July 2, 2018

VIA ELECTRONIC MAIL ONLY AT (johndon.martinez@dot.gov)

Mr. John Don Martinez, Division Administrator
Federal Highway Administration (FHWA), New Mexico Division Office
4001 Office Court Drive, Suite 801
Santa Fe, New Mexico 87507

Re: 2018 1st and 2nd Quarter Special Experimental Projects No. 14 (SEP-14)
New Mexico Department of Transportation (NMDOT) Contractor Prequalification Program Update

Dear Mr. Martinez,

In accordance with FHWA’s SEP-14 reporting requirements outlined in the FHWA letter of February 26, 2015 the NMDOT is required to submit quarterly reporting to the FHWA. The NMDOT is starting its quarterly reporting for 2018 with the submission of this report. The NMDOT requests that the New Mexico Division Office forward this correspondence and all attachments to Mr. Gerald Yakovenko and Mr. Walter Waidelich with SEP-14’s approval office in the FHWA’s Office of Infrastructure. This report is for the first and second quarter reporting periods for 2018 for the NMDOT Contractor Prequalification Program (Program).

(Table 1) - AUI Inc. (AUI), Appeal of Prequalification Score for 2017

The NMDOT received one (1) appeal, which concerned the Program. The appeal was brought under the appeal process available in the Contractor Prequalification Rule 16.27.5 NMAC (Rule) itself. The description and issues raised, and the resolution are detailed below.

The NMDOT, as part of its Rule, established an appeal procedure for any contractor disputing its own prequalification score. Based on the newly published scores for 2017, AUI timely submitted an appeal of its score. Documentation concerning the appeal is enclosed.

AUI submitted an appeal of its 2017 Prequalification Score on January 18, 2018, challenging two non-conformances given to AUI on a District 6 project, CN 6101100R. The non-conformances involve the failure of AUI to make payment promptly to two of its subcontractors, J&H Supply and Gonzales Construction. AUI claimed there was no violation of the contractual requirement for prompt payment and sought to have the non-conformance score adjusted, which would have changed its 2017 Prequalification score. The Cabinet Secretary designated contract legal counsel as the Hearing Officer. Per the appeal process established in the Rule, an informal hearing was held on February 21, 2018. The Hearing Officer issued a written decision on March 8, 2018 denying AUI’s challenge.
(Tab 2) - Compass Form and PQFRA Revisions for Consistency

The NMDOT’s Construction and Civil Rights Bureau (CCRB), under management of the State Construction Engineer (SCE), is responsible for verifying project closure documents including the compass form. The SCE must sign and date each compass form and the date for the SCE’s signature is defined as the project closure date for pre-qualification. As part of on-going audits to ensure accuracy and consistency, it was determined that there were inconsistencies to be addressed.

The first inconsistency relates to prompt payment violations. It is the NMDOT Project Manager’s responsibility to complete a majority of the informational areas on the compass form for each project during project closure. One of the items that is reported on the compass form is the number of prompt payment violations. This informational area is one of the areas where the Project Manager is responsible for reporting the appropriate data. Through NMDOT’s own internal audit of the Program it was discovered that the reported prompt payment data for one particular project that was closed on in a previous year was not correct and there were two separate projects discovered prior to the date being finalized for this year. The result of this audit finding has been a process improvement implemented by the NMDOT. This change to the process involves an independent third party check by the NMDOT Disadvantaged Business Enterprise (DBE) liaison of the data reported by the Project Manager. The DBE liaison is responsible for issuing the determinations of “no good cause” for prompt payment violations. As a result the NMDOT modified three contractor PQFRA’s.

The second inconsistency relates to non-conformances associated with certified payrolls. The specific certified payroll issue addresses 1) the timely payment of employees after the week ending date, 2) timely submittal of the certified payrolls after payment to the employee and 3) reporting of the actual payment date on the certified payrolls. Again, through the NMDOT’s own internal audit of the Program it was discovered that the project offices were inconsistent on issuing non-conformances for these items. NMDOT direction is being provided to the project offices regarding how these items shall be handled in the future to ensure statewide consistency. In addition, a new NMDOT standard specification book will be issued in January 2019. The internal direction to NMDOT staff and specification modifications clearly address the audit findings. Additionally, all non-conformances issued in the past that were related to the certified payroll inconsistencies cited above were rescinded. The NMDOT by addressing these inconsistencies in this manner further shows that the Program is not arbitrary and capricious but rather unbiased and equitable. The PQFRA’s for three (3) contractors was modified to reflect the rescission of the non-conformances.

Finally, and again, through the NMDOT’s own internal audit of the Program it was discovered that two (2) contractors had incorrect PQFRA’s due to a software programing inconsistency. The software has been updated and the contractors’ PQFRA’s have been modified to reflect the update.
It is extremely important to stress and emphasize that none of the inconsistency addressed had any impact or effect on bidding.

(Tab 3) - Contractor Prequalification Rule 18.27.5 NMAC Rulemaking

The NMDOT at its March 13, 2017 State Transportation Commission (STC) meeting in Albuquerque NM requested and received approval from the STC to enter into rulemaking for the Rule. This action was taken because the NMDOT has now reached the halfway point in the SEP-14 process and the NMDOT will be implementing a new standard specification book in January 2019. These two events help aid the internal audit and updates to the Rule necessary to maintain the Program. The NMDOT will be presenting the Rule to the STC at the July 19th in Raton NM. The NMDOT will be requesting and anticipates receiving authorization to finalize the rulemaking. This rulemaking process in NM is extensive and the link provided contains the information and documentation associated with the process. Please access the third bullet under the bolded title "Proposed Rulemaking".

http://dot.state.nm.us/content/nmdot/en/prequalification.html

NMDOT Contractor Prequalification Team to Present at American Association of Transportation Officials (AASHTO) Committee on Construction (COC) in Pittsburgh PA (August 12-16)

The NMDOT Contractor Prequalification team has been afforded a timeslot of Tuesday August 13, 2018 to present to the AASHTO COC. A team member will be available for the presentation and throughout the week for participation and question and answer.

(Tab 4) - Vermont DOT Site Visit

Vermont DOT has expressed interest in the NMDOT Program and has received approval to utilize State Transportation Innovation Council (STIC) funds for a site visit to NM and conduct an information exchange regarding all aspects of the Program. VTrans staff are planning to be in NM from October 6 – 14 2018. The agenda has not yet been fully developed between the two agencies however once completed it will be shared in the event FHWA Division Office and FHWA’s Office of Infrastructure SEP-14 staff as any of these staff members are welcome to attend.

Should there be questions or comments regarding this quarterly update please contact me.

Sincerely,

Armando M. Armendariz, PE
Division Director
Enclosure(s)

AUI Prequalification Appeal Documentation
NMDOT Correspondence to Contractors
AASHTO COC “draft” Agenda

cc:  Tom Church, Cabinet Secretary NMDOT
     Anthony Lujan, Deputy Secretary, NMDOT
     Prequalification Team, NMDOT
     Mike Beck, ACNM Executive Director
January 18, 2018
Via FedEx Overnight

Mr. Tom Church, Cabinet Secretary
N.M. Dept. of Transportation
1120 Cerrillos Rd.
Santa Fe, NM 87504-1149

Re: Appeal of AUI, Inc.'s Prequalification Factor rolling Average (PQFRA)
Date of Notice of PQFRA; 12 January 2018

Dear Mr. Church:

This firm represents AUI, Inc. On behalf of our client, AUI, Inc. hereby submits this appeal concerning AUI, Inc.'s revised prequalification rolling average (PQFRA) in the listing issued 12 January 2018. The applicable regulation concerning this appeal is stated in NMAC §18.27.5.13 A: “[o]nly a contractor disputing their own prequalification factor shall have the right to appeal”. Section D, states: “[a] contractor disputing only the calculation of its prequalification factor shall file its appeal within seven days of publication of the prequalification factor.” This appeal is timely filed.

The appeal relates to interpretations of prompt payment to subcontractors of AUI on Project: CN6101100R. The subcontractors to AUI, are, J & H Supply and Gonzales Construction, regarding their October 2016 payment.

The issue with J & H Supply is unique in that J & H Supply requested that payment be deferred until their invoice could be amended. J & H issued an invoice dated September 30, 2016 for work performed on the project the previous month. NMDOT paid AUI a progress payment on 6 October 2016, the progress payment included work performed by J & H previously invoiced to AUI. J & H informed AUI that they wanted to amend their 30 September invoice to include work that inadvertently omitted on that invoice and would timely submit a revised invoice and requested that payment for the 30
September invoice be deferred. J & H submitted an amended invoice on 17 October. NMDOT issued a zero ($0) to AUI on 25 October; J & H Supply was paid on 27 October 2016. The Invoice that was paid to J & H Supply was the amended invoice received from J & H Supply on 17 October 2016, although misedated to show a date of 30 September 2016. Payment of the invoice received 17 October was tendered to J & H Supply on 27 October two days after AUI received the approved pay estimate from NMDOT.

The payment to Gonzales Construction was made within the applicable time period allowed after receipt of a zero (0) dollar estimate. AUI received a zero dollar estimate on 27 October and paid Gonzales Construction on 28 November within the 30-day requirement of payment allowed when a zero dollar estimate is received. In order to apply the seven-day requirement after receipt of payment, AUI was to have received payment. AUI did not receive payment and applied the statute allowing for payment to the contractors within 30 days of certification of payment, of which the certification was zero payment.

It is AUI’s assertion that there was not a violation of the regulation of prompt payment to subcontractors and the Compass Information Final Information form category for “number of Progress Payments with or without a non-conformance should be changed from 13 to 15. That change will properly reflect the condition of non-conformances and adjust the PQFRA accordingly. AUI, Inc. appeals and requests a hearing concerning inaccurate listing of progress payment non-conformance.

Sincerely,

CALVERT + MENICUCCI, P.C.

For: Sean R. Calvert

cc: Anthony N. Lujan, Deputy Secretary (Anthony.Lujan1@state.nm.us)
Loren Hatch, Deputy Secretary (loren.hatch@state.nm.us)
Armando Armendariz, Division Director (armando.armendariz@state.nm.us)
Jeff Canney, Inspector General (jeff.canney@state.nm.us)
Elizabeth J. Travis, Deputy General Counsel (Elizabeth.travis@state.nm.us)
AUI, Inc.

1106-22
SRC/ffm:jnl

DATE: 1/19/18
Received by Dm # 1793
( ) US Cert Mail
( ) US Mail
( ) Fax
( ) Process Server
( ) Fed Ex
Office of the Secretary
NMDOT
Office of the Cabinet Secretary

Michael F. Menicucci
Calvert Menicucci
8900 Washington St. NE
Suite A
Albuquerque, NM 87113-2727

Re: Designation of Hearing Officer for Appeal of AUI Inc.'s 2017 Prequalification Factor (Pqfra)

Dear Mr. Menicucci,

The New Mexico Department of Transportation (NM DOT) received AUI, Inc.'s (AUI) January 19, 2018, notice of appeal of its 2017 Prequalification Factor (Pqfra) challenging the calculation of its prequalification factor. The appeal is timely. Per the Contractor Prequalification Rule (18.27.5 NMAC), within ten (10) days of receipt of a timely appeal, the NMDOT will advise the parties that an informal hearing will be convened and designating a neutral hearing officer.

Therefore, an informal hearing will be convened for this appeal. I designate Christina E. Anaya, of Robles, Rael & Anaya as the hearing officer for this appeal. Ms. Anaya's contact information is:

Christina E. Anaya
Robles, Rael & Anaya
500 Marquette Ave. NW
Suite 700
Albuquerque, NM 87102
505-242-2228
tina@roblesrael.com

Notice of the hearing date, time and location will be provided under separate cover by the hearing officer. Thank you for your compliance with this administrative process.

Sincerely,

Tom Church, Cabinet Secretary
Michael F. Menicucci – AUI Counsel
January 30, 2018
Page – 2 –

CC: Via E-mail Only
Anthony N. Lujan, Deputy Secretary for Operations
Jeff Canney, Inspector General
Armando M. Armendariz, PE, Division Director
Elizabeth J. Travis, Esq., Deputy General Counsel
Geraldine Gonzales, Assistant General Counsel
Stephen Thies, Assistant General Counsel

Christina E. Anaya – Robles, Rael & Anaya
February 2, 2018

Michael F. Menicucci  
Calvert Menicucci  
8900 Washington St. NE  
Suite A  
Albuquerque, NM 87113-2727  
mmenicucci@hardhadlaw.com

Stephen Thies  
Geraldine L. Gonzales  
New Mexico Department of Transportation  
1200 Cerrillos Road, Room 123  
Santa Fe, NM 87504  
Stephen.Thies@state.nm.us  
Geraldine.Gonzales@state.nm.us

Re: Notice of Informal Hearing and Informal Hearing Procedures regarding Appeal of AUI’s 2017 Prequalification Score (POFRA)

Dear Counsel:

In correspondence dated January 29, 2018, the New Mexico Department of Transportation (NMDOT) Cabinet Secretary designated me as the hearing officer for AUI Inc.’s (AUI) appeal of its 2017 prequalification factor score.

As a preliminary matter, I find it necessary to disclose to the parties in the above-referenced matter that attorney Randy Autio from my firm served as the hearing officer in the Matter of CN A301191- I-25 Jefferson Street to San Antonio Drive- Preliminary Award Protest by El Terrero Construction, LLC. In July 2017, I was designated by the Cabinet Secretary to serve as the hearing officer in the matter AUI’s appeal of its revised prequalification factor score. In addition, attorney Douglas Gardner from my firm has represented and continues to represent the NMDOT in various unrelated litigation cases assigned by State Risk Management. The matters handled by Mr. Autio, Mr. Gardner and myself are not directly adverse to the issues in the present appeal. Randy Autio and I have also served as the hearing officer in other unrelated protests and appeals of decisions made by the NMDOT. I do not believe our firm’s representation in the matters discussed above...
will in anyway interfere with my ability to act as a hearing officer in this case. I have had no interactions with any party in this case, except as a hearing officer for NMDOT.

This disclosure is being made out of an abundance of caution and to ensure all parties a fair and impartial hearing. If either party objects to me serving as the hearing officer in this matter, please notify me in writing by **Wednesday, February 7, 2018 at 5:00 p.m.**

If there is no objection, the following table provides the date, time, location and deadlines associated with the informal hearing.

<table>
<thead>
<tr>
<th><strong>DATE OF HEARING</strong></th>
<th><strong>Friday, February 16, 2018</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LOCATION OF HEARING</strong></td>
<td>New Mexico Department of Transportation Training Room 2 1120 Cerrillos Road Santa Fe, New Mexico 87505</td>
</tr>
<tr>
<td><strong>HEARING START TIME</strong></td>
<td>9:00 A.M.</td>
</tr>
<tr>
<td><strong>TOTAL TIME ALLOTTED FOR HEARING</strong></td>
<td>4 hours (may be changed during hearing by Hearing Officer)</td>
</tr>
<tr>
<td><strong>ALLOCATION OF TIME FOR EACH PARTY</strong></td>
<td>To be determined by Hearing Officer at hearing.</td>
</tr>
<tr>
<td><strong>SUPPORTING DOCUMENTS DUE BEFORE HEARING</strong></td>
<td>The parties will exchange and provide to the Hearing Officer their respective witness and exhibit lists no later than Friday, February 9, 2018 at 5:00 p.m. By this deadline, the parties may also, but are not required to, submit position statements outlining the issues and law applicable to this appeal. At the hearing, please have four (4) copies of each document you intend to submit to the Hearing Officer for consideration. One copy for each of the following: the Hearing Officer, the record, and each party in attendance.</td>
</tr>
<tr>
<td><strong>REBUTTAL DOCUMENTS DUE AFTER HEARING</strong></td>
<td>Wednesday, February 21, 2018. This deadline may be amended by the Hearing Officer at the hearing.</td>
</tr>
<tr>
<td><strong>DETERMINATION LETTER DUE AFTER HEARING</strong></td>
<td>February 27, 2018, unless extended in writing by the Hearing Officer.</td>
</tr>
</tbody>
</table>
The purpose of the informal hearing process is for all parties to have an opportunity to be heard, to present any claims or defenses, to submit arguments and all necessary material evidence for my consideration. Because this is an informal hearing, each party should be prepared to have their fact witnesses testify about the issues in the hearing. However, such testimony is not required. Witnesses may also choose to submit their testimony in writing. If a witness chooses to testify in person, that witness will be sworn in before providing testimony.

Any party to the appeal may choose to have legal counsel present, although the participation of counsel should be limited so that the fact witnesses can present testimony. Please bear in mind, that although a party may choose to have legal counsel present, the rules of evidence and rules of civil procedure do not apply to the hearing. While witnesses may testify and exhibits be submitted to me, witnesses are not subject to cross-examination. I have the authority to and may ask additional questions of any witness during or at the conclusion of their testimony.

Although I will make arrangements for a court reporter to transcribe the hearing, the informal hearing process is not an “on the record” proceeding. My information gathering mechanisms are not solely limited to the day of the scheduled informal hearing and I have the ability to make an independent investigation and to contact any party to solicit additional facts, documents or arguments outside of the informal hearing.

Within seven (7) days of the hearing, unless extended by me in writing, I will gather the parties’ arguments and evidence, make findings of fact and conclusions, and issue a decision letter. If an unsuccessful party does not fully accept my decision it may file an appeal as allowed by law.

All submissions may be sent to me at tina@roblesrael.com. Please also copy my paralegal Cortney Myers at cortney@roblesrael.com. Please remember that the other party must be copied on any communications or submissions sent to me to avoid ex parte communications.

Thank you in advance for your attention to this matter.

Sincerely,

Christina E. Anaya

CEA/elm

cc: Cynthia Gustafson
    Paul Baca Court Reporters
February 2, 2018

Michael F. Menicucci
Calvert Menicucci
8900 Washington St. NE
Suite A
Albuquerque, NM 87113-2727
mmenicucci@hardhatlaw.com

Stephen Thies
Geraldine L. Gonzales
New Mexico Department of Transportation
1200 Cerrillos Road, Room 123
Santa Fe, NM 87504
Stephen.Thies@state.nm.us
Geraldine.Gonzales@state.nm.us

Re: Amended Notice of Informal Hearing and Informal Hearing Procedures regarding Appeal of AUI’s 2017 Prequalification Score (POFRA)

Dear Counsel:

In correspondence dated January 29, 2018, the New Mexico Department of Transportation (NMDOT) Cabinet Secretary designated me as the hearing officer for AUI Inc.’s (AUI) appeal of its 2017 prequalification factor score.

As a preliminary matter, I find it necessary to disclose to the parties in the above-referenced matter that attorney Randy Autio from my firm served as the hearing officer in the Matter of CN A301191- I-25 Jefferson Street to San Antonio Drive- Preliminary Award Protest by El Terrero Construction, LLC. In July 2017, I was designated by the Cabinet Secretary to serve as the hearing officer in the matter AUI’s appeal of its revised prequalification factor score. In addition, attorney Douglas Gardner from my firm has represented and continues to represent the NMDOT in various unrelated litigation cases assigned by State Risk Management. The matters handled by Mr. Autio, Mr. Gardner and myself are not directly adverse to the issues in the present appeal. Randy Autio and I have also served as the hearing officer in other unrelated protests and appeals of decisions made by the NMDOT. I do not believe our firm’s representation in the matters discussed above
will in anyway interfere with my ability to act as a hearing officer in this case. I have had no interactions with any party in this case, except as a hearing officer for NMDOT.

This disclosure is being made out of an abundance of caution and to ensure all parties a fair and impartial hearing. If either party objects to me serving as the hearing officer in this matter, please notify me in writing by **Wednesday, February 7, 2018 at 5:00 p.m.**

If there is no objection, the following table provides the date, time, location and deadlines associated with the informal hearing.

<table>
<thead>
<tr>
<th>DATE OF HEARING</th>
<th>Friday, February 16, 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>LOCATION OF HEARING</td>
<td>New Mexico Department of Transportation Training Room 2 1120 Cerrillos Road Santa Fe, New Mexico 87505</td>
</tr>
<tr>
<td>HEARING START TIME</td>
<td>9:00 A.M.</td>
</tr>
<tr>
<td>TOTAL TIME ALLOTTED FOR HEARING</td>
<td>4 hours (may be changed during hearing by Hearing Officer)</td>
</tr>
<tr>
<td>ALLOCATION OF TIME FOR EACH PARTY</td>
<td>To be determined by Hearing Officer at hearing.</td>
</tr>
<tr>
<td>SUPPORTING DOCUMENTS DUE BEFORE HEARING</td>
<td>The parties will exchange and provide to the Hearing Officer their respective witness and exhibit lists no later than Friday, February 9, 2018 at 5:00 p.m. By this deadline, the parties may also, but are not required to, submit position statements outlining the issues and law applicable to this appeal. At the hearing, please have four (4) copies of each document you intend to submit to the Hearing Officer for consideration. One copy for each of the following: the Hearing Officer, the record, and each party in attendance.</td>
</tr>
<tr>
<td>REBUTTAL DOCUMENTS DUE AFTER HEARING</td>
<td>Wednesday, February 21, 2018. This deadline may be amended by the Hearing Officer at the hearing.</td>
</tr>
<tr>
<td>DETERMINATION LETTER DUE AFTER HEARING</td>
<td>February 27, 2018, unless extended in writing by the Hearing Officer.</td>
</tr>
</tbody>
</table>
The purpose of the informal hearing process is for all parties to have an opportunity to be heard, to present any claims or defenses, to submit arguments and all necessary material evidence for my consideration. Because this is an informal hearing, each party should be prepared to have their fact witnesses testify about the issues in the hearing. However, such testimony is not required. Witnesses may also choose to submit their testimony in writing. If a witness chooses to testify in person, that witness will be sworn in before providing testimony.

Any party to the appeal may choose to have legal counsel present, although the participation of counsel should be limited so that the fact witnesses can present testimony. Please bear in mind, that although a party may choose to have legal counsel present, the rules of evidence and rules of civil procedure do not apply to the hearing. While witnesses may testify and exhibits be submitted to me, witnesses are not subject to cross-examination. I have the authority to and may ask additional questions of any witness during or at the conclusion of their testimony.

Although I will make arrangements for a court reporter to transcribe the hearing, the informal hearing process is not an “on the record” proceeding. My information gathering mechanisms are not solely limited to the day of the scheduled informal hearing and I have the ability to make an independent investigation and to contact any party to solicit additional facts, documents or arguments outside of the informal hearing.

Due to a previous commitment, I will require ten (10) days instead of the standard seven (7) days after the hearing to gather the parties’ arguments and evidence, make findings of fact and conclusions; and issue a decision letter. If additional time is required for this task, I will notify all parties of the extension in writing. If an unsuccessful party does not fully accept my decision it may file an appeal as allowed by law.

All submissions may be sent to me at tina@robesrael.com. Please also copy my paralegal Cortney Myers at cortney@robesrael.com. Please remember that the other party must be copied on any communications or submissions sent to me to avoid ex parte communications.

Thank you in advance for your attention to this matter.

Sincerely,

Christina E. Anaya

CEA/cdm
cc:  Cynthia Gustafson
     Paul Baca Court Reporters
February 9, 2018

Sean R. Calvert
Calvert Menicucci
8900 Washington St. NE
Suite A
Albuquerque, NM 87113-2727
scalvert@hardhatlaw.net

Stephen Thies
Geraldine L. Gonzales
New Mexico Department of Transportation
1200 Cerrillos Road, Room 123
Santa Fe, NM 87504
Stephen.Thies@state.nm.us
Geraldine.Gonzales@state.nm.us

Re: Second Amended Notice of Informal Hearing and Informal Hearing Procedures regarding Appeal of AUI’s 2017 Prequalification Score (PQFRA)

Dear Counsel:

This correspondence is to notify all parties of the adjusted made to the hearing date and time frame for the above referenced matter due to a scheduling conflict with the original date.

If there is no objection, the following table provides the date, time, location and deadlines associated with the informal hearing.

<table>
<thead>
<tr>
<th>DATE OF HEARING</th>
<th>Wednesday, February 21, 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>LOCATION OF HEARING</td>
<td>Modrall Room</td>
</tr>
<tr>
<td></td>
<td>State Bar – ABQ</td>
</tr>
<tr>
<td></td>
<td>5121 Masthead NE</td>
</tr>
<tr>
<td></td>
<td>Journal Center</td>
</tr>
<tr>
<td></td>
<td>Albuquerque, NM 87103</td>
</tr>
</tbody>
</table>

HEARING START TIME | 12:00 P.M.
<table>
<thead>
<tr>
<th><strong>TOTAL TIME ALLOTTED FOR HEARING</strong></th>
<th>4 hours (may be changed during hearing by Hearing Officer)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ALLOCATION OF TIME FOR EACH PARTY</strong></td>
<td>To be determined by Hearing Officer at hearing.</td>
</tr>
<tr>
<td><strong>SUPPORTING DOCUMENTS DUE BEFORE HEARING</strong></td>
<td>The parties will exchange and provide to the Hearing Officer their respective witness and exhibit lists no later than Wednesday, February 14, 2018 at 5:00 p.m. By this deadline, the parties may also, but are not required to, submit position statements outlining the issues and law applicable to this appeal.</td>
</tr>
<tr>
<td></td>
<td>At the hearing, please have four (4) copies of each document you intend to submit to the Hearing Officer for consideration. One copy for each of the following: the Hearing Officer, the record, and each party in attendance.</td>
</tr>
<tr>
<td><strong>REBUTTAL DOCUMENTS DUE AFTER HEARING</strong></td>
<td>Monday, February 26, 2018. This deadline may be amended by the Hearing Officer at the hearing.</td>
</tr>
<tr>
<td><strong>DETERMINATION LETTER DUE AFTER HEARING</strong></td>
<td>February 28, 2018, unless extended in writing by the Hearing Officer.</td>
</tr>
</tbody>
</table>

The purpose of the informal hearing process is for all parties to have an opportunity to be heard, to present any claims or defenses, to submit arguments and all necessary material evidence for my consideration. Because this is an informal hearing, each party should be prepared to have their fact witnesses testify about the issues in the hearing. However, such testimony is not required. Witnesses may also choose to submit their testimony in writing. If a witness chooses to testify in person, that witness will be sworn in before providing testimony.

Any party to the appeal may choose to have legal counsel present, although the participation of counsel should be limited so that the fact witnesses can present testimony. Please bear in mind, that although a party may choose to have legal counsel present, the rules of evidence and rules of civil procedure do not apply to the hearing. While witnesses may testify and exhibits be submitted to me, witnesses are not subject to cross-examination. I have the authority to and may ask additional questions of any witness during or at the conclusion of their testimony.

Although I will make arrangements for a court reporter to transcribe the hearing, the informal hearing process is not an “on the record” proceeding. My information gathering mechanisms are not solely limited to the day of the scheduled informal hearing and I have the ability to make an
independent investigation and to contact any party to solicit additional facts, documents or arguments outside of the informal hearing.

Within seven (7) days of the hearing, unless extended by me in writing, I will gather the parties' arguments and evidence, make findings of fact and conclusions, and issue a decision letter. If an unsuccessful party does not fully accept my decision it may file an appeal as allowed by law.

All submissions may be sent to me at tina@roblesrael.com. Please also copy my paralegal Cortney Myers at cortney@roblesrael.com. Please remember that the other party must be copied on any communications or submissions sent to me to avoid ex parte communications.

Thank you in advance for your attention to this matter.

Sincerely,

Christina E. Anaya

CEA/chm

cc: Cynthia Gustafson
    Paul Baca Court Reporters
February 14, 2018

Susana Martinez
Governor

Tom Church
Cabinet Secretary

Commissioners

Ronald Schneits
Chairman
District 4

Dr. Kenneth White
Secretary
District 1

David Sepich
Commissioner
District 2

Keith Mortensen
Commissioner
District 3

Butch Mathews
Commissioner
District 5

Billy Moore
Commissioner
District 6

Office of General Counsel

Christina Anaya, Esq.
Robles Rael Anaya
500 Marquette Ave., NW
Suite 700
Albuquerque, NM 87102-5346

Re: Appeal of AUI Inc.'s 2017 Prequalification Factor (PoFRA) – New Mexico Department of Transportation's Witness/Exhibit Lists and Position Statement re Project CN 6101100R

Dear Ms. Anaya,

Pursuant to your February 9, 2018, second amended notice of hearing date to the parties in this matter, the New Mexico Department of Transportation (NMDOT) hereby submits its Exhibit and Witness Lists for the AUI Bid Protest hearing scheduled for February 21, 2018. In addition, NMDOT is providing you with its Position Statement.

By copy of this letter, counsel for AUI, Inc., has been provided a copy of the NMDOT's Exhibit and Witness Lists only.

Sincerely,

Stephen P. Thies
Assistant General Counsel – NMDOT

w/Exhibits as stated

Cc: Via Email Only

Sean Calvert, Esq.
scalvert@hardhattlaw.com

Anthony Lujan – NMDOT
Armando Armendariz – NMDOT
Sally Reeves - NMDOT
Elizabeth J. Travis – NMDOT
Geraldine Gonzales – NMDOT
<table>
<thead>
<tr>
<th>EXHIBIT</th>
<th>DATE</th>
<th>WITNESS</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>6/19/15</td>
<td>Martinez</td>
<td></td>
<td>Invitation for Bids</td>
</tr>
<tr>
<td></td>
<td>Martinez</td>
<td></td>
<td>Section 102.7 of the Standard Specifications of Highway and Bridge</td>
</tr>
<tr>
<td>7/8/15</td>
<td>Martinez</td>
<td></td>
<td>Plan Holders List for proposal 6101100R</td>
</tr>
<tr>
<td>6/11/09</td>
<td>Martinez</td>
<td></td>
<td>Notice to Contractors</td>
</tr>
<tr>
<td>11/26/13</td>
<td>Martinez</td>
<td></td>
<td>Notice to Contractors</td>
</tr>
<tr>
<td>6/17/15</td>
<td>Martinez</td>
<td></td>
<td>NMDOT Bid Form</td>
</tr>
<tr>
<td>2/6/18</td>
<td>Martinez</td>
<td></td>
<td>Affidavit of Jeffrey E. Martinez</td>
</tr>
<tr>
<td>12/30/14</td>
<td>Canney</td>
<td></td>
<td>18.27.5.8 Prequalification Rule</td>
</tr>
<tr>
<td>1/12/18</td>
<td>Canney</td>
<td></td>
<td>Published list from OIG’s Prequalification Contractor’s and Subcontractor List</td>
</tr>
<tr>
<td></td>
<td>Canney</td>
<td></td>
<td>Compass Form</td>
</tr>
<tr>
<td>2/5/18</td>
<td>Canney</td>
<td></td>
<td>Affidavit of Jeff Canney</td>
</tr>
<tr>
<td></td>
<td>Grover</td>
<td></td>
<td>Prompt Pay Section 108.1 of Standard Specifications of Highway and Bridge</td>
</tr>
<tr>
<td>7/13/16</td>
<td>Grover</td>
<td></td>
<td>Email from Grover to Monk regarding Change Order (CO) directed by CCRB</td>
</tr>
<tr>
<td>7/27/16</td>
<td>Grover</td>
<td></td>
<td>Signed Change Order (CO)</td>
</tr>
<tr>
<td></td>
<td>Grover</td>
<td></td>
<td>Final Quantity Book</td>
</tr>
<tr>
<td></td>
<td>Grover</td>
<td></td>
<td>Estimate 10 with Voucher information</td>
</tr>
<tr>
<td>9/6/15</td>
<td>Grover</td>
<td></td>
<td>Agenda PreCon for estimate cut-off date</td>
</tr>
<tr>
<td></td>
<td>Grover</td>
<td></td>
<td>Estimate 12 with Voucher Information</td>
</tr>
<tr>
<td></td>
<td>Grover</td>
<td></td>
<td>Estimate 13 with Voucher Information</td>
</tr>
<tr>
<td>11/28/16</td>
<td>Grover</td>
<td></td>
<td>Notice of Non-Conformance Letter to AUI</td>
</tr>
<tr>
<td></td>
<td>Grover</td>
<td></td>
<td>Language from Section 109.8.2 Non-Conformance Excerpt from Standard Specifications for Highway and Bridge</td>
</tr>
<tr>
<td>EXHIBIT</td>
<td>DATE</td>
<td>WITNESS</td>
<td>DESCRIPTION</td>
</tr>
<tr>
<td>---------</td>
<td>--------</td>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td></td>
<td>2/6/17</td>
<td>Grover</td>
<td>Letter re Notice of Non-conformance: B2GNow Prompt Payment</td>
</tr>
<tr>
<td>11/17/16</td>
<td>Coats</td>
<td>Apodaca email to Coats</td>
<td></td>
</tr>
<tr>
<td>11/17/16</td>
<td>Coats</td>
<td>Coats email to Gonzales and Bridge re CAR SC02 with attachments (SC02 and Compliance Audit September 2016)</td>
<td></td>
</tr>
<tr>
<td>11/18/16</td>
<td>Coats</td>
<td>Coats email to Segura regarding AUI Non-Conformance SC 02</td>
<td></td>
</tr>
<tr>
<td>12/7/16</td>
<td>Coats</td>
<td>Apodaca email to Coats “JH paid”</td>
<td></td>
</tr>
<tr>
<td>12/16/16</td>
<td>Coats</td>
<td>Non-Conformance/Corrective Action SC03</td>
<td></td>
</tr>
<tr>
<td>12/19/16</td>
<td>Coats</td>
<td>Coats email to Segura re CAR response to Gonzales Construction (attaching AUI letter and language from 13-1-158 Payments for Purchases</td>
<td></td>
</tr>
<tr>
<td>10/7/15</td>
<td>Segura</td>
<td>Permission to Subcontract Request</td>
<td></td>
</tr>
<tr>
<td>9/15/15</td>
<td>Segura</td>
<td>Permission to Subcontract Request</td>
<td></td>
</tr>
<tr>
<td>10/16</td>
<td>Segura</td>
<td>Compliance Audit Report – October 2016</td>
<td></td>
</tr>
<tr>
<td>1/4/17</td>
<td>Segura</td>
<td>NMDOT Letter re Finding of No Good Cause for Failure to Promptly Pay re JH Supply</td>
<td></td>
</tr>
<tr>
<td>12/21/16</td>
<td>Roybal</td>
<td>Email exchange with Segura re prompt payment violation</td>
<td></td>
</tr>
<tr>
<td>12/21/16</td>
<td>Roybal</td>
<td>Excerpt of Compliance Audit November 2016</td>
<td></td>
</tr>
<tr>
<td>12/22/16</td>
<td>Roybal</td>
<td>Email from Gonzales-Watkins (10:57 am)</td>
<td></td>
</tr>
<tr>
<td>12/22/16</td>
<td>Roybal</td>
<td>Email from Gonzales-Watkins (11:48 am)</td>
<td></td>
</tr>
<tr>
<td>12/22/16</td>
<td>Roybal</td>
<td>Email to Gonzales-Watkins verifying payment</td>
<td></td>
</tr>
<tr>
<td>2/6/17</td>
<td>Roybal</td>
<td>Coats email to Roybal re Pay Estimate 13</td>
<td></td>
</tr>
<tr>
<td>1/11/17</td>
<td>Roybal</td>
<td>Email exchange between Grover and Roybal</td>
<td></td>
</tr>
<tr>
<td>2/6/17</td>
<td>Roybal</td>
<td>Email with draft letter of Final Determination to AUI</td>
<td></td>
</tr>
<tr>
<td>2/6/17</td>
<td>Roybal</td>
<td>Email with Final Determination to AUI with Non-Conformance Letter</td>
<td></td>
</tr>
<tr>
<td>2/14/18</td>
<td>Roybal</td>
<td>NMDOT Position Statement</td>
<td></td>
</tr>
<tr>
<td>NAME</td>
<td>TITLE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jeffrey E. Martinez</td>
<td>Manager for Plans, Specifications &amp; Estimates Bureau (PS&amp;E), New Mexico Department of Transportation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jeff Canney</td>
<td>Inspector General, Office of Inspector General, New Mexico Department of Transportation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jayson Grover</td>
<td>Project Manager for District 6 - NMDOT</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sandra Coats</td>
<td>Office Manager for District 6 - NMDOT</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Damian Segura</td>
<td>DBE Liaison for Construction and Civil Rights Bureau of the New Mexico Department of Transportation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rene Roybal</td>
<td>Labor and Compliance Officer for the Construction and Civil Rights Bureau of the New Mexico Department of Transportation</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
February 14, 2018
Via email Stephen.thies@state.nm.us and Geraldine.gonzales@state.nm.us

Stephen Thies
Geraldine L. Gonzales
New Mexico Department of Transportation
1200 Cerrillos Road, Room 123
Santa Fe, New Mexico 87504

Re: Appeal of AUI, Inc.’s Prequalification Factor rolling Average (PQFRA)
Date of Notice of PQFRA; 12 January 2018

Dear Mr. Thies:

In accordance with the Second Amended Notice of Informal Hearing and Informal Hearing Procedures regarding Appeal of AUI’s 2017 Prequalification Score (PQFRA), AUI, Inc. submits its witness and exhibit lists for the upcoming hearing.

AUI, Inc. anticipates calling the following witnesses to testify at the hearing on February 21, 2018:

1. Carl (Bo) Simmons, J-H Supply Company, Inc. Mr. Simmons are expected to testify with regard to the issuance of an incorrect invoice on September 30, 2016, which was corrected and reissued to AUI, Inc. on October 17, 2016. Mr. Simmons is further expected to testify that J-H Supply Company was paid within seven days of issuance as required.

2. Eddie Gonzales, AUI, Inc. Mr. Gonzales is expected to testify with regard to the invoices received from J-H Supply Company and the payments made by AUI, Inc. Mr. Gonzales is expected to testify that J-H Supply Company asked AUI to delay payment on the original September 30, 2016 invoice as the invoice was incorrect and they were rebilling for the correct amount. Mr. Gonzales is expected to testify that AUI, Inc. paid J-H
Supply within the time required after receipt of the revised invoice and actually paid J-H Supply in excess of the amount approved by NMDOT. Mr. Gonzales is finally expected to testify that he communicated with NMDOT regarding this issue and was informed that the non-conformance had been resolved. Mr. Gonzales is also expected to testify with regard to the invoice from Gonzales Construction, the receipt of a zero dollar pay estimate from NMDOT and the payment to Gonzales Construction.

3. Jayson L. Grover, NMDOT District 6 Project Manager. Mr. Grover is expected to testify that he communicated with Mr. Gonzales and Mr. Simmons of J-H Supply and that the non-conformance was resolved.

4. Patrick Shaw, AUI, Inc. Mr. Shaw is expected to testify with regard to the receipt of the invoices and payments between AUI, J-H Supply Company, Gonzales Construction and NMDOT.

AUI, Inc. anticipates introducing the following exhibits at the hearing of this matter on February 21, 2018.

1. Invoices from J-H Supply Company, Inc.
2. October 17, 2016 e-mail from J-H Supply Company with revised invoice.
5. E-mails between Eddie Gonzales, Carl (Bo) Simmons and Jayson L. Grover dated November 30, 2016.
6. Compass form for CN 6101100R
7. Invoice from Gonzales Construction.
8. Proof of payment to Gonzales Construction.
10. N.M.A.C. Title 18, Chapter 27, Part 5.

If you should have any questions, please let me know.
Very truly yours,
Calvert Menicucci, P.C.

Sean R. Calvert

cc: Christina E. Anaya, Esq.
AUI, Inc.
1006-26
SRC/jnl
Office of General Counsel

February 16, 2018
Via Email: tina@roblesrae.com

Susana Martinez
Governor

Tom Church
Cabinet Secretary

Commissioners

Ronald Schneita
Chairman
District 4

Dr. Kenneth White
Secretary
District 1

David Sepich
Commissioner
District 2

Keith Mortensen
Commissioner
District 3

Buch Mathews
Commissioner
District 5

Billy Moore
Commissioner
District 6

Christina Anaya, Esq.
Robles Rael Anaya
500 Marquette Ave., NW
Suite 700
Albuquerque, NM 87102-5346

Re: New Mexico Department of Transportation's Objection to AUI Inc.'s Witness/Exhibit List

Dear Ms. Anaya,

The New Mexico Department of Transportation (NMDOT) objects to AUI Inc. calling as a witness or cross examining Mr. Jayson L. Grover as stated in AUI Inc.'s witness and exhibit list submitted on February 14, 2018. The basis of the objection is that AUI's attempt to question Mr. Grover as a hostile witness or to cross examine him directly violates the informal hearing procedures established for this proceeding. Specifically, page 2 of the Second Amended Notice of Informal Hearing and Informal Hearing Procedures regarding Appeal of AUI's 2017 Prequalification Score (PQFRA) states, "While witnesses may testify and exhibits be submitted to me, witnesses are not subject to cross-examination." Questioning of an adversarial witness is achieved by asking pure leading questions, thus examining Mr. Grover in any respect would function as a prohibited cross-examination.

Furthermore, the NMDOT intends to present Mr. Grover as its own witness as confirmed by its Witness/Exhibit List provided on February 14, 2018. Therefore you, as the Hearing Officer, would have the opportunity to question Mr. Grover about any issue you deem necessary. This authority is also explicitly reserved by you in your above-referenced Amended Notice.

The subject of Mr. Grover's anticipated testimony disclosed by AUI's witness and exhibit list is that, "he communicated with Mr. Gonzales and Mr. Simmons of J-I Supply and that the non-conformance was resolved." This subject can be adequately addressed by AUI's own witnesses (Mr. Gonzales and Mr. Simmons). Appropriately, this method allows for you to assess the credibility of all witnesses and assign the appropriate weight of the testimony in the proceeding.

To the extent that AUI will claim that its due process rights would be impacted by being unable to question Mr. Grover, that claim is without merit. In this hearing AUI will be afforded several procedural protections, including the opportunity to be heard in a meaningful way and the right to be represented by counsel. Due process protections do not require that every procedural safeguard be invoked, but rather, "[P]rocedural due process is a flexible right and the amount of process due depends on the particular
circumstances of each case." State of New Mexico ex. Rel. CYFD v. William M., 2007-NMCA-055, ¶ 21, 141 N.M. 765. In this instance, the value of requiring Mr. Grover to be cross examined by AUI is minimal given that the Hearing Officer may question Mr. Grover and AUI can adequately establish the non-conformance discussions with its own witnesses.

Therefore, the NMDOT requests that you strike Mr. Grover from AUI's witness and exhibit list. To the extent that you allow AUI to question Mr. Grover, the NMDOT requests that you allow it to question all of AUI's witnesses who are disclosed or testify at the hearing. The NMDOT also requests that you make a ruling in writing on this matter in advance of the hearing so that both parties may adequately prepare.

Sincerely,

[Signature]
Geraldine L. Gonzales
Assistant General Counsel – NMDOT

Cc: Via Email Only

Sean Calvert, Esq.
Anthony Lujan – NMDOT
Armando Armendariz – NMDOT
Sally Reeves – NMDOT
Elizabeth J. Travis – NMDOT
Stephen P. Thies – NMDOT

scalvert@hardhatlaw.com
INFORMAL HEARING OF APPEAL OF AUI, INC.'S 2017 PREQUALIFICATION SCORE

February 21, 2018
12:00 p.m.
State Bar of New Mexico
Montoya Room
5121 Westhead Street, Northeast
Albuquerque, New Mexico 87109

HEARD BEFORE: CHRISTINA E. ANAYA, HEARING OFFICER

FOR AUI, INC.:
SEAN R. CALVERT, ESQ.
CALVERT MENICUCCI
5900 Washington Street, Northeast, Suite A
Albuquerque, New Mexico 87113-2727
(505) 247-9100
scalvert@hardhatlaw.net

FOR NEW MEXICO DEPARTMENT OF TRANSPORTATION (NMDOT):
GERALDINE GONZALES, ESQ.
and
STEPHEN P. THIES, ESQ.
NEW MEXICO DEPARTMENT OF TRANSPORTATION
OFFICE OF GENERAL COUNSEL
1120 Corrillos Road, Room 123
Santa Fe, New Mexico 87504-1149
(505) 827-5437
geraldine.gonzales@state.nm.us
stephen.thies@state.nm.us

REPORTED BY: Mary C. Hanks, CCR, RPR
New Mexico CCR #20
Paul Baca Professional Court Reporters
500 4th Street, Northwest, Suite 105
Albuquerque, New Mexico 87102
(505) 843-9241
<table>
<thead>
<tr>
<th>INDEX</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Case Called</td>
<td>9</td>
</tr>
<tr>
<td>2 Opening Statement by Mr. Calvert</td>
<td>14</td>
</tr>
<tr>
<td>3 Comments and Housekeeping Matters by Ms. Gonzales</td>
<td>31</td>
</tr>
<tr>
<td>4 Opening Statement by Ms. Gonzales</td>
<td>34</td>
</tr>
<tr>
<td>5 AUI, Inc.'s Case-in-Chief:</td>
<td></td>
</tr>
<tr>
<td>6 Witnesses:</td>
<td></td>
</tr>
<tr>
<td>7 Eddie Gonzales:</td>
<td></td>
</tr>
<tr>
<td>8 Direct Examination by Mr. Calvert</td>
<td>56</td>
</tr>
<tr>
<td>9 Cross-Examination by Hearing Officer Anaya</td>
<td>55</td>
</tr>
<tr>
<td>10 Carl &quot;Bo&quot; Simmons:</td>
<td></td>
</tr>
<tr>
<td>11 Direct Examination by Mr. Calvert</td>
<td>56</td>
</tr>
<tr>
<td>12 New Mexico Department of Transportation's Case-in-Chief:</td>
<td></td>
</tr>
<tr>
<td>13 Witnesses:</td>
<td></td>
</tr>
<tr>
<td>14 Jeffrey E. Martinez:</td>
<td></td>
</tr>
<tr>
<td>15 Direct Examination by Mr. Thies</td>
<td>60</td>
</tr>
<tr>
<td>16 Cross-Examination by Hearing Officer Anaya</td>
<td>62</td>
</tr>
<tr>
<td>17 Jeffrey Canney:</td>
<td></td>
</tr>
<tr>
<td>18 Direct Examination by Mr. Thies</td>
<td>64</td>
</tr>
<tr>
<td>19 Cross-Examination by Hearing Officer Anaya</td>
<td>69</td>
</tr>
<tr>
<td>20 Jayson Grover:</td>
<td></td>
</tr>
<tr>
<td>21 Direct Examination by Ms. Gonzales</td>
<td>72</td>
</tr>
<tr>
<td>22 Sandra Coats:</td>
<td></td>
</tr>
<tr>
<td>23 Direct Examination by Ms. Gonzales</td>
<td>101</td>
</tr>
<tr>
<td>24 Cross-Examination by Hearing Officer Anaya</td>
<td>114</td>
</tr>
<tr>
<td>25 New Mexico Department of Transportation's Case-in-Chief (Cont'd):</td>
<td></td>
</tr>
<tr>
<td>26 Witnesses (Cont'd):</td>
<td></td>
</tr>
<tr>
<td>27 Damian Segura:</td>
<td></td>
</tr>
<tr>
<td>28 Direct Examination by Mr. Thies</td>
<td>116</td>
</tr>
<tr>
<td>29 Renee Roybal:</td>
<td></td>
</tr>
<tr>
<td>30 Direct Examination by Mr. Thies</td>
<td>130</td>
</tr>
<tr>
<td>31 Proceedings Conclude</td>
<td>145</td>
</tr>
<tr>
<td>32 Certificate of Court Reporter</td>
<td>146</td>
</tr>
<tr>
<td>33</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td></td>
</tr>
<tr>
<td>EXHIBITS OFFERED AND ADMITTED</td>
<td>PAGE</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>1.AUI, Inc. Exhibits:</td>
<td></td>
</tr>
<tr>
<td>2. 1 - Email</td>
<td>59</td>
</tr>
<tr>
<td>3. 2 - NMUDOT Estimate Summary to Contractor, 9/26/2016</td>
<td>59</td>
</tr>
<tr>
<td>4. 3 - NMUDOT Estimate Summary to Contractor, 9/26/2016</td>
<td>59</td>
</tr>
<tr>
<td>5. 4 - AUI, Inc. Letter of Transmittal to J&amp;H Supply Company, 10/27/2016</td>
<td>59</td>
</tr>
<tr>
<td>6. 5 - Email</td>
<td>59</td>
</tr>
<tr>
<td>7. 6 - NMUDOT Compass Information - Final Information</td>
<td>59</td>
</tr>
<tr>
<td>8. 7 - Gonzales Construction Invoice Number 101916, 10/19/2016</td>
<td>59</td>
</tr>
<tr>
<td>9. 8 - Copy of AUI, Inc. Check Number 123726, 11/20/2016</td>
<td>59</td>
</tr>
<tr>
<td>10. 9 - NMUDOT Prequalified Contractors and Subcontractors list, 01/12/2018</td>
<td>59</td>
</tr>
<tr>
<td>11. 10 - New Mexico Register/Volume XXV, Number 24/December 30, 2014, Title 18, Chapter 27, Part 5, Transportation and Highways, Highway Construction General Provisions, Contractor Prequalification Rule</td>
<td>59</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. New Mexico Department of Transportation Exhibits (Cont'd):</td>
</tr>
<tr>
<td>2. 1 - Invitation for Bids Document</td>
</tr>
<tr>
<td>3. 2 - Copy of Statute 102.6 Interpretation of Quantities</td>
</tr>
<tr>
<td>4. 3 - Plan Holders Listing for Letting of July 17, 2015</td>
</tr>
</tbody>
</table>

Paul Baca Professional Court Reporters
500 Fourth Street NW - Suite 105, Albuquerque NM 87102
<table>
<thead>
<tr>
<th>Page 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXHIBITS OFFERED AND ADMITTED (Cont'd)</td>
</tr>
<tr>
<td>PAGE</td>
</tr>
<tr>
<td>New Mexico Department of Transportation Exhibits (Cont'd):</td>
</tr>
<tr>
<td>20 - Letter of November 28, 2016 to AUI, Inc. from Jayson Grover, RE: Notice of Nonconformance: B2GNOW Prompt Payment</td>
</tr>
<tr>
<td>21 - Excerpt from the 2014 NMDOT Standard Specifications</td>
</tr>
<tr>
<td>22 - Letter of February 6, 2017 to AUI, Inc. from Jayson Grover, RE: Notice of Nonconformance: B2GNOW Prompt Payment</td>
</tr>
<tr>
<td>23 - Screenshots</td>
</tr>
<tr>
<td>24 - Email</td>
</tr>
<tr>
<td>25 - Email</td>
</tr>
<tr>
<td>26 - Email</td>
</tr>
<tr>
<td>27 - Email</td>
</tr>
<tr>
<td>28 - Email</td>
</tr>
<tr>
<td>29 - Email</td>
</tr>
<tr>
<td>30 - NMDOT Permission to Subcontract Request</td>
</tr>
<tr>
<td>31 - NMDOT Permission to Subcontract Request</td>
</tr>
<tr>
<td>32 - Compliance Audit: Subcontractor Response</td>
</tr>
<tr>
<td>33 - Letter of January 4, 2017 to AUI, Inc. from Damian Segura, RE: NMDOT Finding of No Good Cause for Failure to Promptly Pay</td>
</tr>
<tr>
<td>34 - Emails</td>
</tr>
<tr>
<td>35 - Compliance Audit: Response View - November 2016</td>
</tr>
<tr>
<td>36 - Email with Attached Documentation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXHIBITS OFFERED AND ADMITTED (Cont'd)</td>
</tr>
<tr>
<td>PAGE</td>
</tr>
<tr>
<td>New Mexico Department of Transportation Exhibits (Cont'd):</td>
</tr>
<tr>
<td>37 - Emails</td>
</tr>
<tr>
<td>38 - Email</td>
</tr>
<tr>
<td>39 - Emails with Attached Documentation</td>
</tr>
<tr>
<td>40 - Emails with Attached Documentation</td>
</tr>
<tr>
<td>41 - Emails with Attached Documentation</td>
</tr>
<tr>
<td>42 - Office of General Counsel, NMDOT Position Statement Supporting Denial of AUI's Appeal (Position Statement)</td>
</tr>
<tr>
<td>43 - Letter of 2/16/2018 to Ms. Anaya from NMDOT Office of General Counsel, NMDOT Objections to Cross or Direct of Jayson Grover by AUI</td>
</tr>
<tr>
<td>44 -</td>
</tr>
<tr>
<td>45 -</td>
</tr>
<tr>
<td>46 -</td>
</tr>
<tr>
<td>47 -</td>
</tr>
<tr>
<td>48 -</td>
</tr>
<tr>
<td>49 -</td>
</tr>
<tr>
<td>50 -</td>
</tr>
<tr>
<td>51 -</td>
</tr>
<tr>
<td>52 -</td>
</tr>
<tr>
<td>53 -</td>
</tr>
<tr>
<td>54 -</td>
</tr>
<tr>
<td>55 -</td>
</tr>
<tr>
<td>56 -</td>
</tr>
<tr>
<td>57 -</td>
</tr>
<tr>
<td>58 -</td>
</tr>
</tbody>
</table>
HEARING OFFICER ANAYA: Good afternoon. We are on the record in the matter of AUI Inc.'s appeal of its 2017 prequalification factor. My name is Christina Anaya, and I am the hearing officer for today's informal hearing. Today's date is Wednesday, February 21, 2018, and the time is 12:01 p.m.

Can I please have appearances?

Ms. GONZALES: Good afternoon, Ms. Anaya.
Geraldine Gonzales on behalf of the NMDOT. Also representing the NMDOT is Stephen Thies.
MR. CALVERT: Sean Calvert on behalf of AUI, Inc.

HEARING OFFICER ANAYA: Before we begin, for those of you -- I see some familiar faces. Others, I believe are maybe new. I want to go over the process for this informal hearing.

The purpose of this informal hearing process is for all parties to have an opportunity to be heard, to present any claims or defenses, to submit arguments and all necessary material evidence for my consideration.

Because this is an informal hearing, each party should be prepared to have their fact witnesses testify about the issues in this matter. However, such testimony is not required. Witnesses may choose to submit their testimony in writing. If witnesses choose to testify today, that person will be sworn in before providing testimony. If a witness provides written testimony, I would ask that an affidavit be submitted along with or that the testimony be part of an affidavit where the witness swears to the accuracy of the testimony.

Any party to the appeal may choose to have legal counsel present, as we do have today for both parties. I remind counsel that their participation should be limited so that the fact witnesses can present their testimony. I also want to remind the parties that the rules of evidence will not apply today; hence, the name. It's an informal hearing. I do conduct these hearings in an informal manner.

While witnesses may testify and exhibits be submitted, my general practice is not to permit cross-examination. I understand that an issue has been raised with regard to a witness that AUI intends to call, and we will handle that specific issue momentarily.

