

This is an amendment to 18.27.5 NMAC, Sections 3, 7, 8, 11, 12, 13 and 15 effective 1/1/2019.

18.27.5.3 STATUTORY AUTHORITY: Section 13-1-82 NMSA 1978 (1984, as amended through 2012) and Section 13-1-133 to -134 NMSA 1978 (1984, as amended through 2012) Sections 67-3-2 (2003), 67-3-11 (2003), 67-3-14 (2003), and 67-3-43 (1983) NMSA 1978, 23 USC Section 112(b), 23 CFR Sections 635.110 and 635.114.

[18.27.5.3 NMAC - Rp, 18.27.5.3 NMAC, 1/1/2015; A, 1/1/2019]

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.

B. CID is the abbreviation of construction industries division.

C. Compass form means the New Mexico department of transportation form generated at project closure that documents certain contractor performance measurement data.

D. Innovative contracting is an alternate form of competitive bidding consistent with federal and state procurement laws that can result in work being awarded to a responsible bidder that may not submit the lowest monetary bid.

E. Modified bid amount means the contractor's bid multiplied by the contractor's prequalification factor rolling average or Pqfra. The modified bid amount will be used solely for determining the apparent lowest responsible bidder. The modified bid amount will not be used for payment.

F. Packet means the current New Mexico department of transportation contractor prequalification application from the office of inspector general.

G. Performance factor or Pf means the numerical quantification of a contractor's past performance on closed projects for certain objectively measureable criteria.

H. Pf claim or Pfc means the performance measurement of a contractor's unsuccessful demand for reconsideration seeking additional compensation or contract time beyond the cabinet secretary administrative remedy level.

I. Pf disincentive or Pfd means the performance measurement of a contractor's quality of work related to certain contract items. Applicable contract items for disincentive are the following sections 401 pavement smoothness measurement, 403 ~~[and] open graded friction course~~, 403 - a warm mix asphalt - open graded friction course, 404 ~~rubberized~~ open graded friction course, 416 minor paving, 417 miscellaneous paving, 423 hot mix asphalt - ~~[superpave qia and non qia]~~ major paving, 424 warm mix asphalt ~~[qia and non qia]~~ - major paving, 450 ~~[and] major portland cement concrete pavement~~, 451 ~~[qia and non qia]~~ minor portland cement concrete pavement, 456 continuously reinforced concrete pavement, and 901 quality control/quality assurance.

J. Pf liquidated damages or Pfld means the performance measurement of a contractor's timely completion of the contract.

K. Pf non-conformance or Pfn means the performance measurement of a contractor's compliance with the terms and conditions of the contract.

L. Pf safety or Pfs means the performance measurement of a contractor's safety reflected by the contractor's experience modifier rate or emr provided by the contractor's bonding company.

M. Pf subcontractor or Pfsc means the performance measurement of a contractor's prompt payment of its first tier subcontractors ~~[or suppliers]~~.

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

O. Prequalification factor year or Pqfyr means the yearly calculation of a contractor's performance factors.

P. Prequalification factor or Pqf means the overall mathematical analysis of the performance factors that measures contractor responsibility. Prequalification factor is abbreviated Pqf.

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 of the contractor's capability in all respects to perform fully and make satisfactory~~

~~delivery the requirements of the contract including the integrity and reliability that will assure good faith performance.]~~ Project closure means completion of the project and occurs on the date that the state construction engineer or New Mexico department of transportation designee signs the compass form.

S. ~~[Rolling average means a calculation to analyze data points by creating a series of averages of different subsets of the full data set.]~~ Responsibility means an objective determination based on past performance by the New Mexico department of transportation of the contractor's capability in all respects to perform fully and make satisfactory delivery the requirements of the contract including the integrity and reliability that will assure good faith performance.

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

[18.27.5.7 NMAC - Rp, 18.27.5.7 NMAC, 1/1/2015; A, 1/1/2019]

18.27.5.8 PREQUALIFICATION PROCEDURE: The most current version of the prequalification packet to obtain prequalified status ~~[may]~~ must be obtained from the office of inspector general of the New Mexico department of transportation website. Each contractor and subcontractor seeking to become prequalified shall submit the prequalification packet and any supporting information to the New Mexico department of transportation office of inspector general ~~[at the address]~~ as indicated in the prequalification packet. Deadlines are calculated from the date office of inspector general receives the new or renewal packet. Requests for prequalification will not be processed without the submission of a timely, complete and conforming packet. All packets shall contain a complete affidavit, executed under penalty of perjury by an authorized individual, certifying that the information contained in the packet is true and correct. Untimely, incomplete and non-conforming packets will not be processed.

