

Approved

Stretch Goal or Strategic Initiative: Colorado State University System Goal Two: Financial Sustainability.

MATTER FOR ACTION:

The Board of Governors of the Colorado State University System (Board): Approval of revision to Board policy prohibiting indemnification by the Colorado State University System (System) or its institutions except in certain limited contracts.

RECOMMENDED ACTION:

MOVED, that the Board of Governors of the Colorado State University System, under the authority granted by C.R.S. § 23-5-106, hereby approves the revised Board indemnification policy for the System and its institutions, Colorado State University, Colorado State University-Pueblo and Colorado State University-Global Campus.

FURTHER MOVED, that this Board action shall not otherwise modify or amend prior delegations of authority from the Board to the System and the institution Presidents regarding the authority to approve and execute contracts, agreement and other binding legal instruments.

EXPLANATION: Presented by Michael D. Nosler, General Counsel.

On June 7, 2011, the Governor signed into law HB 11-1301 which, among other things, allows governing boards of state institutions designated as an enterprise pursuant to C.R.S. § 23-5-101.7, to contract to indemnify and hold harmless a contractor. Before so contracting, the governing board must determine that the contract serves a valid public purpose and that any risks to the institution are sufficiently limited and outweighed by the benefits of the contract. Further, any claims or expenses that arise from a contract to indemnify or hold harmless must be payable solely from revenues of the institution and may not be paid from the State of Colorado's risk management fund.

By resolution dated August 10, 2011, the Board adopted a policy prohibiting the System and its institutions from indemnifying any contractor, except in limited circumstances and only if certain procedural safeguards are followed. This policy described the criteria that a contract must satisfy in order to qualify as an approved contract, which was limited to the following types of contracts: (a) license of intellectual property; (b) purchase, lease or license of information technology goods and services; (c) purchase, lease or license of specialized equipment, tools and/or supplies predominantly for research activities; or (d) license to enter upon land or utilize laboratory or other building space

("Contract Type"). The policy also contained a requirement that the indemnification or hold harmless provisions be limited so as to not exceed the greater of (a) the total contract price or sum expressed in the contract that limits such liability; (b) the amount that could be awarded in a civil action under C.R.S. § 24-10-114 [not including subsection (2) of such section], if the underlying claim would be subject to the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101 *et seq.* and such Act provides for a waiver or partial waiver of immunity; or (c) the amount of any special insurance contract or rider, or any special loss reserve or other fund that is identified to the contract at the time of contracting and is specifically reserved for the payment of any such liability under the contract ("Liability Cap"). If a contract that contained an indemnification or hold harmless section did not satisfy the Contract Type or Liability Cap requirements, the contract could only be executed if the Board passed a resolution approving such execution.

In the year since the Board's adoption of the Colorado State University System Indemnification Policy, issues have been identified with respect to the actual implementation of that policy. The Contract Type requirement is too narrow and fails to include common contract types that are very similar to those that are included without any real basis for such differentiation. The Liability Cap language is somewhat unclear and also treats both expenditure and revenue contracts identically when, in fact, the risk analysis as between these two types of agreements can be quite different. Finally, as the Board may only act on contracts at a regularly scheduled and announced meeting, institutions have lost opportunities they might otherwise have and have had to delay entering into agreements which were significant for their ongoing operations until such time as the Board could officially act on them.

In order to address the issues that have been identified over the past year in which the Indemnification Policy has been in-force, the Indemnification Policy has been revised. The new policy expands the list of Contract Types and clarifies the Liability Cap, including allowing for different treatment for revenue contracts verses expenditure contracts. Finally, to address problems caused by the scheduling of Board meetings, the Chancellor has been authorized to approve contracts on behalf of the Board if he or she so chooses.

 X
Approved

Denied

Mary Lou Makepeace
Board Secretary Aug 3, 2012

COLORADO STATE UNIVERSITY SYSTEM

SUBJECT: CONTRACTS

Policy: Colorado State University System Indemnification Policy (REVISED)

Effective:

23-5-106. Authority of governing boards - general - health care insurance - contracts of indemnity. (4) THE GOVERNING BOARD OF A STATE INSTITUTION OF HIGHER EDUCATION THAT IS DESIGNATED AS AN ENTERPRISE PURSUANT TO SECTION 23-5-101.7 MAY CONTRACT TO INDEMNIFY AND HOLD HARMLESS A CONTRACTOR IF THE GOVERNING BOARD DETERMINES THAT THE CONTRACT SERVES A VALID PUBLIC PURPOSE AND ANY RISKS TO THE INSTITUTION THAT MAY ARISE FROM ENTERING INTO THE CONTRACT ARE SUFFICIENTLY LIMITED AND OUTWEIGHED BY THE BENEFITS OF THE CONTRACT. NOTWITHSTANDING ANY OTHER PROVISION OF LAW TO THE CONTRARY, A LIABILITY CLAIM OR EXPENSE THAT ARISES FROM A CONTRACT TO INDEMNIFY OR HOLD HARMLESS ENTERED INTO BY A GOVERNING BOARD PURSUANT TO THIS SUBSECTION (4) SHALL NOT BE PAYABLE FROM THE RISK MANAGEMENT FUND CREATED IN SECTION 24-30-1510, C.R.S., AND SHALL BE PAYABLE SOLELY FROM REVENUES OF THE INSTITUTION.

