

**PROPOSED REGULATION OF THE
DEPARTMENT OF TRANSPORTATION**

LCB File No. R172-09

December 14, 2009

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

AUTHORITY: §§1-17 and 21-26, NRS 408.100 and 408.5473; §18, NRS 408.100, 408.5473 and 408.5483; §§19 and 20, NRS 408.100, 408.5473 and 408.548.

A REGULATION relating to transportation facilities; providing that the Department of Transportation may perform certain activities with respect to proposals for transportation facilities; establishing the process for the Department to solicit proposals for transportation facilities and to determine the best proposal of those submitted; providing the contents of certain applications, documents, proposals or notices relating to transportation facilities; providing the qualifications and requirements a person must meet to submit a proposal for a transportation facility; establishing the fee for submitting an unsolicited proposal for a transportation facility; establishing the process for the Department to award a contract for a transportation facility; providing for the reimbursement of certain persons; and providing other matters properly relating thereto.

Section 1. Chapter 408 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 26, inclusive, of this regulation.

Sec. 2. *As used in sections 2 to 26, 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 transportation facility is determined by the Department, on the basis of the criteria 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 transportation facility.*

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. *“Prequalify” means to approve a person who has submitted a qualification submittal to submit a proposal to the Department.*

Sec. 6. *“Project” means the scope of work of development, construction, financing, improvement, maintenance or operation, or any combination thereof, of a transportation facility, as defined by the Department pursuant to a request for qualifications, a request for proposals or both, issued by the Department in response to a solicited proposal or unsolicited proposal.*

Sec. 7. *“Proposal” means a written plan submitted to the Department by a person to develop, construct, finance, improve, maintain or operate, or any combination thereof, a transportation facility.*

Sec. 8. *“Proposer” means a person who submits a solicited proposal or an unsolicited proposal to the Department.*

Sec. 9. *“Qualification submittal” means a response to a request for qualifications.*

Sec. 10. *“Shortlist” means to include a person on a list of persons who have submitted qualification submittals that, based on an evaluation of their qualification submittals, are identified by the Department as eligible to respond to the request for proposals for a project.*

Sec. 11. *“Solicited proposal” means a proposal that is solicited by the Department and is submitted pursuant to the provisions of NRS 408.548 and sections 2 to 26, inclusive, of this regulation.*

Sec. 12. *“Unsolicited proposal” means a proposal that is not solicited by the Department and is submitted pursuant to NRS 408.5475 and sections 2 to 26, inclusive, of this regulation.*

Sec. 13. *In processing, reviewing and evaluating solicited and unsolicited proposals pursuant to the provisions of sections 2 to 26, inclusive, of this regulation, the Department may:*

- 1. Issue a request for qualifications or a request for proposals.*
- 2. Request or obtain additional information concerning any proposer, any person who submits a qualification submittal, any qualification submittal or any proposal from any source.*
- 3. Modify or cancel any request for qualifications or request for proposals at any time.*
- 4. Modify the scope of the proposed project drawn from an unsolicited proposal in order to issue a request for qualifications or a request for proposals or for any other purpose that is, as determined by the Department, in the best interest of the Department or of the public.*
- 5. Waive any deficiencies in a qualification submittal or in a proposal.*
- 6. Accept, process, review and evaluate a qualification submittal or a proposal which does not meet the requirements of NRS 408.5471 to 408.549, inclusive, or sections 2 to 26, inclusive, of this regulation.*
- 7. Allow a person who submits a qualification submittal or a proposal to clarify or supplement the qualification submittal or proposal.*
- 8. Issue a new request for qualifications or a new request for proposals at any time.*
- 9. Reject any qualification submittal or any proposal at any time.*
- 10. Determine the elements, timing and depth of any processing, review or evaluation of any qualification submittal or proposal.*

