

# Contract and Grant Manual

## Chapter 21 -- RISK MANAGEMENT (Revision – May 2011)

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## **21-100 INTRODUCTION**

The University of California faces a myriad of risks from its operations and activities and their related exposures. To address these risks, the [Office of the President \(OP\) Office of Risk Services](#) was established in the early 1960s, originally under the Senior Vice President, Business and Finance, now under the [Office of the Chief Financial Officer](#). The Office of Risk Services is responsible for providing uniform administration of the University's Risk Services Program, purchasing insurance, and managing the University's self-insurance programs as well as developing and implementing Enterprise Risk Management to identify risks and controls systemwide, resulting in reduced cost and efficiencies; identifying risk and developing strategies to minimize the impact of risk; costs and improving safety

### *21-110 SCOPE*

This Chapter provides information about the University's Risk Services and policies as they apply primarily to campus and Division of Agriculture and Natural Resources (DANR) contract and grant administration. The Lawrence Berkeley National Laboratory (LBNL) participates only in the University's Workers' Compensation Self-Insurance Program described below in [21-321](#).

The Chapter also describes specific federal and State clauses which are found in award documents for sponsored projects and subrecipient flow-down requirements as well as insurance, bonding, and indemnification requirements for external recipients of University funding. Related information on purchasing is covered in [Chapter 16](#). Medical claims of human subjects is covered in [Chapter 18](#).

## **21-200 UNIVERSITY RISK FINANCING POLICY**

The [University Risk Financing Policy](#) sets forth the parameters for evaluating and insuring University risks and the financial management of such risks.

### *21-210 AUTHORITY AND RESPONSIBILITY*

The University Risk Financing Policy assigns the President authority and responsibility for:

- 1) coordination of the University Risk Financing Program;
- 2) purchase of all property and liability insurance, including selection of sources; and
- 3) administration of all University insurance programs.

The President has delegated this authority to the Chief Financial Officer.

## **21-300 UNIVERSITY INSURANCE COVERAGE**

The University's risk management coverage includes a variety of insurance programs, with various retentions. Coverage may include the University's self-insurance or purchased primary insurance and purchased excess insurance. Because excess insurance and any primary purchased insurance are renewed annually, the retentions, terms and conditions, and exclusions are subject to change. Thus, it is important to review the current coverages for circumstances specific to a sponsored project with the Campus Risk Manager in advance.

Each insurance program is designed to address different University needs. [Business and Finance Bulletin BUS-81, Insurance Programs](#), "provides an overview of the insurance programs managed by the Office Risk Services that extend coverage for University operations and activities and related exposures." As BUS-81 states, it is not intended to be a comprehensive list or a complete guide to the University's insurance coverages.

Campus Risk Manager should be consulted when there are any questions about the coverage available or the need to purchase additional coverage beyond that provided by the University's insurance programs for a specific sponsored project. The cost of additional insurance "required or approved, and maintained, pursuant to the sponsored agreement" is an allowable direct charge. ([2 CFR Part 220, Appendix A. C. 25](#), formerly Office of Management and Budget (OMB) Circular A-21, Cost Principles for Educational Institutions, [Section J.21.a.](#))

#### 21-310 *BUS-81- MAJOR INSURANCE PROGRAMS*

The University's major insurance programs described in BUS-81 are:

- Workers' Compensation Coverage
- General Liability Coverage
- Foreign Liability Coverage
- Employment Practices Liability Coverage
- Professional Medical and Hospital Liability Coverage
- Automobile Coverage
- Property, Fine Arts, Library Materials, and Boiler and Machinery Coverage
- Marine and Aviation Coverage

#### 21-320 *COVERAGE AND COVERED PARTIES AND PROPERTY*

The levels of coverage and the parties and property covered by each of the University insurance programs named above as listed in BUS-81 are further defined by specific Program Managers in the Office of Risk Services or documents provided on the [OP Risk Services homepage](#).

