



March 16, 2016

VIA ELECTRONIC MAIL ONLY AT (johndon.martinez@dot.gov)

Mr. John Don Martinez, Division Administrator
Federal Highway Administration (FHWA), New Mexico Division Office 4001
Office Court Drive, Suite 801
Santa Fe, New Mexico 87507

Re: 2016 1st Quarter Special Experimental Projects No. 14 (SEP-14) New Mexico Department of Transportation (NMDOT) Contractor Prequalification Program Update

Dear Mr. Martinez,

In accordance with FHWA's SEP-14 reporting requirements outlined in the FHWA letter of February 26, 2015 the NMDOT is required to submit quarterly reporting to the FHWA. The NMDOT is starting its quarterly reporting for 2016 with the submission of this report. The NMDOT requests that the New Mexico Division Office forward this correspondence and all attachments to Mr. Gerald Yakowenko and Mr. Walter Waidelich with SEP-14's approval office in the FHWA's Office of Infrastructure. The 2016 first quarter reporting for the NMDOT Contractor Prequalification Program (Program) is as follows:

AUI Inc. (AUI) Appeal of Prequalification Score for 2016

The NMDOT, as part of its Prequalification of Contractors Rule (Rule), established an appeal procedure for any contractor disputing its prequalification score. See 18.27.5.13 NMAC. The NMDOT published the 2016 contractor prequalification scores (prequalification factor rolling average) for all prequalified contractors in January 2016. The NMDOT received one appeal from contractor AUI based on the publication of the 2016 prequalification scores. AUI's appeal was timely and conformed to the appeal procedures in the Rule. The NMDOT held an informal hearing to provide both parties an opportunity to be heard.

In order to give context to the appeal and the resulting determination this letter will summarize the prequalification score process, AUI's position in the appeal, NMDOT's position, and then the steps that the NMDOT will be soon implementing to address issues raised in the appeal. The Hearing Officer's determination also summarizes AUI's position in greater detail therefore the summary of AUI's position below is more succinct than the summary of NMDOT's position .

Susana Martinez
Governor

Tom Church
Cabinet Secretary

Commissioners

Ronald Schmeits
Chairman
District 4

Dr. Kenneth White
Secretary
District 1

David Sepich
Commissioner
District 2

Keith Mortensen
Commissioner
District 3

Butch Mathews
Commissioner
District 5

Jackson Gibson
Commissioner
District 6

In the Rule the prequalification score is called the contractor's prequalification factor rolling average. The prequalification factor rolling average is comprised of objective performance factor data related to the contractor's past performance on a NMDOT project. Performance factor data is collected upon project closure. After a project is closed, the NMDOT tallies performance factors and inputs the data into an equation. In the following year, the prequalification factor rolling average is applied to contractor's bids on projects. The prequalification score is only applied to the contractor's bid when the project's engineer's estimate exceeds 5 million dollars. In some instances, the application of the score may change the order of bidders and affect the outcome of the award process.

AUI appealed its prequalification score for 2016, stating that the NMDOT should have included AUI's performance factor data from CN 2101820 in its 2016 prequalification score. AUI based its appeal on the fact that it submitted its signed final estimate on December 31, 2015. From AUI's perspective the submission of the signed final estimate is the last step in the contractor's process to achieve project closure. Therefore, because the rule states that performance factor data will be collected upon project closure, AUI interpreted this to mean that its performance factor data would apply on the date it signed the final estimate. Also relevant to the determination was that AUI received information from NMDOT employees that signing the final estimate was the same as project closure for purposes of the Rule.

In the appeal, the NMDOT took the position that it is entitled to broad deference in its interpretation of the meaning of the terms "project closure" and "closed" as they apply in the Rule based on well settled principles of administrative law that involve an agency's statutory and regulatory interpretation. Specifically, that the NMDOT was entitled to deference in explaining what it meant by use of the terms project closure as it applied to the prequalification Rule and that the Hearing Officer must accept the NMDOT's interpretation of the meaning of "project closure" even if the interpretation is not the "best or most plausible one by grammatical or other standards".

