



Associated Contractors of New Mexico

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New Mexico Department of Transportation
PO Box 1149
Santa Fe, New Mexico 87504

ATTN: Rick Padilla, P.E.
Executive Director of Highway Operations

RE: ACNM Comments on proposed repeal and replace 18.27.5 NMAC
NMDOT Contractor Prequalification Rule

Dear Mr. Padilla;

The Associated Contractors of New Mexico (ACNM) wishes to thank the New Mexico Department of Transportation (NMDOT) for the opportunity to provide written comments with regard to the proposed update of the Department's current Contractor Prequalification program. We would also like to thank Secretary Michael Sandoval, yourself, and the entire NMDOT Prequalification team for including ACNM in discussions over the past several months on the proposed update in an effort to address some of the more pressing concerns our membership has had with aspects of the current program. We appreciate the opportunity to work with the NMDOT team in developing an amended version of the program that is amenable to all and meets the needs of the Department in ensuring that the best interests of the state are realized.

With respect to the proposed revisions to 18.27.5 NMAC that have been developed by NMDOT and made available on September 15, 2020 for review, ACNM hereby submits the following on behalf of our membership.

18.27.5.11 PREQUALIFICATION CALCULATION

18.27.5.11A(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.

For quite some time, Contractors have been vocal concerning the lack of consistency between Districts, and even amongst Project Offices in the same District, in the issuance of Non-Conformances on NMDOT

projects. As an example, in some instances one Contractor may be extended an opportunity by the Project Office to address and/or correct a potential Non-Conformance within a certain amount of time prior to a Progress Payment being processed, while another Contractor in a similar situation is not afforded the same courtesy. This disparity creates an unlevel playing field for the contracting community, and is particularly troubling when the prospect of facing a 25% withholding of a Contractors Progress Payment, which is enforceable per the NMDOT specifications, coupled with an adverse finding on the Contractors Compass Report and ultimately adversely impacting its Pfn, results in a “double jeopardy” imposed upon the Contractor.

In light of the inconsistencies experienced in enforcement of Non-Conformances, ACNM proposes limiting calculation of a Contractors Pfn to include only any **unresolved** Non-Conformances, and that for purposes of the Contractors Pfn there be an opportunity for the Contractor to correct any potential Non-Conformances within 5 days of notification by the Project Office of a deficiency prior to processing of the Progress Payment. Enforcement of the requirements of the specification would not be affected, and only those Non-Conformances that remain **unresolved** after the 5 day extension would then be included in the calculation of the Contractors Pfn.

This clarification should also be considered and incorporated into Subsection 18.27.5.11F(2).

18.27.5.11D. *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 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 0.90.*
- (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.*

ACNM raises concern that the method identified to calculate Pfd on a project ultimately creates a 3% disparity between projects that contain disincentive items versus those that do not. Projects that are eligible have the potential to net a Pfd score of 0.90 while those that are not can only achieve a Pfd of 0.93 at best. Contractors faced with gaining a Pfd score of no better than 0.93 could potentially elect not submit a bid on a project with no items subject to disincentive as it would adversely impact their Pqfyr, which in turn would negatively affect their Pqfra for three years. Additionally, calculation of the Contractors Pfd will be affected by any changes to the NMDOT paving specifications and/or specific projects Special Provisions, which will lead to one Contractors Pqfyr and Pqfra being derived under different requirements than another Contractors scores, thus creating an scenario that unfairly scores one Contractor against another. Short of the Department having to restart the Prequalification program any time a specification change or changed condition on a project occurs, continuing under these circumstances could ultimately render application of the Rule as is currently proposed to be ed “arbitrary and capricious”.

ACNM suggests that the Department consider limiting a minimum Pfd to 0.94 as a “perfect” score. Contractors would still be encouraged and incentivized to perform to the level of a 0.90, however any scores landing between 0.90 and 0.93 would default to a best score of 0.94 as their Pfd, thus levelling the playing field between projects that have been subjected to amended specifications or changed conditions, as well as those that may or may not have associated disincentive criteria.

18.27.5.11G. *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 in Pqfyr.*

This language closely reflects the requirements of the current NMDOT Contractor Prequalification Rule. ACNM contends that the Experience Modifier Rate (EMR) as currently being implemented for Prequalification purposes, which imposes a pass/fail evaluation, is not an accurate measurement of a Contractor's actual safety record nor is it reflective of the company's efforts to maintain safe jobsites for its employees and work zones for the traveling public. ACNM has proposed a pass/fail scoring system that utilizes a Contractors participation in one of several New Mexico OSHA (NMOSHA) Safety Partnerships available to the construction industry as a means to establish a commitment to a company-wide culture of safety and safe practices. The Department could readily obtain a current list of participants in any of the certified Safety Partnerships from NMOSHA to identify those Contractors who are actively enrolled and engaged in these programs as the basis for meeting scoring criteria under this Subsection.

