

Tab 12a

**Final rule action report
and recommendation
to adopt Rule 18.27.6 -
the Transportation
Project Fund, to be
effective April 20, 2021**

Commission Brief

SUBJECT: Final rule action report and recommendation to adopt Rule 18.27.6 - the Transportation Project Fund, to be effective April 20, 2021.

PRESENTER: Stephen P. Thies, Assistant General Counsel

BACKGROUND: During the 2019 legislative session, the legislature passed HB 694 which created a new fund known as the “Local Government Transportation Project Fund” (LGTPF). The LGTPF serves as an expeditious mechanism to distribute appropriated funds to local governments using the NMDOT’s existing Metropolitan Planning Organization and Regional Transportation Planning Organization planning process. The Legislature changed the name of the fund during the 2020 Regular Session to the Transportation Project Fund.

Due to the timelines specified in HB 694, the NMDOT passed an emergency rule in mid-2019 to administer the initial \$50 million appropriation. (No money was appropriated to the fund during the 2020 Regular Session). At the same time the State Transportation Commission authorized the adoption of an emergency rule, it authorized the adoption of a permanent rule. That rulemaking process has now been completed. Please see the attached Intra-Departmental Correspondence for additional background on the adoption of the rule.

ACTION: Staff requests approval of the Rule to be effective after publication in the New Mexico Register on April 20, 2021.



Intra-Departmental Correspondence

Date: February 16, 2021

TO: Michael Sandoval, Cabinet Secretary

From: Stephen P. Thies, Assistant General Counsel

Subject: Final Rulemaking Report - Rule 18.27.6 - the Local Government Transportation Project Fund

On April 18, 2019, the State Transportation Commission authorized the opening of rulemaking proceedings to adopt a rule implementing the Local Government Transportation Project Fund.

After publishing the Notice of Proposed Rulemaking in the New Mexico Register on October 15, 2019, the NMDOT held six public hearings in each of the individual transportation districts for the purpose of receiving oral and written public comment from interested parties on the proposed rule. A copy of the draft rule was posted on the NMDOT's website on that same date. In addition to its publication in the New Mexico Register, the Notice of Proposed Rulemaking was published in a newspaper located in the respective districts and sent to all the Metropolitan Planning Organizations, the Regional Transportation Planning Organizations, the New Mexico League of Municipalities and the New Mexico Association of Counties for distribution to their members. The schedule for the public hearings was as follows:

- District 2 on November 19, 2019, in Roswell.
- District 1 on November 20, 2019, in Las Cruces.
- District 6 on November 20, 2019, in Milan.
- District 4 on November 20, 2019, in Las Vegas.
- District 3 on November 25, 2019, in Albuquerque.
- District 5 on November 25, 2019, in Santa Fe.

The public comment period closed at 12:00 p.m. on November 25, 2019, which coincided with the conclusion of the last public hearing.

Copies of the written comments received during the public comment period together with transcripts of the six public hearings can viewed on the NMDOT website at the following Internet link, under the *Public Notices* tab: <https://dot.state.nm.us/content/nmdot/en/public-notice.html>.

A summary of both the written and oral comments received during the public comment period is attached. Also attached is the Concise Explanatory Statement required by the New Mexico State Rules Act. A copy of the statement will be provided to all parties who submitted comments, either in writing or orally, and any other party who requested a copy.

A redline copy of the final rule is attached showing the changes made to the draft rule along with a clean copy.

You are requested to place the Final Rulemaking Report on the agenda for the State Transportation Commission's March 25, 2021 meeting. If the rule is approved, it would be published in the State Register on April 20, 2021 and would become effective on its day of publication.

TITLE 18 TRANSPORTATION AND HIGHWAYS

CHAPTER 27 HIGHWAY CONSTRUCTION GENERAL PROVISIONS

PART 6 TRANSPORTATION PROJECT FUND

18.27.6.1 ISSUING AGENCY: New Mexico department of transportation, Post Office Box 1149, Santa Fe, New Mexico 87504-1149.

[18.27.6.1 NMAC – N, __/__/21]

18.27.6.2 SCOPE: This rule covers the application, evaluation, award and close out process for the transportation project fund (the fund) and all eligible entities in the state of New Mexico applying for and receiving grant money from the fund.

[18.27.6.2 NMAC – N, __/__/21]

18.27.6.3 STATUTORY AUTHORITY: Sections 67-3-11, 67-3-28 and 67-3-78 NMSA 1978.

[18.27.6.3 NMAC – N, __/__/21]

18.27.6.4 DURATION: Permanent.

[18.27.6.4 NMAC – N, __/__/21]

18.27.6.5 EFFECTIVE DATE: April 20, 2021 unless a later date is cited at the end of a section.

[18.27.6.5 NMAC – N, __/__/21]

18.27.6.6 OBJECTIVE:

A. In 2019, the New Mexico legislature enacted Laws of 2019, Chapter 205, Section 1, which created the local government transportation project fund and was compiled as Section 67-3-78 NMSA 1978. In 2020, the New Mexico legislature enacted Laws of 2020, Chapter 31, Section 1, which made certain amendments to the local government transportation project fund enabling statute including changing the title of the fund to simply “transportation project fund.” Money in the transportation project fund is appropriated to the New Mexico department of transportation to administer the fund and to make grants to eligible entities for transportation projects.

B. The purpose of this rule is to describe the application, evaluation, award, and close out processes to be administered by the department for money appropriated to the fund by the New Mexico legislature for the development of transportation infrastructure.

[18.27.6.6 NMAC – N, __/__/21]

18.27.6.7 DEFINITIONS: As used in this rule:

“Annual appropriation” means the annual amount of state funds appropriated to the fund by the legislature.

“Beautification project” means a landscape project that is intended to enhance the attractiveness of a public right-of-way or a transportation facility.

“Commission” means the state transportation commission.

“Department” means the New Mexico department of transportation.

“DFA” means the department of finance and administration of the state of New Mexico.

“Directive” is a written communication that prescribes or establishes policy, organization, methods, procedures, requirements, guidelines, or delegations of authority. It also provides information essential to the administration or operation of the fund.

“District” means one of the six New Mexico department of transportation districts.

“District engineer” means the department of transportation district engineer as designated pursuant to Subsection (C) of Section 67-3-8(C) NMSA 1978 (2019).

“Eligible entity” means those entities eligible under the provisions of the transportation project fund to receive grants for transportation projects.

“Fiscal year” means 12 calendar months commencing on July 1 and ending on June 30 of the year being described.

“Fund” has the same meaning as defined in Section 67-3-78 NMSA 1978 (2019).

“Grant” means the award of funds from the fund to a grantee for a transportation project.

“Grantee” means an eligible entity receiving a grant.

“Grant agreement” means a written document memorializing the terms and conditions of a grant award granted pursuant to the grant program.

“Grant award” means the funds awarded to a grantee from the fund pursuant to a grant.

“Grant program” means the grant program established by the department to make grants to eligible entities for transportation projects. “Landscape” or “landscaping” means any vegetation, mulches, irrigation systems, and other landscape components, such as street furniture, specialty paving, tree gates, walls, planters, fountains, fences, and lighting (excluding public utility street and area lighting).

“Landscape project” means any planned or actual landscape or landscaping on a public right-of-way, including its construction or installation, planning, beautification, and maintenance thereof, by a municipality, county, tribe, or an abutting private property owner or other non-governmental entity.

