ADOPTED REGULATION OF THE

DEPARTMENT OF TRANSPORTATION

LCB File No. R047-26

EXPLANATION – Matter in ***italics*** is new; matter in brackets **[**~~omitted material~~**]** is material to be omitted.

AUTHORITY: §§ 1-20, NRS 338.1587, 338.1588, 408.100 and 408.215.

A REGULATION relating to transportation facilities; establishing procedures for the procurement of a public-private partnership for transportation facility projects; authorizing the Department of Transportation to issue a request for letters of interest in a project; establishing the process for the Department to request qualification submittals for transportation facility projects and to determine the best qualification submittals of those submitted; providing notice requirements for a request for qualifications; establishing the required information a proposer must include in qualification submittals; establishing the process for the Department to request proposals for transportation facility projects and to determine the best proposal of those submitted; establishing the information a person is required to include in the proposal; authorizing the Department to request best and final offers under certain circumstances; establishing the process for the Department to negotiate and award a contract for a transportation facility; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides that in a county with a population of 700,000 or more (currently only Clark County), a public body, including, without limitation, the Nevada Department of Transportation, is authorized to procure a public-private partnership to plan, finance, design, construct, improve, maintain or operate or any combination thereof, a transportation facility. (NRS 338.1586, 338.1587) Existing law also sets forth various methods by which such public bodies are authorized to procure a public-private partnership, including, without limitation, by the solicitation of proposals using requests for qualifications, short-listings of qualified proposers, requests for proposals, negotiations, best and final offers or other procurement procedures. (NRS 338.1588) Under existing law, the Board of Directors of the Department and the Director of the Department are authorized to adopt regulations to carry out the functions of the Department. (NRS 408.100, 408.215)

Sections 13-20 of this regulation establish the process and requirements for the Department to procure a public-private partnership for a project in a county with a population of 700,000 or more (currently only Clark County) through the solicitation of proposals from

proposers that the Department has shortlisted because the Department has determined the shortlisted proposers to be qualified to submit proposals. **Sections 2-12** of this regulation define terms related to such a procurement by the Department.

Section 14 provides that before issuing a request for qualifications for proposers to be shortlisted, the Department may issue a request for letters of interest in the public-private partnership to provide early notification of the project and allow potential proposers to begin teaming arrangements, financial arrangements and preliminary investigative work. Under **section 14**, a request for letters of interest must include, without limitation, the following information about the project: (1) the objectives; (2) the location; (3) the schedule; (4) an estimated budget; and (5) a general description of the scope of work to be completed.

Section 15 establishes the information that the Department will include in a request for qualifications to shortlist persons to submit proposals for a public-private partnership. **Section 15** also provides that the Department: (1) will provide notice of its request for qualifications to each person that responded to a request for letters of interest issued by the Department; and (2) may post notice of the request for qualifications for at least 30 days on the Department's Internet website. Finally, **section 15** also: (1) establishes a process for the submission of a request for additional information or clarification of a request for qualifications; and (2) authorizes the Department to issue an addendum to a request for qualifications to clarify the requirements for a qualification submittal, correct errors or provide supplemental information.

Section 16 prescribes the information that a proposer must include in a qualification submittal submitted in response to a request for qualifications and establishes the procedures for the Department to evaluate and rank qualification submittals. Under **section 16**, the Department will appoint a panel consisting of at least three members to evaluate and rank qualification submittals. **Section 16** authorizes the panel, in evaluating qualification submittals, to seek advice from, and consult with, representatives of and advisors to the Department who have experience and expertise in the subject matter of the project. **Section 16** requires the panel to recommend the proposers for shortlisting and authorizes the Department to accept the recommendations, reject the recommendations or request that the panel conduct further analysis and reconsider its recommendations.

Section 17 requires the Department to provide all shortlisted proposers with a request for proposals and establishes the contents of the request for proposals. **Section 17** also authorizes the Department to issue a draft of the request for proposals to each shortlisted proposer to obtain feedback on the quality of the request and to provide early notice of the details of the request for proposals. Additionally, **section 17** establishes a process for the submission of requests for additional information or clarification concerning the request for proposals and authorizes the Department to issue a formal addendum to a request for proposals to clarify the requirements for proposals, correct errors or provide supplemental information.

