



CITY OF ALBUQUERQUE
Department of Municipal Development

Timothy M. Keller, Mayor

November 25, 2019

Mallery Manzanares
New Mexico Department of Transportation
P.O. Box 1149
Santa Fe, New Mexico 87504
VIA EMAIL ONLY: Mallery.Manzanares@state.nm.us

Re: Comments regarding the New Mexico Department of Transportation's (NMDOT) proposed new rule, 18.27.6 NMAC, Local Government Transportation Project Fund

Dear Ms. Manzanares,

The City of Albuquerque appreciates the opportunity to provide input regarding the above referenced proposed new rule by the NMDOT, and hereby respectfully submits the following comments and proposed changes for the consideration of the NMDOT. All proposed changes from the City of Albuquerque (the City) are reflected in strike/underscore format.

I. COMMENTS AND PROPOSED CHANGES

Comment 1: the definition of "district engineer" in NMAC 18.27.6.7 cites a statute that does not exist.

The proposed definition of "district engineer" currently reads: "'District engineer" means the department of transportation district engineer as designated pursuant to Subsection (C) of Section 67-3-78 NMSA 1978 (2019)."

The role of "district engineer" is important to the implementation of the rule; however, as proposed in the draft rule, it is very problematic because this person/role does not actually exist in the statute. There is no reference to nor any definition of a "district engineer" anywhere in Section 67-3-78 (in subsection "C" or anywhere else in the statute), nor has it been properly defined in the proposed rule anywhere, and this is certain to lead to confusion once people try to start actually applying this rule in practice. The City proposes the following language to try to

capture what it seems is the intention here, while avoiding the need to excise the numerous references to ‘district engineer’ throughout the proposed rule:

“District engineer” means the department of transportation district engineer as designated pursuant to Subsection (C) of Section 67-3-78 NMSA 1978 (2019) in a given district office that has been authorized by the department to act on behalf of that district office for purposes of administration of this fund.

Comment 2: the definition of “public authority” in NMAC 18.27.6.7 is unclear.

The proposed definition of “public authority” does not explicitly include property that a local authority does not own in fee and would therefore, as a result, possibly inadvertently exclude such non-fee-owned property from being included in a project proposal. The City proposes the following language to ensure this property does not get excluded:

“Public authority” is defined as a Federal, State, county, municipality, village, town, Indian tribe, or other local government or instrumentality with authority to finance, build, operate, occupy, traverse, use or maintain a roadway.

Comment 3: the use of the word “participate” in NMAC 18.27.6.8(C)-(D) does not reflect the intent of the enabling statute.

The choice of the word “participate” to describe how the State will provide funds is very odd, particularly given the language of the enabling statute which clearly intends for the state to contribute – to **give** – funds to local governments. The City proposes substituting the following language to provide clarification and align with the enabling statute:

C. The department will ~~participate~~ contribute up to 95% of the total cost of a local government transportation project provided that the local government has demonstrated an ability to provide the remainder of the project costs in local funds. Non-cash contributions can be used on a project but will not count towards the required local match. The local government is responsible for any and all expenditures in excess of the grant award.

D. The department will ~~participate~~ contribute up to 100% of the total cost of a local government transportation project if a financial hardship qualification certificate is issued by DFA. The local government is responsible for any and all expenditures in excess of the grant award.

Comment 4: the “department audit” requirement established in the proposed NMAC 18.27.6.8(I) is too broad.

The proposed rule currently reads: “All grants are subject to department audit. The findings of the audit are final.” Because this language is so broad and fails to specify such things

such as how often, what notice is required, who is to pay, etc., the City proposes the following language to provide some clarification:

I. All grants are subject to department audit, provided that all such audits shall be done upon reasonable prior written notice, during normal business hours, at the department's sole cost and expense and at no time shall there be more than one audit in any four week period. The findings of the audit are final.

Additionally, the City proposes that the Department include some mechanism for review of the audit. As proposed, the language is arguably very subjective and provides no ability for the local government to contest or defend results of an audit.

Comment 5: the use of the phrase “matching share” does not align with the enabling statute and is misleading.

Although this phrase appears in the current version of NMAC 18.27.6.10, it would be prudent to consider updating this language to align it more with the intent of the enabling statutory language. The phrase “matching share” is arguably a mischaracterization of the state's requirements and insinuates that the local government and state are expected to be contributing equal -- matching -- amounts. This may or may not be the case for a given project, but in all likelihood it is unlikely to be so in most cases since the fund is set up to allow for up to 95% state funding to be allocated.

The City proposes striking “matching share” in all instances and replacing it with “non state money contribution requirement” (“non state money” being a defined term in the statute) to accurately reflect the intent of the statute.

Comment 6: the proposed NMAC 18.27.6.12(B) creates a “chicken and egg” situation.

The proposed rule requires the applicant to submit documents that indicate the availability of the proposed local “match.” This language is potentially problematic in that it asks the local government to guess at what portion the state might be willing to contribute for a particular project and then guess at how much the local government should then be willing or able to demonstrate that it can contribute. Nothing in the enabling statute requires this.

The City proposes striking the word “match” and replacing it with “non-state money contribution.” However, it is recommended that that further discussion on this point is needed, and that additional input from the drafters be sought as to what the intention is in order to better draft something that meets both the department' and local governments' needs – as well as the intent of the enabling statute.

Comment 7: the proposed NMAC 18.27.6.12(D) is unclear.