A. Prequalified status will be granted upon the approval of a timely, complete and conforming prequalification packet by the office of inspector general.

B. An untimely, incomplete, or nonconforming packet will result in delays affecting prequalification status and will negatively impact the prime contractor's ability to bid on New Mexico department of transportation projects.

(1) Obtaining prequalified status is a condition to submitting a bid. Prime contractors submitting a new prequalification packet or renewal prequalification packet must ~~[submit it]~~ be approved no later than seven calendar days before the opening of any bid.

(2) Prime contractors submitting a bid without timely obtaining prequalified status shall result in a determination that its bid is non-responsive and the bid shall be rejected.

C. Subcontractors, at any tier, must obtain prequalified status before performing any work ~~[or supplying goods or services to]~~ on the project.

~~[(1) Subcontract packets for subcontractors who fail to obtain prequalified status before performing any work or supplying goods or services to the project shall be rejected.~~

~~[(2)]~~ Work performed ~~[or goods or services supplied]~~ without prequalified status shall be non-compensable.

D. For prime contractors and subcontractors who are currently prequalified by the effective date of this rule the applicant will not need to submit a new prequalification packet until the anniversary date of their last packet.

E. For prime contractors and subcontractors submitting [new] packets, within five calendar days from the receipt of a [new] prequalification packet the office of inspector general will provide notice of receipt of the packet.

(1) If the packet submitted is complete and conforming then the office of inspector general will provide written notice to the applicant of approved prequalified status.

(2) If the packet submitted is incomplete or does not conform to the requirements then the office of inspector general will provide written notice to the applicant that the packet will not be processed until the packet is complete and conforms to the requirements.

(3) The date of the written notice of approved prequalified status shall establish prequalification eligibility for a period of one year. Prequalified status shall automatically terminate if not renewed prior to the expiration date established by the written notice of approved prequalification status.

F. Renewal packets shall be submitted no ~~[later than seven days]~~ more than 30 calendar days before the expiration date on the document published by the office of inspector general titled prequalified contractors and subcontractors list. Prequalified status shall automatically terminate for the failure to submit a timely, complete and

conforming renewal packet. Prequalified status shall be re-established upon the approval of a complete and conforming renewal packet.

G. Appeal of the denial of prequalification eligibility based upon the receipt of untimely, incomplete or non-conforming packet shall be submitted in writing to the office of inspector general with supporting documentation within seven calendar days of the denial of prequalified status. If the appeal is untimely the aggrieved party waives the right to appeal. The inspector general, or designee, will issue a final written decision upholding or reversing the denial of prequalified status within seven calendar days of the receipt of a timely appeal. The inspector general's decision constitutes the final action taken by the office of inspector general related to a denial of prequalified status under this section.

H. Obtaining prequalification status, a performance factor, or a prequalification factor rolling average does not grant a license to do business, a right to bid or to be awarded a contract.

I. In the event a contractor or subcontractor is suspended or debarred, its prequalification status shall immediately and automatically terminate without further notice. In order to obtain renewed prequalification status after a period of suspension or debarment a new complete and conforming prequalification packet must be submitted and approved.

[18.27.5.8 NMAC - Rp, 18.27.5.8, 18.27.5.9, 18.27.5.10, 18.27.5.11, 18.27.5.12 NMAC, 1/1/2015; A, 1/1/2019]

18.27.5.11 PREQUALIFICATION CALCULATION: The New Mexico department of transportation will gather prime contractor performance data from each project upon project closure. The data collected will be used to calculate a yearly prequalification factor. The prequalification factor rolling average will be applied to each prequalified prime contractor to evaluate the prime contractor's bid for department projects as indicated in the invitation for bids.

A. The performance factors are claims, disincentives, liquidated damages, non-conformance, safety, and subcontractor.

(1) Pf claim data will be documented on the compass form and will be collected from the New Mexico department of transportation's closed project records.

(2) Pf disincentive 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 disincentives were assessed on standard specification division for surface treatment and pavements and division for quality criteria items.

(3) Pf liquidated damages 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 liquidated damages were assessed.

(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 assessed.

(5) Pf safety data will be the contractor's experience modifier rating as reported on its prequalification packet.

(6) Pf subcontractor data will be documented on the compass form and will be collected from the New Mexico department of transportation's construction and civil rights ~~[state construction]~~ bureau records indicating findings for the failure to promptly pay subcontractors ~~[or suppliers]~~ without good cause.

B. The performance factors are assigned percentage values within the yearly prequalification factor calculation.

(1) The percentage associated with claims is ~~[45%]~~ fifteen percent.

(2) The percentage associated with disincentives is ~~[30%]~~ thirty percent.

