

NASPO ValuePoint

**AMENDMENT #2**

**PARTICIPATING ADDENDUM**

**COMPUTER EQUIPMENT (DESKTOPS,  
LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED  
PERIPHERALS & SERVICES)**

Led by the State of Minnesota



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Master Agreement #: **23012** (*hereinafter "Master Agreement"*)

Contractor: **INTERNATIONAL BUSINESS MACHINES  
CORPORATION** (*hereinafter "Contractor"*)

Participating State: **STATE OF HAWAII** (*hereinafter "Participating State"*)

**State of Hawaii, State Procurement Office (SPO) Vendor List Contract No. 24-03** (herein after  
"Contract")

Add Section 4, subsection N.

Hawaii Electronic Information Technology Disability Access Standards

All electronic information technology developed or provided under this contract or procurement shall comply with the applicable requirements of the Hawaii Electronic Information Technology Disability Access Standards (Access Standards).



THE PARTIES HERETO HAVE EXECUTED THIS AMENDMENT THROUGH THEIR AUTHORIZED REPRESENTATIVES WITH FULL KNOWLEDGE OF AND AGREEMENT WITH ITS TERMS AND CONDITIONS.

|                                                                                                 |                                                                                                 |
|-------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|
| Participating State: STATE OF HAWAII                                                            | Contractor: INTERNATIONAL BUSINESS MACHINES CORPORATION                                         |
| Signature:<br> | Signature:<br> |
| Name: BONNIE KAHAKUI                                                                            | Name: URANIA DAVIS                                                                              |
| Title: Administrator, SPO                                                                       | Title: Public Sector Contracts                                                                  |
| Date:<br>08/20/2025                                                                             | Date:<br>08/18/2025                                                                             |

**APPROVED AS TO FORM:**



08/19/2025

Deputy Attorney General

NASPO ValuePoint

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NASPO ValuePoint

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***to support documentation of participation and posting  
in appropriate data bases.]***



# Hawaii Electronic Information Technology Disability Access Standards

Published By: The Department of Accounting and General Services, Office of Enterprise  
Technology Services, & the  
Disability and Communication Access Board

Effective Date: January 1, 2025  
Version 1.1

## Revision History

| Revision Number | Date       | Revised By | Description of Changes                                  |
|-----------------|------------|------------|---------------------------------------------------------|
| 1.0             | 01/01/2025 | ETS/DCAB   | Initial release                                         |
| 1.1             | 01/22/2025 | ETS/DCAB   | Minor wording, diacritical mark, and formatting changes |

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## Purpose

The State of Hawai'i is committed to providing individuals with disabilities access to electronic information technology (EIT) equivalent to access provided to individuals without disabilities.

The purpose of the Hawaii Electronic Information Technology Disability Access Standards, henceforth referred to as the Access Standards, is to establish minimum accessibility requirements to ensure that all electronic information technology developed, purchased, used, or provided by a state entity are made accessible to individuals with a disability.

## Scope

These Access Standards apply to all state entities: the executive, legislative, and judicial branches of the State, including its departments, divisions, agencies, offices; public bodies; public elementary, secondary, and postsecondary schools; and the University of Hawai'i. State entities that contract with other entities to provide public service have an obligation to ensure that their contractors comply with these Access Standards.

These Access Standards apply to all EIT developed, purchased, used, or provided by a state entity, and all substantial modifications made by a state entity to EIT. Electronic information technology means electronic information, software, systems, and equipment used in the creation, manipulation, storage, display, or transmission of data, including: (1) Internet and intranet systems; (2) Websites and interfaces; (3) Software applications; (4) Operating systems; (5) Video and multimedia; (6) Telecommunication products; (7) Electronic and digital kiosks; (8) Information transaction machines; (9) Copiers and printers; and (10) Desktop and portable computers.

## Background

Section 504 of the Rehabilitation Act of 1973 is a United States federal law that prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance.

Section 508 of the Rehabilitation Act requires federal agencies to make their electronic and information technology (EIT), also referred to as information and communication technology (ICT), accessible to people with disabilities. The law (29 U.S.C. § 794 (d)) applies to all federal agencies when they develop, procure, maintain, or use EIT. Under Section 508, access must be comparable to that available to employees and members of the public without disabilities.

The federal Americans with Disabilities Act (ADA) of 1990 extended anti-discrimination protections to various sectors beyond those covered by federal funding, including state and local governments. ADA Title II covers public services and accommodations.

Regulations issued by the U.S. Department of Justice (DOJ) on April 24, 2024, revised the ADA Title II regulations to specify that the Web Content Accessibility Guidelines (WCAG) Version 2.1, Level AA is the technical standard for state and local governments' web content and mobile apps.

In 2022, Hawai'i State Senate Bill 2144 was passed into law as Act 172, requiring the Office of Enterprise Technology Services, in consultation with the Disability and Communication Access Board and a working group composed of stakeholders, to develop and publish electronic information technology (EIT) accessibility standards to be implemented by all state entities.

The accessibility standards, referred to as the Hawaii Electronic Information Technology Disability Access Standards, shall require that all electronic information technology developed, purchased, used, or provided by a state entity be made accessible to individuals with a disability, consistent with federal standards to implement section 508 of the Rehabilitation Act of 1973, as amended, and the web access standards issued by the World Wide Web Consortium Web Accessibility Initiative, including functional performance criteria and technical requirements for accessibility.

## Authorities

- A. [Section 508 of the Rehabilitation Act of 1973, as amended \(29 U.S.C. 794d\)](#)
- B. [Americans with Disabilities Act of 1990, As Amended \(42 U.S.C. §§ 12101–12213\)](#)
- C. [Act 172, Session Laws of Hawai‘i 2022 – Relating to Electronic Information Technology Accessibility for Persons with Disabilities](#)
- D. [DOJ Rule, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities \(28 C.F.R. Part 35 Subpart H\)](#)

## Dates

Effective Date of DOJ Rule: April 24, 2024.

Compliance Date: In accordance with 28 C.F.R. section 35.200 (DOJ Rule), a public entity with a total population of 50,000 or more shall ensure compliance with this DOJ Rule by April 24, 2026.

## Roles and Responsibilities

- A. The Office of Enterprise Technology Services (ETS) Chief Information Officer (CIO):
  - a. Oversees development and publication of the Hawaii Electronic Information Technology Disability Access Standards.
  - b. Provides vision and direction for ensuring that electronic information technology (EIT) developed, purchased, used, or provided by a state entity is accessible to individuals with a disability.
  - c. Reviews the Access Standards every three years after the date of initial publication, or more frequently if deemed necessary by the ETS CIO, and amends the Access Standards to reflect advances or changes in electronic information technology.
- B. The Disability and Communication Access Board (DCAB):
  - a. Provides ETS CIO consultation to develop and publish the Access Standards.
  - b. Provides ETS CIO consultation to carry out the triennial Access Standards review and amendments.
  - c. Provides guidance to state agencies regarding the Access Standards.
- C. Department/Agency Director (or equivalent or designee):
  - a. No later than 6 months after publication of the Access Standards, review the Access Standards and revise their department’s/agency’s procurement and development rules, policies, and procedures to incorporate the Access Standards.
  - b. No later than 6 months after the publication of any amendment, review the Access Standards and revise their department’s/agency’s procurement and development rules, policies, and procedures to incorporate the Access Standards.
  - c. Ensure conformance to the Access Standards.

- d. Ensure the relevant Access Standards compliance language is included in all contractual actions for electronic information technology items and services.
- D. Department/Agency ADA Coordinators:
  - a. Receive and process grievances alleging discrimination on the basis of disability.
- E. Department/Agency EEO Officer (or equivalent):
  - a. Receive and process employee grievances alleging discrimination on the basis of disability.

## Functional Performance Criteria and Technical Requirements

Act 172, Session Laws of Hawai'i (SLH) 2022, requires the Access Standards to be consistent with (1) accessibility standards issued by the United States Access Board which implement Section 508 of the Rehabilitation Act of 1973, as amended, and (2) web access standards issued by the World Wide Web Consortium Web Accessibility Initiative.

All electronic information technology that is procured, developed, maintained, or used by state entities shall conform to the following:

- A. Section 508 Standards (36 C.F.R. Part 1194)
  - a. [Appendix A to 36 C.F.R. Part 1194 – Section 508 of the Rehabilitation Act: Application and Scoping Requirements](#)
  - b. [Appendix C to Part 1194 – Functional Performance Criteria and Technical Requirements](#)
- B. [Web Content Accessibility Guidelines \(WCAG\) 2.1 Level A and AA](#), or a subsequent version as adopted by the United States Access Board or Department of Justice.

## Section 508 Standards

Under Section 508 of the Rehabilitation Act of 1973, as amended, federal agencies must provide individuals with disabilities, including employees and members of the public, access to information comparable to access available to others.

The functional performance criteria under Section 508 are as follows:

- **Without Vision:** Where a visual mode of operation is provided, information and communication technology (ICT) shall provide at least one mode of operation that does not require user vision.
- **With Limited Vision:** Where a visual mode of operation is provided, ICT shall provide at least one mode of operation that enables users to make use of limited vision.
- **Without Perception of Color:** Where a visual mode of operation is provided, ICT shall provide at least one visual mode of operation that does not require user perception of color.
- **Without Hearing:** Where an audible mode of operation is provided, ICT shall provide at least one mode of operation that does not require user hearing.
- **With Limited Hearing:** Where an audible mode of operation is provided, ICT shall provide at least one mode of operation that enables users to make use of limited hearing.
- **Without Speech:** Where speech is used for input, control, or operation, ICT shall provide at least one mode of operation that does not require user speech.
- **With Limited Manipulation:** Where a manual mode of operation is provided, ICT shall provide at least one mode of operation that does not require fine motor control or simultaneous manual operations.

- **With Limited Reach and Strength:** Where a manual mode of operation is provided, ICT shall provide at least one mode of operation that is operable with limited reach and limited strength.
- **With Limited Language, Cognitive, and Learning Abilities:** ICT shall provide features making its use by individuals with limited cognitive, language, and learning abilities simpler and easier.

Please refer to the Appendix for a full extract of *Appendix C to Part 1194—Functional Performance Criteria and Technical Requirements* of the Section 508 of the Rehabilitation Act.

## WCAG 2.1 Level A and AA

The WCAG 2.1 Level A and AA will make web content more accessible to people with disabilities, including people with visual, auditory, physical, speech, cognitive, language, learning, and neurological disabilities. Although WCAG 2.1 Level A and AA cover a wide range of issues, they are not able to address the needs of people with all types, degrees, and combinations of disability. WCAG 2.1 Level A and AA also make web content more usable by older individuals with changing abilities due to aging and often improve usability for users in general.

The basic principles that lay the foundation necessary for anyone to access and use web content are as follows:

1. **Perceivable** - Information and user interface components must be presentable to users in ways users can perceive.
  - This means that users must be able to perceive the information being presented (it cannot be invisible to all of their senses).
2. **Operable** - User interface components and navigation must be operable.
  - This means that users must be able to operate the interface (the interface cannot require interaction that a user cannot perform).
3. **Understandable** - Information and the operation of user interface must be understandable.
  - This means that users must be able to understand the information as well as the operation of the user interface (the content or operation cannot be beyond their understanding).
4. **Robust** - Content must be robust enough that it can be interpreted reliably by a wide variety of user agents, including assistive technologies.
  - This means that users must be able to access the content as technologies advance (as technologies and user agents evolve, the content should remain accessible).

## Exceptions

Electronic information technology (EIT) may be exempt from the Disability Access Standards as specified by the U.S. Access Board at the following website: <https://www.access-board.gov/ict/#E202-general-exceptions>. Exceptions applicable at the federal level apply to the state with the implementation of the Access Standards.

The Access Standards shall not require the installation of specific accessibility-related software or peripheral devices at the workstation of an employee who is not an individual with a disability; the

Access Standards require all workstation technology used by a state entity to be compatible with accessibility-related software and peripheral devices.

### Section 508 E202 General Exceptions

- **E202.1 General** – Information and communication technology (ICT) shall be exempt from compliance with the Revised 508 Standards to the extent specified by E202.
- **E202.2 Legacy ICT** – Any component or portion of existing ICT that complies with an earlier standard issued pursuant to Section 508 of the Rehabilitation Act of 1973, as amended (as republished in Appendix D), and that has not been altered on or after January 18, 2018, shall not be required to be modified to conform to the Revised 508 Standards.
- **E202.3 National Security Systems** – The Revised 508 Standards do not apply to ICT operated by agencies as part of a national security system, as defined by 40 U.S.C. 11103(a).
- **E202.4 Federal Contracts** – ICT acquired by a contractor incidental to a contract shall not be required to conform to the Revised 508 Standards.
- **E202.5 ICT Functions Located in Maintenance or Monitoring Spaces** – Where status indicators and operable parts for ICT functions are located in spaces that are frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment, such status indicators and operable parts shall not be required to conform to the Revised 508 Standards.
- **E202.6 Undue Burden or Fundamental Alteration** – Where an agency determines in accordance with E202.6 that conformance to requirements in the Revised 508 Standards would impose an undue burden or would result in a fundamental alteration in the nature of the ICT, conformance shall be required only to the extent that it does not impose an undue burden, or result in a fundamental alteration in the nature of the ICT.
  - **E202.6.1 Basis for a Determination of Undue Burden** – In determining whether conformance to requirements in the Revised 508 Standards would impose an undue burden on the agency, the agency shall consider the extent to which conformance would impose significant difficulty or expense considering the agency resources available to the program or component for which the ICT is to be procured, developed, maintained, or used.
  - **E202.6.2 Required Documentation** – The responsible agency official shall document in writing the basis for determining that conformance to requirements in the Revised 508 Standards constitute an undue burden on the agency, or would result in a fundamental alteration in the nature of the ICT. The documentation shall include an explanation of why and to what extent compliance with applicable requirements would create an undue burden or result in a fundamental alteration in the nature of the ICT.
  - **E202.6.3 Alternative Means** – Where conformance to one or more requirements in the Revised 508 Standards imposes an undue burden or a fundamental alteration in the nature of the ICT, the agency shall provide individuals with disabilities access to and use of information and data by an alternative means that meets identified needs.
- **E202.7 Best Meets** – Where ICT conforming to one or more requirements in the Revised 508 Standards is not commercially available, the agency shall procure the ICT that best meets the Revised 508 Standards consistent with the agency's business needs.
  - **E202.7.1 Required Documentation** – The responsible agency official shall document in writing: (a) the non-availability of conforming ICT, including a description of market research performed and which provisions cannot be met, and (b) the basis for determining that the ICT to be

procured best meets the requirements in the Revised 508 Standards consistent with the agency's business needs.

- **E202.7.2 Alternative Means** – Where ICT that fully conforms to the Revised 508 Standards is not commercially available, the agency shall provide individuals with disabilities access to and use of information and data by an alternative means that meets identified needs.

## DOJ Rule Exceptions

The requirements of [28 C.F.R. § 35.200](#) do not apply to the following:

- A. **Archived web content** - Archived web content as defined in 28 C.F.R. § 35.104.
- B. **Preexisting conventional electronic documents** - Conventional electronic documents that are available as part of a public entity's web content or mobile apps before the date the public entity is required to comply with this subpart, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities.
- C. **Content posted by a third party** - Content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity.
- D. **Individualized, password-protected or otherwise secured conventional electronic documents.** Conventional electronic documents that are:
  - 1. About a specific individual, their property, or their account; and
  - 2. Password-protected or otherwise secured.
- E. **Preexisting social media posts** - A public entity's social media posts that were posted before the date the public entity is required to comply with this subpart.

## Accessibility Recommendations

The best strategy to address accessibility compliance involves a comprehensive and proactive approach, which includes planning and accessibility testing throughout the product lifecycle. To ensure that state entities implement the accessibility standards, the following recommendations for planning, reporting, monitoring, and enforcement should be considered.

### Incorporate Accessibility Early in the IT Project Roadmapping and Planning Phases

State entities must consider the Access Standards in all IT project plans that include an investment in new or existing electronic information technology.

- Accessibility requirements must be included in the project specifications of new systems, especially in the modernization of major systems, and be evaluated throughout any major enhancements of existing systems during the design and development phases.
- Governing IT entities and/or IT management shall provide reference to the Access Standards to the state entities during IT governance roadmapping and planning phases for IT projects.

### Incorporate Accessibility in the Procurement Phase

No later than six months after the publication of the Access Standards, each state entity shall review the standards and revise the entity's existing procurement rules, policies, and procedures to incorporate the standards.

- To ensure compliance, state entities shall include a requirement similar to the following whenever procuring information technology:

*All electronic information technology developed or provided under this contract or procurement shall comply with the applicable requirements of the Hawaii Electronic Information Technology Disability Access Standards (Access Standards).*

- State entities must clearly communicate the expectation that vendors and contractors are held to the Access Standards.
- State entities shall keep documentation of their accessibility evaluation and selection criteria for the evaluation of proposals.
- Where applicable, the vendor shall provide the state entity with its most recent Accessibility Conformance Report (ACR).

#### Voluntary Product Accessibility Template (VPAT®)

A [Voluntary Product Accessibility Template \(VPAT®\)](#) is a document that explains how information and communication technology (ICT) products such as software, hardware, electronic content, and support documentation meet (conform to) the Revised 508 Standards for IT accessibility. VPAT® helps Federal agency contracting officials and government buyers to assess ICT for accessibility when doing market research and evaluating proposals.

Government solicitations which include ICT will specify accessibility requirements, indicating which provisions are required to ensure the deliverable is accessible. A VPAT® is a good way to address the accessibility requirements defined in the solicitation.

#### Establish Monitoring and Reporting Mechanisms

Implement a system for ongoing monitoring of EIT accessibility and establish reporting mechanisms that can show conformance status over time.

- **Automated Accessibility Testing and Reporting:** Implement automated accessibility testing tools that can scan state websites, applications, and documents for common accessibility issues. These tools can help identify potential problems without requiring extensive manual effort.
  - Acquire access to the Siteimprove - <https://siteimprove.com/en-us/content-accessibility/> automated evaluation tool via ETS. The state has a license to use Siteimprove for all Hawaii.gov websites.
- **Compliance Reporting:** Establish a system for agencies and departments to regularly report on their compliance with accessibility standards. This involves documenting efforts made, progress achieved, and any identified challenges or areas for improvement.
- **Complaint and Grievance Process:** Develop and publish grievance procedures to allow anyone who wishes to file a complaint alleging discrimination on the basis of disability in violation of the standards set forth in the Access Standards. Identify an entity resource, such as an agency ADA Coordinator or EEO Officer to manage the complaints and ensure fair and prompt resolution.

#### Conduct Periodic Accessibility Reviews

State entities shall perform regular accessibility audits and testing throughout the product lifecycle, identify issues for review and remediation, evaluate the impact and risk of each issue to appropriately prioritize remediation efforts, and to iteratively improve the conformance levels of the EIT.

- **Accessibility Audits:** Leverage automated testing tools to generate periodic accessibility reports.
  - To get started with website content accessibility evaluation, the departmental content creators can first use the W3C-provided Easy Checks preliminary evaluation procedure, explained at <https://www.w3.org/WAI/test-evaluate/preliminary/>. This preliminary procedure is particularly useful for content creators with no prior experience in authoring accessible web content.
  - Incorporating hands-on testing by individuals with disabilities into the digital accessibility process adds significant value by providing real-world insights that automated tools or theoretical reviews may overlook. This inclusive approach ensures that digital products are truly usable for all people, not just technically compliant. By involving individuals with diverse disabilities in testing, state entities can better understand the challenges they face and validate the compatibility of our products with various assistive technologies like screen readers or voice control systems. Ultimately, this leads to more user-centered designs, a stronger commitment to accessibility, and improved overall user experience for everyone.
- **Compliance Reviews:** State entities must report the level of conformance of EIT systems to their governing IT entities or IT management so that accessibility conformance can be tracked and analyzed.
- **Accessibility Remediation Plans:** Create a plan to address accessibility issues identified within audits, reviews, and reports and prioritize the high-risk issues.

### Provide Training and Awareness

- Encourage accessibility training for acquisition professionals, IT project managers, communications staff, web managers, software developers, and authors of digital content.
- Accessibility statements adhering to the Access Standards shall be made available, where appropriate, on state entity websites. Each entity shall craft a message highlighting the agency's commitment to ensuring equivalent access to information for people with disabilities, and include a reference to the Access Standards, a program point of contact or a method to request assistance or provide feedback, and the date the statement was last updated.

### Continuously Improve

- **Periodic review of the Access Standards:** ETS, in consultation with DCAB, shall review the accessibility standards every three years after the date of the initial publication, or more frequently if the Chief Information Officer deems it necessary, and amend the standards to reflect advances or changes in electronic information technology. Within six months of the publication of any amended accessibility standards, each state entity shall review the amended standards and shall revise the entity's existing procurement and development rules, policies, and procedures to incorporate the amended standards accordingly.
- **User Feedback Mechanisms:** Set up mechanisms for users, including individuals with disabilities, to provide feedback on the accessibility of state websites, applications, and services. This may involve implementing feedback forms, contact information, or dedicated accessibility service centers. Monitoring and responding to user feedback may require a moderate amount of labor, but is crucial for gathering valuable insights.
- **Engage with the Accessibility Community:** Involve individuals with disabilities, disability advocacy groups, and accessibility experts in the design, development, and testing phases. Their

insights and feedback are invaluable for identifying accessibility barriers, ensuring that the EIT is truly inclusive, and that the state's efforts are meeting the needs of the community.

## Definitions

**Accessibility** - means the ability of an individual with a disability to receive, use, and manipulate data and operate controls included in electronic information technology in a manner equivalent to that of individuals who do not have disabilities.

**Accessibility Conformance Report (ACR)** - is a document that formally summarizes the extent to which an information and communications technology (ICT) product or service conforms to an agreed set of international accessibility guidelines and standards.

**Electronic Information** - is information that is created, stored, transmitted, or processed in an electronic format. This can include, but is not limited to:

- (1) Electronic documents, files, and data;
- (2) Emails, text messages, and faxes;
- (3) Databases, spreadsheets, and programs;
- (4) Image, sound, and video files; and
- (5) Web pages and information submitted online.

**Electronic Information Technology (EIT)** - also referred to as information and communication technology (ICT) as defined by [Section 508](#), means electronic information, software, systems, and equipment used in the creation, manipulation, storage, display, or transmission of data, including:

- (1) Internet and intranet systems;
- (2) Websites and interfaces;
- (3) Software applications;
- (4) Operating systems;
- (5) Video and multimedia;
- (6) Telecommunication products;
- (7) Electronic and digital kiosks;
- (8) Information transaction machines;
- (9) Copiers and printers; and
- (10) Desktop and portable computers.

**Individual with a disability** - means an individual with impairments that limit the individual's ability to access or use electronic information technology, including an individual who has:

- (1) No or limited vision;
- (2) No or limited hearing;
- (3) Physical disabilities; or
- (4) Cognitive impairment

**State entity** - means the executive, legislative, and judicial branches of the State, including its departments, divisions, agencies, offices; public bodies; public elementary, secondary, and postsecondary schools; and the University of Hawai'i.

## References and Additional Resources

- U.S. General Services Administration (GSA) [IT Accessibility Laws and Policies](#)
- [Accessibility of Web Content and Mobile Apps Provided by State and Local Government Entities: A Small Entity Compliance Guide](#)
- [PDFs Authoring Guides](#)
- [ICT Testing Baseline for Electronic Documents](#)
- [Create Accessible Meetings](#)
- [Mapping of WCAG 2.0 to Functional Performance Criteria](#)
- [What's New in WCAG 2.1](#)
- [Developing a Website Accessibility Statement](#)

## Appendix

### Appendix C to Part 1194 – Functional Performance Criteria of Section 508 of the Rehabilitation Act

The functional performance criteria provided below are an extract from *Appendix C to Part 1194—Functional Performance Criteria and Technical Requirements* of Section 508 of the Rehabilitation Act.

#### Chapter 3: Functional Performance Criteria

##### 301 General

- **301.1 Scope.** The requirements of Chapter 3 shall apply to ICT where required by Chapter 2 (Scoping Requirements) and where otherwise referenced in any other chapter of these Standards.

##### 302 Functional Performance Criteria

- **302.1 Without Vision.** Where a visual mode of operation is provided, ICT shall provide at least one mode of operation that does not require user vision.
- **302.2 With Limited Vision.** Where a visual mode of operation is provided, ICT shall provide at least one mode of operation that enables users to make use of limited vision.
- **302.3 Without Perception of Color.** Where a visual mode of operation is provided, ICT shall provide at least one visual mode of operation that does not require user perception of color.
- **302.4 Without Hearing.** Where an audible mode of operation is provided, ICT shall provide at least one mode of operation that does not require user hearing.
- **302.5 With Limited Hearing.** Where an audible mode of operation is provided, ICT shall provide at least one mode of operation that enables users to make use of limited hearing.
- **302.6 Without Speech.** Where speech is used for input, control, or operation, ICT shall provide at least one mode of operation that does not require user speech.
- **302.7 With Limited Manipulation.** Where a manual mode of operation is provided, ICT shall provide at least one mode of operation that does not require fine motor control or simultaneous manual operations.
- **302.8 With Limited Reach and Strength.** Where a manual mode of operation is provided, ICT shall provide at least one mode of operation that is operable with limited reach and limited strength.
- **302.9 With Limited Language, Cognitive, and Learning Abilities.** ICT shall provide features making its use by individuals with limited cognitive, language, and learning abilities simpler and easier.

#### Chapter 4: Hardware

##### 401 General

- **401.1 Scope.** The requirements of Chapter 4 shall apply to ICT that is hardware where required by Chapter 2 (Scoping Requirements) and where otherwise referenced in any other chapter of these Standards.

- **EXCEPTION:** Hardware that is assistive technology shall not be required to conform to the requirements of this chapter.

#### 402 Closed Functionality

- **402.1 General.** ICT with closed functionality shall be operable without requiring the user to attach or install assistive technology other than personal headsets or other audio couplers, and shall conform to 402.
- **402.2 Speech-Output Enabled.** ICT with a display screen shall be speech-output enabled for full and independent use by individuals with vision impairments.
  - **EXCEPTIONS:**
    1. Variable message signs conforming to 402.5 shall not be required to be speech-output enabled.
    2. Speech output shall not be required where ICT display screens only provide status indicators and those indicators conform to 409.
    3. Where speech output cannot be supported due to constraints in available memory or processor capability, ICT shall be permitted to conform to 409 in lieu of 402.2.
    4. Audible tones shall be permitted instead of speech output where the content of user input is not displayed as entered for security purposes, including, but not limited to, asterisks representing personal identification numbers.
    5. Speech output shall not be required for: The machine location; date and time of transaction; customer account number; and the machine identifier or label.
    6. Speech output shall not be required for advertisements and other similar information unless they convey information that can be used for the transaction being conducted.
  - **402.2.1 Information Displayed On-Screen.** Speech output shall be provided for all information displayed on-screen.
  - **402.2.2 Transactional Outputs.** Where transactional outputs are provided, the speech output shall audibly provide all information necessary to verify a transaction.
  - **402.2.3 Speech Delivery Type and Coordination.** Speech output shall be delivered through a mechanism that is readily available to all users, including, but not limited to, an industry standard connector or a telephone handset. Speech shall be recorded or digitized human, or synthesized. Speech output shall be coordinated with information displayed on the screen.
  - **402.2.4 User Control.** Speech output for any single function shall be automatically interrupted when a transaction is selected. Speech output shall be capable of being repeated and paused.

- **402.2.5 Braille Instructions.** Where speech output is required by 402.2, braille instructions for initiating the speech mode of operation shall be provided. Braille shall be contracted and shall conform to 36 CFR part 1191, Appendix D, Section 703.3.1.
  - **EXCEPTION:** Devices for personal use shall not be required to conform to 402.2.5.
- **402.3 Volume.** ICT that delivers sound, including speech output required by 402.2, shall provide volume control and output amplification conforming to 402.3.
  - **EXCEPTION:** ICT conforming to 412.2 shall not be required to conform to 402.3.
  - **402.3.1 Private Listening.** Where ICT provides private listening, it shall provide a mode of operation for controlling the volume. Where ICT delivers output by an audio transducer typically held up to the ear, a means for effective magnetic wireless coupling to hearing technologies shall be provided.
  - **402.3.2 Non-private Listening.** Where ICT provides non-private listening, incremental volume control shall be provided with output amplification up to a level of at least 65 dB. A function shall be provided to automatically reset the volume to the default level after every use.
- **402.4 Characters on Display Screens.** At least one mode of characters displayed on the screen shall be in a sans serif font. Where ICT does not provide a screen enlargement feature, characters shall be 3/16 inch (4.8 mm) high minimum based on the uppercase letter "I". Characters shall contrast with their background with either light characters on a dark background or dark characters on a light background.
- **402.5 Characters on Variable Message Signs.** Characters on variable message signs shall conform to section 703.7 Variable Message Signs of ICC A117.1-2009 (incorporated by reference, see 702.6.1).

#### 403 Biometrics

- **403.1 General.** Where provided, biometrics shall not be the only means for user identification or control.
  - **EXCEPTION:** Where at least two biometric options that use different biological characteristics are provided, ICT shall be permitted to use biometrics as the only means for user identification or control.

#### 404 Preservation of Information Provided for Accessibility

- **404.1 General.** ICT that transmits or converts information or communication shall not remove non-proprietary information provided for accessibility or shall restore it upon delivery.

#### 405 Privacy

- **405.1 General.** The same degree of privacy of input and output shall be provided to all individuals. When speech output required by 402.2 is enabled, the screen shall not blank automatically.

#### 406 Standard Connections

- **406.1 General.** Where data connections used for input and output are provided, at least one of each type of connection shall conform to industry standard non-proprietary formats.

#### 407 Operable Parts

- **407.1 General.** Where provided, operable parts used in the normal operation of ICT shall conform to 407.
- **407.2 Contrast.** Where provided, keys and controls shall contrast visually from background surfaces. Characters and symbols shall contrast visually from background surfaces with either light characters or symbols on a dark background or dark characters or symbols on a light background.
- **407.3 Input Controls.** At least one input control conforming to 407.3 shall be provided for each function.
  - **EXCEPTION:** Devices for personal use with input controls that are audibly discernible without activation and operable by touch shall not be required to conform to 407.3.
  - **407.3.1 Tactilely Discernible.** Input controls shall be operable by touch and tactilely discernible without activation.
  - **407.3.2 Alphabetic Keys.** Where provided, individual alphabetic keys shall be arranged in a QWERTY-based keyboard layout and the "F" and "J" keys shall be tactilely distinct from the other keys.
  - **407.3.3 Numeric Keys.** Where provided, numeric keys shall be arranged in a 12-key ascending or descending keypad layout. The number five key shall be tactilely distinct from the other keys. Where the ICT provides an alphabetic overlay on numeric keys, the relationships between letters and digits shall conform to ITU-T Recommendation E.161 (incorporated by reference, see 702.7.1).
- **407.4 Key Repeat.** Where a keyboard with key repeat is provided, the delay before the key repeat feature is activated shall be fixed at, or adjustable to, 2 seconds minimum.
- **407.5 Timed Response.** Where a timed response is required, the user shall be alerted visually, as well as by touch or sound, and shall be given the opportunity to indicate that more time is needed.
- **407.6 Operation.** At least one mode of operation shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate operable parts shall be 5 pounds (22.2 N) maximum.
- **407.7 Tickets, Fare Cards, and Keycards.** Where tickets, fare cards, or keycards are provided, they shall have an orientation that is tactilely discernible if orientation is important to further use of the ticket, fare card, or keycard.
- **407.8 Reach Height and Depth.** At least one of each type of operable part of stationary ICT shall be at a height conforming to 407.8.2 or 407.8.3 according to its position established by the vertical reference plane specified in 407.8.1 for a side reach or a forward reach. Operable parts

used with speech output required by 402.2 shall not be the only type of operable part complying with 407.8 unless that part is the only operable part of its type.

- **407.8.1 Vertical Reference Plane.** Operable parts shall be positioned for a side reach or a forward reach determined with respect to a vertical reference plane. The vertical reference plane shall be located in conformance to 407.8.2 or 407.8.3.
  - **407.8.1.1 Vertical Plane for Side Reach.** Where a side reach is provided, the vertical reference plane shall be 48 inches (1220 mm) long minimum.
  - **407.8.1.2 Vertical Plane for Forward Reach.** Where a forward reach is provided, the vertical reference plane shall be 30 inches (760 mm) long minimum.
- **407.8.2 Side Reach.** Operable parts of ICT providing a side reach shall conform to 407.8.2.1 or 407.8.2.2. The vertical reference plane shall be centered on the operable part and placed at the leading edge of the maximum protrusion of the ICT within the length of the vertical reference plane. Where a side reach requires a reach over a portion of the ICT, the height of that portion of the ICT shall be 34 inches (865 mm) maximum.
  - **407.8.2.1 Unobstructed Side Reach.** Where the operable part is located 10 inches (255 mm) or less beyond the vertical reference plane, the operable part shall be 48 inches (1220 mm) high maximum and 15 inches (380 mm) high minimum above the floor.
  - **407.8.2.2 Obstructed Side Reach.** Where the operable part is located more than 10 inches (255 mm), but not more than 24 inches (610 mm), beyond the vertical reference plane, the height of the operable part shall be 46 inches (1170 mm) high maximum and 15 inches (380 mm) high minimum above the floor. The operable part shall not be located more than 24 inches (610 mm) beyond the vertical reference plane.
- **407.8.3 Forward Reach.** Operable parts of ICT providing a forward reach shall conform to 407.8.3.1 or 407.8.3.2. The vertical reference plane shall be centered, and intersect with, the operable part. Where a forward reach allows a reach over a portion of the ICT, the height of that portion of the ICT shall be 34 inches (865 mm) maximum.
  - **407.8.3.1 Unobstructed Forward Reach.** Where the operable part is located at the leading edge of the maximum protrusion within the length of the vertical reference plane of the ICT, the operable part shall be 48 inches (1220 mm) high maximum and 15 inches (380 mm) high minimum above the floor.
  - **407.8.3.2 Obstructed Forward Reach.** Where the operable part is located beyond the leading edge of the maximum protrusion within the length of the vertical reference plane, the operable part shall conform to 407.8.3.2. The maximum allowable forward reach to an operable part shall be 25 inches (635 mm).

- **407.8.3.2.1 Operable Part Height for ICT with Obstructed Forward Reach.** The height of the operable part shall conform to Table 407.8.3.2.1.

Table 407.8.3.2.1 - Operable Part Height for ICT With Obstructed Forward Reach

| Reach depth                              | Operable part height         |
|------------------------------------------|------------------------------|
| Less than 20 inches (510 mm)             | 48 inches (1220 mm) maximum. |
| 20 inches (510 mm) to 25 inches (635 mm) | 44 inches (1120 mm) maximum. |

- **407.8.3.2.2 Knee and Toe Space under ICT with Obstructed Forward Reach.** Knee and toe space under ICT shall be 27 inches (685 mm) high minimum, 25 inches (635 mm) deep maximum, and 30 inches (760 mm) wide minimum and shall be clear of obstructions.

- **EXCEPTIONS:**

1. Toe space shall be permitted to provide a clear height of 9 inches (230 mm) minimum above the floor and a clear depth of 6 inches (150 mm) maximum from the vertical reference plane toward the leading edge of the ICT.
2. At a depth of 6 inches (150 mm) maximum from the vertical reference plane toward the leading edge of the ICT, space between 9 inches (230 mm) and 27 inches (685 mm) minimum above the floor shall be permitted to reduce at a rate of 1 inch (25 mm) in depth for every 6 inches (150 mm) in height.

#### 408 Display Screens

- **408.1 General.** Where provided, display screens shall conform to 408.
- **408.2 Visibility.** Where stationary ICT provides one or more display screens, at least one of each type of display screen shall be visible from a point located 40 inches (1015 mm) above the floor space where the display screen is viewed.
- **408.3 Flashing.** Where ICT emits lights in flashes, there shall be no more than three flashes in any one-second period.
  - **EXCEPTION:** Flashes that do not exceed the general flash and red flash thresholds defined in WCAG 2.1 (incorporated by reference, see 702.10.1) are not required to conform to 408.3.

#### 409 Status Indicators

- **409.1 General.** Where provided, status indicators shall be discernible visually and by touch or sound.

#### 410 Color Coding

- **410.1 General.** Where provided, color coding shall not be used as the only means of conveying information, indicating an action, prompting a response, or distinguishing a visual element.

#### 411 Audible Signals

- **411.1 General.** Where provided, audible signals or cues shall not be used as the only means of conveying information, indicating an action, or prompting a response.

#### 412 ICT With Two-Way Voice Communication

- **412.1 General.** ICT that provides two-way voice communication shall conform to 412.
- **412.2 Volume Gain.** ICT that provides two-way voice communication shall conform to 412.2.1 or 412.2.2.
  - **412.2.1 Volume Gain for Wireline Telephones.** Volume gain conforming to 47 CFR 68.317 shall be provided on analog and digital wireline telephones.
  - **412.2.2 Volume Gain for Non-Wireline ICT.** A method for increasing volume shall be provided for non-wireline ICT.
- **412.3 Interference Reduction and Magnetic Coupling.** Where ICT delivers output by a handset or other type of audio transducer that is typically held up to the ear, ICT shall reduce interference with hearing technologies and provide a means for effective magnetic wireless coupling in conformance with 412.3.1 or 412.3.2.
  - **412.3.1 Wireless Handsets.** ICT in the form of wireless handsets shall conform to ANSI/IEEE C63.19-2011 (incorporated by reference, see 702.5.1).
  - **412.3.2 Wireline Handsets.** ICT in the form of wireline handsets, including cordless handsets, shall conform to TIA-1083-B (incorporated by reference, see 702.9.1).
- **412.4 Digital Encoding of Speech.** ICT in IP-based networks shall transmit and receive speech that is digitally encoded in the manner specified by ITU-T Recommendation G.722.2 (incorporated by reference, see 702.7.2) or IETF RFC 6716 (incorporated by reference, see 702.8.1).
- **412.5 Real-Time Text Functionality.** [Reserved].
- **412.6 Caller ID.** Where provided, caller identification and similar telecommunications functions shall be visible and audible.
- **412.7 Video Communication.** Where ICT provides real-time video functionality, the quality of the video shall be sufficient to support communication using sign language.

#### 413 Closed Caption Processing Technologies

- **413.1 General.** Where ICT displays or processes video with synchronized audio, ICT shall provide closed caption processing technology that conforms to 413.1.1 or 413.1.2.

