



March 23, 2021

VIA ELECTRONIC MAIL ONLY AT ([melinda.roberson@dot.gov](mailto:melinda.roberson@dot.gov))

Ms. Melinda Roberson  
New Mexico Division Office of Federal Highway Administration (FHWA)  
4001 Office Court Drive, Suite 801  
Santa Fe, New Mexico 87507

**Re: 2020 Annual Report for Special Experimental Projects No. 14 (SEP-14)  
New Mexico Department of Transportation (NMDOT) Contractor  
Prequalification Program**

Dear Ms. Roberson,

Per the FHWA's SEP-14 reporting requirements outlined in the FHWA letter of February 26, 2015 the NMDOT is required to submit an annual report to the FHWA regarding the NMDOT's Prequalification Program (Program) and Contractor Prequalification Rule NMAC 18.27.5 (Rule). The NMDOT requests that the New Mexico Division Office forward this correspondence and all attachments to Mr. Gerald Yakowenko with SEP-14's approval office in the FHWA's Office of Infrastructure. This annual report will be publically available at:

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

As part of the authorization under SEP-14 to implement the Program, both the FHWA and the NMDOT identified criteria for the NMDOT to monitor and track the impact of the Program and Rule. This report provides data for periods both pre and post-Program implementation and draws conclusions about the Program's effect on the data, if any. The data and conclusions follow the same format for reporting contained in the FHWA correspondence and previous 2015, 2016, 2017 and 2019 annual reports.

**\$5 Million Program Threshold (Tab 1)**

All of the data contained in Tab 1 is for the calendar year period January to December for the respective year cited.

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The NMDOT committed to apply the Program to projects with an engineer's estimate exceeding \$5 million, which at the time of Program implementation represented approximately 2/3 of all projects let by the NMDOT. The projects let that fell outside of the threshold, approximately 1/3, would provide bidding opportunities regardless of the bidder's prequalification score.

Between 2015 and 2019, approximately 31% of the project let exceeded the \$5M threshold. However, in 2020, 53.57% of the projects let exceeded the threshold. During the 2020 legislative session, additional funds were allotted to NMDOT which were combined with our federal funding to construct some of the larger projects in the STIP, resulting in a larger number of projects greater than \$5M begin added to the letting schedule. The NMDOT examined the State Transportation Improvement Program (STIP) for the upcoming 2021 calendar year and based on current programed amounts there are 36 total projects and 10 exceed the threshold, or 28%. The targeted range for application of the Program was never met during the 6 year program life.

The NMDOT will re-evaluate the threshold and determine if modifications are needed when application for Prequal 2.0 is submitted to FHWA for approval.

As part of the NMDOT SEP-14 approval, FHWA cited the threshold as an important element of the Program which would allow participation in NMDOT bidding and projects by Disadvantaged Business Enterprises (DBEs). However, for the current federal fiscal year the NMDOT is not establishing project-specific DBE goals because the NMDOT is exceeding its currently established statewide goal of 12.3% with a current DBE participation level of 22.7% (April 1-September 30 semi-annual calculation). Since the NMDOT is exceeding the statewide DBE goal, a reduction in the Program threshold would not reduce DBE participation on NMDOT projects.

The June 19, 2020, the bid letting included an NTC that raised the threshold of the application of the Program to \$100M. This change was necessary due to a litigation issue that will be further discussed in Legal Matters (Tab 8). The result was that the prequalification program affected no projects after the May 15, 2020 letting. Through the May letting, there were 8 projects that were below the \$5M threshold, and 8 project that were subject to the Program.

#### Number of Bidders per Project (Tab 1 continued)

In order to examine the fluctuations in the number of bidders per project, the NMDOT categorized projects by engineer's estimate amount. For calendar years 2015 through 2020, the NMDOT used three categories, up to \$5 million, \$5-\$10 million and over \$10 million.

The average number of bidders are shows in Table 1.

<b>Year</b>	<b>Avg # of Bidders Less than \$5 M</b>	<b>Avg # of Bidders \$5M-\$10M</b>	<b>Avg # of Bidders Greater than \$10M</b>
2015	3.29	3.60	3.00
2016	3.59	3.00	3.80
2017	2.38	3.86	2.83
2018	2.73	3.67	2.63
2019	2.33	2.56	4.86
2020	2.19	2.42	3.06

**Table 1**

The average number of bidders for all projects is as shown in Table 4.

