

NHDES Watershed Assistance Section's 319 Grant Subcontracting and Procurement Guidance for Nonprofit Organizations



**Draft Guidance Document
April 2010**

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Introduction

The Federal Water Pollution Control Act, as amended in 1972 and 1987, is collectively known as the Clean Water Act (CWA). The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and, where attainable, to achieve a level of water quality that provides for the protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water. In 1987 Congress amended the act and added section 319 for the purpose of addressing nonpoint source pollution. CWA section 319 established baseline requirements for state and territorial nonpoint source management programs and authorized national funding to support implementation of approved management programs. CWA section 319(h) is the principal authority for EPA funding dedicated to nonpoint source pollution control.

1. General guidance for RFP/RFQ and Construction Bid documents

The New Hampshire Department of Environmental Services (DES) uses section 319 grants to fund local implementation projects. Recipients of these grants are required to meet certain federal requirements because these are federal funds initially awarded by EPA.

Federal requirements are included in Title 40 of the Code of Federal Regulations (CFR), Office of Management and Budget (OMB) Circulars, and EPA guidelines. Depending on the kind of organization receiving funds (state or local agency, nonprofit, university, etc.), different regulations and OMB circulars apply. For a local government, 40 CFR parts 7, 12, 31, 33, 34, 36 and OMB Circulars A-87, A-102, and A-133 apply. 40 CFR 31.22 clearly outlines the OMB circulars for cost principles applicable to grant recipients (contract or subgrant). **For institutions of higher education, hospitals, or nonprofit organizations, 40 CFR parts 7, 12, 30, 33, 34, 36 regulations and OMB Circulars A-110, A-122, A-133 apply.**

In addition to federal requirements, grant recipients must meet certain state-specific requirements that either comply with state rules or are required to facilitate state compliance with federal requirements. All requirements for use of these grant funds apply not only to the grantee, but to all subcontracts and procurements funded with grant dollars, or counted toward the non-federal match requirement of the grant.

This document is intended to be used as guidance for nonprofit organizations when contemplating, developing, or implementing sub-contracts related to 319 grant project work. It contains highlights of specific financial, reporting, and other requirements that apply to recipients of section 319 grant funds, and their subcontractors. **It is not an all encompassing explanation of procurement and subcontracting rules.** Familiarity and/or reference to the relevant federal and state government regulations is recommended. Please contact your DES project manager with questions or concerns.

1.1 Federal Requirements: Title 40 (Protection of the Environment) of the Code of Federal Regulations.

Title 40 of the CFR, including parts 1 through 790, is published in October or November of each year. Only parts 1 through 51 apply to grants. The CFR codifies changes to EPA grant regulations that have been published in the Federal Register in the previous year (July 1 to June 30).

40 CFR parts 30 (Uniform Administrative Requirements) includes some of the **most critical elements to consider when developing a subcontract**. Some of those elements are detailed below – but **it is highly recommended that the grant recipient (“grantee”) proceed to e-CFR from the US Government Printing Office’s [webpage](#) and carefully review [40 CFR Part 30](#)**. Other applicable sections of the CFR are [40 CFR Part 7](#), [40 CFR Part 12](#), [40 CFR Part 33](#), [40 CFR Part 34](#), and [40 CFR Part 36](#).

The following is a summary of some of the key sections of 40 CFR.

1.1.1 40 CFR Part 30: Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.

[40 CFR part 30](#) establishes uniform administrative requirements for federal grants and agreements awarded to institutions of higher education, hospitals, and other nonprofit organizations. Part 30 outlines pre-award policies, post-award requirements, and after-the-award requirements, which are very similar to those covered under 40 CFR part 31 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), described in the following section. Nonprofit organizations that implement federal programs for the states are also subject to state requirements. The full text of part 30 is provided online at: [e-CFR - Title 40--Protection of the Environment, Chapter 1, Part 30](#). (or <http://www.epa.gov/lawsregs/search/40cfr.html>)

- **1.1.1.1 Copyrights.** Paragraph 9.3 of the Standard State Agreement specifies that no data produced under the agreement shall be subject to copyright. Any grantee contemplating a project that would involve copyrights should contact their DES project manager to discuss special contract provisions. As per [40 CFR 30.36](#), if a grantee purchases ownership in copyrighted materials, EPA is entitled to royalty-free use of the copyright.
- **1.1.1.2 Contract provisions ([40 CFR 30.48](#))** The grantee shall include, in addition to provisions that define a sound and complete agreement, the following provisions in all subcontracts.
 - (a) Contracts in excess of the small purchase threshold (currently \$100,000) shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.
 - (b) All contracts in excess of the small purchase threshold (currently \$100,000) shall contain suitable provisions for termination by the recipient, including the manner by which termination

shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,000. For those contracts or subcontracts exceeding \$100,000, EPA may accept the bonding policy and requirements of the recipient, provided EPA has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to [31 CFR part 223](#), “Surety Companies Doing Business with the United States.”