- **413.1.1 Decoding and Display of Closed Captions.** Players and displays shall decode closed caption data and support display of captions.
- **413.1.2 Pass-Through of Closed Caption Data.** Cabling and ancillary equipment shall pass through caption data.

#### *414 Audio Description Processing Technologies*

- **414.1 General.** Where ICT displays or processes video with synchronized audio, ICT shall provide audio description processing technology conforming to 414.1.1 or 414.1.2.
  - **414.1.1 Digital Television Tuners.** Digital television tuners shall provide audio description processing that conforms to ATSC A/53 Digital Television Standard, Part 5 (2014) (incorporated by reference, *see* 702.2.1). Digital television tuners shall provide processing of audio description when encoded as a Visually Impaired (VI) associated audio service that is provided as a complete program mix containing audio description according to the ATSC A/53 standard.
  - **414.1.2 Other ICT.** ICT other than digital television tuners shall provide audio description processing.

#### *415 User Controls for Captions and Audio Descriptions*

- **415.1 General.** Where ICT displays video with synchronized audio, ICT shall provide user controls for closed captions and audio descriptions conforming to 415.1.
  - **EXCEPTION:** Devices for personal use shall not be required to conform to 415.1 provided that captions and audio descriptions can be enabled through system-wide platform settings.
  - **415.1.1 Caption Controls.** Where ICT provides operable parts for volume control, ICT shall also provide operable parts for caption selection.
  - **415.1.2 Audio Description Controls.** Where ICT provides operable parts for program selection, ICT shall also provide operable parts for the selection of audio description.

### Chapter 5: Software

#### *501 General*

- **501.1 Scope.** The requirements of Chapter 5 shall apply to software where required by Chapter 2 (Scoping Requirements) and where otherwise referenced in any other chapter of these Standards.
  - **EXCEPTION:** Where Web applications do not have access to platform accessibility services and do not include components that have access to platform accessibility services, they shall not be required to conform to 502 or 503 provided that they conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.1 (incorporated by reference, *see* 702.10.1).

#### *502 Interoperability With Assistive Technology*

- **502.1 General.** Software shall interoperate with assistive technology and shall conform to 502.

- **EXCEPTION:** ICT conforming to 402 shall not be required to conform to 502.
- **502.2 Documented Accessibility Features.** Software with platform features defined in platform documentation as accessibility features shall conform to 502.2.
  - **502.2.1 User Control of Accessibility Features.** Platform software shall provide user control over platform features that are defined in the platform documentation as accessibility features.
  - **502.2.2 No Disruption of Accessibility Features.** Software shall not disrupt platform features that are defined in the platform documentation as accessibility features.
- **502.3 Accessibility Services.** Platform software and software tools that are provided by the platform developer shall provide a documented set of accessibility services that support applications running on the platform to interoperate with assistive technology and shall conform to 502.3. Applications that are also platforms shall expose the underlying platform accessibility services or implement other documented accessibility services.
  - **502.3.1 Object Information.** The object role, state(s), properties, boundary, name, and description shall be programmatically determinable.
  - **502.3.2 Modification of Object Information.** States and properties that can be set by the user shall be capable of being set programmatically, including through assistive technology.
  - **502.3.3 Row, Column, and Headers.** If an object is in a data table, the occupied rows and columns, and any headers associated with those rows or columns, shall be programmatically determinable.
  - **502.3.4 Values.** Any current value(s), and any set or range of allowable values associated with an object, shall be programmatically determinable.
  - **502.3.5 Modification of Values.** Values that can be set by the user shall be capable of being set programmatically, including through assistive technology.
  - **502.3.6 Label Relationships.** Any relationship that a component has as a label for another component, or of being labeled by another component, shall be programmatically determinable.
  - **502.3.7 Hierarchical Relationships.** Any hierarchical (parent-child) relationship that a component has as a container for, or being contained by, another component shall be programmatically determinable.
  - **502.3.8 Text.** The content of text objects, text attributes, and the boundary of text rendered to the screen, shall be programmatically determinable.
  - **502.3.9 Modification of Text.** Text that can be set by the user shall be capable of being set programmatically, including through assistive technology.
  - **502.3.10 List of Actions.** A list of all actions that can be executed on an object shall be programmatically determinable.

- **502.3.11 Actions on Objects.** Applications shall allow assistive technology to programmatically execute available actions on objects.
- **502.3.12 Focus Cursor.** Applications shall expose information and mechanisms necessary to track focus, text insertion point, and selection attributes of user interface components.
- **502.3.13 Modification of Focus Cursor.** Focus, text insertion point, and selection attributes that can be set by the user shall be capable of being set programmatically, including through the use of assistive technology.
- **502.3.14 Event Notification.** Notification of events relevant to user interactions, including but not limited to, changes in the component's state(s), value, name, description, or boundary, shall be available to assistive technology.
- **502.4 Platform Accessibility Features.** Platforms and platform software shall conform to the requirements in ANSI/HFES 200.2, Human Factors Engineering of Software User Interfaces-Part 2: Accessibility (2008) (incorporated by reference, see 702.4.1) listed below:
  1. Section 9.3.3 Enable sequential entry of multiple (chorded) keystrokes;
  2. Section 9.3.4 Provide adjustment of delay before key acceptance;
  3. Section 9.3.5 Provide adjustment of same-key double-strike acceptance;
  4. Section 10.6.7 Allow users to choose visual alternative for audio output;
  5. Section 10.6.8 Synchronize audio equivalents for visual events;
  6. Section 10.6.9 Provide speech output services; and
  7. Section 10.7.1 Display any captions provided.

### 503 Applications

- **503.1 General.** Applications shall conform to 503.
- **503.2 User Preferences.** Applications shall permit user preferences from platform settings for color, contrast, font type, font size, and focus cursor.
  - **EXCEPTION:** Applications that are designed to be isolated from their underlying platform software, including Web applications, shall not be required to conform to 503.2.
- **503.3 Alternative User Interfaces.** Where an application provides an alternative user interface that functions as assistive technology, the application shall use platform and other industry standard accessibility services.
- **503.4 User Controls for Captions and Audio Description.** Where ICT displays video with synchronized audio, ICT shall provide user controls for closed captions and audio descriptions conforming to 503.4.

- **503.4.1 Caption Controls.** Where user controls are provided for volume adjustment, ICT shall provide user controls for the selection of captions at the same menu level as the user controls for volume or program selection.
- **503.4.2 Audio Description Controls.** Where user controls are provided for program selection, ICT shall provide user controls for the selection of audio descriptions at the same menu level as the user controls for volume or program selection.

#### 504 Authoring Tools

- **504.1 General.** Where an application is an authoring tool, the application shall conform to 504 to the extent that information required for accessibility is supported by the destination format.
- **504.2 Content Creation or Editing.** Authoring tools shall provide a mode of operation to create or edit content that conforms to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.1 (incorporated by reference, *see* 702.10.1) for all supported features and, as applicable, to file formats supported by the authoring tool. Authoring tools shall permit authors the option of overriding information required for accessibility.
  - **EXCEPTION:** Authoring tools shall not be required to conform to 504.2 when used to directly edit plain text source code.
  - **504.2.1 Preservation of Information Provided for Accessibility in Format Conversion.** Authoring tools shall, when converting content from one format to another or saving content in multiple formats, preserve the information required for accessibility to the extent that the information is supported by the destination format.
  - **504.2.2 PDF Export.** Authoring tools capable of exporting PDF files that conform to ISO 32000-1:2008 (PDF 1.7) shall also be capable of exporting PDF files that conform to ANSI/AIIM/ISO 14289-1:2016 (PDF/UA-1) (incorporated by reference, *see* 702.3.1).
- **504.3 Prompts.** Authoring tools shall provide a mode of operation that prompts authors to create content that conforms to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.1 (incorporated by reference, *see* 702.10.1) for supported features and, as applicable, to file formats supported by the authoring tool.
- **504.4 Templates.** Where templates are provided, templates allowing content creation that conforms to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.1 (incorporated by reference, *see* 702.10.1) shall be provided for a range of template uses for supported features and, as applicable, to file formats supported by the authoring tool.

## Chapter 6: Support Documentation and Services

### 601 General

- **601.1 Scope.** The technical requirements in Chapter 6 shall apply to ICT support documentation and services where required by Chapter 2 (Scoping Requirements) and where otherwise referenced in any other chapter of these Standards.

### 602 Support Documentation

- **602.1 General.** Documentation that supports the use of ICT shall conform to 602.

- **602.2 Accessibility and Compatibility Features.** Documentation shall list and explain how to use the accessibility and compatibility features required by Chapters 4 and 5. Documentation shall include accessibility features that are built-in and accessibility features that provide compatibility with assistive technology.
- **602.3 Electronic Support Documentation.** Documentation in electronic format, including Web-based self-service support, shall conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.1 (incorporated by reference, *see* 702.10.1).
- **602.4 Alternate Formats for Non-Electronic Support Documentation.** Where support documentation is only provided in non-electronic formats, alternate formats usable by individuals with disabilities shall be provided upon request.

### 603 Support Services

- **603.1 General.** ICT support services including, but not limited to, help desks, call centers, training services, and automated self-service technical support, shall conform to 603.
- **603.2 Information on Accessibility and Compatibility Features.** ICT support services shall include information on the accessibility and compatibility features required by 602.2.
- **603.3 Accommodation of Communication Needs.** Support services shall be provided directly to the user or through a referral to a point of contact. Such ICT support services shall accommodate the communication needs of individuals with disabilities.

## Chapter 7: Referenced Standards

### 701 General

- **701.1 Scope.** The standards referenced in Chapter 7 shall apply to ICT where required by Chapter 2 (Scoping Requirements) and where referenced in any other chapter of these Standards.

### 702 Incorporation by Reference

- **702.1 Approved IBR Standards.** The following standards are incorporated by reference (IBR):
- **702.2 Advanced Television Systems Committee (ATSC).** Copies of the referenced standard may be obtained from the Advanced Television Systems Committee, 1776 K Street NW., Suite 200, Washington, DC 20006-2304 (<http://www.atsc.org>).
  - **702.2.1 ATSC A/53 Part 5:2014, Digital Television Standard, Part 5-AC-3 Audio System Characteristics,** August 28, 2014, IBR for 414.1.1.
- **702.3 Association for Information and Image Management (AIIM).** Copies of the referenced standard may be obtained from AIIM, 1100 Wayne Ave., Ste. 1100, Silver Spring, Maryland 20910 ([http://www.aiim.org/Resources/Standards/AIIM\\_ISO\\_14289-1](http://www.aiim.org/Resources/Standards/AIIM_ISO_14289-1)).
  - **702.3.1 ANSI/AIIM/ISO 14289-1-2016, Document Management Applications-Electronic Document File Format Enhancement for Accessibility-Part 1: Use of ISO 32000-1 (PDF/UA-1),** ANSI-approved February 8, 2016, IBR for 504.2.2.

- **702.4 Human Factors and Ergonomics Society (HFES).** Copies of the referenced standard may be obtained from the Human Factors and Ergonomics Society, P.O. Box 1369, Santa Monica, CA 90406-1369 (<http://www.hfes.org/Publications/ProductDetail.aspx?Id=76>).
- **702.4.1 ANSI/HFES 200.2, Human Factors Engineering of Software User Interfaces-Part 2: Accessibility,** copyright 2008, IBR for 502.4.
- **702.5 Institute of Electrical and Electronics Engineers (IEEE).** Copies of the referenced standard may be obtained from the Institute of Electrical and Electronics Engineers, 10662 Los Vaqueros Circle, P.O. Box 3014, Los Alamitos, CA 90720-1264 (<http://www.ieee.org>).
- **702.5.1 ANSI/IEEE C63.19-2011, American National Standard for Methods of Measurement of Compatibility between Wireless Communications Devices and Hearing Aids,** May 27, 2011, IBR for 412.3.1.
- **702.6 International Code Council (ICC).** Copies of the referenced standard may be obtained from ICC Publications, 4051 W. Flossmoor Road, Country Club Hills, IL 60478-5795 (<http://www.iccsafe.org>).
- **702.6.1 ICC A117.1-2009, Accessible and Usable Buildings and Facilities,** approved October 20, 2010, IBR for 402.5.
- **702.7 International Telecommunications Union Telecommunications Standardization Sector (ITU-T).** Copies of the referenced standards may be obtained from the International Telecommunication Union, Telecommunications Standardization Sector, Place des Nations CH-1211, Geneva 20, Switzerland (<http://www.itu.int/en/ITU-T>).
- **702.7.1 ITU-T Recommendation E.161, Series E. Overall Network Operation, Telephone Service, Service Operation and Human Factors-International operation-Numbering plan of the international telephone service, Arrangement of digits, letters and symbols on telephones and other devices that can be used for gaining access to a telephone network,** February 2001, IBR for 407.3.3.
- **702.7.2 ITU-T Recommendation G.722.2, Series G. Transmission Systems and Media, Digital Systems and Networks-Digital terminal equipment-Coding of analogue signals by methods other than PCM, Wideband coding of speech at around 16 kbit/s using Adaptive Multi-Rate Wideband (AMR-WB),** July 2003, IBR for 412.4.
- **702.8 Internet Engineering Task Force (IETF).** Copies of the referenced standard may be obtained from the Internet Engineering Task Force (<http://www.ietf.org>).
- **702.8.1 IETF RFC 6716, Definition of the Opus Codec,** September 2012, J.M. Valin, Mozilla Corporation, K. Vos, Skype Technologies S.A., T. Terriberry, Mozilla Corporation, IBR for 412.4.
- **702.9 Telecommunications Industry Association (TIA).** Copies of the referenced standard, published by the Telecommunications Industry Association, may be obtained from IHS Markit, 15 Inverness Way East, Englewood, CO 80112 (<http://global.ihs.com>).

- **702.9.1 TIA-1083-B, Telecommunications-Communications Products-Handset Magnetic Measurement Procedures and Performance Requirements**, October 2015, IBR for 412.3.2.
- **702.10 Worldwide Web Consortium (W3C)**. Copies of the referenced standard may be obtained from the W3C Web Accessibility Initiative, Massachusetts Institute of Technology, 32 Vassar Street, Room 32-G515, Cambridge, MA 02139 (<http://www.w3.org/TR/WCAG21>).
  - **702.10.1 WCAG 2.1, Web Content Accessibility Guidelines**, W3C Recommendation, September 21, 2023, IBR for: E205.4, E205.4 Exception, E205.4.1, E207.2, E207.2 Exception 2, E207.2 Exception 3, E207.2.1, E207.3, 408.3 Exception, 501.1 Exception, 504.2, 504.3, 504.4, and 602.3.



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Master Agreement #: **23012** (*hereinafter "Master Agreement"*)

Contractor: **INTERNATIONAL BUSINESS MACHINES CORPORATION**  
(*hereinafter "Contractor"*)

Participating State: **STATE OF HAWAII** (*hereinafter "Participating State"*)

**State of Hawaii, State Procurement Office (SPO) Vendor List Contract No. 24-03** (herein after "Contract")

Amendment #1 (*hereinafter "Amendment"*) of Participating Addendum for Hawaii as a Participating State to purchase from the NASPO ValuePoint Master Agreement Number 23012 with International Business Machines Corporation is amended as follows:

1. Amend Section 4.H, HRS Chapter 237 tax clearance requirement.

HRS Chapter 237 tax clearance requirement. Pursuant to Section 103D-328, HRS, Contractor shall be required to submit a tax clearance certificate issued by the Hawaii State Department of Taxation (DOTAX) and the Internal Revenue Service (IRS). Tax clearance certificates issued after September 3, 2019, will have a scannable QR code that can be validated. This enables tax clearance certificates to be processed electronically and printed by the taxpayer. The QR code can be scanned using a web enabled device, such as a smart phone, to confirm authenticity and validity. A tax clearance certificate may be revoked by the Department when the taxpayer falls out of tax compliance.

The Tax Clearance Application, Form A-6, and its completion and filing instructions, are available on the DOTAX website: <http://tax.hawaii.gov/forms/>.

2. Add Section 4, subsection M.

M. Conflict of Terms/Order of Precedence.

- a. Any order placed under this Master Agreement shall consist of the following documents:
  1. A Participating Entity's Participating Addendum ("PA");
    - a. PA and Exhibit A: Attorney General's General Conditions, Exhibit B Special Provisions for Purchases During Declared Disasters
    - b. Exhibit C: International Program License Agreement,
    - c. Exhibit D: International Passport Advantage Agreement,

NASPO ValuePoint  
**AMENDMENT #1**

**PARTICIPATING ADDENDUM**

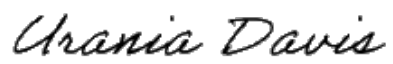
**COMPUTER EQUIPMENT (DESKTOPS,  
LAPTOPS, TABLETS, SERVER, STORAGE, INCLUDING RELATED  
PERIPHERALS & SERVICES)**

Led by the State of Minnesota



- d. Exhibit E: International Passport Advantage Agreement for US State, Local and Education (SLED) Government Contracts Attachment for Subscription License,
  - e. Exhibit F: Client Relationship Agreement
  - f. Exhibit G: Technical Services Attachment for Technology Support Services (TSS) Offerings for State and Local Government
  - g. Exhibit H: International Agreement for Acquisition of Software Maintenance
2. Minnesota NASPO ValuePoint Agreement, as negotiated, including all exhibits;
3. A Purchase Order issued against a PA (terms and conditions set forth in a Purchase Order will not be deemed to modify, diminish, or otherwise derogate the terms and conditions set forth in a Participating Addendum or Minnesota NASPO ValuePoint Master Agreement).

THE PARTIES HERETO HAVE EXECUTED THIS AMENDMENT THROUGH THEIR AUTHORIZED REPRESENTATIVES WITH FULL KNOWLEDGE OF AND AGREEMENT WITH ITS TERMS AND CONDITIONS.

|                                                                                                   |                                                                                                    |
|---------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|
| Participating State: STATE OF HAWAII                                                              | Contractor: INTERNATIONAL BUSINESS MACHINES CORPORATION                                            |
| Signature:<br> | Signature:<br> |
| Name: BONNIE KAHAKUI                                                                              | Name: URANIA DAVIS                                                                                 |
| Title: Administrator, SPO                                                                         | Title: Public Sector Contracts                                                                     |
| Date:<br>12/16/2024                                                                               | Date:<br>12/12/2024                                                                                |

**APPROVED AS TO FORM:**



12/16/2024

Deputy Attorney General

NASPO ValuePoint

**AMENDMENT #1**

**PARTICIPATING ADDENDUM**

**COMPUTER EQUIPMENT (DESKTOPS,  
LAPTOPS, TABLETS, SERVER, STORAGE, INCLUDING RELATED  
PERIPHERALS & SERVICES)**

Led by the State of Minnesota



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For questions on executing a participating addendum, please contact:

NASPO ValuePoint

|                                      |                       |
|--------------------------------------|-----------------------|
| Cooperative Development Coordinator: | Josh Descoteaux       |
| Telephone:                           | (859) 551-0958        |
| Email:                               | jdescoteaux@naspo.org |

*[Please email fully executed PDF copy of this  
document to*

*[PA@naspovaluepoint.org](mailto:PA@naspovaluepoint.org)*

*to support documentation of participation and posting  
in appropriate data bases.]*

## 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 THAT YOU HAVE FULL AUTHORITY TO BIND LICENSEE TO THESE TERMS.**

**IF YOU DO NOT AGREE TO THESE TERMS OR DO NOT HAVE AUTHORITY: i) DO NOT DOWNLOAD, INSTALL, COPY, ACCESS, CLICK ON AN "ACCEPT" BUTTON, OR USE THE PROGRAM; AND ii) 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.**

This International Program License Agreement (IPLA) and applicable Transaction Documents (together the "Agreement") are the complete agreement between Licensee and IBM regarding the use of a Program. The country required terms included in Part 2 of this IPLA replace or modify the terms of Part 1.

Transaction Documents (TDs) provide a description, information, and terms regarding the Program and its authorized use. Examples of TDs for Programs include license information (LI), licensed program specifications (LPS), quote, proof of entitlement (PoE), or invoice. To the extent of any conflict a TD will prevail over the IPLA.

### 1. Program License

- a. A Program is an executable IBM-branded computer program and its related material and includes whole and partial copies. Program details are described in a TD available at <http://www.ibm.com/software/sla> (for Passport Advantage Programs) or <http://www.ibm.com/support/knowledgecenter> (for other IBM Programs), in the Program's system command directory, or as otherwise specified by IBM. IBM software policies (such as backup, temporary use and IBM approved cloud environment) available at <http://www.ibm.com/softwarepolicies> apply to Licensee's use of Programs.
- b. Copies of Programs are copyrighted and licensed.
- c. Licensee is granted a nonexclusive license to:
  - (1) use each copy of a Program, subject to the terms of the Agreement and up to the number of license entitlements Licensee acquires ("Authorized Use");
  - (2) make and install copies to support such Authorized Use; and
  - (3) make a backup copy.
- d. Programs may be used by Licensee, its employees and contractors. Licensee may not rent or lease a Program or provide commercial IT, hosting or timesharing services to any third party. Additional rights may be available for additional fees or under different terms.
- e. The license granted for a Program is subject to Licensee:
  - (1) reproducing copyright notices and other markings on any copy;
  - (2) ensuring anyone who uses the Program: i) does so only on Licensee's behalf within Licensee's Authorized Use; and ii) complies with this Agreement;
  - (3) not reverse assembling, reverse compiling, translating, or reverse engineering the Program, except as expressly permitted by law without the possibility of contractual waiver; and
  - (4) not using any of the elements of the Program or related licensed materials separately from the Program.
- f. If the TD for a Program ("Principal Program") states that a "Supporting Program" is included with the Principal Program, Licensee may use the Supporting Program subject to any license limitations of the Principal Program and only to support the Principal Program.
- g. This license applies to each copy of the Program that Licensee makes.
- h. An update, fix, or patch to a Program is subject to the terms governing the Program unless new terms are provided in an updated TD. Licensee accepts such new terms upon installation of the update, fix, or patch. If a Program is replaced by an update, Licensee agrees to promptly discontinue use of the replaced Program.
- i. If Licensee is dissatisfied with a Program for any reason, Licensee may terminate the license by returning the Program and proof of entitlement to IBM or the authorized IBM Business Partner within 30 days of the

original acquisition date of such Program for a refund of the amount paid. For a downloaded Program, contact the party Licensee acquired the Program from for refund instructions.

## 2. Warranties

- a. IBM warrants that a Program, when used in its specified operating environment conforms to its specifications. The warranty period for a Program is 12 months from acquisition, or the initial license term if less than 12 months, unless another warranty period is specified in the TD.
- b. During the warranty period Licensee will have access to IBM databases containing information on known Program defects, defect corrections, restrictions, and bypasses as described in the IBM Support Guide at <http://www.ibm.com/support/pages/node/733923>.
- c. If the Program does not function as warranted during its warranty period and the problem cannot be resolved with information available in the IBM databases, Licensee may return the Program and proof of entitlement to IBM or the IBM Business Partner for a refund of the amount Licensee paid and Licensee's license terminates.
- d. **IBM does not warrant uninterrupted or error-free operation of an IBM Program or that IBM will correct all defects or prevent third party disruptions. These warranties are the exclusive warranties from IBM and replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and fitness for a particular purpose. IBM warranties will not apply if there has been misuse, modification, damage not caused by IBM, or failure to comply with written instructions provided by IBM. Non-IBM Programs are provided as-is, without warranties of any kind. Third parties may provide their own warranties to Licensee.**
- e. Additional support available during or after the warranty period may be available under separate agreement.

## 3. Charges, Taxes, Payment, and Verification

- a. Licensee's right to use a Program is contingent on Licensee paying applicable charges as specified in the agreement under which Licensee acquired the license entitlements. Licensee is responsible to acquire additional license entitlements in advance of any increase of its use.
- b. Licensee agrees to pay all applicable charges for acquired entitlements and any charges for use in excess of authorizations. Charges are exclusive of any customs or other duty, tax, and similar levies imposed by any authority resulting from Licensee's acquisition of entitlements and will be invoiced in addition to such charges. Amounts are due upon receipt of the invoice from IBM and payable within 30 days of the receipt of invoice ~~invoice date~~ to an account specified by IBM and late payment fees may apply. Licensee is responsible to properly acquire additional license entitlements in advance to increase its use. IBM does not give credits or refunds for charges already due or paid, except as specified elsewhere in this IPLA, the applicable TD, or terms of the agreement under which Licensee acquired license entitlements.
- c. Based on acquired entitlements, Licensee agrees to: i) pay any withholding tax directly to the appropriate government entity where required by law; ii) furnish a tax certificate evidencing such payment to IBM; iii) pay IBM only the net proceeds after tax; and iv) fully cooperate with IBM in seeking a waiver or reduction of such taxes and promptly complete and file all relevant documents.
- d. If Licensee imports, exports, transfers, accesses, or uses a Program across a border, Licensee agrees to be responsible for and pay authorities any custom, duty, tax, or similar levy assessed by the authorities. This excludes those taxes based on IBM's net income.

### 3.1 Licensing Verification

- a. Licensee will, for all Programs at all sites and for all environments, create, retain, and each year provide to IBM upon request with 30 days' advance notice: i) a report, in a format requested by IBM using records, system tools output, and other system information; and ii) supporting documentation (collectively, "Deployment Data").
- b. Upon reasonable notice, IBM and its independent auditors may verify Licensee's compliance with this Agreement, at all sites and for all environments, in which Licensee uses (for any purposes) Programs. 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 will have a written confidentiality agreement with the independent auditor. In addition to providing Deployment Data described above, Licensee agrees to provide to IBM and its auditors additional accurate information and Deployment Data upon request.

- c. Licensee will promptly order and pay charges at IBM's then current rates associated with: i) any deployments in excess of authorizations indicated on or by any annual report or verification; ii) applicable subscription & support services (S&S) for such excess deployments for the lesser of the duration of such excess use or two years; and iii) any additional charges and other liabilities determined as a result of such verification, including but not limited to taxes, duties, and regulatory fees.

#### 4. Liability and Intellectual Property Protection

- a. IBM's entire liability for all claims related to this Agreement will not exceed the amount of any actual direct damages incurred by Licensee up to the amounts paid (if recurring charges, up to 12 months' charges apply) for the entitlements to the Program that is the subject of the claim, regardless of the basis of the claim. **IBM will not be liable for special, incidental, exemplary, indirect, or economic consequential damages, or for lost profits, business, value, revenue, goodwill, or anticipated savings. These limitations apply collectively to IBM, its affiliates, contractors, and suppliers.**
- b. The following amounts are not subject to the above cap: i) third party payments related to infringement claims described in clause 4 c below; and ii) damages that cannot be limited under applicable law.
- c. If a third party asserts a claim against Licensee that an IBM Program infringes a patent or copyright, IBM will defend Licensee against that claim and pay amounts finally awarded by a court against Licensee or included in a settlement approved by IBM. To obtain IBM's defense against and payment of infringement claims, Licensee must promptly: i) notify IBM in writing of the claim; ii) supply information requested by IBM; and iii) allow IBM to control, and reasonably cooperate in, the defense and settlement, including mitigation efforts. IBM's defense and payment obligations for infringement claims extend to claims of infringement based on open source code that IBM selects and embeds in an IBM Program.
- d. IBM has no responsibility for claims based on non-IBM products, items not provided by IBM, or any violation of law or third party rights caused by Content, or any Licensee materials, designs, specifications, or use of a non-current version or release of an IBM Program when an infringement claim could have been avoided by using a current version or release. Content consists of all data, software, and information that Licensee or its authorized users provide, authorize access to, or inputs to a Program.

#### 5. Termination

- a. IBM may terminate Licensee's license to use a Program if Licensee fails to comply with the IPLA, TDs or acquisition agreements, such as the International Passport Advantage Agreement (IPAA). Licensee will promptly destroy all copies of the Program after license termination. Any terms that by their nature extend beyond the termination remain in effect until fulfilled and apply to successors and assignees.

#### 6. Governing Laws and Geographic Scope

- a. Both parties agree to the application of the laws of the country where the transaction for license entitlements is performed, without regard to conflict of law principles. The rights and obligations of each party are valid only in the country where the transaction to acquire license entitlements is performed or, if IBM agrees, the country where the Program is placed in productive use, except all licenses are valid as specifically granted.
- b. Each party is also responsible for complying with: i) laws and regulations applicable to its business and Content; and ii) import, export and economic sanction laws and regulations, including the defense trade control regime of the United States of America and any applicable jurisdictions, that prohibit or restrict the import, export, re-export, or transfer of products, technology, services or data, directly or indirectly, to or for certain countries, end uses or end users.
- c. If any provision of this Agreement for a Program, is invalid or unenforceable, the remaining provisions remain in full force and effect. Nothing in this Agreement affects statutory rights of consumers that cannot be waived or limited by contract. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions under this Agreement.

#### 7. General

- a. IBM is an independent contractor, not Licensee's agent, joint venturer, partner, or fiduciary, and does not undertake to perform any of Licensee's regulatory obligations, or assume any responsibility for Licensee's business or operations. Licensee is responsible for its use of IBM Programs and Non-IBM Programs. IBM is acting as an information technology provider only. IBM's direction, suggested usage, or guidance or use of a Program does not constitute medical, clinical, legal, accounting, or other licensed professional advice. Licensee should obtain its own expert advice.

- 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. Licensee may not use the Program if failure of the Program could lead to death, serious bodily injury, or property or environmental damage.
- d. IBM, its affiliates, and contractors of either require use of business contact information and certain account usage information. This information is not Content. Business contact information is used to communicate and manage business dealings with the Licensee. Examples of business contact information include name, business telephone, address, email, user ID, and tax registration information. Account usage information is required to enable, provide, manage, support, administer, and improve Programs. Examples of account usage information include reported errors and digital information gathered using tracking technologies, such as cookies and web beacons, during use of the Programs. The IBM Privacy Statement at <http://www.ibm.com/privacy> provides additional details with respect to IBM's collection, use, and handling of business contact and account usage information. When Licensee provides information to IBM and notice to, or consent by, the individuals is required for such processing, Licensee will notify individuals and obtain consent.
- e. IBM Business Partners who use or make available Programs are independent from IBM and unilaterally determine their prices and terms. IBM is not responsible for their actions, omissions, statements, or offerings.
- f. IBM may offer Non-IBM Programs, or an IBM Program may enable access to Non-IBM Programs, that may require acceptance of third party terms identified in a TD or presented to the Licensee. Linking to or use of Non-IBM Programs constitutes Licensee's agreement with such terms. IBM is not a party to any third party agreement and is not responsible for such Non-IBM Programs.
- g. License grants to Programs are provided by International Business Machines Corporation, a New York corporation ("IBM Corporation"). The IBM company from which the Licensee acquires entitlements ("IBM") is acting as a distributor and delivering Programs and is responsible for enforcing the terms of this Agreement. If entitlements are acquired from an IBM Business Partner, the IBM company for the country of acquisition is responsible for enforcing the terms of this Agreement. No right or cause of action is created in favor of Licensee against IBM Corporation. Licensee waives all claims and causes of action against IBM Corporation and agrees to look solely to IBM for any rights and remedies in connection with Programs.
- h. Licensee may not sublicense, assign, or transfer the license for any Program (except to the extent assignment or transfer may not be legally restricted or as is expressly permitted in a TD or as otherwise agreed by IBM). IBM may assign its rights and obligations under this Agreement in conjunction with the sale of the portion of IBM's business that includes a Program. IBM may share this Agreement and related documents in conjunction with any assignment.
- i. All notices under the Agreement must be in writing and sent to the business address specified in the agreement Licensee acquired the license entitlements unless a party designates in writing a different address. The parties consent to the use of electronic means and facsimile transmissions for communications as a signed writing. Any reproduction of the Agreement made by reliable means is considered an original. Agreement supersedes any course of dealing, discussions or representations, between the parties.
- j. No right or cause of action for any third party is created by the Agreement. Neither party will bring a legal action arising out of or related to the Agreement more than ~~six~~ two years after the cause of action arose. Neither party is responsible for failure to fulfill its non-monetary obligations due to causes beyond its control. Each party will allow the other reasonable opportunity to comply before it claims the other has not met its obligations.
- k. IBM may use personnel and resources in locations worldwide, including third party contractors to support the delivery of Programs and Program support. Licensee's use of Programs may result in the transfer of Content, including personally identifiable information, across country borders to provide Program support as described in the IBM Software Support Guide.

## Part 2 – Country Required Terms

For licenses acquired in the countries specified below, the following terms replace or modify the referenced terms of this IPLA. Terms not changed by these amendments remain unchanged and in effect.

### 1. AMERICAS

#### Section 3. Charges, Taxes, Payment, and Verification

*Replace the first and second sentence of paragraph b with the following:*

**In Brazil:** Licensee agrees to pay all applicable charges for acquired entitlements and any charges for use in excess of authorizations and any customs or other duty, tax, and similar levies imposed by any authority resulting from Licensee's acquisition of entitlements.

*In paragraph b:*

**In Mexico:** *In the third sentence, delete the words "to an account specified by IBM".*

**In Mexico:** *Add the following new sentence after the third sentence:*

Payments will be made through electronic transfer of funds to an account specified by IBM or in IBM's domicile which is located in Alfonso Napoles Gandara 3111, Santa Fe Peña Blanca, Alvaro Obregon, Mexico City, Zip Code 01210.

*Add at the end of paragraph c the following sentence:*

**In Canada:** Where taxes are based upon the location(s) receiving the benefit of the Program, Licensee has an ongoing obligation to notify IBM of such location(s) if different than Licensee's business address listed in the applicable TD.

*Add at the end of paragraph c the following sentence:*

**In United States:** The parties agree no tangible personal property (e.g. media or publications) shall transfer to Licensee if: i) IBM delivers Programs electronically to Licensee; or ii) Licensee claims a sales or use tax exemption for Programs IBM delivers electronically to Licensee. Where taxes are based upon the location(s) receiving the benefit of the Program, Licensee has an ongoing obligation to notify IBM of such location(s) if different than Licensee's business address listed in the applicable TD.

#### Section 4. Liability and Intellectual Property Protection

*Insert the following disclaimer at the end of paragraph a:*

**In Peru:** In accordance with Article 1328 of the Peruvian Civil Code this limitations and exclusions will not apply in the cases of willful misconduct ("dolo") or gross negligence ("culpa inexcusable").

#### Section 6. Governing Laws and Geographic Scope

*In paragraph a, replace the first sentence only with:*

**In Argentina:** Both parties agree to the application of the laws of the Republic of Argentina, without regard to the conflict of law principles. Any proceeding regarding the rights, duties, and obligations arising from this Agreement will be brought in the Ordinary Commercial Court of the City of "Ciudad Autónoma de Buenos Aires".

**In Chile:** Both parties agree to the application of the laws of Chile, without regard to the conflict of law principles. Any conflict, interpretation or breach related to this Agreement that cannot be solved by the Parties should be remitted to the jurisdiction of the Ordinary Courts of the city and district of Santiago.

**In Colombia:** Both parties agree to the application of the laws of the Republic of Colombia, without regard to the conflict of law principles. All rights, duties and obligations are subject to the judges of the Republic of Colombia.

**In Ecuador:** Both parties agree to the application of the laws of the Republic of Ecuador, without regard to the conflict of law principles. Any dispute arising out or relating to this Agreement will be submitted to the civil judges of Quito and to the verbal summary proceeding.

**In Venezuela:** Both parties agree to the application of the laws of Venezuela, without regard to the conflict of law principles. The parties agree to submit any conflict related to this Agreement, existing between them to the Courts of the Metropolitan Area of the City of Caracas.

**In Peru:** Both parties agree to the application of the laws of Peru, without regard to the conflict of law principles. Any discrepancy that may arise between the parties in the execution, interpretation or compliance of this Agreement that may not be directly resolved shall be submitted to the Jurisdiction and Competence of the Judges and Tribunals of the 'Cercado de Lima' Judicial District.

**In Uruguay:** Both parties agree to the application of the laws of Uruguay. Any discrepancy that may arise between the parties in the execution, interpretation or compliance of this Agreement that may not be directly resolved shall be submitted to the Montevideo Courts ("Tribunales Ordinarios de Montevideo").

*In paragraph a, first sentence only, replace the phrase, "the country where the transaction for license entitlements is performed" with:*

**In United States, Anguilla, Antigua/Barbuda, Aruba, Bahamas, Barbados, Bermuda, Bonaire, British Virgin Islands, Cayman Islands, Curacao, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saba, Saint Eustatius, Saint Kitts and Nevis, Saint Lucia, Saint Maarten, Saint Vincent and the Grenadines, Suriname, Tortola, Trinidad and Tobago, and Turk and Caicos:** the State of New York, United States.

**In Canada:** the Province of Ontario and the federal laws of Canada applicable therein.

*In paragraph a, second sentence, replace the phrase, "the country where the transaction to acquire license entitlements is performed" with:*

**In Argentina:** Argentina

**In Chile:** Chile

**In Colombia:** Colombia

**In Ecuador:** Ecuador

**In Mexico:** Mexico

**In Peru:** Peru

**In Uruguay:** Uruguay

**In Venezuela:** Venezuela

*Add the following sentences at the end of paragraph b:*

**In Brazil:** All disputes arising out of or related to this Agreement, including summary proceedings, will be brought before and subject to the exclusive jurisdiction of the Forum of the City of São Paulo, State of São Paulo, Brazil and the parties irrevocably agree with this specific jurisdiction renouncing any other, however privileged it may be.

**In Mexico:** The Parties agree to submit themselves to the exclusive jurisdiction of the courts of Mexico City to resolve any dispute arising from this Agreement. The Parties waive to any other jurisdiction that may correspond to them due to their current or future domiciles, or for any other reason.

## **Section 7. General**

*In paragraph g:*

**In United States:** *delete the last 2 sentences.*

*In paragraph i, add the following new sentence after the first sentence:*

**In Mexico:** Any change of address must be notified 10 (ten) days in advance, otherwise the notifications made at the last indicated address will have full legal effects.

*In paragraph j:*

**In Brazil:** *delete the entire 2nd sentence of "Neither party will bring a legal action arising out of or related to the Agreement more than two years after the cause of action arose".*

*Add as a new paragraph l to this section:*

**In Canada:** Both parties agree to write this document in English. Les parties ont convenu de rédiger le présent document en langue anglaise.

## **2. ASIA PACIFIC**

### **Section 2. Warranties**

*Add at the end of this section as a new paragraph f:*

**In Australia:** These warranties are in addition to any rights under, and only limited to the extent permitted by, the Competition and Consumer Act 2010.

**In Japan:** IBM's liability is limited to this paragraph and the Liability and Intellectual Property Protection section, applicable TDs as Licensee's sole remedy for failure to meet the warranties specified in this section.