(3) The percentage associated with the liquidated damages is ~~[30%]~~ thirty percent.

(4) The percentage associated with non-conformances is ~~[40%]~~ ten percent.

(5) The percentage associated with safety is ~~[5%]~~ five percent.

(6) The percentage associated with subcontractor is ~~[40%]~~ ten percent.

C. Pf claim or Pfc is calculated in the following manner:

(1) Claims that are not 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 zero.

(b) Claims resolved for less than the value of the claim brought beyond the cabinet secretary level will be assigned a value of one.

(3) Pf claim is calculated by adding the number one to the outcome of the sum of the claim value divided by the sum of closed projects.

(4) Pf claim resulting in a value of one will be assigned a bonus value for Pf claim equal to 0.9.

(5) Pf claim will then be multiplied by the percentage associated with Pf claim. The resulting value will be incorporated into Pqfyr.

D. Pf disincentive or Pfd is calculated in the following manner:

(1) For each closed project:

(a) Sum paid and accepted applicable contract items.

(b) Sum of paid and accepted applicable contract items less applicable contract disincentives.

(c) Divide the total of Subparagraph (a) by the total of Subparagraph (b) of Paragraph (1) of Subsection D of this Section.

(2) Sum all closed projects of [~~Subsection D Paragraph (1) Subparagraph (e)~~] Subparagraph (c) of Paragraph (1) of Subsection D of this Section in a given year and divide by the count of closed projects resulting in Pfd.

(3) Pf disincentive resulting in a value of [~~zero or~~] exactly one with paid and accepted applicable contract items will be assigned a bonus value for Pf disincentive equal to 0.9.

(4) Pf disincentive will then be multiplied by the percentage associated with Pf disincentive. The resulting value will be incorporated into Pqfyr.

E. Pf liquidated damages or Pfld has two separate methods of calculation one for mandatory completion date projects and one for calendar or working day projects:

(1) For mandatory completion date projects liquidated damages equivalence is calculated:

(a) Subtract the mandatory completion date including any awarded time from the notice to proceed date to equate to a whole number.

(b) Subtract the actual completion date from the notice to proceed date to equate to a whole number.

(c) Divide the total of Subparagraph (b) by the total of Subparagraph (a) of Paragraph (1) of Subsection E of this Section.

(d) A resulting value less than or equal to one from Subparagraph (c) of Paragraph (1) of Subsection E of this Section will be assigned a bonus value equal to 0.9.

(2) For calendar or working day projects liquidated damages equivalence is calculated:

(a) Sum of the total days charged.

(b) Sum of the total days contracted.

(c) Divide the total of Subparagraph (a) by Subparagraph (b) of Paragraph (2) of Subsection E of this Section.

(d) A resulting value less than or equal to one from Subparagraph (c) of Paragraph (2) of Subsection E of this Section will be assigned a bonus value equal to 0.9.

(3) Pf liquidated damages for a given year is the calculated from all project liquidated damages. Pf liquidated damages is the sum of liquidated damages equivalence for mandatory completion date, calendar or working day projects divided by the count of closed projects resulting in Pfld.

(4) Pf liquidated damages will then be multiplied by the percentage associated with Pfld. The resulting value will be incorporated into Pqfyr.

F. Pf non-conformance or Pfn is calculated in the following manner:

(1) Sum the number of progress payments per project.

(2) Sum the number of progress payments without non-conformance.

(3) Divide Paragraph (1) by Paragraph (2) of this Subsection.

(4) A resulting value of one for Paragraph (3) of this Subsection will be assigned a bonus value equal to 0.9.

(5) Sum all closed projects of Paragraph (4) of this Subsection in a given year and divide by the count of closed projects resulting in Pfn.

(6) Pf non-conformance for a given year will then be multiplied by the percentage associated with Pfn. The resulting value will be incorporated into Pqfyr.

G. The performance factor for safety or Pfs is the contractor's experience modifier rate supplied annually by the contractor at the time of submission of the prequalification packet.

(1) Pfs for a given year is the numerical value of the contractor's experience modifier rate.

(2) If the experience modifier is equal to or less than one the Pfs is assigned a value of 0.9.

(3) The experience modifier rate is multiplied by the percentage associated with Pfs. The resulting value will be incorporated into Pqfyr.

H. Pf subcontractor or Pfsc is calculated in the following manner:

(1) Negative findings against the prime contractor per project will result in a value of one per finding.

(2) Pfsc for a given year is the sum of all negative findings in the year.

(3) Zero findings on all closed projects within the year will receive a bonus of Pf subcontractor equal to 0.9.

