

**LCB File No. R172-09**

**PROPOSED REGULATION OF THE  
DEPARTMENT OF TRANSPORTATION**

EXPLANATION – Matter in *italics* is new

AUTHORITY: §§ 2-9, NRS 408.548

**Section 1. Chapter 408 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 9, inclusive, of this regulation.**

**Sec. 2. *General for submission of unsolicited proposals. (NRS 408.5475)***

*1. Unsolicited proposals. The rules in this subchapter address the manner by which the Department intends to evaluate submissions of unsolicited proposals received from private entities.*

*2. Reservation of rights. The Department reserves all rights available to it by law and in equity in administering these rules, including, without limitation, the right in its sole discretion to:*

*(a) Withdraw a request for qualifications or a request for proposals at any time, and issue a new request;*

*(b) Reject any and all qualifications submittals or proposals, whether solicited or unsolicited, at any time;*

*(c) Terminate evaluation of any and all qualifications submittals or proposals, whether solicited or unsolicited, at any time;*

*(d) Issue a request for qualifications relating to a project described in an unsolicited proposal after the rejection or termination of the evaluation of the unsolicited proposal and any proposals;*

*(e) Suspend, discontinue, or terminate agreement negotiations with any proposer at any time prior to the actual authorized execution of such agreement by all parties;*

*(f) Negotiate with a proposer without being bound by any provision in its proposal, whether solicited or unsolicited;*

*(g) Issue one or more requests for best and final offers;*

*(h) Negotiate with a proposer to include aspects of unsuccessful proposals for that project in the agreement;*

*(i) Negotiate with a proposer other than the apparent successful proposer if negotiations with the apparent successful proposer are unsuccessful or if financial close, if applicable, with the apparent successful proposer does not occur;*

*(j) Request or obtain additional information about any proposer, qualification submittal or proposal from any source;*

*(k) Modify, issue addenda to, or cancel any request for qualifications or request for proposals;*

*(l) Modify the scope of the proposed project contained in the unsolicited proposal for purposes of issuing a request for qualifications or request for proposals or for such other purposes that are, in the Department's determination, in the best interests of the Department and the public;*

*(m) Waive deficiencies in a qualifications submittal or proposal, accept and review a non-conforming qualifications submittal or proposal, or permit clarifications or supplements to a qualifications submittal or proposal;*

*(n) Revise, supplement, or make substitutions for all or any part of these rules; or*

*(o) Retain or return all or any portion of the fees required to be paid by proposers under*

*this subchapter, as provided in Sec. 3, subsection (2) of this subchapter.*

*3. Costs incurred by proposers. Except as provided in subsection 4, paragraph (d) of Sec. 4 of this subchapter, under no circumstances will the State, the Department, or any of their agents, representatives, consultants, directors, officers, or employees be liable for, or otherwise obligated to, reimburse the costs incurred by proposers, whether or not selected for negotiations, in developing solicited or unsolicited proposals or in negotiating agreements.*

*4. Department information. Any and all information the Department makes available to proposers shall be as a convenience to the proposer and without representation or warranty by, or recourse to, the Department of any kind except as may be expressly specified in the request for qualifications or request for proposals. Proposers may not rely upon any oral statements or responses to inquiries or clarifications by the Department or anyone acting or purporting to be acting on behalf of the Department.*

*5. Procedure for communications. If a proposer has a question or request for clarification regarding any request for qualifications or request for proposals issued by the Department, the proposer shall submit the question or request for clarification in writing to the person responsible for receiving those submissions, as designated in the request for qualifications or request for proposals, and the Department may, in its sole discretion, provide the responses in writing. The proposer shall also comply with any other provisions in the request for qualifications or request for proposals regulating communications.*

*6. Compliance with rules. In submitting any qualification submittal or proposal, the proposer shall be deemed to have unconditionally and irrevocably consented and agreed to the foregoing provisions and all other provisions of this subchapter as well as the solicitation and submittal provisions of the request for qualifications or request for proposals, as applicable.*

*7. Sufficiency of proposal. All proposals, whether solicited or unsolicited, shall provide the requested information and shall be sufficient for the Department to properly evaluate the potential feasibility of the proposed project, the ability of the proposal and project to meet the Department's objectives and goals for the proposed project and the capabilities of the proposer to provide the proposed services and perform the proposed scope of work in connection with the proposed project.*

