



New Mexico DEPARTMENT OF
TRANSPORTATION

April 15, 2019

VIA ELECTRONIC MAIL ONLY AT mbeck@aconm.org

Mr. Mike Beck, Executive Director
Associated Contractors of New Mexico (ACNM)
6135 Edith Boulevard NE
Albuquerque, New Mexico 87125

RE: Contractor Prequalification Rule 18.27.5
Interpretative letter relating to Pf claims performance measurement

Dear Mr. Beck,

As you are aware, commencing with a project slated to be advertised on April 19, 2019, the New Mexico Department of Transportation (NMDOT) will be using a Dispute Resolution Board (DRB) in lieu of the Administrative Remedy provisions found in Section 105.20 of the 2019 Edition of the Standard Specifications for Highway and Bridge Construction (2019 Standard Specifications) for certain select projects. In light of the fact that the DRB process does not allow for an appeal of the Board's decision, it is binding on both the contractor and the NMDOT, the NMDOT finds it necessary to issue this interpretative letter to inform the contracting community how the NMDOT will be calculating "Pf claim" for those projects which utilize the DRB process.

Claims data is an important component of the Contractor Prequalification Rule. Similarly, as noted in the Federal Highway Administration's (FHWA) Memorandum dated February 26, 2015, in which the FHWA approved the NMDOT's Prequalification and Procurement (CPPP) System, the FHWA stressed the need to administer the Contractor Prequalification Rule in a manner that would not create competitive barriers for small businesses and disadvantaged business enterprises.

18.27.5.11.C NMAC (1/1/2015) describes the claims calculation process. That particular provision assigns a value of zero for a claim that is pursued beyond the cabinet secretary administrative remedy level that is resolved for the value of the claim or more. If the claim is resolved for less than the value of the claim a value of one is assigned. At the time this provision was enacted the NMDOT did anticipate the possibility that a contractor would be contractually prohibited from pursuing a claim in district court.

The Contractor Prequalification Rule is premised in part on the objective of rewarding good performers. Obtaining that status generally requires a contractor to take

**Michelle Lujan
Grisham**
Governor

Michael R. Sandoval
Cabinet Secretary

Commissioners

Jennifer Sandoval
Commissioner
District 1

Bruce Ellis
Commissioner
District 2

Keith Mortensen
Commissioner
District 3

Walter G. Adams
Commissioner
District 4

Vacant
Commissioner
District 5

Charles Lundstrom
Commissioner
District 6

certain risks. A contractor awarded a contract that is subject to the DRB process is not taking any risk that claims will arise during its performance that will result in litigation given the structure of the DRB process.

Due to the probable complexity and size of the projects, larger contractors will likely be awarded the contract. If the contractor performs poorly yet submits numerous claims, its prequalification score will not be adversely affected. Administering the claims factor in such a manner could very well create competitive barriers to smaller and disadvantaged contractor. Therefore, to lesson any potential minimization of the claims performance factor and effectively reward a contractor for not taking such a risk, the NMDOT will assign a value of one to claim value for purposes of calculating the Pf claim as that process is described in 18.27.5.11.C for those projects selected for use of the DRB process. The projects selected for use of the DRB process are likely to be relatively complex and have a significant contract value thereby increasing the probability for disputes between the contractor and the NMDOT which results in contract claims. To assign a value of zero could incentivize a contractor who is awarded such a project to submit numerous and inflated claims to the DRB process. The contractor simply would not be penalized in any manner for engaging in such a practice. Further, if the contractor's own actions, such as ineffective project management, poor scheduling and/or substandard work, result in an increase in the number of claims submitted by the contractor, assigning a claim value of zero would effectively reward the contractor for its lack of responsibility, a result contrary to the stated objective of the Contractor Prequalification Rule.¹

If usage of DRB process moves beyond its use in a few select projects to application to all future NMDOT projects, an amendment to the Contractor Prequalification Rule could become necessary. In the meantime, the NMDOT will be monitoring the DRB process to determine its cost effectiveness.

Should you or any of your members have any questions or comments relating to this interpretative letter, please submit them in writing to NMDOT-#GO-pregual-questions@state.nm.us.

Thank you,



Michael R. Sandoval
NMDOT Cabinet Secretary

¹ 18.27.5.6 - OBJECTIVE: To establish policies and procedures for a determination of responsibility through a contractor prequalification system that directly rewards good performers and encourages poor performers to improve.