“Letter of approval” means a document issued by a district engineer that authorizes an eligible entity to proceed with a project that is located in full or in part within a department right-of-way or NHS route, or when the project ties into or crosses a department right-of-way or an NHS route, or when the project may have an effect on existing improvements within department rights-of-way. A project agreement is not required for a project that receives a letter of approval.

“Letter of authorization” means a document issued by a district engineer that authorizes an eligible entity to proceed with seeking funding for a project that is located in full or in part within a department right-of-way or NHS route, or when the project ties into or crosses a department right-of-way or an NHS route, or when the project may have an effect on existing improvements within department rights-of-way. A letter of authorization is a conditional approval of a project. Final approval shall be given by a project agreement.

“Local funds” means revenue received from any locally imposed gross receipts tax, property tax, municipal gasoline tax, franchise fee, user fees or any other locally imposed

fees or taxes, and enterprise activities, which can be lawfully used for transportation projects, but excluding state grants and loans and federal grants.

“Maintenance” is defined as the planned strategy of extending the service life of an existing roadway system, including its structures and appurtenances, by applying cost-effective treatments or procedures that preserves the system, retards future deterioration, and maintains or improves the functional condition of the system without significantly increasing the structural capacity. Examples of pavement related maintenance activities include asphalt crack sealing, chip sealing, slurry or micro-surfacing, thin and ultra-thin hot-mix asphalt overlay, concrete joint sealing, diamond grinding, dowel-bar retrofit, and isolated, partial and/or full-depth concrete repairs to restore functionality of the slab; e.g., edge spalls, or corner breaks. Examples of maintenance activities for bridge structures include deck joint repair and replacement; bearing repair and replacement; localized deck repairs; deck sealing; grid deck section repair or localized section replacement; concrete repair on pedestals, bents, caps, piling, piers, and columns; and bridge deck drainage.

“Metropolitan transportation plan” means the official multimodal transportation plan addressing no less than a 20-year planning horizon that a MPO develops, adopts, and updates through the metropolitan transportation planning process.

“MPO” means metropolitan planning organization.

“National Highway System” or “NHS” means that system of highways designated and approved in accordance with the provisions of 23 U.S.C. 103(b).

“Non-state money” has the same meaning as defined in Section 67-3-78 NMSA 1978 (2019).

“Program guidelines” means guidelines for the operation of the grant program established and revised by the department from time to time.

“Project agreement” means a written document between an eligible entity and the department that memorializes the roles and responsibilities of the parties with respect to a project that receives a letter of authorization. The project agreement will include, but is not limited to, the roles and responsibilities with respect to design standards and exceptions, compliance with state, local and federal regulations, survey and right of way acquisition requirements, and construction phase duties and obligations. A project agreement is required in addition to a grant agreement.

“Public authority” is defined as a Federal, State, county, municipality, village, town, tribe, or other local government or instrumentality with authority to finance, build, operate, or maintain a public roadway.

“Public highway” means every public street, road, highway or thoroughfare of any kind in this state used by the public whether actually dedicated to the public and accepted by proper authority or otherwise.

“Public right-of-way” means a strip of property, owned by a public authority, within which a public roadway exists or is planned to be built. The public right-of-way consists of all lands within the defined highway right-of-way limits, including airspace above and below the facility. This area typically includes, but is not limited to, the roadway(s), shoulders, and sidewalk(s), if any; areas for drainage, utilities, landscaping, berms, and fencing; rest areas; and the defined clear zone.

“Public roadway” means any road or street owned and maintained by a public authority and open to public travel.

“Regional transportation plan” means the multimodal transportation plan for the non-metropolitan area covered by the RTPO, developed, adopted and updated through the RTPO planning process.

“Roadway” means that portion of a public roadway intended for vehicular use.

“RTPO” means regional transportation planning organization.

“Secretary” means the cabinet secretary of the New Mexico department of transportation or designee.

“State highway” means every public highway which has been designated as a state highway either by the legislature or by the state transportation commission.

“Transportation facility” means any road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility, sidewalk, bicycle facility or similar facility used for the transportation of persons or goods, together with any buildings, structures, parking areas, appurtenances, and other property needed to operate such facility.

“Transportation infrastructure” has the same meaning as defined in Section 67-3-78 NMSA 1978 (2019).

“Transportation project” has the same meaning as defined in Section 67-3-78 NMSA 1978 (2019).

“Transportation improvement program” (TIP) means a prioritized listing/program of transportation projects covering a period of 4 years that is developed and formally adopted by a MPO as part of the metropolitan transportation planning process, consistent with the metropolitan transportation plan, and required for projects to be eligible for funding under title 23 U.S.C. and title 49 U.S.C. chapter 53.

“Tribal/Local Public Agency Handbook” means the most recent edition of the guidance developed by the department to assist tribal and local public agencies in successfully navigating the planning, design, and implementation of federally-funded transportation projects.

[18.27.6.7 NMAC – N, __/__/21]

18.27.6.8 GENERAL GUIDELINES:

A. The department may make grants to eligible entities for transportation projects as funds are appropriated in a manner deemed necessary to effectuate the purposes of the fund.

B. Eligible projects include environmental and other studies, planning, design, construction and acquisition of rights of way necessary for the development of transportation infrastructure, and includes highways, streets, roadways, bridges, crossing structures, parking facilities, including all areas for vehicular, transit, bicycle or pedestrian use for travel, ingress, egress and parking. An eligible entity may seek funding for any discrete phase of a transportation project. A project included in a transportation improvement program is an eligible project provided the project is not funded with federal funds and the project does not qualify as a beautification project.

C. The department will award up to 95% of the total cost of a transportation project provided that the eligible entity has demonstrated an ability to provide the remainder of the project costs in local funds. The eligible entity is responsible for any and all expenditures in excess of the grant award.

D. The department will award up to 100% of the total cost of a transportation project if a financial hardship qualification certificate is issued by DFA, or if the department

makes such a determination in the event a tribe requests a waiver. The eligible entity is responsible for any and all expenditures in excess of the grant award.

E. Costs associated with preparing, reviewing, and submitting an application and any required supporting documentation prepared by the eligible entity, and any costs of a consultant's services incurred in preparing an application, are not eligible for grant funding participation.

F. The department will not perform any in depth analysis or review of project scope, cost estimates, functionality, project phasing and scheduling or overall constructability. The department may conduct an in-depth analysis after the completion of a project when evaluating the eligible entity's ability to properly administer, implement and complete a project.

G. Applicants must have the ability to successfully deliver their project.

H. All grant awarded funds must be spent no later than thirty (30) months from the effective date of the grant agreement.

I. All grants are subject to department audit.

J. Grants awarded to an eligible entity will be provided for a specific project. Unexpended funds cannot be used for any other purpose or project. A grant award can be used for any project included in the state transportation improvement program provided the project will not be receiving any federal funding and is not a transportation beautification project. Unexpended grant awards will be returned to the department after project completion.

[18.27.6.8 NMAC – N, __/__/21]

18.27.6.9 CALL FOR PROJECTS:

A. The department will invite eligible entities to submit applications for grants from the fund for transportation projects by a call for projects letter using a two-phase application process. The first phase will consist of a request to submit a project feasibility form. Submittal of the project feasibility form is mandatory in order to be eligible to submit a full application in the second phase. If a project is determined to be feasible, phase two will consist of a request for the eligible entity to submit a completed project application. Any specific criteria applicable to the funding cycle will be specified in the call for projects. Applications for program funds shall conform to the application instructions described in the call for projects or the phase two request. Any procedures, requirements, conditions, restrictions, and limitations applicable to the funding cycle other than those contained in this rule will be specified in the call for projects or the phase two application request.