**In New Zealand:** These warranties are in addition to any rights under the Consumer Guarantee Act 1993 or other legislation that cannot be limited by law.

### Section 3. Charges, Taxes, Payment, and Verification

*In paragraph b. replace the third sentence with the following 2 sentences:*

**In Hong Kong, Indonesia, Korea, Macau, Malaysia, Philippines, Singapore, and Vietnam:** Amounts are due upon receipt of the invoice from IBM and payable within 30 days of the invoice date to an account specified by IBM. If payment is not received within 30 days from the invoice date, IBM may charge a late payment fee on the amount outstanding, calculated on the number of days the payment is received late, at the lesser of: i) 2% for every 30 day period or portion thereof; or ii) the maximum amount permissible by applicable law.

**In Thailand:** Amounts are due upon receipt of the invoice from IBM and payable within 30 days of the invoice date to an account specified by IBM. If payment is not received within 30 days from the invoice date, a late payment fee may be applied on the amount outstanding, at the rate of 1.25% per month, calculated on the number of days the payment is received late.

*In the first sentence of paragraph c, remove the word "and" before "(iv)", and add a semicolon and the following new item "(v)":*

**In India:** ; and (v) file accurate Taxes Deducted at Source (TDS) returns on a timely basis. If any tax, duty, levy or fee ("Taxes") are not charged on the basis of the exemption documentation provided by the Licensee and the taxation authority subsequently rules that such Taxes should have been charged, then the Licensee will be liable to pay such Taxes, including any interests, levies and/or penalties applicable thereon.

*In the first sentence of paragraph c, remove the word "and" before "(iv)", and replace item (iv) and add new item (v) with:*

**In Singapore, Malaysia, Philippines, Thailand, Indonesia, and Vietnam:** (iv) fully cooperate with IBM in seeking a waiver or reduction of withholding or other tax that Licensee requests a waiver or reduction; and v) promptly complete, file, and keep current all relevant documents for any such waiver, reductions, or exemptions.

### Section 4. Liability and Intellectual Property Protection

*In paragraph a, add at the end of the first sentence the following:*

**In Australia:** (for example, whether based in contract, tort, negligence, under statute or otherwise)

*In paragraph a, second sentence after the word "special" and before the word "incidental", add the following:*

**In Philippines:** (including nominal and exemplary damages), moral,

*Add as a new paragraph after the end of paragraph a (and ensure paragraphs properly reletter):*

**In Australia:** Where IBM is in breach of a guarantee implied by the Competition and Consumer Act 2010, IBM's liability is limited to the repair or replacement of goods or the supply of equivalent goods, or the payment of the cost of replacing the goods or having the good repaired. Where a guarantee relates to the right to sell, quiet possession, or clear title of a good under schedule 2 of the Competition and Consumer Act, then none of these limitations apply.

### Section 5. Termination

*Add at the end of the section as a new paragraph b:*

**In Indonesia:** The parties waive article 1266 of the Indonesian Civil Code to the extent it requires a court decree for the termination of an agreement creating mutual obligations.

### Section 6. Governing Laws and Geographic Scope

*In paragraph a, in the first sentence only, replace the phrase, "the country where the transaction for license entitlements is performed" with:*

**In Cambodia, Laos:** the State of New York, United States

**In Australia:** the State or Territory in which the transaction is performed

**In Hong Kong:** the Hong Kong Special Administrative Region of the People's Republic of China

**In Macau:** the Hong Kong Special Administrative Region of the People's Republic of China

**In Korea:** the Republic of Korea, and subject to the Seoul Central District Court of the Republic of Korea

**In Taiwan:** Taiwan

**In India:** India

*In paragraph a, in the second sentence, replace the phrase "the country where the transaction to acquire license entitlements is performed or, if IBM agrees, the country where the Program is placed in productive use" with:*

**In Hong Kong:** the Hong Kong Special Administrative Region of the People's Republic of China

**In Macau:** the Macau Special Administrative Region of the People's Republic of China

**In Taiwan:** Taiwan

*In paragraph b, in the first sentence, item ii), after the word "including" and before words "the defense", add:*

**In Japan:** those of Japan laws and

*Add at the end of the section as a new paragraph d:*

**In Cambodia, Laos, Philippines, and Sri Lanka:** Disputes will be finally settled by arbitration in Singapore under the Arbitration Rules of the Singapore International Arbitration Center ("SIAC Rules").

**In India:** Disputes shall be finally settled in accordance with The Arbitration and Conciliation Act, 1996 then in effect, in English, with seat in Bangalore, India. There shall be one arbitrator if the amount in dispute is less than or equal to Indian Rupee five crores and three arbitrators if the amount is more. When an arbitrator is replaced, proceedings shall continue from the stage they were at when the vacancy occurred.

**In Indonesia:** Disputes will be finally settled by arbitration in Jakarta, Indonesia, administered by the Indonesian National Board of Arbitration established in the year 1977 ("Badan Arbitrase Nasional Indonesia" or "BANI") in accordance with the rules of the Indonesian National Board of Arbitration. The arbitration award shall be final and binding on the parties without appeal and shall be in writing and set forth the findings of fact and the conclusion of law.

**In People's Republic of China:** Either party has the right to submit the dispute to the China International Economic and Trade Arbitration Commission in Beijing, the PRC, for arbitration. The parties agree three arbitrators will be used to resolve any dispute.

**In Vietnam:** Disputes will be finally settled by arbitration in Vietnam under the Arbitration Rules of the Vietnam International Arbitration Centre ("VIAC Rules"). All proceedings and documents presented will be in the English language.

## Section 7. General

*In paragraph j, in the second sentence, replace the phrase "two years" with:*

**In India:** three years

*Add to the end of this section the following new paragraph l:*

**In Indonesia:** This agreement is made in the English and Bahasa Indonesian language versions. To the extent permitted by the applicable law, the English version will prevail in the event of conflict between such versions.

## 3. EUROPE, MIDDLE EAST, AND AFRICA

### Section 2. Warranties

*In paragraph d, Replace the fourth sentence with the following two sentences:*

**In Czech Republic, Estonia, and Lithuania:** Non-IBM Programs are provided as-is, without warranties of any kind or liabilities for defects. The parties hereby exclude any liability of IBM for defects beyond the agreed warranties.

### Section 3. Charges, Taxes, Payment, and Verification

*In paragraph b, add the following to the end of the third sentence:*

**In Italy:** if IBM requests in a written notice to Licensee.

**In Ukraine:** , on the overdue amount from the next day after the due date up to the date of actual payment, prorated for each day of delay, at the interest rate of double the discount rate determined by the National Bank of Ukraine (NBU) during the delay period (paragraph 6 of article 232 of Commercial Code of Ukraine does not apply).

*In paragraph b, replace the third sentence with the following:*

**In France:** Amounts are due and payable within 10 days of the invoice date to an account specified by IBM and late payment fees apply equal to the most recent European Central Bank rate plus 10 points, in addition to debt collection costs of forty (40) euros or, if these costs exceed forty euros, complementary indemnification subject to justification of the amount claimed).

**In Russia:** Amounts are due upon receipt of the invoice and payable within 30 days of the invoice date through electronic transfer of funds to an account specified by IBM. Late payment fees at the rate of 24% per annum calculated for each day beyond the 30 days may apply.

*In paragraph b, add the following to the end of the last sentence:*

**In Lithuania:** , or except as provided by law

*At the end of paragraph b, add the following:*

**In Italy:** In the instance of no payment or partial payment, and also following a formal credit claim procedure or trial that IBM may initiate, in derogation of article 4 of Legislative Decree n. 231 dated October 9, 2002, and according to article 7 of the same Legislative Decree, IBM will notify Licensee in writing by registered, return receipt mail of late payment fees due.

#### **Section 4. Liability and Intellectual Property Protection**

*In paragraph a, in the first sentence insert the following before the words "the amounts paid":*

**In Belgium, France, Germany, Italy, Luxembourg, Malta, Portugal, and Spain:** the greater of €500,000 (five hundred thousand euro) or

**In Ireland and United Kingdom:** 125% of

*In paragraph a, in the first sentence, replace the phrase "direct damages incurred by Licensee" with:*

**In Spain:** and proven damages incurred by Licensee as a direct consequence of the IBM default

*In paragraph a, insert after the first sentence the following new sentence:*

**In Slovakia:** Referring to § 379 of the Commercial Code, Act No. 513/1991 Coll. as amended, and concerning all conditions related to the conclusion of the agreement, both parties state that the total foreseeable damage, which may accrue, shall not exceed the amount above, and it is the maximum for which IBM is responsible.

*In paragraph a, insert before the second sentence the following new sentence:*

**In Russia:** IBM will not be liable for the forgone benefit.

*In paragraph a, in the second sentence, delete the word:*

**In Ireland and United Kingdom:** economic

*In paragraph a, replace the second sentence with:*

**In Belgium, Netherlands, and Luxembourg:** IBM will not be liable for indirect or consequential damages, lost profits, business, value, revenue, goodwill, damage to reputation or anticipated savings, any third party claim against Licensee, and loss of (or damage to) data.

**In France:** IBM will not be liable for damages to reputation, indirect damages, or lost profits, business, value, revenue, goodwill, or anticipated savings.

**In Portugal:** IBM will not be liable for indirect damages, including loss of profit.

**In Spain:** IBM will not be liable for damage to reputation, lost profits, business, value, revenue, goodwill, or anticipated savings.

*Add the following at the end of paragraph a:*

**In France:** The terms of the Agreement, including financial terms, were established in consideration of the present clause, which is an integral part of the general economy of the Agreement.

*In paragraph b, replace "and ii) damages that cannot be limited under applicable law" with the following:*

**In Germany:** ; ii) damages for body injury (including death); iii) loss or damage caused by a breach of guarantee assumed by IBM in connection with any transaction under this Agreement; and iv) caused intentionally or by gross negligence.

#### **Section 6. Governing Laws and Geographic Scope**

*In paragraph a, first sentence only, replace the phrase "the country where the transaction for license entitlements is performed" with:*

**In Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Romania, Russia, Serbia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan:** Austria

**In Estonia, Latvia, and Lithuania:** Finland

**In Algeria, Andorra, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo Republic, Djibouti, Democratic Republic of Congo, Equatorial Guinea, French Guiana, French Polynesia, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Lebanon, Madagascar, Mali, Mauritania, Mauritius, Mayotte, Morocco, New Caledonia, Niger, Reunion, Senegal, Seychelles, Togo, Tunisia, Vanuatu, and Wallis and Futuna:** France

**In Angola, Bahrain, Botswana, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Iraq, Jordan, Kenya, Kuwait, Liberia, Malawi, Malta, Mozambique, Nigeria, Oman, Pakistan, Qatar, Rwanda, Sao Tome and Principe,**

**Saudi Arabia, Sierra Leone, Somalia, Tanzania, Uganda, United Arab Emirates, West Bank/Gaza, Yemen, Zambia, and Zimbabwe:** England

**In Liechtenstein:** Switzerland

**In South Africa, Namibia, Lesotho, and Swaziland:** the Republic of South Africa

**In United Kingdom:** England

*In paragraph a, add the following at the end of the first sentence:*

**In France:** The Parties agree that articles 1222 and 1223 of the French Civil Code are not applicable.

*Add the following at the end of paragraph a:*

**In Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Moldova, Montenegro, Romania, Russia, Serbia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan:** All disputes arising out of this Agreement shall be finally settled by the International Arbitral Centre of the Austrian Federal Economic Chamber (Arbitration Body), under the Rules of Arbitration of that Arbitral Centre (Vienna Rules), in Vienna, Austria, with English as the official language, by three impartial arbitrators appointed in accordance with the Vienna Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Vienna Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 500,000.00.

**In Estonia, Latvia, and Lithuania:** All disputes arising out of this Agreement shall be finally settled by the Arbitration Institute of the Finland Chamber of Commerce (FAI) (Arbitration Body), under the Arbitration Rules of the Finland Chamber of Commerce (Rules), in Helsinki, Finland, with English as the official language, by three impartial arbitrators appointed in accordance with those Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 500,000.00.

**In Afghanistan, Angola, Bahrain, Botswana, Burundi, Cape Verde, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Iraq, Jordan, Kenya, Kuwait, Lebanon, Liberia, Libya, Madagascar, Malawi,, Mozambique, Nigeria, Oman, Pakistan, Palestinian Territory, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Seychelles, Sierra Leone, Somalia, South Sudan, Tanzania, Uganda, United Arab Emirates, Western Sahara, Yemen, Zambia, and Zimbabwe:** All disputes arising out of this Agreement shall be finally settled by the London Court of International Arbitration (LCIA) (Arbitration Body), under the LCIA Arbitration Rules (the Rules), in London, UK, with English as the official language, by three impartial arbitrators appointed in accordance with the Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 500,000.00.

**In Algeria, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo Republic, Democratic Republic of Congo, Equatorial Guinea, French Guiana, French Polynesia, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Mauritania, Mauritius, Morocco, Niger, Senegal, Togo, and Tunisia:** All disputes arising out of this Agreement shall be finally settled by the ICC International Court of Arbitration, in Paris (Arbitration Body), under its arbitration rules (the Rules), in Paris, France, with French as the official language, by three impartial arbitrators appointed in accordance with the Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any

copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 250,000.00.

**In South Africa, Namibia, Lesotho, and Swaziland:** All disputes arising out of this Agreement shall be finally settled by the Arbitration Foundation of Southern Africa (AFSA) (Arbitration Body), under the Rules of the Arbitration of the AFSA (the Rules), in Johannesburg, South Africa, with English as the official language, by three impartial arbitrators appointed in accordance with the Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 250,000.00.

**In Andorra, Austria, Cyprus, France, Germany, Greece, Israel, Italy, Portugal, Spain, Switzerland, and Turkey:** All disputes will be brought before and subject to the exclusive jurisdiction of the following court of competent jurisdiction:

**In Andorra:** the Commercial Court of Paris.

**In Austria:** the court of Vienna, Austria (Inner City).

**In Cyprus:** the competent court of Nicosia.

**In France:** Commercial Court of Paris.

**In Germany:** the courts of Stuttgart.

**In Greece:** the competent court of Athens.

**In Israel:** the courts of Tel Aviv Jaffa.

**In Italy:** the courts of Milan.

**In Portugal:** the courts of Lisbon.

**In Spain:** the courts of Madrid.

**In Switzerland:** the commercial court of the canton of Zurich.

**In Turkey:** the Istanbul Central (Çağlayan) Courts and Execution Directorates of Istanbul, the Republic of Turkey.

**In Netherlands:** The Parties waive their rights under Title 7.1 ('Koop') and clause 7:401 and 402 of the Dutch Civil Code, and their rights to invoke a full or partial dissolution ('gehele of partiele ontbinding') of this Agreement under section 6:265 of the Dutch Civil Code.

## Section 7. General

*In paragraph d, insert the following at the end of the paragraph:*

**In Spain:** IBM will comply with requests to access, update or delete contact information if submitted to the following address: IBM, c/ Santa Hortensia 26-28, 28002 Madrid, Departamento de Privacidad de Datos.

*In paragraph j, add to the end the paragraph:*

**In Czech Republic:** Pursuant to Section 1801 of Act No. 89/2012 Coll. (the "Civil Code"), Section 1799 and Section 1800 of the Civil Code as amended, do not apply to transactions under this Agreement. Licensee accepts the risk of a change of circumstances under Section 1765 of the Civil Code.

*In paragraph j:*

**In Bulgaria, Croatia, Russia, Serbia, and Slovenia:** *delete the 2nd sentence that says: "Neither party will bring a legal action arising out of or related to the Agreement more than two years after the cause of action arose".*

*In paragraph j, add to the end of the second sentence:*

**In Lithuania:** , except as provided by law

*In paragraph j, replace the second sentence with:*

**In Poland:** Neither party will bring a legal action arising out of or related to the Agreement more than three years after the cause of action arose, except for an action of non-payment which will be brought no more than 2 years after payment is due.

*In paragraph j, second sentence, replace the word "two" with:*

**In Latvia and Ukraine:** three

**In Slovakia:** four

*In paragraph j, add to the end of the third sentence that says: "Neither party is responsible for failure to fulfill its non-monetary obligations due to causes beyond its control":*

**In Russia:** , including but not limited to earthquakes, floods, fires, acts of God, strikes (excluding strikes of the parties' employees), acts of war, military actions, embargoes, blockades, international or governmental sanctions, and acts of authorities of the applicable jurisdiction.

*In paragraph j, third sentence, modify the sentence: "Neither party is responsible for failure to fulfill its non-monetary obligations due to causes beyond its control" as follows:*

**In Ukraine:** Neither party is responsible for failure to fulfill its non-monetary obligations due to causes or regulatory changes beyond its control, including but not limited to import, export and economic sanctions requirements of the United States.

*Add the following at the end of the section as new paragraph l:*

**In Hungary:** By entering into this Agreement, Licensee confirms that Licensee was sufficiently informed of all the provisions of this Agreement and had the opportunity to negotiate those terms. The following provisions may significantly deviate from the provisions generally applied by Hungarian law and both parties accept those provisions by signing the Agreement: Program License; Warranties; Charges, Taxes, Payment, and Verification; Liability and Intellectual Property Protection; Termination; Governing Laws and Geographic Scope; and General.

**In Czech Republic:** Licensee expressly accepts the terms of this agreement which include the following important commercial terms: i) limitation and disclaimer of liability for defects (Warranties); ii) limitation of Licensee's entitlement to damages (Liability and Intellectual Property Protection); iii) binding nature of export and import regulations (Governing Laws and Geographic Scope); iv) shorter limitation periods (General); v) exclusion of applicability of provisions on adhesion contracts (General); and vi) acceptance of the risk of a change of circumstances (General).

**In Romania:** The Licensee expressly accepts, the following standard clauses that may be deemed 'unusual clauses' as per the provisions of article 1203 Romanian Civil Code: clauses 2, 4, 5, 8j. The Licensee hereby acknowledges that it was sufficiently informed of all the provisions of this Agreement, including the clauses mentioned above, it properly analyzed and understood such provisions and had the opportunity to negotiate the terms of each clause.



# International Passport Advantage Agreement

This International Passport Advantage Agreement (IPAA) and its applicable Attachment(s) and Transaction Document(s) (TD(s)) are the complete agreement regarding each transaction under this IPAA (together the Agreement) under which Client may order Eligible Products (EPs) from IBM or IBM Business Partners. EPs are IBM and Non-IBM offerings such as Programs, Appliances, or Services made available to Client by IBM. Services include but are not limited to Software Subscription and Support (S&S), Cloud Services, or other Services IBM provides, such as customization, configuration, or other services to support EPs, as detailed in a TD.

TDs provide the specifics of transactions, such as charges, and a description of and information about the applicable EPs. Examples of TDs include terms of use, service descriptions, License Information documents (LIs), quotes, and Proofs of Entitlement (PoEs). There may be more than one TD applicable to a transaction.

Attachments provide supplemental terms that apply across certain types of EPs.

Subject to Section 8, in the event of conflict, an Attachment prevails over this IPAA, and a TD prevails over any Attachment and this IPAA.

## 1. IPAA Acceptance

- a. The Client Originating Company (identified as the Originating Site in the IPAA Enrollment Form) and each of its participating Enterprise companies (identified as an Additional Site in the IPAA Enrollment Form) (together, the Client) accept this IPAA by submitting an IPAA Enrollment Form to IBM or Client's chosen IBM Business Partner.
- b. The IBM Originating Company that accepts the Client Originating Company's orders and the Client Originating Company agree to coordinate the activities of their own Enterprise under this IPAA. The Client Originating Company is responsible for compliance with the terms by all Client Sites assigned a Passport Advantage Site Number (each, a Site) under this IPAA.
- c. Enterprise means the set of legal entities that, by more than 50%, owns, are owned by, or are under common ownership with the Client Originating Company.
- d. This IPAA is effective on the date IBM accepts the initial order under this IPAA and remains in effect until the Client Originating Company or the IBM Originating Company terminates it as described in this IPAA. IBM accepts Client's orders by: i) sending a TD that includes the level of authorized use; ii) making a Program or Cloud Service available; iii) shipping an Appliance; or iv) providing the Services.

## 2. Content and Data Protection

- a. Content consists of all data, software, and information that Client or its authorized users provide, authorize access to, or inputs to the Cloud Services or information or data Client may provide, make available or grant access to, in connection with IBM providing the Cloud Services or other Services. Client grants the rights and permissions to IBM, its affiliates, and contractors of either, to use, provide, store, and otherwise process Content solely for the purpose of providing the Cloud Services or other Services. As between IBM and Client, use of the Cloud Services or other Services will not affect Client's ownership or license rights in Content.
- b. IBM, its affiliates, and their respective contractors may access and use the Content solely for the purpose of providing and managing the IBM Cloud Services or other IBM Services. IBM will treat all Content as confidential by only disclosing the Content to IBM employees and contractors to the extent necessary to provide the IBM Cloud Services or other IBM Services.
- c. Client is responsible for obtaining all necessary rights and permissions to permit processing of Content in the Cloud Services or for IBM to perform other Services. Client will make disclosures and obtain consent required by law before Client provides, authorizes access to, or inputs individuals' information, including personal or other regulated data, for processing in the IBM Cloud Services or use by IBM in providing the other Services.
- d. If any Content could be subject to governmental regulation or may require security measures beyond those specified by IBM for the Cloud Services or to provide other Services, Client will not provide, allow access to, or input the Content for processing in the Cloud Services or provide or allow access of Content to IBM to provide other Services unless specifically permitted in the applicable TD or unless IBM has first agreed in writing to implement additional security and other

measures. Client is responsible for adequate back-up of Content on Client managed systems prior to providing or allowing access of Content to IBM to provide other Services.

- e. IBM Data Security and Privacy Principles (DSP), at <http://ibm.com/terms/?id=z126-7745>, apply for generally-available, standard IBM Cloud Services and other IBM Services as identified in a TD. At IBM's discretion, IBM may change the DSP from time to time and the change will be effective when published or on the specified effective date. The intent of any change will be to improve and clarify existing commitments and maintain alignment to current adopted operational and security standards or applicable laws. The intent is not to degrade the security or functionality.
- f. The specific security features and functions of an IBM Cloud Service or other IBM Services will be described in the applicable Attachment and/or TD(s). Client is responsible for selecting, ordering, enabling, or using available data protection features appropriate to support Client's use of Cloud Services. Client is responsible for assessing the suitability of the Cloud Services for the Content and Client's intended use of Content with Services IBM will provide. Client acknowledges that the use of Cloud Services and other Services meets Client's requirements and processing instructions required to comply with applicable laws.
- g. IBM's Data Processing Addendum (DPA) is found at <http://www.ibm.com/dpa>. A DPA Exhibit(s) will specify how IBM will process personal data contained in Content. The DPA and applicable DPA Exhibit(s) apply to personal data contained in Content, if and to the extent: i) the European General Data Protection Regulation (EU/2016/679); or ii) other data protection laws identified at <http://www.ibm.com/dpa/dpl> apply. Upon request by either party, IBM, Client and/or their respective affiliates, will enter into additional agreements as required by law in the prescribed form for the protection of regulated personal data included in Content. The parties agree (and will ensure that their respective affiliates agree) that such additional agreements will be subject to the terms of the Agreement.
- h. For IBM Cloud Services with self-managed features, Client can remove Content at any time. Otherwise, IBM will return or remove Content from IBM computing resources upon the expiration or cancellation of the IBM Cloud Services or other IBM Services, or earlier upon Client's request. IBM may charge for certain activities performed at Client's request (such as delivering Content in a specific format). IBM does not archive Content; however, some Content may remain in backup files until expiration of such files as governed by IBM's backup retention practices.

### **3. Warranties**

- a. IBM warrants an IBM Program as set forth in its applicable IBM license agreement.
- b. IBM warrants it provides Services using commercially reasonable care and skill as described in the Agreement. The warranty for Services ends when the Services end.
- c. IBM warrants that an IBM Machine component of an Appliance used in its specified operating environment conforms to its specifications. The warranty period is specified in the applicable Attachment or TD.
- d. If an Appliance does not function as warranted during its warranty period and IBM is unable to repair or replace it with a functionally equivalent, Client may return it to IBM or the IBM Business Partner for a refund of the amount Client paid (for recurring charges, up to twelve months' charges) and Client's license or right to use such Appliance terminates.
- e. These warranties are the exclusive warranties from IBM and replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and fitness for a particular purpose. IBM does not warrant uninterrupted or error-free operations of an EP or that IBM will correct all defects or prevent third-party disruptions or unauthorized third-party access to an EP. IBM warranties will not apply if there has been misuse, modification, damage not caused by IBM, or failure to comply with written instructions provided by IBM. Non-IBM EPs and preview products, or identified non-warranted IBM EPs are sold under the Agreement as-is, without warranties of any kind. Third parties may provide their own warranties to Client for Non-IBM EPs.

### **4. Charges, Taxes, Payment, and Verification**

- a. Client's right to use an EP is contingent on Client paying applicable charges as specified in the Agreement under which Client acquired the entitlements.
- b. Client agrees to pay all applicable charges for acquired entitlements and any charges for use of excess authorizations. Charges are exclusive of any customs or other duty, tax, and similar levies

imposed by any authority resulting from Client's acquisitions of entitlements and will be invoiced in addition to such charges. Amounts are due upon receipt of the invoice and payable within 30 days of the invoice date to an account specified by IBM and if not paid within 30 days, late payment fees may apply. Client is responsible to properly acquire additional entitlements in advance to increase its use. Prepaid EPs must be used within the applicable period. IBM does not give credits or refunds for any prepaid, one-time charges, or other charges already due or paid except as specified in this Agreement. IBM may pro-rate charges for select EPs to align with a common date such as Anniversary dates.

- c. Client agrees to: i) pay any withholding tax directly to the appropriate government entity where required by law; ii) furnish a tax certificate evidencing such payment to IBM; iii) unless otherwise stated, pay IBM only the net proceeds after tax; and iv) fully cooperate with IBM in seeking a waiver or reduction of such taxes and promptly complete and file all relevant documents.
- d. If Client imports, exports, transfers, accesses, or uses an EP across a border, Client agrees to be responsible for and pay authorities any custom, duty, tax, or similar levy assessed by the authorities. This excludes those taxes based on IBM's net income.
- e. If Client pays for Subscription License charges through periodic (annual, quarterly, monthly) billings, Client's obligation to pay such charges is absolute and unconditional and Client agrees not to assert any right of setoff against IBM or any assignee of IBM. Neither IBM nor IBM's affiliates and subsidiaries make any representation regarding Client's accounting treatment of such payments; IBM may account for such receivables as financing receivables for United States reporting purposes.

#### **4.1 License Verification**

- a. Client will, for all Programs at all Sites and for all environments, create, retain, and each year provide to IBM upon request with 30 days' advance notice: i) a report of deployed Programs, in a format requested by IBM, using records, system tools output, and other system information; and ii) supporting documentation (collectively, Deployment Data).
- b. Upon reasonable notice, IBM and its independent auditors may verify Client's compliance with the Agreement at all Sites and for all environments, in which Client uses (for any purpose) Programs. Verification will be conducted in a manner that minimizes disruption to Client's business, and may be conducted on Client's premises, during normal business hours. IBM will have written confidentiality agreement with the independent auditor. In addition to providing Deployment Data described above, Client agrees to provide to IBM and its auditors additional accurate information and Deployment Data upon request.
- c. Client will promptly order and pay at IBM's then current prices for: i) any deployments in excess of authorizations indicated on or by any annual report or verification; ii) applicable S&S for such excess deployments for the lesser of the duration of such excess use or two years; and iii) any additional charges and other liabilities determined as a result of such verification, including but not limited to taxes, duties, and regulatory fees.

#### **4.2 Volume Pricing**

- a. IBM assigns each EP a point value, which may be zero, and can be changed by IBM. A Relationship Suggested Volume Pricing (RSVP) level is determined by aggregating points for all EPs ordered during Client's Passport Advantage Program Term (PA Program Term). The point value of Client's initial EP order determines Client's initial RSVP level. Client may attain a higher RSVP level by placing additional EP orders. The higher RSVP level will apply to orders placed after the higher RSVP level is attained. A Suggested Volume Pricing (SVP) level is also calculated for each order and is based on the point value for that order. If the SVP level for an order is higher than Client's current RSVP level, the SVP level will apply to that order.
- b. The initial PA Program Term commences with Client's first order after enrollment and continues until the last day of the twelfth full month thereafter (i.e., the initial PA Program Term includes 12 full months, plus if the order was not placed on the first day of a month, the remainder of the first month). On the first day of the month following the end of the prior PA Program Term (the Anniversary), the next 12-month PA Program Term begins. For each PA Program Term after the initial PA Program Term, Client's RSVP level is reset on the Anniversary, based on EPs acquired by all active Sites during the prior PA Program Term. The RSVP level for a new PA Program Term will

not be lowered by more than one level below Client's RSVP level at the end of the prior PA Program Term.

**RSVP/SVP Level Table**

| RSVP/SVP Level | BL   | D   | E     | F     | G     | H      |
|----------------|------|-----|-------|-------|-------|--------|
| Points         | <500 | 500 | 1,000 | 2,500 | 5,000 | 10,000 |

- c. For Client's Sites enrolled as a Government Site or Academic Volume Option Site on the IPAA Enrollment Form receive applicable discounted pricing and the above section 4.2 terms do not apply. For Academic Volume Option pricing, EPs must be used for academic or administrative purposes only and may not be used for commercial purposes.

**5. Liability and Intellectual Property Protection**

- a. IBM's entire liability for all claims related to the Agreement will not exceed the amount of any actual direct damages incurred by Client up to the amounts paid (if recurring charges, up to 12 months' charges apply) for the EP that is the subject of the claim, regardless of the basis of the claim. IBM will not be liable for special, incidental, exemplary, indirect, or economic consequential damages, or lost profits, business, value, revenue, goodwill, or anticipated savings. These limitations apply collectively to IBM, its affiliates, contractors, and suppliers.
- b. The following amounts are not subject to the above cap: i) third-party payments related to infringement claims described in the paragraph 5(c) below; and ii) damages that cannot be limited under applicable law.
- c. If a third party asserts a claim against Client that an IBM EP acquired under the Agreement infringes a patent or copyright, IBM will defend Client against that claim and pay amounts finally awarded by a court against Client or included in a settlement approved by IBM. To obtain IBM's defense against and payment of infringement claims, Client must promptly: i) notify IBM in writing of the claim; ii) supply information requested by IBM; and iii) allow IBM to control, and reasonably cooperate in, the defense and settlement, including mitigation efforts. IBM's defense and payment obligations for infringement claims extend to claims of infringement based on open-source code that IBM selects and embeds in an IBM EP.
- d. IBM has no responsibility for claims based on Non-IBM EPs, items not provided by IBM, or any violation of law or third-party rights caused by Content, or any Client materials, designs, specifications, or use of a non-current version or release of an IBM EP when an infringement claim could have been avoided by using a current version or release.

**6. Termination**

- a. Either party may terminate: i) this IPAA without cause on at least 30 days' notice to the other after expiration or termination of its obligations under each Agreement; or ii) immediately for cause if the other is in material breach of an Agreement, provided the non-complying party is given notice and reasonable time to comply. Termination of this IPAA does not terminate transactions in effect and not affected by the cause of a material breach and provisions of the Agreement, as they relate to such transactions, remain in effect until fulfilled or otherwise terminated in accordance with the Agreement term. Upon any termination of Client's license to use a Program, Client will promptly destroy all copies of such Program.
- b. Any terms that by their nature extend beyond the Agreement termination remain in effect until fulfilled and apply to successors and assignees.
- c. Each party will allow the other reasonable opportunity to comply before it claims the other has not met its obligations. Client's failure to pay, or Client providing inaccurate or fraudulent account or payment information to acquire EPs, is a material breach.
- d. This IPAA is terminated if for 24 consecutive months: i) Client has not placed an order; and ii) there are no continuous Services in effect.

**7. Governing Laws and Geographic Scope**

- a. Both parties agree to the application of the laws of the country where the transaction is performed (or for IBM or Non-IBM Cloud Services, the laws of the country of Client's business address), without regard to conflict of law principles.

- b. The rights and obligations of each party are valid only in the country where the transaction is performed (or for IBM or Non-IBM Cloud Services the country of Client's business address) or, if IBM agrees, the country where the IBM EP or Non-IBM EP is placed in productive use, except all licenses are valid as specifically granted.
- c. Each party is also responsible for complying with: i) laws and regulations applicable to its business and Content; and ii) import, export and economic sanction laws and regulations, including the defense trade control regime of the United States of America and any applicable jurisdiction that prohibit or restrict the import, export, re-export, or transfer of products, technology, services or data, directly or indirectly, to or for certain countries, end uses or end users. IBM will not serve as Client's exporter or importer, except as required by data protection laws, for: i) any Content; ii) use of any portion of a Cloud Service from a country outside Client's business address.
- d. If any provision of the Agreement is invalid or unenforceable, the remaining provisions remain in full force and effect. Nothing in the Agreement affects statutory rights of consumers that cannot be waived or limited by contract. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions under the Agreement.

## 8. Program License

- a. IBM Programs available under this IPAA are licensed under IBM's International Program License Agreement (IPLA) or a designated IBM license agreement available at <http://www.ibm.com/terms/pla>, and the Program's LI available at <http://www.ibm.com/terms/?cat=software-license>. If there is a conflict between the terms of this IPAA, including its applicable Attachments and TDs, and the terms of the IPLA including the applicable LI, the terms of this IPAA prevail.
- b. Trade-up licenses for Programs that replace qualifying IBM Programs active on S&S or qualifying Non-IBM Programs may be acquired for a reduced charge. When Client installs a replacement Program, the replaced Program license terminates, Client is required to uninstall and destroy all terminated copies of the replaced Program, and upon request from IBM, provide evidence of such.

### 8.1 IBM Software Subscription and Support

- a. IBM Software Subscription and Support (S&S) for IBM Programs is detailed in the IBM Support Guide at <http://www.ibm.com/support/guide>. IBM provides S&S for each IBM Program licensed under this IPAA that Client has active S&S. S&S begins and ends as specified in a TD.
- b. Software Subscription provides Client access to generally-available defect corrections, restrictions, bypasses, and any new versions, releases, or updates.
- c. Software Support (Support) provides Client assistance with Client's: i) routine, short duration installation and usage (how-to) questions; and ii) code-related questions. Support for a specific version or release of an IBM Program is available only until IBM withdraws the Support for that IBM Program's version or release. Client must upgrade to a supported version or release of the IBM Program to continue to receive Support. The IBM Software Support Lifecycle policy is available at <http://www.ibm.com/support/lifecycle>.
- d. After Support is withdrawn for selected IBM Program versions or releases, listed in the IBM Support Guide and while Client has current S&S coverage for such IBM Programs, IBM will continue to provide Support only for existing code patches and fixes. IBM will not develop or provide new patches or fixes for those selected IBM Program versions or releases.
- e. IBM uses information about errors and problems to improve IBM Programs and Services and assist with the provision of related support offerings.
- f. If Client elects to continue S&S for an IBM Program at a designated Site, Client must maintain S&S for all uses and installations of the IBM Program at that Site.
- g. If Client requests to renew expiring S&S at a lesser quantity of IBM Program uses and installations than the expiring quantity, Client must provide system generated documentation that verifies current uses and installations of the IBM Program to IBM, as specified in the Agreement. If the documentation is not received by IBM at least 30 days prior to the S&S renewal date, Client must renew all expiring quantities.
- h. If Client's S&S coverage lapses, the benefits of S&S will no longer be available to the Client including the ability to access the Program's downloads, media, and fixes. To reinstate S&S, Client must acquire S&S at then current prices for all uses and installations.

- i. Client shall not use S&S benefits for IBM Programs for which Client is not fully authorized. If Client does, Client must reinstate S&S for all such unauthorized uses and installations at then current prices.

## **9. Term Licenses and Renewal**

- a. Programs IBM offers under term licensing models give Client access to a Program and S&S for a term duration specified in applicable TDs. The license term begins and ends as specified in a TD.
- b. When the license term of the Program ends, Client's access to the Program and S&S will terminate and Client is required to uninstall and destroy all terminated copies of the affected Program. Client agrees to provide evidence of such upon request from IBM.

### **9.1 Subscription License**

- a. Client may not terminate entitlements for Subscription License before the end of the current term.
- b. For select Programs that Client has previously licensed and has active S&S (Qualifying Program), Client may upgrade to a Subscription License Upgrade Program, as detailed in a TD. When a Subscription License Upgrade is acquired, Client may use the Qualifying Program and the Subscription License Program in any deployment combination up to the total number of entitlements purchased for the Subscription License Upgrade Program.

### **9.2 Monthly License**

- a. Client may terminate a Monthly License term early by giving IBM at least 30 days' written notice. Client will receive a prorated refund for any whole months remaining in a prepaid term.

### **9.3 Fixed Term License**

- a. Client may terminate a Fixed Term License early by giving IBM at least 30 days' written notice. Client will receive a prorated refund for any whole months remaining in a prepaid term.

### **9.4 Term License Renewal**

- a. If the Program is still available and Client renews for another term, IBM will renew the expiring license entitlements for the term and renewal charges specified in the TD.
- b. If Client does not renew for another term, Client's right to use the Program and S&S terminates and Client is required to uninstall and destroy all terminated copies of the affected Program. Client agrees to provide evidence of such upon request from IBM.
- c. If Client does not renew a Subscription License Upgrade Program for a new term, Client's right to use the Program and S&S terminates and Client is required to uninstall and destroy all terminated copies of the affected Program except the Qualifying Program. Client agrees to provide evidence of such upon request from IBM. Client may continue to use the Qualifying Program at the Program version level in use at the end of the term or, if applicable, the designated Qualifying Program replacement. If Client elects to resume available S&S for the Qualifying Program, Client must acquire the S&S at then current prices for all uses and installations of the Qualifying Program.
- d. If Client requests to renew expiring licenses at a lesser quantity of the Program uses and installations than the expiring quantity, Client must provide system generated documentation that verifies the current Program uses and installations to IBM, as specified in the Agreement. If the documentation is not received by IBM at least 30 days prior to the renewal date, Client must renew all expiring quantities.
- e. If available, Client may change the renewal option for a Term License at any time by giving IBM at least 30 days' written notice before the end of the current term.

## **10. Full Capacity and Virtualization Requirements**

- a. Client must license the total number of physical processor cores activated and available for use on all servers where the EP, if applicable, is deployed (Full Capacity).

### **10.1 Virtualization Environment Products (Sub-Capacity or Container Licensing)**

- a. Sub-Capacity Licensing – EPs that meet the requirements for Sub-Capacity usage (see <http://www.ibm.com/software/passportadvantage/subcaplicensing.html>) may be licensed under Sub-Capacity Licensing terms (Eligible Sub-Capacity Product). Client must acquire entitlements equal to the virtualization capacity available to the Eligible Sub-Capacity Product.

