

February 16, 2021

CONCISE EXPLANATORY STATEMENT

The New Mexico Department of Transportation (“NMDOT”) hereby adopts a new rule for the purpose of establishing the processes to be used in administering the money appropriated to the Transportation Project Fund by the New Mexico Legislature.

- (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:** April 20, 2021
- (3) **Date of Adoption of Rule:** March 25, 2021
- (4) **Reasons for Adopting Rule:** The adopted rule is intended to establish the application, evaluation, award, and close out processes to be used by the NMDOT in administering the money appropriated to the Transportation Project Fund by the New Mexico Legislature.
- (5) **Reasons for Changes from Published Rule:** The final rule remedies certain typographical designation errors. In particular, Subsections D, E and F of 18.27.6.15 NMAC are paragraphs that should have been designated by whole numbers in parentheses from (1) to (3). Corresponding corrections were made to the remaining subsections in that section. Another typographical designation error was the reference to Section 67-3-78 NMSA in the definition of “District Engineer”. The changes are non-substantive edits to the rule.

The final rule has been amended to reflect recent legislative changes made to the original enabling legislation (HB 694 enacted during the 2019 legislative session and signed into law on April 3, 2019, codified at Section 67-3-78 NMSA 1978 (2019)). HB 207, which was passed during the 2020 regular legislative session and signed into law on March 4, 2020, changed the name of the fund. Going forward, the fund will simply be known as the “Transportation Project Fund.” In addition, HB 207 added tribes to the list of eligible entities, added “transit, bicycle and bicycle” projects to the definition of transportation infrastructure and expanded the types of projects eligible for funding to include maintenance projects while expressly excluding beautification projects. These additions necessitated the need for new definitions and other edits. These amendments fall within the scope of the current rulemaking and do not require a new proceeding.

The NMDOT held six (6) public hearings during the public comment period. Substantive feedback and public comments were received at the hearings and during the comment period that support a number of amendments to the published proposed rule.

Amendments were made to the final rule to substitute words as suggested by a number of comments. For example, a comment suggested that the use of the word “participate” did not reflect the intent of the enabling statute. Another comment suggested that use of the phrase “matching share” is a mischaracterization. In addition to the suggested changes, a few other word substitutions or additions were made to the final rule for clarification purposes. These amendments fall within the scope of the current rulemaking and do not require a new proceeding.

Numerous comments were directed towards the description of what constitutes an eligible project. To address any misunderstanding, the final rule has been amended to explicitly provide that a project can be phased and that funding can be sought for any particular phase. For example, an eligible entity can submit an application for a planning or design project, a corridor or feasibility study, seek funding for just the construction phase of an already designed project, or request funds for the entire project. Regardless whether funding is sought for a distinct phase or the entire project, project readiness and the ability to complete the project or the phase for which funding is sought within the specified grant period is important. Eligible entities should take note that if funding is sought for a specific phase of a project the applicant should consider whether federal funding may be sought for a subsequent phase. Receipt of federal funding for a future phase could be jeopardized if an earlier phase did not comply with federal requirements.

The final rule has been amended to provide that projects receiving federal funds are not eligible under the program. Specifically, a local government cannot use this program to provide its match on a federally funded project. In order for a project, or an identified phase of a project (i.e. design, right of way, construction, or utilities), to be included in the State Transportation Improvement Program (STIP), it is necessary that full funding for the project be reasonably anticipated to be available for the project within the time period contemplated for completion of the project. There exists no reasonable anticipation that any project will receive funding from the program. However, a regionally significant project that appears in the STIP will be eligible provided it receives no federal funding.

The NMDOT received a number of comments and inquiries related to consultant costs incurred in preparing an application and the use non-cash contributions especially by small communities. The final rule clarifies that the costs of a consultant associated with the preparation of an application are not eligible for reimbursement. As for the use of non-cash contributions, allowing this practice would require much greater oversight on the part of the NMDOT to verify and quantify the non-cash contribution. The intent of the program is to limit the NMDOT’s involvement and oversight of the grants, not to increase it.

The process used to solicit and select projects received extensive commentary including comments from those planning organizations who conducted that process during the initial funding cycle. After considering those comments, the final rule will provide for a two-phase process. Phase-one will consist of the submission of a project feasibility form in response to a call for projects. The project feasibility will allow for a basic review of project feasibility including the need to comply with cultural or biological resources, or applicable environmental

regulations. Phase-two will consist of the submission of a more in-depth project application. Both the feasibility form and the application will be submitted to the MPO/RTPO where the project is located. Each MPO/RTPO will be evaluating and ranking projects in an open meeting based on the specific merits of the individual project using the evaluation criteria specified in the call for projects. The NMDOT is currently in the process of developing the criteria for future use. The criteria will apply statewide regardless of the project's location and will be contained in the call for projects. More guidance related to this process will be forthcoming in a program guide.

Numerous comments were directed towards the need to submit project certifications similar to those required by other NMDOT programs. One comment encouraged greater oversight of a local government's compliance with cultural or biological resources than suggested by the draft rule. Consistent with the intent of the program to limit oversight on the part of the NMDOT, the NMDOT will not require submission of any certifications if the project receives no federal funding. Nevertheless, the NMDOT has a responsibility to the legislature to ensure that the appropriated funds are being used in accordance with applicable laws and regulations. As a result, the phase one feasibility form will be reviewed by the NMDOT's Environmental Bureau to identify whether the project invokes any regulatory issues. If a permit is determined to be necessary, the local government will be obligated to provide the NMDOT with a copy. In addition to providing a copy of any identified permits, the NMDOT has the right to conduct an audit of the local government's compliance with cultural or biological resources, environmental regulations, and other applicable laws and regulations.

