



State of Oklahoma
Department of Central Services
Central Purchasing

**IBM GENERAL TERMS
AND
REQUIREMENTS AGREEMENT**

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PREFACE

This IBM General Terms and Requirements Agreement (the "Agreement") will govern all transactions for the acquisitions of machines, products, programs and services by the State of Oklahoma from IBM that reference this Agreement in the relevant purchase order. If an Agency of the State of Oklahoma has some special provisions, these will be negotiated with IBM and included in the purchase order issued to IBM. The General Terms and Requirements in this document can not be modified without the written consent of the State Purchasing Director and an authorized representative from IBM.

A. GENERAL PROVISIONS

A.1. Glossary of Terms

- A.1.1. Acceptance of Risk of Loss** – This relates to shipping and receiving liability, IBM assumes Risk of Loss up to State agency signoff on Bill of Lading upon delivery. By accepting the hardware by signing the Bill of Lading, the State agency accepts liability for said hardware. Title and risk of loss or damage to all items, shall transfer from IBM to State upon delivery by IBM of the items, including Machines to the Destination. Destination shall mean receiving dock or other point specified in the Contract Document.
- A.1.2. Chief Information Officer** – a person with authority to contract for information technology goods and services and who may delegate that authority to the Director of Central Purchasing. All references in this Agreement to the Director of Central Purchasing shall be read to also include the Chief Information Officer.
- A.1.3. Contractor** – As used herein is IBM.
- A.1.4. Customer or Customer Enterprise**----all state agencies/commissions/authorities/boards, all State Higher Education, and any agency/commission funded by State of Oklahoma legislature.
- A.1.5. Customer-set-up Machine** – an IBM Machine that Customer is responsible for installing according to instructions provided with it.
- A.1.6. Date of Installation** –
- a. for an IBM Machine that IBM is responsible for installing, the business day after the day IBM installs it or, if Customer defers installation, makes it available to Customer for subsequent installation by IBM;
 - b. for a Customer-set-up Machine and a non-IBM Machine, the second business day after the Machine's standard transit allowance period. For purposes of this Agreement, the standard transit allowance period for such Machines is six (6) calendar days after the date of shipment for the Machine.; and
 - c. for a Program --
 - (1) basic license, the second business day after the Program's standard transit allowance period. For purposes of this Agreement, the standard transit allowance period for Programs is two (2) business days after the date of shipment for the Program
 - (2) copy, the date (specified in a Contract Document) on which IBM authorizes Customer to make a copy of the Program, and
 - (3) chargeable component (also called a feature), the date Customer uses the chargeable component or a copy. Customer agrees to notify IBM of the chargeable component's Date of Installation.
- A.1.7. Designated Machine** – either i) the machine on which Customer will use an ICA Program for processing and which IBM requires Customer to identify to IBM by type/model and serial number, or ii) any machine on which Customer uses the ICA Program if IBM does not require Customer to provide this identification
- A.1.8. DCS** – Department of Central Services, a state agency authorized to award contracts on behalf of the State of Oklahoma.
- A.1.9. Enterprise** – as applied to IBM means any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent. The term "Enterprise" applies only to the portion of the Enterprise located in the United States.
- A.1.10. IBM Machine** – a Machine bearing an IBM logo.
- A.1.11. IBM Product** – an IBM Machine, ICA Program, or Other IBM Program.
- A.1.12. ICA Programs**----any program product IBM licenses under section A.40 of this Agreement.
- A.1.13. Licensed Internal Code (called "LIC")** – Machine Code used by certain IBM Machines IBM specifies (called "Specific Machines").
- A.1.14. Machine** - is a machine, its features, conversions, upgrades, elements or accessories or any combination of them. The term "Machine" includes an IBM Machine and any non-IBM Machine (including other equipment) that IBM may provide under terms of a Contract.

- A.1.15. Machine Code** – microcode, basic input/output system code (called "BIOS"), utility programs, device drivers, diagnostics, and any other code (all subject to any exclusions in the license provided with it) delivered with an IBM Machine for the purpose of enabling the Machine's function as stated in its Specifications. The term "Machine Code" includes LIC.
- A.1.16. Materials** - are literary works or other works of authorship (such as but not limited to programs, program listings, programming tools, documentation, reports, drawings and similar works) that IBM may deliver under terms of a Contract. The term "Materials" does not include off-the-shelf software sold by IBM, such as Tivoli Storage Manager, DB2, Programs, Machine Code, or Licensed Internal Code.
- A.1.17. Non-IBM Program** – a Program licensed under a separate third party license agreement.
- A.1.18. Other IBM Program** – an IBM Program licensed under a separate IBM license agreement (e.g., IBM International Program License Agreement).
- A.1.19. Product** – is a Machine or Program.
- A.1.20. Program** - is the following, including the original and all whole or partial copies:
1. machine-readable instructions and data;
 2. components;
 3. audio-visual content (such as images, text, recordings, or pictures); and
 4. related licensed materials.
- The term "Program" includes any IBM Program and any non-IBM Program that IBM may provide under a Contract. The term does not include Machine Code or Materials.
- A.1.21. Service** - is performance of a task, provision of advice and counsel, assistance or use of a resource (such as access to an information data base) that IBM makes available under a Contract.
- A.1.22. Specifications** – information specific to a Product. IBM Machine Specifications are in a document entitled "Official Published Specifications." ICA Program Specifications are in a document entitled "Licensed Program Specifications."
- A.1.23. Specified Operating Environment** - is the machines and programs with which a Program is designed to operate, as described in the Program's Specifications.
- A.1.24. State** – is the State of Oklahoma
- A.1.25. Type 1 Materials** – are materials created during a service performance period, which constitute a "work made for hire" to the extent permissible under U.S. copyright law and in which the State will have all rights, title and interest (including ownership of copyright). If any such Materials are not works made for hire under applicable law, IBM assigns the ownership of copyrights in such Materials to Customer. Customer grants IBM an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, sublicense, distribute and prepare derivative works based on Type I Materials.
- A.1.26. Type 2 Materials** – are materials created during a service performance period or otherwise in which IBM or third parties have all rights, title and interest (including ownership of copyright). IBM grants Customer an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform and distribute (within Customer's Enterprise only) copies of Type II Materials.

