

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 ~~d~~Department of ~~t~~Transportation, PO Box 1149, Santa Fe, New Mexico, 87504-1149.

~~[18.27.5.1 NMAC - Rp, 18.27.5.1 NMAC, xx/xx/2021]~~
~~[18.27.5.1 NMAC - Rp, 18.27.5.1 NMAC, 1/1/2015]~~

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 the project limits.

~~[18.27.5.2 NMAC - Rp, 18.27.5.2 NMAC, xx/xx/2021]~~
~~[18.27.5.2 NMAC - Rp, 18.27.5.2 NMAC, 1/1/2015]~~

18.27.5.3 STATUTORY AUTHORITY: Sections 13-1-82~~[, NMSA 1978 (1984, as amended through 2012) and Section]~~ 13-1-133 to -134~~[, NMSA 1978 (1984, as amended through 2012) Sections]~~ 67-3-2~~[(2003)], 67-3-11-[(2003)], 67-3-14-[(2003)], and 67-3-43 [(4983)]-NMSA 1978;~~ 23 U.S.C. section 112(b); 23 C.F.R. sections 635.110 and 635.114.

~~[18.27.5.3 NMAC - Rp, 18.27.5.3 NMAC, xx/xx/2021]~~
~~[18.27.5.3 NMAC - Rp, 18.27.5.3 NMAC, 1/1/2015; A, 1/1/2019]~~

18.27.5.4 DURATION: Permanent.

~~[18.27.5.4 NMAC - Rp, 18.27.5.4 NMAC, xx/xx/2021]~~
~~[18.27.5.4 NMAC - Rp, 18.27.5.4 NMAC, 1/1/2015]~~

18.27.5.5 EFFECTIVE DATE: ~~[January 1, 2015]~~xxxxxxxx xx, 2021, unless a later date is cited at the end of a section.

~~[18.27.5.5 NMAC - Rp, 18.27.5.5 NMAC, xx/xx/2021]~~
~~[18.27.5.5 NMAC - Rp, 18.27.5.5 NMAC, 1/1/2015]~~

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, xx/xx/2021]~~
~~[18.27.5.6 NMAC - Rp, 18.27.5.6 NMAC, 1/1/2015]~~

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 ~~[current edition of the]~~-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 as constituted under the laws of the state for the administration of transportation work.

~~[D]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 may not submit the lowest monetary bid.

~~[E]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.

~~[F]G.~~ Packet or prequalification packet means the current New Mexico department of transportation contractor prequalification application form issued by ~~from~~ the office of inspector general and completed by a contractor.

~~[G]H.~~ Performance factor or Pf means the numerical quantification of a contractor's past performance on closed projects for certain objectively measureable criteria.

[H]. Pf claim or Pfc means the performance measurement of a contractor's unsuccessful demand for reconsideration ~~[seeking additional compensation or contract time]~~ 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.

[I]. Pf disincentive or Pfd means the performance measurement of a contractor's quality of work related to certain contract items. Applicable contract items for disincentive are the following sections 401 pavement smoothness measurement, 403 open graded friction course, 403 - a warm mix asphalt - open graded friction course, 404 rubberized open graded friction course, 416 minor paving, 417 miscellaneous paving, 423 hot mix asphalt - major paving, 424 warm mix asphalt - major paving, 450 major portland cement concrete pavement, 451 minor portland cement concrete pavement, 456 continuously reinforced concrete pavement, and division 900 quality criteria.

[J]. Pf liquidated damages or Pfd means the performance measurement of a contractor's timely completion of the contract.

[K]. Pf non-conformance or Pfn means the performance measurement of a contractor's compliance with the terms and conditions of the contract.

[L]. 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.

~~[M. Pf subcontractor or Pfc means the performance measurement of a contractor's prompt payment of its first tier subcontractors.]~~

N. Prequalification factor [Pqf] rolling average or Pqfra means the final measure of responsibility that ~~[is]~~ may be applied to ~~[the]~~ a contractor's bid resulting in the 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 measures contractor responsibility. ~~[Prequalification factor is abbreviated Pqf.]~~

~~[Q. Prequalification packet means the New Mexico department of transportation form submitted annually.]~~

[R]. Prequalification project means a major construction project that is let through the New Mexico department of transportation, 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.

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 ~~[and occurs on the date that the state construction engineer or New Mexico department of transportation designee signs]~~ is documented on the compass form.

