the D/D will send an *Issues Resolved* letter to notify the provider that the reimbursable amount is zero.

Notification Letter

The D/D E&O Committee must review change orders involving additional cost to be recovered. Once the D/D E&O Committee concurs with the coding and has determined the dollar amount of the provider liability, the D/D will send a *Notification Letter* to the provider outlining the errors and omissions and detailing the additional costs as documented with the change orders. The notification must include references to any previous points of coordination and agreements (see Section 5 of this document). The letter must also state that the provider has 30 calendar days to request a meeting to discuss any remaining questions and that if no meeting is requested by the provider, TxDOT will

proceed with the formal request for payment as described in Section 9 of this document. A template for the *Notification Letter* is provided on the PEPS website.

Meeting Requested

If the provider requests a meeting, the D/D will use this meeting to consider any additional information or explanation that may affect the cost identified for recovery. As a result of the meeting, the identified cost may or may not change and the provider may agree or disagree with the D/D.

If there is a genuine disagreement, TxDOT must look for a way to resolve the disagreement through negotiation and compromise prior to initiating cost recovery procedures. Resolution may not be possible if the provider does not agree with the identification of fault, its identified share of responsibility, or the determination of the amount to be requested. Upon agreement or determination that no agreement can be reached, TxDOT must proceed with cost recovery procedures identified in Section 9 of this document.

No Meeting Requested

If no meeting is requested, TxDOT will proceed with cost recovery procedures identified in Section 9 of this document.

In-kind Services

TxDOT will not accept in-kind services as payment for additional costs owed.

7. Contractor Claims Following Construction

After a project is constructed, there is a possibility of a contractor claim that may involve a previous error and omission identified during construction. Depending on the situation, it's possible the provider could be responsible for some or all of the cost of the contractor claim. If there is a possibility of provider responsibility, upon notice of the contractor claim, the provider must be notified of the situation and be given the opportunity to contribute any information to TxDOT that may be useful in addressing the contractor claim. The provider will not be involved in any discussions or negotiations with the contractor during the claims process.

Upon settlement of all previous claims with the contractor, if additional costs are identified, TxDOT must consider the same factors as during construction in determining the provider's level of responsibility. If additional costs are to be recovered, the D/D must send a *Notification Letter* to the provider stating the final claims, outlining the errors and omissions, and detailing the additional costs. The notification must include references to any previous points of coordination and preliminary agreements regarding the errors and omissions. The letter must indicate the provider has 30 calendar days to request a meeting to discuss any remaining questions and that if no meeting is requested by the provider, TxDOT will proceed with the formal request for payment.

If a meeting is requested, the D/D will follow the procedures in Section 6 of this document. Otherwise, the D/D will proceed with cost recovery procedures identified in Section 9 of this document.

8. Post-Construction Design Error

Sometimes a design error is not discovered until after the project is constructed and in use. The provider remains responsible for the design after construction and after the professional services contract has terminated.

If a possible design error is identified after construction, the D/D must notify the Contract Services Division (CSD) immediately for guidance because the statute of limitations may become a factor. Even if the provider contract is still active, CSD must be contacted for guidance in these situations.

9. Cost Recovery Procedures

Overview

If payment is being requested subsequent to a recent change order or for one or more change orders at the end of a project, a *Notification Letter* should have been sent and the subsequent coordination with the provider should have already occurred to finalize the additional cost to be requested. For requests at the end of a project, if a related contractor claim is anticipated, refer to Section 7 of this document.

The provider may disagree with the determination of responsibility at the time of a change order, at project completion, or during the processing of a contractor claim after construction. If there is a genuine disagreement, TxDOT must look for a way to resolve the disagreement through negotiation and compromise prior to initiating cost recovery procedures. The provider cannot request consideration by TxDOT Administration of the disagreement until after the D/D has sent the *Request for Payment Letter*.

Request for Payment Letter

The *Request for Payment Letter* serves as the formal request for payment indicating the provider's apparent liability for the identified costs. After the *Notification Letter* is sent and any discussions have been completed with the provider, the D/D will coordinate via email with the Financial Management Division (FIN) to request an Item ID, which must be included in the *Request for Payment* letter.