<b>Year</b>	<b># Projects Bid</b>	<b>Avg # of Bidders</b>
2015	60	3.3167
2016	52	3.4615
2017	25	2.7333
2018	44	2.8409
2019	48	2.6667
2020	56	2.5179

**Table 2**

There has been a slight decrease in the number of bidders over the years that can be the result of many circumstances. The NMDOT's letting schedule has been bridge heavy over the last few years and not all of the NMDOT' contractors are in the bridge building business. In addition, the ability to acquire pits from the Stand Land Office has been more challenging, limiting the number of contractors that have access to good aggregate pits to construct projects. Water permits have also posed an issue for many contractors and may be reducing the number of contractors willing to go through the effort to secure the necessary construction resources. Quite a few projects are in remote areas and some contractors are not willing to mobilize to those areas without the possibility of another project in the vicinity. The larger projects that we have seen over the last couple of years keep contractors busy for longer periods of time, reducing their ability to bid additional projects until their equipment and manpower are available. Finally, the letting schedule does not distribute the type of construction consistently through the year, so there may be a number of months in a row that consists mainly of roadway rehabilitation projects, followed by a few months of bridge rehabilitation and reconstruction projects. When lumped together, contractors are not able to spread out the work in a manner that would allow them to bid on multiple projects.

There does not appear to be much consistency in projects having a single bidder post-Program implementation as shown in Table 3.

Year	# Projects Single Bidder
2014	8
2015	3
2016	3
2017	9
2018	8
2019	5
2020	8

**Table 3**

The NMDOT does not award all single bidder contracts, In 2020, 5 of the single bid projects were bridge rehabilitation or reconstruction projects, 1 was a very small electric project and the other 2 were remote projects geared towards the contractors with pits in the area.

Average Unit Bid Price (Tab 2)

The NMDOT evaluated whether the Program has had significant impact on average unit bid prices for major contract items. To do this, the NMDOT compared average unit bid prices for major items between 2016 and 2020. The largest percent change fluctuations in AUB for 2020 were seen in bid items 203000 Unclassified Excavation (-27.13%), 203100 Borrow (-23.15%), 207000 Subgrade Preparation (-37.89%), 405000 Detour Pavement Construction (+22.02%), 423283 HMA SP-IV Complete (-37.39%) and Structural Concrete Class A 511000 (+25%). The items that had a reduction in the bid unit price can be attributed quantity of scale for 2020 projects, doubling to quadrupling the 2019 quantities. As previously indicated, there was an increase for projects greater than \$5M, which resulted in much larger major item quantities. The rise in the AUB price of the Detour Pavement Construction item can be attributed to an increase in the section being required to accommodate more traffic. This item is bid per square yard so any increase to the section would cause an increase in the AUB price. The increase in Structural Concrete Class A can be attributed to a high demand with a low supply of contractors able to produce the work. As you can see from the data sheets included in the table under Tab 2, the price fluctuation for asphalt has been relatively flat. Broadly speaking, there has not been significant fluctuations in AUB post-Program implementation except for the bid items described in this paragraph.

Number of Prequalified Contractors/Subcontractors (Tab 3)

In order to evaluate changes to the number of contractors and subcontractors applying for prequalification status with the NMDOT, the NMDOT tallied the number of prequalified companies from the list that the NMDOT maintains titled “Prequalified Contractors and Subcontractors List”. The data compares the number of prequalified contractors and subcontractors from 2019 and 2020. For 2020 the Department had 328 prequalified contractors and subcontractors, the same number as in 2019. Ninety companies expired in 2020 and did not renew their prequalification status. The NMDOT has monitored and measured the number of

prequalified bidders but placed more emphasis on the number of bidders per project to determine the overall health of the Program and impacts on competitive bidding, if any.

Prequalified Contractors		In state v. Out of state				
Report Date	Count		New	In state	35	72.92%
12/31/2019	328			Out of state	13	27.08%
12/31/2020	328			Total	48	
Decrease	0		Expired	In state	60	66.67%
				Out of state	30	33.33%
2019 Data				Total	90	
New	48					
Expired	90					
Decrease	-42					

#### Quarterly Reports (Tab 4)

The biannual report can be found in Tab 4.