- b. Container Licensing – EPs that meet the requirements for Container usage (see <http://www.ibm.com/software/passportadvantage/containerlicenses.html>) may be licensed under Container Licensing terms (Eligible Container Product). Client must acquire entitlements for the total number of processor cores associated with the capacity of all containers available to the Eligible Container Product.
- c. Client is responsible to comply with the virtualization environments requirements to be eligible for Sub-Capacity Licensing or Container Licensing benefits.
- d. Prior to an increase in Sub Capacity or Container Licensing Programs, Client must first acquire sufficient licenses, including IBM Software Subscription and Support, if applicable, to cover that increase.
- e. If EP deployments do not meet the Sub-Capacity Licensing or Container Licensing requirements in this section, Client is required to license at Full Capacity.

## 10.2 Client's Reporting Responsibilities

In addition to the License Verification terms in section 4.1 and applicable TDs, the following reporting and resolution terms apply.

- a. For EPs under Sub-Capacity Licensing and Container Licensing, Client agrees to properly install, run, and maintain the most current version of the applicable license reporting tool within 90 days of Client's first deployment and produce a report. Unless IBM approves a different reporting tool, the Client agrees to the following tools.
  - Sub-Capacity Products -Client will use the IBM License Metric Tool (ILMT) and to subscribe to the ILMT support notifications at <http://www.ibm.com/support/mynotifications> and promptly install any updates.
  - Container Products – Client will use the IBM License Service tool and Client is responsible to correctly configure according to the Eligible Container Product's documentation.
- b. Client must assign a person in Client's organization with authority to manage and promptly resolve questions on reports or inconsistencies between report contents, license entitlement, and the applicable license reporting tool.
- c. For EPs under Sub-capacity Licensing or Container Licensing, for all Sites and environments, Client is required to run reports at least once per quarter and retain each report a minimum of 2 years and provide to IBM upon request. Manual reporting is not permitted for Container Products.
- d. For EPs running in Full Capacity, in all Sites and environments, Client may track (manually or using an available IBM tools) and report Client's licenses for each EP at least once a year and retain each report a minimum of 2 years and provide reports to IBM upon request. Report format must contain similar information as noted in the Manual Calculation of Virtualization Capacity report at: <http://www.ibm.com/software/passportadvantage/subcaplicensing.html>.
- e. For EPs that no longer meet Sub-Capacity Licensing requirements for which Client would like to continue to license under Sub-Capacity Licensing terms, Client will submit a migration plan to meet the Sub-Capacity Licensing requirements for IBM's review and approval. During this migration, Client shall maintain the version of ILMT that supported the EP based on the Sub-Capacity Licensing requirements prior to becoming ineligible and continue to generate ILMT reports. With IBM's prior written consent, Client may manually manage and track such EPs in accordance with item d above.
- f. Except for IBM approved changes, modifications, or updates to software licensing tools, Client may not alter, modify, omit, delete, or misrepresent by any means, directly or indirectly:
  - (1) any IBM-approved software reporting tools, including its code, or any report generated by such tools; or
  - (2) any manually generated reports that misrepresents use of EPs.

## 10.3 Excess Use Resolution

- a. IBM will notify Client in writing, if Client has used any EPs in excess of Client's Authorized Use or is otherwise not in compliance with the Agreement, the Client agrees to promptly pay the charges at then current prices that IBM specifies in an invoice for: i) any such excess use; ii) S&S and Selected Support for such excess use for the lesser of the duration of such excess use or two years; and iii)

any additional charges and other liabilities determined, including but not limited to taxes, duties, and regulatory fees.

## **11. Selected Support**

- a. IBM may provide Selected Support services for Programs that: i) are not typically supported by IBM; and ii) are licensed to Client under separate license terms, such as non-warranted IBM Programs, Non-IBM Programs, or Open-Source Code Programs. Selected Support provides Support Services and may also provide Client assistance with application design and development as specified by IBM. IBM's Software Support Lifecycle does not apply to these Programs and Subscription Services are not offered for these Programs. If Client allows Selected Support Services coverage to lapse, Client may acquire new coverage at then current prices.

## **12. CEO (Complete Enterprise Option) Product Categories**

- a. Collections of EPs may be offered by IBM on a per user basis subject to a minimum initial user quantity (a CEO Product Category). For Client's first CEO Product Category, Client must acquire licenses for all users in their Enterprise who have been assigned a machine capable of copying, using, or extending the use of any Program in the CEO Product Category (CEO User). For each additional CEO Product Category, Client must meet the applicable minimum initial order user quantity requirement for the CEO Product Category but is not required to acquire licenses for all CEO Users.
- b. Any installs of any component of a CEO Product Category can only be used by or for users for whom licenses have been obtained. All Programs used on an end user device to access a Program on a server must be acquired from the same CEO Product Category as the server Program they access.

## **13. Appliances**

- a. An Appliance is an EP which is a combination of Program components, Machine components, and any applicable Machine Code components offered together as a single offering and designed for a specific function. Unless otherwise provided, terms that apply to a Program apply to the Program component of an Appliance. Client shall not use any component independent of the Appliance of which it is a part.
- b. A Machine component is an IBM or non-IBM device, including its feature, upgrades, and accessories. A Machine Code component is computer instructions, fixes, replacements, and related materials, such as data and passwords relied on, provided by, used with, or generated by a Machine component, that permit the operation of the Machine component's processors, storage, or other functionality. Machine Code may include software code licensed under separate agreement identified in an Other Internal Licensed Code Attachment. Client acceptance of this IPAA includes acceptance of IBM's Machine Code license agreements provided with the Appliance. A Machine Code component is licensed only for use to enable a Machine component to function under its specifications and only for the capacity and capability for which Client has acquired IBM's written authorization. The copy of the Machine Code component is copyrighted and licensed.
- c. Each Appliance is manufactured from parts that may be new or used, and in some cases, an Appliance or its replacement parts may have been previously installed. Regardless, IBM's warranty terms apply.
- d. When Client acquires an Appliance directly from IBM, IBM transfers title to a Machine component to Client or, if applicable, Client's lessor, upon payment of all the amounts due except in the United States where title transfers upon shipment. IBM pays for insurance on Client's behalf until delivery to Client's location. Client must report any loss in writing to IBM within 10 business days of delivery and follow the claim procedure provided by IBM. For an upgrade acquired for an Appliance, IBM reserves transfer of title of the Machine component until IBM receives payment of all the amounts due and receives all removed parts, which then become IBM's property. IBM will not serve as the exporter or importer of record.
- e. If an Appliance is IBM-set-up (IBM installable), Client will allow installation within 30 days of shipment or additional charges may apply. Client will promptly install or allow IBM to install mandatory engineering changes. If an Appliance is Client-set-up (Client installable), Client will install it according to instructions provided with it.

### 13.1 Appliance Services

- a. IBM provides Appliance Services consisting of Machine maintenance and S&S as a single offering as well as other service offerings described in the IBM Appliance Support Guide at <https://www.ibm.com/support/pages/node/737691>.
- b. Appliance Services cover undamaged and properly maintained and installed Appliances used as authorized by IBM with unaltered identification labels. Services do not cover alterations, accessories, supply items, consumables (such as batteries), structural parts (such as frames and covers), or failures caused by a product for which IBM is not responsible. One year of Appliance Services is included with the purchase of an Appliance starting on the Warranty Start Date specified in a TD.
- c. If Client renews Appliance Services for an Appliance, Client must: i) also renew any expansions or add-ons applied to the Appliance; and ii) maintain Appliance Services for all uses and installations of the Appliance and expansions at a designated Site. All renewals will be fulfilled with Appliance Services offered at the same level of service, if available, that Client was entitled to during that prior coverage.
- d. If Client allows Appliance Services coverage to lapse, the benefits of Appliance Services will no longer be available to the Client. To reinstate Appliance Services, Client must acquire Appliance Services at then current prices for all uses and installations. The Appliance may be inspected by IBM no later than 30 days after Appliance Services have been reinstated. If the Appliance is not in acceptable condition, Client must restore the Appliance into acceptable working condition, as determined by IBM, to receive Appliance Service for that Appliance.
- e. Parts removed or exchanged for upgrade, warranty service, or maintenance become IBM property and must be returned to IBM within 30 days. A replacement takes on the warranty or maintenance status of the replaced part. If Client returns an Appliance to IBM, Client will remove all features not supported under Appliance Services, securely erase all data, and ensure that it is free of any legal restrictions that would prevent its return.

### 14. Cloud Services

- a. Cloud Services are "as a service" EPs that IBM makes available and provides via a network, such as software as a service, platform as a service, or infrastructure as a service, or other network delivered services as specified in a TD.
- b. Cloud Services are designed to be available 24/7, subject to maintenance. IBM will provide advance notice of scheduled maintenance.
- c. When IBM accepts Client's order, IBM provides Client the authorizations specified in the TD. IBM provides the facilities, personnel, equipment, software, and other resources necessary to provide Cloud Services. IBM provides generally available user guides and documentation to support Client's use of the IBM Cloud Service.
- d. Client will provide hardware, software, and connectivity to access and use Cloud Services, including any required Client-specific URL addresses and associated certificates.
- e. Client's authorized users may access Cloud Services only to the extent of authorizations Client acquires. Client is responsible for use of Cloud Services by any user who accesses the Cloud Services with Client's account credentials.
- f. The following acceptable use terms apply for Client's use of the Cloud Services. Cloud Services may not be used to undertake any activity or host Content that: i) is unlawful, fraudulent, harmful, malicious, obscene, or offensive; ii) threatens or violates the rights of others; iii) disrupts or gains (or intends to disrupt or gain) unauthorized access to data, services, networks, or computing environments within or external to IBM; iv) sends unsolicited, abusive, or deceptive messages of any type; or v) distributes any form of malware. Client may not use Cloud Services for crypto mining, unless otherwise agreed by IBM in writing. Client may not: i) reverse engineer any portion of a Cloud Service; ii) assign or resell direct access to a Cloud Service to a third party outside Client's Enterprise; or iii) combine a Cloud Service with Client's value add to create a Client branded solution that Client markets to its end user customers unless otherwise agreed by IBM in writing.
- g. Additional terms, including data protection terms, for Cloud Services are provided in the General Terms for Cloud Offerings for Passport Advantage Agreements document at <http://www.ibm.com/terms/?id=i126-5948>. Each Cloud Service is described in a Service Description

and may include additional Client responsibilities. These documents can be viewed at <http://www.ibm.com/terms/?cat=cloud-sd>. Technical support and service level commitments, if any, are specified in a TD.

- h. Client acquires Cloud Services on a subscription basis or as specified in a TD. Client may increase authorization levels to the Cloud Services by placing an order. Client may only decrease Client's authorization levels when renewing the Cloud Services.

## 15. General Terms

- a. EPs are for use within Client's Enterprise only. Client may not assign, resell, rent, lease, or transfer an EP to a third party. Any attempt to do so is void. Lease-back financing of Appliances is permitted. EPs may not be used to provide commercial hosting or other commercial information technology services to third parties.
- b. IBM may withdraw on 12 months' notice Term Licenses, S&S, Selected Support, Cloud Services, Appliance Services, or other Services. IBM will continue to provide the withdrawn offering for the remainder of Client's unexpired term or work with Client to migrate to another generally available IBM offering. Non-IBM EPs may be discontinued at any time if the third party discontinues or IBM no longer makes available such Non-IBM EPs.
- c. IBM is an independent contractor, not Client's agent, joint venturer, partner, or fiduciary, and does not undertake to perform any of Client's regulatory or other obligations or assume any responsibility for Client's business or operations. Client is responsible for its use of IBM EPs and Non-IBM EPs. IBM is acting as an information technology provider only. IBM's direction, suggested usage, guidance, or Client's use of an IBM EP does not constitute medical, clinical, legal, accounting, or other licensed professional advice. Client should obtain its own expert advice. Each party is responsible for determining the assignment, direction, control, and compensation of its and its affiliates personnel and their respective contractors.
- d. For Programs IBM provides to Client 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 Client and IBM.
- e. Client may not use IBM EPs or Non-IBM EPs if failure or interruption of the IBM EPs or Non-IBM EPs could lead to death, serious bodily injury, or property or environmental damage.
- f. Parties will not disclose confidential information to employees or contractors of the other party without a separate, signed confidentiality agreement. If confidential information is exchanged in connection with the Agreement, the applicable confidentiality agreement is incorporated into, and subject to, this IPAA. This paragraph does not apply to Content provided in the use of an IBM Cloud Services or Non-IBM Cloud Service.
- g. IBM will notify Client of any modifications to this IPAA by posting a notice at <http://www.ibm.com/terms> and Client can subscribe on that web page to receive direct notification of any such modifications. For existing Clients, the effective date of new IPAA terms will be three months following the document publish date and changes are not retroactive. Changes will apply, as of the effective date, to new orders and renewals. Client accepts changes by placing new orders or allowing transactions to renew after the effective date of the new IPAA terms.
- h. IBM maintains a robust set of business conduct and related guidelines covering conflicts of interest, market abuse, anti-bribery and corruption, and fraud. IBM and its personnel comply with such policies and require contractors to have similar policies.
- i. IBM, its affiliates, and their respective contractors require use of business contact information and certain account usage information. This information is not Content. Business contact information is used to communicate and manage business dealings with the Client. Examples of business contact information include name, business telephone, address, email, user ID, and tax registration number(s). Account usage information is required to enable, provide, manage, support, administer, and improve EPs. Examples of account usage information include reported errors and digital information gathered using tracking technologies, such as cookies and web beacons during use of the EPs. The IBM Privacy Statement at <http://www.ibm.com/privacy> provides additional details with respect to IBM's collection, use, and handling of business contact and account usage information. When Client provides information to IBM and notice to, or consent by, the individuals is required for such processing, Client will notify the individuals and obtain their consent.

- j. IBM Business Partners who use or make available IBM EPs or Non-IBM EPs are independent from IBM and unilaterally determine their prices and terms. IBM is not responsible for their actions, omissions, statements, or offerings. If IBM notifies Client their current IBM Business Partner will no longer resell an IBM EP, Client may select to acquire the EP directly from IBM or another authorized IBM Business Partner as available.
- k. IBM may offer Non-IBM EPs, or an IBM EP may enable access to Non-IBM EP, that may require acceptance of third-party terms presented to the Client. Linking to or use of Non-IBM EPs constitutes Client's agreement with such third-party terms. Third-party terms and privacy practices govern use of Content Client may provide, grant access to or input to a Non-IBM Cloud Service or other Non-IBM Service. IBM is not a party to any third-party agreement and is not responsible for Non-IBM EPs. Access to Non-IBM EPs may be discontinued at any time if the third party discontinues or IBM no longer makes available such Non-IBM EPs.
- l. A preview product is when IBM makes an IBM EP or Non-IBM EP or feature of an IBM EP or Non-IBM EP available at no charge, with limited or pre-release functionality, or for a limited time, to try available functionality (such as beta, trial, evaluation, no-charge, or designated preview products). Services levels agreements set forth in the Agreement (including in a TD or Attachment) that provides service levels does not apply to preview products. A preview product may not be covered by support and IBM may change or discontinue a preview product at any time and without notice. For any preview product that is provided as a pre-release, IBM is not obligated to release a generally available product. Client is responsible for placing an order under generally available terms for generally available EPs when a preview expires.
- m. Neither party may assign the Agreement, in whole or in part, without the prior written consent of the other. IBM may assign its right to receive payments without consent. IBM will remain responsible to perform its obligations. Assignments by IBM in conjunction with the sale of the portion of IBM's business that includes an IBM EP or Non-IBM EP is not restricted by the foregoing. IBM may share the Agreement and related documents in conjunction with any assignment.
- n. The parties' consent to use electronic means and facsimile transmissions for communications as a signed writing. Any reproduction of the Agreement made by reliable electronic means is considered an original. The Agreement supersedes any course of dealing, discussions, or representations between the parties. Where approval acceptance, consent, access, cooperation, or similar action by either party is required, such action will not be unreasonably delayed or withheld.
- o. No right or cause of action for any third party is created by the Agreement or any transaction under it. Neither party will bring a legal action arising out of or related to the Agreement more than two years after the cause of action arose. Neither party is responsible for failure to fulfill its non-monetary obligations due to causes beyond its control.
- p. IBM may use personnel and resources in locations worldwide, including third-party contractors to support the delivery of IBM EPs and Non-IBM EPs. Client's use of IBM EPs or Non-IBM EPs may result in the transfer of Content, including personally identifiable information, across country borders. A list of countries where Content may be transferred and processed is described in the TD or as specified in Services support documentation. IBM is responsible for the obligations under the Agreement even if IBM uses a third-party contractor and will have appropriate agreements in place to enable IBM to meet its obligations.
- q. If IBM and Client agree to use a Client requested third-party service to support the procurement or payment activities associated with the Agreement, IBM agrees to submit or receive applicable documents (such as invoices or similar contracting documents) using the third-party service. Client agrees to reimburse IBM for any third-party fees associated with IBM's use of such third-party service. In the event: i) the third-party service becomes unavailable for any reason; or ii) the third-party provider modifies the service or terms of use in a manner IBM deems commercially unacceptable, the Client agrees to directly accept documents from IBM and pay IBM directly. Client remains responsible to IBM for timely payments of invoices. If there is a claim or proceeding against IBM related to IBM's proper use of Client's requested third-party service, Client shall be responsible, to the extent permitted by law, for damage or injury caused by the Client's officers and employees in the scope of their employment provided that the Client's liability for such damage or injury has been determined by a court or agreed to by the Client. The Client shall pay for such damage and/or injury provided that funds are appropriated and allotted for that purpose. IBM agrees to promptly notify Client in writing of any such claim or proceeding.

## Part 2 – Country Required Terms

For licenses acquired in the countries specified below, the following terms replace or modify the referenced terms of this IPAA. Terms not changed by these amendments remain unchanged and in effect.

### AMERICAS

#### Section 2. Content and Data Protection

*In paragraph a, second sentence, and paragraph b, in both the first and second sentences:*

**In Mexico:**

*Replace the word "contractors" with the word "providers".*

#### Section 4. Charges, Taxes, Payment, and Verification

*In paragraph b, replace the first and second sentence with the following:*

**In Brazil:** Client agrees to pay all applicable charges for acquired entitlements and any charges for use in excess of authorizations and any customs or other duty, tax, and similar levies imposed by any authority resulting from Client's acquisitions under this Agreement.

*In paragraph b:*

**In Mexico:**

*In the third sentence, delete the words "to an account specified by IBM".*

**In Mexico:**

*Add the following new sentence after the third sentence:*

Payments will be made through electronic transfer of funds to an account specified by IBM or in IBM's domicile which is located in Alfonso Napoles Gandara 3111, Santa Fe Peña Blanca, Alvaro Obregon, Mexico City, Zip Code 01210.

*Add at the end of paragraph b the following sentence:*

**In Canada:** Where taxes are based upon the location(s) receiving the benefit of the Program, Client has an ongoing obligation to notify IBM of such location(s) if different than Client's business address listed in the applicable TD.

*Add at the end of paragraph b the following sentence:*

**In United States:** The parties agree no tangible personal property (e.g. media or publications) shall transfer to Client if: i) IBM delivers Programs electronically to Client; or ii) Client claims a sales or use tax exemption for Programs IBM delivers electronically to Client. Where taxes are based upon the location(s) receiving the benefit of the Program, Client has an ongoing obligation to notify IBM of such location(s) if different than Client's business address listed in the applicable TD.

#### Section 5. Liability and Intellectual Property Protection

*In paragraph a:*

**In Mexico:**

*Eliminate the word "contractors," in the last sentence.*

*Insert the following disclaimer at the end of paragraph a:*

**In Peru:** In accordance with Article 1328 of the Peruvian Civil Code the limitations and exclusions will not apply in the cases of willful misconduct ("dolo") or gross negligence ("culpa inexcusable").

#### Section 7. Governing Laws and Geographic Scope

*In paragraph a, replace the first sentence only with:*

**In Argentina:** Both parties agree to the application of the laws of the Republic of Argentina, without regard to the conflict of law principles. Any proceeding regarding the rights, duties, and obligations arising from this Agreement will be brought in the Ordinary Commercial Court of the City of "Ciudad Autónoma de Buenos Aires".

**In Chile:** Both parties agree to the application of the laws of Chile, without regard to the conflict of law principles. Any conflict, interpretation or breach related to this Agreement that cannot be solved by the Parties should be remitted to the jurisdiction of the Ordinary Courts of the city and district of Santiago.

**In Colombia:** Both parties agree to the application of the laws of the Republic of Colombia, without regard to the conflict of law principles. All rights, duties and obligations are subject to the judges of the Republic of Colombia.

**In Ecuador:** Both parties agree to the application of the laws of the Republic of Ecuador, without regard to the conflict of law principles. Any dispute arising out or relating to this Agreement will be submitted to the civil judges of Quito and to the verbal summary proceeding.

**In Venezuela:** Both parties agree to the application of the laws of Venezuela, without regard to the conflict of law principles. The parties agree to submit any conflict related to this Agreement, existing between them to the Courts of the Metropolitan Area of the City of Caracas.

**In Peru:** Both parties agree to the application of the laws of Peru, without regard to the conflict of law principles. Any discrepancy that may arise between the parties in the execution, interpretation or compliance of this Agreement that may not be directly resolved shall be submitted to the Jurisdiction and Competence of the Judges and Tribunals of the 'Cercado de Lima' Judicial District.

**In Uruguay:** Both parties agree to the application of the laws of Uruguay. Any discrepancy that may arise between the parties in the execution, interpretation or compliance of this Agreement that may not be directly resolved shall be submitted to the Montevideo Courts ("Tribunales Ordinarios de Montevideo").

*In paragraph a, first sentence only, replace the phrase, "the country where the transaction is performed (or for IBM or Non-IBM Cloud Services, the laws of the country of Client's business address)" with:*

**In United States, Anguilla, Antigua/Barbuda, Aruba, Bahamas, Barbados, Bermuda, Bonaire, British Virgin Islands, Cayman Islands, Curacao, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saba, Saint Eustatius, Saint Kitts and Nevis, Saint Lucia, Saint Maarten, Saint Vincent and the Grenadines, Suriname, Tortola, Trinidad and Tobago, and Turk and Caicos:** the State of New York, United States.

**In Canada:** the Province of Ontario and the federal laws of Canada applicable therein.

**In Mexico:** Mexico

*In paragraph b, second sentence, replace the phrase, "the country where the transaction is performed (or for IBM or Non-IBM Cloud Services the country of Client's business address) or, if IBM agrees, the country where the IBM EP or Non-IBM EP is placed in productive use" with:*

**In Argentina:** Argentina

**In Chile:** Chile

**In Colombia:** Colombia

**In Ecuador:** Ecuador

**In Mexico:** Mexico

**In Peru:** Peru

**In Uruguay:** Uruguay

**In Venezuela:** Venezuela

*Add the following as a new item e paragraph:*

**In Brazil:** All disputes arising out of or related to this Agreement, including summary proceedings, will be brought before and subject to the exclusive jurisdiction of the Forum of the City of São Paulo, State of São Paulo, Brazil and the parties irrevocably agree with this specific jurisdiction renouncing any other, however privileged it may be.

**In Mexico:** The Parties agree to submit themselves to the exclusive jurisdiction of the courts of Mexico City to resolve any dispute arising from this Agreement. The Parties waive to any other jurisdiction that may correspond to them due to their current or future domiciles, or for any other reason.

## **Section 13. Appliances**

*In paragraph d, replace the first sentence with the following:*

**In Argentina, Chile, Colombia, Ecuador, Peru, Uruguay and Venezuela:** When IBM accepts Client's order, IBM transfers title to a Machine component upon tradition to Client or Client's lessor.

## Section 14. Cloud Services

### In Mexico:

*In paragraph e, second sentence delete ", personnel".*

*Add as a new paragraph i, the following:*

- i. The Parties acknowledge and agree that, given its nature, the Cloud Services do not imply the provision of IBM personnel nor of personnel of IBM suppliers for the benefit of the Client, and consequently, Cloud Services are not considered as Services or Specialized Works in terms of the Corresponding Labor and Tax Laws.

## Section 15. General Terms

*In paragraph c:*

### In Mexico:

*In the first sentence replace the word "contractor" with the word "company" and in the last sentence replace the word "contractors" it with the word "providers".*

*In paragraph f (first sentence), h (second sentence), and i (first sentence):*

### In Mexico:

*Replace the word "contractors" with the word "providers".*

*In paragraph o:*

**In Brazil:** delete the entire 2nd sentence of "Neither party will bring a legal action arising out of or related to the Agreement more than two years after the cause of action arose".

*In paragraph p:*

**In Mexico:** The words "personnel and" are eliminated and the word "contractors" in first and last sentences is substituted with "suppliers".

*Add as a new paragraph r to this section:*

**In Canada:** Both parties agree to write this document in English. Les parties ont convenu de rédiger le présent document en langue anglaise.

## ASIA PACIFIC

### Section 3. Warranties

*Add at the end of this section as a new paragraph f:*

**In Australia:** These warranties are in addition to any rights under, and only limited to the extent permitted by, the Competition and Consumer Act 2010.

**In Japan:** IBM's liability is limited to this paragraph and the Liability and Intellectual Property Protection section, applicable TDs as Client's sole remedy for failure to meet the warranties specified in this section.

**In New Zealand:** These warranties are in addition to any rights under the Consumer Guarantee Act 1993 or other legislation that cannot be limited by law.

### Section 4. Charges, Taxes, Payment, and Verification

*In paragraph b. replace the third sentence that starts with "Amounts are due upon receipt..." with the following 2 sentences:*

**In Hong Kong, Indonesia, Korea, Macau, Malaysia, Philippines, Singapore, and Vietnam:** Amounts are due upon receipt of the invoice from IBM and payable within 30 days of the invoice date to an account specified by IBM. If payment is not received within 30 days from the invoice date, IBM may charge a late payment fee on the amount outstanding, calculated on the number of days the payment is received late, at the lesser of: i) 2% for every 30 day period or portion thereof; or ii) the maximum amount permissible by applicable law.

**In Thailand:** Amounts are due upon receipt of the invoice from IBM and payable within 30 days of the invoice date to an account specified by IBM. If payment is not received within 30 days from the invoice date, a late payment fee may be applied on the amount outstanding, at the rate of 1.25% per month, calculated on the number of days the payment is received late.

*In the first sentence of paragraph c, remove the word "and" before "iv)", and add a semicolon and the following new item "v)":*

**In India:** ; and v) file accurate Taxes Deducted at Source (TDS) returns on a timely basis. If any tax, duty, levy or fee ("Taxes") are not charged on the basis of the exemption documentation provided by the Client and the taxation authority subsequently rules that such Taxes should have been charged, then the Client will be liable to pay such Taxes, including any interests, levies and/or penalties applicable thereon.

*In the first sentence of paragraph c, remove the word "and" before "iv)", and replace item iv) and add new item v) with:*

**In Singapore, Malaysia, Philippines, Thailand, Indonesia, and Vietnam:** iv) fully cooperate with IBM in seeking a waiver or reduction of withholding or other tax that Client requests a waiver or reduction; and v) promptly complete, file, and keep current all relevant documents for any such waiver, reductions, or exemptions.

## **Section 5. Liability and Intellectual Property Protection**

*In paragraph a, add at the end of the first sentence the following:*

**In Australia:** (for example, whether based in contract, tort, negligence, under statute or otherwise)

*In paragraph a, second sentence after the word "special" and before the word "incidental", add the following:*

**In Philippines:** (including nominal and exemplary damages), moral,

*Add as a new paragraph after the end of paragraph a (and ensure paragraphs properly reletter):*

**In Australia:** Where IBM is in breach of a guarantee implied by the Competition and Consumer Act 2010, IBM's liability is limited to the repair or replacement of goods or the supply of equivalent goods, or the payment of the cost of replacing the goods or having the good repaired. Where a guarantee relates to the right to sell, quiet possession, or clear title of a good under schedule 2 of the Competition and Consumer Act, then none of these limitations apply.

## **Section 6. Termination**

*Add at the end of the section as a new paragraph d:*

**In Indonesia:** The parties waive article 1266 of the Indonesian Civil Code to the extent it requires a court decree for the termination of an agreement creating mutual obligations.

## **Section 7. Governing Laws and Geographic Scope**

*In paragraph a, in the first sentence only, replace the phrase, "the country where the transaction is performed (or for IBM or Non-IBM Cloud Services, the laws of the country of Client's business address)" with:*

**In Cambodia, Laos:** the State of New York, United States

**In Australia:** the State or Territory in which the transaction is performed

**In Hong Kong:** the Hong Kong Special Administrative Region of the People's Republic of China

**In Macau:** the Hong Kong Special Administrative Region of the People's Republic of China

**In Korea:** the Republic of Korea, and subject to the Seoul Central District Court of the Republic of Korea

**In Taiwan:** Taiwan

**In India:** India

*In paragraph b, in the second sentence, replace the phrase "the country where the transaction is performed (or for IBM or Non-IBM Cloud Services the country of Client's business address) or, if IBM agrees, the country where the IBM EP or Non-IBM EP is placed in productive use" with:*

**In Hong Kong:** the Hong Kong Special Administrative Region of the People's Republic of China

**In Macau:** the Macau Special Administrative Region of the People's Republic of China

**In Taiwan:** Taiwan

*In paragraph c, in the first sentence, item ii), after the word "including" and before words "the defense", add:*

**In Japan:** those of Japan laws and

*Add at the end of the section as a new paragraph e:*

**In Cambodia, Laos, Philippines, and Sri Lanka:** Disputes will be finally settled by arbitration in Singapore under the Arbitration Rules of the Singapore International Arbitration Center ("SIAC Rules").

**In India:** Disputes shall be finally settled in accordance with The Arbitration and Conciliation Act, 1996 then in effect, in English, with seat in Bangalore, India. There shall be one arbitrator if the amount in dispute is less than or equal to Indian Rupee five crores and three arbitrators if the amount is more. When an arbitrator is replaced, proceedings shall continue from the stage they were at when the vacancy occurred.

**In Indonesia:** Disputes will be finally settled by arbitration in Jakarta, Indonesia, administered by the Indonesian National Board of Arbitration established in the year 1977 ("Badan Arbitrase Nasional Indonesia" or "BANI") in accordance with the rules of the Indonesian National Board of Arbitration. The arbitration award shall be final and binding on the parties without appeal and shall be in writing and set forth the findings of fact and the conclusion of law.

**In People's Republic of China:** Either party has the right to submit the dispute to the China International Economic and Trade Arbitration Commission in Beijing, the PRC, for arbitration. The parties agree three arbitrators will be used to resolve any dispute.

**In Vietnam:** Disputes will be finally settled by arbitration in Vietnam under the Arbitration Rules of the Vietnam International Arbitration Centre ("VIAC Rules"). All proceedings and documents presented will be in the English language.

## **Section 15. General Terms**

*In paragraph o, in the second sentence, replace the phrase "two years" with:*

**In India:** three years

*Add to the end of this section the following new paragraph r:*

**In Indonesia:** This agreement is made in the English and Bahasa Indonesian language versions. To the extent permitted by the applicable law, the English version will prevail in the event of conflict between such versions.

## **EUROPE, MIDDLE EAST, AND AFRICA**

### **Section 2. Content and Data Protection**

*Replace first sentence of paragraph g with the following:*

**In Switzerland:** IBM's Data Processing Addendum (DPA) at <http://ibm.com/dpa> and the applicable DPA Exhibit apply and supplement the Agreement, if and to the extent the European General Data Protection Regulation (EU/2016/679) (GDPR) or the Swiss Federal Privacy Act (SFPA) apply to personal data contained in Content.

### **Section 3. Warranties**

*In paragraph e, replace the fourth sentence that starts with "Non-IBM EPs...", and before the existing last sentence, with the following two sentences:*

**In Czech Republic, Estonia, and Lithuania:** Non-IBM EPs and preview products, or identified non-warranted IBM EPs are provided as-is, without warranties of any kind or liabilities for defects. The parties hereby exclude any liability of IBM for defects beyond the agreed warranties.

### **Section 4. Charges, Taxes, Payment, and Verification**

*In paragraph b, add the following to the end of the third sentence:*

**In Italy:** if IBM requests in a written notice to Client.

**In Ukraine:**, on the overdue amount from the next day after the due date up to the date of actual payment, prorated for each day of delay, at the interest rate of double the discount rate determined by the National Bank of Ukraine (NBU) during the delay period (paragraph 6 of article 232 of Commercial Code of Ukraine does not apply).

*In paragraph b, replace the third sentence with the following:*

**In France:** Amounts are due and payable within 10 days of the invoice date to an account specified by IBM and late payment fees apply equal to the most recent European Central Bank rate plus 10 points, in addition to debt collection costs of forty (40) euros or, if these costs exceed forty euros, complementary indemnification subject to justification of the amount claimed).

**In Russia:** Amounts are due upon receipt of the invoice and payable within 30 days of the invoice date through electronic transfer of funds to an account specified by IBM. Late payment fees at the rate of 24% per annum calculated for each day beyond the 30 days may apply.

*In paragraph b, add the following to the end of the sixth sentence that starts with "IBM does not give credit...":*

**In Lithuania:**, or except as provided by law

*At the end of paragraph b, add the following:*

**In Italy:** In the instance of no payment or partial payment, and also following a formal credit claim procedure or trial that IBM may initiate, in derogation of article 4 of Legislative Decree n. 231 dated October 9, 2002, and according to article 7 of the same Legislative Decree, IBM will notify Client in writing by registered, return receipt mail of late payment fees due.

## **Section 5. Liability and Intellectual Property Protection**

*In paragraph a, in the first sentence insert the following before the words "the amounts paid":*

**In Belgium, France, Germany, Italy, Luxembourg, Malta, Portugal, and Spain:** the greater of €500,000 (five hundred thousand euro) or

**In Ireland and United Kingdom:** 125% of

*In paragraph a, in the first sentence, replace the phrase "direct damages incurred by Client" with:*

**In Spain:** and proven damages incurred by Client as a direct consequence of the IBM default

*In paragraph a, insert after the first sentence the following new sentence:*

**In Slovakia:** Referring to § 379 of the Commercial Code, Act No. 513/1991 Coll. as amended, and concerning all conditions related to the conclusion of the agreement, both parties state that the total foreseeable damage, which may accrue, shall not exceed the amount above, and it is the maximum for which IBM is responsible.

**In Russia:** IBM will not be liable for the forgone benefit.

*In paragraph a, in the second sentence, delete the word:*

**In Ireland and United Kingdom:** economic

*In paragraph a, replace the second sentence with the following and bold the text:*

**In Belgium, Netherlands, and Luxembourg:** IBM will not be liable for indirect or consequential damages, lost profits, business, value, revenue, goodwill, damage to reputation or anticipated savings, any third party claim against Client, and loss of (or damage to) data.

**In France:** IBM will not be liable for damages to reputation, indirect damages, or lost profits, business, value, revenue, goodwill, or anticipated savings.

**In Portugal:** IBM will not be liable for indirect damages, including loss of profit.

**In Spain:** IBM will not be liable for damage to reputation, lost profits, business, value, revenue, goodwill, or anticipated savings.

*Add the following new sentence at the end of paragraph a:*

**In France:** The terms of the Agreement, including financial terms, were established in consideration of the present clause, which is an integral part of the general economy of the Agreement.

*In paragraph b, replace "and ii) damages that cannot be limited under applicable law" with the following:*

**In Germany:** ; ii) damages for body injury (including death); iii) loss or damage caused by a breach of guarantee assumed by IBM in connection with any transaction under this Agreement; and iv) caused intentionally or by gross negligence.

## Section 6. Termination

*In paragraph a, insert the following at the end of clause i) before "; or":*

**In Russia:** without payment of any damages or penalties to the other party on the basis of early termination

*In paragraph a, insert the following new sentence at the end of paragraph a:*

**In Netherlands:** The Parties waive their rights under Title 7.1 ('Koop') and clause 7:401 and 402 of the Dutch Civil Code, and their rights to invoke a full or partial dissolution ('gehele of partiele ontbinding') of this Agreement under section 6:265 of the Dutch Civil Code

*In paragraph b, delete the sentence:*

**In Switzerland:** Failure to pay is a material breach.

## Section 7. Governing Laws and Geographic Scope

*In paragraph a, first sentence only, replace the phrase "the country where the transaction is performed (or for IBM or Non-IBM Cloud Services, the laws of the country of Client's business address)" with:*

**In Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Romania, Russia, Serbia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan:** Austria

**In Estonia, Latvia, and Lithuania:** Finland

**In Algeria, Andorra, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo Republic, Djibouti, Democratic Republic of Congo, Equatorial Guinea, French Guiana, French Polynesia, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Lebanon, Madagascar, Mali, Mauritania, Mauritius, Mayotte, Morocco, New Caledonia, Niger, Reunion, Senegal, Seychelles, Togo, Tunisia, Vanuatu, and Wallis and Futuna:** France

**In Angola, Bahrain, Botswana, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Iraq, Jordan, Kenya, Kuwait, Liberia, Malawi, Malta, Mozambique, Nigeria, Oman, Pakistan, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Sierra Leone, Somalia, Tanzania, Uganda, United Arab Emirates, West Bank/Gaza, Yemen, Zambia, and Zimbabwe:** England

**In Liechtenstein:** Switzerland

**In South Africa, Namibia, Lesotho, and Swaziland:** the Republic of South Africa

**In United Kingdom:** England

*In paragraph a, add the following new sentence after the first sentence:*

**In France:** The Parties agree that articles 1222 and 1223 of the French Civil Code are not applicable.

*Add the following at the end of paragraph a:*

**In Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Hungary, Kazakhstan, Kosovo, Kyrgyzstan, Moldova, Montenegro, Romania, Russia, Serbia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan:** All disputes arising out of this Agreement shall be finally settled by the International Arbitral Centre of the Austrian Federal Economic Chamber (Arbitration Body), under the Rules of Arbitration of that Arbitral Centre (Vienna Rules), in Vienna, Austria, with English as the official language, by three impartial arbitrators appointed in accordance with the Vienna Rules.

Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Vienna Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 500,000.00.

**In Estonia, Latvia, and Lithuania:** All disputes arising out of this Agreement shall be finally settled by the Arbitration Institute of the Finland Chamber of Commerce (FAI) (Arbitration Body), under the Arbitration Rules of the Finland Chamber of Commerce (Rules), in Helsinki, Finland, with English as the official language, by three impartial arbitrators appointed in accordance with those Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or

exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 500,000.00.