Section 18 establishes procedures for evaluating and ranking proposals submitted by the shortlisted proposers. Under **section 18**, the Department will appoint: (1) a technical proposal selection committee consisting of at least three members to evaluate and rank the technical aspects of each final proposal, which may seek advice from, and consult with, representatives of and advisors to the Department with experience and expertise in the subject matter of the proposal; and (2) a separate price proposal selection committee consisting of at least three

members to evaluate and rank the financial aspects of each proposal. Finally, **section 18** establishes the method for the scoring and ranking of final proposals.

Section 19 provides procedures for the issuance by the Department of a request for best and final offers when none of the proposals received by the Department is responsive to the request for proposals or satisfactorily achieves the goals and needs of the project. Under **section 19**, the Department will evaluate best and final offers in the same manner as the Department evaluates final proposals.

Section 20 provides that the Department will attempt to negotiate a contract with the apparent successful proposer, which is defined in **section 3** as the proposer whose proposal was the highest ranked proposal. Under **section 20**, if the Department is unable to negotiate a satisfactory contract with the apparent successful proposer, the Department may suspend or end negotiations with the apparent successful proposer and initiate negotiations with the next best proposer. **Section 20** authorizes the Department to repeat this process until the Department has reached a satisfactory contract or has attempted to negotiate with every finalist which the Department has ranked. Finally, **section 20** provides that the Department will conduct a public hearing after it has successfully negotiated a contract to review and ratify the contract and provide certain information to the public.

Section 1. Chapter 408 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 20, inclusive, of this regulation.

Sec. 2. ***As used in sections 3 to 20, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 3 to 12, inclusive, of this regulation, have the meanings ascribed to them in those sections.***

Sec. 3. ***"Apparent successful proposer" means the proposer whose proposal for a project is determined by the Department, on the basis of the factors set forth in the request for proposals, to be the highest ranked proposal of those proposals submitted and with whom the Department undertakes to negotiate and enter into a contract for the project.***

Sec. 4. ***"Financial close" means the stage in an agreement or transaction where the applicable financing documents have been executed and all conditions to the commitment or disbursement of funds have been satisfied or waived.***

Sec. 5. ***"Private partner" has the meaning ascribed to it in NRS 338.1582.***

Sec. 6. *"Project" means the planning, development, construction, financing, improvement, maintenance or operation, or any combination thereof, of a transportation facility pursuant to a public-private partnership.*

Sec. 7. *"Proposal" means a written plan submitted to the Department by a proposer pursuant to a request for proposals to plan, develop, construct, finance, improve, maintain or operate, or any combination thereof, a transportation facility.*

Sec. 8. *"Proposer" means a person who submits a response to a request for qualifications, a request for proposals or both to the Department with the intention of entering into a public-private partnership for a project.*

Sec. 9. *"Public-private partnership" has the meaning ascribed to it in NRS 338.1583.*

Sec. 10. *"Qualification submittal" means a response to a request for qualifications.*

Sec. 11. *"Shortlist" means to include a proposer on a list of proposers who have submitted qualification submittals that, based on evaluation of their qualification submittals, are identified by the Department as eligible to respond to the request for proposals for a project.*

Sec. 12. *"Transportation facility" has the meaning ascribed to it in NRS 338.1584.*

Sec. 13. *The provisions of sections 2 to 20, inclusive, of this regulation, apply only to the procurement of a public-private partnership by the Department for a project in a county whose population is 700,000 or more.*

Sec. 14. *Before issuing a request for qualifications pursuant to section 15 of this regulation, the Department may issue a request for letters of interest in a project to provide early notification of the project and to allow potential proposers to begin teaming*

arrangements, financial arrangements and preliminary investigative work. A request for letters of interest may include, without limitation:

1. The general objectives of the project;

2. The location of the project;

3. The schedule of the project;

4. An estimated budget for the completion of the project; and

5. A general description of the scope of the work to be performed.

Sec. 15. *1. The Department may shortlist a person for a project by issuing a request for qualifications. If the Department issues a request for qualifications, the request for qualifications must include, without limitation:*

(a) The date and time by which a qualification submittal must be submitted to the Department;

(b) The proposed responsibilities of the private partner;

(c) The basic configuration of the project, including, without limitation, the length of the proposed transportation facility, roadways included in the construction of the transportation facility, major interchanges and connectivity;

(d) A summary of material terms of the proposed contract with the private partner, including, without limitation, the duration of the contract and the estimated costs of the project;

(e) The deadline by which financial close must occur;

(f) A request for information regarding key personnel and principal and major participants of the organization of the proposer who will be involved in the project;

(g) A rating that is acceptable to the Department for a surety company that is authorized to transact surety business in this State;