Board Policy:

Neither the Colorado State University System (System), nor any institution of the System, shall contract to indemnify or hold harmless any other person or party, except as authorized in this policy or otherwise expressly provided by law, without express approval by or on behalf of the Board. This Board policy shall not otherwise modify or amend prior delegations of authority from the Board to the System and the Institution Presidents regarding the authority to approve and execute contracts, agreements and other binding legal instruments.

In accordance with Colorado law, C.R.S. § 23-5-106, the Board authorizes the System and the institutions, Colorado State University, Colorado State University-Pueblo and Colorado State University-Global Campus, to contract to indemnify and hold harmless certain contractors only if the agreement is specifically identified and approved in accordance with this policy and the procedures listed herein for such indemnification have been satisfied. The Chancellor may modify the System Fiscal Rules to be consistent with the directives and approvals contained in this policy.

I. Approved Contracts

The institutions and the System may contract to indemnify and hold harmless a contractor only when the contract meets criteria 1, 2, 3, 4 and 5:

(1) The contract falls into one of the following categories ("Contract Type"):

- a. License of intellectual property;
- b. Lease, license, sale or purchase of information technology goods and services;
- c. Lease, license, sale, purchase or like agreement for specialized equipment, tools, services and/or supplies predominantly for research activities;
- d. License, permit or other similar agreement to enter upon or utilize land or other facilities or space;
- e. Agreement where only the chosen product, equipment, or service will meet the needs of the institution because it is an approved sole source procurement or , after reasonable due diligence, it has specifications that others lack and there has been a determination, after reasonable due diligence, that the product, equipment or service is not reasonably available from another contractor and the indemnification clause is not negotiable; or
- f. Agreement where the party seeking indemnification is the federal government or a state or local government or agency thereof, and the responsible agency or entity has declined a request to remove or nullify the indemnity clause.

(2) The contract is necessary and appropriate to the normal operation of the institution or System;

(3) The contract clause requiring indemnification is considered standard in the industry, or, if no standard exists, is reasonable under the circumstances and is non-negotiable, as determined by the Office of the General Counsel or a designated reviewing attorney for the institution;

(4) The maximum amount of liability to which the institution or the System is agreeing to be exposed under the indemnification or hold harmless clause of the contract does not exceed the following ("Liability Cap"):

- a. Expenditure Agreement: Where the contract is one in which the System and its institutions are expending funds or receiving goods, services or other benefits, the maximum amount of tort or other liability under the indemnification clause of the contract does not exceed \$200,000¹.
- b. Revenue Agreement: Where the contract is one in which the System and its institutions are receiving funds or providing goods, services or other benefits, the maximum amount of tort or other liability under the indemnification clause of the contract does not exceed the greater of \$200,000 or the amount to be received by the System and its institutions under the contract.

(5) The potential liability attributable to the indemnification or hold harmless clause in the contract is reasonably likely to be covered by insurance, bonds, surety instruments, loss reserves, a risk management fund, or other such source of funds.

The Board hereby finds that Approved Contracts serve a valid public purpose and the risks to the System and the institutions are outweighed by the benefits of such contracts, provided that the procedures listed herein for approving such contracts have been followed.

II. Procedure for Approved Contracts

If the System or an institution desires to enter into an Approved Contract, the following procedure will be followed:

- (1) The Office of the General Counsel or designated reviewing attorney shall make a prior written determination that the contract clause requiring indemnification is considered standard in the industry, or, if no standard exists, is reasonable and non-negotiable, and the contract is otherwise consistent with the System Fiscal Rules and this Policy;

¹ Where this valuation is not clear, the CFO of the institution or designee shall reasonably determine the value to assign and the basis for such determination will be noted as part of the approval process of the contract.

- (2) The Risk Manager for the respective institution or the CFO of the System shall make a prior written determination that the potential liability attributable to the indemnification or hold harmless clause in the contract is reasonably likely to be covered by insurance, bonds, Surety instruments, loss reserves, a risk management fund, or other such source of funds; and
- (3) The President of the institution or the CFO of the System shall make a prior written determination that (i) the contract meets the requirements of Part I to be characterized as an Approved Contract, including, where applicable, that the condition of Part I, Section (1) e. has been met, (ii) the contract serves a valid public purpose of the respective institution or System Office, and (iii) any risks arising from the contract are sufficiently limited, reasonable, and warranted under the particular circumstances that they are outweighed by the benefits of the contract.

III. Procedure for Approval of other Contracts

If the System or an institution desires to enter into an agreement that contains an indemnification or hold harmless clause but that does not satisfy the requirements to be an Approved Contract, such agreement may not be entered into without the prior written approval of the Chancellor of the System. In order to authorize execution of the agreement, the Chancellor of the System must make a prior written determination that the contract serves a valid public purpose and that any risks to the institution or System that may arise from entering into the contract are sufficiently limited and outweighed by the benefits of the contract so as to warrant approval on behalf of the Board.

In the event the Chancellor is unwilling to approve any contract within the scope of the Chancellor's approval authority under this policy, the Chancellor may choose to submit the contract to the Board for its consideration at its next regularly scheduled meeting.

History: August 2011, March 2012, August 2012