#### 21-321 *Workers' Compensation Coverage*

Workers' Compensation Coverage is a self-insured program is designed to provide coverage to employees for benefits prescribed by the State due to a job related injury resulting from an accident or occupational disease. Management of this program, fiduciary activity, and provision of contracted claims administration are the responsibility of the OP Office of Risk Services. Local program activities and performance are the responsibility of campus, hospital, and the

LBNL Workers' Compensation Managers. Workers' compensation premium is included in the benefit rates direct charged to sponsored agreements.

For employees permanently residing and working out of State, special arrangements must be made for coverage. Arrangements for this coverage must be made through an employee's site Workers' Compensation Manager prior to a University employee commencing work out of State.

#### *21-322 General, Foreign, Employment Practices, and Professional Medical and Hospital Liability Coverages*

General liability self-insurance coverage is specific to:

- (1) bodily injury or property damage caused by an occurrence or accident;
- (2) personal injury, or advertising injury caused by specified offenses;
- (3) liability imposed in the administration of the University's employee benefits program;  
and
- (4) liability in rendering or failing to render consultancy or advisory service, or any other service of a professional nature.

Foreign liability purchased insurance covers University operations outside the United States, such as research projects and University sites and facilities in foreign countries as well as University employees working abroad.

Employment Practices Liability Coverage is specific to liability arising from employment practices, wrongful acts such as wrongful termination, discrimination, harassment, retaliation, or workplace tort.

Professional Medical and Hospital Liability is specific to healthcare employees for liability arising in the course and scope of employment, including claims against healthcare employees related to patient care.

#### *21-323 Automobile Coverage*

Automobile Self-Insurance Coverage includes liability and physical damage when operating a vehicle in the course and scope of University employment. In addition to the automobile coverage described in BUS-81, [G-28, Policy and Regulations Governing Travel](#) and [BUS-74, Business Travel Accident Insurance](#), both described below in [21-334](#), provide additional information regarding the University's insurance coverage for employees traveling on University business.

#### *21-324 Property, Fine Arts, Library Materials, and Boiler and Machinery Coverage*

Property, Fine Arts, Library Materials, and Boiler and Machinery Coverage is for risks of physical loss or damage to real and personal property owned by the University or in which the University has an insurable interest or in the care, custody or control of the University.

The University's property insurance program should be consulted for a current list of perils not covered. It is a policy of The Regents not to purchase earthquake or flood insurance. Therefore, such coverage is generally not purchased for a particular individual sponsored project. The campus Risk Manager must be consulted if a sponsor requires such coverage.

#### 21-325 *Marine and Aviation Coverage*

These two coverages are specific to operation of marine and aviation vehicles owned by the University, in which the University has an insurable interest, in the care, custody or control of the University; for which the University has agreed to insure under written contract prior to a loss; or for which the University is legally liable. These programs are designed to provide coverage for:

- (1) risks of physical loss or damage to University marine or aviation vehicles;
- (2) liabilities arising from the University's marine and aviation operations that result in bodily injury and/or property damage to third party(ies); and
- (3) foreign shipments of University property.

#### 21-330 *OTHER RELATED BUSINESS AND FINANCE BULLETINS*

Guidelines for other University insurance programs not included in BUS-81 are as follows:

##### 21-331 [BUS-23, Insurance Coverage for Students Engaged in Off-Campus Activities](#)

When students travel to participate in off-campus activities sponsored and supervised by the University, they are covered 24 hours a day, worldwide, for a wide variety of accidents and incidents while away from the campus. However, students must register all out-of-state and foreign country travel at [www.uctrips-insurance.org](http://www.uctrips-insurance.org) to ensure coverage for each covered off-campus activity.

##### 21-332 [BUS-39, Loss of or Damage to Property of Individuals](#)

BUS-39 sets forth the University's responsibility for loss of or damage to property of individuals, including employees, faculty, and students.

