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Key Terms And Conditions In California Public Contracts

*By Michael R. Rizzo and Mary E. Buxton**

Every California public contract allocates risk between the State and the contractor. Although the substantive work to be performed differs from one procurement to another, the contractual terms governing liability, indemnification, insurance, intellectual property, confidentiality, termination, audit rights, and dispute resolution often determine the parties' legal and financial obligations more than the technical specifications themselves. Accordingly, contractors should carefully review both the solicitation and the State's standard contract provisions before submitting an offer or executing a contract.

This BRIEFING PAPER examines the principal terms and conditions commonly found in California public contracts administered by the Department of General Services (DGS), including provisions governing limitation of liability, warranties, indemnification, insurance, stop-work orders, termination, intellectual property, confidentiality, audit rights, and mandatory flow-down clauses. These provisions collectively establish the State's framework for allocating contractual risk and protecting public resources while ensuring the successful performance of government contracts.

The DGS, Procurement Division, publishes standardized General Provisions that are incorporated into most State procurement contracts. Separate General Provisions are maintained for Non-Information Technology (IT) Goods, IT Cloud Computing Services, and IT Non-Cloud Goods and Services procurements.[1] Because DGS periodically revises these forms to reflect statutory amendments, procurement policy changes, and evolving contracting practices, practitioners should always consult the version incorporated into the applicable solicitation or contract rather than relying upon prior editions. Throughout this PAPER

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these documents are collectively referred to as the General Provisions, with distinctions noted where the three forms differ materially.

Although the General Provisions establish baseline contractual requirements applicable across State procurements, agencies may supplement those provisions through Special Terms and Conditions, Statements of Work, solicitation-specific requirements, Department of Technology policies, or program-specific statutes. Consequently, contractors should review all incorporated documents together rather than considering the General Provisions in isolation.

In recent years, California public contracting has evolved significantly. Privacy regulation has expanded following implementation of the California Privacy Rights Act (CPRA); cybersecurity requirements have assumed greater importance in IT procurements; cloud computing, Software-as-a-Service (SaaS), and digital services have become routine acquisition vehicles; and DGS has continued to revise its mandatory contract language to address emerging legal and operational risks. While the fundamental principles governing public contracting remain unchanged, these developments have materially affected contractual risk allocation and contractor compliance obligations.

Sovereign Immunity

The allocation of contractual risk in California public contracts reflects the longstanding doctrine of sovereign immunity. Unlike private parties, governmental entities may not be sued except to the extent authorized by constitution or statute. Government Code § 815 establishes the statutory basis for public entity tort liability, while § 814 preserves liability based on contract.[2]

Government Code § 815 provides that, except as otherwise provided by statute, a public entity is not liable for injury arising from an act or omission of the public entity or its employees.

Government Code § 814 expressly preserves contractual liability from the effects of Part 2 of Division 3.6 of the Government Code. It also preserves the right to obtain relief other than money or damages against a public entity or public employee. Contract claims remain subject to applicable claim presentation, procedural, and contractual requirements; § 814 does not exempt them from the Government Claims Act as a whole.

The General Provisions therefore serve an important function beyond merely establishing administrative requirements. They represent the State's primary mechanism for allocating contractual risk within the contractual relationship. Provisions addressing limitation of liability, indemnification, insurance, warranties, confidentiality, intellectual property, audit rights, and dispute resolution collectively define the extent to which particular risks remain with the State or are transferred to the contractor.

Limitation Of Liability

Limitation of liability provisions are among the most heavily negotiated terms in California public contracts because they define the maximum financial

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exposure of each contracting party. These provisions allocate risk by restricting the types or amounts of damages recoverable for breach of contract or other legal claims. From the State's perspective, liability provisions protect public funds while ensuring that contractors remain financially accountable for losses attributable to their conduct. From the contractor's perspective, negotiated liability limitations provide predictability by capping potential exposure and excluding categories of damages that may be disproportionate to the value of the contract.

California distinguishes between Non-IT commodities contracts and IT contracts in its treatment of limitation of liability. The distinction reflects the different risks presented by technology procurements, where software failures, cybersecurity incidents, intellectual property disputes, and service interruptions may expose both parties to substantially greater losses than traditional procurements involving commodities.

The Non-IT General Provisions do not establish a comprehensive monetary limitation on the contractor's liability. Instead, they generally provide that the contractor remains liable for personal injury or property damage caused by its fault or negligence during the performance of the contract. Liability is limited only in narrowly defined circumstances, such as where damage results from alterations or attachments made by persons other than the contractor or where normal operation and maintenance of the supplied goods damages such alterations or attachments.[3]

Accordingly, contractors performing Non-IT commodities contracts should recognize that California generally allocates the risk of negligent performance to the contractor rather than through an agreed contractual cap on damages. Unlike many private-sector commercial agreements, California's standard Non-IT procurement terms do not contain a general aggregate dollar cap on the contractor's liability. Any proposed departure requires consideration of the applicable procurement rules and approval requirements.

The IT General Provisions adopt a different approach. Recognizing the unique risks associated with technology procurements, DGS has established a contractual limitation on damages that generally limits the contractor's liability to the applicable Purchase Price, subject to the stated exceptions and any different limitation approved by the authorized DGS or Department of Technology official.[4]

For purposes of this limitation, "Purchase Price" generally means the aggregate contract price.[5] Where a contract contemplates multiple purchase orders, such as a master agreement or multiple-award schedule contract, the limitation ordinarily applies separately to the purchase order giving rise to the claim rather than to the total value of the master contract. This structure prevents relatively small task orders from exposing contractors to unlimited liability while preserving the State's ability to recover meaningful damages for each discrete procurement.