B. The completed phase one feasibility form must be submitted to the appropriate MPO or RTPO based on a project's physical location on or before the date specified in the call for projects. Failure to timely submit the required project feasibility form as required in the call for projects will result in the eligible entity being ineligible for funding in the funding cycle.

C. The completed project application must be submitted to the same MPO or RTPO where the project feasibility form was submitted unless otherwise instructed in writing by the department. Failure to timely submit the phase two project application will result in the eligible entity being ineligible for funding in the funding cycle.

D. An incomplete project feasibility form or project application will be rejected and will not be considered for funding in the funding cycle unless amended or corrected on or before the date specified in the call for projects.

[18.27.6.9 NMAC – N, __/__/21]

18.27.6.10 FINANCIAL HARDSHIP:

A. Eligible entities may request a waiver of their share in whole or in part due to financial hardship. Waiver requests with supporting documentation shall be submitted to the department's division or bureau designated in the call for projects.

B. If the eligible entity's application is accepted, the eligible entity shall submit a resolution or certification indicating that it cannot match all or a portion of its share. The resolution or certification shall be signed by the appropriate eligible entity official(s).

C. The department will request from the DFA's local government division a financial analysis and recommendation on a financial hardship request submitted by a county or municipality. The department will conduct the financial analysis if a waiver request is made by a tribe. The eligible entity shall cooperate with any request to provide necessary financial documents or other information requested by DFA or the department in conjunction with a financial analysis. Failure to do so will result in a denial of the waiver request.

D. If a waiver is granted, the eligible entity must request an amendment to its Grant Agreement.

[18.27.6.10 NMAC – N, __/__/21]

18.27.6.11 APPLICATION PROCEDURES, REVIEW AND EVALUATION PROCESS:

A. Any eligible entity interested in applying for a grant award must submit a completed project feasibility form to their MPO or RTPO. A complete project feasibility form must be submitted to the appropriate MPO or RTPO before the deadline specified in the call for projects.

B. If a project is determined to be feasible, the eligible entity will be requested to submit a project application.

B. Timely application packages will be reviewed and ranked by the MPO/RTPO using the criteria specified in the call for projects.



C. Each MPO/RTPO will submit its ranked list of projects to the district engineer for the district where the project is located no later than thirty (30) days prior to the start of the fiscal year in which funding is available.

D. Each individual district engineer will present their recommendation to the secretary prior to start of the fiscal year in which funding is available.

E. The secretary shall by August 1st of the fiscal year in which funds are available submit a proposed list of transportation projects identified by the above described project review process to the commission.

F. Final project selection and funding amounts will be determined by the commission no later than September 1st of that same fiscal year. The commission's decision will be final. At its discretion, the commission may adjust the projects selected in an effort to program funds in a geographically equitable manner or in any other manner. The commission may, in its sole discretion, reject all applications or award grants totaling less than the funds appropriated for the particular fiscal year. The commission may approve subsequent changes to a priority list as it deems necessary.

G. After projects are selected, the department will send out award letters and grant agreements to the selected eligible entities. Applicants whose projects were not selected

will be notified as well. Each awarded eligible entity must execute a grant agreement with the department. Once a fully executed grant agreement has been received by the department, the eligible entity may then proceed with authorized project activities. If the eligible entity fails to execute and return the grant agreement within sixty (60) days of receiving the notice of award, the project shall be considered lapsed and may be submitted to the commission for re-programming.

H. The department shall disburse the grant to the eligible entity after receipt of a request for disbursement submitted by the eligible entity to the department and receipt of a fully executed project agreement. The format of the request for disbursement will be determined by the department.

I. Any moneys appropriated to a specific eligible entity by the legislature shall be disbursed to the eligible entity after receipt of a request for disbursement submitted by the eligible entity to the department and the receipt of a fully executed project agreement.
[18.27.6.11 NMAC – N, __/__/21]

18.27.6.12 APPLICATION REQUIREMENTS:

Applicants must submit the following documents (as a single PDF) as part of the application process:

A. Completed Application. The format and content of the application will be determined by the department;

B. Resolution of Sponsorship from their governing body, indicating the availability of the proposed match. Subject to any local restrictions, the resolution may provide that the applicant's chief executive or other appropriate officer is authorized to sign the grant agreements and all associated documents and amendments on behalf of the eligible entity as required for receipt of the grant. Alternatively, the applicant may submit an official letter signed by the applicant's chief executive or official with budget authority, indicating the availability of the match;

C. Detailed map of project location;

D. If applicable, letters of support from the governmental entity that owns in fee simple or possesses a perpetual easement for the project right-of-way (ROW) if the applying applicant does not own in fee simple or possess a perpetual easement for all of the project ROW; and

E. If applicable, a letter of approval or authorization from the district engineer.

[18.27.6.12 NMAC – N, __/__/21]

18.27.6.13 EVALUATION PROCESS: Each MPO/RTPO will be evaluating and ranking projects based on the specific merits of the individual projects using the evaluation criteria specified in the call for projects.

[18.27.6.13 NMAC – N, __/__/21]

18.27.6.14 AGREEMENT CONDITIONS, REQUIREMENTS AND PROCEDURES:

A. The eligible entity must expend and account for grant funds in accordance with state laws and procedures for expending and accounting for its own funds.

B. If an eligible entity commences performance on a transportation infrastructure project but fails to complete the project, the department may seek reimbursement of the grant award received by the eligible entity for that project.

C. The department shall have the right to evaluate the activities of eligible entity as necessary to ensure grant awards are used for authorized purposes in compliance with applicable laws, regulations and the provisions of the grant agreement.

[18.27.6.14 NMAC – N, __/__/21]

18.27.6.15 DESIGN/BIDDING/CONSTRUCTION:

A. A transportation project that is located in full or in part within a department right-of-way or NHS route eligible entity must be administered in accordance with the “Tribal/Local Public Agency Handbook”.

B. A transportation project that ties into or crosses a department right-of-way or an NHS route, or when the project may have an effect on existing improvements within department rights-of-way, requires the approval of the department as evidenced by either a letter of approval or letter of authorization from the district engineer for the district where the project is located. The eligible entity shall contact the appropriate district engineer to determine if either is needed for the project. The district engineer will conduct a review of the project and determine whether the project requires a letter of approval or a letter of authorization from the department. If the district engineer determines the project does not require a letter of authorization, the district engineer, or designee, will submit a letter of approval to the eligible entity. If the district engineer determines the project requires a letter of authorization, the eligible entity must enter into a project agreement with the department before any grant funding will be distributed. The eligible entity shall cause the project to be constructed in compliance with any and all department designated standards, conditions and criteria as specified in the project agreement.

C. For transportation projects funded entirely by the fund, or in combination with local funds, and no Federal-aid funds are involved, the following apply:

(1). It will be the eligible entity’s responsibility to ensure compliance with any and all state, local and federal regulations including the Americans with Disabilities Act (ADA) and laws regarding noise ordinances, air quality, surface water quality, ground water quality, threatened and endangered species, hazardous materials, historic and cultural properties, and cultural resources. The department will not be involved in permit preparation, review, or coordination with the regulatory agencies. However, the eligible entity shall provide to the district where the project is located a copy of any permit identified by the department in the project feasibility form.

(2). Projects on locally owned roadways are to be designed in accordance with the eligible entity’s established design standards. The eligible entity is responsible for ensuring that the plans, specifications and estimates meet applicable design criteria and standards. The department will not perform any detailed technical reviews of project design and related documents.

