



Commonwealth of Virginia  
Virginia Information Technologies Agency

**STATEWIDE HARDWARE AND MAINTENANCE &  
INFORMATION TECHNOLOGY SERVICES CONTRACTS**

Date: April 16, 2014

Contract #: VA-100802-IBM

Authorized User: All public bodies, including VITA, and all Commonwealth Agencies as defined by §2.2-4301 and referenced by §2.2-4304 of the *Code of Virginia*

Contractor: IBM Corporation  
9201 Arboretum Parkway  
Richmond, VA 23236

FIN: 13-0871985

Contact Person: Joe Cooper  
Voice: 289-333-3160  
Cell: 647-242-6043  
Email: [cooper@ca.ibm.com](mailto:cooper@ca.ibm.com)

Term: July 22, 2013 – July 21, 2014

Payment: Net 30 days

For Additional Contract Information, Please Contact:

Virginia Information Technologies Agency  
Supply Chain Management

Greg Searce  
Strategic Sourcing Specialist  
Phone: 804-416-6166  
E-Mail: [gregory.searce@vita.virginia.gov](mailto:gregory.searce@vita.virginia.gov)  
Fax: 804-416-6361

NOTES: Individual Commonwealth of Virginia employees are not authorized to purchase equipment or services for their personal use from this Contract.

For updates, please visit our Website at <http://www.vita.virginia.gov/procurement/contracts.cfm>

**VIRGINIA INFORMATION TECHNOLOGIES AGENCY (VITA):** Prior review and approval by VITA for purchases in excess of \$100,000.00 is required for State Agencies and Institutions only.





## COMMONWEALTH of VIRGINIA

Sam A. Nixon, Jr.  
Chief Information Officer  
Email: [cio@vita.virginia.gov](mailto:cio@vita.virginia.gov)

### Virginia Information Technologies Agency

11751 Meadowville Lane  
Chester, Virginia 23836-6315  
(804) 416-6100

TDD VOICE -TEL. NO.  
711

April 16, 2014

Russell Boles  
Andy Harmond  
IBM

Mr. Boles & Mr. Harmond,

Per section 3.B. ("Termination for Convenience) of contract VA-100802-IBM, The Virginia Information Technologies Agency has elected to terminate your contract for convenience. Your contract will be terminated on May 16, 2014. IBM is still responsible for IFA reporting on this contract until May 16, 2014 and any associated IFA fees and eVA fees.

Respectfully,  
Gregory Scarce  
Strategic Sourcing Specialist  
Virginia Information Technologies Agency  
(804) 416-6166



## *COMMONWEALTH of VIRGINIA*

### **Virginia Information Technologies Agency**

Samuel A. Nixon, Jr.  
Chief Information Officer  
E-mail: [cio@vita.virginia.gov](mailto:cio@vita.virginia.gov)

11751 Meadowville Lane  
Chester, Virginia 23836-6315  
(804) 416-6100

TDD VOICE -TEL. NO.  
711

May 23, 2013

Mr. David Young  
IBM

Mr. Young,

Per Section 3.A. ("Term and Termination") of contract VA-100802-IBM, The Virginia Information Technologies Agency has elected to exercise its option to renew the contract for one year, from July 22, 2013 through July 21, 2014. Should you have any questions, please feel free

Respectfully,  
Doug Crenshaw  
Strategic Sourcing Manager  
Virginia Information Technologies Agency  
(804) 416-6160



## *COMMONWEALTH of VIRGINIA*

### **Virginia Information Technologies Agency**

Samuel A. Nixon, Jr.  
Chief Information Officer  
E-mail: [cio@vita.virginia.gov](mailto:cio@vita.virginia.gov)

11751 Meadowville Lane  
Chester, Virginia 23836-6315  
(804) 416-6100

TDD VOICE -TEL. NO.  
711

June 21, 2012

Mr. David Young  
IBM

Mr. Young,

Per Section 3.A. ("Term and Termination") of contract VA-100802-IBM, The Virginia Information Technologies Agency has elected to exercise its option to renew the contract for one year, from July 22, 2012 through July 21, 2013. Should you have any questions, please feel free to contact me.

Respectfully,  
Doug Crenshaw  
Strategic Sourcing Manager  
Virginia Information Technologies Agency  
(804) 416-6160



**HARDWARE AND MAINTENANCE CONTRACT**

**BETWEEN**

**THE VIRGINIA INFORMATION TECHNOLOGIES AGENCY  
ON BEHALF OF  
THE COMMONWEALTH OF VIRGINIA**

**AND**

**INTERNATIONAL BUSINESS MACHINES (IBM)**

**HARDWARE AND MAINTENANCE CONTRACT  
TABLE OF CONTENTS**

<b>1. PURPOSE</b>	<b>5</b>
<b>2. DEFINITIONS</b>	<b>5</b>
A. Acceptance	5
B. Authorized Users	5
C. Confidential Information	5
D. Machine	5
E. Machine Code	5
F. Maintenance Level	5
G. Maintenance Services (or Maintenance)	6
H. Operating Condition	6
I. Party	6
J. Product	6
K. Receipt (of Product)	6
L. Requirements	6
M. Response Time	6
N. Service	6
O. Specification	6
P. Software Publisher	6
Q. Supplier	6
R. System Software	6
<b>3. TERM AND TERMINATION</b>	<b>7</b>
A. Contract Term	7
B. Termination for Convenience	7
C. Termination for Breach or Default	7
D. Termination for Non-Appropriation of Funds	7
E. Effect of Termination	7
F. Transition of Services	8
G. Contract Kick-Off Meeting	8
H. Contract Closeout	8
<b>4. DELIVERY, INSTALLATION AND ACCEPTANCE</b>	<b>8</b>
A. Delivery Procedure	8
B. Late Delivery	9
C. Product Installation	9
D. Product Acceptance	9
E. Cure Period	9
F. Product Discontinuation	9
<b>5. PRODUCT SUPPORT AND ADDITIONAL SERVICES</b>	<b>10</b>
A. Authorized User or Third Party Support	10
1. Documentation and Support Availability	10
2. Timeliness and Price	10
B. Modification	10
C. Training	11
D. Parts and Maintenance Support	11
E. Inventory Record	11
F. Product Service Record	11
G. Additional Services	11
H. Compatibility	11
I. Escalation Procedures	12
<b>6. WARRANTY AND REMEDY</b>	<b>12</b>
A. Supplier	12

<b>B. Ownership</b>	<b>12</b>
<b>C. Supplier Viability</b>	<b>12</b>
<b>D. Product</b>	<b>12</b>
<b>E. Performance Standards and Mean Time Between Failure</b>	<b>12</b>
<b>F. Warranty Services</b>	<b>13</b>
1. Product Covered	13
2. Preventive Maintenance	13
3. Remedial Maintenance	13
4. Replacement Parts	13
5. Spares	13
6. Notification and Correction of Defects	13
7. One-year Depot Warranty	13
8. On-site Warranty	13
9. System Software Warranty	13
10. Remedies	13
<b>G. Product Maintenance Services and Renewal Options</b>	<b>14</b>
<b>7. MAINTENANCE SERVICES</b>	<b>14</b>
<b>A. Ordering</b>	<b>14</b>
<b>B. Renewal</b>	<b>15</b>
<b>C. Services</b>	<b>15</b>
1. Product Covered	15
2. Preventive Maintenance	15
3. Remedial Maintenance	15
4. Replacement Parts	15
5. Spares	15
6. Notification and Correction of Defects	15
7. Advanced Replacement Services	15
8. On-site Maintenance Services	15
9. System Software Maintenance	16
10. Escalation Procedures	16
11. Remedies	16
<b>8. SCOPE OF USE</b>	<b>16</b>
<b>9. SOFTWARE LICENSE</b>	<b>16</b>
<b>10. ORDERS AND COMPENSATION</b>	<b>16</b>
<b>A. Supplier Quote and Request for Quote</b>	<b>16</b>
<b>B. Orders</b>	<b>17</b>
<b>C. Purchase Price and Price Protection</b>	<b>17</b>
<b>D. Supplier-Sponsored Product Promotions</b>	<b>17</b>
<b>E. Invoice Procedure</b>	<b>18</b>
<b>F. Purchase Payment Terms</b>	<b>18</b>
<b>11. REPORTING</b>	<b>19</b>
<b>A. Supplier's Report of Sales and Industrial Funding Adjustment</b>	<b>19</b>
<b>B. Small Business Participation</b>	<b>19</b>
<b>12. CONFIDENTIALITY</b>	<b>19</b>
<b>A. Treatment and Protection</b>	<b>19</b>
<b>B. Exclusions</b>	<b>19</b>
<b>C. Return or Destruction</b>	<b>20</b>
<b>13. INDEMNIFICATION AND LIABILITY</b>	<b>20</b>
<b>A. Indemnification</b>	<b>20</b>
<b>B. Liability</b>	<b>21</b>

C. Exclusion of liability for damages.	21
14. SECURITY COMPLIANCE	21
15. BANKRUPTCY	22
16. GENERAL PROVISIONS	22
A. Relationship Between VITA and Authorized User and Supplier	22
B. Incorporated Contractual Provisions	22
C. Compliance with the Federal Lobbying Act.	23
D. Governing Law	23
E. Dispute Resolution	23
F. Advertising and Use of Proprietary Marks	23
G. Notices	23
H. No Waiver	23
I. Assignment	24
J. Captions	24
K. Severability	24
L. Survival	24
M. Force Majeure	24
N. Remedies	24
O. Right to Audit	24
P. Offers of Employment	25
Q. Contract Administration	25
R. Entire Contract	25

## HARDWARE AND MAINTENANCE CONTRACT

THIS HARDWARE AND MAINTENANCE CONTRACT ("Contract") is entered into by and between the Virginia Information Technologies Agency (hereinafter referred to as "VITA"), pursuant to §2.2-2012 of the Code of Virginia and on behalf of the Commonwealth of Virginia, and International Business Machines Corporation ("Supplier" or "IBM"), a corporation headquartered at 9201 Arboretum Parkway Richmond VA 23236, to be effective as of July 22, 2010 ("Effective Date").

### 1. PURPOSE

This Contract sets forth the terms and conditions under which Supplier agrees to sell certain of Supplier's Product, and to provide various Services to the Authorized Users.

### 2. DEFINITIONS

#### A. Acceptance

Supplier provides warranty services in accordance with the "IBM Agreement for Machines", contained in Exhibit D. Supplier does not provide acceptance testing but does warrant that the Machine conforms to its specifications.

#### B. Authorized Users

All Public Bodies, including VITA and all Commonwealth agencies, as defined by §2.2-4301 and referenced by §2.2-4304 of the Code of Virginia.

#### C. Confidential Information

Any confidential or proprietary information of a Party that is disclosed in any manner, including oral or written, graphic, machine readable or other tangible form, to any other Party in connection with or as a result of discussions related to this Contract or any order issued hereunder, and which at the time of disclosure either (i) is marked as being "Confidential" or "Proprietary", (ii) is otherwise reasonably identifiable as the confidential or proprietary information of the disclosing Party, or (iii) under the circumstances of disclosure should reasonably be considered as confidential or proprietary information of the disclosing Party.

#### D. Machine

A hardware device, its features, conversions, upgrades, elements, or accessories, or any combination of them. The term "Machine" includes an IBM Machine and any non-IBM Machine (including other equipment) that IBM may provide to Customer.

#### E. Machine Code

Microcode, basic input/output system code (called "BIOS"), utility programs, device drivers, diagnostics, and any other code (all subject to any exclusions in the license provided with it) delivered with an IBM Machine for the purpose of enabling the Machine's function as stated in its Specifications. The term "Machine Code" includes LIC. (Licensed Internal Code)

#### F. Maintenance Level

The parameters of Maintenance Services, including the times during which and time-frames in which Supplier shall respond to a request for Maintenance Services. The available Maintenance Levels shall be as defined in Exhibit D hereto. The actual Maintenance Level for a unit of Product shall be set forth in the executed order for Maintenance of that Product referencing this Contract. Maintenance Coverage Period (MCP)

The term during which Maintenance is to be provided for a unit of Product.

**G. Maintenance Services (or Maintenance)**

Those Services, preventive and remedial, performed by Supplier at Authorized User's request in order to ensure continued operation of the Product. Maintenance Services shall include support services.

**H. Operating Condition**

That condition which allows the Product to function in a normal, acceptable working manner, as designed by the Product manufacturer and described in the manufacturer's Product documentation.

**I. Party**

Supplier, VITA, or any Authorized User.

**J. Product**

Hardware, peripherals, separate software programs as set forth in Exhibit C and any other equipment, including all upgrades, all applicable user documentation and related accessories as set forth on Exhibit C provided pursuant to this Contract.

**K. Receipt (of Product)**

An Authorized User or its Agent has physically received the Product at the correct "ship to" location.

**L. Requirements**

The functional, performance, operational, compatibility, and other parameters and characteristics of the Product as set forth in the applicable documentation, Exhibit D and such other parameters, characteristics, or performance standards for the Product that may be agreed upon in writing by the Parties. [Note: In case of conflict, see the Entire Contract clause for order of precedence.

**M. Response Time**

The time between Supplier's receipt of Authorized User's request for Maintenance and the time Supplier commences repair of the Product.

**N. Service**

Any Product-related work performed or service provided, including certain Maintenance Services or other services for the Product and provision to the Authorized User of any deliverable, by Supplier under this Contract

**O. Specification**

Information specific to a Machine. IBM Machine Specifications are in a document entitled "Official Published Specifications."

**P. Software Publisher**

The licensor of the System Software provided by Supplier under this Contract.

**Q. Supplier**

Means the Supplier and any of its Affiliates (i.e., an entity that controls, is controlled by, or is under common control with Supplier).

**R. System Software**

The operating system code, including software, firmware and microcode, (object code version) for each Product, including any subsequent revisions, as well as any applicable documentation. Supplier assumes that all System Software is provided by a third party and makes no representations or warranties regarding third party System Software. Supplier does provide Machine Code, specific to each machine.

### **3. TERM AND TERMINATION**

#### **A. Contract Term**

This Contract is effective and legally binding as of the Effective Date and, unless terminated as provided for in this section, shall continue to be effective and legally binding for a period of two (2) years. VITA, at its sole discretion, may extend this Contract for up to three (3) additional one (1) year periods after the expiration of the initial two (2) year period. VITA will issue a written notification to the Supplier stating the extension period, not less than thirty (30) days prior to the expiration of any current term. Warranty on or Maintenance Services for any Product ordered during the term of the Contract may extend beyond the term of this Contract. Performance of an order or SOW issued during the term of this Contract may survive the expiration of the term of this Contract, in which case all terms and conditions required for the operation of such order or SOW shall remain in full force and effect until the Warranty or Maintenance Services pursuant to such order or SOW have met the final Acceptance criteria of the applicable Authorized User

#### **B. Termination for Convenience**

VITA may terminate this Contract, in whole or in part, or any order issued hereunder, in whole or in part, or an Authorized User may terminate for convenience an order, in whole or in part, upon not less than thirty (30) days prior written notice at any time for any reason.

#### **C. Termination for Breach or Default**

VITA shall have the right to terminate this Contract, in whole or in part, or any order issued hereunder, in whole or in part, or an Authorized User may terminate an order, in whole or in part, for breach and/or default of Supplier. Supplier shall be deemed in breach and/or default in the event that Supplier fails to meet any material obligation set forth in this Contract or in any order issued hereunder.

If VITA deems the Supplier to be in breach and/or default, VITA shall provide Supplier with notice of breach and/or default and allow Supplier thirty (30) days to cure the breach and/or default. If Supplier fails to cure the breach as noted, VITA may immediately terminate this Contract or any order issued hereunder, in whole or in part. If an Authorized User deems the Supplier to be in breach and/or default of an order, such Authorized User shall provide Supplier with notice of breach and/or default and allow Supplier thirty (30) days to cure the breach and/or default. If Supplier fails to cure the breach and/or default as noted, such Authorized User may immediately terminate its order, in whole or in part. Any such termination shall be deemed a Termination for Breach or a Termination for Default. In addition, if Supplier is found by a court of competent jurisdiction to be in violation of or to have violated 31 USC 1352 or if Supplier becomes a party excluded from Federal Procurement and Non-procurement Programs in connection with this Contract, VITA may immediately terminate this Contract, in whole or in part, for breach. VITA shall provide written notice to Supplier of such termination and Supplier shall provide written notice to VITA if Supplier is charged with violation of 31 USC 1352 or if federal debarment proceedings are instituted against Supplier in connection with this Contract.

#### **D. Termination for Non-Appropriation of Funds**

All payment obligations under this Contract are subject to the availability of legislative appropriations at the federal, state, or local level, for this purpose. In the event of non-appropriation of funds, irrespective of the source of funds, for the items under this Contract, VITA may terminate any order, in whole or in part, or an Authorized User may terminate its order, in whole or in part, for those goods or services for which funds have not been appropriated. Written notice will be provided to the Supplier as soon as possible after legislative action is completed.

#### **E. Effect of Termination**

Upon termination, neither the Commonwealth, nor VITA, nor any Authorized User shall have any future liability except for Products or certain Maintenance or other Services accepted by the Authorized User prior to the termination date.

In the event of a Termination for Breach or Termination for Default, Supplier shall accept return of any Products or services that were not accepted by the Authorized User(s), and Supplier shall refund any

monies paid by any Authorized User for such Product or services, including certain Maintenance Services, and all costs of de-installation and return of the Products shall be borne by Supplier.

Supplier shall refund a prorated return of monies from the point of the breach for Maintenance and will negotiate a return of monies for the Products based on the circumstance.

#### **F. Transition of Services**

Prior to or upon expiration or termination of this Contract and at the request of VITA, Supplier shall provide all assistance as VITA or an Authorized User may reasonably require transitioning Product-related Services to any other supplier with whom VITA or such Authorized User contracts for provision of Product-related services. This obligation may extend beyond expiration or termination of the Contract for a period not to exceed six (6) months. IBM can help identify service providers.

#### **G. Contract Kick-Off Meeting**

Within 30 days of Contract award, Supplier may be required to attend a contract orientation meeting, along with the VITA contract manager/administrator, the VITA and/or other CoVa Agency project manager(s) or authorized representative(s), technical leads, VITA representatives for SWaM and Sales/IFA reporting, as applicable, and any other significant stakeholders who have a part in the successful performance of this Contract. The purpose of this meeting will be to review all contractual obligations for both parties, all administrative and reporting requirements, and to discuss any other relationship, responsibility, communication and performance criteria set forth in the Contract. The Supplier may be required to have its assigned account manager and a representative from its contracts department in attendance. The time and location of this meeting will be coordinated with Supplier and other meeting participants by the VITA contract manager.

#### **H. Contract Closeout**

Prior to the contract's expiration date, Supplier may be provided contract close out documentation as applicable to this Contract and shall complete, sign and return to VITA Supply Chain Management within 30 days of receipt. This documentation as applicable to this Contract may include, but not be limited to: Patent/Royalty Certificate, Tangible Property/Asset Certificate, Escrow Certificate, SWaM Reports Completion Certificate, Sales Reports/IFA Payments Completion Certificate, and Final Payment Certificate. Supplier is required to process these as requested to ensure completion of close-out administration and to maintain a positive performance reputation with the Commonwealth of Virginia. Any closeout documentation not received within 30 days of Supplier's receipt of our request will be documented in the contract file as Supplier non-compliance. Supplier's non-compliance may affect any pending payments due the Supplier, including final payment, until the documentation is returned.

### **4.DELIVERY, INSTALLATION AND ACCEPTANCE**

#### **A. Delivery Procedure**

Supplier shall deliver all Product F.O.B. destination, with such destination being the "ship to" address specified in the applicable order. In all cases, Supplier shall arrange and pay for all transportation and insurance sufficient to fully protect the Product while in transit. Each shipment shall include a packing slip indicating this Contract number, the Authorized User's order number, the part number, a description of the Product shipped and the quantity shipped. Each package in any shipment shall be numbered, shall have stenciled on one end and one side a description of the quantity of Product contained therein by part number and description, and shall conspicuously display the number of the package in that shipment which contains the packing slip. Supplier shall make available all appropriate and/or related user documentation at the time of delivery of the first unit of each different Product type. Product delivered without the appropriate and required documentation shall be considered "shipped short" until the applicable documentation has been received.

When IBM accepts Customer's order, IBM agrees to sell Customer the Machine described in a Transaction Document. IBM transfers title to Customer or, when the Machine is shipped to Customer or its designated location. However, IBM reserves a purchase money security interest in the Machine until IBM receives the amounts due. For a feature, conversion, or upgrade involving the removal of

parts which become IBM's property, IBM reserves a security interest until IBM receives payment of all the amounts due and the removed parts. Customer authorizes IBM to file appropriate documents to permit IBM to perfect its security interest.

For each Machine, IBM bears the risk of loss or damage up to the time it is delivered to the IBM-designated carrier for shipment to Customer or Customer's designated location. Thereafter, Customer assumes the risk. Each Machine will be covered by insurance, arranged and paid for by IBM for Customer, covering the period until it is delivered to Customer or Customer's designated location. For any loss or damage, Customer must i) report the loss or damage in writing to IBM within 10 business days of delivery and ii) follow the applicable claim procedure.

IBM's Global (ROL) Risk of Loss Customer Transit Insurance covers generally (i) goods and/or merchandise and/or property of every description whether new or used, including computer related products manufactured and / or sold by IBM Corporation and similar merchandise incidental to the business of the IBM and including prepaid freight, advanced freight, guaranteed freight and freight payable "vessel lost or not lost," under or on deck, sold by IBM Corporation to its customers or business partners wherein risk of loss has transferred from IBM Corporation to its customer or business partner or other third party; and (ii) goods and merchandise of others in which IBM may have an interest. This insurance covers all risk of physical loss or damage from any external cause. Excluded are IBM inter-company shipments that are covered under a global property insurance program, unlawful goods, delay (Business Interruption)/loss of market/consequential damages, pollution and war risks on land.

#### **B. Late Delivery**

Supplier will make commercially reasonable efforts to deliver Products when requested. Some situations and circumstance may be beyond the control of the Supplier.

#### **C. Product Installation**

Installation shall include: unpacking, removal of all shipping/packing materials, positioning, connecting to internal utility services, testing, and related necessary services to allow for Acceptance by the Authorized User.

All Product installations shall comply with building and facilities standards established by the ordering Authorized User. If such Authorized User installs the Product, Supplier shall provide all reasonably necessary telephone assistance at no charge.

These systems are customer install units. If installation is requested then a fee will be required.

Customer agrees to provide an environment meeting the requirements for the Machine as specified in its published documentation.

IBM has standard installation procedures. IBM will successfully complete these procedures before it considers an IBM Machine (other than a Machine for which Customer defers installation or a Customer-set-up Machine) installed.

Customer is responsible for installing a Customer-set-up Machine and a non-IBM Machine according to instructions shipped with the Machine provided by IBM or the Machine's manufacturer.

#### **D. Product Acceptance**

Refer to Suppliers return policy found in the IBM Agreement for Machines in Exhibit D.

#### **E. Cure Period**

Refer to Supplier's IBM Agreement for Machines in Exhibit D.

#### **F. Product Discontinuation**

During the term of this Contract, if any Product listed on Exhibit C is discontinued and Supplier does not offer a substitute acceptable to VITA, Supplier, shall make reasonable commercial efforts for each Authorized User who purchased the discontinued Product, continue to meet such Authorized User's maintenance needs for the discontinued Product for not less than twelve (12) months. Additionally, Supplier shall make available to the Authorized User maintenance parts for discontinued

Product for a period of time in accordance with its policy on discontinued Products. . In every event, Supplier will provide any Authorized User with a commercially reasonable advance written notice of its intent to discontinue any Product type previously ordered by such Authorized User.

IBM products are announced as end of support a minimum of two years in advance. The products are announced as end of Marketing or sale availability, and then remain supported on maintenance for no less than two years; usually they remain supported for 5 years. Once a product reached End of Service IBM will support the products on a commercially reasonable basis due to the potential lack of service parts and skill.

## **5. PRODUCT SUPPORT AND ADDITIONAL SERVICES**

### **A. Authorized User or Third Party Support**

#### **1. Documentation and Support Availability**

In the event that VITA terminates this Contract, Supplier shall provide on a negotiated hourly billable rate all the necessary user and installation documentation and maintenance and repair training reasonably required to enable any Authorized User to maintain and repair the Product itself or to obtain support and maintenance services from a third-party. Supplier shall also provide the documentation and training necessary to allow any Authorized User to self-maintain to the subcomponent level. In addition, Supplier agrees to provide, for a period based on Supplier's spare parts inventory and policy from the date of the last purchase, spare parts and components at the cost set forth in Exhibit C, including those solely sourced by Supplier, to enable any Authorized User or its designated third-party maintenance provider to provide full maintenance and repair of the Product.

Please refer to the Self maintain program (: <https://www-304.ibm.com/services/weblectures/dlv/Gate.wss?handler=Offering&action=index&customer=bpws&offering=wssx>), as described in Exhibit G.

OR

Training is available for a fee

<http://www-304.ibm.com/jct03001c/services/learning/ites.wss/zz/en?pageType=page&c=a0011023>

#### **2. Timeliness and Price**

Supplier agrees to make the above-referenced documentation and training either self maintainer or training found in Section C below

### **B. Modification**

IBM manages Engineering Changes (EC) as follows:

1) Entitlement - Once IBM announces Engineering Changes, a customer with applicable products is entitled to them.

2) Management

IBM can manage and install Engineering Changes if the machine is covered by an IBM Maintenance Agreement (MA).

Without a MA, EC management may be done by IBM as a billable activity, the customer or the third party maintainer.

3) Microcode patches are handled as EC's and released by "hardcopy" (tape) outside IBM. Microcode patches will be transmitted electronically to IBM equipment only by IBM.

#### **C. Training**

Pursuant to a mutually agreed upon schedule, Supplier shall provide sufficient personnel experienced and qualified to conduct such training. Available optional training, and applicable pricing and discounts, are described in Exhibit C.

#### **D. Parts and Maintenance Support**

See Exhibit D

#### **E. Inventory Record**

Supplier shall maintain, at no additional cost, a record of all units of Product covered under warranty/maintenance by type, quantity and location, including the end date for each unit's Warranty Period or maintenance term ("Inventory Record"). Product quantities and types may vary as Product is added or deleted from coverage, and Authorized User shall notify Supplier in writing of any Product relocated, added, or removed from service. Upon such notification, Supplier shall amend the Inventory Record to reflect such relocation, addition, or deletion of Product. Supplier shall provide, at no additional cost, a copy of the most current Inventory Record to any Authorized User upon request and such Inventory Record shall be a base line, "non-customized" report. IBM will provide customized inventory records for an additional charge.

#### **F. Product Service Record**

Supplier shall maintain, based on a negotiated rate, a Product Service Record for each unit of Product covered under warranty or maintenance. The Product Service Record shall record the following for such unit of Product: (i) installation/removal/ modifications; (ii); (iii) (IV) services not covered by warranty or maintenance. Upon request by the Authorized User, Supplier shall provide, at no additional cost, a copy of the Product Service Record.

#### **G. Additional Services**

In addition to any on-site warranty or maintenance service obligations, Supplier shall, upon request of an Authorized User by means of an order issued in accordance with the ordering provisions of this Contract, provide additional on-site services which may include: (i) relocation of previously installed hardware; (ii) assistance to Authorized User's communications department in mutually acceptable duties related to the warranty or maintenance services provided under this Contract; and (iii) cabling, if applicable. The Authorized User shall compensate Supplier for such additional on-site services in accordance with the prices identified in Exhibit C.