The IT General Provisions similarly limit the State's contractual liability to the applicable Purchase Price while expressly preserving all governmental immunities recognized by statute.[6] The IT General Provisions generally exclude recovery of consequential, incidental, indirect, special, and punitive damages by either party.[7] The exclusion is subject to express contractor liability provisions in the Statement of Work and the exceptions in § 12.2. These exclusions reflect the recognition that technology failures frequently generate business losses that greatly exceed the value of the underlying contract and are often difficult to quantify with reasonable certainty.

The exclusion of consequential damages promotes predictability in pricing and reduces the need for contractors to incorporate substantial contingency costs into their proposals. It likewise protects public agencies from unpredictable damage awards that could substantially exceed appropriated contract funds.

California's IT General Provisions recognize that certain categories of risk should remain outside any contractual limitation of liability. Accordingly, the contractual cap generally does not apply to obligations arising from:

- infringement of patents, copyrights, trade secrets, or other intellectual property rights;
- contractual indemnification obligations relating

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to third-party claims involving bodily injury or damage to tangible property;

- liability for noncompliance with applicable statutes and regulations;
- costs or attorney's fees that the State becomes entitled to recover as a prevailing party; and
- specified direct mitigation, remediation, third-party-claim, and notification costs resulting from a data breach attributable to the contractor's acts or omissions.[8]

These exceptions reflect the State's policy that contractors should remain fully responsible for risks uniquely within their control, particularly those involving ownership of intellectual property or negligent conduct causing injury to third parties.

Warranties And Disclaimer Of Warranties

Warranty provisions define the minimum level of performance that the State is entitled to receive under a public contract. By establishing contractual assurances regarding the quality, functionality, and legal sufficiency of goods and services, warranty provisions allocate responsibility for defective performance and reduce the State's procurement risk. Unlike limitation-of-liability provisions, which restrict available remedies, warranty provisions establish affirmative obligations that contractors must satisfy throughout the applicable warranty period.

California's General Provisions distinguish between warranties applicable to Non-IT commodities contracts and those governing IT procurements. Although both sets of provisions seek to ensure that the State receives conforming goods and services, the IT General Provisions recognize the unique characteristics of software, cloud services, and technology solutions by providing more detailed warranty language and more carefully defined limitations on contractor responsibility.

The Non-IT General Provisions require contractors to warrant that goods furnished under the contract conform to the contract requirements, are merchantable, are fit for their intended purpose, and are free from defects in materials, workmanship, and, where applicable, design.[9] These warranties generally become effective upon the State's acceptance of the goods unless the contract specifies otherwise.[10]

The contractor's design warranty depends upon the source of the design specifications. Where the State provides detailed specifications, the contractor ordinarily is not responsible for design defects inherent in those specifications. Conversely, where the contractor develops or furnishes the design, the contractor remains responsible for ensuring that the resulting product satisfies the contractual requirements, even if the State reviews or approves the contractor's proposed design. State approval of contractor-prepared specifications therefore does not shift responsibility for design adequacy back to the State.[11]

These warranty provisions largely mirror the implied warranties recognized under California's Commercial Code while supplementing those statutory protections through express contractual obligations. As a practical matter, the General Provisions significantly reduce a contractor's ability to disclaim the implied warranties that frequently arise in private commercial transactions.

The IT General Provisions contain substantially more comprehensive warranty obligations. Technology procurements frequently involve software development, systems integration, cloud-hosted services, cybersecurity controls, and ongoing maintenance obligations that cannot be evaluated solely at the time of delivery. Consequently, the IT General Provisions establish warranties addressing not only product quality but also functionality, intellectual property rights, and information security.

Under the IT General Provisions, the contractor warrants that deliverables will substantially conform to the contractual requirements. Services must be performed in a skilled, professional manner by competent personnel and in accordance with the contract.[12] These are distinct warranties, and the applicable form and Statement of Work determine their scope and duration.

The contractor also warrants that deliverables will be free from material defects in materials and work-

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manship and, where the contract includes agreed design specifications, that the delivered solution will provide the material functionality required by those specifications.[13] The applicable software warranty and incorporated specifications should be reviewed separately from any proposed license terms.

The IT General Provisions also define several important limitations on contractor responsibility. For example, contractors generally do not warrant that software will operate without any interruption or be entirely free of immaterial defects.[14] Likewise, contractors ordinarily are not responsible for defects resulting from unauthorized modifications made by the State, operation outside the approved computing environment, or misuse inconsistent with the contract or product documentation.[15]

Where contractors resell third-party hardware or software, the IT General Provisions typically require the contractor to pass through any additional manufacturer warranties available from the original vendor.[16] These pass-through warranties supplement, rather than replace, the contractor's own contractual warranty obligations.

Insurance Requirements

The DGS's General Provisions require contractors performing work on State property, or otherwise exposing the State to operational risk, to maintain insurance appropriate to the nature of the procurement.[17] At a minimum, contractors are generally required to maintain commercial general liability insurance and workers' compensation insurance meeting applicable statutory requirements. Depending upon the scope of work, agencies may require additional forms of insurance, including automobile liability, professional liability (errors and omissions), cyber liability, environmental impairment liability, aviation liability, or other specialized coverages.