D. In accordance with Section 67-3-62 NMSA 1978, any transportation projects for constructing highways along new alignments or for purposes of substantially widening highways along the existing alignments must consider provisions for pedestrian, bicycle, and equestrian facilities concurrent with the design of the project.

E. Pursuant to Section 61-23-26 NMSA 1978, all transportation projects involving engineering requires the engineering to be under the responsible charge of a licensed professional engineer.

F. The eligible entity will be responsible for advertising the project for construction bids and for receiving and publicly opening bids received for the project. The department will have no involvement in the bidding process.

G. The eligible entity shall follow its normal procedures for award of the contract and assure that all applicable requirements are followed. The eligible entity shall retain the executed contract, document the award date, and the preconstruction conference minutes as part of the project files. The department will have no involvement in the award of the contract and will not participate in resolving any disputes between the eligible entity and its bidders.

H. The eligible entity will have the responsibility and control of the construction phase and resulting quality of the completed work. The department will have no involvement in the construction phase other than its discretionary ability to periodically monitor the implementation of the project, and will not participate in resolving any disputes between the eligible entity and its contractor.

I. Department personnel will not conduct periodic assurance inspections or comparison material testing. The department, at its discretion, may perform a final inspection upon project completion.

[18.27.6.15 NMAC – N, __/__/21]

18.27.6.16 PROJECT EVALUATION:

A. The eligible entity's performance and administration of the grant funding will be reviewed and evaluated by the department at the completion of the project or, if the eligible entity fails to complete the project, following the close of the fiscal year in which the project was to be completed. If an eligible entity demonstrates, pursuant to the criteria set forth in subsection B below, an inability to properly administer a project a reduction of twenty (25%) percent will be applied to the scoring criteria applicable to the eligible entity's next project application .

B. The following criteria shall be used in determining the ability of an eligible entity to properly administer a project:

(1) Whether the eligible entity demonstrated a pattern of unsatisfactory project implementation and completion;

(2) Whether the eligible entity has failed to keep all required books, make all requested reports, and conform to all rules and regulations adopted by DFA's local government division, financial management bureau applicable to the grant;

(3) Whether the eligible entity fails the complete the project within the allotted time; or

(4) Whether the department obtains documentation through an audit or audits that finds the eligible entity has not performed in accordance with the terms of the grant agreement, the standards set forth in the grant agreement, in accordance with generally accepted governmental accounting principles, or failed to comply with any and all state, local and federal regulations including the Americans with Disabilities Act (ADA) and laws regarding noise

ordinances, air quality, surface water quality, ground water quality, threatened and endangered species, hazardous materials, historic and cultural properties, and cultural resources.

C. In the event the department has conducted an evaluation pursuant to this section and has issued a preliminary determination that the eligible entity has demonstrated an inability to properly administer a project, the department shall provide written notice of the determination to the eligible entity with an opportunity to provide additional information within thirty (30) calendar days, unless the parties to some other timeframe, to address, mitigate or refute the conclusions of the department.

(1) If the eligible entity does not produce any additional information with the designated timeframe, the preliminary determination of the department shall become final.

(2) If the eligible entity produces information with the designated timeframe, after considering the additional information the department will promptly issue a final a final determination.

[18.27.6.16 NMAC – N, __/__/21]

18.27.6.17 PROJECT DOCUMENTATION:

A. The eligible entity shall maintain a complete set of project files for a period of not less than five (5) years following the completion of the project. The project files shall contain all documents that are specified as required by the grant agreement.

[18.27.6.17 NMAC – N, __/__/21]

18.27.6.18 PROJECT MONITORING AND CLOSE OUT:

A. The department reserves the right to request the eligible entity to submit progress reports at any time. Reports are due within thirty (30) days of such a request.

B. Within sixty (60) days after the date of completion of the project, the eligible entity must submit a written certification that it has complied with the requirements of this rule and the grant agreement.

C. The department reserves the right to request the eligible entity to submit additional documentation to demonstrate completion of the terms and conditions required by the grant program. It is the responsibility of the eligible entity to comply in full with all such requests and to submit the requested documentation in a timely manner.

D. Financial audits of the project may be required. Financial audits do not limit the authority of the department to conduct or arrange for additional audits, reviews, and evaluations. The eligible entity must make records available for review or audit upon request by the department. The department is entitled to recover amounts based on the results of an audit.

[18.27.6.18 NMAC – N, __/__/21]

February 16, 2021

CONCISE EXPLANATORY STATEMENT

The New Mexico Department of Transportation (“NMDOT”) hereby adopts a new rule for the purpose of establishing the processes to be used in administering the money appropriated to the Transportation Project Fund by the New Mexico Legislature.

(1) Statutory Authority for Rule Promulgation: Section 67-3-11, NMSA 1978, authorizes the NMDOT to make all rules and regulations as may be necessary to carry out the provisions of Chapter 67 NMSA 1978.

(2) Effective Date of Rule: April 20, 2021

(3) Date of Adoption of Rule: March 25, 2021

(4) Reasons for Adopting Rule: The adopted rule is intended to establish the application, evaluation, award, and close out processes to be used by the NMDOT in administering the money appropriated to the Transportation Project Fund by the New Mexico Legislature.

(5) Reasons for Changes from Published Rule: The final rule remedies certain typographical designation errors. In particular, Subsections D, E and F of 18.27.6.15 NMAC are paragraphs that should have been designated by whole numbers in parentheses from (1) to (3). Corresponding corrections were made to the remaining subsections in that section. Another typographical designation error was the reference to Section 67-3-78 NMSA in the definition of “District Engineer”. The changes are non-substantive edits to the rule.

The final rule has been amended to reflect recent legislative changes made to the original enabling legislation (HB 694 enacted during the 2019 legislative session and signed into law on April 3, 2019, codified at Section 67-3-78 NMSA 1978 (2019)). HB 207, which was passed during the 2020 regular legislative session and signed into law on March 4, 2020, changed the name of the fund. Going forward, the fund will simply be known as the “Transportation Project Fund.” In addition, HB 207 added tribes to the list of eligible entities, added “transit, bicycle and bicycle” projects to the definition of transportation infrastructure and expanded the types of projects eligible for funding to include maintenance projects while expressly excluding beautification projects. These additions necessitated the need for new definitions and other edits. These amendments fall within the scope of the current rulemaking and do not require a new proceeding.

The NMDOT held six (6) public hearings during the public comment period. Substantive feedback and public comments were received at the hearings and during the comment period that support a number of amendments to the published proposed rule.

Amendments were made to the final rule to substitute words as suggested by a number of comments. For example, a comment suggested that the use of the word “participate” did not reflect the intent of the enabling statute. Another comment suggested that use of the phrase “matching share” is a mischaracterization. In addition to the suggested changes, a few other word substitutions or additions were made to the final rule for clarification purposes. These amendments fall within the scope of the current rulemaking and do not require a new proceeding.

Numerous comments were directed towards the description of what constitutes an eligible project. To address any misunderstanding, the final rule has been amended to explicitly provide that a project can be phased and that funding can be sought for any particular phase. For example, an eligible entity can submit an application for a planning or design project, a corridor or feasibility study, seek funding for just the construction phase of an already designed project, or request funds for the entire project. Regardless whether funding is sought for a distinct phase or the entire project, project readiness and the ability to complete the project or the phase for which funding is sought within the specified grant period is important. Eligible entities should take note that if funding is sought for a specific phase of a project the applicant should consider whether federal funding may be sought for a subsequent phase. Receipt of federal funding for a future phase could be jeopardized if an earlier phase did not comply with federal requirements.