##### 21-333 [BUS-63, Insurance Requirements/Certificates of Insurance](#)

BUS-63 outlines University insurance requirements and describes assignment of responsibilities within the University Risk Services Program for Certificates of Insurance issued on behalf of or to the University. Certificates of Insurance and BUS-63 as applicable to extramural awards is outlined below in [21-410](#).

##### 21-334 [G-28, Policy and Regulations Governing Travel](#) and [BUS-74, Business Travel Accident Insurance](#)

Insurance requirements and coverage applicable to University employees' travel on University business are discussed in both G-28 and BUS-74. Employees must register all out-of-state and foreign country travel at <http://www.uctrips-insurance.org/> to ensure coverage for each such business trip under the University's business accident insurance described in BUS-74.

#### 21-335 [\*BUS-80, Insurance Programs for Information Technology Systems\*](#)

This Bulletin provides an overview of the insurance programs managed by the Office of Risk Services that extend coverage for Information Technology Systems and related exposures. These include programs for the physical loss or damage to hardware or data and for damages and claims expenses that the University is obligated to pay because of an actual or alleged privacy breach, confidentiality breach, security breach or online media activity.

### **21-400 UNIVERSITY REQUIREMENTS**

The University Risk Financing Policy, the [\*Standing Orders of The Regents\*](#), the Tort Claims Act, and the University's insurance programs are all factors which determine acceptable indemnification and insurance terms and conditions in sponsored agreements. Extramural awards may contain specific requirements for insurance coverage, indemnification, termination, repayment, re-performance, and/or liquidated damages, which could be potential sources of liability for the University. As described below, whenever standard language is not used in these areas, the appropriate campus office should be consulted.

#### 21-410 *STANDARD INSURANCE COVERAGE LANGUAGE AND CERTIFICATES OF INSURANCE*

A Certificate of Insurance is a document that provides evidence that an individual or entity has adequate insurance coverage in force to protect the interests of the University of California and other parties when necessary. A Certificate is issued:

- By the University or by University insurance carriers as evidence of the University's insurance coverage to non-University parties in connection with risk incurred by the University;
- To the University by insurance carriers and/or self-insurance administrators as evidence of non-University party's insurance in connection with risks incurred by independent contractors, consultants, vendors, and other service providers performing any type of work or activity under a service agreement, purchase order, or any other contract entered into by the University; and
- To the University by insurance carriers and/or self-insurance administrators as evidence of non-University party's insurance in connection with risks incurred by external users of University facilities,

As outlined in [\*BUS-63, Insurance Requirements/Certificates of Insurance\*](#), requests for issuance of a certificate of insurance from the University to an external sponsor may be submitted to the campus Risk Manager.

[BUS-63](#) also sets forth the recommended insurance requirements for sub-agreements including indemnification and obtaining certificates from a subcontractor, subrecipient, or consultant. (Also see [BUS-43, Materiel Management, Cost-Reimbursement Type Subagreements for Research, an Informal Guide](#).) Exceptions to the recommended insurance requirements may be developed after consultation with the campus Risk Manager following an appropriate risk identification analysis. Campus Risk Management Office may determine that little or no risk is involved and may lower the requirements. Conversely, campus Risk Management Office may determine that additional risk is present and may raise coverage requirements. Whenever standard insurance language is not provided in an agreement, the campus Risk Manager must be consulted to review and assist with developing acceptable language.

#### *21-420 LIQUIDATED DAMAGES AND REPERFORMANCE EXPOSURES*

Any clause for liquidated damages, repayment, or re-performance is cause for concern and should be negotiated out of an agreement or referred to the Office of General Counsel for review.

The term "liquidated damages" refers to a sum stipulated and agreed upon by the contracting parties at the time the contract is made as being payable as compensation for loss suffered in the event of a breach. They are not damages necessarily based on an actual loss. Liquidated damages are often used in contract breaches for the late delivery of goods or late completion of construction projects. For examples of liquidated damages clauses in federal contracts, see [21-F02](#).