*8. Proposer's additional responsibilities. The Department, in its sole discretion, may authorize the successful proposer to seek licensing, permitting, approvals, and participation required from other governmental entities and private parties, subject to such oversight and review by the Department as specified in the agreement or in any separate contract for consultant services.*

*9. Public meetings and hearings. All public meetings or hearings required to be held pursuant to applicable law or regulation will be directed and overseen by the Department, with participation by such other parties as the Department deems appropriate.*

*10. Additional matters. Any matter not specifically addressed in this subchapter which relates to, pertains to, arises out of or is necessary or desirable for the acquisition, design, development, financing, construction, reconstruction, extension, expansion, maintenance, or operation of a transportation facility pursuant to this subchapter, shall be deemed to be within the primary purview of the Department, and all decisions pertaining thereto, whether or not addressed in this subchapter, shall be as determined by the Department, in its sole discretion, subject to the provisions of applicable law.*

**Sec. 3. Submission of request to review unsolicited proposals. (NRS 408.5475)**

*1. Requests to the Department for the acquisition, design, development, financing, construction, reconstruction, extension, expansion, maintenance, or operation, or any combination thereof, of a transportation facility, must comply with the requirements of NRS 408.5475(2). Unsolicited proposals that comply with the requirements of this subchapter shall be processed in accordance with the requirements of this subchapter.*

*2. Requests submitted pursuant to subsection 1 of this Sec. 3 must be accompanied by a fee for a review conducted by the Department. The amount of review fee shall be set by the Department based on the complexity or cost of the project and an estimate of the Department's review cost. The amount of the fee shall be published on the Department's website. The Department may review and modify the fee from time-to-time as it deems appropriate. Nothing contained herein shall dictate the level of review that the Department shall undertake or modify the rights of the Department to reject an unsolicited proposal without completing its review. The elements, timing and depth of any review shall be determined by the Department, in its sole discretion.*

**Sec. 4. *Qualification Submittals and Proposals: Advertisement by Department; publication; information available to proposers.***

*1. If the unsolicited proposal complies with Sec. 3 and is determined by the Department to identify a project that may be in the best interest of the State, the Department may issue a request for qualifications or a request for proposals, as applicable, and publish notice thereof for at least 15 days after issuance in a newspaper of general circulation in this State or on the Department's website for the purpose of receiving qualification submittals or proposals, as applicable, for the same transportation facility, as such transportation facility may have been modified in the sole discretion of the Department. If a request for qualifications is used, the*

*Department may prequalify or shortlist one or more proposers to receive a request for proposals. The Department is not obligated to utilize a request for qualifications and may, in its sole discretion, proceed directly to a request for proposals.*

*2. The individual or entity that submitted the original unsolicited proposal may, in the sole discretion of the Department, be required to submit a qualification submittal or proposal, as applicable, in response to a request for qualifications or request for proposals*

*3. A request for qualifications or a request for proposals published pursuant to subsection 1 of this Sec. 4 must include, without limitation:*

*(a) A description of the proposed project, which may, in the sole discretion of the Department, include modifications to the proposed project submitted with the unsolicited proposal;*

*(b) The date by which the qualification submittal or proposals must be submitted to the Department, which must not be less than 30 days after the date that the request for qualifications or request for proposals is first published in a newspaper or on the Department's website pursuant to subsection 1 of this Sec. 4; and*

*(c) A statement setting forth the place and time in which a proposer desiring to submit a qualification submittal or proposal for the project may obtain available information from the Department related to the request for qualifications or request for proposal, as applicable, including, without limitation, the information set forth in subsection 4 of this Sec. 4.*

*4. The Department shall maintain at the time and place set forth in the request for qualifications or request for proposals the following information for inspection by a proposer desiring to submit a proposal for the project:*

*(a) The extent to which any required designs must be completed for the qualification submittal or proposal and any other requirements for any design and construction of the project that the Department determines to be necessary;*

*(b) A list of the requirements set forth in NRS 408.5483(1)(a)-(f);*

*(c) A list of the factors the Department will use to evaluate the proposer teams who submit a qualification submittal or proposal for the project, including, without limitation:*

*(1) The relative weight to be assigned to each factor; and*

*(2) A disclosure of whether the factors that are not related to cost are, when considered as a group, more or less important in the process of evaluation than the factor of cost; and*

*(d) A statement as to whether a proposer that is prequalified or shortlisted to receive a request for proposals, or which submits a proposal, will be partially reimbursed for the cost of preparing a proposal or best and final offer, or both. If partial reimbursement will be provided, the request for proposals shall include an estimate of the amount of the partial reimbursement and the terms under which such payment shall be earned and payable.*