I also want to remind the parties and the witnesses today that I do have the authority to ask questions. If there is any issue that I feel has been
MR. CALVERT: I do not, although I believe -- and you will hear when we make our opening statement. I believe your partner may have been the hearing officer. I will bring up just in passing, my understanding is last month the First Judicial District Court entered an order overturning one of his hearings and specifically ruling that the PQFRA that we are here on today is arbitrary and capricious. So to the extent that's already been decided adversely to the Department and contrary to prior decision, I just bring it up. But I have no objection.

MR. THIES: Can I address the comment that he made?

HEARING OFFICER ANAYA: Yes.

MR. THIES: The First Judicial District did not rule that the prequalification rule was arbitrary and capricious. The rule was very fact-specific to the issue before that Court and said -- as applied and given the facts that were presented to the judge, the judge concluded that the application of the prequalification rule, again in that fact situation, was arbitrary and capricious. The judge did not conclude that the rule itself is arbitrary and capricious.

HEARING OFFICER ANAYA: Will this become an issue in this matter?
MR. CALVERT: I don't believe it is in front of this hearing -- in front you as part of this hearing. The appeal was strictly as to two negative -- negative-factor rulings by the Department. I will discuss it briefly because it does relate to -- we don't believe that the specific portions of the rule as applied to subcontractor payments comply with the statutes, comply with -- they had the authority, and so it's contrary to law and that kind of thing.

HEARING OFFICER ANAYA: We will get to that at the hearing.

Ms. Gonzales, do you have any objection to my serving as the hearing officer?

MS. GONZALES: No objection.

HEARING OFFICER ANAYA: Another preliminary matter: I note that both parties have labeled their exhibits with numbers, and I think for ease of reference and in order so that I don't require one of you right now to change the letters, I would just ask you, Mr. Calvert, address your exhibits as AUI Exhibit 1, AUI Exhibit 2.

And, Ms. Gonzales, similarly, with NMDOT Exhibit 1 and NMDOT Exhibit 2.

Before we begin, I want to address a letter that was sent by the NMDOT regarding AUI’s intent to call Jayson Grover as a witness.

Ms. Gonzales, I received your letter. I have reviewed your letter. And is there anything else that you would like to add regarding your objection to AUI’s plan to call Mr. Grover as a witness?

MS. GONZALES: Your Honor, the New Mexico Department of Transportation filed the objection based on what was provided in AUI’s witness and exhibit list. And the basis of our objection is laid out in the exhibit that we have now marked as NMDOT Exhibit 43. That is a copy of the letter that was provided to you. Just briefly so I don't cover each of the points that are already in the letter submitted to you, which you've already reviewed, we just want to state for the record that we believe calling Mr. Grover would violate the ground rules established for this proceeding and, of course, that you have the authority to question Mr. Grover to the extent that you find it necessary based on what he covers in his testimony. And we believe that AUI is able to establish what they're seeking to establish through the testimony of their own witnesses.

HEARING OFFICER ANAYA: Mr. Calvert?

MR. CALVERT: I don't know whether Mr. Gracen's [sic] even here.
however, focus specifically on the payment issue that is
before you today with regard to their authority. So I
need to touch a little bit on the basic authority for
the rule.

The rule is included in the exhibits. I
think it's in both, but I know it's AUI Exhibit Number
10. It identifies the basis -- the statutory authority
for the Department to issue this regulation. The only
provision that is cited there that is particularly of
reference or authority for the rule is in 67-3-43, which
gives the Department the authority to issue regulations
regarding the advertising for bids and determination of
responsive bidders. Okay? I only mention that because
when you actually look at the Procurement Code, which is
also identified as the authority for this regulation,
responsive bidder is fairly limited and doesn't support
what the Department has done in this instance.

The Procurement Code at 13-1-82 has the
definition of what is a responsive bidder. This is
relied on and cited in the rule. 31-1-82 (sic) says:
"A bidder who submits a responsive bid and who has
furnished, when required, information and data to prove
that his financial resources, production or service
facilities, personnel, service reputation and experience
are adequate to make satisfactory delivery of the
1. services, construction or items of tangible personal
2. property described in the invitation for bids.
3. A responsible bidder determination under
4. the Procurement Code is a purely binary determination.
5. You either are or are not, based on your identifying
6. factors, financial capability, personnel, et cetera,
7. capable of doing the job or not. It does not provide
8. for a determination as made by the Department. You are
9. 95 percent responsible, and, therefore, we are going to
10. adjust your bid by some percentage. It is a positive or
11. negative decision, and if you are nonresponsive, if you
12. are not a responsible bidder, you are just plain not
13. allowed to be awarded a contract. There is no provision
14. in the statute that allows for a preferential treatment
15. of parties' bids.

   This is confirmed that it is purely an
16. either/or binary decision in Shed Industries versus
17. King, 1980, New Mexico Supreme Court 886. Similarly,
18. while not applicable to the Department, it is confirmed
19. by the General Services Department regulations
20. interpreting and enforcing the Procurement Code, while
21. all other state agencies, at NMAC 14-1-79.

   Finally, you get confirmation at 13-1-133,
22. which is the actual specific statute that refers to
23. receipt of bids by nonresponsible bidders. That says:

   "If a bidder...who otherwise would have been awarded a
24. contract is found not to be a responsible bidder or
25. offerer, a determination that the bidder or offerer is
26. not a responsible bidder or offerer, setting forth the
27. basis of the finding, shall be prepared by the state
28. purchasing agent or a central purchasing office."
29. In other words, if you're not responsible,
30. a document goes in the file and the contract is not
31. awarded. There is nothing allowing for this 95 percent
32. or 105 percent responsibility determination that the
33. Department actually is using.

   More importantly for you today, however, is
34. that Section 13-1-82 is clear and limited as to the
35. factors that may be considered in determining whether a
36. bidder is responsible or not. It focuses on the
37. contractor's financial resources, production or surface,
38. facilities personnel, service reputation and experience.
39. That is the entirety of the available factors under
40. 13-1-82 for making a determination as to responsibility.
41. There is no mention of payment practices to
42. subcontractors. And if you look at what 13-1-82 is
43. intended to do, determine whether or not a contractor is
44. capable or likely capable, since it's before they
45. actually start the work, of completing the work, whether
46. they pay their subcontractors in seven or ten days just
interpret, but they can't grant the right to an agency
to enlarge or reduce the specific statutory
requirements.
In this instance both in terms of the
responsibility, responsible bidder determination and, as
we'll see in just a second, the prompt payment
provisions, the Department actually is adding new
requirements, shorter time frames and is actually going
contrary to what the legislature has determined is
supposed to be the payment provision for the Department.
The Procurement Code contains a provision
regarding prompt payment on the application by public
agencies. It's 13-1-158. This would include payment
applications by the Department. That section provides
that within 15 days of receipt of an application by a
contractor, the agency has to make a written
certification as to whether or not the work is actually
performed and acceptable. Once that determination is
made, they have 30 days to make payment to the
contractor, and if they fail to make payment within
those 30 days, then they owe the contractor an interest
payment at one-and-a-half percent. So, essentially,
statute sets up for the Department 15 and then 30, 45
days within which to review the application and make the
payment to the contractor.
13-1-158 says absolutely nothing about payment from the contractor to the subcontractors. It is not in the statute governing the Department. Interestingly, the Procurement Code does have a provision allowing the Department, and they rely on this, to issue the contract provision that's at issue today, 13-1-170, that says: The Department may issue by regulation standard contract clauses. 13-1-170 is important, however, because Subpart B, I believe, of 13-1-170 specifically directs any agency that is going to issue standard -- by regulation, standard contract clauses is required to incorporate in its contract the prompt payment provisions of 13-1-158. The Department contract does not. It does not include any provisions requiring prompt payment from the Department to the contractor or assessing the interest under 13-1-158. What it does instead is contain a provision that requires the contractor to pay the subcontractor within seven days -- and we'll talk about what that trigger is for that seven days in just a second -- a provision that does not exist in statute. So they have expanded the requirement of the statute, which, as I indicated, the courts have already ruled is beyond their power.

There is a statute that does specifically say contractors have to pay their subcontractors within seven days of receipt of payment. It's 57-28-1 of the New Mexico Prompt Payment Act. However, the legislature, in passing the Prompt Payment Act, the Retainage Act at the time, specifically exempted the Department from application of that statute. So there is a statute that would require, once a contractor receives payment on a public project, that it pay its subs within seven days. The legislature specifically determined and excluded the Department from that statute. By rule and contract, the Department is now trying to go, in contrary to the legislature determination, and add back in that seven-day payment provision, which, again, they're not entitled to do. Accordingly, it's AUI's initial position that the Department lacks authority for this rule and requirement regarding the payment time. It can't enlarge a bridge or expand statutory scheme, which it has attempted to through the prequalification rule and specifically the payment provisions for contractors and their subcontractors.

So let's turn to the contract itself, which is our second argument as to why the Department is not entitled to impose this prequalification factor. The NMDOT standard contract has one clause
that gives rise to -- against AUI, Section 108.1 of the
Department's standard specifications. The Department
has included it in its exhibits, although the list
wasn't numbered. So it is NMDOT Exhibit 12. Section
108.1 has one paragraph that is relevant to the issue in
this hearing. The remainder of the paragraph deals with
more general contractor-subcontractor relations issues.
But there is one paragraph that addresses prompt
payment. I want to read it to the Court because this is
the crux of the second argument.

"The Contractor shall promptly pay its
Subcontractors and Suppliers for satisfactory
performance of their contracts no later than seven Days
after receipt of Progress Payment for the
Subcontractor's Work or Supplier's Materials by the
Department. For purposes of this section, a
Subcontractor's portion of the Work is satisfactorily
completed when it's Accepted by the Department. In no
event shall the Contractor and its Subcontractors fail
to promptly pay their Subcontractors and Suppliers the
amounts due for undisputed Accepted Work within seven
Days of the Contractor receiving a Progress Payment from
the Department. The payment by the Department to the
Contractor is not a condition precedent for payment by
the Contractor to any Subcontractor or Supplier. A zero
dollar Progress Payment by the Department does not
relieve the Contractor from paying the Subcontractor or
Supplier for Accepted Work."

So there are two things to note about that
clause. The clause twice specifies the seven-day
payment provision. In both instances, it is very
specific that the seven days are triggered by receipt of
a Progress Payment from the Department. Nothing else
triggers the seven days. Per the specific language of
the clause, first sentence: No later than seven days
after receipt of Progress Payment. Third sentence: Pay
their Subcontractors and Suppliers for undisputed
accepted work within seven days of the contractor
receiving a Progress Payment from the Department.

So the trigger for payment is payment by
the Department. So once the contractor has the funds,
they are to pay their subcontractors within seven days.
This matches with the requirements of the New Mexico
Prompt Payment Act. It doesn't apply to the Department,
but it's consistent with those payment provisions. It
is consistent with the federal payment provisions, which
trigger upon receipt of the payment from the
Department -- or from the government agency.

However, that's not how the Department
applied the contract and prequalification rule in this
therefore, they are entitled to deference in
interpretation of their regulation. However, the cases
that provide that, it is only where the Department is
interpreting by regulation a statute which it is granted
authority over. Here this is a purely contract
 provision developed by the Department. And I would note
that the Schultz & Lindsay Construction contract case is
a case against the Department where the Court came back
and said: The Department, you, specifically, we're
going to interpret the contract against you because there
is any ambiguity. So to the extent that last sentence
regarding zero dollar Progress Payments creates an
ambiguity, you would interpret it against the Department
and just go on the two provisions that actually
specifically say it's seven days after receipt of the
payment.

There's a third basis of --
HEARING OFFICER ANAYA: Mr. Calvert --
MR. CALVERT: Yes.
HEARING OFFICER ANAYA: -- before we go on,
because it's 12:30, I know they're having lunch in the
conference room adjoining this one. If NMDOT or the
court reporter is having difficulty -- I mean, I hate to
wait 30 minutes, but I also would be pressed to go over
and tell them that we're already partway -- partway in

instance. Instead the Department -- on the final
sentence of the paragraph -- applied penalties based on
one instance, on failure to pay within seven days of
submission of the estimate by AUI. Remember, the
statute says the Department has 14 days after receipt of
the estimate to even approve it and then 30 days to pay.
They penalized AUI for failure to pay within seven days
of even turning in the estimate. There is, however,
nothing in that last sentence regarding zero dollar
Progress Payments that says the contractor has to pay
within seven days. What it says is: "A zero dollar
Progress Payment by the Department does not relieve the
Contractor from paying the Subcontractor or
Supplier...." So just because you got a zero dollar
doesn't mean you no longer have to pay that sub, but it
says absolutely nothing about timing for that payment.

While AUI doesn't believe the payment
requirement is ambiguous, since it clearly says it's due
seven days after payment by the Department, it's worth
noting that since this is the Department's contract, any
ambiguities will be interpreted against the Department,
Schultz & Lindsay Construction Company versus State of
New Mexico, 1972, New Mexico Supreme Court 613.

I anticipate, having done this before, the
department will argue it is their regulation, and,
our hearing and asking them to just not talk during their lunch hour.

So, Ms. Gonzales, do you have a preference as to whether you would like to wait until 1:00 to proceed?

MS. GONZALES: Your Honor, I had some housekeeping matters that I wanted to take care of before we jumped into opening statements. That was going to be one of the issues I was going to address with you.

My understanding is that their lunch is going to be until 1:30. I talked with the State Bar. So it wouldn't just be until 1:00. They were supposed to leave the area for their lunch so that it wasn't going to be quite a disruption. They are going to take a break in that room from 2:45 to 3:00 p.m., and hopefully their final break is going to be at 5:00 when they're leaving.

So the fact that we are sharing a wall that abuts this other room is really going to present, I think, a few issues for the hearing. So my preference at this point would be to just continue as along the court reporter is not at any disadvantage.

(Discussion off the record.)

MR. CALVERT: Not a problem.

There is a third legal basis for overturning the negative preference qualification given by the Department. To the extent the Department claims that payment is due based on approval by the Department -- remember 108.1, which talks about approval by the Department even though it doesn't say that payment is due within X number of days of approval. Rather than payment, and you agree with that argument, the only alternate basis for setting the commencement of the time to pay is the Department's approval of the work. According to 108.1, a subcontractor's portion of the work is satisfactorily completed when it's accepted by the Department.

In this case, however, in connection with Estimate 13, specifically, the Department never notified AUI that the work was accepted. Instead, it applied the prequalification factor based on failure to pay within seven days of AUI just turning in the application. You will see when we get to the testimony, each of these payment applications is dated by the contractor when it is submitted to the Department. There is a second signature block for acceptance by the Department indicating that the work is accepted. The contractor
never receives back payment applications or acceptance
from the Department until they receive a payment.
In the case of the zero dollar payment
application, Number 13, AUI never receives notice that
the Department approved it, so it has no way of tracking
that seven-day payment provision. All it has is a
statute that says -- well, a contract that says you have
to pay within seven days of payment and a statute that
says the Department had 44 days from submitting the
payment application in order to pay the contractor. So
AUI had no way of complying with a seven-day requirement
that goes based on acceptance because it's never told by
the Department when the work has been accepted.
Finally, AUI challenges the
prequalification factor as applied to them as
duplicative. NMDOT assessed AUI negative
prequalification factors in connection with three
payment applications on the CN 6101100R Project. And
hopefully I won't have to say that more than once or
twice. Only two of those payment applications are
relevant to this proceeding. The third, AUI is not
contesting.
The Department penalized AUI on its
prequalification factor based on late payment and

So they negatively impacted their qualification factor
for late payment. We will argue about whether or not it
was late. But that is how they did it. They then also
gave AUI a penalty under the prequalification
subcontractor provision for those exact same late
payments. So based on the same set of facts, each
instance, there is nothing different. It's not like
there is a duplication where the Department could
justify a further penalty. They penalized AUI twice
based on the same singular fact patterns.
In this case, on the CN 6101100R Project,
the Department gave AUI a negative prequalification
factor based on late payments to subcontractors even
though in both cases AUI paid the subcontractors more
than AUI was paid by the Department and prior to the
payment by the Department.
In fact, in one instance, the Department
negatively adjusted AUI's prequalification factor
because the subcontractor in question specifically asked
AUI not to pay it based on a prior incorrect invoice,
but to pay it an increased sum based on issuance of a
revised payment application before the Department
approved that or paid AUI for it. AUI did this and paid
in advance of receipt of payment for that revised
invoice from the Department.
We believe that there is no basis for applying these negative qualification factors based on contractor-subcontractor payment. It's contrary to statute. It's just not allowed. But even if you did, the contract is fairly straightforward. It's seven days after receipt of payment. That's the trigger. The Department is applying it differently based on either their acceptance or, in one instance, purely the invoice triggers the seven days to pay. There is no justification for that in statute, in rule. It just doesn't exist.

And finally, even if you were to find that there was a violation, it's ADI's position that they should only be hit with the one or the other. You can't both hit them as a nonconformance under the Progress Payment and under the prequalification subcontracting factor where you are essentially double-fining them for the same instance.

That's what we have. Thank you.

HEARING OFFICER ANAYA: Thank you.

Ms. Gonzales?

MS. GONZALES: Briefly, I'd just like to address a few points that Mr. Calvert made because they were not evident from the appeal letter that was sent by ADI in this matter, specifically as it relates to whether the Department has proper rulemaking authority to promulgate this rule for performance of contractors and then also the issue that he raised concerning duplication where a contractor receives a score for a nonconformance and a subcontractor prompt payment. Neither of those things were in their appeal letter.

The Department, at this point, would like to reserve the right to submit a rebuttal statement, since Mr. Calvert covered many legal issues that did not appear in their appeal letter, and so we did not have proper notice that they were going to raise those issues. The appeal letter only indicates that there is a concern with the nonconformances that were issued for this project.

I also believe that the scope of the opening was sort of well beyond what we normally expect for these informal hearings, and I have a few housekeeping matters that I'd like to address before I start my opening. May I?

HEARING OFFICER ANAYA: Please proceed.

MS. GONZALES: Okay. I did lay out the time frames for the break and the issue with the noise. To the extent it gets a little more loud, we'll ask our paralegal that we have here to go and ask the individuals who are next door to be more quiet.
Do we have a formal ruling on the objection
that we laid for cross-examination of Mr. Grover -- or
calling Mr. Grover as a witness?

HEARING OFFICER ANAYA: I believe, based on
Mr. Calvert's statement, there will be no
cross-examination. If we need to revisit that, we will
do so. But it's my understanding at this point that
Mr. Calvert does not intend --

MR. CALVERT: Correct.

HEARING OFFICER ANAYA: -- to call this
NMDOT project manager.

MS. GONZALES: I appreciate that.
The last thing is that Mr. Grover does need
to leave at 3:00 p.m. He has a family obligation. He
is our third witness that will testify. I would ask
that if there are no questions from the hearing officer,
that you would permit the indulgence to allow him to
exit the hearing at around 3:00 p.m. if he's already
testified.

HEARING OFFICER ANAYA: I would just ask
that you remind me. I mean, if we need to make any
other accommodations, we'll try and get any questions in
before that time.

MS. GONZALES: I'd like to proceed with my
opening now.

HEARING OFFICER ANAYA: Please proceed.

OPENING STATEMENT

MS. GONZALES: The Department understands
that this is an informal hearing and the purpose of this
hearing is primarily to elicit testimony and facts from
the words of the witnesses themselves with limited
interruption from the attorneys. And so the Department
will remain cognizant of that fact as we are leading our
witnesses through our testimony.

And with that in mind, I have just a brief
opening statement concerning the issues that the
Department sees that this appeal has raised, as well as
the evidence that you should expect to hear.

The legal argument reflecting the
Department's position in terms of the issues raised in
this appeal and the Department's analysis of those
issues is in Exhibit 43 -- I'm sorry -- Exhibit 42,
NMDOT Exhibit Number 42, which should be in your book.

This is an appeal in which AUI is disputing
its prequalification score for 2018. I believe earlier
it was stated it was 2017. The score was calculated in
2017, but it would start to apply in March of 2018.
Specifically, AUI is challenging that it received two
performance factor scores related to the issues of
nonconformance and prompt payment of subcontractors on
The evidence will show that AUI's score is proper because it did, in fact, fail to timely pay two of its subcontractors on the project and that the Department relied on established rules and procedures to calculate its score, AUI's score, based on the failure to promptly pay its two subcontractors.

The requirement for AUI to pay its subcontractors within a designated and specific time frame is made explicit in the party's contract. Mr. Calvert had indicated in his opening that the contract was merely a contractual provision. I want to point out that that is not true. Section 108.1 is incorporated in what the Department references as the Division 100, which is established by rule. So it's a contractual provision that has the force and effect of a rule. The rule is 18.27.2 NMAC. And we would also like the opportunity to address that in our rebuttal statement.

The requirement, as I said, for AUI to pay its subcontractors is made explicit in Section 108.1. In this case, they had seven days from the date that the NMDOT issued payment to them to pay its two subcontractors, J-H Supply and Gonzales Construction.

In order to establish the facts to you
1. from a prime to a subcontractor.
2. With that and if you don't have any
3. questions from me concerning my opening, I think we're
4. ready to proceed with the next step for this hearing.
5. HEARING OFFICER ANAYA: Thank you. I do
6. not have any questions.
7. Mr. Calvert, if you'll call your first
8. witness.
9. MR. CALVERT: We would call Eddie Gonzales.
10. EDDIE GONZALES,
11. after having been first duly sworn under oath, was
12. questioned and testified as follows:
13. DIRECT EXAMINATION
14. BY MR. CALVERT:
15. Q. Eddie, we ought to be pretty brief today, but
16. can you explain to the hearing officer what your role
17. was on the project for NMCDOT?
18. A. So I was the project manager in charge of the
19. AUI side of the -- of the project itself.
20. Q. Okay. And are you familiar with the two
21. nonconformances and DBE findings that the Department
22. gave to AUI on that project?
23. A. Yes, I am.
24. Q. Okay. Before we get into the exhibits, can you
25. sort of generally explain for the hearing officer what

happened with regard to J-K?
1. A. Okay. So the J-K subcontract payment was -- we
2. received an estimate that showed a certain amount of
3. items that were reported -- or accepted by the DOT with
4. that particular estimate, and I received an invoice from
5. J-K that actually reflected all of the items that were
6. in his subcontract. So I asked him to revise that
7. invoice because they were incorrect of what he was
8. invoicing us versus what was actually paid on that
9. estimate -- or reported on that estimate. And he did
10. that. They actually revised the estimate reflecting the
11. quantities that were in the estimate that was paid for,
12. reported for initially. But the revision didn't come
13. until way after payment and whatnot was happening there.
14. So in that -- in that setup right there, I
15. asked -- I asked No or Lorettia, J-K, to actually -- or
16. they asked me to -- to let us pay them the full amount
17. when we -- when they finished the contract, which was
18. the following estimate. So that's -- that's -- in a
19. nutshell, that's basically what happened. They invoiced
20. us the total amount on the estimate that came up after.
21. Q. Okay. So I'm going to hand you the AUI exhibit
22. binder and if you would look at AUI's Exhibit 1.
23. A. Okay.
24. Q. I want you to skip over the first two pages for
the moment. The back part of Exhibit 1 is two invoices
from J-H. Do you see that?
A. Correct.
Q. Okay. Can you explain to the hearing officer
with regard to these invoices which is the first invoice
and sort of what they were billing versus what the
Department had approved?
A. Okay. So if you look at the one that's
actually scratched out --
Q. That's the last one in Exhibit 1?
A. That's the last one in Exhibit 1, yes.
Correct.
Q. Okay.
A. -- they had showed in there that -- they
revised the quantities. So if you look up at the 2,400
linear feet versus the 2,137, up on top there, that's
what they originally -- they originally invoiced us on
that piece right there. But if you notice the date, the
date didn't change. She didn't change the date when she
re-invoiced us. The only time frame of -- of the
changed invoice or revised is her email on the 17th
showing that she revised it, which is Exhibit 1, the
first page itself. That's when it reflects when she
revised the estimate -- I mean the invoice. I'm sorry.
Q. Got it.

Let me go through and make sure we have
this correct. The last page of Exhibit 1, you're saying
that's the initial invoice from J-H, correct?
A. That's correct.
Q. And does this invoice match what the Department
had approved for J-H at that point?
A. No.
Q. Okay. So page 3 of Exhibit 1, is this the
corrected invoice?
A. This is the corrected invoice.
Q. All right. And is this just the amount that
the Department had approved at that point, or is this
the entirety of their contract?
A. This is what the Department had approved on
that particular contract itself.
Q. Okay.
A. And it is also -- it is the plan that it turned
cut to be. It's exactly what the contract was with J-H.
Q. Okay.
MS. GONZALES: Hearing Officer, I'm unclear
as to which page they're referencing right now in terms
of what had actually been approved by the Department.
Are you talking about the invoice that
totals $8,000?
HEARING OFFICER ANAYA: The third page of
the four-page exhibit.

MR. CALVERT: Correct.

THE WITNESS: Yes.

MR. CALVERT: And it is 58,000.

Q. (BY MR. CALVERT) Okay. And so you had mentioned the third and fourth pages, while they're different invoices, they have the same date, correct?

A. That is correct.

Q. Okay. Is September 30th the date that the revised invoice was sent to you?

A. No.

Q. So now I want you to turn to the first page of the Exhibit 1. And when was the revised invoice sent to you?

A. October 17th, 2016.

Q. So I want you to hop over to AUIs Exhibit 2. And what is this?

A. What estimate is it or --

Q. Well, let me do it this way. Let me lead you a little bit. Is this one of the estimates you would have presented to the Department?

A. This is correct. Yes.

Q. Okay. And so this is the estimate for work done between August 26th and September 25th --

A. That is correct.
Q. Okay. And any idea whether this is signed by J-H saying they received the payment?
Q. Okay. So it looks like J-H got the payment on October 27th, 2016?
A. Correct.
Q. Now, you said you gave them the payment the day after, I think you said, you turned in the pay estimate; is that correct?
A. No.
Q. Okay.
A. I gave -- we -- we paid those guys actually the day after that we received a payment.
Q. Okay.
A. Or the day of, it looks like here.
Q. All right. So I want to go to Exhibit 3.
HEARING OFFICER ANAYA: And I’ll just preface that with AUI Exhibit 3.
MR. CALVERT: AUI’s Exhibit 3. Thank you.
I keep forgetting.
Q. (BY MR. CALVERT) Is this next month’s estimate from AUI?
A. That’s correct.
Q. And when did you submit it?
A. I signed it and turned it in October 27th, 2016.
Q. Does this include part of J-H's work?
A. Yes.
Q. Okay. Had you been paid by the Department for that portion of J-H's work that's included in the October payment estimate on October 27th when you turned it in to the Department?
A. No. We have not been paid as of yet.
Q. Okay. So we're going to get into this a little later, but let's talk about it now. This payment estimate for October, how much is actually going to get paid to AUI on this estimate?
A. Not -- we don't get anything, no payment.
Q. Okay. Why not?
A. At this point, we're in retainage, so of course they retain 5 percent when the contract reaches 95 percent, per the rule. So they'll cut a zero dollar just to show and reflect what kind of items or what's being reported, the work that's been completed at that time. So they'll -- they'll come up and they'll determine they have 5 percent -- they're allowed to retain 5 percent on these contracts when it gets up to the total contract amount. So in this instance, they reported these items, but AUI don't get any money because it's actually a retainage at that point, until the job is completed and all the items are billed and completed. Then retainage -- end of the job for acceptance.
Q. So you're going to have to -- after this payment estimate, once the job's fully complete and accepted, you're going to have to submit another payment estimate on which the retainage is paid, correct?
A. What happens is the Department actually bills us.
Q. Okay.
A. They come in and they bill these estimates/invoices. And if there is no work being completed and the job still hasn't been completed throughout, they continue giving these zero dollars. So the time frame just kind of keeps fizzling out because not all the paperwork is in, not all the -- not all the information has been gathered, nobody's -- you know, none of the final completion dates have been completed. They keep issuing these zero dollars until they get a completion date and a completed job approval by the DCF with us. And then they would release the retainage once everything is complete.
Q. All right. So the $119,000 -- 119,784.78 that you're billing in this estimate may not have been paid
1. to ADI for months after October 27th?
2. A. Probably three months after, yes, because
3. December 16 was the final.
4. Q. Okay. Down at the bottom of Exhibit 3, is that
5. your signature again?
6. A. That's correct.
7. Q. Did you ever get back anything from the
8. Department, since they weren't going to be paying you
9. until much later, showing that the Department had
10. approved or accepted your estimate?
11. A. No.
12. Q. Okay. At some point after the October payment
13. estimate, were you informed that the Department was
14. treating the nonpayment to J-H as a nonconformance?
15. A. Yes.
16. Q. What discussions did you have with the
17. Department regarding that nonconformance?
18. A. Well, the discussions were that they wanted us
19. to come up with a good cause of why we didn't report
20. this or pay them in the seven-day time frame. So in
21. that stretch right there, I got ahold of J-H, and we
22. all -- we all come together and we decided -- or I asked
23. Bo to let the DOT -- NMDOT know that he wanted to push
24. that payment back so that we can get all of the -- all
25. of items paid in that one estimate, because the revision

Q. Who did you talk to -- or did you talk to
anybody at the Department regarding that decision to
push it back?
A. Absolutely.
Q. Who did you talk to?
A. I spoke with Jayson Grover on several
occasions. Mr. Segura, I spoke to him once. And
he's the one that kind of put together a letter after
asking me to gather as much information as I could to --
to explain why we had reported it in a later fashion.
Q. Okay. If you would look at ADI's Exhibit 5,
can you explain to the hearing officer what the email
chain in Exhibit 5 is?
A. So it started -- so this email chain --
particular chain started with Mr. Grover sending me the
letter for the prompt payment issue, showing it was
late, the time frame and whatnot. And then that's where
I asked J-H, Bo and these guys to actually ask -- to
retract for the original invoice and to explain to them
what he was explaining to me or what he had asked me to
do with that invoice. And if you keep going through
this, then I sent it off to Jayson explaining to him.
Jayson again being the project manager for the State of
New Mexico. And he reviewed it and sent it -- he
reviewed mine and sent it back. Or -- then I had
actually J-N's email chain right here, is reviewing the
nonconformance and trying to explain to Jayson that he's
the one that actually asked us to push that back, which
we did, for payment itself for the next -- the next one.
And then Mr. Grover was -- was answering and responded
to that stating that he couldn't get ahold of Loretta,
but he had thanked Bo on --
Q. And what was Mr. Grover's role with NMDOT?
A. He's the project manager for the DOT.
Q. Okay. So if you look at that first page of
Exhibit 5, what does Mr. Grover say back in November of
2016 regarding the nonconformance?
A. He says, "It would appear the issue has been
resolved."
Q. Okay. So as far as he's concerned back in
November of 2016, the nonconformance is resolved. It's
not an issue?
A. According to that, yes.
Q. Okay. At some point later, do you find out
that even though he said it was fine, the Department
still decided to give you a nonconformance and points on
the revised prequal?
A. That's correct. They sent the nonconformance
letter stating that we had breached the actual rule and
that they issued us a noncompliance.
Q. Okay. How far after he said it was okay did
that happen?
A. I can't tell you unless I look at the letter.
Q. Okay. Fair enough.
I want you to look at Exhibit 6.
HEARING OFFICER ANAYA: And, again,
referring to AUI.
HEARING OFFICER ANAYA: That's fine.
THE WITNESS: Okay.
Q. (BY MR. CALVERT) Mr. Gonzales, do you know
whether prior to receiving the Compass information
report for the project you knew that they were -- the
Department was backtracking the J-N payment as a
nonconformance?
A. No, not as a prequal ding. It was more of a
nonconformance letter itself.
Q. Okay. And when did you get the Compass form?
A. In -- I have an email on that actually
somewhere. I wouldn't know to be exact.
Q. Would it have been after March of 2017?
A. Yes.
Q. So several months after Mr. Gracen said it was
1 all resolved?
2 A. Yes. Mr. Grover.
3 Q. I'm sorry. Mr. Grover said it was all
4 resolved.
5 Okay. So the other nonconformance that you
6 got from the Department, as I understand it, was related
7 to Gonzales Construction?
8 A. That's correct.
9 Q. Okay. Can you explain what happened there?
10 A. So something similar. We -- we received a zero
11 dollar pay estimate because we were already in
12 retainage. So the work was completed, as we were
13 already in the 5 percent retainage itself. So when we
14 picked that up -- when I signed the zero dollar
15 estimate -- again, we don't -- we don't get the other
16 estimates coming back in return of when you're accepted
17 or when it's actually targeted or when that seven days
18 is triggered. So in the specs itself, it allows the
19 Department to pay you, 30 days.
20 So in our instances, after I signed it, we
21 assumed that we had 30 days to pay this guy at that
22 point, and that's when we -- that's when we paid that,
23 because we never got an actual deposit or acceptance or
24 a payment like we typically do when we get paid. So
25 there was nothing to show when they approved it or they

accepted it other than when I agreed to the quantities
that were sitting in that particular estimate.
Q. Okay. So I want you to look at Exhibit -- AUI
Exhibit 7. And is that the invoice from Gonzales
Construction?
A. Correct.
Q. Okay. And what's the date of that invoice?
A. 10/19.
Q. Okay. And would you have included this in your
estimate to the Department for October 2016?
A. Yeah.
Q. If you need to look, it's Exhibit 3.
A. If you look at the second page on Exhibit 3, under Cold Milling, there is nothing -- there is nothing
reporting under the Cold Milling item in that particular
estimate.
Q. Well, if you look a little further down, do you
see the one that says "Rumble Strips?"
A. Oh, yes. I'm sorry.
Q. Okay. And that would be the invoice -- that
would refer to the Gonzales Construction invoice for
rumble strips that's AUI Exhibit 7, correct?
A. That's correct, yes.
Q. All right. So you submitted this application
to the Department on October 27, 2016, correct?
Q. Okay. And you don't get back anything from the Department indicating it's accepted?
A. No.
Q. And I think you already talked about this estimate. I think you said you finally got paid the retainage, which would have included the rumble strips and such, off of Estimate 16 several months later?
A. That is correct.
Q. I want you to look at AUI Exhibit 9.
A. Okay.
Q. And what is that?
A. That is a check to Gonzales Construction.
Q. And is that the payment to Gonzales for the rumble strips?
A. That is correct.
Q. And when was that payment issued to Gonzales?
Q. Okay. Had you been paid by the Department for the rumble strips at this point?
A. No. We hadn't gotten paid for them. No.
Q. Okay. And just to be clear, you had issued this payment to him based on it being 30 days since you had submitted your payment application?
A. Since I submitted it, correct.
negatively affected under the Pf subcontractor rate?

Q. Okay. So the Pf nonconformance for the late payments and the Pf subcontract factor were for the exact same two late payments, one to J-H and one to Gonzales, right?

A. That's correct.

Q. Okay.

MR. CALVERT: That's all the questions I have for this witness.

CROSS-EXAMINATION

BY HEARING OFFICER ANAYA:

Q. Mr. Gonzales, you talked about not receiving anything from NMDOT to indicate their approval or acceptance of your estimates; is that correct?

A. On the zero dollars -- or actually throughout the whole project, until we got paid, yes.

Q. Are there any affirmative steps you can take?

A. If I had access to their system, yes. But no, I do not have access.

Q. Okay. Okay. I do not have any other questions.

HEARING EXAMINER ANAYA: Do you have any follow-up?

MR. CALVERT: Not with him.

HEARING OFFICER ANAYA: Thank you.

MR. CALVERT: We would call, as our second witness, Mr. Simmons.

CARL "BO" SIMMONS, after having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. CALVERT:

Q. Mr. Simmons, what's your -- where do you work?

A. J-H Supply Company.

Q. Okay. And what's your role with J-H?

A. Vice president.

Q. Okay. Are you familiar with the payment issue with AUI for the CN 6010011R [sic] project?

A. Yes, I am.

Q. Okay. I want you to look at Exhibit 5.

HEARING OFFICER ANAYA: AUI's Exhibit 5.

MR. CALVERT: AUI's Exhibit 5. Thank you.

Q. (BY MR. CALVERT) There you go, sir, if you would look at the second page of that exhibit.

A. May I be excused one second?

Q. Sure.
A. I left my glasses.
Q. Understood.
A. I can squint or make this easy.
Okay.
Q. Is that your email to Mr. Gonzales and
Mr. Grover regarding the payment application?
A. Yes, it is.
Q. Okay. And as far as J-H was concerned or as
far as you were concerned, was -- was J-H timely paid
for that estimate?
A. Yes, sir. Per our estimate, we were.
Q. Okay. Did J-H ask AUI to pay -- to withhold
the initial payment and pay based on the revised larger
estimate?
A. Yes, we did.
Q. Okay. And were you paid on that?
A. Yes, we were.
Q. Okay. Is J-H supply a DBE entity?
A. Yes, we are.
Q. Okay. Do you know whether you were qualifying
for the DBE on that project?
A. I do not know that.
Q. Fair enough.
All right. But as far as you're concerned,
J-H was paid promptly on -- or within seven days?

MR. CALVERT: That's all I would have for
this witness.
HEARING OFFICER ANAYA: I don't have any
questions for this witness.
MR. CALVERT: Could we -- if there is not
going to be any cross-examination, could we let the J-H
folks go?
HEARING OFFICER ANAYA: Do you have any
objection, Ms. Gonzales?
MS. GONZALES: No objection.
HEARING OFFICER ANAYA: They may be
excused.
Why don't we go off the record? We'll take
a five-minute break.
(RECESS, 1:17 P.M. TO 1:29 P.M.)
HEARING OFFICER ANAYA: Let's go back on
the record. It is 1:29 p.m.
Mr. Calvert, you may call your next
witness.
MR. CALVERT: No further witnesses.
HEARING OFFICER ANAYA: And at this time,
are you going to move for the admission of AUI's
exhibits?
MR. CALVERT: I would move for the admission, if needed, for AUI Exhibits 1 through 10.

HEARING OFFICER ANAYA: Any objection from NMDOT?

Ms. GONZALES: No objection.

HEARING OFFICER ANAYA: So AUI's Exhibits 1 through 10 will be admitted.

(AUI, Inc. Exhibit Numbers 1 through 10 are offered and admitted into evidence.)

HEARING OFFICER ANAYA: Mr. Calvert, I have a binder of exhibits. I do not know if AUI has a separate binder to provide for the court reporter, or I can provide my binder. You do have a copy?

MR. CALVERT: I do have an extra binder.

HEARING OFFICER ANAYA: What I would like for you to do is with a marker or pen, whatever the case may be, if you will write "AUI" before each exhibit number, that will help keep the record straight, before you submit that to the hearing officer.

MR. CALVERT: Okay. Done.

HEARING OFFICER ANAYA: Thank you.

Mr. THIES, will you call your first witness?

MR. THIES: Thank you. My first witness would be Mr. Jeffrey Martinez.
A. Yes, I do.
Q. Can you describe it for us?
A. This is the bid schedule for Control Number 6101100R.
Q. The control number you just recited, is that the control number for this particular -- for the project and why we're here today?
A. Yes.
Q. Briefly, can you just kind of describe the contents of the bid schedule or the bid form?
A. The bid schedule contains the bid items for the project, and the bid schedule is what's provided to the contractor for submittal of his bid. It provides the bid item prices and extended amounts, and then the bid schedule is submitted to the Department.
Q. I'd like to just draw your attention generically to some of these numbers. Let's go to the first page where we have 201000, Clearing and Grubbing. The number itself, is there any importance to that?
A. The number, it's the bid item number. And the bid item number is reflective of the section of our standard specifications in which the contractor can go and determine what's the work involved in that bid item number.
Q. Do you know, based on your experience with the Department of Transportation, whether it's possible to track a particular number from the start of the project all the way through the end of the project? Does that number show up in a number of documents?
A. The number shows up on the bid schedule, which is a required document for bid submittal, and it also shows up on the construction plans, on the Summary of Quantity sheet.
MR. THIES: That's all the questions I have of this witness.
HEARING OFFICER ANAYA: I have one, Mr. Martinez.
CROSS-EXAMINATION
BY HEARING OFFICER ANAYA:
Q. Going back to the written testimony that you submitted -- and I don't know if you have that before you, because I'm going to ask a question about a specific sentence.
MR. THIES: Okay.
Q. (BY HEARING OFFICER ANAYA) And if you will go to page 3 of your written testimony, at the top, it starts with an A for answer. Now, that second sentence there, "The only addenda issued after the project is advertised, unless the contractor obtains a copy after the addendum has been issued, in which case the contract
documents would include the addendum." Can you please explain that sentence to me. I'm having trouble understanding that.

A. Okay. So a contractor can go into our office and receive the contract documents, and we'll give him all the contract documents for this specific project.

Now, if there has been addendum issued at the time already for that project, then the contractor will also get the addendum that has been issued at that time.

Q. That clears it up perfectly.

A. All right.

Q. Thank you.

MR. THIES: No follow-up questions.

HEARING OFFICER ANAYA: Thank you. You may be excused.

MR. THIES: Ms. Anaya, I would offer Exhibits -- Department Exhibits 1 through 10 -- make sure I'm offering the right ones -- or Exhibits 1 through 7, which would include the prepared testimony of Mr. Martinez.

Mr. Calvert?

MR. CALVERT: None.

HEARING OFFICER ANAYA: Those will be admitted.

(NMDOOT Exhibit Numbers 1 through 7 are offered and admitted into evidence.)

MR. THIES: Thank you.

HEARING OFFICER ANAYA: Please call your next witness.

MR. THIES: Mr. Jeffrey Canney.

Again, Ms. Anaya, we submitted the prepared testimony of Mr. Canney. I just have a few questions, a clarification of one of the items on one part of his testimony. If you want, I can proceed with that.

HEARING OFFICER ANAYA: Yes, sir. Please proceed.

JEFFREY CANNEY,

after having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. THIES:

Q. Mr. Canney, you reviewed your testimony and it's accepted. And we'll talk about a particular issue. Let me point to that, a correction we're talking about. The second-to-the-last question that starts with the question: "Based on your involvement with the prequalification -- posting," we're going to talk about that briefly. But other than that particular question, are there any changes or additions to your testimony?
Q. Now before -- well, let's address that quick question. It's my understanding that since your testimony was prepared and you signed your affidavit, there is an issue that's come up unrelated to the prompt payment to subcontractors that has modified your testimony, is that correct, on this particular question?
A. That's right. That is correct.
Q. And I believe that that particular issue involves a payment by subcontractors to the employer; is that correct?
A. That's correct.
Q. So due to that the issue coming up, there is some irregularity in the prequal, the process of calculating AMI's score; is that correct?
A. That's correct.
Q. But it doesn't -- that irregularity doesn't go to the issue that we're here on today? That's the prompt payment issue.
A. That's correct. I don't make any changes to the prequal scores until I get a signed Compass form by Sally Reeves.
Q. And Sally Reeves is?
A. She is a construction engineer, I believe.
Q. Since you brought up the Compass form, that particular document was not included in the initial documents you identified. I'd like to direct your attention to Exhibit Number -- this would be Department Exhibit Number 10. Do you recognize that document?
A. I do.
Q. And can you describe that briefly for us?
A. This is what we call the Compass form. It has two pages. The first page has construction details that the Office of Inspector General doesn't normally review. It's the second page that the Office of Inspector General uses as our performance factors.
This is our data form. We take the data form off this form and enter it into our Excel spreadsheet and our database, which we reconcile against.
Q. Is this a copy of the Compass form that you used for AMI?
A. I believe so, yes.
MR. THIES: Ms. Anaya, I would offer Exhibits -- at this time, Department Exhibits 8, 9, 10 and Exhibit 11, which is the affidavit of Mr. Canney, along with his prepared testimony.
HEARING OFFICER ANAYA: Any objection, Mr. Calvert?
MR. CALVERT: No, although I think it's
worth noting for the record, the prepared testimony is
not included in those exhibits. So there is the
affidavit swearing to the truth of the exhibits and
testimony, but you don't know what exhibits and
testimony it's talking about. I believe the only place
the direct testimony appears is in Exhibit 42. And we
would have no objection to the admission of the direct
testimony in Exhibit 42 for either Mr. Canney or
Mr. Martinez, if that made sense.

HEARING OFFICER ANAYA: Give me a second.
Well, let's go back so we make sure we have
all of the correct exhibits that pertain to this witness
that we're trying to introduce.

MR. THIES: His prepared testimony is
attached to the prepared position paper that was
submitted to you. It's not included as a separate
exhibit in this particular case, the exhibits being
sponsored by Mr. Canney, 9, 10, 11 and 12 -- or 9, 10
and 11. I offered his prepared testimony. As I
indicated, it's attached to our position paper. And a
copy of that position paper, along with Mr. Martinez'
testimony and Mr. Canney's testimony, was provided to
opposing counsel prior to this hearing date.

HEARING OFFICER ANAYA: And there is no
exhibit -- I'm --

MR. THIES: It's attached to Exhibit Number 42.

HEARING OFFICER ANAYA: 42.
So NMDOT's Exhibits 8 through 11 and 42
will be admitted without objection.
(NMDOT Exhibit Numbers 8 through 11 and 42
are offered and admitted into evidence.)

HEARING OFFICER ANAYA: I do have one
question before I excuse this witness.
And, Counsel, you can let me know whether
this is the appropriate witness to address my question.

CROSS-EXAMINATION

BY HEARING OFFICER ANAYA:

Q. Now, on your written testimony -- and I will
refer you to page 2, in the middle of the page, with the
question, "What is a performance factor?" We have heard
today that AUI -- that AUI is being dinged, for lack of
a better word, with regard to two of these performance
factors for the same issue, which is the late payment to
a subcontractor. Now, I want to get some information
from NMDOT. And whether it is from you or another
witness, you can let me know who is the appropriate
person for me to get that information. What is the
basis for doing so? Is there some language that I am
missing? What is -- is there a legal basis?

PAUL BACA PROFESSIONAL COURT REPORTERS
500 FOURTH STREET NW - SUITE 105, ALBUQUERQUE NM 87102

PAUL BACA PROFESSIONAL COURT REPORTERS
500 FOURTH STREET NW - SUITE 105, ALBUQUERQUE NM 87102
MS. GONZALEZ: Your Honor, it's in the prequalification rule. There is an -- there are two performance factors -- I'm sorry -- there are six total performance factors that a contractor is evaluated on. So why don't we reference AUI's Exhibit 10, I believe, which is a part of the prequalification -- I'm sorry. This is a mess here.

HEARING OFFICER ANAYA: So may this witness be excused? Is this something that does not involve factual testimony?

MS. GONZALEZ: Yes. Yes.

HEARING OFFICER ANAYA: Then you may be excused. Thank you.

MS. GONZALEZ: So if I can proceed again.

HEARING OFFICER ANAYA: Ms. Gonzales, please proceed.

MS. GONZALEZ: Yes. The performance factors are all laid out in the prequalification rule. As you can see, that has been filed with State Center for Records and Archives and was implemented as of January 1st of 2015. The performance factors are listed in Section 18.27.5.11. Now, as you can see, there are six performance factors that are numbered within that section. They start A. (1), (2), (3), (4), (5) and (6). Performance factor nonconformance is number four.

Performance factor subcontractor payment is performance factor number six.

As you can see, in Section 8 of the rule, it goes on to state the different percentages associated with that performance factor that make up a yearly score.

So to explain a little better: The performance factor related to the nonconformance is given 10 percent weight of the score. The performance factor related to subcontractor prompt payment is given another 10 percent weight in the total score.

AUI's score is comprised of whether they had filed any claims against the project, whether they had disinterests, et cetera. So those are but two parts of their entire score that they received on the project. And then to the extent that they closed any other projects in 2017, which I believe they did, they would have scores associated with those projects which then make up their yearly score which is reflected in AUI Exhibit 9. As you can see, they have a score, for 2013, of a .977. It's actually one of the better scores that the Department has for this. So it is clearly stated in the rule that there are two performance factors that could be related to subcontractor prompt payment: Nonconformance and the prompt pay.
And just to add to that, my witness, Mr. Grover, will be talking about what a nonconformance is in the contract and sort of what that means for the prime.

HEARING OFFICER ANAYA: Thank you.

MR. THIES: With that, I'm turning it over to Ms. Gonzales.

HEARING EXAMINER ANAYA: Thank you. Please call your next witness.

MS. GONZALES: I would like to call Jayson Grover. He's the project manager for the NMDOT.

And, Your Honor, I have for you something I haven't marked as an exhibit, but I think it will help in understanding the dates that we're looking at for the payments to the subcontractors. I already showed them to Mr. Calvert. They're just copies of calendars for the year in question, so October 2016, November 2016 and December 2016. Mr. Grover's going to go over in his testimony the date of payment from the NMDOT to AUI and then the dates that payment, based on the standard specifications in the contract, would have been due from AUI to its subcontractors. I think that might help you in sort of just getting a perspective on the dates that we're talking about.

HEARING OFFICER ANAYA: Thank you. Please proceed.

JAYSON GROVER,

after having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MS. GONZALES:

Q. Good afternoon, Mr. Grover. Could you please state your name for the record?

A. Jayson Grover.

Q. And what's your job title?

A. I am the project manager -- or a project manager for District 6, NMDOT.

Q. Great.

And are you aware of Project 6101120R?

A. I am.

Q. Okay. And what role did you perform on that project?

A. I was the project manager over this job. I was responsible for ensuring contractor compliance with all state and federal regulations and contract requirements.

Q. Great.

And who was the prime contractor?

A. AUI, Inc.

Q. And what work was generally involved in the scope of the project?
A. The scope of this project was to replace some existing drainage structures that went underneath I-40 at approximately Milemarker 95. We took out the existing drainage structures and built new concrete box culverts, rebuilt the roadway over the top and then put new guardrails over the top of the -- over the top of that.

Q. Great.

And can you just give the hearing officer an example of the time frame as to when NMDOT started the work?

A. The official first day of work on the project was September 28th, 2015, and I believe the project reached physical completion in February 2017.

Q. Perfect.

Was the project federal-aid funded?

A. It was. The majority of the funds used on this job were federal dollars.

Q. And when a project is federally funded, what does that mean?

A. Whenever the Feds grant money for the use of a project, with it comes stipulations, requirements -- federal requirements for the use of those funds. So as a project manager for the State, I was responsible to ensure not only state specifications and regulations were followed but also federal requirements for the use of those funds.

Q. And when NMDOT doesn't monitor a contractor's compliance with state or federal regulations, what happens with that federal or state funding?

A. There's the risk of nonparticipation. If not all federal requirements are met for the use of that money, the Feds are not obliged to allow the State to use that money on our projects.

Q. Okay. So I'm going to turn now to the subcontractor payment requirements, and I have the NMDOT exhibit book open. I'm looking at NMDOT Exhibit 12.

And why don't we start there. Are you aware of any contractual provisions which would require a prime to pay a subcontractor within a certain time frame?

A. I am.

Q. What does that say?

A. If you look at this exhibit --

Q. Why don't you state where you're pointing to?

A. NMDOT Exhibit 12, second-to-the-last paragraph, it states: "The Contractor shall promptly pay its Subcontractors and Suppliers for satisfactory performance of their contracts no later than seven Days after receipt of Progress Payment for the Subcontractors' Work or Supplier's Materials by the
1 Department. For purposes of this section, a
2 Subcontractor's portion of the Work is satisfactorily
3 completed when it is Accepted by the Department."
4 Q. And we'll talk about that acceptance portion
5 later in your testimony.
6 I just want to ask you: Was this
7 specification applicable to this project, 6101100R?
8 A. Yes, it was.
9 Q. And how do you know that?
10 A. Prior to -- or during the advertising of the
11 project -- actually, if you look at -- we have it here,
12 NMDOT Exhibit -- Exhibit 4, I believe.
13 Q. Let's look at our index that Stephen might have
14 taken. Oh, there it is.
15 A. I'm sorry. Exhibit Number 1 -- NMDOT Exhibit
16 Number 1. This is the invitation for bids. So prior to
17 any project being awarded a contractor, it's advertised,
18 and this is one of the -- some of the information
19 included in the advertisement. But if you notice, the
20 highlighted portion there on the left-hand side of the
21 page, "All projects shall be constructed in accordance
22 with the New Mexico Department of Transportation's 2014
23 Edition of the Standard Specifications for Highway and
24 Bridge Construction...unless otherwise noted." So
25 because of that being included in the -- well, part the

invitation for bid, the 2014 spec would apply to this
project.
Q. Great.
A. There are. Included in the contract book for
this job was two notice to contractors. One is the
NMDOT Exhibit Number 4, which is dated June 11th, 2009.
The other is NMDOT Exhibit Number 5, dated November 26,
2013.
Q. Was the earlier notice, the 2009 notice,
removed from the NMDOT contract at some point in this
project?
A. It was.
Q. And how do you know it was removed? I'm sorry.
What prompted the removal?
A. If you turn to -- okay. If you turn to NMDOT
Exhibit Number 13, if you turn to the second page --
first and second pages -- excuse me -- you'll see an
email I received from the NMDOT State Construction
Engineer, Sally Reeves, dated July 2015. This email was
sent to me and all other project managers across the
State of New Mexico directing us that the federal
requirements notice to contractor that we had used in
1 our job had been updated, and direction was provided to
2 take this revised notice to contractor and update what
3 was in our project by January.
4 
5 And if you turn, then, to the next exhibit,
6 Exhibit Number 15, you'll see where we -- NMDOT Number
7 14, you'll see where this new Federal Requirements
8 Notice to Contractor, or the NTC, was added to the
9 contract by change order.
10 Q. And after the 2009 notice was removed from the
11 contract, what was the time frame in which AUI had to
12 pay its subcontractors for accepted work?
13 A. The federal requirements notice to contractors
14 stipulates seven days from the time that the prime
15 receives payment from the Department matching the
16 direction provided earlier that we talked about in the
17 2014 specifications.
18 Q. And is that the time frame that applied when
19 the issues with prompt pay for J-H and Gonzales
20 Construction happened?
21 A. It is, yes.
22 Q. Okay. Can you just tell me generally what
23 steps the NMDOT takes to monitor payment from prime
24 contractors to subcontractors?
25 A. The Department utilizes a program called
26 B2GNow. We have access to it. The prime has access to

1 it, as do all subcontractors. And it's a program where
2 dates are entered for when subcontractors are paid, when
3 they should expect payments, and it gives the
4 subcontractor the opportunity to declare whether or not
5 they were paid within allowed time frames. It's a yes
6 or a no.
7 Q. And you're not going to talk about B2GNow
8 directly in your testimony. That's something that
9 you've delegated to your office manager, right?
10 A. Yes, ma'am. For this job, I delegated the
11 responsibility of overseeing the B2GNow recording to my
12 office manager, Sandra Coats.
13 Q. Okay. So I want to discuss the specific issues
14 with prompt payment or nonpayment to J-H Supply. So let
15 me just ask you generally, what work was J-H Supply
16 performing on the project?
17 A. J-H Supply was subcontracted to complete the
18 guardrail on the job and all necessary components that
19 involved the guardrail.
20 Q. And when did they start performing that work?
21 A. Let me -- if you would turn to NMDOT Exhibit
22 13, this is what we call the final quantity book. And
23 if you turn to page 4 of the exhibit, you'll see a
24 highlighted item, "Single Face W-Beam Guardrail," and
25 the dates tied to that specific pay item showing that
work was completed for this item in July, September, as well as October of 2016.