S. Responsibility means an objective determination made by the department, based on past performance, ~~[by the New Mexico department of transportation]~~ of ~~[the]~~ a 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, xx/xx/2021]

[18.27.5.7 NMAC - Rp, 18.27.5.7 NMAC, 1/1/2015; A, 1/1/2019]

18.27.5.8 PREQUALIFICATION PROCEDURE: To obtain prequalified status, the ~~[most]~~ current version of the prequalification packet ~~[to obtain prequalified status]~~ must be obtained from the office of inspector general through use of the ~~[New Mexico]~~ department ~~[of transportation]~~ website. Each contractor and subcontractor seeking to become prequalified shall submit the prequalification packet and any supporting information to the ~~[New Mexico]~~ department's ~~[of transportation]~~ office of inspector general as indicated in the prequalification packet. Deadlines are calculated from the date office of inspector general receives the new or renewal packet. Requests for prequalification will not be processed without the submission of a timely, complete and conforming packet. All packets shall contain a complete affidavit, executed under penalty of perjury by an authorized individual, certifying

that the information contained in the packet is true and correct. 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~~-submission of a bid without timely obtaining prequalified status shall result in a determination that ~~its~~-the 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. ~~For prime contractors and subcontractors submitting packets~~, ~~W~~-~~w~~ithin 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, xx/xx/2021]~~

~~[18.27.5.8 NMAC - Rp, 18.27.5.8, 18.27.5.9, 18.27.5.10, 18.27.5.11, 18.27.5.12 NMAC, 1/1/2015; A, 1/1/2019]~~

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 ~~New Mexico~~-department ~~of transportation~~-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, xx/xx/2021]~~

~~[18.27.5.9 NMAC - Rp, 18.27.5.14 NMAC, 1/1/2015]~~

18.27.5.10 LICENSING: Only contractors licensed in New Mexico may perform highway construction work for the ~~[New Mexico] department [of transportation]~~. 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.

~~[18.27.5103 NMAC - Rp, 18.27.5.10 NMAC, xx/xx/2021]~~

~~[18.27.5.10 NMAC - Rp, 18.27.5.9 NMAC, 1/1/2015]~~

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 ~~[New Mexico]~~ department ~~[of transportation]~~ 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 [will be applied to each prequalified prime contractor] as a responsibility evaluation to evaluate ~~[the]~~ prime contractor~~’[s]~~ 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~~[, and subcontractor]~~.

(1) Pf claim data will be documented on the compass form and will be collected from the New Mexico department of transportation’s closed project records.

(2) Pf disincentive data will be documented on the compass form and will be collected from the New Mexico department of transportation’s closed project records indicating whether disincentives were assessed on standard specification division for surface treatment and pavements and division for quality criteria items.

(3) Pf liquidated damages data will be documented on the compass form and will be collected from the New Mexico department of transportation’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 New Mexico department of transportation’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.

~~[(6) Pf subcontractor data will be documented on the compass form and will be collected from the New Mexico department of transportation’s construction and civil rights bureau records indicating findings for the failure to promptly pay subcontractors without good cause.]~~

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 ~~[ten]~~ twenty percent.

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

~~[(6) The percentage associated with subcontractor is ten percent.]~~

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

(1) Claims that are not pursued beyond the cabinet secretary administrative remedy level or subsequent 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 [are pursued]-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 the value of the claim or more than the claim value asserted at [brought beyond] the cabinet secretary level reconsideration will be assigned a value of zero.

(b) Claims resolved for less than the value of the claim brought beyond the cabinet secretary level reconsideration 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.

0.9. (4) Pf claim resulting in a value of one will be assigned a bonus value for Pf claim equal to
(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 of paid and accepted applicable contract items less applicable contract

disincentives.

(c) Divide the total of ~~s[S]ubparagraph (a)~~ by the total of ~~[S]ubparagraph (b)~~ ~~[of Paragraph (1) of Subsection D of this Section].~~

(d) If ~~s[S]ubparagraph (a)~~ is equal to zero, ~~[of Paragraph (1) of Subsection D of this Section]~~ ~~s[S]ubparagraph (c)~~ ~~[of this Section]~~ will be assigned a value of one.

(e) If the result of ~~s[S]ubparagraph (c)~~ ~~[of Paragraph (1) of Subsection D of this Section]~~ is exactly one with paid and accepted applicable contract items, ~~s[S]ubparagraph (c)~~ ~~[of this Section]~~ will be assigned a value equal to 0.9.

(2) Sum all closed projects of ~~s[S]ubparagraph (c)~~ ~~[of Paragraph (1) of Subsection D of this Section]~~ 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 ~~s[S]ubparagraph (b)~~ by the total of ~~s[S]ubparagraph (a)~~ ~~[of Paragraph (1) of Subsection E of this Section].~~

(d) A resulting value less than or equal to one from ~~s[S]ubparagraph (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 ~~s[S]ubparagraph (a)~~ by ~~s[S]ubparagraph (b)~~ ~~[of Paragraph (2) of Subsection E of this Section].~~

(d) A resulting value less than or equal to one from ~~s[S]ubparagraph (c)~~ ~~[of Paragraph (2) of Subsection E of this Section]~~ will be assigned a bonus value equal to 0.9.