Unlike many commercial contracts, California's General Provisions intentionally avoid establishing fixed insurance limits for every procurement. Instead, the procuring agency retains discretion to determine the types and amounts of insurance reasonably necessary to protect the State's interests based upon the risks presented by the particular acquisition. Before performance begins, contractors are ordinarily required to furnish certificates of insurance demonstrating compliance with the contractual insurance requirements. The procuring agency may also require copies of endorsements, declarations pages, or policy language necessary to verify that the required coverage has been obtained.

Many State contracts additionally require the State of California to be named as an additional insured under the contractor's commercial general liability policy.[18] This endorsement generally provides the State with direct protection under the contractor's insurance policy for claims arising from the contractor's operations. Contractors should carefully review the scope of any additional-insured endorsement because policy language varies among insurers and may limit coverage for completed operations or other categories of risk.

Certification Requirements

For IT procurements, agencies must comply with the State Administrative Manual (SAM), the Statewide Information Management Manual (SIMM), Department of Technology policies, and DGS procurement requirements. SAM § 4819.41 and State Contracting Manual (SCM) § 1013 address certification of compliance for IT acquisitions. Current SIMM 71A instructions require the SIMM 71B certification to be signed by the state entity's Chief Information Officer (CIO) or designated management official before commencing work on an acquisition. A new certification is required for each subsequent amendment. For agency-affiliated state entities, Agency Information Officer (AIO) approval is required when acquisition costs exceed the entity's Department of Technology Project Cost Delegation or $1 million, whichever is lower. The approved certification must be submitted to DGS or CDT when required and retained in the procurement file.[19]

A certification is not required for acquisitions below $5,000 under SCM § 1013. Other exclusions and approval requirements must be evaluated under current

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SAM § 4819.41 and SIMM 71A and 71B; an exclusion from IT project approval should not be assumed to establish an exclusion from procurement certification.

Although a certificate of compliance is not required for procurements valued at less than $5,000, departments purchasing any IT goods and/or services must provide documentation and/or written justification as to how the acquisition was authorized. The departments must retain this documentation and/or justification within the procurement file.

Indemnification

Introduction To Indemnification

The concept of indemnity is for one party to compensate the other party to a contract for certain types of losses relating to the performance of that contract that such other party may suffer. Under its standard procurement provisions, California generally requires contractors to provide indemnification to the State for injury to persons or damage to property.

Indemnification Of The State By The Contractor

The General Provisions contain several indemnification requirements. First, the contractor must indemnify the State against any liability caused by the contractor's violation of law or regulation. The Non-IT General Provisions state:

> COMPLIANCE WITH STATUTES AND REGULATIONS:
>
> (a) Contractor warrants and certifies that in the performance of this Contract, it will comply with all applicable statutes, rules, regulations and orders of the United States and the State of California and agrees to indemnify the State against any loss, cost, damage or liability by reason of Contractor's violation of this provision.[20]

Second, the contractor is required to indemnify the State for any liability caused by the contractor's lack of authority to enter into a contract and perform contractual duties. The Non-IT General Provisions include the following clause:

> CONTRACTOR'S POWER AND AUTHORITY: The Contractor warrants that it has full power and authority to grant the rights herein granted and will hold the State harmless from and against any loss, cost, liability, and expense (including reasonable attorney fees) arising out of any breach of this warranty. Further, Contractor avers that it will not enter into any arrangement with any third party which might abridge any rights of the State under this Contract.[21]

In addition, Non-IT goods contractors must agree to the following indemnification requirement that covers injury to persons or damage to property:

> INDEMNIFICATION:
>
> 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 Contract, and from any and all claims and losses accruing or resulting to any person, firm or corporation which may be injured or damaged by Contractor in the performance of this Contract.[22]

Indemnification By The Government

California generally does not offer reciprocal indemnification under its standard procurement terms, but statutory exceptions must be considered. For example, Public Resources Code § 4476(e)(1) addresses prescribed burning agreements with the California Department of Forestry and Fire Protection (CAL FIRE). If the department elects not to purchase the specified insurance, the agreement must provide for indemnification and hold-harmless protection, a maximum dollar amount of departmental liability, or a proportionate allocation of liability. The statute does not guarantee that a landowner will avoid every financial or property loss.[23]

Stop Work

Stop Work, Generally

Generally, the State will issue a stop work order when it wishes the contractor to cease performance on a contract. Reasons for a stop work order include a contractor's violation of contractual duties or state law or a dispute between the contractor and the government. The contractor must understand the stop work process and its responsibilities in responding to a stop work order.