Q. So they started performing work in July, it looks like?

A. They did, yes.

Q. Okay. If J-H was performing work in July, how do you know that the NMDOT paid J-H for that July work?

A. What I'd like to turn to is NMDOT Exhibit Number 16. This is the estimate for the work completed in the month of July, Estimate Number 10. If you turn to -- let's see. It would be the first -- if you turn to the sixth page of the exhibit, this is the cover sheet to the actual estimate where both I and the project manager for AUI signed.

If you turn to the next page, you'll see the list of the pay items that are included in that estimate, and you'll see highlighted items involving the guardrail installation, thus showing me work was performed and accepted for that July estimate.

Q. Do you know if AUI made timely payment to J-H Supply for its July work?

A. They did. Yes, they did.

Q. And is there any particular date when work in a specific month may not be included on the estimate that the NMDOT prepares?

A. Yes.

One thing I guess now would be the time to make clear. These estimates are generated by the Department. They're not invoices submitted by the contractor. These estimates are generated by the Department, and they're a compilation of all accepted work that has taken place over the course of the month that that estimate captures.

My DOT inspectors are obligated and tasked to monitor contractors' performance throughout the month. And as work is accepted, they enter payment into our software program called Site Manager. Once they -- they enter that work has been accepted, the estimate cutoff date -- as the project manager, I generate this.

And included on the estimate is all work that has been accepted to date. And these -- these estimates go from estimate cutoff date to estimate cutoff date. In this case, AUI had chosen an estimate cutoff date of the 25th of each month.

So in answer to the question, what work was performed over the course of the month that may not be on that estimate, it would have been any work completed after the cutoff date of the 25th. So work completed and accepted on July 26th would have fallen on the next estimate or the August estimate.
Q. That's correct.

And why don't we -- just to make this really abundantly clear, can you explain how the final quantity book information is generated into the estimate? Do you review the quantity book information in preparation of the NMDOT estimate?

A. I do. Those written underneath me are tasked of ensuring contractor compliance with all specification requirements, and they are -- they do not issue acceptance of the work until everything is done satisfactory -- satisfactorily. Once the work is accepted, that is when they go into our reporting software, Site Manager, and enter what has been accepted to date.

Q. Maybe you can give her an example.

A. Okay. If you turn to -- if you turn back to NMDOT Exhibit 15, earlier I referenced you to page 4 of 16. Let's turn the page and go to page 5 of 16. Here are a couple of other items that have been subcontracted to J-N Supply to complete, "End Treatment TL-3 End Terminal." You'll see three entry dates where, starting on July 18th, Brandon Lopez accepted and reported one treatment having been completed and accepted it on the 18th. If you look again on September -- yeah, September 23rd, 2016, another end treatment was accepted. What that tells me when it comes time for me to generate the estimate is that the subcontractor's been on the job, has completed this work, and now that it has been entered as accepted and ready to pay, I take this information and I generate the monthly estimate for issuing payment to the prime contractor.

Q. So why don't we turn to the specific months and specific issues with J-N Supply that resulted in the nonconformance or prompt payment violation?

But before I do that, I want to ask you just a few more questions on the estimate cutoff date.

You said that AXI had picked that date; is that correct?

A. Correct.

Q. And how do they do that?

A. Prior to any construction project, before we show up on the job ready to go to work, we have a preconstruction meeting -- a mandatory preconstruction meeting. And at those meetings, one of the things we do is the prime contractor tells us when they would like the estimate cutoff date for each individual project. For this project, the contractor elected the 25th of each month.

And if you turn to NMDOT Exhibit 17, you'll see the preconstruction conference meeting agenda we used for our preconstruction meeting in September of
2015. And if you turn to the second page of that agenda, you will see where it was established, the cutoff date, for each monthly estimate being on the 25th. That's about two-thirds of the way down the page.

Q. So turning back to your final quantity book, when was the next time after July that J-H performed work on the project?

A. After July -- let's see. If you turn back to NMDOT Exhibit 15, turn back to page 4 of 16 and 5 of 16, because that is where the work subcontracted to J-H is going to be, you'll see highlighted there in yellow that after July, more work was performed and accepted for guardrail installation in September of 2016, specifically September 23rd.

Q. And did NMDOT make payment to AUI for J-H's September work?

A. We did.

Q. And how do you know that?

A. If you turn now to NMDOT Exhibit 18, this is Estimate Number 12. This estimate captures all work performed and accepted up until September 25th, the estimate cutoff date.

If you turn to -- again, it's a number of pages in -- about the fourth or fifth page of the exhibit, you will see a list of work items that are completed and are tied to this specific estimate, and you'll see highlighted in yellow -- I'm sorry. It's blue. I'm not color-blind. That's blue. You'll see highlighted in blue, again, "Single Face W-Beam Guardrail" and "End Treatment TL-3 End Terminal" and "Transition Metal Barrier to Rigid Barrier" items, all of which were subcontracted to J-H to complete.

Q. And just to be abundantly clear, who prepares this estimate?

A. I prepare this estimate as NMDOT project manager. Once it's completed -- or once I generate the estimate, after the estimate cutoff date, I then send the estimate to the contractor's project manager, which in this case would be Eddie Gonzales. I ask him to review. If he has any questions, that's when he can tell me, There is a missed an payment on this item; what about this? But once he signs the estimate, he returns it to my office where I sign the estimate, and we move forward as a department with processing at the same time for that estimate.

Q. So you know that AUI received and reviewed this estimate how?

A. If you look at -- going back to NMDOT Exhibit 18, for example, and go to the fifth page -- excuse me -- the sixth page, this is the cover sheet for the
1 estimate, and you'll see signatures, "Approved for
2 Payment By," there at the bottom of the page. First, as
3 I said, the contractor signs it as he accepts quantities
4 paid to date. He signs it. The date on this is
5 September 26th. And then he returned it to me that same
6 day when I signed it, again on September 26th, and then
7 I turned it in for processing and payment.
8 Q. Does MMI receive all of the documents in this
9 estimate package?
10 A. They do. They are aware of the dollar amount
11 of the estimate, as well as what line items or what pay
12 items have been accepted and are, therefore, associated
13 with that dollar amount. And that would be the next
14 page.
15 Q. So if J-R Supply -- I'm sorry. What are the
16 work dates that Estimate 12 would not include?
17 A. Estimate 12, you see, had an estimate cutoff
18 date of September 25th. So any work completed after
19 September 25th would not be captured here, as well as
20 any work completed prior to August 26th. And, actually,
21 if you look at the top, right corner of that page,
22 you'll see the pay period, which is included in this
23 estimate, and the dates are listed there, August 26th to
24 September 25th.
25 Q. If MMI receives a revised invoice after the
26 estimate cutoff date, does that impact its obligation to
27 pay its subcontractor within seven days from the date it
28 receives payment from the NMDOT?
29 A. It does not. And, actually, I have no
30 involvement or knowledge of when subcontractors submit
31 invoices.
32 Q. Because you're just paying off of the
33 quantities that are reported by your inspectors?
34 A. Reported and accepted work to date, yes.
35 Q. What if a subcontractor agrees to a late
36 payment?
37 A. It is my understanding -- well, as per
38 specification, it doesn't really matter. I don't know
39 of any provision in the federal requirements, in the
40 NTCs we review to date or in the NMDOT standard
41 specifications that make failure to promptly pay
42 subcontractors acceptable in any situation.
43 Q. So, in essence, what you're saying is there is
44 no contract excuse for a revised invoice or for a
45 subcontractor to agree to a later date for payment?
46 A. No. No. My job is to ensure they are
47 paid on time and, therefore, meet federal and state
48 requirements.
49 Q. Okay. When did you find out that MMI did not
50 make timely payment to J-R Supply?
A. This would have been -- for the September estimate, I would have found out in November.

Q. And what action did you take after you found that J-H did not make payment to J-H?

A. As soon as it was realized that a prompt -- potential prompt payment violation was there, I directed my office manager to issue what we call a Corrective Action Report, basically putting the contractor on notice that we have a potential issue that may result in a nonconformance.

Q. And what happens after your project -- your office manager sends the Corrective Action Report?

A. As soon as the prime contractor receives a Corrective Action Report, they're given the opportunity to respond. And based on their response, we then take that information and we forward it on to Damian Segura, he is our NMDOT DBE liaison in Santa Fe. And he then assists us in the Projects Office in determining whether or not there was good cause for failure to meet the prompt payment requirements.

Q. Do you hold the Corrective Action Report open until you receive Mr. Segura's determination?

A. We do. We do.

Q. Okay. So can you now turn to NMDOT Exhibit 20 and describe that for me?
Q. Yes.
A. Yes.
Q. And how do you know that?
A. If you turn to NMDOT Exhibit Number 19 and
again scroll through the first five, six pages and get
to the actual meat and potatoes of the estimate, you'll
see a list of items completed for it in this pay
estimate. And, again, highlighted in blue, not yellow,
you'll see items completed by J-H that were accepted and
paid within this month.
Q. Can you tell us -- you were talking about your
letter that you issued closing out the corrective action
on NMDOT Exhibit 20 and issue of that nonconformance.
Can you just tell me what a nonconformance is?
A. A nonconformance, basically put, is when a
contractor fails to comply with all the specifications
and contractual requirements. There is actually an
exhibit that addresses nonconformance and defines it.
If you go to NMDOT Exhibit 21, this is an excerpt from
the 2014 NMDOT Standard Specifications. And if you read
with me under Section 109.8.9.2, Non-Conformance, it
says there that "If the Contractor fails to comply with
all material terms and conditions of the Contract, the
Department shall withhold an additional 25 percent as a
Non-Conformance from each Progress Payment and

Q. Do you have a choice to not issue a
nonconformance?
A. I do not. Because of the wording from the --
because of the wording that we just read there, it says
"the Department shall." I do not have an option.
Q. Mr. Gonzales testified that he had contacted
you to let you know that J-H Supply had requested a
later payment date or had submitted a revised invoice.
I'm going to have you look at AUI Exhibit 5. And can
you tell me based on that exhibit what date he contacted
you?
A. Looking through this chain of emails, it looks
like it began on November 30th.
Q. And J-H Supply had performed its work for this
contact prior to September 25th; is that correct?
A. That is correct.
Q. Did he contact you before deciding that they
were going to pay their subcontractor late?
A. No. We had no discussions on the matter until
we had issued the Corrective Action Report documenting
that we were aware of a potential violation.
Q. When you closed out your nonconformance, did
you advise AUI that it was going to impact their
Q. And can you tell us where that language is in your letter of November 28th?
A. If you turn back to NMDOT Exhibit Number 20, if you look at the last paragraph in the letter, I state that "AUI was previously provided a Corrective Action Report regarding this matter. Estimate #14 will be a zero dollar estimate due to the remaining balance of the project already being held in retainage until the final estimate, and therefore no additional retainage can be withheld as a result of this non-conformance, however, be advised that this information will be recorded as part of the Department's Prequalification Program." So yes, they were advised.
Q. Now, I'd like to turn to Gonzalez Construction and the work they did on the project. Can you tell the hearing officer what they did?
A. Gonzalez Construction was contracted to complete the rumble strips on the job.
Q. Okay. And do you know approximately, by looking at your final quantity book, when they were doing that work?
A. If you turn back again to Exhibit Number 16 -- I'm sorry -- NMDOT Exhibit 15 -- if you turn back to

NMDOT Exhibit Number 15, this time if you turn to page 6 of 6, you will see highlighted there in blue "Rumble Strips," with a date of acceptance for rumble strips having been completed on October 11th, 2016.
Q. When did the NMDOT make payment to AUI for Gonzales' work?
A. If you turn to -- okay. If you turn to NMDOT Exhibit Number 19, on the first page, this is Estimate Number 13. This would have captured all the work completed in that month time frame. So the estimate cutoff date would have been October 25th. And then turning to the next page -- next page, you will see that the payment was actually processed on the accounting date of November 3rd, 2016.
Q. And when we uncover that for J-H Supply, why don't we go back to make sure our record is clear? Can we go to Estimate 12, which is NMDOT Exhibit 19, I believe. Estimate 12 is NMDOT Exhibit --
A. 18, yes.
Q. -- 18. And can you show me on the estimate where it shows the date that the NMDOT processed payment to AUI?
A. Okay. If you turn to the second page of that exhibit, you will see an accounting date of October 6th, 2016. And what that accounting date is is when the DOT

PAUL BACA PROFESSIONAL COURT REPORTERS
500 FOURTH STREET NW - SUITE 105, ALBUQUERQUE NM 87102

PAUL BACA PROFESSIONAL COURT REPORTERS
500 FOURTH STREET NW - SUITE 105, ALBUQUERQUE NM 87102
Q. Let's turn back to Exhibit 19, which is Estimate 13 -- I'm sorry -- NMDOT Exhibit 19, which is Estimate 13. And I want you to turn to page 2. Based on the accounting date, what was the date that payment would have been due to Gonzales Construction from AUI?
A. Specifications require within seven days of -- in this case, November 3rd, 2015. So three plus seven.
Q. They would have had to have been paid by November 10th.
D. Did NMDOT make an actual payment to AUI for this estimate?
A. This is a zero dollar estimate. There is no money tied to it, but yes, we did accept work.
Q. And you know you accepted work because that work appears later on in that estimate; is that correct?
A. Yes.
Q. And AUI would know that the DOT accepted work because they signed the estimate; is that correct?
A. They signed the estimate in recognition of the items that were signed to, yes, the accepted items completed to date.
Q. Why is the zero dollar payment made at this point?
A. We touched on this a little bit earlier, but the specifications require the Department to withhold 5 percent of the original contract amount for release as retainage up until the final estimate. The reason we do that is to ensure towards the end of the project, basically we have something to hold over the contractor's head basically to ensure that final paperwork is submitted on time, so as to ensure we can properly close out the project. We don't retain it forever. We do release it prior to project closure. But the specifications do require that we hold the last 5 percent.
Q. And back to NMDOT Exhibit 12, can you tell me if there is any language that talks about the obligation to promptly pay and a prime contractor receiving a zero dollar estimate?
A. There is language.
Q. And can you read that for the hearing officer?
A. NMDOT Exhibit 12, second-to-the-last paragraph [sic], "The payment by the Department to the Contractor is not a condition precedent for payment by the Contractor to any Subcontractor or Supplier. A zero dollar Progress Payment by the Department does not relieve the Contractor from paying the Subcontractor or Supplier for Accepted Work."
"The Contractor's failure to make timely or prompt Subcontractor or Supplier payments for undisputed
Q. When did you find out that AUI didn't timely pay Gonzales Construction?

A. In November. Actually, this is --

Q. Maybe a little later?

A. --the November estimate, so this would have been in December.

Q. Okay. And what action did you take once you discovered they didn't make timely payment?

A. We followed the same process we did when we discovered the prompt payment violation to J-H. I directed my office manager to issue a Corrective Action Report documenting a potential issue, thereby giving the contractor the opportunity to respond. And then based on his response, we forwarded that information, again, to DBK liaison in Santa Fe to assist us in making a final determination of whether or not good cause -- whether or not there was good cause for the failure to promptly pay.

Q. And as far as you know, there was no good cause that was found for either of these prompt payment issues?

A. There wasn't. After completion of both investigations, it was found no good cause existed, and so we moved forward with issuing an actual nonconformance.

Q. And can you point the hearing officer to the document that shows the issuance of the nonconformance?

A. If you turn to NMDOT Exhibit 22, this is another letter from me to AUI. In this case, it's another notice of nonconformance for the B28Now prompt payment violation. In this letter, I advise the contractor, AUI, that no good cause was found for failure to pay its subcontractor, Gonzales Construction, in a timely manner, and then I advised them that, again, this issue will result in a nonconformance and affect their -- it would be recorded as part of the Department's Prequalification Program.

Q. Did you ever tell AUI that they could pay Gonzales Construction within 30 days?

A. I did not.

Q. Did AUI avail themselves of any other contractual remedies in terms of filing a claim against you for these nonconformances?

A. They did not.

Q. Is the project now closed?

A. It is.

Q. Okay. I want to do just a little bit of...
Q. So tell me the date that NMDOT paid AUI for Gonzales' work.

A. Okay.

Q. And I'd like to do the same with J-H Supply if we can really quickly, because I believe Mr. Gonzales' testimony was the same, that it was paid soon after AUI was paid by the Department. I'd like you to turn to AUI Exhibit Number 4 and NMDOT Exhibit 12. Based on NMDOT Exhibit 12 and the payment date reflected in that --

A. Okay. Second page of NMDOT Exhibit 12 shows an accounting date of October 6th, and what I'm seeing in the AUI exhibit is October 27th.

Q. And is that within seven days?

A. That is not.

MS. GONZALES: Let me just check my notes, Hearing Officer, to make sure I have no further questions for Mr. Grover.

Q. (BY MS. GONZALES) Does holding retenaige from AUI change AUI's obligation to pay its subcontractor?

A. It does not. A zero dollar estimate is only a formality. Each estimate, whether or not money's tied to it, is a statement of what work has been accepted to date. And by definition on the specifications we read earlier, once work is accepted, the prime contractor is obligated to pay its subs for accepted work.
Q. And I have one more question based on an exhibit in AUI's exhibit book, and it concerns an email exchange in which you said that you thought the issue was resolved. It's AUI Exhibit 5. This is related to the corrective action for J-H Supply, correct?
A. Yes, it is.
Q. What did you mean by the issue was resolved?
A. Reading through this email string real quick, refreshing my memory as to -- okay. As stated before, the subcontractors are given the opportunity to self-report, to basically report in B2GNow whether or not they feel they were paid within contractual requirements. J-H Supply's first response was "no," which led to our issuing a non -- a Corrective Action Report. Later, as we started asking for more information, J-H felt that they needed to change their answer to "yes." So my first thought was, well, then, there is a miscommunication; someone entered the wrong date. So that is what led me to respond. "It is my understanding" -- okay. If you look at my response to Eddie -- or Carl, "Thank you Carl. It is my understanding that my office manager has been unable to get ahold of Loretta" -- she's with J-H -- "to make the changes to B2GNow. It would appear the issue has been resolved." But that was --
HEARING OFFICER ANAYA: I do not. That was very thorough testimony. I do not have any questions.

You can call your next witness. And this witness may be excused.

MS. GONZALES: I'd like to call Sandra Coats.

SANDRA COATS, after having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MS. GONZALES:

Q. Ms. Coats, can you please state your name for the record?

A. Yes. My name is Sandra Coats.

Q. And where do you work?

A. NMDOT District 6.

Q. And what's your job title, ma'am?

A. My job title, I am a Construction Engineer Tech II.

Q. And are you familiar with 6101100R?

A. Yes, I am.

Q. And can you tell me what your job title was for that project?

A. I was a CET III, office manager.

Q. And were you the office manager to Mr. Grover?

A. Yes.

Q. And as the office manager, do you have any responsibility for verifying payment from a prime to a subcontractor?

A. Yes, I do.

Q. Are you aware of any contract requirements that require a time frame for a timely payment to a subcontractor?

A. Yes.

Q. And what is that time frame?

A. Seven days.

Q. If I refer to the words "prompt payment" in your testimony, you'll know what I'm talking about?

A. Yes.

Q. What system do you use to verify that?

A. B2GNow.

Q. Are contractors required to use B2GNow?

A. Yes, they are.

Q. Can you point me to any contractual language --

I apologize; I don't want to hit you in the stomach with these -- contractual language that obligates a contractor to use B2GNow?

A. Yes. Exhibit -- NMDOT Exhibit -- NMDOT Exhibit Number 5, "Notice to Contractors," dated November 26th, 2013, paragraph three reads, "The Contractor has the
burden of proving compliance with these prompt payment
provisions and SHALL do so through its timely B2GNow
reporting obligation."
Q. Okay. I'm going to have you turn back to
Exhibit 23.
A. Okay.
Q. When the prompt payment issues occurred with
J-M and Gonzales Construction, what time frame were you
using to evaluate whether the payment --
A. Seven days.
Q. And do subcontractor invoice dates ever trigger
the prompt payment obligation?
A. No, they do not.
Q. For payment made by the NMDOT in October to
AUL, when can you first access B2GNow?
A. November.
Q. Okay. And I would like you to describe what
you have prepared for the hearing officer today in terms
of your process for reviewing B2GNow.
A. Okay.
Q. But first let me just confirm that this is the
process you used for J-M Supply and for Gonzales
Construction on this project?
A. Yes, it is.
So as she mentioned, NMDOT 23, these are
screenshots of our actual software program that we use
to verify prompt payment. So page 1 of this exhibit,
it's -- I'm sorry -- B2GNow. You open up the program.
You will call out a program number that's on page 2. I
enter 6101100R, and it will bring up that project. Then
on page 3, there is a series of tabs at the top,
left-hand corner. I will go to Compliance Audit List,
and what that will show me is a listing of all the
audits for that particular contract -- subcontractor in
question. So then on page 4, there are the audits that
you will see listed from the start of the project all
the way to the completion of the project.
So if you will turn the page to 5, once I
click on the month in question -- for instance, that
would have been November -- it'll bring up all the
information I need for that particular subcontractor.
Q. Were you looking at November or October?
A. Oh, I apologize. I was looking at October --
October 2016.
Q. And can I just stop you on page 5? It looks
like some of the text was cut off at the bottom of the
page. Will you just describe to the hearing officer a
little bit what that screen looks like?
A. So the screen looks like -- you can see
A Brothers. You can see BSN. It's a listing of all the
subcontractors for that particular prime.
So then if you go to page 6, I will have a compliance audit for that particular month in question, which was October. On this, it shows me an update payment data. This screenshot here will verify the payment date from NMDOT to its prime, which this particular date is October the 6th, 2016. So that's my date that I know that I have seven days to make sure they have paid all their subs within that time frame.
So if you go to page number 7, I will pull up J-H Supply. There are two columns circled there on the right-hand side. They read "Prompt Payment Confirmed," and they both are "yes" on them. But initially when I was in there, what prompted me was a "no" in red, so it alerted me they were not paid promptly.
Q. So was this screen answer changed subsequent to when you reviewed the information in November?
A. Yes.
Q. Okay. And do you know what prompted that --
I'm sorry. Excuse me. Just keep on going.
A. Okay. So on page number 8, this screenshot here shows audit information verifying prompt payment from the prime and the sub. If you will take note where it says "data recorded" on the second row there, it says that the prime was paid by the State of New Mexico on 11/4/2016. That's when the prime would have the option to enter a date there. They entered 11/4 when the actual date was 10/6.
Q. And how do you know that was the actual date?
A. Because on the previous page -- actually, two pages forward, it tells me, on the updated data, when they were paid from the State of New Mexico, on 10/6.
That would be page 6. So it tells me there when they were paid. However, they have put in a date of 11/4, which is incorrect. The sub reported that they were paid on 10/31 of 2016, which obviously is very late. So that's how I know -- that's what prompted me to do an investigation.
Q. And so are the steps that you just described generally what you do to check SBGNOW?
A. Yes.
Q. Yes.
A. On page 9 --
Q. I don't want you to start with that yet. I have more questions on J-H Supply.
A. Oh, okay.
Q. After J-H wasn't promptly paid, what do you do after that?
A. What I like to do is I like to get a hold of the
1. sub and make sure that, you know — because sometimes

2. they subsequently put in things that change everything.

3. So before I do this, I like to do a little

4. investigation, a little work on my level, before it gets

5. even to Damian in Santa Fe. So, I like to call the sub,

6. know that, you know, the "no" on here, is the correct, and you

7. notify — for instance, I notified A of the

8. discrepancy, the "no," a non-conformance. And then I

9. would go after that and notify Damian Segura of the

10. non-conformance.

11. Q. So let's just look at Exhibit 24, you said you

12. called the sub to verify that they were not promptly

13. paid. So can you explain a little bit about what NWOC

14. Exhibit 24 is?

15. A. So I called Loreto. I — I got a better feel

16. on the phone and I got more personal that way and I

17. understand better. So I called Loreto on the phone,

18. and we had the discussion about the non payment

19. that was entered into the B2DB. And she stated

20. that — she was very firm that they were not paid within

21. the allotted seven days. So I asked her to please send

22. me an email to — so I would have paper trail of you

23. know our conversation and she did. She sent me an

24. email in November 17th, and I stated that with regards

25. to the request from AUI to change our answer in B2DB
Q. And what does that exhibit say?
A. This is a letter -- an email, actually, from Loretta Apodaca instructing me, "Sandra, after discussing this issue with Mr. Carl 'Bo' Simmons he did make the verbal agreement with AUI that J-H Supply would send payment for work on Project 6101018 after the project was complete. I apologize for any inconvenience this matter has caused. Thank you for your time and patience."

Q. What's the date of that email?
A. This date is December the 7th, 2016.

Q. And NMDOT had paid AUI for J-H's work on October 6th?
A. Yes.

Q. Did AUI call you and tell you that they had this agreement?
A. No.

Q. And they didn't tell you, obviously, originally when you had first contacted Loretta?
A. Right.

Q. Is it sufficient for a prime to delay payment based on a verbal agreement with its sub?
A. No.

Q. So I want to move to Gonzales Construction.
A. Yes.
A. Okay.

Q. When did you find out approximately that --
   actually, I think we're going to have to turn back to
   the B2GNow screenshots.

A. Okay. That would be NMDOT Exhibit Number 23,
   page 9.

Q. When did you find out approximately that AUI
   didn't promptly pay Gonzales?

A. In December.

Q. And did you follow the same process you did to
   evaluate B2GNow as you did with J-H?

A. Yes, I did.

Q. And can you just walk me through, starting on
   page 9, what those payments represent?

A. So on page 9A, this is the page where the
   information states -- it's an update payment data. This
   states when the NMDOT made payment to the prime. It
   states the date and amount so that we know it was a zero
   dollar pay estimate. However, they track it, and they
   implement the B2GNow, and this date was 11/3 of 2016.

Q. Okay.

A. So then we go to page 10. And the data report
   states that payment from the -- the prime reported
   payment from the State on 11/28/2016, but I know that
   that's not the case because on the previous page, it's

PAUL BACA PROFESSIONAL COURT REPORTERS
500 FOURTH STREET NW - SUITE 105, ALBUQUERQUE NM 87102
3:00. I think that's the time their break ends, and then we'll proceed, because I'm having trouble hearing everything with the noise.

Thank you.

(RECESS, 2:48 p.m. to 3:01 p.m.)

HEARING EXAMINER ANAYA: We're back on the record. It's 3:01.

Ms. Gonzales, if you'll proceed with the examination of Ms. Coats.

MS. GONZALEZ: Yes. Thank you, Hearing Officer. I only have a few.

I forgot my last question. Can you read that back to me?

(The court reporter complies.)

Q. (BY MS. GONZALEZ) So the SC 03, which is Exhibit 28, did you issue that after you found out Gonzales Construction was not promptly paid?

A. Yes.

Q. Did you take any further action with SC 03?

A. Yes.

Q. What did you do?

A. I notified Damian.

Q. And who is Damian?

A. Damian Segura is an NMDOT Department liaison.

Q. And when did you notify him?

A. I notified him on December the 19th.

Q. I understand that Eddie Gonzales, the project manager to AUI, used to work with DOT.

A. Yes.

Q. Did you ever work with him?

A. Yes.

Q. And in what capacity did you work with him?

A. He was the project manager. I was the office manager.

Q. And did you ever -- do you know if Mr. Gonzales existed at the time that he worked for the NMDOT?

A. Yes, he was.

Q. Did you ever tell AUI they could make payment to Gonzales Construction within 30 days?

A. No.

MS. GONZALEZ: I have no further questions for Ms. Coats.

CROSS-EXAMINATION

BY HEARING OFFICER ANAYA:

Q. Ms. Coats, you said that Eddie Gonzales was aware of the prompt payment requirements. Why do you say that?

A. Because we had the B2GNOW in place when he worked for the DOT.
Q. And was the -- was that program something he would have used in his employment with NMDOT?
A. Yes.

HEARING OFFICER ANAYA: Do you have any follow-up questions?
MS. GONZALES: No, but I would like to move in my exhibits for Ms. Coats. I would like to move starting with NMDOT Exhibit 23, NMDOT Exhibit 24, NMDOT Exhibit 25, NMDOT Exhibit 26, NMDOT Exhibit 27, NMDOT Exhibit 28, NMDOT Exhibit 29. And I believe that is it.

HEARING EXAMINER ANAYA: So NMDOT Exhibits 23 through 29?
MS. GONZALES: Correct.

HEARING OFFICER ANAYA: Any objections?
MR. CALVERT: No objection.
HEARING EXAMINER ANAYA: NMDOT Exhibits 23 through 29 will be admitted. (NMDOT Exhibit Numbers 23 through 29 are offered and admitted into evidence.)

MS. GONZALES: And I ask one other thing.

Q. If there are no further questions for Ms. Coats, may she be excused.

HEARING OFFICER ANAYA: She may be excused.

Thank you.

Mr. Thies, please proceed.

Page 116

MR. THIES: The Department would now call Mr. Damian Segura.

DAMIAN SEGURA,

after having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. THIES:
Q. Good afternoon, Mr. Segura.
A. Good afternoon.
Q. Could you please state your name and your position, what you currently do with the Department of Transportation?
A. My name is Damian Segura, and I am the compliance manager over the DBE Program and the Contractor Compliance Program for the NMDOT.
Q. Do your duties include issues associated with the contractor prompt payment?
A. Yes.
Q. Prompt payment, is that a state requirement or a federal requirement?
A. It's a federal requirement.
Q. You're familiar with the reasons we're here today?
A. Yes.
Q. And briefly, what's your understanding of the
Q. Do you use that particular document during your investigation of a prompt payment allegation?
A. I do.
Q. Can you describe how or why you use that document?
A. So I will use this document on doing a prompt payment investigation to determine what the subcontractor was required to do during the project. And I’ll identify that from the work items that are delineated in the -- in the Form 1086 during that review.
Q. And the work items, are they identified by number, or are they -- are they described?
A. They’re identified by both item and description.
Q. I want to turn back to a prior exhibit that was entered into the record, Department of Transportation Exhibit Number 1. Do you recognize that document?
A. I do.
Q. And can you describe that?
A. It is the notice to subcontractor update, which is verification for prompt payment provisions, clarification of good cause and prohibition of cross-project offsets.
Q. And this particular Notice to Contractor?
1. contains the date of November 26th, 2013?
2. A. Yes.
3. Q. Was this notice used in your review of this
4. matter?
5. A. It was.
6. Q. And what do you look for in this notice?
7. A. I look for what were the prompt payment
8. requirements for this particular project.
9. Q. And for this particular project, what was the
10. prompt payment requirement?
11. A. That the contractor be paid no less than seven
12. days after receiving Progress Payment from NMDOT.
13. Q. Does the notice contain a provision to excuse
14. prompt payment by a contractor or the subcontractor?
15. A. It says, "The ONLY good cause recognized by the
16. Department to excuse a payment beyond the timing set in
17. Section 108.1, paragraph 6, is a claim concerning the
18. Subcontractor's or Supplier's Work."
19. Q. What do you understand the claim to be?
20. A. The claim would be a dispute in quantities or
21. something to that effect.
22. Q. I'd like to direct your attention to Exhibit
23. Number 25 -- Department of Transportation Exhibit 25.
24. It consists of three pages. There is an email, and
25. there is a document and another email and a document --

PAUL BACA PROFESSIONAL COURT REPORTERS
500 FOURTH STREET NW - SUITE 105, ALBUQUERQUE NM 87102
hundreds of any kind of -- any corresponding emails or documents pertinent to the matter.

Q. Do you review payment estimates?
A. I don't.
Q. I'd like to direct your attention to what's been marked as Department of Transportation Exhibit 16.
Can you briefly look at that, and do you recognize the document?
A. The document here, I typically don't refer to.
Q. I'll refer to the documents that are estimates under the contracts, which are -- which begin -- I don't know -- on the seventh page.
Q. Did you use that document during the course of your investigation on the prompt payment allegation?
A. Yes. I used these documents.
Q. And what purpose do you use this document?
A. So what I'll do is I will look at the items that were accepted by the Department during that pay estimate period and see if the subcontractor completed and accepted work for those estimates.
Q. And in doing that, what do you look at in this particular item?
A. In this particular item, we'll look at the quantities -- excuse me -- the description of the work items. We'll also look at the quantity paid, and then

Q. Directing your attention to what's been marked as Department of Transportation Exhibit 19 --
A. Uh-huh.
Q. -- can you look at that document briefly?
A. Yes, sir.
Q. Do you recognize any portion of that exhibit?
A. I do. I recognize the -- I believe it's the seventh page of Exhibit 18 -- NMDOT Exhibit 18, which is Estimate Number 12, pay period 8/25/2016 to 9/25/2016.
Q. Did you use this exhibit in your investigation of the prompt payment allegation?
A. I did.
Q. Do you know what pay period this covers?
A. Estimate Number 12 is for the pay period August 25, 2016 to September 25th, 2016.
Q. And does this exhibit indicate what type of services were performed by NUI or one of the subcontractors during this period?
1. A. Yes.
2. Q. And where is that reflected?
3. A. It's reflected in the item numbers and then the quantities paid.
4. Q. Can you tell whether any of the services that were performed by J-H Supply were performed in this particular pay period?
5. A. Yes.
6. Q. And what were those services?
7. A. It is the single face with beam guardrail, the end treatment to end terminal, and the transition metal barrier to ridge barrier. Those are the descriptions in the item codes.
8. Q. Do you recall when approximately you first became aware of the prompt payment issue involving J-H Supply?
9. A. Yes. Approximately mid-November, I believe, Sandra Coats called me or emailed me with the particulars that they may have a prompt payment issue on this project.
10. Q. Now, I'll direct your attention to what's been marked as New Mexico Department of Transportation Exhibit 31. Do you recognize this document?
11. A. I do.
12. Q. And briefly, can you describe the document?
A. Uh-huh.
Q. Do you recognize it?
A. I do.
Q. Can you briefly describe what it is?
A. It's the B2GNow screenshot of the subcontractor response for this particular project for the audit time period of October 2016.
Q. And do you use that document during your investigation?
A. I will use documents like this during my investigation. Yes.
Q. What are you looking for in this document?
A. So in this document, on screenshots, we'll look for subcontractor response, whether or not they were paid promptly by the prime contractor.
Q. Can you elaborate on that particular answer?
A. So in the process of reviewing B2GNow -- the easiest way for a subcontractor to report they haven't been promptly paid is to mark in B2GNow, "No, I have not been promptly paid." This is reviewed by our project staff and periodically by our staff at CCRB, which is the Construction - Civil Rights Bureau in Santa Fe, which is the department I work in. If it's marked no, that's a flag right away that we need to go and investigate whether or not that sub was paid promptly.

Oftentimes, the project staff, as Sandra was alluding to, will do some of their own investigation. Sometimes they come directly to us and say, We haven't been paid; could you conduct an investigation?
Q. What are you looking for?
A. I'm looking for -- on this one, it looks like there was an edited payment response on behalf of the prime subcontractor per the attached emails.
Q. All right. And in general --
A. The first thing I would look for on this is are they -- is the prime -- did the prime pay the sub, and did the sub respond yes.
Q. Using that document, can you determine if it was paid within seven days?
A. Yes.
Q. And how would that be?
A. The payment date here is marked "10/31/2016."
Q. And does it indicate if the subcontractor received payment and when they received payment?
A. Yes, in B2GNow.
Q. Directing your attention to what's been marked as Department Exhibit Number 33, do you recognize that document?
A. I do.
Q. Can you describe it for us?
A. It is the final determination for no good cause
to failure to pay -- to promptly pay on this project.
Contract Number CN 61011008, in reference to J-H Supply
Company.
Q. Is that issued at the conclusion of your
investigation?
A. It is.
Q. And based on your investigation, what did you
determine?
A. I determined that AUI did not provide good
cause to not pay J-H for work performed and accepted in
the October audit frame and performed and accepted by
September 23rd in the estimate time frame.
Q. I want to go back to a prior exhibit, Exhibit
Number 32, the comments here.
A. Uh-huh.
Q. Why were those comments entered?
A. Those comments are entered, to the best of my
understanding, in the fact that -- that the prime and
subcontractor edited their original response to say that
they were indeed promptly paid or made an -- made an
arrangement to be paid at a later date.
Q. Okay. And based on your review, is an
agreement -- in your position and experience in the
CCR, is it your experience -- do you think a contractor
has a right to modify when they can pay a contractor --
subcontractor?
A. In my review, I review what work was performed
and accepted by the Department. Once it's reviewed and
accepted by the Department, it needs to be paid within
seven days of the issuance of the next Progress Payment.
That's what I review.
Q. Did you ever give AUI the opportunity to
explain why they had not made a payment within seven
days of receiving payment?
A. So prior to this letter, I would issue an
initial request letter to the prime contractor giving
them, typically, five business days to respond with
any -- one or two things, either evidence that they --
that the prime contractor paid the subcontractor within
the required time frame or good cause -- or evidence of
good cause of failure to promptly pay within the
seven-day prompt payment period.
Q. Do you recall, did AUI provide you with any
reasoning or explanation?
A. To the best of my recollection, I believe they
provided the documents that were referred to earlier in
the testimonies of Mr. Grover, the fact that they had a
previous agreement with the subcontractor to be paid
later on later work.
Q. Going back to Exhibit 34, do you know if that was a copy that was provided to AUI?
A. It is, yeah. It's issued -- so what I'll do is I'll issue a final determination letter to the Project Office, as typically the single point of contact between the prime contractor and the Department is the project manager. So I'll always issue final determination letters or any letters that I send through the project manager.

MR. THIES: That's all the questions I have.

HEARING EXAMINER ANAYA: I don't have any questions.

What exhibits will be moved through this witness?

MR. THIES: I would offer Department Exhibits 30 through 33.

HEARING EXAMINER ANAYA: Any objection?

MR. CALVERT: No objection.

HEARING EXAMINER ANAYA: So NMDOT Exhibits 30 through 33 will be admitted.

(QMDOT Exhibit Numbers 30 through 33 are offered and admitted into evidence.)

HEARING OFFICER ANAYA: And you may be excused. Thank you.
A. I did. I received an email from Damian Sagra on December 21st with the Corrective Action Report and -- what was the other information I received?
Q. Before we get into some of the other exhibits I’m going to have you review, we’ve heard a lot of references to B2GNow. Can you explain that for us?
A. B2GNow is a system we use to track and monitor DBE utilization for all contractors that are involved in federally funded projects with the State of New Mexico.
Q. The use of B2GNow by contractors and subcontractors, is that a contractual requirement?
A. It is.
Q. And what exactly does it involve? Do people enter data, dates, payments? What?
A. They do. It’s a Web-based site that contractors are required to log in to. And what they do is they input payments to their subcontractors, and the subcontractors can confirm payments and indicate whether they were paid promptly or not.
Q. So when you’re reviewing this program, what are you looking for with a prompt payment?
A. Well, we look first to see if the prime contractor was paid, and that’s usually via data from our accounting system that’s automatically recorded. So we have payment dates to the prime contractor, and then we check to see whether they paid their subcontractors on time, and we use the date that the prime contractor was paid to count whether they were paid within seven days or not. And we, of course, look at the responses to the prompt payment question.
Q. I’d like to direct your attention to what’s been marked as Department of Transportation Exhibit Number 34. Could you briefly review that exhibit?
A. So this looks like an email from Damian that he forwarded to me regarding the Gonzales prompt payment issue, along with the Corrective Action Report Number 3 that came from Sandra Coats.
Q. Let me find Corrective Action Number 3. Now, let’s turn to Department of Transportation Exhibit 28. It looks like there are two pages to the exhibit. Can you review that quickly?
A. Yes. It’s an email from Sandra Coats to Eddie and Jean-Marie. I believe it has -- I wasn’t copied on this one, but I believe this is where the Corrective Action Number 3 regarding the prompt payment was sent to Eddie Gonzales of AUI.
Q. Looking at page 2 of this exhibit, do you recognize that document?
Q. Is that the Corrective Action Report that you received that initially started your investigation?
A. Yes. This is the one I received.
Q. I would like to direct your attention to Exhibit Number 35. Do you recognize that document?
A. I do. It's a screenshot from B2GNow. It's the compliance audit, November 2016 audit period.
Q. Did you use this screenshot in the course of your investigation?
A. I did. This was one of the first pages that I went to in B2GNow to see whether or not the subcontractor had responded regarding the prompt payment when it indicated yes or no.
Q. Can you walk us through how you review this and what you determine after reviewing it?
A. So of course based on the corrective actions and emails we received, I look in those months, those audit periods. So this is 2015, which I can see what amount was paid, what information the prime contractor entered and, as far as dates, what date the contractor reportedly paid the sub and what date the subcontractor lists that they were actually paid or received a check. And then we check to see whether or not they were paid within seven days. And so in this case, it said "no."
Q. What does that no mean?
A. The no just means they didn't receive payment within seven days of the date that the prime contractor was paid.
Q. I'd like to direct your attention to what's marked as Department of Transportation Number 36. Do you recognize that --
A. It's an --
Q. -- document?
A. It's an --
Q. Can you describe it for us?
A. It's an email I -- I initiated to Kendra Gonzales-Watkins on Gonzales Construction. I was just trying to get a little more information regarding the matter. So I emailed her to see if she could provide an invoice so I could check dates and dollar amounts and see if they matched with the screenshots that we discussed prior to this, the screenshot of November 26, 2016 in B2GNow, to see if the amount Gonzales received matched what B2GNow states.
Q. And directing your attention to Department of Transportation Exhibit 37, can you describe that document for us?
1. It was just a follow-up to Kendra of Gonzales
2. Construction verifying the date that they received the
3. check. And so I was just verifying that Gonzales
4. received payment on 12/6 after being invoiced -- after
5. submitting an invoice to AUI dated 10/19, just to kind
6. of see what the gap was.
7. Q. Are there any additional documents for what you
8. use in your investigation?
9. A. I did. I drafted and forwarded a request to
10. AUI through Jayson Grover, the project manager, just for
11. any additional information that they may have or may
12. want me to consider in the investigation.
13. Q. Directing your attention to Exhibit 39, can you
14. describe that for us?
15. A. It's an email from Jayson Grover. It's an
16. attached response from AUI regarding this project,
17. 61011008, requesting a -- requesting a final
18. determination letter from our office so they could move
19. forward on the project.
20. Q. And page 2 -- it looks like there are several
21. pages here. I'll direct your specific attention to the
22. fourth page of the exhibit, a letter dated January 10th,
24. A. This is a letter to show good cause of failure
25. to pay the subcontractor, additional information as to

why they paid late and if there was a reason behind the
late payment that we could consider.
Q. Do you recall if they provided a reason for not
paying promptly?
A. It seemed to me that they were using the 30-day
payment and then they had a zero dollar estimate, so
they didn't think they had to pay.
Q. Based on your experience, does a zero dollar
estimate excuse the contractor from making prompt
payment?
A. No.
Q. Directing your attention now to Exhibit Number
40, do you recognize that?
A. I do. It's an email between myself and Lisa
Vega from District 6 and Jayson Grover and you as well.
Q. And you received that during the course of your
investigation?
A. I did. It was a request for the final
determination letter.
Q. Did you provide a final determination letter?
A. I did.
Q. Referring you to Exhibit Number 41, it's a
letter dated January 6 --
A. February 6.
Q. -- February 6th, 2017. Do you recognize that
HEARING OFFICER ANAYA: So NMDOT exhibits 34 through 41 will be admitted. (NMDOT Exhibit Number 34 through 41 are offered and admitted into evidence.)

MS. GONZALES: And, Your Honor, I would offer 42 -- I'm sorry -- 43 to be moved into the record. That was the objection -- the evidence. 42 was already moved in.

HEARING EXAMINER ANAYA: Correct. Any objection to NMDOT Exhibit 43?

MR. CALVERT: No objection.

HEARING OFFICER ANAYA: NMDOT Exhibit 43 will be admitted.

And you may be excused. Thank you. (NMDOT Exhibit Number 43 is offered and admitted into evidence.)

MR. THIES: At this time, we have no additional exhibits or testimony.

There is something I wish to address, though, in our closing summary.

HEARING OFFICER ANAYA: Let's discuss our closing. What I was hoping to do -- because there was some dense legal argument made during opening, I would prefer to have written closing. I would like to discuss with you the time frame for receipt of the closing. I
am proposing March 2nd. And if there is any objection
to that date, please feel free to let me know.

MS. GONZALES: I'm sorry, Hearing Officer.

HEARING OFFICER ANAYA: If you need a few
moments to discuss it, that's fine.

MR. THILLS: Before we go and discuss legal
arguments, we're going to be submitting -- Mr. Calvert
presented a lot of legal arguments that we weren't put
on notice by his original appeal, and he was throwing
out a lot of state statutes, judges' decisions.

Coincidentally, he admitted one decision that talks
about one of the state statutes that he referenced and
that's about the rulemaking authority of the Department
of Transportation where responsibility -- there is a
state statute, 67-3-43, which does allow the
Department -- grants the express authority to adopt
rules and regulations relating to its responsibility.

That issue was addressed in the First Judicial District,
and the judge concluded that the prequalification rule
was a valid exercise under the Department's statutory
authority.

But due to the -- some of the other issues
that Mr. Calvert raised, he failed to reference the
federal regulations and statutes. And because this is a
federally funded project, the Department has to comply
with the conditions, to receive that money, imposed on
it by the United States Department of Transportation.

There is a statute in the Procurement Code,
13-30, which, in a sense, allows an exception to
compliance with many provisions of the State Procurement
Code when the Department is obligated by federal law
regulations to follow those laws or regulations in
contracting for projects. If we comply with federal law
and regulations under that particular statute, 13-1330
[sic], the Department is deemed to have complied with
the State Procurement Code.

Again, we weren't on notice that these
issues were going to be addressed, and that's why we're
not able to adequately respond to those. Had we been
given notice of those particular issues, I know I would
have had one additional witness called to testify. And
that's -- I would like the opportunity to prepare some
written testimony from that witness and submit that for
the hearing officer's consideration. It goes to the
factors on some of the arbitrary and capacious arguments
that Mr. Calvert was making, that those need to be
standing on from a factual basis.

HEARING EXAMINER ANAYA: With that said, I
do not have a copy of the appeal letter. I would like
to have a copy of the appeal letter.
So, Mr. Calvert, if you can provide that to me, it would be much appreciated.

Now, if there is additional information that you would like me to consider -- I may just reverse the date I previously gave you for closing.

If there is any additional information, written testimony, other exhibits, I would ask that that information be provided to me by the close of business on March 2nd.

And then closing arguments, which I believe will address either why I should not consider arguments that were outside the appeal letter and, alternatively, the federal regulations you addressed, the interplay between that state law, DOT's obligation to follow federal regulations, within the closing, I would propose March 5th for written closing.

I would like those to be simultaneously submitted. I don't think there is a need to allow for AUI to first submit their closing and then NMDOT. I prefer they be submitted no later than the close of business March 5th.

Now, in terms of my decision, I will be receiving the transcript on or about March 5th, so I -- depending on what I receive, the amount of legal arguments, I'm looking at March 12th. I may be a little optimistic with that. I can't say at the moment, but right now, I am planning to have a decision by March 12th. I knew that's beyond the seven-day period, but given the circumstances and the fact that I will be receiving the transcript on or about March 5th, I think that is doable on my end.

MR. THIES: Those dates are acceptable -- acceptable to us.

I want to point out that a big issue on the Department's -- from the Department's perspective is, one of the reasons we wanted to get this hearing conducted as timely as possible is there is going to be a bid letting on March 9th. And under the prequal rule, while the appeal is pending, AUI gets to use their last year's prequal score. That potentially could put them at an advantage over other contractors submitting a bid on March 9th. It's foreseeable that we could get it challenged to an award of a project to AUI because we're using last year's score, and the other contractors are using the current-year score.

And that's why we're extremely prejudiced by being bushwhacked with all these legal arguments today, because based on the appeal, it was a very straight issue. As indicated in the appeal that J-R had an agreement that modified the Department's contract
HEARING EXAMINER ANAYA: I would need to see the appeal letter to even address that preliminary issue. If you have alternative dates and you want to push up the time frame, let me know. My concern is, though, with my receipt of the transcript. And I can ask for an expedited transcript. I don't know that that's within the budget, and that's another concern.

MS. GONZALES: I think that if we did get -- because the DOT would like to see the transcript as well because Mr. Calvert's argument were made primarily in his opening statement. And so he cited some cases in those arguments and alluded to multiple things. So it would be helpful to have that transcript, from the DOT's perspective, before we submit to you on March 5th our closing. So I would -- I would propose if we could get the transcript in a week, by February 28th.

HEARING OFFICER ANAYA: Is that doable?

(Discussion off the record with the court reporter.)

MS. GONZALES: Okay. I think that's fine.

HEARING OFFICER ANAYA: That would be February 26.

MR. THIES: We're talking next Monday?

MS. GONZALES: Yes.

HEARING EXAMINER ANAYA: And so with that, Ms. Gonzales, will that give you sufficient time, until --

MS. GONZALES: Yes.

HEARING EXAMINER ANAYA: -- through March 5th to provide whatever additional documents and the closing statement?

MS. GONZALES: Yes, I believe so.

HEARING OFFICER ANAYA: Mr. Calvert, do those proposed dates work for you?

MR. CALVERT: I believe those dates should work.

I would note that we didn't have the benefits, sort of like my opening, of their argument to you until we arrived here this morning. Similarly, it's the exact same arguments as to the authority for why these statutes -- why they can do this. I did not
raise, because I didn't know the Department was going to raise, the federal prompt pay under 29 -- 4926 [sic]. I would like to address that as an additional basis of why the prequel rule and contract are invalid and contrary to law.

HEARING EXAMINER ANAYA: All right. So we will have the transcript on February 26th. I will have any additional information, documents, testimony by close of the business March 2nd, and written closing by the close of business on March 5th. The record will close at 5:00 p.m. on March 5th.

Anything else, Mr. Calvert?

MR. CALVERT: Nothing else.

HEARING OFFICER ANAYA: Mr. Thies?

Ms. Gonzales?

MS. GONZALES: No, nothing further.

HEARING EXAMINER ANAYA: We will go off the record, 3:48. Thank you.

MS. GONZALES: Thank you. (The proceedings conclude, 3:48 p.m.)

---

1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO
3
4 CERTIFICATE OF COURT REPORTER
5 I, MARY C. HANKINS, Certified Court Reporter, New Mexico Certified Court Reporter No. 20, and Registered Professional Reporter, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings that were reduced to printed form by me to the best of my ability.

I FURTHER CERTIFY that the Reporter's Record of the proceedings truly and accurately reflects the exhibits, if any, offered by the respective parties. I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.

DATED THIS 26th day of February 2018.

MARY C. HANKINS, CCR, RPR
Certified Court Reporter
New Mexico CCR No. 20
Date of CCR Expiration: 12/31/2018
Paul Baca Professional Court Reporters
<table>
<thead>
<tr>
<th>STATE OF NEW MEXICO</th>
</tr>
</thead>
<tbody>
<tr>
<td>COUNTY OF BERNALILLO</td>
</tr>
</tbody>
</table>

**CERTIFICATE OF COURT REPORTER**

L. MARIE C. HANKINS, CCR, RPR, Certified Court Reporter, New Mexico Certified Court Reporter No. 20, and Registered Professional Reporter, hereby certify that I reported the foregoing proceedings in the foregoing shorthand and that the foregoing pages are a true and correct transcript of those proceedings that were reduced to printed form by me to the best of my ability.

I, FURTHER, CERTIFY that the Reporter's Record of the proceedings truly and accurately reflects the exhibits, if any, offered by the respective parties.

I, FURTHER, CERTIFY that I am not employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.

DATED THIS 20th day of January 2014.

[Signature]

Mary C. Hankins, CCR, RPR
Certified Court Reporter
New Mexico CCR No. 20
Date of CCR registration: 12/21/2010
Paul Baca Professional Court Reporters

PAUL BACA PROFESSIONAL COURT REPORTERS
500 FOURTH STREET NW - SUITE 105, ALBUQUERQUE NM 87102
From: Edith Gonzales
Sent: Thursday, November 17, 2016 4:04 PM
To: Jean-Marie Bridge
Subject: FYI - REVISED INVOICE

FYI
Edith Gonzales
Project Manager

From: Loretta Apodaca [mailto:lo7876@yahoo.com]
Sent: Monday, October 27, 2016 12:27 PM
To: Edith Gonzales
Subject: REVISED INVOICE

ATTACHED IS THE REVISED INVOICE FOR THE WORK THAT WAS PERFORMED ON NMDOT PROJECT 6101100. SHOULD YOU HAVE NEED OF ANY ADDITIONAL INFORMATION PLEASE LET ME KNOW...

MAY YOU ENJOY A PEACEFUL AND BLESSED DAY....

