



New Mexico DEPARTMENT OF
TRANSPORTATION
MOBILITY FOR EVERYONE

Via Electronic Mail Only at (Cindy.Vigue@dot.gov)

Cindy Vigue
U.S. Department of Transportation
Federal Highway Administration
NM Division
4001 Office Court Drive, Ste. 801
Santa Fe, NM 87507

November 8, 2021

Re: Work Plan for Special Experimental Project 14 (SEP-14) Project Award Using a Prequalification Program

Dear Ms. Vigue,

The following work plan and attachment are submitted by the New Mexico Department of Transportation (NMDOT) for review and acceptance to the SEP-14 program.

I. Introduction/Purpose: A brief statement regarding the request for approval from FHWA to enter the SEP-14 program with a short explanation of NMDOT's proposed prequalification program

The NMDOT is formally requesting approval under the Federal Highway Administration SEP-14 platform to continue the use a performance-based prequalification program applicable to each contractor bidding for NMDOT state and federally funded construction projects. The NMDOT prequalification program proposes to evaluate contractor past performance as a measure of contractor responsibility, similar to the Department's previous SEP-14 Prequalification Program. The prequalification program NMDOT seeks to implement is performance driven and NMDOT will use elements of contractor past performance, such as timely project completion, to make a determination about a contractor's responsibility. Determinations about contractor responsibility will be applied to each bid and may adjust the order of bidders. NMDOT seeks to reward good performing contractors and encourage poor performing contractors to improve.

The first step to the implementation of this program will involve gathering objective data from closed projects for contractor performing work in New Mexico. The data gathered during the performance period will be processed through an equation. Once the data is processed, the equation produces a yearly score representing the measurement of the contractor's past performance and responsibility. The score is published, and the contractor will have an opportunity to review and appeal the score before it is applied to their bid. The prequalification program will provide incentives to good performers and enable the NMDOT to award projects in a manner that emphasizes contractor responsibility.

**Michelle Lujan
Grisham**
Governor

Michael R. Sandoval
Cabinet Secretary

Commissioners

Jennifer Sandoval
Commissioner, Vice-Chairman
District 1

Bruce Ellis
Commissioner
District 2

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Commissioner, Chairman
District 4

Thomas C. Taylor
Commissioner
District 5

Charles Lundstrom
Commissioner, Secretary
District 6

The NMDOT has worked diligently with our industry partners to update the previous prequalification program and the criteria used to evaluate contractor responsibility. Public comment was addressed through the rulemaking process.

This proposal describes the scope and history of the program, including NMDOT's authority to continue an innovative performance-based prequalification program. The scoring section describes the performance factors NMDOT intends to measure, including how the performance factors are tallied and how the prequalification score is calculated. This proposal concludes with an overview of the planned schedule for implementation of the prequalification program.

II. Scope: A discussion of the intended application of the prequalification program

NMDOT will implement the prequalification program by rule, the NMDOT rule governing prequalification, 18.27.5 NMAC (amended effective 6-18-2021 - attached). The program will be applied to projects as an innovative contracting incentive. The definition of project {18.27.5.7 Q) was clarified in the amended rule. Prequalification project means a major construction project that is let through the NMDOT Plans, Specifications and Estimates Bureau as a competitive sealed bid procurement resulting in a contract executed by the department. The definition of prequalification project expressly excludes maintenance and other construction services work procured by any other means, including but not limited to, multiple source award, price agreement, sole source, qualification-based, design-build, or small purchase procurement methods.

Similar to the previous SEP-14 Prequalification Program, the NMDOT has used the authority of its policy making body, the State Transportation Commission, the New Mexico Procurement Code, and the internal rulemaking polity to develop objective criteria to measure contractor responsibility. As the policy making body for the NMDOT, the State Transportation Commission has broad authority to determine all matters of policy which would include adopting policies governing the acceptance of bids. By statute, the State Transportation Commission has specific authority to make policy determination that will implicate contractor responsibility. For example, the State Transportation Commission is statutorily authorized to adopt rules and regulations to exclude bidders from bidding on NMDOT construction projects. Despite the State Transportation Commission's power to exclude bidders, NMDOT tailored this prequalification program to encompass the principles of open and fair competition among bidders.

The NMDOT has broad authority to adopt regulations that would facilitate the efficient determination of a contractor's responsibility. The day-to-day operations of the NMDOT are within the purview of the Cabinet Secretary, who is guided by the NMDOT's Standard Specifications as well as the New Mexico Procurement Code for guiding the procurement process applicable to a public works construction project. The New Mexico Procurement Code requires projects be awarded to the lowest responsible bidder. Inherent to the award is a determination by the Cabinet Secretary and contracting agency of a bidder's responsibility. Finally, as a state agency, NMDOT has the ability to adopt rules to facilitate

the day-to-day efficient management of the department, which includes rules applicable to contractor responsibility.

NMDOT limited application of the previous SEP-14 prequalification rolling average factor to projects with an estimated value of \$5 million or greater. The intent was to capture 2/3 of the department's projects. During the last program, the first 4 years only captured 1/3 of the projects. In the last reporting period, it was determined that the prequalification program affected 1/2 of the projects. It is proposed that the \$5 million threshold remain the same for the proposed program period. Data will still be collected for projects below the threshold but the prequalification factor rolling average will not be applied to projects below the established threshold. The Cabinet Secretary will retain the right to modify the threshold on an annual basis via the Invitation to Bid or a Notice to Contractors.