Re-performance exposure for the University arises when a contract requires that the contractor redo work which is unacceptable to the sponsor at the contractor's expense or charges the contractor for the additional costs of having the work done by a new contractor if the contract is terminated for unsatisfactory progress. This includes clauses that require repayment of the sponsor award for work that the sponsor does not find "acceptable."

Both liquidated damages clauses and clauses which create repayment or re-performance exposures are inappropriate in an award to the University because research at the University is conducted on a "reasonable efforts" basis. Specific results are not guaranteed. However, "reasonable efforts" means a vigorous, high quality effort consistent with the University's normal standard of excellence and professionalism. (See [Chapter 2-635, Research Based on Reasonable Efforts](#).) In addition, the University receives no fee or profit on its research. Since payment is generally based on actual costs incurred to perform the research, there is no fund to pay for liquidated damages or re-performance exposure. Thus, such clauses create an unfunded liability for the University.

#### *21-430 INDEMNIFICATION AND THIRD PARTY LIABILITY*

Indemnification means that one party assumes financial responsibility in the event of a specified loss. An indemnification clause transfers the risk of damages or loss from one party to another. The language of an indemnification clause should only hold the University liable for the culpable acts or omissions of its own employees, officers, agents, students, invitees or guests. Culpability includes strict liability, negligence, and gross negligence. Requiring the University to assume

liability for other parties such as subcontractors and consultants that are not under the University's control is considered "third party liability."

[Standing Order 100.4](#) (dd)(9) describes the duties of the President, including the President's ability to contractually indemnify another party. Specifically, 100.4 (dd)(9) requires a resolution of The Regents to solicit, accept, or execute "agreements by which the University assumes liability for conduct of persons other than University officers, agents, employees, students, invitees, and guests..." This Standing Order applies to contracts, pledges, gifts, grants, and "other documents necessary in the exercise of the President's duties..." (Regents' [Standing Order 100.4\(dd\)\(9\)](#).) Proposals and awards which assume third party liability must be submitted to The Regents for approval, subject to the limited redelegation described below. (See [21-610](#); also [Chapter 10-210](#) on Regents' Items.)

Language which improperly attempts to require the University to assume third party liability or to expand the University's liability beyond acts "arising out of the University's performance of the Scope of Work" may be found in various clauses, in addition to the indemnification clause, such as those covering insurance, Workers' Compensation, leasing, intellectual property (patents, copyrights and rights in data), limitation of liability, and equipment. Any clause which discusses liability should be reviewed for this issue.

The language in an indemnification clause must limit the University's liability to culpable acts, most frequently negligent or intentional but may also include strict liability, over which it has control and to the extent that it has control, i.e., its own employees, officers, or agents' acts or omissions, arising out of the University's performance of the scope of work. The payment of attorneys' fees should also be limited. Sample standard indemnification clauses can be obtained from the campus Risk Manager. For exceptions to indemnification language, consult with the appropriate campus office in accordance with campus procedures.

In May 2007, The Regents delegated to the President to authority execute contracts that contain indemnification provisions in (a) material transfer agreements to transfer tangible research product into the University, (b) in research or training or public service agreements with nonprofit or governmental entities, and (c) in land access agreements, all in the furtherance of research, training or public service that might require assumption by the University of third-party liability as a result of or arising out of University acts or University contract performance. Whereas previously such contracts required approval by The Regents, agreements within the qualifying agreements with indemnification language consistent with the delegated authority no longer require Regental approval. The President's authority to enter into these qualifying agreements has been [redelegated to the Provost and Executive Vice President](#) and, subsequently, to the Executive Director, Research Policy Analysis and Coordination (OP RPAC). Acceptance of such clauses in these qualifying agreements may be done in consultation with OP RPAC, the Office of General Counsel or the campus Legal Affairs, and the campus Risk Manager.