The D/D must prepare a certified letter for signature by the District Engineer or Division Director and provide a copy to the PEPS Division, Financial Management Division (FIN), and Contract Services Division (CSD). Section 16 of this document provides Contact Information. The letter must include an outline of the errors and omissions, along with the additional costs, and references to any previous points of coordination and preliminary agreements. It is possible that both parties know the situation will be resolved after the *Request for Payment Letter*, or that the provider plans to disagree with a portion or all of the identified cost through the appropriate process.

The letter must also indicate the following:

- the provider must respond within 30 calendar days of the date of the *Request for Payment Letter*
- the Item ID number from FIN
- the provider's response must include:
 - payment or
 - a request for consideration by TxDOT Administration regarding whether TxDOT should pursue reimbursement for the identified error and omission, which includes a detailed written explanation of the disagreement
- specific instructions for how to remit payment as described in Section 12 of this document; and
- if payment is not received, TxDOT will consider legal action.

Payment Received

When payment is received, the payment will be processed according to the steps identified under Section 12 of this document. If the provider requests a Release and Settlement Agreement, the process described in section 14 of this document must be used.

Request for Consideration by TxDOT Administration

When the District Engineer or Division Director receives a provider's request for consideration by TxDOT Administration, the D/D will contact the PEPS Division and submit a complete copy of the *Request for Payment Letter* together with the provider's written explanation of disagreement. At this time the D/D must also identify a primary point of contact. The PEPS Division will coordinate directly with the D/D on any additional steps or submission of information, as requested by the PEPS Division Director. PEPS will notify FIN that the invoice is "In Dispute" and stop the automated invoicing process until the appeal is final.

As described in Section 10 of this document, the PEPS Division Director will coordinate with TxDOT Administration regarding the request for consideration. The Chief Engineer will review the disagreement as submitted through the PEPS Division Director. PEPS will send a *Decision Letter* to the provider, with a copy to FIN.

No Response

If a payment or request for consideration is not received, then FIN will send a *Demand Letter* requesting payment within 30 days.

If no payment or response is received to the invoice or *Demand Letter*, FIN will send a *Final Demand Letter* notifying the provider to respond and send payment within 10 days.

If there is no response to the *Final Demand Letter*, FIN will coordinate with the Office of the Attorney General for further collection effort.

10. Consideration by TxDOT Administration

Process

Consideration by TxDOT Administration provides an opportunity for the disagreement to be reviewed outside the D/D. The number of steps to be taken will depend on the size and extent of the issues involved. Minor issues may be handled through the submission and review of the relevant information by the PEPS Division Director. Other issues may involve a discussion by teleconference including the PEPS Division Director, D/D staff, and provider staff. Larger issues may require one or more meetings with D/D staff and provider staff. D/D staff will be responsible for direct coordination with the provider.

After adequate information has been collected, the PEPS Division Director will submit a summary and recommendation to the Chief Engineer for review and decision.

Notification of Decision

The PEPS Division will prepare and send a *Decision Letter* to the provider with the Chief Engineer's decision. The D/D and FIN will receive a copy. If payment of a portion or the entire amount is required, the *Decision Letter* will also indicate the following:

- the provider must respond with payment within 30 calendar days of the date of the *Decision Letter*

- specific instructions for how to remit payment as described in Section 12 of this document; and
- if payment is not received, TxDOT will consider legal action

Payment Received

When payment is received, the payment will be processed according to the steps identified under Section 12 of this document. If the provider requests a Release and Settlement agreement, PEPS will coordinate with CSD to prepare the Release and Settlement agreement as described in section 14 of this document.

No Response

If a payment is not received within 30 days of the date of the *Decision Letter*, FIN will send a *Final Demand Letter* notifying the provider to respond and send payment within 10 days.

If there is no response to the Final Demand Letter, FIN will coordinate with the Office of the Attorney General for further collection effort.