III History: A discussion of NMDOT's current contractor prequalification rule

On February 26, 2015, NMDOT received approval for the original SEP-14 application, to include two three-year evaluation periods. Beginning in March 2015, NMDOT began gathering performance data for all of its active construction projects. In January of each year thereafter, the projects closed over the previous year were used to calculate a rolling average prequalification number for each prime contractor, which was subsequently used to evaluate the prime contractors bid for the following year. The new numbers were calculated in January and February and were applied to bids from March through February of the following year. Prime contractors with no performance data for the year were assigned a multiplier factor of 1. The program expired in March 2021.

Discussions for the future of the NMDOT prequalification program began with the new administration in the fall of 2019. After multiple meetings with our industry partners, following the rulemaking process and receiving approval from the NM State Transportation Commission on May 20, 2021, the following modifications to the original rule are being proposed to move forward with a "Prequal 2.0" program.

Since the expiration of the approved SEP-14 program, the current prequalification program does not effectively take into account contractor performance, nor does it provide a method to incentivize good performance. The existing program requires prospective bidders to answer questions in a prequalification packet as a condition to bidding; however, the current rule provides no method to adequately evaluate the contractor's responses. Without an adequate mechanism to reward past performance or to make determinations about contractor responsibility, the existing rule provides no mechanism to ensure the maximum benefit to the taxpayer through quality projects and efficient management of the NMDOT.

IV. Scoring: A brief outline of the criteria and procedures used to evaluate contractor responsibility

NMDOT proposes to evaluate responsibility through measuring five performance factors. The performance factors are measured throughout project construction and are tallied at

the project's closure resulting in a prequalification score for the contractor. The prequalification scores are published once a year and used for bid evaluation and award purposes. Section 18.27.5.12 remains in the modified rule as providing the method by which the NMDOT will notify the contractor of changes to their prequalification factor or prequalification rolling average.

1. Claims (Pf_c): Claims will be considered only if they are unsuccessfully resolved against the contractor at the public works mediation level, as opposed to the previous rule, that modified the score if the claim was not successfully resolved at the Cabinet Secretary level. The appeal provisions in the rule provide contractors with adequate notice of the remedies available to them in the event of a dispute and a substantive opportunity to be heard. If the Contractor received the claim value or less than the claim value at the mediation level, then the Contractor would receive a score which would negatively impact their Pf claim and $Pqfra$ numbers. It should be noted that mediation is required in the state of New Mexico prior to litigation.
2. Disincentives (Pf_d): Disincentives are set by contract and measure certain road qualities such as road smoothness. Disincentives assessed to a contractor on a closed project will be evaluated through an equation, utilized on a Department maintained spreadsheet. Pf disincentives has been modified to include items from the 300, 400 and 900 Divisions of the *New Mexico Department of Transportation Standard Specifications for Highway and Bridge Construction*. The list of specific items will be made available on our prequalification website page and will be included as a standard special provision in each of our prequalification projects.
3. Liquidated Damages (Pf_{ld}): Liquidated damages are an amount established by contract and assessed to a contractor if contract time is exceeded. Liquidated damages assessed to a contractor on a closed project will be evaluated through the equation in the Department maintained spreadsheet. This is unchanged from the previous SEP-14 Prequalification Program.
4. Non-conformances (Pf_n): Non-conformances are established by contract and are a measurement of a contractor's timely compliance with the submission of contractually required documents related to their work that same month. Non-conformances assessed to a contractor on a closed project will be evaluated through the spreadsheet equation. The previous rule contained a subcontractor prompt payment (Pf_{sc} 10%) as well as a prime contractor non-conformance (Pf_{nc} 10%). Subcontractor prompt payment has been combined with the Pf non-conformance and non-conformance is now worth 20% of the prequal calculation as opposed to 10%. The prime contractor does not have control over the subcontractor's prompt payment to their employees or second tier subcontractors, so the prequalification committee and industry partners agreed to modify the rule to 20% of the P_{qfra} factor for the prime contractor only (Pf_n - non-conformances).

5. Safety (P_s): Safety data will be the contractor's experience modifier rating as reported on its prequalification application. This is unchanged from the previous SEP-14 Prequalification Program.

The contractor's yearly performance factor, or P_{qfyr}, is the sum of the individual performance factors multiplied by their associated percentages as follows:

$$P_{qfyr} = P_{fc} * 15\% + P_{fd} * 30\% + P_{fd} * 30\% + P_{fn} * 20\% + P_{fs} * 5\%$$

At the start of the modified Program, each contractor will enter with the same score of 1.0, eliminating the possibility of inappropriate or protracted competitive advantages to any group of contractors. The contractor's prequalification rated average (P_{qfra}) is weighted using a rolling average, and after three years, a bad score from a previous year no longer impacts the bidder. Poor performers will still have the opportunity to bid on projects to which the Program does not apply in order to gain experience and improve their performance. The only modification to this statement is that the first performance period year will contain data with projects in the July 2021 letting until the end of February 2023, resulting in a first performance period of 20 months. This elongated first performance period was at the request of our industry partners as it can be difficult to close a project within the one-year period and would allow more contractors to obtain a score in the first performance period, leveling the playing field more quickly. The performance collection timeframes have also been adjusted from January-December to March-February so that project closure is not affected by the holiday season and legislative sessions.

