



# University of Colorado

Boulder | Colorado Springs | Denver | Anschutz Medical Campus

## BOARD OF REGENTS

### 13. BUSINESS AND FINANCE

#### Policy 13.G: Contractual Indemnification of Contractors

##### 13.G.1 Definitions

For purposes of this policy:

- (A) an “indemnification obligation” is any contractual obligation pursuant to which the university agrees to assume the liabilities of any third party (person or entity) or to defend or hold such third party harmless for claims, settlements, judgments or similar liabilities; and
- (B) a “contractor” is any person or entity with whom the university has a written contractual relationship.

##### 13.G.2 Policy

- (A) The president and chancellors are authorized to agree to an indemnification obligation only under the following circumstances:
  - (1) The contract containing the indemnification obligation ~~is for the university's acquisition of essential goods or services and~~, in the opinion of the Office of University Counsel:
    - (a) ~~the contract~~ contains terms ~~that of the contract~~ are non-negotiable for consumers (such contracts are sometimes referred to as contracts of adhesion and ordinarily include “clickwrap” software license agreements); ~~or and~~
    - (b) the indemnification obligation is a contingent liability that is incidental to the contract and is so remote or unlikely that it could not reasonably be reduced to a sum certain.
  - (2) The contract containing the indemnification obligation has sufficiently limited risks which are outweighed by the benefits of the contract as demonstrated by a written ~~is for the university's acquisition of essential goods or services or is a revenue contract and, upon review of a risk analysis performed by the business unit responsible for managing the contract, with advice and endorsement obtained from~~ and recommendation provided by the Office of University Counsel, ~~the president or chancellor~~

42 concludes that the risk to the university that may arise from entering into the  
43 contract are The business unit must demonstrate that it understands the  
44 risks associated with the indemnification obligation and explain how the  
45 risks are sufficiently limited and outweighed by the benefits of the contract  
46 by considering at a minimum, the following factors:-

47  
48 ~~The risk analysis and recommendation provided by the Office of University~~  
49 ~~Counsel should, at a minimum, consider the following factors:~~

- 50  
51 (a) The importance of the contract to the achievement of system or  
52 campus goals or objectives and the impact on the system or campus  
53 if the contract is not executed.  
54  
55 (b) The net value of the contract to the system or campus. For example,  
56 a materials transfer agreement which provides essential research  
57 materials without charge may be more beneficial than a revenue  
58 contract where revenues only slightly exceed costs.  
59  
60 (c) The availability of other contractors who can provide the same goods  
61 or services at similar cost without requiring an indemnification  
62 obligation.  
63  
64 (d) The likelihood that further efforts to negotiate an approach to  
65 contractual allocation of risk that does not require the university to  
66 indemnify the contractor will be successful, and the likelihood that the  
67 university intends to engage in future transactions with such  
68 contractor.  
69  
70 (e) Whether the indemnification obligation is required by state or federal  
71 law as a condition of a contract with, or grant to or from, a  
72 governmental entity, and whether such governmental entity enjoys  
73 immunity from claims or liabilities related to the subject matter of the  
74 contract or grant.  
75  
76 (f) The extent to which the university is able to mitigate the risk posed by  
77 the ~~indemnity-indemnification~~ obligation or to limit any liability arising  
78 from the ~~indemnification indemnity~~ obligation. ~~For example:~~

79  
80 (B) An indemnification obligation is acceptable and does not require president or  
81 chancellor approval when the contract containing the indemnification obligation,  
82 in the opinion of the Office of University Counsel:

- 83  
84 (1) limits the maximum potential liability by, for example: exceeding a finite  
85 amount or limiting the obligation to the university's own acts and omissions  
86 which are covered by the Colorado Governmental Immunity Act;  
87  
88 (2) is reasonably likely to be covered by insurance, bonds, surety instruments,  
89 loss reserves, a risk management fund, or other source of funds; and  
90

(3) is explicitly accepted by the business unit responsible for managing the contract, which understands and accepts the associated risks.

~~(a) An indemnification obligation that requires the university to hold a contractor harmless for claims or liabilities arising from the acts or omissions of university employees is more likely to be acceptable than an indemnification obligation that requires the university to hold a contractor harmless for the acts or omissions of non-university personnel. An indemnification obligation that requires the university to hold a contractor harmless for claims or liabilities arising from the gross negligence or willful or wanton acts of the directors, officers, employees, agents or contractors of such contractor is generally unacceptable.~~

~~(b) An indemnification obligation accompanied by a contractual provision that caps the university's potential liability is more likely to be acceptable than an indemnification obligation where the university's potential liability is unlimited.~~

~~(c) An indemnification obligation accompanied by a contractual provision that requires the indemnified contractor to carry insurance and includes a waiver of insurer subrogation rights is more likely to be acceptable than an indemnification obligation that is not accompanied by such a provision.~~

~~(d) An indemnification obligation that requires the university to hold a contractor harmless for claims or liabilities for violation of intellectual property rights arising from the university's use of contractor intellectual property is more likely to be acceptable than an indemnity obligation that is not limited as to subject matter.~~

~~(e) An indemnification obligation is more likely to be acceptable if the university encumbers funds to pay for any potential liability or if such liability is reasonably likely to be covered by insurance, bonds, surety instruments, loss reserves, a risk management fund, or other source of funds than an indemnification obligation with respect to which there is no identified source of funds to pay for any potential liability.~~

13.G.3 Further Delegation, and Record Keeping ~~and Training~~

The authority delegated to the president and chancellors pursuant to section (A) of paragraph 13.G.2, herein, may be further delegated expressly in writing, provided that all such written delegations shall be maintained by the Secretary of the Board of Regents and reported annually to the Board of Regents.

~~The authority delegated to the president and chancellors pursuant to section (B) of paragraph 13.G.2, herein, may not be further delegated. At the request of the Board of Regents, a complete copy of any agreement entered into by the president or the chancellors pursuant to section 13.G.2(BA) shall be forwarded to the Secretary of the~~

140 Board of Regents and reported ~~annually~~ to the Board of Regents. Information reported  
141 to the Board of Regents related to section 13.G.2(~~BA~~) shall include, to the extent  
142 possible, an estimate of the amount of the total potential liability imposed by any  
143 agreement entered into by the president or chancellor.  
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~~The Office of University Counsel shall develop guidance and training for any individual  
145 exercising this authority.  
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148 **History:**

- 149 • Adopted: January 8, 2016.
- 150 • Revised: ~~N/A~~TBD.
- 151 • Last Reviewed: ~~June 18, 2020~~TBD.
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