Kind Regards,
Loretta L. Apodaca
JH Supply Company, LP
505.344.0526

---

Invoices

<table>
<thead>
<tr>
<th>Project ID</th>
<th>P.O. No.</th>
<th>Terms</th>
<th>Net To</th>
<th>Project</th>
</tr>
</thead>
<tbody>
<tr>
<td>CMH-6101100</td>
<td>6101100-1</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Est Qty</th>
<th>Prior Qty</th>
<th>Qty</th>
<th>UOM</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>6101100</td>
<td>METAL BARRIER W-BEAM</td>
<td>2.400</td>
<td>2.400</td>
<td>LF</td>
<td>32.70</td>
<td>77,877.85</td>
<td></td>
</tr>
<tr>
<td>6101100</td>
<td>METAL BARRIER END</td>
<td>3</td>
<td>3</td>
<td>EA</td>
<td>1,025.00</td>
<td>3,075.00</td>
<td></td>
</tr>
<tr>
<td>6101100</td>
<td>TREATMENT TYPE 1, T-3</td>
<td>6</td>
<td>6</td>
<td>EA</td>
<td>3,000.00</td>
<td>18,000.00</td>
<td></td>
</tr>
<tr>
<td>6101100</td>
<td>METAL BARRIER R-NAGED BARRIER</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6101100</td>
<td>REMOVAL OF EXISTING RAIL</td>
<td>1.876</td>
<td>0</td>
<td>1.876</td>
<td>0.00</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Subtotal $88,712.85
Sales Tax (7.3125%) $2,000
Total $90,712.85

---

EXHIBIT 1
## Invoice Details

**Project ID** | **P.O. No.** | **Terms** | **Project**
---|---|---|---
CMB 610100 | CIBOLA-1-40 | Net 10 | AUI8101200-15

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Est. Qty</th>
<th>Prior Qty</th>
<th>QTY</th>
<th>UOM</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>000005</td>
<td>METAL BARRIER W/GEAR</td>
<td>2,400</td>
<td>0</td>
<td>2,400.0</td>
<td>LF</td>
<td>15.72</td>
<td>37,687.84</td>
</tr>
<tr>
<td>600001</td>
<td>METAL BARRIER END TREATMENTS, TYPE 1, TL=3</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>EA</td>
<td>4,050.0</td>
<td>12,150.0</td>
</tr>
<tr>
<td>999999</td>
<td>METAL BARRIER R RUGGED BARRIER</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
<td>0.00</td>
<td></td>
</tr>
<tr>
<td>999999</td>
<td>REMOVAL OF EXISTING RAIL</td>
<td>1,975</td>
<td>0</td>
<td>0</td>
<td></td>
<td>0.00</td>
<td></td>
</tr>
</tbody>
</table>

**Subtotal**: $18,712.85

**Sales Tax (7.3125%)**: $0.00

**Total**: $18,712.85

---

## Invoice Details

**Project ID** | **P.O. No.** | **Terms** | **Project**
---|---|---|---
CMB 610100 | CIBOLA-1-40 | Net 10 | AUI8101200-15

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Est. Qty</th>
<th>Prior Qty</th>
<th>QTY</th>
<th>UOM</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>000005</td>
<td>METAL BARRIER W/GEAR</td>
<td>2,400</td>
<td>0</td>
<td>2,197.2</td>
<td>LF</td>
<td>15.72</td>
<td>35,668.76</td>
</tr>
<tr>
<td>600001</td>
<td>METAL BARRIER END TREATMENTS, TYPE 1, TL=3</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>EA</td>
<td>4,590.0</td>
<td>13,770.0</td>
</tr>
<tr>
<td>999999</td>
<td>METAL BARRIER R RUGGED BARRIER</td>
<td>5</td>
<td>0</td>
<td>5</td>
<td></td>
<td>3,000.00</td>
<td>12,000.00</td>
</tr>
<tr>
<td>999999</td>
<td>REMOVAL OF EXISTING RAIL</td>
<td>1,975</td>
<td>0</td>
<td>0</td>
<td></td>
<td>0.00</td>
<td></td>
</tr>
</tbody>
</table>

**Subtotal**: $552,077.50

**Sales Tax (7.3125%)**: $0.00

**Total**: $552,077.50
## Estimate Summary to Contractor

### Project Number: $511138R$

<table>
<thead>
<tr>
<th>Task Number</th>
<th>Task Description</th>
<th>Unit Price</th>
<th>Qty</th>
<th>Value</th>
<th>Quantity</th>
<th>Cumulative Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>0020</td>
<td>UNCLASSIFIED EXCAVATION</td>
<td>$ 7.70</td>
<td>1.00</td>
<td>$ 7.70</td>
<td>1.00</td>
<td>$ 7.70</td>
</tr>
<tr>
<td>0030</td>
<td>BASE BLOW</td>
<td>$ 9.00</td>
<td>1.00</td>
<td>$ 9.00</td>
<td>1.00</td>
<td>$ 9.00</td>
</tr>
<tr>
<td>0040</td>
<td>BASE BLOW</td>
<td>$ 10.00</td>
<td>1.00</td>
<td>$ 10.00</td>
<td>1.00</td>
<td>$ 10.00</td>
</tr>
<tr>
<td>0050</td>
<td>BASE BLOW</td>
<td>$ 11.00</td>
<td>1.00</td>
<td>$ 11.00</td>
<td>1.00</td>
<td>$ 11.00</td>
</tr>
</tbody>
</table>

### Notes:
- Amendments:
  - Amend 1: 01/02/2016
  - Amend 2: 01/03/2016
- Additional Notes:
  - Project Manager: [Name]
  - Date: 01/04/2016

---

**File Information:**
- File Path: C:\Users\jgrov01\AppData\Local\Temp\91\qpy9277.htm
- Date: 09/26/2016
## Estimate Summary to Contractor

**NEW MEXICO DEPARTMENT OF TRANSPORTATION**

**Estimate Summary to Contractor**

Vendor ID: 514962
Vendor Name: ALE, Inc.
Estimate Number 2019

<table>
<thead>
<tr>
<th>Contract ID: 40114100R</th>
<th>Pop Period: 05/01/2016 to 09/30/2016</th>
</tr>
</thead>
</table>

**Contract Location:**
- L4, JBP 91,105 to 941,110 for 5000 ft.

**Contractor:**
- ALE, Inc.
- PO Box 8021
- Albuquerque, NM 87191-5803
- Phone: (505) 294-8818

**Receiver Agent:**
- Receiver: CTR
- Release Order: NO

**Subcontractor:**
- CTR

**Enclosure:**
- Contract

**Project Number:** 40114100

<table>
<thead>
<tr>
<th>Description</th>
<th>Original Contract Amount</th>
<th>Contract Amount</th>
<th>Percent Complete</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$3,205,498.13</td>
<td>$3,205,498.13</td>
<td>100%</td>
</tr>
</tbody>
</table>

**Total in Dollars:**

<table>
<thead>
<tr>
<th>Total in Dollars</th>
<th>Free of Dollars</th>
<th>Total Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>$3,205,498.13</td>
<td>$3,205,498.13</td>
<td></td>
</tr>
</tbody>
</table>

**Project Number:** 40114100R

<table>
<thead>
<tr>
<th>Description</th>
<th>Line Item Number</th>
<th>Item Code / Description</th>
<th>Unit Price</th>
<th>Qty/Unit</th>
<th>Unit Cost</th>
<th>Total Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>0301-0111</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>OPEN GRADED FRICTION COURSE COMPLETE</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0101</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>COLD MILLING (ASPHALT)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0102</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>CEMENTED MULCH SOILS</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0103</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>SINGLEFACE WIRE WREATH GUARDWALL</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0104</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>ENDTREATMENT T-L &amp; END TERMINAL</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0105</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>TRANSITION METAL BARRIER TO RUBB-BARRIER</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0106</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>CONCRETE WALL DAMPER-40</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0107</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>HUMBLE STRIP</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0108</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>CLAY SEEDING</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0301-0109</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>CLASS C MIRAGING</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0302-0101</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>EXCAVATION AND BACKFILL FOR MAJOR STRUCTURES</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0302-0102</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>RESURFACING BARS GRADE 6</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0302-0103</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>ASPHALT CLASS II</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0302-0104</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>UTILITY MILE DRAPE</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0302-0105</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>HOT THERMOPLASTIC PAVEMENT MARKINGS</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0302-0106</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>TRAFFIC CONTROL MANAGEMENT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Approving Authority:**
- Project Manager: [Signature]
- Date: [Signature Date]

**EXHIBIT**

file://C:/Users/groo01/AppData/Local/Temp/118/qpy8906.htm

10/27/2016

file://C:/Users/groo01/AppData/Local/Temp/118/qpy8906.htm

10/27/2016
LETTER OF TRANSMITTAL

TO: J&H Supply Co.
    2132 Osuna NE, Ste. A
    Albuquerque, NM 87118

DATE: October 27, 2016

ATTN:

WE ARE SENDING YOU THE ATTACHED VIA:

TO: Eddie Gonzales
    Project Manager

7420 Reading Ave. SE
    Albuquerque, NM 87106

RE: I-40 Culvert Replacement, MP 91,000 to 96,100, Cibola County

| COPY | SHEET | PAGE | PAYMENTS
|------|-------|------|------------|
| 1    | 2016  | 1    | 1234567890

PAY ESTIMATE #1

Thank you Carl.

It is my understanding that my office manager has been unable to get ahold of Loretta to make the changes to B2GNow. It would appear the issue has been resolved.

Thank you,

JAYSON L. GROVER

NMDOT District 6 Project Manager
Grants Project Office 1
Phone: 505-285-6867
Cell: 505-285-8145

EXHIBIT 4

EXHIBIT 5
From: thscpgdc@gmail.com [mailto:thscpgdc@gmail.com]
Sent: Wednesday, November 30, 2016 1:59 PM
To: Eddie@Gallina.net; Grover, Jayson; NMDOT; Martinez, James M.; NMDOT
Cc: Gonzales, David D.; NMDOT; Coes, Sandra; NMDOT; Vega, Lisa; NMDOT; Burros, Octavio; NMDOT; Lopez, Brandon; NMDOT; Patrick@Gallina.net; han@lkhale.com; caw3251@gmail.com; gailegros@gmail.com; nmdot@tiga.com; calderon@tiga.com; eddie@mmklein.com; eddie@Gallina.net
Subject: RE: 6101100R Notice of Non-Conformance

Eddie,

I have reviewed the issue concerning the Non-Conformance, and would like to offer the following solution.

J-H Supply re-submitted our invoice to AUI on 10-17-2016. The re-submitted invoice was received on 10-27-2016. That being the case, we were paid within the allowable time period per B2Gnow, and there should not be a Non-Conformance issued concerning this payment.

I will have Loreta make the changes to B2Gnow indicating prompt payment, or this letter will be my authorization for the NMDOT to make the change to speed up the process.

If you have any questions, or require any additional information, please contact me.

Thanks,

Carl (Bo) Simmons
VP J-H Supply Co. Inc.

--- Original Message ---

From: Eddie Gonzales <EddieG@Gallina.net>
To: Grover, Jayson; NMDOT; NMDOT <Jayson.Grover@state.nm.us>; Martinez, James M.; NMDOT; NMDOT <James.Martinez@state.nm.us>
Cc: Gonzales, David D.; NMDOT; Coes, Sandra; NMDOT; Vega, Lisa; NMDOT; Burros, Octavio; NMDOT; Lopez, Brandon; NMDOT; Patrick@Gallina.net; han@lkhale.com; caw3251@gmail.com; gailegros@gmail.com; nmdot@tiga.com; calderon@tiga.com; eddie@mmklein.com; eddie@Gallina.net
Subject: 6101100R Notice of Non-Conformance

Eddie,

See the attached letter regarding Prompt Payment issues on CN 6101100R.

Jayson L. Grover
NMDOT District 6 Project Manager
Grants Project Office 1
Office: 505-285-6867
Cell: 505-285-8145

Loretta, if you can please contact Mr. Grover and retract your stance on the original invoice and correct your answer on B2Gnow that would clear up all of this confusion.

If anyone should have any questions please feel free to contact me and I will be glad to help in sorting things out.

Thank you all,

Eddie Gonzales
Project Manager

7410 Reading Ave. SE
Albuquerque, NM 87105
Ph: (505) 284-2231; Fax (505) 898-5322
Email: eddie@Gallina.net

From: Grover, Jayson; NMDOT [mailto:Jayson.Grover@state.nm.us]
Sent: Monday, November 28, 2016 12:47 PM
To: Eddie Gonzales; Martinez, James M.; NMDOT
Cc: Gonzales, David D.; NMDOT; Coes, Sandra; NMDOT; Vega, Lisa; NMDOT; Burros, Octavio; NMDOT; Grover, Jayson; NMDOT; Lopez, Brandon; NMDOT
Subject: 6101100R Notice of Non-Conformance

Jayson,

I have attached the revised invoice from the email dated 10-17-16 sent to me from Loreta (JJ) even though the date stayed the same on the invoice as claimed by Loreta (JJ) 9-30-16. It was revised to include all of the end sections and some additional rail that was missed on the original invoice. I am also confused on the non-conformance because I signed the estimate on 10-27-16 and that is the day we delivered the check to JJ for payment also included in your nonconformance letter. Even though I was a zero dollar estimate I would think that we would have had 7 days of when you approve it since I don't have that info (zero dollar estimate) I would assume that you would have start the allowed 7 days after your approval. So what I'm getting at is I feel that all of the requirements were meet with the notice of Non Conformance that is being assessed and would like to have this removed from our record for Prequalification as stated in your letter.
## Invoice

Gonzales Construction
P.O. Box 1468
Dolores, CO 81323
970-824-2410
lagonzales@gmail.com

### Project No.
CHS101101

### Bill To
AIE Inc.
P.O. Box 4928
Albuquerque, NM 87119-4928

### Project Name:
S-400 Cabinet Replacement

### Quantity | Description | UOM | Rate  | Amount  |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>3.750</td>
<td>Double Step</td>
<td>C</td>
<td>2.50</td>
<td>9.3750</td>
</tr>
</tbody>
</table>

**2018**

<table>
<thead>
<tr>
<th>VEN. #</th>
<th>JOB #</th>
<th>PHASE #</th>
<th>COST CODE</th>
<th>COST TYPE</th>
<th>PC #</th>
<th>AP #</th>
<th>COMP #</th>
<th>APPR.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**ENTERED OCT 3 1 2018**

Please remit to above address.

Total: $10,312.00

---

**TLPAs DO NOT USE THIS PAGE**

---

**EXHIBIT Z**
<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>PERMIT NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>FM Solutions, LLC</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>05/20/2018</td>
<td>05/19/2019</td>
<td>162882021</td>
</tr>
<tr>
<td>A &amp; A Drilling &amp; Blast, Inc.</td>
<td>Bisbee, AZ</td>
<td>85601</td>
<td>04/20/2017</td>
<td>04/19/2018</td>
<td>161852201</td>
</tr>
<tr>
<td>A &amp; A Painting, LLC</td>
<td>Cannelton, OH</td>
<td>44401</td>
<td>03/20/2017</td>
<td>03/20/2017</td>
<td>161022201</td>
</tr>
<tr>
<td>A &amp; S Construction Company</td>
<td>Denver, CO</td>
<td>80210</td>
<td>02/13/2017</td>
<td>02/12/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>A &amp; B Inc.</td>
<td>El Paso, TX</td>
<td>79930</td>
<td>03/20/2017</td>
<td>03/19/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>A &amp; H Construction, LLC</td>
<td>Las Cruces, NM</td>
<td>88001</td>
<td>04/18/2017</td>
<td>04/17/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>AAC Construction, LLC</td>
<td>Santa Fe, NM</td>
<td>87501</td>
<td>03/20/2018</td>
<td>03/20/2019</td>
<td>161022201</td>
</tr>
<tr>
<td>AHC Corporation, Inc.</td>
<td>Farmington, NM</td>
<td>87501</td>
<td>04/20/2017</td>
<td>04/21/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>ABC Construction, Inc.</td>
<td>Denver, CO</td>
<td>80222</td>
<td>03/20/2017</td>
<td>03/21/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>AC &amp; Co. Construction, Inc.</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>03/20/2017</td>
<td>03/21/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>AC &amp; Company, LLC</td>
<td>Rio, NM</td>
<td>88122</td>
<td>06/12/2017</td>
<td>06/12/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Access Limited Construction</td>
<td>Clovis, GA</td>
<td>88101</td>
<td>06/12/2017</td>
<td>06/12/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Ace J. Muthman</td>
<td>Raton, NM</td>
<td>87740</td>
<td>03/20/2017</td>
<td>03/21/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Adan-Gardner Construction, LLC</td>
<td>Chandler, AZ</td>
<td>85225</td>
<td>03/20/2017</td>
<td>03/21/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>A Care of New Mexico, Inc.</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>10/16/2017</td>
<td>10/15/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Aiken Construction Services, Inc.</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>03/20/2017</td>
<td>03/21/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Advanced Testing &amp; Materials, Inc.</td>
<td>Las Cruces, NM</td>
<td>88001</td>
<td>10/16/2017</td>
<td>10/15/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Advantage Baritone &amp; Redman, LLC</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>04/20/2017</td>
<td>04/20/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Advantage Drilling, LLC</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>06/20/2017</td>
<td>06/20/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>ARCO Wholesale &amp;女儿, Inc.</td>
<td>Green River, WY</td>
<td>82901</td>
<td>03/20/2017</td>
<td>03/21/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Armada North American, Inc.</td>
<td>Las Cruces, NM</td>
<td>88001</td>
<td>04/20/2017</td>
<td>04/21/2018</td>
<td>161022201</td>
</tr>
<tr>
<td>Albuquerque Airehoff, Inc.</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>04/20/2017</td>
<td>04/21/2018</td>
<td>161022201</td>
</tr>
</tbody>
</table>

*Activity permit holder shall immediately begin corrective action to eliminate the violation.*

**EXHIBIT A**

*All other Mustangs Permits are valid for a term of 120 days.*
<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>PDRA-MA Dealings/Prequalification Factor &amp; Rating.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albuquerque Regional Blasting, Inc.</td>
<td>Albuquerque, NM</td>
<td>87105</td>
<td>87100</td>
<td>4/12/2017</td>
<td>3/10/2018</td>
</tr>
<tr>
<td>Alcan Land Surveying, Inc.</td>
<td>Albuquerque, NM</td>
<td>87106</td>
<td>87100</td>
<td>4/14/2017</td>
<td>4/12/2018</td>
</tr>
<tr>
<td>Alvis Traffic Control, Inc.</td>
<td>El Paso, CO</td>
<td>79901</td>
<td>81201</td>
<td>8/2/2018</td>
<td></td>
</tr>
<tr>
<td>Alpha Milling Company, Inc.</td>
<td>Alamosa, CO</td>
<td>81610</td>
<td>81610</td>
<td>10/1/2017</td>
<td>9/30/2018</td>
</tr>
<tr>
<td>Alpha Parking &amp; Construction Company, Inc.</td>
<td>Aurora, CO</td>
<td>80017</td>
<td>80017</td>
<td>1/25/2017</td>
<td>1/24/2019</td>
</tr>
<tr>
<td>American Civil Constructors West Coast, LLC</td>
<td>Las Vegas, NV</td>
<td>89107</td>
<td>89107</td>
<td>11/2/2017</td>
<td>11/1/2018</td>
</tr>
<tr>
<td>American Geosynthetic Solutions, LLC</td>
<td>Denver, CO</td>
<td>80220</td>
<td>80220</td>
<td>3/1/2017</td>
<td>2/28/2019</td>
</tr>
<tr>
<td>American Truck Systems, LLC</td>
<td>Fort Worth, TX</td>
<td>76107</td>
<td>76107</td>
<td>9/1/2017</td>
<td>8/31/2019</td>
</tr>
<tr>
<td>Amtec Construction, Inc.</td>
<td>Portland, OR</td>
<td>97223</td>
<td>97223</td>
<td>12/1/2017</td>
<td>12/31/2018</td>
</tr>
<tr>
<td>AVCONCO LLC dba BBI Surveying</td>
<td>Chicago, IL</td>
<td>60034</td>
<td>60034</td>
<td>3/2/2016</td>
<td>3/31/2018</td>
</tr>
<tr>
<td>Anderson Drilling, Inc.</td>
<td>Commerce City, CO</td>
<td>70025</td>
<td>70025</td>
<td>7/12/2017</td>
<td>7/11/2018</td>
</tr>
<tr>
<td>Arizona Environmental Services, LLC</td>
<td>Phoenix, NM</td>
<td>85011</td>
<td>85011</td>
<td>4/2/2017</td>
<td></td>
</tr>
<tr>
<td>Apache Construction Co., the Valley Forge Co.</td>
<td>Albuquerque, NM</td>
<td>87106</td>
<td>87106</td>
<td>10/31/2017</td>
<td>10/30/2018</td>
</tr>
<tr>
<td>ASP Southern Construction Company, LLC</td>
<td>Salt Lake City, UT</td>
<td>84109</td>
<td>84109</td>
<td>11/2/2017</td>
<td>11/1/2018</td>
</tr>
<tr>
<td>Armor Constructions, LLC</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>87107</td>
<td>7/16/2016</td>
<td>7/15/2017</td>
</tr>
<tr>
<td>Associated Technologies, Inc.</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>87104</td>
<td>7/4/2016</td>
<td></td>
</tr>
<tr>
<td>AUL, Inc.</td>
<td>Albuquerque, NM</td>
<td>87103</td>
<td>87103</td>
<td>8/24/2016</td>
<td>8/23/2017</td>
</tr>
<tr>
<td>Avanti Gardens, Inc.</td>
<td>Santa Fe, NM</td>
<td>87504</td>
<td>87504</td>
<td>8/27/2017</td>
<td>8/26/2018</td>
</tr>
<tr>
<td>B &amp; M Concrete Pumping, LLC</td>
<td>Carlsbad, NM</td>
<td>88025</td>
<td>88025</td>
<td>8/23/2017</td>
<td>8/22/2018</td>
</tr>
<tr>
<td>Badger Deflecting Corp.</td>
<td>Bloomfield, NM</td>
<td>88013</td>
<td>88013</td>
<td>9/20/2016</td>
<td>9/19/2017</td>
</tr>
<tr>
<td>Bahn Construction, LLC</td>
<td>Huron City, TX</td>
<td>74743</td>
<td>74743</td>
<td>4/10/2017</td>
<td>4/9/2018</td>
</tr>
</tbody>
</table>

*All other PDRA-MA Dealings/Prequalifiers have reached a score of 1.0.
<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>P Farr Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapa-Velasquez, Inc.</td>
<td>Albuquerque, NM</td>
<td>87104</td>
<td>12/19/2017</td>
<td>12/19/2018</td>
<td></td>
</tr>
<tr>
<td>Cobb, Pender &amp; Associates, Inc.</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>05/06/2017</td>
<td>05/06/2018</td>
<td></td>
</tr>
<tr>
<td>Castle Constructors, LLC</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>07/11/2017</td>
<td>07/11/2018</td>
<td></td>
</tr>
<tr>
<td>Compass Engineering &amp; Construction Services, LLC</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>10/24/2017</td>
<td>10/24/2018</td>
<td></td>
</tr>
<tr>
<td>Comanche Aggregates &amp; Asphalt Trucking</td>
<td>Las Vegas, NV</td>
<td>78135</td>
<td>06/20/2017</td>
<td>06/20/2018</td>
<td></td>
</tr>
<tr>
<td>Coates Inc</td>
<td>Las Cruces, NM</td>
<td>88007</td>
<td>06/04/2017</td>
<td>06/04/2018</td>
<td></td>
</tr>
<tr>
<td>ConQuest Corporation</td>
<td>Albuquerque, NM</td>
<td>87102</td>
<td>06/28/2017</td>
<td>06/28/2018</td>
<td></td>
</tr>
<tr>
<td>Construction Services</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>07/12/2017</td>
<td>07/12/2018</td>
<td></td>
</tr>
<tr>
<td>Constructors, Inc.</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>06/04/2017</td>
<td>06/04/2018</td>
<td></td>
</tr>
<tr>
<td>Craig &amp; Craigson, Inc.</td>
<td>Pueblo, CO</td>
<td>81002</td>
<td>07/12/2017</td>
<td>07/12/2018</td>
<td></td>
</tr>
<tr>
<td>Doughty-Kaywood, Inc.</td>
<td>St. George, UT</td>
<td>84704</td>
<td>07/12/2017</td>
<td>07/12/2018</td>
<td></td>
</tr>
<tr>
<td>Doughty Company, Inc.</td>
<td>Albuquerque, NM</td>
<td>87110</td>
<td>05/03/2017</td>
<td>05/03/2018</td>
<td></td>
</tr>
<tr>
<td>CPP Engineering, Inc.</td>
<td>Highlands Ranch, CO</td>
<td>80126</td>
<td>05/28/2017</td>
<td>05/28/2018</td>
<td></td>
</tr>
<tr>
<td>Cressey Parking &amp; Maintenance</td>
<td>Las Vegas, NM</td>
<td>89129</td>
<td>05/28/2017</td>
<td>05/28/2018</td>
<td></td>
</tr>
<tr>
<td>Cross Construction, Inc.</td>
<td>Sandy, CO</td>
<td>84704</td>
<td>07/12/2017</td>
<td>07/12/2018</td>
<td></td>
</tr>
<tr>
<td>CS Acquisition Company, LLC dbi Online Services, Inc.</td>
<td>Albuquerque, NM</td>
<td>87105</td>
<td>06/03/2017</td>
<td>06/03/2018</td>
<td></td>
</tr>
<tr>
<td>CS-Oberholtzer Services, Inc.</td>
<td>Roswell, NM</td>
<td>87201</td>
<td>05/28/2017</td>
<td>05/28/2018</td>
<td></td>
</tr>
<tr>
<td>CS-Oberholtzer Services, Inc.</td>
<td>Roswell, NM</td>
<td>87201</td>
<td>05/28/2017</td>
<td>05/28/2018</td>
<td></td>
</tr>
<tr>
<td>CSM Construction, Inc.</td>
<td>Scottsdale, AZ</td>
<td>85251</td>
<td>06/08/2017</td>
<td>06/08/2018</td>
<td></td>
</tr>
<tr>
<td>CTC, Inc</td>
<td>Fort Worth, TX</td>
<td>76116</td>
<td>02/25/2017</td>
<td>02/25/2018</td>
<td></td>
</tr>
<tr>
<td>Custom Grazing Inc</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>05/03/2017</td>
<td>05/03/2018</td>
<td></td>
</tr>
<tr>
<td>Cutter Repair, Inc.</td>
<td>Laramie, WY</td>
<td>82070</td>
<td>05/03/2017</td>
<td>05/03/2018</td>
<td></td>
</tr>
<tr>
<td>D E Ready Mix, Inc.</td>
<td>Santa Fe, NM</td>
<td>87501</td>
<td>07/12/2017</td>
<td>07/12/2018</td>
<td></td>
</tr>
</tbody>
</table>

**PFA-Farr Farr Construction's Prequalification Factor rating average.**

**All entities that were evaluated or reevaluated have a score of 3.00**
<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>PERIOD 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richardson Farms, LLC</td>
<td>Albuquerque, NM</td>
<td>87102</td>
<td>1/18/2017</td>
<td>1/18/2018</td>
<td></td>
</tr>
<tr>
<td>Geal Bros., Inc.</td>
<td>Hobbs, NM</td>
<td>88240</td>
<td>3/6/2017</td>
<td>3/6/2018</td>
<td></td>
</tr>
<tr>
<td>Papin Asphalt Sealing, LLC</td>
<td>Pueb, NM</td>
<td>84167</td>
<td>9/23/2017</td>
<td>9/23/2018</td>
<td></td>
</tr>
<tr>
<td>Paines &amp; Company, LLC</td>
<td>Albuquerque, NM</td>
<td>87120</td>
<td>5/18/2017</td>
<td>5/17/2018</td>
<td></td>
</tr>
<tr>
<td>Fila Construction, LLC</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>3/28/2017</td>
<td>3/28/2018</td>
<td></td>
</tr>
<tr>
<td>Fisher Sand &amp; Gravel, New Mexico Inc.</td>
<td>Pueblo, NM</td>
<td>87002</td>
<td>3/14/2017</td>
<td>3/14/2018</td>
<td>0.827</td>
</tr>
<tr>
<td>Pameo Inc.</td>
<td>Alamosa, CO</td>
<td>81104</td>
<td>4/18/2017</td>
<td>4/17/2018</td>
<td></td>
</tr>
<tr>
<td>R.D. Construction, Inc.</td>
<td>Tempe, AZ</td>
<td>85284</td>
<td>11/27/2017</td>
<td>11/28/2018</td>
<td>0.900</td>
</tr>
<tr>
<td>Foster Brothers, Inc.</td>
<td>Silver City, NM</td>
<td>88063</td>
<td>8/14/2017</td>
<td>8/13/2018</td>
<td></td>
</tr>
<tr>
<td>Franklin Earthmoving, Inc.</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>9/22/2017</td>
<td>9/22/2018</td>
<td></td>
</tr>
<tr>
<td>Presshoff, Inc.</td>
<td>St. George, UT</td>
<td>84707</td>
<td>4/1/2017</td>
<td>4/1/2018</td>
<td></td>
</tr>
<tr>
<td>Gesse-Bloom, LLC</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>8/4/2017</td>
<td>8/4/2018</td>
<td></td>
</tr>
<tr>
<td>GeoCom, Inc.</td>
<td>El Paso, TX</td>
<td>91207</td>
<td>12/27/2017</td>
<td>12/28/2018</td>
<td></td>
</tr>
<tr>
<td>GeoViz Construction, Inc.</td>
<td>Albuquerque, NM</td>
<td>87121</td>
<td>12/23/2017</td>
<td>12/22/2018</td>
<td></td>
</tr>
<tr>
<td>GeoFog Plastics, Inc.</td>
<td>Albuquerque, NM</td>
<td>87121</td>
<td>12/22/2017</td>
<td>12/22/2018</td>
<td></td>
</tr>
<tr>
<td>Gemini Hydrotransport, LLC</td>
<td>Albuquerque, NM</td>
<td>88315</td>
<td>8/11/2017</td>
<td>8/10/2018</td>
<td></td>
</tr>
<tr>
<td>General Hydros, Inc.</td>
<td>Albuquerque, NM</td>
<td>89105</td>
<td>9/1/2017</td>
<td>9/1/2018</td>
<td></td>
</tr>
<tr>
<td>Gemini Rafa Products, Inc.</td>
<td>Monticello, UT</td>
<td>84107</td>
<td>11/16/2017</td>
<td>11/16/2018</td>
<td></td>
</tr>
<tr>
<td>Galster, Inc.</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>8/14/2017</td>
<td>8/14/2018</td>
<td></td>
</tr>
</tbody>
</table>

*New Mexico Department of Transportation Prequalified Contractors and Subcontractors List January 2, 2018
*This list is reviewed once a month.
TITLE 18
TRANSPORTATION AND HIGHWAYS
CHAPTER 27
HIGHWAY CONSTRUCTION GENERAL PROVISIONS
PART 6
CONTRACTOR PREQUALIFICATION RULE

18.27.5.1 ISSUING AGENCY: The New Mexico Department of Transportation, Post Office Box 1449, Santa Fe, New Mexico, 87504-1449.

18.27.5.2 SCOPE: This rule applies to the New Mexico Department of Transportation construction projects and to all contracts and subcontracts seeking or anticipating the performance of work within the project limits.


18.27.5.4 NMAC - Rp. 18.27.5.3 NMAC, 01-01-15.

18.27.5.5 DURATION: Permanent.

18.27.5.6 EFFECTIVE DATE: January 1, 2015, unless a later date is cited at the end of a section.

18.27.5.7 DEFINITIONS:
A. This rule adopts the abbreviations, symbols and definitions in the division 100 - general provisions of the New Mexico Department of Transportation current edition of the standard specifications for highways and bridges construction and incorporates the same by reference.
B. CID is the abbreviation of construction industry division.
C. Contractors CIP is the abbreviation of construction contractor performance index rating system.
D. Contractor performance index rating system.
E. Modified bid amount means the contractor's bid multiplied by the contractor performance index rating system.
F. Modified bid amount will be used to award the lowest responsibility bidder.

EXHIBIT 10
K. If N/C or NFO means the performance measurement of a contractor's compliance with the terms and conditions of the contract.

L. If safety or NS means the performance measurement of a contractor's safety reflected by the contractor's experience under part 30 of the New Mexico Department of Transportation.

M. If subcontractor or NS means the performance measurement of a subcontractor's percent payment of its subcontracts or suppliers.

N. For rolling average or RAV means the final measure of responsibility that is applied to the contractor's bid resulting in the modified bid amount.

O. Prequalification factor or P or NS means the yearly calculation of a contractor's performance factor.

P. Prequalification factor or P or NS means the overall statistical analysis of the performance factors that measure contractor responsibility. Prequalification factor is determined by the New Mexico Department of Transportation.

Q. Prequalification packet means the New Mexico Department of Transportation form submitted annually.

R. Responsibility means an objective determination based on past performance by the New Mexico Department of Transportation in the contractor's capability in all aspects of performing fully and making satisfactory delivery of the requirements of the contract including the integrity and reliability that will assure good final performance.

S. Rolling average means a calculation to analyze data points by creating a series of averages of different subsets of the full data set.

[R. 18.27.5.7 NMAC - Rp. 18.27.5.7 NMAC, 01-01-15]

18.27.5.8 PREQUALIFICATION PROCEDURE: To obtain prequalified status, the contractor must submit the prequalification packet to the New Mexico Department of Transportation within 10 days after receiving notice.

18.27.5.8.1 Prequalification packet: The contractor must submit the following items in the order listed:

1. Prequalification Form
2. Evidence of Current Insurance Coverage
3. Evidence of Surety Bond Coverage
4. Evidence of Financial Responsibility
5. Evidence of Compliance with Local Ordinances
6. Evidence of Compliance with State and Federal Laws
7. Evidence of Compliance with Federal Regulations
8. Evidence of Compliance with State Regulations
9. Evidence of Compliance with Local Regulations
10. Evidence of Compliance with Other Applicable Laws

18.27.5.8.2 Evidence of Current Insurance Coverage: The contractor must provide evidence of current insurance coverage that meets the requirements of the New Mexico Department of Transportation.

18.27.5.8.3 Evidence of Surety Bond Coverage: The contractor must provide evidence of surety bond coverage that meets the requirements of the New Mexico Department of Transportation.

18.27.5.8.4 Evidence of Financial Responsibility: The contractor must provide evidence of financial responsibility that meets the requirements of the New Mexico Department of Transportation.

18.27.5.8.5 Evidence of Compliance with Local Ordinances: The contractor must provide evidence of compliance with local ordinances that meet the requirements of the New Mexico Department of Transportation.

18.27.5.8.6 Evidence of Compliance with State and Federal Laws: The contractor must provide evidence of compliance with state and federal laws that meet the requirements of the New Mexico Department of Transportation.

18.27.5.8.7 Evidence of Compliance with Federal Regulations: The contractor must provide evidence of compliance with federal regulations that meet the requirements of the New Mexico Department of Transportation.

18.27.5.8.8 Evidence of Compliance with State Regulations: The contractor must provide evidence of compliance with state regulations that meet the requirements of the New Mexico Department of Transportation.

18.27.5.8.9 Evidence of Compliance with Local Regulations: The contractor must provide evidence of compliance with local regulations that meet the requirements of the New Mexico Department of Transportation.

18.27.5.8.10 Evidence of Compliance with Other Applicable Laws: The contractor must provide evidence of compliance with other applicable laws that meet the requirements of the New Mexico Department of Transportation.

18.27.5.9 DEFICIENT, FALSE OR MISLEADING STATEMENTS: Any deficiencies, omissions, or misrepresentations in the prequalification packet or information provided shall be subject to the penalties set forth in the New Mexico Department of Transportation's rules and regulations.

18.27.5.10 LICENSING: Any contractor licensed in New Mexico who fails to comply with the requirements set forth in the New Mexico Department of Transportation's rules and regulations may be subject to the penalties set forth in the New Mexico Motor Carrier Act.

18.27.5.11 FREQUENTCALCULATION: The New Mexico Department of Transportation will calculate the prime contractor performance factor each year for each project. The calculation will be based on the prime contractor's performance factor for the previous year, the percentage of work completed, and the number of days on which the contractor met the requirements set forth in the New Mexico Department of Transportation's rules and regulations.

A. If NS means the performance measurement of a contractor's compliance with the terms and conditions of the contract.

B. If safety or NS means the performance measurement of a contractor's safety reflected by the contractor's experience under part 30 of the New Mexico Department of Transportation.

C. If subcontractor or NS means the performance measurement of a subcontractor's percent payment of its subcontracts or suppliers.

D. For rolling average or RAV means the final measure of responsibility that is applied to the contractor's bid resulting in the modified bid amount.

E. If P or NS means the yearly calculation of a contractor's performance factor.

F. Prequalification factor or P or NS means the overall statistical analysis of the performance factors that measure contractor responsibility. Prequalification factor is determined by the New Mexico Department of Transportation.

G. Prequalification packet means the New Mexico Department of Transportation form submitted annually.

H. Responsibility means an objective determination based on past performance by the New Mexico Department of Transportation in the contractor's capability in all aspects of performing fully and making satisfactory delivery of the requirements of the contract including the integrity and reliability that will assure good final performance.

I. Rolling average means a calculation to analyze data points by creating a series of averages of different subsets of the full data set.

[R. 18.27.5.7 NMAC - Rp. 18.27.5.7 NMAC, 01-01-15]

18.27.5.9 NMAC - Rp. 18.27.5.9 NMAC, 01-01-15]
(4) PF non-conformance data will be documented on the compass form and will be collected from the New Mexico Department of Transportation's closed project records indicating whether non-conformances were sustained.
(5) PF safety data will be the contractor's experience modifier rating as reported on its prequalification packet.
(6) PF socioeconomic data will be documented on the compass form and will be collected from the New Mexico Department of Transportation's closed project records indicating findings for the failure to promptly pay subcontractors or suppliers without good cause.

b. The performance factors are assigned percentage values while the yearly prequalification factor calculation.
(1) The percentage associated with claims is 15%.
(2) The percentage associated with disbursements is 50%.
(3) The percentage associated with the liquidated damages is 30%.
(4) The percentage associated with prequalification is 20%.
(5) The percentage associated with safety is 5%.
(6) The percentage associated with subcontractors is 10%.

C. PF claims or PFs is calculated in the following manner:
(1) Claims that are pursued beyond the cabinet secretary administrative remedy level will not be included in the calculation for PF claim.
(2) For claims that are pursued beyond the cabinet secretary administrative remedy level, a binary system will be used to assign a value of zero or one to evaluate claims.
(a) Claims resolved for the value of the claim or more brought beyond the cabinet secretary level will be assigned a value of one.
(b) Claims resolved for less than the value of the claim brought beyond the cabinet secretary level will be assigned a value of zero.
(3) PF claim is calculated by adding the number of cases to the outcome of the sum of the claim value divided by the sum of closed projects.
(4) PF claim result in a value of one will be assigned a bonus value for PF claim equal to 0.5.
(5) PF claim will then be multiplied by the percentage associated with PF claim. The resulting evidence will be incorporated into Payroll.

D. PF deductible or PFs is calculated in the following manner:
(2) For each closed project:
(a) Sum paid and accepted applicable contract items less applicable contract adjustments.
(b) Sum of paid and accepted applicable contract items less applicable contract adjustments.
(c) Divide the total of Subparagraph (a) by the total of Subparagraph (b) of Paragraph (1) of Subsection D of this section.
(3) Sum all closed projects of Subsection D Paragraph (1) of Subparagraph (c) of this section in a given year and divide by the count of closed projects resulting in PF deductible equal to 0.5.
(4) PF deductible will then be multiplied by the percentage associated with PF deductible. The resulting evidence will be incorporated into Payroll.

E. PF liquidated damages or PFs is calculated as a two-step process of calculation one for monetary completion date projects and one for calendar or working day projects.
(3) For monetary completion date projects liquidated damages equivalence is calculated:
(a) Subtract the monetary completion date including any extended time from the notice to proceed date to determine a whole number.
(b) Subtract the actual completion date from the notice to proceed date to determine a whole number.
(c) Divide the total of Subparagraph (a) by the total of Subparagraphs (a) of Paragraph (1) of Subsection E of this section. A resulting value less than one is equal to one from Subparagraph (c) of Paragraph (1) of Subsection E of this section will be assigned a bonus value equal to 0.5.

18.275 NMAC
<table>
<thead>
<tr>
<th>EXHIBIT</th>
<th>DATE</th>
<th>WITNESS</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>6/19/15</td>
<td>Martinez</td>
<td>Invitation for bids</td>
</tr>
<tr>
<td>2</td>
<td>7/8/15</td>
<td>Martinez</td>
<td>Section 102.7 of the Standard Specifications of Highway and Bridge</td>
</tr>
<tr>
<td>3</td>
<td>6/1/09</td>
<td>Martinez</td>
<td>Plan Holders List for proposal 6101100R</td>
</tr>
<tr>
<td>4</td>
<td>6/11/13</td>
<td>Martinez</td>
<td>Notice to Contractors</td>
</tr>
<tr>
<td>5</td>
<td>11/16/13</td>
<td>Martinez</td>
<td>Notice to Contractors</td>
</tr>
<tr>
<td>6</td>
<td>6/17/15</td>
<td>Martinez</td>
<td>NMDOT Bid Form</td>
</tr>
<tr>
<td>7</td>
<td>2/6/18</td>
<td>Martinez</td>
<td>Affidavit of Jeffrey E. Martinez</td>
</tr>
<tr>
<td>8</td>
<td>12/30/14</td>
<td>Canney</td>
<td>18275 Prequalification Rule</td>
</tr>
<tr>
<td>9</td>
<td>3/12/18</td>
<td>Canney</td>
<td>Published list from OZG's Prequalification Contractor's and Subcontractor List</td>
</tr>
<tr>
<td>10</td>
<td></td>
<td>Canney</td>
<td>Compass Form</td>
</tr>
<tr>
<td>11</td>
<td>2/5/18</td>
<td>Canney</td>
<td>Affidavit of Jeff Canney</td>
</tr>
<tr>
<td>12</td>
<td></td>
<td>Grover</td>
<td>Prompt Pay Section 108.1 of Standard Specifications of Highway and Bridge</td>
</tr>
<tr>
<td>13</td>
<td>7/13/15</td>
<td>Grover</td>
<td>Email from Grover to Monk regarding Change Order (CO) directed by CCRB</td>
</tr>
<tr>
<td>14</td>
<td>7/27/15</td>
<td>Grover</td>
<td>Signed Change Order (CO)</td>
</tr>
<tr>
<td>15</td>
<td></td>
<td>Grover</td>
<td>Final Quantity Book</td>
</tr>
<tr>
<td>16</td>
<td></td>
<td>Grover</td>
<td>Estimate 10 with Voucher Information</td>
</tr>
<tr>
<td>17</td>
<td>9/6/15</td>
<td>Grover</td>
<td>Agenda PreCon for estimate cut-off date</td>
</tr>
<tr>
<td>18</td>
<td></td>
<td>Grover</td>
<td>Estimate 12 with Voucher Information</td>
</tr>
<tr>
<td>19</td>
<td></td>
<td>Grover</td>
<td>Estimate 13 with Voucher Information</td>
</tr>
<tr>
<td>20</td>
<td>11/28/15</td>
<td>Grover</td>
<td>Notice of Non-Conformance Letter to AUI</td>
</tr>
<tr>
<td>21</td>
<td></td>
<td>Grover</td>
<td>Language From Section 109.8.2 Non-Conformance Exempt from Standard Specifications for Highway and Bridge</td>
</tr>
</tbody>
</table>
INVITATION FOR BIDS

NEW MEXICO DEPARTMENT OF TRANSPORTATION

BIDS CALLED FOR – July 17, 2015

SANTA FE, NEW MEXICO

Notice is hereby given that sealed bids will be received until 11:00 a.m., local prevailing time, at the office of the New Mexico Department of Transportation, General Office, Building 6, 1400 Salome Street, Santa Fe, NM 87503, or the principal office of the New Mexico Department of Transportation, at 1010 E. 5th Street, Santa Fe, NM 87501, until 11:00 a.m. on July 17, 2015, by the NEW MEXICO DEPARTMENT OF TRANSPORTATION, the above address, Santa Fe, NM 87505, for the following project:

I-40, MP 91.100 to MP 96.100 located in Otero County. The approximate length is 5.00 miles.

Plans and specifications may also be examined at the office of the District Highway Engineer, 1010 E. 5th Street, Santa Fe, NM 87501.

FEDERAL AID PROJECT

GN-1000

I-40, MP 91.100 to MP 96.100 located in Otero County. The approximate length is 5.00 miles.

Construction consists of SAFETY, Ford & Cable Barrier Installation, Traffic Control (Flashing), and Miscellaneous Construction.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

For a copy of the DBE Plan, please contact the New Mexico Department of Transportation, Building 6, 1400 Salome Street, Santa Fe, NM 87503, or call 505-827-5820.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.

At this time NMDO will meet the State DBE Goal on Federal assisted projects through a combination of race-neutral and race-conscious measures. This project is subject to race-conscious measures. The established DBE goal for this project is 5.00%.

This contract must be completed in 180 working days.
2. A Bidder fails to timely pay, periodically settle, or provide security for the payment of claims for labor, equipment, materials, supplies, or services supplied due to nonpayment or pending Contract;

4. A Bidder is not Proprietary;

5. A Bidder defaults under a previous Contract, including Contracts with other public entities;

6. A Bidder performs work unfaithfully, or fails to comply with Section 104A.5, "Schedules;"

7. The Department issues a notice of Suspension or Determination to the Bidder;

8. A Bidder submits more than one (1) Bid for the same Work under its own name, or under a different name;

9. Bidder seeks of collaboration among Bidders or prospective Bidders, in the preparation of a Bid for a Department Project;

10. A Bid Item Unit Price results in an Unreasonable Bid in the potential detriment of the public or the Department. The Department may require the Appraiser to negotiate with the timely receipt of their respective estimates, and to justify the basis for the price;

11. A Bid Item Unit Price or Total Contract Price is significantly less than the Engineer's estimate or from other sources in the potential detriment of the public or the Department;

12. A Bid Item Unit Price does not include reasonable allowance for any material, labor, or services necessary to complete the Bid Item in the timely receipt in the public or the Department;

13. A Bidder contests or communicates with any State Transportation Commissioner or any Department representative responsible for Bid review and the Award of the Contract in violation of the Bid Leader or Award process or any other time prior to the bid selection that the Bidder has been awarded the Project, except for exercising the Bidder's right to file a written protest pursuant to Section 123B.0502, "Post-Bid Resolution Procedures" as a response to an inquiry from the Bid Leader's committee;

14. A potential to the timely receipt in the Department is made under contract.

15. Failure to attend a mandatory Pre-Bid Conference when so required by the Bid Leader or Special Provision or Attachment;

16. A Bidder is subject of any judgment or verdict implying a civil or criminal penalty under either the Federal False Claims Act or the New Mexico Fraud Against Taxpayers Act;

17. The Project is a Bid Project or change Project Specifications;

18. If the Department becomes aware of an error in the quantity of a Bid item shown in the Bid Schedule, Plans, or other Contract documents which may call into question the Department's ability to determine which Unit will result in the lowest ultimate cost to the Department;

19. When it is in the best interests of the public or the Department to do so;

162.1 INTERPRETATION OF QUANTITIES

The quantities appearing in the Bid Schedule, Plans, or other Contract documents are approximate only and are prepared for the comparison of bids. Payment to the Contractor shall be made only for the actual quantities of work performed and accepted, or specified. Materials furnished shall be at the Contractor's risk and expense.

162.2 EXHIBIT H EXHIBIT H

The Department will include Plans and Specifications in accordance with accepted engineering standards and will give such directions as may enable any

NMDOT EXH 2

completed Contractor to construct the Work. The submission of a bid shall include plans that evidence that the Contractor has conducted a Pre-Bid Site Visit and completed the conditions to be encountered in performing the Work and accepts the provisions and requirements of the Contract. The Contractor must notify the Bidder for the Bid Form for the Bid to be considered a Revisited Bid.

2. Where available, bidders lists and other records of bidders' names shall be available for review by the Agency or the Department, as the Department may charge for such records and the Department's cost of providing the information, and the Department does not guarantee the accuracy of the information.

3. The Department does not warrant the availability of such substitute investigation documentation, and the Department is not responsible for any loss or damage to the Bidder caused by the absence or condition of any substitute investigation documentation from previous projects performed by the Bidder in the State or Federal Projects, and determines how such substitutes conditions may affect the contract, including the cost of the Work;

4. Requests for Contract Interpretation shall be in writing, addressed to the Chief Engineer, and shall be reviewed by the Chief Engineer at least 10 days prior to the bid date for the award of the Contract. Such request shall be in writing and delivered to the Bidder in person or mailed to the Bidder at least 20 days prior to the bid date for the award of the Contract. The Contractor agrees that it will make all claims based on misinterpretation or misunderstanding of the Contract or because of lack of information, and

4. The Contractor is not entitled to a written response by the Chief Engineer when Contract Interpretation requests are received less than 10 days before Bid Closing. If a written response by the Department is required, the Contractor shall be notified of the Contract documents.

162.3 PREPARATION OF BID

1. Submit the Bid as provided in the Bid Package, and complete the forms shown in the Required Documents for Bid Submission. For each Bid Item, the Bidder shall submit a separate package to the Department for the Bid Item Price. The Bid Item Unit Price is the sum of the Bid Item Price, except when a Bid Item Unit Price is stated. The Department shall determine the Bid Item Unit Price for each Bid Item by multiplying the respective Bid Item Unit Price and quantities, and add any other amount as may be necessary to complete the Bid Item. The Total Bid Amount for each Bid Item shall be the sum of the Bid Item Unit Prices.

2. Each Bid shall be accompanied by a Bid Bond in a form satisfactory to the Department, which shall be held and deposited with the Department until the Contract is executed between the Department and the Contractor.

3. Any Bidder may submit additional information as may be necessary to complete the Bid Item. The Total Bid Amount for each Bid Item shall be the sum of the Bid Item Unit Prices.

4. No part of the Bid shall be altered, altered, or modified after the Bid Opening, except as may be necessary to complete the Bid Item. The Total Bid Amount for each Bid Item shall be the sum of the Bid Item Unit Prices.

5. Include the applicable State tax and local option tax. The Department will pay the full amount.

6. Include any other business tax, TIF tax, and other taxes imposed by a local government entity.

7. Include any other business tax, TIF tax, and other taxes imposed by a local government entity.
PLAN HOLDERS LISTING FOR LETTING OF JULY 17, 2015
07/8/15
P. S. & E. BUREAU
NEW MEXICO DEPARTMENT OF TRANSPORTATION

(1) 1101016 / CN 1190102 – Grant County
Peter Smith & Daniel, A&M Inc.
HV Construction, Inc.
James Renco Construction Co.
J & J Supply, Inc.
Mountain States Construction, Inc.
PO Box 3750
P.O. Box 6206
6337 Chispar Rd NE
PO Box 2172
Mesilla, NM 88043
Albuquerque, NM 87110
Albuquerque, NM 87115
Albuquerque, NM 87107
(505)865-2690
(505)1250
(505)464-4205
(505)865-2680
(505)865-2690

(2) 6501500 / CN 8010500R – Cibola County
Albuquerque Aguilum Inc.
A & M, Inc.
El Tenor Construction, LLC
F & F Construction, Inc.
Papillon Oilfield & Energy
Highway Supply LLC
Intermountain Construction
J & J Supply, Inc.
Kaw Construction Co.
Star Recycling Company
10800 E Paseo Rd
8311 Farwell Rd.
2120 Chispar Rd
2120 Chispar Rd
PO Box 8333
Albuquerque, NM 87193
Albuquerque, NM 87123
Albuquerque, NM 87115
Albuquerque, NM 87115
Albuquerque, NM 87105
(505)1250
(505)493-1234
(505)694-4484
(505)865-2654
(505)865-2654
(505)865-2650

(3) 3500061 / CN 5900061 – Sierra County
Appaloosa Construction Inc.
Bright Oil Co.
Dorson Construction, Inc.
Nevada Highway Construction
P.O. Box 12395
2129 Chispar Rd.
PO Box 2172
Albuquerque, NM 87121
Albuquerque, NM 87119
Albuquerque, NM 87119
(505)865-1150
(505)865-0677
(505)362-7097

(4) 6900092 / CN 9000902 – Dona Ana County
Battery Mart, Inc.
Highway Supply LLC
J & J Supply, Inc.
K & K, Inc.
R & G Contractors, Inc.
P.O. Box 19015
2216 Wheeler Rd
1120 Chispar Rd.
PO Box 30273
Albuquerque, NM 87112
Albuquerque, NM 87115
Albuquerque, NM 87115
Albuquerque, NM 87105
Albuquerque, NM 87107
(505)396-0384
(505)345-8210
(505)345-8200
(505)396-0394
(505)396-0392

(5) 5000352 / CN 9000358 – San Juan County
Highway Supply LLC
J & J Supply, Inc.
San Juan Construction Corp.
P.O. Box 7439
2130 Chispar Rd.
PO Box 1914
Albuquerque, NM 87107
Albuquerque, NM 87115
Albuquerque, NM 87115
(505)345-8210
(505)345-8200
(505)362-7097

PLAN HOLDERS LISTING FOR LETTING OF JULY 17, 2015
07/8/15
P. S. & E. BUREAU
NEW MEXICO DEPARTMENT OF TRANSPORTATION

(3) 5900061 / CN 5900061 – Sierra County
continued
J & J Supply, Inc.
Kino Construction, Inc.
National Construction Group
R & G Contractors, Inc.
San Juan Construction Co.
Weston Construction Co.
P.O. Box 19015
P.O. Box 48528
PO Box 6206
9101 Broadway, S.E.
PO Box 1116
Albuquerque, NM 87119
Albuquerque, NM 87108
Albuquerque, NM 87110
Albuquerque, NM 87115
Albuquerque, NM 87105
(505)865-2690
(505)493-1234
(505)865-2654
(505)865-2650
(505)865-2650

(4) 9000902 / CN 9000902 – Dona Ana County
Battery Mart, Inc.
Highway Supply LLC
J & J Supply, Inc.
K & K, Inc.
R & G Contractors, Inc.
P.O. Box 19015
2216 Wheeler Rd
1120 Chispar Rd.
PO Box 30273
Albuquerque, NM 87112
Albuquerque, NM 87115
Albuquerque, NM 87115
Albuquerque, NM 87105
Albuquerque, NM 87107
(505)396-0384
(505)345-8210
(505)345-8200
(505)396-0394
(505)396-0392

(5) 9000358 / CN 9000358 – San Juan County
Highway Supply LLC
J & J Supply, Inc.
San Juan Construction Corp.
P.O. Box 7439
2130 Chispar Rd.
PO Box 1914
Albuquerque, NM 87107
Albuquerque, NM 87115
Albuquerque, NM 87115
(505)345-8210
(505)345-8200
(505)362-7097
SELECTED DBE (DBE) PROGRAM PROVISIONS
DISADVANTAGED BUSINESS PARTICIPATION IN USDOT ASSISTED CONTRACTS

June 11, 2009

Objective:

The purpose of the DBE Program is to implement the provisions of 49 CFR Part 26, other pertinent regulations, and source legislation. The objectives are: (a) To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in the USDOT’s highway, transit, and airport financial assistance programs; (b) To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts; (c) To ensure that USDOT’s DBE program is narrowly tailored in accordance with applicable law; (d) To ensure that only firms that fully meet the eligibility standards specified in 49 CFR Part 26 are permitted to participate as DBEs; (e) To help remove barriers to the participation of DBEs in USDOT-assisted contracts; (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs, and (h) to comply with the New Mexico Procurement Code §13-1-28 through §13-1-196, NMSA 1976, as amended, and any applicable regulations therein.