(4) The sum of Pfsc for a given year is multiplied by the percentage associated with Pfsc. The resulting value will be incorporated into Pqfyr.

I. The contractor's yearly performance factor is the sum of the individual performance factors multiplied by their associated percentages.

J. The equation is $Pqfyr = Pfc * [15\%] \text{ fifteen percent} + Pfd * [30\%] \text{ thirty percent} + Pfl * [30\%] \text{ thirty percent} + Pfn * [10\%] \text{ ten percent} + Pfs * [5\%] \text{ five percent} + Pfsc * [10\%] \text{ ten percent}$.

K. In the absence of data for any given year a contractor's Pqfyr will be assigned a value of one.

L. For joint ventures the higher value of all joint venture applicant's Pqfra will be used for the modified bid amount.

M. The contractor's prequalification factor rolling average will be denoted as Pqfra.

(1) The Pqfra will be calculated through the use of a rolling average covering a period of three years. Each rolling average year will be assigned a weighting factor and will be multiplied by the appropriate weighting factor starting with the most recent year.

(2) The most recent year, denoted as Pqfyr 1, will be multiplied by the weighting factor of 0.9.

(3) The preceding year, denoted as Pqfyr 2, will be multiplied by the weighting factor of 0.6.

(4) The preceding year, denoted as Pqfyr 3, will be multiplied by the weighting factor of 0.3.

(5) The sum of Pqfyr 1 through Pqfyr 3, is multiplied by their appropriate weighting factors and then divided by the sum of all weighting factors to result in the contractor's overall Pqfra.

N. The equation for $Pqfra = (Pqfyr 1 * 0.9 + Pqfyr 2 * 0.6 + Pqfyr 3 * 0.3) / (0.9 + 0.6 + 0.3)$.

O. All equations and calculations whether interim or final will be rounded to the thousandths place. [18.27.5.11 NMAC - N, 1/1/2015; A, 1/1/2019]

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 Pqfra will be calculated once a year on projects closed between January first and December thirty-first of the previous year.

B. The Pqfra will be posted on the office of inspector general list titled prequalified contractors and subcontractors list by the second Friday in January.

C. The Pqfra will be applied to a prime contractor's bid(s) beginning with the March bid opening until superseded by an updated Pqfra.

D. The Pqfra will be used to determine the modified bid amount.

E. A Pqfra may be re-calculated and reposted at times other than the second Friday in January in order to implement the decision of a hearing officer, a court order or a required correction.

[18.27.5.12 NMAC - N, 1/1/2015; A, 1/1/2019]

18.27.5.13 APPEAL PROCEDURE: 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 their factor to the New Mexico department of transportation under this section.

B. To be considered an appeal must conform in timing, form and service to all requirements in this section or the appeal shall be rejected.

C. A contractor disputing only the misapplication of its prequalification factor to their bid shall file the appeal according to the bidding dispute resolution procedures in the division 100-general provisions of the New

Mexico department of transportation current edition of the standard specifications for highway and bridge construction [~~bidding dispute resolution procedures~~].

D. A contractor disputing only the calculation of its prequalification factor shall file its appeal within seven calendar days of the publication of their prequalification factor.

E. The appeal filed must conform to the requirements below and contain the following information:

- (1) The appeal shall be in writing.
- (2) Appeals made by electronic mail shall not be considered.
- (3) The appeal shall clearly and concisely state the party's right to appeal, the grounds for appeal, the requested relief, and contain relevant laws, rules, regulations and documents to support the appeal.
 - (a) Sufficient copies of cited laws, rules, regulations, or documentary evidence shall be included with the appeal.
 - (b) Supporting documentary evidence not submitted at the time of filing the appeal shall be submitted no later than five calendar days before the hearing.
- (4) The documents submitted in the appeal process shall not be considered confidential and will be subject to the Inspection of Public Records Act, Sections 14-2-1 to 14-2-12 NMSA 1978 (1993, as amended through 2011).

F. Service of the appeal shall occur as follows:

- (1) A contractor disputing its prequalification factor shall serve the appeal upon the New Mexico department of transportation's cabinet secretary. The contractor shall contemporaneously provide a copy of the appeal to the office of the general counsel and the office of inspector general at the respective address for each.
- (2) Service upon the cabinet secretary must be made either in person, by certified mail return receipt requested, or by delivery by a nationally recognized courier.
- (3) Service must be made during regular business hours.
- (4) Service made outside of regular business hours will be considered effective the next business day.