The NMDOT argued that although the Rule did not contain a definition of project closure, it was AUI's burden to prove that signing the final estimate was the same as "project closure" for purposes of the Rule and to prove that the NMDOT erred in not including its performance factor data for CN 2101820 in the 2016 score calculations. The NMDOT's position relied on the fact that it explicitly adopted the current edition of the Standard Specifications for Highway and Bridge Construction. Specifically, Standard Specifications section 109.10, which lays out a multi-step process of both contractor and NMDOT action to achieve "project closure". In this section, the event of signing the final estimate is but one step (and not the last step) in the larger multi-step process of "project closure". Therefore, the NMDOT concluded that the plain meaning of "project closure" is the end of both contractor and NMDOT action in the process.

The outcome of the hearing was a conclusion that project closure was not an objectively identifiable data point, and for that reason, the Rule's use of the term project closure was ambiguous. Therefore, AUI was entitled to having its performance factor data from 2101820 included in the 2016 prequalification score calculations.

As a result of the determination the NMDOT is undertaking the following steps to improve the Program and the process that the NMDOT uses to obtain performance factor data and calculate prequalification scores at project closure. The NMDOT will:

- 1) Provide an official interpretation of what constitutes project closure for the Rule and post the interpretation on external webpage;
- 2) Modify the compass form to include a project closure date, the compass form once completed with the project closure date will be provided to the contractor for each project closed;
- 3) Provide additional internal training to NMDOT staff related to communication protocols for the Program and Rule.

The NMDOT will provide copies of the project closure interpretation, compass form and prequalification training in its next quarterly report.

Associated Contractors of New Mexico (ACNM) Feedback Quarterly Meeting January 2016

As stated in the annual report, the NMDOT participates in quarterly meetings with ACNM regarding the Rule and Program. At the last quarterly meeting, ACNM raised questions about which date will be used for project closure for the Program. The NMDOT will address the questions discussed in the official interpretation letter mentioned above. Also, ACNM expressed general positive feedback for lowering the threshold for application of the prequalification score to projects with engineer's estimates that exceed 5 million dollars. At the end of the meeting, ACNM presented a letter prepared by one of its members related to the claims performance factor. The NMDOT has not yet responded to this correspondence.

Should there be questions or comments please contact me.

Sincerely,

/S/

Ernest D. Archuleta, PE
Operations Director

Attachment(s)
Hearing Officer Determination

cc: Tom Church, Cabinet Secretary NMDOT
Anthony Lujan, Deputy Secretary, NMDOT
Loren Hatch, Deputy Secretary, NMDOT
Armando Armendariz, Division Director, NMDOT
Mike Beck, ACNM Executive Director

**IN THE MATTER OF THE APPEAL OF
AUI INC.'S PREQUALIFICATION FACTOR (PF)**

FINDINGS OF FACTS AND HEARING OFFICER DETERMINATION

This matter came before Rick Padilla, P.E., the New Mexico Department of Transportation (NMDOT) State Maintenance Engineer, whom the Cabinet Secretary, Tom Church, designated as the informal hearing officer for the appeal filed by AUI, Inc. (AUI), regarding AUI's prequalification factor (Pf) score.

The hearing occurred February 5, 2016. The hearing was conducted to conform with the appeal procedure set by 18.27.5.13 NMAC: "*Contractor Prequalification Rule*" (also referred to as the "*Rule*"). Both parties appeared at the hearing and had counsel present. Patrick Shaw P.E., Vice-President of Operations, testified for Claimant AUI, represented by Mike Menicucci, of the Calvert Menicucci Law Firm. Sally Reeves, P.E., acting State Construction Engineer, testified for Respondent NMDOT, represented by Geraldine Gonzales, Assistant General Counsel for the NMDOT. Certified Court Reporter, Cynthia Chapman, prepared a certified copy of the transcript of the hearing, which consists of a single volume. Exhibits were offered and admitted, as identified on pages 2 to 3, below.

SUMMARY OF THE PROTEST

AUI is a contractor for NMDOT construction projects and is subject to prequalification requirements established by the *Contractor Prequalification Rule*, 18.27.5.2 NMAC, and in accordance with the New Mexico Procurement Code, NMSA 1978, Sections 13-1-82 and 13-1-134. Compliance with the *Contractor Prequalification Rule* is a requirement for bid responsiveness on NMDOT projects and is incorporated into the current version of the NMDOT *Standard Specifications for Highway and Bridge Construction* (the "Specifications"). NMDOT Specifications, § 102.2, 2014¹ ed.