18.27.5.11I. *The equation is $Pqfyr = Pfc * \text{fifteen percent} + Pfd * \text{thirty percent} + Pfld * \text{thirty percent} + Pfn * \text{twenty percent}$.*

ACNM notes that the equation included in this Subsection has inadvertently omitted the Prequalification Factor for Safety (Pfs), which would account for five percent of the Contractors annual Prequalification Score. We suggest that the Pqfyr equation be amended as follows:

$$Pqfyr = (Pfc * \text{fifteen percent}) + (Pfd * \text{thirty percent}) + (Pfld * \text{thirty percent}) + (Pfn * \text{twenty percent}) + (Pfs * \text{five percent})$$

18.27.5.11L. *The equation for $Pqfra = (Pqfyr 1 * 0.9 + Pqfyr 2 * 0.6 + Pqfyr 3 * 0.3) / (0.9 + 0.6 + 0.3)$.*

- (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.*

In an effort to provide clarity, ACNM would suggest the equation noted in this Subsection be amended as follows:

$$Pqfra = ((Pqfyr1 * 0.9) + (Pqfyr2 * 0.6) + (Pqfyr3 * 0.3)) / (0.9 + 0.6 + 0.3)$$

In addition, subparagraph (2) seems to indicate that the Department may establish a new Pqfra for all Contractors if changes to any aspect of the Pqfyr become necessary. In doing so, all Pqfra would then be reset to 1.0 for the period of time necessary to acquire sufficient data to establish new scores, thus in effect beginning an entirely new program each time a change is needed – even in the midst of a calendar year. ACNM suggests that this could adversely impact a Contractor who has been diligent in establishing a favorable score under the terms of the program, only to see that effort wiped away by any change in the scoring criteria.

18.27.5.12 POSTING, REVIEW AND APPLICATION OF PREQUALIFICATION FACTOR

18.27.5.12D. The Pqfra may be used to determine the modified bid amount.

ACNM notes that use of the word “may” in this Subsection suggests that implementation of a Pqfra on bids is a discretionary act that may subject the Department to concerns over an arbitrary application of the Rule.

18.27.5.14 PREQUALIFICATION COMMITTEE

... 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.

Since there does not appear to be a specific threshold value indicated in the revised Rule that would identify the size of projects to which the Pqfra would be applied, ACNM voices concern over the perception that any threshold applicable to Department bid lettings is viewed as being fluid from letting to letting, which further calls into question the methodology to be employed by the Committee and/or Cabinet Secretary in determining a pertinent threshold value for a particular project letting versus a threshold established and applied to other project lettings. ACNM suggests the Department consider establishing a minimum threshold value within the Rule applicable to a project upon which a Contractors Pqfra may be applied, and identifying a means by which a revised threshold could be assigned to either a particular project to be bid or for a specific project letting.

CLOSING COMMENTS

In conclusion, at the outset of any program such as this, there is a component of time that needs to be considered with regard to gathering sufficient data necessary to establish a Contractors initial Pqfyr. For this reason, we believe that the timeframe should be adequate to provide a Contractor the ability to establish its Pqfyr1 while also allowing the Department time to collect pertinent data needed to establish the score. ACNM suggests that this initial period for gathering such data should be at least 24 months before the Department would actually begin to factor in a Contractors Pqfra score on NMDOT received bids. This would also be beneficial in addressing industry’s concerns with regard to consistency of the NMDOT’s Bid Letting schedule, the availability of applicable projects by which a Contractor can reasonably expect to be able to generate its initial Pqfyr, the scope and magnitude of a project, the timing of project closure, etc.

On behalf of the membership of ACNM, I once again extend our appreciation for this opportunity to share comments from the industry on the proposed repeal and replacement of 18.27.5 NMAC, the Contractor Prequalification Rule. Please feel free to contact either myself or ACNM’s Executive Director, Mr. Jim Garcia, at jgarcia@aconm.org if you have additional questions or wish to discuss the issue further.

Respectfully,

ASSOCIATED CONTRACTORS OF NEW MEXICO



Patrick Shaw
2020 ACNM Chapter President