

Comment Summary for 18.27.5 NMAC Public Comments Received On or Before October 15, 2020.

	Entity or Individual Submitting Comment	NMAC Rule Section	Comment	NMDOT Consideration of Comment and Reasons for Adopting or Changing Final Rule and for Accepting or Rejecting Public Comment
1	ACNM	18.27.5.11A(4) Prequalification Calculation	<p>“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.”</p>	<p><i>No change: Establishment of quality measurement for unresolved non-conformances would require implementation of new administrative reporting not tied to existing project records.</i></p>
2	ACNM	18.27.5.11D Prequalification Calculation	<p>“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 to [sic] 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 [sic] scenario that unfairly scores one Contractor against another.”</p>	<p><i>Under consideration.</i></p>

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3	ACNM	18.27.5.11G Prequalification Calculation	<p>“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.”</p>	<p><i>No Change: NMDOT has considered the comment and has concluded the measure for the factor will remain unchanged.</i></p>
4	M. Beck (Oral Comments)	18.27.5.11G Prequalification Calculation	<p>[At Hearing] EMR is not necessarily representative of a contractors’ safety performance for highway construction, but instead is merely based on the company’s NICS code. Consider incorporating a company’s participation in OSHA safety partnerships as a component in the measure of corporate safety.</p>	<p><i>No Change: See above.</i></p>
5	ACNM	18.27.5.11I Prequalification Calculation	<p>“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.”</p>	<p><i>No Action Required: Comment points to a typographical error in redline that is not in published rule.</i></p>
6	M. Beck (Oral comments)	18.27.5.11K, L Prequalification Calculation	<p>[At Hearing] Timing for first year calculation, ACNM proposes a two year time frame before the scores begin to apply to bids for a more level playing field.</p>	<p><i>Under Consideration.</i></p>

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7	ACNM	18.27.5.11L Prequalification Calculation	“In an effort to provide clarity, ACNM would suggest the equation noted in this Subsection be amended as follows: $Pqfra = ((Pqfyr1 * 0.9) + (Pqfyr2 * 0.6) + (Pqfyr3 * 0.3)) / (0.9 + 0.6 + 0.3)$ ”	<i>Accept change (not substantive).</i>
8	ACNM	18.27.5.11L Prequalification Calculation	“In addition, subparagraph (2) seems [sic] 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.”	<i>No change: Comment is a correct interpretation of the rule which may allow a reset depending on the materiality of a subsequent change to 18.27.5 NMAC.</i>
9	ACNM	18.27.5.12D Posting and Review Pqfra	“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.”	<i>No change: the Rule correctly reflects the NMDOT's discretionary authority.</i>
10	ACNM	18.27.5.14 Prequalification Committee	“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	<i>No change: NMDOT has considered the comment and concluded the suggestion is not consistent with the framework of the program.</i>

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			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.”	
11	Alan Stott (JHCC)	18.27.5.7I Definitions	Claims: "Failed claims" count against contractor if forced to go above Cabinet Secretary level. A settlement for less than Cabinet Secretary level claim value should be evaluated on many factors not just money.	<i>No change: The revised Rule provides a scoring buffer for claims resolution achieved prior to litigation or arbitration.</i>