(d) All negotiated subcontracts (except those for less than the small purchase threshold) awarded by grant recipients shall include a provision to the effect that the recipient, EPA, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All subcontracts, including small purchases, awarded by grant recipients shall contain the procurement provisions of the appendix to Circular A-110, as applicable. See OMB Circular A-110 at: <http://www.whitehouse.gov/omb/rewrite/circulars/a110/a110.html>

- **1.1.1.3 Financial Specifications.** Financial requirements for section 319 grant recipients and their subcontractors are categorized by the following topics:

- **Allowable costs.** All costs charged to EPA grants must be eligible, necessary, and reasonable for performing the tasks outlined in the approved project work plan. The costs, including match, must be incurred during the period of performance of the project. The costs also must be allowable, meaning that the costs must conform to specific federal requirements ([40 CFR part 30.27](#); and [OMB Circular A-122](#)). In addition, costs must be well documented.
 - **Financial management.** [40 CFR 30.21](#) require that grantees and subcontractors meet specific standards regarding financial reporting, accounting records, internal control, budget control, allowable cost, source documentation, and cash management.
 - **Matching funds.** Matching funds are the portion of the allowable project costs that the grantee (or third party) contributes to a grant agreement. Grantees are required to document 40% of the total project cost in non-federal matching funds. Matching funds may include the value of volunteer labor, donated services, donated products, or other goods or services that would have otherwise been paid for with grant dollars. One accepted source of volunteer labor value determination is [Independent Sector](#). Professional time may be credited at that professional's normal rate for the service. All matching funds must conform to the same laws, regulations, and grant conditions as the federal funds in the grant (see [40 CFR 30.23](#) and [OMB Circular A-122](#)). Grantees should check with their DES project manager for additional matching fund guidance.
- **1.1.1.4 Debarment and Suspension.** [40 CFR part 30.13](#) states that anyone who has been debarred or suspended by a government agency must be excluded from all federal financial and nonfinancial assistance. By signing and submitting the EPA's Certification Regarding Debarment, Suspension, and Other Responsibility Matters form, applicants certify that they have not been debarred or suspended by a government agency. See Appendix C for a copy of this form.
 - **1.1.1.5 Payment processes.** State-determined payment processes are used to pay grantees. Payment will be made from the State to the grantee as detailed in the Grant Agreement. Payments to the sub-contractor are the sole responsibility of the grantee. Note that payment requests from the 319 grantee to DES may take a month or longer to process through the State accounting system, so grantees and sub-contractors should discuss and agree upon appropriate cash-flow measures.
 - **1.1.1.6 Operation and Maintenance.** Grant recipients are obligated to continue operating and maintaining measures and practices that have been funded with section 319 funds, and are required to develop operation and maintenance plans as part of their Grant Agreements. Grantees must also include in subcontracts a provision that the recipient will also properly operate and maintain practices implemented through a section 319 project when applicable. Please see the DES requirements in the operation and maintenance provision of the grant agreement.
 - **1.1.1.7 Procurement Standards.** Grant recipients may use their own procurement procedures provided that the procedures conform to applicable laws and standards. In the event that the grant recipient does not have an approved formal procurement procedure, State methodologies may be used. Procurements of less than \$1,000 require 3-telephone quotes; procurements ranging from \$1,000 to \$2,000 require 3-written quotes; and procurements exceeding \$2,000 must follow the

federally approved process detailed in 40 CFR 30.40 through 30.47, and the solicitation must be published in a state newspaper for 3-consecutive days. **Solicitations for engineers, architects, surveyors, and consultants must follow the qualifications based selection process as detailed in State Statute 21-I:22 (and subsections ‘a’ through ‘d’ as applicable).** The CFR and Statute detailed information on procedures required for the procurement of materials or services which vary depending on the nature of the project. The text of those sections have not been duplicated here. Please refer to [40 CFR 30.40 through 30.47](#) and [State Statute 21-I:22](#) as applicable. Some notable elements are:

- **Competition.** [40 CFR 30.43](#) requires that all procurement transactions be conducted in a way that provides open and free competition. Purchases for projects must be made on a competitive basis to ensure that fair and reasonable prices are obtained for goods and services. Federal regulations require documentation of cost or price analysis in connection with every procurement action regardless of amount. State requirements also specify that all RFP/RFQ/RFBs exceeding \$2,000 shall be published in a state newspaper for 3 consecutive days.
- **Conflict of Interest.** [40 CFR 30.42](#) requires standards of conduct to avoid conflict of interest. Recipients of federal funds may not participate in the selection, award, or administration of a contract if real or apparent conflict of interest would result.
 - Paragraph 13 of the standard state agreement provides additional detail on state prohibition of conflict of interest which should be adapted for use in subcontracts (See Appendix B – Standard State Grant Agreement Terms).
- **1.1.1.8 Property Management.** Property management and procedures are detailed in [40 CFR part 30.34 through 40 CFR 30.37](#) and [OMB Circular A-122](#). Property (e.g., equipment, supplies) purchased in whole or in part with federal funds should be itemized. Property purchased with these funds may continue to be used for its intended purpose indefinitely. If equipment with a fair market value of less than \$5,000 is sold, there are no further obligations to EPA. If the fair market value of the item exceeds \$5,000, EPA has the right request reimbursement for its share of the item’s value.
- **1.1.1.9 Quality Assurance.** Projects involving watershed surveying, watershed management planning, or implementation of watershed restoration activities may be eligible for coverage under the *New Hampshire Section 319 Nonpoint Source Grant Program Quality Assurance Project Plan* (319 Program QAPP). Projects that involve the collection of environmental data that are not eligible for coverage under the 319 Program QAPP must develop individual project QAPPs in accordance with specific EPA guidelines ([40 CFR 31.45](#)). QAPPs outline the procedures that a monitoring project will use to make sure that samples are collected, data are stored, and reports are written to ensure quality sufficient to meet the needs of the project. Grantees should discuss QAPP requirements with the state as early in the grant process as possible, and subcontracts that involve QAPP related work must specify compliance with QAPP requirements. Specific QAPP guidance for 319 grant projects is available on the DES website at <http://des.nh.gov/organization/divisions/water/wmb/was/qapp/index.htm>.
- **1.1.1.10 Record-Keeping Specifications.** Section 319 grant recipients are required to retain all records pertaining to federally sponsored activities or projects for seven years after the date of submission of the final financial status report or final date of reconciliation of outstanding issues.

The records must be available and accessible to the state or EPA, as requested, for review or audit ([40 CFR 30.53](#)).

- Note that Paragraph 7 of the standard state agreement provides additional detail regarding state records and accounts requirements which should be adapted for use in subcontracts. Of particular note is that the state requires grantees to maintain records for **seven** years though the CFRs specify three years.
- **1.1.1.11 Termination.** [40 CFR 30.61](#) includes provisions for termination. The grantee should refer to the detailed information in [40 CFR 30.61](#) for more information. Also note that Paragraph 12 of the standard state agreement contains requirements for termination (See Appendix B).
- **1.1.1.12 Reporting Specifications.** All section 319 grants are subject to EPA's general grant requirements found in [40 CFR part 30.51](#), which specify various basic grant reporting requirements. Grantees are also encouraged to include provisions in their subcontracts which will assist them in meeting their DES reporting requirements. Please see Exhibit A of your grant agreement or contact your DES project manager for details on reporting requirements. Copies of the DES reporting forms are available on the [DES website](#).

1.1.2 40 CFR Part 7 and Part 12: Nondiscrimination in Program Receiving Federal Assistance from the Environmental Protection Agency.

[40 CFR part 7](#) prohibits discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or gender, and Part 12 prohibits discrimination based on handicap. The regulations outline the following requirements:

- Submission of an assurance with the proposal that the applicant will comply with the federal requirements.
- Maintenance of compliance information during the life of the contract and for three years after completing the project.
- Public notification that the funding recipient does not discriminate on the basis of race, color, national origin, gender, or handicap.

1.1.3 40 CFR Part 33: Participation by Disadvantaged Business Enterprises.

As per 40 CFR Part 33 Subpart C, organizations are required to conduct a competitive bid process for contractor selection making a good faith effort to hire disadvantaged businesses. A list of disadvantaged business enterprises is available on [NHDOT's website](#), the [U.S. Small Business Administration list](#) or contact your DES project manager for assistance. (See Appendix A – DBE Guidance for more information)

1.1.4 40 CFR Part 34: New Restrictions on Lobbying: Interim Final Rule.