Furthermore, Supplier shall, upon request of an Authorized User by means of an order issued in accordance with the ordering provisions of this Contract, provide the following services beyond those identified as warranty or maintenance service offerings: (i) service on equipment not covered by this Contract, (ii) repair of damage or replacement of parts of hardware resulting from changes in the hardware environment, extraordinary use of the hardware, or interconnected devices, or (iii) service outside the applicable hours of service specified in an executed order referencing this Contract. The charge for such services shall be at the hourly rate specified in Exhibit C and shall be inclusive of all expenses. Warranty or maintenance services requested for a unit of hardware within the forty-eight (48) hour period immediately following Remedial Maintenance performed on the same unit of hardware for the same problem, shall not be considered an additional service and shall be provided at no charge. Requests for additional services shall only be approved for payment by the Authorized User when a Product Service Record is included with the applicable invoice.

Per call is a minimum of 2 hours labor charge plus cost for travel, repair of product and required parts. Any such travel expenses must be pre-approved by the Authorized User and shall be reimbursable by such Authorized User at the then-current per diem amounts as published by the Virginia Department of Accounts ([http://www.doa.virginia.gov/Admin\\_Services/CAPP/CAPP\\_Topics/20335.pdf](http://www.doa.virginia.gov/Admin_Services/CAPP/CAPP_Topics/20335.pdf)), or a successor URL(s)).

#### **H. Compatibility**

See Exhibit D.

## **I. Escalation Procedures**

Escalation needs to be defined as both a local process and a national process. Here is an excerpt for the national process:

The IBM SSR can invoke an escalation on supported product, depending on the severity of the problem. This is done by contacting the Duty Manager at the IBM National Call Center at 1-800-IBM-SERV. The National Call Center provides 24x7x365 coverage with backup capability. The IBM Duty Manager will engage the necessary support and will contact the required local Services Management Office to assist in the escalation/resolution of the reported problem. Along with these escalation actions, your employee can open a specific situation record that will automatically notify required personnel of your company. IBM SSRs are contacted via their RIM / laptop through the IBM Digital Communications System (DCS). During a repair action, an escalation is usually initiated by the SSR but can be initiated by the customer as well. The SSR will initiate an escalation when they are not making reasonable progress towards a problem resolution. Escalation is usually calculated in terms of Severity 1,2,3,4 with Severity 1 being the worst situation. With each increasing level of severity, additional IBM management is automatically alerted.

## **6. WARRANTY AND REMEDY**

### **A. Supplier**

Supplier shall perform its obligations hereunder in accordance with the accepted industry standards as reflected by and in accordance with the IBM Agreement for Machines contained in Exhibit D.

### **B. Ownership**

Supplier is the owner of the Product or otherwise has the right to grant to the Commonwealth or any Authorized User title to or the right to use the Product provided hereunder without violating or infringing any law, rule, regulation, copyright, or patent of a third party. The Commonwealth or an Authorized User's remedy for any breach of the foregoing is set forth in the Section of this Contract entitled "Indemnification and Liability".

### **C. Supplier Viability**

Supplier warrants that it has the financial capacity to perform and continue to perform its obligations under this Contract, that no legal proceedings have been threatened or brought against Supplier that could materially adversely affect performance of this Contract, and that entering into this Contract is not prohibited by any contract, or order by any court of competent jurisdiction.

### **D. Product**

Supplier warrants the following with respect to the Product:

See attached IBM Agreement for Machines contained in Exhibit D.

The System Software shall not contain any embedded device or code (e.g., time bomb) that is intended to obstruct or prevent any Authorized User's use of the System Software, nor shall Supplier disable any Authorized User's use of such System Software through remote access or otherwise. If the System Software contains authorization codes allowing access to a data base or other software, Supplier warrants that such codes shall be perpetual and non-expiring.

Supplier assumes that System Software is third party software and cannot make representations or warranties on third party System Software

### **E. Performance Standards and Mean Time Between Failure**

IBM does not publish Mean Time between failure standards. However, upon individual customer requests IBM can provide MTBF for individual configurations. If the product is found to have a hardware failure please refer to the IBM Agreement for Machines.

## **F. Warranty Services**

During the warranty period of thirty-six (36) months, or as specified in the applicable order, Supplier warrants that the Product shall meet the Requirements. Supplier shall provide warranty services (including unlimited telephonic support and all necessary travel and labor) during the Warranty Period at the prices identified in Exhibit C. Supplier shall correct, at no additional cost to any Authorized User, all errors identified during the warranty period that result in a failure of the Product to meet the Requirements.

Exhibit D provides detailed descriptions of the Supplier's warranty and maintenance offerings and responsibilities as well as remedies available to the Authorized User in the event Supplier fails to perform its warranty and maintenance obligations. Exhibit D defines coverage periods, response times, and restore times.

If multiple warranty levels are available, an Authorized User may elect, at any time, an alternative warranty level offered by Supplier. Such amendment shall take effect within thirty (30) days following Supplier's receipt of Authorized User's written notice, in the form of a modification to an order.

Authorized User's designated control organization shall have the exclusive authority to request warranty services. Supplier shall not respond to calls for service from any other source without prior written approval of Authorized User's agreement administrator designated on the relevant order.

### **1. Product Covered**

Exhibit C lists all Product types covered under warranty.

### **2. Preventive Maintenance**

Supplier's Preventive Maintenance offerings and responsibilities, and the Authorized User's associated remedies, are described in Exhibit D.

### **3. Remedial Maintenance**

Supplier's Remedial Maintenance offerings and responsibilities, and the Authorized User's associated remedies, are described in Exhibit D.

### **4. Replacement Parts**

Supplier's offerings and responsibilities related to Replacement Parts, and the Authorized User's associated remedies, are described in Exhibit D.

### **5. Spares**

IBM does not provide "Spares" but does maintain products and parts to fix and repair.

### **6. Notification and Correction of Defects**

See Exhibit D.

### **7. One-year Depot Warranty**

Not Applicable

### **8. On-site Warranty**

Supplier's on-site warranty offerings and responsibilities are described in Exhibit D.

### **9. System Software Warranty**

Not applicable.

### **10. Remedies**

In addition to any remedies described in Exhibit D "IBM Agreement for Machines" if Supplier is unable to make the Product conform, in all material respects to the Requirements or Specifications, within thirty (30) days following notification by an Authorized User, Supplier shall, at such Authorized User's request, either (i) replace the non-conforming Product or (ii) accept return of the non-conforming Product and return all monies paid by such Authorized User for the returned Product.

Notwithstanding the above, IBM Product(s) may be returned for any reason within 30 days of the date of invoice and Customer may obtain a refund or credit. IBM does not provide refunds or credits for portions of a packaged offering provided at a single price. Customer must return the complete package for a refund or credit. To qualify for this credit or refund, Customer must call Customer's IBM customer support representative to obtain a return-authorization form. Customer must return the IBM Product, including all documentation and accessories, intact and in its original packaging, to an IBM designated location by the date IBM specifies. A copy of the invoice, the return-authorization form, and the shipping label must accompany the return. Shipping and handling charges generally will not be refunded or credited. IBM Products authorized by IBM for return and returned without an IBM return-authorization form, or returned after the date specified by IBM in the return-authorization form, may be subject to a restocking fee equal to 15% of the price paid. Customer agrees to pay the restocking fee as IBM specifies.

This Returns policy does not apply to IBM Product(s) that Customer acquires for which IBM creates a unique machine type model (MTM) not generally available for purchase by all IBM customers.

If a Product ships as a result of an IBM error, IBM will initiate a return of the Product with appropriate documentation at no charge to Customer if IBM is notified of the error within 30 days of the date of the invoice.

## **G. Product Maintenance Services and Renewal Options**

Supplier warrants that it at least sixty (60) days prior to the expiration of the Warranty Period, shall notify the Authorize User of the expiration, and the Authorized User, at its sole discretion, may order from Supplier Maintenance Services, for a period of one (1) year (Maintenance Coverage Period) and for the annual fee identified in Exhibit C. shall make Maintenance Services available for all the Products, which are components of Products listed in Exhibit C, for a period of at least one (1) year from the expiration of the initial Warranty Period of any Product provided to an Authorized User pursuant to this Contract. Termination of this Contract or cancellation of Maintenance Services by an Authorized User shall not affect this provision.

THE OBLIGATIONS OF SUPPLIER UNDER THIS WARRANTY AND REMEDY SECTION ARE MATERIAL. EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION ENTITLED WARRANTY SUPPLIER MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY CONCERNING MERCHANTABILITY OR FITNESS FOR ANY OTHER PARTICULAR PURPOSE.

## **7. MAINTENANCE SERVICES**

Supplier shall provide Maintenance Services (including unlimited telephonic support and all necessary travel and labor) during the Maintenance Coverage Period (MCP) at the prices identified in Exhibit C without additional charge to maintain the Product in accordance with the Requirements.

Exhibit D provides detailed descriptions of the Supplier's warranty and maintenance offerings and responsibilities as well as remedies available to the Authorized User in the event Supplier fails to perform its warranty and maintenance obligations. Exhibit D defines coverage periods, response times, and restore times. Authorized User's designated control organization shall have the exclusive authority to request maintenance services. Supplier shall not respond to calls for service from any other source without prior written approval of Authorized User's agreement administrator designated on the relevant order.

### **A. Ordering**

An Authorized User may order Maintenance Services for any Product at any time during the term of the Contract, irrespective of whether such Product is covered under warranty or maintenance at the time the order is issued to Supplier. Each order shall identify: subject to prior certification by Supplier

Product and, if applicable, serial number, for which Maintenance Services shall be provided, Maintenance Level to be provided and MCP for the Product Maintenance.

Authorized User may elect, at any time, an alternative Maintenance Level offered by Supplier. Such amendment shall take effect within thirty (30) days following Supplier's receipt of Authorized User's written notice, in the form of a modification to an order.

Unless otherwise agreed to by the Authorized User and Supplier, the MCP for a unit of Product shall be one (1) year from the effective date of any executed order for Maintenance on such Product.

## **B. Renewal**

At least sixty (60) days prior to the expiration of the MCP for each unit of Product, Supplier shall notify the Authorized User of such expiration, and the Authorized User, at its sole discretion, may issue an order to Supplier to renew Maintenance Services, including System Software Maintenance Services, for an additional one (1) year period. The annual fee for Maintenance Services shall not exceed the fee charged for the preceding year's Maintenance Services by more than three percent (3%), or the annual change in CPI, as defined in the Purchase Price and Price Protection section, in effect at the time, whichever is less. Termination of this Contract or cancellation of Maintenance Services, if provided as a separate offering from Supplier, by an Authorized User shall not affect this Contract or the grant of any license pursuant thereto.

IBM's maintenance renewal cycle starts 180 days in advance of the expiration term date. Notification is provided a minimum of 60 days in advance of the expiration date. See Master Services Agreement contained in Exhibit D.

## **C. Services**

Maintenance Services shall be as follows:

### **1. Product Covered**

Exhibit C lists all Product types for which Supplier offers Maintenance Services. No Authorized User is obligated to continue Maintenance Services on Product that has been removed from service, provided Supplier has been notified in writing of such removal.

### **2. Preventive Maintenance**

Supplier's Preventive Maintenance offerings and responsibilities, and the Authorized User's associated remedies, are described in Exhibit D.

### **3. Remedial Maintenance**

Supplier's Remedial Maintenance offerings and responsibilities, and the Authorized User's associated remedies, are described in Exhibit D.

### **4. Replacement Parts**

Supplier's offerings and responsibilities related to Replacement Parts, and the Authorized User's associated remedies, are described in Exhibit D.

### **5. Spares**

Supplier does not maintain Spares.

### **6. Notification and Correction of Defects**

Supplier's offerings and responsibilities related to notification and correction of defects, and the Authorized User's associated remedies, are described in Exhibit D.

### **7. Advanced Replacement Services**

Supplier's advanced replacement service offerings and responsibilities are described in Exhibit D.

### **8. On-site Maintenance Services**

Supplier's on-site maintenance service offerings and responsibilities are described in Exhibit D.

## **9. System Software Maintenance**

Supplier assumes that System Software is third party software and cannot make representations or warranties on third party Software. IBM's software provided by and owned by IBM shall be licensed in accordance with IBM's International Program License Agreement included in Exhibit E.

## **10. Escalation Procedures**

See Exhibit D.

## **11. Remedies**

IBM does not provide maintenance remedies.

## **8. SCOPE OF USE**

Any Authorized User may use the Product, and any software licensed in connection with such Product. Supplier further authorizes use of the Product by third parties who are under contract with an Authorized User to provide outsourcing services, including but not limited to providing application development services, data processing or facilities or infrastructure management services for the benefit of such Authorized User or Commonwealth Public bodies but only for the express purposes of conducting services or business for VITA or Authorized Users. Supplier assumes that System Software is third party software and cannot make representations or warranties on third party System Software

## **9. SOFTWARE LICENSE**

Supplier provides licensed separate software programs at the prices detailed in Exhibit C. (additional software offerings may be made available in the future) Software is licensed in accordance with the Agreement contained in Exhibit E.

## **10. ORDERS AND COMPENSATION**

### **A. Supplier Quote and Request for Quote**

Should an Authorized User determine that a competitive process is required to ensure it receives the best value, such Authorized User may, at its sole discretion, on a case-by-case basis and upon approval by VITA, use a Request for Quote (RFQ) process to obtain product identical or similar to that provided by Supplier pursuant to this Contract. The RFQ process is typically used when an Authorized User requires a complete solution that may be fulfilled by Products and Services herein, but whose complexity or size may result in economies that could not be passed on to the Authorized User within the confines of the established contract catalog discount pricing. When an RFQ is used, the project timing and requirements will be clearly outlined in the RFQ document. In some situations, the Authorized User may not identify the exact specifications required. If that is the case, the RFQ respondents will be given the opportunity to identify and propose their recommended specifications.

In cases where the RFQ process is invoked, the Authorized User will issue an RFQ describing its requirements to potential suppliers, and suppliers will provide, at their discretion, within the timeframe specified in the RFQ, a detailed Statement of Work (SOW)-based quote. Any quote submitted to the Authorized User as a result of this process shall include (a) a detailed description of each item proposed, at the Exhibit C line item level, (b) the quantity of each such item, (c) the contract price, (d) any additional percentage discount offered, and (e) an extended/total price.

Generally, the Authorized User will select the supplier offering the lowest total cost proposal. However, non-price factors may be included in the evaluation criteria for a given RFQ. Any purchase from Supplier that is a result of the RFQ process shall be subject to the terms and conditions specified and outlined in this Contract and any subsequent modifications. Additional terms and conditions may be requested or mandated within the RFQ document. To the extent that any terms and conditions of the Authorized User are inconsistent with the terms and conditions of this Contract, the terms and conditions of this Contract shall supersede.

## B. Orders

Notwithstanding all Authorized User's rights to license or purchase Supplier's products or services under this Contract, an Authorized User is under no obligation to license or purchase from Supplier any of Supplier's products or services. This Contract is optional use and non-exclusive and all Authorized Users may, at their sole discretion, purchase, and license or otherwise receive benefits from third party suppliers of products and services similar to, or in competition with, the products and services provided by Supplier.

Supplier is required to accept any order placed by an Authorized User through the eVA electronic procurement website portal ([eVA Home Page](#)). eVA is the Commonwealth of Virginia's e-procurement system. State agencies, as defined in §2.2-2006 of the Code of Virginia, shall order through eVA. All other Authorized Users are encouraged to order through eVA, but may order through the following means:

- i). Purchase Order (PO): An official PO form issued by an Authorized User.

Any other order/payment charge or credit card process, such as AMEX, MASTERCARD, or VISA under contract for use by an Authorized User.

This ordering authority is limited to issuing orders for the Products and Services available under this Contract. Under no circumstances shall any Authorized User have the authority to modify this Contract. An order from an Authorized User may contain additional terms and conditions; however, to the extent that the terms and conditions of the Authorized User's order are inconsistent with the terms and conditions of this Contract, the terms of this Contract shall supersede.

Notwithstanding the foregoing, Supplier shall not accept any order from an Authorized User if such order is to be funded, in whole or in part, by federal funds and if, at the time the order is placed, Supplier is not eligible to be the recipient of federal funds as may be noted on any of the Lists of Parties Excluded from Federal Procurement and Non-procurement Programs.

ALL CONTRACTUAL OBLIGATIONS UNDER THIS CONTRACT IN CONNECTION WITH AN ORDER PLACED BY ANY AUTHORIZED USER ARE THE SOLE OBLIGATION OF SUCH AUTHORIZED USER AND NOT THE RESPONSIBILITY OF VITA UNLESS SUCH AUTHORIZED USER IS VITA.

## C. Purchase Price and Price Protection

Exhibit C sets forth the prices by Product type (including whole units and repairable major components thereof) and for warranty services and Maintenance Services, and the appropriate Commonwealth discounts. The discounts shall not decrease for a period of not less than two (2) years from the Effective Date of this Contract. Thereafter, any increase in price shall be limited to once per twelve (12) month period and shall not exceed the lesser of three percent (3%) or the annual increase in the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, for the expenditure category "Information technology, hardware and services" as published by the Bureau of Labor Statistics of the Department of Labor (<http://www.bls.gov/>), for the effective date of the increase compared with the same index one (1) year prior. Supplier shall demonstrate the added value for any requested price increase. Any change in price shall be submitted in writing in accordance with the above and shall not become effective for sixty (60) days thereafter. Semi-annually, VITA may check the prices for Product against the CPI-U, as defined above, for the expenditure category "Information technology, hardware and services", and the prices in Exhibit C shall be appropriately reduced to ensure continued price competitiveness, if required.

## D. Supplier-Sponsored Product Promotions

The Supplier, at its discretion, may sponsor Product and Service promotions during the Contract term or any extensions thereof. Should Supplier choose to sponsor such a promotion, Supplier shall provide in writing to VITA, at least five (5) days prior to the promotion, the following information: (i) the dates of the promotion or the duration of the promotion to include the commencement date and the ending date; (ii) the exact Products or Services covered in the promotion; and (iii) the pricing or percentage discount offered during the promotion. VITA shall communicate to Supplier in writing its agreement to the promotion.

All Supplier-sponsored Product or Service promotions shall be available to all Authorized Users. Should the Supplier request a promotion that would be limiting, either through product configuration or quantities of Products and Services, VITA, at its sole discretion, may not provide a written agreement. VITA and Supplier agree that promotions shall not target any one Authorized User, or a few Authorized Users.

VITA and Authorized Users, at their discretion, may assist in advertising the promotion. This assistance may consist of advertising space on Authorized User web sites, or other assistance at an Authorized User's discretion.

#### **E. Invoice Procedure**

Supplier shall remit each invoice to the "bill-to" address provided with the order promptly after all Products or Services have been accepted. Payment for Maintenance Services shall be annually in arrears unless otherwise stated herein. No invoice shall include any costs other than those identified in the executed order, which costs shall be in accordance with Exhibit C. Without limiting the foregoing, all shipping costs are the Supplier's responsibility except to the extent such charges are identified in Exhibit C, or as noted in any executed order referencing this Contract. Invoices issued by the Supplier shall identify at a minimum:

- ii). Product or Service type and description
- iii). Product serial number, if any
- iv). Quantity, charge and extended pricing for each Product and/or Service item
- v). Applicable order date
- vi). Ship date
- vii). Ship-to location contact name
- viii). This Contract number and the applicable order number

Supplier shall submit separate invoices for the Maintenance charges (detailing the Product types and quantities by Authorized User site), for billable additional services, and for any installation services, including the appropriate Product Service Record or other agreed upon written instrument. Additional invoices may be required by Authorized User from time to time detailing charges for Product at affiliate locations by corporate department.

Any terms included on Supplier's invoice shall have no force or effect and will in no way bind VITA or any Authorized User.

#### **F. Purchase Payment Terms**

Supplier is responsible for the accuracy of its billing information. Supplier agrees not to issue invoices hereunder until Product has been accepted. Charges for Product or Services accepted more than ninety (90) days prior to receipt of a valid invoice may not be paid. Should Supplier repeatedly over bill Authorized User, Authorized User may assess a one percent (1%) charge for the amount over billed for each month that such over billing continues.

Product shipped without the applicable Documentation may not meet Acceptance criteria, and payment shall not be due until after the required Documentation is provided.

If there are any disputed items, an Authorized User shall pay all undisputed charges and promptly notify Supplier in writing of any disputed amount. Supplier shall thereupon review its records, and, if it does not concur with the Authorized User, provide the Authorized User with documentation to support the charge. If such charges remain in dispute, such dispute shall be resolved in accordance with the Dispute Resolution section of this Contract. In the absence of the Supplier's written evidence identifying the merit of the disputed amounts, Authorized User may not pay the disputed amounts and may consider the matter concerning the specific identified amounts closed. All payment terms are net 30 days.

## 11. REPORTING

### A. Supplier's Report of Sales and Industrial Funding Adjustment

By the 10th day of every month, the Supplier shall submit the "Supplier Monthly Report of Sales". A template showing the format in which the report is to be submitted and contact information for submission is available at <http://www.vita.virginia.gov/uploadedFiles/SCM/SupplierReportofSalesTemplate.xls>. The report shall be submitted via electronic mail to the VITA IFA Coordinator and shall report total sales (defined for purposes of this report as all invoiced payments received by Supplier from all Authorized Users) for this Contract during the preceding month. Supplier shall be responsible for submitting the monthly report of sales even if Supplier has had no sales (i.e., a \$0.00 total sales value) for the reporting period.

The Supplier shall submit the Industrial Funding Adjustment (IFA) payment for the period covered by such "Supplier Monthly Report of Sales" within thirty (30) days after submitting the "Supplier Monthly Report of Sales". The IFA payment is equal to two percent (2%) of total sales reported during the relevant month.

The IFA payment shall be submitted to VITA, Attention VITA Controller in the form of a check or electronic payment, made payable to the Treasurer of Virginia. The IFA payment shall reference this Contract number, "report amounts", and "report period" and shall be accompanied by a copy of the relevant "Supplier Monthly Report of Sales". Contact information for submission of IFA payments is available at <http://www.vita.virginia.gov/uploadedFiles/SCM/SupplierReportofSalesTemplate.xls>.

Failure to comply with reporting, payment and distribution requirements of this section may result in default of the Contract.

### B. Small Business Participation

Supplier and VITA agree to meet promptly after the Effective Date of this Contract to discuss the participation of Virginia Department of Minority Business Enterprise (DMBE)-certified Small Businesses as subcontractors and second-tier suppliers under this Contract.

Supplier and VITA agree to meet annually thereafter to review small business subcontracting reports and discuss further action with respect to small business subcontracting and spend.

In addition, by the 10th day of every month, Supplier shall submit to VITA the Small Business Subcontracting Monthly Report (template to be provided). The report should specify the amount of such spend provided to small businesses. Supplier shall submit the report to [SWaM@vita.virginia.gov](mailto:SWaM@vita.virginia.gov).

## 12. CONFIDENTIALITY

### A. Treatment and Protection

Each Party shall (i) hold in strict confidence all Confidential Information of any other Party, (ii) use the Confidential Information solely to perform or to exercise its rights under this Contract, and (iii) not transfer, display, convey or otherwise disclose or make available all or any part of such Confidential Information to any third-party. However, an Authorized User may disclose the Confidential Information as delivered by Supplier to subcontractors, contractors or agents of such Authorized User that are bound by non-disclosure contracts with such Authorized User. Each Party shall take the same measures to protect against the disclosure or use of the Confidential Information as it takes to protect its own proprietary or confidential information (but in no event shall such measures be less than reasonable care).

### B. Exclusions

The term "Confidential Information" shall not include information that is:

- i). in the public domain through no fault of the receiving Party or of any other person or entity that is similarly contractually or otherwise obligated;

- ii). obtained independently from a third-party without an obligation of confidentiality to the disclosing Party and without breach of this Contract;
- iii). developed independently by the receiving Party without reference to the Confidential Information of the other Party; or
- iv). required to be disclosed under The Virginia Freedom of Information Act (§§2.2-3700 et seq. of the Code of Virginia) or similar laws or pursuant to a court order.
- v). Either Party may use in its business activities the ideas, concepts and know-how contained in the disclosing Party's Confidential Information which are retained in the memories of the receiving Party's personnel that have had access to Confidential Information under this Contract without disclosing that Party's Confidential information.

### **C. Return or Destruction**

Authorized User, Supplier shall (i) at its own expense, (a) promptly return to the disclosing Authorized User all tangible Confidential Information (and all copies thereof except the record required by law) of the disclosing Authorized User, or (b) upon written request from the disclosing Authorized User, destroy such Confidential Information and provide the disclosing Authorized User with written certification of such destruction, and (ii) cease all further use of the Authorized User's Confidential Information, whether in tangible or intangible form.

VITA or the Authorized User shall retain and dispose of Supplier's Confidential Information in accordance with the Commonwealth of Virginia's records retention policies or, if Authorized User is not subject to such policies, in accordance with such Authorized User's own records retention policies.

## **13. INDEMNIFICATION AND LIABILITY**

### **A. Indemnification**

Supplier will defend the Commonwealth, VITA or any Authorized User, their officials, employees or agents (collectively, "Commonwealth Indemnified Parties") against any claim by an unaffiliated third party that any Machine infringes its patent or copyright, and will pay the amount of any resulting adverse final judgment (or settlement to which we consent), to the applicable Commonwealth Indemnified Parties to which such judgment applies. VITA must notify Supplier promptly in writing of the claim and, to the extent permitted by applicable law of the Commonwealth of Virginia, including Virginia Code §§2,2-510 and -514, give Supplier control over its defense or settlement. VITA or the Authorized Users agree to provide us with reasonable assistance in defending the claim, and Supplier will reimburse VITA or the applicable Authorized Users for reasonable out of pocket expenses that VITA and the Authorized Users incur in providing that assistance.

Supplier's obligations will not apply to the extent (but only to the extent) that any claim or adverse final judgment to the extent based on is based predominantly on (i) specifications, code, or materials VITA or an Authorized User provides; (ii) VITA's or an Authorized User's use of Machines after Supplier notifies any of them to discontinue use due to such a claim; (iv) use of, or access to Machines, by any person or entity other than VITA or an Authorized User as permitted by the applicable statement of work for Services; or (v) an alteration of Machines by someone other than Supplier or its contractors. VITA or the Authorized User will be responsible for any costs or damages that result from these actions.

If Supplier receives information concerning a copyright or patent infringement claim related to a Machine, Supplier may, at our expense and without obligation to do so, either (i) procure for VITA or Authorized Users the right to continue to use the allegedly infringing Machine as permitted by the applicable purchase order or (ii) modify the Machines to make it non-infringing or (iii) replace it with a non-infringing functional equivalent, in which case VITA or the Authorized User will stop using the allegedly infringing Machine immediately. If however, as a result of a copyright or patent infringement claim, VITA or an Authorized User's use of a Machine as provided for

under the applicable statement of work for Services is enjoined by a court of competent jurisdiction, Supplier will either procure the right to continue its use, modify it to make it non-infringing, or replace it with a non-infringing functional equivalent. If any other type of third party claim is brought against VITA or Authorized Users regarding Supplier's property, VITA or the applicable Authorized User must notify Supplier promptly in writing.

## **B. Liability**

There may be situations in which VITA or an Authorized User has a right to claim damages or payment. Except as otherwise specifically provided in this paragraph, whatever the legal basis for such claims, Supplier's total liability (and that of our contractors) will be limited, to the maximum extent permitted by applicable law, to direct damages up to two hundred percent of the value (i.e., greater of amount paid or a "not to exceed" amount specified in the purchase order), in the aggregate, for the Machines giving rise to the claims. In the event the Machines are provided to VITA or an Authorized User on a gratuitous or no-charge basis, Supplier's total liability to VITA or such Authorized User will not exceed US \$50,000 or its equivalent in local currency. The limitations on direct damages under this paragraph will not apply with respect to the following in connection with the performance of this Contract:

- i). Supplier's Section 14 (defense of infringement claims);
- ii). Suppliers liability for damages for tortious willful misconduct or tortious gross negligence, to the extent caused by Supplier or its agents;
- iii). bodily injury, including death, and damage to real property and tangible personal property to the extent of Supplier's willful misconduct or gross negligence; and
- iv). Supplier's obligations under Section 13 (Confidentiality).