(3) Pf liquidated damages for a given year is ~~the~~ 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 ~~p[P]aragraph (1)~~ by ~~[P]aragraph (2)~~ ~~[of this Subsection].~~

(4) A resulting value of one for ~~p[P]aragraph (3)~~ ~~[of this Subsection]~~ will be assigned a bonus value equal to 0.9.

(5) Sum all closed projects of ~~p[P]aragraph (4)~~ ~~[of this Subsection]~~ 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.] Pf subcontractor or Pfsc is calculated in the following manner:~~

~~(1) Negative findings against the prime contractor per project will result in a value of one per finding.~~

~~(2) Pfsc for a given year is the sum of all negative findings in the year.~~

~~(3) Zero findings on all closed projects within the year will receive a bonus of Pf subcontractor equal to 0.9.~~

~~(4) The sum of Pfsc for a given year is multiplied by the percentage associated with Pfsc.~~

~~The resulting value will be incorporated into Pqfyr.]~~

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

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

[K]J. In the absence of data for any given year a contractor's Pqfyr will be assigned a value of one.

[M]K. The contractor's prequalification factor rolling average will be denoted as Pqfra.

(1) The Pqfra 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.

(2) The most recent year, denoted as Pqfyr 1, will be multiplied by the weighting factor of 0.9.

(3) The preceding year, denoted as Pqfyr 2, will be multiplied by the weighting factor of 0.6.

(4) The preceding year, denoted as Pqfyr 3, will be multiplied by the weighting factor of 0.3.

(5) The sum of Pqfyr 1 through Pqfyr 3, is multiplied by their appropriate weighting factors and then divided by the sum of all weighting factors to result in the contractor's overall Pqfra.

[N]L. The equation for Pqfra = $(Pqfyr 1 * 0.9 + Pqfyr 2 * 0.6 + Pqfyr 3 * 0.3) / (0.9 + 0.6 + 0.3)$.

[O.] (1) All equations and calculations whether interim or final will be rounded to the thousandths place.

(2) ~~The department may reset the rolling average calculation for all contractors in the event the Pqfyr equation is amended. The new calculation will apply to those prequalification projects let after the effective date of the amendment. The reset Pqfra calculation will start again at year zero.~~

[E]M. ~~For joint ventures the higher value of all joint venture applicant's Pqfra will be used for the modified bid amount.~~

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

~~[18.27.5.11 NMAC - Rp, 18.27.5.11 NMAC, xx/xx/2021]~~

~~{18.27.5.11 NMAC - N, 1/1/2015; A, 1/1/2019}~~

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 January first and December thirty-first of the previous year.

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

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 March bid opening until superseded by an updated Pqfra.

D. The Pqfra ~~will~~ 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 January in order to implement the decision of a hearing officer, a court order or a required correction.

~~[18.27.5.3 NMAC - Rp, 18.27.5.3 NMAC, xx/xx/2021]~~

~~{18.27.5.12 NMAC - N, 1/1/2015; A, 1/1/2019}~~

18.27.5.13 ADMINSTRATIVE 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 in Subsection B of 18.27.5.12 NMAC.

(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 office 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,

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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 February 28, 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 office 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 March 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, xx/xx/2021]

[18.27.5.13 NMAC - N, 1/1/2015; A, 1/1/2019]

18.27.5.14 PREQUALIFICATION COMMITTEE: Members of the prequalification committee will be designated by the department's cabinet secretary [~~of the New Mexico department of transportation~~] 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, xx/xx/2021]

[18.27.5.14 NMAC - N, 01-01-15]

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 corporation pursuant to Subsection A of 54-1A-303 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.

B. For a merged corporation pursuant to Subsection A of 54-1A-303 NMSA 1978, or a similar statutory provision, the surviving 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 who merged and will be used for the modified bid amount.

C. 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, xx/xx/2021]
[18.27.5.15 NMAC - Rp, 18.27.5.15, 1/1/2015; A, 1/1/2019]~~

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 ~~[state-]~~department of transportation standard specifications for highway and bridge construction, as amended by this rule.

~~[18.27.5.17 NMAC - Rp, 18.27.5.17 NMAC, xx/xx/2021]
[18.27.5.17 NMAC - N, 1/1/2015]~~

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 1/1/2015) repealed effective xx/xx/2021.~~

~~**OTHER:** 18.27.5 NMAC, Contractor Prequalification Rule, (filed xx/xx/20xx) replaced 18.27.5 NMAC, Contractor Prequalification Rule, effective xx/xx/20xx.~~