#### 21-440 *PARTIAL IMMUNITY FROM TORT LIABILITY*

Tort liability refers to a civil or private wrong based on a legally enforceable obligation. Failure to meet the legal requirement of using a degree of care of an ordinary and prudent person can

result in liability for damages. Under the California Tort Claims Act, the University is partially immune from tort liability. [Division 3.6 of the California Government Code](#) sets forth the conditions under which a public entity such as the University is liable for actions and when it is exempt. For example, it is immune to claims for punitive damages ([Code Section 818](#)). However, a public entity may not be immune from liability when it has a statutory duty to protect against certain kinds of risk and fails to discharge that duty with reasonable diligence ([Code Section 815.6](#)).

#### 21-450 *SPECIAL COVERAGES*

As noted above in [21-300, University Insurance Coverage](#), Contract and Grant Officers must consult with campus Risk Management if a specific sponsored project requires additional coverage beyond that provided by the University's insurance programs. The cost for coverage above the University's Risk Services Program is an allowable charge if it meets the criteria set forth in [2 CFR Part 220, Appendix A, C. 25](#) (formerly OMB Circular A-21, J.21.a.) as stated in 21-300.

#### 21-460 *GENERAL REVIEW OF AGREEMENTS*

Risk Management recommends that sponsored agreements, whether they are for funds into the University or for subawards from the University to another entity, be reviewed in accordance with the following checklist:

- Read the entire award document to identify all language about indemnification. It is not unusual for references to indemnification issues to be located in several places. (For an example, see [21-500](#) below on federal clauses.)
- Does the other party have adequate liability coverage for the type of activity covered under the contract? *Business and Finance Bulletin* [BUS-63, Insurance Requirements/Certificates of Insurance](#), provides guidance on minimum liability requirements or consult with the campus Risk Management Office.
- Are the limits required of the University reasonable and appropriate for the type of activity covered by the award (e.g., are they too high)?
- Does the award need to be modified to show that the University is self-insured? For example, if it just requires an "insurance policy", add "or a program of self-insurance."
- Does the award limit the University's liability to the negligent acts or omission of University officers, agents, employees, students, invitees, and guests as stipulated in The Regents Bylaws and Standing Orders or does it extend Regents' liability to third parties? (See [21-430, Indemnification and Third Party Liability](#), above.)
- If the award requires assumption of liability for property damage, is it covered by the University's property insurance programs? Consult with the campus Risk Manager.

## **21-500 FEDERAL REQUIREMENTS**

Federal requirements for bonding and insurance for contracts, grants, and cooperative agreements are set forth in Federal Acquisition Regulation ([FAR](#)) [Part 28](#) and agency supplements and in [2 CFR Part 215.31](#) (formerly OMB Circular No. A-110), Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations. The FAR also contains indemnification clauses. These requirements are described in more detail in the "External Requirements -- Federal" section at the end of this chapter.

### *21-510 CONTRACT REQUIREMENTS*

FAR Part 28 describes the federal contract bond and insurance requirements. [Subpart 28.3 - Insurance](#) sets forth the general insurance requirements for all government contractors including University research contracts. The National Aeronautics and Space Administration (NASA) has additional insurance requirements in the [NASA FAR Supplement Subpart 1828.3, Insurance](#).

FAR clauses in [FAR Part 52.228](#) related to risk management issues are inserted in the University's federal research and development contracts to cover federal liability and indemnification. The NASA FAR Supplement clauses at [1852.228](#) apply only to specific NASA contracts, which include space station, space shuttle, or expendable launch vehicle activities. These FAR requirements are described in [21-F01](#) in the end of this chapter.

### *21-511 Tort Liability*

The FAR clause on liability to third persons applicable to the University is [52.228-7](#). (See External Requirements--Federal [21-F01](#).) The University is partially immune from tort liability to third persons under the Tort Claims Act as explained above in [21-440](#).

### *21-512 Liability, Indemnification, and Liquidated Damages in Other FAR Clauses*

Other FAR clauses in University research and development contracts address liability and indemnification for patent infringement, defective cost or pricing data, and inspection of research and development and liquidated damages. These clauses described in [21-F02](#) protect the federal government against loss or damages caused by contractor or subcontractor practices in these areas.