The New Mexico Department of Transportation (NMDOT) will strive to meet the annual State Goal for DBE participation in federal-aid construction and consultant design programs and activities in New Mexico. The long-range objective of the Department will be to establish a level playing field for DBE contractors to compete for federally assisted highway construction projects as prime contractors, subcontractors, design consultants, and other consultants. It is the intent of the NMDOT to provide opportunities to DBE firms so they can in time graduate from the DBE Program and perform as prime contractors and subcontractors without DBE Program assistance.

Statutory Authority:

The following is a brief history of the Regulations, which implement the DBE Program.

USDOT Regulations (49 CFR Part 23 and 26) published in the Federal Register, Volume 45, No. 83 dated March 31, 1980, established a requirement that all recipients of Federal-Aid highway program funds establish a Minority Business Enterprise (MBE) Program. The regulations were applicable both to Federal-Aid construction and to its non-construction activities. USDOT published further regulations in the Federal Register, Volume 48, No. 141 on July 21, 1983. This regulation implemented Section 106(c) of the Surface Transportation Assistance Act (STAA) of 1982, which provided that not less than a fixed percentage of the amount authorized to be appropriated under the Act should be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. USDOT published regulations in the Federal Register, Volume 52, No. 203 on October 21, 1987 implementing Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987.

As a result of the decision by the United States Supreme Court in Alexander v. Brosi, 612 U.S. 108, 115 L.Ed.2d 781 (1988), and its progeny in federal district courts across the country, USDOT promulgated new regulations to meet the strict scrutiny test
for affirmative action programs announced in Federal Register, February 2, 1999, 64 Fed. Reg. 5935 repeal the former regulations found at 49 CFR Part 26. These regulations are effective March 4, 1999, and require each primary recipient of federal-aid, including NMDOT, to develop and implement a DBE Program consistent with Part 26 by September, 1999, as a condition to receiving federal-aid funding. The regulations observe a national aspirational goal of 10% DBE participation in federal-aid public works construction; require primary recipients to establish for DBE participation goals, and mandate state limits on certified DBEs. NMDOT's legal authority for 49 CFR Part 23 (as amended) and Part 26, includes any one or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native NMDOT, Construction Organizations, DBE and non-DBE business communities that work with the NMDOT and other interested parties.

Policy Statement:
It is the policy of the New Mexico Department of Transportation on, among through the NMDOT's OEO, to encourage and support the DBE Program and its objectives to the maximum extent possible. This rule will be circulated throughout the NMDOT, Construction Organizations, DBE and non-DBE business communities that work with the NMDOT and other interested parties.

The NMDOT and all recipients of USDOT-assisted contracts will not discriminate on the basis of race, color, national origin or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The NMDOT and all recipients will further ensure that the NMDOT and all recipients of USDOT-assisted contracts will not discriminate in the development, implementation and administration of the DBE Program, Implementation of the DBE Program by the NMDOT is a legal obligation and failure to carry out its terms will be treated as a violation whereby sanctions may be imposed as provided for under 49 CFR Part 26. The DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the NMDOT in its financial assistance agreements with USDOT.

No person will be excluded from participation in or denied the benefits of, or otherwise discriminated against in connection with the award and performance of any contract covered by this DBE Program or 49 CFR Part 26 on the basis of race, color, sex or national origin.

In administering the DBE Program, the NMDOT will use criteria or methods that would have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex or national origin.

From time to time NMDOT will receive interpretations from USDOT, which will be binding on NMDOT, sub-recipients, and contractors.

Definitions:
APRILATION - has the same meaning as the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121, except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when either directly or indirectly one concern controls or has the power to control the other; or a third party or parties control or have the power to control both; or an identity of interest between or among parties exists that affiliation may be found.

In determining whether affiliations exist, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and statutory cap on the participation of firms in the DBE program.

ALASKA NATIVE - a citizen of the United States who is a person of one-fourth (1/4) degree or more Alaskan Indian (including Tsimshian Indians not enroled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native.

ALASKA NATIVE CORPORATION (ANC) - any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the state of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

COMMERCIAL USEFUL FUNCTION (CUF) - means that a DBE is responsible for execution of a distinct element of the work of a contract or subcontract and carries out its responsibilities by actually performing, managing and supervising the work involved, or provides professional services.

COMPLIANCE - means that a recipient has correctly implemented the requirements of this part.

CONTRACT - means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

CONTRACT GOAL - means the percentage of DBE participation established by NMDOT, if required, for a USDOT-Assisted Contract.

CONTRACTOR - means one who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.

DEPARTMENT - means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

DESIGN AND BUILD PROJECT DELIVERY SYSTEM - means a procurement process by which a using agency contracts with one firm who has responsibility for the design, construction and delivery of a project under a single contract with the using agency.

DESIGN CONSULTANT (OR OTHER CONSULTANTS) - means an individual, firm or
partnered with the MNDOT to provide services for engineering, surveying, environmental, hazardous materials, subsurface utility engineering, and other services which require a rigorous, logical, science-based approach for data acquisition to be used in the development of MNDOT highway construction plans. Other consultants include providers of any professional services funded with FHWA monies and FTA and PAA grant recipients receiving $250,000 or more in aggregate.

DISADVANTAGED BUSINESS ENTERPRISE OR DBE - means a for-profit small business concern that is at least 51 percent owned by one or more individuals who are socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals and whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it.

GOOD FAITH EFFORTS (GFE) - means efforts to achieve a DBE goal or other requirement of the DBE Program which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirements.

IMMEDIATE FAMILY MEMBER - means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandchild, mother-in-law or father-in-law.

INDIAN TRIBE - means any Indian tribe, band, nation, or other organized group or community of Indians, including any AHC, recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or are recognized as such by the State in which the tribe, band, nation, group, or community resides.

JOINT VENTURE - means an association of two or more DBE firms that work together in a for-profit business enterprise for which the parties combine their property, capital, equipment, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

LSOP - Linking Outreach and Services Program - means a contractor who enters into Cooperative Agreements with chambers of commerce and trade associations to provide liaison services between the USDOT, its grantees, recipients, contractors, subcontractors, and minority-owned and disadvantaged business enterprises.

NAICS - North American Industry Classification System - replaces the Standard Industrial Classification Code (SIC) designation which best describes the primary business of a firm.

NATIVE HAWAIIAN - means any individual whose ancestry were Hawaiians, prior to 1778, of the area which now comprise the State of Hawaii.

NATIVE HAWAIIAN ORGANIZATION - means any community service organization serving Native Hawaiians in the state of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities principally benefit such Native Hawaiians.

MNDOT - means New Mexico Department of Transportation.

NONCOMP liance - means that a recipient has not completely implemented the requirements of 49 CFR Part 26.

OEO - means Office of Equal Opportunity Programs.

OPERATING ADMINISTRATION (OA) - means any of the following parts of USDOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), The Federal Transit Administration (FTA). The "Administrator" of any OA includes his or her designee.

OVER-CONCENTRATION - means a condition in which DBE firms are being utilized in certain types of work to the extent that non-DBEs are unduly burdened from participating in this type of work.

PERSONAL NET WORTH - means the net value of the assets of an individual remaining after all total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or participating DBE firm, or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

PRIMARY INDUSTRY CLASSIFICATION - means the six-digit NAICS designation which best describes the primary business of a firm. The NAICS code designations are described in the North American Industry Classification Manual.

PRIMARY RECIPIENT - means a recipient to which USDOT financial assistance is given and passes some or all of it on to another recipient.

PRINCIPAL PLACE OF BUSINESS - means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where the management of the firm's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.


PROCUREMENT CODE REGULATIONS - means 1 NMAC 5.2, as amended.

PROFESSIONAL SERVICES - means the services of architects, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, lawyers, psychologists, planners, veterinarians, construction managers and other persons or businesses providing similar professional services, which may be designated as such by a determination issued by the state purchasing agent or a central purchasing office.

PROGRAM - means any undertaking on a recipient's part to use USDOT financial assistance, authorized by the laws to which this part applies.

PROPOSAL - means an offer compiled and developed by an offeror in response to a Request for Proposal.

RACE-CONSCIOUS MEASURE - means a program that is focused specifically on assisting.
only DBEs, including women-owned DBEs.

RACE-NEUTRAL MEASURE - means a program that is, or can be, used to assist all small businesses. For purposes of this part, race-neutral includes gender-neutrality.

READY, WILLING, AND ABLE - means, for the purpose of selling annual DBE goals, in the context of a DBE or non-DBE business, that it has the necessary license to perform work on USDOJT-assisted contracts in its home state, is not currently suspended or debarred, and has demonstrated its intent in performing work on USDOJT-assisted contracts by submitting a bid, proposal, or offer as a prospective prime contractor, subcontractor, supplier, lessor, lessee, consultant, or other relevant business entity on a New Mexico USDOJT-assisted contract within the current or two (2) previous federal fiscal years, or such shorter duration as established by the NMDOT.

RECIPIENT - means any entity, public or private, to which USDOJT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FRA, or FTA or who has applied for such assistance.

REGULAR DEALER - means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or leasing of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalts without owning, operating, or maintaining a place of business, if the person both owns and operates distribution equipment for the products. Any supplementary of regular dealer's own distribution equipment will be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturer's representatives, or other persons who arrange or expedite transactions are not regular dealers.

REQUEST FOR PROPOSALS (RFP) - means all documents, including those attached or incorporated by reference, used for soliciting proposals.

RESPONSIBLE BIDDER - means a bidder who submits a responsive bid and who has furnished, when required, information and data to prove that his financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services, construction or items of tangible personal property described in the invitation for bids.

RESPONSIBLE OFFEREE - means an offeror who submits a responsive proposal and who has furnished, when required, information and data to prove that his financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services or items of tangible personal property described in the proposal.

RESPONSIVE BID - means a bid which conforms in all material respects to the requirements set forth in the invitation for bids. Material respects of a bid include but are not limited to price, quality, quantity or delivery requirements.

RESPONSIVE OFFER - means an offer which conforms in all material respects to the requirements set forth in the request for proposals. Material respects of a request for a proposal include, but are not limited to, price, quality, quantity, or delivery requirements.

SECRETARY - means the Secretary of the U.S. Department of Transportation or designee.

SERVICES - means the furnishing of labor, time or effort by a contractor not involving the delivery of a specific end product other than reports and other materials which are merely incidental to the required performance. "Services" includes the furnishing of insurance but does not include construction or the services of employees of a state agency or a local public body.

SET-ASIDE - means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

SMALL BUSINESS ADMINISTRATION (SBA) - means the United States Small Business Administration.

SMALL BUSINESS CONCERN - means with respect to firms seeking to participate as DBEs in USDOJT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration Regulations Implementing 19 (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in 13 CFR Part 120.

SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL - means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is -

An individual whom the NMDOT finds to be a socially and economically disadvantaged individual on a case-by-case basis. Any individual in the following groups, members of which are rebuiltly presumed to be socially and economically disadvantaged:

(a) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(b) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(c) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(d) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Micronesia, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(e) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives islands, Nepal or Sri Lanka;
(f) Woman,

(a) Any additional groups whose members are designated as socially and economically disadvantaged by the SSA, at such time as the SSA designation becomes effective.

SOFTWARE-The entire set of programs, procedures, and related documentation associated with a computer program used for the purpose of reporting Contractors' compliance with DBE participation in New Mexico USDOT Assisted contracts. The NMDO GT is expected to obtain these plans, and these plans must be provided to the NMDO GT whenever it is requested by the NMDO GT

STATE GOAL - means the percentage of DBE participation in New Mexico USDOT Assisted contracts that the NMDO GT expects to achieve at the time of the bid letting. The NMDO GT sets the state goal annually.

TRIBALLY OWNED CONCERN means any concern at least 51 percent owned by an Indian tribe as defined in section 1.

UNIFIED CERTIFICATION PROGRAM (UCP) means an entity that provides a one-stop shopping service in a single program that seeks to manage DBE certification. The entity must comply with the provisions of this rule concerning certification and procurement.

USDOT - means U.S. Department of Transportation.

USDOT-ASSISTED CONTRACT - means any contract between a recipient and a contractor (at any level) funded in whole or in part with USDOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Pre-Bid:

Pre-bid services and Requests for Proposals, to inform the certified Disadvantaged Business Enterprises of contract opportunities available, but not be limited to, the following:

All certified DBE's will be placed on the NMDO GT's regular and/or electronic mail to receive Invitations for Bid, Plan Holders List, Requests for Proposals and other NMDO GT procurement mailings.

Plans, Specifications, and Invitations for Bid will be available for inspection by certified DBE firms at the QEO and the PBSE Bureau of the NMDO GT.

Requests for Proposals (RFPs) will be available for inspection by certified DBE firms at the QEO and the PBSE Bureau of the NMDO GT.

Award of Contract Procedures:

The NMDO GT Award of Contract Procedures will include, but not be limited to, the following:

The NMDO GT will include appropriate DBE contract provisions, or summaries thereof, to the Plans, Specifications, Invitations for Bid, and Requests for Proposals and Contract Proposals for all Federal-Aid contracts. Selected DBE - Program Provisions - DBE Participation in USDOT Assisted Projects will be included in appropriate contracts.

For all projects using race-neutral measures, the following DBE forms, as appropriate, are required to be submitted for award of contract:

(a) The Participating Contractor’s and Consultant’s Annual Profile Registration Form A-1012 is to be submitted to the NMDO GT annually.

(b) The Notice to Construction Contractors Bidder’s List of Quotations for the DBE Program 80-DBE is to be submitted by all construction contractors with a contract bid at the time of the bid letting.

(c) The Design and Other Consultant Offeror’s List Form A-1013 is to be submitted by all consultant at the time of the proposal submittal.

(d) A fully executed Certification of Consultant or Offeror for DBE Annual State Goal Form A-1014 is to be submitted at the time a proposal is submitted.

In the event projects use race-conscious measures, the following DBE forms, as appropriate, are required to be submitted for award of contract:

(a) The Participating Contractor’s and Consultant’s Annual Profile Registration Form A-1012 is to be submitted to the NMDO GT annually.

(b) The Notice to Construction Contractors Bidder’s List of Quotations for the DBE Program 80-DBE is to be submitted by all construction contractors with a contract bid at the time of the bid letting.

(c) The Design and Other Consultant Offeror’s List Form A-1013 is to be submitted at the time the proposal is submitted.

(d) A fully executed Certification of Consultant or Offeror for DBE Annual State Goal Form A-1014 is to be submitted at the time a proposal is submitted.

(e) For construction projects, the apparent low bidder will complete and sign Form A-888A-DBE A-1 at the time of the Bid Opening. All bid DBE forms must be certified by the NMDO GT prior to submission of Form A-888A-DBE A-1.

1. The construction contract will be awarded to the lowest qualified and responsible bidder who gives written assurance to the established DBE contract goal or who can satisfactorily demonstrate good faith efforts to meet the goal or demonstrate good faith efforts to meet the goal or demonstrate that it cannot do so. Failure to meet the goal or demonstrate good faith efforts will render the bid non-responsive.

(f) For design or other consultant proposals, all responsible offerors will complete and sign Form A-888B-DBE A-2 (Appendix L) and include it with other required documents of the offeror’s “Proposal Package” upon successful negotiations for consulting services. All offeror’s written assurance will be considered binding.

1. The design or other consultant contract will be awarded to the best qualified and responsible offeror who gives written assurance to the established DBE contract goal or who can satisfactorily demonstrate good faith efforts why it cannot do so. Failure to meet the goal or demonstrate good faith efforts will
render the consultants proposal non-responsive.

(2) The design consultant and other consultants will be selected in accordance with the requirements of NMSSA 1976, §13:1-115 and NMSSA 13:1-120.

(a) The information required by Form A-565 DBE A-1 and Form A-565B DBE A-2 must be complete and accurate in every detail and in final form at the time it is submitted to the NMDOT for approval. This form will be evaluated prior to the award of the contract. Failure to submit either document in proper form and accuracy will render the bid or proposal non-responsive. All bidders or contractors are required to list on Form A-565 DBE A-1 or Form A-565B DBE A-2, the following information:

1. The names of DBE subcontractors/subconsultants and suppliers that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm listed; and
4. Written documentation of the bidder’s or offeror’s commitment to use a DBE subcontractor/subconsultant/supplier whose participation it submits to meet the DBE contract goal.

(b) If the contract goal is not met, evidence of good faith efforts must be documented and submitted with appropriate Form A-565 DBE A-1 or Form A-565B DBE A-2.

Good Faith Efforts (GFEs):

Good Faith Efforts. When more conscientious measures are used and a project goal is established NMDOT will consider the quality, quantity, and integrity of the different kinds of efforts that the contractor or bidder or offeror has made. The efforts employed by the contractor or bidder or offeror should be those that one could reasonably expect a contractor or a bidder or offeror to make if they were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. More pro forma efforts are not good faith efforts to meet the DBE contract requirements. On the other hand, NMDOT will count bona fide good faith effort making a determination to award a contract.

The following is a list of types of actions, which the NMDOT will consider as part of the bidder's or offeror's good faith efforts to obtain DBE participation. This list is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive, as other factors or types of efforts may be relevant in appropriate cases. This demonstration should include, but is not limited to, the following:

(a) Soliciting through all reasonable and available means (e.g. attendance at pre-bid, pre-proposal meetings, advertising and any written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder or offeror must solicit this interest within sufficient time to allow DBEs to respond to the solicitation. The bidder or offeror must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

(b) Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units in order to facilitate DBE participation, even when the prime contractor or prime consultant might otherwise prefer to perform those work items with its own forces.

(c) Providing interested DBEs with adequate information about the construction plans, construction specifications, design scope of work and requirements of the contract in a timely manner to assist them in responding to a solicitation.

(d) Negotiating in good faith with interested DBEs. It is the bidder's or offeror's responsibility to make a portion of the work available to DBE subcontractors, subconsultants and suppliers and to select those portions of the work or materials needs that are consistent with the available DBE subcontractors, subconsultants and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses and telephone numbers of DBEs that were considered, a description of the information provided regarding the construction plans and specifications for the work selected for subcontracting or requirements and design scope of work of the RFP and subconsulting; and evidence as to why additional agreements could not be reached for DBEs to perform the work. A bidder or offeror using good business judgment would consider a number of factors in negotiating with subcontractors including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself a sufficient reason for a bidder's or offeror's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of the prime contractor or consultant to perform the work of a contract with its own organization does not relieve the bidder or offeror of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable. Excessive or unreasonable will be deemed 10% or more than any bid received for that item of work by a non-DBE. Prime consultants will evaluate subconsultants on quality of submittal of subcontractor services. Prime consultants are not required to accept subconsultants offers of lower quality with respect to other subconsultants offers.

(e) Prime contractors and consultants will not reject DBEs as being unqualified without sound reasons which will be based on a thorough investigation of their capabilities. The contractors or consultant's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-acceptance of bids or proposals in the contractor's or consultant's efforts to meet the project goals.

(f) Making efforts to assist interested DBEs in obtaining bonding, letters of credit, insurance as required by the recipient, contractor or consultant.

(g) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

(h) Effectively using the services of available minority/women community organizations; minority/women contractor's groups; local, state, and Federal minority/women business
assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

In determining whether a bidder or offeror has made good faith efforts, the NMDOT may take into account the performance of other bidders or offerors in meeting the contract. For example, when the apparent successful bidder or offeror fails to meet the contract goal, but others meet it, the NMDOT may reasonably raise the question of whether with additional reasonable efforts; the apparent successful bidder or offeror could have met the goal. If the apparent successful bidder or offeror fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders or offerors, the NMDOT may view this, in conjunction with other factors, as evidence of the apparent successful bidder or offeror having made good faith efforts.

If the NMDOT determines that the contractor or bidder or offeror has failed to meet the requirements outlined in paragraph 20.3.1, the NMDOT will provide the contractor or bidder or offeror the opportunity for administrative reconsideration before awarding the contract or proposal. As part of this reconsideration, the following guidelines apply:

(a) The contractor or bidder or offeror will have the opportunity to provide written documentation or argument concerning the issue of whether the bidder or offeror met the DBE contract goal or made adequate good faith efforts to do so.

(b) The NMDOT's decision on reconsideration will be made by an official who did not take part in the original determination that the bidder or offeror failed to meet the DBE contract goal or make adequate good faith efforts to do so.

(c) The contractor or bidder or offeror will have the opportunity to meet in person with the NMDOT's reconsideration official to discuss the issues of whether it met the DBE contract goal or make adequate good faith efforts to do so.

(d) The NMDOT will send a written decision on the reconsideration, explaining the basis for finding that the contractor or bidder or offeror did or did not meet the DBE contract goal or make adequate good faith efforts to do so.

(e) The result of this reconsideration process is not administratively appealable to the USDOT.

If the NMDOT lists a master contract for "design-build" or "turnkey" contract or similar legally binding instrument, to a contractor or consultant, who in turn lists subsequent subcontracts for the work of the project, the NMDOT may establish a DBE contract goal for the project. The master contractor or consultant then establishes DBE contract goals, as appropriate, for the subcontracts it lists. The NMDOT will maintain oversight of the master contractor's or consultant's activities to ensure that they are conducted consistent with the requirements of the NMDOT's DBE Program and 49 CFR Parts 23 (as amended) and 23.

The NMDOT requires that the successful bidder or offeror, or subsequently the prime contractor or consultant, not terminate for convenience a DBE subcontractor or subconsultant listed in Form A-SSS 1025 DBE A-1, A-5565 DBE A-2, or an approved substitute DBE firm, and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the NMDOT's prior written consent. See the Termination / Substitution / Replacement of Listed DBE Firms for projects having Race Conscious Measures in paragraph 27 of this program.

(a) When a DBE subcontractor or subconsultant is terminated, or fails to complete its work on the contract for any reason, the NMDOT will require the prime contractor to make good faith efforts to find another DBE subcontractor or subconsultant to substitute for the original DBE. These good faith efforts will be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established.

(b) The NMDOT will apply the requirements of this section to DBE contractors or bidders or offerors for prime contracts. In determining whether a DBE contractor or bidder or offeror for a prime contract has met a contract goal, NMDOT will count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

Counting DBE Participation Toward Goals:

When a DBE participates in a contract, only the value of the work actually performed by the DBE will be credited towards DBE project goals.

The entire amount of the portion of a construction contract or design or other consultant contract that is performed by the DBE's own forces will be credited. Included are the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor or subconsultant purchases or leases from the prime contractor or its affiliate).

Credit will be allowed for the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract. Credit will be allowed for fees reasonably and not excessive as compared with fees customarily allowed for similar services.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE subcontractor or subconsultant is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward meeting the DBE project goal.

When a DBE performs as a participant in a joint venture, credit for a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces will be allowed.

Credit to a DBE contractor will be allowed only if the DBE is performing a commercially useful function on the contract.

A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the criteria set forth in paragraph 20.3.1 must be applied.
function, an evaluation will be made of the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work and other relevant factors.

A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, an examination of similar transactions, particularly those in which DBEs do not participate will be performed.

If a DBE construction contractor does not perform or execute responsibility for at least the percentage determined in the NMDOT's Standard Specifications for Highway and Bridge Construction of the total cost of its contract with its own forces, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that the DBE is not performing a commercially useful function.

If a DBE design consultant or other consultant does not perform or execute responsibility for at least 20% of the total cost of its contract with its own forces, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that the DBE is not performing a commercially useful function.

When a DBE is presumed not to be performing a commercially useful function as provided above, the DBE may present evidence to rebut this presumption. It may be determined that the firm is performing a commercially useful function given the type of work involved and normal industry practice.

Decisions concerning commercially useful function matters are not administratively appealable to USDOT.

To determine whether a DBE trucking firm is performing a commercially useful function, the NMDOT will evaluate the amount of work subcontracted, industry practices and other relevant factors.

The DBE must be responsible for the management and supervision of the entire trucking operation for which the DBE is responsible on a particular contract, and there cannot be a continued arrangement for the purpose of countering DBE participation.

The DBE must own and operate at least one fully equipped, insured and operational truck used on the contract. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures and operates using drivers it employs.

The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

A lease arrangement or agreement will indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks will display the name and identification number of the DBE.

Prior to beginning work on a contract, the DBE must submit valid lease agreements to the NMDOT on leased trucks and written agreements with owner-operators. Whether the agreement is with an owner-operator or trucks hired from a trucking firm, the agreement must include the:

(a) Operator's Name;
(b) Social Security number;
(c) Federal Identification Number (FIN);
(d) Cab Card Number of the Truck;
(e) Description of the Truck and the Method of Payment.

Credit for DBE Truck Owner/Operators:

An Owner/Operator must own one (1) fully operational truck and operate it himself/herself for hire. The individual must possess a Commercial Driver's License and the truck must have a valid certificate to run for hire. The individual must have the appropriate operating license and insurance. The individual must be an independent owner-operator and cannot be in an employment/employer relationship with a prime contractor.

Owner/Operator trucks may be utilized by the prime contractor to meet a DBE goal and must be covered by a fully executed written agreement.

For each owner/operator to be credited, the contractor or subcontractor must submit to the NMDOT an agreement that includes or has attached the following information:

(a) Operator or Owner/Operator's name;
(b) Social Security Number;
(c) Copy of Vehicle registration receipts;
(d) Current Vehicle license numbers;
(e) Truck Numbers;
(f) Method of payment (hour, ton, load).
The prime contractor may count towards its DBE participation the total dollar value paid to an owner/operator for the haul. Payments to owner/operators must be certified to by the prime contractor prior to finalizing the project or as work progresses, as required by the NMDOT. If required, the owner/operator must be shown on the prime contractor’s certified payroll.

Termination/Substitution/Replacement of DBE Firms for Projects Having Race-Conscious Measures:

The NMDOT requires that the prime contractor or consultant not terminate for convenience a DBE subcontractor or subconsultant or an approved substitute DBE firm, and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without a justification letter written to the NMDOT.

If a DBE subcontractor or subconsultant is terminated, or the DBE firm fails to complete its work on the contract for any reason, the NMDOT requires the prime contractor or consultant to make good faith efforts to find another certified DBE subcontractor or subconsultant to substitute for the original DBE firm. These good faith efforts will be documented and directed at finding another certified DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet DBE participation.

If a DBE subcontractor or subconsultant is unwilling or unable to perform the work to meet the established goal for the prime contractor or consultant, the prime contractor or consultant will immediately notify the NMDOT’s appropriate project manager in writing, and request to be relieved of meeting the established goal with the named DBE. The prime contractor or consultant will include with this request a justification and the efforts made to deal with the named DBE.

If the prime contractor’s or consultant’s request to be relieved is approved by the NMDOT, and a DBE contract goal shortfall exists, the prime contractor or consultant will immediately attempt to obtain sufficient DBE participation by subcontracting or subconsulting with other certified DBEs.

If the prime contractor or consultant is unable to replace the DBE with another or other certified DBE firms, the prime contractor or consultant will evaluate the remaining items of work and will document and submit the good faith efforts made to subcontract or subconsult DBE work with certified DBEs or to purchase materials or supplies from certified DBE suppliers for such remaining items. The NMDOT may allow a DBE subcontract goal waiver, adjust the DBE goal in accordance submitted and accepted good faith efforts, or assess construction contract liquidated damages or design contract liquidated damages as may be appropriate, depending on the individual project’s overall circumstances.

Prompt Payment Mechanism to Subcontractors:

To ensure that all obligations under contracts awarded to DBEs are met, the NMDOT will review the construction contractor’s or design consultant’s and other consultant’s DBE involvement efforts during the performance of the contract. Prime contractors or design consultants and other consultants will pay all subcontractors or subconsultants their respective subcontract amount by electronic transfer, if available, for NMDOT undisputed acceptable work within ten (10) calendar days after the contractor or consultant receives payment for such work from the NMDOT.

The construction contractor will be required to submit information as provided for in the supporting software system by indicating when payments made to DBEs and non-DBEs within ten (10) calendar days after the contractor receives payment for such work. A prime contractor, design consultant or other consultant will be required to fully document any allegations of breaches of contract or subcontracts. The prime contractor, design consultant, or other consultant will ensure that all conditions are met for prompt payment of the contractor, design consultant, or other consultant is found in violation of the contract or subcontracts within thirty (30) calendar days of satisfactory completion of the entire subcontractor or subconsultant's work and final payment of such work by the NMDOT.

Record Keeping Requirements:

The prime contractor or consultant will keep such records as necessary to ensure compliance with its DBE utilization obligations.

As requested, the prime contractor or consultant will submit all subcontracts and other financial transaction documentation executed with DBEs in such form, manner and content as provided by the NMDOT.

All such records must be retained by the prime contractor or consultant for at least three (3) years after project acceptance, with the PHA following the completion of the contract. These records will be available for inspection by the NMDOT, the FHWA, the USDOE or any other appropriately sanctioned New Mexico State Agencies or Federal Agencies or Departments.

The prime contractor or consultant, or other consultants’ DBE liaison officer or designee will be responsible for ensuring DBE’s complete Form A-644, Disadvantage Business Enterprise (DBE) Participation, and submit the form to the NMDOT, OEO.

The NMDOT will conduct at a minimum an annual audit on selected construction and consultant projects to verify actual participation reported on Form A-644 Disadvantage Business Enterprise (DBE) Participation.

The NMDOT will maintain, provide data and monitor DBE participation through the following:

Any information related to the operation of NMDOT’s DBE Program as directed by USDOE administration.

NMDOT will create and maintain a Participating Contractor or Consultant Annual Profile Registration list consisting of all firms bidding on prime construction and prime consultant design contracts and bidding on award as subcontractors and subconsultants, suppliers or USDOE-assisted projects. For every firm, the following information will be annually collected and maintained:

(a) Firm’s name
(c) Firm's address (including phone, fax and e-mail)
(d) Race/Gender
(e) Firm's status as a DBE or non-DBE
(f) Age of firm
(g) The annual gross receipt of firm
(h) Primary NAICS Codes
(i) Secondary NAICS Codes

A Notice to Construction Contractors: Bidders List of Quoters and Design or Other Consultant Offeror's List of Quoters will be one method used in determining the availability of DBE and non-DBE firms and therefore the relative availability of ready, willing and able DBE's, for the purpose of establishing and monitoring the NMDOT's state goal.

The NMDOT will require all construction bidders to submit Form BL-DBE-Bidders List of Quoters at the bid letting. Failure to submit this form will render the bidder non-responsive.

The NMDOT will require all design or other consultant offeror's to submit the Design or Other Consultant Offeror's List of Quoters Form, No A-1013 at the time of submittal of the offeror or other consultant proposal. Failure to submit this form will render the offeror or other consultant proposal non-responsive.

Compliance Procedures:

Whenever the NMDOT believes the construction contractor, design consultant or other consultant, or any subcontractor or supplier on a USDOT-assisted contract may not be operating in compliance with the terms, conditions or requirements of this DBE Program, including but not limited to, encouraging fronting, breaking or the circumstances of a DBE not performing a commercially useful function as defined, the NMDOT will conduct an investigation. If it is found that the construction contractor, design consultant or other consultant, any subcontractor or supplier is not in compliance with the DBE Program, the non-compliant party will be notified in writing by the NMDOT. A compliance conference to discuss the area(s) of non-compliance may be held between the NMDOT and the non-compliant party or parties. If the non-compliant party or parties fail or refuses to perform in compliance with the DBE Program or these Selected DBE Program Protocols, a "Notice of Non-Compliance" will be transmitted. If the non-compliant party or parties correct the deficiencies, the "Notice of Non-Compliance" will be rescinded and the party or parties will be notified as to compliance. If the deficiencies are not corrected, the NMDOT will initiate administrative action against the non-compliant party or parties, which may include but not be limited to:

(a) Termination of the contract.
(b) For construction, withholding an appropriate percentage of partial payments pursuant to Section 169 of the Standard Specifications for Highway and Bridge Construction. This percentage may be the amount of any proposed monetary sanction.

(c) Initiation of appropriate debarment or decertification proceedings.
(d) Referral of any unlawful actions to the appropriate enforcement agencies.
(e) Other actions as appropriate, at the discretion of the NMDOT.

Recipient/Contractor Assurances:

Each contract the NMDOT enters into with a construction contractor, design consultant, other consultant or recipient on a USDOT-assisted project will ensure that each contract and subcontracts, Department will include the following assurances:

Recipient will not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The NMDOT will take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The NMDOT's DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement implementation of this program a legal obligation and failure to carry out its terms will be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the USDOT may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

The contractor or recipient or subcontractor will not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor or recipient will carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as recipient deems appropriate.
NOTICE TO CONTRACTORS

November 28, 2013

Subcontractor Prompt Payment Provisions, Clarification of Good Cause and Prohibition of Cross-Project Offset

Pursuant to 49 CFR 26.28, as implemented by Section 108.1, paragraph 6 of the New Mexico Department of Transportation Standard Specifications and Notice to Contractors “Selected DBE(DBE) Program Provisions Disadvantaged Business Participation in USDOT Assisted Contracts,” June 11, 2009. "Prompt Payment Mechanism to Subcontractors”, Contractors SHALL pay Subcontractors and Suppliers for satisfactory performance of their contracts no later than seven (7) Days from receipt of each Progress Payment the Department makes to the Contractor. The Contractor shall ensure the Subcontractor or Supplier receives payment within the above-mentioned timeline.

A Subcontractor's or Supplier's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, documented and accepted by the Department. When the Department makes an incremental Acceptance of a portion of the work, the Work of a Subcontractor or Supplier covered by that Acceptance is deemed to be satisfactorily completed, triggering the Contractor's obligation to promptly pay for that portion of the Work.

The Contractor has the burden of proving compliance with these prompt payment provisions and SHALL do so through its timely 82GNow reporting obligation. The Department may recognize supporting documentation of such payment in one or more of the following forms: (1) proof of the timely deposit of funds into the Subcontractor's or Supplier's bank account, (2) proof of hand delivery of timely payment to the Subcontractor or Supplier, or (3) proof of mailing payment to the Subcontractor or Supplier, postmarked no later than three (3) Days prior to the expiration of the seven (7) Day period.

The ONLY good cause recognized by the Department to excuse a payment beyond the timing set in Section 108.1, paragraph 6, is a claim concerning the Subcontractor's or Supplier's Work. Within a project, the Contractor may only withhold a Subcontractor's or Supplier's payment for Work undisputed and accepted by the Department upon proof of a claim between the Contractor and Subcontractor for the work at issue. Such proof must be submitted in accordance with Contract provisions, including but not limited to the Notice to Contractors, "Selected DBE (DBE) Program Provisions Disadvantage Business Participation in USDOT Assisted Contracts". The Contractor has the burden of proof to support the Contractor's assertion of good cause and must submit verifiable explanation and proof of the claim between the parties to the Project Manager within the same timeframe for prompt payment, seven (7) Days.

The Contractor is further advised that due to recent federal (FHWA) interpretations of 49 C.F.R Part 26, concerning prompt payment obligations to Subcontractors and Suppliers,
<table>
<thead>
<tr>
<th>LINE</th>
<th>ITEM DESCRIPTION</th>
<th>AMOUNT</th>
<th>ORDER AND UNITS</th>
<th>DOLLARS</th>
<th>CMS</th>
<th>DOLLARS</th>
<th>CM</th>
</tr>
</thead>
<tbody>
<tr>
<td>0010</td>
<td>010001 CUTTING 6&quot;</td>
<td>LUMP</td>
<td>LUMP</td>
<td>6210.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0020</td>
<td>010002 EXCAVATION</td>
<td>C.Y.</td>
<td></td>
<td>2905.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0030</td>
<td>010003 BISECT</td>
<td>C.Y.</td>
<td></td>
<td>1060.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0040</td>
<td>010004 ROCK EXCAVATION</td>
<td>C.Y.</td>
<td></td>
<td>2020.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0050</td>
<td>010005 DEMOLISH</td>
<td>C.Y.</td>
<td></td>
<td>5600.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0060</td>
<td>010006 BASIS COURSE</td>
<td>C.Y.</td>
<td></td>
<td>1200.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0070</td>
<td>010007 OPEN GRADED</td>
<td>TCM</td>
<td></td>
<td>20.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0080</td>
<td>010008 OPEN GRADED</td>
<td>TCM</td>
<td></td>
<td>20.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0090</td>
<td>010009 EARTH RAMP</td>
<td>C.Y.</td>
<td></td>
<td>7200.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0100</td>
<td>010010 ROADWAY</td>
<td>C.Y.</td>
<td></td>
<td>6200.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LINE NO</td>
<td>DESCRIPTION</td>
<td>APPROVED QUANTITY</td>
<td>UNIT PRICE</td>
<td>BID AMOUNT</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>-------------------</td>
<td>-------------------</td>
<td>------------</td>
<td>------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0100</td>
<td>410505 S105 PAVEMENT</td>
<td>3400.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0110</td>
<td>793012 10' CURB</td>
<td>1400.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0120</td>
<td>621000 REMOVAL OF CONCRETE AND BACKFILL</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0230</td>
<td>621100 REMOVAL OF CONCRETE</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0240</td>
<td>622000 KEYPW CLASS A</td>
<td>40.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0250</td>
<td>622500 CLEAN WATER ACT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0260</td>
<td>622600 CLEAN WATER ACT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0270</td>
<td>702000 TEMPORARY SEED</td>
<td>6.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0280</td>
<td>702300 COMPOSTED MECH</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0290</td>
<td>702600 ROCKS</td>
<td>1250.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0330</td>
<td>703200 SWEEP CLEAN PREPARATION AND BACKFILL</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0340</td>
<td>703300 SWEEP CLEAN PREPARATION AND BACKFILL</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0370</td>
<td>821000 S105 PAVEMENT</td>
<td>2800.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### New Mexico Department of Transportation

**DATE:** 06/17/15  
**TIME:** 08:17 AM  
**FILE:** 4

#### PROJECT(S): 6161.00

<table>
<thead>
<tr>
<th>ITEM NO.</th>
<th>ITEM DESCRIPTION</th>
<th>APPR. QUANTITY</th>
<th>UNIT PRICE</th>
<th>EST. AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>0320</td>
<td>CONCRETE CLASS C SEEDING</td>
<td>0.300</td>
<td>DOLLARS</td>
<td>123.00</td>
</tr>
<tr>
<td>0730</td>
<td>CEMENT REINFORCEMENT</td>
<td>EACH</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0900</td>
<td>CRUSHED Stone MESSAGE SIGN</td>
<td>2.000</td>
<td>LARGO</td>
<td>850.00</td>
</tr>
<tr>
<td>0930</td>
<td>TRAFFIC CONTROL DEVICES FOR CONSTRUCTION</td>
<td>LAMP</td>
<td>LARGO</td>
<td>123.00</td>
</tr>
<tr>
<td>0931</td>
<td>3/4TH MILE COLUMNS</td>
<td>2.000</td>
<td>LARGO</td>
<td>123.00</td>
</tr>
<tr>
<td>0932</td>
<td>NEW CONCRETE PLANT</td>
<td>EACH</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0933</td>
<td>REINFORCING BARS GRADE 65</td>
<td>120.000</td>
<td>DOLLARS</td>
<td>123,000</td>
</tr>
<tr>
<td>0940</td>
<td>SAND BAGS</td>
<td>EACH</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0950</td>
<td>REINFORCEMENT UNIT</td>
<td>1.000</td>
<td>DOLLARS</td>
<td>123.00</td>
</tr>
<tr>
<td>0960</td>
<td>FIRE EXTINGUISHER UNIT</td>
<td>3.000</td>
<td>DOLLARS</td>
<td>123.00</td>
</tr>
<tr>
<td>0970</td>
<td>SANDING BY THE CONTRACTOR</td>
<td>LARGO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0980</td>
<td>SHINING BY THE CONTRACTOR</td>
<td>LARGO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0990</td>
<td>BRICK CONSTRUCTION</td>
<td>LARGO</td>
<td></td>
<td>123.000.00</td>
</tr>
<tr>
<td></td>
<td>SECTION COST TOTAL</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**SECTION 5023 MARCH STRUCTURES**

---

### New Mexico Department of Transportation

**DATE:** 06/17/15  
**TIME:** 08:17 AM  
**FILE:** 5

#### PROJECT(S): 6161.00

<table>
<thead>
<tr>
<th>ITEM NO.</th>
<th>ITEM DESCRIPTION</th>
<th>APPR. QUANTITY</th>
<th>UNIT PRICE</th>
<th>EST. AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>0330</td>
<td>BRICK WALL UNIT</td>
<td>270.000</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0400</td>
<td>CONCRETE, CLASS A</td>
<td>423.000</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0410</td>
<td>CONCRETE, CLASS A</td>
<td>423.000</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0415</td>
<td>CONCRETE, CLASS A</td>
<td>423.000</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0420</td>
<td>PROGRAMS P.F.</td>
<td>2.700</td>
<td>DOLLARS</td>
<td>123.00</td>
</tr>
<tr>
<td>0430</td>
<td>REINFORCING BARS GRADE 65</td>
<td>123,000.00</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0440</td>
<td>RUBBER CLASS A</td>
<td>30.000</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0450</td>
<td>RUBBER CLASS B</td>
<td>890.000</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0460</td>
<td>GUNMETRIC CLASS</td>
<td>123,000.00</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0470</td>
<td>IMPREGNATED LINER L.</td>
<td>123,000.00</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td>0480</td>
<td>TREATED LINER</td>
<td>123,000.00</td>
<td>DOLLARS</td>
<td>30,000.00</td>
</tr>
<tr>
<td></td>
<td>SECTION COST TOTAL</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
AFFIDAVIT OF JEFFREY E MARTINEZ

STATE OF NEW MEXICO

COUNTY OF SANTA FE

Jeffrey E. Martinez, Project Engineer and Manager for the Plans, Specifications and Estimates Bureau (PS&E) for the New Mexico Department of Transportation, upon being duly sworn according to law, under oath, deposes and states: I have read the foregoing Direct Testimony, Exhibits, and it is true and accurate based on my own personal knowledge and belief.

SIGNED this 16th day of February, 2018.

Jeffrey E. Martinez

SUBSCRIBED AND SWORN to before me this 16th day of February, 2018.

Cynthia Wilson, Notary Public in and for the State of New Mexico

My Commission Expires: 2023-05-20

CYNTHIA WILSON-GUERRERO
State of New Mexico
My Comm'ns Expe. 11/20/2020

NMDOT EXH 7
TRANSPORTATION AND HIGHWAYS
CHAPTER 27
HIGHWAY CONSTRUCTION GENERAL PROVISIONS
PART 5 - CONTRACTOR PREQUALIFICATION RULE

18.27.5.1 ISSUING AGENCY: The New Mexico Department of Transportation, post office box 1149, Santa Fe, New Mexico, 87504-1149, 18.27.5.1 NMAC, 01-01-15.

18.27.5.2 SCOPE: This rule applies to the New Mexico department of transportation construction projects and to all contractors and subcontractors existing or contemplating the performance of work within the project limits. 18.27.5.2 NMAC - Rs., 18.27.5.2 NMAC, 01-01-15.

18.27.5.3 STATUTORY AUTHORITY: Section 13-1-43 NMRS 1978, as amended through 1981, and 18.27.5.3 NMAC - Rs., 18.27.5.3 NMAC, 01-01-15.

18.27.5.4 DURATION: Permanent. 18.27.5.4 NMAC - Rs., 18.27.5.4 NMAC, 01-01-15.

18.27.5.5 EFFECTIVE DATE: January 1, 1985, unless a later date is cited at the end of a section. 18.27.5.5 NMAC - Rs., 18.27.5.5 NMAC, 01-01-15.

18.27.5.6 OBJECTIVE: To establish policies and procedures for the determination of responsibility through a contractor prequalification system that directly rewards good performance and encourages poor performance to improve. 18.27.5.6 NMAC - Rs., 18.27.5.6 NMAC, 01-01-15.

18.27.5.7 DEFINITIONS:
A. This rule adopts the abbreviations, symbols, and definitions in the Division 100 general provisions of the New Mexico Department of Transportation current edition of the standard specifications for highway and bridge construction and incorporates the same by reference. 18.27.5.7 NMAC - Rs., 18.27.5.7 NMAC, 01-01-15.

B. NMAC is the abbreviation of transportation industry division.

C. Prequalified is a contractor who is qualified to perform construction projects and to be prequalified shall submit the prequalification packet and pay the required fees to the department for review. 18.27.5.7 NMAC - Rs., 18.27.5.7 NMAC, 01-01-15.

D. Innovative contracting is a sole-source or competitive bidding consistent with federal and state procurement law that can result in work being awarded to a responsible bidder that may not meet the lowest responsible bid.

E. Contractor prequalification system is a method of selecting qualified contractors for construction projects. 18.27.5.7 NMAC - Rs., 18.27.5.7 NMAC, 01-01-15.

F. Prequalification is the process of determining a contractor's eligibility to perform construction projects.

G. Prequalification factor is the factor used to determine a contractor's eligibility to perform construction projects.

H. Publisher is the individual responsible for the publication of the prequalification packet.

I. Prequalification procedure is the process of determining a contractor's eligibility to perform construction projects.

J. Prequalified contract is a contract awarded to a contractor who has been prequalified by the department.

K. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

L. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

M. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

N. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

O. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

P. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

Q. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

R. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

S. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

T. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

U. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

V. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

W. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

X. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

Y. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.

Z. Prequalification procedure is the method used to determine a contractor's eligibility to perform construction projects.
18.27.5.12 POSTING, REVIEW AND APPLICATION OF PREQUALIFICATION FACTOR: The following procedures will apply to the posting, review and application of the prequalification factor:

A. The factors will be calculated on a six-year prequalification period, beginning January first and ending December thirty-first of the next year.

B. The factors will be posted on the office of the director's general list of prequalified contractors and subcontractors, as set forth in the next year's prequalification list.

C. The factors will be posted on the office of the director's general list of prequalified contractors and subcontractors, as set forth in the next year's prequalification list.

D. Factors will be applied to all bid projects beginning with the March first opening until superseded by an updated factor.

E. Factors will be used to determine the modified bid amount.

18.27.5.13 APPEAL PROCEDURES: In the event of the appeal of a contractor's prequalification factor, the following procedures shall apply:

A. Only a contractor disputing their own prequalification factor shall have the right to appeal.

B. To be considered an appeal, must be in writing, and shall consist of the following information:

C. A contractor disputing the calculation or application of its prequalification factor shall file its appeal within seven days of the publication of their prequalification factor.

D. The appeal shall be made in accordance with the following information:

E. The appeal shall be made in accordance with the following information:

F. The appeal shall be made in accordance with the following information:

G. Supporting documentation shall be submitted at the time of filing the appeal.

H. The documents submitted in the appeal process shall be received within the next five business days of the appeal filing date.

I. Service of the appeal shall occur as follows:

J. Service of the appeal shall occur as follows:

K. Service of the appeal shall occur as follows:

L. Service of the appeal shall occur as follows:

M. Service of the appeal shall occur as follows:

18.27.5.11 NMAC §-N, 01-01-15
The hearing officer has the authority to determine the total time allotted for the informal hearing and how the time will be apportioned between the parties.

The hearing officer shall be responsible for maintaining a record of the evidence and proceedings.

(1) The hearing officer will weigh the usability of the evidence provided by both parties.

(2) The hearing officer may use any reliable information, not matter the source, in arriving at a determination.

(3) If the hearing officer uses information in the determination not provided by either party, then the hearing officer will allow a reasonable amount of time for both parties to review the information.

(4) The hearing officer's decision will constitute the final department action on the appeal.

(5) No further action on the appeal may be taken by the other party if the hearing officer's decision is appealed by the other party.

(6) If the appealing party does not timely appeal the decision, then the decision is final.

Section 1 of the appeal through the hearing officer's decision will be made by the director of the agency.

18.27.5 NMAC - N. 01-01-15

18.27.5.14 PREQUALIFICATION COMMITTEE: Members of the prequalification committee will be designated by the director of the department of transportation and shall meet annually to review the prequalification process. Any information related to a prequalification process may be reviewed by the prequalification committee to determine responsibility.

18.27.5.14 NMAC - N. 01-01-15

18.27.5.15 PREQUALIFICATION FOR CONSOLIDATED COMPANIES, JOINT VENTURES, AND OTHER SPECIAL BUSINESS FORMATIONS: The following prequalification process procedures and rules will apply to consolidated companies, joint ventures, and other special business formations:

A. For consolidated companies, the company's parent company is not included in the consolidation if such company is an individual company. The parent company must be individually prequalified before a notice to proceed is issued for the project. The project agreement of the consolidated company must be reviewed and approved by the director. The parent company's prequalification will be used for the modified bid amount.

B. For consolidated companies, the parent company's parent company must be individually prequalified before a notice to proceed is issued for the project. The parent company's prequalification will be used for the modified bid amount.

C. Each joint venture must be individually prequalified before a notice to proceed is issued for the project. The joint venture's prequalification will be used for the modified bid amount.

D. Each joint venture must be individually prequalified before a notice to proceed is issued for the project. The joint venture's prequalification will be used for the modified bid amount.

E. Each joint venture must be individually prequalified before a notice to proceed is issued for the project. The joint venture's prequalification will be used for the modified bid amount.

18.27.5.15 NMAC - Rq. 18.27.5.15, 01-01-15

18.27.5.16 ADOPTION OF THE NEW MEXICO STATE DEPARTMENT OF TRANSPORTATION CURRENT EDITION OF THE STANDARD SPECIFICATIONS FOR HIGHWAY AND BRIDGE CONSTRUCTION: This rule adopts by reference the current edition of the New Mexico department of transportation standard specifications for highway and bridge construction, as amended by this rule.

18.27.5.16 NMAC - N. 01-01-15

HISTORY OF 18.27.5 NMAC

18.27.5 NMAC
<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>PCFRAN 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>814 Solutions, LLC</td>
<td>Albuquerque, NM</td>
<td>87106</td>
<td>5/10/2017</td>
<td>5/31/2018</td>
<td></td>
</tr>
<tr>
<td>A &amp; A Drilling &amp; Blasting, Inc</td>
<td>Buckeye, AZ</td>
<td>85326</td>
<td>4/10/2017</td>
<td>4/30/2018</td>
<td></td>
</tr>
<tr>
<td>A &amp; A Painting, LLC</td>
<td>Campbell, OH</td>
<td>44405</td>
<td>3/20/2017</td>
<td>3/20/2018</td>
<td></td>
</tr>
<tr>
<td>A &amp; B Construction Company</td>
<td>Laramie, WY</td>
<td>82071</td>
<td>3/20/2017</td>
<td>3/20/2018</td>
<td></td>
</tr>
<tr>
<td>A-K Mountain Construction, LLC</td>
<td>Big Pine, TX</td>
<td>93832</td>
<td>3/20/2017</td>
<td>3/20/2018</td>
<td></td>
</tr>
<tr>
<td>A line of Professional Contractors, LLC</td>
<td>Las Cruces, NM</td>
<td>88005</td>
<td>4/10/2017</td>
<td>4/30/2018</td>
<td></td>
</tr>
<tr>
<td>A.A.C. Construcon, LLC</td>
<td>Santa Fe, NM</td>
<td>87507</td>
<td>1/10/2017</td>
<td>1/31/2018</td>
<td></td>
</tr>
<tr>
<td>ABG Concrete Mfg., Inc.</td>
<td>Espanola, NM</td>
<td>87532</td>
<td>6/20/2017</td>
<td>6/20/2018</td>
<td></td>
</tr>
<tr>
<td>ABI Oilfield, Inc.</td>
<td>Denver, CO</td>
<td>80229</td>
<td>6/20/2017</td>
<td>6/20/2018</td>
<td></td>
</tr>
<tr>
<td>Abraham's Construction Inc.</td>
<td>Albuquerque, NM</td>
<td>87105</td>
<td>1/20/2017</td>
<td>2/22/2017</td>
<td></td>
</tr>
<tr>
<td>AC &amp; Company, LLC</td>
<td>Aliso, CA</td>
<td>92653-4977</td>
<td>9/10/2017</td>
<td>9/30/2018</td>
<td></td>
</tr>
<tr>
<td>Access Limited Construction</td>
<td>Dripping Springs, TX</td>
<td>78620-7701</td>
<td>10/10/2017</td>
<td>10/31/2018</td>
<td></td>
</tr>
<tr>
<td>Abe J. Westermann</td>
<td>Azusa, CA</td>
<td>91702</td>
<td>3/20/2017</td>
<td>3/20/2018</td>
<td></td>
</tr>
<tr>
<td>Acheson Gardner Construction, LLC</td>
<td>Chandler, AZ</td>
<td>85225</td>
<td>3/20/2017</td>
<td>3/20/2018</td>
<td></td>
</tr>
<tr>
<td>Add 2 New Mexico, Inc.</td>
<td>Albuquerque, NM</td>
<td>87105</td>
<td>12/10/2017</td>
<td>12/31/2018</td>
<td></td>
</tr>
<tr>
<td>Adams Construction Company, Inc</td>
<td>Albuquerque, NM</td>
<td>87106</td>
<td>2/20/2017</td>
<td>2/28/2018</td>
<td></td>
</tr>
<tr>
<td>Advanced Testing &amp; Materials, Inc</td>
<td>Los Lunas, NM</td>
<td>87031</td>
<td>1/10/2017</td>
<td>1/31/2018</td>
<td></td>
</tr>
<tr>
<td>Advanced Royalty &amp; Rosewater, LLC</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>12/10/2017</td>
<td>12/31/2018</td>
<td></td>
</tr>
<tr>
<td>Advantage Drilling, LLC</td>
<td>Albuquerque, NM</td>
<td>87106</td>
<td>6/20/2017</td>
<td>6/30/2018</td>
<td></td>
</tr>
<tr>
<td>ABCOM Energy &amp; Construction, Inc</td>
<td>Greenwood Village, CO</td>
<td>78111</td>
<td>3/20/2017</td>
<td>3/31/2018</td>
<td></td>
</tr>
<tr>
<td>Alamosa-Martin Associates, LLC</td>
<td>Lea, NM</td>
<td>88040</td>
<td>8/20/2017</td>
<td>8/20/2018</td>
<td></td>
</tr>
<tr>
<td>Albuquerque Airport, Inc.</td>
<td>Albuquerque, NM</td>
<td>87106</td>
<td>5/10/2017</td>
<td>5/10/2018</td>
<td></td>
</tr>
<tr>
<td>COMPANY NAME</td>
<td>CITY, STATE</td>
<td>ZIP CODE</td>
<td>APPROVED DATE</td>
<td>EXPIRATION DATE</td>
<td>PQGR-2017</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-------------</td>
<td>----------</td>
<td>---------------</td>
<td>----------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Barros Sand &amp; Gravel, Inc.</td>
<td>Torreon, TX</td>
<td>87323</td>
<td>10/23/2017</td>
<td>10/23/2018</td>
<td></td>
</tr>
<tr>
<td>Barnes Construction</td>
<td>Poteau, OK</td>
<td>74451</td>
<td>10/23/2017</td>
<td>10/23/2018</td>
<td></td>
</tr>
<tr>
<td>Reed Construction, Inc.</td>
<td>Albuquerque, NM</td>
<td>87101</td>
<td>3/15/2018</td>
<td>3/15/2019</td>
<td></td>
</tr>
<tr>
<td>COMPANY NAME</td>
<td>CITY, STATE</td>
<td>ZIP CODE</td>
<td>APPROVED DATE</td>
<td>EXPIRATION DATE</td>
<td>FORBAN 2017</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-------------</td>
<td>----------</td>
<td>---------------</td>
<td>-----------------</td>
<td>-------------</td>
</tr>
<tr>
<td>College Corporation</td>
<td>Gallop, NM</td>
<td>87501</td>
<td>4/29/2017</td>
<td>4/29/2018</td>
<td></td>
</tr>
<tr>
<td>Demcon, Inc.</td>
<td>Houston, TX</td>
<td>77006</td>
<td>4/28/2017</td>
<td>4/27/2018</td>
<td></td>
</tr>
<tr>
<td>Daniel B. Steinhart &amp; Associés, Inc.</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>8/30/2017</td>
<td>8/30/2018</td>
<td></td>
</tr>
<tr>
<td>Dehapa Brothers, LLC</td>
<td>Harleton, PA</td>
<td>71096</td>
<td>4/22/2017</td>
<td>4/20/2018</td>
<td></td>
</tr>
<tr>
<td>Dierick Industries, Inc.</td>
<td>West Richland, WA</td>
<td>99355</td>
<td>8/25/2017</td>
<td>8/22/2018</td>
<td></td>
</tr>
<tr>
<td>Dallas Electric, Inc.</td>
<td>Silver City, NM</td>
<td>82901</td>
<td>9/1/2017</td>
<td>9/1/2018</td>
<td></td>
</tr>
<tr>
<td>Denver ENGINEERING company</td>
<td>Edgemont, NM</td>
<td>82029</td>
<td>9/2/2017</td>
<td>9/1/2018</td>
<td></td>
</tr>
<tr>
<td>Designations, Inc.</td>
<td>Paterson, NJ</td>
<td>73212</td>
<td>3/15/2017</td>
<td>3/15/2018</td>
<td></td>
</tr>
<tr>
<td>Desert Fox, LLC</td>
<td>Presidio, NM</td>
<td>85361</td>
<td>9/7/2017</td>
<td>9/7/2018</td>
<td></td>
</tr>
<tr>
<td>DeLong &amp; Stevens, Inc. (See Davis Lending &amp; Supply)</td>
<td>Colorado Springs, CO</td>
<td>80920</td>
<td>12/15/2017</td>
<td>12/15/2018</td>
<td></td>
</tr>
<tr>
<td>D'Andrea, Inc.</td>
<td>Albuquerque, NM</td>
<td>87118</td>
<td>9/2/2017</td>
<td>9/1/2018</td>
<td></td>
</tr>
<tr>
<td>Diamond Const. Inc. of Las Cruces</td>
<td>Las Cruces, NM</td>
<td>88037</td>
<td>9/18/2017</td>
<td>9/18/2018</td>
<td></td>
</tr>
<tr>
<td>DODGE SURFACES, Inc.</td>
<td>Rogers, MN</td>
<td>55547</td>
<td>9/27/2017</td>
<td>9/18/2018</td>
<td></td>
</tr>
<tr>
<td>Dugger Construction Company</td>
<td>Albuquerque, NM</td>
<td>87102</td>
<td>3/30/2017</td>
<td>3/30/2018</td>
<td></td>
</tr>
<tr>
<td>Duke Construction, LLC</td>
<td>Las Cruces, NM</td>
<td>88004</td>
<td>4/13/2017</td>
<td>4/13/2018</td>
<td></td>
</tr>
<tr>
<td>Eitel, Inc.</td>
<td>Tompkins, TX</td>
<td>77414-0309</td>
<td>9/11/2017</td>
<td>9/10/2018</td>
<td></td>
</tr>
<tr>
<td>D. W. Andrus Construction Co.</td>
<td>Silver City, NM</td>
<td>85829</td>
<td>6/18/2017</td>
<td>6/18/2018</td>
<td></td>
</tr>
<tr>
<td>E &amp; E Construction, Inc.</td>
<td>Flagstaff, NM</td>
<td>86004</td>
<td>2/26/2017</td>
<td>2/26/2018</td>
<td></td>
</tr>
<tr>
<td>El Tecora Construction, LLC</td>
<td>Rio Rancho, NM</td>
<td>87144</td>
<td>7/10/2017</td>
<td>7/10/2018</td>
<td>0.026</td>
</tr>
<tr>
<td>Esteve &amp; Sons Co. LLC</td>
<td>Espanola, NM</td>
<td>87532</td>
<td>11/22/2017</td>
<td>11/12/2018</td>
<td></td>
</tr>
</tbody>
</table>

*FORBAN means Contractor's Prequalification factor rating average.