**Sec. 5. *Qualifications of proposer.***

**1. *A proposer may be:***

*(a) An individual; or*

*(b) An entity, including, without limitation, a corporation, limited liability company, partnership, joint venture or other form of association; or*

*(c) A consortia or team comprised of more than one individuals or entities; or*

*(d) A “person” as defined in NRS 0.039.*

**2. *To qualify for award of a contract under this subchapter, a proposer must:***

*(a) Demonstrate that it is able to obtain a performance bond and payment bond or other performance security as the Department, in its sole discretion, may require;*

*(b) Demonstrate that it is able to obtain insurance covering general liability and liability for errors and omissions as the Department, in its sole discretion, may require; and*

*(c) Ensure that the proposer and any members, subcontractors and subconsultants of the proposer possess the licenses and certificates required to carry out the functions of their respective professions within this State. This requirement must be satisfied as of the date of award of the contract awarded under this subchapter.*

*Sec. 6. Procedure for prequalifying or shortlisting proposers among proposers that have submitted qualification submittals.*

*1. If a request for qualifications is used, the request for qualifications must:*

*(a) Set forth the general evaluation factors that the Department will use to shortlist or prequalify proposers, including the relative weight to be assigned to each factor; and*

*(b) Set forth the date by which qualification submittals must be submitted to the Department.*

*2. The Department shall conduct an evaluation of the qualification submittals in a manner consistent with the evaluation criteria set forth in the request for qualifications, which may include an evaluation of:*

*(a) Capabilities, related experience, facilities, or techniques of the proposer or unique combinations of these qualities that are integral factors for achieving the project objectives;*

*(b) Qualifications, capabilities, and experience of the proposer that are critical to achieving the project objectives; and*



*(c) Any other factors or evaluation criteria determined by the Department, in its sole discretion, as appropriate to a particular project.*

*3. The Department may request clarifications or undertake interviews of proposers in connection with the evaluation of qualification submittals.*

**Sec. 7. Requests for proposals and best and final offers: Selection or rejection of proposal or offer; contents of contract between Department and proposer; duties of the proposer.**

*1. After prequalifying or shortlisting proposers pursuant to Sec. 6, the Department may provide a request for proposals for the project to each shortlisted or prequalified proposer. In such case, or if the Department, in its sole discretion, elects to not have a request for qualifications and proceeds directly to a request for proposals, the request for proposals must:*

*(a) Set forth the general evaluation factors that the Department will use to select the proposer, including the relative weight to be assigned to each factor; and*

*(b) Set forth the date by which proposals must be submitted to the Department.*

*2. The Department shall conduct an evaluation of the proposals in a manner consistent with the evaluation criteria set forth in the request for proposals, which may include an evaluation of:*

*(a) Technical proposals, including the proposer's approach to performing the required scope of services;*

*(b) Financial proposals, including pricing, plans of finance and financial models, as applicable; and*

*(c) Any other factors or evaluation criteria determined by the Department, in its sole discretion, as appropriate to the particular project.*

*The Department may use a best value, low bid, lowest adjusted cost or any other evaluation methodology it determines, in its sole discretion, to be appropriate to the particular project. Such methodology will be generally described in the request for proposals.*

*3. The Department may hold discussions with proposers during the proposal process, including, without limitation in both one-on-one and joint meetings, and respond to requests for clarifications received from proposers. The Department may also request clarifications or undertake interviews of proposers in connection with the evaluation of proposals. .*

*4. The Department shall verify that each proposal sets forth a project that satisfies the applicable requirements of NRS 408.5483.*

*5. After completing a review of proposals for the project and any clarifications provided by proposers in accordance with subsection (3) of this Sec. 7, the Department shall:*

*(a) Rank each responsive proposal submitted ranking the apparent successful proposal number one, the next highest ranked proposal number two, and so on, for each of the submitted responsive proposals , using the criteria set forth in the request for proposals; or*

*(b) Reject all the proposals; or*

*(c) Request best and final offers from proposers in accordance with subsection 6 of this Sec. 7; or*

*(d) Take any action allowable under law or in equity, including, without limitation, those set forth in Sec. 2 and in the request for proposals.*

*6. If the Department determines that no proposal received is responsive, in the interest of the Department and the State or satisfactorily achieves the goals and needs of the project, and if the Department further determines that requesting best and final offers pursuant to this subsection may result in the submission of a satisfactory proposal, the Department may, in its*