### *21-520 FEDERAL GRANT AND OTHER AGREEMENT REQUIREMENTS*

The Federal bonding and insurance requirements for grants and other agreements are in the [2 CFR Part](#) (formerly OMB [Circular No. A-110](#)), [Sections 215.21\(c\)-\(e\)](#) and [215.31](#). The requirements in these sections are described in [21-F03](#).

## **21-600 STATE REQUIREMENTS**

### *21-610 STATE STANDARD CONTRACT AND INTERAGENCY AGREEMENTS*

State of California agencies usually provide an interagency agreement when funding a project with the University. The State [General Terms and Conditions for Interagency Agreements, GIA](#), do not have and do not require insurance or indemnification clauses. However, when a State agency uses a [Standard Contract Agreement Form](#) (versus an interagency agreement) with the University, the agency may insist on attaching the [General Terms and Conditions \(GTC\)](#) with the following indemnification language pre-printed on it:

The Contractor agrees to indemnify, defend and save harmless the State, its officers, agents, and employees from any and all claims and losses accruing or resulting to any and all contractors, subcontractors, suppliers, laborers and any other person, firm or corporation furnishing or supplying work, services, materials or supplies in connection with the performance of this Agreement, and from any and all claims and losses accruing or resulting to any person, firm or corporation who may be injured or damaged by the Contractor in the performance of this Agreement.

As explained above in [21-430](#), without obtaining approval of The Regents, [Standing Order 100.4](#) allows the University to assume liability only for its own "officers, agents, employees, students, invitees, and guests..." As every State General Terms and Conditions (GTC) Exhibit for contracts contains this clause requiring its contractors to assume liability for third parties, that is, those other than their own employees, officers, etc., each State Standard Agreement incorporating this Exhibit would require Regental approval under The Regents' Standing Orders. The Regents, therefore, authorized the President to execute all State Standard Agreements containing this indemnification clause at their February 14, 1975 meeting. The authority to accept these Agreements was been redelegated to [Chancellors](#) and [the Laboratory Director](#) in their Delegation of Authority for Contract and Grant Administration. (See [Chapter 13-710](#) and [13-930](#).)

In addition, however, the University and the State Department of General Services agreed to the use of an indemnity/hold harmless clause which provides mutual indemnification between the two parties in lieu of the above cited clause. This clause may be used in State Standard Agreements in place of the above-cited GTC indemnification clause as well as in interagency agreements (GIAs) if the agency requires an indemnification clause (indemnification clauses are not required or necessary in a GIA), with the following exceptions determined by the State Department of General Services:

- The clause should be used in agreements which are funded by pass-through or subvention funds; and
- Agencies may refuse to use it when the University bids on a contract, competing with private, for-profit corporations.

## 21-620 *INSURANCE*

The State Department of General Services and the OP Office of Risk Services have historically agreed that contracts and agreements between The Regents and the State do not require evidence

of insurance. However, this agreement is subject to the decisions of the current Director of the Department of General Services and can, therefore, change.

## **21-999 RELATED UNIVERSITY REFERENCES**

- [The Regents' Policy 5301](#): University Risk Financing Policy, January 1970; Amended September, 2005.
- [Standing Order of The Regents 100.4\(dd\)\(9\)](#)

### *Business and Finance Bulletins*

- [BUS-23, Insurance Coverage for Students Engaged in Off-Campus Activities](#)
  - [BUS-39 Loss of or Damage to Property of Individuals](#)
  - [BUS-43 Materiel Management](#)
  - [BUS-63 Insurance Requirements/Certificates of Insurance](#)
  - [BUS-74 Business Travel Accident Insurance](#)
  - [BUS-80: Insurance Programs for Information Technology Systems](#)
  - [BUS-81, Insurance Programs](#)
  - [G-28 Policy and Regulations Governing Travel](#)
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## **EXTERNAL REQUIREMENTS--FEDERAL**

**21-F01 Federal Acquisition Regulation (FAR) [Subpart 28.3](#), Insurance; NASA FAR Supplement [Subpart 1828.3](#), Insurance**

### **PURPOSE**

These subparts prescribe the federal contract requirements for insurance and liability.