The final rule has been amended to provide that projects receiving federal funds are not eligible under the program. Specifically, a local government cannot use this program to provide its match on a federally funded project. In order for a project, or an identified phase of a project (i.e. design, right of way, construction, or utilities), to be included in the State Transportation Improvement Program (STIP), it is necessary that full funding for the project be reasonably anticipated to be available for the project within the time period contemplated for completion of the project. There exists no reasonable anticipation that any project will receive funding from the program. However, a regionally significant project that appears in the STIP will be eligible provided it receives no federal funding.

The NMDOT received a number of comments and inquiries related to consultant costs incurred in preparing an application and the use non-cash contributions especially by small communities. The final rule clarifies that the costs of a consultant associated with the preparation of an application are not eligible for reimbursement. As for the use of non-cash contributions, allowing this practice would require much greater oversight on the part of the NMDOT to verify and quantify the non-cash contribution. The intent of the program is to limit the NMDOT’s involvement and oversight of the grants, not to increase it.

The process used to solicit and select projects received extensive commentary including comments from those planning organizations who conducted that process during the initial funding cycle. After considering those comments, the final rule will provide for a two-phase process. Phase-one will consist of the submission of a project feasibility form in response to a call for projects. The project feasibility will allow for a basic review of project feasibility including the need to comply with cultural or biological resources, or applicable environmental

regulations. Phase-two will consist of the submission of a more in-depth project application. Both the feasibility form and the application will be submitted to the MPO/RTPO where the project is located. Each MPO/RTPO will be evaluating and ranking projects in an open meeting based on the specific merits of the individual project using the evaluation criteria specified in the call for projects. The NMDOT is currently in the process of developing the criteria for future use. The criteria will apply statewide regardless of the project's location and will be contained in the call for projects. More guidance related to this process will be forthcoming in a program guide.

Numerous comments were directed towards the need to submit project certifications similar to those required by other NMDOT programs. One comment encouraged greater oversight of a local government's compliance with cultural or biological resources than suggested by the draft rule. Consistent with the intent of the program to limit oversight on the part of the NMDOT, the NMDOT will not require submission of any certifications if the project receives no federal funding. Nevertheless, the NMDOT has a responsibility to the legislature to ensure that the appropriated funds are being used in accordance with applicable laws and regulations. As a result, the phase one feasibility form will be reviewed by the NMDOT's Environmental Bureau to identify whether the project invokes any regulatory issues. If a permit is determined to be necessary, the local government will be obligated to provide the NMDOT with a copy. In addition to providing a copy of any identified permits, the NMDOT has the right to conduct an audit of the local government's compliance with cultural or biological resources, environmental regulations, and other applicable laws and regulations.

Numerous comments were received relating to the requirement that the local government must return an executed grant agreement within 30 days of receiving the notice of award. Concern was expressed regarding the ability of the governing body to pass a resolution within that time-period. The final rule extends that time-period to 60 days. In addition, the final rule does not contain any requirement that the governing body pass a resolution authorizing the execution of the grant agreement. Whether such a resolution is necessary will depend on local requirements. If such a resolution is necessary, the local government is given the option to include a provision in the resolution of sponsorship submitted with the application authorizing the appropriate local governmental official, such as the county or city manager, to execute the grant agreement without the need to obtain later governing body approval if awarded a grant.

Based on comments received, the requirement that the local government submit a resolution indicating the availability of the proposed match appears to be misunderstood. By default, the program provides that the NMDOT will award 95% of the estimated cost of a project as reflected in the project application unless the local government requests a lesser amount. The resolution needs to provide that the local government has budgeted or otherwise made arrangements for its 5% contribution, or if the local government is contributing more than 5% of the estimated costs has budgeted or made arrangement for the increased percentage being contributed.

Several comments were received relating to the disbursement process. The relevant provision in the final rule has been amended to clarify that the grant agreement cannot impose any additional requirements on the disbursement process other than those contained in the final rule. The final rule contains two requirements: (1) submission of a request for the grant funds; and (2) return of a fully executed grant agreement. After their receipt, the NMDOT will disburse 100% of the awarded grant funds to the eligible entity. Other agreements between the NMDOT and a local government may provide for a reimbursement process. A disbursement differs in that it is a one-time payment of the entire grant award while a reimbursement is piece-meal payment process. Each program administered by the NMDOT is subject to its own rules. The disbursement process provided for by this program does not modify the payment process for any other program.

A number of comments raised concerns related to right-of-way ownership or control. To address these concerns, the final rule provides that a governmental entity must possess the project right-of-way either in fee simple or as a perpetual easement. The governmental entity possessing such an interest need not be the applicant but in those circumstances the parties must have an agreement for the use of the right-of-way by the applicant.

A very comprehensive comment was received suggesting numerous substantive changes to the post-project evaluation or audit provisions. After considering the comment, and consistent with the intent of this program, the NMDOT concluded that changes should be made. The intent of this program is to provide a mechanism to distribute state general funds to local governments for use in completing local transportation projects. Projects are to be selected on a competitive basis. Unlike other programs administered by the NMDOT, this program seeks to limit the bureaucratic oversight required by those funding sources. Nevertheless, the NMDOT has a responsibility to the legislature to ensure that the appropriated funds are being used appropriately, responsibly, timely and in accordance with applicable laws and regulations. The primary means for doing so is through the use of program audits. The NMDOT needs the flexibility to conduct whatever audit it deems necessary to make that assessment. Although an audit will likely include recommendations related to its findings, a majority of the audits will be performed after the project has been completed making it difficult for a local government to correct the audit findings. The final rule provides that a local government will have the ability to submit additional documentation prior to an audit becoming final. The final rule also imposes consequences if an audit demonstrates the inability on the part of a local government to properly administer a project. Additional details relating to audits will be contained in the planned future program guide.

Comments were received suggesting the scope of eligible projects be expanded to include all modes of transportation including transit enhancements, safety projects, bike and pedestrian improvements, and others. Legislation enacted during the 2020 legislative session made such a change. Prior to that amendment, those types of projects were not eligible. The final rule has been amended accordingly.

(6) Reasons for Not Accepting Substantive Arguments from Public Comment: A number of comments were directed at the role, responsibility and authority of the State Transportation Commission when awarding grant funding. The State Legislature has delegated to the State Transportation Commission the power to determine all matters of policy for the NMDOT. Unless the language in a future appropriations legislation provides otherwise, this delegation gives the State Transportation Commission the authority to determine who receives the funds, in what amount, and whether all the funds appropriated in a specific fiscal year should be awarded in that particular year. Any attempt to limit the policy authority of the State Transportation Commission through an administrative rule is impermissible. As a result, no changes will be made in response to these comments.

Comment was received requesting explicit language that the use of state price agreements or cooperative agreements would be permitted. Unless the location or nature of the project requires otherwise, the local government is responsible for awarding service or construction contracts using its normal procurement process. A local government will need to make its own determination whether it can use a state price agreement or cooperative agreement. The local government need not use a contractor who may be included in any NMDOT approved list of contractors. The local government must make its own determination of contractor qualification or responsibility using standards applicable to its locally funded projects. Likewise, the scope and extent of inspections, quality assurances, material testing, and other construction phase duties are the responsibility of the local government. The NMDOT will not involve itself in these matters.

Several comments addressed the inability of a local government to use non-cash contributions. As noted above, permitting the use of non-cash contributions, or force account labor, would require much greater oversight on the part of the department to verify and quantify the non-cash contributions. Such oversight is contrary to the intent of the program to be one of limited oversight. As a result, the final rule will not provide that force account labor and equipment costs are eligible for reimbursement.