- 11. Terminate the processing, review or evaluation of any qualification submittal or any proposal, whether solicited or unsolicited, at any time.*
- 12. Issue a request for qualifications for a project drawn from an unsolicited proposal if the unsolicited proposal is rejected or evaluation of the unsolicited proposal is terminated.*
- 13. Suspend or terminate negotiations with any proposer at any time before the execution of an agreement of the parties.*
- 14. Negotiate with a proposer without being bound to any provision in his or her proposal.*
- 15. Negotiate with a proposer to include aspects of unsuccessful proposals for that project in the successful proposal and subsequent agreement or contract.*
- 16. Negotiate with a subsequent proposer if negotiations with the apparent successful proposer are unsuccessful or if financial close with the apparent successful proposer does not occur, if applicable.*
- 17. Issue one or more requests for best and final offers.*
- 18. Retain or return any portion of the fees required to be paid by a proposer pursuant to section 18 of this regulation.*

Sec. 14. *The Department will conduct any public meeting, hearing or other proceeding required by the provisions of NRS 408.5471 to 408.549, inclusive, or sections 2 to 26, inclusive, of this regulation.*

Sec. 15. *To qualify for an award of a contract for a transportation facility pursuant to section 24 of this regulation, a proposer must:*

- 1. Demonstrate that the proposer can procure and maintain a performance bond and a payment bond or another type of performance security that the Department may require;*

2. *Demonstrate that the proposer can obtain general liability insurance and errors and omissions insurance that the Department may require; and*

3. *Ensure, by the date that the contract is awarded, that the proposer and any contractor, subcontractor or consultant of the proposer possesses any license or certificate required of their profession pursuant to the laws of this State.*

Sec. 16. 1. *The Department may, but is not required to, prequalify or shortlist a person for projects by issuing a request for qualifications.*

2. *If the Department issues a request for qualifications, the request for qualifications must set forth the following:*

(a) *The criteria that the Department will use to prequalify or shortlist a person who submits a qualification submittal. Such criteria may include, without limitation:*

(1) *The capabilities, experience, facilities or techniques of the person;*

(2) *How the person's capabilities, experience, facilities or techniques, or a combination thereof, help achieve the objectives of the project;*

(3) *Whether the person's qualifications, capabilities, experience, facilities or techniques, or a combination thereof, are critical to achieving the objectives of the project; and*

(4) *Any other criteria the Department determines is appropriate for the particular project.*

(b) *The relative weight assigned to each criterion used to prequalify or shortlist a person.*

(c) *The date by which a qualification submittal must be submitted to the Department.*

(d) *The information set forth in subsection 2 of section 20 of this regulation.*

3. *After receiving a qualification submittal, the Department will evaluate the qualification submittal in accordance with the criteria set forth in the request for qualifications issued by the Department.*

4. *During the evaluation of a person's qualification submittal, the Department may interview the person or request clarification from the person concerning the qualification submittal.*

5. *The Department will provide written notification to each person who submitted a qualification submittal informing the person of whether he or she has been prequalified or shortlisted.*

6. *After the Department evaluates all qualification submittals for a particular project, the Department will determine which of the persons who submitted the qualification submittals will be prequalified or shortlisted for the particular project. Persons who submitted qualification submittals and who are prequalified or shortlisted for a particular project may submit a proposal for that project.*

Sec. 17. 1. *Each solicited proposal must contain sufficient information for the Department to evaluate:*

(a) The feasibility of the proposed project;

(b) The ability of the proposer, the proposal and the project to meet the objectives and goals of the Department for the proposed project; and

(c) The capabilities of the proposer to provide the necessary services and perform the scope of work required by the proposed project.

2. *Each unsolicited proposal must contain sufficient information for the Department to evaluate:*

- (a) The feasibility of the proposed transportation facility;*
- (b) The ability of the proposer, the proposal and the transportation facility to meet the objectives and goals of the Department for the proposed transportation facility; and*
- (c) The capabilities of the proposer to provide the necessary services and perform the scope of work required by the proposed transportation facility.*

Sec. 18. *1. A person who submits an unsolicited proposal must submit a fee for the processing, review and evaluation of the proposal pursuant to NRS 408.5483.*

2. The fee required pursuant to this section will be set by the Department. The Department will determine a reasonable fee for the processing, review and evaluation of an unsolicited proposal depending on the typical complexity and cost of a transportation facility and the estimated costs of the Department to review an unsolicited proposal.

3. The Department will publish the fee for submitting an unsolicited proposal on its website at the Internet address <http://www.nevadadot.com> or any successor website used by the Department to advertise projects.