In accordance with the *Rule*, on January 8, 2016, the NMDOT Office of Inspector General (OIG) published the *Prequalified Contractors and Subcontractors List*, which included publication of "PQFRA", contractor's prequalification factor rolling average. AUI received a PQFRA of "1.00." Subsequent to publication of the list, AUI filed its appeal, January 13, 2016. As grounds for the appeal AUI alleges NMDOT erred by not using performance data from project CN 2101820, because "project closure" for calculation of the contractor Pf/PQFRA should have been found to have occurred in 2015, not 2016. Through the appeal, AUI requests NMDOT evaluate the Compass form for CN 2101820 and generate a revised Pf/PQFRA which includes data from CN 2101820, based on the date AUI submitted the signed final estimate to the NMDOT, December 31, 2015. Should AUI be successful, the resulting PQFRA would be "0.950", a potential benefit to AUI in future bids.

¹All references to the NMDOT Standard Specifications for Highway and Bridge Construction refer to the 2014 edition, unless otherwise stated. The Specifications are available in electronic format at:
http://dot.state.nm.us/content/dam/nmdot/Plans_Specs_Estimates/2014_Specs_For_Highway_And_Bridge_Construction.pdf

The issue before the hearing officer is whether, upon reconsideration of the Compass form for CN 2101820, the NMDOT determination that the project data should be excluded from the PQFRA calculations for projects closed in 2015 was in error. Key to the determination is the definition of "project closure" and "projects closed between January first and December thirty-first of the previous year" as well as identification of the project closure date for CN 2101820.

EXHIBITS

AUI offered and admitted²:

- A. Copy of AUI's Appeal Letter, dated January 13, 2016, with attached exhibits 1-7 concerning AUI's prequalification factor
- B. Copy NMDOT Compass information for CN/Project No. 2101820/2101820, NM 395, MP 0.000 to MP 0.5000
- C. Letter, dated January 28, 2016, from Associated Contractors of New Mexico (ACNM) concerning understanding of timing for NMDOT project closure
- D. Final Payment Voucher signed by AUI and delivered to NMDOT on December 31, 2015
- E. Email, dated September 3, 2015, from Mike Beck to Mike Beck "FW: Prequalification question"
- F. Email, dated February 9, 2016, from Aaron Clark to Patrick Shaw "RE: Pre Qualification"
- G. Email, dated February 9, 2016, from Aaron Clark to Patrick Shaw "RE: Pre Qualification"

NMDOT offered and admitted³:

1. NMDOT *Contractor Prequalification Rule*, 18.27.5 NMAC
2. NMDOT Standard Specifications for Highway and Bridge Construction ("Specifications"), Section 109.10 "Project Closure"
3. NMDOT Specifications Section 109.10.8 "Physical Completion and Release of Retainage and Final Payment"
4. NMDOT Intra-Departmental Correspondence (IDC), dated August 22, 2014, "Project Closure Operations Division Directive 2014-05"
5. CN 2101820 Estimate Summary to Contractor, dated 12/31/2015
6. Form A-211-A, rev 08/13, "Final Payment Voucher" CN 2101820
7. Voucher Summary, Invoice No. Dist 2 HWA2101820 Est #4, 01/28/2016
8. Form A-1177, Final Transmittal Package Checklist for All Projects, Project Number: 2101820
9. Form A-1079, NMDOT IDC, dated 1/6/16, from Aaron Clark to Tim Parker, "Final Acceptance for Project/Control Number: 2101820" and Form A-1081, Project Certification, dated 1/20/2016
10. Letter, dated January 19, 2016, from NMDOT District 2 Engineer, Tim Parker, to Federal Highway Administration (FHWA), "CN: CN [sic]# 2101820 - FMIS / Project Closure Process", with State Construction Engineer Concurrence dated February 2, 2016 by Sally Reeves, acting

² AUI Exhibits A-D were admitted at the hearing. Exhibits E-G were submitted on February 10, 2016, the deadline announced by the hearing officer at hearing without objection.

³ NMDOT Exhibits 1-17 were admitted at the hearing. Exhibits 18-23 were submitted on February 10, 2016, the deadline announced by the hearing officer at hearing without objection.