### **APPLICABILITY**

While the FAR subparts apply to all federal contractors and subcontractors, specific requirements may apply only to certain types of contractors and subcontractors as explained below. The NASA FAR Supplement Subpart applies only to NASA certain contracts, generally to those including space shuttle, space station, or expendable launch vehicle activities.

### **SUMMARY OF PROVISIONS**

FAR Subpart 28.3, Insurance, sets forth the types of insurance federal contractors and subcontractors are required to carry in accordance with the kind of federal contracts they are receiving and the work to be performed. [Subpart 28.311](#) instructs the federal contracting officer to insert in cost-reimbursement contracts the clause at [52.228-7](#) on liability insurance, described below.

The NASA FAR Supplement Subpart 1828.3, Insurance, provides for additional liability requirements for NASA contractors which may be inserted into contracts with the clauses at [1852.228](#) described below.

## **IMPLEMENTING REGULATIONS**

The clause at 52.228-7, Insurance--Liability to Third Persons, sets forth all the types of insurance the contractor must maintain and the extent of Government liability.

The NASA FAR Supplement (NFS) clause at [1852.228-72, Cross-Waiver of Liability for Space Shuttle Services](#), is inserted in contracts over \$100,000 which involve space transportation systems operations including payload activity and ground support. It requires that the parties working on a shuttle launch project agree not to sue each other for damages to their property or employees while working on the project.

Additional NFS clauses at [1852.228-76, Cross-Waiver of Liability for Space Station Activities](#), and [1852.228-78, Cross-Waiver of Liability for NASA Expendable Launch Vehicle \(ELV\) Launches](#), provide the same requirements as 1852.228-72 for the additional named activities.

## **PRIMARY UNIVERSITY RESPONSIBILITY**

Office of Risk Services

## **UNIVERSITY IMPLEMENTATION**

University Risk Financing Program

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## **EXTERNAL REQUIREMENTS--FEDERAL**

### **21-F02 Other FAR Clauses Related to Liability, Indemnification, and Liquidated Damages**

#### **PURPOSE**

The FAR provides clauses addressing the liability of the contractor and subcontractor in other areas where liability is an issue. These include defective cost or pricing data, copyrights and patents, inspection of research and development, and subcontracting plans. The clauses protect the Government against loss or damages caused by the contractor or subcontractor practices in these areas.

#### **APPLICABILITY**

All Federal contractors and subcontractors in accordance with the type of contract, work to be performed, i.e., research, service, construction, etc., and type of contractor.

## SUMMARY OF PROVISIONS

[FAR 15.408](#) instructs the Government contracting officer to insert the contract clauses at [52.215-10](#), [52.215-11](#), [52.215-12](#), and [52.215-13](#) in contracts which require cost or pricing data. These clauses protect the Government from liability for defective cost or pricing data.

[FAR 19.708](#) requires contracting officers to insert the clause at [52.219-16, Liquidated Damages-- Subcontracting Plan](#), in all solicitations and contracts containing the clause at [52.219-9, Small Business Subcontracting Plan](#).

[FAR 27.201-2\(c\)\(1\)](#) prescribes a clause which addresses liability for patent infringement, [52.227-3, Patent Indemnity](#), be inserted in certain Federal contracts and subcontracts.

[FAR 45.107\(a\)](#) instructs the Government contracting officer to insert the clause at [52.245-01](#) which addresses the issue of liability for Government property.

[FAR 46.308 and 46.309](#) prescribe that the clauses at [52.246-8](#) or [52.246-9](#) respectively be inserted in cost-reimbursement contracts for research and development. [52.246-8](#) allows the Government to require the contractor to replace or correct work not meeting contract requirements. Thus, [52.246-9, Inspection of Research and Development \(Short Form\)](#), is the preferred inspection clause for university research contracts.