**In Afghanistan, Angola, Bahrain, Botswana, Burundi, Cape Verde, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Iraq, Jordan, Kenya, Kuwait, Lebanon, Liberia, Libya, Madagascar, Malawi,, Mozambique, Nigeria, Oman, Pakistan, Palestinian Territory, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Seychelles, Sierra Leone, Somalia, South Sudan, Tanzania, Uganda, United Arab Emirates, Western Sahara, Yemen, Zambia, and Zimbabwe:** All disputes arising out of this Agreement shall be finally settled by the London Court of International Arbitration (LCIA) (Arbitration Body), under the LCIA Arbitration Rules (the Rules), in London, UK, with English as the official language, by three impartial arbitrators appointed in accordance with the Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 500,000.00.

**In Algeria, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo Republic, Democratic Republic of Congo, Equatorial Guinea, French Guiana, French Polynesia, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Mauritania, Mauritius, Morocco, Niger, Senegal, Togo, and Tunisia:** All disputes arising out of this Agreement shall be finally settled by the ICC International Court of Arbitration, in Paris (Arbitration Body), under its arbitration rules (the Rules), in Paris, France, with French as the official language, by three impartial arbitrators appointed in accordance with the Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 250,000.00.

**In South Africa, Namibia, Lesotho, and Swaziland:** All disputes arising out of this Agreement shall be finally settled by the Arbitration Foundation of Southern Africa (AFSA) (Arbitration Body), under the Rules of the Arbitration of the AFSA (the Rules), in Johannesburg, South Africa, with English as the official language, by three impartial arbitrators appointed in accordance with the Rules. Each party will nominate one arbitrator, who will jointly appoint an independent chairman within 30 days or else the chairman will be appointed by the Arbitration Body under the Rules. The arbitrators will have no authority to award injunctive relief or damages excluded by or exceeding limits in this Agreement. Nothing in this Agreement will prevent either party from resorting to judicial proceedings for (1) interim relief to prevent material prejudice or a breach of confidentiality provisions or intellectual property rights, or (2) determining the validity or ownership of any copyright, patent or trademark owned or asserted by a party or its Enterprise company, or (3) debt collection in amounts below USD 250,000.00.

**In Andorra, Austria, Cyprus, France, Germany, Greece, Israel, Italy, Portugal, Spain, Switzerland, and Turkiye:** All disputes will be brought before and subject to the exclusive jurisdiction of the following court of competent jurisdiction:

**In Andorra:** the Commercial Court of Paris.

**In Austria:** the court of Vienna, Austria (Inner City).

**In Cyprus:** the competent court of Nicosia.

**In France:** Commercial Court of Paris.

**In Germany:** the courts of Stuttgart.

**In Greece:** the competent court of Athens.

**In Israel:** the courts of Tel Aviv Jaffa.

**In Italy:** the courts of Milan.

**In Portugal:** the courts of Lisbon.

**In Spain:** the courts of Madrid.

**In Switzerland:** the commercial court of the canton of Zurich.

**In Turkiye:** the Istanbul Central (Çağlayan) Courts and Execution Directorates of Istanbul, the Republic of Turkiye.

**In Netherlands:** The Parties waive their rights under Title 7.1 ('Koop') and clause 7:401 and 402 of the Dutch Civil Code, and their rights to invoke a full or partial dissolution ('gehele of partiele ontbinding') of this Agreement under section 6:265 of the Dutch Civil Code.

### Section 13. Appliances

*In paragraph d, the first sentence, add all countries listed in the following after "United States":*

**In Portugal, Spain, Switzerland, and Turkiye:** , Portugal, Spain, Switzerland and Turkiye,

### Section 15. General Terms

*In paragraph i, insert the following at the end of the paragraph:*

**In Spain:** IBM will comply with requests to access, update or delete contact information if submitted to the following address: IBM, c/ Santa Hortensia 26-28, 28002 Madrid, Departamento de Privacidad de Datos.

*In paragraph o, add to the end the paragraph:*

**In Czech Republic:** Pursuant to Section 1801 of Act No. 89/2012 Coll. (the "Civil Code"), Section 1799 and Section 1800 of the Civil Code as amended, do not apply to transactions under this Agreement. Client accepts the risk of a change of circumstances under Section 1765 of the Civil Code.

**In Bulgaria, Croatia, Russia, Serbia, and Slovenia:**

*In paragraph o, delete the 2nd sentence that says: "Neither party will bring a legal action arising out of or related to the Agreement more than two years after the cause of action arose".*

*In paragraph o, add to the end of the second sentence:*

**In Lithuania:**, except as provided by law

*In paragraph o, replace the second sentence with:*

**In Poland:** Neither party will bring a legal action arising out of or related to the Agreement more than three years after the cause of action arose, except for an action of non-payment which will be brought no more than 2 years after payment is due.

*In paragraph o, second sentence, replace the word "two" with:*

**In Latvia and Ukraine:** three

**In Slovakia:** four

*In paragraph o, add to the end of the third sentence that says: "Neither party is responsible for failure to fulfill its non- monetary obligations due to causes beyond its control":*

**In Russia:**, including but not limited to earthquakes, floods, fires, acts of God, strikes (excluding strikes of the parties' employees), acts of war, military actions, embargoes, blockades, international or governmental sanctions, and acts of authorities of the applicable jurisdiction.

*In paragraph o, third sentence, modify the sentence: "Neither party is responsible for failure to fulfill its non-monetary obligations due to causes beyond its control" as follows:*

**In Ukraine:** Neither party is responsible for failure to fulfill its non-monetary obligations due to causes or regulatory changes beyond its control, including but not limited to import, export and economic sanctions requirements of the United States.

*Add the following at the end of the section as new paragraph r:*

**In Hungary:**

- r. By entering into this Agreement, Client confirms that Client was sufficiently informed of all the provisions of this Agreement and had the opportunity to negotiate those terms. The following provisions may significantly deviate from the provisions generally applied by Hungarian law and both parties accept those provisions by signing the Agreement: IPPA Acceptance; Content and Data Protection; Warranties; Charges, Taxes, Payment, and Verification; Liability and Intellectual Property Protection; Termination; Governing Laws and Geographic Scope; General Terms, Program License; Term Licenses and Renewal; Full Capacity and Virtualization Requirements;

Selected Support, CEO (Complete Enterprise Option) Product Categories; Appliances; and Cloud Services.

**In Italy:**

- r. Pursuant to the art. 1341 and 1342 of Italian Civil Code, Client expressly accepts the following articles of this Agreement: IPPA Acceptance; Content and Data Protection; Warranties; Charges, Taxes, Payment, and Verification, including License Verification and Volume Pricing; Liability and Intellectual Property Protection; Termination; Governing Laws and Geographic Scope; General Terms; Program License, including IBM Software Subscription and Support; Term Licenses and Renewal, including Subscription License, Monthly License, Fixed Term License, and Term License Renewal; Full Capacity and Virtualization Requirements, including EPs in a Virtualization Environment (Sub-Capacity or Container Licensing), Sub-Capacity Licensing, Container Licensing, Client Reporting Responsibilities, and Excess Use Resolution; Selected Support; CEO (Complete Enterprise Option) Product Categories; Appliances, including Appliance Services; and Cloud Services.

**In Czech Republic:**

- r. Client expressly accepts the terms of this agreement which include the following important commercial terms: i) limitation and disclaimer of liability for defects (Warranties); ii) IBM's right to verify Client's usage data and other information affecting the calculation of charges (License Verification), iii) limitation of Client's entitlement to damages (Liability and Intellectual Property Protection); iv) binding nature of export and import regulations (Governing Laws and Geographic Scope); v) shorter limitation periods (General Terms); vi) exclusion of applicability of provisions on adhesion contracts (General Terms); and vii) acceptance of the risk of a change of circumstances (General Terms).

**In Romania:**

- r. The Client expressly accepts, the following standard clauses that may be deemed 'unusual clauses' as per the provisions of article 1203 Romanian Civil Code: clauses 3, 4, 5, 7, and 8n. The Client hereby acknowledges that it was sufficiently informed of all the provisions of this Agreement, including the clauses mentioned above, it properly analyzed and understood such provisions and had the opportunity to negotiate the terms of each clause.



# International Passport Advantage Agreement

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## US State, Local, and Education (SLED) Government Contracts

### Attachment for Subscription License

This Attachment for Subscription License (“Attachment”) govern the license of Programs IBM makes available on a Subscription License basis that Client acquires from IBM or an IBM Business Partner under a State and Local Government Contract with IBM. This Attachment supplements the terms of the IBM International Passport Advantage Agreement Revision 11 (Z125-5831-11) or equivalent agreement, as applicable, between Client and IBM (“IPAA”). Client accepts these terms by the incorporation or attachment to their State and Local contracts with IBM. Capitalized terms not defined in this Attachment are defined in the IPAA.

#### Subscription License

A Subscription License is a licensing model that gives Client access to a Program and IBM Subscription and Support (S&S) for a term specified in applicable Transaction Documents (TDs). The license term begins and ends as specified in a TD. No more than a 12-month Subscription Term is permitted. IBM will invoice in full upon acceptance of Client’s order. Client will not receive a prorated refund for any unused term.

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This Attachment, the IPAA, the US State & Local Government contract, and any applicable Transaction Document(s), are the complete Agreement between the parties regarding transactions by which Client acquires Subscription License or Subscription License Upgrade for a Program, and replaces all prior oral or written communications or commitments between Client and IBM regarding this subject. By entering into this Attachment, including any applicable Transaction Documents, neither party is relying on any representation not specified in this Attachment, the IPAA, or a Transaction Document. Additional or different terms in any written communication from Client (such as a purchase order) are void.

International Business Machines Corporation, 1 New Orchard Road, Armonk, New York 10504

This Client Relationship Agreement (CRA) and applicable Attachments and Transaction Documents are the complete agreement regarding each transaction under this CRA (together, the "Agreement") under which Client may order Programs, Cloud and other Services, Machines and Appliances (collectively, IBM Products) and third-party products and services (Non-IBM Products).

Transaction Documents (TDs) provide the specifics of transactions, such as charges and a description of and information about the Product. Examples of TDs include statements of work, service descriptions, license information, licensed program specifications, ordering documents, supplements, or invoices. There may be more than one TD applicable to a transaction.

Attachments provide supplemental terms that apply across certain types of IBM Products or Non-Products.

In the event of conflict, an Attachment prevails over this CRA and a TD prevails over both the CRA and any Attachment and only applies to the specific transaction.

## 1. Program License

For Programs packaged with IBM's International Program License Agreement (IPLA) or IPLA family license agreements for early release, evaluation or non-warranted Programs, that have specific use rights and terms, those terms apply. For all other IBM Programs, the following license applies. The terms of the IPLA and terms of this CRA related to acquisition and licensing of Programs are equivalent terms.

- a. A Program is an executable IBM-branded computer program and related material and includes whole and partial copies. Program details are described in TDs and can be found in the Program's system command directory, at <http://www.ibm.com/software/sla> (for Passport Advantage Programs) or <http://www.ibm.com/support/knowledgecenter> (for other IBM Programs), or as otherwise specified by IBM. IBM Software Policies (such as backup, temporary use and IBM approved cloud environment) available at <http://www.ibm.com/softwarepolicies> apply to Client's use of Programs. Programs do not include Machine Code or Project Materials as defined below.
- b. Copies of Programs are copyrighted and licensed.
- c. Client is granted a nonexclusive license to:
  - (1) use each copy of a Program, subject to the terms of the Agreement and up to the number of license entitlements Client acquires from IBM or an IBM Business Partner ("Authorized Use");
  - (2) make and install copies to support such Authorized Use; and
  - (3) make a backup copy as described in IBM's Software Policies.
- d. Programs may be used by Client, its employees and contractors. Client may not rent or lease a Program or provide commercial IT, hosting, or timesharing services to any third party. Client may not sublicense, assign, or transfer the license for any Program (except to the extent assignment or transfer may not be legally restricted or as is expressly permitted in a TD or as otherwise agreed by IBM in writing). Additional rights may be available for additional fees or under different terms.
- e. The license granted for a Program is subject to Client:
  - (1) reproducing copyright notices and other markings on any copy;
  - (2) ensuring anyone who uses the Program: i) does so only on Client's behalf within Client's Authorized Use; and ii) complies with the license terms and the Agreement;
  - (3) not reverse assembling, reverse compiling, translating, or reverse engineering the Program, except as expressly permitted by law without the possibility of contractual waiver; and
  - (4) not using any of the elements of the Program or related licensed material separately from the Program.
- f. If a TD for a Program ("Principal Program") states that a "Supporting Programs" is included with the Principal Program, Client may use the Supporting Program subject to any license limitations of the Principal Program and only to support the Principal Program.
- g. This license applies to each copy of the Program that Licensee makes.
- h. An update, fix, or patch to a Program is subject to the terms governing the Program unless new terms are provided in an updated TD. Client accepts such new terms upon installation of the update, fix, or patch. If a Program is replaced by an update, Client agrees to promptly discontinue use of the replaced Program.
- i. Selected licensing type and metrics applicable to a Program license are specified in an Attachment or TD. All Programs licensed on a server or capacity-based metric must be licensed to the full capacity of the server on which the Program is installed, unless sub-capacity usage is available from IBM and Client complies with the applicable sub-capacity requirements and terms as set forth in Attachments and TDs.
- j. For Programs packaged with an IPLA or IBM License Agreement for Non-Warranted Programs, if Client as licensee is dissatisfied with a Program for any reason, Client may terminate the license by returning the Program and proof of entitlement to IBM or the authorized IBM Business Partner within 30 days of the original acquisition date of such

Program for a refund of the amount paid. For a downloaded Program, contact the party Licensee acquired the Program from for refund instructions.

## 2. Services – Cloud Services

- a. A Cloud Service is an "as a service" IBM offering that IBM makes available via a network, such as software as a service, platform as a service, infrastructure as a service, or other network delivered services.
- b. Cloud Services are designed to be available 24/7, subject to maintenance. IBM will provide advance notice of scheduled maintenance. Technical support and service level commitments, if any, are specified in an Attachment or TD.
- c. When IBM accepts Client's order, IBM provides Client the authorizations specified in the TD. IBM provides the facilities, personnel, equipment, software, and other resources necessary to provide Cloud Services. IBM provides generally available user guides and documentation to support Client's use of the IBM Cloud Service.
- d. Enabling Software is software that Client downloads to Client systems that facilitates the use of a Cloud Service and will be identified in a TD. Enabling Software is not part of the Cloud Service and Client may use Enabling Software only in connection with use of the Cloud Service and in accordance with any licensing terms specified in a TD. The licensing terms will specify applicable warranties, if any. **Otherwise, Enabling Software is provided as-is, without warranties of any kind.**
- e. Client will provide hardware, software and connectivity to access and use Cloud Services, including any required Client-specific URL addresses and associated certificates.
- f. Client's authorized users may access Cloud Services only to the extent of authorizations Client acquires. Client is responsible for use of Cloud Services by any user who accesses the Cloud Services with Client's account credentials.
- g. The following acceptable use terms apply for Client's use of the Cloud Services. Cloud Services may not be used to undertake any activity or host Content that: i) is unlawful, fraudulent, harmful, malicious, obscene, or offensive; ii) threatens or violates the rights of others; iii) disrupts or gains (or intends to disrupt or gain) unauthorized access to data, services, networks, or computing environments within or external to IBM; iv) sends unsolicited, abusive or deceptive messages of any type; or v) distributes any form of malware. Client may not use Cloud Services for crypto-mining, unless otherwise agreed by IBM in writing. Client may not: i) reverse engineer any portion of a Cloud Service; ii) assign or resell direct access to a Cloud Service to a third party outside Client's Enterprise; or iii) combine a Cloud Service with Client's value add to create a Client-branded solution that Client markets to its end user customers unless otherwise agreed by IBM in writing.

### 2.1 Changes and Withdrawal of IBM Cloud Services

- a. At any time and at IBM's discretion, IBM may change Cloud Services, including corresponding published descriptions.
- b. The intent of any change will be to: i) make available additional features and functionality; ii) improve and clarify existing commitments; or iii) maintain alignment to current adopted operational and security standards or applicable laws. Changes will not degrade the security or functionality of the Cloud Services.
- c. Changes will be effective when published or on the specified effective date. Any Changes that do not meet the conditions specified above will only take effect, and Client accepts, upon: i) a new order; ii) the term renewal date for the Cloud Services that automatically renew; or iii) notification from IBM of the change effective date for ongoing services that do not have a specified term.
- d. IBM may withdraw a Cloud Service on 12 months' notice. IBM will continue to provide withdrawn Cloud Services for the remainder of Client's unexpired term or work with Client to migrate to another generally available IBM offering.

### 2.2 Term and Termination of Cloud Services

- a. The term begins on the date IBM notifies Client that Client can access the Cloud Services. The ordering TD will specify whether the Cloud Services renew automatically, proceed on a continuous use basis, or terminate at the end of the term. For automatic renewal, unless Client provides written notice to IBM or the IBM Business Partner involved in the Cloud Services not to renew at least 30 days prior to the term expiration date, the Cloud Services will automatically renew for the specified term. For continuous use, the Cloud Services will continue to be available on a month-to-month basis until Client provides 30 days written termination notice to IBM or the IBM Business Partner involved in the Cloud Services. The Cloud Services will remain available until the end of the calendar month after such 30-day period.
- b. IBM may suspend or limit, to the extent necessary, Client's use of a Cloud Service if IBM reasonably determines there is a material breach of Client's obligations, security breach, violation of law, or breach of the acceptable use terms set forth in section 2 above. IBM will provide notice prior to a suspension, as commercially reasonable. If the cause of a suspension can reasonably be remedied, IBM will provide notice of the actions Client must take to reinstate the Cloud Services. If Client fails to take such actions within a reasonable time, IBM may terminate the Cloud Services.
- c. Client may terminate a Cloud Service on 30 days' notice: i) at the written recommendation of a government or regulatory agency following a change in either applicable law or the Cloud Services; ii) if a change to the Cloud Services causes Client to be noncompliant with applicable laws; or iii) if IBM notifies Client of a change to the Cloud Services that has a material adverse effect on Client's use of the Cloud Services, provided that IBM will have 90 days to work with Client to minimize such effect. In the event of any such Client termination above or a similar termination of a Non-IBM Product as permitted in the third-party agreement terms, IBM shall refund a portion of any prepaid amounts for the applicable Cloud Service for the period after the date of termination. Client may terminate a Cloud Services for

material breach of IBM's obligations by IBM giving notice and reasonable time to comply. If the Cloud Services or Non-IBM Products are terminated for any other reason, Client will pay to IBM, on the date of termination, the total amounts due per the Agreement. Upon termination, IBM may assist Client in transitioning Content to an alternative technology for an additional charge and under separately agreed terms.

### **3. Services – Other Services**

- a. Services are project or other labor-based Services, such as consulting, installation, customization and configuration, maintenance, Program support, and remote services IBM provides to Client. When IBM accepts Client's order, IBM will provide or make the Services as described in an Attachment or TD.
- b. Services to support and maintain IBM Products and applicable Non-IBM Products are described in IBM's Support Guide at <https://www.ibm.com/support/pages/node/733923> and applicable terms in an Attachment, TD or as available under separate agreement.

#### **3.1 Service Deliverables Ownership and Licensing**

- a. When IBM provides deliverables, Client will own the copyright in works of authorship that IBM develops for Client as described in a TD (Project Materials). Project Materials exclude Existing Works. Existing Works are works of authorship delivered to Client, but not created, under the SOW, and includes any modifications or enhancements of such works made during the performance of the Services. Some Existing Works may be subject to a separate license agreement (Existing Licensed Works). A Program is an example of an Existing Licensed Work and is subject to its Program terms.
- b. IBM grants Client an irrevocable (subject to Client's payment obligations), nonexclusive, worldwide license to use, execute, reproduce, display, perform and prepare derivatives of Existing Works that are not Existing Licensed Works. IBM retains an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, sublicense, distribute, and prepare derivative works of Project Materials.

#### **3.2 Services Termination**

- a. Either party may terminate a Service if a material breach concerning the Service is not remedied within a reasonable time.
- b. IBM will provide at least 90 days' notice prior to withdrawal of standard Services offerings.
- c. Client agrees to pay charges for Services provided through the effective date of termination.
- d. If Client terminates without cause or IBM terminates for breach, Client will:
  - (1) meet all minimum commitments;
  - (2) pay termination or adjustment charges specified in a TD; and
  - (3) pay any additional costs IBM reasonably incurs because of early termination, such as costs relating to subcontracts or resource relocation.IBM will take reasonable steps to mitigate any such additional costs.
- e. Specific termination rights for a Service may be specified in a TD.

### **4. Machines and Appliances**

- a. A Machine is an IBM-branded device including its features, upgrades, and accessories. An Appliance is a Program and an IBM or a Non-IBM Machine combination designed for a particular function. Unless otherwise provided, terms that apply to a Program apply to the Program component of an Appliance and terms that apply to a Machine apply to the Machine component of an Appliance. Client may not use or transfer an Appliance's Program component independently of the Appliance.
- b. When IBM accepts Client's order, IBM transfers title to Machines and Non-IBM machines to Client or Client's lessor upon payment of all amounts due, except in the United States where title transfers upon shipment. IBM bears risk of loss until delivery to the carrier for shipment. IBM pays for insurance on Client's behalf until delivery to Client's location. Client must report any loss in writing to IBM within 10 business days of delivery and follow the claim procedure. Additional charges may apply for IBM installation more than six months after shipment. Client must follow instructions provided to install Client set up Machines.
- c. Machines and parts removed or exchanged for upgrade, warranty service, or maintenance are IBM property and must be returned to IBM promptly. A replacement assumes the warranty or maintenance status of the replaced part. A Machine may include parts that are not new, and, in some instances, Machines may have been previously installed. Regardless, IBM's warranty terms apply. Client will promptly install or allow IBM to install mandatory engineering changes. Client may only acquire Machines for use within Client's Enterprise in the country where acquired and not for resale, lease, or transfer. Lease-back financing is permitted.

#### **4.1 Machine Code and Built in Capacity**

- a. Machines may include Machine Code (MC) and Built in Capacity (BIC). MC is computer instructions, fixes, replacements, and related materials, such as data and passwords relied on, provided, used with or generated by MC, that permit the operation of the machine's processors, storage or other functionality. "MC may include Other Internal Licensed Code (OILC) licensed under a separate agreement as identified for a Machine in the server product support

pages at <https://www.ibm.com/support/pages/node/631391>. BIC is computing resource (e.g., processors, storage and other functionality) that IBM provides for a Machine. Use of BIC may be restricted by contract, technology or other measures.

- b. Copies of MC are copyrighted and licensed. IBM only provides copies, fixes or replacements for MC for Machines under warranty or IBM maintenance, or under a separate written agreement which may be subject to additional charges. Client agrees that all copies, fixes or replacements for MC will be obtained solely as authorized by IBM.
- c. Client is granted a nonexclusive license to use MC only: i) on the Machine for which IBM provided it; and ii) to access and use BIC only to the extent paid for by Client, activated by IBM and subject to the IBM Authorized Use Table for Machines (AUT) Attachment available at [http://www.ibm.com/systems/support/machine\\_warranties/machine\\_code/aut.html](http://www.ibm.com/systems/support/machine_warranties/machine_code/aut.html).
- d. Except as provided in an OILC, Client may not alter, reverse assemble, reverse compile, translate or reverse engineer the MC, or circumvent or interfere, by any means, with IBM's contractual, technological or other measures that restrict, monitor or report on use of BIC or MC.
- e. Client agrees to IBM's implementation of technological and other measures that restrict, monitor and report on use of BIC or MC, and to install any changes IBM provides. Use of BIC in excess of authorizations from IBM is subject to additional charges.
- f. While Client's license to MC is in effect, Client may transfer possession of the entire MC along with all of Client's rights and obligations only with corresponding transfer of the Machine, including BIC, and a hardcopy of this MC license, and only if the transferee agrees to the terms of this MC license. Client's MC license terminates immediately upon transfer.
- g. This Agreement governs MC and BIC on Machines Client acquires from another party.

## 5. Content and Data Protection

- a. Content consists of all data, software, and information that Client or its authorized users provides, authorizes access to, or inputs to the Cloud Service or information or data Client may provide, make available or grant access to, in connection with IBM providing other Services. Client grants the rights and permissions to IBM, its affiliates, and contractors of either, to use, provide, store, and otherwise process Content solely for the purpose of providing the Cloud Services or other Services. Use of the Cloud Services or other Services will not affect Client's ownership or license rights in Content.
- b. IBM, its affiliates, and contractors of either may access and use the Content solely for the purpose of providing and managing the applicable Cloud Services or other Services. IBM will treat all Content as confidential by only disclosing to IBM employees and contractors to the extent necessary to provide the Cloud Services or perform other Services.
- c. Client is responsible for obtaining all necessary rights and permissions to permit processing of Content in the Cloud Services or to provide other Services. Client will make disclosures and obtain consent required by law before Client provides, authorizes access to or inputs individuals' information, including personal or other regulated data, for processing in the Cloud Services or use by IBM in providing the other Services.
- d. If any Content could be subject to governmental regulation or may require security measures beyond those specified by IBM for the Cloud Services or to provide other Services, Client will not provide, allow access to, or input the Content for processing in the Cloud Services or provide or allow access of Content to IBM to provide other Services unless specifically permitted in the applicable TD or unless IBM has first agreed in writing to implement additional security and other measures. Client is responsible for adequate back-up of Content on Client managed systems prior to providing or allowing access of Content to IBM to provide Services.
- e. IBM Data Security and Privacy Principles (DSP), at <http://ibm.com/terms/?id=z126-7745>, apply for generally available standard Cloud Services and other Services as identified in a TD. At IBM's discretion, IBM may change the DSP from time to time and the change will be effective when published or on the specified effective date. The intent of any change will be to improve and clarify existing commitments and maintain alignment to current adopted operational and security standards or applicable laws. The intent is not to degrade the security or functionality.
- f. The specific security features and functions of a Cloud Service or other Services will be described in the applicable Attachment and TD. Client is responsible for selecting, ordering, enabling, or using available data protection features appropriate to support Client's use of Cloud Services. Client is responsible for assessing the suitability of the Cloud Services for the Content and Client's intended use or the use of Content with the Services IBM will provide. Client acknowledges that the use of Cloud Services and other Services meet Client's requirements and processing instructions required to comply with applicable laws.
- g. IBM's Data Processing Addendum (DPA) is found at <http://ibm.com/dpa>. The DPA and applicable DPA Exhibit(s) apply to IBM's processing of personal data on behalf of the Client.
- h. For Cloud Services with self-managed features, Client can remove Content at any time. Otherwise, IBM will return or remove Content from IBM computing resources upon the expiration or cancellation of the Cloud Service, other Services, or earlier upon Client's request. IBM may charge for certain activities performed at Client's request (such as delivering Content in a specific format). IBM does not archive Content; however, some Content may remain in backup files until expiration of such files as governed by IBM's backup retention practices.

## 6. Warranties

- a. IBM warrants that a Program, when used in its specified operating environment conforms to its specifications. The warranty period for a Program (not the Program component of an Appliance) is 12 months from acquisition, or the initial license term if less than 12 months, unless another warranty period is specified in an Attachment or TD.
- b. During the Program warranty period, Client will have access to IBM databases containing information on known Program defects, defect corrections, restrictions, and bypasses as described in the IBM Support Guide at <http://www.ibm.com/support/pages/node/733923>.
- c. IBM warrants that it provides Cloud Services and Services using commercially reasonable care and skill and as described in an applicable Attachment or TD, including any completion criteria. Project Materials will comply with the Attachment or TD at the time of delivery. The warranty for Cloud Services or Services ends when the Cloud Services or Services end.
- d. IBM warrants that a Machine when used in its specified operating environment conform to its specifications. For a Machine or Appliance, the warranty period is specified in the Attachment or TD. During its warranty period, IBM will repair or exchange the Machine without charge, as specified in the Attachment or TD. Warranty does not apply to Machines that Client did not allow IBM to install as required by the TD. Client may purchase warranty service upgrades and post warranty support where available. For Appliances, post warranty support includes maintenance and S&S.
- e. If a Machine, Appliance, or Program does not function as warranted during its warranty period and IBM is unable to repair or replace it with a functional equivalent, Client may return it to IBM or the IBM Business Partner and upon such return receive a refund of the amount Client paid (for recurring charges, up to twelve months' charges) and Client's license or right to use terminates.
- f. **These warranties are the exclusive warranties from IBM and replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and fitness for a particular purpose. IBM does not warrant uninterrupted or error-free operation of an IBM Product or that IBM will correct all defects or prevent third-party disruptions or unauthorized third-party access to an IBM Product. IBM warranties will not apply if there has been misuse, modification, damage not caused by IBM, or failure to comply with written instructions provided by IBM. Non-IBM Products and preview products, or identified non-warranted IBM Products, are sold under the Agreement as-is, without warranties of any kind. Third parties may provide their own warranties to Client for Non-IBM Products.**
- g. Additional support available during or after the warranty period may be available under separate agreement.

## 7. Charges, Taxes, Payment and Verification

- a. Client's right to use an IBM Program or Non-IBM Program or IBM Cloud Services or Non-IBM Cloud Services is contingent on Client paying applicable charges as specified in a TD or applicable agreement under which Client acquired the entitlements. Client is responsible to acquire additional entitlements in advance of any increase of its use.
- b. Client agrees to pay all applicable charges specified in a TD for an IBM Product or Non-IBM Product and charges for use in excess of authorizations. Charges are exclusive of any customs or other duty, tax, and similar levies imposed by any authority resulting from Client's acquisitions under the Agreement and will be invoiced in addition to such charges. Amounts are due upon receipt of the invoice from IBM and payable within 30 days of the invoice date to an account specified by IBM and late payment fees may apply. Prepaid IBM Products or Non-IBM Products must be used within the applicable period. IBM does not give credits or refunds for any prepaid, one-time charges, or other charges already due or paid, except as may be specified in an Agreement. The parties agree no tangible personal property (e.g. media or publications) shall transfer to Client if: i) IBM delivers Programs electronically to Client, or ii) Client claims a sales or use tax exemption for Programs IBM delivers electronically to Client. Where taxes are based upon the location(s) receiving the benefit of the Cloud Service, Client has an ongoing obligation to notify IBM of such location(s) if different than Client's business address listed in the applicable Attachment or TD.
- c. In the event Client is required to pay any withholding or deduction of tax required under an applicable governmental entity regulation based on IBM's charge for a cross border transaction, Client will increase the sum payable by the amount necessary to ensure IBM receives an amount equal to the sum it would have received had no withholdings or deductions been made. Client is responsible to pay any withholding tax directly to the appropriate government entity where required by law.
- d. If Client imports, exports, transfers, accesses, or uses an IBM Product or Non-IBM Product across a border, Client agrees to be responsible for and pay authorities any custom, duty, tax, or similar levy assessed by the authorities. This excludes those taxes based on IBM's net income.
- e. IBM will invoice: i) recurring charges at the beginning of the selected billing frequency term; ii) overage and usage charges in arrears; and iii) one-time charges upon IBM's acceptance of an order.
- f. IBM may change recurring charges, labor rates and minimum commitments on 90 days' notice, except for Cloud Services. For Cloud Services, if IBM commits to pricing as specified in a TD, IBM will not change such pricing during the specified term. If there is not a specified commitment, then IBM may change pricing on thirty days' notice. A change applies on the invoice date or the first day of the charging period or new term on or after the effective date IBM specifies in the notice. IBM may change one-time charges without notice. However, a change to a one-time charge does not

apply to an order if: i) IBM receives the order before the announcement date of the increase; and ii) within 90 days after IBM's receipt of the order, the Product is shipped or made available to Client.

## 7.1 Licensing Verification

- a. Client will, for all Programs and MC, at all sites and for all environments, create, retain, and each year provide to IBM upon request within 30 days' advance notice: i) a report, in a format requested by IBM using records, system tools output, and other system information; and ii) supporting documentation (collectively, "Deployment Data").
- b. Upon reasonable notice, IBM and its independent auditors may verify Client's compliance with this Agreement, at all sites and for all environments, in which Client uses (for any purposes) Programs and MC. Verification will be conducted in a manner that minimizes disruption to Client's business and may be conducted on Client's premises, during normal business hours. IBM will have a written confidentiality agreement with the independent auditor. In addition to providing Deployment Data described above, Licensee agrees to provide to IBM and its auditors additional accurate information and Deployment Data upon request.
- c. Client will promptly order and pay charges at IBM's then current rates associated with: i) any deployments in excess of authorizations indicated on or by any annual report or verification; ii) applicable software maintenance or subscription and support services (S&S) for such excess deployments for the lesser of the duration of such excess use or two years; and iii) any additional charges and other liabilities determined as a result of such verification, including but not limited to taxes, duties, and regulatory fees.

## 8. Liability and Intellectual Property Protection

- a. IBM's entire liability for all claims related to the Agreement will not exceed the amount of any actual direct damages incurred by Client up to the amounts paid (if recurring charges, up to 12 months' charges apply) for the Product that is the subject of the claim, regardless of the basis of the claim. **IBM will not be liable for special, incidental, exemplary, indirect, or economic consequential damages, or lost profits, business, value, revenue, goodwill, or anticipated savings.** These limitations apply collectively to IBM, its affiliates, contractors, and suppliers.
- b. The following amounts are not subject to the above cap: i) third-party payments related to infringement claims described in the paragraph c below; and ii) damages that cannot be limited under applicable law.
- c. If a third party asserts a claim against Client that an IBM Product acquired under the Agreement infringes a patent or copyright, IBM will defend Client against that claim and pay amounts finally awarded by a court against Client or included in a settlement approved by IBM. To obtain IBM's defense against and payment of infringement claims, Client must promptly: i) notify IBM in writing of the claim; ii) supply information requested by IBM; and iii) allow IBM to control, and reasonably cooperate in, the defense and settlement, including mitigation efforts. IBM's defense and payment obligations for infringement claims extend to claims of infringement based on open-source code that IBM selects and embeds in an IBM Product.
- d. IBM has no responsibility for claims based on: i) Non-IBM Products; ii) items not provided by IBM; iii) IBM's proper use of any Client required third-party product or service related to the administration of the transaction; iv) any violation of law or third-party rights caused by Content, or any Client materials, designs, specifications; or v) Client's use of a non-current version or release of an IBM Product when an infringement claim could have been avoided by using a current version or release.

## 9. Termination

- a. Either party may terminate: i) this CRA without cause on at least 30 days' notice to the other after expiration or termination of its obligations under each Agreement; or ii) immediately for cause if the other is in material breach of an Agreement, provided the non-complying party is given notice and reasonable time to comply. Termination of this CRA does not terminate transactions in effect and not affected by the cause of a material breach and provisions of the Agreement, as they relate to such transactions, remain in effect until fulfilled or otherwise terminated in accordance with the Agreement term. Upon any termination of Client's license to use a Program or MC, Client will promptly destroy all copies of the Program or MC after either party has terminated the license.
- b. Any terms that by their nature extend beyond the Agreement termination remain in effect until fulfilled and apply to successors and assignees.
- c. Each party will allow the other reasonable opportunity to comply before it claims the other has not met its obligations. Client's failure to pay, or Client providing inaccurate or fraudulent account or payment information to acquire IBM Products or Non-IBM Products, is a material breach.

## 10. Governing Laws and Geographic Scope

- a. Both parties agree to the application of the laws of the State of New York, United States, without regard to conflict of law principles. Any disputes will be brought before a court of competent jurisdiction within the United States.
- b. The rights and obligations of each party are valid only in the country where the transaction is performed (or for IBM or Non-IBM Cloud Services or remotely delivered IBM or Non-IBM Services, the country of Client's business address) or, if IBM agrees, the country where the IBM Product or Non-IBM Product is placed in productive use, except all licenses are valid as specifically granted.

- c. Each party is also responsible for complying with: i) laws and regulations applicable to its business and Content; and ii) import, export and economic sanction laws and regulations, including the defense trade control regime of the United States of America and any applicable jurisdiction, that prohibit or restrict the import, export, re-export, or transfer of products, technology, services or data, directly or indirectly, to or for certain countries, end uses or end users. IBM will not serve as Client's exporter or importer, except as required by data protection laws, for: i) any Content; or ii) use of any portion of a Cloud Service from a country outside Client's business address.
- d. If any provision of the Agreement is invalid or unenforceable, the remaining provisions remain in full force and effect. Nothing in the Agreement affects statutory rights of consumers that cannot be waived or limited by contract. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions under the Agreement.

## 11. General

- a. IBM is an independent contractor, not Client's agent, joint venturer, partner, or fiduciary, and does not undertake to perform any of Client's regulatory obligations or assume any responsibility for Client's business or operations. Client is responsible for its use of IBM Products and Non-IBM Products. IBM is acting as an information technology provider only. IBM's direction, suggested usage, guidance, or Client's use of an IBM Product does not constitute medical, clinical, legal, accounting, or other licensed professional advice. Client should obtain its own expert advice. Each party is responsible for determining the assignment of its and its affiliates personnel and their respective contractors, and for their direction, control, and compensation.
- b. For Programs IBM provides to Client 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 Client and IBM.
- c. Client may not use IBM Products or Non-IBM Products if failure or interruption of the IBM Products or Non-IBM Products could lead to death, serious bodily injury, or property or environmental damage.
- d. Parties will not disclose confidential information to employees or contractors of the other party without a separate, signed confidentiality agreement. If confidential information is exchanged in connection with the Agreement, the applicable confidentiality agreement is incorporated into, and subject to, this CRA. This paragraph does not apply to Content provided in the use of an IBM Cloud Service or Non-IBM Cloud Service.
- e. Client accepts an Attachment or TD by ordering, enrolling, using, or making a payment for, the IBM Product or Non-IBM Product. Since this CRA may apply to many future orders, IBM may change this CRA by providing Client at least 90 days' written notice. Changes are not retroactive. They will only apply as of the effective date to: i) new orders; ii) ongoing or continuous IBM Product or Non-IBM Product offerings that do not expire; and iii) renewals. For transactions with a defined renewable contract period stated in a TD, Client may request that IBM defer the change effective date until the end of the current contract period. Client accepts changes by placing new orders or continuing use after the change effective date or allowing transactions to renew after receipt of the change notice. Except as specifically provided in this CRA or as specified in an Attachment or TD, all changes to an Agreement must be in writing accepted by both parties.
- f. IBM maintains a robust set of business conduct and related guidelines covering conflicts of interest, market abuse, anti-bribery and corruption, and fraud. IBM and its personnel comply with such policies and require contractors to have similar policies.
- g. IBM, its affiliates, and contractors of either require use of business contact information and certain account usage information. This information is not Content. Business contact information is used to communicate and manage business dealings with the Client. Examples of business contact information include name, business telephone, address, email, user ID, and tax registration information. Account usage information is required to enable, provide, manage, support, administer, and improve IBM Products. Examples of account usage information include reported errors and digital information gathered using tracking technologies, such as cookies and web beacons, during use of IBM Products. The IBM Privacy Statement at <https://www.ibm.com/privacy/> provides additional details with respect to IBM's collection, use, and handling of business contact and account usage information. When Client provides information to IBM and notice to, or consent by, the individuals is required for such processing, Client will notify individuals and obtain consent.
- h. IBM Business Partners who use or make available IBM Products or Non-IBM Products are independent from IBM and unilaterally determine their prices and terms. IBM is not responsible for their actions, omissions, statements, or offerings. If IBM notifies Client their current IBM Business Partner will no longer resell an IBM Product, Client may select to acquire auto renewing or continuous use of IBM Products directly from IBM or from another authorized IBM Business Partner.
- i. IBM may offer Non-IBM Products, or an IBM Product may enable access to Non-IBM Product, that may require acceptance of third-party terms presented to the Client. Linking to or use of Non-IBM Products constitutes Client's agreement with such terms. Third-party terms and privacy practices govern use of a Non-IBM Cloud Service or other Service, including Content Client may provide, grant access to or input to. IBM will invoice Client for charges due and submit Client's order details to the third-party provider for the enablement and delivery of the Non-IBM Product. IBM is not a party to any third-party agreement and is not responsible for Non-IBM Products. Access to ongoing Non-IBM Products may be discontinued at any time if the third party discontinues or IBM no longer makes available such Non-IBM Products.