#### Prequalification Committee Appointment and Meetings (Tab 5)

The prequalification committee members consist of Mr. Jeff Canney, Inspector General, Rick Padilla, Executive Director for Highway Operations, and David Quintana, Chief Engineer. By Rule, this committee is responsible for making decisions related to the day-to-day administration of the Program. The prequalification committee members along with a support team of diverse and knowledgeable individuals have previously met on a monthly basis to address the operational needs of the Program. Monthly meetings were not conducted during the last year to review data from the Program, as the program was in its final year. The committee did meet internally to discuss changes to be proposed for a new pre-qualification program five times during 2020 and additional 4 times in early 2021 to prepare the revised rule. The support team consists of Ms. Lisa Vega P.E., Assistant District Engineer of Construction, Mr. Justin Gibson P.E., District Engineer, Ms. Tisha Clark, Acting State Construction Engineer, Ms. Elizabeth Travis, Esq., Office of General Counsel (OGC), Ken Swain, OGC and Judith Paquin, OGC.

#### Continued Dialogue with Associated Contractors of New Mexico (Tab 6)

In 2016 the Associated Contractors of New Mexico (ACNM) requested to discontinue meetings with subsequent discussion on renewing the meetings. In 2019 the NMDOT and ACNM met twice, the first time on August 13, 2019 and the second time on November 19, 2019. The topic of the meetings was to discuss concerns regarding the effects of the prequalification program to the NMDOT and contracting community. In 2020, the NMDOT met with the members from the Associated Contractors of New Mexico (ACNM) and Asphalt Paving Association of New

Mexico (APANM) 6 times, with an additional 2 meetings in early 2021 to discuss the proposed changes to the new Rule.

Rulemaking (Tab 6 Continued)

The NMDOT at its March 13, 2017 State Transportation Commission (STC) meeting in Albuquerque, NMDOT requested and received approval from the STC to enter into rulemaking for the Rule. This action was taken because the NMDOT had reached the halfway point in the SEP-14 process and the NMDOT was getting ready to implement 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. On August 29<sup>th</sup> and 30<sup>th</sup> 2017 the NMDOT conducted prequalification workshops where an open exchange occurred between stakeholders and the NMDOT related to the Rule and the proposed modifications. The NMDOT completed the open comment period for the Rule by conducting a public hearing on February 23, 2018 for the purpose of receiving oral and or written comments. The NMDOT presented the Rule to the STC at the July 19, 2018 STC in Raton, NM, 2018 where the NMDOT was granted authorization to finalize the rulemaking. The initial rulemaking was finalized in January, 2019. Due to issues that have arisen since implementation of the Rule, additional revisions to the Rule are required to provide clarification and to improve implementation. The rulemaking process in NM is extensive and the link provided contains the information and documentation associated with the process. <http://dot.state.nm.us/content/nmdot/en/prequalification.html>. The date for the proposed Rulemaking hearing for the modified rule is set of April 22, 2021.

Prequalification Scores for 2020 (Tab 7)

The number of projects closed for each year, along with the resulting number of prequalification scores issued is shown in the table below.

Year	# Projects Closed	# Prequal Scores Issued
2016	25	17
2017	55	27
2018	28	29
2019	51	34
2020	32	31

The 2020 prequalification factor rolling average for all contractors published is shown in the table below.

COMPANY NAME	PQFRA 2020 Scores will apply to March	PQFRA 2019 Scores will apply to March	PQFRA 2018 Scores will apply to March	PQFRA 2017 Scores will apply to March	PQFRA 2016 Scores will apply to March	PQFRA 2015

	<b>2021 letting and on</b>	<b>2020 letting and on</b>	<b>2019 letting and on</b>	<b>2018 letting and on</b>	<b>2017 letting and on</b>	
Albuquerque Asphalt, Inc.	0.950	0.900	0.900	0.917	0.950	
Apache Construction Co., dba Valley Fence Co.	0.917	0.950				
AUI, Inc.	0.952	0.922	0.939	0.976	0.950	0.950
Bixby Electric, Inc.	0.917	0.950				
C & E Concrete, Inc.		0.983	0.951	0.919	0.953	
Constructors, Inc.	0.959	0.950	0.918	0.953	1.005	
El Terrero Construction, LLC	0.912	0.925	0.917	0.936	0.950	
Fisher Sand & Gravel - New Mexico, Inc.	0.928	0.939	0.934	0.927	0.933	0.950
FNF Construction, Inc.	0.903	0.905	0.900	0.900	0.917	0.950
H.O. Construction, Inc.	1.023	1.035				
Hasse Contracting Company Inc.	0.900	0.901	0.903	0.921	0.950	
Highway Supply, LLC	0.971	0.983	0.950	0.917	0.950	
Interstate Highway Construction, Inc.		0.999	0.982	0.966	0.956	
James Hamilton Construction Company	0.953	0.923	0.961			
J-H Supply Company, Inc.	0.965	0.955	0.974	0.962		
K. Barnett & Sons, Inc.	0.933	0.974	0.983	0.967	0.950	
Kiewit New Mexico Company	0.947	0.992	0.980			