*All other NMDOT Prime Contractors received a score of 6.00

<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>FORBAN 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enchantment Trenching, LLC</td>
<td>Albuquerque, NM</td>
<td>87105</td>
<td>5/23/2017</td>
<td>5/23/2018</td>
<td></td>
</tr>
<tr>
<td>Enright, Inc.</td>
<td>Hobbs, NM</td>
<td>88240</td>
<td>3/16/2017</td>
<td>3/16/2018</td>
<td></td>
</tr>
<tr>
<td>EZ Construction</td>
<td>Organ, NM</td>
<td>88055</td>
<td>3/15/2017</td>
<td>3/15/2018</td>
<td></td>
</tr>
<tr>
<td>Faller Asphalt Sealing, LLC</td>
<td>Pueblo, CO</td>
<td>81201</td>
<td>5/23/2017</td>
<td>5/22/2018</td>
<td></td>
</tr>
<tr>
<td>Ferris &amp; Company, LLC</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>5/21/2017</td>
<td>5/21/2018</td>
<td></td>
</tr>
<tr>
<td>Fox Construction, LLC</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>3/24/2017</td>
<td>3/24/2018</td>
<td></td>
</tr>
<tr>
<td>Fisher &amp; Grand – New Mexico, Inc.</td>
<td>Pueblo, NM</td>
<td>87043</td>
<td>3/15/2017</td>
<td>3/14/2018</td>
<td>0.927</td>
</tr>
<tr>
<td>Flame On, Inc.</td>
<td>Moriarty, NM</td>
<td>88025</td>
<td>4/13/2017</td>
<td>4/13/2018</td>
<td></td>
</tr>
<tr>
<td>FNF Construction, Inc.</td>
<td>Tempe, AZ</td>
<td>85281</td>
<td>2/17/2017</td>
<td>2/16/2018</td>
<td></td>
</tr>
<tr>
<td>Fowler Brothers, Inc.</td>
<td>Silver City, NM</td>
<td>85829</td>
<td>6/14/2017</td>
<td>6/13/2018</td>
<td></td>
</tr>
<tr>
<td>Franks' Earthmoving, Inc.</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>5/26/2017</td>
<td>5/25/2018</td>
<td></td>
</tr>
<tr>
<td>Freytag, Inc.</td>
<td>Coml Windham, VA</td>
<td>20185</td>
<td>4/17/2017</td>
<td>4/16/2018</td>
<td></td>
</tr>
<tr>
<td>Gandy &amp; Gutter, LLC</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>5/24/2017</td>
<td>5/23/2018</td>
<td></td>
</tr>
<tr>
<td>GCI Inc.</td>
<td>El Paso, TX</td>
<td>79907</td>
<td>1/21/2018</td>
<td>1/21/2018</td>
<td></td>
</tr>
<tr>
<td>Gerber Construction, Inc.</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>3/15/2017</td>
<td>3/15/2018</td>
<td></td>
</tr>
<tr>
<td>Gaylord Sealing, Inc.</td>
<td>Albuquerque, NM</td>
<td>87121</td>
<td>9/30/2017</td>
<td>9/30/2018</td>
<td></td>
</tr>
<tr>
<td>General Hysteria Utilities, LLC</td>
<td>Alamogordo, NM</td>
<td>88310</td>
<td>9/11/2017</td>
<td>9/11/2018</td>
<td></td>
</tr>
<tr>
<td>General Petroleum, Inc.</td>
<td>Alamosa, CO</td>
<td>81101</td>
<td>9/30/2017</td>
<td>9/30/2018</td>
<td></td>
</tr>
<tr>
<td>Genova Road Products, Inc.</td>
<td>Munford, UT</td>
<td>33571</td>
<td>7/14/2017</td>
<td>7/14/2018</td>
<td></td>
</tr>
<tr>
<td>Goodwin, LLC</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>9/15/2017</td>
<td>9/15/2018</td>
<td></td>
</tr>
<tr>
<td>Goalitization International, LLC</td>
<td>Grand Junction, CO</td>
<td>81522</td>
<td>5/20/2017</td>
<td>5/20/2018</td>
<td></td>
</tr>
<tr>
<td>COMPANY NAME</td>
<td>CITY, STATE</td>
<td>ZIP CODE</td>
<td>APPROVED DATE</td>
<td>EXPIRATION DATE</td>
<td>POPUP 2017</td>
</tr>
<tr>
<td>---------------------------</td>
<td>-------------</td>
<td>----------</td>
<td>---------------</td>
<td>-----------------</td>
<td>------------</td>
</tr>
<tr>
<td>Cross Enterprise LLC</td>
<td>Tijeras, NM</td>
<td>87053</td>
<td>05/01/2017</td>
<td>05/01/2019</td>
<td></td>
</tr>
<tr>
<td>GM Entalco, LLC</td>
<td>Santa Fe, NM</td>
<td>87501</td>
<td>09/29/2017</td>
<td>09/29/2018</td>
<td></td>
</tr>
<tr>
<td>Golden Associates, Inc.</td>
<td>Albuquerque, NM</td>
<td>87113-2002</td>
<td>04/30/2018</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gonzales Construction Company d/b/a K &amp; J Construction</td>
<td>Delano, CO</td>
<td>83135</td>
<td>3/19/2017</td>
<td>3/19/2018</td>
<td></td>
</tr>
<tr>
<td>Grace Steel and Fabrication, LLC</td>
<td>Scottsdale, AZ</td>
<td>85251</td>
<td>09/09/2017</td>
<td>09/09/2018</td>
<td></td>
</tr>
<tr>
<td>Grandi Testing Lab, Inc.</td>
<td>Los Lunas, NM</td>
<td>87031</td>
<td>01/20/2017</td>
<td>01/19/2018</td>
<td></td>
</tr>
<tr>
<td>Granite Construction Company</td>
<td>Westmont, CA</td>
<td>90287</td>
<td>03/02/2018</td>
<td>03/01/2018</td>
<td></td>
</tr>
<tr>
<td>Grass Masters, LLC</td>
<td>Las Cruces, NM</td>
<td>88004</td>
<td>08/10/2017</td>
<td>08/14/2017</td>
<td></td>
</tr>
<tr>
<td>G.R. Engineers, Inc.</td>
<td>Cleveland, OH</td>
<td>44118</td>
<td>10/10/2017</td>
<td>10/01/2018</td>
<td></td>
</tr>
<tr>
<td>Groundhog Excavating, Inc.</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>7/26/2017</td>
<td>7/26/2018</td>
<td></td>
</tr>
<tr>
<td>Gulf Coast Contracting, LLC</td>
<td>Tappan, NY, FL</td>
<td>33786</td>
<td>11/30/2017</td>
<td>11/30/2018</td>
<td></td>
</tr>
<tr>
<td>Gutierrez Industries, LLC</td>
<td>Las Cruces, NM</td>
<td>88001</td>
<td>10/01/2017</td>
<td>10/01/2018</td>
<td></td>
</tr>
<tr>
<td>Gutterman Construction Solutions, LLC</td>
<td>Albuquerque, NM</td>
<td>87108</td>
<td>11/24/2017</td>
<td>11/18/2018</td>
<td></td>
</tr>
<tr>
<td>KDO, Construction, Inc.</td>
<td>Albuquerque, NM</td>
<td>87110</td>
<td>10/30/2017</td>
<td>10/15/2018</td>
<td></td>
</tr>
<tr>
<td>Hageman Constructors, Inc.</td>
<td>Denver, CO</td>
<td>80216</td>
<td>03/03/2018</td>
<td>03/03/2018</td>
<td></td>
</tr>
<tr>
<td>Hardy Hole Drilling</td>
<td>Chapsault, NM</td>
<td>87004</td>
<td>09/24/2017</td>
<td>09/24/2018</td>
<td></td>
</tr>
<tr>
<td>Harris Rail Navi Motion, Inc.</td>
<td>Albuquerque, NM</td>
<td>87107</td>
<td>11/27/2017</td>
<td>11/15/2018</td>
<td></td>
</tr>
<tr>
<td>Hass Contracting Company</td>
<td>Albuquerque, NM</td>
<td>87113</td>
<td>05/22/2017</td>
<td>05/22/2018</td>
<td>0.851</td>
</tr>
<tr>
<td>Hayden Building Corp</td>
<td>Phoenix, AZ</td>
<td>85010</td>
<td>03/02/2017</td>
<td>03/02/2018</td>
<td></td>
</tr>
<tr>
<td>Haywood &amp; Baker Inc.</td>
<td>Ranchos MD</td>
<td>87111</td>
<td>02/26/2017</td>
<td>02/26/2018</td>
<td></td>
</tr>
<tr>
<td>Hernandez Concrete Pumping, Inc.</td>
<td>Albuquerque, NM</td>
<td>87116</td>
<td>07/30/2017</td>
<td>07/30/2018</td>
<td></td>
</tr>
<tr>
<td>Highland Enterprises, Inc.</td>
<td>Las Cruces, NM</td>
<td>88004</td>
<td>06/11/2017</td>
<td>06/11/2018</td>
<td>0.851</td>
</tr>
</tbody>
</table>

*PM&I is a pre-contractor's prequalification factor rolling average. *All other NMDOT Prime Contractors received a score of 1.00.
### New Mexico Department of Transportation
Prequalified Contractors and Subcontractors List
January 23, 2018

<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>PORTRA 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mountain States Construction, Inc.</td>
<td>Albuquerque, NM</td>
<td>87199</td>
<td>10/17/2017</td>
<td>10/16/2018</td>
<td>0,920</td>
</tr>
<tr>
<td>Murphy Builders, Inc.</td>
<td>Santa Fe, NM</td>
<td>87501</td>
<td>4/22/2017</td>
<td>4/19/2018</td>
<td>0,580</td>
</tr>
<tr>
<td>MWH, Inc.</td>
<td>Albuquerque, NM</td>
<td>87106</td>
<td>8/24/2017</td>
<td>7/23/2018</td>
<td>0,017</td>
</tr>
<tr>
<td>Nielson Industrial Services, Inc.</td>
<td>Oklahoma City, OK</td>
<td>73137</td>
<td>6/24/2017</td>
<td>6/01/2017</td>
<td>0,077</td>
</tr>
<tr>
<td>New World Building</td>
<td>Silver City, NM</td>
<td>88061</td>
<td>9/22/2017</td>
<td>7/22/2018</td>
<td>0,017</td>
</tr>
<tr>
<td>Nick Green &amp; Sons Construction, Inc.</td>
<td>Clovis, NM</td>
<td>88101</td>
<td>8/8/2017</td>
<td>7/27/2018</td>
<td>0,090</td>
</tr>
<tr>
<td>North Geotechnical Services, LLC</td>
<td>Albuquerque, NM</td>
<td>87111</td>
<td>4/21/2017</td>
<td>4/21/2017</td>
<td>0,077</td>
</tr>
<tr>
<td>Northern Mountain Constructors, Inc.</td>
<td>El Paso, NM</td>
<td>88025</td>
<td>12/31/2016</td>
<td>11/30/2019</td>
<td>0,090</td>
</tr>
<tr>
<td>NWS, Inc.</td>
<td>Albuquerque, NM</td>
<td>87110</td>
<td>3/20/2017</td>
<td>3/19/2017</td>
<td>0,090</td>
</tr>
<tr>
<td>OGC, Inc.</td>
<td>Palos Verdes, CA</td>
<td>90274</td>
<td>9/21/2017</td>
<td>9/20/2017</td>
<td>0,090</td>
</tr>
<tr>
<td>O’Keefe Services Group, Inc.</td>
<td>Farmington, NM</td>
<td>87405</td>
<td>2/22/2017</td>
<td>2/21/2017</td>
<td>0,090</td>
</tr>
<tr>
<td>Open-Bond Associates</td>
<td>Lodi, CA</td>
<td>95240</td>
<td>6/21/2017</td>
<td>6/21/2017</td>
<td>0,090</td>
</tr>
<tr>
<td>Open Road Innovations, Inc.</td>
<td>Wheat Ridge, CO</td>
<td>80033</td>
<td>5/21/2017</td>
<td>5/21/2017</td>
<td>0,090</td>
</tr>
<tr>
<td>O’Neill Transport, LLC</td>
<td>Albuquerque, NM</td>
<td>87123</td>
<td>7/1/2017</td>
<td>6/30/2018</td>
<td>0,090</td>
</tr>
<tr>
<td>P &amp; M Signs, Inc.</td>
<td>Mountainair, NM</td>
<td>87036</td>
<td>9/11/2017</td>
<td>9/11/2017</td>
<td>0,090</td>
</tr>
<tr>
<td>Pacheco Construction &amp; Training, Inc.</td>
<td>Tucumcari, NM</td>
<td>88411</td>
<td>5/11/2017</td>
<td>4/23/2018</td>
<td>0,090</td>
</tr>
<tr>
<td>Pavement Marking, Inc.</td>
<td>Tempe, AZ</td>
<td>85284</td>
<td>1/24/2017</td>
<td>1/31/2017</td>
<td>0,090</td>
</tr>
</tbody>
</table>

*PORTRA means Contractor's Prequalification Replacing Average.  
All other NMDOT RFP Contractors received a score of 1.00.*
<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rock &amp; Co.</td>
<td>Brighton, CO</td>
<td>80001</td>
<td>12/1/2017</td>
<td>11/30/2018</td>
</tr>
<tr>
<td>Rock Solid Stabilization &amp; Reclamation</td>
<td>Gensburg, NY</td>
<td>86218</td>
<td>10/2/2017</td>
<td>10/15/2018</td>
</tr>
<tr>
<td>Honey Construction, Inc.</td>
<td>Cantonton, NM</td>
<td>88040</td>
<td>4/12/2017</td>
<td>4/11/2018</td>
</tr>
<tr>
<td>Auyoba Enterprises</td>
<td>Santa Fe, NM</td>
<td>87505</td>
<td>5/12/2017</td>
<td>5/28/2018</td>
</tr>
<tr>
<td>Hotel Services, Inc.</td>
<td>Mesa, AZ</td>
<td>85237</td>
<td>12/22/2017</td>
<td>12/24/2017</td>
</tr>
<tr>
<td>Russell Bub &amp; Gravel Co., Inc.</td>
<td>Las Cruces, NM</td>
<td>88010</td>
<td>10/20/2017</td>
<td>10/19/2018</td>
</tr>
<tr>
<td>J.J. Lewis Construction, Inc.</td>
<td>Rockville, MN</td>
<td>85665</td>
<td>6/10/2017</td>
<td>6/15/2018</td>
</tr>
<tr>
<td>Hollon Brothers Construction, Inc.</td>
<td>Albuquerque, NM</td>
<td>87129</td>
<td>3/22/2017</td>
<td>3/28/2018</td>
</tr>
<tr>
<td>San Esteban PonceFunds, Inc.</td>
<td>Santa Fe, NM</td>
<td>87501</td>
<td>2/22/2017</td>
<td>2/22/2017</td>
</tr>
<tr>
<td>Sandy Jones Contractor</td>
<td>Williamsburg, VA</td>
<td>82162</td>
<td>8/16/2017</td>
<td>8/16/2018</td>
</tr>
<tr>
<td>Belvedere Foundation Company</td>
<td>Sterling, VA</td>
<td>20164</td>
<td>6/17/2017</td>
<td>6/17/2018</td>
</tr>
<tr>
<td>CRDA Construction, Inc.</td>
<td>Centennial, CO</td>
<td>80112</td>
<td>12/12/2017</td>
<td>12/12/2018</td>
</tr>
<tr>
<td>Seattle Lumber Co., Inc.</td>
<td>Anchorage, AK</td>
<td>99504</td>
<td>5/16/2017</td>
<td>5/16/2017</td>
</tr>
<tr>
<td>B&amp;A-D &amp; N Construction, Inc.</td>
<td>Gallup, NM</td>
<td>87305</td>
<td>1/12/2017</td>
<td>1/12/2017</td>
</tr>
<tr>
<td>Sierra Valley Contractors, LLC</td>
<td>T or C, NM</td>
<td>87311</td>
<td>2/24/2017</td>
<td>2/24/2017</td>
</tr>
<tr>
<td>Mason Bros., Inc.</td>
<td>Centennial, CO</td>
<td>80112</td>
<td>2/24/2017</td>
<td>2/24/2017</td>
</tr>
<tr>
<td>Smith &amp; Aguirre Construction Co., Inc.</td>
<td>Las Cruces, NM</td>
<td>88004</td>
<td>5/14/2017</td>
<td>5/14/2017</td>
</tr>
<tr>
<td>Smith Engineering Company</td>
<td>Tooele, NM</td>
<td>84074</td>
<td>10/16/2017</td>
<td>10/16/2017</td>
</tr>
<tr>
<td>Smith Environmental &amp; Engineering</td>
<td>Waukesha, WI</td>
<td>53189</td>
<td>5/23/2017</td>
<td>5/23/2017</td>
</tr>
<tr>
<td>Seitho Construction, Inc.</td>
<td>Odeillo, NM</td>
<td>87891</td>
<td>11/21/2017</td>
<td>11/21/2017</td>
</tr>
</tbody>
</table>

*All NMDOT Prime Contractor's owned a score of 1.00*
### New Mexico Department of Transportation
Prequalified Contractors and Subcontractors List

*This list is revised once a month.

<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>PQQFA DATE 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Lane Construction Corporation</td>
<td>Charlotte, NC</td>
<td>28205-3742</td>
<td>9/14/2017</td>
<td>8/31/2018</td>
<td>0.850</td>
</tr>
<tr>
<td>The Truitt Companies, Inc.</td>
<td>Tampa, FL</td>
<td>33634-0393</td>
<td>11/16/2017</td>
<td>11/15/2018</td>
<td>0.850</td>
</tr>
<tr>
<td>TGC Companies, Inc. d/b/a TGC Plumbing &amp; Utility</td>
<td>Albuquerque, NM</td>
<td>87109</td>
<td>6/28/2017</td>
<td>8/30/2018</td>
<td></td>
</tr>
<tr>
<td>Today's Ties &amp; Keyline Design</td>
<td>Thousand Oaks, CA</td>
<td>91362</td>
<td>12/30/2017</td>
<td>12/30/2018</td>
<td></td>
</tr>
<tr>
<td>Total Highway Maintenance, LLC</td>
<td>Odessa, TX</td>
<td>79761-4027</td>
<td>10/11/2017</td>
<td>10/10/2018</td>
<td></td>
</tr>
<tr>
<td>Traffic Research &amp; Analysis, Inc.</td>
<td>Phoenix, AZ</td>
<td>85016</td>
<td>6/20/2017</td>
<td>8/19/2018</td>
<td></td>
</tr>
<tr>
<td>Veech Fence LLC</td>
<td>Bernalillo, NM</td>
<td>87004</td>
<td>1/19/2017</td>
<td>8/17/2018</td>
<td></td>
</tr>
<tr>
<td>Ultimate Concrete, LLC</td>
<td>El Paso, TX</td>
<td>79938</td>
<td>2/28/2017</td>
<td>8/27/2018</td>
<td></td>
</tr>
<tr>
<td>Universal Constructors, Inc.</td>
<td>Albuquerque, NM</td>
<td>87101</td>
<td>2/28/2017</td>
<td>8/27/2018</td>
<td></td>
</tr>
<tr>
<td>UPRER USA, Inc.</td>
<td>Tomball, TX</td>
<td>77377-1922</td>
<td>4/30/2017</td>
<td>4/28/2018</td>
<td></td>
</tr>
<tr>
<td>USA Construction Company, Inc.</td>
<td>Mesa, AZ</td>
<td>85213</td>
<td>8/15/2017</td>
<td>8/14/2018</td>
<td></td>
</tr>
<tr>
<td>Vance Brothers, Inc.</td>
<td>Kansas City, MO</td>
<td>64133-0127</td>
<td>3/15/2017</td>
<td>8/14/2018</td>
<td></td>
</tr>
<tr>
<td>Venegas Engineering Management and Construction, Inc</td>
<td>El Paso, TX</td>
<td>79902</td>
<td>3/20/2017</td>
<td>8/14/2018</td>
<td></td>
</tr>
<tr>
<td>Veracruz Construction, Inc.</td>
<td>Marion, TX</td>
<td>76655-8747</td>
<td>5/5/2017</td>
<td>8/14/2018</td>
<td></td>
</tr>
<tr>
<td>Villalobos Construction Co., Inc.</td>
<td>Las Cruces, NM</td>
<td>88005-6144</td>
<td>9/13/2017</td>
<td>8/12/2018</td>
<td>0.650</td>
</tr>
<tr>
<td>Vial Consulting Group, LLC</td>
<td>Albuquerque, NM</td>
<td>87102</td>
<td>12/14/2017</td>
<td>12/13/2018</td>
<td>0.520</td>
</tr>
<tr>
<td>Wacob BUILD, Inc.</td>
<td>Albuquerque, NM</td>
<td>87105-5457</td>
<td>5/5/2017</td>
<td>8/5/2018</td>
<td></td>
</tr>
<tr>
<td>Welch Oil &amp; Gas Inc.</td>
<td>Las Cruces, NM</td>
<td>88004-7307</td>
<td>1/15/2017</td>
<td>8/14/2018</td>
<td></td>
</tr>
<tr>
<td>Western Dewatering, Inc.</td>
<td>El Paso, TX</td>
<td>79933</td>
<td>3/14/2017</td>
<td>8/13/2018</td>
<td></td>
</tr>
<tr>
<td>Western Explosives Systems Company</td>
<td>Salt Lake City, UT</td>
<td>84106</td>
<td>9/15/2017</td>
<td>9/14/2018</td>
<td></td>
</tr>
<tr>
<td>Western Milling, LLC</td>
<td>Grand Junction, CO</td>
<td>81501-2072</td>
<td>1/22/2017</td>
<td>1/21/2018</td>
<td></td>
</tr>
<tr>
<td>Western Technologies, Inc.</td>
<td>Albuquerque, NM</td>
<td>87113</td>
<td>2/25/2017</td>
<td>2/24/2018</td>
<td></td>
</tr>
</tbody>
</table>

### New Mexico Department of Transportation
Prequalified Contractors and Subcontractors List

*This list is revised once a month.

<table>
<thead>
<tr>
<th>COMPANY NAME</th>
<th>CITY, STATE</th>
<th>ZIP CODE</th>
<th>APPROVED DATE</th>
<th>EXPIRATION DATE</th>
<th>PQQFA DATE 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>weekend Landscape Construction, Inc.</td>
<td>Albuquerque, NM</td>
<td>87106-2106</td>
<td>7/26/2017</td>
<td>7/25/2018</td>
<td></td>
</tr>
<tr>
<td>White Cloud Pipeline Corporation</td>
<td>Ruidoso, NM</td>
<td>88345-0220</td>
<td>4/20/2017</td>
<td>4/19/2018</td>
<td></td>
</tr>
<tr>
<td>WinPatterson, Inc.</td>
<td>Albuquerque, NM</td>
<td>87110</td>
<td>3/27/2017</td>
<td>3/26/2018</td>
<td></td>
</tr>
<tr>
<td>You Domo Consultants, LLC</td>
<td>Albuquerque, NM</td>
<td>87101</td>
<td>9/1/2017</td>
<td>8/31/2018</td>
<td></td>
</tr>
<tr>
<td>ZText</td>
<td>El Paso, TX</td>
<td>79936</td>
<td>7/15/2017</td>
<td>7/14/2018</td>
<td></td>
</tr>
</tbody>
</table>

Contractors with 2017 PQQFA score but not prequalified as of 12-20-17:

- G. Sandhuff Construction, Inc. | Las Cruces, NM | 88006 | 7/29/2017 | 1.012 |
- MANS Construction Company | Las Cruces, NM | 88004 | 12/1/2016 | 12/30/2016 | 1.208 |

*All other NMDOT Prime Contractors received a score of 3.00*
February 6, 2017

ALI, Inc.
ATTN: Edith Gonzales, Project Manager
P.O. Box 9823
Albuquerque, New Mexico 87118

RE: NMDOT Finding of No Good Cause for Failure to Promptly Pay—
NMDOT Project No. EN 04113—Chama County
Subcontractor: Gonzales Construction Inc.

Dear Mr. Gonzales,

By letter dated January 10, 2017, the New Mexico Department of Transportation (NMDOT) requested ALI, Inc. (ALI) to provide additional documentation or other information relating to a prompt payment dispute involving its Subcontractor, Gonzales Construction, Inc. On December 19, 2016, ALI responded by email stating that ALI was under the impression they had 10 days to pay the subcontractor and had no new information to submit in relation to NMDOT’s request.

To briefly summarize the facts resulting in NMDOT’s initial prompt payment inquiry:

- Gonzales Construction issued an invoice to ALI dated October 15, 2016.
- NMDOT paid a zero dollar ($0.00) progress payment to ALI on October 27, 2016.
- ALI paid Gonzales Construction on December 6, 2016 for the work performed and accepted by NMDOT in October.
- Payment to Gonzales Construction was more than seven (7) days after ALI’s receipt of the October 27, 2016 progress payment.

With respect to this dispute, ALI’s prompt payment obligation was created by section 108.3 of the NMDOT’s Standard Specification for Highway and Bridge Construction, 2014 Edition (Standard Specifications), and the Notice to Contractors entitled “Subcontractor Prompt Payment Provisions, Clarification of Good Cause and Prohibition of Cross-Project Offset” dated November 26, 2013 (NTPC). Section 108.3 requires in part as follows:

The Contractor shall promptly pay its subcontractors and suppliers for satisfactory performance of their interests on any work or materials included in the Contract. The Contractor shall provide written documentation to the Department that the work has been satisfactorily completed within thirty (30) days of the completion of the work. The contract price shall be adjusted by the Department only when it is accepted by the Department.

Addressing your response that Section 13-1-158 applies to this dispute, it does not, but it is a statutory provision contained in the New Mexico Procurement Code. The Procurement Code applies to expenditures by state agencies, such as the NMDOT, and local public bodies in their purchase of goods and services, but does not apply to private party contracts.

Sincerely,

[Signature]

René Reynolds, P.E. Program
Construction and Civil Rights Bureau
New Mexico Department of Transportation

CC: Jason Griner, NMDOT DBE Project Manager
    Sandra Coates, NMDOT DBE Office Manager
    Gordia Bynum, NMDOT 109 Construction Liaison Engineer
    Joceline Gallegos, NMDOT DBE Compliance
    Damaris Segura, NMDOT DBE Ombudsman
    Teri Reaves, NMDOT DBE Acting Construction Engineer
January 4, 2017

AUI, Inc.
ATTN: Edna Gonzalez, Project Manager
P.O. Box 9585
Albuquerque, New Mexico 87199

RE: NMDOT Finding of No Good Cause for Failure to Promptly Pay — CN EID 11010 — J&H Supply Company Inc.

Dear Ms. Gonzalez,

The New Mexico Department of Transportation (NMDOT) received AUI, Inc.'s (AUI) email correspondence sent on December 13, 2016 confirming our phone call. In the phone call you stated that AUI had no new information to submit to respond to NMDOT's request to provide evidence demonstrating its subcontractor J&H Supply Company Inc. (J&H) was timely paid for accepted work.

The NMDOT made the request for evidence demonstrating timely payment pursuant to Section 208.1.1 of the NMDOT's Standard Specifications for Highway and Bridge Construction (2014 Edition) and the prompt payment clause required by 49 C.F.R. § 26.28. Section 208.1.1 obligates a contractor to promptly pay its subcontractors and suppliers for satisfactory performance of their contracts no later than seven (7) days of receipt of a progress payment from the NMDOT. The prompt payment requirement is also referenced in the NMDOT's notice to Contractors titled "Subcontractor Prompt Payment Provisions, Clarification of Hard Case and Termination of Subcontractor Effort" dated November 26, 2013, which was incorporated in AUI's contract with the NMDOT. Based on review of the information and relevant contract provisions I find that AUI did not timely pay J&H and that good cause does not exist to excuse the failure to timely pay.

To briefly restate the series of events and my findings leading to NMDOT's initial prompt payment letter, I find that:

- J&H issued an invoice to AUI dated September 30, 2016 for work performed on the above project.
- NMDOT paid a progress payment to AUI for $20,322.75 on October 6, 2016. The progress payment included the work performed by J&H and previously invoiced to AUI on September 30, 2016.
- J&H contested the original invoice to include all new sections and additional material work on October 6, 2016 and submitted it to AUI.
- A zero ($0) progress payment was issued by the NMDOT on October 27, 2016. Part of the accepted work included in this progress payment was the additional work J&H performed and included in the amended invoice on October 17, 2016.
- Based on the October 6, 2016 progress payment AUI should have paid J&H for that work no later than October 13, 2016.

- AUI paid J&H on October 27, 2016 for the full amount of the amended invoice, this included work paid for by the NMDOT on October 6, 2016.

Based on the findings, I conclude that good cause did not exist to excuse AUI's failure to promptly pay J&H after its receipt of the October 6, 2016 progress payment. Amending the invoice date does not change the requirement to promptly pay within a certain timeframe after receipt of payment from the NMDOT. Additionally, AUI does not have the authority to waive or agree to violate the contract payment obligations contained in its contract with the NMDOT. Agreements of this sort are without effect. Payment was due to J&H on or before October 13, 2016 and was not made. Work performed by J&H after the progress payment was issued by the NMDOT should have been paid within the appropriate timeframe after the next progress payment was issued by the NMDOT.

This is my final determination for this prompt payment investigation. Please feel free to contact me if you have any questions or concerns regarding this information.

Sincerely,

Davion Segura
Deputy Director
Construction and Civil Rights Bureau
New Mexico Department of Transportation

[Signature]

CC: Ayman Graayer, NMDOT US Project Manager
    Sandra Gobea, NMDOT DB Office Manager
    Gustavo Barela, NMDOT US Construction Liason Engineer
    Jackie Gallina, NMDOT COS Compliance
    Renee Barrios, NMDOT COS Director
    Salty Reeves, NMDOT Acting Construction Engineer
SECTION 106: PROSECUTION AND PROGRESS

The Contractor is wholly and solely responsible and liable for the performance of all Work or any part thereof by its Subcontractors, Subsuppliers, and Suppliers on the Project.

106.1 SUBCONTRACTING

Any individual, partnership, firm, corporation, or joint venture performing Work on the Project that is an employee of the Contractor or a Subcontractor unless otherwise excepted in this Section. A Subcontract or Subsuppliers is not a Subcontractor unless Work is being performed on the Project.

The Contractor shall perform with its own organization at least 40% of the Work based on the Total Bid Amount. The Contractor's organization shall include those persons and their direct and indirect Equipment and materials or entities, if any, that shall not include persons who are are wholly owned by the Entity's or Subcontractor, assignees, or agents. The Contractor shall make a request for Subcontractor approvals before subcontracting Work and shall not subcontract this requirement by placing a subcontractor's employees on the pay roll. The Department will treat a person or group personally operating as an independent Contractor as an independent Contractor for the purpose of this Section.

The Department will provide the required forms for a list of intended Subcontractors and Material suppliers in the Bid Package. The Contractor shall submit this list at the time of contract award and update the list as the Work progresses. The Contractor is responsible for ensuring that all Subcontractors are qualified by the Department and are duly licensed for the Work to be performed. All Subcontractor agreements are required to be submitted with the Department. The Department will also verify that Subcontractor, Subsuppliers, and Subsuppliers are in compliance with all applicable state and federal laws and regulations including the New Mexico Public Works Act. The Contractor shall comply with the New Mexico Subcontractor Fair Practices Act to the extent it is applicable to the Project.

A Subcontractor is not a Subcontractor unless the Subcontractor is using the Contractor to meet the DBE requirement associated with the Project. A Subcontractor is an individual, partnership, firm, corporation, or joint venture that performs Work on the Project but does not perform Work on the Project site. Transportation of materials within the Project site (e.g., motor vehicles or trucks used to provide materials to and from the Project area) and is subcontracted Work shall not be considered Subcontractor Work. The Contractor shall comply with the New Mexico Subcontractor Fair Practices Act to the extent it is applicable to the Project.

Responsibility for the Work under the Contract and the Contract Documents shall not be divided or delegated by subcontracting or any other assignment of interest.

The Contractor shall promptly pay to Subcontractors and Subsuppliers for materials, labor, and other Work on the Project, as directed by the Department, and shall not accept any Project payments from the Department for any part of the Work performed by the Contractor or Subcontractors, unless the Contractor has paid all Subcontractors and Subsuppliers for the Work performed.

The Department can take action against the Contractor for failure to pay Subcontractors and Subsuppliers the amounts due for the Work performed under the Contract. The Department shall have the right to suspend, temporarily or permanently, the Contractor's access to the Project site or to the Department's offices or facilities, and shall require the Contractor to pay, at its own expense, all costs and expenses incurred by the Department in connection with such suspension.
Grover, Jayson, NMDOT

To: Grover, Jayson, NMDOT

Subject: Notice of Change to Contract

The purpose of the change order is to delete any and all NTCs in the project contract related to federal contracting or civil rights requirements and replace it with the new Federal Requirements NTC that is attached to this change order.

The following is a list of NTCs that is being deleted and replaced:

[Project Office to list the appropriate NTCs by title and date — if you are not sure, please work with your CLE. If you have a previous version of the combined Federal Requirements NTC, it is likely to be only one NTC]

This change is retroactive to the beginning of the project (contract time start date) and any non-conformances that were issued based on the requirements in the deleted NTCs that are no longer appropriate or applicable will be rescinded by letter to the contractor, including those non-conformances related to employee payments and submission of certified payrolls.

If you have any questions, please contact your CLE.

Thanks,

Sally Reeves
Acting State Construction Engineer
Construction and Civil Rights Bureau
Phone: 505-467-9887

---

I have attached the new Federal Requirements NTC. Please process a change order to delete the existing NTC/NTCs and replace this with the new NTC. Please use the following explanation.

NMDOT EXH 13
<table>
<thead>
<tr>
<th>Date</th>
<th>Name</th>
<th>Action</th>
<th>Date</th>
<th>Recommend</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>07/06/16</td>
<td>Martinez, Pete J</td>
<td>Approval</td>
<td>07/07/16</td>
<td>Approved</td>
<td>Approved</td>
</tr>
<tr>
<td>07/06/16</td>
<td>Martinez, Pete J</td>
<td>Approval</td>
<td>07/15/16</td>
<td>Approved</td>
<td>Approved</td>
</tr>
<tr>
<td>07/06/16</td>
<td>Marti, James G.</td>
<td>Approval</td>
<td>07/15/16</td>
<td>Approved</td>
<td>Approved</td>
</tr>
<tr>
<td>07/06/16</td>
<td>Mejia, Luis B.</td>
<td>Approval</td>
<td>07/07/16</td>
<td>Approved</td>
<td>Approved</td>
</tr>
<tr>
<td>07/06/16</td>
<td>Keyser, Larry G.</td>
<td>Approval</td>
<td>07/07/16</td>
<td>Approved</td>
<td>Approved</td>
</tr>
<tr>
<td>07/06/16</td>
<td>Bozich, Orlando</td>
<td>Approval</td>
<td>07/12/16</td>
<td>Approved</td>
<td>Approved</td>
</tr>
<tr>
<td>Item #</td>
<td>Item Number</td>
<td>Item Description</td>
<td>Unit Price</td>
<td>Bid Qty</td>
<td>Unit Cost</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
<td>-----------------</td>
<td>------------</td>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
<td>1</td>
<td>00837402</td>
<td>UNNEEDED SALVATION</td>
<td>0.02</td>
<td>16,000</td>
<td>0.00</td>
</tr>
<tr>
<td>2</td>
<td>00837403</td>
<td>NONRECHECKED SALVATION</td>
<td>0.03</td>
<td>10,000</td>
<td>0.00</td>
</tr>
</tbody>
</table>

**NOTES:**

Page 1 of 16
<table>
<thead>
<tr>
<th>Line Item #</th>
<th>User ID</th>
<th>Location Name</th>
<th>Unit Price</th>
<th>Bid Qty</th>
<th>Bid Cost</th>
<th>Current Audit Qty</th>
<th>Current Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>01010812</td>
<td>418250001</td>
<td>3740</td>
<td>123.00</td>
<td>100</td>
<td>12,300.00</td>
<td>150</td>
<td>18,750.00</td>
</tr>
<tr>
<td>01010812</td>
<td>418250001</td>
<td>3740</td>
<td>123.00</td>
<td>100</td>
<td>12,300.00</td>
<td>150</td>
<td>18,750.00</td>
</tr>
<tr>
<td>01010812</td>
<td>418250001</td>
<td>3740</td>
<td>123.00</td>
<td>100</td>
<td>12,300.00</td>
<td>150</td>
<td>18,750.00</td>
</tr>
</tbody>
</table>

**Note:** The table continues with more rows, each representing a different line item with similar columns.
### FINAL QUANTITY

**HIGHWAY & EMERGENCY DEPARTMENT**

**State Highway and Toll Road**

<table>
<thead>
<tr>
<th>Line Item</th>
<th>Item Number</th>
<th>Description</th>
<th>Unit Price</th>
<th>Bid Qty</th>
<th>Net CO Qty</th>
<th>Current Appr Qty</th>
<th>Current Amount</th>
<th>Unit</th>
<th>CO / Net</th>
<th>CO / Net</th>
</tr>
</thead>
<tbody>
<tr>
<td>1211</td>
<td>001201</td>
<td>Concrete Panel Hinge</td>
<td>$12.00</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1200</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Line Item Details**

<table>
<thead>
<tr>
<th>Item Number</th>
<th>Description</th>
<th>Unit Price</th>
<th>Bid Qty</th>
<th>Net CO Qty</th>
<th>Current Appr Qty</th>
<th>Current Amount</th>
<th>Unit</th>
<th>CO / Net</th>
<th>CO / Net</th>
</tr>
</thead>
<tbody>
<tr>
<td>001201</td>
<td>Concrete Panel Hinge</td>
<td>$12.00</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1200</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Line No.</td>
<td>Item No.</td>
<td>Description</td>
<td>Unit Price</td>
<td>Bid Qty</td>
<td>Sale D/O</td>
<td>Current Bid Qty</td>
<td>Current Amount</td>
<td>Final Qty</td>
<td>Final Total</td>
</tr>
<tr>
<td>---------</td>
<td>----------</td>
<td>-------------</td>
<td>------------</td>
<td>---------</td>
<td>-----------</td>
<td>----------------</td>
<td>---------------</td>
<td>-----------</td>
<td>-------------</td>
</tr>
<tr>
<td>1</td>
<td>CO2001</td>
<td>PORTABLE ENTRANCE FENCING</td>
<td>$12.50</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1250.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>CO2002</td>
<td>PORTABLE ENTRANCE FENCING</td>
<td>$12.50</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1250.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>CO2003</td>
<td>PORTABLE ENTRANCE FENCING</td>
<td>$12.50</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1250.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>CO2004</td>
<td>PORTABLE ENTRANCE FENCING</td>
<td>$12.50</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1250.00</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Total Reported in This Item:** $5,250.00

<table>
<thead>
<tr>
<th>Line No.</th>
<th>Item No.</th>
<th>Description</th>
<th>Unit Price</th>
<th>Bid Qty</th>
<th>Sale D/O</th>
<th>Current Bid Qty</th>
<th>Current Amount</th>
<th>Final Qty</th>
<th>Final Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>CO2001</td>
<td>PORTABLE ENTRANCE FENCING</td>
<td>$12.50</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1250.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>CO2002</td>
<td>PORTABLE ENTRANCE FENCING</td>
<td>$12.50</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1250.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>CO2003</td>
<td>PORTABLE ENTRANCE FENCING</td>
<td>$12.50</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1250.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>CO2004</td>
<td>PORTABLE ENTRANCE FENCING</td>
<td>$12.50</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>1250.00</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Total Reported in This Item:** $5,250.00
Office of General Counsel

Christina Anaya, Esq.
Robles Rael Anaya
500 Marquette Ave., NW
Suite 700
Albuquerque, NM 87102-5346

Re: New Mexico Department of Transportation’s Additional Information, Exhibits and Testimony – CN 610110R

March 2, 2018

Via Email: tina@roblesrael.com

Susana Martinez
Governor

Tom Church
Cabinet Secretary

Commissioners

Ronald Schneits
Chairman
District 4

Dr. Kenneth White
Secretary
District 1

David Sepich
Commissioner
District 2

Keith Mortensen
Commissioner
District 3

Butch Mathews
Commissioner
District 5

Billy Moore
Commissioner
District 6

Dear Ms. Anaya,

Please accept the following as the New Mexico Department of Transportation’s additional information, exhibits and witness testimony as directed by you at the hearing on February 21, 2018 concerning the appeal of AUI’s 2018 prequalification score. The following documents are being submitted and marked as NMDOT exhibits to supplement the record:

<table>
<thead>
<tr>
<th>Exhibit</th>
<th>Exhibit Designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-mail from Damian Segura to Jayson Grover and Sandra Coats with Letter from Damian Segura concerning initial request for evidence of prompt payment from AUI.</td>
<td>NMDOT Exhibit 44</td>
</tr>
<tr>
<td>Letter from AUI Responding to Damian Segura Request.</td>
<td>NMDOT Exhibit 45</td>
</tr>
<tr>
<td>Testimony and Affidavit of Damian Segura concerning NMDOT Exhibits 44 and 45.</td>
<td>NMDOT Exhibit 46</td>
</tr>
<tr>
<td>Testimony and Affidavit of Renee Roybal concerning Contractor Access to NMDOT Payment Dates in B2gNow.</td>
<td>NMDOT Exhibit 47</td>
</tr>
<tr>
<td>Direct Deposit Advices for August 12, 2016, October 6, 2016 and November 3, 2016.</td>
<td>NMDOT Exhibit 48</td>
</tr>
<tr>
<td>Affidavit of Sandra S. Gallegos.</td>
<td>NMDOT Exhibit 49</td>
</tr>
<tr>
<td>Judge Singleton’s Order from James Hamilton v NMDOT, D-101-cv-2017-01016, dated September 14, 2017.</td>
<td>NMDOT Exhibit 50</td>
</tr>
<tr>
<td>Judge Ortiz’s Order from James Hamilton v NMDOT, D-101-cv-2017-01024, dated January 17, 2018.</td>
<td>NMDOT Exhibit 51</td>
</tr>
</tbody>
</table>
Thank you for the opportunity to supplement the record.

Sincerely,

[Signature]

Geraldine L. Gonzales
Assistant General Counsel – NMDOT

Enclosures

Cc:  Via Email Only

  Sean Calvert, Esq.  scalvert@hardhatlaw.com
  Anthony Lujan – NMDOT
  Armando Armendariz – NMDOT
  Sally Reeves – NMDOT
  Elizabeth J. Travis – NMDOT
  Stephen P. Thies – NMDOT
Sent: Monday, December 12, 2016 1:47 PM

To: Grover, Jayson, NMDOT; Coats, Sandra, NMDOT
Cc: Roybal, Renee D, NMDOT; Reeves, Sally, NMDOT; Burrola, Octavio, NMDOT; Gallegos, Jackie, NMDOT

Subject: 6101100R Prompt Payment Initial Request


Attached is the initial request for evidence for prompt payment from AUI. Please send out at your earliest convenience. Please let me know if you have any questions.

Thanks,

Damian Segura
Construction and Civil Rights Bureau
NMDOT
(505) 629-9890
December 12, 2016

AUI, Inc.
ATTN: Eddie Gonzales, Project Manager
P.O. Box 9825
Albuquerque, New Mexico 87119

RE: CN 63101100R Request for Documentation to Show Good Cause for Failure to Promptly Pay to Subcontractor

Dear Mr. Gonzales,

The New Mexico Department of Transportation (NMDOT) through its Construction and Civil Rights Bureau (CCRB) is investigating AUI, Inc.’s (AUI) prompt payment to J&H Supply Company Inc. (J&H) for work performed and accepted by NMDOT in October 2016. This letter is to request any additional documentation supporting that AUI promptly paid J&H or has good cause for its failure to promptly pay. From the documents originally requested by the Project Office it appears the following sequence of events took place:

- J&H issued an invoice to AUI dated September 30, 2016.
- NMDOT paid a progress payment to AUI for $89,212.73 on October 6, 2016. The progress payment included the work performed by J&H, which they invoiced to AUI.
- J&H amended the original invoice to include all end sections and additional rail work on October 17, 2016 and submitted it to AUI.
- A zero ($0) progress payment was issued on October 25, 2016. Part of the accepted work included in this progress payment was the additional work J&H performed and included on the amended invoice.
- AUI paid J&H on October 27, 2016 for the full amount of the amended invoice, which included work accepted by the October 6, 2016 progress payment and the additional work added to the amended invoice.

It appears, based on the above sequence of events, that payments to J&H for work performed and accepted by NMDOT was made past the seven (7) calendar day timeframe, resulting in apparent violations of the prompt payment provisions of the contract. The prompt payment provisions are contained in the NMDOT Standard Specifications for Highway and Bridge Construction (Standard Specifications) Section 108.1 “Subcontracting” which requires the contractor to pay its subcontractors and suppliers for satisfactory performance of their contracts no later than seven (7) calendar days after receipt of the progress payment for the subcontractor’s work or supplier’s materials by the NMDOT. This requirement is also contained in the NMDOT Notice to Contractors titled “Subcontractor Prompt Payment Provisions, Clarification of Good Cause and Prohibition of Cross-Project Offset” dated November 26, 2013 and incorporated into the contract.

In this instance, payment was due to J&H for accepted work by October 13, 2016. Therefore, please provide additional documentation and/or evidence supporting good cause
to CCRB through the NMDOT District 6 Project Office no later than December 19, 2016. Failure to demonstrate good cause to delay payments to these subcontractors will result in a prompt payment finding for violations of the contract and Section 108.1 of the Standard Specifications.

If you have any questions or concerns relating to this matter please to not hesitate to contact me.

Sincerely,

[Signature]

Damian Segura
NMDOT DBE Liaison

CC:  Jayson Grover, NMDOT D6 Project Manager
     Sandra Coates, NMDOT D6 Office Manager
     Octavio Burrola, NMDOT D6 Construction Liaison Engineer
     Jackie Gallegos, NMDOT CCRB Compliance
     Renee Roybal, NMDOT CCRB DBE
     Sally Reeves, NMDOT Acting Construction Engineer
Jayson, after my phone conversation with Mr. Segura on 12-12-16 last Monday I advised him that I had no further information for him on this matter. Mr. Segura advised me that he was going to gather the additional information from JH Supply if needed and was going to have a conversation with FHWA and explain the situation. If any further action or information is needed please feel free to contact me.

Thank you!

Eddie Gonzales
Project Manager

---

From: Grover, Jayson, NMDOT
Sent: Monday, December 12, 2016 1:52 PM
To: Eddie Gonzales
Cc: Grover, Jayson, NMDOT; Vega, Lisa, NMDOT; Gonzales, David D., NMDOT; Coats, Sandra, NMDOT; Turner, Gilbert, NMDOT; Vega, Lisa, NMDOT
Subject: 6101100R Prompt Payment to Sub: Request for Documentation

Hello Eddie,

Please see the attached letter from our NMDOT DBE Liaison. It appears that payments to J&H for work performed was made past the seven day requirement. Please provide any additional documentation you may have on the issue no later than December 19, 2016. After that a final determination will be made.

Thanks,

Jayson L. Grover

NMDOT District 6 Project Manager
Grants Project Office 1
Office: 505-285-6867
Cell: 505-285-8145
AFFIDAVIT OF DAMIAN SEGURA

STATE OF NEW MEXICO )
COUNTY OF SANTA FE ) ss

Damian Segura, Compliance Manager for the DBE Program and the Contractor Compliance Program Support Services Program for the New Mexico Department of Transportation, upon being duly sworn according to law, under oath, deposes and states: I have read the foregoing Supplemental Written Testimony, and reviewed the exhibits referenced in the testimony, they are true and accurate based on my own personal knowledge and belief.

SIGNED this 27 day of February, 2018.

Damian Segura

SUBSCRIBED AND SWORN to before me this 27th day of February, 2018.

Cynthia Wilson
NOTARY PUBLIC IN AND FOR THE STATE OF NEW MEXICO

My Commission Expires:

NMDOT EXH 46
SUPPLEMENTAL WRITTEN TESTIMONY OF DAMIAN SEGURA

Q. Please state your name and provide a general description of your responsibilities with the New Mexico Department of Transportation.

A. My name is Damian Segura. I am currently the compliance manager over the DBE Program and the Contractor Compliance Program Support Services Program for the NMDOT. In that capacity, I conduct investigations related to a prime contractor's compliance with its prompt payment obligation.

Q. Have you provided testimony before in this proceeding?
A. Yes, I provided direct testimony during the informal hearing held on February 21, 2018.

Q. What is the purpose of your supplemental testimony?
A. I am testifying to sponsor two additional exhibits that were inadvertently omitted as part of my testimony.

Q. What exhibits are you referring to?
A. First, a copy of an email I sent to Jayson Grover on December 12, 2016 and the letter attached to that email. The exhibit is marked as NDMOT Exhibit 44. The purpose of the email was to provide Mr. Grover with my letter to AUI dated December 12, 2016 requesting documentation AUI would like me to consider in my investigation of the prompt payment issue involving J-H Supply.

Q. And the second exhibit?
A. The second exhibit is a copy of the email response from Eddie Gonzales with AUI dated December 19, 2016, responding to Mr. Grover's email forwarding my December 12, 2016 letter. These are marked as NDMOT Exhibit 45.

Q. Is there anything else you would like to add regarding these exhibits?
A. Yes, as I testified during the informal hearing, my standard practice when investigating prompt payment allegations involves sending the contractor a letter similar to the December 12, 2016 letter offering the contractor the opportunity to provide an explanation for their failure to pay a subcontractor within the seven-day period. As stated in AUI's email of December 19, 2016, AUI had no additional information to submit beyond what had already been submitted.