*sole discretion, prepare and provide a request for best and final offers for the project to each proposer that submitted a proposal or, in the sole discretion of the Department, those proposers that submitted responsive proposals or proposals within a competitive range. In conjunction with preparing best and final offers, the Department may undertake discussions with the proposers, including, without limitation, one-on-one meetings and may alter the scope of the project, modify the terms of any contract, revise the estimates and costs of the project, and revise the selection factors and relative weights described in paragraph (a) of subsection 1 of this Sec. 7. A request for best and final offers prepared pursuant to this subsection must set forth the date by which best and final offers must be submitted to the Department.*

*7. The Department may hold discussions with proposers during the best and final offers process, including, without limitation, in both one-on-one and joint meetings, and respond to requests for clarifications received from proposers. The Department may also request clarifications or undertake interviews of proposers in connection with the evaluation of best and final offers.*

*8. After completing a review of the best and final offers and any clarifications provided by proposers in accordance with subsection (7) of this Sec. 7, the Department shall:*

*(a) Rank each responsive best and final offer submitted ranking the apparent successful proposal number one, the next highest ranked proposal number two, and so on, for each of the submitted responsive best and final offers, using the criteria set forth in the request for best and final offers; or*

*(b) Reject all the best and final offers; or*

*(c) Request another best and final offer from proposers in accordance with subsection 6 of this Sec. 7; or*

*(d) Take any action allowable under law or in equity, including, without limitation, those set forth in Sec. 2 and in the request for best and final offers.*

*9. The Department shall first attempt to negotiate a contract with the proposer evaluated as the apparent successful proposer pursuant to paragraph (a) of subsection 5 of this Sec. 7 or pursuant to paragraph (a) of subsection 8 of this Sec. 7. If the Department is unable to negotiate a satisfactory contract with such apparent successful proposer, as determined by the Department, in its sole discretion, the Department may formally, and in writing, suspend or end all negotiations with that proposer and proceed to negotiate with the next proposer in the order of the selection ranking until a contract is reached or negotiations with all ranked proposers end.*

*10. If the Department successfully negotiates a contract with a proposer as set forth in subsection 9 of this Sec. 7, Department shall hold a public meeting to:*

*(a) Review and ratify the selection; and*

*(b) Make available to the public a summary setting forth the general evaluation factors used by the Department to select the successful proposer and the ranking of the proposers who submitted proposals and, if applicable, best and final offers. The Department shall not release to a third party, or otherwise make public, financial, confidential or proprietary information submitted by a proposer.*

*11. The Department may partially reimburse the unsuccessful proposers that submitted a responsive proposal if partial reimbursement was provided for in the request for qualifications or request for proposals pursuant to subsection 4, paragraph (d) of Sec. 4. The amount of reimbursement must not exceed, for each unsuccessful proposer, 3 percent of the total capital cost of the project, as estimated by the Department, or, if no construction work is part of the*

*project scope of work, 3 percent of the total project cost, as estimated by the Department . The reimbursement shall be payable in the manner set forth in the request for proposals, but in no event later than the later of contract execution or financial closing.*

**Sec. 8. Contract.**

*1. A contract awarded pursuant to this section must:*

*(a) Comply with the provisions of NRS 338.020 to 338.090, inclusive;*

*(b) Specify an amount that is the maximum amount that the Department will pay under the contract, excluding any amount related to costs, charges, compensation or fees that may be incurred or be payable as a result of termination of the contract or such events, conditions or circumstances as authorized by the contract; and*

*(c) Contain provisions as required by NRS 408.5483(5).*

*2. A proposer to whom a contract is awarded pursuant to this section shall, where design and construction is included within the contract, assume overall responsibility for ensuring that the design and construction of the project is completed in a satisfactory manner in accordance with the terms of the contract.*

*3. No contract awarded pursuant to this Section is effective unless and until it is first approved by the Department and executed by the chairman of the Board of Transportation.*

**Sec. 9. Modifying Unsolicited Proposal Program.** *The Department reserves the right, in its sole discretion from time-to-time, to issue certain parameters and limitations on the unsolicited proposal process, including, without limitation, identification of certain periods of time during which the Department will accept or not accept unsolicited proposals, information concerning minimum or anticipated review periods for unsolicited proposals and a description of the type or nature of transportation facilities and proposed projects that the Department will*

*consider or not consider. Any such parameters or limitations, if issued by the Department, shall be posted on the Department's website.*