



Associated Contractors of New Mexico

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April 21, 2021

RE: Proposed Revisions to 18.27.5 NMAC - Contractor Prequalification Rule

Mr. Griego,

The Associated Contractors of New Mexico (ACNM) representing the Heavy/Highway/Utility contracting community in New Mexico appreciates the opportunity to express our concerns as it relates to the repeal and replace 18.27.5 NMAC - Contractor Prequalification Rule. Our membership includes many of the contractors, subcontractors, material suppliers and professional service companies that compete through qualified bid process to complete the work for NMDOT. Understanding that the entirety of the program is to reward good contractor performance and encourages lesser quality contractor performance to improve, and as stated in the Purpose to “fine tune” the rule to better accomplish the intended purpose of the program, we respectfully submit our response to this hearing.

ACNM and affiliates have been included in the process since our initial submittal dated September 5, 2014. In that time, we have submitted many qualified statements and together we have been able to remedy many revisions to the program like claims, extended evaluation scoring, and eliminating subjective criteria. After reviewing the latest version, we submit one item for consideration to the hearing panel.

Prequalification Rolling Average

The current rule creates a 3% disparity between projects that contain disincentive items versus those that do not. The initial rule from 2015 tried to prevent this by allowing non-disincentive projects to receive a 0.9 for *Performance factor disincentive (Pfd)*. This created a loophole where contractors were able to bid a project with no disincentive and still receive a perfect score.

When NMDOT changed the rule in 2019, they changed the *Performance factor disincentive* to give a contractor a 1.00 for *Pfd* when there was no disincentive present on the project. This created a 3% disparity between projects that contain disincentive items versus those that do not. This has left many contractors with higher scores, even though they may be performing perfectly.

For example, if you compare two contractors that perform perfectly on two different projects, one with a disincentive item and one without, the contractor with disincentive work will receive a *Prequalification factor rolling average (Pqfra)* of 0.90 and the non-disincentive contractor will receive a 0.93. This discrepancy ultimately will cause well-performing contractors to avoid projects with no disincentive to maintain their lower score. This could cause NMDOT to have fewer bidders on projects and in turn could cause the cost of projects to increase by eliminating competition. On the other hand, this same issue can cause smaller contractors or subcontractors to not be able to compete with contractors that bid disincentive work.

A contractor that is normally a subcontractor may want to start expanding their business. They will start off by bidding smaller projects, many of which may not have any disincentive work. In this case, the best score they could receive is a 0.93. Therefore, when they decide to bid a bigger project, they will have a 3% disadvantage, not due to their performance, but simply due to the type of project they worked on.

ACNM is proposing that NMDOT reevaluate ACNM's previous request to change the *Prequalification factor rolling average (Pqfra)* to the lowest score of 0.94, instead of the current purposed rule of 0.90. Changing the lowest score to a 0.94 will fix the issues described above. *Prequalification factor year (Pqfyr)* would still be evaluated to 0.90.

Changing the *Pqfra* to minimum of 0.94 will also allow NMDOT to make modifications to their specifications without having to face bid disputes or prequalification disputes due to NMDOT not comparing projects "apples to apples". For example, if a project is bid in January with HMA using the Department's current QLA evaluation of HMA, and another project is bid in July with a different Percent-Within-Limits technique, NMDOT will still be able to evaluate fairly without the threat of a bid or score dispute.

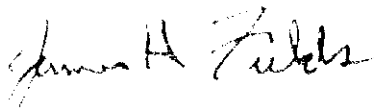
This change to 0.94 will also allow NMDOT to add new types of techniques and technologies to the specification and allow multiple contractors to bid without the higher risk of having their score impacted by bidding these newer techniques and technologies. An example of this would be bidding jobs with Stone Matrix Asphalt, roller compacted concrete, or Balanced Mix Design (BMD). Both issues could lead to challenges to the rule of being arbitrary and capricious.

Our proposal is to limit a minimum *Pqfra* of no lower than 0.94 be applied to bids. Contractors still have the opportunity have a score of 0.90 overall; however, a score of 0.94 would be applied to the bid. There would be no change to the maximum *Pqfra* score. Please note that narrowing the scoring band was an initial goal of NMDOT Secretary Sandoval at the beginning of our committee.

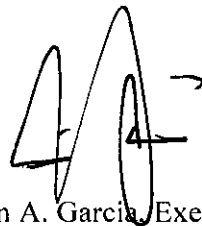
The Associated Contractors of New Mexico and our community of members believe that our collaborative efforts with the NMDOT is positive and we appreciate the opportunity to participate in this process. In as much as we all agree that quality, safety, and effective communication is paramount to our mutual goals, it is the consumer that will benefit the most from our partnership. We would like to thank all the team members from NMDOT and ACNM working group that assisted in the prequalification process.

Respectfully submitted,

Associated Contractors of New Mexico



James Fields, ACNM Chapter President



Jim A. Garcia, Executive Director