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The General Provisions contain a stop work clause that allows the State, at any time, to order a contractor to stop all, or any part, of the work called for by a contract.[24] This clause gives the State the unilateral right to issue to a contractor an order to stop performance on all or any part of a contract for a period up to 60 days, with any further period subject to agreement.[25] Once the contractor receives a stop work order, it must immediately comply and must take reasonable steps during the period of the work stoppage to reduce the incurrence of costs attributable to the stopped work.[26] The State must either cancel the stop work order or terminate the work covered by the stop work order within 45 days after delivery of the order or an agreed extension of that decision period.[27] Once the stop work order is canceled or the period of the work stoppage expires, the contractor must resume work as stated in the contract.[28]

Loss Of Profits

The State is not liable to a contractor for loss of profits resulting from a stop work order.[29] However, if the stop work order is canceled or the period of the stop work order expires, the State must make an equitable adjustment to the contract price, or the delivery schedule, or both, and it must modify the contract accordingly if (a) the stop work order increased the time or contractor's cost for performance of any part of the contract, and (b) the contractor asserts its right to an equitable adjustment within 60 days after the period of work stoppage ends; the State may consider a later proposal before final payment if it determines that the facts justify doing so.[30] Moreover, if the stop work order is not canceled, but instead, the work described in the stop work order is terminated for convenience, the State must compensate the contractor for reasonable costs that result from the stop work order in determining the termination settlement.[31]

Termination

Termination, Generally

Through inclusion of the relevant contract terms and conditions found in the General Provisions, California reserves the right to terminate a contract for three reasons: (1) the State's own convenience; (2) default by the contractor; and (3) nonappropriation of funds by the state legislature. In a termination for convenience situation, the contractor is not terminated for cause or for any violation of its contractual obligations. Instead, as discussed below, the State may terminate a contract based solely on its own interest. Termination for default, on the other hand, is the State's exercise of its contractual right to terminate the contract because of the contractor's failure to comply with the contract's terms.

Termination For Convenience

California's General Provisions reserve a contractual right to terminate for the State's convenience, a mechanism also used in federal and other public contracting. This clause permits the State to terminate a contract in whole or in part if such termination is in the State's interest.[32] To effect such a termination, the State must deliver a termination notice to the contractor specifying the effective date and extent of the termination.[33] After receiving a termination notice, the contractor must (1) stop work as specified in the termination notice; (2) not place any further subcontracts for materials, services, or facilities, except as necessary to complete the continued portion of the contract work; (3) terminate all subcontracts to the extent they relate to the work terminated; and (4) settle all outstanding liabilities and settlement proposals arising from the termination of subcontracts.[34]

The IT General Provisions and Non-IT General Provisions differ in how they resolve a situation in which the State and the contractor are unable to agree on termination costs. Under the Non-Cloud IT General Provisions, unless otherwise specified in the Statement of Work, the State will pay the following amounts, subject to the full-performance payment ceiling: (1) the contract price for deliverables accepted, utilized, or retained by the State and not paid for; and (2) the total of (a) the reasonable costs incurred in the performance of the terminated work to date, (b) the reasonable cost of settling and paying termination settlement proposals under terminated subcontracts chargeable to the terminated portion of the contract, and (c) other costs reasonably incurred by the contractor in winding

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down and terminating the work.[35] The Non-IT General Provisions do not contain similar language. Rather, they provide that the terminated portion of the contract is deemed to remain in effect until the termination settlement, if any, is concluded.[36] Therefore, the State and the contractor are free to negotiate the terms of the termination settlement under Non-IT commodities contracts.

Termination For Default

The State may terminate a contract for default if the contractor fails to perform according to the terms and conditions of the contract or fails to perform with such diligence as will ensure the project's completion within the time specified by the contract.[37] Examples of default termination grounds include a contractor's failure to make progress or failure to comply with *any* contract provision. The cure requirements differ by form. Non-IT General Provisions § 11.3(b) expressly addresses failures to make progress or perform other contract provisions; it does not impose the same express cure requirement for late delivery. Non-Cloud IT General Provisions § 16.3 requires a material breach and failure to cure within the stated period, ordinarily at least 15 days unless the Statement of Work specifies otherwise.[38] Moreover, a contractor cannot be terminated for default based on causes beyond its control and without its fault or negligence, such as acts of God, acts of the public enemy, or acts by the state or federal government in either their sovereign or contractual capacities.[39] A contractor terminated for default may be liable for excess reprocurement costs and other recoverable losses, subject to the applicable contract provisions, including the IT limitation-of-liability clause.[40] A contractor reserves the right to challenge a default termination decision through the disputes process.[41] An improper termination for default will then be converted to a termination for convenience.[42]

Termination For Nonappropriation Of Funds

The State may also terminate a contract for nonappropriation of funds by the state legislature.[43] The continuation of a contract that extends into fiscal years beyond that in which it is approved by the legislature is contingent upon the appropriation of funds for such purpose by the legislature.[44] When the legislature does not appropriate funds to effect such continuation, a contractor must (1) take back any affected goods or deliverables furnished under the contract; (2) terminate any services supplied to the State under the contract; and (3) relieve the State of any further obligation.[45] The State is obligated to return and pay for the packing, crating, and transportation of all goods or deliverables to the contractor.[46]

Intellectual Property

Intellectual Property Program

Intangible assets that are subject to statutory protection under patent, copyright, and trademark law are considered intellectual property. DGS created an Intellectual Property Program applicable to state-owned intellectual property[47] that includes four components: (1) an Intellectual Property Database to track state-owned intellectual property; (2) Intellectual Property Management Plans for state agencies; (3) an Intellectual Property Outreach Campaign for state agencies; (4) guidance for state agencies regarding contractual provisions regarding intellectual property.[48]

As part of the fourth component, each agency or department may require a contractor to represent that it is the owner or authorized user of any third-party intellectual property used in a project, to warrant that it has the legal right to use third-party intellectual property connected with a project, and to grant the State of California a fully-paid license to use third-party intellectual property arising from or included in a project.