## **C. Exclusion of liability for damages.**

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS CONTRACT, NEITHER PARTY NOR THEIR CONTRACTORS WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, CONSEQUENTIAL (INCLUDING WITHOUT LIMITATION, DAMAGES FOR BUSINESS INTERRUPTION, OR LOSS OF BUSINESS INFORMATION), SPECIAL, OR INCIDENTAL DAMAGES OR DAMAGES FOR LOSS OF PROFITS OR REVENUES ARISING IN CONNECTION WITH THIS CONTRACT, ANY PURCHASE ORDER FORMACHINES SERVICES, DELIVERABLES, FIXES, PRODUCTS, OR ANY OTHER MATERIALS OR INFORMATION, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF SUCH POSSIBILITY WAS REASONABLY FORESEEABLE.

## **14. SECURITY COMPLIANCE**

Supplier agrees to comply with all provisions of the then-current Commonwealth of Virginia security procedures, published by the Virginia Information Technologies Agency (VITA) and which may be found at (<http://www.vita.virginia.gov/library/default.aspx?id=537#securityPSGs>) or a successor URL(s), as are pertinent to Supplier's operation. Supplier further agrees to comply with all provisions of the relevant Authorized User's then-current security procedures as are pertinent to Supplier's operation and which have been supplied to Supplier by such Authorized User. Supplier shall also comply with all applicable federal, state and local laws and regulations. For any individual Authorized User location, security procedures may include but not be limited to: background checks, records verification, photographing, and fingerprinting of Supplier's employees or agents. Supplier may, at any time, be required to execute and complete, for each individual Supplier employee or agent, additional forms which may include non-disclosure agreements to be signed by Supplier's employees or agents acknowledging that all Authorized User information with which such employees and agents come into contact while at the Authorized User site is confidential and proprietary. Any unauthorized release of proprietary information by the Supplier or an employee or agent of Supplier shall constitute a breach of this Contract.

Supplier shall indemnify, defend, and hold the Commonwealth, VITA, the Authorized User, their officers, directors, employees and agents harmless from and against any and all fines, penalties (whether criminal or civil), judgments, damages and assessments, including reasonable expenses suffered by, accrued against, or charged to or recoverable from the Commonwealth, VITA, the Authorized User, their officers, directors, agents or employees, on account of the failure of Supplier to perform its obligations pursuant to this Section.

Notwithstanding the foregoing, Supplier's entire and collective liability under this Section shall in no event exceed two hundred percent of the value (i.e., greater of amount paid or a "not to exceed" amount) of the applicable statement of work for Services, in the aggregate, for the Services giving rise to claims under this Section.

## **15. BANKRUPTCY**

If Supplier becomes insolvent, takes any step leading to its cessation as a going concern, or ceases business operations for any reason and other than assignment as allowed by this Contract, then VITA may immediately terminate this Contract, and an Authorized User may terminate an order, on notice to Supplier unless Supplier immediately gives VITA or such Authorized User adequate assurance of the future performance of this Contract or the applicable order. If bankruptcy proceedings are commenced with respect to Supplier, and if this Contract has not otherwise terminated, then VITA may suspend all further performance of this Contract until Supplier assumes or rejects this Contract pursuant to Section 365 of the Bankruptcy Code or any similar or successor provision, it being agreed by VITA and Supplier that this is an executory contract. Any such suspension of further performance by VITA pending Supplier's assumption or rejection shall not be a breach of this Contract, and shall not affect the right of VITA or any Authorized User to pursue or enforce any of its rights under this Contract or otherwise.

## **16. GENERAL PROVISIONS**

### **A. Relationship Between VITA and Authorized User and Supplier**

Supplier has no authority to contract for VITA or any Authorized User or in any way to bind or to commit VITA or any Authorized User to any agreement of any kind or to assume any liabilities of any nature in the name of or on behalf of VITA or any Authorized User. Under no circumstances shall Supplier, or any of its employees, hold itself out as or be considered an agent or an employee of VITA or any Authorized User, and neither VITA nor any Authorized User shall have any duty to provide or maintain any insurance or other employee benefits on behalf of Supplier or its employees. Supplier represents and warrants that it is an independent contractor for purposes of federal, state and local employment taxes and agrees that neither VITA nor any Authorized User is responsible to collect or withhold any federal, state or local employment taxes, including, but not limited to, income tax withholding and social security contributions, for Supplier. Any and all taxes, interest or penalties, including, but not limited to, any federal, state or local withholding or employment taxes, imposed, assessed or levied as a result of this Contract shall be paid or withheld by Supplier or, if assessed against and paid by VITA or any Authorized User, shall be reimbursed by Supplier upon demand by VITA or such Authorized User.

### **B. Incorporated Contractual Provisions**

The then-current contractual provisions at the following URL are mandatory contractual provisions, required by law or by VITA, and that are hereby incorporated by reference:

<http://www.vita.virginia.gov/uploadedFiles/SCM/StatutorilyMandatedTsandCs.pdf>

The contractual claims provision §2.2-4363 of the Code of Virginia and the required eVA provisions at <http://www.vita.virginia.gov/uploadedFiles/SCM/eVATsandCs.pdf> are also incorporated by reference.

The then-current terms and conditions in documents posted to the aforementioned URLs are subject to change pursuant to action by the legislature of the Commonwealth of Virginia, change in VITA policy, or the adoption of revised eVA business requirements. If a change is made to the terms and conditions, a new effective date will be noted in the document title. Supplier is advised to check the URLs periodically.

**C. Compliance with the Federal Lobbying Act.**

Supplier's signed certification of compliance with 31 USC 1352 (entitled "Limitation on use of appropriated funds to influence certain Federal Contracting and financial transactions") or by the regulations issued from time to time thereunder (together, the "Lobbying Act") is incorporated as Exhibit F hereto.

**D. Governing Law**

This Contract shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia without regard to that body of law controlling choice of law. Any and all litigation shall be brought in the circuit courts of the Commonwealth of Virginia. The English language version of this Contract prevails when interpreting this Contract. The United Nations Convention on Contracts for the International Sale of Goods and all other laws and international treaties or conventions relating to the sale of goods are expressly disclaimed. UCITA shall apply to this Contract only to the extent required by §59.1-501.15 of the Code of Virginia.

**E. Dispute Resolution**

In accordance with §2.2-4363 of the Code of Virginia, Contractual claims, whether for money or other relief, shall be submitted in writing to the public body from whom the relief is sought no later than sixty (60) days after final payment; however, written notice of the Supplier's intention to file such claim must be given to such public body at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims shall not delay payment of amounts agreed due in the final payment. The relevant public body shall render a final decision in writing within thirty (30) days after its receipt of the Supplier's written claim.

The Supplier may not invoke any available administrative procedure under §2.2-4365 of the Code of Virginia nor institute legal action prior to receipt of the decision of the relevant public body on the claim, unless that public body fails to render its decision within thirty (30) days. The decision of the relevant public body shall be final and conclusive unless the Supplier, within six (6) months of the date of the final decision on the claim, invokes appropriate action under §2.2-4364, Code of Virginia or the administrative procedure authorized by §2.2-4365, Code of Virginia.

Upon request from the public body from which the relief is sought, Supplier agrees to submit any and all contractual disputes arising from this Contract to such public body's alternative dispute resolution (ADR) procedures. Supplier may invoke such public body's ADR procedures, if any, at any time and concurrently with any other statutory remedies prescribed by the Code of Virginia.

In the event of any breach by a public body, Supplier's remedies shall be limited to claims for damages and Prompt Payment Act interest and, if available and warranted, equitable relief, all such claims to be processed pursuant to this Section.

**F. Advertising and Use of Proprietary Marks**

Supplier shall not use the name of VITA or any Authorized User or refer to VITA or any Authorized User, directly or indirectly, in any press release or formal advertisement without receiving prior written consent of VITA or such Authorized User. In no event may Supplier use a proprietary mark of VITA or an Authorized User without receiving the prior written consent of VITA or the Authorized User.

**G. Notices**

Any notice required or permitted to be given under this Contract shall be in writing and shall be deemed to have been sufficiently given if delivered in person, or if deposited in the U.S. mails, postage prepaid, for mailing by registered, certified mail, or overnight courier service addressed to the addresses shown on the signature page. Both parties agree to accept e-mail correspondence as notice required or permitted under this Contract and it shall be regarded as sufficiently given. VITA or Supplier may change its address for notice purposes by giving the other notice of such change in accordance with this Section.

**H. No Waiver**

Any failure to enforce any terms of this Contract shall not constitute a waiver.

## **I. Assignment**

This Contract shall be binding upon and shall inure to the benefit of the permitted successors and assigns of VITA and Supplier. Supplier may not assign, subcontract, delegate or otherwise convey this Contract or any of its rights and obligations hereunder, to any entity without the prior written consent of VITA, and any such attempted assignment or subcontracting without consent shall be void. VITA may assign this Contract to any entity, so long as the assignee agrees in writing to be bound by the all the terms and conditions of this Contract.

If any law limits the right of VITA or Supplier to prohibit assignment or nonconsensual assignments, the effective date of the assignment shall be thirty (30) days after the Supplier gives VITA prompt written notice of the assignment, signed by authorized representatives of both the Supplier and the assignee. Any payments made prior to receipt of such notification shall not be covered by this assignment.

## **J. Captions**

The captions are for convenience and in no way define, limit or enlarge the scope of this Contract or any of its Sections.

## **K. Severability**

Invalidity of any term of this Contract, in whole or in part, shall not affect the validity of any other term. VITA and Supplier further agree that in the event such provision is an essential part of this Contract, they shall immediately begin negotiations for a suitable replacement provision.

## **L. Survival**

The provisions of this Contract regarding Software License, Warranty, Confidentiality, Liability and Indemnification, and the General Provisions shall survive the expiration or termination of this Contract. In addition, the provisions of this Contract necessary for the use and operation of the Maintenance provisions herein, shall continue in effect through termination of the Maintenance.

## **M. Force Majeure**

No Party shall be responsible for failure to meet its obligations under this Contract if the failure arises from causes beyond the control and without the fault or negligence of the non-performing Party. If any performance date under this Contract is postponed or extended pursuant to this section for longer than thirty (30) calendar days, VITA, by written notice given during the postponement or extension, may terminate Supplier's right to render further performance after the effective date of termination without liability for that termination, and in addition an Authorized User may terminate any order affected by such postponement or delay.

Supplier shall be paid for all products and services provided and accepted up to the Force Majeure event.

## **N. Remedies**

The remedies set forth in this Contract are intended to be cumulative. In addition to any specific remedy, VITA and all Authorized Users reserve any and all other remedies that may be available at law or in equity.

## **O. Right to Audit**

VITA reserves the right to audit those Supplier records that relate to the Product purchased and Services rendered or the amounts due Supplier for such services under this Contract. VITA's right to audit shall be limited as follows:

- i). Three (3) years from Service performance date;
- ii). Performed at Supplier's premises, during normal business hours at mutually agreed upon times; and
- iii). Excludes access to Supplier cost information.

In no event shall the Supplier have the right to audit, or require to have audited, VITA or any Authorized User.

**P. Offers of Employment**

During the first twelve (12) months of the Contract, should Supplier hire an employee of VITA who has substantially worked on any project covered by this Contract without prior written consent, the Supplier shall be billed for fifty percent (50%) of the employee's annual salary in effect at the time of termination.

**Q. Contract Administration**

Supplier agrees that at all times during the term of this Contract an account executive, at Supplier's senior management level, shall be assigned and available to VITA. Roles and responsibilities of the account executive are TBD based on Supplier proposal. Supplier reserves the right to change such account executive upon reasonable advance written notice to VITA.

**R. Entire Contract**

The following Exhibits, including all subparts thereof, are attached to this Contract and are made a part of this Contract for all purposes:

- Exhibit A Request for Proposal
- Exhibit B Reserved
- Exhibit C Prices, Fees, Service Charges and Payment Schedule
- Exhibit D Warranty and Maintenance Descriptions and IBM Agreement for Machines
- Exhibit E IBM's International Program License Agreement for separate software programs
- Exhibit F Certification Regarding Lobbying
- Exhibit G Self-Maintainer Terms

This Contract, its Exhibits, and any prior non-disclosure agreement constitute the entire agreement between VITA and Supplier and supersedes any and all previous representations, understandings, discussions or agreements between VITA and Supplier as to the subject matter hereof. Any and all terms and conditions contained in, incorporated into or referenced by the Supplier's proposal shall be deemed invalid. The provisions of the Virginia Department of General Services, Division of Purchases and Supply Vendor's Manual shall not apply to this Contract or any order issued hereunder. This Contract may only be amended by an instrument in writing signed by VITA and Supplier. In the event of a conflict, the following order of precedence shall apply:

This Contract, Exhibit D, Exhibit E, Exhibit C, and Exhibit A.

An Authorized User and Supplier may enter into an ordering agreement pursuant to this Contract. To the extent that such ordering agreement or order issued hereunder, include any terms and conditions inconsistent with the terms and conditions of this Contract, or it's Exhibits in accordance with the order of precedence, such terms and conditions shall be of no force and effect.

VITA and Supplier each acknowledge that it has had the opportunity to review this Contract and to obtain appropriate legal review if it so chose.

Executed as of the last date set forth below by the undersigned authorized representatives of VITA and Supplier.

Supplier

By: \_\_\_\_\_

(Signature)

Name: Andy Hermons

(Print)

Title: CLIENT MANAGER

Date: 08-10-10

Address for Notice:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

VITA

By: \_\_\_\_\_

(Signature)

Name: Sam Nixon, Jr.

(Print)

Title: CIO

Date: August 16, 2010

Address for Notice:

11751 Meadowville Lane  
Chester VA 23836

Attention: Contract Administrator

## Exhibit A

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## Detailed Description of Proposed Solution(s)

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Supplier's response by item in the tables set forth in Section 5, clearly identifying and detailing the proposed Solution, and any processes, methodologies, and resources required by the Solution type defined in Section 5. Requested limitation: 25 pages.

### *5. Functional and Technical Requirements*

Suppliers are to indicate their capability of fulfilling each specific requirement below. Each Supplier's responses will be reviewed and compared across Suppliers within each service type in order to determine the best solution for the Commonwealth.

Detailed requirements are presented in questionnaire format to facilitate direct responses and establish accountability regarding delivery of Solution by the Supplier. To respond to each requirement, Supplier is asked to enter, in the space provided in Column A, a code that best corresponds to its intended response for the requirement listed.

The acceptable codes for Column A are as follows:

Y - "Yes" - Supplier can fully meet the requirement as documented with its current application or proposed solution. If applicable, Supplier should provide in Column B an explanation of how it will fulfill the requirement. This may include use of alliances with other suppliers. Supplier may also use Column B to cross-reference a detailed explanation included in an attachment of its proposal.

F - "Yes, Future" - Supplier will be able to fully meet this requirement in the near future (not longer than six months). Supplier should provide a proposed start date and cross-reference any attached documentation in Column B.

N - "No" - Supplier cannot meet the requirement and has no firm plans to be in the position to meet this need within six months.

A blank or "NA" in any box in Column A will be interpreted by VITA as an "N".

VITA has posed some open-ended questions. In those instances, Supplier is to provide adequate information to allow VITA to properly evaluate its proposal.

## A. General

	Requirements	A	B
1.	In order to sell/service the entire Commonwealth of Virginia, will you be incorporating subcontractors or alliances? Please provide the details of your plan.	Y	IBM is prepared to sell to all public bodies in the entire Commonwealth of Virginia via the direct channel. IBM's Virginia team includes a host of experts that are able to handle any needs a user might have. This team includes field representatives that are experts in products and services, an inside team that are able to address any order or support issues, and a technical support experts that are highly trained and available to answer technical questions. This team strategy allows IBM to handle all issues a Virginia user might have directly.
2.	VITA strongly encourages Suppliers to develop a catalog website that interfaces with eVA. Can your company produce a punch-out catalog website?  Refer to:  <a href="http://www.eva.virginia.gov/vendors/pages/catalogcreation.htm">http://www.eva.virginia.gov/vendors/pages/catalogcreation.htm</a>	Y	Please see attachment for additional information.  In the hard copy version of this response, the printed document is at the end of this section.    IBMpunchoutcatalog capabilities.doc
3.	Can your firm have a catalog website up, functioning and interfacing with eVA within 30 days of contract award?	Y	IBM works with customers to develop a website that is tailored to your requirements and needs. Please refer to our example attached (CSOL –etools overview).    CSOL - etools overview.pdf
4.	Will your firm have a dedicated account management team on this contract? Please provide details.	Y	<b><u>IBM Points of Contacts</u></b> <b>IBM Contact Supporting the COVA</b> Mr. Andy Harmond Client Manager 9201 Arboretum Parkway Richmond, VA 23236 E-Mail: harmond@us.ibm.com Phone: 757-620-8002 <b>Contracts Management</b> Ms. Ethel H. James State Contract Administrator

	Requirements	A	B
			<p>E-Mail: ethelj@us.ibm.com  Phone: 919 882-6377  Fax: 800-242-6329</p> <p><b>State/Local Government, K-12/Higher Education</b></p> <p>Mr. Jeffrey L. Oliver  Client Representative  E-Mail: jeffoliv@us.ibm.com  Phone: 800-426-1751 ext 631284  Fax: 800-242-6329</p> <p><b>IBM Maintenance Support</b>  Phone: 800-IBM-SERV or 800-426-7378</p> <p><b>IBM Global Finance</b>  Scott Giles  iFSR  E-Mail: scogiles@us.ibm.com  Phone: 770-863-1820</p> <p><b>System x/Modular Sales Specialist – Virginia</b>  David Young  Phone 800-656-0833, Option 1, x6103</p>
5.	Will your firm have an account executive on this contract? Please provide details.	Y	<p><b><u>IBM Points of Contacts</u></b></p> <p><b>IBM Contact Supporting the COVA</b>  Mr. Andy Harmond  Client Manager  9201 Arboretum Parkway  Richmond, VA 23236  E-Mail: harmond@us.ibm.com  Phone: 757-620-8002</p> <p><b>Contracts Management</b>  Ms. Ethel H. James  State Contract Administrator  E-Mail: ethelj@us.ibm.com  Phone: 919 882-6377  Fax: 800-242-6329</p> <p><b>State/Local Government, K-12/Higher Education</b></p> <p>Mr. Jeffrey L. Oliver  Client Representative  E-Mail: jeffoliv@us.ibm.com  Phone: 800-426-1751 ext 631284  Fax: 800-242-6329</p>

	<b>Requirements</b>	<b>A</b>	<b>B</b>
6.	<p><b>Does your firm have the marketing ability and resources to promote this contract to schools, universities, local and state agencies? Please provide marketing plan and examples of marketing tools.</b></p>	Y	<p>IBM has an extensive team of marketing professionals that will assist the sales and service team in communicating details of this contract. Marketing tools available include EDM for email communication to large numbers of users, interactive HTML order status and invoice information emailed directly to the users, notifications of impending warranty expirations, and customized touch plans that can meet the varied needs of different departments. IBM Marketing can also provide marketing materials to agencies for distribution should they so require. In addition, IBM's web capabilities include the ability to customize web portals for each agency as another avenue of communication to users.</p>
7.	<p><b>Does your firm offer any product incentives, credits and or rebate programs? Please provide details.</b></p>	Y	<p>IBM has built its discounting structure for this contract without incentives, credits or rebates built in. Occasionally, IBM will offer special programs for limited times to the users of this contract that would be in addition to the discounting structure in place. These special programs may include special incentives or rebates. If such a program is offered, this would be communicated through IBM's EDM channel as well as through the customized web portals.</p>

## B. Reports

	Requirements	A	B
1.	Can your firm provide reports on request to users detailing products that have been placed in any of their locations? Please provide examples.	Y	<p>IBM e-tools are state-of-the-art, web-based client support applications that provide access to a host of information including the ability to view near real-time status of contracts, orders, billing, and inventory. Our clients can receive immediate response to questions rather than placing time-consuming phone calls. Our suite of e-tools offers our clients ways to increase their productivity and save costs. IBM has designed a set of e-tools to make it easier than ever for our clients to do business with IBM. IBM Client Support and Administrative e-tools provide the information that you need, when you need it. Best of all, these tools are available at no cost.</p> <p>Our web technology provides on demand access to up-to-date information.</p> <p>In the hard copy version of this response, the printed document is at the end of this section.</p>  <p>Inventory Tracking.pdf</p>
2.	Does your firm maintain an electronic service log that is available to users on specific computer hardware? Please provide examples.	Y	<p>IBM Client Support and Administrative e-tools provide the information that you need, when you need it. IBM has created a web based tool to be used to place and track Electronic Service Requests to IBM ITS Team. This tool allows the IBM External customers the ability to place and self-service break/fix calls through the web. Our customers can also place a Service Request with IBM by dialing 1-800-IBM-SERV.</p> <p>In the hard copy version of this response, the printed document is at the end of this section.</p>  <p>ESC + Presentation 043008 (Microsoft).ppt</p>

3.	<p><b>Does your firm provide any additional reports that would be an added value to the Commonwealth? Please describe and provide examples.</b></p>	Y	<p>IBM has extensive reporting capabilities and is willing to work with the Commonwealth and/or individual agencies to design customized reporting, in addition to standard contract reporting, that meets individual needs. These needs can be communicated to the Sales team and addressed ad hoc. Additional charges may apply.</p>
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### C. Related Services

	Requirements	A	B
1.	Does your firm have a customer support program? Please describe your firm's ability to keep users informed of new products, changes in technology, advanced specification documentation and other market information.	Y	<p>Please see attached file.</p> <p>In the hard copy version of this response, the printed document is at the end of this section.</p>  <p>IBM Corp Related Services Question #1</p>
2.	Does your firm provide installation services? Please provide details.	Y	<p>Please see the section called <b>Error! Reference source not found.</b> for IBM's implementation plan.</p>
3.	Is your firm willing to commit to service-levels agreements? If so, please refer to Appendix A.	Yes, as service level objectives.	<p>Our response service level objectives for the requested tasks are stated in Appendix A. Please see our SLO response within this document for 24x7x2 24x7x4 9x5x4 and 9x5 NBD SLO. IBM has only priced 24x7x4 and 9x5 NBD SLO. Other options are available upon request using similar discounts off the commercially available price offering.</p>
4.	For security reasons, will your firm allow the user to keep a failed hard drive while receiving a new hard drive that is covered under warranty? Please provide details and pricing if necessary.	Y	<p>We have several options that will meet this requirement:</p> <p>IBM PARTS Replacement:</p> <p>1) The IBM Parts replacement strategy for several System x and Blade technology products is a CRU (Customer Replacement Unit) strategy. When the client calls in a service request for a failed hard drive, the IBM Remote Support center verifies the failure and if a replacement hard drive is needed, the hard drive is shipped to the location for the client to replace. The client then has 30 days to use the return shipping label provided by IBM to return the failed disk unit back to IBM before an invoice for the price of the hard drive is created and mailed to the client. For this support model, the client must be willing to accept the CRU part instead of requiring an onsite IBM field technician to provide and replace the hard drive. If the client requires onsite IBM technician support for the hard drive replacement, the technician will bring the part to the location (or use the part that was</p>

	Requirements	A	B
			<p>shipped to the site), but he or she is required to remove the failed unit upon service completion so they can account for the part and return the failed unit to IBM.</p> <p>IBM Hard Drive Retention Offering:  2) No matter whether the client site accepts CRU (Customer Replacement Unit) parts or if they require onsite field technician replacement of their hard drives, the client would retain possession of the failed units permanently; IBM would not require the failed unit to be returned.</p> <p>This offering is a fee service offering and will be priced at time of order request at the then current hard drive disk retention commercially available price as an addition to the hardware break fix warranty or maintenance service. A warranty or maintenance service contract must exist for this separate fee service offering to apply.</p>
5.	<p><b>Does your firm provide in-house quality assurance and testing processes for all hardware? Please provide details.</b></p>	Y	<p>The IBM Quality Policy Statement is as follows:</p> <p>IBM has an overriding worldwide commitment to the quality of the products, solutions, and services we provide to our customers. Quality is recognized as a fundamental component of the value customers receive from IBM. IBM is committed to the goals of achieving total customer satisfaction, delivering superior products, solutions, and services, and exceeding customer requirements. Recognizing that the marketplace is the driving force behind everything we do, IBM implements effective business processes that support value creation for our customers and our stakeholders.</p>
6.	<p><b>Do your service and maintenance technicians have and maintain current industry certifications? Please provide details and types of certifications.</b></p>	Y	<p>IBM requires all SSRs to obtain A+ Certification before employment. A+ Certification is recognized across the microcomputer industry as a credible means of demonstrating technical knowledge and customer relationship skills. To obtain A+ Certification, representatives are tested on computer repair, preventative maintenance, safety, diagnosis, configuration, installations and upgrades.</p>

	Requirements	A	B
			<p>Some examples of our certifications:</p> <p>Network – Training and certifications – voice, wireless, routing, switching, security: Cisco (CCNA, CCDA, CCDP, CCNP, CCIE, Novell Master CNE, RCDD, Nortel (NCSS, NCTS), Juniper (JNCIS-SSL, JNCIA-IDP, JNCIS-FWV, JNCIS-ER, JNCIA-DX, JNCIA-WX.</p> <ul style="list-style-type: none"> <li>▪ Server – MCSE; Unix/AIX trained and certified, Linux trained, some Sun trained</li> <li>▪ Client – MCSE</li> <li>▪ Telecom – Voice, VoIP</li> </ul>
7.	<b>If you not the manufacturer or OEM certified to service/repair units, have you partnered with an organization that is OEM certified for the devices that you are proposing? Please provide details.</b>	N/A	IBM is the manufacturer and will provide certified service.
8.	<b>Does your firm have an in-house order tracking system that can be accessed 24x7 by a user? Please provide details.</b>	Y	Yes. IBM's Customer Support OnLine website allows customs to retrieve order, delivery and availability information online for a specific order or set of orders. To access IBM's Customer Support On-Line order status visit the following website. Information required for order tracking is as follows: Enterprise, customer, INAC or company number along with Purchase Order number. <a href="http://www.ibm.com/account/orderstatus/myorders/login?cc=us">http://www.ibm.com/account/orderstatus/myorders/login?cc=us</a>
9.	<b>Does your firm have the ability to deliver large quantities of equipment to multiple locations? Please describe your firm's process and experience including delivery time and scheduling procedures.</b>	Y	IBM has extensive experience with large deliveries and complex roll out plans to multiple locations. IBM's strategy when coordinating fulfillment of such an order is to work hand in hand with the end user to ensure that particular user's individual needs are met. IBM has strong business relationships with numerous bulk shippers who are able to accommodate variances in delivery schedules, dock capabilities, palette sizes and shapes, etc. IBM's Sales and Services team will work with each particular end user

	Requirements	A	B
			from the time such an order is placed to ensure all special needs are identified at the outset of the project and will devise a shipment strategy that meets those needs, and engage the appropriate shipping partner.
10.	Does your firm have a return policy? Please provide details.	Y	<p>New, standard IBM Product may be returned for any reason within 30 days of the date of invoice and you may obtain a refund or credit. IBM does not provide refunds or credits for portions of a packaged offering provided at a single price. You may return the complete package for a refund or credit. To qualify for this credit or refund (as applicable), you must call your IBM customer support representation to obtain a return-authorization form. You must return the new IBM Product, including all documentation and accessories, intact and in its original packaging, to an IBM designated location by the date IBM specifies. A copy of the invoice, the return-authorization form, and the shipping label must accompany the return. Shipping and handling charges generally will not be refunded or credited. IBM Products authorized by IBM for return and returned without an IBM return-authorization form or returned after the date specified by IBM in the return-authorization form, may be subject to a restocking fee equal to 15% of the price paid.</p> <p>This Returns policy does not apply to IBM Product(s) that you acquire for which IBM creates a unique machine type model (MTM) not generally available for purchase by all IBM customers. If the Product ships as a result of an IBM error, IBM will initiate a return of the Product with appropriate documentation at no charge to you if IBM is notified of the error within 30 days of the date of the invoice.</p>
11.	Does your firm charge a re-stocking fee on returned equipment? Please provide details.	Y	IBM Products authorized by IBM for return and returned without an IBM return-authorization form, or returned after the date specified by IBM in the return-authorization form, may be