- j. An IBM Product or Non-IBM Product or feature of an IBM Product or Non-IBM Product is considered "preview product" when IBM makes such product or features available at no charge, with limited or pre-release functionality, or for a limited time, to try available functionality (such as beta, trial, evaluation, no-charge, or designated preview products). Service level agreements, if any, do not apply to preview products. A preview product may not be covered by support and IBM may change or discontinue a preview product at any time and without notice. For any preview product that is provided as pre-release, IBM is not obligated to release a generally available product. Client is responsible to return a preview product or place an order under generally available terms for acquiring IBM Product or Non-IBM Product beyond the preview period. IBM may provide Client opportunities to voluntarily provide feedback in connection with the use of IBM Products, which IBM may use for any purpose.
- k. Neither party may assign the Agreement, in whole or in part, without the prior written consent of the other. IBM may assign rights to receive payments. IBM will remain responsible to perform its obligations. Assignment by IBM in conjunction with the sale of the portion of IBM's business that includes an IBM Product or Non-IBM Product is not restricted. IBM may share an Agreement and related documents in conjunction with any assignment.
- l. This CRA applies to IBM and Client (accepting this CRA) and their respective Enterprise companies that provide or acquire IBM Products or Non-IBM Products under this CRA. The parties shall each coordinate the activities of their own Enterprise companies under this CRA. Enterprise companies include: i) companies within the same country that Client or IBM control (by owning greater than 50% of the voting shares); and ii) any other entity that controls, is controlled by or is under common control with Client or IBM and has agreed to a participation agreement.
- m. All notices under the Agreement must be in writing and sent to the business address specified for the Agreement unless a party designates in writing a different address. The parties consent to the use of electronic means and facsimile transmissions for communications as a signed writing. Any reproduction of the Agreement made by reliable means is considered an original. The Agreement supersedes any course of dealing, discussions or representations between the parties. Where approval, acceptance, consent, access, cooperation, or similar action by either party is required, such action will not be unreasonably delayed or withheld.
- n. No right or cause of action for any third party is created by the Agreement or any transaction under it. Neither party will bring a legal action arising out of or related to the Agreement more than two years after the cause of action arose. Neither party is responsible for failure to fulfill its non-monetary obligations due to causes beyond its control.
- o. IBM may use personnel and resources in locations worldwide, including third-party contractors to support the delivery of IBM Products and Non-IBM Products. Client's use of IBM Products or Non-IBM Products may result in the transfer of Content, including personally identifiable information, across country borders. A list of countries where Content may be transferred and processed is described in the applicable TD or support documentation. IBM is responsible for the obligations under the Agreement even if IBM uses a third-party contractor and will have appropriate agreements in place to enable IBM to meet its obligations.
- p. If IBM and Client agree to use a Client requested third-party service to support the procurement or payment activities associated with an Agreement, IBM agrees to submit or receive applicable documents (such as invoices or similar contracting documents) using the third-party service. In the event: i) the third-party service becomes unavailable for any reason; or ii) the third-party provider modifies the service or terms of use in a manner IBM deems commercially unacceptable, the Client agrees to directly accept documents. Client remains responsible to IBM for timely payments of invoices and for any claims or proceedings related to the third-party service provider's failure to comply with applicable laws or for such provider's use, misuse, or disclosure of data or confidential information. IBM agrees to promptly notify Client in writing of any such claim or proceeding.

# Technical Services Attachment for Technology Support Services (TSS) Offerings for State and Local Government



Using this Technical Services Attachment for TSS Offerings (Attachment or TSA), Client may order TSS offerings from IBM. Additional details are provided in Transaction Documents. The agreement in place between the parties (CRA or equivalent) referenced in the signature page, this Attachment, and Transaction Documents are the complete agreement regarding TSS transactions hereunder. In the event of conflict, a) this Attachment prevails over the agreement, and b) a Transaction Document prevails over both the agreement and this Attachment and only applies to the specific transaction.

## 1. Services

IBM will provide Services, as described in a) this Attachment and b) Statements of Work (SOW), Schedules, and Change Authorizations (collectively Transaction Documents or TDs), to support Client's Machines and Programs that are eligible for the specific Service that Client is acquiring hereunder and are documented in the applicable TD (Eligible Machines, Eligible Programs, and collectively, Eligible Products). This Attachment replaces all other previously accepted versions of this Attachment for the Client named in the signature page, as to new transactions dated after the effective date of this Attachment.

IBM will identify Eligible Products, Specified Locations (entire information processing environment, or a portion thereof, at multiple sites or a single building), hours of coverage selected, applicable Services, and the contract period, in TDs. Additional details may be documented in the TD, as applicable to the specific transaction. Client may access IBM Support to place service requests by calling the Support number for Client's country, listed at <https://www.ibm.com/planetwide/> 24x7 or otherwise as directed by IBM, by voice or electronically (depending on severity), however IBM will begin servicing the request during the applicable entitled coverage days and hours. Coverage is based on the time zone where the Eligible Machine is located. IBM provides Services during the hours of service selected in the TD.

Eligible Machines must meet IBM's safety and serviceability requirements. Any IBM inspection for maintenance eligibility is subject to a charge. IBM reserves the right to inspect a Machine within one month from the start of Service. If the Machine is not in acceptable condition for Service, IBM will restore it for a charge or Client may withdraw its request for maintenance Service.

Machine Maintenance is Service to keep Machines in, or restore them to, conformance with their official published specifications, and may include:

- a. remote assistance with problem determination (whether system problems are machine or program related);
- b. on-site and remote diagnostic and remedial maintenance Service in accordance with the service level specified for the Eligible Machine in the TD;
- c. if available for Client's IBM Eligible Machines, installation of Service Programs to endeavor to:
  - (1) detect and analyze permanent errors;
  - (2) correlate temporary errors; and
  - (3) identify and report media problems.
- d. the services of support specialists from IBM manufacturing, engineering, and development locations as deemed necessary by IBM;
- e. the planning, scheduling, and installation of any engineering changes or field change orders required to improve the serviceability, performance, and safety of the IBM Eligible Machines;
- f. assisting Client in establishing and implementing electronic support facilities such as IBM Electronic access; and
- g. activation, for use by IBM personnel, of electronic facilities to remotely diagnose, applying fixes, and update Client's IBM Eligible Machines.

Machine Maintenance does not cover:

- a. improperly maintained or damaged Machines, Machines with altered identification labels, alterations, accessories;
- b. supply items, consumables (such as batteries and printer cartridges), structural parts (such as frames and covers), or failures caused by a product for which IBM is not responsible;
- c. Machine installation, engineering change activity, or preventive maintenance;
- d. service of features, parts, or devices not supplied by the Machine's manufacturer, or IBM during the performance of Service;
- e. unsuitable physical or operating environment; and
- f. any failure caused by a move of an Eligible Machine by non-IBM personnel (change of location). IBM may inspect the Machine for damage after such move, such inspection to be provided as a billable Service. IBM may restore the Machine to its official published specifications upon Client request, as a billable Service.

IBM does not warrant uninterrupted or error-free operation or that IBM will correct all defects or prevent third party disruptions or unauthorized third party access.

IBM may use tools, owned or licensed by IBM, in the performance of the Service (IBM Tools). IBM continuously develops and utilizes new IBM Tools and capabilities for the purpose of providing remote and on-site problem determination and resolution support to IBM Clients. Some IBM Tools (e.g., an application (App)), are used by on site technicians to capture and store images of the Machine and transmit the images to a remote IBM Subject Matter Expert with a goal of faster and more cost effective repair and one-visit resolution of complex issues. The images may also be modified and/or used for training and to improve maintenance services. Unless licensed in writing by IBM, Client has no right to access, retain, copy, or use the IBM Tools and no Client license or intellectual property right is

granted or implied by the use of the IBM Tools used in connection with performance of the Services. IBM Tools are subject to the terms associated with them. IBM Tools are not warranted. If applicable, upon completion of the Service Client agrees to cease use of, uninstall and remove the IBM Tools from Client's Eligible Machines and facilities.

For acquisitions through an IBM Business Partner (BP) authorized to resell IBM Services, the BP establishes the price at which they market IBM Services and communicates the terms for each BP transaction directly to Client. However, IBM establishes the terms of each Service IBM provides and will provide the Services as described in this Attachment and applicable TD. Whenever a party is required to provide notification to the other, each agrees to notify the applicable BP.

If a BP that Client has contracted through is no longer able to offer IBM Services, IBM will notify Client in writing. Client may continue to receive the Services by instructing IBM in writing to transfer administration of the Services to 1) another BP of Client's choice approved to offer IBM Services, or 2) IBM under a standard direct relationship where IBM invoices Client.

### **1.1 Warranty Service Upgrade (WSU)**

During the warranty period for certain Eligible Machines, Client may select an upgrade to the standard warranty. WSU may not be terminated or transferred during the warranty period. When the warranty period ends, the Machine is added to maintenance at the type of Service selected for WSU.

### **1.2 Maintenance of IBM Machines**

IBM will provide maintenance of Eligible IBM Machines specified in the TD. IBM may provide an exchange replacement for installation by Client. Replacements may be i) a part of a Machine (called a Client Replaceable Unit (CRU), e.g., keyboard, memory, or hard disk drive), or ii) an entire Machine.

#### **1.2.1 Hardware Support Extension**

After IBM has announced End of Service for specified Machines, IBM may offer limited support, to include remote assistance, from IBM's support center or via electronic access, and on-site assistance, in response to Client requests for hardware support on the specified Machines that have reached End of Service (Hardware Support Extension). IBM neither warrants i) uninterrupted or error-free operation of this IBM Service or Machines covered hereunder; nor ii) that IBM will correct all defects or prevent third party disruptions or unauthorized third party access to the Machines. On-site repair is subject to the availability of repair parts and skilled resources and does not include repairs that require Software, Engineering, or Development Support. Response time and availability of parts may vary by location. The covered Eligible Machines, Coverage Period (the HW Support Extension Effective Date to the HW Support Extension End Date), locations, options selected, and charges, all as applicable, are specified in the applicable TD. Newly added Machines are reflected in separate TDs. This Service does not renew. Subsequent periods of coverage are documented in separate TDs.

IBM will:

- a. provide remote technical support for problem determination (PD) and problem source identification (PSI);
- b. provide on-site technical resources, if necessary, for hardware defect resolution (for example, but not limited to, the exchange of field replaceable units (FRUs), provided that the parts are generally commercially available); and
- c. determine if an applicable resolution exists, which may include existing patches or workarounds for Client installation.

For the avoidance of doubt, IBM's responsibilities under Hardware Support Extension do not include any: (1) preventive service; (2) support for newly reported defects or previously reported or known defects for which no updates, patches, or fixes were created; (3) engineering change management; or (4) development of any new machine code updates, patches, or fixes (including those designed to address security). IBM publishes its responses to security vulnerabilities at its IBM Product Security Incident Response (PSIRT) blog found here: <https://www.ibm.com/blogs/psirt/>

Notwithstanding the terms of Section 6, IBM may withdraw Hardware Support Extension for any Machine on 30 days' written notice. Client will receive a credit for any remaining prepaid period associated with this IBM withdrawal. Client termination is addressed in Section 7.

### **1.3 Maintenance of Non-IBM Machines**

IBM will provide repair Service for the manufacturer's base configuration for each covered model of Eligible non-IBM Machines specified in the TD. IBM requires up to 30 days to initiate support on newly added Eligible non-IBM Machines that Client adds or relocates. Repair of non-IBM Machines is subject to the availability of parts and technical support required of the manufacturer. Repair parts will be functionally equivalent to those replaced, may be new or used, and may have been manufactured by other than the original manufacturer. Upon written notice, IBM may withdraw coverage for an Eligible non-IBM Machine due to lack of available repair parts or manufacturer technical support. Client will receive a credit for any remaining prepaid period associated with this withdrawal.

#### **1.3.1 Multi-Vendor Service**

IBM provides maintenance support and repair coordination of maintenance activities for Machines in a multi-vendor environment (also called Multiple Vendor Service or MVS). For repair coordination, Client must notify service providers that IBM will be placing the requests for service. IBM then places warranty or maintenance calls with service providers on Client's behalf and remains responsible for coordinating maintenance activities and problem resolution until resolved. Notwithstanding other terms of this Attachment:

- a. Charges are based on MVS Inventory. IBM will adjust the charges when the inventory changes;
- b. MVS Services do not automatically renew. Additions or renewals are documented in a new TD with the new inventory, period, and applicable charges; and
- c. Client commits to continue MVS for the specified transaction contract period. No credit is given for Client termination during the committed term.

#### 1.4 IBM Software Maintenance

IBM provides software maintenance (SWMA) for Eligible Programs for which Client is licensed. IBM makes available the most current commercially available version, release, or update to all of the Eligible Programs for which Client acquires support in the specified operating environment, as made available. Information to order versions, releases or updates is found at <https://www.ibm.com/support/pages/node/733923>

Eligible Programs are listed at [www.ibm.com/services/supline/products/](http://www.ibm.com/services/supline/products/) or may be obtained from Client's IBM representative. The listing of Eligible Programs contains the last date of service for each respective release. IBM supports only current releases of Eligible Programs. It is Client's responsibility to ensure that its Eligible Programs are current when requesting Service. Availability information can be viewed at <http://www-01.ibm.com/software/support/lifecycle/>

IBM provides assistance for Client's a) routine, short-duration installation and usage (how-to) questions and b) code defect-related questions. IBM provides assistance via telephone and, if available, electronic access, only to Client's Information Systems (IS) technical support personnel. This assistance is not available to Client's end users. IBM provides Severity 1 assistance 24 hours a day, every day of the year. Consult the IBM Support Guide at <https://www.ibm.com/support/pages/node/733923> for details. A 24x7 (every day of the year) all-severity option may be available for an extra charge. All Licensed units must be covered by IBM SWMA service for an Eligible Program. No partial coverage is allowed.

Service is provided solely for Eligible Programs located within the United States (USA) and all support will be provided in the English language. Software "traps" or other tools that may be necessary to diagnose problems will be sent only to the USA Eligible Programs location, and the diagnosis and repair of data encryption will be discussed only with personnel at the USA Eligible Programs location.

#### 1.5 Support via USA Citizens or US Persons Option

US Government, public sector, and commercial clients can acquire an IBM Support via U.S. Citizens or U.S. Persons Option (Option) when access restrictions, based on immigration status or citizenship, apply US law. Commercial clients must specify the reasons for such restrictions.

For purposes of this section, **US Person** includes US Citizens, lawful permanent residents, and protected individuals as provided in 22 C.F.R. § 120.15. **US Citizenship** can be based on birth or naturalization and is evidenced by acceptable proof of citizenship per 32 C.F.R. Part 117.

IBM support for hardware or software is a mandatory prerequisite for this Option. This Option provides an IBM US Citizen or US Person contact, as applicable, to manage IBM remote hardware and software support for Client. IBM will provide remote support agents meeting the required criteria to interact with Client. Client data submitted for diagnostic purposes may be stored and accessed outside the US and may be viewed or handled by non-US Citizens or Persons. Client agrees not to send protected or sensitive data to IBM. IBM Support via US Citizens or US Persons is available via voice support, during prime shift only. Each time Client calls IBM, Client must identify itself as a Support via US Citizens or US Persons Client, as applicable. IBM will verify Client's entitlement then transfer Client to the appropriate contact.

#### 1.6 Machine Control Program Remote Support

Remote Support Service is provided only for Machine Control Programs (MCP), meaning code delivered with an IBM Machine that executes below the external user interface (e.g., implemented in a part of storage that is not addressable by user programs). IBM will provide remote assistance (via telephone from IBM's support center or electronic access) in response to Client's routine installation, configuration, and usage (how-to) questions pertaining to MCPs on covered IBM Machines, during normal business hours in the local time zone where Client receives Service. Hardware maintenance is a mandatory prerequisite for MCP. For an additional charge, 24x7 (every day of the year) all-severity option may be available.

## 2. Client Responsibilities

Client agrees:

- a. to provide IBM with the inventory of Eligible Products to be covered at each Specified Location and to notify IBM of inventory changes, utilizing the specified tools or systems to provide such written notice. Any changes to contracted configuration or inventory may result in a change to original charges;
- b. as required for the specific Service, to designate the Primary Technical Contact (PTC), Client's country-based representative to whom IBM may direct general technical information and questions regarding the Eligible Products within the environment, in order to enable effective communication with the IBM support center;
- c. to have valid licensing and subscription in place for Eligible Programs covered by a Service;
- d. that all Client notices must be in writing and received by IBM 60 days prior to the effective date of a change, unless otherwise specified;
- e. to limit use of any access codes to electronic diagnostic tools, information databases, or other Service delivery facilities to those authorized to use them under Client's control and only in support of Eligible Products and Services identified in TDs;
- f. to provide IBM with necessary information requested, and keep such information current;
- g. to access IBM Support as directed by IBM, such as by calling 1-800-IBM-SERV or the Support number for a specific country listed at <https://www.ibm.com/planetwide/> and providing machine type / serial or customer number or, to obtain support electronically, use the Internet web site: <http://www.ibm.com/support/>;
- h. to allow remote access to Client's system to assist in isolating the problem cause. Client remains responsible for adequately protecting its system and all data contained therein whenever IBM remotely accesses it. If Client denies remote access to its system by IBM, IBM may be limited in its ability to resolve the problem. If IBM is unable to resolve the problem without access, IBM will notify Client and close the service call;

- i. that some Services may require the installation and use of remote connectivity tools and equipment for direct problem reporting, remote problem determination and resolution. Any third party communications or connectivity charges are Client's responsibility;
- j. to use the information obtained under these Services only for the support of the information processing requirements within Client's Enterprise;
- k. when a part return is required, Client is charged for the replacement part if IBM does not receive the replaced part within 15 calendar days of Client's receipt of the replacement. Client may request that IBM install the replacement as a billable installation;
- l. to securely erase all non-IBM programs and all data (including confidential, proprietary and personal data regarding any individual or entity) from any Machine or part of a Machine returned to IBM for any reason and ensure that it is free of any legal restrictions that would prevent its return;
- m. that, to perform its responsibilities, IBM may ship all or part of the Machine or its software to other IBM or third party locations around the world;
- n. that Client is responsible for obtaining all necessary permissions to use, provide, store and process content in connection with Services, and grants IBM permission to do the same. Client is responsible for adequate content back-up and maintaining its system security during the Services. Some of Client's content may be subject to governmental regulation or may require security measures beyond those specified by IBM for an offering. Client will not input or provide such content unless IBM has first agreed in writing to implement additional required security measures;
- o. that Services may be performed on-site at Client's Specified Locations and off-site at IBM locations, and that IBM uses global resources (non-permanent residents used locally and personnel in locations worldwide) for delivery of Services;
- p. that the terms of the Machine Code License at [http://www-947.ibm.com/systems/support/machine\\_warranties/support\\_by\\_product.html](http://www-947.ibm.com/systems/support/machine_warranties/support_by_product.html) apply to Eligible IBM Machines and all Machine Code and Machine Code updates on such Eligible IBM Machines;
- q. to follow the service request procedures that IBM provides, to include installing entitled Machine Code and other software updates (downloaded from an IBM web site or copied from other electronic media), and to follow IBM's (or manufacturer's) guidelines pertaining to operator responsibilities, maintenance procedures, and supplies, prior to placing a Service request;
- r. that some devices have write or wear limitations as documented in the device's hardware product specifications. Once a device reaches its write or wear limitation, the device is considered end of life and therefore no longer eligible for warranty or maintenance Services. Replacement of devices that reach write or wear limitations is a Client responsibility not covered under warranty or maintenance Services;
- s. that, with respect to Services under this Attachment, the parties agree to look to their own risk management (including insurance) to cover damage, destruction, loss, theft, or government taking (collectively, Loss) of their respective tangible property (whether owned or leased), and neither party shall be liable to the other for such Loss except liability for negligence under applicable law;
- t. that Client cannot resell Services or transfer Services to another Machine; and
- u. that IBM and its affiliates, and their contractors and subprocessors, may, wherever they do business, store and otherwise process business contact information (BCI) of Client, its personnel and authorized users, for example name, business telephone, address, email and user IDs for business dealings with them. Where notice to or consent by the individuals is required for such processing, Client will notify and obtain such consent.

### 3. Charges

**For sales through IBM**, charges are based on Service selections, payment option, and any prepay period. Renewal charges are calculated at the start of each renewal period. IBM will invoice Client in advance for the Machine/Service List on the Schedule and charges period specified in the TD. Price protection will apply from the start date through the committed term as follows:

- a. no price increase announced by IBM will apply for the committed term specified in the TD; and
- b. Client will receive the benefit of a price decrease as of the stated effective date, if the price decrease is announced by IBM with an effective date during the committed term specified in the TD.

All newly added Eligible Products and Services, and changes to existing Eligible Product configurations and Services, will be charged at the then-current rate, and price protection will apply, for the term specified in the new TD.

For each transaction, total Service charges are adjusted when:

- a. a review of the inventory count indicates a change from the last accounting; or
- b. a Specified Location is affected by a change that results in additional charges (e.g., a change in tax rates), Eligible Machine type, or Service is added, deleted, or changed.

Increases to charges apply at the renewal of the term.

**For sales through an IBM Business Partner (BP)**, the IBM BP sets the charges and charges terms. The IBM BP may impose an additional charge for some actions (e.g., termination), or for IBM's provision of some additional services (e.g., Service upgrades) as identified in this Attachment and its associated TDs. Notwithstanding any other term of this Attachment, Client must inquire with the IBM BP regarding charges, credits, or refunds. Client's payment is made directly to the IBM BP and any credit or refund is received from the IBM BP. Any required notices (e.g., changes to inventory or termination of Service) must be provided in writing to Client's BP with a copy to IBM.

### Re-establishment Fee

If Client's warranty or maintenance Service coverage for a Machine lapses by 90 days or more, and Client subsequently requests to restart Services, a re-establishment fee applies based on the number of days of lapsed coverage, up to 365 days of the applicable Service fees for the Machines.

### Software Maintenance After License Fee

For the Operating System and Licensed Program Products (LPPs), SWMA After License Fee (ALF) is a one-time charge to resume SWMA and applies:

- a. if there is a resumption of the SWMA after a lapse of the service; or
- b. when Client transfers a Software License for a Program not currently covered by IBM SWMA; or
- c. when Client acquires the Software License with the purchase of a used Machine, unless Client acquires SWMA within 30 days of the acquisition. For SWMA for IBM i, the most current operating system version and release is required to be installed.

The new support period begins on the date that IBM accepts Client's order.

#### **4. Automatic Inventory Insertion**

##### **4.1 Machine Maintenance**

If Client selects the Automatic Inventory Increase Option, IBM will automatically increase the inventory count and associated Services at Specified Locations. The following terms apply. If at any time either Client or IBM requests a review of the inventory count, both Client and IBM will cooperate in updating the last formal inventory. This cooperation will be limited to the exchange and consolidations of the inventory files.

If the Machine is under warranty when added, Services will commence at warranty exit. If the Machine is not under warranty when added, Services will commence at the later of a) the date of installation or b) the previous yearly anniversary of the start of the transaction contract period. IBM Machines specifically excluded from coverage at transaction contract period start remain outside the scope of this section unless Client requests IBM add them during the transaction contract period. Services are the same as for all other Machines of the same type at the Specified Location.

Newly installed IBM Machines of the same type as WSU are added at date of actual installation and covered at the same WSU support level.

##### **4.2 Software Maintenance**

IBM will increase the inventory count and associated Services when an Eligible Program licensed for use on an Eligible IBM Machine is added to the inventory. Applicable Services are the same as for other copies of the Program licensed for use on Eligible IBM Machines of the same type at the Specified Location.

Services will commence immediately upon addition of the Eligible Program to the inventory (After License Fees may apply), except if the Program is covered under the Agreement for Acquisition of Software Maintenance when added to the inventory, then Services under this Attachment will commence at the end of that support period.

#### **5. Renewal**

The Schedule will state if Services automatically renew.

#### **6. Withdrawal of Service or Support, Change of Support Level**

IBM may withdraw a Service or support for an Eligible Product on 90 days' written notice. Client will receive a credit for any remaining prepaid period associated with an IBM withdrawal of Service or support.

For some Products, instead of withdrawing all Service or support for those Products, IBM will withdraw only engineering and development support and continue to provide limited support for known defects (Change of Support Level). Unless otherwise specified in the Change of Support Level notice, IBM will continue to:

- a. provide remote technical support for problem determination (PD) and problem source identification (PSI);
- b. provide on-site technical resources, if necessary, for hardware defect resolution (for example, but not limited to, the exchange of field replaceable units (FRUs), provided that the parts are generally commercially available); and
- c. determine if an applicable resolution exists, which may include existing patches or workarounds for Client installation.

Beginning on the effective date in the notice, IBM's responsibilities will no longer include any: (1) preventive service; (2) support for newly reported defects or previously reported or known defects for which no updates, patches, or fixes were created; (3) engineering change management; or (4) development of any new machine code updates, patches, or fixes (including those designed to address security). IBM publishes its responses to security vulnerabilities at its PSIRT blog found here: <https://www.ibm.com/blogs/psirt/>

Affected Products will be covered under the new support level on the effective date in the notice (Effective Date), unless Client notifies IBM in writing of Client's intent to terminate coverage before the Effective Date.

#### **7. Termination**

Client has committed to continue Services for the entire transaction contract period as documented in the applicable TD. However, Client may terminate Services for an Eligible Product if Client: a) replaces the terminated Services with equivalent new IBM Services, or b) on 60 days' written notice to IBM if Client permanently removes the Eligible Machine from productive use within Client's Enterprise. Client may also terminate Services immediately prior to the start of any fiscal year for which funds have not been appropriated.

Client will receive a credit for any remaining prepaid period associated with Services Client terminates in accordance with this provision and a separate invoice for the equivalent Services added, if applicable. Other than as described in this Section 7, no credit is given for Client termination during the committed term.

#### **8. Data Processing Protection**

IBM's Data Processing Addendum (DPA) at <http://ibm.com/dpa> and the DPA Exhibit at <https://www.ibm.com/mysupport/s/article/support-privacy> apply to the processing of Client's personal data by IBM on behalf of Client in order to provide IBM Services, if and to the extent i) the European General Data Protection Regulation (E/2016/679) (GDPR); or ii) other data protection laws identified at <http://ibm.com/dpa/dpl> apply.

## **9. Purchase Order Clients**

If Client requires a purchase order for its acquisitions hereunder, the following terms apply. For purchase order clients buying directly through IBM, IBM receives Client purchase orders (PO) as documentation of Client's order for Services acquired under this Attachment. Additional or different terms in any written communication from Client (including a PO) are void. If Client requires a PO, IBM is not required to commence Services until IBM receives Client's fully executed PO. IBM is not responsible for Service delays or lapses in Service caused by PO wait time. IBM must receive a renewal PO at least 30 days prior to the contract period end date to avoid termination for non-renewal.

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This 1) Technical Services Attachment for TSS Offerings (Attachment), 2) applicable Transaction Documents, and 3) the agreement specified herein comprise the complete Agreement regarding the Services and replace any prior oral or written communications between Client and IBM. Accordingly, neither party is relying upon any representation that is not specified in the complete Agreement including, without limitation, any representations concerning 1) levels of service, hours, or charges to provide any Service; 2) the experiences of other clients; or 3) results or savings Client may achieve.

Each party accepts the terms of this Attachment by signing this Attachment by hand or, where recognized by law, electronically.

# International Agreement for Acquisition of Software Maintenance

## Part 1 – General Terms

This IBM International Agreement for Acquisition of Software Maintenance (called the "Agreement") governs Customer's acquisition of IBM software maintenance ("Software Maintenance"), which may also be referred to as subscription and support ("S&S") in connection with IBM System z Programs. Software Maintenance is provided only for those Eligible Programs licensed by Customer within its Enterprise. Acquisition of Software Maintenance in quantities greater than the number for which Customer is licensed does not create or imply any greater license authorization. An "Enterprise" in this Agreement is any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent. "Eligible Programs" are described below.

IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote and market Software Maintenance offerings. When Customer orders Software Maintenance marketed to Customer by IBM Business Partners, IBM will provide Software Maintenance to Customer under the terms of this Agreement. IBM is not responsible for 1) the actions of IBM Business Partners, 2) any additional obligations they have to Customer or 3) any products or services that they supply to Customer under their agreements. In the event that Customer's IBM Business Partner is no longer able to market Software Maintenance, for any reason, Customer may continue to receive Software Maintenance under the terms of this Agreement by instructing IBM to transfer administration of Software Maintenance to either 1) another IBM Business Partner of Customer's choice (who may require Customer to first execute one of their agreements) who is approved to market Software Maintenance to Customer, or 2) IBM.

Section 2 of the Agreement contains terms that are specific to a particular hardware platform. The terms in the remaining sections are in addition to those in section 2, and apply to all platforms.

### 1. Incorporated Terms

Eligible Programs to which this Agreement applies are licensed under the International Program License Agreement ("IPLA") unless otherwise specified by IBM. A copy of the IPLA is provided with each Program in the Eligible Program's directory or in a library identified as "License," a booklet, or on a CD. Sections of the IPLA entitled "Licensee Data and Databases," "Limitation of Liability," "Compliance Verification," "General," and "Geographic Scope and Governing Law," including any associated Country-unique Terms applicable to those sections are also part of this Agreement, subject to the following:

- a. If the IPLA version provided with the IBM Eligible Program is not version 13 or higher (the version number is indicated by the last two digits in the form number – for example, the "13" in Z125-3301-13), then version 13 applies. Customer may obtain a copy of version 13 from IBM or its resellers and on the Internet at [www.ibm.com/software/sla](http://www.ibm.com/software/sla); and
- b. the following changes:
  - (1) The terms "Program" and "Program license(s)" are replaced by the term "Software Maintenance."
  - (2) The term "Licensee" is replaced by the term "Customer."
  - (3) The phrase "the laws of the country in which Customer acquired the Program license" in the Governing Law subsection is replaced by "the laws of the country in which Software Maintenance is acquired."
  - (4) The statement, "All of our rights, duties, and obligations are subject to the courts of the country in which Customer acquired the Program license" in the Jurisdiction subsection is replaced by the statement, "All rights, duties, and obligations of each of the parties are valid only in the country in which Software Maintenance is acquired or, if IBM agrees, the country where Software Maintenance is used."

Capitalized terms used but not defined in this Agreement have the meaning given to them in the IPLA.

## 2. Software Maintenance

a. For Eligible Programs running on an IBM System z platform or equivalent:

- (1) **Eligible Programs:** Programs for which S&S is available are listed at [www-1.ibm.com/servers/eserver/zseries/library/swpriceinfo](http://www-1.ibm.com/servers/eserver/zseries/library/swpriceinfo). Click on IPLA Subscription and Support Addenda.
- (2) **S&S Period:** One year. When Customer orders S&S with a Program, the initial S&S Period begins on the date that IBM makes the Program available to Customer.
- (3) **Early Termination of an S&S Period for a Program:** While Customer may terminate an S&S Period, IBM does not issue a credit or refund for the unused portion of an S&S Period.
- (4) **Automatic Renewal:** If, by the last day of the current S&S Period, IBM has received no written communication from Customer concerning Customer's renewal of S&S for a Program, IBM will automatically renew that expiring S&S Period under the Agreement terms and charges in effect on that date, subject to applicable law. Subsequent S&S Periods begin on the day following the end of the preceding S&S Period.
- (5) **S&S Period Adjustment:** When Customer acquires S&S initially or resumes it, or prior to the end of the then current S&S Period, Customer may request that the S&S Period duration is adjusted to end at a month of Customer's choice. If Customer does not choose a date, IBM will inform Customer of the end date. The "S&S ("Software Maintenance") Charge" (see item (1) in subsection b. Software Maintenance acquired directly from IBM of section 3. Charges and Payment below) will be pro-rated accordingly.
- (6) **S&S:** During the S&S Period, for the unmodified portion of a Program, and to the extent problems can be recreated in the specified operating environment, IBM will provide the following:
  - (a) defect correction information, a restriction, or a bypass;
  - (b) Program Updates: periodic releases of collections of code corrections, fixes, functional enhancements and new versions and releases to the Program and documentation; and
  - (c) Technical Assistance: a reasonable amount of remote assistance via telephone or electronically to address suspected Program defects. Technical assistance is available from the IBM support center in the Customer's geography. Additional details regarding Technical Assistance, including IBM contact information (see Appendix C: Contact Information), are provided in the IBM Software Support Handbook at [www14.software.ibm.com/webapp/set2/sas/f/handbook/home.html](http://www14.software.ibm.com/webapp/set2/sas/f/handbook/home.html).

S&S does not include assistance for 1) the design and development of applications, 2) Customer's use of Programs in other than their specified operating environment, or 3) failures caused by products for which IBM is not responsible under this Agreement.

S&S is provided only if the Program is within its support timeframe as specified in the Software Support Lifecycle policy for the Program.

- (7) **Resumption Fee:** A charge to resume S&S after Customer either (a) declined S&S at the time Customer acquired the license for a Program or (b) terminated S&S. This charge is equal to the total of all S&S Charges that Customer would have paid during the lapsed interval. An S&S Period in such an instance begins on the date that IBM accepts Customer's order.
  - (8) **S&S Upgrade:** If Customer upgrades S&S due to an increase in the level of use of an Eligible Program, any increase to the S&S Charge will be pro-rated to the end of the current S&S Period.
- b. For Eligible Programs running on IBM distributed platforms (e.g., IBM Power Systems, IBM System i, IBM System p, IBM System x, IBM System Storage, and IBM Retail Store Solutions) or equivalent:

- (1) **Eligible Programs:** Unless otherwise provided by IBM, Eligible Programs for which Software Maintenance is available are listed at [www.ibm.com/servers/eserver/series/sftsol/subscript2.htm](http://www.ibm.com/servers/eserver/series/sftsol/subscript2.htm) or may be obtained from Customer's IBM marketing representative or IBM Business Partner.
- (2) **Initial Software Maintenance Period:** Customer must choose either one year, the charge for which may be included with the Eligible Program, or, for an additional charge, three years of Software Maintenance at the time Customer orders an Eligible Program. The Initial Software Maintenance Period begins on the date that IBM makes the Program available to Customer. If the Eligible Program is part of an IBM Software Maintenance for OS/400, i5/OS, and selected Programs, then the Initial Software Maintenance Period duration will be adjusted so that the expiration coincides with that of the other Eligible Programs in the group. In such event, the Initial Software Maintenance Period may be less than one year.
- (3) **Subsequent Software Maintenance Periods (under this Agreement):** One or three years, at Customer's option.
- (4) **Early Termination of a Software Maintenance Period for a Program:** While Customer may terminate a Software Maintenance Period, IBM does not issue a credit or refund for the unused portion of a Software Maintenance Period.
- (5) **Renewal:**
  - (a) It is Customer's responsibility to renew Software Maintenance at the end of each Software Maintenance Period. IBM or Customer's IBM Business Partner will renew expiring Software Maintenance under terms and charges made available to Customer prior to expiration of the then current Software Maintenance Period, if it receives Customer's order to renew (e.g., order form, order letter, purchase order) not later than the expiration date. Subsequent Software Maintenance Periods under this Agreement (or other terms and charges made available to Customer prior to expiration of the then current Software Maintenance Period) begin on the day following the end of the preceding Software Maintenance Period. If Customer does not renew Software Maintenance by the expiration date of the Software Maintenance Period but subsequently wishes to acquire Software Maintenance, a Software Maintenance After License Fee, as set forth below, will apply.
  - (b) For Eligible Programs running on Power Systems, System i or System p platforms, if the Customer specifies in advance, IBM, even if it does not receive Customer's order to renew, will continue to provide Software Maintenance under terms and charges made available to Customer prior to expiration of the current Software Maintenance Period.
- (6) **Software Maintenance:** During the Software Maintenance Period:
  - (a) IBM makes available to Customer the most current commercially available version, release, or update to all of the Eligible Programs for which Customer acquires Software Maintenance under this Agreement, should any be made available. For Power Systems, System i, and System p Programs under this Agreement, Customer may obtain upgrades to any more recent commercially available version, release or update. Customer's right to upgrade to a new version, release or update under this subsection may only be exercised during the Software Maintenance Period and expires at the end of the Period if Software Maintenance is not renewed.
  - (b) For IBM Software Maintenance for OS/400, i5/OS, and selected Programs, Customer is entitled to upgrade an Eligible Program to a specific version or release only one time per machine, notwithstanding 2.b.(6)(a) above.
  - (c) IBM provides Customer technical assistance for Customer's 1) routine, short duration installation and usage (how-to) questions; and 2) code-related questions.
  - (d) IBM provides assistance via telephone and, if available, electronic access, to only Customer's information systems (IS) technical support personnel during the normal business hours (IBM published prime shift hours) of IBM support center in the Customer's geography. This assistance is not available to Customer's end users. IBM provides Severity 1 assistance 24 hours a day, every day of the year. Additional details regarding assistance, including the definition of Severity 1, are

provided in the IBM Software Support Handbook at  
[www14.software.ibm.com/webapp/set2/sas/f/handbook/home.html](http://www14.software.ibm.com/webapp/set2/sas/f/handbook/home.html).