Third-Party Intellectual Property Liability

Intellectual property infringement can arise in connection with various types of intellectual property, including trade secrets, trademarks, copyrights, patents, and derivatives of such. Patents, trademarks, and copyrights can be disclosed without losing their protected nature; trade secrets depend on maintaining secrecy, although disclosure subject to enforceable confidentiality protections does not necessarily destroy that status.

California Commercial Code § 2312(3) provides an

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infringement warranty in sales of goods, unless otherwise agreed, where the seller is a merchant regularly dealing in goods of the kind. It should not be described as a universal warranty for all service contracts. Specifically, under California law:

> Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like, but a buyer who furnishes specifications to the seller must hold the seller harmless against such claim which arises out of compliance with specifications.[49]

In addition to this statutory provision, the State obtains greater protection through mandatory model contract terms issued by the DGS. The IT General Provisions include a warranty against infringement, requiring the contractor to warrant "that Deliverables . . . will not infringe or violate any U.S. Intellectual Property Rights."[50] The IT General Provisions also state that in a case of infringement, there is no limit on the contractor's liability for infringement of third-party intellectual property rights.[51]

Both the Non-IT General Provisions and the IT General Provisions include intellectual property indemnification provisions.[52]

The Non-IT General Provisions contain specific patent, copyright, and trade-secret indemnity provisions. Section 7.2 expressly addresses several combination, software-use, and State-modification exclusions.[53] The applicable form and exclusions should be examined before determining whether a particular infringement or trade-secret claim is covered.

The indemnity also sets forth requirements for the contractor to remedy the infringement and includes a defense obligation. Contractors can remedy infringement by (1) obtaining for the State, at their own expense, the right to continue using the infringing item; (2) modifying the item to cure the infringement; or (3) taking back the item and finding a substitute. The General Provisions contain the following language:

> Should the Goods or software, or the operation thereof, become, or in the Contractor's opinion are likely to become, the subject of a claim of infringement of a United States patent or copyright or a trade secret, the State shall permit the Contractor at its option and expense either to procure for the State the right to continue using the Goods or software, or to replace or modify the same so they become non-infringing. If none of these options can reasonably be taken, or if the use of such Goods or software by the State shall be prevented by injunction, the Contractor agrees to take back such Goods or software and make every reasonable effort to assist the State in procuring substitute Goods or software. If, in the sole opinion of the State, the return of the infringing Goods or software makes the retention of other Goods or software acquired from the Contractor under this Contract impractical, the State shall then have the option of terminating such Contracts, or applicable portions thereof, without penalty or termination charge.[54]

The IT General Provisions address IP indemnity and remedies in § 11.1. Their conditions and remedies should be analyzed under that section rather than assumed to be identical to the Non-IT clause.

Grant Of Intellectual Property Rights

Federal procurement law distinguishes patent ownership from rights in technical data and computer software. Federal Acquisition Regulation (FAR) 52.227-14 generally grants the Government unlimited rights in data first produced under the contract, subject to the clause's exceptions and applicable alternates.[55] FAR 52.227-11 permits a contractor to elect to retain title to subject inventions, subject to disclosure, election, and other conditions; the Government retains a paid-up license and specified additional rights, including march-in rights. Rights in privately developed data or software require separate analysis under the applicable clauses and licenses.[56]

California's IT General Provisions address work-product ownership, government purpose rights, and license grants separately. Unless the Statement of Work or federal funding requirements provide otherwise, the contractor owns Work Product under § 9.1.1. The State receives Government Purpose Rights under § 9.2. Unless otherwise specified in the Statement of Work or required for federally funded projects, Work Product originated or prepared by the contractor under the contract is the contractor's exclusive property. Inde-

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pendently developed or obtained pre-existing materials are addressed separately and are not Work Product.[57] The State receives unlimited, irrevocable, worldwide, perpetual, royalty-free, non-exclusive rights to use, modify, reproduce, perform, release, display, create derivative works from, and disclose Work Product for State government purposes. These rights include authorizing outside recipients to use Work Product for such purposes, but do not authorize commercial use.[58]

The current IT clause grants Government Purpose Rights to Work Product; the earlier wording limiting that grant to Work Product delivered as a deliverable should not be used to describe the current clause. Pre-existing materials and other software licenses require separate consideration. The Non-IT goods form does not contain the same general work-product ownership and government purpose rights provisions.[59]

Rights In Documentation, Data, And Computer Software

Rights in documentation, data, and computer software under the IT General Provisions must be evaluated under § 4 (License Grants), § 9 (Rights in Work Product and Government Purpose Rights), § 10 (Confidentiality; Data Rights), and the applicable Statement of Work. Work-product ownership does not alone determine the license to pre-existing software, and the State's data rights must be distinguished from the contractor's rights in its own materials.[60]

Confidentiality Of Data

The Non-IT General Provisions contain the following confidentiality language:

> All financial, statistical, personal, technical and other data and information relating to the State's operation which are designated confidential by the State and made available to the Contractor in order to carry out this Contract, or which become available to the Contractor in carrying out this Contract, shall be protected by the Contractor from unauthorized use and disclosure through the observance of the same or more effective procedural requirements as are applicable to the State. The identification of all such confidential data and information as well as the State's procedural requirements for protection of such data and information from unauthorized use and disclosure shall be provided by the State in writing to the Contractor.[61]

IT confidentiality and data rights are separately addressed in § 10 of the applicable IT General Provisions and supplemented by § 21 data protection requirements.[62]