4. The Department may review and modify the fee for submitting an unsolicited proposal as the Department deems appropriate. If the Department changes the fee, the Department will publish the new fee pursuant to subsection 3 and the new fee will apply to unsolicited proposals submitted after the date of publication of the new fee.

Sec. 19. *1. If the Department receives an unsolicited proposal which complies with the requirements of NRS 408.5475 and sections 2 to 26, inclusive, of this regulation, and the Department determines pursuant to NRS 408.5483 that the unsolicited proposal identifies a transportation facility that serves a public purpose, the Department may:*

- (a) Issue a request for qualifications pursuant to section 16 of this regulation; or*

(b) Issue a request for proposals pursuant to NRS 408.548 and sections 2 to 26, inclusive, of this regulation.

2. If the Department elects not to issue a request for qualifications pursuant to section 16 of this regulation for the transportation facility, the Department may proceed directly to issuing a request for proposals.

3. A request for proposals issued by the Department must set forth:

(a) The criteria the Department will use to select the apparent successful proposer, including, without limitation, the relative weight to be assigned to each criterion;

(b) The date on which the proposal must be submitted to the Department; and

(c) The information set forth in subsection 2 of section 20 of this regulation.

4. The Department may, when issuing a request for qualifications or a request for proposals based on a transportation facility set forth in an unsolicited proposal, modify the scope of the project and issue the requests based on the modified scope.

5. The Department may require a proposer who submits an unsolicited proposal to submit a qualification submittal or submit a proposal, as applicable, in response to the Department's request for qualifications or request for proposals.

Sec. 20. 1. *Except as otherwise provided in this subsection, if the Department issues a request for qualifications pursuant to section 16 of this regulation or a request for proposals pursuant to section 19 of this regulation, the Department will publish notice of its request for at least 15 days after the Department issues its request in either a newspaper of general circulation in this State or on the Department's website at the Internet address <http://www.nevadadot.com> or any successor website used by the Department to advertise projects. The Department is not required to publish a notice pursuant to this subsection if the*

Department issues a request for proposals to persons who have been prequalified or shortlisted.

2. A published notice of a request for qualifications or a published notice of request for proposals must include, without limitation:

(a) A description of the proposed project, which may include modifications to a project drawn from an unsolicited proposal;

(b) A statement indicating how a person who submits a qualification submittal or a proposer can obtain any available information from the Department concerning the request for qualifications or request for proposals, as applicable, including, without limitation:

(1) The location where the information may be obtained;

(2) The days or times the information may be accessible for inspection; and

(3) The type of information that may be available, including the information described in subsection 3;

(c) The general evaluation method the Department will use for the project; and

(d) The date on which qualification submittals or a proposal must be submitted to the Department. The Department will set such date at least 30 days after the date that notice of the request is first published pursuant to subsection 1.

3. The Department will make available, at the place and times set forth in the published notice of request for qualifications or published notice of request for proposals, the following information for inspection by a person who submits a qualification submittal or a proposer:

(a) A description of the extent to which any designs required by the request must be completed;

(b) The requirements for any design and construction of the project the Department determines to be necessary;

(c) A list of the criteria set forth in NRS 408.5483 that the Department considers to determine whether a transportation facility serves a public purpose;

(d) A list of the criteria the Department will use to evaluate a qualification submittal or a proposal, including, without limitation:

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

(2) Whether the criteria that are not related to costs are, when considered as a whole, more or less important or worth more or less weight in the evaluation than criteria related to costs; and

(e) A statement as to whether a person who has been prequalified or shortlisted or who submits a proposal will be partially reimbursed for costs associated with preparing the proposal and preparing a best and final offer, if applicable. If the Department determines that partial reimbursement will be provided, the Department will include in the statement required by this section and in the request for proposals:

(1) An estimate of the amount of the reimbursement;

(2) The circumstances under which such a person is qualified to be reimbursed; and

(3) The circumstances under which the reimbursement is payable.

Sec. 21. 1. *The Department will conduct an evaluation of a proposal consistent with the criteria for evaluation set forth in the Department's request for proposals. The evaluation may include a review of:*

(a) The technical aspects of the proposal, including, without limitation, the proposer's approach to performing the scope of services required by the project;

(b) The financial aspects of the proposal, including, without limitation, the price of the project and any financial plan or financial models of the proposer; and

(c) Any other criteria the Department determines is appropriate for the particular project.

