



Mr. Mershawn Griego
New Mexico Department of Transportation
P.O. Box 1149
Santa Fe, New Mexico, 87544
MershawnC.Griego@state.nm.us

April 22, 2021

Subject: Written Public Comments for the Repeal and Replacement of 18.27.5 NMAC

We respectfully submit this letter to serve as Albuquerque Asphalt Inc.'s official written comments regarding the repeal and replacement of 18.27.5 NMAC per the NMDOT Notice of Proposed Rulemaking Hearing.

During this latest process NMDOT and industry members had several meetings discussing proposed changes to 18.27.5 NMAC. During this process we came to many agreements and some disagreements regarding how the rule should be changed. We believe that the contracting community has arrived at a compromise where we believe the prequalification rule will not only be successful, but also have the support of many contractors throughout the state. This change is outlined below and is also the same comment from ACNM:

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 decided to bid a bigger project, they would 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 would fix the issues described above. Prequalification factor year (Pqfry) would still be evaluated to 0.90.

Changing the Pqfra to minimum of 0.94 would 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 would still be able to evaluate fairly without the threat of a bid or score dispute.

This change to 0.94 would 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.

This change would need to occur in 18.27.5.11 Prequalification Calculation part K and read similar to the following:

Once the Pqfra is calculated, scores less than 0.94 will be rounded to 0.94. 0.94 will be the minimum possible reported score for Pqfra. The resulting Pqfra calculation will be the final department determination of a contractor's most recent Pqfyr and Pqfra calculations.

This change has been submitted by ACNM and several other contractors. We believe this change will help the rule be more successful and less susceptible to legal challenges.

Please contact me with any questions.

Regards,



Robert Wood
President
Albuquerque Asphalt Inc.