11. Statute of Limitations

The statute of limitations for a provider to sue TxDOT under its contract is four years, but, under the Civil Practice and Remedies Code Section 16.061, state agencies are exempt from that limitation period. However, state agencies are not exempt from Civil Practice and Remedies Code Section 16.008, which provides a ten to twelve year statute of limitations for state agencies to file suits arising out of defective or unsafe conditions caused by certain professional services providers. In a situation where timing may be a factor due to the statute of limitations, the D/D must contact the Contract Services Division (CSD) and General Counsel Division (GCD) for specific guidance. GCD will work with the Attorney General's Office to ensure that any suit filed against the provider for recovery of costs will comply with the statute of limitations stated in the applicable code.

12. Remittance of Payment

Remittance of payment is to be handled in accordance with the TxDOT *Financial Management Policy Manual*, Chapter 6, Section 12, "Reimbursements". Payment should be sent to TxDOT, Attn. Revenue Management, P.O. Box 149001, Austin, TX 78714-9001. For wire transfers, contact FIN_ACCTREC@txdot.gov.

13. Credit of Recovered Funds

Credit of recovered funds is to be handled in accordance with the TxDOT *Financial Management Policy Manual*, Chapter 6, Section 12, "Reimbursements". In addition, Chapter 3, Section 6 "Additional Budget Requests (ABR)" addresses the process of moving recovered funds back to the district.

Once a provider has paid for an error and omission, the additional cost to TxDOT no longer exists. Any future reference to an error and omission as having cost TxDOT money is no longer correct because the provider has paid the debt.

14. Settlement Agreement

Overview of the Release and Settlement Agreement

If not requested by the provider, it is not necessary to execute a settlement agreement. However, if a provider requests a settlement agreement, the D/D must contact Contract Services Division (CSD) to assist in the development of the release and settlement agreement.

CSD will determine the form of the release and settlement agreement, whether it is a blanket release or one more narrowly focused. The D/D must provide CSD with the details of the dispute and a summary of the discussions with the provider. The “dispute” is the error and omission and additional cost that the provider owes TxDOT. In most cases, the release for the dispute will be narrowly focused so that the provider is not released from any more liability than the specific issue being addressed. The D/D may contact CSD for assistance with wording the description of the dispute.

Review Requirements

The Release and Settlement Agreement must be reviewed by CSD before submitting it to the provider for signature. If the provider requests any changes, they must be approved by CSD.

Signature Authority

The signature authority for the Release and Settlement Agreement is the same as for the contract. The execution process focuses on electronic signatures, provided through the DocuSign system. These electronic (digital) signatures are considered legally binding and are preferred for execution of the Release and Settlement Agreement.

Partial Execution

After CSD has reviewed and approved the Release and Settlement Agreement, the D/D will submit the Release and Settlement Agreement to the provider for partial execution using the DocuSign system for electronic signatures. The provider will sign the document electronically and return the partially executed agreement back to the D/D.

Full Execution

The D/D will submit the partially executed agreement to the PEPS Service Center (PEPS SC), along with an explanatory memo confirming CSD’s review and approval of the document. The PEPS SC will use the DocuSign system to rout the agreement for full execution by the appropriate signature authority. Once the agreement is fully executed, the PEPS SC will send the fully executed agreement to CSD for the contract file, and send copies to the D/D and the provider.

15. TxDOT Responsibility

TxDOT has the responsibility to identify errors and omissions and fairly evaluate the responsibility for additional cost when applicable. TxDOT spends large sums for engineering and construction services and is responsible for pursuing the recovery of appropriate costs when they are clearly due. In this pursuit, it is the responsibility of TxDOT staff to ensure that TxDOT follows business practices that are professional, fair, equitable, and reasonable.

16. Contact Information

General questions related to the policy and procedures addressed in this document may be addressed to the Professional Engineering Procurement Services Division (PEPS) Center of Excellence at PEPS_COE_Process@txdot.gov.

Questions related to TxDOT policies, release and settlement agreements, or the legal aspects of the procedures may be addressed to the Contract Services Division (CSD) at CS_Contract_Review@txdot.gov.

Questions related to making payments may be addressed to the Financial Management Division (FIN) Finance Revenue Group at FIN_ACCTREC@txdot.gov.

Questions related to construction related issues or change orders may be addressed to the Construction Division (CST) Support Group at CST-ConstructionSupport@txdot.gov.