Examination And Audit

Personal Information

Government contractor status alone does not determine whether the California Consumer Privacy Act of 2018 (CCPA), as amended by the California Privacy Rights Act (CPRA), applies. Coverage depends on the statutory definitions, the entity's activities, and the processing at issue. A government contractor should evaluate whether it is a covered business or has obligations in another defined role; the CCPA term "contractor" is not synonymous with every government contractor. Government agencies generally are not covered businesses.[63]

The CCPA governs "personal information," a term broader than information that directly identifies a person. The definition includes information identifying, relating to, describing, reasonably capable of association with, or reasonably linkable, directly or indirectly, to a particular consumer or household. Covered categories include identifiers, commercial information, biometric information, internet activity, geolocation, sensory information, professional or employment information, education information, and specified inferences, subject to statutory qualifications.[64]

Covered businesses must provide required notices and honor applicable consumer rights, including rights concerning access, deletion, correction, sale or sharing, and specified uses of sensitive personal information. Service-provider and contractor obligations depend on their defined roles and applicable agreements.[65] Publicly available information, lawfully obtained truthful information of public concern, and qualifying deidentified or aggregate consumer information are excluded from personal information as specified in Civil Code § 1798.140(v)(2)–(3).[66]

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Examination And Audit Of Records In General

Contracts with the State of California include an examination and audit of records provision that allows the State to review and examine documents relating to the performance of the contract for at least three years after final payment. The State may negotiate a longer audit period with the contractor. Below is the Non-IT General Provision's examination and audit provision:

> EXAMINATION AND AUDIT: Contractor agrees that the State, or its designated representative, shall have the right to review and copy any records and supporting documentation pertaining to performance of this Contract. Contractor agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. Contractor agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees or others who might reasonably have information related to such records. Further, Contractor agrees to include a similar right of the State to audit records and interview staff in any subcontract related to performance of this Contract.[67]

IT General Provisions § 15.5 separately addresses records directly pertaining to performance and reasonable advance written audit notice.[68]

Non-Discrimination Clause

This clause prohibits contractors from unlawful discrimination or harassment during the course of the contract.[69] The Non-IT General Provisions clause includes the following enumerated categories. This quotation should not be treated as an exhaustive statement of all protections under current employment discrimination law:

> During the performance of this Contract, Contractor and its subcontractors shall not unlawfully discriminate, harass or allow harassment, against any employee or applicant for employment because of sex, sexual orientation, race, color, ancestry, religious creed, national origin, disability (including HIV and AIDS), medical condition (cancer), age, marital status, and denial of family care leave.[70]

This clause must be flowed down to subcontractors.[71]

Mandatory Flow-Down Clauses Generally

Of the clauses listed above, the Audit of Records and Non-Discrimination clauses are most frequently required to be flowed down to subcontractors in California public contracts. A mandatory flow-down clause is a contract clause in the prime contract that requires the prime to insert the substance of the clause into a subcontract. A discretionary flow-down clause is one that the prime has discretion whether to include in the subcontract but is not required to.

Often when a mandatory flow-down clause appears in a subcontract, it will be the same clause that is in the prime contract, but the prime contractor will stand in the shoes of the government, and the subcontractor will stand in the shoes of the prime contractor. Below is a sample from the Non-IT General Provisions, which informs the prime contractor it must flow down the clause to its subcontractors:

> [The] Contractor and subcontractors shall ensure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment . . . . The Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the Contract.[72]

Guidelines

These *Guidelines* are intended to help you understand the key terms and conditions in California public contracts. They are not, however, a substitute for professional representation in any specific situation.

1. Check the current version of every document that is incorporated. DGS revises its General Provisions from time to time, so always consult the version actually incorporated into the solicitation or contract you are dealing with, not an earlier edition. Agencies can also add their own requirements through Special Terms and Conditions, Statements of Work, Department of Technology policies, or program-specific statutes. Read all of these documents together rather than looking at the General Provisions on their own.

2. Do not count on disclaiming implied warranties. The General Provisions largely track the implied war-

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ranties under the Commercial Code and sharply limit a contractor's ability to disclaim them. If you prepare the design, you stay responsible for it even if the State reviews or approves it. IT contractors do not warrant error-free software. They also are not responsible for unauthorized modifications by the State, use outside the specified environment, or misuse.

3. Expect to indemnify the State, not the reverse. The State generally gives contractors no indemnification. Instead, it requires contractors to indemnify the State for violations of law, lack of authority, and injury to persons or damage to property. Under the IT indemnity, the contractor controls the defense, but the State may join cases that raise public law issues or could set a precedent, and it must approve any settlement.

4. Plan for termination for convenience from the start. The State can terminate in whole or in part whenever it is in the State's interest. You must then stop work, place no new subcontracts, terminate the affected subcontracts, and settle outstanding liabilities. Keep cost records that will support a settlement. The IT General Provisions spell out how termination costs are recovered, while Non-IT terms leave the settlement to negotiation.

5. Use your defenses to a default termination. The State must give you an opportunity to cure before terminating for default. You cannot be terminated for causes beyond your control, and you can challenge the termination through the disputes process. An improper default termination is converted to a termination for convenience.

6. Build audit, privacy, and flow-down compliance into your operations. Keep records for at least three years after final payment and allow auditors access and employee interviews. If you collect personal information while performing the contract, comply with the CCPA and the CPRA. Flow the audit and nondiscrimination clauses down into every subcontract.

