



University of Colorado

Boulder | Colorado Springs | Denver | Anschutz Medical Campus

BOARD OF REGENTS

1 **13. BUSINESS AND FINANCE**

2
3 **Policy 13.G: Contractual Indemnification of Contractors**

4
5 **13.G.1 Definitions**

6 For purposes of this policy:

- 7
8
9 (A) an “indemnification obligation” is any contractual obligation pursuant to which the
10 university agrees to assume the liabilities of any third party (person or entity) or to
11 defend or hold such third party harmless for claims, settlements, judgments or
12 similar liabilities; and
13
14 (B) a “contractor” is any person or entity with whom the university has a written
15 contractual relationship.
16

17 **13.G.2 Policy**

18
19 The president and chancellors are authorized to agree to an indemnification obligation
20 only under the following circumstances:

- 21
22 (A) The contract containing the indemnification obligation is for the university’s
23 acquisition of essential goods or services and, in the opinion of the Office of
24 University Counsel:
25
26 (1) the terms of the contract are non-negotiable for consumers (such contracts
27 are sometimes referred to as contracts of adhesion and ordinarily include
28 “clickwrap” software license agreements); or
29
30 (2) the indemnification obligation is a contingent liability that is incidental to the
31 contract and is so remote or unlikely that it could not reasonably be
32 reduced to a sum certain.
33
34 (B) The contract containing the indemnification obligation is for the university’s
35 acquisition of essential goods or services or is a revenue contract and, upon
36 review of a risk analysis and recommendation provided by the Office of University
37 Counsel, the president or chancellor concludes that the risk to the university that
38 may arise from entering into the contract are sufficiently limited and outweighed by
39 the benefits of the contract.
40

41 The risk analysis and recommendation provided by the Office of University
42 Counsel should, at a minimum, consider the following factors:
43

- 44 (1) The importance of the contract to the achievement of system or campus
45 goals or objectives and the impact on the system or campus if the contract
46 is not executed.
47
- 48 (2) The net value of the contract to the system or campus. For example, a
49 materials transfer agreement which provides essential research materials
50 without charge may be more beneficial than a revenue contract where
51 revenues only slightly exceed costs.
52
- 53 (3) The availability of other contractors who can provide the same goods or
54 services at similar cost without requiring an indemnification obligation.
55
- 56 (4) The likelihood that further efforts to negotiate an approach to contractual
57 allocation risk that does not require the university to indemnify the
58 contractor will be successful, and the likelihood that the university intends
59 to engage in future transactions with such contractor.
60
- 61 (5) Whether the indemnification obligation is required by state or federal law
62 as a condition of a contract with, or grant to or from, a governmental entity,
63 and whether such governmental entity enjoys immunity from claims or
64 liabilities related to the subject matter of the contract or grant.
65
- 66 (6) The extent to which the university is able to mitigate the risk posed by the
67 indemnity obligation or to limit any liability arising from the indemnity
68 obligation. For example:
69
- 70 (a) An indemnification obligation that requires the university to hold a
71 contractor harmless for claims or liabilities arising from the acts or
72 omissions of university employees is more likely to be acceptable
73 than an indemnification obligation that requires the university to
74 hold a contractor harmless for the acts or omissions of non-
75 university personnel. An indemnification obligation that requires the
76 university to hold a contractor harmless for claims or liabilities
77 arising from the gross negligence or willful or wanton acts of the
78 directors, officers, employees, agents or contractors of such
79 contractor is generally unacceptable.
80
- 81 (b) An indemnification obligation accompanied by a contractual
82 provision that caps the university's potential liability is more likely to
83 be acceptable than an indemnification obligation where the
84 university's potential liability is unlimited.
85
- 86 (c) An indemnification obligation accompanied by a contractual
87 provision that requires the indemnified contractor to carry insurance
88 and includes a waiver of insurer subrogation rights is more likely to
89 be acceptable than an indemnification obligation that is not
90 accompanied by such a provision.
91
- 92 (d) An indemnification obligation that requires the university to hold a
93 contractor harmless for claims or liabilities for violation of
94 intellectual property rights arising from the university's use of

95 contractor intellectual property is more likely to be acceptable than
96 an indemnity obligation that is not limited as to subject matter.
97

- 98 (e) An indemnification obligation is more likely to be acceptable if the
99 university encumbers funds to pay for any potential liability or if such
100 liability is reasonably likely to be covered by insurance, bonds, surety
101 instruments, loss reserves, a risk management fund, or other source
102 of funds than an indemnification obligation with respect to which
103 there is no identified source of funds to pay for any potential liability.
104

105 **13.G.3 Further Delegation, Record Keeping and Training**

106
107 The authority delegated to the president and chancellors pursuant to section (A) of
108 paragraph 13.G.2, herein, may be further delegated expressly in writing, provided that all
109 such written delegations shall be maintained by the Secretary of the Board of Regents
110 and reported annually to the Board of Regents.
111

112 The authority delegated to the president and chancellors pursuant to section (B) of
113 paragraph 13.G.2, herein, may not be further delegated. A complete copy of any
114 agreement entered into by the president or the chancellors pursuant to section 13.G.2(B)
115 shall be forwarded to the Secretary of the Board of Regents and reported annually to the
116 Board of Regents. Information reported to the Board of Regents related to section
117 13.G.2(B) shall include, to the extent possible, an estimate of the amount of the total
118 potential liability imposed by any agreement entered into by the president or chancellor.
119

120 The Office of University Counsel shall develop guidance and training for any individual
121 exercising this authority.
122

125 **History:**

- 126 • Adopted: January 8, 2016.
- 127 • Revised: N/A.
- 128 • Last Reviewed: January 8, 2016.