Q. Does this conclude your supplemental testimony?
A. Yes.
AFFIDAVIT OF RENE ROYBAL

STATE OF NEW MEXICO )
COUNTY OF SANTA FE )
)

Renée Roybal, Management Analyst in the DBE Support Services Program for the New Mexico Department of Transportation, upon being duly sworn according to law, under oath, deposes and states: I have read the foregoing Supplemental Testimony, and it is true and accurate based on my own personal knowledge and belief.

SIGNED this 27th day of February, 2018.

Renee Roybal

SUBSCRIBED AND SWORN to before me this 27th day of February, 2018.

[Signature]
NOTARY PUBLIC IN AND FOR THE STATE OF NEW MEXICO

My Commission Expires:

[Seal]

CYNTHIA WILSON GUSTAFSON
Notary Public
State of New Mexico
My Comm. Expires 10/30/2020

NMDOT EXH 47
SUPPLEMENTAL WRITTEN TESTIMONY OF RENEE ROYBAL

Q. Please state your name and provide a general description of your responsibilities with the New Mexico Department of Transportation.
A. My name is Renee Roybal. I currently oversee the NMDOT DBE Support Services Program and perform periodic compliance reviews for construction projects.

Q. Have you previously provided testimony in this proceeding?
A. Yes, I provided direct testimony during the informal hearing held on February 21, 2018.

Q. What is the purpose of your supplemental testimony?
A. I am testifying to provide additional insight into the information that a contractor is able to view in the B2GNow program.

Q. Can you expand on that statement?
A. Yes, through their access to B2GNow, both a prime contractor and a subcontractor can see the date the contractor received a progress payment from the NMDOT. For a prime contractor, the payment date is shown in the Compliance audit information detail entitled “Payment to Prime.” For this particular project, AUI would have seen the following information related to Pay Estimate #12, which provided payment for work accepted by the NMDOT during the period of August 26, 2016 through September 25, 2016. As is clearly evident, a progress payment was made on 10/6/2016.

| Compliance Audit Information |
|-------------------------------|--------------------------|
| Compliance Audit Time Period  | October 2016             |
| Compliance Audit Sigma       |                          |
| Compliance Audit Reference   |                          |
| System Audit Number          |                          |
| Date Posted                  |                          |
| Final Audit?                 |                          |
| Payment to Prime             |                          |

Q. Is the payment date for a zero dollar estimate reflected in B2GNow?
A. Yes, both the payment date and the amount of the payment that would have been made but for the fact that the payment is being processed as a zero dollar estimate is shown in B2GNow and is easily reviewable by a prime contractor.

Q. What information would Gonzales Construction have been able to view in B2GNow after receiving payment from AUI on December 6, 2016?
A. Gonzales Construction would have seen a screen view similar to the following:
$5,010.00

Payment Detail Provided by Prime:

Check 123726

Confirm Reported Amount?

- Correct - the amount reported by the prime contractor as PAID to us is correct ($5,010.00)
- Incorrect - the amount reported by the prime contractor as PAID to us is not correct

1. Payment Date: 12/6/2016 (mm/dd/yyyy)
- If multiple payments were received, enter the date of the first payment.

2. Were you paid in accordance with the organization's prompt payment policy?
- Yes - we were paid within 7 days of the prime being paid on 11/3/2016.
- No - we were not paid within 7 days of the prime being paid on 11/3/2016.

The information viewable by Gonzales Construction indicated that AUI reported making a payment to Gonzales in the amount of $5,010.00 by check number 123726 on December 6, 2016. The date that AUI received payment from the NMDOT is shown in red. For this particular payment, Pay Estimate #13, which covered the pay period between September 26, 2016 through October 25, 2016, the date the NMDOT paid AUI is shown as 11/3/2016 with that same date contained in both answers that Gonzales can select from when submitting its response whether it had been promptly paid.

Q. Does this conclude your supplemental testimony?
A. Yes.
DEPARTMENT OF TRANSPORTATION
P O Box 1149
Santa Fe, NM 87504-1149

State of New Mexico
Department of Finance & Administration

AUI INC
P O BOX 9825
ALBUQUERQUE, NM 87119-9825

041379157

NON-NEGOTIABLE

<table>
<thead>
<tr>
<th>Date</th>
<th>Payment Amount</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug/12/2016</td>
<td>$180,338.03</td>
<td>0000105616</td>
</tr>
</tbody>
</table>

Payment Date: 8/12/2016

<table>
<thead>
<tr>
<th>Invoice Number</th>
<th>Invoice Date</th>
<th>Voucher ID</th>
<th>Gross Amount</th>
<th>Discounts</th>
<th>Late Charges</th>
<th>Paid Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>D6_6101100R_Est10</td>
<td>Jul/27/2016</td>
<td>000623681</td>
<td>180,338.03</td>
<td>0.00</td>
<td>0.00</td>
<td>180,338.03</td>
</tr>
</tbody>
</table>

Reference: 0000105616

NMDOT EXH 48

<table>
<thead>
<tr>
<th>Vendor Number</th>
<th>Name</th>
<th>Bank Charge</th>
<th>Transfer Cost Cd</th>
</tr>
</thead>
<tbody>
<tr>
<td>0000048892</td>
<td>AUI INC</td>
<td>$0.00</td>
<td></td>
</tr>
</tbody>
</table>

Reference: 0000105616

<table>
<thead>
<tr>
<th>Date</th>
<th>Total Gross Amt</th>
<th>Total Discounts</th>
<th>Total Late Charges</th>
<th>Total Paid Amt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug/12/2016</td>
<td>$180,338.03</td>
<td>$0.00</td>
<td>$0.00</td>
<td>$180,338.03</td>
</tr>
</tbody>
</table>
DEPARTMENT OF TRANSPORTATION
P O Box 1149
Santa Fe, NM 87504-1149

State of New Mexico
Department of Finance & Administration

AUI INC
P O BOX 9825
ALBUQUERQUE, NM 87119-9825

041379157

NON-NEGOTIABLE

Payment Date: 10/6/2016
Reference: 0000109330

<table>
<thead>
<tr>
<th>Invoice Number</th>
<th>Invoice Date</th>
<th>Voucher ID</th>
<th>Gross Amount</th>
<th>Discounts</th>
<th>Late Charges</th>
<th>Paid Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>D6_61010000R_ESTW12</td>
<td>Sep/26/2016</td>
<td>00632355</td>
<td>88,672.56</td>
<td>0.00</td>
<td>0.00</td>
<td>88,672.56</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Vendor Number</th>
<th>Name</th>
<th>Bank Charge</th>
<th>Transfer Cost Cd</th>
</tr>
</thead>
<tbody>
<tr>
<td>0000048892</td>
<td>AUI INC</td>
<td>$0.00</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reference</th>
<th>Date</th>
<th>Total Gross Amt</th>
<th>Total Discounts</th>
<th>Total Late Charges</th>
<th>Total Paid Amt</th>
</tr>
</thead>
<tbody>
<tr>
<td>0000109330</td>
<td>Oct/06/2016</td>
<td>$88,672.56</td>
<td>$0.00</td>
<td>$0.00</td>
<td>$88,672.56</td>
</tr>
</tbody>
</table>
## Payment Details

**Payment Date:** 11/3/2016  
**Reference:** 0000111275

<table>
<thead>
<tr>
<th>Invoice Number</th>
<th>Invoice Date</th>
<th>Voucher ID</th>
<th>Gross Amount</th>
<th>Discounts</th>
<th>Late Charges</th>
<th>Paid Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>D6_6101100R_Est13</td>
<td>Oct/27/2016</td>
<td>00637034</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
</tr>
</tbody>
</table>

### Vendor Information

<table>
<thead>
<tr>
<th>Vendor Number</th>
<th>Name</th>
<th>Bank Charge</th>
<th>Transfer Cost Cd</th>
</tr>
</thead>
<tbody>
<tr>
<td>0000045892</td>
<td>AUI INC</td>
<td>$0.00</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reference</th>
<th>Date</th>
<th>Total Gross Amt</th>
<th>Total Discounts</th>
<th>Total Late Charges</th>
<th>Total Paid Amt</th>
</tr>
</thead>
<tbody>
<tr>
<td>0000111275</td>
<td>Nov/03/2016</td>
<td>$0.00</td>
<td>$0.00</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
</tbody>
</table>
AUI PREQUALIFICATION SCORE APPEAL CN 6101100R

AFFIDAVIT OF SANDRA S. GALLEGOS

I, Sandra S. Gallegos, having first been duly sworn upon oath, depose and state as follows:

1. I am over the age of 18 years, am of sound mind and am not otherwise disqualified from making this affidavit.

2. I am employed by the New Mexico Department of Transportation (NMDOT) with the Financial Control Unit.

3. My job title is Administrative Manager.

4. I am familiar with various NMDOT financial processes.

5. I have reviewed NMDOT Exhibits 16, 18 and 19 which are screen shots of SHARE, estimate summaries to contractor and other financial information concerning payments from the NMDOT to AUI, Inc. (AUI) on CN 6101100R.

6. Each day staff that I manage retrieves from the Department of Finance the direct deposit registers for all NMDOT financial transactions that occurred that day.

7. The direct deposit registers contain documents called direct deposit advices which show electronic funds transfers from the NMDOT to contractors and suppliers.

8. The direct deposit registers are uploaded into the NMDOT’s records management system called EDMS.

9. The NMDOT standard practice is to send copies of the direct deposit advices to the contractor and suppliers on the same day staff that I manage retrieves them from the Department of Finance.

10. I accessed the NMDOT records management system EDMS on February 28, 2018. I opened the file folder titled “Financial Reports”. From this folder I can access past direct deposit registers which contain direct deposit advices.

NMDOT EXH 49
11. Using the payment/accounting dates and reference numbers on page 2 of Exhibits 16, 18 and 19 I was able to locate the direct deposit advices from NMDOT to AUI on CN 6101100R.

12. The direct deposit advices show that the NMDOT processed electronic funds transfer payments to AUI's bank account. AUI's bank account is on the center of the advices and is the number "041379157".

13. On CN 6101100R for estimate 10, the NMDOT processed an electronic funds transfer to AUI's bank account on August 12, 2016. The advice is included in NMDOT Exhibit 48.

14. The NMDOT sent a copy of this direct deposit advice to AUI's mailing address on the advice.

15. On CN 6101100R for estimate 12, the NMDOT processed an electronic funds transfer to AUI's bank account on October 6, 2016. The advice is included in NMDOT Exhibit 48.

16. The NMDOT sent a copy of this direct deposit advice to AUI's mailing address on the advice.

17. On CN 6101100R for estimate 13, a direct deposit advice was generated for November 3, 2016. The advice is included in NMDOT Exhibit 48.

18. The NMDOT sent a copy of this direct deposit advice to AUI's mailing address on the advice.

FURTHER AFFIANT SAYETH NAUGHT.

Sandra S. Gallegos
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Subscribed and sworn to before me this ___ day of March, 2018 by Sandra S. Gallegos.

(Notary Public)

My Commission Expires:

7/15/19

OFFICIAL SEAL
PEGGY MARTINEZ-RAEL
Notary Public
State of New Mexico
My Comm. Expires 7/15/19
STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT  

JAMES HAMILTON CONSTRUCTION CO.,  

v.  

TOM CHURCH, CABINET SECRETARY  
THE NEW MEXICO DEPARTMENT OF  
TRANSPORTATION, et al.,  

Defendants.  

ORDER GRANTING NEW MEXICO DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS  

This matter is before the Court on Defendant Tom Church's motion to dismiss. The Court has determined that a hearing is unnecessary. The Court in its discretion may rely upon the pleadings filed in this matter if the written submissions are sufficient to resolve the matters presented. See National Excess Insurance Co. v. Bingham, 1987-NMCA-109, ¶ 9, 106 N.M. 325, 742 P.2d 537 (recognizing motions may be resolved by the district court without oral argument provided there is an adequate opportunity for written response to the arguments presented); Flagstar Bank v. Licha, 2015-NMCA-086, ¶¶ 28 & 29, 356 P.3d 1102 (stating no authority requires district court to hold a hearing on motions). See also LR 1-201(E).

Defendant's motion is made pursuant to Rule 1-012(B)(1) and (6). The motion is not well taken under Rule 1-012(B)(1). Plaintiff's Complaint in part seeks a declaratory judgment that a Department of Transportation regulation, 18.27.5 NMAC is void and violates the Procurement Code. The parties do not cite any other statute that provides for judicial review of a regulation adopted by the Department. Therefore, the appropriate method for review is declaratory judgment. Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2011-
NMCA-014, ¶22, 149 N.M. 386, 249 P.3d 924 (if no other statutory method to review regulations, proper avenue to challenge regulation is declaratory judgment action.)


Defendant contends that it has statutory authority to adopt the regulation from several sources. The regulation states that its authority is NMSA 1978, §13-1-82 (2012) and §§13-1-133 to -134, §67-3-2 (2003), §67-3-11 (2003), §67-3-14 (2003), and §67-3-43 (1983). 18.27.5.3 NMAC. Of particular note is Section 67-3-43:

The state highway department may construct, reconstruct and maintain all state highways by work done with its own forces or let the work on contract after advertising for bids subject to the approval of the state highway commission. Such advertisement for bids shall be in accordance with the rules and regulations adopted therefor by the commission . . . . The chief highway administrator may reject any or all bids if they are unbalanced or for any other good reason, but otherwise he shall award the contract to the lowest responsible bidder allowing for such preference as may be provided by law . . . . The commission may adopt rules and regulations providing for the exclusion of contractors from bidding and for the determination of a responsible bidder pursuant to the provisions of the Public Purchases Act.

The Procurement Code, successor to the Public Purchases Act, defines “responsible bidder” as a bidder who submits a responsive bid and who has furnished, when required, information and data to prove that his financial resources, production or service facilities, personnel, service
reputation and experience are adequate to make satisfactory delivery of the services, construction or items of tangible personal property described in the invitation for bids.” NMSA 1978, §13-1-82.

The Court must be deferential to the administrative agency in its review of regulations. “An agency’s rule-making function involves the exercise of discretion, and a reviewing court will not substitute its judgment for that of the agency on that issue where there is no showing of an abuse of that discretion. Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement.” Wilcox v. New Mexico Bd. of Acupuncture & Oriental Med., 2012-NMCA-106, ¶ 7, 288 P.3d 902, 905–06 (quoting Old Abe Co. v. N.M. Mining Comm’n, 1995-NMCA-134, ¶10, 121 N.M. 83, 908 P.2d 776).

The Department has shown that the prequalification factor is reasonably consistent with its statutory authority. The requirements of the rule are reasonably related to ascertaining whether a bidder is a responsible bidder. The Court will not substitute its judgment for that of the Department in its adoption of the rule.

IT IS THEREFORE ORDERED that Defendant Tom Church’s motion to dismiss is granted. The First Amended Complaint for Declaratory Judgment is dismissed.

Sarah M. Singleton, Judge Pro Tem-Div.II
Sitting by Designation

On the date of acceptance for efilng copies of the above order were eserved on those registred for eservice in this matter.
STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT  

JAMES HAMILTON CONSTRUCTION CO.,  
Plaintiff/Appellant  

v.  

TOM CHURCH, CABINET SECRETARY  
NEW MEXICO DEPARTMENT OF  
TRANSPORTATION, FISHER SAND  
& GRAVEL -NEW MEXICO INC.  

Defendants/Appellees  

No. D-101-CV-2017-C1024  

ORDER ON ADMINISTRATIVE APPEAL  

THIS MATTER having come before the Court on an Administrative Appeal by Plaintiff/Appellant JAMES HAMILTON CONSTRUCTION CO. pursuant to Rule 1-074 NMRA, the Court having reviewed the Record on Appeal and having heard the arguments of counsel finds:  

1. Plaintiff/Appellant's bid protest is not a pre-award but instead a post-award protest. Accordingly, the appeal was timely filed as a Post Award Bid Protest pursuant to Section 103.3.2 of the New Mexico Standard Specifications for Bridge and Highway Construction (2014 Edition) (hereafter Specifications). The Hearing Officer's decision finding otherwise is therefore reversed.  

2. As applied in this case, the Prequalification Factor was arbitrary and capricious. In this case, the rule was subjectively applied.  

3. The Hearing Officer's decision upholding the application of the Prequalification Factor was not supported by substantial evidence and should be reversed and remanded to the
Defendant/Appellee Department of Transportation for further hearing on damages sustained by Plaintiff/Appellant in this case.

4. The appeal is not moot. The project in this matter, CN2101771 has already commenced and the Court will not disturb the going forward of said project by Fisher Sand & Gravel. IT IS THEREFORE ORDERED that the Hearing Officer's decision in this matter be set aside, and the issue of damages be remanded to the New Mexico Department of Transportation.

\[Signature\]

JUDGE RAYMOND Z. ORTIZ   DMNSJ

Approved:

/s/ Jeffrey Dahl
Jeffrey A. Dahl
HOLT MYNATT MARTINEZ P.C.
Attorneys for Plaintiff/Appellant
James Hamilton Construction Co.

Approved as to form:

Approved via email 1/16/18
Stephen F. Thies
Elizabeth J. Travis
Attorneys for Defendant/Appellee
Tom Church, Cabinet Secretary and
New Mexico Department of Transportation

Approved as to form:

Approved via email 1/16/18
Jeremy K. Harrison
MODRALL SPERLING
Attorneys for Fisher Sand & Gravel-New Mexico Inc.
AUI, INC.'S CLOSING ARGUMENT

As indicated in argument at the hearing of this matter it is AUI's position that there are four separate grounds upon which the New Mexico Department of Transportation's ("Department") assignment of a negative adjustment to AUI's Prequalification Factor Rolling Average may be rejected. These include: 1) that the Contractor Prequalification Rule and prompt payment provisions are contrary to statute; 2) that the Department's interpretation of the prompt payment requirements is contrary to the specific provisions of its contract; 3) that with regard to Estimate 13, if you determine that payment is triggered under the contract by some factor other than payment by the Department, AUI still cannot be penalized as the Department never notified AUI of its approval; and 4) that the negative prequalification factor assessed by the Department is duplicative as AUI was assessed a penalty for late payment as a non-conformance and then was assessed a separate penalty based on negative findings from the State DBE Liaison for exactly the same set of facts.

1. Scope of Hearing

AUI anticipates that the Department will attempt to limit the scope of the hearing to the specific allegations raised in the notice of appeal sent to the Department. Such a limitation however is not supported by anything in the regulations establishing the procedure for this hearing.

The Contractor Prequalification Rule requires a written appeal identifying the right to appeal and basis for the appeal. N.M.A.C. 18.27.5.13(F). Nothing in the regulation however limits the scope of the review to the specific issues raised in the written appeal and the Department suffers no prejudice where the administrative hearing includes issues not raised in the written notice of appeal. Limitation of the scope of an administrative appeal may be warranted where issues are raised in an appeal for decision by the Department, but no such limitation is appropriate here
where the Department has no authority to do anything other than convene an administrative hearing where the appointed hearing officer will determine the scope and formality of the proceeding. The Contractor Prequalification Rule requires the Department, regardless of the merit or lack thereof of an appeal to provide notice of a hearing to the parties. N.M.A.C. 18.27.5.13(G). Accordingly, the written notice of appeal serves as nothing more or less than a notice of appeal in any other proceeding, which do not require identification of the issues on appeal in order to preserve issues, but rather simply require identification of the ruling being appealed. Rule 1-072, N.M.R.A.; Rule 1-073, N.M.R.A.; Rule 12-202, N.M.R.A.; N.M.S.A. 1978, §61-1-4; and N.M.S.A. 1978, §12-8-10.

The Department was not prejudiced by arguments related to the authority for the Department to promulgate or interpret the Contractor Prequalification Rule as indicated by the fact that the Department included such arguments in its own briefing. See, Department Position Statement, NMDOT Ex. 42, pp. 3, 8, 9 & 11.

2. The Contractor Prequalification Rule is Contrary to Law as Applied to the Prompt Payment Requirements

As noted in opening argument the Department is subject to the requirements of the New Mexico Procurement Code. The Department even cites sections of the Procurement Code as the basis for the issuance of the Contractor Prequalification Rule and the basis for its issuance of the Division 100s of the Standard Specifications for Highway and Bridge Construction, which includes the prompt payment clause at issue in this hearing.

The Procurement Code includes Section 13-1-158 governing the prompt payment obligations on public works projects for agencies of the State of New Mexico. Section 13-1-158 provides requirements for the timing within which an agency, like the Department, must make payment to its contractors. Section 13-1-
158 however, contains absolutely no provision governing when a contractor must pay its subcontractors.

Interestingly the Procurement Code does have a section allowing an agency with the power to issue regulations the authority to require by rule that contracts include uniform contract clauses. N.M.S.A. 1978, §13-1-170. The Department actually cites this section as authority for issuance of its Division 100s, including the prompt payment clause that is at issue. That section however contains no reference to uniform clauses regarding payment to subcontractors. It does, however, require the Department by regulation to require that its contracts impose late payment charges on itself in compliance with 13-1-158.

Contrary to the specific provisions of 13-1-158 and 13-1-170 the Department does not in their contract require payment by the Department in compliance with the terms of 13-1-158. In fact, it does the opposite repeatedly providing that the Department can withhold 25% of the progress payment for various non-conformances that have nothing to do with acceptance or rejection of the work, which is specifically not allowed by the Procurement Code. Further it adds the provision regarding contractor payment to its subcontractors, which is not part of the statute.

As held by the Court in Wilcox v. New Mexico Board of Acupuncture and Oriental Medicine, 2012-NMCA-106 "An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority". See also, Rivas v. Board of Cosmetologists, 1984-NMSC-076 and Romero v. Laidlaw Transit Services, Inc. 2015-NMCA-107. "It is well established that the legislature may not delegate authority to a board or commission to adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty". McCulloch v. Ashby, 1963-NMSC-217 (citing Campbell v. Galeno Chemical Co., 281 U.S. 599.
The Department thus lacks the authority to expand the prompt payment requirements of the Procurement Code by its regulations where the legislature has not explicitly made that a requirement. This is particularly true of the Department and the contract clause at issue as the legislature has enacted a statute which would require contractors upon receipt of payment from a public agency to pay their subcontractors within seven days. N.M.S.A. 1978, §57-28-1, et seq. The legislature in enacting the Prompt Payment Act however specifically excluded the Department from its application. N.M.S.A. 1978, §57-28-2(C). The Department thus is not just expanding by rule the scope of a statute, which is not allowed, but actually is attempting to create a requirement which was specifically rejected by the legislature.

Even more troubling is the argument made by the Department at the hearing that in promulgating the prompt payment requirements in its contract it is not governed by the Procurement Code, but by federal regulations. This is despite the fact that the regulation adopted by the Department enacting the prompt payment clause specifically cites the Procurement Code, not federal regulations as its source of authority. Assuming that the Department had authority to alter the requirements of the Procurement Code where federal regulations applied to its expenditures the prompt payment requirement adopted by the Department is even more clearly contrary to law when you compare the contract clause with what was required by the applicable federal regulation.

The Department cites in their position paper 49 C.F.R. part 26 as the source of their authority and actually the requirement that they include the prompt payment requirement that appears in Section 108.1 of the Standard Specifications. See, Department Position Statement, NMDOT Ex. 42, p. 8. A review of 49 C.F.R. part 26 makes clear that the Department has either never actually read the section or just chose to ignore the very specific requirements given by the Department of
Transportation. The Department actually cites to a document entitled “Prompt Payment and Retainage” issued by the Department of Transportation as the basis for its contract clause:

Every DOT-assisted contract must include a commitment by the parties to carry out all applicable requirements of 49 C.F.R. Part 26 (2016) in the administration of the contract. See 49 C.F.R. §26.13 (2016). This commitment covers the prompt payment and release of retainage requirements in 49 C.F.R. §26.29.

Department Position Statement, NMDOT Ex. 42, p. 8.

So if 49 C.F.R. §26.29 contains the prompt payment and release of retainage requirements of the Department of Transportation what does that clause actually provide? It certainly does not provide for a clause anything like what the Department adopted and is trying to impose against AUI.

§26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor’s work is satisfactorily completed. You must use one of the following methods to comply with this requirement:

(1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.

(2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor’s work is satisfactorily completed.

(3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for
satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

49 C.F.R. §26.29 (emphasis added). The regulation is not difficult to understand or unclear. The Department was required as a recipient of federal funding from the Department of Transportation to adopt a contract clause requiring that contractors pay their subcontractor within thirty days from payment by the Department. 49 C.F.R. §26.29(a). This makes extremely clear that payment from the Department is the trigger for any obligation of the contractor to make payment and that the contractor has thirty days, not the seven days from acceptance, to pay their subcontractors.

Further as to both J-H Supply and Gonzales Construction their work was included in Estimate 13, which the Department did not pay as it held the entirety of Estimate 13 and a portion of the earlier Estimate 12 as retainage. The federal regulations is exceedingly clear in giving the Department three possible options as to how it handles contractor payment to subcontractors of retainage funds held by the Department. In fact, the regulation indicates that the Department must adopt one of the three allowed approaches. The Department adopted none of them. The first two approaches allowed by the Department of Transportation provide options where the Department does not hold retainage. The Department however does hold retainage as indicated by estimates 12 and 13 where it withheld payment to AUI. The third option allows the Department to hold retainage, but requires incremental retainage release, not done by the Department, and requires the contractor to pay their subcontractors within thirty days of release of the retainage. In this case the money held by the Department on the work performed by J-H Supply and Gonzales Construction was not released until months after they had actually been paid. Testimony of Eddie Gonzales.
This is not a situation where the Department has adopted a reasonable interpretation of statute or regulation. Instead the Department is acting as a lone ranger out enforcing a law all of its own that is actually directly contrary to any law that might govern the Department.

3. **Imposition of the Negative Factor was Contrary to the Applicable Contract Term.**

The Department’s interpretation and enforcement of the contract payment provision is contrary to the clear and unambiguous terms of the contract, although admittedly not quite so blatantly as it contrary to the applicable statutes and regulations.

The contract contains a single paragraph governing the entirety of the dispute between the parties.

*The Contractor shall promptly pay its Subcontractors and Suppliers for satisfactory performance of their contracts no later than seven (7) Days after receipt of Progress Payment for the Subcontractor’s Work or Supplier’s Materials by the Department. For purposes of this section, a Subcontractor’s portion of the Work is satisfactorily completed when it is Accepted by the Department. In no event shall the Contractor and its Subcontractors fail to promptly pay their Subcontractors and Suppliers the amounts due for undisputed Accepted Work within seven (7) Days of the Contractor receiving a Progress Payment from the Department. The payment by the Department to the Contractor is not a condition precedent for payment by the Contractor to any Subcontractor or Supplier. A zero dollar ($0.00) Progress Payment by the Department does not relieve the Contractor from paying the Subcontractor or Supplier for Accepted Work.*

Section 108.1 Standard Specifications (emphasis added). Nothing could be clearer then that the Contractor has an obligation under Section 108.1 to pay its subcontractors and suppliers within seven days after it receives payment from the Department. The clause actually states this twice just to make it exceedingly clear.

Since a contract must be read as a whole, what do the other three sentences in this paragraph require? The first provides that “[f]or purposes of this section, a
Subcontractor's portion of the Work is satisfactorily completed when it is Accepted by the Department". Unfortunately nothing in the clause ties anything to the Work being satisfactorily completed. There is a reference to "satisfactory performance", but again payment for satisfactory performance is to be made within seven days of receipt of payment from the Department. So maybe it just makes clear that if the Department has accepted the work then the work was satisfactorily performed. "Accepted" however is a defined term in the contract as "1) the determination by the Department that Materials and Work are in compliance with the Contract. 2) The process by which the Department determines whether or not the quality of produced Material or Work is Acceptable pursuant to the Contract, including sampling, testing, certifications and assessment of test results." Section 101.4 Standard Specifications. This defines the term, but doesn’t give any indication when Acceptance actually occurs. The contract does have a provision labeled Acceptance, Section 105.18, that addresses acceptance of the work by the Department prior to final acceptance of the project. Under that section a contractor "may request that the Project Manager inspect a portion of the Project (e.g., a Structure, a section of Road, etc.) at any time during the Work. If the Project Manager finds that portion to be in accordance with the Contract, the Project Manager may Accept that portion as complete, and, without waiving the provisions in Section 105.3 "Compliance with Plans and Specification," and Section 109.10, "Project Closure" the Contractor may be relieved of further responsibility for that portion unless the Department discovers latent defects before final Acceptance of the Work.". Section 105.18.1 Standard Specifications. Of course in this instance AUI never requested and the Department never granted partial acceptance under Section 105.18.1 for the materials supplied by J-H Supply or the work performed by Gonzales Construction. Regardless, the clause never ties payment to either "satisfactory completion" or "Acceptance" of the subcontractor's work.
Next the contract makes clear that payment by the Department to the Contractor is not a condition precedent to payment to the Subcontractor or Supplier. A Contractor therefore cannot rely upon non-payment by the Department as a basis for avoiding its contractual obligations to pay the subcontractor or supplier. *Midamerica Construction Management, Inc. v. Mastec North America, Inc.*, 436 F.3d 1257 (10th Cir. 2006). This sentence however says nothing about the timing of that payment, just avoids a contractor claiming they do not have to pay at all.

Finally the contract indicates that a zero dollar progress payment does not relieve the contractor from paying its subcontractor or supplier for accepted work. This suffers from the same issue that AUI never requested and the Department never granted partial acceptance for the work. Regardless this clause, like the prior, merely makes clear that the issuance of a zero dollar payment by the Department doesn’t relieve AUI from the obligation to pay its subcontractors and suppliers. AUI does not allege that it was relieved from making payment, it was however relieved from making payment until it was due under the terms of its agreements with the subcontractors or suppliers, or within seven days of payment by the Department, since those are the payment terms it contracted for.

While AUI does not believe the payment requirement is ambiguous since it clearly says it is due seven days after payment by the Department, it is worth noting that since this is the Department’s contract any ambiguities would be interpreted against the Department. *Schultz & Lindsay Constr. Co. v. State of New Mexico*, 1972-NMSC-013. Having been through this with the Department before I anticipate they will argue that the Division 100s are enacted by regulation and the Department is entitled to deference when interpreting its own regulations. That is true however only where an agency is interpreting its regulations issued pursuant to power granted to it by the Legislature. “Rules and regulations enacted by an
agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement”. Wilcox v. N.M. Board of Accupuncture and Oriental Medicine, 2012-NMCA-106. There is no statute that is being interpreted or implemented in these contract clauses, and notably the Schultz & Lindsay case is specifically regarding the NMDOT standard specifications.

4. **Acceptance of Subcontract Work**

The Department enforced the penalty against AUI based on its, wrong, interpretation that the contract requires payment within seven days of the Department’s acceptance of the subcontracted work. As noted above this is not a reasonable interpretation of the contract as the contract specifically ties payment timing to the receipt of payment, not acceptance by the Department. Even if payment were tied to acceptance of the subcontract work, no acceptance was ever made as defined by the contract and AUI was never notified that the Department had accepted the work.

Notably the contract provision regarding progress payments to the contractor says nothing about the work being Accepted. “The Project Manager will prepare and post Progress Payments based on estimates of the value of the Work performed and Materials complete-in-place, and in accordance with Section 109.9, “Stockpile” and minus price reductions within five (5) Days of the estimate cut-off date”. Accordingly all the approval of Estimates 12 and 13 proves is that according to the Project Manager the work was complete-in-place and had a specific value. The only times under the contract where the Department Accepts work is 1) where it makes a partial acceptance of the work and takes over control of that portion of the project at the request of the Contract, Section 105.18.1; 2) where the work does not comply with the plans and specifications, but the Department accepts the work in return for a reduction in price under a change order, Section 105.3; and 3) where the work is complete, the Department has conducted a final inspection and
has accepted the entirety of the project, Section 109.10.6. None of those occurred here and the Department did not accept the project until after the final inspection in December.

Further, the Department never notified AUI of any action on Estimate 13 so any calculation of time based on the project manager's approval of Estimate 13 is not effective as to AUI as AUI was not made aware of that action.

5. **Negative Findings by State DBE Liaison**

Even if the payments to J-H Supply and Gonzales Supply were late under Section 108.1 of the contract, which they were not, there is no basis for the duplicative penalty assessed by the State DBE Liaison. As noted above there is absolutely no requirement in federal or state law that would require payment to DBE subcontractors and suppliers other than within thirty days of receipt of payment. No interpretation of the contract should allow for a finding that the payments to J-H Supply and Gonzales Construction were a non-conformance or breach of the contract where payment in both instances was made prior to payment by the Department for the work. At least with the Department's argument for non-conformance it has some basis, however irrational, for that claim as the contract does state that a zero dollar Progress Payment by the Department does not relieve the contractor from paying its subcontractors. The same cannot be said for the negative findings by the State DBE Liaison.

As noted above the DBE requirements are a matter of federal law. The Department of Transportation’s DBE prompt payment requirement is that payment be made within thirty days of receipt of a progress payment for the subcontractors work, 49 C.F.R. §26.29. Under any interpretation of the facts AUI made payment to J-H Supply and Gonzales Construction prior to thirty days after receipt of payment. As such there was no violation of any DBE requirements that could have justified a negative finding.
6. **The Department did not Pay Estimates 12 and 13 Until 2017, Months**

After Payment to the Subcontractors.

The Department noted that Estimate 13 was a zero dollar payment estimate because the Department was holding retainage on AUI until 2017. What the Department did not point out however is that they also didn’t pay for work under Estimate 12. Estimate 12 was submitted by AUI on September 26, 2016. AUI Ex. 2. The gross amount earned by AUI for work performed between August 26, 2016 and September 25, 2016 on Estimate 12 was $206,334.10. AUI Ex. 2. The Department however only paid $88,672.56. AUI Ex. 2; NMDOT Ex. 18. More than half of the work performed in September, 2016, which would include the first portion of the work by J-H Supply, was not paid for by the Department until it finally accepted the work, released retainage and paid in 2017. No allocation is made in Estimate 12 as to which work is being paid by the Department and thus must be paid to the subcontractors within a number of days of receipt of payment and which work was being held by the Department. Under the DBE regulations NMDOT should have established a system for incremental acceptance of the work and partial release of retention, but they did not do so. 49 C.F.R. §26.29(b)(3). Accordingly the Department cannot establish whether or not AUI was actually paid for the work done by J-H Supply in September, 2016, which would be a necessary precondition to finding that AUI had paid J-H Supply late. Even clearer then Estimate 12 however is that AUI was not paid on Estimate 13 until 2017.

In the case of both Estimates 12 and 13 AUI paid its subcontractors well in advance of receipt of payment from the Department for their work. AUI paid J-H Supply on October 27, 2016. AUI Ex. 4. AUI paid Gonzales Supply on November 28, 2016. AUI Ex. 8. AUI was not paid for the work held by the Department as retainage until March, 2017. NMDOT Ex. 23, p. 4. As AUI paid both subcontractors well in advance of payment by the Department and within the times required for
payment based on the DBE regulations no negative Prequalification Factor Rolling Average adjustment should have been made related to the payments to J-H Supply or Gonzales Construction.

7. Conclusion

The Department’s assessment of a negative Prequalification Factor Rolling Average against AUI cannot be justified. AUI paid its subcontractors in compliance with the terms of its contract with the Department and in accordance with the DBE prompt payment regulations. As such all four adjustments to AUI’s Prequalification Factor Rolling Average should be reversed and AUI’s Prequalification Factor Rolling Average should be readjusted to reflect its positive performance on projects for the Department.

Respectfully submitted,

Calvert Menicucci, P.C.

Sean R. Calvert
Counsel for AUI, Inc.
8900 Washington St., NE, Suite A
Albuquerque, New Mexico 87113
(505) 247-9100
scalvert@hardhatlaw.net
March 5, 2018

Christina Anaya, Esq.
Robles Rael Anaya
500 Marquette Ave., NW
Suite 700
Albuquerque, NM 87102-5346

Re: New Mexico Department of Transportation’s Closing Argument
    CN 6101100R

Dear Ms. Anaya,

The New Mexico Department of Transportation (NMDOT) submits the following as its closing argument as requested by you at the conclusion of the February 21, 2018 hearing. You allowed until the close of business on March 5, 2018 for the parties to simultaneously submit written closing arguments.

To briefly summarize the NMDOT’s closing argument, AUI did not meet it burden of proof in its challenge to the NMDOT’s issuance of two Non-Conformances for AUI’s failure to abide by its contractual obligation to promptly pay its subcontractors.¹ Instead, at the hearing for the first time,² rather than attempting to meet its burden of proof, AUI sought to divert the Hearing Officer’s attention from the issues at hand by raising multiple complex legal arguments attacking the validity of the Contractor Prequalification Rule, 18.27.5 NMAC (01-01-15) (“Prequalification Rule”) and NMDOT’s procurement process. For the reasons discussed below, these arguments should not be considered by the Hearing Officer in this proceeding. Accordingly, due to AUI’s failure to meet its burden of proof, the NMDOT respectively requests that AUI’s appeal be denied.

A. AUI Did Not Meet its Burden of Proof to excuse its failure to comply with its contractual obligation to promptly pay its subcontractors

¹ See NMDOT Exhibits 12 and 21.
² See “Appeal of AUI, Inc.’s Prequalification Factor rolling Average (PQFRA) Date of Notice of PQFRA; 12 January 2018”. (Notice of Appeal)
Section 108.1 of the New Mexico State Department of Transportation Standard Specifications for Highway and Bridge Construction, 2014 Edition (the "Standard Specifications") provides in part as follows:

The Contractor's failure to make timely or prompt Subcontractor or Supplier payments for undisputed Accepted Work is a Non-Conformance. ...

In its appeal, AUI challenged two of the three Non-Conformances on the basis that there was no "violation of the regulation of prompt payment to subcontractors." The Non-Conformances negatively affected AUI's prequalification factor rolling average, or Pqfra, in 2018. Non-Conformances are one of the six performance factors described in Section 18.27.5.11 of the Prequalification Rule used in the calculation of a contractor's Pqfra. The other five are: claims; disincentives; liquidated damages; safety; and subcontractor.

As stated by Mr. Calvert at the very beginning of the hearing, "[t]his is not a very factually complex or even factually disputed matter. I think almost all of the dates, applicable provisions, et cetera are going to be stipulated to. There really isn't going to be fact dispute."

Notwithstanding that statement, AUI nevertheless sought to excuse its failure to comply with its prompt payment contractual obligation with the testimony of two witnesses. However, AUI presented no credible factual evidence to support its request to revise the number of Non-Conformances that were issued on CN 6101100R. As the aggrieved party, AUI bears the burden of proof in this proceeding to show that by substantial evidence the NMDOT acted arbitrarily, capriciously, abused its discretion or acted unlawfully when it assessed the two Non-Conformances.

Addressing the J-H Supply issue first, in challenging the Non-Conformance assessed by the NMDOT for AUI's failure to promptly pay J-H Supply, AUI presented testimony that it had an oral agreement with J-H Supply to delay payment from October 13, 2016 to a later date. AUI sought to prove the existence of this alleged agreement through its submission of a revised J-H

---

8 Pursuant to rule 18.27.3, NMAC, Division 100 of the Standard Specifications are adopted as part of Section 18 - Transportation and Highways, of the New Mexico Administrative Code. If not in conflict with legislative policy, legislatively authorized rules and regulations have the force of law. Romero v. Dairyland Ins. Co., 1990-NMSC-111, ¶ 7, 111 N.M. 154, 803 P.2d 243.

4 See last paragraph, page 2 of "Appeal of AUI, Inc.'s Prequalification Factor Rolling Average (PQFRA) Date Notice of PQFRA; 12 January 2018", (Notice of Appeal).

5 See NMDOT Exhibit 42 Testimony of Jeff Canney.


7 An agency action can be overturned if it is, "arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law." AMREP Southwest Inc. v. Sandoval County Assessor, 2012-NMCA-082, ¶ 7, 284 P.3d 1118, (internal citations omitted).

8 See Testimony of Eddie Gonzales, Pg. 44, Lines 5-7.
Supply invoice. AUI’s testimony amounts to the proposition that its oral agreement with J-H Supply unilaterally altered a material term of its contract with the NMDOT yet AUI cited no legal authority that allows such a unilateral amendment to the parties’ contract. Based on the lack of any legal authority or facts to support its position, AUI’s assertion that the Non-Conformance should be not have been assessed cannot prevail. Furthermore, AUI’s own testimony on this issue showed that AUI did not comply with the terms of the contract because AUI took no steps to inform the NMDOT about its alleged agreement. The revised invoice was provided to AUI after J-H Supply should have already been paid (October 13, 2016), and AUI did not make payment to J-H Supply within seven days after receiving the revised invoice from J-H Supply (by October 24, 2016).

On the other hand, the NMDOT presented the testimony of multiple witnesses to establish that J-H Supply performed work during the pay period that started on August 26, 2016 and ended on September 25, 2016. That the NMDOT accepted and then paid AUI for that work on October 6, 2016. That the terms of the parties’ contract clearly obligated AUI to pay J-H Supply within seven days after receiving the payment from the NMDOT, and that AUI failed to provide the NMDOT with evidence that there existed a legitimate dispute with its subcontractor that would have shown good cause to excuse its obligation to make prompt payment. Based on the facts and testimony presented, the NMDOT’s action in issuing the Non-Conformance was reasonable, rational and supported by the evidence in the record.

As it relates to Gonzales Construction, AUI’s evidence is also lacking and fails to support its position. First, AUI cited no legal authority to support its argument that the New Mexico Procurement Code governed its payment to Gonzales Construction. In its attempt to show that the New Mexico Procurement Code applied, AUI appeared to argue that since it did not “invoice” the NMDOT for its work, it therefore had thirty days to make payment to Gonzales Construction when the NMDOT processed the zero dollar pay estimate. AUI’s testimony about its “invoking” the NMDOT is misguided, a contractor does not invoice the NMDOT for work it performs. Rather, as Jayson Grover testified, NMDOT prepares a progress payment estimate that a contractor reviews, and once the parties agree on the work that was performed by the contractor or its subcontractors and accepted by the NMDOT during the pay period, the progress payment is signed by the contractor at which time the NMDOT processes the progress

---

9 See page 2 of NMDOT Exhibit 30, which shows J-H Supply would be performing work items 606001, 606051 and 606062. Pages 4 and 5 of NMDOT Exhibit 15, which shows work items 606001, 606051 and 606062 were accepted by the NMDOT on September 23, 2016. Page 7 of NMDOT Exhibit 12 which shows work items 606001, 606051 and 606062 were included in Pay Estimate 12. And page 1 of NMDOT Exhibit 31 which indicates payment was made to AUI on October 6, 2016.

10 See NMDOT Exhibit 5.

11 See NMDOT Exhibit 33.

12 See Testimony of Eddie Gonzales, Pg. 41, Lines 19-22 and Pg. 51, Lines 10-19
payment. Even accepting the argument that it had thirty days to make payment, AUI nevertheless failed to actually pay Gonzales Construction within that timeframe. Once again, AUI has not met its burden of proof to justify reversal of the Non-Conformance.

Conversely, testimony provided on behalf of the NMDOT clearly established that Gonzales Construction performed work during the pay period that started on September 26, 2016 and ended on October 25, 2016. The NMDOT accepted and paid AUI for this work on November 3, 2016, which then contractually obligated AUI to pay Gonzales Construction on or before November 10, 2016, which it failed to do. Because its argument that a zero dollar payment somehow modified its contractual obligation is untenable, the NMDOT's action in issuing the Non-Conformance was reasonable, rational, and supported by the evidence.

B. Discussion of AUI's Legal Arguments

As noted above, legal counsel for AUI raised a number of legal issues at the outset of the hearing. As a result, the Hearing Officer instructed the parties to address the authority of the Hearing Officer to consider these legal challenges. Some, but not all of the legal issues raised by AUI are discussed. The NMDOT does not believe that it must discuss all the arguments due primarily to the limited role of the Hearing Officer in this appeal, and in part due to the manner in which the arguments were presented makes it difficult to systematically address the arguments.

AUI's appeal was filed pursuant to Section 18.27.5.13.D of the Prequalification Rule. Section 18.27.5.13.D provides that a contractor disputing only the calculation of its prequalification factor shall file an appeal within seven days of the publication of their prequalification factor. The appeal “shall clearly and concisely state the ... grounds for the appeal”. Once such an appeal is filed, Section 18.27.5.13 requires the Cabinet Secretary to convene an informal hearing to be conducted either by the Secretary or a neutral hearing officer.

---

23 See Testimony of Jayson Grover, Pg. 80, Lines 1-25.
24 See NMDOT Exhibit 23, Pg. 10.
25 See page 2 of NMDOT Exhibit 31, which indicates and page 6 of NMDOT Exhibit 15, which indicates item 631000 was accepted by the NMDOT on October 11, 2016. See page 2 of NMDOT Exhibit 31, which shows Gonzales Construction would be performing work item 631000. Page 6 Exhibit 15, which shows work item 631000 was accepted by the NMDOT on October 11, 2016. Page 7 of NMDOT Exhibit 19 which shows work item 631000 was included in Pay Estimate 13; and page 2 of NMDOT Exhibit 35, which indicates that AUI received payment on November 3, 2016.
26 See NMDOT Exhibits 48 and 49 regarding the processing of a zero-dollar pay estimate and the notices AUI received that a zero-dollar estimate had been processed.
The Hearing Officer's role in such an appeal is to serve as the arbiter of the factual question whether the NMDOT miscalculated the contractor's prequalification factor. The Hearing Officer's authority is limited to adjudicating the dispute presented by applying the applicable rule, i.e., the Contractor Prequalification Rule, to the particular facts of the dispute. *Maso v. State of New Mexico Taxation and Revenue Department, Motor Vehicle Division*, 2004-NMSA-025, ¶ 12, 135 N.M. 152, 85 P.3d 276. Stated differently, the authority of the Hearing Officer is limited to a finding whether the application of the Contractor Prequalification Rule based on the facts presented was arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with the rule.

Nothing in the Contractor Prequalification Rule supports an inference that the Hearing Officer may consider or rule upon the legal authority of the NMDOT to adopt the Prequalification Rule or any other rule, the reasonableness of any adopted rule, or other legal challenges to the procurement procedures employed by the NMDOT. *Victor v. New Mexico Department of Health*, 2014-NMCA-012, ¶ 24, 316 P.3d 213. Given its limited role, it is therefore the position of the NMDOT that the Hearing Officer does not have the authority to consider the legal arguments presented by AUI. The NMDOT will nonetheless address some of the legal issues raised by AUI if for no other reason to point out the unreasonableness of the legal arguments presented in AUI's efforts to divert the Hearing Officer's focus from the real issue, namely that AUI failed to comply with its contractual obligation to promptly pay its subcontractors on two occasions.

One of the many legal arguments advanced by AUI is that the NMDOT has no authority to adopt the Prequalification Rule. To the contrary, pursuant to NMSA 1978 § 67-3-43 (1983), the Transportation Commission is given the express authority to adopt rules that provide for the determination of a responsible bidder. As a purchasing authority, this express rulemaking authority gives the NMDOT considerable discretionary power to determine the lowest responsible bidder. *BC & L Pavement Services, Inc., v. Higgins*, 2002-NMCA-087, ¶ 20, 132 N.M. 490, 51 P.3d 533; *State ex rel. KNC, Inc., v. New Mexico Department of Finance and Administration*, 1985-NMCA-057, ¶ 16, 103 N.M. 167, 704 P.2d 79.

Related to this issue, AUI goes on to argue that a finding of responsibility is binary: a contractor is either responsible or non-responsible based upon a contractor's "financial resources, production or service facilities, personnel, service reputation and experience". However, in making this argument AUI takes liberties with the holding of the case cited for its position, *Shed Industries, Inc. v. King*, 1980-NMSC-086, 95 N.M. 62, 618 P.2d 1226. The *Shed* case involved a determination whether a bid was responsible based upon a subsequently repealed definition

---

17 Pursuant to NMSA 1978 § 13-1-99, the Department of Transportation is excluded from central purchasing through the state purchasing agent.
of a responsible bid. Furthermore, AUI ignores a recent ruling issued in the First Judicial District in which the Court held that the NMDOT showed that the Contractor Prequalification Rule was "reasonably related to ascertaining whether a bidder is a responsible bidder." See Order Granting New Mexico Department of Transportation’s Motion to Dismiss dated September 14, 2017, James Hamilton Construction Co. v Tom Church, Cabinet Secretary, New Mexico Department of Transportation, et al., D-101-cv-2017-01016.

Another legal argument advanced by AUI is that the zero dollar Progress Payment provision in Section 108.1 of the Standard Specifications is ambiguous. Citing Schultz & Lindsay Construction Company v. State, 1972-NMSC-013, 83 N.M. 534, 494 P.2d 612, AUI argues that the contract should be construed against NMDOT as its drafter, and therefore the construction of any ambiguities and uncertainties in the meaning of this provision should be construed against the NMDOT. However, the Supreme Court also held in that same decision that a "contract must be considered and construed as a whole, with meaning and significance given to each part in its proper context with all other parts, so as to ascertain the intention of the parties. The primary objective in construing a contract is to ascertain the intent of the parties." (Citations omitted.) Schultz & Lindsay Construction Company, 1972-NMSC-013, ¶ 4. When considered and construed as a whole, the only reasonable construction of this particular provision requires a finding that contractor is obligated to make payment to its subcontractor’s within seven days of receiving a zero dollar estimate.

Furthermore, “[t]he primary objective in construing a contract is to ascertain the intention of the parties. Such an objective is best achieved by giving great weight, if not the controlling weight, to the construction of the contract adopted by the parties, as reflected by available evidence.” Mobile Investors v. Spratte, 1980-NMSC-006, ¶ 6, 93 N.M. 752, 605 P.2d 1151. (Citations omitted.) As the party bearing the burden of proof in this proceeding, it was necessary for AUI to present evidence that in the course of its dealings with the NMDOT the seven-day prompt payment requirement is not applicable to zero-dollar progress payments. It presented no such evidence. In contrast, the NMDOT presented testimony that the seven-day prompt payment obligation applies equally to zero-dollars pay estimates.

Similarly, AUI’s argument that there is no compliance with section NMSA 1978, § 13-1-158, NMSA 1978 (1997) is inconsistent with the parties’ course of dealing with one another with

---

18 A responsible bid was defined as “a written offer to furnish materials or services in conformity with standards, specifications, delivery terms and conditions and other requirements established by the user or central purchasing office.” Section 13-1-2(H), NMSA 1978 (Repealed by L 1984, Ch. 65, § 176, ef. Nov. 1, 1984).
19 See also ¶ 3 of Section 107.30 of the Standard Specifications which provides that the "Contractor agrees that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Contract.”
respect to the making of progress payments. In addition, AUI ignores the phrase "unless otherwise agreed upon by the parties" that is found in subsection 13-1-158.B. Section 109.8 of the Standard Specifications, which is incorporated into the parties' contract, sets forth in detail the process for making progress payments to a contractor. Upon executing the contract for CN 6101100R, the parties agreed to this process. In doing so, any requirement that AUI submit a "written notice ... that payment is requested for services or construction completed", and for the NMDOT to issue "a written certification of complete or partial acceptance or rejection of the ... construction" within fifteen days of the request for payment from the contractor before making payment to the contractor was supplanted by the parties' contract. It is worth noting that acceptance of AUI's argument would result in contractors not receiving payment from the NMDOT for upwards to 45 days after the close of the agreed upon progress payment period. It is difficult to understand why AUI would argue for such a result.

AUI also argues that the NMDOT lacks authority for imposing the seven-day prompt payment requirement on the basis that it is an expansion of the NMDOT's regulatory authority not authorized by state statute. It is difficult to understand the reasoning for this argument but it appears that AUI takes the position that since the NMDOT is exempted from the Prompt Payment Act it has no authority whatsoever to impose any time-period in which a contractor must pay subcontractors.

However, one of the statutory provisions cited by AUI actually undermines this argument. Using very permissive language, NMSA § 13-1-170 (1997) provides that "[a] state agency, local public body or central purchasing office with the power to issue regulations may require by regulation that contracts include ... other contract provisions as appropriate." In addition to its express statutory authority to adopt regulations relating to a contractor's responsibility, the NMDOT is granted the general authority to adopt rules by NMSA 1978 § 67-3-11 (2003). Using that authority, the NMDOT adopted the Standard Specifications, which are found in 18.27.2 NMAC (05/31/13). The provision requiring contractors to promptly pay its subcontractors is

---

22 See NMDOT Exhibit 1. Invitation for Bldgs.
23 See Section 57-28-2, NMSA 1978. Definitions:
As used in the Prompt Payment Act:
C. "owner" means a person, local public body or state agency other than the department of transportation.
24 AUI also throws in a comment about the NMDOT failing to include Section 13-1-158 in its standard contract. This statement is incorrect in that Section 109.11 of the Standard Specifications, which is incorporated into the NMDOT contract, provides that "[t]he Department will pay the Contractor late payment charges as authorized by NMSA 1978, 13-1-158 for construction services and Materials not the subject of a disputed Claim or subject to Retainage or Withheld Progress Payments and that have been certified by the Department to have been received and Accepted."
26 The rule adopts by reference Division 100-General Provisions of the New Mexico Department of Transportation 2013 Standard Specifications for Highway and Bridge Construction as replacement to the 2007
contained in those regulations. Contrary to the position advanced by AUI, adoption of the seven-day prompt payment is not an improper expansion of its regulatory authority but instead simply a reasonable exercise of the NMDOT’s statutory rule making authority.

Moreover, as the recipient of Federal-aid highway funds, the NMDOT must comply with 49 CFR Part 26. 49 CFR § 26.29 requires the NMDOT to include “a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment [the NMDOT] make[s] to the prime contractor.” The FHWA allows a state transportation department the ability to select the actual number of days subject to its approval. The NMDOT’s prompt pay regulation is reasonably related to this legislative mandate. Therefore, given the deferential standard applicable to its adoption, the prompt payment requirement is presumed valid. Wilcox v. N.M. Bd. of Acupuncture & Oriental Med., 2012–NMCA–106, ¶ 7, 288 P.3d 902.

Although AUI failed to raise the issue in its appeal filed with the Cabinet Secretary, it nonetheless argued that the penalty for AUI failing to promptly pay its subcontractor was duplicative. AUI’s prequalification factor rolling average was negatively affected due to its failure to promptly pay its subcontractors being treated as a performance factor under both 18.27.5.11.F and 18.27.5.11.H. However, a Non-Conformance is not limited to solely a contractor’s failure to promptly pay a subcontractor. Instead, a Non-Conformance is defined as the “Contractor’s failure to comply with the Contract”, which can include the failure of the contractor to comply with other contractual provisions as well the prompt payment provision. For example, Section 108.3.3 of the Standard Specifications obligates a contractor to periodically submit an updated or revised and Acceptable schedule. Failure to do so will result in the issuance of a Non-Conformance that will likewise negatively affect the contractor yearly prequalification factor.