(h) The factors that the Department will use to evaluate a qualification submittal. Such factors may include, without limitation:

(1) The evaluation factors set forth in subsection 2 of NRS 338.1588 and the relative weight given to factors in accordance with subsection 3 of NRS 338.1588;

(2) The plan of the proposer for the design and construction of the proposed transportation facility;

(3) The plan of the proposer for the operation and maintenance of the proposed transportation facility;

(4) The ability of the organization of the proposer to manage technical issues and risks associated with the project with a clear definition of the functional relationships between the teams involved in each stage of the project and the key personnel of the proposer; and

(5) The financial plan of the proposer to complete all of the requirements necessary to meet the deadline for financial close; and

(i) A statement that the proposed form of the contract and technical aspects of the project are available for review on the Internet website of the Department.

2. The Department:

(a) Will provide notice of a request for qualifications to each person that responded to a request for letters of interest issued pursuant to section 14 of this regulation; and

(b) May publish notice of the request for qualifications for at least 30 days on the Department's website at the Internet address https://www.dot.nv.gov or any successor website used by the Department to advertise projects.

3. Upon issuance of a request for qualifications, a potential proposer may request additional information or clarification concerning the request for qualifications. The Department will establish a deadline by which a person must submit a request for additional information or clarification and a deadline by which the Department will provide a formal response to such a request. Unless providing notice of the formal response of the Department would result in the disclosure of confidential information, the Department may notify potential proposers of the formal response of the Department to a request for additional information or clarification by posting the response on the Department's website at the Internet address https://www.dot.nv.gov or any successor website used by the Department to advertise projects.

4. The Department may issue a formal addendum to a request for qualifications to clarify the requirements for a qualification submittal, correct errors or provide supplemental information.

Sec. 16. *1. A qualification submittal must include, without limitation:*

(a) A statement of whether the proposer is qualified to bid on a project pursuant to NRS 338.1379 or 408.333;

(b) The information requested by the Department concerning the organization of the proposer and each principal participant and major participant, including, without limitation, information concerning whether the proposer and each participant and major participant hold any applicable licenses or certifications;

(c) Evidence satisfactory to the Department that the proposer has obtained a surety bond that is in the amount required by the Department and executed by the proposer as principal and a surety company qualified and authorized to do business in this State as surety;

(d) Any financial statements of the proposer and, if applicable, its guarantor that are requested by the Department;

(e) Any information concerning the credit rating of the proposer and, if applicable, its guarantor that is requested by the Department;

(f) A statement explaining any material changes in the financial condition of the proposer;

(g) The information requested by the Department concerning the plan of the proposer to manage the design and construction of the proposed transportation facility;

(h) The information requested by the Department concerning the plan of the proposer for the operation and maintenance of the proposed transportation facility;

(i) The information requested by the Department concerning the financial plan of the proposers to complete the tasks necessary to achieve financial close not later than the deadline for financial close set forth in the request for qualifications;

(j) The information requested by the Department concerning the qualifications of the key personnel of the proposer;

(k) The information requested by the Department concerning the experience and past performance of the proposer;

(l) The information requested by the Department concerning the safety programs established and the safety records accumulated by the proposer; and

(m) Any other information requested by the Department to complete the qualification submittal.

2. The Department will appoint a panel consisting of at least three members to evaluate and rank qualification submittals. In evaluating and ranking qualification submittals, the panel may seek advice from, and consult with, representatives of and advisors to the Department who have experience and expertise in the subject matter of the project. The Department may refuse to submit a qualification submittal to the panel for evaluation and ranking if the qualification submittal does not include all information necessary to complete the qualification submittal.

3. The panel appointed pursuant to subsection 2 shall evaluate and rank qualification submittals:

(a) Based on:

(1) The financial strength of the proposer and its guarantor, if any, which must be determined through an analysis of the financial plan of the proposer, any financial statements and credit ratings provided in the qualification submittal, and the experience of the proposer in securing financing of a similar size and type for similar types of projects; and

(2) The ability of the proposer to meet the needs of the project as indicated in the plan of the proposer for the design and construction of the transportation facility and the plan of the proposer for the operation and maintenance of the transportation facility; and

(b) Giving relative weight to the factors set forth in subsection 3 of NRS 338.1588.

4. The panel shall recommend to the Department at least three but not more than five proposers to shortlist for the project.

5. The Department may:

(a) Accept the recommendations of the panel and shortlist the proposers recommended by the panel;

(b) Reject the recommendations of the panel; or

(c) Request that the panel conduct further analysis and reconsider its recommendations.

