



DATE: May 25, 2021

TO: The General Public

FROM: NMDOT

SUBJECT: Rulemaking 18.27.5 NMAC, Contractor Prequalification Rule

**Michelle Lujan
Grisham**
Governor

Michael R. Sandoval
Cabinet Secretary

CONCISE EXPLANATORY STATEMENT

Pursuant to NMSA 1978, § 14-5-5.5 the New Mexico Department of Transportation (“NMDOT”) provides this concise explanatory statement which summarizes rulemaking to the Contractor Prequalification Rule, 18.27.5 NMAC.

NMDOT hereby adopts a repeal and replacement of 18.27.5 NMAC for the purposes of providing simplification of scoring factors, clarification of definitions and a reworking of the appeals procedure.

(1) **Statutory Authority for Rule Promulgation:** Section 67-3-11, NMSA 1978, authorizes the NMDOT to make all rules and regulations as may be necessary to carry out the provisions of Chapter 67 NMSA 1978.

(2) **Effective Date of Rule:** June 8, 2021

(3) **Date of Adoption of Rule:** May 20, 2021

(4) **Reasons for Adopting Rule:** The adopted rule simplifies scoring factors, clarifies definitions and adopts a new appeals procedure for the Contractor Prequalification Rule, 18.27.5 NMAC.

(5) **Reasons for Changes from Published Rule:**

The NMDOT held a public video hearing on October 15, 2020 during the public comment period. Substantive feedback and public comments were received during the comment period and through the hearing that support a number of changes to the published proposed rule. Because of public comment after the first hearing, a second public video hearing was held on April 22, 2021 to receive further feedback and comments.

Commissioners

Jennifer Sandoval
Commissioner, Vice-Chairman
District 1

Bruce Ellis
Commissioner
District 2

Hilma E. Chynoweth
Commissioner
District 3

Walter G. Adams
Commissioner, Chairman
District 4

Thomas C. Taylor
Commissioner
District 5

Charles Lundstrom
Commissioner, Secretary
District 6

Changes were made to these sections of the proposed rule after consideration of comments from the public:

A typographical error in the yearly prequalification factor equation (“Pqfyr”) found in the published redline rule was corrected. The prequalification safety factor (“Pfs”) of 5% has been included in the proposed rule.

A suggestion that parentheses be added to the calculation equation for the prequalification factor rolling average (“Pqfra”) will be adopted as reflected in the final published rule, as no substantive change will result.

18.27.5.11 Section J (3) was added to apply a value of 0.94 to any bids that were less than or equal to 0.94 after any rounding had occurred.

A suggestion regarding timing of any department reset of scoring was considered and a period not to exceed two (2) years after any resetting of scores was adopted.

(6) Reasons for Not Accepting Substantive Comments or Suggestions from the Public Comment:

The following suggestions and comments were considered and rejected by the Prequalification Committee:

A suggestion that only unresolved non-conformances be included in calculation of a contractor’s performance was rejected by the Department because to measure only unresolved non-conformances would require new administrative reporting not tied to existing project records.

A comment was made that the use of the Experience Modifier Rate (EMR) to grade a contractor’s safety record does not adequately reflect that contractor’s efforts to maintain safety on job sites. A suggestion was made that its participation in OSHA Safety Partnerships would be a better measure of safety practices, was considered by the Department and rejected because EMR scores are not membership based therefore assuring a level playing field among contractors regarding their contractor’s safety record.

A comment was made that a high performing contractor could be adversely impacted by the NMDOT’s decision to reset prequalification scores. NMDOT rejects any suggestion of a change to its discretionary decision to reset the scores in the

prequalification program. Administration of the Prequalification Program requires the Department maintain this ability to reset scores across the board.

A suggestion that the use of the word “may” in describing the Department’s ability to apply prequalification scores to a project will result in a discretionary application of the rule. The NMDOT maintains that it will continue to administer the program to maximize the stated benefits. Prequalification scores will continue to be applied as NMDOT determines necessary for the success of the program.

A suggestion was made that a threshold value of a project that will use prequalification scores should be included in the rule was rejected. NMDOT’s position is that this suggestion is not consistent with the framework of the program and would compromise the Department’s authority to properly administer the program.

A comment was received that a determination of a failed claim included in a contractor’s score should be made based on more factors than just the monetary amount of any judgment. This comment was rejected as the Rule provides a scoring buffer for claims resolution achieved prior to litigation or arbitration.