11. Email, dated December 31,2015, from Libby Johnson to Laura Johnson, "RE: 2101820
12. Form A-1103, rev 12/3/2015, NMDOT COMPASS Information - Final Information, Control No. 2101820
13. "Project Closure Dates from Compass Reports" [CN A300815, 3100460,6100421,9900368, AND 2101820]
14. Untitled Exhibit [Selected AUI Project Data, CN 1101052, CN A300940, CN A301170]
15. Supporting data re CN 1101052, CN A300940, CN A301170
16. NMSA 1978, Section 13-1-158 "Payments for Purchases"
17. Letter, dated November 20,2015, from Ernest Archuleta, P.E., Operations Division Director, to ACNM, Mike Beck, Executive Director, "Contractor Prequalification Rule 18.27.5 NMAC (Rule) and Questions Regarding Claims Performance Factor"
18. Affidavit of Sally J. Reeves
19. Affidavit of Armando M. Armendariz
20. Compass form for CN 6100298
21. *Chevron, U.S.A., Inc. V. Nat. Resources Def Council, Inc.*, 467 U.S. 837 (1984)
22. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)
23. *Thomas Jefferson University v. Shala/a*, 512 U.S. 504 (1994)

Neither party withdrew exhibits as of the time of this determination.

RELEVANT FACTS NOT IN DISPUTE:

1. The *Contractor Prequalification Rule* requires NMDOT calculate performance factors (Pf) and determine the prequalification factor rolling average (PQFRA) for prime contractors. 18.27.5.7 (E), (N), and 18.27.5.11 NMAC; AUI Ex. A; NMDOT Ex. 1.
2. The *Rule* requires the NMDOT post the resulting PQFRA scores annually. 18.27.S.12(A) NMAC; AUI Ex. A; NMDOT Ex. 1.
3. January 8, 2016, the NMDOT Office of Inspector General (OIG) published the *Prequalified Contractors and Subcontractors List*, (the "List") including the posting of the annual PQFRA scores for prime contractors. AUI Ex. A, pp. 10-15.
4. The List shows a score of "0.950" for three contractors; all remaining contractors, including AUI, received a score of "1.00." *Id.*
5. Under certain circumstances, the NMDOT will use the published PQFRA to modify submitted bid amounts for purposes of determining the apparent lowest responsible bidder, which may result in project award to a bid that is not the lowest monetary bid. 18.27.5.7(E) and 18.27.5.12(D) NMAC; AUI Ex. A; NMDOT Ex. 1.
6. PQFRA is the result of calculations based upon certain objectively measurable criteria referred to as "performance factors" (Pf); Pf for each criterion is quantified based on a contractor's past performance on closed projects. 18.27.5.7(G) NMAC; AUI Ex. A; NMDOT Ex. 1.

7. The *Rule* requires NMDOT calculate the annually published PQFRA scores based on data from projects closed between January first and December thirty-first of the previous year. 18.27.S.12(A) NMAC; AUI Ex. A; NMDOT Ex. 1.
8. The NMDOT gathers prime contractor performance data used in the calculation of PQFRA from each project upon project closure. 18.27.5.11NMAC; AUI Ex. A; NMDOT Ex. 1.
9. For each project, the contractor performance data used in the calculation is to be documented on the Compass Form or in the contractor's applicable prequalification packet. 18.27.5.11(A)(1-6) NMAC; AUI Ex. A; NMDOT Ex. 1.
10. The *Rule* defines "Compass form" as the NMDOT form generated at project closure that documents certain contractor performance measurement data. 18.27.S.7(C) NMAC; AUI Ex. A; NMDOT Ex. 1.
11. Page one of the Compass form documents project information including, but not limited to, contract values and completion dates for certain activities; page two of the Compass form documents prequalification Pf measurements, identifies the project manager, and contains a space for the project manager to sign and date the page. AUI Ex. B; NMDOT Exs.12, 20.
12. Neither page of the Compass form has an identified location to document "project closure date" or "date closed." *Id.*
13. The *Rule* does not include definitions for the terms "closed," "closed projects," or "project closure." 18.27.5.7 NMAC; AUI Ex. A; NMDOT Ex. 1.
14. The *Rule* adopts and incorporates the abbreviations, symbols and definitions from Division 100, "General Provisions", of the NMDOT Specifications⁴ • 18.27.S.7(A) NMAC; AUI Ex. A; NMDOT Ex. 1.
15. The Division 100 section governing "Abbreviations, Symbols, Terms and Definitions" does not define "closed," "closed projects," or "project closure." NMDOT Specifications, § 101.4.
16. The *Rule* adopts by reference the current edition of the NMDOT Specifications. 18.27.5.16 NMAC; AUI Ex. A; NMDOT Ex.1.
17. NMDOT Specifications contains Section 109.10, "Project Closure," which identifies eight (8) steps, with the final step, Step VIII, "Physical Completion and Release of Retainage and Final Payment." NMDOT Specifications, §109.10.8; AUI Ex. A; NMDOT Exs. 2, 3.
18. Specifications Section 109.10.8 describes actions to be taken by the NMDOT triggered by the date by which a contractor returns, or should have returned, the final payment estimate to the NMDOT; those actions include acceptance of the work, paying the balance due on the final payment estimate, and closing the project. NMDOT Specifications §109.10.8, 3; AUI Ex. A; NMDOT Ex. 3.

