

AASHTO-ARTBA-AGC Joint Committee

“Issues Relating to Performance-Based Contractor Prequalification”

ARTBA 2015 Discussion Paper

With transportation investment constrained across virtually all levels of governments, the players involved in highway and bridge improvement projects – including public owners and industry – must be fully committed to safety, efficiency, innovation and quality. This is especially critical given the continued use of alternative project delivery methods, which often revise the traditional allocation of risks and responsibilities among the parties.

In this context, the Federal Highway Administration (FHWA) and some state DOTs have explored the concept of performance-based prequalification for contractors. Under such a system, a DOT utilizes a given set of factors to evaluate a contractor’s ability to complete a specific project, beyond just the contractor’s financial capacity. While contractors have been subject to a myriad of ratings systems for various purposes, performance-based prequalification is distinctive in that it can be designed to affect the outcome of the procurement process itself.

In researching this initiative, FHWA noted the possibility of states’ using this type of prequalification as a replacement for performance bonds, at least for projects under a certain dollar threshold. FHWA sees this as a potential cost savings given the relatively rare instances of default. Other advocates of performance-based prequalification view it as an incentive for improved performance by contractors, especially in that “marginal” contractors would need to improve their ratings to remain competitive. Moreover, several highway agencies outside the U.S. have utilized similar ratings mechanisms for many years. An FHWA international scan report on construction management practices noted that in at least one case (the U.K.), the system reflects the public owner’s explicit preference to work with a limited number of experienced, “better quality” contractors on an ongoing basis. The same report acknowledges this rationale could conflict with the long-standing values in the U.S. of maximizing competition and inviting participation by qualified firms of varying sizes and profiles.

Recently, the New Mexico Department of Transportation (NMDOT) received FHWA’s approval for its new Contractor Performance-based Prequalification and Procurement (CPPP) System. Through this process, NMDOT will rate several elements of a prime contractor’s past performance and calculate a “prequalification factor,” which it will apply to future bids on projects costing more than \$5 million. The factors include liquidated damages, disincentives, non-conformances, subcontractor prompt payment, claims and safety. In announcing its approval of New Mexico’s CPPP System in March 2015, FHWA noted the state’s highway projects previously “have gone to the lowest bidder with the risk of increased costs in latter phases of the project.” The new system would “provide an incentive for contractors to be more reliable with cost – with an eye towards winning future bids.” For many months, there has been a spirited dialogue among the industry, NMDOT and FHWA on the particulars of this system, most notably the treatment of out-of-state or other firms without a track record in New Mexico from which a prequalification factor could be calculated.

Given all these developments, the Joint Committee is seeking feedback on the suitability of performance-based contractor prequalification and the forms it could take in the different states, starting with the following questions:

- *Is your state considering a performance-based prequalification system, or currently using one?*
- *What are the factors a state DOT should legitimately use as part of such a system?*
- *How can these factors be calculated with maximum objectivity and transparency?*
- *In your state, would this type of system ultimately reduce claims and/or costs on projects?*
- *Is it possible to balance the interests of existing contractors in a state with those of new contractors or firms that have not yet done business the state, who essentially start with a “blank slate?”*