ENDNOTES:

[1]The current General Provisions forms are DGS PD 401-NITGP (Non-IT General Provisions, Goods, Rev. 02/20/2025) (Non-IT General Provisions); DGS PD 402-ITGP (IT General Provisions, Cloud Computing Services, Rev. 02/20/2025) (Cloud IT General Provisions); and DGS PD 403-ITGP (IT General Provisions, Non-Cloud Goods & Services, Rev. 02/20/2025) (Non-Cloud IT General Provisions). References to IT General Provisions encompass both IT forms unless otherwise indicated; form-specific citations identify Cloud or Non-Cloud. See DGS, Required Language for Solicitations and Contracts, https://www.dgs.ca.gov/PD/Resources/Page-Content/Procurement-Division-Resources-List-Folder/Required-Language-for-Solicitations-and-Contracts. The version incorporated into the applicable contract controls.

[2]Cal. Gov. Code §§ 814–815; see Colome v. State Athletic Comm'n, 47 Cal. App. 4th 1444 (1996) (addressing statutory duties and tort immunities, rather than a general contractual waiver).

[3]See Non-IT General Provisions § 9.3(b): "Contractor shall not be liable for damages arising out of or caused by an alteration or an attachment not made or installed by the Contractor, or for damage to alterations or attachments that may result from the normal operation and maintenance of the Goods provided by the Contractor during the Contract."

[4]See IT General Provisions § 12.1 (Limitation of Liability): "Contractor's liability for damages to the State for any cause whatsoever, and regardless of the form of action, whether in Contract or tort, shall be limited to the Purchase Price."

[5]See IT General Provisions § 12.1: " 'Purchase Price' means the aggregate Contract price; except that, with respect to a Contract under which multiple purchase orders will be issued . . . . 'Purchase Price' will mean the total price of the purchase order for the Deliverable(s) that gave rise to the loss, such that Contractor will have a separate limitation of liability for each purchase order."

[6]See IT General Provisions § 12.1: "The State's liability for damages . . . shall be limited to the Purchase Price . . . . Nothing herein shall be construed to waive or limit the State's sovereign immunity or any other immunity from suit provided by law."

[7]See IT General Provisions § 12.1: "IN NO EVENT WILL A PARTY BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, OR PUNITIVE DAMAGES . . . ."

[8]See IT General Provisions § 12.2(a)–(e) (statutory and regulatory noncompliance; IP liability; injury or property-damage indemnity; costs and attorney fees recoverable by the State as prevailing party; and specified direct costs of contractor-attributable data

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breaches); see also § 12.1 (qualifications to the consequential-damages exclusion).

[9]See Non-IT General Provisions § 5(a) (Warranties & Representations): "Contractor warrants that Goods and services furnished hereunder will conform to the requirements of this Contract . . ., and such Goods will be merchantable, fit for their intended purposes, free from all defects in materials and workmanship and, to the extent not manufactured pursuant to detailed designs furnished by the State, free from defects in design."

[10]See Non-IT General Provisions § 5 (Warranties & Representations): "Unless otherwise specified, the warranties contained in this Contract begin after acceptance has occurred."

[11]See Non-IT General Provisions § 5(a): "The State's approval of designs or specifications furnished by Contractor shall not relieve the Contractor of its obligations under this warranty."

[12]See Non-Cloud IT General Provisions §§ 8.2–8.3 (deliverable-conformity and services warranties); see also § 8.4 (harmful code warranty).

[13]See Non-Cloud IT General Provisions § 8.2.

[14]See Cloud IT General Provisions § 8.4.2(a); Non-Cloud IT General Provisions § 8.4.1(a) (software need not be error-free or run without immaterial interruption, subject to the Statement of Work).

[15]See Cloud IT General Provisions § 8.4.2(b); Non-Cloud IT General Provisions § 8.4.1(b) (qualifications concerning State modifications, specified combinations, and misuse or unauthorized use).

[16]See Cloud IT General Provisions § 8.6; Non-Cloud IT General Provisions § 8.5.

[17]See Non-IT General Provisions § 9.1 (Insurance): "When performing work on property in the care, custody or control of the State, Contractor shall maintain all commercial general liability insurance, workers' compensation insurance and any other insurance the State deems appropriate."

[18]See Non-IT General Provisions § 9.1: "Upon request by the buyer, the Contractor may be required to have the State shown as an 'additional insured' on selected policies."

[19]See SAM § 4819.41; SCM § 1013; SIMM 71A (Feb. 2025), pp.3,5–9; SIMM 71B (May 2025).

[20] See Non-IT General Provisions § 15.2(a); see also IT General Provisions § 13.1 (compliance with statutes and regulations).

[21] See Non-IT General Provisions § 2.5; see also IT General Provisions § 2.2 (contractor power and authority).

[22] See Non-IT General Provisions § 7.1 (indemnification).

[23]Cal. Pub. Res. Code § 4476(e)(1) (agreement provisions required if the department elects not to purchase the specified insurance).

[24]See Non-IT General Provisions § 13.1; IT General Provisions § 18.1.

[25]See Non-IT General Provisions § 13.1; IT General Provisions § 18.1.

[26]See Non-IT General Provisions § 13.1; IT General Provisions § 18.1.

[27]See Non-IT General Provisions § 13.1; IT General Provisions § 18.1.

