

007  
Research Administration  
Unit Library  
2199 Addison Street  
Suite 406A, Great Western  
Berkeley, CA 94720

University of California  
Office of the President

University Controller

Research Administration Office

# Memo

## Operating Guidance

No. 90-5

March 27, 1990

VICE CHANCELLORS — BUSINESS AND FINANCE ADMINISTRATION\*  
CONTRACTS AND GRANTS OFFICERS  
OFFICE OF THE PRESIDENT FUNCTIONAL MANAGERS

### CONTRACTS AND GRANTS OFFICERS

Subject: FAR Clause: Liquidated Damages -- Small Business  
Subcontracting Plans [AUG 1989]

Enclosure 1 is a copy of a FAR clause at 52.219-16, titled "Liquidated Damages -- Small Business Subcontracting Plans (AUG 1989)." This clause is to be used in federal contracts that also contain the clause 52.219-9, Small Business and Small Disadvantage Business Subcontracting Plan. The latter is found in contracts over \$500,000 that have subcontracting opportunities.

In essence, the liquidated damages clause subjects the contractor to possible penalties if it can be shown that the contractor failed to make good faith efforts to comply with its subcontracting plans. (Such subcontracting plans generally set goals for the award of a portion of subcontract dollars to small businesses and small disadvantaged businesses. For further information, see Contract and Grant Memo 84-14, Subcontracting Reporting Forms SF 294 and SF 295, dated May 1, 1984.)

The University's Materiel Management office requested an opinion on this clause from General Counsel's office. Enclosure 2 is a copy of a memo from Mary MacDonald to Dave Haskins. On the basis of this memo, we can advise Contract and Grant officers that the FAR clause 52.219-16 is acceptable.

Refer: Bill Sellers  
(415) 642-1638  
ATSS 8-582-1638

Subject Index: 16  
Organization Index: F-005; U-115



David F. Mears  
Director, Research  
Administration Office

Enclosures

cc: Dave Haskins, w/o encls.

**52.219-16 Liquidated Damages—Small Business Subcontracting Plan.**

As prescribed in 19.708(b)(2), insert the following clause:

**LIQUIDATED DAMAGES—SMALL BUSINESS  
SUBCONTRACTING PLAN (AUG 1989)**

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this subpart, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small Business and Small Disadvantaged Business Subcontracting Plan," or willful or intentional action to frustrate the plan.

(b) If, at contract completion, or in the case of a commercial products plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled Small and Small Disadvantaged Business Subcontracting Plans, the Contractor shall pay the Government liquidated damages in an amount stated. The amount of probable damages attributable to the Contractor's failure to comply, shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal or, in the case of a commercial products plan, that portion of the dollar amount allocable to Government contracts by which the Contractor failed to achieve each subcontract goal.

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial products plans; i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in this contract entitled, Small Business and Small Disadvantaged Business Subcontracting Plan, the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial products plan.

(e) The Contractor shall have the right of appeal, under the clause in this contract entitled, Disputes, from any final decision of the Contracting Officer.

(f) Liquidated damages shall be in addition to any other remedies that Government may have.

(End of clause)

OFFICE OF THE GENERAL COUNSEL  
590 UNIVERSITY HALL  
BERKELEY - EXTENSION 2-2822

RECEIVED

Please Refer to  
File No.

MAR 16 1990

March 15, 1990

RESEARCH ADMINISTRATION

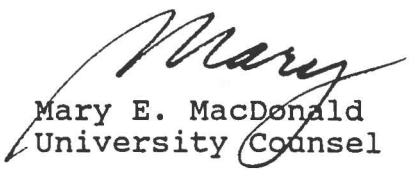
ASSISTANT UNIVERSITY MATERIEL COORDINATOR DAVID J. HASKINS

Re: Federal Acquisition Regulation Re Imposition of Liquidated  
Damages for Failure to Meet Small Business Subcontracting  
Goals

This is in response to your memorandum dated August 29, 1989, requesting an opinion on whether the University would have to present every federal contract to the Board of Regents for approval since provisions of the Federal Acquisition Regulations require a prime contractor to pay liquidated damages upon a finding of a lack of good faith effort to meet its small business subcontracting goals. You expressed concern that this liquidated damages provision would constitute an unfunded liability which could not be accepted without approval by the Board.

In my opinion, the liquidated damages provision does not constitute an "obligation on the part of the University to expenditures or costs for which there is no established fund source." (Standing Order 100.4(dd)(1).) The potential for imposition of liquidated damages would not constitute an "obligation." The liquidated damages are not an automatically assessed monetary obligation, but apply only where the prime contractor (here, the University) fails to make a good faith effort to meet its small business subcontracting goals. If the University did not have a policy of identifying and making a good faith effort to subcontract with small businesses, my advice would be different because the imposition of liquidated damages would be a foregone conclusion. This is, however, not the case, to the best of my knowledge.

Please call if you have additional questions.

  
Mary E. MacDonald  
University Counsel

kl

cc: R. W. Brady

  
R. W. Brady