A contractor's overall factor (P_{qfra}) will be the result of a three-year rolling- average of its annual results, with emphasis on the most current year's values, the sum of P_{qfyr} 1 through P_{qfyr} 3, each multiplied by the appropriate weighting factor, divided by the sum of the weighting factors as follows:

$$P_{qfra} = ((P_{qfyr1} * 0.9) + (P_{qfyr2} * 0.6) + (P_{qfyr3} * 0.3)) / (0.9 + 0.6 + 0.3)$$

As some projects do not contain disincentive factors, and to ensure there is room for a small error on projects, some of which may consist of up to three construction seasons, the lowest score that will be applied to a contractor's bid has been capped at 0.94. With the previous rule, this number was 0.90. This will even the playing field for contractors that assume more risk with complicated projects as opposed to those that stick to projects that do not contain disincentive factors, such as guardrail and lighting projects.

Project closure (18.27.5.7 R) for prequalification was modified to be the physical completion of the project as established in the current edition of the *New Mexico Department of Transportation Standard Specifications for Highway and Bridge Construction*, Section 109.10.8, which is documented on the compass form (~~see attached~~). The previous rule defined project closure as the signature of the State Construction Engineer's signature on the compass form. The modification was made to ensure that the contractor received a score for their project once all their contractual obligations for the project were met, not when NMDOT had completed their administrative processes.

As with the previous rule, NMDOT will not track or count data from any project which has been terminated by the NMDOT at no fault of the contractor.

The original program consisted of two three-year evaluation periods. This application request is also for two three-year periods. After the third year of the first evaluation period, the NMDOT prequalification committee will determine whether any part of the program, including the objective criteria measured, needs to change. As the program is very similar to the previous program, it is not anticipated that meetings will be required on a regular basis. The NMDOT will continue its dialogue with its industry partners regarding the program and if substantive feedback or issues are presented regarding the application of the program, the committee will determine how to respond. NMDOT executive staff meets with industry partners on a quarterly basis to discuss any issues, which may include feedback on the prequalification program.

V: Schedule and Reporting: A brief statement of the program milestones and completion date.

After meetings with our industry partners, following the rulemaking process, and receiving approval from the NM State Transportation Commission on May 20, 2021, the previous Contractor Prequalification Rule was repealed and replaced with the new Rule, effective June 8, 2021.

Data collection for projects began with those in the July 2021 letting. The initial reporting period will end February 2023. Provided approval is granted for the SEP-14 Application, the contractor's scores will be tabulated and there will be a period for posting and review of the scores. The Pqfra will be posted on the department's website by the second Friday in March. The rolling average factor will be applied to the prime contractor's bid for prequalification projects in accordance with the invitation for bids beginning with the May, 2023 bid opening.

The NMDOT will undertake a process to review claims data and measure cost effectiveness through an analysis of claims, projects with singular bidders, number of prequalified contractors and Average Unit Bid prices and will provide an initial report, annual (intermediate) reports and a final report to the Division Office in a readable and suitable format for publication.

Claims represent a significant cost to the NMDOT, due to resources, personnel hours and funds spent in resolution of the claim. Claims were reduced with the original SEP-14 Prequalification Plan, and it is anticipated that claims will remain low with the implementation of the modified SEP-14 Prequalification Plan, if approved.

The NMDOT believes that the program poses no significant risk to competitive bidding on state or federally funded projects. If the number of projects bid with only one bidder increases significantly, then the NMDOT will reevaluate the program. Similar to the previous program, NMDOT expects that the number of bidders as a whole will remain fairly consistent.

The NMDOT will continue to monitor the number of prequalified contractors and subcontractors to determine if there are any significant changes during the program evaluation period. Poor performers will have the opportunity to bid on projects to which the program does not apply and the rolling average ensures that after a short period of time, a score for any given year rolls off the calculation. The program provides poor performers the opportunity to have work, gain experience and improve their performance.

VI: Early termination of SEP-14 Approval

If approval of SEP-14 is terminated due to a determination from FHWA or NMDOT that the effects of the experiment are unacceptable, the NMDOT has options that it will take into consideration. The NMDOT can choose to continue the program on state funded projects only and to not implement the program by excluding it from future projects through the invitation for bids, and/or enter rulemaking.

VII: Closing

The purpose of this proposal is to evaluate contractor performance objectively, to reward good performers and encourage poor performers to improve. By objectively measuring contractor performance, NMDOT intends to maximize quality, cost and efficiency in construction. The NMDOT believes the previous SEP-14 Prequalification Program was a success, and would like the opportunity to continue the program, with the modifications presented in this application.

We look forward to working with you on this proposal. Please feel free to contact me at any time with questions or concerns.