Comments were received requesting that smaller communities not be held to the same level or degree of compliance with applicable state, local and federal regulations. As a condition of receiving grant funds from the NMDOT the local government agrees to comply with all applicable state, local and federal regulations. Whether the legal obligation is imposed by a state statute or regulation, or a federal law or regulation, compliance is required regardless of the size or location of the community. The NMDOT does not have the authority to excuse compliance. Failure to comply with applicable state, local and federal regulations will subject the local government to the consequences contained in the final rule.

Comment received suggesting the fund should advance certain NMDOT goals and objectives. The purpose of the Fund is to provide money to local governments to address their unmet transportation infrastructure needs not to advance any goals and objectives of the NDMOT.

SUMMARY OF PUBLIC COMMENTS	
	General Comments
	<p>Written comment was received suggesting the fund should advance the New Mexico Climate Strategy as well as advancing the New Mexico Department of Transportation's 2040 Long Range, Multi-Modal Transportation Plan.</p> <p>Written comment requested specific language be added to clarify the fund could be used as the local match on federally funded projects.</p> <p>Written comment received that it is difficult to get funding through the RTPO. RTPO claimed not to understand the process. Appears comments relates to recent funding.</p> <p>Written comment that acronym confusing the Local Government Road Fund.</p> <p>Written comment (also presented orally) praising fund.</p> <p>Written comment received relating to the definition of "District Engineer".</p> <p>Oral comment received suggesting that the adoption of the rule should involve discussions with the NMDOT and the RTPOs.</p> <p>Oral inquiry regarding the statement in the Notice of Proposed Rulemaking that project located entirely within local roadway receive the least amount of Departmental oversight. Questioned whether the statement related to project oversight or paperwork oversight.</p> <p>Written comment (also presented orally) that a specified amount be designated for planning and design projects. Concern expressed that smaller entities do not have the financial ability to produce shovel ready projects.</p> <p>Oral comment made requesting that the process for finalizing a project held to a minimum.</p> <p>Oral inquiry at public hearing relating to the existing rule.</p> <p>Oral inquiry at public hearing asking about project ranking process.</p> <p>Oral comments were received suggesting a training program be developed for local governments and that the department make presentations to the governing bodies.</p>

Comments regarding a specific provision	
18.27.6.7 DEFINITIONS:	
“Public authority” is defined as a Federal, State, county, municipality, village, town, Indian tribe, or other local government or instrumentality with authority to finance, build, operate, or maintain a public roadway.	Written comment received that definition may exclude non-fee-owned property from being included in a project proposal.
“Public highway” means every public street, road, highway or thoroughfare of any kind in this state used by the public whether actually dedicated to the public and accepted by proper authority or otherwise.	Written comment received that the definition of “public highway” could allow privately owned facilities to be eligible recipient of funds.
18.27.6.8 GENERAL GUIDELINES	
A. The department may make grants to local governments for local government transportation projects as funds are appropriated in a manner deemed necessary to effectuate the purposes of the fund.	A number of comments were received suggesting the LGTPF give preference to smaller, rural communities. Suggestions included encouraging funding be distributed in a geographical manner, not based on population centers, funding be specifically allocated between rural and non-rural areas, and that the fund be made a rural set-aside program since MPOs and Tribal entities already have a set-aside program, and that the criteria used to rank projects be weighted to benefit rural communities or based on miles of road the local government is required to maintain versus is road maintenance budget.
B. Eligible projects include environmental and other studies, planning, design, construction and acquisition of rights of way necessary for the development of transportation infrastructure, and includes highways, streets, roadways, bridges, crossing structures, parking facilities, including all areas for vehicular use for travel, ingress, egress and parking.	<p>Written comment received to explicitly include multimodal options.</p> <p>Several oral comments received suggesting a portion of the funding be dedicated for planning and design projects. Stated that earmarking a portion of the funds in this matter would benefit the small entities.</p> <p>Inquiry received at public hearing whether a highway could be broken up into segments.</p> <p>Inquiry received at public hearing whether the phrase “environmental and other studies” limits the scope of a proposed project to environmental studies or other studies such as corridor and feasibility studies eligible.</p>

	<p>Inquiry received at public hearing asking whether the fund is geared towards engineering or construction projects.</p> <p>Oral comment made at public hearing encouraging funding different phases of projects.</p> <p>Written and oral comments received suggesting that the scope of eligible projects be expanded to include all modes of transportation including transit enhancements, safety projects, bike and pedestrian improvements, Intelligent Transportation Systems and Transportation Systems Management improvements.</p> <p>MRMPO submitted comment suggesting the fund consider multi-model projects pointing out that the MRMPO follows federal requirements when reviewing transportation project a process not geared towards reviewing and ranking projects located on local roads. MRMPO stated it is its belief that the fund is biased toward local roadway projects, not multi-modal projects.</p>
<p>C. The department will participate up to 95% of the total cost of a local government transportation project provided that the local government has demonstrated an ability to provide the remainder of the project costs in local funds. Non-cash contributions can be used on a project but will not count towards the required local match. The local government is responsible for any and all expenditures in excess of the grant award.</p>	<p>Several comments were received relating to the inability of a local government to use non-cash contributions especially by small entities.</p> <p>Written comment received that the use of the word “participate” in both subparagraph C and D does not reflect the intent of the enabling statute.</p>
<p>E. In-kind contributions associated with preparing, reviewing, and submitting an application and any required supporting documentation prepared by the local government are not eligible for grant funding participation.</p>	<p>Received oral inquiry at public hearing whether consultant costs incurred in preparing an application are eligible expenses.</p>
<p>F. The department will not perform any detailed technical reviews of project scope, cost budget, project schedule or any other required documentation.</p>	<p>Written comment received regarding the kind of review to be performed by the department. Same comment asked whether the proposals will be evaluated on the basis of federally requirement performance measures.</p>

	<p>Written comment received asking whether the standard would apply to prior LGRF funded or federally funded projects.</p> <p>Written comment received stating that this provision conflicts with another provision relating to the department ability to request information from the local government.</p> <p>Written comment received that a project made need to be phased since some project may not be able to be completed within the 30-month time period. (e.g., planning, design, ROW acquisition, bidding, construction).</p> <p>An oral comments received suggesting the time period be extended to 48 months due to the inability of obtain the necessary due in part to the need to obtain additional funding to complete a project.</p>
<p>H. All grant awarded funds must be spent no later than thirty (30) months from the effective date of the Grant Agreement.</p>	
<p>I. All grants are subject to department audit. The findings of the audit are final.</p>	<p>Written comment received whether the audits will be based on the Local Government Handbook Procedures and a possible conflict with part F.</p> <p>Written comment received inquiring whether the local government would be given a chance to correct the audit findings.</p> <p>Written comment received that the language is too broad and fails to provide any specifics.</p> <p>Written comment received asking whether funding is disbursed or reimbursable that would require local government to upfront the costs.</p>
<p>J. Grants awarded to a local government will be provided for a specific project. Unexpended funds cannot be used for any other purpose or project. Unexpended grant awards will be returned to the department after project completion.</p>	
<p>18.27.6.9 CALL FOR PROJECTS:</p>	
<p>A. The department will invite local governments to submit applications for grants from the fund for local transportation infrastructure projects by a call for projects letter. Any specific criteria applicable to the funding cycle will be</p>	<p>Oral inquiry received whether a program guideline will be developed to assist a RTPO in the determination whether a proposed project qualifies for funding. Oral comment</p>