The decision to treat a prompt payment violation more harshly by treating it as a performance factor under both 18.27.5.11.F and 18.27.5.11.H NMAC is a policy decision made by the NMDOT when it adopted the Prequalification Rule. Its reasons for doing so include the important race-neutral mechanism that the prompt payment provision plays in furthering the objectives of the FHWA’s disadvantaged business enterprise program as well as the fact that a contractor has a contractual obligation to notify the NMDOT whenever it believes cause exists for it not to

citation: See ¶ 6, Section 108.1 of the Standard Specifications.

26 See 49 CFR § 26.3(a)(1).


30 See Section 101.4 Term and Definitions, Standard Specifications.

31 See Section 18.27.5.11.B(4) & F, NMAC.
promptly pay a subcontractor. However, the role of the Hearing Officer is not to conduct a rational connection review of the policy decisions made by the NMDOT. But instead, the Hearing Officer’s role is limited to conducting a review whether the NMDOT’s calculation of AUI’s prequalification factor rolling average was supported by substantial evidence and in accordance with the Prequalification Rule.

C. Closing

Clearly, AUI has not met its burden of proof to show that the NMDOT’s assessment of the two Non-Conformances was the product of any arbitrary, capricious, or unlawful action. As AUI acknowledged in its own opening statement, the facts of this matter are not in dispute. AUI failed on two occasions to promptly pay a subcontractor that resulted in the issuance of two Non-Conformances that in turn negatively affected its yearly prequalification factor. Accordingly, the NMDOT respectively requests that AUI’s appeal be denied.33

Sincerely,

[Signature]

Stephen Thies and Geraldine L. Gonzales
Assistant General Counsels – NMDOT

Cc: Via Email Only

Sean Calvert, Esq.
Anthony Lujan – NMDOT
Armando Armendariz – NMDOT
Sally Reeves - NMDOT
Elizabeth J. Travis – NMDOT

32 See ¶ 5, page 1 of Notice to Contractors, NMDOT Exhibit 5.
33 See Notice of Appeal “The appeal relates to interpretations of prompt payment to subcontractors of AUI on Project: CN 6101100R.”
In the Matter of AUI, Inc.'s Appeal of NMDOT's Prequalification Score for 2018.

HEARING OFFICER'S DETERMINATION

This Hearing Officer was designated as the Informal Hearing Officer by Secretary Tom Church, New Mexico Department of Transportation ("NMDOT") to hear AUI Inc.'s ("AUI") appeal of the NMDOT's calculation of AUI's prequalification factor year score ("prequalification score" "pqfyr"). This matter came before this Hearing Officer for informal hearing on February 21, 2018. AUI was represented by Scan Calvert of Calvert Menicucci, P.C.; and NMDOT was represented by Assistant General Counsel Geraldine L. Gonzales and Assistant General Counsel Stephen Thies. The hearing was held pursuant to the requirements of NMDOT’s Contractor Prequalification Rule, 18.27.5.13 NMAC ("Rule"). The appeal concerns the following related issues: Was NMDOT’s issuance of two Non-Conformances for AUI’s failure to promptly pay its subcontractors which negatively affected AUI’s prequalification factor rolling average ("Pqfra") for 2018 arbitrary, capricious, or an abuse of discretion; not otherwise supported by substantial evidence in the record; or, otherwise not in accordance with law? Evidence, argument and testimony were presented by AUI and NMDOT at the informal hearing. The record remained open until Monday, March 5, 2018 at 5:00 p.m. to allow the parties to submit rebuttal documents and/or written closing arguments. On March 2, 2018 both parties submitted additional documentation/exhibits. Additionally, both parties submitted written closing arguments on March 5, 2018 per the Hearing Officer’s request. The Informal Hearing was transcribed by Certified Court Reporter, Mary Hankins of Paul Baca Court Reporters, and a certified transcript of the hearing was prepared with the exhibits admitted at the hearing. The parties’ additional documents and written closing arguments were admitted as supplements to the record.

Summary of the Case

NMDOT's Contractor Prequalification Rule, 18.27.5 NMAC authorizes NMDOT to gather data about contractor performance on NMDOT projects and to calculate the contractor's prequalification score. The Prequalification Rule also authorizes NMDOT to use the prequalification score to evaluate the contractor’s bids submitted on NMDOT projects. Id. The purpose of the Rule is to ensure the contractor has the expertise and capacity to perform a NMDOT project by rewarding good performers and encouraging poor performers to improve. The contractor with a lower prequalification factor rolling year average ("Pqfra") could be awarded a project over a contractor with a lower monetary bid.

This administrative appeal centers on NMDOT’s decision to penalize AUI in the calculation of its prequalification score under two categories, compliance with the terms of the contract and prompt payment of subcontractors. See 18.27.5 NMAC (K)(M) (setting forth the pre-qualification factors) NMDOT’s calculation of both of these factors was impacted by the same underlying facts set forth below.

AUI entered into a contract with NMDOT to complete project CN6101100R. In the parties’ contract, there was a clause requiring that all subcontractors must be paid within seven (7) days of
the Contractor receiving a Progress Payment from the Department. The contract further stated that “the payment by the Department to the Contractor is not a condition precedent for payment by the Contractor to any Subcontractor or Supplier. A zero dollar ($0.00) Progress Payment by the Department does not relieve the Contractor from paying the Subcontractor or Supplier for Accepted Work.” Moreover, additional documents governing the parties’ agreement provided that the only good cause for failing to pay a subcontractor within seven (7) days was an issue with the subcontractor’s work. The additional documents also placed the burden of demonstrating good cause on the Contractor and required that good cause be shown within seven (7) days of the progress payment by NMDOT.

Relevant to this matter, AUI contracted with two (2) subcontractors for the instant project, J&H Supply Company (“J&H”) and Gonzales Construction. The first Non-Conformance issued by NMDOT concerns J&H. On October 6, 2016, the NMDOT made a progress payment to AUI for work performed during the pay period commencing on August 26, 2016 and ending on September 25, 2016. J&H had performed work during this time period and submitted an invoice to AUI. AUI did not make payment to J&H within seven (7) days of the October 6, 2016 progress payment, or by October 13, 2016. Although J&H initially reported this payment as delinquent, J&H later stated that it and AUI had verbally agreed that J&H would submit a revised invoice to include work performed in October 2016. AUI maintains that its agreement with J&H relieved AUI of the obligation to pay J&H by October 13, 2016. Alternatively, AUI claims it was not notified of NMDOT’s acceptance of the work.

The second Non-Conformance issued by NMDOT pertains to the AUI’s failure to pay subcontractor Gonzales Construction within seven (7) days of NMDOT’s issuance of a zero dollar progress payment. Gonzales Construction performed work on October 11, 2016 that was accepted by NMDOT on November 3, 2016. However, due to the retainage agreement between the parties, NMDOT issued a zero dollar progress payment on this date. AUI did not pay Gonzales Construction within seven (7) days of the zero progress payment, or by November 10, 2016. AUI maintains that the zero dollar progress payment relieved AUI of any obligation to pay Gonzales Construction within seven (7) days. Alternatively, AUI claims it was not notified of NMDOT’s acceptance of the work.

AUI initiated this appeal of its prequalification score based upon NMDOT’s issuance of these two (2) Non-Conformances.
Issues Raised

1. Was NMDOT’s issuance of a Non-Conformance to AUI on the grounds it failed to abide by its contractual obligation to pay J&H within seven (7) days of NMDOT’s progress payment arbitrary, capricious, contrary to law, or not supported by substantial evidence?
   a. Did J&H and AUI’s agreement for J&H to submit a revised invoice constitute good cause for AUI’s failure to pay J&H within seven (7) days of NMDOT’s October 6, 2016 progress payment?

2. Was NMDOT’s issuance of a Non-Conformance to AUI on the grounds it failed to abide by its contractual obligation to pay Gonzales Construction within seven (7) days of NMDOT’s zero dollar progress payment arbitrary, capricious, contrary to law, or not supported by substantial evidence?

Table of Exhibits Submitted by All Parties

<table>
<thead>
<tr>
<th>Exhibit</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUI EX 1</td>
<td>Email from Eddie Gonzales with attached invoices from J-H Supply Co., dated November 17, 2016.</td>
</tr>
<tr>
<td>AUI EX 2</td>
<td>NMDOT Estimate Summary to Contractor No. 12, dated September 26, 2016.</td>
</tr>
<tr>
<td>AUI EX 3</td>
<td>NMDOT Estimate Summary to Contractor No. 13, dated October 27, 2016.</td>
</tr>
<tr>
<td>AUI EX 4</td>
<td>AUI Letter of Transmittal to JH Supply Co, dated October 27, 2016.</td>
</tr>
<tr>
<td>AUI EX 6</td>
<td>NMDOT Compass Information – Final, dated March 10, 2017.</td>
</tr>
<tr>
<td>AUI EX 7</td>
<td>Gonzales Construction Invoice No. 101916, dated October 19, 2016.</td>
</tr>
<tr>
<td>AUI EX 8</td>
<td>Payment from AUI to Gonzales Construction, Check no. 123726, dated November 28, 2016.</td>
</tr>
<tr>
<td>AUI EX 10</td>
<td>Transportation and Highways Highway Construction General Provisions Contractor Prequalification Rule, 18.27.5 NMAC.</td>
</tr>
</tbody>
</table>

1 The issues presented are limited to the arguments raised in AUI’s notice of appeal submitted on January 18, 2018. See 18.27.5.13(E)(3) (requiring that appeals state all of the grounds for relief along with supporting documents to support the appeal). In spite of the fact that AUI is limited to the grounds stated in its Notice of Appeal, the Hearing Officer will address the additional legal arguments raised at the informal hearing and in AUI’s written closing in the Conclusions of Law.

2 AUI Exhibit 11 was submitted after the informal hearing but prior to the close of the record, and are admitted into evidence.
<table>
<thead>
<tr>
<th>Exhibit</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>NMDOT EX 1</td>
<td>Invitation for Bids.</td>
</tr>
<tr>
<td>NMDOT EX 2</td>
<td>Section 102.7 of the Standard Specifications of Highway and Bridge.</td>
</tr>
<tr>
<td>NMDOT EX 5</td>
<td>Notice to Contractors, dated November 26, 2013.</td>
</tr>
<tr>
<td>NMDOT EX 6</td>
<td>NMDOT Bid Form, dated June 17, 2015.</td>
</tr>
<tr>
<td>NMDOT EX 7</td>
<td>Affidavit of Jeffrey E. Martinez, dated February 6, 2018.</td>
</tr>
<tr>
<td>NMDOT EX 8</td>
<td>18.27.5.8 Prequalification Rule, dated December 30, 2014.</td>
</tr>
<tr>
<td>NMDOT EX 9</td>
<td>Published list from OIG's Prequalification Contractor's and Subcontractor List, dated January 12, 2018.</td>
</tr>
<tr>
<td>NMDOT EX 10</td>
<td>Compass Form.</td>
</tr>
<tr>
<td>NMDOT EX 12</td>
<td>Prompt Pay Section 108.1 of Standard Specifications of Highway and Bridge.</td>
</tr>
<tr>
<td>NMDOT EX 13</td>
<td>Email from Grover to Monk regarding Change Order (CO) directed by CCRB, dated July 13, 2016.</td>
</tr>
<tr>
<td>NMDOT EX 15</td>
<td>Final Quantity Book.</td>
</tr>
<tr>
<td>NMDOT EX 16</td>
<td>Estimate 10 with Voucher information.</td>
</tr>
<tr>
<td>NMDOT EX 17</td>
<td>Agenda PreCon for estimate cut-off date, dated September 6, 2015.</td>
</tr>
<tr>
<td>NMDOT EX 18</td>
<td>Estimate 12 with Voucher Information.</td>
</tr>
<tr>
<td>NMDOT EX 19</td>
<td>Estimate 13 with Voucher Information.</td>
</tr>
<tr>
<td>NMDOT EX 20</td>
<td>Notice of Non-Conformance Letter to AUI, dated November 18, 2016.</td>
</tr>
<tr>
<td>NMDOT EX 21</td>
<td>Language from Section 109.8.2 Non-Conformance Excerpt from Standard Specifications for Highway and Bridge.</td>
</tr>
<tr>
<td>NMDOT EX 23</td>
<td>Steps for Verification of Prompt Pay.</td>
</tr>
<tr>
<td>NMDOT EX 24</td>
<td>Apodaca email to Coats, dated November 17, 2016.</td>
</tr>
<tr>
<td>NMDOT EX 25</td>
<td>Coats email to Gonzales and Bridge re CAR SC02 with attachments (SC02 and Compliance Audit September 2016), dated November 17, 2016.</td>
</tr>
<tr>
<td>NMDOT EX 26</td>
<td>Coats email to Segura regarding AUI Non-Conformance SC 02, dated November 18, 2016.</td>
</tr>
<tr>
<td>NMDOT EX 27</td>
<td>Apodaca email to Coats &quot;JH paid&quot;, dated December 7, 2016.</td>
</tr>
<tr>
<td>NMDOT EX 28</td>
<td>Non-Conformance/Corrective Action SC03, dated December 16, 2016.</td>
</tr>
<tr>
<td>NMDOT EX 29</td>
<td>Coats email to Segura re CAR response to Gonzales Construction (attaching AUI letter and language from 13-1-158 Payments for Purchases), dated December 19, 2016.</td>
</tr>
<tr>
<td>NMDOT EX 30</td>
<td>Permission to Subcontract Request -- JH Supply, dated October 7, 2015.</td>
</tr>
<tr>
<td>NMDOT EX 31</td>
<td>Permission to Subcontract Request -- Gonzales Construction, dated September 15, 2015.</td>
</tr>
<tr>
<td>NMDOT EX 32</td>
<td>Compliance Audit Report, dated October 2016.</td>
</tr>
</tbody>
</table>
Findings of Fact

These findings reflect the facts established through testimony or evidence submitted at the informal hearing of this appeal and while the record remained open that are relevant to deciding the issues presented.

1. Section 108.1 of the Standard Specifications for Highway and Bridge Construction requires Contractors to “pay Subcontractors and Suppliers for Satisfactory performance of their contracts no later than seven (7) days from the receipt of each Progress Payment the Department makes to the Contractor.” See NMDOT Exhibit 12.

3NMDOT Exhibits 44-51 were submitted after the hearing but prior to the closing of the record, and are admitted into evidence.
2. Section 108.1 further states, “payment by the Department to the Contractor is not a condition precedent for payment by the Contractor to any Subcontractor or Supplier. A zero dollar ($0.00) Progress Payment by the Department does not relieve the Contractor from paying the Subcontractor or Supplier for Accepted Work.” See NMDOT Exhibit 12.

3. Pursuant to the Notice to Contractors incorporated into AUI’s contract with NMDOT, AUI had “the burden of proving compliance with these prompt payment provisions and SHALL do so through its timely B2GNow reporting obligation.” See id (emphasis in original).

4. The Notice further stated that the “ONLY good cause recognized by the Department to excuse a payment beyond the timing set in Section 108.1, paragraph 6, is a claim concerning the Subcontractor’s or Supplier’s Work.” See id (emphasis in original).

5. Moreover, AUI was required to show good cause for any non-payment of a subcontractor within seven (7) days after the Progress Payment from NMDOT. See id.

6. On October 6, 2016, NMDOT submitted payment to AUI for work completed between August 26, 2016 and September 25, 2016. See Transcript, p. 85, ll. 17-24; see also Transcript, p. 92, ll. 20-p. 93, l. 1; NMDOT Exhibit 18.

7. AUI was notified of NMDOT’s payment and acceptance of the work through the B2GNow program. See NMDOT Exhibit 23; see also NMDOT Exhibit 47.

8. AUI did not submit payment to J&H for work completed during this period by October 13, 2016. See Transcript p. 106, ll. 5-13; see also NMDOT Exhibit 4; AUI Exhibit 5.

9. J&H originally reported this payment delinquent through B2GNow. See Transcript p. 99, ll. 8-25; see also NMDOT Exhibit 4; AUI Exhibit 5.

10. AUI reached an agreement with J&H for J&H to submit a revised invoice for September 2016. See AUI Exhibit 5.


12. AUI did not notify NMDOT of this agreement prior to October 13, 2016. See AUI Exhibit 5; see also NMDOT Exhibit 44.

13. On November 3, 2016, NMDOT issued a zero payment to AUI for work completed in mid-October 2016 and accepted the work. See NMDOT Exhibit 23.

14. AUI was notified of NMDOT’s zero progress payment and acceptance of the work through the B2GNow program. See NMDOT Exhibit 23; see also NMDOT Exhibit 47.

15. AUI did not submit payment to Gonzales Construction for work completed by November 10, 2016. See Transcript, p. 97, l. 20-p. 98, l. 3; see also AUI Exhibit 8.

---

4 B2GNow is a software used by NMDOT to track payments to contractors and subcontractors. See Transcript p. 77, l. 24-p. 78, l. 6.
Conclusions of Law\(^5\)

1. Pursuant to 18.27.5.13(E)(3) NMAC, AUI waived any arguments not raised in its January 18, 2018 Notice of Appeal, including the following arguments raised for the first time at the February 21, 2018 informal hearing and in AUI's written Closing Argument, dated March 5, 2018:
   a. That NMDOT was without legal authority to adopt the Prequalification Rule.
   b. That the prompt payment requirements in the parties' contract and supporting documents violate the Procurement Code.
   c. That NMDOT's assessment of penalties under two (2) factors (compliance with contract terms and prompt payment) was duplicative.
2. Even assuming AUI had not waived these arguments, none of these arguments are viable.
3. NMDOT acted within its authority in establishing the Prequalification Rule. See NMDOT Exhibit 50 (Ruling from Judge Sarah Singleton, dated September 14, 2017).
4. NMDOT has the legal authority to set terms for its contract with AUI, including prompt payment requirements. See NMSA 1978 §13-1-170.
5. The prompt payment requirements are also incorporated into the regulations promulgated by NMDOT pursuant to statute. See 18.27.2.8 NMAC.
6. The Prequalification Rule lists non-conformance with contract requirements and prompt payment of subcontractors as separate factors that are that account for different percentages of the prequalification score. See 18.27.5.7(F)(H) NMAC; see also 18.27.5.11(B)(4, 6) NMAC.
7. AUI's claim that penalizing it under both factors for the same set of facts was duplicative is not supported by any authority whereas the NMDOT offered evidence that the NMDOT made a policy decision to allow the same actions to result in a penalty under both factors. See NMDOT's Closing Argument, p. 8.
8. NMDOT's decision to penalize AUI under both factors for the same set of facts was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence.
9. The prompt payment provisions set forth in Section 108.1 of the Standards as well as the Notice to Contractors are not ambiguous.
10. AUI failed to comply with the prompt payment provision by failing to pay J&H within seven (7) days of the October 6, 2016 payment for work J&H completed between August 26, 2016 and September 26, 2016.
11. AUI failed to show that good cause existed for its failure to comply with the prompt payment provision as its agreement with J&H regarding a revised invoice does not constitute good cause pursuant to the terms of AUI's agreement with NMDOT.

\(^5\) AUI raised the issue of whether NMDOT was authorized to impose prompt payment requirements pursuant to federal regulations and/or whether NMDOT complied with the applicable federal prompt payment regulations. Because this Hearing Officer determines that NMDOT's reliance on the parties' contract, specifically Section 108.1, is dispositive, it will not address the issue as to whether AUI's payment was governed by or compliant with federal regulations.
12. Additionally, AUI failed to make any effort to show good cause for its lack of prompt payment by October 13, 2016 as required by the parties’ agreement.

13. NMDOT’s determination that AUI failed to promptly pay J&H and there was no good cause to justify the lack of prompt payment was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

14. NMDOT’s determination that AUI’s failure to promptly pay J&H constituted non-conformance with the terms of the parties’ contract was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

15. Per the clear language of Section 108.1, the seven (7) day deadline for payment to subcontractors applies after issuance of a zero progress payment.

16. AUI failed to comply with the prompt payment provision by failing to pay Gonzales Construction within seven (7) days of the zero payment made on November 3, 2016 for work completed by Gonzales Construction in mid-October 2016.

17. NMDOT’s determination that AUI failed to promptly pay Gonzales Construction and there was no good cause to justify the lack of prompt payment was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

18. NMDOT’s determination that AUI failed to promptly pay J&H constituted non-conformance with the terms of the parties’ contract was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

19. AUI did not carry its burden of proof to establish that NMDOT’s issuance of two Non-Conformances for AUI’s failure to promptly pay its subcontractors which negatively affected AUI’s Pqfia for 2018 arbitrary, capricious, or an abuse of discretion; not otherwise supported by substantial evidence in the record.

20. AUI did not carry its burden of proof to establish that NMDOT’s that NMDOT’s issuance of two Non-Conformances for AUI’s failure to promptly pay its subcontractors which negatively affected AUI’s Pqfia for 2018 was contrary to NMDOT Rule or New Mexico law.

21. AUI’s appeal is denied and NMDOT’s calculation of AUI’s prequalification score is affirmed.

**Conclusion**

This Determination constitutes final agency action on this matter. Any party aggrieved by this decision has thirty days to appeal this decision to State District Court pursuant to NMSA 1978 13-1-183.

Christina Anaya, Hearing Officer

03-08-18

Date

Transmitted to the parties via e-mail only on March 8, 2018 without party exhibits.
For AUI: to Sean Calvert
For NMDOT: to Geraldine Gonzales
to Steve Thies

scalvert@hardhatlaw.net
Geraldine.Gonzales@state.nm.us
Stephen.Thies@state.nm.us
February 28, 2018

VIA FACSIMILE AT (505-242-9050) and ELECTRONIC MAIL AT TawnyaH@awilinc.net

AUI, Inc.
Attention: Ms. Howells
PO Box 9825
Albuquerque, NM 87119

Re: Revised Score, Updated Compass Form and Updated Prequalified Contractors and Subcontractors List

Ms. Howells,

AUI, Inc. (AUI) closed CN: 8101100R in calendar year 2017, resulting in a Prequalification Factor Rolling Average (PQFRA) of 0.977 for the calendar year 2018. Enclosed with this correspondence please find the revised Compass Form for CN: 8101100R. During the New Mexico Department of Transportation’s (NMDOT) continuing audit of the prequalification program it was determined there were three (3) non-conformances reported. Of the three (3) non-conformances, one (1) was associated with late payroll submission. In order to provide statewide consistency with the prequalification program the non-conformance associated with late payroll submission is being corrected. As a result of the NMDOT’s audit, the final count for all non-conformances for this project should be two (2). This now results in a PQFRA for AUI of 0.976 for the calendar year 2018. The NMDOT reviewed all bids for 2018 and the updated score has not affected any bid submitted.

Thank you,

[Signature]

Armando M. Armendariz
NMDOT Division Director Design and Construction

Enclosure(s)

Cc: Tom Church, Cabinet Secretary
Anthony Lujan, Deputy Secretary
Prequalification Team
Jon Don Martinez, FHWA
<table>
<thead>
<tr>
<th><strong>District</strong></th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contractor</strong></td>
<td>AUI Inc</td>
</tr>
<tr>
<td><strong>Control No.</strong></td>
<td>6101100R</td>
</tr>
<tr>
<td><strong>Project No.</strong></td>
<td>6101100R</td>
</tr>
<tr>
<td><strong>Type of Project</strong></td>
<td>OTHER</td>
</tr>
<tr>
<td><strong>Route Road No.</strong></td>
<td>I00040</td>
</tr>
<tr>
<td><strong>Bridge(Yes/No)</strong></td>
<td>NO</td>
</tr>
<tr>
<td><strong>Rural/Urban</strong></td>
<td>RURAL</td>
</tr>
<tr>
<td><strong>Lane Miles</strong></td>
<td>5</td>
</tr>
<tr>
<td><strong>Interstate/Non-Interstate</strong></td>
<td>INTERSTATE</td>
</tr>
<tr>
<td><strong>Date Construction Started</strong></td>
<td>September 28, 2015</td>
</tr>
<tr>
<td><strong>Substantial Completion Date</strong></td>
<td>October 11, 2016 ✓</td>
</tr>
<tr>
<td><strong>Date of Letting</strong></td>
<td>July 15, 2017</td>
</tr>
<tr>
<td><strong>N.T.P. Notice to Proceed</strong></td>
<td>September 27, 2015 ✓</td>
</tr>
<tr>
<td><strong>Physical Completion Date</strong></td>
<td>February 21, 2017 ✓</td>
</tr>
<tr>
<td><strong>District Final Acceptance</strong></td>
<td>February 21, 2017</td>
</tr>
<tr>
<td><strong>Type of Time Count</strong></td>
<td>WD</td>
</tr>
<tr>
<td><strong>Total Days District to Final</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Reason over 120 days to Final</strong></td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Original Contract Time</strong></td>
<td>180 WD</td>
</tr>
<tr>
<td><strong>Time Extensions- Days</strong></td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Reason for Time Extension</strong></td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Revised Contract Time</strong></td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Time Charged</strong></td>
<td>172</td>
</tr>
<tr>
<td><strong>Liquidated Damages Charged</strong></td>
<td>5 as per 603.1.6</td>
</tr>
<tr>
<td><strong>Liquidated Damages Amount</strong></td>
<td>$5,000.00</td>
</tr>
<tr>
<td><strong>Date sent to S.C.B.</strong></td>
<td>March 3, 2017</td>
</tr>
<tr>
<td><strong>Original Bid Amount</strong></td>
<td>$2,926,849.70</td>
</tr>
<tr>
<td><strong>Engineer Estimate Amount</strong></td>
<td>$3,328,574.00</td>
</tr>
<tr>
<td><strong>Final Project Cost(Less GRT)</strong></td>
<td>$2,816,753.35</td>
</tr>
<tr>
<td><strong>Final Total (GRT Inc.)</strong></td>
<td>$3,001,603.03</td>
</tr>
<tr>
<td><strong>G.R.T. Amount</strong></td>
<td>$184,849.45</td>
</tr>
<tr>
<td><strong>Final Change Order Completed(Yes/No)</strong></td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Claim</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Date Final Paid by NMDOT</strong></td>
<td>March 1, 2017 ✓</td>
</tr>
<tr>
<td><strong>Notes/ Comments</strong></td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Pro Rata Values (Fed / State)</strong></td>
<td>85.44%/14.56</td>
</tr>
<tr>
<td><strong>EEO Interviews</strong></td>
<td>Yes. Available in the Project Files</td>
</tr>
<tr>
<td><strong>Project Diaries</strong></td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Warranties</strong></td>
<td>No</td>
</tr>
</tbody>
</table>
# New Mexico Department of Transportation

**Prequalification Performance Factor Measurements**

Fields that are highlighted in yellow are calculated values - do not enter any data.

<table>
<thead>
<tr>
<th>PI liquidated damages (Pld)</th>
<th>For MCD Projects:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory Completion Date</td>
<td></td>
</tr>
<tr>
<td>CO Time Extensions # of Days</td>
<td></td>
</tr>
<tr>
<td>Adjusted Mandatory Completion Date</td>
<td>1/0/00</td>
</tr>
<tr>
<td>Notice to Proceed Date (as indicated in SiteManager)</td>
<td></td>
</tr>
<tr>
<td>Substantial Completion Date (Actual Completion Date)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PI claim (Pfc)</th>
<th>For WD or CD Projects:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original Contract Time</td>
<td>160</td>
</tr>
<tr>
<td>CO Time Extensions # of Days</td>
<td>0</td>
</tr>
<tr>
<td>Adjusted Contract Time</td>
<td>180</td>
</tr>
<tr>
<td>Total Days Charged</td>
<td>172</td>
</tr>
</tbody>
</table>

**PI claim (Pfc)**

Yes or No. If yes, indicate level of claim at this time. **NO**

**PI non-conformance (Pn)**

' # of Progress Payments (including zero dollar payments) | 18

**PI disincetive (Pd)**

<table>
<thead>
<tr>
<th>$ Value of applicable item</th>
<th>$ Value of Disincentive</th>
</tr>
</thead>
<tbody>
<tr>
<td>401</td>
<td>$0.00</td>
</tr>
<tr>
<td>403</td>
<td>$20,340.00</td>
</tr>
<tr>
<td>404</td>
<td>$0.00</td>
</tr>
<tr>
<td>416</td>
<td>$167,800.00</td>
</tr>
<tr>
<td>417</td>
<td>$0.00</td>
</tr>
<tr>
<td>423</td>
<td>$0.00</td>
</tr>
<tr>
<td>424</td>
<td>$0.00</td>
</tr>
<tr>
<td>450</td>
<td>$0.00</td>
</tr>
<tr>
<td>451</td>
<td>$0.00</td>
</tr>
<tr>
<td>901</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$187,800.00</strong></td>
</tr>
</tbody>
</table>

**PI subcontractor (Psc)**

# of findings from the State DBE Liaison. Attach letter(s) from the DBE Liaison.

---

**Project Manager:**

**Date:** 2-22-18

**Project Manager Signature:**

---

**PI claim (Pfc)**

# of Claims resolved for less than the value of the claim

---

**State Construction Engineer Signature:**

**Project Closure Date:** 2/28/18

*** T/LPAs DO NOT USE THIS PAGE ***

Corrected
February 6, 2017

AUI, Inc.
ATTN: Eddie Gonzales, Project Manager
P.O. Box 9825
Albuquerque, New Mexico 87119

RE: NMDOT Finding of No Good Cause for Failure to Promptly Pay — NMDOT Project No. CN 6101100R — Cibola County
Subcontractor: Gonzales Construction Inc.

Dear Mr. Gonzales,

By letter dated January 10, 2017, the New Mexico Department of Transportation (NMDOT) requested AUI, Inc. (AUI) to provide additional documentation or other information relating to a prompt payment dispute involving its Subcontractor, Gonzales Construction, Inc. On December 19, 2016, AUI responded by email stating that AUI was under the impression they had 30 days to pay the subcontractor and had no new information to submit in relation to NMDOT’s request.

To briefly summarize the facts resulting in NMDOT’s initial prompt payment inquiry:

- Gonzales Construction issued an invoice to AUI dated October 19, 2016.
- NMDOT paid a zero dollar ($0.00) progress payment to AUI on October 27, 2016.
- AUI paid Gonzales Construction on December 6, 2016 for the work performed and accepted by NMDOT in October.
- Payment to Gonzales Construction was more than seven (7) day after AUI’s receipt of the October 27, 2016 progress payment.

With respect to this dispute, AUI’s prompt payment obligation was created by section 108.1 of the NMDOT’s Standard Specification for Highway and Bridge Construction, 2014 Edition (Standard Specifications), and the Notice to Contractors entitled “Subcontractor Prompt Payment Provisions, Clarification of Good Cause and Prohibition of Cross-Project Offset” dated November 26, 2013 (NTC). Section 108.1 requires in part as follows:

The Contractor shall promptly pay its Subcontractors and Suppliers for satisfactory performance of their contracts no later than seven (7) calendar days after receipt of Progress Payment for the Subcontractor’s Work or Supplier’s Materials by the Department. For the purposes of this section, a Subcontractor’s portion of the Work is satisfactorily completed when it is accepted by the Department.

Addressing your response that Section 13-1-158 applies to this dispute, it does not, but it is a statutory provision contained in the New Mexico Procurement Code. The Procurement Code applies to expenditures by state agencies, such as the NMDOT, and local public bodies in their purchase of goods and services, but does not apply to private party contracts.
between a prime contractor and subcontractor. Instead, as described above, the obligation to promptly pay its subcontractors and material suppliers is imposed on a contractor when the contractor enters into a construction contract with the NMDOT.

After reviewing the documentation and other evidence related to this matter, I find that AUI has not met its burden to show good cause for its failure to promptly pay its Subcontractor, Gonzales Construction for accepted work no later than seven (7) days after AUI's receipt of the October 27, 2016 progress payment from the NMDOT.

This is my final determination for this prompt payment investigation. Please feel free to contact me if you have any questions or concerns regarding this information.

Sincerely,

[Signature]

Renee Roybal, DBE Program
Construction and Civil Rights Bureau
New Mexico Department of Transportation

CC: Jayson Grover, NMDOT D6 Project Manager
Sandra Coates, NMDOT D6 Office Manager
Octavio Serrano, NMDOT D6 Construction Liaison Engineer
Jackie Gallegos, NMDOT CCRB Compliance
Dan Hillis, NMDOT CCRB DBE Liaison
Sally Reeves, NMDOT Acting Construction Engineer
January 4, 2017

AUI, Inc.
ATTN: Eddie Gonzales, Project Manager
P.O. Box 9825
Albuquerque, New Mexico 87119

RE: NMDOT Finding of No Good Cause for Failure to Promptly Pay -- CN 610110CR -- J&H Supply Company Inc.

Dear Mr. Gonzales,

The New Mexico Department of Transportation (NMDOT) received AUI, Inc.'s (AUI) email correspondence sent on December 29, 2016 confirming our phone call. In the phone call you stated that AUI had no new information to submit to respond to NMDOT’s request to provide evidence demonstrating its subcontractor J&H Supply Company Inc. (J&H) was timely paid for accepted work.

The NMDOT made the request for evidence demonstrating timely payment pursuant to Section 108.1 of the NMDOT's Standard Specifications for Highway and Bridge Construction (2014 Edition) and the prompt payment clause required by 49 CFR § 26.29. Section 108.1 obligates a contractor to promptly pay its subcontractors and suppliers for satisfactory performance of their contracts no later than seven (7) days of receipt of a progress payment from the NMDOT. The prompt payment requirement is also reiterated in the NMDOT’s Notice to Contractors titled "Subcontractor Prompt Payment Provisions, Clarification of Good Cause and Prohibition of Cross-Project Offset" dated November 26, 2013, which was incorporated in AUI's contract with the NMDOT. Based on review of the information and relevant contract provisions I find that AUI did not timely pay its subcontractor J&H and that good cause does not exist to excuse the failure to timely pay.

To briefly restate the series of events and my findings leading to NMDOT's initial prompt payment inquiry, I find that:

- J&H issued an invoice to AUI dated September 30, 2016 for work performed on the above project.
- NMDOT paid a progress payment to AUI for $83,212.73 on October 6, 2016. The progress payment included the work performed by J&H and previously invoiced to AUI on September 30, 2016.
- J&H amended the original invoice to include all end sections and additional rail work on October 17, 2016 and submitted it to AUI.
- A zero ($0) progress payment was issued by the NMDOT on October 25, 2016. Part of the accepted work included in this progress payment was the additional work J&H performed and included on the amended invoice on October 17, 2016.
- Based on the October 6, 2016 progress payment AUI should have paid J&H for that work no later than October 13, 2016.
AUI paid J&H on October 27, 2016 for the full amount of the amended invoice, this included work paid for by the NMDOT on October 6, 2016.

Based on the findings, I conclude that good cause did not exist to excuse AUI's failure to promptly pay J&H after its receipt of the October 6, 2016 progress payment. Amending the invoice date does not change the requirement to promptly pay within a certain timeframe after receipt of payment from the NMDOT. Additionally, AUI does not have the authority to waive or agree to violate the prompt payment obligations contained in its contract with the NMDOT. Agreements of this sort are without effect. Payment was due to J&H on or before October 13, 2016 and was not made. Work performed by J&H after the progress payment was issued by the NMDOT should have been paid within the appropriate timeframe after the next progress payment was issued by the NMDOT.

This is my final determination for this prompt payment investigation. Please feel free to contact me if you have any questions or concerns regarding this information.

Sincerely,

[Signature]

Damian Segura, DBE Liaison
Construction and Civil Rights Bureau
New Mexico Department of Transportation

CC: Jayson Grover, NMDOT D6 Project Manager
    Sandra Coates, NMDOT D6 Office Manager
    Octavio Burrola, NMDOT D6 Construction Liaison Engineer
    Jackie Gallegos, NMDOT CC RB Compliance
    Renee Roybal, NMDOT CC RB DBE
    Sally Reeves, NMDOT Acting Construction Engineer
February 28, 2018

VIA FACSIMILE AT (303-790-8524) and ELECTRONIC MAIL AT estimating@ihequality.com

Interstate Highway Construction, Inc.
Attention: Mr. Randall
PO Box 4356
Englewood, CO 80155

Re: Revised Score, Updated Compass Form and Updated Prequalified Contractors and Subcontractors List

Mr. Randall,

Interstate Highway Construction, Inc. (Interstate) closed CN: 6100470 in calendar year 2017, resulting in a Prequalification Factor Rolling Average (PQFRA) of 0.972 for calendar year 2018. Enclosed with this correspondence please find the revised Compass Form for CN: 6100470. During the New Mexico Department of Transportation’s (NMDOT) continuing audit of the prequalification program it was determined there should have been two (2) non-conformances reported. Of the two (2) non-conformances, one (1) was associated with late payroll submission. In order to provide statewide consistency with the prequalification program the non-conformance associated with late payroll submission is being corrected. As a result of the NMDOT’s audit, the final count for all non-conformances for CN: 6100470 is one (1). This now results in a PQFRA for Interstate of 0.966 for the calendar year 2018. The NMDOT reviewed all bids for 2018 and the updated score has not affected any bid submitted.

Thank you,

[Signature]

Armando M. Armendariz
NMDOT Division Director Design and Construction

Enclosure(s)

Cc: Tom Church, Cabinet Secretary
    Anthony Lujan, Deputy Secretary
    Prequalification Team
    Jon Don Martinez, FHWA
<table>
<thead>
<tr>
<th><strong>COMPASS INFORMATION - FINAL INFORMATION</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District</strong></td>
</tr>
<tr>
<td><strong>Contractor</strong></td>
</tr>
<tr>
<td><strong>Control No.</strong></td>
</tr>
<tr>
<td><strong>Project No.</strong></td>
</tr>
<tr>
<td><strong>Type of Project</strong></td>
</tr>
<tr>
<td><strong>Route Road No.</strong></td>
</tr>
<tr>
<td><strong>Bridge(Yes/No)</strong></td>
</tr>
<tr>
<td><strong>Rural/Urban</strong></td>
</tr>
<tr>
<td><strong>Lane Miles</strong></td>
</tr>
<tr>
<td><strong>Interstate/Non-Interstate</strong></td>
</tr>
<tr>
<td><strong>Date Construction Started</strong></td>
</tr>
<tr>
<td><strong>Substantial Completion Date</strong></td>
</tr>
<tr>
<td><strong>Date of Letting</strong></td>
</tr>
<tr>
<td><strong>N.T.P. Notice to Proceed</strong></td>
</tr>
<tr>
<td><strong>Physical Completion Date</strong></td>
</tr>
<tr>
<td><strong>District Final Acceptance</strong></td>
</tr>
<tr>
<td><strong>Type of Time Count</strong></td>
</tr>
<tr>
<td><strong>Total Days District to Final</strong></td>
</tr>
<tr>
<td><strong>Reason over 120 days to Final</strong></td>
</tr>
<tr>
<td><strong>Original Contract Time</strong></td>
</tr>
<tr>
<td><strong>Time Extensions- Days</strong></td>
</tr>
<tr>
<td><strong>Reason for Time Extension</strong></td>
</tr>
<tr>
<td><strong>Revised Contract Time</strong></td>
</tr>
<tr>
<td><strong>Time Charged</strong></td>
</tr>
<tr>
<td><strong>Liquidated Damages Charged</strong></td>
</tr>
<tr>
<td><strong>Liquidated Damages Amount</strong></td>
</tr>
<tr>
<td><strong>Date sent to S.C.B.</strong></td>
</tr>
<tr>
<td><strong>Original Bid Amount</strong></td>
</tr>
<tr>
<td><strong>Engineer Estimate Amount</strong></td>
</tr>
<tr>
<td><strong>Final Project Cost(less GRT)</strong></td>
</tr>
<tr>
<td><strong>Final Total (GRT Inc.)</strong></td>
</tr>
<tr>
<td><strong>G.R.T. Amount</strong></td>
</tr>
<tr>
<td><strong>Final Change Order Completed(Yes/No)</strong></td>
</tr>
<tr>
<td><strong>Claim</strong></td>
</tr>
<tr>
<td><strong>Date Final Paid by NMDOT</strong></td>
</tr>
<tr>
<td><strong>Notes/ Comments</strong></td>
</tr>
<tr>
<td><strong>Pro Rata Values (Fed / State)</strong></td>
</tr>
<tr>
<td><strong>EEO Interviews</strong></td>
</tr>
<tr>
<td><strong>Project Diaries</strong></td>
</tr>
<tr>
<td><strong>Warranties</strong></td>
</tr>
<tr>
<td>Pf liquidated damages (Pfd)</td>
</tr>
<tr>
<td>---------------------------</td>
</tr>
<tr>
<td>Mandatory Completion Date</td>
</tr>
<tr>
<td>CO Time Extensions # of Days</td>
</tr>
<tr>
<td>Adjusted Mandatory Completion Date</td>
</tr>
<tr>
<td>Notice to Proceed Date (as indicated in SiteManager)</td>
</tr>
<tr>
<td>Substantial Completion Date (Actual Completion Date)</td>
</tr>
</tbody>
</table>

| Original Contract Time | 180 |
| CO Time Extensions # of Days | 18 |
| Adjusted Contract Time | 198 |
| Total Days Charged | 198 |

| Pf claim (Pfc) | Yes or No, if yes, indicate level of claim at this time: NO |
| Pf non-conformance (Pfn) | # of Progress Payments (Including zero dollar payments) 18 |
| | # of Progress Payments without a non-conformance 17 |

<table>
<thead>
<tr>
<th>Pf disIncentive (Pfd)</th>
<th>$ Value of applicable item</th>
<th>$ Value of DisIncentive</th>
</tr>
</thead>
<tbody>
<tr>
<td>401</td>
<td></td>
<td></td>
</tr>
<tr>
<td>403</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>404</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>415</td>
<td>34,019.65</td>
<td>0.00</td>
</tr>
<tr>
<td>417</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>423</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>424</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>430</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>451</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>901</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>34,019.65</strong></td>
<td><strong>0.00</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Pf subcontractor (Pfsc)</th>
<th># of findings from the State DBE Liaison, Attach letter(s) from the DBE Liaison.</th>
</tr>
</thead>
<tbody>
<tr>
<td>02/21/18</td>
<td>[Signatures]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Project Manager</th>
<th>Date</th>
<th>Project Manager Signature</th>
<th>Project Closure Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>[Signatures]</td>
<td>2/22/18</td>
<td>[Signatures]</td>
<td><strong>Note</strong>: Pf subcontractor (Pfsc) # of findings from the State DBE Liaison, Attach letter(s) from the DBE Liaison.</td>
</tr>
</tbody>
</table>
February 28, 2018

VIA FACSIMILE AT (505-287-7364) and ELECTRONIC MAIL AT wlm@ceconcrete.net

C & E Concrete, Inc.
Attention: Mr. Meech
PO Box 2547
Milan, NM 87021

Re: Revised Score, Updated Compass Form and Updated Prequalified Contractors and Subcontractors List

Mr. Meech,

C & E Concrete, Inc. (C&E) closed CN: 6100289R in calendar year 2017, resulting in a Prequalification Factor Rolling Average (PQFRA) of 0.944 for the calendar year 2018. Enclosed with this correspondence please find the revised Compass Form for CN: 6100289R. During the New Mexico Department of Transportation's (NMDOT) continuing audit of the prequalification program it was determined there were two (2) non-conformances reported. Of the two (2) non-conformances, two (2) were associated with late payroll submission. In order to provide statewide consistency with the prequalification program the non-conformance associated with late payroll submission is being corrected. As a result of the NMDOT's audit, the final count for all non-conformances for CN: 6100289 is (0). This now results in a PQFRA for Interstate of 0.919 for the calendar year 2018. The NMDOT reviewed all bids for 2018 and the updated score has not affected any bid submitted.

Thank you,

Armando M. Armendariz
NMDOT Division Director Design and Construction

Enclosure(s)

Cc: Tom Church, Cabinet Secretary
Anthony Lujan, Deputy Secretary
Prequalification Team
Jon Don Martinez, FHWA
<table>
<thead>
<tr>
<th><strong>COMPASS INFORMATION - FINAL INFORMATION</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District</strong></td>
</tr>
<tr>
<td><strong>Contractor</strong></td>
</tr>
<tr>
<td><strong>Control No.</strong></td>
</tr>
<tr>
<td><strong>Project No.</strong></td>
</tr>
<tr>
<td><strong>Type of Project</strong></td>
</tr>
<tr>
<td><strong>Route Road No.</strong></td>
</tr>
<tr>
<td><strong>Bridge(Yes/No)</strong></td>
</tr>
<tr>
<td><strong>Rural/Urban</strong></td>
</tr>
<tr>
<td><strong>Lane Miles</strong></td>
</tr>
<tr>
<td><strong>Interstate/Non-Interstate</strong></td>
</tr>
<tr>
<td><strong>Date Construction Started</strong></td>
</tr>
<tr>
<td><strong>Substantial Completion Date</strong></td>
</tr>
<tr>
<td><strong>Date of Letting</strong></td>
</tr>
<tr>
<td><strong>N.T.P. Notice to Proceed</strong></td>
</tr>
<tr>
<td><strong>Physical Completion Date</strong></td>
</tr>
<tr>
<td><strong>District Final Acceptance</strong></td>
</tr>
<tr>
<td><strong>Type of Time Count</strong></td>
</tr>
<tr>
<td><strong>Total Days District to Final</strong></td>
</tr>
<tr>
<td><strong>Reason for Time Extension</strong></td>
</tr>
<tr>
<td><strong>Original Contract Time</strong></td>
</tr>
<tr>
<td><strong>Time Extensions - Days</strong></td>
</tr>
<tr>
<td><strong>Reason for Time Extension</strong></td>
</tr>
<tr>
<td><strong>Revised Contract Time</strong></td>
</tr>
<tr>
<td><strong>Time Charged</strong></td>
</tr>
<tr>
<td><strong>Liquidated Damages Charged</strong></td>
</tr>
<tr>
<td><strong>Liquidated Damages Amount</strong></td>
</tr>
<tr>
<td><strong>Original Bid Amount</strong></td>
</tr>
<tr>
<td><strong>Engineer Estimate Amount</strong></td>
</tr>
<tr>
<td><strong>Final Project Cost (Less GRT)</strong></td>
</tr>
<tr>
<td><strong>Final Total (GRT Inc.)</strong></td>
</tr>
<tr>
<td><strong>G.R.T. Amount</strong></td>
</tr>
<tr>
<td><strong>Final Change Order Completions(Yes/No)</strong></td>
</tr>
<tr>
<td><strong>Claim</strong></td>
</tr>
<tr>
<td><strong>Date Final Paid by NMDOT</strong></td>
</tr>
<tr>
<td><strong>Notes/Comments</strong></td>
</tr>
<tr>
<td><strong>Pro Rata Values (Fed / State)</strong></td>
</tr>
<tr>
<td><strong>EEO Interviews</strong></td>
</tr>
<tr>
<td><strong>Project Diaries</strong></td>
</tr>
<tr>
<td><strong>Warranties</strong></td>
</tr>
</tbody>
</table>
**New Mexico Department of Transportation**

**Funding Information**

<table>
<thead>
<tr>
<th>Field</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contract No.</td>
<td>6100289R</td>
</tr>
<tr>
<td>District</td>
<td>6</td>
</tr>
</tbody>
</table>

**Performance Factors Measurements**

- **Mandatory Completion Date**: 6/30/2023
- **Notice to Proceed Date (as indicated in SiteManager)**: 1/10/2023
- **Substantial Completion Date (Actual Completion Date)**: 6/30/2023

**For WD or CD Projects:**

- **Original Contract Time**: 60 days
- **AD Time Extensions # of Days**: 10
- **Adjusted Contract Time**: 70 days
- **Total Days Charged**: 70

**Pf claim (Pfc)**

- **Yes or No**: NO

**Pf non-conformance (Pfn)**

- **# of Progress Payments (including zero dollar payments)**: 7
- **# of Progress Payments without a non-conformance**: 7

**Pf disincentive (PDI)**

<table>
<thead>
<tr>
<th>Item</th>
<th>Value of applicable item</th>
<th>Value of Disincentive</th>
</tr>
</thead>
<tbody>
<tr>
<td>401</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>403</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>404</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>416</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>417</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>423</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>424</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>450</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>451</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>801</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
</tbody>
</table>

**Pf subcontractor (PFC)**

- **# of findings from the State DBE Liaison, Attached letter(s) from the DBE Liaison**: 6

**DeWyett Shirley**

2/22/2018

**Project Manager**

Date: 2/22/2018

**Project Manager Signature**

2/22/18

**State Construction Engineer**

Signature: [Signature]

2/22/18
February 28, 2018

VIA FACSIMILE AT (734)420-1781 and ELECTRONIC MAIL AT AHunt@ramservices.com

RAM Construction Services of Michigan, Inc.
Attention: Annette Hunt
13800 Eckles Road
Livonia, Michigan 48150

Re: Revised Score and Updated Prequalified Contractors and Subcontractors List

Ms. Hunt,

RAM Construction Services of Michigan, Inc. (RAM) closed CN: A300696 in calendar year 2016, resulting in a Prequalification Factor Rolling Average (PQFRA) of 0.985 for calendar year 2017. RAM Construction did not close any projects in 2017 resulting in a PQFRA of 1.0 for calendar year 2018. During the New Mexico Department of Transportation's (NMDOT) continuing audit of the prequalification program it was determined that RAM's PQFRA for the calendar year 2018 is 0.977. The NMDOT reviewed all bids for 2018 and the updated score has not affected any bid submitted.

Thank you,

Armando M. Armendariz
NMDOT Division Director Design and Construction

Cc: Tom Church, Cabinet Secretary
Anthony Lujan, Deputy Secretary
Prequalification Team
Jon Don Martinez, FHWA

Susana Martinez
Governor

Tom Church
Cabinet Secretary

Commissioners

Ronald Schmela
Chairman
District 4

Dr. Kenneth White
Secretary
District 1

David Sepich
Commissioner
District 2

Keith Mortensen
Commissioner
District 3

Butch Mathews
Commissioner
District 5

Billy Moore
Commissioner
District 6
February 28, 2018

VIA FAX AT (505-769-3262) and ELECTRONIC MAIL AT Kerry@kbarnett.com

K. Barnett & Sons, Inc.
Attention: Kerry O’Hare
PO Box 960
Clovis, New Mexico 88102

Re: Revised Score and Updated Prequalified Contractors and Subcontractors List

Ms. O’Hare,

K. Barnett & Sons, Inc. (K. Barnett) closed CN: 2100140 in calendar year 2016, resulting in a Prequalification Factor Rolling Average (PQFRA) of 0.950 for calendar year 2017. K Barnett did not close any projects in 2017 resulting in a PQFRA of 1.0 for the calendar year 2018. During the New Mexico Department of Transportation’s (NMDOT) continuing audit of the prequalification program it was determined that K. Barnett's PQFRA for calendar year 2018 is 0.967. The NMDOT reviewed all bids for 2018 and the updated score has not affected any bid submitted.

Thank you,

Armando M. Armendariz
NMDOT Division Director Design and Construction

Cc: Tom Church, Cabinet Secretary
    Anthony Lujan, Deputy Secretary
    Prequalification Team
    Jon Don Martinez, FHWA

Susana Martinez
Governor

Tom Church
Cabinet Secretary

Commissioners

Ronald Schmeits
Chairman
District 4

Dr. Kenneth White
Secretary
District 1

David Sepich
Commissioner
District 2

Keith Mortensen
Commissioner
District 3

Butch Mathews
Commissioner
District 5

Billy Moore
Commissioner
District 6
February 28, 2018

VIA FACSIMILE AT (505-717-2013) and ELECTRONIC MAIL AT Andrew@MWIINC.Net

MWI, Inc.
Attention: Mr. Pedroncelli
PO Box 30670
Albuquerque, NM 87102

Re: Revised Score and Updated Compass Form and Updated Prequalified Contractors and Subcontractors List

Mr. Pedroncelli,

MWI closed two (2) projects in calendar year 2016, CN: 9900362 and CN: A301590R, resulting in a Prequalification Factor Rolling Average (PQFRA) of 0.960 for calendar year 2017. MWI closed CN: F100221 in calendar year 2017, resulting in a PQFRA of 0.917 for the calendar year 2018. Enclosed with this correspondence please find the revised Compass Form for CN: A301590R. During the New Mexico Department of Transportation’s (NMDOT) continuing audit of the prequalification program it was determined there should have been three (3) prompt payment violations reported on the compass form for CN: A301590R. As a result of the NMDOT’s audit, the final count for prompt payment violations for CN: A301590R is three (3). This now results in a PQFRA for MWI of 1.055 for calendar year 2017 and 0.987 for calendar year 2018. The NMDOT reviewed all bids for 2017 and 2018 and the updated score has not affected any bid submitted.

Thank you,

Armando M. Armendariz
NMDOT Division Director Design and Construction

Enclosure(s)

Cc: Tom Church, Cabinet Secretary
    Anthony Lujan, Deputy Secretary
    Prequalification Team
    Jon Don Martinez, FHWA
August 12 – August 16, 2018

7:00 AM – 5:00 PM  Registration Desk Open  TBD
7:00 AM – 8:30 AM  Breakfast  TBD
8:00 AM – 9:30 AM  Contract Administration Session  TBD
                 Moderator – Gary Angles, Section Chair, Ohio DOT

- Update on New Mexico DOT Performance Based Contractor Prequalification and Procurement
  Moderated by Jerry Yakovenko, FHWA
  o Sally Reeves, New Mexico DOT
  o Armando Armendarez, New Mexico DOT
  o AGR/ARTBA perspectives (5 minutes each)
    Brian Deery, AGC Headquarters and Rich Juliano, ARTBA Headquarters

- Penn DOT Rapid Bridge Replacement PPP
  Moderated by Sue Eiseman, Kansas DOT
  o Gary R. Kleist, P.E., Project Manager for The Bureau of Project Delivery, Penn DOT

9:30 AM – 9:45 AM  Break  TBD
9:45 AM – 11:30 AM  Contract Administration Session (Continued)  TBD

- Panel on CM/GC contracting
  Moderated by Jerry Yakovenko, FHWA
  o Sharon Foerschler, P.E., Nevada DOT
  o Rachel Falsetti, P.E., Caltrans
  o Ken Kubacki, Granite Construction Company

11:30 AM – 11:45 AM  AASHTOWARE Update  TBD
                     Janet Treadway, Ohio DOT
11:45 AM – 12:00 PM  COC Chair Discussion Topics  TBD
                     Moderator – TBD, Committee Chair, DOT
12:00 PM – 1:30 PM  Lunch  TBD
                     Speaker by Sydne Jacques
                     Leadership by Design, Not Default – The Formula to Create Stronger Influence