⁴ The current version of the Division 100, General Provisions, of the NMDOT Specifications is codified by 18.27.2 NMAC.

19. The Specifications require the NMDOT and contractor to "agree on the schedule for completion of all [work]⁵ necessary for project closure pursuant to Section 109.10 'Project Closure'" during the completion conference prior to the NMDOT's determination of substantial completion for the project. NMDOT Specifications, §109.10.2; AUI Ex. A; NMDOT Ex. 2.
20. The Specifications require the contractor to submit a proposed updated schedule for project closure to the NMDOT project manager for approval within five (5) calendar days of the completion conference. *Id.*
21. The NMDOT project manager is the representative of the NMDOT who holds the delegated authority for administration of the project. NMDOT Specifications, §101.4 "Project Manager."
22. The NMDOT project manager assigned CN 2101820 was Aaron Clark. AUI Ex. B; NMDOT Ex. 12.
23. For CN 2101820, the project manager signed page two of the Compass form on December 18, 2015, eight days after AUI achieved substantial completion. *Id.*
24. For CN 2101820, at some time after the project manager signed page two, page one of the Compass form was updated to include milestone dates achieved in January 2016 and a note indicating AUI signed the final estimate and submitted all required documentation to the project officer prior to the end of the year, but "the project as not called PC until 01/06/2016 due to documents needing to be done at the project level." *Id.*
25. For CN 2101820, NMDOT released AUI from any further responsibility for project CN 2101820, in accordance with Specifications Section 109.10, as of January 06, 2016. NMDOT Ex. 9.
26. For CN 2101820, NMDOT paid AUI the final amount due on January 29, 2016. AUI Ex. B; NMDOT Exs. 7, 12.

ANALYSIS

AUI's appeal is based on a claim the terms "project closure" or "date closed" as used in the Rule and applied the situation presented by CN 2101820, should mean the date by which the contractor returns the signed final estimate. This position is based on a claim that this date is ambiguous as used in the *Rule*, because the *Rule* is insufficient to inform the contractor's expectations concerning calculation of PQFRA. Additionally, AUI states it relied on information provided from NMDOT concerning questions about the project closeout timing and scheduled CN 2101820 to complete in December specifically for the project to count in the 2015 PQFRA calculations. AUI believes NMDOT's failure to consider the project for those calculations was an error.

To bolster this position, AUI testified it relied on information received through conversations with the project office, including the NMDOT project manager Aaron Clark and NMDOT project auditor Libby Johnson, and upon information received from the representative of the Associated Contractors of New

⁵The Specifications, Section 101.4, specifically defines "Work" broadly to include all activities necessary to carry out the duties and obligations imposed by the project contract.

Mexico, Mike Beck, that for purposes of determining the PQFRA the NMDOT would consider the project closure date to be the date the contractor returns the signed final estimate. As a result, because AUI thought the project closure date for PQFRA calculations would be set at the date by which the contractor completed all obligations under its control, and because this understanding was discussed with the project manager, AUI took efforts, including working overtime and additional hours to complete the project in December and to completed all its contractual obligations in 2015.