specified in the letter. Applications for program funds shall conform to the application instructions described in the call for projects. Any procedures, requirements, conditions, restrictions, and limitations applicable to the funding cycle other than those contained in this rule will be specified in the letter.	made suggesting the department develop program guidelines to assist the RTPOs and COGs. Inquiry received at public hearing asking whether the forms currently used by the RTPOs will be required. MRCOG suggested the department develop an application which contains defined criteria for use in reviewing the applications.
B. Completed applications must be submitted to the appropriate MPO or RTPO based on a project's physical location on or before the date specified in the letter. Failure to timely submit the required documentation as required in the call for projects will result in the local government being ineligible for funding in the funding cycle.	Written comment received supporting requirement. Oral comment received criticizing the short time frame for submitting and ranking applications. Oral and written comments received recommending that project applications be submitted to the appropriate NMDOT district or the NMDOT planning bureau. It was strongly recommended that MPO only review projects on the federal aid system. It was pointed out that MPOs do not have programming authority over the LGTFP and does not have data on local roads, which the MPO believes the fund is directed towards.
18.27.6.10 FINANCIAL HARDSHIP:	
A. Local governments eligible for participation in the program may request a waiver of their matching share in whole or in part due to financial hardship. Waiver requests with supporting documentation shall be submitted to the department's division or bureau designated in the call for projects.	Numerous oral comments were submitted requesting that tribes be eligible for the waiver.
B. Waiver of matching funds will not be considered if a local government has an unexpended grant award for an unfinished local government transportation project.	Comment received whether this provision would apply if the local government have grant projects that are "on time, on budget, and in good standing." Written comment received that use of the phrase "matching share" is a mischaracterization.

<p>18.27.6.11 APPLICATION PROCEDURES, REVIEW AND EVALUATION PROCESS:</p>	<p>Oral comment received inquiring about an appeal process if the STC decides not to award a local entity the grant.</p>
<p>A. Any local government interested in applying for a grant award must submit a completed application packet to their MPO or RTPO. A complete application packet must be submitted to the appropriate MPO or RTPO before the application deadline specified in the call for projects.</p>	<p>Suggestion that application be sent to NMDOT, not the RTPO.</p> <p>Written comment made that deadline may not provide sufficient time to obtain approval of the governing body.</p> <p>Oral comments received requesting the application process be extended upwards to 120 days. Suggested the process be streamlined to avoid the necessity of going before the governing board numerous times.</p>
<p>B. Application packages submitted to the MPO/RTPO will be reviewed and ranked by the MPO/RTPO using the criteria developed by the MPO/RTPO.</p>	<p>Written comment received supporting vetting by MPO/RTPO. Encouraged the submittal of “shovel ready” projects.</p> <p>Written and oral comments criticizing the use of the respective MPO/RTPO’s criteria. Pointed out the technical evaluation is objective while the policy review is subjective. Questioned whether other MPO/RTPOs follow same process.</p> <p>Oral comment made at public hearing requesting that the application review meetings be open to the public.</p> <p>Same written and oral comments criticized process as to bureaucratic. Suggested using the LGRF process since done by state employees not representatives of local government who have a vested income in the outcome.</p> <p>Same written and oral comments pointed out that the technical evaluation criteria used by the RTPO in D4 favors shovel ready projects over maintenance or preservation projects. Stated this particular RTPO has modified its evaluation process to make more fair.</p>

	<p>Same written and oral comments suggested that a uniform evaluation process be developed and used by the MPO/RTPOs.</p> <p>Another comment received pointed out that the selection process utilized by a RTPO in prioritizing projects is designed for use in prioritizing federally-funded projects. The LGTPF should use a different process.</p> <p>Written comment received suggesting that all MPOs and RTPO use the same criteria and the criteria be contained in the rule. Noted that the MRCOG simply accepted Project Feasibility Forms but did not rank the projects. Commented went on to request that if the MRCOG is involved in the programming/selection process, it be given the authority to make the final decision. Noted the fact that the MPOs and RTPOs all use different criteria. Commenter inquired whether an appeal process will be provided if a local government's project is rejected any level of review.</p> <p>Oral comment made regarding the use of different criteria by the respective RTPOs and inquiry made whether the criteria used by subsequent reviewers will be provided to the RTPOs.</p> <p>Oral and written comment received noting that the MPO Project Prioritization Process is developed to score and rank projects seeking federal aid. The MPO noted that it has no means, staff or capacity to collect local road data. The MPO noted that its prioritization process is ill-suited for use in prioritization local projects. It was suggested that the NMDOT develop its own ranking process.</p>
<p>C. Each MPO/RTPO will submit its ranked list of projects to the district engineer for the district where the project is located no later than thirty (30) days prior to the start of the fiscal year in which funding is available.</p>	<p>Written comment received that this provision conflicts with the NMDOT Planning Procedures Manual which requires correspondence to be sent to the planning liaison. Asked if intended?</p>

<p>F. Final project selection and funding amounts will be determined by the commission no later than September 1st of that same fiscal year. The commission's decision will be final. At its discretion, the commission may adjust the projects selected in an effort to program funds in a geographically equitable manner or in any other manner. The commission may, in its sole discretion, reject all applications or award grants totaling less than the funds appropriated for the particular fiscal year. The commission may approve subsequent changes to a priority list as it deems necessary.</p>	<p>Written comment received asking what criteria would be used by the STC to reject all applications or award grants totaling less than the funds appropriated for the particular fiscal year.</p> <p>Written comment received asking under what conditions the STC may approve subsequent changes to a priority list as it deems necessary.</p> <p>Oral comment received criticizing the ability of the STC to reject or adjust the priority list presented to it. Requested a limit be placed on the STC's discretion.</p>
<p>G. After projects are selected, the department will send out award letters and grant agreements to the selected local governments. Applicants whose projects were not selected will be notified as well. Each awarded local government must execute a grant agreement with the department. Once a fully executed grant agreement has been received by the department, the local government may then proceed with authorized project activities. If the local government fails to execute and return the grant agreement within thirty (30) days of receiving the notice of award, the project shall be considered lapsed and may be submitted to the commission for re-programming.</p>	<p>Numerous written and oral comments were received relating to the requirement that the local government must return an executed grant agreement within 30 days of receiving the notice of award. One comments asked about the reprogramming of the funds. Suggestion made to allow a request for extension. Several of these comments were submitted by tribes and pueblos. Concern was expressed regarding ability to pass a resolution within that time period. Concern was also expressed that the NMDOT may not expeditiously process the grant agreement. Question raised how the NMDOT will verify receipt of the grant agreement. Question asked how funds will be reprogrammed.</p>
<p>H. Subject to any terms and conditions contained in the grant agreement, the department shall disburse the grant to the local government after receipt of a request for disbursement submitted by the local government to the department and if applicable a fully executed project agreement. The format of the request for disbursement will be determined by the department.</p>	<p>Written request made to clarify what is meant by disbursement and noted possible conflict with existing agreements.</p> <p>Written comment received asking whether the disbursement is the same as a request for reimbursements required by other agreements.</p> <p>Written comment received that requirements for the request for disbursement should be contained in the rule.</p>
<p>18.27.6.12 APPLICATION REQUIREMENTS:</p>	<p>Written comment received inquiring whether a .ftp site will be established to allow for large files.</p>