G. 10 calendar days after receipt of a timely and complete appeal the cabinet secretary shall provide the following:

- (1) Notice to all parties advising the parties that an informal hearing will be convened and designating a neutral hearing officer or designating [~~himself~~] the cabinet secretary themselves as the hearing officer.
- (2) Within seven calendar days of the cabinet secretary's designation the hearing officer will provide a notice to all parties of hearing with the date, time and location of the hearing. The notice of hearing will be provided no later than seven calendar days before the chosen hearing date for the informal hearing.

H. The formal rules of civil procedure, formal discovery processes, and the formal rules of evidence shall not apply to the informal hearing.

- (1) Any party to the appeal may choose to have legal counsel present.
- (2) The hearing officer has the authority to determine the degree of formality of the hearing.
- (3) 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.

I. The hearing officer shall be responsible for maintaining a record of the evidence and proceedings.

- (1) The hearing officer will weigh the credibility of the evidence provided by both parties.
- (2) The hearing officer may use any reliable information, no 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 rebuttal from either party.

J. The hearing officer shall issue a decision regarding the appeal within seven calendar days of the hearing unless otherwise extended by the hearing officer in writing, no extension shall exceed 21 calendar days from the hearing.

- (1) The hearing officer's decision will constitute the final department action on the appeal.
- (2) No further action on the appeal may be taken by the either party if the hearing officer's decision is accepted by both parties.

(3) If [~~the appealing~~] either party does not fully accept the hearing officer's decision then [~~the appealing~~] that party may proceed with [~~litigation~~] an appeal in state district court by filing the appropriate pleadings.

K. Record of the appeal through the hearing officer's decision will be maintained by the office of inspector general for seven years after the date of the informal hearing.

L. For bidding purposes and during the period of appeal the contractor's previous prequalification factor will apply.
[18.27.5.13 NMAC - N, 1/1/2015; A, 1/1/2019]

18.27.5.15 [PREQUALIFICATION FOR CONSOLIDATED COMPANIES, JOINT VENTURES AND OTHER SPECIAL BUSINESS FORMATIONS: The following prequalification packet procedure and Pqfra will apply to consolidated companies, consolidated companies related by common ownership and joint ventures:

~~A. For consolidated companies not related by common ownership and the parent company is not included in the consolidation each subsidiary within the consolidated company must be individually prequalified seven calendar days before a notice to proceed will be issued for the project. The Pqfra scores of the subsidiaries survive the merger or consolidation and the highest Pqfra of the subsidiaries joined by consolidation will be used for the modified bid amount.~~

~~B. For consolidated companies related by common ownership each subsidiary and parent company in the merger or consolidated company must be individually prequalified before a notice to proceed will be issued for the project. The Pqfra scores of the subsidiaries survive the merger or consolidation and the highest Pqfra of the subsidiaries or parent company joined by consolidation will be used for the modified bid amount.~~

~~C. Each prime contractor participating in the joint venture must be individually prequalified seven days before bid opening to join forces as a joint venture for bidding and performing work related to a single project. The joint venture itself need not prequalify.~~

~~(1) In addition to being individually prequalified each prime contractor participating in the joint venture shall file with the office of inspector general statement of joint venture.~~

~~(2) For joint ventures the higher value of all joint venture applicant's Pqfra will be used for the modified bid amount.]~~ **PREQUALIFICATION FOR CONSOLIDATED CORPORATIONS, MERGED CORPORATIONS, AND JOINT VENTURES:** The following prequalification packet procedure and Pqfra will apply to consolidated corporations, merged corporations and joint ventures:

A. For a consolidated corporation pursuant to Subsection A of 54-1A-303 NMSA 1978, or a similar statutory provision, the new corporation must be prequalified no later than seven calendar days before the opening of any bid.

B. For a merged corporation pursuant to Subsection A of 54-1A-303 NMSA 1978, or a similar statutory provision, the surviving corporation must be prequalified no later than seven calendar days before the opening of any bid. The Pqfra score of the surviving corporation will be the highest Pqfra of the individual corporations who merged and will be used for the modified bid amount.

C. Each prime contractor participating in the joint venture must be individually prequalified seven calendar days before bid opening to join forces as a joint venture for bidding and performing work related to a single project. The joint venture itself need not prequalify.

(1) The joint venture shall file with the office of inspector general at least seven calendar days before the opening of any bid a completed statement of joint venture form. The most current version of the statement of joint venture form must be obtained from the New Mexico department of transportation website.

(2) For joint ventures the higher value of all joint venture applicant's Pqfra will be used for the modified bid amount.

(3) Each prime contractor participating in the joint venture will receive a compass form for the project to be used in calculating the prime contractor's individual prequalification factor.

[18.27.5.15 NMAC - Rp, 18.27.5.15, 1/1/2015; A, 1/1/2019]