	Requirements	A	B
			subject to a restocking fee equal to 15% of the price paid.
12.	Does your firm offer IT equipment disposal and recycling services? Please provide details.	Y, Future	<p>Please see document attached below.</p> <p>In the hard copy version of this response, the printed document is at the end of this section.</p>  <p>GARS Overview_2008_v2.c</p>
13.	Does your firm adhere to Energy Star 4.0 energy efficiency standards for computer hardware products? Please provide list of qualified products.	N	<p>While servers are not listed in EnergyStar program yet, IBM has been an ENERGY STAR Partner from the program's inception in 1992 -- in fact, IBM worked with the U.S. Environmental Protection Agency (EPA) in the development of the program and its requirements. EPA has recently begun an effort to develop an ENERGY STAR specification for enterprise level IT equipment and an ENERGY STAR building rating for data centers. IBM is participating in this effort. Established in 1991, IBM's Product Stewardship program has brought about industry-leading practices in design for the environment, product environmental metrics and product recycling. Its objectives are to:</p> <ul style="list-style-type: none"> <li>Develop products with consideration for their upgradeability to extend product life.</li> <li>Develop products with consideration for their reuse and recyclability at the end of product life.</li> <li>Develop products that can safely be disposed of at the end of product life.</li> <li>Develop and manufacture products that use recycled materials where they are technically and economically justifiable.</li> <li>Develop products that will provide improvements in energy efficiency and/or reduced consumption of energy.</li> <li>Develop products that minimize resource use and environmental impacts through selection of environmentally preferred materials and finishes.</li> </ul> <p>IBM's product stewardship</p>

	<b>Requirements</b>	<b>A</b>	<b>B</b>
			<p>requirements are included in its Integrated Product Development process, a strategic tool used by process and product development engineers. IBM's Product Stewardship program also provides a proactive and strategic approach to the worldwide environmental management of products for the corporation.</p>

## Exhibit C

Intel/ AMD Based

### *Market Basket Configuration*

**Only fill in Yellow Shaded Cells**

**Pricing is to include the Industrial Funding Adjustment (see Section 8 of RFP ), eVA fees and all FOB Destination Charges**

A. Tower Server Offering	Unit Price (Provide a link to public site to verify this cost)	Discount % from Unit	Unit Discounted Price
(2) Quad Core 2.4GHz	\$ 6,643.00	30%	\$ 4,650.10
Minimum 2 Processor Sockets			
16GB ECC Memory			
(3) 100GB Hot Plug SAS 15K Hard Drives			
Dual embedded gigabit network adapters			
Raid 5 SAS Controller with battery backup			
DVD ROM Drive			
Redundant power supply			
Integrated Server Management			
3 Year Onsite Parts and Labor Warranty (Next Business Day)	Standard	0%	\$ -
<b>Total Tower Offering</b>			<b>\$ 4,650.10</b>
B. Rack Server Offering	Unit Price (Provide a link to public site to verify this cost)	Discount %	Unit Discounted Price
(4) Quad Core 2.4GHz	\$ 21,195.00	37%	13352.85
Minimum 4 Processor Sockets			
32GB ECC Memory			
(5) 140GB Hot Plug SAS 15K Hard Drives			
Raid 5 SAS Controller with battery backup			
Dual Embedded Gigabit Network Adapters			

Redundant Power Supply			
Integrated Server Management			
3 Year Onsite Parts and Labor Warranty (Next Business Day)	Standard	0%	\$ -
<b>Total Rack Offering</b>			<b>\$ 13,352.85</b>

<b>C. Blade Server Offering</b>	<b>Unit Price (Provide a link to public site to verify this cost)</b>	<b>Discount %</b>	<b>Unit Discounted Price</b>
(4) Quad Core 2.4GHz	\$ 11,504.00	37%	\$ 7,247.52
Minimum 4 Processor Sockets			
32GB ECC Memory			
(2) 140GB Hot Plug SAS 15K Hard Drives			
Integrated Raid Controller			
2 Integrated Gigabit Network Adapters			
(2) Gigabit Ethernet Pass-Thru Modules			
Enclosure (Fully Powered and Fully Fanned)	\$ 16,367.00	37%	\$ 10,311.21
Upgradeable to Ethernet Blade Switch and Fiber Channel Switch			
3 Year Onsite Parts and Labor Warranty (Next Business Day)	Standard	0%	\$ -
<b>Total Blade Offering</b>			<b>\$ 17,558.73</b>

<b>D. Optional Services (see note #2 at bottom)</b>	<b>Unit Price (Provide a link to public site to verify this cost)</b>	<b>Discount % (see note at bottom)</b>	<b>Unit Discounted Price</b>
Onsite Installation per hour (regardless of server type)			
Data Migration per hour (regardless of server type)			
Imaging per hour (regardless of server type)			
Configuration per hour (regardless of server type)			
Tower Server Cost for 4th year Onsite Parts and Labor Warranty (Next Business Day)	\$ 267.00	20%	\$ 213.60
Tower Server Cost for 5th year Onsite Parts and Labor Warranty (Next Business Day)	\$ 267.00	20%	\$ 213.60
Rack Server Cost for 4th year Onsite Parts and Labor Warranty (Next Business Day)	\$ 1,200.00	20%	\$ 960.00
Rack Server Cost for 5th year Onsite Parts and Labor Warranty (Next Business Day)	\$ 1,200.00	20%	\$ 960.00
Blade Server Cost for 4th year Onsite Parts and Labor Warranty (Next Business Day)	\$ 200.00	20%	\$ 160.00
Blade Server Cost for 5th year Onsite Parts and Labor Warranty (Next Business Day)	\$ 200.00	20%	\$ 160.00

Section D is optional for suppliers. If a supplier wishes to offer the items listed in section D, supplier is to fill-out all areas to be considered for award. Suppliers can win both sections (Servers and Optional Services) but cannot win just Optional Services.

The discount proposed for each optional service is the minimum discount level for that service during the term of the contract. Suppliers may offer higher discounts but may not go below proposed discount level.

<b>Pricing for ALL additional add-on devices that are offered are to include the Industrial Funding Adjustment (see Section 8 of RFP ), eVA fees and all FOB Destination Charges (no exceptions)</b>			
<b>Manufacturer (see note #1)</b>	<b>Minimum Discount %</b>		
IBM DS3400 SAN	20%		
IBM DS3300 SAN	20%		
IBM DS3200 SAN	20%		
IBM DS4700 SAN	20%		
IBM DS5000 SAN	20%		
IBM DS5100 SAN	20%		
IBM DS5200 SAN	20%		
IBM DS5300 SAN	20%		
Storage Hard Drives	20%		
Storage Licenses	20%		
IBM Warranties	20%		
IBM Tape Drives	20%		
IBM Bladecenter H Chassis	37%		
IBM Bladecenter E Chassis	37%		
IBM Bladecenter S Chassis	37%		
IBM HS21XM Blade Server	37%		
IBM HS22 Blade Server	37%		
IBM HS12 Blade Server	37%		
IBM LS21 Blade Server	37%		
IBM LS22 Blade Server	37%		
IBM LS41 Blade Server	37%		
IBM LS42 Blade Server	37%		
IBM X3950M2 Server	37%		
IBM X3850M2 Servers	37%		
IBM X3755 Server	37%		
IBM X3650M2 Server	30%		
IBM X3550M2 Server	30%		
IBM X3500M2 Server	30%		
IBM X3400M2 Server	30%		
IBM X3350 Server	30%		
IBM X3200M2 Server	30%		

IBM X3250M2 Server	30%		
Server and Storage Warranties	20%		
IBM Racks	10%		
IBM Server Memory	10%		
IBM Server Hard Drives	18%		
IBM Monitors	12%		
IBM Server Processors	10%		
IBM Server I/O Options	10%		

**Note #1** - Suppliers are to list manufacturers that they wish to propose in column "A" that will supply add-on devices for the proposed servers. (APC, Kendall Howard, etc.) Suppliers are then to enter the minimum discount in column "B" for that manufacturer. The proposed discount will be the minimum discount level for that manufacturer for the life of the contract. Proposed manufactures and their associated add-ons can only be purchased at the time of sale with the server. Routers and Switches that are specific to Blade servers can only be purchased at time of sale. Other router and switches are not to be part of this contract.

## EXHIBIT D

### Maintenance Levels proposed:

#### ***24x7x4 hours***

IBM's objective is to respond on-site within 4 hours of IBM's receipt of your initial request for service, after the problem has been remotely evaluated and it has been determined that an on-site visit is necessary. Service is provided around the clock every day, including IBM holidays.

#### ***9x5/Next business day***

IBM's objective is to respond on-site on the business day after IBM's receipt of your initial request for service, after the problem has been remotely evaluated and it has been determined that an on-site visit is necessary. Requests for service may be made 24 hours a day, however, service hours are 8 a.m. to 5 p.m. local time, Monday through Friday, excluding IBM holidays.

An IBM System Services Representative (SSR) will respond the next business day to trouble calls placed before 5 PM on a business day, Monday through Friday. It is IBM's objective to answer a call placed before 5 PM local time on Friday with an on-site service visit Monday. Calls placed after 5 PM may require an additional day for an on-site response. Thus, a call placed after 5 PM local time on Friday may be answered by an on-site service visit on Tuesday. The same principles apply to IBM holidays.

### Warranty and Maintenance Services:

When a service request is opened, the IBM Support Center will verify the machine type and serial number, validate your customer profile, and assign a problem number. Your service request will be managed to completion by the Problem Resolution Center who will call you within one hour of the receipt of your call.

#### The Problem Resolution Center will:

- Review call record
- Perform problem determination
- Resolve problem over the phone if possible
- Determine skills and parts required
- Document customer request, scheduling requirements, special handling instructions
- Dispatch a Systems Services Representative (SSR) to your location. The SSR will arrive on-site at the location during our response time objectives, which are determined by the contracted level of service.
- Update customer records

IBM's proposed maintenance solution includes stocking standard components within the IBM Parts Inventory Management System (PIMS). SSRs are contacted and dispatched via a portable terminal known as a Research in Motion (RIM) communication device. These devices provide rapid two-way radio communication among IBM service personnel and management. SSRs may have the needed parts in their individual parts supplies. Via the portable electronic communication devices, your IBM SSR has electronic access to this entire parts distribution. Efforts are made to support all geographic areas with an availability level equal to total requirements.

# IBM Agreement for Machines

This IBM Agreement for Machines (called the "Agreement") governs transactions by which Customer purchases Machines and obtains licenses to associated Programs from International Business Machines Corporation ("IBM").

## 1. Attachments and Transaction Documents

Additional terms for Machines are in documents called "Attachments" and "Transaction Documents" provided by IBM. In general, Attachments contain terms that may apply to more than one transaction, while Transaction Documents (such as a supplement, order confirmation, order acceptance, schedule, invoice, exhibit, proof of entitlement or addendum) contain specific details and terms related to each individual transaction. Customer may receive one or more Transaction Documents for a single transaction. Attachments and Transaction Documents are part of this Agreement only for those transactions to which they apply. Each transaction is separate and independent from other transactions. If there is a conflict among the terms of this Agreement, Attachments, and Transaction Documents, those of an Attachment prevail over those of this Agreement, and the terms of a Transaction Document prevail over those of both this Agreement and an Attachment.

## 2. Definitions

**Customer-set-up Machine** – an IBM Machine that Customer is responsible for installing according to instructions provided with it.

**Date of Installation** –

- a. for an IBM Machine that IBM is responsible for installing, the business day after the day IBM installs it or, if Customer defers installation, makes it available to Customer for subsequent installation by IBM; and
- b. for a Customer-set-up Machine and a non-IBM Machine, the second business day after the Machine's standard transit allowance period. Enterprise — any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent. The term "Enterprise" applies only to the portion of the Enterprise located in United States of America.

**IBM Machine** – a Machine bearing an IBM logo.

**IBM Program** – an IBM Program licensed under a separate IBM license agreement (for example, IBM International Program License Agreement). For the purpose of this Agreement, IBM Program does not include Programs available and licensed under an IBM Customer Agreement ("ICA") as an "ICA Program" defined in such ICA.

**Licensed Internal Code (called "LIC")** – Machine Code used by certain IBM Machines IBM specifies (called "Specific Machines").

**Machine** – a hardware device, its features, conversions, upgrades, elements, or accessories, or any combination of them. The term "Machine" includes an IBM Machine and any non-IBM Machine (including other equipment) that IBM may provide to Customer.

**Machine Code** – microcode, basic input/output system code (called "BIOS"), utility programs, device drivers, diagnostics, and any other code (all subject to any exclusions in the license provided with it) delivered with an IBM Machine for the purpose of enabling the Machine's function as stated in its Specifications. The term "Machine Code" includes LIC.

**Non-IBM Program** – a Program licensed under a separate third party license agreement.

**Product** – a Machine or a Program.

**Program** – the following, including the original and all whole or partial copies:

- a. machine-readable instructions and data;
- b. components, files, and modules;
- c. audio-visual content (such as images, text, recordings, or pictures); and
- d. related licensed materials (such as keys and documentation).

The term "Program" includes any IBM Program or Non-IBM Program that IBM may provide to Customer. The term does not include Machine Code.

**Specifications** - information specific to a Machine. IBM Machine Specifications are in a document entitled "Official Published Specifications."

### **3. Acceptance of Terms**

Customer accepts the terms in Attachments and Transaction Documents by i) signing them (by hand or electronically), ii) using the Product, or allowing others to do so, or iii) making any payment for the Product. A Product becomes subject to this Agreement when IBM accepts Customer's order by i) sending Customer a Transaction Document or ii) shipping the Machine or making the Program available to Customer. Any Attachment or Transaction Document will be signed by both parties if requested by either party.

### **4. Charges and Payment**

#### **4.1 Charges**

A Transaction Document specifies the amount payable for Products based on one-time or recurring charges. Additional charges may apply (such as special handling expenses). IBM will inform Customer in advance whenever additional charges apply. Recurring charges for a Machine begin on its Date of Installation. Unless otherwise provided in this Agreement (including any applicable Attachment or Transaction Document) IBM does not give credits or refunds for any prepaid or other charges already due or paid.

#### **4.2 Usage Charges**

One-time and recurring charges may be based on measurements of actual or authorized use (for example, authorized capacity for Machines). Customer agrees to provide actual usage data as described in an Attachment or Transaction Document.

If a Transaction Document provides an estimated total charge for usage charges, the estimate is for planning purposes only. IBM invoices charges based on Customer's actual or authorized use, subject to any specified minimum commitment.

If Customer makes changes to its environment that impact usage charges (for example, change authorized capacity for Machines), Customer agrees to promptly notify IBM and pay any applicable charges. Charges will be adjusted accordingly. In the event that IBM changes the basis of measurement, its terms for changing charges will apply.

#### **4.3 Changes to Charges**

From time to time, IBM may change its charges. Customer receives the benefit of a decrease in charges for amounts that become due on or after the effective date of the decrease.

Unless provided otherwise in an Attachment or Transaction Document, IBM may increase recurring charges for Machines provided under this Agreement, by giving Customer three months' written notice. An increase applies on the first day of the invoice or charging period on or after the effective date IBM specifies in the notice. IBM may increase one-time charges without notice. However, an increase to one-time charges does not apply to Customer if IBM receives the order before the announcement date of the increase and IBM ships the Machine or makes the Program available to Customer within three months after IBM's receipt of the order.

Upon reasonable notice, IBM may verify the usage data and other information affecting the calculation of charges under this Agreement. Such verification will be conducted in a manner that minimizes disruption to Customer's business and may be conducted on Customer's premises, during Customer's normal business hours. Customer agrees to i) provide records, system tools outputs, and other electronic or hard copy system information reasonably necessary for such verification, and ii) promptly pay any additional, valid charges and other liabilities determined as a result of such verification.

#### **4.4 Payment**

Credit or debit card transactions will be processed at time of order. For payment by other than credit or debit card transactions, amounts are due upon receipt of invoice and payable as specified in a Transaction Document. Customer agrees to pay accordingly, including any late payment fee. Payment may be made electronically to an account specified by IBM or by other means agreed to by the parties (for example, credit or debit card transactions).

If a Product is quoted with an incorrect price (for example, due to typographical error or error in pricing information):

- a. IBM has the right to refuse or cancel any orders placed for the Product quoted at the incorrect price, even if IBM has confirmed the receipt of your order and charged your credit or debit card; and
- b. If IBM has charged your credit or debit card but subsequently canceled your order, IBM will promptly issue a credit to your credit or debit card account for the amount charged.

#### **4.5 Taxes**

If any authority imposes upon any transaction under this Agreement a duty, tax, levy, or fee, excluding those based on IBM's net income, then Customer agrees to pay that amount as specified in an invoice, unless Customer supplies exemption documentation. Customer is responsible for any personal property taxes for each Machine from the date IBM ships it to Customer. For Programs that IBM delivers electronically to Customer and for which Customer claims a state sales and use tax exemption, Customer and IBM agree that no tangible personal property (for example, media and publications) is transferred to Customer. Customer is responsible for any sales and use tax liabilities that may arise as a result of Customer's subsequent re-distribution of such Programs.

#### **5. Changes to the Agreement Terms**

In order to maintain flexibility in our business relationship, IBM may change the terms of this Agreement by providing Customer at least three months' written notice. However, these changes are not retroactive. They apply, as of the effective date IBM specifies in the notice, only to new orders, on-going transactions that do not expire, and transactions with a defined renewable contract period. For transactions with a defined renewable contract period, Customer may request that IBM defer the change effective date until the end of the current contract period.

Customer acknowledges its agreement to have these changes apply for such transactions by i) placing new orders for Products after the change effective date, ii) failing to request that the change effective date be deferred until the start of the next renewal period, iii) allowing transactions to renew after receipt of the change notice, or iv) failing to terminate non-expiring transactions prior to the change effective date. Changes to charges are implemented as described in the Charges and Payment section above.

Otherwise, for a change to be valid, both parties must sign it.

#### **6. IBM Business Partners**

IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote, market, and support certain Products. Customer may order IBM Machines that are promoted or marketed to Customer by IBM Business Partners or other suppliers, however, i) this Agreement applies only if a Transaction Document subject to this Agreement is provided for the specific transaction, and ii) such Business Partners and suppliers remain independent and separate from IBM.

IBM is not responsible for the actions or statements of IBM Business Partners or other suppliers, any obligations either has to Customer, or any products or services that they supply to Customer under their agreements.

#### **7. Machine Production Status**

Each IBM Machine is manufactured from parts that may be new or used. In some cases, a Machine may not be new and may have been previously installed. Regardless, IBM's applicable warranty terms described in section 14 apply.

#### **8. Delivery**

Delivery dates are estimates unless otherwise specifically agreed in a Transaction Document. Transportation charges, if applicable, will be specified in a Transaction Document. For Programs IBM provides to Customer in tangible form, IBM fulfills its shipping and delivery obligations upon the delivery of such Programs to the IBM-designated carrier, unless otherwise agreed to in writing by Customer and IBM.

#### **9. Title and Risk of Loss**

When IBM accepts Customer's order, IBM agrees to sell Customer the Machine described in a Transaction Document. IBM transfers title to Customer or, if applicable, Customer's lessor when the Machine is shipped to Customer or its designated location. However, IBM reserves a purchase money security interest in the Machine until IBM receives the amounts due. For a feature, conversion, or upgrade involving the removal of parts which become IBM's property, IBM reserves a security interest

until IBM receives payment of all the amounts due and the removed parts. Customer authorizes IBM to file appropriate documents to permit IBM to perfect its security interest.

For each Machine, IBM bears the risk of loss or damage up to the time it is delivered to the IBM-designated carrier for shipment to Customer or Customer's designated location. Thereafter, Customer assumes the risk. Each Machine will be covered by insurance, arranged and paid for by IBM for Customer, covering the period until it is delivered to Customer or Customer's designated location. For any loss or damage, Customer must i) report the loss or damage in writing to IBM within 10 business days of delivery and ii) follow the applicable claim procedure.

## **10. Machine Installation**

Customer agrees to provide an environment meeting the requirements for the Machine as specified in its published documentation.

IBM has standard installation procedures. IBM will successfully complete these procedures before it considers an IBM Machine (other than a Machine for which Customer defers installation or a Customer-set-up Machine) installed.

Customer is responsible for installing a Customer-set-up Machine and a non-IBM Machine according to instructions provided by IBM or the Machine's manufacturer.

## **11. Machine Upgrades and Engineering Changes**

As used in this section, the term "upgrade" includes, without limitation, features and conversions. IBM sells upgrades for installation on Machines, and, in certain instances, only for installation on a designated, serial-numbered Machine. Within 30 days of the shipment of an upgrade, Customer agrees to install the upgrade or, if IBM is responsible for the installation, to allow IBM to install the upgrade. Otherwise, IBM may terminate the transaction and Customer must return the upgrade at Customer's expense.

Customer agrees to allow IBM to install mandatory engineering changes (such as those required for safety) on a Machine.

Many upgrades and engineering changes require the removal of parts and the transfer of ownership and possession of the removed parts to IBM. Customer is responsible for the return of all removed parts to IBM upon installation of the upgrade or engineering change. As applicable, Customer represents that Customer has permission from the owner and any lien holders to i) install upgrades and engineering changes and ii) transfer ownership and possession of removed parts to IBM. Customer further represents that all removed parts are genuine, unaltered, and in good working order. A part that replaces a removed part will assume the warranty or maintenance service status of the replaced part.

## **12. Machine Code**

Machine Code is licensed under the terms and restrictions of the Machine Code license agreement (for example, IBM License Agreement for Machine Code, IBM Agreement for Licensed Internal Code, or an equivalent) provided with the Machine Code.

Machine Code is licensed only for use to enable a Machine to function in accordance with its Specifications and only for the capacity and capability for which Customer has acquired IBM's written authorization. Customer agrees to use Machine Code only as specified in this Agreement and as may be further authorized or restricted in its applicable license agreement. Without limiting additional restrictions in the applicable license, Customer may not:

- a. otherwise copy, display, transfer, adapt, modify, or distribute (electronically or otherwise) Machine Code, except as IBM may authorize in the Machine's user documentation or in writing to Customer;
- b. reverse assemble, reverse compile, otherwise translate, or reverse engineer Machine Code unless expressly permitted by applicable law without the possibility of contractual waiver;
- c. sublicense or assign the license for Machine Code; or
- d. lease Machine Code or any copy of it.

International Business Machines Corporation, one of its subsidiaries, or a third party owns Machine Code including all copyrights in Machine Code and all copies of Machine Code (this includes the original Machine Code, copies of the original Machine Code, and copies made from copies). Machine Code is copyrighted and licensed (not sold).

The capacity of certain Machines is limited by technological measures in Machine Code. Customer agrees to IBM's implementation of such technological measures to limit Machine capacity.

## **13. Programs**

Programs are copyrighted and licensed (not sold) under the terms of the license agreements applicable to them. You accept the terms of the license for a Program according to the method specified in the license.

## **14. Warranty**

### **14.1 Warranty for Machines**

IBM warrants that each IBM Machine is free from defects in materials and workmanship and conforms to its Specifications.

The warranty period for an IBM Machine is a fixed period commencing on its Date of Installation and specified in a Transaction Document. During the warranty period, IBM provides repair and exchange service for the IBM Machine, without charge, under the type of service IBM designates for the IBM Machine. If an IBM Machine does not function as warranted during the warranty period and IBM is unable to either i) make it do so or ii) replace it with one that is at least functionally equivalent, Customer may return it to IBM for a refund.

### **14.2 Warranty for Systems**

When IBM specifies in an Attachment or Transaction Document that it is providing Products to Customer that are intended to operate together as a system, IBM warrants that those Products are compatible and, when installed in accordance with their Specifications, will operate with one another. This warranty is in addition to IBM's other applicable warranties.

### **14.3 Extent of Warranty**

If a Machine is subject to federal or state consumer warranty laws, IBM's statement of limited warranty included with the Machine applies in place of these Machine warranties.

The warranty stated above will not apply to the extent that there has been misuse (including, but not limited to, use of any Machine capacity or capability, other than that authorized by IBM in writing), accident, modification, unsuitable physical or operating environment, improper maintenance by Customer or a third party, or failure or damage caused by a product for which IBM is not responsible. The warranty for IBM Machines is voided by removal or alteration of Machine or parts identification labels.

**THIS WARRANTY IS CUSTOMER'S EXCLUSIVE WARRANTY AND REPLACES ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY OF NON-INFRINGEMENT.**

### **14.4 Items Not Covered by Warranty**

IBM does not warrant uninterrupted or error-free operation of a Machine or that IBM will correct all defects.

IBM will identify IBM Machines that it does not warrant.

Unless otherwise specified in an Attachment or Transaction Document, IBM provides non-IBM Machines (including those provided with, or installed on, an IBM Machine at Customer's request) WITHOUT WARRANTIES OF ANY KIND. However, non-IBM manufacturers, suppliers, or publishers may provide their own warranties to Customer. Warranties, if any, for IBM Programs and Non-IBM Programs may be found in their license agreements.

## **15. Machine Warranty Service**

### **15.1 Warranty Service General**

IBM provides certain types of warranty service to keep Machines in, or restore them to, conformance with their Specifications during the Machine's warranty period as specified in the Warranty for Machines section above. IBM will inform Customer of the available types of warranty service for a Machine. At its discretion, IBM will i) either repair or exchange the failing Machine and ii) provide the warranty service either at Customer's location or a service center. IBM manages and installs selected engineering changes that apply to IBM Machines and may also perform preventive maintenance.

Any feature, conversion, or upgrade IBM services must be installed on a Machine which is i) the designated, serial-numbered Machine, if applicable, and ii) at an engineering-change level compatible with the feature, conversion, or upgrade.

When the type of warranty service requires that Customer deliver the failing Machine to IBM, Customer agrees to ship it suitably packaged (prepaid unless IBM specifies otherwise) to a location IBM designates. After IBM has repaired or exchanged the Machine, IBM will deliver it to Customer at IBM's expense unless IBM specifies otherwise. IBM is responsible for loss of, or damage to, Customer's Machine while it is i) in IBM's possession or ii) in transit in those cases where IBM is responsible for the transportation charges.

Customer agrees:

- a. to obtain authorization from the owner to have IBM service a Machine that Customer does not own;
- b. where applicable, before IBM provides warranty service, to --
  - (1) follow the problem determination and service request procedures that IBM provides,
  - (2) secure all programs, data, and funds contained in a Machine, and
  - (3) inform IBM of changes in a Machine's location.
- c. to follow the service instructions that IBM provides (which may include installing Machine Code and other software updates either downloaded from an IBM Internet Web site or copied from other electronic media);
- d. unless otherwise agreed in an Attachment or Transaction Document, Customer is responsible for i) any data and the content of any database Customer makes available to IBM in connection with warranty service under this Agreement, ii) the selection and implementation of procedures and controls regarding access, security, encryption, use, and transmission of data, and iii) backup and recovery of the database and any stored data, and
- e. when Customer returns a Machine to IBM for any reason --
  - (1) to securely erase from any Machine all programs not provided by IBM with the Machine and data, including without limitation, the following: i) information about identified or identifiable individuals or legal entities ("Personal Data") and ii) Customer's confidential or proprietary information and other data. If removing or deleting Personal Data is not possible, Customer agrees to transform such information (for example, by making it anonymous) so that it no longer qualifies as Personal Data under applicable law;
  - (2) to remove all funds from Machines returned to IBM. IBM is not responsible for any funds, programs not provided by IBM with the Machine, or data contained in a Machine that Customer returns to IBM; and
  - (3) IBM may ship all or part of the Machine or its software to other IBM or third party locations around the world to perform its responsibilities under this Agreement, and Customer authorizes IBM to do so.