/Signed By/

Rick Padilla
Executive Director for Highway Operations

Attachment(s)

Cc: *Via email only*
Michael Sandoval, NMDOT Cabinet Secretary
Justin Reese, NMDOT Deputy Secretary
John Romero, NM DOT Division Director of Operations
Tisha Clark, NMDOT Acting State Construction Engineer
Elizabeth Travis, NMDOT General Counsel
Cindy Vigue, FHWA New Mexico Division Administrator
Brian Hogge, FHWA Office of Preconstruction
Max Valerio, FHWA Area Engineer

TITLE 18 TRANSPORTATION AND HIGHWAYS
CHAPTER 27 HIGHWAY CONSTRUCTION GENERAL PROVISIONS
PART 5 CONTRACTOR PREQUALIFICATION RULE

18.27.5.1 ISSUING AGENCY: The New Mexico department of transportation, PO Box 1149, Santa Fe, New Mexico, 87504-1149.
 [18.27.5.1 NMAC - Rp, 18.27.5.1 NMAC, 6/8/2021]

18.27.5.2 SCOPE: This rule applies to the New Mexico department of transportation construction projects and to all contractors and subcontractors seeking or anticipating the performance of work within project limits.
 [18.27.5.2 NMAC - Rp, 18.27.5.2 NMAC, 6/8/2021]

18.27.5.3 STATUTORY AUTHORITY: Section 13-1-82 NMSA 1978 13-1-133 to -134 NMSA 1978, 67-3-2, 67-3-11, 67-3-14, and 67-3-43 NMSA 1978, 23 USC Section 112(b), 23 CFR Sections 635.110 and 635.114. [18.27.5.3 NMAC - Rp, 18.27.5.3 NMAC, 6/8/2021]

18.27.5.4 DURATION: Permanent. [18.27.5.4 NMAC - Rp, 18.27.5.4 NMAC, 6/8/2021]

18.27.5.5 EFFECTIVE DATE: June 8, 2021, unless a later date is cited at the end of a section.
 [18.27.5.5 NMAC - Rp, 18.27.5.5 NMAC, 6/8/2021]

18.27.5.6 OBJECTIVE: To establish policies and procedures for a determination of responsibility through a contractor prequalification system that directly rewards good performers and encourages poor performers to improve.
 [18.27.5.6 NMAC - Rp, 18.27.5.6 NMAC, 6/8/2021]

18.27.5.7 DEFINITIONS:

- A.** This rule adopts the abbreviations, symbols and definitions in the division 100-general provisions of the current edition of the *New Mexico Department of Transportation Standard Specifications for Highway and Bridge Construction* and incorporates the same by reference
- B.** CID is the abbreviation of construction industries division.
- C.** Compass form means the New Mexico department of transportation form generated at prequalification project closure that documents certain contractor performance measurement data.
- D.** Department means the New Mexico department of transportation.
- E.** Innovative contracting is an alternate form of competitive bidding consistent with federal and state procurement laws that can result in work being awarded to a responsible bidder that did not submit the lowest monetary bid.
- F.** Modified bid amount means the contractor's bid multiplied by the contractor's prequalification factor rolling average or Pqfra. The modified bid amount will be used solely for determining the apparent lowest responsible bidder. The modified bid amount will not be used for payment.
- G.** Packet or prequalification packet means the current New Mexico department of transportation contractor prequalification application form issued by the office of inspector general and completed by a contractor or subcontractor.
- H.** Performance factor or Pf means the numerical quantification of a contractor's past performance on closed projects for certain objectively measurable criteria.
- I.** Pf claim or Pfc means the performance measurement of a contractor's unsuccessful demand for reconsideration of a claim, pursued beyond the cabinet secretary administrative remedy level final determination through recourse to litigation or arbitration subsequent to an unsuccessful public works mediation.
- J.** Pf disincentive or Pfd means the performance measurement of a contractor's quality of work for certain contract items related to pavement and structures work where the materials are subject to laboratory testing by both the contractor and department or quality-based price reductions. Applicable project contract items for Pf disincentive are governed by division 400, 500, and 900 quality criteria, as established in the current edition of the *New Mexico Department of Transportation Standard Specifications for Highway and Bridge Construction* and as may be amended by special provision.
- K.** Pf liquidated damages or Pfld means the performance measurement of a contractor's timely completion of the contract.
- L.** Pf non-conformance or Pfn means the performance measurement of a contractor's compliance with the terms and conditions of the contract.
- M.** Pf safety or Pfs means the performance measurement of a contractor's safety reflected by the contractor's experience modifier rate or emr provided by the contractor's bonding company.
- N.** Prequalification factor rolling average or Pqfra means the final measure of responsibility that may be applied to a contractor's bid resulting in a modified bid amount.
- O.** Prequalification factor year or Pqfyr means the yearly calculation of a contractor's performance factors.
- P.** Prequalification factor or Pqf means the overall mathematical analysis of the performance factors that measure contractor responsibility.
- Q.** Prequalification project means a major construction project that is let through the plans specifications and estimates bureau of

the department, as a competitive sealed bid procurement resulting in a contract executed by the department. The definition of prequalification project expressly excludes maintenance and other construction services work procured by any other means, including but not limited to, multiple source award, price agreement, sole source, qualification-based, design-build, job order contracting or small purchase procurement methods.

R. Prequalification project closure for purposes of the application of the prequalification calculation means the date of physical completion of the project as established in the current edition of the *New Mexico Department of Transportation Standard Specifications for Highway and Bridge Construction*, section 109.10.8, which is documented on the compass form.

S. Responsibility means an objective determination made by the department, based on past performance, of the contractor's capability in all respects to perform fully and make satisfactory delivery of the requirements of the contract including the integrity and reliability that will assure good faith performance.