## IMPLEMENTING REGULATIONS

The clauses at [52.215-10 - Price Reduction for Defective Cost or Pricing Data](#), [52.215-11- Price Reduction for Defective Cost or Pricing Data--Modifications](#), [52.215-12 - Subcontractor Cost or Pricing Data](#), and [52.215-13 - Subcontractor Cost or Pricing Data-Modifications](#), are inserted in contracts when cost or pricing data is required. Under these clauses, the contractor or subcontractor is liable to repay the Government for excess charges due to defective cost or pricing data.

[52.219-16 - Liquidated Damages--Subcontracting Plan](#), carries the risk of a penalty if a contractor willfully or intentionally fails to meet its subcontract plans goals. This clause is acceptable since the risk of any penalty is minimal and would have to be because of the University's intentional failure to act.

[52.227-3 - Patent Indemnity](#), provides language on liability to the Government if the contractor infringes a U.S. patent during performance of the contract. This clause is generally only applicable to the purchase of commercial items. In research contracts, the Government normally grants permission to the contractor to use any U.S. patent in the performance of the contract ([FAR clause 52.227-1, Authorization and Consent](#)).

[52.245-01- Government Property](#), sets forth the contractor's liability for damage or loss of Government property.

52.246-08- Inspection of Research and Development -- Cost-Reimbursement, is inserted in contracts in which the primary objective is a deliverable item. In this clause, the Government may require the contractor to redo unacceptable work and, if the contractor fails to do so, may charge the contractor for any increased costs. Thus, the clause creates an unfunded liability for the contractor. 52.246-09- Inspection of Research and Development (Short Form), should be used instead of 52.246-08 for research and development contracts with the University. If 52.246-08 is used, Alternate I for contracts on a no-fee basis should be substituted.

## **PRIMARY UNIVERSITY RESPONSIBILITY**

The Principal Investigator's (PI) department is responsible for preparing the cost and pricing data. Campus Purchasing Office is responsible for managing any subcontracting plan that may be required under a federal contract. Principal Investigators should use their best efforts to insure that the results of work under a contract do not infringe any U.S. patent.

The campus department is primarily responsible for safeguarding government property, in conjunction with campus equipment management. Finally, the campus Contract and Grant Officer is responsible for assuring that the applicable inspection clause and alternate are used. The PI is responsible for completing the scope of work under the contract and performing to the "reasonable efforts" standard.

## **UNIVERSITY IMPLEMENTATION**

*Contract and Grant Manual* [Chapters 2, 15, 16, and 21](#).

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## **EXTERNAL REQUIREMENTS--FEDERAL**

**21-F03 [2 CFR Part 215](#) (Formerly OMB [Circular A-110](#)), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations -- Bonding and Insurance**

### **PURPOSE**

As this Circular sets forth the administrative requirements for Federal grants and other agreements, it contains the bonding and insurance requirements which apply to these types of awards to higher education institutions.

### **APPLICABILITY**

This Circular applies to grants and other agreements from the Federal Government to higher education institutions, hospitals, and other non-profit organizations.

### **SUMMARY OF PROVISIONS**

[Subpart C - Post-Award Requirements, 215.21](#), Standards for financial management systems, (c), (d), and (e) set forth the bonding requirements. These apply to recipients who borrow money and/or lack sufficient coverage to protect the Government's interest. These requirements do not apply to the University.

Under [Subpart C, 215.31](#), Insurance Coverage, a recipient is required to maintain the same insurance coverage for real property and equipment acquired with Federal funds as is maintained for other property owned by the recipient.

## **LEAD AGENCY**

[Office of Management and Budget](#)

## **IMPLEMENTING REGULATIONS**

Individual agency guidelines

## **PRIMARY UNIVERSITY RESPONSIBILITY**

[Office of Risk Services](#)

## **UNIVERSITY IMPLEMENTATION**

University Risk Financing Program