[28]See Non-IT General Provisions § 13.2; IT General Provisions § 18.2.

[29]See Non-IT General Provisions § 13.2; IT General Provisions § 18.2.

[30]See Non-IT General Provisions § 13.2; IT General Provisions § 18.2 (60-day assertion period and discretion to consider a later proposal before final payment).

[31]See Non-IT General Provisions § 13.3; IT General Provisions § 18.2.

[32]See Non-IT General Provisions § 11.2(a); IT General Provisions § 16.2.

[33]See Non-IT General Provisions § 11.2(a); IT General Provisions § 16.2.

[34]See Non-IT General Provisions § 11.2(b); IT General Provisions § 16.2.1.

[35]See Non-Cloud IT General Provisions §§ 16.2.2–16.2.3 (proposal timing and payments). Compare Cloud IT General Provisions § 16.2.

[36]See Non-IT General Provisions § 11.2(a).

[37]See Non-IT General Provisions § 11.3(a); Non-Cloud IT General Provisions § 16.3.

[38]See Non-IT General Provisions § 11.3(b); Non-Cloud IT General Provisions § 16.3 (distinct cure requirements).

[39]See Non-IT General Provisions §§ 11.3, 15.13; Non-Cloud IT General Provisions §§ 16.3, 20.3 (default and force majeure).

[40]See Non-IT General Provisions § 11.4; Non-Cloud IT General Provisions § 16.4, subject to § 12 (limitation of liability).

[41]See Non-IT General Provisions §§ 11.3, 12; Non-Cloud IT General Provisions §§ 16.3.2, 17.

[42]See Non-IT General Provisions § 11.3; Non-Cloud IT General Provisions § 16.3.2 (effect of final determination that contractor was not in default).

[43]See Non-IT General Provisions § 11.1; IT Gen-

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eral Provisions § 16.1 (nonappropriation of funds).

[44]See Non-IT General Provisions § 11.1; IT General Provisions § 16.1 (nonappropriation of funds).

[45]See Non-IT General Provisions § 11.1; IT General Provisions § 16.1 (nonappropriation of funds).

[46]See Non-IT General Provisions § 11.1; IT General Provisions § 16.1 (nonappropriation of funds).

[47]See Cal. Gov. Code §§ 13988, 13988.2 (legislative findings and DGS intellectual property management functions).

[48]See https://www.dgs.ca.gov/OLS/Resources/Page-Content/Office-of-Legal-Services-Resources-List-Folder/Intellectual-Property-Program.

[49] Cal. Com. Code § 2312, subd. (3).

[50]See Non-Cloud IT General Provisions § 8.2(e) (noninfringement warranty).

[51]See IT General Provisions § 12.2(b) (IP liability exception).

[52]See Non-IT General Provisions § 7.2; IT General Provisions § 11.1 (IP indemnity and remedies).

[53]See Non-IT General Provisions § 7.2(e).

[54] See Non-IT General Provisions § 7.2(d) (IP indemnity and remedies). Compare IT General Provisions § 11.1.

[55]See 48 C.F.R. § 52.227-14(b) (data rights, subject to applicable exceptions and alternates).

[56]See 48 C.F.R. § 52.227-11(b)–(d), (h) (contractor election, government rights, and march-in rights).

[57]See IT General Provisions §§ 9.1.1–9.1.2 (Work Product and pre-existing materials).

[58]See IT General Provisions § 9.2 (Government Purpose Rights).

[59]See IT General Provisions §§ 4, 9.1–9.2. Compare Robert K. Huffman & Linda T. O'Sullivan, "Uncharted Waters: State Contracting Terms and Conditions, Intellectual Property, and the Homeland Security Era," 33 Pub. Cont. LJ. 163, 169 (2003) (historical discussion predating the current forms).

[60]See IT General Provisions §§ 4, 9–10.

[61] See Non-IT General Provisions § 6; compare IT General Provisions §§ 10, 21 (separate IT confidentiality, data-rights, and data-protection provisions).

[62]See IT General Provisions §§ 10, 21 (separate IT confidentiality, data-rights, and data-protection provisions).

[63]Cal. Civ. Code §§ 1798.100 et seq., 1798.140(d), (j), (ag) (coverage and defined roles); California Department of Justice, California Consumer Privacy Act, https://www.oag.ca.gov/privacy/ccpa.

[64] Cal. Civ. Code, § 1798.140(v)(1).

[65]Cal. Civ. Code §§ 1798.100, 1798.105–1798.106, 1798.110–1798.121, 1798.130 (applicable notices and consumer rights).

[66]Cal. Civ. Code § 1798.140(v)(2)–(3) (exclusions from personal information).

[67] See Non-IT General Provisions § 10.5. Compare IT General Provisions § 15.5.

[68]See IT General Provisions § 15.5.

[69]See Non-IT General Provisions § 8.1(a)–(b); IT General Provisions § 13.2 (nondiscrimination and required subcontract provisions).

[70] See Non-IT General Provisions § 8.1(a)–(b); see also IT General Provisions § 13.2 (nondiscrimination and required subcontract provisions).

[71]See Non-IT General Provisions § 8.1(a)–(b); IT General Provisions § 13.2 (nondiscrimination and required subcontract provisions).

[72] See Non-IT General Provisions § 8.1(a)–(b); see also IT General Provisions § 13.2 (nondiscrimination and required subcontract provisions).

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