T. Rolling average means a calculation to analyze data points by creating a series of averages of different subsets of the full data set. [18.27.5.7 NMAC - Rp, 18.27.5.7 NMAC, 6/8/2021]

18.27.5.8 PREQUALIFICATION PROCEDURE: To obtain prequalified status, the current version of the prequalification packet must be obtained from the office of inspector general through use of the department website. Each contractor and subcontractor seeking to become prequalified shall submit its prequalification packet and any supporting information to the department's office of inspector general as indicated in the prequalification packet. Untimely, incomplete and non-conforming packets will not be processed.

A. Prequalified status will be granted upon the approval of a timely, complete and conforming prequalification packet by the office of inspector general.

B. An untimely, incomplete, or nonconforming packet will result in delays affecting prequalification status and will negatively impact the prime contractor's ability to bid on New Mexico department of transportation projects.

(1) Obtaining prequalified status is a condition to submitting a bid. Prime contractors submitting a new prequalification packet or renewal prequalification packet must be approved no later than seven calendar days before the opening of any bid.

(2) A prime contractor's submitting a bid without timely obtaining prequalified status shall result in a determination that its bid is non-responsive and the bid shall be rejected.

C. Subcontractors, at any tier, must obtain prequalified status before performing any work on the project. Work performed without prequalified status shall be non-compensable.

D. For prime contractors and subcontractors who are currently prequalified by the effective date of this rule the applicant will not need to submit a new prequalification packet until the anniversary date of their last packet.

E. Within five calendar days from the receipt of a prequalification packet the office of inspector general will provide notice of receipt of the packet to the contractor.

(1) If the packet submitted is complete and conforming then the office of inspector general will provide written notice to the applicant of approved prequalified status.

(2) If the packet submitted is incomplete or does not conform to the requirements then the office of inspector general will provide written notice to the applicant that the packet will not be processed until the packet is complete and conforms to the requirements.

(3) The date of the written notice of approved prequalified status shall establish prequalification eligibility for a period of one year. Prequalified status shall automatically terminate if not renewed prior to the expiration date established by the written notice of approved prequalification status.

F. Renewal packets shall be submitted no more than 30 calendar days before the expiration date on the document published by the office of inspector general titled prequalified contractors and subcontractors list. Prequalified status shall automatically terminate for the failure to submit a timely, complete and conforming renewal packet. Prequalified status shall be re-established upon the approval of a complete and conforming renewal packet.

G. Appeal of the denial of prequalification eligibility based upon the receipt of untimely, incomplete or non-conforming packet shall be submitted in writing to the office of inspector general with supporting documentation within seven calendar days of the denial of prequalified status. If the appeal is untimely the aggrieved party waives the right to appeal. The inspector general, or designee, will issue a final written decision upholding or reversing the denial of prequalified status within seven calendar days of the receipt of a timely appeal. The inspector general's decision constitutes the final action taken by the office of inspector general related to a denial of prequalified status under this section.

H. Obtaining prequalification status, a performance factor, or a prequalification factor rolling average does not grant a license to do business, a right to bid or to be awarded a contract.

I. In the event a contractor or subcontractor is suspended or debarred, its prequalification status shall immediately and automatically terminate without further notice. In order to obtain renewed prequalification status after a period of suspension or debarment a new complete and conforming prequalification packet must be submitted and approved.

[18.27.5.8 NMAC - Rp, 18.27.5.8 NMAC, 6/8/2021]

18.27.5.9 DEFICIENT, FALSE OR MISLEADING STATEMENTS: Any deficient, deceptive, false, fraudulent or misleading statements in the prequalification packet or incomplete affidavit may subject the offending party to an automatic rejection or revocation of prequalified status, suspension, debarment proceedings or other civil and criminal penalties under the department rules and may be reported to the New Mexico attorney general and the federal highway administration for further action.

[18.27.5.9 NMAC - Rp, 18.27.5.9 NMAC, 6/8/2021]

18.27.5.10 LICENSING: Only contractors licensed in New Mexico may perform highway construction work for the department. The timing

and requirements for licensure appear in the invitation for bids for the project. All persons seeking additional information should refer to the New Mexico CID rules and regulations and the Construction Industries Licensing Act. Contractors are not required to have the necessary construction industry licenses to submit a prequalification packet.

[18.27.5.10 NMAC - Rp, 18.27.5.10 NMAC, 6/8/2021]

18.27.5.11 PREQUALIFICATION CALCULATION: Prequalification calculations shall only be applied to those prequalification projects, which the contractor performed pursuant to a contract with the department and obtained prequalification project closure status documented by a completed compass form. The department will gather prime contractor performance data from each prequalification project upon prequalification project closure. The data collected will be used to calculate a yearly prequalification factor. The department may apply prequalification factor rolling average calculations as a responsibility evaluation to evaluate prime contractor bids for award of department projects, as indicated in the invitation for bids.

A. The performance factors are claims, disincentives, liquidated damages, non-conformance, and safety.

(1) Pf claim data will be documented on the compass form and will be collected from the department's closed project records.

(2) Pf disincentive data will be documented on the compass form and will be collected from the department's closed project records indicating whether disincentives were assessed based on calculations in the applicable standard specifications.

(3) Pf liquidated damages data will be documented on the compass form and will be collected from the department's closed project records indicating whether liquidated damages were assessed.

(4) Pf non-conformance data will be documented on the compass form and will be collected from the department's closed project records indicating whether non-conformances were assessed.

(5) Pf safety data will be the contractor's experience modifier rating as reported on its prequalification packet.