Kimo Constructors, Inc.	0.967	0.933	0.967	0.987	0.987	
La Calerita Construction, LLC	0.906	0.913	0.931	0.959		
MANS Construction Company		1.069	1.138	1.208		
Meridian Contracting, Inc.		0.983	0.952	0.921	0.957	
Mountain States Constructors, Inc.	0.901	0.902	0.900	0.900	0.917	0.950
MWI, Inc.	0.950	0.900	0.935	0.987	0.950	
Northern Mountain Constructors, Inc.	0.950	0.983	0.967	0.950		
Oldcastle SW Group, Inc.	0.967	0.933	0.967	0.950		
R.T. Electric, Inc.		0.996	0.991	0.987		
RAM Construction Services of Michigan, Inc.			0.988	0.977	0.965	
Rock Canyon Construction	0.917	0.950				
Roper Construction, Inc.	0.983	0.967	0.950			
San Bar Construction Corp.	0.917	0.933	0.967	0.950		
Star Paving Company	0.967	0.950				
Structures, Inc.	1.054	1.082				
The Truesdell Corporation	0.987	0.957	0.927	0.950		
TLC Company, Inc. dba TLC Plumbing & Utility	0.950					
Villalobos Construction Co., Inc.		0.933	0.967	0.950		
Vital Consulting Group, LLC		1.356	0.906	0.928	0.967	

As you can see from the list, these contractors received a score other than 1.0 that has been applied to their bids. All other contractors bidding on NMDOT projects had have a 1.0 applied to their bids for evaluation purposes. The average number of projects closed over a 5 year period is 38, ranging from 25 to 51 and alternating higher and lower numbers. The average number of prequalification scores issues rose until 2020, when it dropped slightly from 34 down to 31.

Only 2 contractors had a Pfqra score greater than 1.000 and most contractors showed a slight, but steady improvement throughout the course of the program.

#### Performance Factor (Tab 7 Continued)

The NMDOT would like to discuss a trend that has been observed concerning a performance factor of particular interest, which shows the Program and Rule are operating properly. The performance factor trend that the NMDOT sees important to highlight is the trend related to claims. Several claims (that would be impacted by the Program and Rule) have been filed since the inception of the Program. All but one claim has been resolved at the District Engineer's level or under the reconsideration by the Cabinet Secretary. This is a dramatic reduction in the number of claims submitted and carried forward past the Cabinet Secretary level for reconsideration onto District Court. The NMDOT sees this trend as one positive indicator of the success of the Program and Rule.

#### Legal Matters (Tab 8)

In 2020 there were three, active legal challenges to the Contractor Prequalification Rule (the "Rule"). A detailed summary of these legal challenges is set out below.

##### (1) Constructors Inc. (Constructors) Writ of Mandamus.

Constructors filed a Writ of Mandamus, D-503-CV-202000180 (Writ), in the Fifth Judicial District Court seeking a court order for the NMDOT to score three "construction projects" completed in 2019, the scoring of which would benefit the contractor by lowering its Prequalification Factor Rolling Average (PQFRA) score. NMDOT defended the action on the grounds the projects were maintenance work and that the Rule had never been applied to maintenance projects. The Writ challenges the NMDOT prequalification scoring, excluding the maintenance projects, on the same grounds that form the basis of its appeal in the First Judicial District court (discussed below). On April 28, 2020, after holding a hearing on the matter the court entered an Order Granting Peremptory Writ of Mandamus pursuant to NMSA §44-2-7, ordering the NMDOT to score the contractor's completed price agreement work and recalculate the contractor's PQFRA. On May 28, 2020, the NMDOT filed both a Motion to Reconsider and a Motion to Stay Pursuant to Rule 1-062(B).