## 15.2 Replacements

When warranty service involves the exchange of a part or Machine, the item IBM replaces becomes its property and the replacement becomes Customer's. Customer represents that all removed items are genuine and unaltered. The replacement may not be new, but will be in good working order and at least functionally equivalent to the item replaced. The replacement assumes the warranty service status of the replaced item. Before IBM exchanges a part or Machine, Customer agrees to remove all features, parts, options, alterations, and attachments not under IBM's service. Customer also agrees to i) ensure that the part or Machine is free of any legal obligations or restrictions that prevent its exchange and ii) transfer ownership and possession of removed parts to IBM.

Warranty service for some IBM Machines involves IBM providing Customer with an exchange replacement for installation by Customer. Such exchange replacements may be i) a part of a Machine (called a Customer Replaceable Unit, or "CRU," for example, keyboard, memory, or hard disk drive), or ii) an entire Machine. Customer may request IBM to install the replacement CRU or Machine, however, Customer may be charged for the installation. IBM provides information and replacement instructions with Customer's Machine and at any time on Customer's request. IBM specifies in the materials shipped with a replacement whether the failing CRU or Machine must be returned to IBM. When return is required, return instructions and a container are shipped with the replacement, and Customer may be charged for the replacement if IBM does not receive the failing CRU or Machine within 15 days of Customer's receipt of the replacement.

### **15.3 Items Not Covered**

Warranty service does not cover:

- a. accessories, supply items, consumables (such as batteries and printer cartridges), and structural parts (such as frames and covers);
- b. failures caused by a product for which IBM is not responsible;
- c. service of Machine alterations; or
- d. service of a Machine to which any of the warranty exclusions or limitations in the above section, Items Not Covered by Warranty, apply.

### **15.4 Warranty Service Upgrade**

For certain Machines, Customer may select a service upgrade from the standard type of warranty service for the Machine. IBM charges for the service upgrade during the warranty period.

Customer may not terminate the service upgrade or transfer it to another Machine during the warranty period.

When the warranty period ends, the Machine will convert to maintenance Service at the same type of Service Customer selected for warranty Service upgrade.

## **16. Intellectual Property Protection**

For purposes of this Intellectual Property Protection section, the term "Machine" also includes Machine Code.

### **16.1 Third Party Claims**

If a third party asserts a claim against Customer that an IBM Machine that IBM provides to Customer under this Agreement infringes that party's patent or copyright, IBM will defend Customer against that claim at IBM's expense and pay all costs, damages, and attorney's fees that a court finally awards against Customer or that are included in a settlement approved in advance by IBM, provided that Customer:

- a. promptly notifies IBM in writing of the claim;
- b. allows IBM to control, and cooperates with IBM in, the defense and any related settlement negotiations; and
- c. is and remains in compliance with the Machine's applicable license terms and Customer's obligations under section 16.1 (Remedies) below.

### **16.2 Remedies**

If such a claim is made or appears likely to be made, Customer agrees to permit IBM, in IBM's discretion, either to i) enable Customer to continue to use the Machine, ii) modify it, or iii) replace it with one that is at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, then on IBM's written request, Customer agrees to promptly return the Machine to IBM and discontinue its use. IBM will then give Customer a credit equal to Customer's net book value for the Machine, calculated according to generally-accepted accounting principles.

### **16.3 Claims for Which IBM is Not Responsible**

IBM has no obligation regarding any claim based on any of the following:

- a. anything provided by Customer or a third party on Customer's behalf that is incorporated into a Machine or IBM's compliance with any designs, specifications, or instructions provided by Customer or a third party on Customer's behalf;
- b. a Machine's use other than in accordance with its applicable licenses and restrictions or use of a non-current version or release of a Machine, to the extent a claim could have been avoided by using the current release or version;
- c. any modification of a Machine made by Customer or a third party on Customer's behalf or the combination, operation, or use of a Machine with any other product, hardware device, program, data, apparatus, method, or process;
- d. the distribution, operation or use of a Machine outside Customer's Enterprise; or
- e. a non-IBM Machine or a Program.

This Intellectual Property Protection section states IBM's entire obligation and Customer's exclusive remedy regarding any third party intellectual property claims.

## **17. Limitation of Liability**

### **17.1 Items for which IBM May be Liable**

Circumstances may arise where, because of a default on IBM's part or other liability, Customer is entitled to recover damages from IBM. Regardless of the basis on which Customer is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM's entire liability for all claims in the aggregate arising from or related to each Machine or otherwise arising under this Agreement will not exceed the amount of any actual direct damages up to the greater of \$100,000 or the charges (if recurring, 12 months' charges apply) for the Machine that is the subject of the claim. For purposes of this Limitation of Liability section, the term "Machine" also includes Machine Code.

This limit also applies to any of IBM's subcontractors. It is the maximum for which IBM and its subcontractors are collectively responsible. The following amounts are not subject to a cap on the amount of damages:

- a. payments referred to in the Intellectual Property Protection section above; and
- b. damages for bodily injury (including death) and damage to real property and tangible personal property for which IBM is legally liable.

### **17.2 Items for Which IBM is Not Liable**

Except as expressly required by law without the possibility of contractual waiver, under no circumstances is IBM or its subcontractors liable for any of the following even if informed of their possibility:

- a. loss of, or damage to, data;
- b. special, incidental, exemplary, or indirect damages or for any economic consequential damages; or
- c. lost profits, business, revenue, goodwill, or anticipated savings.

## **18. General Principles of Our Relationship**

### **18.1 Notices and Communications**

Written communications, including notices to the receiving party's designated representative, are to be sent to the address (physical, e-mail or facsimile) specified in an applicable Attachment or Transaction Document. The parties consent to the use of electronic means and facsimile transmissions to send and receive communications in connection with our business relationship arising out of this Agreement, and such communications are acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity.

### **18.2 Assignment and Resale**

Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other. Any attempt to assign without consent is void. The assignment of this Agreement, in whole or in part, within the Enterprise of which either party is a part or to a successor organization by merger or acquisition does not require the consent of the other. IBM is also permitted to assign its rights to payments without obtaining Customer's consent. It is not considered an assignment for IBM to divest a portion of its business in a manner that similarly affects all of its customers.

Customer agrees to acquire Machines with the intent to use them within its Enterprise and not for reselling, leasing, or transferring to a third party, unless either of the following applies:

- a. Customer is arranging lease-back financing for the Machines; or
- b. Customer purchases the Machines without any discount or allowance, and does not remarket them in competition with IBM's authorized remarketers.

### **18.3 Compliance with Laws**

IBM will comply with laws applicable to IBM generally as a provider of information technology products and services. IBM is not responsible for determining the requirements of laws applicable to Customer's business, including those relating to Products that Customer acquires under this Agreement, or that IBM's provision of or Customer's receipt of particular Products under this Agreement meets the requirements of such laws. Neither party is obligated to take any action that would violate applicable law.

Each party will comply with applicable export and import laws and regulations, including those of the United States that prohibit or limit export for certain uses or to certain end users.

#### **18.4 Dispute Resolution**

Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. Each party waives any right to a jury trial in any proceeding arising out of or related to this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this Agreement. Unless otherwise required by applicable law without the possibility of contractual waiver or limitation, i) neither party will bring a legal action, regardless of form, arising out of or related to this Agreement or any transaction under it more than two years after the cause of action arose; and ii) after such time limit, any legal action arising out of this Agreement or any transaction under it and all respective rights related to any such action lapse.

#### **18.5 Other Principles of Our Relationship**

- a. Neither party grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent.
- b. The exchange of any confidential information will be made under a separate, signed confidentiality agreement. However, to the extent confidential information is exchanged in connection with any Product under this Agreement, the applicable confidentiality agreement is incorporated into, and subject to, this Agreement.
- c. This Agreement and any transaction under it do not create an agency, joint venture, or partnership between Customer and IBM. Each party is free to enter into similar agreements with others to develop, acquire, or provide competitive products and services.
- d. Each party grants only the licenses and rights specified in this Agreement. No other licenses or rights (including licenses or rights under patents) are granted either directly, by implication, or otherwise. The rights and licenses granted to Customer under this Agreement may be terminated if Customer fails to fulfill its applicable payment obligations.
- e. Customer authorizes International Business Machines Corporation and its subsidiaries (and their successors and assigns, contractors and IBM Business Partners) to store and use Customer's business contact information wherever they do business, in connection with IBM products and services or in furtherance of IBM's business relationship with Customer.
- f. No right or cause of action for any third party is created by this Agreement or any transaction under it, nor is IBM responsible for any third party claims against Customer except as described in the Intellectual Property Protection section above or as permitted by the Limitation of Liability section above for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.
- g. Customer is responsible for selecting the Products that meet its needs and for the results obtained from the use of the Products, including Customer's decision to implement any recommendation concerning Customer's business practices and operations.
- h. Where approval, acceptance, consent or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.
- i. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.
- j. As reasonably required by IBM to fulfill its obligations under this Agreement, Customer agrees to provide IBM with sufficient and safe access (including remote access) to Customer's facilities, systems, information, personnel, and resources, all at no charge to IBM. IBM is not responsible for any delay in performing or failure to perform caused by Customer's delay in providing such access or performing other Customer responsibilities under this Agreement.

#### **19. Agreement Termination**

Either party may terminate this Agreement on written notice to the other following the expiration or termination of the terminating party's obligations under this Agreement, including any applicable Attachment or Transaction Document.

Either party may terminate this Agreement if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply.

Any terms of this Agreement that by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to both parties' respective successors and assignees.

## 20. Geographic Scope and Governing Law

The rights, duties, and obligations of each party are valid only in United States of America except that all licenses are valid as specifically granted. Both parties agree to the application of the laws of the State of New York to govern, interpret, and enforce all of Customer's and IBM's respective rights, duties, and obligations arising from, or relating in any manner to, the subject matter of this Agreement, without regard to conflict of law principles.

If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect.

Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.

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This Agreement, including its applicable Attachments and Transaction Documents, is the complete agreement regarding transactions by which Customer acquires Products from IBM, and replaces any prior oral or written communications between Customer and IBM. In entering into this Agreement, including each Attachment and Transaction Document, neither party is relying on any representation that is not specified in this Agreement including without limitation any representations concerning: i) performance or function of any Machine or system, other than as expressly warranted in the Warranty section above; ii) the experiences or recommendations of other parties; or iii) results or savings Customer may achieve. Additional or different terms in any written communication from Customer (such as a purchase order) are void.

Each party accepts, on behalf of its Enterprise, the terms of this Agreement by signing this Agreement (or another document that incorporates it by reference) by hand or electronically. Once signed, i) any reproduction of this Agreement, an Attachment, or Transaction Document made by reliable means (for example, electronic image, photocopy or facsimile) is considered an original and ii) all Machines ordered under this Agreement are subject to it.

Agreed to:

Customer Legal Name

Agreed to:

International Business Machines Corporation

By \_\_\_\_\_

Authorized signature

Title:

By \_\_\_\_\_

Authorized signature

Title:

Name (type or print):

Name (type or print):

Date:

Date:

Customer identification number:

Agreement number:

Customer address:

IBM address:

# Exhibit E



## International Program License Agreement

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### Part 1 - General Terms

BY DOWNLOADING, INSTALLING, COPYING, ACCESSING, CLICKING ON AN “ACCEPT” BUTTON, OR OTHERWISE USING THE PROGRAM, LICENSEE AGREES TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ACCEPTING THESE TERMS ON BEHALF OF LICENSEE, YOU REPRESENT AND WARRANT THAT YOU HAVE FULL AUTHORITY TO BIND LICENSEE TO THESE TERMS. IF YOU DO NOT AGREE TO THESE TERMS,

- DO NOT DOWNLOAD, INSTALL, COPY, ACCESS, CLICK ON AN “ACCEPT” BUTTON, OR USE THE PROGRAM; AND
- PROMPTLY RETURN THE UNUSED MEDIA, DOCUMENTATION, AND PROOF OF ENTITLEMENT TO THE PARTY FROM WHOM IT WAS OBTAINED FOR A REFUND OF THE AMOUNT PAID. IF THE PROGRAM WAS DOWNLOADED, DESTROY ALL COPIES OF THE PROGRAM.

### 1. Definitions

“**Authorized Use**” – the specified level at which Licensee is authorized to execute or run the Program. That level may be measured by number of users, millions of service units (“MSUs”), Processor Value Units (“PVUs”), or other level of use specified by IBM.

“**IBM**” – International Business Machines Corporation or one of its subsidiaries.

“**License Information**” (“**LI**”) – a document that provides information and any additional terms specific to a Program. The Program’s LI is available at <http://www.ibm.com/software/sla/>. The LI can also be found in the Program’s directory, by the use of a system command, or as a booklet included with the Program.

“**Program**” – the following, including the original and all whole or partial copies: 1) machine-readable instructions and data, 2) components, files, and modules, 3) audio-visual content (such as images, text, recordings, or pictures), and 4) related licensed materials (such as keys and documentation).

“**Proof of Entitlement**” (“**PoE**”) – evidence of Licensee’s Authorized Use. The PoE is also evidence of Licensee’s eligibility for warranty, future update prices, if any, and potential special or promotional opportunities. If IBM does not provide Licensee with a PoE, then IBM may accept as the PoE the original paid sales receipt or other sales record from the party (either IBM or its reseller) from whom Licensee obtained the Program, provided that it specifies the Program name and Authorized Use obtained.

“**Warranty Period**” – one year, starting on the date the original Licensee is granted the license.

### 2. Agreement Structure

This Agreement includes **Part 1 - General Terms**, the LI, and the PoE and is the complete agreement between Licensee and IBM regarding the use of the Program. It replaces any prior oral or written communications between Licensee and IBM concerning Licensee’s use of the Program. The terms of Part 2 may replace or modify those of Part 1. To the extent of any conflict, the LI prevails over both Parts.

### 3. License Grant

The Program is owned by IBM or an IBM supplier, and is copyrighted and licensed, not sold.

IBM grants Licensee a nonexclusive license to 1) use the Program up to the Authorized Use specified in the PoE, 2) make and install copies to support such Authorized Use, and 3) make a backup copy, all provided that

- a. Licensee has lawfully obtained the Program and complies with the terms of this Agreement;
- b. the backup copy does not execute unless the backed-up Program cannot execute;
- c. Licensee reproduces all copyright notices and other legends of ownership on each copy, or partial copy, of the Program;
- d. Licensee ensures that anyone who uses the Program (accessed either locally or remotely) 1) does so only on Licensee’s behalf and 2) complies with the terms of this Agreement;
- e. Licensee does not 1) use, copy, modify, or distribute the Program except as expressly permitted in this Agreement; 2) reverse assemble, reverse compile, otherwise translate, or reverse engineer the

Program, except as expressly permitted by law without the possibility of contractual waiver; 3) use any of the Program's components, files, modules, audio-visual content, or related licensed materials separately from that Program; or 4) sublicense, rent, or lease the Program; and

- f. if Licensee obtains this Program as a Supporting Program, Licensee uses this Program only to support the Principal Program and subject to any limitations in the license to the Principal Program, or, if Licensee obtains this Program as a Principal Program, Licensee uses all Supporting Programs only to support this Program, and subject to any limitations in this Agreement. For purposes of this Item "f," a "Supporting Program" is a Program that is part of another IBM Program ("Principal Program") and identified as a Supporting Program in the Principal Program's LI. (To obtain a separate license to a Supporting Program without these restrictions, Licensee should contact the party from whom Licensee obtained the Supporting Program.)

This license applies to each copy of the Program that Licensee makes.

### **3.1 Trade-ups, Updates, Fixes, and Patches**

#### **3.1.1 Trade-ups**

If the Program is replaced by a trade-up Program, the replaced Program's license is promptly terminated.

#### **3.1.2 Updates, Fixes, and Patches**

When Licensee receives an update, fix, or patch to a Program, Licensee accepts any additional or different terms that are applicable to such update, fix, or patch that are specified in its LI. If no additional or different terms are provided, then the update, fix, or patch is subject solely to this Agreement. If the Program is replaced by an update, Licensee agrees to promptly discontinue use of the replaced Program.

### **3.2 Fixed Term Licenses**

If IBM licenses the Program for a fixed term, Licensee's license is terminated at the end of the fixed term, unless Licensee and IBM agree to renew it.

### **3.3 Term and Termination**

This Agreement is effective until terminated.

IBM may terminate Licensee's license if Licensee fails to comply with the terms of this Agreement.

If the license is terminated for any reason by either party, Licensee agrees to promptly discontinue use of and destroy all of Licensee's copies of the Program. Any terms of this Agreement that by their nature extend beyond termination of this Agreement remain in effect until fulfilled, and apply to both parties' respective successors and assignees.

## **4. Charges**

Charges are based on Authorized Use obtained, which is specified in the PoE. IBM does not give credits or refunds for charges already due or paid, except as specified elsewhere in this Agreement.

If Licensee wishes to increase its Authorized Use, Licensee must notify IBM or an authorized IBM reseller in advance and pay any applicable charges.

## **5. Taxes**

If any authority imposes on the Program a duty, tax, levy, or fee, excluding those based on IBM's net income, then Licensee agrees to pay that amount, as specified in an invoice, or supply exemption documentation. Licensee is responsible for any personal property taxes for the Program from the date that Licensee obtains it. If any authority imposes a customs duty, tax, levy, or fee for the import into or the export, transfer, access, or use of the Program outside the country in which the original Licensee was granted the license, then Licensee agrees that it is responsible for, and will pay, any amount imposed.

## **6. Money-back Guarantee**

If Licensee is dissatisfied with the Program for any reason and is the original Licensee, Licensee may terminate the license and obtain a refund of the amount Licensee paid for the Program, provided that Licensee returns the Program and PoE to the party from whom Licensee obtained it within 30 days of the date the PoE was issued to Licensee. If the license is for a fixed term that is subject to renewal, then Licensee may obtain a refund only if the Program and its PoE are returned within the first 30 days of the initial term. If Licensee downloaded the Program, Licensee should contact the party from whom Licensee obtained it for instructions on how to obtain the refund.

## 7. Program Transfer

Licensee may transfer the Program and all of Licensee's license rights and obligations to another party only if that party agrees to the terms of this Agreement. If the license is terminated for any reason by either party, Licensee is prohibited from transferring the Program to another party. Licensee may not transfer a portion of 1) the Program or 2) the Program's Authorized Use. When Licensee transfers the Program, Licensee must also transfer a hard copy of this Agreement, including the LI and PoE. Immediately after the transfer, Licensee's license terminates.

## 8. Warranty and Exclusions

### 8.1 Limited Warranty

IBM warrants that the Program, when used in its specified operating environment, will conform to its specifications. The Program's specifications, and specified operating environment information, can be found in documentation accompanying the Program (such as a read-me file) or other information published by IBM (such as an announcement letter). Licensee agrees that such documentation and other Program content may be supplied only in the English language, unless otherwise required by local law without the possibility of contractual waiver or limitation.

The warranty applies only to the unmodified portion of the Program. IBM does not warrant uninterrupted or error-free operation of the Program, or that IBM will correct all Program defects. Licensee is responsible for the results obtained from the use of the Program.

During the Warranty Period, IBM provides Licensee with access to IBM databases containing information on known Program defects, defect corrections, restrictions, and bypasses at no additional charge. Consult the IBM Software Support Handbook for further information at <http://www.ibm.com/software/support>.

If the Program does not function as warranted during the Warranty Period and the problem cannot be resolved with information available in the IBM databases, Licensee may return the Program and its PoE to the party (either IBM or its reseller) from whom Licensee obtained it and receive a refund of the amount Licensee paid. After returning the Program, Licensee's license terminates. If Licensee downloaded the Program, Licensee should contact the party from whom Licensee obtained it for instructions on how to obtain the refund.

### 8.2 Exclusions

**THESE WARRANTIES ARE LICENSEE'S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT. SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF EXPRESS OR IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO LICENSEE. IN THAT EVENT, SUCH WARRANTIES ARE LIMITED IN DURATION TO THE WARRANTY PERIOD. NO WARRANTIES APPLY AFTER THAT PERIOD. SOME STATES OR JURISDICTIONS DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO LICENSEE.**

**THESE WARRANTIES GIVE LICENSEE SPECIFIC LEGAL RIGHTS. LICENSEE MAY ALSO HAVE OTHER RIGHTS THAT VARY FROM STATE TO STATE OR JURISDICTION TO JURISDICTION.**

**THE WARRANTIES IN THIS SECTION 8 (WARRANTY AND EXCLUSIONS) ARE PROVIDED SOLELY BY IBM. THE DISCLAIMERS IN THIS SUBSECTION 8.2 (EXCLUSIONS), HOWEVER, ALSO APPLY TO IBM'S SUPPLIERS OF THIRD PARTY CODE. THOSE SUPPLIERS PROVIDE SUCH CODE WITHOUT WARRANTIES OR CONDITION OF ANY KIND. THIS PARAGRAPH DOES NOT NULLIFY IBM'S WARRANTY OBLIGATIONS UNDER THIS AGREEMENT.**

## 9. Licensee Data and Databases

To assist Licensee in isolating the cause of a problem with the Program, IBM may request that Licensee 1) allow IBM to remotely access Licensee's system or 2) send Licensee information or system data to IBM. However, IBM is not obligated to provide such assistance unless IBM and Licensee enter a separate written agreement under which IBM agrees to provide to Licensee that type of technical support, which is beyond IBM's warranty obligations in this Agreement. In any event, IBM uses information about errors and problems to improve its products and services, and assist with its provision of related support

offerings. For these purposes, IBM may use IBM entities and subcontractors (including in one or more countries other than the one in which Licensee is located), and Licensee authorizes IBM to do so.

Licensee remains responsible for 1) any data and the content of any database Licensee makes available to IBM, 2) the selection and implementation of procedures and controls regarding access, security, encryption, use, and transmission of data (including any personally-identifiable data), and 3) backup and recovery of any database and any stored data. Licensee will not send or provide IBM access to any personally-identifiable information, whether in data or any other form, and will be responsible for reasonable costs and other amounts that IBM may incur relating to any such information mistakenly provided to IBM or the loss or disclosure of such information by IBM, including those arising out of any third party claims.

## **10. Limitation of Liability**

The limitations and exclusions in this Section 10 (Limitation of Liability) apply to the full extent they are not prohibited by applicable law without the possibility of contractual waiver.

### **10.1 Items for Which IBM May Be Liable**

Circumstances may arise where, because of a default on IBM's part or other liability, Licensee is entitled to recover damages from IBM. Regardless of the basis on which Licensee is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM's entire liability for all claims in the aggregate arising from or related to each Program or otherwise arising under this Agreement will not exceed the amount of any 1) damages for bodily injury (including death) and damage to real property and tangible personal property and 2) other actual direct damages up to the two (2) times the charges (or, if the Program is subject to fixed term charges, up to eighteen (18) Licensee paid for the Program that is the subject of the claim, and 3) *payments referred to in the Intellectual Property Protection section (10A) below* .

This limit also applies to any of IBM's Program developers and suppliers. It is the maximum for which IBM and its Program developers and suppliers are collectively responsible.

### **10.2 Items for Which IBM Is Not Liable**

**UNDER NO CIRCUMSTANCES IS IBM, ITS PROGRAM DEVELOPERS OR SUPPLIERS LIABLE FOR ANY OF THE FOLLOWING, EVEN IF INFORMED OF THEIR POSSIBILITY:**

- a. **LOSS OF, OR DAMAGE TO, DATA;**
- b. **SPECIAL, INCIDENTAL, EXEMPLARY, OR INDIRECT DAMAGES, OR FOR ANY ECONOMIC CONSEQUENTIAL DAMAGES; OR**
- c. **LOST PROFITS, BUSINESS, REVENUE, GOODWILL, OR ANTICIPATED SAVINGS.**

## **10A. Intellectual Property Protection**

### **10A.1 Third Party Claims**

If a third party asserts a claim against Licensee that the Program infringes that party's patent or copyright, IBM will defend Licensee against that claim at IBM's expense and pay all costs, damages, and attorney's fees that a court finally awards against Licensee or that are included in a settlement approved in advance by IBM, provided that Licensee:

- a. promptly notifies IBM in writing of the claim;
- b. subject to the applicable law of the Commonwealth of Virginia, including Virginia Code §§2,2-510 and - 514, allows IBM to control, and cooperate with IBM in, the defense and any related settlement negotiations; and
- c. is and remains in compliance with the Program's license terms and Licensee's obligations under Remedies below.

### **10A.2 Remedies**

If such a claim is made or appears likely to be made, Licensee agrees to permit IBM, in IBM's discretion, to: i) enable Licensee to continue to use the Program; ii) modify it; or iii) replace it with one that is at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, Licensee agrees to immediately discontinue use of the Program and return it and all copies to IBM on IBM's written

request. IBM will then give Licensee a credit equal to the amount Licensee paid for the returned Program license (if the Program is subject to Fixed Term charges, up to twelve months' charges).

### **10A.3 Claims for Which IBM is Not Responsible**

IBM has no obligation regarding any claim arising from or related to any of the following:

- a. anything provided by Licensee or a third party on Licensee's behalf that is incorporated into a Program or IBM's compliance with any designs, specifications, or instructions provided by Licensee or a third party on Licensee's behalf;
- b. modification of a Program by Licensee or a third party on Licensee's behalf;
- c. a Program's use other than in accordance with its applicable licenses and restrictions or use of a non-current version or release of a Program, when a claim could have been avoided or the risk of a claim reduced by using the current version or release;
- d. the combination, operation, or use of the Program with any Program, hardware device, program, data, apparatus, method, or process;
- e. the distribution, operation, or use of the Program outside Licensee's entity or for the benefit of any third party;
- f. infringement related to interactive voice response functionality or use of a Program in a telephone call processing environment; or
- g. Separately Licensed Code, if any, as identified in the LI for the Program.

The LI for the Program or other documents may permit Licensee to copy, modify, or redistribute all or portions of the Program without paying additional licensing fees to IBM. The indemnification obligation under this Agreement only applies to copies of the Program provided to Licensee by IBM and additional copies expressly authorized in a PoE. IBM has no obligation for claims relating to copies of the Program neither provided by IBM nor specifically authorized by a POE, even if permitted by the LI for the Program or other documents.

h. This Intellectual Property section does not obligate in any manner any third-party supplier of code (including Separately Licensed Code) included with or part of the Program.

## **11. Compliance Verification**

For purposes of this Section 11 (Compliance Verification), "IPLA Program Terms" means 1) this Agreement and applicable amendments and transaction documents provided by IBM, and 2) IBM software policies that may be found at the IBM Software Policy website ([www.ibm.com/softwarepolicies/](http://www.ibm.com/softwarepolicies/)), including but not limited to those policies concerning backup, sub-capacity pricing, and migration.

The rights and obligations set forth in this Section 11 remain in effect during the period the Program is licensed to Licensee, and for two years thereafter.

### **11.1 Verification Process**

Licensee agrees to create, retain, and provide to IBM and its auditors accurate written records, system tool outputs, and other system information sufficient to provide auditable verification that Licensee's use of all Programs is in compliance with the IPLA Program Terms, including, without limitation, all of IBM's applicable licensing and pricing qualification terms. Licensee is responsible for 1) ensuring that it does not exceed its Authorized Use, and 2) remaining in compliance with IPLA Program Terms.

Upon reasonable notice, IBM may verify Licensee's compliance with IPLA Program Terms at all sites and for all environments in which Licensee uses (for any purpose) Programs subject to IPLA Program Terms. Such verification will be conducted in a manner that minimizes disruption to Licensee's business, and may be conducted on Licensee's premises, during normal business hours. IBM may use an independent auditor to assist with such verification, provided IBM has a written confidentiality agreement in place with such auditor.

### **11.2 Resolution**

IBM will notify Licensee in writing if any such verification indicates that Licensee has used any Program in excess of its Authorized Use or is otherwise not in compliance with the IPLA Program Terms. Licensee agrees to promptly pay directly to IBM the charges that IBM specifies in an invoice for 1) any such excess use, 2) support for such excess use for the lesser of the duration of such excess use or two years, and 3) any additional charges and other liabilities determined as a result of such verification.