6. The Department will provide written notification to each proposer who submitted a qualification submittal informing the proposer whether the proposer has been shortlisted.

Sec. 17. *1. The Department will provide each proposer who was shortlisted pursuant to section 16 of this regulation with a request for proposals. A request for proposals must include, without limitation:*

(a) Instructions to the shortlisted proposers concerning the process for the submission and evaluation of proposals, including, without limitation, the basic configuration of the transportation facility, the term of the contract for the project, anticipated revenues to support the financing of the project, requirements for the submission of a financial plan, requirements for the content, format and functionality of a financial model for the project and requirements for a financial model auditor who will conduct an independent audit of the financial model of the apparent successful proposer;

(b) Information concerning the terms and conditions of the contract between the Department and the private partner selected by the Department that will govern the project throughout each phase of the project, including, without limitation, the obligations of the private partner for the design, construction, operation, maintenance and financing of the project;

(c) Technical provisions that provide the technical requirements for the design, construction, operation and maintenance of the project and for determining and undertaking repairs and maintenance before the termination of the contract so that the transportation facility is returned to the Department in good condition; and

(d) Any information or documents that the Department determines will assist the shortlisted proposers to understand the project and submit a proposal, including, without limitation, records applicable to the requirements for the operation and maintenance of the project.

2. The Department may issue a draft request for proposals to each shortlisted proposer to allow the shortlisted proposers to offer feedback to the Department on the quality of the request for proposals and to provide the shortlisted proposers with early notice of the details of the request for proposals, including, without limitation, the scope and the technical aspects of the project.

3. Upon issuance of a request for proposals, each shortlisted proposer may request from the Department additional information or clarification concerning the request for proposals. The Department will establish a deadline by which shortlisted proposers must submit a request for additional information or clarification and a deadline by which the Department will provide a formal response to a request for additional information or clarification. The Department will provide each shortlisted proposer with any formal response to a request for additional information or clarification.

4. The Department may issue a formal addendum to a request for proposals to clarify the requirements for a proposal, correct errors or provide supplemental information.

Sec. 18. ***1. To evaluate a proposal, the Department will appoint:***

(a) A technical proposal selection committee consisting of at least three members to evaluate and rank the technical aspects of each proposal. In evaluating the technical aspects of a proposal, a technical proposal selection committee may seek advice from, and consult with, representatives of and advisors to the Department who have experience and expertise in the subject matter of the proposal.

(b) A price proposal selection committee consisting of at least three members, who must not be members of the technical proposal selection committee, to evaluate and rank the financial aspects of each proposal.

2. The technical proposal selection committee shall review and assign a score to the technical aspects of the proposal before the price proposal selection committee reviews the financial aspects of the proposal.

3. The technical proposal selection committee shall evaluate the technical aspects of each proposal, which may be based on, without limitation, a review of:

(a) The proposer's proposal for the design and construction of the proposed transportation facility;

(b) The preliminary roadway schematic in the proposal;

(c) The preliminary baseline schedule that will be used to plan and monitor the progress of the project;

(d) The organizational structure of the proposer and the capabilities and experience of key personnel of the proposer; and

(e) The approach of the proposer to the operation and maintenance of the project.

4. The price proposal selection committee shall evaluate and score the financial aspects of a proposal which may be based on, without limitation, the lowest maximum availability payment for the first year for which the Department will make availability payments and shall conduct an assessment of:

(a) The reasonableness of the financial plan of the proposer;

(b) The reasonableness of the financial model submitted to the Department as part of the proposal;

(c) The approach and ability of the proposer to execute the financial plan, including, without limitation, the financial capacity of the proposer and any guarantors of the proposer; and

(d) A validation of the proposal, including, without limitation, the financial model, for consistency with the request for proposals.

5. The Department may develop a model to forecast the financial performance of a project, which may use assumptions concerning:

(a) Cash flows for the completion of the design and construction of the project and the operation and maintenance of the project; and

(b) The payment of financing costs and profit during the term of the contract for the project.

➥ To assess the reasonableness of the financial aspects of a proposal, the Department and the price proposal selection committee may compare the financial aspects of the proposal to the forecast of the financial performance of a project using the model described in this subsection.

6. The Department is not required to evaluate a proposal if the Department determines that the proposal:

(a) Is not responsive because it does not meet the requirements of the technical proposal and the price proposal set forth in this section; or

(b) Otherwise does not adequately respond to the request for proposals.