In particular, by December 31, 2015, AUI submitted all paperwork required by the contract, had no outstanding claims or other issues unresolved that would affect the Pf calculations for the performance measures for CN 2101820, and had returned the final estimate, signed. In testimony, AUI stated NMDOT knew AUI was trying to get the project, all of the paperwork and everything complete for the project to count for the 2015 prequalification scoring. TR 19:3 - 21. This understanding seems to be confirmed by the NMDOT project manager. AUI Ex. F, G. AUI also offered testimony that NMDOT had stated in a meeting with ACNM, that AUI attended, that submission of the final estimate would be counted as the "project completion" date. However, the facts underlying this position are not clearly supported by the record of the hearing or the exhibits presented. See, e.g. AUI Ex. C *contrasted with* NMDOT Ex. 19. Due to the conflict concerning this, I did not consider the testimony in my analysis.

The NMDOT contends the AUI attempt to replace the terms "project closure" in the *Rule* cannot be upheld on a plain reading of the rule and the expectation that it would be satisfied by the return of the signed estimate was unreasonable. And as a result, the AUI appeal should not stand. In support of its position, NMDOT points to case law that supports a conclusion an agency means what it says; in this case, by directly incorporating the Specifications Section 109.10, "Project Closure" NMDOT intended to refer to a multi-step process involving both contractor obligations and NMDOT obligations to be completed. TR 55:11-13; NMDOT Exs. 21,23.

NMDOT contends the rule is clear and unambiguous when read together with the incorporated Specifications and cannot be read to define project closure as the date by which the contractor returns the final estimate. If NMDOT had intended the trigger for the timing of the Pf/PQFRA calculations to occur with the contractor's final act, it would have said so in the *Rule*. Further the NMDOT contends the interpretation that project closure occurs at a point after the contractor's final act is reasonable based upon consideration of the process the NMDOT must accomplish in order to close a project. As an example, the process must be robust enough to account for performance factors that may not be able to be determined until a time after final payment has been made, such as may occur with Pf "Claims". In general, I find support for this contention that the intent of the *Rule* is to identify a process inclusive of both contractor and NMDOT obligations to be met under varying circumstances.

However, NMDOT's position that the *Rule* is clear as to the intent, meaning or application of the terms "closed" "closed projects" or "project closure" is not supported by the testimony or a fair reading of the Rule together with the Standard Specifications. At the conclusion of the testimony and consideration of the evidence submitted, NMDOT is unable to define "project closure date" or point to a data-point found on the Compass form or otherwise documented which is to be used for the annual PQFRA calculations for all projects. At best through its testimony NMDOT defines what project closure isn't. In

fact the testimony and exhibits show that "closed" may mean any number of points in a process: for example, closed in FMIS, closed in SiteManager, or closed but in Legal status. TR 50:23-51:19; NMDOT Ex. 18. There is no testimony or exhibits that state what date is used to document the closure date in the NMDOT records which result in the calculations ultimately reported in the OIG List. No evidence clearly identifies this date for any project in the record.

While the NMDOT is entitled to deference for its reasonable interpretation of the rules it promulgates, I find the interpretation as applied to the facts surrounding CN 2101820 to be unreasonable in this case, based in large part on: the NMDOT's inability to point to an objective standard or data point that is used by NMDOT to generate the annual PQFRA calculations for the List issued by OIG; and the actions taken by the project manager related to Specification Section 109.10 and to the Compass Form.

Under the *Rule*, the Compass Form is to be generated by the NMDOT at "project closure." The evidence shows a standard form, A-1103 revised after implementation of the *Rule*, but that form does not document a "date generated." AUI Ex. B; NMDOT Exs.12, 20. Comparing the Compass forms in the record, both those for which the project was counted for 2015 PQFRA and those which did not, NMDOT hopes to persuade a conclusion that the date cannot be the one AUI suggests and that NMDOT did not err by excluding CN 2101820 from the 2015 calculations. The argument is not persuasive.

While the *Rule* does not require all performance data to be on the Compass form, the data used in the calculations should be objectively verifiable and documented. The *Rule* requires the NMDOT generate the Compass form upon project closure. AUI Ex. A; NMDOT Ex. 1. As noted above, the Compass forms submitted into evidence do not clearly document a date the form is generated, or that the project is determined to be closed or otherwise document the project closure date to be used for the calculations of the PQFRA. Importantly, I note the record does not include any testimony or exhibits identifying the data point actually used to enter data for the PQFRA calculations for "date closed" or "project closure." In the absence of that evidence, what project closure is, I find the fact to be highly instructive that all of the Compass forms in the record, with the exception of NMDOT Exhibit 20, show page two is signed by the project manager in 2015. I give more weight to that signature and date found on the page containing "Prequalification Performance Factor Measurements" as representing the Compass form generation date, than I do to dates later added to page one, which does not directly reference the prequalification process.