As proposed, if the governmental entity does not own a right of way that is implicated by its proposed project, the rule requires the applicant to submit letters of support from the entity or entities that own the right of way. This language is not clear and is arguably confusing regarding land issues. If any portion of the project is property that is non-fee-owned by the applicant local government, the department would presumably want the local government to submit copies of the applicable license(s) and ROW documents so that the department is able to ensure that those documents give the proper rights to the local government to do the things that it is seeking to do in the project on the subject properties. For example, the City may have a ROW over a parcel, but may have the right to trench, dig, install new facilities, move vegetation, etc. on that parcel. The City proposes the following clarifying language:

If applicable, letters of support from the governmental entity or entities that own the project right of way (ROW) if the applying applicant does not own all of the project ROW. If any portion of the land on which the project is to be situated is not owned in fee by the applicant local government, copies of all licenses, franchise agreements, and /or any other types of grants of rights of way and easements that provide the right(s) necessary for the local government to proceed with the activities proposed by the project thereupon;

Comment 8: the proposed NMAC 18.27.6.14 does not account for issues that are outside the local entity's control.

As proposed, NMAC 18.27.6.14 would allow the state to seek reimbursement of the grant award if the local awardee fails to complete the project for any reason whatsoever. A local government should not be deemed to have failed to have met the obligations hereunder if the failure was due to reasons outside of its exclusive control. Additionally, if the project was, for example, done in phases such that portions are able to be put into service for the benefit of the community, then to the extent of that – that the project has, in fact, succeeded, the local government should not be required to reimburse the grant monies. The City proposes adding the following language to account for this:

A. If a local government commences performance on a transportation infrastructure project but fails to complete the project for reasons within the local government's exclusive control, then for that portion of the project that is either incomplete or is complete but is not able to be placed in service for the benefit of the public served by the local government, the department may seek reimbursement of the grant award received by the local government for that project.

B. The department shall have the right to monitor the activities of local government as reasonably necessary to ensure grant awards are used for authorized purposes in compliance with laws, regulations and that the provision of contracts or grant agreements and performance goals are achieved.

Comment 9: the proposed NMAC 18.27.6.16 also does not account for issues that are outside the local entity's control.

The proposed NMAC 18.27.6.16 establishes the process for evaluating the local entity's performance and administration of the grant by the state. As originally drafted, this process is largely one sided and subjective, with no contemplation of the fact that there may be situations that afford no avenues for local governments to seek review of the findings or to submit additional information for consideration to support their efforts to comply. The time frame for the review and evaluation should be specified, especially since so much hinges on the results. The City proposes the following language to resolve this issue:

18.27.6.16 PROJECT EVALUATION:

A. The local government's performance and administration of the grant funding will be reviewed and evaluated by the department at the completion of the project or, if the local government fails to complete the project, following the close of the fiscal year in which the project was to be completed. If a local government ~~exhibits~~ demonstrates, pursuant to the criteria set forth in subpart B below, an inability to properly administer a project, the department shall have discretion to withhold future grant funds ~~may be withheld~~ for a period of -x- years.

B. The following criteria shall be used for the department's consideration in determining the ability of a to determine whether a local government cannot to properly administer a project:

(1) Whether tThe local government has a demonstrated history of unsatisfactory project implementation and completion in the absence of the local government's production of any reliable, documented, mitigating evidence to the contrary;

(2) ~~The~~ Whether the local government has faileds to keep all required books, make all required reports, and conform to all applicable rules and regulations adopted by the Local Government Division, Financial Management Bureau of the New Mexico Department of Finance and Administration for the subject project, and has not produced any reliable evidence or documentation that would reasonably mitigate any such failures;

(3) ~~The~~ Whether the local government is for any reason not responsible for the failure of the project to be completed within the allotted time otherwise not responsible; or

(4) ~~If~~ Whether the department obtains documented evidence through random audits by the department determine of the local government conducted pursuant to 18.27.6.8(I) that the local government has not performed in accordance with any of the material terms of the grant agreement, the standards set forth in the grant agreement or in accordance with generally accepted governmental accounting principles.

C. In the event the department has conducted an evaluation pursuant to this section and has issued a preliminary determination that the local government has demonstrated an inability to properly administer a project, the department shall provide written notice of such preliminary determination to the local government specifying the bases for such determination and shall provide the local government with an opportunity to provide additional information within 30 days (or such other timeframe agreed to between the department and the local government) to address, mitigate or refute the conclusions of the department.

(1) If the local government does not produce any additional information within the designated timeframe, the preliminary determination of the department shall become final.

(2) If the local government does produce additional information within the designated timeframe, the department shall review the additional information and issue a final determination within 60 days of receipt.

Comment 10: the proposed NMAC 18.27.6.18(C) places too great of a burden on local entities.

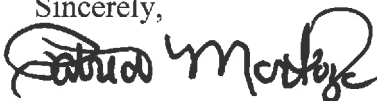
The proposed NMAC 18.27.6.18(C) reserves the state's right to request additional records to demonstrate that the local grant recipient has completed the project. Though this is reasonable, the proposed rule does not specify a time frame for compliance, nor does it specify who shall bear the cost of an audit. The City proposes the following language to make the rule more balanced:

C. ... The local government must make records available for review or audit upon reasonable advance request by the department. The department is entitled to recover amounts based on the results of an audit. Any and all audits conducted by the department shall be at the departments' sole cost and expense.

II. CONCLUSION

The City feels strongly that the comments, concerns and proposed changes outlined herein would serve to better align the language of the proposed rule with that of the enabling statute and would lend more clarity and transparency to the framework for the administration of this fund. Again, the City thanks the NMDOT for its consideration of the foregoing comments and proposed changes, and welcomes any questions that the NMDOT may have regarding any of the above.

Sincerely,



Patrick Montoya, Director, Department of Municipal Development

City of Albuquerque