Numerous comments were received relating to the requirement that the local government must return an executed grant agreement within 30 days of receiving the notice of award. Concern was expressed regarding the ability of the governing body to pass a resolution within that time-period. The final rule extends that time-period to 60 days. In addition, the final rule does not contain any requirement that the governing body pass a resolution authorizing the execution of the grant agreement. Whether such a resolution is necessary will depend on local requirements. If such a resolution is necessary, the local government is given the option to include a provision in the resolution of sponsorship submitted with the application authorizing the appropriate local governmental official, such as the county or city manager, to execute the grant agreement without the need to obtain later governing body approval if awarded a grant.

Based on comments received, the requirement that the local government submit a resolution indicating the availability of the proposed match appears to be misunderstood. By default, the program provides that the NMDOT will award 95% of the estimated cost of a project as reflected in the project application unless the local government requests a lesser amount. The resolution needs to provide that the local government has budgeted or otherwise made arrangements for its 5% contribution, or if the local government is contributing more than 5% of the estimated costs has budgeted or made arrangement for the increased percentage being contributed.

Several comments were received relating to the disbursement process. The relevant provision in the final rule has been amended to clarify that the grant agreement cannot impose any additional requirements on the disbursement process other than those contained in the final rule. The final rule contains two requirements: (1) submission of a request for the grant funds; and (2) return of a fully executed grant agreement. After their receipt, the NMDOT will disburse 100% of the awarded grant funds to the eligible entity. Other agreements between the NMDOT and a local government may provide for a reimbursement process. A disbursement differs in that it is a one-time payment of the entire grant award while a reimbursement is piece-meal payment process. Each program administered by the NMDOT is subject to its own rules. The disbursement process provided for by this program does not modify the payment process for any other program.

A number of comments raised concerns related to right-of-way ownership or control. To address these concerns, the final rule provides that a governmental entity must possess the project right-of-way either in fee simple or as a perpetual easement. The governmental entity possessing such an interest need not be the applicant but in those circumstances the parties must have an agreement for the use of the right-of-way by the applicant.

A very comprehensive comment was received suggesting numerous substantive changes to the post-project evaluation or audit provisions. After considering the comment, and consistent with the intent of this program, the NMDOT concluded that changes should be made. The intent of this program is to provide a mechanism to distribute state general funds to local governments for use in completing local transportation projects. Projects are to be selected on a competitive basis. Unlike other programs administered by the NMDOT, this program seeks to limit the bureaucratic oversight required by those funding sources. Nevertheless, the NMDOT has a responsibility to the legislature to ensure that the appropriated funds are being used appropriately, responsibly, timely and in accordance with applicable laws and regulations. The primary means for doing so is through the use of program audits. The NMDOT needs the flexibility to conduct whatever audit it deems necessary to make that assessment. Although an audit will likely include recommendations related to its findings, a majority of the audits will be performed after the project has been completed making it difficult for a local government to correct the audit findings. The final rule provides that a local government will have the ability to submit additional documentation prior to an audit becoming final. The final rule also imposes consequences if an audit demonstrates the inability on the part of a local government to properly administer a project. Additional details relating to audits will be contained in the planned future program guide.

Comments were received suggesting the scope of eligible projects be expanded to include all modes of transportation including transit enhancements, safety projects, bike and pedestrian improvements, and others. Legislation enacted during the 2020 legislative session made such a change. Prior to that amendment, those types of projects were not eligible. The final rule has been amended accordingly.

(6) Reasons for Not Accepting Substantive Arguments from Public Comment: A number of comments were directed at the role, responsibility and authority of the State Transportation Commission when awarding grant funding. The State Legislature has delegated to the State Transportation Commission the power to determine all matters of policy for the NMDOT. Unless the language in a future appropriations legislation provides otherwise, this delegation gives the State Transportation Commission the authority to determine who receives the funds, in what amount, and whether all the funds appropriated in a specific fiscal year should be awarded in that particular year. Any attempt to limit the policy authority of the State Transportation Commission through an administrative rule is impermissible. As a result, no changes will be made in response to these comments.

Comment was received requesting explicit language that the use of state price agreements or cooperative agreements would be permitted. Unless the location or nature of the project requires otherwise, the local government is responsible for awarding service or construction contracts using its normal procurement process. A local government will need to make its own determination whether it can use a state price agreement or cooperative agreement. The local government need not use a contractor who may be included in any NMDOT approved list of contractors. The local government must make its own determination of contractor qualification or responsibility using standards applicable to its locally funded projects. Likewise, the scope and extent of inspections, quality assurances, material testing, and other construction phase duties are the responsibility of the local government. The NMDOT will not involve itself in these matters.

Several comments addressed the inability of a local government to use non-cash contributions. As noted above, permitting the use of non-cash contributions, or force account labor, would require much greater oversight on the part of the department to verify and quantify the non-cash contributions. Such oversight is contrary to the intent of the program to be one of limited oversight. As a result, the final rule will not provide that force account labor and equipment costs are eligible for reimbursement.

Comments were received requesting that smaller communities not be held to the same level or degree of compliance with applicable state, local and federal regulations. As a condition of receiving grant funds from the NMDOT the local government agrees to comply with all applicable state, local and federal regulations. Whether the legal obligation is imposed by a state statute or regulation, or a federal law or regulation, compliance is required regardless of the size or location of the community. The NMDOT does not have the authority to excuse compliance. Failure to comply with applicable state, local and federal regulations will subject the local government to the consequences contained in the final rule.

Comment received suggesting the fund should advance certain NMDOT goals and objectives. The purpose of the Fund is to provide money to local governments to address their unmet transportation infrastructure needs not to advance any goals and objectives of the NMDOT.