On July 9, 2020, the parties filed a Stipulated Motion to Stay the Proceedings to allow the parties the opportunity to resolve the issues without further litigation. The court entered an Order Granting Stipulated Motion to Stay the Proceedings on July 13, 2020. On February 10, 2021, the

court filed a stipulated Order to Extend Stay and Vacate Status Conference until June 30, 2021 to allow for completion of on-going rule-making efforts that would obviate the need for further litigation.

(2) Appeal of Administrative Ruling Regarding Constructors Inc. (Constructors) 2020 PQFRA.

On February 27, 2020, Constructors filed an Appeal of Administrative Ruling by NMDOT, D 101-CV- 202000578 (Appeal) in the First Judicial District Court. The Appeal asserted that the NMDOT had erred in the 2019 calculation of the contractor's PQFRA by excluding "construction projects" that were completed in 2019 pursuant to Price Agreements (PA) Nos. 80-805-18-16687 and 70-805-16-15418. The contractor did not serve the complaint on the NMDOT until July 29, 2020. On August 17, 2020, the court filed an Order to Stay Proceedings based on the stipulated motion of the parties.

Constructors agreed to stay both the Writ and the Appeal proceedings to allow NMDOT to complete the on-going rule-making efforts addressing the Rule score calculations, with an understanding that final amendments may obviate the contractor's complaint concerning its 2019 PQFRA score. On February 22, 2021 the court entered a stipulated Order to Stay Proceedings until June 30, 2021 to allow for completion of on-going rule-making efforts.

Additionally, due to the on-going litigation and unanticipated impacts to Rule scoring that may impact multiple contractors, the NMDOT Cabinet Secretary raised the threshold for application of Prequalification Factor Rolling Average to NMDOT Project Bids from \$5 million to \$100 million, effective June 18, 2020.

(3) James Hamilton Construction Company (JHCC) legal challenge to the Rule arising from the Award of CN 2101771, Resolved 09/28/2020

The last legal challenge was associated with a 2017 project, CN 2101771, and the contractor's bid protest, which alleged the NMDOT improperly awarded the project to the second low apparent bidder Fisher Sand & Gravel - NM (FSG) after applying FSG's prequalification score in accordance with the Rule. The essence of JHCC's bid protest was that the NMDOT's use of the Rule to alter low bid values for award consideration was contrary to state procurement policy. The bid protest hearing officer upheld the NMDOT's decision to award the project to FSG.

JHCC then sought judicial review in state court (D-101-CV-2017-01016) seeking a Temporary Restraining Order (TRO), preliminary injunction and stay to restrain the NMDOT from allowing FSG to begin work on the project and a declaratory judgment that the NMDOT was without authority to implement Rule. JHCC's request for a restraining order was denied; NMDOT had awarded the project to FSG and FSG had already begun work at the time the court considered the TRO application. The court granted NMDOT's motion to dismiss the declaratory judgment and

held the Rule is reasonably consistent with the NMDOT's statutory authority to adopt rules relating to bidder responsibility.

JHCC appealed the dismissal of D-101-CV-2017-01016 to the New Mexico Court of Appeals November 2017, (A-1-CA-36816). After being fully briefed, the Court of Appeals affirmed the District Court's decision on September 28, 2020. The Appellate Court held that the Procurement Code allows the NMDOT to consider factors other than low bid in awarding contracts; that the Rule, as promulgated, was consistent with statutory authority; was not arbitrary and capricious; and that JHCC had failed to state a claim upon which relief may be granted.

In summary, NMDOT believes the program to be successful in rewarding good contractors, and offering opportunities and encouraging poor performing contractors to improve. The changes to the Program that will be proposed to FHWA will improve the Program and continue to ensure that quality the foundation of each NMDOT construction project.

Should there be questions or comments please contact me.

Sincerely,



[Michael Sandoval \(Apr 5, 2021 10:13 MDT\)](#)

Michael Sandoval  
Cabinet Secretary, NMDOT

Attachment(s)

cc: Rick Padilla, Executive Director Highway Operations, NMDOT  
James Fields, ACNM Chapter President  
Jim Garcia, ACNM Executive Director

# 2020 Annual Report Prequalification 3-23-2021

Final Audit Report

2021-04-05

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