AUI includes unrefuted evidence that since July or August 2015, NMDOT was aware of questions from the contracting community concerning how the project closure date would be determined for purposes of calculating the PQFRA scores, and that the issue would be especially important for projects that would be completing at the end of the calendar year. TR 28: 19 to 29: 20; AUI Ex. E. The NMDOT did not issue a written response clarifying project closure or closeout timing as applied to the *Rule*, despite having a process in place to address questions concerning the *Rule* with written responses. TR 30: 5, 68:25 to 70:11; *compare with* NMDOT Ex. 17. I find there is evidence to support the conclusion that AUI discussed this matter with the project manager and that the project manager understood project completion for purposes of the prequalification calculation would occur at the time the contractor returned the signed final estimate. TR 19:6-21;AUI Exs. F, G. While there is no evidence of the final

schedule accepted by the project manager, identifying the project completion date as occurring in December, AUI testified that was the original schedule with the purpose of completing for prequalification. TR 21:13-20.

Because the project manager ultimately accepts the Section 109.10.2 schedule identifying project closure including the process described in 109.10.8, and because the project manager is the authorized representative of the NMDOT as concerns the project, it was reasonable for AUI to rely on communications from the NMDOT that CN 2101820 would count toward the 2015 PQFRA as long as the contractor returned the signed final estimate and returned all documentation required to fulfill all contractual obligations.

In this case, in accordance with the information and process NMDOT discussed with the contractor through the project manager concerning project closure for prequalification scoring purposes, it appears AUI completed its contractual obligations in 2015 and that the project manager generated the Compass form in December 2015, despite the fact final acceptance and final payment both occurred in 2016.

Conclusion

I find for purposes of application of the Rule, "project closure" is a term without clear definition and a key element for the PQFRA calculation. I find that the term is described as a date to be determined between the project manager and contractor, to be reflected in a schedule and approved by the project manager in accordance with 109.10.2. I find an approved schedule must include all steps of 109.10, "Project Closure" including 109.10.8. I also find, according to the Rule, "project closure" is the date that the Compass form is to be generated. After review of the record, I find there is no established, objective data point identifying and documenting this date for calculation of the annual PQFRA. Accordingly I find the *Rule* ambiguous with respect to the data point used to determine project closure data for the annual calculation of the PQFRA score.

Additionally, I find the record contains evidence sufficient to support the conclusion that AUI reasonably relied on information communicated through the NMDOT concerning the determination of project closure for purposes of the *Rule*, including direct communication with the project manager during the course of the project supported the belief that by returning the signed the final estimate before the end of the year, December 31, 2015, the project performance measurements would be counted for the 2015 Pf/PQFRA calculations.

In this particular case, due to the fact that the *Rule* does not clearly inform the third party contractors of the triggering event for "project closure" and AU I's reasonable reliance on information communicated through the project office and supported by the language of 109.10.2, the NMDOT erred by not counting CN 2101820 in the 2015 calculations for PQFRA, based on the facts the project manager signed the Compass form and the contractor submitted the final estimate, the final action to be taken by that contractor under the circumstances presented, in 2015.

I find AU I's appeal has merit and the NMDOT erred under the circumstances by excluding CN 2101820 from the 2015 PQFRA calculation for AUI. As a result of this determination, the NMDOT is to recalculate

the AUI Pf/PQFRA score to include the performance data from CN 2101820 and repost the OIG List with the amended score.

This determination serves as the final agency action on this matter. The record of the appeal will be maintained by the OIG for seven years after the date of the informal hearing, to February 5, 2022 .

Respectfully submitted:



2/17/2016

Rick E. Padilla, P.E., Hearing Officer
NMDOT State Maintenance Engineer

Dated

Encl. Transcript

Transmitted to the parties via email only on 2/17/2016 without party exhibits:

For AUI: to Mike Menicucci

mmenicucci@hardhatlaw.com

For NMDOT: to Geraldine Gonzales

Geraldine.Gonzales@state.nm.us