Federal restrictions regarding lobbying are provided in [40 CFR 34.100](#) and [OMB Circulars A-87](#) and [A-122](#). Note that 40 CFR part 34 prohibits the use of federal grant funds to influence (or attempt to influence) a federal employee. It also requires the submission of Standard Form LLL ("Disclosure of Lobbying Activities") if nonfederal funds have been used to influence (or attempt to influence) a federal employee. See Appendix D for a copy of this form.

1.1.5 40 CFR Part 36: Drug-Free Workplace.

[40 CFR Part 36](#) requires that as a condition of their grant, grantees must certify that they maintain a **drug-free workplace**. By signing and submitting the proposal, the applicant certifies that he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant.

1.2 State of New Hampshire requirements for 319 Grant Recipients and project subcontracts.

Please note that the 319 grantee is ultimately responsible for the completion of activities as listed in the grant agreement regardless of whether the grantee engages subcontractors to perform some or all of those tasks. Previous successful grantee/subcontractor agreements have been structured to closely parallel the arrangement of payments and activities in the grantee's 319 grant agreement, and clearly delineate the responsibilities and expectations of each party.

Note that all subcontract Request for Proposals, Request for Qualifications, or Request for Bids contemplated as part of a 319 grant project **must be reviewed and approved** by the DES project manager in writing before the grantee issues the request or enters into any sub-agreement as required by the terms of your grant agreement:

Paragraph 15. ASSIGNMENT AND SUBCONTRACTS. The Grantee shall not assign, or otherwise transfer any interest in this Agreement without the prior written consent of the State. None of the Project Work shall be subcontracted or subgranted by the Grantee other than as set forth in Exhibit A without the prior written consent of the State.

Insurance requirements

Grantees must insure that their subcontractors also maintain insurance that meets the requirements as specified in the standard state agreement, and provide documentation to the grantee. Unless special provisions in Exhibit C of the Grant Agreement specify otherwise, the insurance related terms of the standard state agreement are as follows:

Paragraph 17. INSURANCE AND BOND.

17.1 The Grantee shall, at its sole expense, obtain and maintain in force, or shall require any subcontractor, subgrantee or assignee performing Project work to obtain and maintain in force, both for the benefit of the State, the following insurance:

17.1.1 statutory worker's compensation and employees liability insurance for all employees engaged in the performance of the Project, and

17.1.2 comprehensive public liability insurance against all claims of bodily injuries, death or property damage, in amounts not less than \$2,000,000 for bodily injury or death any one incident, and \$500,000 for property damage in any one incident; and

17.2 The policies described in subparagraph 17.1 of this paragraph shall be the standard form employed in the State of New Hampshire, issued by underwriters acceptable to the State, and authorized to do business in the State of New Hampshire. Each policy shall contain a clause prohibiting cancellation or modification of the policy earlier than ten (10) days after written notice has been received by the State.

Use of Materials Produced

Paragraph 9.5 of the Standard State Agreement provides the State rights to royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use for state or

federal government purposes use of all materials produced using grant or match funds, and all sub-agreements should also include such a provision.

2A. RFP/RFQ Documents

The general federal requirements detailed in Section 1 apply to all requests for procurement of goods or services using EPA Section 319 grant funds. The following documents are examples specific to qualifications-based selection of services such as consulting, planning, design and engineering. Examples of construction bid documents are provided in Section 2B.

Examples:

Note that the provided examples are **examples only** and do not necessarily provide all currently required information or components for every specific project or project type. Please refer to the federal guidance for more information and contact DES if you have any questions.

- a. Cobbett's example – See Appendix F
- b. Baker example - See Appendix G
- c. Suncook example – See Appendix H

2B. Additional Requirements for Construction Bid Documents

The general federal requirements detailed in Section 1 apply to all requests for procurement of goods or services using EPA Section 319 grant funds. The following documents are examples specific to cost-based bids to provide construction services. Examples of qualifications based RFPs and RFQs are provided in Section 2A.

Construction specific procurement requirements:

- **Bonding requirements** for construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold (currently \$100,000). Bonding requirements are detailed in [40 CFR 30.48](#).
- **Procurement procedures** Subawardees may use their own procurement procedures provided that the procedures conform to applicable federal laws and standards. Additional procurement procedures are required for construction projects. The CFR contains detailed information on procedures required for the procurement of materials or services. The text of those sections have not been duplicated here. Please **refer to 40 CFR 30.44**.

Examples:

Note that the provided example does not necessarily provide all currently required information or components for every specific project or project type. Please refer to the federal guidance for more information and contact DES if you have any questions.

- d. Cains Pond example – See Appendix I
- e. Small construction project bid example – See Appendix K

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