B. The performance factors are assigned percentage values within the yearly prequalification factor calculation.

(1) The percentage associated with claims is fifteen percent.

(2) The percentage associated with disincentives is thirty percent.

(3) The percentage associated with the liquidated damages is thirty percent.

(4) The percentage associated with non-conformances is twenty percent.

(5) The percentage associated with safety is five percent.

C. Pf claim or Pfc is calculated in the following manner:

(1) Claims that are not pursued subsequent to the cabinet secretary administrative remedy level or to a public works mediation held pursuant to the public works mediation act, section 13-4C-1 NMSA 1978, will not be included in the calculation for Pf claim.

(2) For claims that a contractor pursues beyond the cabinet secretary administrative remedy level, and for which the department receives service of process of a summons and complaint or a request for arbitration, a binary system will be used to assign a value of zero or one to evaluate claims.

(a) Claims resolved for more than the value offered by the department at the cabinet secretary administrative remedy level will be assigned a value of zero.

(b) Claims resolved for less than or equal to the value offered by the department at cabinet secretary administrative remedy level will be assigned a value of one.

(3) Pf claim is calculated by adding the number one to the outcome of the sum of the claim value divided by the sum of closed projects.

(4) Pf claim resulting in a value of one will be assigned a bonus value for Pf claim equal to 0.9.

(5) Pf claim will then be multiplied by the percentage associated with Pf claim. The resulting value will be incorporated into Pqfyr.

D. Pf disincentive or Pfd is calculated in the following manner:

(1) For each closed project:

(a) Sum paid and accepted applicable contract items.

(b) Sum paid and accepted applicable contract items less applicable contract disincentives.

(c) Divide the total of Subparagraph (a) by the total of Subparagraph (b).

(d) If Subparagraph (a) is equal to zero, Subparagraph (c) will be assigned a value of one.

(e) If the result of Subparagraph (c) is exactly one with paid and accepted applicable contract items,

Subparagraph (c) will be assigned a value equal to 0.9.

(2) Sum all closed projects of Subparagraph (c) in a given year and divide by the count of closed projects resulting in Pfd.

(3) Pf disincentive will then be multiplied by the percentage associated with Pf disincentive. The resulting value will be incorporated into Pqfyr.

E. Pf liquidated damages or Pfld has two separate methods of calculation one for mandatory completion date projects and one for calendar or working day projects:

(1) For mandatory completion date projects liquidated damages equivalence is calculated:

(a) Subtract the mandatory completion date including any awarded time from the notice to proceed date to equate to a whole number.

(b) Subtract the actual completion date from the notice to proceed date to equate to a whole number.

(c) Divide the total of Subparagraph (b) by the total of Subparagraph (a) of Paragraph (1) of Subsection E of this section.

(d) A resulting value less than or equal to one from Subparagraph (c) of Paragraph (1) of Subsection E of this section will be assigned a bonus value equal to 0.9.

(2) For calendar or working day projects liquidated damages equivalence is calculated:

(a) Sum of the total days charged.

(b) Sum of the total days contracted.

(c) Divide the total of Subparagraph (a) by Subparagraph (b).

(d) A resulting value less than or equal to one from Subparagraph (c) will be assigned a bonus value equal to 0.9.

(3) Pf liquidated damages for a given year is calculated from all project liquidated damages. Pf liquidated damages is the sum of liquidated damages equivalence for mandatory completion date, calendar or working day projects divided by the count of closed projects resulting in Pfld.

(4) Pf liquidated damages will then be multiplied by the percentage associated with Pfld. The resulting value will be incorporated into Pqfyr.

F. Pf non-conformance or Pfn is calculated in the following manner:

(1) Sum the number of progress payments per project.

(2) Sum the number of progress payments without non-conformance.

(3) Divide Paragraph (1) by Paragraph (2).

(4) A resulting value of one for Paragraph (3) will be assigned a bonus value equal to 0.9.

(5) Sum all closed projects of Paragraph (4) in a given year and divide by the count of closed projects resulting in Pfn.

(6) Pf non-conformance for a given year will then be multiplied by the percentage associated with Pfn. The resulting value

will be incorporated into Pqfyr.

G. The performance factor for safety or Pfs is the contractor's experience modifier rate supplied annually by the contractor at the time of submission of the prequalification packet.

(1) Pfs for a given year is the numerical value of the contractor's experience modifier rate.

(2) If the experience modifier is equal to or less than one the Pfs is assigned a value of 0.9.

(3) The experience modifier rate is multiplied by the percentage associated with Pfs. The resulting value will be incorporated

into Pqfyr.

H. The contractor's yearly performance factor or Pqfyr is the sum of the individual performance factors multiplied by their associated percentages.

I. The equation is $Pqfyr = Pfc * \text{fifteen percent} + Pfd * \text{thirty percent} + Pfld * \text{thirty percent} + Pfn * \text{twenty percent} + Pfs * \text{five percent}$.

J. The contractor's prequalification factor rolling average will be denoted as Pqfra, which will be calculated through the use of a rolling average covering a period of three years. Each rolling average year will be assigned a weighting factor and will be multiplied by the appropriate weighting factor starting with the most recent year.