- (e) Software Maintenance does not include assistance for 1) the design and development of applications, 2) Customer's use of Eligible Programs in other than their specified operating environment, or 3) failures caused by products for which IBM is not responsible under this Agreement.
- (f) And only if the Program is within its support timeframe as specified in the Software Support Lifecycle policy for the Program.
- (7) **Software Maintenance After License Fee** (which may be referred to as "Maintenance After License" or "MAL" in connection with System i platforms and as "After License Charge" or "ALC" in connection with System p platforms):
  - (a) Software Maintenance After License Fee is the charge to resume Software Maintenance if Customer
    - i. did not renew it before the end of the then current Software Maintenance Period; or
    - ii. terminated it.
  - (b) The Software Maintenance Period for a resumption of Software Maintenance begins on the date that IBM accepts Customer's order.
  - (c) The Software Maintenance After License Fee applies when Customer acquires a used Power Systems, System i, or System p machine and wishes to acquire Software Maintenance for OS/400, i5/OS, and selected Programs, unless
    - i. the machine has the most current version and release of the appropriate operating system installed; and
    - ii. Customer acquires Software Maintenance within 30 days of Customer's acquisition of the machine.
  - (d) The Software Maintenance After License Fee applies when Customer acquires a used Power Systems, System i, or System p machine and wishes to acquire Software Maintenance for the AIX operating system or AIX selected Programs unless
    - i. the machine has a current version and release of the AIX operating system or AIX selected Programs installed and
    - ii. Customer acquires Software Maintenance within 30 days of Customer's acquisition of the machine.
  - (e) For Software Maintenance for other Eligible Programs not otherwise covered by this subsection 2.b(7), a Software Maintenance After License Fee may apply to Customers acquiring used Power System, System i, or System p machines. Please contact your IBM representative, or where applicable, an IBM Business Partner or IBM Call Center, for further information.
- (8) Transfer of IBM Software Maintenance on Power Systems, System i and System p machines: In addition to the provisions of section 4. "Software Maintenance Transferability" below, Software Maintenance for Programs running on Power Systems, System i or System p platforms
  - (a) applies to a designated machine (type, model and serial number);
  - (b) may be transferred only to another machine that is licensed for the same operating system at the same or a more recent release level; and
  - (c) may incur an increase in the Software Maintenance Charge if the "transferred to" machine is of a larger capacity.

### 3. Charges and Payment

If Customer returns an Eligible Program for refund as allowed under its license terms, IBM or Customer's IBM Business Partner will terminate, and refund any charges paid for, Software Maintenance ordered with the Program. IBM does not give refunds for Software Maintenance without the return of the associated Eligible Program.

- a. Software Maintenance acquired from an IBM Business Partner  
When Customer acquires Software Maintenance from an IBM Business Partner, the IBM Business Partner sets the charges and the terms governing charges. Customer will pay Customer's IBM Business Partner directly.
- b. Software Maintenance acquired directly from IBM
  - (1) Charges for Software Maintenance during each Software Maintenance Period, called the Software Maintenance Charge, are invoiced in advance.
  - (2) The Software Maintenance Charge may vary, depending on, for example, the machine (type/model), the Eligible Program or group of Eligible Programs, or level of use of the Eligible Program.
  - (3) IBM may increase the Software Maintenance Charge without notice. An increase will not apply to Customer if IBM receives Customer's order for Software Maintenance before the announcement date of the increase and within three months of receipt by IBM of Customer's order IBM makes Software Maintenance available to Customer. Customer receives the benefit of a decrease in the Software Maintenance Charge for amounts which become due on or after the effective date of the decrease.
  - (4) Amounts are due and payable upon receipt of invoice. Customer agrees to pay accordingly, including any late payment fee.
  - (5) If any authority imposes a duty, tax, levy or fee, excluding those based on IBM's net income, upon Software Maintenance IBM supplies under this Agreement, then Customer agrees to pay that amount as specified in the invoice, unless Customer supplies exemption documentation.

#### **4. Software Maintenance Transferability**

Customer may transfer Software Maintenance only to an entity that is within Customer's Enterprise and located within the country in which Software Maintenance is acquired, provided that the entity receiving the Eligible Program agrees to the terms of this Agreement.

#### **5. Customer's Responsibilities**

Customer agrees that when Customer acquires Software Maintenance for an Eligible Program:

- a. Customer will acquire Software Maintenance for the same level of use as that at which the Eligible Program is authorized. Partial coverage for a particular Eligible Program is not offered;
- b. Customer is responsible for the results obtained from the use of the Software Maintenance;
- c. Customer will, at IBM's request, allow IBM to remotely access Customer's system to assist Customer in isolating the software problem cause;
- d. Customer remains responsible for adequately protecting Customer's system and all data contained in it whenever IBM remotely accesses it with Customer's permission to assist Customer in isolating the software problem cause;
- e. Customer will provide sufficient, free, and safe access to Customer's facilities for IBM to fulfill its obligations; and
- f. except as permitted by section 4. Software Maintenance Transferability above, Customer will not assign, or otherwise transfer, this Agreement or Customer's rights under this Agreement, or delegate Customer's obligations, without IBM's prior written consent. Any attempt to do so is void. The assignment of this Agreement, in whole or in part, within the Enterprise of which either of us 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 under this Agreement without obtaining your 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.

## 6. Warranty for Software Maintenance

IBM warrants that Software Maintenance will be provided using reasonable care and skill and according to its description in the IBM Software Support Handbook at [www14.software.ibm.com/webapp/set2/sas/t/handbook/home.html](http://www14.software.ibm.com/webapp/set2/sas/t/handbook/home.html). Customer agrees to provide timely written notice of any failure to comply with this warranty so that IBM can take corrective action.

The warranties will be voided by misuse, accident, modification, unsuitable physical or operating environment, operation in other than the specified operating environment, or failure caused by a product for which IBM is not responsible.

**EXCEPT AS EXPRESSLY REQUIRED BY LAW WITHOUT THE POSSIBILITY OF CONTRACTUAL WAIVER OR LIMITATION, THESE WARRANTIES ARE CUSTOMER'S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF SATISFACTORY QUALITY, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE.**

IBM does not warrant uninterrupted or error-free provision of Software Maintenance or that IBM will correct all defects.

## 7. Changes to Agreement Terms

IBM may change the terms of this Agreement by giving Customer three months' prior written notice by letter or e-mail, either directly to Customer or through Customer's IBM Business Partner. These changes are not retroactive and apply, as of the effective date IBM specifies in the notice, only to new orders and renewals.

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

## 8. Termination and Withdrawal

Either of us 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.

IBM may withdraw Software Maintenance for an Eligible Program by publishing a notice of withdrawal not less than 12 months prior to its effective date. If IBM withdraws Software Maintenance for which Customer has prepaid and IBM has not yet fully provided it to Customer, at its sole discretion IBM will either continue to provide Software Maintenance to Customer until the end of the current Software Maintenance Period or give Customer a prorated refund. Acquisition of Software Maintenance does not extend the period for which an Eligible Program is supported.

Notwithstanding anything to the contrary in this Agreement, if IBM terminates Customer's license for an Eligible Program due to Customer's breach of any of its terms, IBM may also concurrently terminate Software Maintenance for that Eligible Program. In this instance, IBM is not obligated to issue a refund or credit for any unused portion of Software Maintenance.

IBM may withdraw the Software Maintenance offering in its entirety on 12 months' written notice to all then current Software Maintenance customers by letter or e-mail.

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

## 9. Additional Terms

- a. To assist Customer in isolating the cause of a software problem, IBM may ask Customer to (1) allow IBM to remotely access Customer's system or (2) send customer information or system data to IBM. IBM uses information about errors and problems only to improve its products and services and assist with its provision of Software Maintenance. IBM may use subcontractors and IBM Enterprise entities in other countries for these purposes, and Customer authorizes IBM to do so.

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

- b. All information exchanged is nonconfidential. If either of us requires the exchange of confidential information, it will be made under a signed confidentiality agreement.
- c. Each may communicate with the other by electronic means and such communication is acceptable as a signed writing to the extent permissible under applicable law. 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.

This Agreement is the complete agreement regarding Customer's acquisition of Software Maintenance, and replaces any prior oral or written communications between Customer and IBM concerning Software Maintenance. In entering into this Agreement, neither party is relying on any representation that is not specified in this Agreement including without limitation any representations concerning: 1) performance or function of any product or system, other than as expressly warranted in section 6 above; 2) the experiences or recommendations of other parties; or 3) results or savings Customer may achieve. Additional or different terms in any written communication from Customer (such as a purchase order) are void.

Customer accepts the terms of this Agreement without modification by any one of the following means: to the extent permissible under applicable law, by ordering, using, or making payment for Software Maintenance or, where required by law, signing a transaction document. Software Maintenance becomes subject to this Agreement when IBM or Customer's IBM Business Partner accepts Customer's order or payment. Once in effect, 1) unless prohibited by applicable local law or specified otherwise, any reproduction of this Agreement made by reliable means (for example, photocopy, electronic scan or facsimile) is considered an original and 2) Software Maintenance Customer orders under this Agreement is subject to it.

## Part 2 – Country-unique Terms

### AMERICAS

*The following terms apply to all Americas countries (except Brazil, Canada and the United States) unless a specific country term states otherwise:*

#### 3. Charges and Payment

*In subsection b. Software Maintenance acquired directly from IBM, the following replaces item (4):*

Amounts are due upon receipt of invoice and payable as IBM specifies in a transaction document. The currency for payment of amounts due is US dollars or the equivalent in local currency as follows:

- (a) As long as the country operates in a free currency exchange market, Customer and IBM agree that IBM will accept payment in the applicable country national currency calculated at the country official exchange rate published by the bank specified in a transaction document on the date payment is made.
- (b) If the government of a country establishes any restriction or limitation on its free currency exchange markets, Customer agrees to make payments to IBM in US dollars to a bank account in New York, NY, USA, designated by IBM in the transaction document, provided that such payment is not illegal under country law. If such method of payment is forbidden by country law, Customer agrees to pay the amount indicated in the transaction

document in country national currency, calculated at the official exchange rate which is in use for the remittance of dividends and net earnings to foreign investors outside the country.

Customer agrees to pay accordingly, including any late payment fee. The late payment fee is calculated and payable in US dollars at two percent (or the maximum rate allowed by local law if such is less than two percent) of the delinquent amount due per each thirty day period during which any delinquent balance remains unpaid.

*All additional terms apply to the referenced country.*

## **BRAZIL**

### **2. Software Maintenance**

*In subsection a. For Eligible Programs running on an IBM System z platform,*

*items 2 through and including 5 are deleted in their entirety.*

*In item 6, the phrase "S&S Period" is replaced by the following:*

the period for which Customer has paid for S&S

*In item 8, the phrase "pro-rated to the end of the current S&S Period" is replaced by the following:*

effective on the first day of the following month

### **3. Charges and Payment**

*In subsection b. Software Maintenance acquired directly from IBM, the following replaces item (1):*

For Eligible Programs running on IBM distributed platforms or equivalent, charges for Software Maintenance during each Software Maintenance Period, called the Software Maintenance Charge, are invoiced in advance. For Eligible Programs running on an IBM System z platform or equivalent, charges for Software Maintenance, called the Software Maintenance Charge, are invoiced monthly in advance.

*In subsection b. Software Maintenance acquired directly from IBM, the following replaces item (3):*

IBM may increase charges for Software Maintenance provided under this Agreement. IBM's ability to increase such charges is subject to the requirements of Brazilian law.

*In subsection b. Software Maintenance acquired directly from IBM, the following replaces item (4):*

Amounts are due upon receipt of invoice and payable in local currency as IBM specifies in a transaction document. Customer agrees to pay accordingly, including any late payment fee. Delinquent amounts are subject to monetary correction based on the inflation index called the "General Price Index" calculated by Getulio Vargas Foundation (IGP-M/FGV), plus interest at the rate of one percent per month, both calculated "pro rata die." The late payment fee is calculated against the resultant delinquent amount at the following rates:

- (a) if payment is made between the 31st day and the 60th day from invoice date, a two percent late payment penalty applied to the resultant delinquent amount, or
- (b) if payment is made 61 or more days from invoice date, a ten percent late payment penalty applied to the resultant delinquent amount.

*The following is added to subsection b. Software Maintenance acquired directly from IBM as item (6):*

Amounts due are expressed in local currency.

*The following is added to subsection b. Software Maintenance acquired directly from IBM as item (7):*

The charges for Software Maintenance acquired under this Agreement are inclusive of all applicable taxes that are IBM's responsibility on the base date established in a transaction document. The parties agree that IBM will adjust the charges accordingly should any of the following occur:

- (a) any change is made to the rate, form or base of calculation, form of payment, classification or taxes levied on the Software Maintenance or on their costs,
- (b) a new applicable tax is created,
- (c) any change is made to any other legal aspect related to the taxes applicable on the base date,
- (d) any change is made to the origin or to the delivery location for the Software Maintenance,
- (e) any change is made to the location where Services are to be provided, or
- (f) any change is made to the manner in which Services are marketed.

#### **7. Changes to Agreement Terms**

*The following replaces this section in its entirety:*

In order to maintain flexibility in our business relationship, the terms of this Agreement may be changed upon execution of an amendment and the changes shall apply as of the effective date specified in the amendment. They apply 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.

#### **8. Termination and Withdrawal**

*The words "or e-mail" in the fourth paragraph of this section are deleted.*

#### **9. Additional Terms**

*In the first sentence of item c, the phrase "and such communications are acceptable as a signed writing" is deleted.*

**In the clause that begins with "This Agreement is the complete..."**

*In the fourth sentence, which begins with "Customer accepts the terms...", the following phrase is deleted:*

any one of the following means: to the extent permissible under applicable law, by ordering, using, or making payment for Software Maintenance or, where required by law,

*In the fifth sentence, which begins with "Software Maintenance becomes subject to this Agreement...", the phrase "accepts Customer's order or payment" is replaced by the following phrase:*

accepts Customer's order by signing it.

**ANGUILLA, ANTIGUA AND BARBUDA, ARUBA, BAHAMAS, BARBADOS, BERMUDA, BRITISH VIRGIN ISLANDS, CAYMAN ISLANDS, DOMINICA, GRENADA, GUYANA, JAMAICA, MONTSERRAT, NETHERLANDS ANTILLES, SAINT KITTS AND NEVIS, SAINT LUCIA, SAINT MARTIN, SAINT VINCENT AND THE GRENADINES, SURINAME, TRINIDAD AND TOBAGO, TURKS AND CAICOS ISLANDS, BELIZE, BOLIVIA, COSTA RICA, DOMINICAN REPUBLIC, EL SALVADOR, HAITI, HONDURAS, GUATEMALA, NICARAGUA, PANAMA, AND PARAGUAY**

## **2. Software Maintenance**

*The following replaces (4) Automatic Renewal in subsection 2.a For Eligible Programs running on an IBM System z platform or equivalent:*

IBM will renew, for an additional payment, expiring S&S for all of Customer's Program licenses for an additional Software Maintenance Period if IBM receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current coverage period or (2) Customer's payment within 30 days of Customer's receipt of the S&S invoice for the next coverage period.

### **UNITED STATES OF AMERICA**

## **2. Software Maintenance**

*The following is added at the end the sentence beginning with "While Customer may terminate an S&S Period ..." in (3) Early Termination of an S&S Period for a Program in subsection 2.a For Eligible Programs running on an IBM System z platform or equivalent:*

unless the S&S Period was renewed under the provisions of subsection 4 Automatic Renewal (below). In such event, Customer may obtain a credit, prorated to the end of that S&S Period from the first day of the month following the later of (a) IBM's receipt of Customer's termination request or (2) Customer's requested date of termination, through the end of that S&S Period.

### **ASIA PACIFIC**

### **AUSTRALIA**

## **3. Charges and Payment**

*The following paragraph is added after item b:*

All charges or other amounts payable under this Agreement are specified to include applicable goods and services tax ("GST").

*The following paragraph replaces item b(5) in its entirety:*

If any government or authority imposes a duty, tax (other than income tax), levy, or fee, on the Agreement or on the Software Maintenance itself, that is not otherwise provided for in the amount payable, Customer agrees to pay it when IBM invoices Customer. If the rate of GST changes, IBM may adjust the charge or other amount payable to take into account that change from the date the change becomes effective.

## **6. Warranty for Software Maintenance**

*The following paragraph is added as the first paragraph of this section:*

The warranties specified in this section are in addition to any rights Customer may have under the Competition and Consumer Act 2010 or other legislation and are only limited to the extent permitted by the applicable legislation.

### **CAMBODIA, LAOS, PEOPLE'S REPUBLIC OF CHINA, VIETNAM, BANGLADESH, BHUTAN, NEPAL**

## **2. Software Maintenance**

*The following replaces (4) Automatic Renewal in subsection 2.a For Eligible Programs running on an IBM System z platform or equivalent:*

IBM will renew, for an additional payment, expiring S&S for all of Customer Program licenses for an additional S&S Period if IBM receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current coverage period or (2)

Customer's payment within 30 days of Customer's receipt of the S&S invoice for the next coverage period.

#### **HONG KONG SAR, MACAU SAR, AND TAIWAN**

*As applies to transactions initiated and performed in Taiwan and the special administrative regions, phrases throughout this Agreement containing the word "country" (for example, "country of acquisition" and "country of installation") are replaced with the following:*

- (1) In Hong Kong SAR: "Hong Kong SAR"*
- (2) In Macau SAR: "Macau SAR" except in the Governing Law clause (section 14.1)*
- (3) In Taiwan: "Taiwan."*

#### **INDONESIA**

##### **8. Termination and Withdrawal**

*The following paragraph is added between the first and second paragraphs:*

We both waive in this regard, the provision of article 1266 of the Indonesian Civil Code to the extent the article provision requires such court decree for the termination of an agreement creating mutual obligations.

#### **JAPAN**

##### **8. Termination and Withdrawal**

*The following paragraph is added to this section:*

When all or a substantial portion of either party's assets, credits or business are so changed as to make continued performance of that party's obligations impracticable or impossible, the other party may terminate this Agreement with prior notice.

#### **NEW ZEALAND**

##### **6. Warranty for Software Maintenance**

*The following paragraph is added as the first paragraph of this section:*

The warranties specified in this Part are in addition to any rights Customer may have under the Consumer Guarantees Act 1993 or other legislation which cannot be excluded or limited. The Consumer Guarantees Act 1993 will not apply in respect of any goods or services which IBM provides, if Customer requires the goods or services for the purposes of a business as defined in that Act.

#### **EUROPE, MIDDLE EAST, AFRICA (EMEA)**

##### **EUROPEAN UNION MEMBERS**

##### **6. Warranty for Software Maintenance**

*For European Union Member States the following is added to Section 6:*

In the European Union, consumers have legal rights under applicable national legislation governing the sale of consumer goods and services. Such rights are not affected by the provisions set out in this Section 6 Warranty for Software Maintenance.

## AUSTRIA

### 6. Warranty for Software Maintenance

*This Section 6. Warranty for Software Maintenance is amended as specified for GERMANY.*

## FRANCE

### 3. Charges and Payment

*In subsection b. Software Maintenance acquired directly from IBM the following is added to the end of item (3).*

If Customer disagrees with the increase, Customer may terminate the transaction by notifying IBM, in writing, within fifteen days after the date of IBM's notification to Customer of the increase.

## GERMANY

### 3. Charges and Payment

*In subsection b. Software Maintenance acquired directly from IBM, item (3), "three months" is replaced with "four months."*

### 6. Warranty for Software Maintenance

*For Germany (and Austria) the following replaces Section 6. Warranty for Software Maintenance in its entirety.*

IBM warrants that Software Maintenance will be provided using reasonable care and skill and according to its description in the IBM Software Support Handbook at [www14.software.ibm.com/webapp/set2/sas/f/handbook/home.html](http://www14.software.ibm.com/webapp/set2/sas/f/handbook/home.html). Customer agrees to provide timely written notice of any failure to comply with this warranty so that IBM can take corrective action. IBM will remedy any defects covered by warranty, of which written notice has been given by Customer. If a defect is not remedied within a reasonable period of time, Customer may with respect to that defect, at Customer's choice, either request a reduction of price, or, if the value or the serviceability of the work is substantially impaired, instant termination ("Kündigung") of this Agreement. In case of minor defects or deviations, Customer shall not be entitled to terminate the Agreement.

The warranties will be voided by misuse, accident, modification, unsuitable physical or operating environment, operation in other than the specified operating environment, or failure caused by a product for which IBM is not responsible.

Without prejudice to Customer's rights under other warranty provisions of the Agreement, IBM does not warrant uninterrupted or error-free provision of Software Maintenance or that IBM will correct all defects.

### 9. Additional Terms

*The following paragraph is added as the last paragraph of subsection a:*

When assisting Customer in isolating the cause of a software problem, should IBM access Customer's personally-identifiable data upon Customer's request, "IBM Supplementary Terms and Conditions for Processing of Customer Data by Order according to § 11 BDSG" applies.

**6. Warranty for Software Maintenance (Ireland only)**

*The following paragraph is added:*

Except as expressly provided in these terms and conditions, or Section 12 of the Sale of Goods Act 1893 as amended by the Sale of Goods and Supply of Services Act, 1980 (the "1980 Act"), all conditions or warranties (express or implied, statutory or otherwise) are hereby excluded including, without limitation, any warranties implied by the Sale of Goods Act 1893 as amended by the 1980 Act (including, for the avoidance of doubt, Section 39 of the 1980 Act).

**Entire Agreement**

*The following sentence is added to the second from last paragraph of Part 1:*

Nothing in this paragraph shall have the effect of excluding or limiting liability for fraud.

**PARTICIPATING ADDENDUM**



**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

Led by the State of Minnesota

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Master Agreement #: **23012** (*hereinafter "Master Agreement"*)

Contractor: **INTERNATIONAL BUSINESS MACHINES CORPORATION** (*hereinafter "Contractor"*)

Participating State: **STATE OF HAWAII** (*hereinafter "Participating State"*)

**State of Hawaii, State Procurement Office (SPO) Vendor List Contract No. 24-03**

This Addendum will add the State of Hawaii as a Participating State to purchase from the NASPO ValuePoint Master Agreement Number 23012 with International Business Machines Corporation.

1. Scope: This addendum covers the Computer Equipment (Desktops, Laptops, Tablets, Servers, Storage, Including Related Peripherals & Services) led by the State of Minnesota for use by state agencies and other entities located in the Participating State of Hawaii authorized by that State's statutes to utilize State contracts.
2. Participation: All jurisdictions located within the State of Hawaii, which have obtained prior written approval by its Chief Procurement Officer, will be allowed to purchase from the Master Agreement. Private nonprofit health or human services organizations with current purchase of service contracts governed by Hawaii Revised Statutes (HRS) chapter 103F are eligible to participate in the SPO price/vendor list contracts upon mutual agreement between the Contractor and the non-profit. (Each such participating jurisdiction and participating nonprofit is hereinafter referred to as a "Participating Entity"). Issues of interpretation and eligibility for participation are solely within the authority of the Administrator, State Procurement Office.
3. Primary Contacts: The primary contact individuals for this Participating Addendum are as follows (or their named successors):

Contractor

|            |                                                                  |
|------------|------------------------------------------------------------------|
| Name:      | Urania Davis                                                     |
| Address:   | 6303 Barfield Rd, NE Sandy Springs, GA 30328                     |
| Telephone: | (919)486-6625                                                    |
| Fax:       | N/A                                                              |
| Email:     | <a href="mailto:Urania.davis1@ibm.com">Urania.davis1@ibm.com</a> |

**PARTICIPATING ADDENDUM**

**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

Led by the State of Minnesota

Participating State

|            |                                                                                   |
|------------|-----------------------------------------------------------------------------------|
| Name:      | Matthew Chow                                                                      |
| Address:   | State Procurement Office<br>1151 Punchbowl Street, Room 416<br>Honolulu, HI 98613 |
| Telephone: | (808) 586-0577                                                                    |
| Fax:       | (808) 586-0540                                                                    |
| Email:     | <a href="mailto:matthew.m.chow@hawaii.gov">matthew.m.chow@hawaii.gov</a>          |

4. Participating State Modifications or Additions to the Master Agreement: These modifications or additions apply only to actions and relationships within the Participating State and its Entities.

☒ The following changes are modifying or supplementing the Master Agreement terms and conditions.

**Changes:**

A. eProcurement System and Marketplace

The State of Hawaii, State Procurement Office, has instituted a statewide eProcurement system, Aloha eBuys. Periscope Holdings, Inc. ("Periscope"), the State's eProcurement system provider, has implemented Aloha eBuys, which will allow Participating Entities to easily search and purchase from this Price/Vendor List Contract. Therefore, Contractor acknowledges and agrees to the following, which requirements are separate from and additive to any of Contractor's requirements under the NASPO ValuePoint Master Agreement.

- i. Remittance of the VCAF – On a quarterly basis, and at the same time as the submission of the Quarterly Sales Report per the above, the Contractor shall remit the VCAF via Automated Clearing House (ACH) transaction directly to Periscope using the Reconciler portal, or as otherwise reasonably directed by Periscope or the State, no later than thirty (30) days after the end of each calendar quarter. The calendar quarters will end September 30, December 31, March 31, and June 30 of each year. Periscope's or the State's receipt or acceptance of any Quarterly Sales Report and/or VCAF furnished pursuant to the Contract shall not preclude Periscope or the State from challenging the validity thereof at any time. Failure to remit the Quarterly Sales Report and/or VCAF timely and accurately may result in Contractor's goods and/or services being made ineligible for purchase through the Aloha eBuys marketplace.



**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

Led by the State of Minnesota

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Continued non-compliance by the Contractor may result in the Contractor being found in default of the Contract and, thus, may be subject to termination. Assistance with VCAF remittance is available from the Periscope Customer Service by email or telephone, which contact information shall be providing during Contractor's onboarding.

- ii. Catalog Implementation – Contractor shall cooperate with State and/or Periscope as requested, including attendance of meetings, to include and maintain throughout the term an Aloha eBuys marketplace catalog of products and services consistent with and limited to the Contract items. Contractor may choose one of the following catalog options.
  - a. Hosted Catalog – Contractor shall provide a list of its awarded products and services (including product name, descriptions, images, relevant specifications, keyword search terms, etc.) and pricing consistent with the Contract and in the electronic format provided by Periscope. The product and service list may only provide the awarded products and services at prices listed in the Contract, including quantity and other discounts. In order to maintain the most up-to-date version of the product and service list in compliance with Contract terms, Contractor must provide updated product and service pricing information via electronic format approved by Periscope at least annually but no more than four times per year or as otherwise permitted by the Contract.
  - b. Punchout Catalog – Contractor shall “punch out” to its own online catalog, provided that its own online catalog is capable of being integrated with the Aloha eBuys marketplace via Commerce eXtensible Markup Language. Contractor's punchout catalog may only provide the awarded products and services at prices listed in the Contract, including quantity and other discounts. Contractor must validate its punchout catalog is current by providing a written update to Periscope every four (4) months (or as otherwise provided in the Contract), verifying that Contractor has audited the offered products and services and pricing.

Any price stated by Contractor under the Contract (including in its hosted or punchout catalog) shall be inclusive of the VCAF, and Contractor shall not reflect the VCAF as a separate line item on customer quotes and invoices.

Contractor shall 1) attend a vendor onboarding meeting with Periscope within thirty (30) days of the date of execution of this Amendment, and 2) complete upload of the hosted catalog or integration of the punchout

**PARTICIPATING ADDENDUM**



**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

Led by the State of Minnesota

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catalog as well as the approval process(es) within ninety (90) calendar days of the date of execution of this Amendment. Contractor shall cooperate with State and Periscope for any other reasonable requests to ensure a catalog's accurate depiction of the Contract.

Any changes to Contractor's catalog permitted by the Contract must be pre-approved in writing by the State.

- iii. Vendor and Contract Performance Reviews – The State and/or Periscope may reasonably request Contractor to participate virtually in an annual business review, for which review Contractor shall provide Contract sales information as well as marketing action plans, target strategies and staff training plans and requirements designed to grow utilization of the Contract. Periscope shall also provide and discuss Quarterly Sales Reporting and VCAF remittance compliance data.
  - iv. Retention and Inspection of Records and Audit – The Contractor shall keep records of all Sales in sufficient detail to enable the State or Periscope to determine the VCAF payable by the Contractor. The State and/or Periscope may examine and audit, at its own expense, Contractor's Sales records and Sales Reports for completeness and accuracy. If such examination reveals underpayment of the VCAF, the Contractor shall immediately pay to Periscope the amount of deficiency. If the examination reveals an underpayment of 5% or more, then the Contractor shall reimburse the State and Periscope for the cost of the audit.
- B. Quarterly Sales Reporting. The Contractor shall be required to submit a quarterly report documenting all Sales made under the Contract ("Quarterly Sales Report"). "Sales" shall mean total invoices for gross purchases, less any credits, taxes, regulatory fees, and separately stated shipping charges not included in unit prices, procured on or utilizing pricing and/or other terms of this Contract, regardless of the purchase process. The Quarterly Sales Report shall be submitted directly to Periscope using the Reconciler portal (Periscope's reporting tool to which a link shall be provided to Contractor), or otherwise as reasonably directed by Periscope or State. Quarterly Sales Report will include any periods less than a full calendar quarter if Amendment and/or Contract does not start at the first day of a quarter or end on the last day of the quarter.

Contractor shall submit one Quarterly Sales Report for each contract for each reporting period in accordance with the following schedule:

**PARTICIPATING ADDENDUM**

**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

Led by the State of Minnesota

|                        | <b>Date Range</b>       | <b>Due No Later Than</b> |
|------------------------|-------------------------|--------------------------|
| Fiscal Year, Quarter 1 | July 1 – September 30   | October 31               |
| Fiscal Year, Quarter 2 | October 1 – December 31 | January 31               |
| Fiscal Year, Quarter 3 | January 1 – March 31    | April 30                 |
| Fiscal Year, Quarter 4 | April 1 – June 30       | July 31                  |

The Quarterly Sales Report must contain the following information:

- a. Complete and accurate details of all Sales, credits, returns, refunds, and the like for the reporting quarter;
- b. Purchasing Participating Entity and type;
- c. Product/service description, unit price, quantity and total sale amount;
- d. Invoice number and date;
- e. Total Vendor Collected Administrative Fee amount due for the reporting quarter. "Vendor Collected Administrative Fee (VCAF)" shall mean that for all Sales made under or utilizing the pricing or other terms of the Contract that have been invoiced, the Contractor shall remit a VCAF in the amount of one and one-half percent (1.5%) of all Sales to Periscope on behalf of the State;
- f. Such other information as the State and Periscope may reasonably request; and
- g. If no Sales were made during the reporting quarter, then a Quarterly Sales Report shall still be submitted showing zero Sales and zero VCAF due.

Initiation and submission of the Quarterly Sales Report are the responsibility of the Contractor without prompting or notification by Periscope or the State, and Periscope and the State assume no responsibility for any Contractor's failure to meet its sales reporting and fee remittance obligations. The State reserves the right to contact Contractor at any time to request that Contractor attest to the amounts reported to have been paid to them by Participating Entities.

The State and Periscope shall have a perpetual, irrevocable, non-exclusive, royalty free, transferable right to display, modify, copy, and otherwise use reports, data and information provided.

- C. The validity of this Addendum, any of its terms or provisions, as well as the right and duties of the parties in this Addendum, shall be governed by the laws of the State of Hawaii. The attached Exhibit A, Attorney General's General Conditions, are made part of this Addendum. Any action at law or in equity to enforce or interpret the provisions of this Addendum shall be brought in a court of competent jurisdiction in Honolulu, Hawaii.
- D. Inspection of Facilities. Pursuant to HRS § 103D-316, the Participating State, at reasonable times, may inspect the part of the plant or place of business of the



**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

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Contractor or any subcontractor that is related to the performance of a Master Agreement and this Addendum.

- E. Campaign Contributions. The Contractor is notified of the applicability of HRS § 11-355, which prohibits campaign contributions from Contractor during the term of the Addendum if the contractor is paid with funds appropriated by the Hawaii State Legislature.
- F. Purchases by State of Hawaii government entities under this Master Agreement are not mandatory. This addendum is non-exclusive and any conflict among documents shall follow the Order of Precedence described in the Master Agreement.
- G. The State of Hawaii's purchasing card (pCard) is required to be used by the State's executive departments/agencies (excluding the Department of Education, the Hawaii Health System Corporation, the Office of Hawaiian Affairs, and the University of Hawaii) for all orders totaling less than \$2,500. For purchases of \$2,500 or more, agencies may use the pCard, subject to its credit limit or issue a purchase order.
- H. Pursuant to HRS §103D-310(c), if Contractor is doing business in the Participating State, Contractor is required to comply with all laws governing entities doing business in the Participating State, including the following HRS chapters.
  - 1. Chapter 237, General Excise Tax Law;
  - 2. Chapter 383, Hawaii Employment Security Law;
  - 3. Chapter 386, Workers' Compensation;
  - 4. Chapter 392, Temporary Disability Insurance;
  - 5. Chapter 393, Prepaid Health Care Act; and

A Certificate of Good Standing is required for entities doing business in the State.

The Hawaii Compliance Express (HCE) is utilized for verification of compliance. The SPO will conduct periodic checks to confirm Contractor's compliance on HCE throughout the term of the Addendum.

Alternatively, Contractors not utilizing HCE to demonstrate compliance shall provide paper certificates to the SPO as instructed below. All certificates must be valid on the date it is received by the SPO. All applications for applicable clearances are the responsibility of the Contractor.

HRS Chapter 237 tax clearance requirement. Pursuant to Section 103D-328, HRS, Contractor shall be required to submit a tax clearance certificate issued by the Hawaii State Department of Taxation (DOTAX) and the Internal Revenue Service (IRS). The certificate shall have an original green certified copy stamp and shall be valid for six (6) months from the most recent approval stamp date on the certificate.

**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**Led by the State of Minnesota

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The Tax Clearance Application, Form A-6, and its completion and filing instructions, are available on the DOTAX website: <http://tax.hawaii.gov/forms/>.

HRS Chapters 383 (Unemployment Insurance), 386 (Workers' Compensation), 392 (Temporary Disability Insurance), and 393 (Prepaid Health Care) requirements. Pursuant to Section 103D-310(c) Contractor shall be required to submit a certificate of compliance issued by the Hawaii State Department of Labor and Industrial Relations (DLIR). The certificate is valid for six (6) months from the date of issue. A photocopy of the certificate is acceptable to the SPO.

The DLIR Form LIR#27 Application for Certificate of Compliance with Section 3-122-112, HAR, and its filing instructions are available on the DLIR website: <http://labor.hawaii.gov/forms/>.

Compliance with Section 103D-310(c), HRS, for an entity doing business in the State. Contractor shall be required to submit a Certificate of Good Standing (COGS) issued by the State of Hawaii Department of Commerce and Consumer Affairs (DCCA) – Business Registration Division (BREG). The Certificate is valid for six (6) months from date of issue. A photocopy of the certificate is acceptable to the SPO.

To obtain the Certificate, the Contractor must be registered with the BREG. A sole proprietorship is not required to register with the BREG and is therefore not required to submit the certificate.

For more information regarding online business registration and the COGS is available at <http://cca.hawaii.gov/breg/>.

- I. Effective Date and Contract Period. This Addendum is effective upon the date of execution by the Participating State and shall continue for the term set forth in the Master Agreement.

- J. Licensing

Contractors must be properly licensed and capable of performing the Work as described in the Master Agreement, in accordance with the Professional and Vocational licensing laws of the state. Contractors under Participating Addendums must maintain all required licenses through the duration of the contract and Participating Addendum.

- K. Insurance

The Contractor shall maintain in full force and effect during the life of this contract, liability and property damage insurance to protect the Contractor and its

**PARTICIPATING ADDENDUM****COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

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Subcontractors, if any, from claims for damages for personal injury, accidental death and property damage which may arise from operations under this contract, whether such operations be by the Contractor or by Subcontractor or anyone directly or indirectly employed by either of them. If any Subcontractor is involved, the insurance policy or policies shall name the Subcontractor as additional insured.

As an alternative to the Contractor providing insurance to cover operations performed by a Subcontractor and naming the Subcontractor as additional insured, the Contractor may require the Subcontractor to provide its own insurance, which meets the requirements herein. It is understood that a Subcontractor's insurance policy or policies are in addition to the Contractor's own policy or policies.

The following minimum insurance coverage(s) and limit(s) shall be provided by the Contractor, including its Subcontractor(s) where appropriate.

**Coverage****Limits**

|                                                   |                                                     |
|---------------------------------------------------|-----------------------------------------------------|
| Commercial General Liability<br>(occurrence form) | \$1,000,000 per occurrence<br>\$2,000,000 aggregate |
| Automobile Liability                              | \$1,000,000 per accident                            |

Cyber Liability covering claims and losses with respect to network, internet (Cloud) or other data disclosure risks (such as data breaches, releases of Confidential Information, unauthorized access/use of information, and identity theft) within limits of not less than \$1,000,000 per claim and \$2,000,000 aggregate.

Each insurance policy required by this contract, including a Subcontractor's policy, shall contain the following clauses:

- 1) "The State of Hawaii is added as an additional insured as respects to operations performed for the State of Hawaii."
- 2) "It is agreed that any insurance maintained by the State of Hawaii will apply in excess of, and not contribute with, insurance provided by this policy."

A Waiver of Subrogation shall apply to the General Liability, Automobile Liability and Worker's Compensation insurance policies and shall be in favor of the State of Hawaii.

The Contractor agrees to deposit with the State of Hawaii certificate(s) of insurance necessary to satisfy the State that the insurance provisions of this Addendum have



**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

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been complied with and to keep such insurance in effect and the certificate(s) therefore on deposit with the State during the entire term of the price/vendor list and price/vendor list extensions, if any, including those of its Subcontractor(s), where appropriate. Upon request, Contractor shall provide a copy of the policy or policies or shall allow the State to inspect a copy of the policy or policies.

Failure of the Contractor to provide and keep in force such insurance shall be regarded as material default, entitling the State to exercise any or all the remedies provided in the contract and this RFP for a default by the Contractor.

The procuring of such required insurance shall not be construed to limit the Contractor's liability hereunder nor to fulfill the indemnification provisions and requirements of this RFP. Notwithstanding said policy or policies of insurance, the Contractor shall be obliged for the full and total amount of any damage, injury, or loss caused by negligence or neglect connected with this vendor list.