2. The evaluation of a proposal must include a verification by the Department that the proposal satisfies the requirements of subsection 1 of NRS 408.5483. The Department is not required to evaluate the proposal if the Department determines that the proposal:

(a) Is not responsive because it does not meet the requirements of subsection 1 of NRS 408.5483 or the provisions of sections 2 to 26, inclusive, of this regulation; or

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

3. In evaluating a proposal, the Department may use any evaluation method the Department determines to be appropriate for the particular project, including, without limitation, a best value, low bid or lowest adjusted cost method. The method the Department will use for each project must be described in the request for proposals for that project.

4. 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 clarifications or interview a proposer in connection with the evaluation of the proposal.

5. After reviewing the proposals submitted for the project and any clarifications or additional information provided by a proposer pursuant to subsection 4, the Department may:

(a) Rank each responsive proposal submitted using the criteria set forth in the request for proposals, 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 a best and final offer from a proposer pursuant to section 22 of this regulation;

or

(d) Take any other action, including, without limitation, any action set forth in section 13 of this regulation or in the request for proposals.

Sec. 22. 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;

(2) Serves a public purpose; or

(3) Satisfactorily achieves the goals and needs of the project; 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 criteria for evaluation of the proposals and the relative weight assigned to each criteria.

4. A request for best and final offers issued by the Department must set forth the date 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 and any clarifications or additional information provided by a proposer pursuant to subsection 5, 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;

(b) Reject all best and final offers;

(c) Request another best and final offer from a proposer pursuant to this section; or

(d) Take any other action, including, without limitation, any action set forth in section 13 of this regulation or in the request for proposals.

Sec. 23. 1. *After determining the apparent successful proposer pursuant to section 21 or 22 of this regulation, the Department will attempt to negotiate a contract for the transportation facility with the apparent successful proposer.*

2. 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.

3. If the Department suspends or ends negotiations with the apparent successful proposer, the Department may initiate negotiations 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.

4. If the Department successfully negotiates a contract with a proposer, the Department will hold a public hearing to:

(a) Review and ratify the selection of the proposer and the contract. Ratification of a contract requires approval by the Department and execution of the contract by the Chair of the Board.

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

Sec. 24. 1. A contract awarded by the Department for a transportation facility must:

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

(b) Contain the provisions required pursuant to NRS 408.5483; and

(c) Specify an amount that is the maximum amount the Department will pay for the performance of all the work required by the contract, excluding any amount related to costs,

charges, compensation or fees that may be incurred as a result of termination of the contract or such events, conditions or circumstances as authorized by the contract.

2. A proposer to whom a contract is awarded pursuant to sections 2 to 26, inclusive, of this regulation has overall responsibility for ensuring that the design and construction of the project is completed in a satisfactory manner, if design and construction is included in the contract.

3. A contract awarded pursuant to sections 2 to 26, inclusive, of this regulation is not effective unless and until it is ratified pursuant to subsection 4 of section 23 of this regulation.

Sec. 25. The Department may authorize a successful proposer with whom the Department executes a contract to seek licensing, permits, approvals or the participation of other governmental or private entities to complete the project, subject to such oversight and review by the Department as the contract or any other separate agreement for services provides.

Sec. 26. 1. Except as otherwise provided in this section, the Department and its agents, officers or employees are not liable for reimbursing any proposer for the costs incurred by the proposer in developing or negotiating a proposal.

2. The Department may partially reimburse the unsuccessful proposers who submitted a responsive proposal, or any other person as set forth in the request for proposals, if partial reimbursement was provided for in the request for proposals pursuant to paragraph (e) of subsection 3 of section 20 of this regulation.

3. The amount of such reimbursement must not exceed, for each unsuccessful proposer or other person:

(a) Three percent of the total capital cost of the project, as estimated by the Department, if construction is part of the scope of the project; or

(b) Three percent of the total project cost, as estimated by the Department.

4. Any reimbursement made pursuant to this section is payable in the manner set forth in the request for proposals but, notwithstanding the request for proposals, is payable not later than the execution of the contract or financial close, whichever occurs later.