(1) The equation for $Pqfra = ((Pqfyr 1 * 0.9) + (Pqfyr 2 * 0.6) + (Pqfyr 3 * 0.3)) / (0.9 + 0.6 + 0.3)$. A contractor's overall Pqfra is the sum of Pqfyr 1 through Pqfyr 3, each multiplied by the appropriate weighting factor, is divided by the sum of all weighting factors to result in the contractor's overall Pqfra.

(a) Pqfyr 1, the most recent year, will be multiplied by the weighting factor of 0.9.

(b) Pqfyr 2, the first preceding year, will be multiplied by the weighting factor of 0.6.

(c) Pqfyr 3, the second preceding year, will be multiplied by the weighting factor of 0.3.

(d) In the absence of data for any given year, a contractor's Pqfyr will be assigned a value of one.

(2) All equations and calculations whether interim or final will be rounded to the thousandths place.

(3) After all rounding has occurred any Pqfra that has an assigned value of less than or equal to 0.94 will, then, be assigned a value of 0.94, for the purposes of calculating the modified bid amount.

K. The resulting Pqfra calculation will be the final department determination of a contractor's most recent Pqfyr and Pqfra calculations.

L. The department may reset the Pqfra calculation for all contractors in the event the Pqfyr equation is amended.

(1) Upon reset all contractor scores will be set to one.

(2) The department may implement the reset by setting Pqfyr 1 to cover a period of performance not to exceed two years.

(3) The new calculation will apply to those prequalification projects let after the effective date of the amendment.

[18.27.5.11 NMAC - Rp, 18.27.5.11 NMAC, 6/8/2021]

18.27.5.12 POSTING, REVIEW AND APPLICATION OF PREQUALIFICATION FACTOR: The following procedures will apply to the posting, review and application of the prequalification factor:

A. The Pqfra will be calculated once a year on prequalification projects closed between March first of the previous year and the last calendar day in February of the current year.

B. The Pqfra will be posted on the department's website, in the office of inspector general document titled prequalified contractors and subcontractors list, by the second Friday in March.

C. The Pqfra will be applied to a prime contractor's bid(s) for prequalification projects in accordance with the invitation for bids

beginning with the May bid opening until superseded by an updated Pqfra

D. The Pqfra may be used to determine the modified bid amount.

E. A Pqfra may be re-calculated and reposted at times other than the second Friday in March in order to implement the decision of a hearing officer, a court order or a required correction.

[18.27.5.12 NMAC - Rp, 18.27.5.12 NMAC, 6/8/2021]

18.27.5.13 ADMINISTRATIVE REVIEW: This section governs the exclusive administrative review procedure and remedy to address prequalification calculations performed under 18.27.11 NMAC.

A. To protest the department's application of a prequalification score to a bid, the contractor must follow the bidding dispute resolution procedures in the current edition of the *New Mexico Department of Transportation Standard Specifications for Highway and Bridge Construction*, section 103.3.

B. Administrative review of a prequalification calculation is available only for a contractor seeking reconsideration of its own score. The department shall reject a request for administrative review of another contractor's score.

C. To be considered by the department, a request for administrative review shall strictly conform in timing form and service of filing as provided in this section. Any request for administrative review that does not comply with these directives may be rejected and deemed denied.

(1) Form: the request shall be in writing. The request shall include a plain statement of the issue, grounds for reconsideration, and requested relief.

(2) Timing: The request for review shall be served within 10 days of the date the office of inspector general posts the prequalified contractors and subcontractors list.

(3) Service: A request shall be served on the department cabinet secretary with a contemporaneous copy provided to the office of inspector general and the office of general counsel at the respective address for each.

(a) A request may be served in person, by certified mail, return receipt requested, or by delivery by a nationally recognized courier. Service cannot be perfected and the department shall not consider requests made by electronic mail or facsimile.

(b) Service shall be made during the department's normal business hours. Any service made after business hours will be considered effective the next business day.

D. The department cabinet secretary shall, within 10 days of receipt of a conforming request, provide written notice to the contractor of the department's decision resolving the matter or submitting the matter to an informal hearing.

(1) Notice of the election to refer the matter for an informal hearing shall designate a neutral person or the cabinet secretary as the hearing officer.

(2) Notice of the election submitting the matter to an informal hearing shall stay application of the contractor's Pqfra pending completion of the administrative remedy.

E. The designated hearing officer shall, within 10 days of the notice of appointment, provide written notice of the scheduled informal hearing date, time and location.

(1) The notice of hearing will be provided to the parties no later than seven calendar days before the chosen hearing date.

(2) The hearing officer has the discretion to determine the location of the hearing and whether telephonic or video appearance will be allowed.

(3) No continuances of the hearing will be granted except as determined by the hearing officer.

(4) The hearing officer shall set the deadlines and method for pre-hearing submittals no later than three business days before the hearing.

F. The informal hearing shall be a hearing on the record. The hearing officer will conduct the hearing as informally as is practicable to facilitate fact-finding. The formal rules of civil procedure, formal discovery processes and the formal rules of evidence shall not apply to the conduct of the informal hearing.

(1) The hearing officer shall determine the degree of formality of the hearing, the total time allotted for the informal hearing and how the time will be apportioned between the parties.

(2) Legal representation is not required but any party may choose to have legal counsel present. Legal counsel is prohibited from testifying but may offer opening or closing statements.

(3) The contractor has the burden of proof to show by substantial evidence the department incorrectly performed the prequalification factor calculation.