**L. Special Provisions for Purchases During Declared Disasters**

The attached Exhibit B, Required FEMA Disaster Provisions are made part of this addendum. FEMA requires inclusion of certain provisions for the State to receive reimbursement.

5. Services. All services available through the Master Agreement may be offered and sold by Contractor to Purchasing Entities.
6. Information Technology Security Standards. When working with non-public data from the State of Hawaii, have processes for:
  - Security incident notification. Notify the State of Hawaii if an incident lead to unauthorized disclosure of non-public information and mitigation steps to reduce further risk to the State of Hawaii.
  - Technical requirements. Implements technical requirements that are aligned with the CIS controls: <https://www.cisecurity.org/controls/>
  - Security policies and standards. Implement security policies that are aligned with the NIST 800-53. Based on the sensitivity of the data more stringent controls from 800-53 would be required: <https://csrc.nist.gov/publications/detail/sp/800-53/rev-5/final>
7. Equipment Lease Agreements: Equipment Leasing is not authorized by this Addendum.
8. Travel. Contractor shall be reimbursed actual cost of all travel conducted while providing the required services. Allowable travel and State per diem charges will be agreed upon at the time work is requested. All travel shall be pre-approved.

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Costs for transportation may be based upon mileage rates, actual costs incurred, or a combination thereof, provided the method used results in a reasonable charge. Travel costs shall be considered reasonable and allowable only to the extent that they do not exceed, on a daily basis, the maximum State per diem rates in effect at the time of the travel.

If travel expenses are not justified and approved by the Agency, Contractor will be responsible for any expenditure.

9. Subcontractors: All contactors, dealers, and resellers authorized in the State of Hawaii, as shown on the dedicated Contractor (cooperative contract) website, are approved to provide sales and service support to participants in the NASPO ValuePoint Master Agreement. The contractor's dealer participation will be in accordance with the terms and conditions set forth in the aforementioned Master Agreement. Subcontractors are allowed under this Addendum.

10. Orders: Any order placed by a Participating Entity or Purchasing Entity for a product and/or service available from this Master Agreement shall be deemed to be a sale under (and governed by the prices and other terms and conditions) of the Master Agreement unless the parties to the order agree in writing that another contract or agreement applies to such order.

11. Freight Charges (unless otherwise stated in the master contract):

Prices proposed will be the delivered price to any state agency or political subdivision. All deliveries will be F.O.B. destination with all transportation and handling charges paid by the Contractor. Responsibility and liability for loss or damage will remain with Contractor until final inspection and acceptance when responsibility will pass to the Buyer except as to latent defects, fraud, and Contractor's warranty obligations. Any portion of a full order originally shipped without transportation charges (that failed to ship with the original order, thereby becoming back-ordered) will also be shipped without transportation charges.

12. Purchase Order and Payment Instructions:

All purchase orders issued by Participating Entities under this Addendum shall include the Participating State contract number: SPO Vendor List Contract No. 24-03 and the NASPO ValuePoint Master Agreement Number 23012.

Purchase Orders and Payments shall be made to International Business Machines Corporation or its authorized subcontractors, if any.

**PARTICIPATING ADDENDUM**



**COMPUTER EQUIPMENT (DESKTOPS, LAPTOPS, TABLETS, SERVERS, STORAGE, INCLUDING RELATED PERIPHERALS & SERVICES)**

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Invoices and Payment Instructions:

Contractor(s) shall forward original invoice(s), directly to the ordering agency. The GET or use tax and county surcharge may be added to the invoice as a separate line item and shall not exceed the current max pass-on tax rate(s) for each island.

County surcharges on state general excise (GE) tax or Use tax may be visibly passed on but is not required. For more information on county surcharges and the max pass-on tax rate, please visit the Department of Taxation's website at <http://tax.hawaii.gov/geninfo/countysurcharge>.

Pursuant to HRS § 103-10, Participating State and any agency of the Participating State or any county, shall have thirty (30) calendar days after receipt of invoice or satisfactory delivery of goods to make payment. Any interest for delinquent payment shall be as allowed by HRS § 103-10.

13. Participating Entity as Individual Customer:

Each Participating Entity shall be treated as an individual customer. Except to the extent modified by this Addendum, each Participating Entity will be responsible to follow the terms and conditions of the Master Agreement; and will have the same rights and responsibilities for their purchases as the Lead State has in the Master Agreement. Each Participating Entity will be responsible for its own charges, fees, and liabilities. Each Participating Entity will have the same rights to any indemnity or to recover any costs allowed in the Master Agreement for their purchases. The Contractor will apply the charges to each Participating Entity individually.

14. Entire Contract:

This Addendum, the Master Agreement, and the Attorney General's General Conditions, set forth the entire agreement, and all the conditions, understandings, promises, warranties, and representations among the parties with respect to this Addendum and the Master Agreement, and supersedes any prior communications, representations, or agreements whether, oral or written, with respect to the subject matter hereof.

Terms and conditions inconsistent with, contrary or in addition to the terms and conditions of this Addendum, the Master Agreement, and the Attorney General's General Conditions that are included in any purchase order or other document shall be void. The terms and conditions of this Addendum, the Master Agreement, and the Attorney General's General Conditions, shall govern in the case of any such inconsistent, contrary, or additional terms.

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Led by the State of Minnesota

IN WITNESS WHEREOF, the parties have executed this Addendum as of the date of execution by both parties below.

|                                                                                                 |                                                                                                  |
|-------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|
| Participating State: STATE OF HAWAII                                                            | Contractor: INTERNATIONAL BUSINESS MACHINES CORPORATION                                          |
| Signature:<br> | Signature:<br> |
| Name: BONNIE KAHAKUI                                                                            | Name: URANIA DAVIS                                                                               |
| Title: Administrator, SPO                                                                       | Title: Public Sector Contracts                                                                   |
| Date:<br>04/23/2024                                                                             | Date:<br>04/18/2024                                                                              |

**APPROVED AS TO FORM:**


04/23/2024

Deputy Attorney General

For questions on executing a participating addendum, please contact:

NASPO ValuePoint

|                                      |                                                                  |
|--------------------------------------|------------------------------------------------------------------|
| Cooperative Development Coordinator: | Josh Descoteaux                                                  |
| Telephone:                           | (859) 551-0958                                                   |
| Email:                               | <a href="mailto:jdescoteaux@naspo.org">jdescoteaux@naspo.org</a> |

**[Please email fully executed PDF copy of this document to**

**[PA@naspovaluepoint.org](mailto:PA@naspovaluepoint.org)**

**to support documentation of participation and posting in appropriate data bases.]**

## GENERAL CONDITIONS

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## GENERAL CONDITIONS

1. Coordination of Services by the STATE. The head of the purchasing agency ("HOPA") (which term includes the designee of the HOPA) shall coordinate the services to be provided by the CONTRACTOR in order to complete the performance required in the Contract. The CONTRACTOR shall maintain communications with HOPA at all stages of the CONTRACTOR'S work, and submit to HOPA for resolution any questions which may arise as to the performance of this Contract. "Purchasing agency" as used in these General Conditions means and includes any governmental body which is authorized under chapter 103D, HRS, or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods or services or both.
  
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
  - a. In the performance of services required under this Contract, the CONTRACTOR is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the work and services required under this Contract; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE'S opinion, the services are being performed by the CONTRACTOR in compliance with this Contract. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use the CONTRACTOR exclusively, and that the CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
  
  - b. The CONTRACTOR and the CONTRACTOR'S employees and agents are not by reason of this Contract, agents or employees of the State for any purpose, and the CONTRACTOR and the CONTRACTOR'S employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
  
  - c. The CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of the CONTRACTOR'S performance under this Contract. Furthermore, the CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to the CONTRACTOR'S employees and agents, and to any individual not a party to this Contract, for all loss, damage, or injury caused by the CONTRACTOR, or the CONTRACTOR'S employees or agents in the course of their employment.
  
  - d. The CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by the CONTRACTOR by reason of this Contract, including but not limited to (i) income taxes, (ii) employment related fees, assessments, and taxes, and (iii) general excise taxes. The CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Contract.
  
  - e. The CONTRACTOR shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. The CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of the Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Contract. The CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 17 of these General Conditions.
  
  - f. The CONTRACTOR is responsible for securing all employee-related insurance coverage for the CONTRACTOR and the CONTRACTOR'S employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

- g. The CONTRACTOR shall obtain a certificate of compliance issued by the Department of Labor and Industrial Relations, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
- h. The CONTRACTOR shall obtain a certificate of good standing issued by the Department of Commerce and Consumer Affairs, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
- i. In lieu of the above certificates from the Department of Taxation, Labor and Industrial Relations, and Commerce and Consumer Affairs, the CONTRACTOR may submit proof of compliance through the State Procurement Office's designated certification process.

3. Personnel Requirements.

- a. The CONTRACTOR shall secure, at the CONTRACTOR'S own expense, all personnel required to perform this Contract.
- b. The CONTRACTOR shall ensure that the CONTRACTOR'S employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Contract, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with and satisfied.

4. Nondiscrimination. No person performing work under this Contract, including any subcontractor, employee, or agent of the CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.

5. Conflicts of Interest. The CONTRACTOR represents that neither the CONTRACTOR, nor any employee or agent of the CONTRACTOR, presently has any interest, and promises that no such interest, direct or indirect, shall be acquired, that would or might conflict in any manner or degree with the CONTRACTOR'S performance under this Contract.

6. Subcontracts and Assignments. The CONTRACTOR shall not assign or subcontract any of the CONTRACTOR'S duties, obligations, or interests under this Contract and no such assignment or subcontract shall be effective unless (i) the CONTRACTOR obtains the prior written consent of the STATE, and (ii) the CONTRACTOR'S assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR'S assignee or subcontractor have been paid. Additionally, no assignment by the CONTRACTOR of the CONTRACTOR'S right to compensation under this Contract shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.

- a. Recognition of a successor in interest. When in the best interest of the State, a successor in interest may be recognized in an assignment contract in which the STATE, the CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:

- (1) The Assignee assumes all of the CONTRACTOR'S obligations;
- (2) The CONTRACTOR remains liable for all obligations under this Contract but waives all rights under this Contract as against the STATE; and
- (3) The CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required bonds.

- b. Change of name. When the CONTRACTOR asks to change the name in which it holds this Contract with the STATE, the procurement officer of the purchasing agency (hereinafter referred to as the "Agency procurement officer") shall, upon receipt of a document acceptable or satisfactory to the

Agency procurement officer indicating such change of name (for example, an amendment to the CONTRACTOR'S articles of incorporation), enter into an amendment to this Contract with the CONTRACTOR to effect such a change of name. The amendment to this Contract changing the CONTRACTOR'S name shall specifically indicate that no other terms and conditions of this Contract are thereby changed.

- c. Reports. All assignment contracts and amendments to this Contract effecting changes of the CONTRACTOR'S name or novations hereunder shall be reported to the chief procurement officer (CPO) as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
  - d. Actions affecting more than one purchasing agency. Notwithstanding the provisions of subparagraphs 6a through 6c herein, when the CONTRACTOR holds contracts with more than one purchasing agency of the State, the assignment contracts and the novation and change of name amendments herein authorized shall be processed only through the CPO's office.
7. Indemnification and Defense. The CONTRACTOR shall defend, indemnify, and hold harmless the State of Hawaii, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR'S employees, officers, agents, or subcontractors under this Contract. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.
  8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against the CONTRACTOR in connection with this Contract, the CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
  9. Liquidated Damages. When the CONTRACTOR is given notice of delay or nonperformance as specified in paragraph 13 (Termination for Default) and fails to cure in the time specified, it is agreed the CONTRACTOR shall pay to the STATE the amount, if any, set forth in this Contract per calendar day from the date set for cure until either (i) the STATE reasonably obtains similar goods or services, or both, if the CONTRACTOR is terminated for default, or (ii) until the CONTRACTOR provides the goods or services, or both, if the CONTRACTOR is not terminated for default. To the extent that the CONTRACTOR'S delay or nonperformance is excused under paragraph 13d (Excuse for Nonperformance or Delay Performance), liquidated damages shall not be assessable against the CONTRACTOR. The CONTRACTOR remains liable for damages caused other than by delay.
  10. STATE'S Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to the CONTRACTOR under this Contract, any amounts owed to the State of Hawaii by the CONTRACTOR under this Contract or any other contracts, or pursuant to any law or other obligation owed to the State of Hawaii by the CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify the CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by the CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that the CONTRACTOR shall be entitled to such exclusion only to the extent that the CONTRACTOR is current with, and not delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.
  11. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("HAR"), as the same may be amended from time to time.
  12. Suspension of Contract. The STATE reserves the right at any time and for any reason to suspend this Contract for any reasonable period, upon written notice to the CONTRACTOR in accordance with the provisions herein.
    - a. Order to stop performance. The Agency procurement officer may, by written order to the CONTRACTOR, at any time, and without notice to any surety, require the CONTRACTOR to stop all or any part of the performance called for by this Contract. This order shall be for a specified

period not exceeding sixty (60) days after the order is delivered to the CONTRACTOR, unless the parties agree to any further period. Any such order shall be identified specifically as a stop performance order issued pursuant to this section. Stop performance orders shall include, as appropriate: (1) A clear description of the work to be suspended; (2) Instructions as to the issuance of further orders by the CONTRACTOR for material or services; (3) Guidance as to action to be taken on subcontracts; and (4) Other instructions and suggestions to the CONTRACTOR for minimizing costs. Upon receipt of such an order, the CONTRACTOR shall forthwith comply with its terms and suspend all performance under this Contract at the time stated, provided, however, the CONTRACTOR shall take all reasonable steps to minimize the occurrence of costs allocable to the performance covered by the order during the period of performance stoppage. Before the stop performance order expires, or within any further period to which the parties shall have agreed, the Agency procurement officer shall either:

- (1) Cancel the stop performance order; or
  - (2) Terminate the performance covered by such order as provided in the termination for default provision or the termination for convenience provision of this Contract.
- b. Cancellation or expiration of the order. If a stop performance order issued under this section is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the CONTRACTOR shall have the right to resume performance. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the Contract shall be modified in writing accordingly, if:
- (1) The stop performance order results in an increase in the time required for, or in the CONTRACTOR'S cost properly allocable to, the performance of any part of this Contract; and
  - (2) The CONTRACTOR asserts a claim for such an adjustment within thirty (30) days after the end of the period of performance stoppage; provided that, if the Agency procurement officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this Contract.
- c. Termination of stopped performance. If a stop performance order is not cancelled and the performance covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop performance order shall be allowable by adjustment or otherwise.
- d. Adjustment of price. Any adjustment in contract price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

### 13. Termination for Default.

- a. Default. If the CONTRACTOR refuses or fails to perform any of the provisions of this Contract with such diligence as will ensure its completion within the time specified in this Contract, or any extension thereof, otherwise fails to timely satisfy the Contract provisions, or commits any other substantial breach of this Contract, the Agency procurement officer may notify the CONTRACTOR in writing of the delay or non-performance and if not cured in ten (10) days or any longer time specified in writing by the Agency procurement officer, such officer may terminate the CONTRACTOR'S right to proceed with the Contract or such part of the Contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the Agency procurement officer may procure similar goods or services in a manner and upon the terms deemed appropriate by the Agency procurement officer. The CONTRACTOR shall continue performance of the Contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.
- b. CONTRACTOR'S duties. Notwithstanding termination of the Contract and subject to any directions from the Agency procurement officer, the CONTRACTOR shall take timely, reasonable, and

necessary action to protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest.

- c. Compensation. Payment for completed goods and services delivered and accepted by the STATE shall be at the price set forth in the Contract. Payment for the protection and preservation of property shall be in an amount agreed upon by the CONTRACTOR and the Agency procurement officer. If the parties fail to agree, the Agency procurement officer shall set an amount subject to the CONTRACTOR'S rights under chapter 3-126, HAR. The STATE may withhold from amounts due the CONTRACTOR such sums as the Agency procurement officer deems to be necessary to protect the STATE against loss because of outstanding liens or claims and to reimburse the STATE for the excess costs expected to be incurred by the STATE in procuring similar goods and services.
- d. Excuse for nonperformance or delayed performance. The CONTRACTOR shall not be in default by reason of any failure in performance of this Contract in accordance with its terms, including any failure by the CONTRACTOR to make progress in the prosecution of the performance hereunder which endangers such performance, if the CONTRACTOR has notified the Agency procurement officer within fifteen (15) days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of a public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the CONTRACTOR shall not be deemed to be in default, unless the goods and services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the CONTRACTOR to meet the requirements of the Contract. Upon request of the CONTRACTOR, the Agency procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the CONTRACTOR'S progress and performance would have met the terms of the Contract, the delivery schedule shall be revised accordingly, subject to the rights of the STATE under this Contract. As used in this paragraph, the term "subcontractor" means subcontractor at any tier.
- e. Erroneous termination for default. If, after notice of termination of the CONTRACTOR'S right to proceed under this paragraph, it is determined for any reason that the CONTRACTOR was not in default under this paragraph, or that the delay was excusable under the provisions of subparagraph 13d, "Excuse for nonperformance or delayed performance," the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to paragraph 14.
- f. Additional rights and remedies. The rights and remedies provided in this paragraph are in addition to any other rights and remedies provided by law or under this Contract.

#### 14. Termination for Convenience.

- a. Termination. The Agency procurement officer may, when the interests of the STATE so require, terminate this Contract in whole or in part, for the convenience of the STATE. The Agency procurement officer shall give written notice of the termination to the CONTRACTOR specifying the part of the Contract terminated and when termination becomes effective.
- b. CONTRACTOR'S obligations. The CONTRACTOR shall incur no further obligations in connection with the terminated performance and on the date(s) set in the notice of termination the CONTRACTOR will stop performance to the extent specified. The CONTRACTOR shall also terminate outstanding orders and subcontracts as they relate to the terminated performance. The CONTRACTOR shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance subject to the STATE'S approval. The Agency procurement officer may direct the CONTRACTOR to assign the CONTRACTOR'S right, title, and interest under terminated orders or subcontracts to the STATE. The CONTRACTOR must still complete the performance not terminated by the notice of termination and may incur obligations as necessary to do so.

- c. Right to goods and work product. The Agency procurement officer may require the CONTRACTOR to transfer title and deliver to the STATE in the manner and to the extent directed by the Agency procurement officer:
- (1) Any completed goods or work product; and
  - (2) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the CONTRACTOR has specifically produced or specially acquired for the performance of the terminated part of this Contract.

The CONTRACTOR shall, upon direction of the Agency procurement officer, protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest. If the Agency procurement officer does not exercise this right, the CONTRACTOR shall use best efforts to sell such goods and manufacturing materials. Use of this paragraph in no way implies that the STATE has breached the Contract by exercise of the termination for convenience provision.

d. Compensation.

- (1) The CONTRACTOR shall submit a termination claim specifying the amounts due because of the termination for convenience together with the cost or pricing data, submitted to the extent required by chapter 3-122, HAR, bearing on such claim. If the CONTRACTOR fails to file a termination claim within one year from the effective date of termination, the Agency procurement officer may pay the CONTRACTOR, if at all, an amount set in accordance with subparagraph 14d(3) below.
- (2) The Agency procurement officer and the CONTRACTOR may agree to a settlement provided the CONTRACTOR has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total Contract price plus settlement costs reduced by payments previously made by the STATE, the proceeds of any sales of goods and manufacturing materials under subparagraph 14c, and the Contract price of the performance not terminated.
- (3) Absent complete agreement under subparagraph 14d(2) the Agency procurement officer shall pay the CONTRACTOR the following amounts, provided payments agreed to under subparagraph 14d(2) shall not duplicate payments under this subparagraph for the following:
  - (A) Contract prices for goods or services accepted under the Contract;
  - (B) Costs incurred in preparing to perform and performing the terminated portion of the performance plus a fair and reasonable profit on such portion of the performance, such profit shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided, however, that if it appears that the CONTRACTOR would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
  - (C) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to subparagraph 14b. These costs must not include costs paid in accordance with subparagraph 14d(3)(B);
  - (D) The reasonable settlement costs of the CONTRACTOR, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this Contract. The total sum to be paid the CONTRACTOR under this subparagraph shall not exceed the

total Contract price plus the reasonable settlement costs of the CONTRACTOR reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph 14d(2), and the contract price of performance not terminated.

- (4) Costs claimed, agreed to, or established under subparagraphs 14d(2) and 14d(3) shall be in accordance with Chapter 3-123 (Cost Principles) of the Procurement Rules.

15. Claims Based on the Agency Procurement Officer's Actions or Omissions.

- a. Changes in scope. If any action or omission on the part of the Agency procurement officer (which term includes the designee of such officer for purposes of this paragraph 15) requiring performance changes within the scope of the Contract constitutes the basis for a claim by the CONTRACTOR for additional compensation, damages, or an extension of time for completion, the CONTRACTOR shall continue with performance of the Contract in compliance with the directions or orders of such officials, but by so doing, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

- (1) Written notice required. The CONTRACTOR shall give written notice to the Agency procurement officer:
- (A) Prior to the commencement of the performance involved, if at that time the CONTRACTOR knows of the occurrence of such action or omission;
  - (B) Within thirty (30) days after the CONTRACTOR knows of the occurrence of such action or omission, if the CONTRACTOR did not have such knowledge prior to the commencement of the performance; or
  - (C) Within such further time as may be allowed by the Agency procurement officer in writing.
- (2) Notice content. This notice shall state that the CONTRACTOR regards the act or omission as a reason which may entitle the CONTRACTOR to additional compensation, damages, or an extension of time. The Agency procurement officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Agency procurement officer;
- (3) Basis must be explained. The notice required by subparagraph 15a(1) describes as clearly as practicable at the time the reasons why the CONTRACTOR believes that additional compensation, damages, or an extension of time may be remedies to which the CONTRACTOR is entitled; and
- (4) Claim must be justified. The CONTRACTOR must maintain and, upon request, make available to the Agency procurement officer within a reasonable time, detailed records to the extent practicable, and other documentation and evidence satisfactory to the STATE, justifying the claimed additional costs or an extension of time in connection with such changes.

- b. CONTRACTOR not excused. Nothing herein contained, however, shall excuse the CONTRACTOR from compliance with any rules or laws precluding any state officers and CONTRACTOR from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the Contract.

- c. Price adjustment. Any adjustment in the price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

16. Costs and Expenses. Any reimbursement due the CONTRACTOR for per diem and transportation expenses under this Contract shall be subject to chapter 3-123 (Cost Principles), HAR, and the following guidelines:

- a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
- b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-sized vehicle.
- c. Unless prior written approval of the HOPA is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for inter-island or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.

17. Payment Procedures; Final Payment; Tax Clearance.

- a. Original invoices required. All payments under this Contract shall be made only upon submission by the CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Contract have been performed by the CONTRACTOR according to the Contract.
- b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
- c. Prompt payment.
  - (1) Any money, other than retainage, paid to the CONTRACTOR shall be disbursed to subcontractors within ten (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
  - (2) Upon final payment to the CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
- d. Final payment. Final payment under this Contract shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid. Further, in accordance with section 3-122-112, HAR, CONTRACTOR shall provide a certificate affirming that the CONTRACTOR has remained in compliance with all applicable laws as required by this section.

18. Federal Funds. If this Contract is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Contract to be payable from federal funds, the CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds. Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by the CONTRACTOR.

19. Modifications of Contract.

- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract permitted by this Contract shall be made by written amendment to this Contract, signed by the CONTRACTOR and the STATE, provided that change orders shall be made in accordance with paragraph 20 herein.
- b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract shall be permitted.

- c. Agency procurement officer. By written order, at any time, and without notice to any surety, the Agency procurement officer may unilaterally order of the CONTRACTOR:
    - (A) Changes in the work within the scope of the Contract; and
    - (B) Changes in the time of performance of the Contract that do not alter the scope of the Contract work.
  - d. Adjustments of price or time for performance. If any modification increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, an adjustment shall be made and this Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this Contract or as negotiated.
  - e. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if written modification of the Contract is not made prior to final payment under this Contract.
  - f. Claims not barred. In the absence of a written contract modification, nothing in this clause shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under this Contract or for a breach of contract.
  - g. Head of the purchasing agency approval. If this is a professional services contract awarded pursuant to section 103D-303 or 103D-304, HRS, any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract which increases the amount payable to the CONTRACTOR by at least \$25,000.00 and ten per cent (10%) or more of the initial contract price, must receive the prior approval of the head of the purchasing agency.
  - h. Tax clearance. The STATE may, at its discretion, require the CONTRACTOR to submit to the STATE, prior to the STATE'S approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract, a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid.
  - i. Sole source contracts. Amendments to sole source contracts that would change the original scope of the Contract may only be made with the approval of the CPO. Annual renewal of a sole source contract for services should not be submitted as an amendment.
20. Change Order. The Agency procurement officer may, by a written order signed only by the STATE, at any time, and without notice to any surety, and subject to all appropriate adjustments, make changes within the general scope of this Contract in any one or more of the following:
- (1) Drawings, designs, or specifications, if the goods or services to be furnished are to be specially provided to the STATE in accordance therewith;
  - (2) Method of delivery; or
  - (3) Place of delivery.
- a. Adjustments of price or time for performance. If any change order increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed by the order, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in the Contract price made pursuant to this provision shall be determined in accordance with the price adjustment provision of this Contract. Failure of the parties to agree to an adjustment shall not excuse the CONTRACTOR from proceeding with the Contract as changed, provided that the Agency procurement officer promptly and duly makes the provisional adjustments in payment or time for performance as may be reasonable. By

proceeding with the work, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, or any extension of time for completion.

- b. Time period for claim. Within ten (10) days after receipt of a written change order under subparagraph 20a, unless the period is extended by the Agency procurement officer in writing, the CONTRACTOR shall respond with a claim for an adjustment. The requirement for a timely written response by CONTRACTOR cannot be waived and shall be a condition precedent to the assertion of a claim.
- c. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if a written response is not given prior to final payment under this Contract.
- d. Other claims not barred. In the absence of a change order, nothing in this paragraph 20 shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under the Contract or for breach of contract.

21. Price Adjustment.

- a. Price adjustment. Any adjustment in the contract price pursuant to a provision in this Contract shall be made in one or more of the following ways:
  - (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (2) By unit prices specified in the Contract or subsequently agreed upon;
  - (3) By the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as specified in the Contract or subsequently agreed upon;
  - (4) In such other manner as the parties may mutually agree; or
  - (5) In the absence of agreement between the parties, by a unilateral determination by the Agency procurement officer of the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as computed by the Agency procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, HAR.
- b. Submission of cost or pricing data. The CONTRACTOR shall provide cost or pricing data for any price adjustments subject to the provisions of chapter 3-122, HAR.

22. Variation in Quantity for Definite Quantity Contracts. Upon the agreement of the STATE and the CONTRACTOR, the quantity of goods or services, or both, if a definite quantity is specified in this Contract, may be increased by a maximum of ten per cent (10%); provided the unit prices will remain the same except for any price adjustments otherwise applicable; and the Agency procurement officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.

23. Changes in Cost-Reimbursement Contract. If this Contract is a cost-reimbursement contract, the following provisions shall apply:

- a. The Agency procurement officer may at any time by written order, and without notice to the sureties, if any, make changes within the general scope of the Contract in any one or more of the following:
  - (1) Description of performance (Attachment 1);
  - (2) Time of performance (i.e., hours of the day, days of the week, etc.);
  - (3) Place of performance of services;

- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the STATE in accordance with the drawings, designs, or specifications;
  - (5) Method of shipment or packing of supplies; or
  - (6) Place of delivery.
- b. If any change causes an increase or decrease in the estimated cost of, or the time required for performance of, any part of the performance under this Contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this Contract, the Agency procurement officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the Contract accordingly.
  - c. The CONTRACTOR must assert the CONTRACTOR'S rights to an adjustment under this provision within thirty (30) days from the day of receipt of the written order. However, if the Agency procurement officer decides that the facts justify it, the Agency procurement officer may receive and act upon a proposal submitted before final payment under the Contract.
  - d. Failure to agree to any adjustment shall be a dispute under paragraph 11 of this Contract. However, nothing in this provision shall excuse the CONTRACTOR from proceeding with the Contract as changed.
  - e. Notwithstanding the terms and conditions of subparagraphs 23a and 23b, the estimated cost of this Contract and, if this Contract is incrementally funded, the funds allotted for the performance of this Contract, shall not be increased or considered to be increased except by specific written modification of the Contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract.
24. Confidentiality of Material.
- a. All material given to or made available to the CONTRACTOR by virtue of this Contract, which is identified as proprietary or confidential information, will be safeguarded by the CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
  - b. All information, data, or other material provided by the CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.
25. Publicity. The CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any state employee, including the HOPA, the CPO, the Agency procurement officer, or to the services or goods, or both, provided under this Contract, in any of the CONTRACTOR'S brochures, advertisements, or other publicity of the CONTRACTOR. All media contacts with the CONTRACTOR about the subject matter of this Contract shall be referred to the Agency procurement officer.
26. Ownership Rights and Copyright. The STATE shall have complete ownership of all material, both finished and unfinished, which is developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract, and all such material shall be considered "works made for hire." All such material shall be delivered to the STATE upon expiration or termination of this Contract. The STATE, in its sole discretion, shall have the exclusive right to copyright any product, concept, or material developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract.
27. Liens and Warranties. Goods provided under this Contract shall be provided free of all liens and provided together with all applicable warranties, or with the warranties described in the Contract documents, whichever are greater.

28. Audit of Books and Records of the CONTRACTOR. The STATE may, at reasonable times and places, audit the books and records of the CONTRACTOR, prospective contractor, subcontractor, or prospective subcontractor which are related to:
- a. The cost or pricing data, and
  - b. A state contract, including subcontracts, other than a firm fixed-price contract.
29. Cost or Pricing Data. Cost or pricing data must be submitted to the Agency procurement officer and timely certified as accurate for contracts over \$100,000 unless the contract is for a multiple-term or as otherwise specified by the Agency procurement officer. Unless otherwise required by the Agency procurement officer, cost or pricing data submission is not required for contracts awarded pursuant to competitive sealed bid procedures.
- If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the STATE is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data was not used or relied upon, the price will be reduced in such amount.
30. Audit of Cost or Pricing Data. When cost or pricing principles are applicable, the STATE may require an audit of cost or pricing data.
31. Records Retention.
- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
  - (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.
32. Antitrust Claims. The STATE and the CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the CONTRACTOR hereby assigns to STATE any and all claims for overcharges as to goods and materials purchased in connection with this Contract, except as to overcharges which result from violations commencing after the price is established under this Contract and which are not passed on to the STATE under an escalation clause.
33. Patented Articles. The CONTRACTOR shall defend, indemnify, and hold harmless the STATE, and its officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys fees, and all claims, suits, and demands arising out of or resulting from any claims, demands, or actions by the patent holder for infringement or other improper or unauthorized use of any patented article, patented process, or patented appliance in connection with this Contract. The CONTRACTOR shall be solely responsible for correcting or curing to the satisfaction of the STATE any such infringement or improper or unauthorized use, including, without limitation: (a) furnishing at no cost to the STATE a substitute article, process, or appliance acceptable to the STATE, (b) paying royalties or other required payments to the patent holder, (c) obtaining proper authorizations or releases from the patent holder, and (d) furnishing such security to or making such arrangements with the patent holder as may be necessary to correct or cure any such infringement or improper or unauthorized use.

34. Governing Law. The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the parties to this Contract, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Contract shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
35. Compliance with Laws. The CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect the CONTRACTOR'S performance of this Contract.
36. Conflict Between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the procurement rules, the procurement rules in effect on the date this Contract became effective shall control and are hereby incorporated by reference.
37. Entire Contract. This Contract sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and the CONTRACTOR relative to this Contract. This Contract supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations, oral or written, express or implied, between the STATE and the CONTRACTOR other than as set forth or as referred to herein.
38. Severability. In the event that any provision of this Contract is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Contract.
39. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE'S right to enforce the same in accordance with this Contract. The fact that the STATE specifically refers to one provision of the procurement rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Contract shall not constitute a waiver or relinquishment of the STATE'S rights or the CONTRACTOR'S obligations under the procurement rules or statutes.
40. Pollution Control. If during the performance of this Contract, the CONTRACTOR encounters a "release" or a "threatened release" of a reportable quantity of a "hazardous substance," "pollutant," or "contaminant" as those terms are defined in section 128D-1, HRS, the CONTRACTOR shall immediately notify the STATE and all other appropriate state, county, or federal agencies as required by law. The Contractor shall take all necessary actions, including stopping work, to avoid causing, contributing to, or making worse a release of a hazardous substance, pollutant, or contaminant, and shall promptly obey any orders the Environmental Protection Agency or the state Department of Health issues in response to the release. In the event there is an ensuing cease-work period, and the STATE determines that this Contract requires an adjustment of the time for performance, the Contract shall be modified in writing accordingly.
41. Campaign Contributions. The CONTRACTOR is hereby notified of the applicability of 11-355, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.
42. Confidentiality of Personal Information.
  - a. Definitions.

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:

    - (1) Social security number;
    - (2) Driver's license number or Hawaii identification card number; or

- (3) Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

b. Confidentiality of Material.

- (1) All material given to or made available to the CONTRACTOR by the STATE by virtue of this Contract which is identified as personal information, shall be safeguarded by the CONTRACTOR and shall not be disclosed without the prior written approval of the STATE.
- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.
- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.
- (2) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
  - (A) The personal information collected, used, or maintained by the CONTRACTOR will be treated as confidential;
  - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
  - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for the CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, the CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

e. Records Retention.

- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.

SPECIAL PROVISIONS  
(REQUIRED FEMA DISASTER PROVISIONS)

1. Administrative, Contractual, or Legal Remedies

For all contracts greater or equal to \$150,000, which is the current Simplified Acquisition Threshold set by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council pursuant to 41 U.S.C. § 1908, Contractor agrees to be bound by the administrative, contractual, or legal remedies set forth in the State of Hawaii, General Conditions (AG-008), which govern contractors' violation or breach of contract terms and appropriate sanctions and penalties.

2. Termination for Cause and for Convenience

For all contracts in excess of \$10,000, Contractor agrees to be bound by the termination for cause and for convenience provisions set forth in the State of Hawaii, General Conditions (AG-008).

3. Equal Employment Opportunity

If this contract is for construction, Contractor agrees, pursuant to the requirements provided in 2 C.F.R. Part 200, Appendix II, and 41 C.F.R. § 60-1.4(b), as follows:

(A) Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(B) Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(C) Contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(D) Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(E) Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965 [Part I - Nondiscrimination in Government Employment; Part II - Nondiscrimination in Employment by Government Contractors and Subcontractors; Part III - Nondiscrimination Provisions in Federally Assisted Construction Contracts], and the rules, regulations, and relevant orders of the Secretary of Labor.

(F) Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(G) In the event of Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and Contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(H) Contractor also agrees to include the following language in every subcontract or purchase order (unless exempted by rules, regulations, or orders of

the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965), followed by the provisions of subparagraphs (A) through (G) in this paragraph 3, so that such provisions will be binding upon each subcontractor or vendor.

Contractor shall incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 C.F.R. chapter 60, which is paid for in whole or in part with funds obtained from the federal government or borrowed on the credit of the federal government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any federal program involving such grant, contract, loan, insurance or guarantee, the following equal opportunity clause:

[followed by Subsections (A) through (G)]

Contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for non-compliance, provided, however, that in the event Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

#### 4. Davis-Bacon Act

If the Davis-Bacon Act, 40 U.S.C. §§ 3141-3148, is applicable to this contract, Contractor agrees to comply with all provisions of the Davis-Bacon Act and shall pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. Contractor also agrees to pay wages not less than once a week. Contractor accepts the current prevailing wage determination issued by the federal Department of Labor. Contractor also agrees to comply with the Copeland "Anti Kickback" Act, 40 U.S.C. § 3145 and Department of Labor regulations, 29 C.F.R. Part 3, and shall not induce, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The State shall report all suspected or reported violations of the Copeland Anti Kickback Act to FEMA.

To the extent applicable, Contractor's subcontracts shall also require subcontractor to comply with the Davis-Bacon Act, 40 U.S.C. §§ 3141-3148, the Copeland Anti Kickback Act, 40 U.S.C. § 3145, and 29 C.F.R. Part 3, and Contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all of these contract clauses.

5. Contract Work Hours and Safety Standards Act

If this contract is in excess of \$100,000 and involves the employment of mechanics or laborers, Contractor agrees to comply with the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 3701-3708, and the accompanying Department of Labor regulations, 29 C.F.R. Part 5. Contractor, pursuant to 40 U.S.C. § 3702, shall compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the Contractor shall compensate the worker at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. If this contract includes construction work, Contractor shall not require any laborer or mechanic performing work under this contract to perform such work in surroundings or under working conditions which are unsanitary, hazardous or dangerous, provided however, that such requirements shall not apply for purchases of supplies or materials or of articles ordinarily available on the open market, or for contracts for transportation.

6. Clean Air Act and Federal Water Pollution Control Act

Contractor agrees to comply with paragraph 40 (Pollution Control) of the State of Hawaii, General Conditions (AG-008), and all applicable standards, orders or regulations issued pursuant to the Clean Air Act, 42 U.S.C. §§ 7401-7671q, and the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-1387, and will report violations to FEMA and the Regional office of the Environmental Protection Agency.

7. Energy Efficiency

To the extent applicable to this contract, Contractor agrees to comply with all applicable mandatory standards and policies relating to energy efficiency of the State.

8. Excluded Parties List System

Contractor understands and agrees that if Contractor is listed on the government-wide Excluded Parties List System in the System for Award Management at [www.SAM.gov](http://www.SAM.gov) as suspended or debarred, Contractor cannot be awarded this contract.

9. Byrd Anti-Lobbying Amendment

If this contract is for an award of \$100,000 or more, Contractor shall file a written declaration with the State agency identified as the contracting agency for this project certifying that Contractor has not and will not use federally appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any federal contract, grant or any other award covered by 31 U.S.C. § 1352. Included within the written declaration shall be the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on behalf of Contractor with respect to this contract. Contractor also agrees to disclose any lobbying with non-federal funds that takes place in connection with obtaining any federal award.

10. Recovered and Recycled Materials

To the extent applicable to this contract, Contractor agrees to comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. Section 6002 requires Contractor to use only items, designated in guidelines of the Environmental Protection Agency at 40 C.F.R. part 247, that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000.

11. Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment

To the extent applicable, Contractor agrees to comply with applicable requirements of 2 C.F.R. § 200.216.

12. Domestic Preferences for Procurements

To the extent applicable, Contractor agree to comply with applicable requirements of 2 C.F.R. 2 C.F.R. § 200.322.