<p>... Applicants must submit the following documents (as a single PDF) as part of the application process:</p>	
<p>A. Completed Application. The format of the application will be determined by the department</p>	<p>Oral comment received questioning whether the department determining the format of the application conflicts the use of the MPO/RTPO's use of its criteria. Suggested that the MPO/RTPO be able to develop the application format.</p> <p>Oral and written comments received from a MPO pointing out that the process it utilizes apply only to the federal-aid system and projects of regional significance. The MPO would not be able to sufficiently score projects based upon the current application requirements. Much more data and information would be needed.</p>
<p>B. Resolution of Sponsorship from their governing body, indicating the availability of the proposed match. Alternatively, the applicant may submit an official letter signed by the applicant's chief executive or official with budget authority, indicating the availability of the match;</p>	<p>Written and oral comments received that obtaining the resolution could take more than 30 days.</p> <p>Written comments received relating to the requirement that the local government submit a resolution indicating the availability of the proposed match.</p> <p>Same written comment proposed the department engage in discussions with interested parties with the objective of agreeing upon wording that meets the needs of both the department and local governments.</p>
<p>D. If applicable, letters of support from the governmental entity or entities that own the project right-of-way (ROW) if the applying applicant does not own all of the project ROW.</p>	<p>Written comment received that obtaining the letter of support may not be feasible within the 30-day period.</p> <p>Written comment received suggesting the language is unclear.</p>
<p>18.27.6.13 EVALUATION PROCESS: Each MPO/RTPO will be evaluating and ranking projects based on the transportation needs of the local government and the specific merits of the individual projects using evaluation criteria developed by the MPO/RTPO.</p>	<p>Oral and written comments received from a MPO stating that it has no means to rank and evaluate projects that are considered local and not regionally significant.</p>

<p>18.27.6.14 AGREEMENT CONDITIONS, REQUIREMENTS AND PROCEDURES:</p> <p>C. The department shall have the right to monitor the activities of local government as necessary to ensure grant awards are used for authorized purposes in compliance with laws, regulations and the provision of contracts or grant agreements and performance goals are achieved.</p>	<p>Written comment received that this provision conflicts with section 18.27.6.9(F) that the department will not perform any detailed reviews.</p> <p>Written comment received that this provision conflicts with other provision related to projects located entirely on local roads. Requested that the department expressly state that no NMDOT or FHWA issued certifications will be required if no federal funds involved.</p>
<p>18.27.6.15 DESIGN/BIDDING/CONSTRUCTION:</p> <p>B. A local government project that is located in full or in part within a department right-of-way or NHS route, or when the project ties into or crosses a department right-of-way or an NHS route, or when the project may have an effect on existing improvements within department rights-of-way, requires the approval of the department as evidenced by either a letter of approval or letter of authorization from the district engineer for the district where the project is located. The local government shall contact the appropriate district engineer to determine if either is needed for the project. The district engineer will conduct a review of the project and determine whether the project requires a letter of approval or a letter of authorization from the department. If the district engineer determines the project does not require a letter of authorization, the district engineer, or designee, will submit a letter of approval to the local government. If the district engineer determines the project requires a letter of authorization, the local government must enter into a project agreement with the department before any grant funding will be distributed. The local government shall cause the project to be constructed in compliance with any and all department designated standards, conditions and criteria as specified in the project agreement.</p>	<p>Written comment received requesting the rule require the DE to consult with NMDOT Environmental Bureau prior to authorizing a request to locate a project in a department right-of-way or an NHS route.</p> <p>Comment was received that specific language be added to clarify that the fund can be utilized for the local government's match on federally funded projects.</p>
<p>C. For local transportation projects funded entirely by the fund, or in combination with local funds, and no Federal-aid funds are involved, the following apply:</p>	<p>Comment received at public hearing suggesting use of the LGRF handbook in lieu of the proposed rule.</p>

<p>D. All design activities necessary to advance the project to construction will be the responsibility of the local government.</p>	<p>Written comments received that this provision conflicts with 18.27.6.8.B, which provides design projects are eligible for funding.</p>
<p>E. It will be the local government's responsibility to ensure compliance with any and all state, local and federal regulations including the Americans with Disabilities Act (ADA) and laws regarding noise ordinances, air quality, surface water quality, ground water quality, threatened and endangered species, hazardous materials, historic and cultural properties, and cultural resources. The department will not be involved in permit preparation, review, or coordination with the regulatory agencies.</p>	<p>Written comments received to require NMDOT Environmental Bureau oversight of local projects and to require certifications for cultural or biological resources.</p> <p>Written comment received seeking verification that no certifications will be required and asking who determines the necessary level of environmental study.</p> <p>Oral comment received requesting smaller communities not be held to the same level or degree of compliance with applicable state, local and federal regulations.</p>
<p>G. In accordance with Section 67-3-62 NMSA 1978, any transportation infrastructure projects for constructing highways along new alignments or for purposes of substantially widening highways along the existing alignments must consider provisions for pedestrian, bicycle, and equestrian facilities concurrent with the design of the project.</p>	<p>Oral comments received questioning the need for local governments to abide by this requirement.</p>
<p>H. Pursuant to Section 61-23-26 NMSA 1978, all local government transportation infrastructure projects involving engineering requires the engineering to be under the responsible charge of a licensed professional engineer.</p>	<p>Oral comment received suggesting adding "New Mexico" in front of "licensed professional engineer".</p>
<p>I. The local government will be responsible for advertising the project for construction bids and for receiving and publicly opening bids received for the project. The department will have no involvement in the bidding process.</p>	<p>Written comment received requesting explicit language that use of General Services (price agreements?) or CES (Cooperative Educational Services) is permitted.</p> <p>Inquiry received requesting clarification whether the local government has to use the department's approved list of contractors.</p>
<p>L. Department personnel will not conduct periodic assurance inspections or comparison material testing. The department, at its discretion, may perform a final inspection upon project completion.</p>	<p>Inquiry received whether clause means the NMDOT will not require nor conduct any quality control testing.</p>
<p>18.27.6.16 PROJECT EVALUATION:</p>	

<p>B. The following criteria shall be used to determine whether a local government cannot properly administer a project:</p> <p>(1) The local government has a history of unsatisfactory project implementation and completion;</p> <p>(2) The local government fails to keep all books, make all reports, and conform to all rules and regulations adopted by the Local Government Division, Financial Management Bureau of the New Mexico Department of Finance and Administration;</p>	<p>Written comment received that this particular clause is subjective and one-sided. Requested a substantial rewrite and additional provisions.</p> <p>Written comment made regarding conflict with DFA's requirements for capital outlay projects and the NMDOT's requirements for grant agreements.</p>
<p>18.27.6.17 PROJECT DOCUMENTATION:</p> <p>A. The local government shall maintain a complete set of project files for a period of not less than five (5) years following the completion of the project. The project files shall contain all documents that are specified as required by the grant agreement.</p>	<p>Written comment received whether the grant agreement will specify the document retention period.</p>
<p>18.27.6.18 PROJECT MONITORING AND CLOSE OUT:</p> <p>A. The department reserves the right to request the local government to submit progress reports at any time. Reports are due within 30 days of such a request.</p>	<p>Written comment received that this provision conflicts with 18.27.6.8.</p>
<p>B. Within 60 days after the date of completion of the project, the local government must submit a written certification that it has complied with the requirements of this rule and the grant agreement.</p>	<p>Written comment received requesting the time period be extended to 90 days.</p>
<p>C. The department reserves the right to request the local government to submit additional documentation to demonstrate completion of the terms and conditions required by the grant program. It is the responsibility of the local government to comply in full with all such requests and to submit the requested documentation in a timely manner.</p>	<p>Written comment received that this requirement to expansive. Suggested limiting document to show compliance with the grant agreement.</p>