## 12. Third Party Notices

The Program may include third party code that IBM, not the third party, licenses to Licensee under this Agreement. Notices, if any, for the third party code ("Third Party Notices") are included for Licensee's information only. These notices can be found in the Program's NOTICES file(s). Information on how to obtain source code for certain third party code can be found in the Third Party Notices. If in the Third Party Notices IBM identifies third party code as "Modifiable Third Party Code," IBM authorizes Licensee to 1) modify the Modifiable Third Party Code and 2) reverse engineer the Program modules that directly interface with the Modifiable Third Party Code provided that it is only for the purpose of debugging Licensee's modifications to such third party code. IBM's service and support obligations, if any, apply only to the unmodified Program.

## 13. General

- a. Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.
- b. For Programs IBM provides to Licensee in tangible form, IBM fulfills its shipping and delivery obligations upon the delivery of such Programs to the IBM-designated carrier, unless otherwise agreed to in writing by Licensee and IBM.
- c. If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect.
- d. Licensee agrees to comply with all applicable export and import laws and regulations, including U.S. embargo and sanctions regulations and prohibitions on export for certain end uses or to certain users.
- e. Licensee authorizes International Business Machines Corporation and its subsidiaries (and their successors and assigns, contractors and IBM Business Partners) to store and use Licensee's business contact information wherever they do business, in connection with IBM products and services, or in furtherance of IBM's business relationship with Licensee. The foregoing is subject to the Confidentiality obligations set forth in the "Hardware and Maintenance Contract" to which this Agreement is an exhibit.
- f. Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this Agreement.
- g. Neither Licensee nor IBM is responsible for failure to fulfill any obligations due to causes beyond its control.
- h. No right or cause of action for any third party is created by this Agreement, nor is IBM responsible for any third party claims against Licensee, except as permitted in Subsection 10.1 (Items for Which IBM May Be Liable) above for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.
- i. In entering into this Agreement, neither party is relying on any representation not specified in this Agreement, including but not limited to any representation concerning: 1) the performance or function of the Program, other than as expressly warranted in Section 8 (Warranty and Exclusions) above; 2) the experiences or recommendations of other parties; or 3) any results or savings that Licensee may achieve.
- j. IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote, market, and support certain Programs. IBM Business Partners remain independent and separate from IBM. IBM is not responsible for the actions or statements of IBM Business Partners or obligations they have to Licensee.
- k. The license and intellectual property indemnification terms of Licensee's other agreements with IBM (such as the IBM Customer Agreement) do not apply to Program licenses granted under this Agreement.

## 14. Geographic Scope and Governing Law

14.1 This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia without regard to that body of law controlling choice of law. Any and all litigation shall be brought in the circuit courts of the Commonwealth of Virginia. The English language

version of this Agreement prevails when interpreting this Contract. The United Nations Convention on Contracts for the International Sale of Goods and all other laws and international treaties or conventions relating to the sale of goods are expressly disclaimed. UCITA shall apply to this Contract only to the extent required by §59.1-501.15 of the Code of Virginia.

---

## EXHIBIT F: CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief, that:

- i). No Federal appropriated funds have been paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee or an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal Contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal Contract, grant, loan, or cooperative agreement.
- ii). If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal Contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- iii). The undersigned shall require that the language of this certification be included in the award documents for all sub awards at all tiers (including subcontracts, sub grants, and Contracts under grants, loans and cooperative agreements) and that all sub recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Organization: \_\_\_\_\_

Date: \_\_\_\_\_

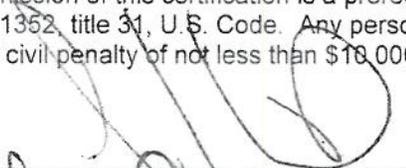
  
\_\_\_\_\_  
Andy Halmond  
\_\_\_\_\_  
Ibm Corporation  
\_\_\_\_\_  
07/28/2010  
\_\_\_\_\_

Exhibit G

**IBM-STG**  
**System & Technology Division**

**US**  
**WARRANTY**  
**SELF-MAINTAINER**  
**GUIDE**

Version 1.2

## **Prolog**

Forward any changes, updates or suggestions to Mark Lindsley- (919) 248-3529 or by email-  
mdlindsl@us.ibm.com.

**TABLE OF CONTENTS:**

**I. Overview**

**Description .....1**

**Highlights .....2**

**Claims Procedures .....2**

**Terms and Conditions.....3**

**IBM Responsibilities.....4**

**Customer Responsibilities.....4**

**II. Process Overview**

**Customer/Machine Eligibility.....5**

**Process Details.....5**

**IBM Warranty Self-Maintainer Reimbursement Rates .....6**

# **I. OVERVIEW**

## **Description**

In the current marketplace, internal support organizations face many challenges providing hardware support for their customers. Two of these challenges are the wide variety of computing platforms and constantly increasing service level demands. These challenges have caused organizations to look to new ways to improve their efficiency.

The strategy many support organizations are using is to request that manufacturers provide them with the ability to perform their own warranty repairs. The benefits derived from such a strategy include faster response times on mission critical computers, control of service and support delivery requirements, and resource balancing within their organizations.

The IBM US Warranty Self-Maintainer Program is a special bid fee based program that allows IBM customers to perform their own warranty service work on IBM selected products during the warranty period. The program is intended to meet the needs of customers who have the requirement to perform hardware repair in-house. Currently, the US Warranty Self-Maintainer Program is available to complement an already broad and comprehensive set of warranty and service offerings.

The IBM US Warranty Self-Maintainer Program provides customers the opportunity to perform warranty service work on selected products during the duration of their applicable warranty. Customer performed repairs on eligible products during the warranty period are paid for by IBM at a fixed rate per incident. The rate is set by IBM and is subject to change at IBM's discretion. Customers enrolled in the program are also eligible to purchase parts at a discount.

In addition to reimbursement for repair actions performed in-house; IBM provides a number of other services under the program. They include Technical Support through the IBM Support Center via a toll free number available from 9:00AM-9:00PM, 7 days a week. IBM also provides access to Servicebench on the Web, which allows claims to be filed on-line, and business partner warranty support for non-technical support issues.

Presently, the IBM US Warranty Self-Maintainer Program allows enrolled customers to perform warranty service work on all selected products designated Customer Carry-In Repair/Exchange or IBM On-Site Repair.

## **Highlights**

- Self-Maintainer is an IBM System & Technology Group Special Bid (US & Puerto Rico only)
- A Warranty Startup Fee of \$1000.00 is required for each service location
  - A non-refundable, charge per service location covering a two year period
  - Includes Web & CBT self-study training materials and all education updates for the two year period
  - Includes access to Servicebench on the Web: electronic parts ordering and claims processing
  - The renewal charge is \$500.00 per service location every two years.
- Offers exchange of failed warranty part for replacement part
- A per incident labor reimbursement on each eligible claim
- IBM 800# technical and non technical support
- Customers are approved to service only internal/enterprise machines
- The service technicians must be company employees
- Required Certification Training
  - Server+ Certification (Industry standard certification)-prerequisite for IBM certification
  - IBM Warranty Certification
    - RXW01 Warranty Basics for Administrators - web based - required to maintain warranty authorization
    - RXW02 Warranty Basics for Technicians - web based -prerequisite for product specific training.
  - Product Specific Training (Must be certified on the product being serviced)
    - XW2001 Server/Netfinity and xSeries Training – web based
      - additional classroom instruction recommended for Netfinity and xSeries servers with 4 processors or higher – call 800-426-8322 for schedules and pricing

## **Claims Procedures**

- **Cross Ship Procedure**
  1. -Claims must be submitted electronically through Servicebench.
  2. -Most Orders received by 4pm local time will be shipped the same day (monitors/2nd day delivery).
  3. -IBM pays shipping costs.
  4. -Defective parts must be returned within 30 days or the location is billed.
  5. - No additional paperwork needed to generate reimbursement for eligible claims.

### **Emergency Warranty Parts Program**

1. -IBM offers an optional (fee) 2 hour parts availability at over 110 locations nationwide.

## **Terms and Conditions**

- Both IBM and Customer must sign the IBM Systems & Technology US Warranty Self-Maintainer Agreement, good for a period of 24 months.
- All IBM selected products must be acquired from IBM or an approved IBM Business Partner.
- Machines must be installed in the customer's business enterprise located in the United States or Puerto Rico.
- A Warranty Startup Fee of \$1,000.00 for participation in the Warranty Self-Maintainer Program is invoiced to the customer after the Agreement is signed and the Startup Kit is shipped. A renewal fee of \$500.00 is invoiced upon a renewal of the Agreement for a two year period.
- Labor reimbursement will also be paid by IBM on a "per incident" basis at a rate set by IBM.
- Parts cannot be sold to a third party.
- The Agreement, or any of its rights or duties may not be assigned without IBM's prior written consent.
- The Agreement may be modified at any time by written agreement signed by both the customer and IBM.
- IBM reserves the right to review all records related to warranty activity of IBM products. Reviews will be conducted at a mutually acceptable site, during normal business hours. IBM may require Reimbursement for all invalid claims identified during reviews.
- Physical damage as a result of abuse, repairs associated with the end of lease period, or software problems and updates are not within the scope of warranty activity.

## **IBM Responsibilities**

- Honor all valid claims for exchange of parts used by the Customer in providing approved warranty service. The replacement part may not be new, but will be in good working order and functionally equivalent to the replaced Service Part.
- Reimburse the customer for labor on a per incident basis, where applicable.
- Pay normal transportation charges for parts shipped to the Customer and parts shipped back to IBM. Emergency claims shipments will incur a shipping/handling charge.
- Make available training for service personnel and electronic copies of IBM service materials and service Information.
- Provide the Customer with applicable warranty and service technical information for machines covered by the agreement.
- Provide technical support and assistance with service management issues.

## **Customer Responsibilities**

- All warranty claims must be validated to ensure warranty service is performed only on machines owned or leased by the company per IBM's guidelines and within their applicable warranty period.
- Warranty service under the self-maintainer program must be performed by a company employee trained by the IBM Corporation and may not be assigned to a third party.
- Maintain the capability to perform warranty service by maintaining access to the electronic technical information service library to provide warranty service.
- Use only IBM identified service parts in the performance of warranty service.
- Submit a warranty claim request for each claim for exchange of IBM parts within 15 days of the service date.
- Be committed to performing hardware repair and ensure personnel maintain understanding of warranty service criteria and procedures.
- Submit only valid warranty claims

## **II. Process Overview**

### **Process Details**

- The IBM Rep submits a Lotus Notes IBM Warranty Self-Maintainer Request form.
- The Program Manager prepares and forwards the Agreement to the Customer.
- The Agreement is reviewed and signed by the Customer and returned to the Program Manager.
- The Program Manager submits the Agreement to Contract Operations for approval.
- The Program Manager sends the Customer a welcome package containing a signed copy of the Agreement and additional program information.
- The Customer is issued a Warranty Start-Up service kit which contains training courses
- The Customer is invoiced \$1,000.00 for the Warranty Start-Up fee.
- After the technician completes the training requirements, their names and course data are loaded into IBM's Service Profile Management Database (SPM). Course completion is required to maintain warranty certification.
- Access to Servicebench on the Web is provided after the Customer becomes IBM warranty approved.

IBM Warranty Self-Maintainer Sample Reimbursement Rate Schedule

<b>Description</b>	<b>Labor Rate</b>	<b>Travel Applies*</b>
<b>IBM IntelliStation ®</b>		
Keyboards, Mice, External Options, PCMCIA Cards,	\$25.00	No
HDD, FDD, Optical Drives, Memory, Some Internal Options	\$40.00	Yes
System Board, Processor, Power Supply**	\$75.00	Yes
Travel	\$25.00	Yes
<b>IBM xSeries Servers (2-Way)</b>		
Keyboards, Mice, External Options	\$40.00	No
Memory, HDD, Fan Assembly**	\$80.00	Yes
System Board, Power Supply**	\$120.00	Yes
Travel	\$25.00	Yes
<b>IBM xSeries Servers (4-Way) &amp; Blades</b>		
Keyboards, Mice, Fan External Options	\$40.00	No
Memory, HDD, Fan Assembly	\$80.00	Yes
System Board, Power Supply**	\$175.00	Yes
Travel	\$25.00	Yes
<b>IBM Monitor Exchange</b>	\$25.00	No

\* Travel may not apply to all warranty providers. Only products covered by an on-site warranty are eligible for travel payment.

\*\*Base system warranty repairs must be performed by technicians that have completed IBM's required product service training.

Note: With few exceptions, these rates are assigned at a commodity level. It is strongly suggested that you check the Bill Of Material (BOM) list in Servicebench for the machine type and part number to determine the exact reimbursement.

**All rates are effective January 1, 2006**

## **Revision History**

September 3, 2002 – Added URL for website.

July 22, 2003 (Version 5.1) – Updated reimbursement schedule.

August 20, 2003 (Version 5.2) – Changed the reimbursement amount for ThinkPad Hard drives from \$40.00 to \$25.00.

September 4, 2003 (Version 5.3) – Deleted the old reimbursement schedule.

July 2004 (Version 5.4) – Added reference to xSeries for list of covered products.

- Defined IBM and Customer responsibilities based on language from agreement.
- Added reference to PC Business Essentials and Service Profile Management Database

October 19, 2004 –(Version 6.0) – Updated reimbursement rates to reflect 2005 rate schedule.

- Updated course numbers.

October 29, 2004 (Version 6.1) - Changed “IBM Personal Computing Division Products and xSeries Server products” to “selected products”.

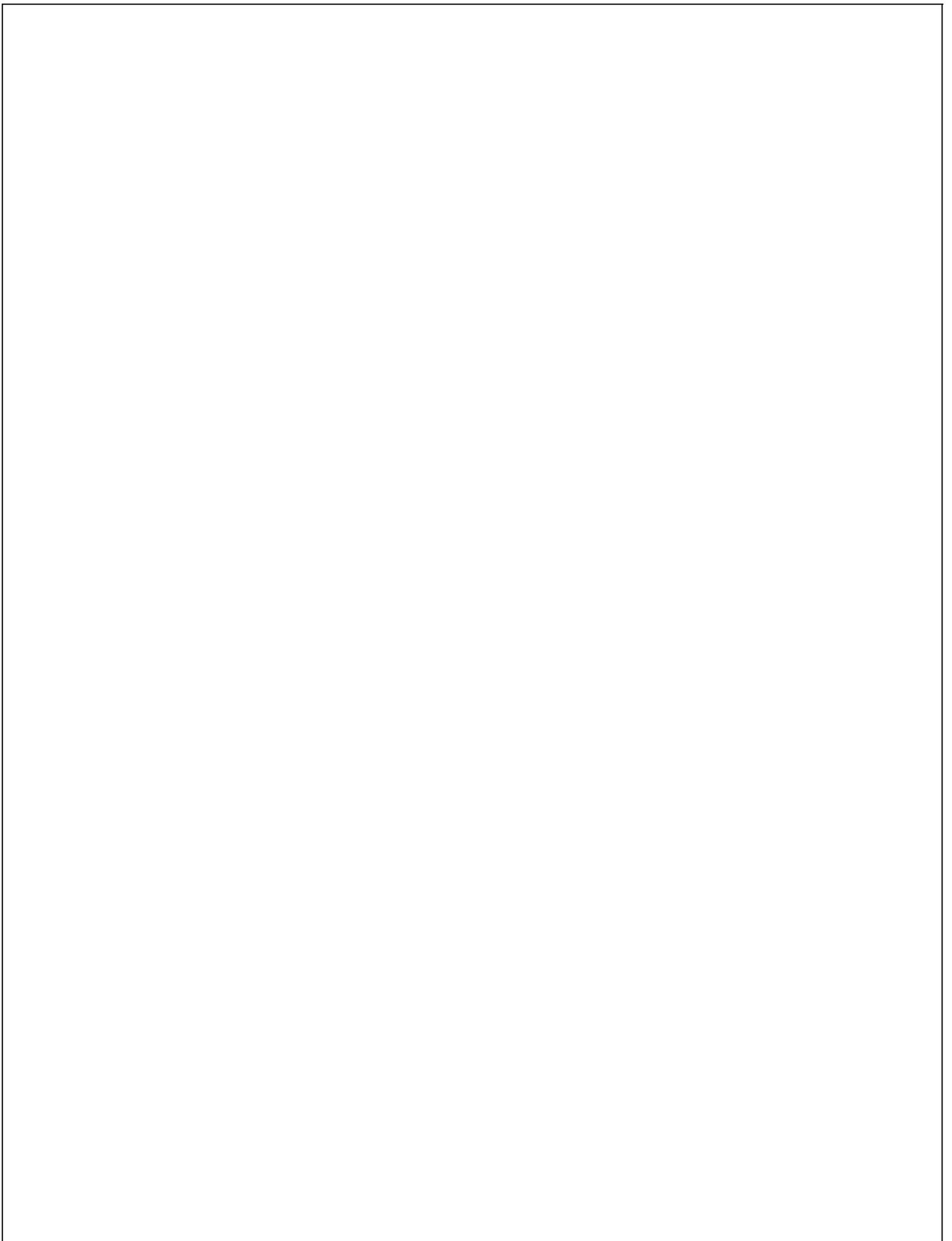
- Changed “HelpCenter” to “Support Center”
- Changed “Authorized” to service to “Approved”
- Added Physical Damage statement under “Terms and Conditions”
- Added commitment statement and description of valid warranty claims under “Customer Responsibilities”
- Deleted “Customer/Machine Eligibility” under “Process Overview”

May 04, 2005 (Version 1.0) – Changed the reimbursement rates tables to reflect Xseries Product Rates for Servers and Intellistation. Changed document to state Systems & Technology Division.

May 17, 2005 (Version 1.1) – Changed PCD to STG in the text of the document and also updated this against the self maintainer comments as well.

January 5<sup>th</sup>, 2006 (Version 1.1) – Changed the labor reimbursement rates to reflect the 2006 changes and then the information on the product specific training as well.

June 25<sup>th</sup>, 2007 (Version 1.2) – Changed the text to read Servicebench as opposed to Eclaim due to move to Servicebench for claim submission in 07.





# **Information Technology Services Contract**

Between

**The Virginia Information Technologies Agency**

on behalf of

**The Commonwealth of Virginia**

and

**International Business Machines (IBM)**

**INFORMATION TECHNOLOGY SERVICES CONTRACT  
TABLE OF CONTENTS**

<b>1. PURPOSE AND SCOPE</b>	<b>4</b>
<b>2. DEFINITIONS</b>	<b>4</b>
A. Acceptance	4
B. Agent	4
C. Authorized Users	4
D. Confidential Information	4
E. Deliverable	4
F. Party	4
G. Requirements	4
H. Service	4
I. Statement of Work (SOW)	4
J. Supplier	5
K. Work Product Means	5
<b>3. TERM AND TERMINATION</b>	<b>5</b>
A. Contract Term	5
B. Termination for Convenience	5
C. Termination for Breach or Default	5
D. Termination for Non-Appropriation of Funds	6
E. Effect of Termination	6
F. Transition of Services	6
G. Contract Kick-Off Meeting	6
H. Contract Closeout	6
<b>4. SERVICES</b>	<b>7</b>
A. Nature of Services and Engagement	7
B. Statement of Work (SOW)	7
C. Change Orders	7
D. Acceptance	7
E. Cure Period	8
<b>5. RIGHTS TO WORK PRODUCT</b>	<b>8</b>
A. Work Product	8
B. Ownership	8
C. Pre-existing Work	9
D. Return of Materials	9
<b>6. SUPPLIER PERSONNEL</b>	<b>9</b>
A. Selection and Management of Supplier Personnel	9
B. Supplier Personnel Supervision	9
C. Key Personnel	9
D. Subcontractors	9
<b>7. GENERAL WARRANTY</b>	<b>10</b>
A. Ownership	10
B. Supplier's Viability	10
C. Supplier's Past Experience	10
D. Performance	10
E. Malicious Code	10
<b>8. LIMITED WARRANTY PERIOD AND REMEDY</b>	<b>10</b>
<b>9. TRAINING AND DOCUMENTATION</b>	<b>11</b>
<b>10. ORDERS AND COMPENSATION</b>	<b>11</b>
A. Request for Quote	11
B. Order	11

C. Purchase Price and Price Protection	11
D. Purchase Payment Terms	12
E. Reimbursement of Expenses	12
11. REPORTING	13
A. Supplier's Report of Sales and Industrial Funding Adjustment	13
B. Small Business Participation	13
12. STEERING COMMITTEE	13
13. COMPETITIVE PRICING	14
14. CONFIDENTIALITY	14
A. Treatment and Protection	14
B. Exclusions	14
C. Return or Destruction	15
D. Confidentiality Statement	15
15. INDEMNIFICATION AND LIABILITY	15
A. Indemnification	15
B. Liability	16
16. SECURITY COMPLIANCE	16
17. IMPORT/EXPORT	17
18. GENERAL PROVISIONS	17
A. Relationship Between VITA and Authorized User and Supplier	17
B. Incorporated Contractual Provisions	17
C. Compliance with the Federal Lobbying Act	18
D. Governing Law	18
E. Dispute Resolution	18
F. Advertising and Use of Proprietary Marks	18
G. Notices	18
H. No Waiver	19
I. Assignment	19
J. Captions	19
K. Severability	19
L. Survival	19
M. Force Majeure	19
N. Remedies	19
O. Right to Audit	19
P. Offers of Employment	20
Q. Contract Administration	20
R. Entire Contract	20

## **INFORMATION TECHNOLOGY SERVICES CONTRACT**

THIS INFORMATION TECHNOLOGY SERVICES CONTRACT ("Contract") is entered into by and between the Virginia Information Technologies Agency (VITA) pursuant to §2.2-2012 of the Code of Virginia and on behalf of the Commonwealth of Virginia (hereinafter referred to as "VITA"), and International Business Machines (IBM) ("Supplier"), a corporation headquartered at 9201 Arboretum Parkway Richmond VA 23236 to be effective as of July 22, 2010 ("Effective Date").

### **1. PURPOSE AND SCOPE**

This Contract sets forth the terms and conditions under which Supplier shall provide services ("Services") for Intel based servers to the Authorized Users.

### **2. DEFINITIONS**

#### **A. Acceptance**

Successful performance of the Services at the location designated in the applicable Statement of Work, or completed and successful Acceptance testing in conformance with the Requirements as mutually agreed in the applicable Statement of Work.

#### **B. Agent**

Any third party independent agent of any Authorized User.

#### **C. Authorized Users**

All public bodies, including VITA, as defined by §2.2-4301 and referenced by §2.2-4304 of the Code of Virginia.

#### **D. Confidential Information**

Any confidential or proprietary information of a Party that is disclosed in any manner, including oral or written, graphic, machine readable or other tangible form, to any other Party in connection with or as a result of discussions related to this Contract or any order or SOW issued hereunder, and which at the time of disclosure either (i) is marked as being "Confidential" or "Proprietary", (ii) is otherwise reasonably identifiable as the confidential or proprietary information of the disclosing Party, or (iii) under the circumstances of disclosure should reasonably be considered as confidential or proprietary information of the disclosing Party.

#### **E. Deliverable**

The tangible embodiment of the Services, Work Product, performed or provided by Supplier as identified in the applicable Statement of Work.

#### **F. Party**

Supplier, VITA, or any Authorized User.

#### **G. Requirements**

The functional, performance, operational, compatibility, Acceptance testing criteria and other parameters and characteristics of the Service(s) and Deliverables as set forth in Exhibit A and the applicable Statement of Work and such other parameters, characteristics, or performance standards that may be agreed upon in writing by the Parties.

#### **H. Service**

Any work performed or service provided, including provision to the Authorized User of any Deliverable, by Supplier under this Contract. Service includes the discovery, creation, or development of Work Product, if any.

#### **I. Statement of Work (SOW)**

Any document in substantially the form of Exhibit B (describing the deliverables, due dates, assignment duration and payment obligations for a specific project, engagement, or assignment

for which Supplier shall be providing Services to an Authorized User), which, upon signing by both Parties, shall be deemed a part of this Contract.

**J. Supplier**

Means the Supplier and any of its Affiliates (i.e., an entity that controls, is controlled by, or is under common control with Supplier).

**K. Work Product Means**

Literary works or other works of authorship (such as software programs and code, documentation, reports, and similar works) that Supplier delivers to Customer as part of Services. (collectively, the "Work Product") Work Product shall not include configuration of software or software programs available under their own license terms or agreements. Further, notwithstanding the foregoing or anything to the contrary contained elsewhere herein, Supplier reserves all rights in and to the materials, products, reports, computer programs (source and object code), deliverables, inventions, tools, software, documentation, utilities and standards developed by Supplier or Supplier's third party contractors prior to or independent of the Services hereunder and utilized to provide the Services and including any modifications or enhancements to them that may be made in connection with the Services (collectively, "Supplier Proprietary Information"). Work Product shall not include any Supplier Proprietary Information and such Supplier Proprietary Information shall remain the exclusive property of Supplier at all times, including any copyright therein.

**3. TERM AND TERMINATION**

**A. Contract Term**

This Contract is effective and legally binding as of the Effective Date and, unless terminated as provided for in this section, shall continue to be effective and legally binding for a period of two (2) years. VITA, in its sole discretion, may extend this Contract for up to three (3) additional one (1) year periods after the expiration of the initial two (2) year period. VITA will issue a written notification to the Supplier stating the extension period, not less than thirty (30) days prior to the expiration of any current term. Performance of an order or SOW issued during the term of this Contract may survive the expiration of the term of this Contract, in which case all terms and conditions required for the operation of such order or SOW shall remain in full force and effect until Services pursuant to such order or SOW have met the final Acceptance criteria of the applicable Authorized User.

**B. Termination for Convenience**

VITA may terminate this Contract, in whole or in part, or any order or SOW issued hereunder, in whole or in part, or an Authorized User may terminate an order or SOW, in whole or in part, upon not less than thirty (30) days prior written notice at any time for any reason.

**C. Termination for Breach or Default**

VITA shall have the right to terminate this Contract, in whole or in part, or any order or SOW issued hereunder, in whole or in part, or an Authorized User may terminate an order or SOW, in whole or in part, for breach and/or default of Supplier. Supplier shall be deemed in breach and/or default in the event that Supplier fails to meet any material obligation set forth in this Contract or in any order or SOW issued hereunder.

If VITA deems the Supplier to be in breach and/or default, VITA shall provide Supplier with notice of breach and/or default and allow Supplier thirty (30) days to cure the breach and/or default. If Supplier fails to cure the breach as noted, VITA may immediately terminate this Contract or any order or SOW issued hereunder, in whole or in part. If an Authorized User deems the Supplier to be in breach and/or default of an order or SOW, such Authorized User shall provide Supplier with notice of breach and/or default and allow Supplier thirty (30) days to cure the breach and/or default. If Supplier fails to cure the breach and/or default as noted, such Authorized User may

immediately terminate its order or SOW, in whole or in part. Any such termination shall be deemed a Termination for Breach or a Termination for Default. In addition, if Supplier is found by a court of competent jurisdiction to be in violation of or to have violated 31 USC 1352 or if Supplier becomes a party excluded from Federal Procurement and Non-procurement Programs, VITA may immediately terminate this Contract, in whole or in part, for breach. VITA shall provide written notice to Supplier of such termination and Supplier shall provide written notice to VITA if Supplier is charged with violation of 31 USC 1352 or if federal debarment proceedings are instituted against Supplier.

#### **D. Termination for Non-Appropriation of Funds**

All payment obligations under this Contract are subject to the availability of legislative appropriations at the federal, state, or local level, for this purpose. In the event of non-appropriation of funds, irrespective of the source of funds, for the items under this Contract, VITA may terminate any order or SOW, in whole or in part, or an Authorized User may terminate its order or SOW, in whole or in part, for those goods or services for which funds have not been appropriated. Written notice will be provided to the Supplier as soon as possible after legislative action is completed.