(4) A party may call its own witnesses to provide relevant testimony but may not subpoena or cross-examine witnesses. The hearing officer shall have the exclusive authority to question any party or witness.

(5) A party may provide written documents to the hearing officer, including relevant laws, rules, regulations, specifications to support the party's position, at least three business days prior to the hearing date. Presentation of such evidence shall be made electronically to the hearing officer and opposing party, whenever practicable. During a hearing, a party may offer additional written evidence to the hearing officer with copy to opposing party. Such evidence may be added to the record at the hearing officer's discretion.

(6) Before concluding the hearing, the hearing officer may hold the proceeding open for three days after the hearing date for receipt of supplemental evidence, material or closing statements. When directed, parties may timely supplement the record after the hearing by providing such materials to the informal hearing officer and the opposing party.

G. The hearing officer's final written decision concludes the administrative remedy and constitutes the department's final agency action on the matter.

(1) The hearing officer shall issue the written decision within seven calendar days of the conclusion of the administrative hearing proceedings unless the deadline is otherwise extended by the hearing officer. The deadline for issuing the determination shall not exceed twenty-one calendar days from the conclusion of the hearing proceedings or April 30, whichever occurs first.

(a) To reach a decision, the hearing officer may use any reliable information, no matter the source. If the hearing officer uses information not provided by either party that information shall be entered into the record and the use of that information will be documented in the written decision.

(b) In the written decision, the hearing officer will make findings concerning the credibility of witness testimony and the reliability, significance and sufficiency afforded the evidence on the record.

(2) The hearing officer shall be responsible for maintaining a record of the evidence and proceeding during the administrative review. After completion of the decision, the hearing officer shall provide the department with a certified copy of the record. The administrative record shall be maintained by the department for seven years after the date of the decision on the matter.

H. The department shall implement the hearing officer's decision for the May bid openings.

(1) If a party remains aggrieved by the hearing officer's decision that party may seek judicial review.

(2) Judicial review shall be an appellate, record review and must be brought in the first judicial district court.

(3) If the matter is submitted to judicial review, each party shall bear its own costs and attorney fees.

[18.27.5.13 NMAC - Rp, 18.27.5.13 NMAC, 6/8/2021]

18.27.5.14 PREQUALIFICATION COMMITTEE: Members of the prequalification committee will be designated by the department's cabinet secretary and shall meet annually to review the prequalification process. Any information reported by a prime contractor or subcontractor during the prequalification process may be reviewed by the prequalification committee to determine responsibility. The cabinet secretary has the exclusive authority to determine the department threshold applicable to project lettings. The committee may make recommendations to the cabinet secretary for adjusting the department threshold for application of Pqfra to project bid lettings.

[18.27.5.14 NMAC - Rp, 18.27.5.14 NMAC, 6/8/2021]

18.27.5.15 PREQUALIFICATION FOR CONSOLIDATED CORPORATIONS, MERGED CORPORATIONS, AND JOINT VENTURES: The following prequalification packet procedure and Pqfra will apply to consolidated corporations, merged corporations and joint ventures:

A. For a consolidated or merged corporation pursuant to Section 53-14-6 NMSA 1978, or a similar statutory provision, the new corporation must be prequalified no later than seven calendar days before the opening of any bid. The Pqfra score of the surviving corporation will be the highest Pqfra of the individual corporations.

B. Each prime contractor participating in the joint venture must be individually prequalified seven calendar days before bid opening to join forces as a joint venture for bidding and performing work related to a single project. The joint venture itself need not prequalify.

(1) The joint venture shall file with the office of inspector general at least seven calendar days before the opening of any bid a completed statement of joint venture form. The most current version of the statement of joint venture form must be obtained from the New Mexico department of transportation website.

(2) For joint ventures the higher value of all joint venture applicant's Pqfra will be used for the modified bid amount.

(3) Each prime contractor participating in the joint venture will receive a compass form for the project to be used in calculating the prime contractor's individual prequalification factor.

[18.27.5.15 NMAC - Rp, 18.27.5.15 NMAC, 6/8/2021]

18.27.5.16 ADOPTION OF THE NEW MEXICO STATE DEPARTMENT OF TRANSPORTATION CURRENT EDITION OF THE STANDARD SPECIFICATIONS FOR HIGHWAY AND BRIDGE CONSTRUCTION: This rule adopts by reference the current edition of the New Mexico Department of Transportation Standard Specifications for Highway and Bridge Construction, as amended by this rule. [18.27.5.16 NMAC - Rp, 18.27.5.16 NMAC, 6/8/2021]

HISTORY OF 18.27.5 NMAC:

Pre-NMAC History: None

History of the Repealed Material:

18 NMAC 27.5, Highway Construction General Provisions-Contractor Prequalifications, filed 11/13/1998. This was a temporary rule expiring 120 days from effective date of 11/30/1998.

18.27.5 NMAC, Contractor Prequalification Rule, (filed 12/07/2000) repealed and replaced by 18.27.5 NMAC, Contractor Prequalification Rule, effective 01/01/2015.

18.27.5 NMAC, Contractor Prequalification Rule, (filed 12/16/2014) repealed and replaced effective 6/8/2021.

Other History:

18.27.5 NMAC, Contractor Prequalification Rule (filed 12/16/2014) replaced by 18.27.5 NMAC, Contractor Prequalification Rule effective 6/8/2021.