7. The Department may hold meetings or discussions with a proposer during the proposal process, including, without limitation, individual meetings with a proposer or joint meetings with multiple proposers. The Department may request additional information or clarification or interview a proposer in connection with the evaluation of the proposal.

8. To rank the proposals and establish the apparent successful proposer, the Department may use the best-value methodology that considers a combination of the score of the technical aspects of the proposal assigned by the technical proposal selection committee and the score of the financial aspects of the proposal assigned by the price proposal selection committee.

9. After reviewing the rankings of the technical proposal selection committee and the price proposal selection committee, the Department may:

(a) Rank each proposal, with the highest ranked proposal as the apparent successful proposal, and the next highest ranked proposal as the second best proposal, and so on, for each proposal;

(b) Reject all proposals;

(c) Request that the technical proposal selection committee, the price proposal selection committee, or both, conduct further evaluations and reconsider their recommendations; or

(d) Request a best and final offer from a proposer pursuant to section 19 of this regulation.

10. As used in this section, "availability payment" means the periodic payment by the Department to the private partner upon completion of the transportation facility and its availability for public use, which may, but is not required to be, an annual payment and which may be based on, without limitation, the availability for public use of the transportation facility capacity, traffic volumes, condition of the transportation facility and other operational and maintenance milestones. Such payments may be made in lieu of toll revenues when charging a toll for the use of the transportation facility is not possible or practical.

Sec. 19. *1. The Department may issue a request for best and final offers if the Department determines that:*

(a) No proposal received by the Department:

(1) Is responsive to the request; or

(2) Satisfactorily achieves the goals and needs of the project for any reason, including, without limitation, the proposals received:

(I) Are not cost effective;

(II) Exceed budget amounts or cost estimates; or

(III) Identify technical or scope ambiguities in the request for proposals; and

(b) A request for best and final offers may result in the submission of a satisfactory proposal.

2. The Department may issue a request for best and final offers to:

(a) Each proposer who submitted a proposal for the project; or

(b) Only those proposers who submitted responsive proposals or proposals within a competitive range.

3. The Department may, when preparing a request for best and final offers:

(a) Hold individual or joint meetings or discussions with proposers concerning the project;

(b) Modify the scope of the project;

(c) Modify the terms of any contract;

(d) Revise the estimates of costs of the project; or

(e) Revise the factors for evaluation of the proposals and the relative weight assigned to each factor.

4. A request for best and final offers issued by the Department must set forth the date and time on which best and final offers must be submitted to the Department.

5. After receiving submissions of best and final offers, the Department will evaluate the best and final offers in the same manner as the Department evaluates a proposal, including, without limitation, refusing to review a nonresponsive best and final offer, holding individual meetings with a proposer or joint meetings with multiple proposers and requesting clarifications or interviewing a proposer concerning the proposal.

6. After reviewing the best and final offers submitted for the project, the Department may:

(a) Rank each responsive best and final offer submitted, with the highest ranked offer as the apparent successful proposal, and the next highest ranked offer as the second best proposal, and so on, for each offer; or

(b) Reject all best and final offers.

Sec. 20. *1. After determining the apparent successful proposer pursuant to section 18 or 19 of this regulation, the Department will attempt to negotiate a contract for the project with the apparent successful proposer.*

2. The Department will issue a notice of intent for an award of a contract to provide proposers notice that the Department intends to negotiate and execute a contract with the apparent successful proposer.

3. If the Department cannot negotiate a satisfactory contract, as determined by the Department, with the apparent successful proposer, the Department may suspend or end negotiations with that proposer by notifying the proposer in writing of the Department's decision to suspend or end negotiations.

4. If the Department suspends or ends negotiations with the apparent successful proposer, the Department may negotiate with the proposer who was ranked as the next best proposer during the evaluation process. The Department may repeat the process of suspending or ending negotiations and beginning a negotiation with the next successful proposer until the Department can reach a satisfactory contract or until the Department has attempted to negotiate with every proposer which the Department ranked during the evaluation process.

5. The Department may suspend or end negotiations to enter into a contract for the project if the Department, in its sole discretion, determines that the suspension and ending of negotiations is in the best interest of the State.

6. If the Department successfully negotiates a contract with a proposer, the Department will hold a public hearing to review and ratify the selection of the proposer and the contract. Ratification of a contract requires approval by the Department.

7. After the Department publishes its notice of intent to award a contract, the Department may, upon request, provide an unsuccessful proposer with an evaluation of his or her proposal.