#### **E. Effect of Termination**

Upon termination, neither the Commonwealth, nor VITA, nor any Authorized User shall have any future liability except for Deliverables accepted by the Authorized User or Services rendered by Supplier and accepted by the Authorized User prior to the termination date.

In the event of a Termination for Breach or Termination for Default, Supplier shall accept return of any Deliverable that was not accepted by the Authorized User(s), and Supplier shall refund any monies paid by any Authorized User for such Deliverable, and all costs of de-installation and return of Deliverables shall be borne by Supplier.

#### **F. Transition of Services**

Prior to or upon expiration or termination of this Contract and at the request of VITA, Supplier shall provide all assistance as VITA or an Authorized User may reasonably require to transition Services to any other supplier with whom VITA or such Authorized User contracts for provision of services identical or similar to the Services provided by Supplier pursuant to this Contract. This obligation may extend beyond expiration or termination of the Contract for a period not to exceed six (6) months. In the event of a termination for breach and/or default of Supplier, Supplier shall provide such assistance at no charge or fee to VITA or any Authorized User; otherwise, Supplier shall provide such assistance at the hourly rate or a charge agreed upon by Supplier and VITA or an Authorized User.

#### **G. Contract Kick-Off Meeting**

Within 30 days of Contract award, Supplier may be required to attend a contract orientation meeting, along with the VITA contract manager/administrator, the VITA and/or other CoVa Agency project manager(s) or authorized representative(s), technical leads, VITA representatives for SWaM and Sales/IFA reporting, as applicable, and any other significant stakeholders who have a part in the successful performance of this Contract. The purpose of this meeting will be to review all contractual obligations for both parties, all administrative and reporting requirements, and to discuss any other relationship, responsibility, communication and performance criteria set forth in the Contract. The Supplier may be required to have its assigned account manager as specified in Section 6.0 and a representative from its contracts department in attendance. The time and location of this meeting will be coordinated with Supplier and other meeting participants by the VITA contract manager.

#### **H. Contract Closeout**

Prior to the contract's expiration date, Supplier may be provided contract close out documentation and shall complete, sign and return to VITA Supply Chain Management within 30 days of receipt. This documentation may include, but not be limited to: Patent/Royalty Certificate, Tangible

Property/Asset Certificate, Escrow Certificate, SWaM Reports Completion Certificate, Sales Reports/IFA Payments Completion Certificate, and Final Payment Certificate. Supplier is required to process these as requested to ensure completion of close-out administration and to maintain a positive performance reputation with the Commonwealth of Virginia. Any closeout documentation not received within 30 days of Supplier's receipt of our request will be documented in the contract file as Supplier non-compliance. Supplier's non-compliance may affect any pending payments due the Supplier, including final payment, until the documentation is returned.

#### **4. SERVICES**

##### **A. Nature of Services and Engagement**

This Contract is optional use and non-exclusive and all Authorized Users may, at their sole discretion, receive benefits from third party suppliers of services similar to, or in competition with, services provided by Supplier.

By operation of this Contract, any SOW resulting in a commitment of any individual employee or contractor of Supplier, whether employed by Supplier or a contractor or subcontractor of Supplier, for more than one thousand (1,000) hours of work during any six (6) month period or of any such individual employee or contractor for more than eight (8) months in any twelve (12) month period shall be voidable by VITA, in its sole discretion. If an SOW is voided by VITA, such SOW shall no longer be binding on either Party and all obligations with respect to such SOW shall expire. It shall be the responsibility of VITA or the Authorized Users to monitor hours usage and to notify Supplier prior to the aforementioned hours caps being utilized.

##### **B. Statement of Work (SOW)**

All Services shall be performed at the times and locations set forth in the applicable SOW and with respect to time and materials type SOW at the rates set forth in Exhibit D herein. Unless VITA issues a written authorization for a time and materials type SOW, any SOW shall may be of a fixed price type but may, with the written approval of VITA, contain a cost-reimbursable line item(s) for pre-approved travel expenses. For time and materials type SOWs, Supplier personnel shall maintain daily time records of hours and tasks performed which shall be submitted or made available for inspection by the Authorized User upon forty-eight (48) hours advance written notice.

##### **C. Change Orders**

All changes to the Services to be provided pursuant to any given SOW must be described in a written change request (template provided as Exhibit C), which includes any appropriate adjustments to the SOW. Either Party to an SOW may issue a change request that will be subject to written approval of the other Party before it becomes part of this Contract. In no event shall any SOW or any modification thereto require the Supplier to perform any work beyond the scope of this Contract as such scope is defined in Exhibit A hereto.

##### **D. Acceptance**

Service(s) shall be deemed accepted when the Authorized User determines that such Service(s) meets the Requirements set forth in the applicable SOW Authorized User shall commence Acceptance testing within five (5) calendar days, or within such other period as set forth in the applicable SOW, after receipt of the Service. Acceptance testing will be no longer than fifteen (15) calendar days, or such longer period as may be agreed in writing between Authorized User and Supplier, for each Deliverable or for the first instance of each Service type set forth in Exhibit B. Supplier agrees to provide to the Authorized User such assistance and advice as the Authorized User may reasonably require, at no additional cost, during such Acceptance testing. Authorized User shall provide to Supplier written notice of Acceptance upon completion of installation and successful Acceptance testing. Should Authorized User fail to provide Supplier written notice of successful or unsuccessful Acceptance testing within five (5) calendar days following the Acceptance testing period, the Service shall be deemed Accepted, notwithstanding anything to the contrary contained in this Contract.

## **E. Cure Period**

Supplier shall correct any non-conformities identified during Acceptance testing and re-submit such non-conforming Service for re-testing within seven (7) days of the appropriate Authorized User's written notice of non-conformance, or as otherwise agreed between such Authorized User and Supplier in the applicable SOW. Should Supplier fail to cure the non-conformity or deliver a Service which meets the Requirements, the Authorized User may, in its sole discretion: (i) reject the Service in its entirety, and any Service rendered unusable due to the non-conforming Service, and recover amounts previously paid hereunder for all such Services; (ii) issue a "partial Acceptance" of the Service with an equitable adjustment in the price to account for such deficiency; or (iii) conditionally accept the applicable Service while reserving its right to revoke Acceptance if timely correction is not forthcoming. Failure of a Service to meet, in all material respects, the Requirements after the second set of acceptance tests may constitute a default by Supplier. In the event of such default, the Authorized User may, at its sole discretion, terminate its order or SOW, in whole or in part, for the Services to be provided there under by Supplier.

## **5. RIGHTS TO WORK PRODUCT**

If Authorized User is a state agency, board, commission, or other quasi-political entity of the Commonwealth of Virginia or other body referenced in Title 2.2 of the Code of Virginia, any license to pre-existing work shall be held by, and all rights in, title to, and ownership in copyright of of Work Product shall vest with the Commonwealth. If Authorized User is a locality, municipality, school, school system, college, university, local board, local commission, or local quasi-political entity, any license to pre-existing work shall be held by, and all rights in, title to, and ownership in copyright of Work Product shall vest with that public body.

### **A. Work Product**

VITA and Supplier each acknowledge that performance of this Contract may result in Work Product. Except as expressly permitted under this Contract, Supplier further agrees that neither Supplier nor any of Supplier's employees, contractors, agents or subcontractors, nor any party claiming through Supplier or Supplier's employees, shall, other than in the performance of this Contract, make use of or disclose to others any proprietary information not belonging to or properly licensed to Supplier or Supplier's subcontractors relating to the Work Product. All Services performed hereunder shall include delivery of all Work Product. Upon final payment by an Authorized User for the Work Product, Supplier shall at no time deny access to the Work Product, regardless of form, by the Commonwealth or the Authorized User.

### **B. Ownership**

Supplier agrees that, whether or not the Services are considered "works made for hire, Supplier assigns the ownership of copyrights in Work Products to the Commonwealth of Virginia and its assigns or the Authorized User and its assigns. Except as specifically set forth in writing and signed by both VITA and Supplier, or Authorized User and Supplier, Supplier agrees that the Commonwealth or the Authorized User shall have all rights as set forth in this Contract with respect to any Work Product created or developed under this Contract without regard to the origin of the Work Product. The Commonwealth of Virginia grants IBM an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, sublicense, distribute, and prepare derivative works based on, Work Product.

Nothing in this Section 5 or any other provision of this Contract or any Statement of Work or order issued under this Contract shall prevent either party from using ideas, concepts, expressions, know-how, skills and experience possessed by it prior to, or developed or learned by it in the course of, performance under the Contract or the applicable Statement of Work or order.

### **C. Pre-existing Work**

If (for some reason) and to the extent that the Work Products contain any Supplier Proprietary Information, upon final payment for such Work Products, Supplier hereby grants to the Authorized User an irrevocable, perpetual, non-exclusive, worldwide, royalty-free right and license to use Supplier Proprietary Information for its internal data processing or business purposes only, . It is expressly understood that "perpetual" license rights shall commence upon final payment for the Work Product and shall exist in perpetuity unless otherwise terminated in accordance with the applicable provisions of the Contract.

Without waiving either party's rights in its patents or copyrights, nothing in this Contract shall prevent either party or its affiliates from (a) any party from independently developing materials which are competitive, irrespective of their similarity to Work Products hereunder or (b) either party's personnel from making use of the ideas, techniques, and know-how acquired, or principles learned, or experience gained during the performance of the Services under this Contract.

### **D. Return of Materials**

Upon termination of this Contract, Supplier shall immediately return to VITA or the appropriate Authorized User all copies, in whatever form, of any and all Confidential Information, and other properties provided by VITA or such Authorized User, which are in Supplier's possession, custody or control.

## **6. SUPPLIER PERSONNEL**

### **A. Selection and Management of Supplier Personnel**

Supplier shall take such steps as may be necessary to ensure that all Supplier personnel performing Services under this Contract are competent and knowledgeable of the contractual arrangements and the applicable SOW between Authorized User and Supplier. Supplier shall be solely responsible for the conduct of its employees, agents, and subcontractors, including all acts and omissions of such employees, agents, and subcontractors, and shall ensure that such employees and subcontractors comply with the appropriate Authorized User's site security, information security and personnel conduct rules, as well as applicable federal, state and local laws, including export regulations. Authorized User reserves the right to require the immediate removal from such Authorized User's premises of any employee, subcontractor or agent of Supplier whom such Authorized User believes has failed to comply or whose conduct or behavior is unacceptable or unprofessional or results in a security or safety breach.

### **B. Supplier Personnel Supervision**

Supplier acknowledges that Supplier or any of its agents, contractors, or subcontractors, is and shall be the employer of Supplier personnel, and shall have sole responsibility to supervise, counsel, discipline, review, evaluate, set the pay rates of and terminate the employment of Supplier personnel.

### **C. Key Personnel**

An SOW may designate certain of Supplier's personnel as Key Personnel or Project Managers. Supplier's obligations with respect to Key Personnel and Project Managers shall be described in the applicable SOW. Failure of Supplier to perform in accordance with such obligations may be deemed a default of this Contract or of the applicable SOW.

### **D. Subcontractors**

Supplier shall not use subcontractors to perform the Services unless specifically authorized in writing to do so by the Authorized User. If an order or SOW issued pursuant to this Contract is supported in whole or in part with federal funds, Supplier shall not subcontract any Services pursuant to such order or SOW to any subcontractor that is a party excluded from Federal Procurement and Non-procurement Programs. In no event shall Supplier subcontract any Services to any subcontractor which is debarred by the Commonwealth of Virginia or which owes

back taxes to the Commonwealth and has not made arrangements with the Commonwealth for payment of such back taxes.

## **7. GENERAL WARRANTY**

With respect to the Services provided by Supplier, Supplier represents and warrants the following:

### **A. Ownership**

Supplier has the right to provide the Services, including Deliverables, without violating or infringing any law, rule, regulation, copyright, patent, trade secret or other proprietary right of any third party.

### **B. Supplier's Viability**

Supplier warrants that it has the financial capacity to perform and continue to perform its obligations under this Contract; that Supplier has no constructive or actual knowledge of an actual or potential legal proceeding being brought against Supplier that could materially adversely affect performance of this Contract; and that entering into this Contract is not prohibited by any contract, or order by any court of competent jurisdiction.

### **C. Supplier's Past Experience**

Supplier warrants that the Services have been successfully performed for a non-related third-party without significant problems due to the Services or Supplier.

### **D. Performance**

- i). All Services shall be by competent personnel performed with care, skill and diligence, consistent with or above applicable professional standards currently recognized in its profession.
- ii). Services pursuant to a particular Request for Proposal ("RFP"), quote, or Request for Quote (RFQ), and any associated Deliverables shall be fit for the particular purposes specified by VITA in the RFP and in this Contract and, if applicable, by the Authorized User requesting such quote or issuing such RFQ, and Supplier is possessed of superior knowledge with respect to the Services and Deliverables and is aware that all Authorized Users are relying on Supplier's skill and judgment in providing the Services and Deliverables;
- iii). The Services and Deliverables shall meet or exceed the Requirements;
- iv). The documentation which Supplier is required to provide under this Contract shall be sufficient in detail .

### **E. Malicious Code**

Supplier has used its best efforts through quality assurance procedures to ensure that there are no computer viruses or undocumented features in any of the media or means used to deliver the Services. Supplier has used the best available means to scan any media on which Deliverables are provided to the Authorized User.

## **8. LIMITED WARRANTY PERIOD AND REMEDY**

During the warranty period as specified in the applicable SOW, Supplier warrants that the Services shall meet Requirements. Supplier shall as VITA's and Authorized User' sole and exclusive remedy correct, at no additional cost to any Authorized User, all errors identified during the warranty period that result in a failure of the Services to meet the Requirements. .

**THE OBLIGATIONS OF SUPPLIER UNDER THIS GENERAL WARRANTY SECTION ARE MATERIAL SUBJECT TO ANY STATUTORY WARRANTIES WHICH CANNOT BE EXCLUDED. THERE ARE NO OTHER WARRANTIES. EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY CONCERNING MERCHANTABILITY OR FITNESS FOR ANY OTHER PARTICULAR PURPOSE.**

## 9. TRAINING AND DOCUMENTATION

Any training or documentation necessary for an Authorized User to have full benefit of the Service shall be deemed included in the scope of the applicable SOW unless expressly excluded.

## 10. ORDERS AND COMPENSATION

### A. Request for Quote

Authorized Users of this Contract, depending on the complexity of services required and/or each supplier's available resources have the option to select one or more suppliers to provide type of services. In addition, an Authorized User may determine that a competitive process is required to ensure it receives the best value. In either or both of such circumstances, the Authorized User may, at its sole discretion, use a Request for Quote (RFQ) process to obtain services identical or similar to those provided by Supplier pursuant to this Contract.

Supplier shall respond to the RFQ by providing a quote, including an estimated total price, and, if requested by the Authorized User, a proposal and documentation of the qualifications of the individual(s) proposed for providing services to the Authorized User. In no event shall Supplier's quote exceed Supplier's Contract pricing. Should Supplier be unable to respond to the RFQ due, for example, to resource constraints, Supplier shall notify Authorized User in writing of its inability to perform the work requested by such Authorized User, and provide the reasons for such inability to perform, prior to the due date for the submission of quotes in response to the RFQ..

### B. Order

Supplier is required to accept any order placed by an Authorized User through the eVA electronic procurement website portal ([eVA Home Page](#)). eVA is the Commonwealth of Virginia's e-procurement system. State agencies, as defined in §2.2-2006 of the Code of Virginia, shall order through eVA. All other Authorized Users are encouraged to order through eVA, but may order through the following means:

- i). Purchase Order (PO): An official PO form issued by an Authorized User.
- ii). Any other order/payment charge or credit card process, such as AMEX, MASTERCARD, or VISA under contract for use by an Authorized User.

This ordering authority is limited to issuing orders for the Services available under this Contract. Under no circumstances shall any Authorized User have the authority to modify this Contract. An order from an Authorized User may contain additional terms and conditions; however, to the extent that the terms and conditions of the Authorized User's order are inconsistent with the terms and conditions of this Contract, the terms of this Contract shall supersede.

Notwithstanding the foregoing, Supplier shall not accept any order from an Authorized User if such order is to be funded, in whole or in part, by federal funds and if, at the time the order is placed, Supplier is not eligible to be the recipient of federal funds as may be noted on any of the Lists of Parties Excluded from Federal Procurement and Non-procurement Programs.

ALL CONTRACTUAL OBLIGATIONS UNDER THIS CONTRACT IN CONNECTION WITH AN ORDER PLACED BY ANY AUTHORIZED USER ARE THE SOLE OBLIGATION OF SUCH AUTHORIZED USER AND NOT THE RESPONSIBILITY OF VITA UNLESS SUCH AUTHORIZED USER IS VITA.

### C. Purchase Price and Price Protection

Exhibit D sets forth the fees and the appropriate Commonwealth discounts. Fees shall not increase and discounts shall not decrease for a period of not less than two (2) years from the Effective Date. No such increase shall exceed the lesser of three percent (3%) or the annual increase in the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, All Items, not seasonally adjusted, as published by the Bureau of Labor Statistics of the Department of Labor (<http://www.bls.gov/cpi/home.htm>), for the effective date of the increase compared with the same index one (1) year prior. Any such change in price shall be submitted in writing in

accordance with the above and shall not become effective for sixty (60) days thereafter. Invoice Procedures

For an order with a period of performance not expected to exceed one (1) month, Supplier shall remit each invoice to the "bill-to" address provided with the order promptly after all Deliverables or Services have been accepted and in accordance with the milestone payment schedule, if any, in the applicable order. For a time and materials type SOW with a period of performance expected to exceed one (1) month, Supplier shall submit invoices to the ordering Authorized User monthly in arrears, unless otherwise specified in such SOW. For a fixed price type SOW, Supplier shall invoice in accordance with the milestone payment schedule, if any, in the applicable SOW; if such SOW does not include a milestone payment schedule, Supplier shall invoice after all Deliverables or Services have been accepted by the ordering Authorized User. No invoice shall include any costs other than those identified in the executed order or SOW, which costs shall be in accordance with Exhibit D. Without limiting the foregoing, all shipping costs are the Supplier's responsibility except to the extent such charges are identified in Exhibit D, or as noted in any executed order or SOW referencing this Contract. Any cost reimbursable work performed or expenses incurred by Supplier prior to the effective date of the order shall not be billed to or reimbursed by the Authorized User. Invoices issued by the Supplier shall identify at a minimum:

- i). Deliverable or Service type, or project milestone, and description
- ii). Quantity, charge and extended pricing for each Deliverable and/or Service item or milestone; or, for a time and materials type order or SOW, the name(s) of the assigned employee(s), the hourly rate(s), and the number of hours worked;
- iii). Applicable order date or SOW date
- iv). This Contract number and the applicable order number
- v). Supplier's Federal Employer Identification Number (FEIN).

Any terms included on Supplier's invoice shall have no force or effect and will in no way bind VITA or any Authorized User.

#### **D. Purchase Payment Terms**

Supplier is responsible for the accuracy of its billing information. Supplier agrees not to issue invoices hereunder until Services have been performed or milestones have met Acceptance criteria. Charges for Services accepted more than ninety (90) days prior to receipt of a valid invoice may not be paid, except in accordance with a milestone payment schedule. Should Supplier repeatedly over bill Authorized User, Authorized User may assess a one percent (1%) charge for the amount over billed for each month that such over billing continues.

Prompt payment Act.

If there are any disputed items, the appropriate Authorized User shall pay all undisputed charges and promptly notify Supplier in writing of any disputed amount. Supplier shall thereupon review its records, and, if it does not concur with such Authorized User, provide such Authorized User with documentation to support the charge. If such charges remain in dispute, such dispute shall be resolved in accordance with the Dispute Resolution section of this Contract. In the absence of the Supplier's written evidence identifying the merit of the disputed amounts, Authorized User may not pay the disputed amounts and may consider the matter concerning the specific identified amounts closed. All payment terms are net 30 days after Acceptance.

#### **E. Reimbursement of Expenses**

If allowable pursuant to an Authorized User's SOW, such Authorized User shall pay, or reimburse Supplier, for all reasonable and actual travel-related expenses for greater than thirty (30) miles from portal to portal incurred by Supplier during the relevant period; provided, however, that such Authorized User shall only be liable to pay for Supplier's travel-related expenses, including transportation, meals, lodging and incidental expenses, that have been authorized by such Authorized User in advance and which will be reimbursable by such Authorized User at the then-

current per diem amounts as published by the Virginia Department of Accounts ([http://www.doa.virginia.gov/Admin\\_Services/CAPP/CAPP\\_Topics/20335\\_Meals\\_Lodging\\_10200\\_9.pdf](http://www.doa.virginia.gov/Admin_Services/CAPP/CAPP_Topics/20335_Meals_Lodging_10200_9.pdf)), or a successor URL(s)).

All reimbursed expenses will be billed to the Authorized User on a pass-through basis without any markup by Supplier. At Authorized User's request, Supplier shall provide copies of receipts for all travel expenses over US\$30.00.

## **11. REPORTING**

### **A. Supplier's Report of Sales and Industrial Funding Adjustment**

By the 10th day of every month, the Supplier shall submit the "Supplier Monthly Report of Sales". A template showing the format in which the report is to be submitted and contact information for submission is available at [VITA:Supplier / Vendor Reporting Requirements](#). The report shall be submitted via electronic mail to the VITA IFA Coordinator and shall report total sales (defined for purposes of this report as all invoiced payments received by Supplier from all Authorized Users) for this Contract during the preceding month. Supplier shall be responsible for submitting the monthly report of sales even if Supplier has had no sales (i.e., a \$0.00 total sales value) for the reporting period.

The Supplier shall submit the Industrial Funding Adjustment (IFA) payment for the period covered by such "Supplier Monthly Report of Sales" within thirty (30) days after submitting the "Supplier Monthly Report of Sales". The IFA payment is equal to two percent (2%) of total sales reported during the relevant month.

The IFA payment shall be submitted to VITA, Attention VITA Controller in the form of a check or electronic payment, made payable to the Treasurer of Virginia. The IFA payment shall reference this Contract number, "report amounts", and "report period" and shall be accompanied by a copy of the relevant "Supplier Monthly Report of Sales". Contact information for submission of IFA payments is available at [VITA:Supplier / Vendor Reporting Requirements](#).

Failure to comply with reporting, payment and distribution requirements of this section may result in default of the Contract.

### **B. Small Business Participation**

Supplier and VITA agree to meet promptly after the Effective Date of this Contract to discuss the participation of Virginia Department of Minority Business Enterprise (DMBE)-certified Small Businesses as subcontractors and second-tier suppliers under this Contract.

Supplier and VITA agree to meet annually thereafter to review small business subcontracting reports and discuss further action with respect to small business subcontracting and spend.

In addition, by the 10th day of every month, Supplier shall submit to VITA the Small Business Subcontracting Monthly Report (template to be provided). Supplier's report should include spend on all Supplier's contracts with second-tier suppliers which provide products or services under this Contract. The report should specify the amount of such spend provided to small businesses. Supplier shall submit the report to [SWaM@vita.virginia.gov](mailto:SWaM@vita.virginia.gov).

## **12. STEERING COMMITTEE**

In order to facilitate mutually beneficial contractual relationships with suppliers, VITA has procedures for establishing a steering committee ("Steering Committee"), consisting of senior management personnel, including personnel involved in the contractual relationship, from VITA and Supplier.

Roles of the Steering Committee include but are not limited to a) identifying potential issues which may arise during the performance of a contract, b) discussing and assigning roles and responsibilities, c) establishing methods for quickly resolving potential disputes, d) setting rules for

communication and decision making, e) monitoring and measuring the business relationship between the parties, and f) acting as a final decision board for escalated problems.

A meeting of the Steering Committee is intended to be a forum for brainstorming and sharing ideas, emphasizing respect, cooperation, and access, with the end goal of developing relationships to avoid conflict. A facilitator may, but is not required to, conduct a meeting of the Steering Committee.

A Steering Committee for this Contract will be formed at VITA's option. Meetings may be held at any time during the Contract term, should VITA, at its sole discretion, determine that a meeting(s) would be beneficial to the contractual relationship, and Supplier agrees to participate in such meeting(s). In addition, Supplier may at any time submit a written request to VITA for a meeting of the Steering Committee, which VITA will not unreasonably deny.

Supplier shall ensure the availability of the appropriate personnel to meet with the VITA contract management team. Additional Steering Committee meetings involving representatives from VITA, the Supplier, and an Authorized User may be required prior to or during performance on any specific Statement of Work issued pursuant to this Contract.

### **13. COMPETITIVE PRICING**

If, after this Contract is entered into, VITA becomes aware that Supplier has, during the term of this Contract, entered into an agreement directly with any other state government in the United States for more favorable terms for like services, VITA and Supplier shall, upon notice from VITA to Supplier, enter into good faith negotiations over an amendment to this Contract which may reflect the rights, obligations and benefits substantially similar to those contained in such other agreement. When assessing whether a contract is more favorable, factors such as the total volume of revenue, forms of customer commitment, similarity in the kinds of services being performed, as well as the relevant terms and conditions of the other agreement when viewed as whole, shall be considered. The Supplier shall have no obligation to maintain documentation or monitor its other agreements to comply with this clause.

### **14. CONFIDENTIALITY**

#### **A. Treatment and Protection**

Each Party shall (i) hold in strict confidence all Confidential Information of any other Party, (ii) use the Confidential Information solely to perform or to exercise its rights under this Contract, and (iii) not transfer, display, convey or otherwise disclose or make available all or any part of such Confidential Information to any third-party. However, an Authorized User may disclose the Confidential Information as delivered by Supplier to subcontractors, contractors or agents of such Authorized User that are bound by non-disclosure contracts with such Authorized User. Each Party shall take the same measures to protect against the disclosure or use of the Confidential Information as it takes to protect its own proprietary or confidential information (but in no event shall such measures be less than reasonable care).

#### **B. Exclusions**

The term "Confidential Information" shall not include information that is:

- i). in the public domain through no fault of the receiving Party or of any other person or entity that is similarly contractually or otherwise obligated;
- ii). obtained independently from a third-party without an obligation of confidentiality to the disclosing Party and without breach of this Contract;
- iii). developed independently by the receiving Party without reference to the Confidential Information of the other Party; or
- iv). required to be disclosed under The Virginia Freedom of Information Act (§§2.2-3700 et seq. of the Code of Virginia) or similar laws or pursuant to a court order.

### **C. Return or Destruction**

Upon the termination or expiration of this Contract or upon the earlier request of the disclosing Authorized User, Supplier shall (i) at its own expense, (a) promptly return to the disclosing Authorized User all tangible Confidential Information (and all copies thereof except the record required by law) of the disclosing Authorized User, or (b) upon written request from the disclosing Authorized User, destroy such Confidential Information and provide the disclosing Authorized User with written certification of such destruction, and (ii) cease all further use of the Authorized User's Confidential Information, whether in tangible or intangible form.

VITA or the Authorized User shall retain and dispose of Supplier's Confidential Information in accordance with the Commonwealth of Virginia's records retention policies or, if Authorized User is not subject to such policies, in accordance with such Authorized User's own records retention policies.

### **D. Confidentiality Statement**

All Supplier personnel, contractors, agents, and subcontractors performing Services pursuant to this Contract shall be required to sign a confidentiality statement or non-disclosure agreement. Any violation of such statement or agreement shall be deemed a breach of this Contract and may result in termination of the Contract or any order or SOW issued hereunder.

## **15. INDEMNIFICATION AND LIABILITY**

### **A. Indemnification**

Supplier will defend the Commonwealth, VITA or any Authorized User, their officials, employees or agents (collectively, "Commonwealth Indemnified Parties") against any claim by an unaffiliated third party that any service deliverable infringes its copyright or patent, and will pay the amount of any resulting adverse final judgment (or settlement to which we consent), to the applicable Commonwealth Indemnified Parties to which such judgment applies. VITA must notify Supplier promptly in writing of the claim and, to the extent permitted by applicable law of the Commonwealth of Virginia, including Virginia Code §§2,2-510 and -514, give Supplier control over its defense or settlement. VITA or the Authorized Users agree to provide us with reasonable assistance in defending the claim, and Supplier will reimburse VITA or the applicable Authorized Users for reasonable out of pocket expenses that VITA and the Authorized Users incur in providing that assistance.

