



November 20, 2015

VIA ELECTRONIC MAIL ONLY AT mbeck@aconm.org

Associated Contractors of New Mexico (ACNM)
Mike Beck, Executive Director ACNM
6135 Edith Boulevard NE
Albuquerque, New Mexico 87125

Re: Contractor Prequalification Rule 18.27.5 NMAC (Rule) and Questions Regarding Claims Performance Factor

Mr. Beck,

In a recent meeting between The New Mexico Department of Transportation (NMDOT) and the Associated Contractors of New Mexico (ACNM), ACNM requested clarification from the NMDOT about the performance factor for claims. Specifically, ACNM requested clarification on two points as follows:

- 1) Does the NMDOT count a claim pursued beyond the Cabinet Secretary administrative remedy level, starting with Public Works Mediation or with the filing of litigation?
- 2) Does the NMDOT count the claim value presented to the District Engineer or the claim value pursued in litigation for evaluating whether the claim was successful?

Each question will be addressed in turn. The Rule prescribes certain conditions before a claim will be counted for the claims performance factor calculation. See 18.27.5.6 (H) NMAC and 18.27.5.11 (C) NMAC. To address the first question, the NMDOT interprets the cited provisions to mean that any action taken to pursue a claim after the Cabinet Secretary has rendered a written decision on the claim will be considered. This means that if action is taken to pursue a claim either by proceeding with litigation in State District Court, requesting that a claim be submitted to arbitration, or exhausting the mandatory mediation procedures of the Public Works Mediation Act that claim may be counted if unsuccessful in the performance factor calculation.

To answer the second question, the NMDOT will use the claim value presented to the District Engineer to determine whether the claim was successful or unsuccessful. 18.27.5.11 (C) (2) (a) NMAC states that claims resolved for the value of the claim or more will be assigned a value of zero for the performance factor calculation. 18.27.5.11 (C) (2) (b) NMAC states that claims resolved for less than the value of the

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Butch Mathews
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District 5

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Commissioner
District 6

claim will be assigned a value of one for the performance factor calculation. Each cited section references the value of the claim “brought beyond the Cabinet Secretary level” as the baseline for determining whether a claim was successful or unsuccessful. The 2014 Edition of the NMDOT Standard Specifications for Highway and Bridge Construction (Standard Specifications) Section 105.20.1 “District Level” prohibits the claimant from amending the basis of entitlement, compensation or time requested as the claimant proceeds through the administrative remedy process from the District Engineer to the Cabinet Secretary. This prohibition ensures that the claim is evaluated in its entirety at both levels.

Reading the two provisions in conjunction, the NMDOT interprets the Standard Specifications and Rule to require that the claim value be the same whether presented to the District Engineer or to the Cabinet Secretary. Therefore, the NMDOT will use the value of the claim presented to the District Engineer to evaluate whether the claim was resolved for more or less and to then assign the appropriate performance factor. This interpretation also serves the NMDOT’s stated goal of claim resolution at the lowest administrative remedy level.

Should you have any questions or comments please do not hesitate to contact me.

Thank you,

A handwritten signature in blue ink that reads "Ernest Archuleta PE". The signature is written in a cursive style.

Ernest Archuleta, PE
Operations Divisions Director

Cc: Tom Church, Cabinet Secretary
Anthony Lujan, Deputy Secretary
Loren Hatch, Deputy Secretary
Armando Armendariz, Division Director
Prequalification Team
J. Don Martinez, FHWA
Marcus Wilner, FHWA
Mike Moehn, ACNM President