Supplier's obligations will not apply to the extent (but only to the extent) that any claim or adverse final judgment to the extent based on is based predominantly on (i) specifications, code, or materials VITA or an Authorized User provides; (ii) VITA's or an Authorized User's use of service Deliverables after Supplier notifies any of them to discontinue use due to such a claim; (iv) use of, or access to, service deliverables by any person or entity other than VITA or an Authorized User as permitted by the applicable statement of work for Services; or (v) an alteration of service Deliverables by someone other than us or our contractors. VITA or the Authorized User will be responsible for any costs or damages that result from these actions.

If Supplier receives information concerning a copyright infringement claim related to a service Deliverable, we may, at our expense and without obligation to do so, either (i) procure for VITA or Authorized Users the right to continue to use the allegedly infringing service Deliverable as permitted by the applicable statement of work for Services, or (ii) modify the service Deliverable to make it non-infringing or (iii) replace it with a non-infringing functional equivalent, in which case VITA or the Authorized User will stop using the allegedly infringing service Deliverable immediately. If however, as a result of a copyright infringement claim, VITA or an Authorized User's use of a Service deliverable as provided

for under the applicable statement of work for Services is enjoined by a court of competent jurisdiction, Supplier will either procure the right to continue its use, modify it to make it non-infringing, or replace it with a non-infringing functional equivalent. If any other type of third party claim is brought against VITA or Authorized Users regarding Supplier's property, VITA or the applicable Authorized User must notify Supplier promptly in writing.

## **B. Liability**

**A.** There may be situations in which VITA or an Authorized User has a right to claim damages or payment. Except as otherwise specifically provided in this paragraph, whatever the legal basis for such claims, Supplier's total liability (and that of our contractors) will be limited, to the maximum extent permitted by applicable law, to direct damages up to two hundred percent of the value (e.g., greater of amount paid or a "not to exceed" amount specified in the SOW) of the applicable statement of work for Services, in the aggregate, for the Services giving rise to the claims. In the event Services or any Services Deliverables are provided to VITA or an Authorized User on a gratuitous or no-charge basis, Supplier's total liability to VITA or such Authorized User will not exceed US \$50,000, or its equivalent in local currency. The limitations on direct damages under this paragraph will not apply with respect to the following in connection with the performance of this Contract:

- (i) Supplier's Section 14 (defense of infringement claims);
- (ii) Suppliers liability for damages for tortious willful misconduct or tortious gross negligence, to the extent caused by Supplier or its agents;
- (iii) bodily injury, including death, and damage to real property and tangible personal property to the extent of Supplier's willful misconduct or gross negligence; and
- (iv) Supplier's obligations under Section 13 (Confidentiality).

**B. Exclusion of liability for damages.** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS CONTRACT, NEITHER PARTY NOR THEIR CONTRACTORS WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, CONSEQUENTIAL (INCLUDING WITHOUT LIMITATION, DAMAGES FOR BUSINESS INTERRUPTION, OR LOSS OF BUSINESS INFORMATION), SPECIAL, OR INCIDENTAL DAMAGES OR DAMAGES FOR LOSS OF PROFITS OR REVENUES ARISING IN CONNECTION WITH THIS CONTRACT, ANY STATEMENT OF WORK FOR SERVICES, SERVICES, DELIVERABLES, FIXES, PRODUCTS, OR ANY OTHER MATERIALS OR INFORMATION, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF SUCH POSSIBILITY WAS REASONABLY FORESEEABLE.

## **16. SECURITY COMPLIANCE**

Supplier agrees to comply with all provisions of the then-current Commonwealth of Virginia security procedures, published by the Virginia Information Technologies Agency (VITA) and which may be found at (<http://www.vita.virginia.gov/library/default.aspx?id=537#securityPSGs>) or a successor URL(s), as are pertinent and applicable to Supplier's provision of Services hereunder operation. Supplier further agrees to comply with all provisions of the relevant Authorized User's then-current security procedures as are pertinent to Supplier's provision of Services hereunder operation and which have been supplied to Supplier by such Authorized User. Supplier shall also comply with all applicable federal, state and local laws and regulations. For any individual Authorized User location, security procedures may include but not be limited to: background checks, records verification, photographing, and fingerprinting of Supplier's employees or agents. Supplier may, at any time, be required to execute and complete, for each individual Supplier employee or agent, additional forms

which may include non-disclosure agreements to be signed by Supplier's employees or agents acknowledging that all Authorized User information with which such employees and agents come into contact while at the Authorized User site is confidential and proprietary. Any unauthorized release of proprietary information by the Supplier or an employee or agent of Supplier shall constitute a breach of this Contract.

Supplier shall indemnify, defend, and hold the Commonwealth, VITA, the Authorized User, their officers, directors, employees and agents harmless from and against any and all fines, penalties (whether criminal or civil), judgments, damages and assessments, including reasonable expenses suffered by, accrued against, or charged to or recoverable from the Commonwealth, VITA, the Authorized User, their officers, directors, agents or employees, on account of the failure of Supplier to perform its obligations pursuant this Section.

## **17. IMPORT/EXPORT**

In addition to compliance by Supplier with all export laws and regulations VITA requires that any data deemed "restricted" or "sensitive" by either federal or state authorities, must only be collected, developed, analyzed, or otherwise used or obtained by persons or entities working within the boundaries of the United States.

## **18. GENERAL PROVISIONS**

### **A. Relationship Between VITA and Authorized User and Supplier**

Supplier has no authority to contract for VITA or any Authorized User or in any way to bind, to commit VITA or any Authorized User to any agreement of any kind, or to assume any liabilities of any nature in the name of or on behalf of VITA or any Authorized User. Under no circumstances shall Supplier, or any of its employees, hold itself out as or be considered an agent or an employee of VITA or any Authorized User, and neither VITA nor any Authorized User shall have any duty to provide or maintain any insurance or other employee benefits on behalf of Supplier or its employees. Supplier represents and warrants that it is an independent contractor for purposes of federal, state and local employment taxes and agrees that neither VITA nor any Authorized User is responsible to collect or withhold any federal, state or local employment taxes, including, but not limited to, income tax withholding and social security contributions, for Supplier. Any and all taxes, interest or penalties, including, but not limited to, any federal, state or local withholding or employment taxes, imposed, assessed or levied as a result of this Contract shall be paid or withheld by Supplier or, if assessed against and paid by VITA or any Authorized User, shall be reimbursed by Supplier upon demand by VITA or such Authorized User.

### **B. Incorporated Contractual Provisions**

The then-current contractual provisions at the following URL are mandatory contractual provisions, required by law or by VITA, and that are hereby incorporated by reference: <http://www.vita.virginia.gov/uploadedFiles/SCM/StatutorilyMandatedTsandCs.pdf>

The contractual claims provision §2.2-4363 of the Code of Virginia and the required eVA provisions at <http://www.vita.virginia.gov/uploadedFiles/SCM/eVATsandCs.pdf> are also incorporated by reference.

The then-current contractual provisions at the following URL are required contractual provisions, required by law or by VITA, that apply **to all orders placed under this Contract that are** partially or wholly funded by the American Recovery and Reinvestment Act of 2009 (ARRA) and are hereby incorporated by reference: [http://www.vita.virginia.gov/uploadedFiles/SCM/ARRA\\_Ts\\_and\\_Cs.pdf](http://www.vita.virginia.gov/uploadedFiles/SCM/ARRA_Ts_and_Cs.pdf)

The then-current terms and conditions in documents posted to the aforementioned URLs are subject to change pursuant to action by the legislature of the Commonwealth of Virginia, change in VITA policy, or the adoption of revised eVA business requirements. If a change is made to the terms and conditions, a new effective date will be noted in the document title. Supplier is advised to check the URLs periodically.

### **C. Compliance with the Federal Lobbying Act**

Supplier's signed certification of compliance with 31 USC 1352 (entitled "Limitation on use of appropriated funds to influence certain Federal Contracting and financial transactions") or by the regulations issued from time to time thereunder (together, the "Lobbying Act") is incorporated as Exhibit F hereto.

### **D. Governing Law**

This Contract shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia without regard to that body of law controlling choice of law. Any and all litigation shall be brought in the circuit courts of the Commonwealth of Virginia. The English language version of this Contract prevails when interpreting this Contract. The United Nations Convention on Contracts for the International Sale of Goods and all other laws and international treaties or conventions relating to the sale of goods are expressly disclaimed. UCITA shall apply to this Contract only to the extent required by §59.1-501.15 of the Code of Virginia.

### **E. Dispute Resolution**

In accordance with §2.2-4363 of the Code of Virginia, Contractual claims, whether for money or other relief, shall be submitted in writing to the public body from whom the relief is sought no later than sixty (60) days after final payment; however, written notice of the Supplier's intention to file such claim must be given to such public body at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims shall not delay payment of amounts agreed due in the final payment. The relevant public body shall render a final decision in writing within thirty (30) days after its receipt of the Supplier's written claim.

The Supplier may not invoke any available administrative procedure under §2.2-4365 of the Code of Virginia nor institute legal action prior to receipt of the decision of the relevant public body on the claim, unless that public body fails to render its decision within thirty (30) days. The decision of the relevant public body shall be final and conclusive unless the Supplier, within six (6) months of the date of the final decision on the claim, invokes appropriate action under §2.2-4364, Code of Virginia or the administrative procedure authorized by §2.2-4365, Code of Virginia.

Upon request from the public body from whom the relief is sought, Supplier agrees to submit any and all contractual disputes arising from this Contract to such public body's alternative dispute resolution (ADR) procedures, if any. Supplier may invoke such public body's ADR procedures at any time and concurrently with any other statutory remedies prescribed by the Code of Virginia.

In the event of any breach by a public body, Supplier's remedies shall be limited to claims for damages and Prompt Payment Act interest and, if available and warranted, equitable relief, all such claims to be processed pursuant to this Section. In no event shall Supplier's remedies include the right to terminate any license or support services hereunder.

### **F. Advertising and Use of Proprietary Marks**

Supplier shall not use the name of VITA or any Authorized User's name or refer to VITA or any Authorized User, directly or indirectly, in any press release or formal advertisement without receiving prior written consent of VITA or such Authorized User. In no event may Supplier use a proprietary mark of VITA or an Authorized User without receiving the prior written consent of VITA or the Authorized User.

### **G. Notices**

Any notice required or permitted to be given under this Contract shall be in writing and shall be deemed to have been sufficiently given if delivered in person, or if deposited in the US mails, postage prepaid, for mailing by registered, certified mail, or overnight courier service addressed to the addresses shown on the signature page. Both parties agree to accept e-mail correspondence as notice required or permitted under this Contract and it shall be regarded as sufficiently given. VITA or Supplier may change its address for notice purposes by giving the other Party notice of such change in accordance with this Section.

#### **H. No Waiver**

Any failure to enforce any terms of this Contract shall not constitute a waiver.

#### **I. Assignment**

This Contract shall be binding upon and shall inure to the benefit of the permitted successors and assigns of VITA and Supplier. Supplier may not assign, subcontract, delegate or otherwise convey this Contract or any of its rights and obligations hereunder, to any entity without the prior written consent of VITA, and any such attempted assignment or subcontracting without consent shall be void. VITA may assign this Contract to any entity, so long as the assignee agrees in writing to be bound by the all the terms and conditions of this Contract.

If any law limits the right of VITA or Supplier to prohibit assignment or nonconsensual assignments, the effective date of the assignment shall be thirty (30) days after the Supplier gives VITA prompt written notice of the assignment, signed by authorized representatives of both the Supplier and the assignee. Any payments made prior to receipt of such notification shall not be covered by this assignment.

#### **J. Captions**

The captions are for convenience and in no way define, limit or enlarge the scope of this Contract or any of its Sections.

#### **K. Severability**

Invalidity of any term of this Contract, in whole or in part, shall not affect the validity of any other term. VITA and Supplier further agree that in the event such provision is an essential part of this Contract, they shall immediately begin negotiations for a suitable replacement provision.

#### **L. Survival**

The provisions of this Contract regarding License, Rights To Work Products, Warranty, Confidentiality, Liability and Indemnification, and the General Provisions shall survive the expiration or termination of this Contract.

#### **M. Force Majeure**

No Party shall be responsible for failure to meet its obligations under this Contract if the failure arises from causes beyond the control and without the fault or negligence of the non-performing Party. If any performance date under this Contract is postponed or extended pursuant to this section for longer than thirty (30) calendar days, VITA, by written notice given during the postponement or extension, may terminate Supplier's right to render further performance after the effective date of termination without liability for that termination, and in addition an Authorized User may terminate any order or SOW affected by such postponement or delay.

Supplier shall be paid for all services provided and accepted up to the Force Majeure event.

#### **N. Remedies**

The remedies set forth in this Contract are intended to be cumulative. In addition to any specific remedy, VITA and all Authorized Users reserve any and all other remedies that may be available at law or in equity.

#### **O. Right to Audit**

VITA reserves the right to audit those Supplier records that relate to the Services rendered or the amounts due Supplier for such Services under this Contract. VITA's right to audit shall be limited as follows:

- i). Three (3) years from Service performance date;
- ii). Performed at Supplier's premises, during normal business hours at mutually agreed upon times; and
- iii). Excludes access to Supplier cost information.

The Supplier shall not have the right to audit, or require to have audited, VITA or any Authorized User.

**P. Offers of Employment**

During the first twelve (12) months of the Contract, should Supplier hire an employee of an Authorized User who has substantially worked on any project covered by this Contract without prior written consent, the Supplier shall be billed for fifty percent (50%) of the employee's annual salary in effect at the time of termination.

**Q. Contract Administration**

Supplier agrees that at all times during the term of this Contract an account executive, at Supplier's senior management level, shall be assigned and available to VITA. Supplier reserves the right to change such account executive upon reasonable advance written notice to VITA.

**R. Entire Contract**

The following Exhibits, including all subparts thereof, are attached to this Contract and are made a part of this Contract for all purposes:

- i). Exhibit A Service Requirements
- ii). Exhibit B Statement of Work (SOW) Template
- iii). Exhibit C Change Order Template
- iv). Exhibit D Service Fees
- v). Exhibit F Certification Regarding Lobbying

This Contract, its Exhibits, and any prior non-disclosure agreement constitute the entire agreement between VITA and Supplier and supersede any and all previous representations, understandings, discussions or agreements between VITA and Supplier as to the subject matter hereof. Any and all terms and conditions contained in, incorporated into, or referenced by the Supplier's Proposal shall be deemed invalid. The provisions of the Virginia Department of General Services, Division of Purchases and Supply Vendor's Manual shall not apply to this Contract or any order or SOW issued hereunder. This Contract may only be amended by an instrument in writing signed by VITA and Supplier. In the event of a conflict, the following order of precedence shall apply: this Contract document, Exhibit A, any individual SOW, Exhibit D.

Any modification to an SOW that extends the period of performance beyond one (1) year or increases the value of such SOW above US\$100,000 shall, absent the prior written approval of VITA, be voidable by VITA, in its sole discretion. If an SOW is voided by VITA, such SOW shall no longer be binding on either Party and all obligations with respect to such SOW shall expire. [Note: period of performance may be shorter than one (1) year, but not greater, and dollar values may be lower than \$100,000 but not greater.]

An Authorized User and Supplier may enter into an ordering agreement pursuant to this Contract. To the extent that such ordering agreement, or any order or SOW issued hereunder, include any terms and conditions inconsistent with the terms and conditions of this Contract, such terms and conditions shall be of no force and effect.

VITA and Supplier each acknowledge that it has had the opportunity to review this Contract and to obtain appropriate legal review if it so chose.

Executed as of the last date set forth below by the undersigned authorized representatives of VITA and Supplier.

Supplier

By: \_\_\_\_\_

(Signature)

Name: \_\_\_\_\_

(Print)

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Address for Notice:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Attention: \_\_\_\_\_

VITA

By: \_\_\_\_\_

(Signature)

Name: \_\_\_\_\_

(Print)

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Address for Notice:

11751 Meadowville Lane

Chester VA 23836

Attention: Contract Administrator

**EXHIBIT B**  
**CONTRACT NUMBER VA-100802-IBM**  
**BETWEEN**  
**VIRGINIA INFORMATION TECHNOLOGIES AGENCY**  
**AND**  
**International Business Machines (IBM)**

Exhibit B is hereby incorporated into and made an integral part of Contract Number VA-100802-IBM (“Contract”) between the Virginia Information Technologies Agency (“VITA” or “Commonwealth” or “State”) and International Business Machines (IBM) (“Supplier”).

In the event of any discrepancy between this Exhibit B and Contract No. VA-100802-IBM the provisions of Contract No. VA-100802-IBM shall control.

[Note: Instructions for using this template to draft a Statement of Work are in *italics*. These instructions should be deleted after the appropriate text has been added to the Statement of Work. Contractual language is **not italicized** and should remain in the document. Text that is highlighted in blue is variable based on the nature of the project.]

**STATEMENT OF WORK**

This Statement of Work is issued by VITA on behalf of Authorized User, hereinafter referred to as “Authorized User”. The objective of the project described in this Statement of Work is for the Supplier to provide the Authorized User with a Authorized User Project Name Solution (“Solution”).

**1. Project Scope and Understanding of the Requirements**

*Provide information on the scope of the project and the Authorized User’s requirements for this particular engagement including:*

- a) general description of the Solution*
- b) project boundaries*
- c) Authorized User-specific requirements*
- d) special considerations for implementing technology at Authorized User’s location(s)*
- e) other characteristics of this project that must be addressed to insure the success of the engagement*

**2. Contract Products and Services to Support the Requirements**

**a. Solution Components**

*List the Solution components (hardware, software, etc.) provided by Supplier that will be used to support the requirement. Identify any special configuration requirements, and describe the system infrastructure to be provided by the Authorized User. Provide an overview that reflects how the system will be deployed within the Authorized User’s environment.*

**b. Services**

*Provide information on the services (e.g., requirements development, Solution design, configuration, installation) that will be provided by Supplier in the course of providing the Solution.*

**c. Training and Knowledge Transfer**

*Provide an overview of training services to be provided to the Authorized User and any special requirements for specific knowledge transfer to support the Authorized User’s successful implementation of the Solution. If the intent is for the Authorized User to become self-sufficient in*

operating or maintaining the Solution, determine the type of training necessary, and develop a training plan, for such user self-sufficiency.

**d. Support**

Document the level of support, as available under the Contract, required by the Authorized User to operate and maintain the Solution. This may include conversion support, legacy system integration, transition assistance, Solution maintenance (including maintenance level), or other specialized consulting to facilitate delivery or use of the Solution.

**3. Project Events and Tasks**

Provide a high-level overview of project events and tasks to be accomplished to deliver the required Solution.

**4. Period of Performance**

Implementation of the Solution will occur within XX (XX) months of execution of this Statement of Work. This includes delivery and installation all of the products and services necessary to implement the Authorized User's Solution, training, and any support, other than on-going maintenance services. The period of performance for maintenance services shall be one (1) year after implementation and may be extended for additional one (1) year periods, pursuant to and unless otherwise specified in the Contract.

**5. Place of Performance**

Tasks associated with this engagement will be performed at the Authorized User's location(s) in \_\_\_\_\_, Virginia, at Supplier's location(s) in Wherever, or other locations as required by the effort.

**6. Milestones, Deliverables, Payment Schedule, and Holdbacks**

The following table identifies milestone events and deliverables, the associated schedule, any associated payments, any retainage amounts, and net payments.

Milestone Event	Deliverable	Schedule	Payment	Retainage	Net Payment
Project kick-off meeting	---	Execution + 5 days	---	---	---
Site survey	Site survey report	Execution + 10 days	---	---	---
Installation of software	---	Execution + 20 days	\$10,000	\$1,000	\$9,000
Configuration and testing	---	Execution + 20 days	---	---	---
Training	Training manual	Execution + 30 days	\$10,000	\$1,000	\$9,000
User Acceptance Testing	---	Execution + 30 days	\$20,000	\$2,000	\$18,000
Implementation complete	Solution	Execution + 45 days	\$10,000	(\$4,000)	\$14,000

The total Solution price shall not exceed \$US XXX.

Supplier's invoices shall show retainage of ten percent (10%). Following completion of Solution implementation, Supplier shall submit a final invoice to the Authorized User, for the final milestone payment amount plus the total amount retained by the Authorized User.

Required Deliverables are as follows: (Provide a description of all Deliverables for this engagement.)

- o Site survey report:
- o Training manual:

- o **Solution: See Sections 1 and 2 above.**

In addition, Supplier will provide copies of any briefing materials, presentations, or other information developed to support this engagement.

Any inventions, combinations, machines, methods, formulae, techniques, processes, improvements, software designs, computer programs, strategies, specific computer-related know-how, data and original works of authorship discovered, created, or developed by Supplier, or jointly by Supplier and an Authorized User(s) in the execution of this Statement of Work shall be deemed Work Product. Configuration of software shall not be deemed Work Product. All provisions of the Contract regarding Work Product shall apply to this Statement of Work.

If travel expenses are not included in the **fixed price** of the Solution, such expenses shall be reimbursed in accordance with Commonwealth of Virginia travel policies as published by the Virginia Department of Accounts (<http://www.doa.virginia.gov/procedures/adminservices/capp/pdfdocs/20335.pdf>).

**7. Acceptance Criteria**

Acceptance Criteria for this Solution will be based on a User Acceptance Test (UAT) **designed by Supplier and accepted by the Authorized User**. The UAT will ensure that all of the functionality required for the Solution has been delivered. **Supplier will provide the Authorized User with a detailed test plan and acceptance check list based on the mutually agreed upon UAT Plan. This UAT Plan check-list will be incorporated into this Exhibit D-X.**

*This section should reflect the mutually agreed upon UAT and Acceptance Criteria specific to this engagement.*

Each deliverable created under this Statement of Work will be delivered to the Authorized User with a Deliverable Acceptance Receipt. This receipt will describe the deliverable and provide the project manager with space to indicate if the deliverable is accepted, rejected, or conditionally accepted. Conditionally Accepted deliverables will contain a list of deficiencies that need to be corrected in order for the deliverable to be accepted by the Project Manager. The Project Manager will have **ten (10)** days from receipt of the deliverable to provide Supplier with the signed Acceptance Receipt unless an alternative schedule is mutually agreed to between Supplier and the Authorized User in advance.

**8. Assumptions and Project Roles and Responsibilities**

This section contains assumptions specific to this engagement.

*State assumptions here.*

The following roles and responsibilities have been defined for this engagement:

**(Sample Responsibility Matrix)**

<b>Responsibility Matrix</b>	<b>Supplier</b>	<b>Authorized User</b>
Infrastructure – Preparing the system infrastructure that meets the recommended configuration defined in <b>Section 2B herein</b>		√
Server Hardware		√
Server Operating		√
Server Network Connectivity		√
Relational Database Management Software (Installation and Implementation)		√
Server Modules – Installation and Implementation	√	
PC Workstations – Hardware, Operating System, Network Connectivity		√
PC Workstations – Client Software		√

Application Installation on PC Workstations	√	
Wireless Network Access Points	√	
Cabling, Electric and User Network Connectivity from Access Points		√
Wireless Mobile Computing Products – Scanners, printers	√	
Project Planning and Management	√	√
Requirements Analysis	√	√
Application Design and Implementation	√	
Product Installation, Implementation and Testing	√	
Conversion Support	√	
Conversion Support -- Subject Matter Expertise		√
Documentation	√	
Training	√	
Product Maintenance and Support	√	
Problem Tracking	√	√
Troubleshooting – IT Infrastructure		√
Troubleshooting – Solution	√	

## 9. Security Requirements

*Provide (or reference as an Attachment) Authorized User's security requirements. For any individual Authorized User location, security procedures may include but not be limited to: background checks, records verification, photographing, and fingerprinting of Supplier's employees or agents. Supplier may, at any time, be required to execute and complete, for each individual Supplier employee or agent, additional forms which may include non-disclosure agreements to be signed by Supplier's employees or agents acknowledging that all Authorized User information with which such employees and agents come into contact while at the Authorized User site is confidential and proprietary. Any unauthorized release of proprietary information by the Supplier or an employee or agent of Supplier shall constitute a breach of the Contract.*

At a minimum, Supplier shall adhere to all of VITA's standard security requirements.

## 10. Risk Management

*Risk is a function of the probability of an event occurring and the impact of the negative effects if it does occur. Negative effects include schedule delay, increased costs, and poor quality of deliverables.*

*Depending on the level of risk of this project, as assessed by the Authorized User, this section may contain any or all of the following components, at a level of detail commensurate with the level of risk:*

- a) *Identification of risk factors.*
- b) *Initial risk assessment.*
- c) *Risk management/mitigation plan, including determination of roles and responsibilities of the Authorized User and Supplier.*
- d) *Risk monitoring plan, including frequency and form of reviews, project team responsibilities, steering and oversight committee responsibilities, documentation.*

## 11. Reporting

*The following are examples of reporting requirements which may be included in the Statement of Work by the Authorized User. [Note: In an effort to help VITA monitor Supplier performance, it is strongly recommended that the Statement of Work include "Supplier Performance Assessments". These assessments may be performed at the discretion of the Authorized User and are not mandated by VITA.]*

**Weekly/Bi-weekly Status Update.** The weekly/bi-weekly status report, to be submitted by Supplier to the Authorized User, should include: accomplishments to date as compared to the project plan; any changes in tasks, resources or schedule with new target dates, if necessary; all open issues or questions regarding the project; action plan for addressing open issues or questions and potential impacts on the project; risk management reporting.

**Supplier Performance Self-Assessment.** Within thirty (30) days of execution of the Statement of Work, the Supplier and the Authorized User will agree on Supplier performance self-assessment criteria. Supplier shall prepare a monthly self-assessment to report on such criteria. Supplier shall submit its self-assessment to the Authorized User who will have five (5) days to respond to Supplier with any comments. If the Authorized User agrees with Supplier's self-assessment, such Authorized User will sign the self-assessment and submit a copy to the VITA Supplier Relationship Manager.

**Supplier Performance Assessments.** The Authorized User may develop assessments of the Supplier's performance and disseminate such assessments to other Authorized Users of the Contract. Prior to dissemination of such assessments, Supplier will have an opportunity to respond to the assessments, and independent verification of the assessment may be utilized in the case of disagreement.

**12. Point of Contact**

For the duration of this project, the following project managers shall serve as the points of contact for day-to-day communication:

Authorized User: \_\_\_\_\_

Supplier: \_\_\_\_\_

By signing below, both parties agree to the terms of this Exhibit.

Supplier

VITA

By: \_\_\_\_\_

By: \_\_\_\_\_

(Signature)

(Signature)

Name: \_\_\_\_\_

Name: \_\_\_\_\_

(Print)

(Print)

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## EXHIBIT F: CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief, that:

- i). No Federal appropriated funds have been paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee or an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal Contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal Contract, grant, loan, or cooperative agreement.
- ii). If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal Contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- iii). The undersigned shall require that the language of this certification be included in the award documents for all sub awards at all tiers (including subcontracts, sub grants, and Contracts under grants, loans and cooperative agreements) and that all sub recipients shall certify and disclose accordingly.

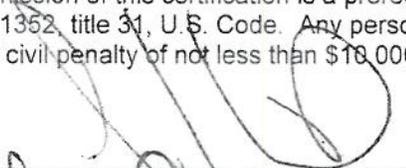
This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Organization: \_\_\_\_\_

Date: \_\_\_\_\_

  
\_\_\_\_\_  
Andy Halmond  
\_\_\_\_\_  
Ibm Corporation  
\_\_\_\_\_  
07/28/2010  
\_\_\_\_\_