A.2. Addendum for Customer Transaction – IBM

No term or condition contained in document titled "The Addendum for Customer Transaction (ACT)" will override any term or condition contained within this document.

A.3. Contract Documents

- A.3.1.** Contract Documents will consist of the following documents in order of preference: An accepted Purchase Order referencing this Agreement, Contract Modifications, IBM's contract documents (which may include statements of work, supplements, schedules, invoices or exhibits, IBM Attachments), this Agreement, Requests for Proposals or invitations to Bid and required forms, including the Supplier Contract Affidavit DCS Form 079. IBM will email purchase order acceptance or rejection to DCS and the agency within one (1) business day of purchase order receipt. The State accepts IBM's contract documents and Attachments by issuing a purchase order for the transaction or signing the documents.

A.4. Contract Modification

- A.4.1.** A Contract is issued under the authority of the State Purchasing Director and signed by the Director or a State Agency Representative. The Contract may be modified only through a written Contract Modification, signed by the State Purchasing Director or an Agency Representative and the authorized representative from IBM.
- A.4.2.** Any change to the Contract, including the addition of work or materials, the revision of payment terms, or the substitution of work or materials, directed by a person who is not specifically authorized by the State Purchasing

Director or the State Agency's representative in writing, or made unilaterally by the Supplier, shall be void and without effect. Unless otherwise specified by applicable law or rules, such changes, including unauthorized written Contract Modifications, shall be void and without effect, and the Contractor shall not be entitled to any claim under a Contract based on those changes. No oral statement of any person shall modify or otherwise affect the terms, conditions, or specifications stated in this Agreement or a Contract.

A.5. Audit and Records

- A.5.1.** As used in this clause, "records" includes books, documents, and other data, regardless of type or form. In accepting any Contract with the State, IBM agrees any pertinent State or Federal agency will have the right to examine and audit all records relevant to execution and performance of the resultant Contract and relevant to the scope of the audit. Upon request, such audit will be conducted under the confidentiality terms in Section A.14 of this Agreement.
- A.5.2.** IBM is required to retain official records (such as the Contract Documents and Materials) relative to a Contract for the duration of the Contract and for a period of three years following completion and/or termination of the Contract. If an audit, litigation, or other action involving such records is started before the end of the three year period, the records are required to be maintained for three years from the date that all issues arising out of the action are resolved, or until the end of the three year retention period, whichever is later.

A.6. Delivery, Inspection and Acceptance

- A.6.1.** Unless otherwise specified in the Contract, all deliveries shall be F.O.B. Destination. IBM shall prepay all packaging, handling, shipping and delivery charges and firm prices quoted in the bid shall include all such charges. All products to be delivered pursuant to the Contract shall be subject to final inspection and acceptance by the State at destination upon delivery. "Destination" shall mean delivered to the receiving dock or other point specified in the purchase order. The State assumes no responsibility for goods until accepted by the State, by signing the Bill of Lading, at the receiving point in good condition. Title and risk of loss or damage to all items shall be the responsibility of IBM until accepted by the receiving agency. IBM shall be responsible for filing, processing, and collecting any and all damage claims accruing prior to acceptance. Acceptance of Services shall be as described in the applicable statement of work.
- A.6.2.** IBM shall exert commercially reasonable efforts to deliver products and services on or before the required date. Deviations, substitutions or changes in products and services shall not be made unless expressly authorized in writing by DCS.

A.7. Choice of Law

Any claims, disputes, or litigation relating to the solicitation, or the execution, interpretation, performance, or enforcement of the Contract shall be governed by the laws of the State of Oklahoma.

A.8. Choice of Venue

Venue for any action, claim, dispute or litigation relating in any way to the Contract shall be in Oklahoma County, Oklahoma.

A.9. Termination for Cause

- A.9.1.** IBM may terminate this Agreement or a Contract for default or other just cause with a 30-day written notification to the Central Purchasing Division. The State may terminate the Contract for default or any other just cause upon a 30-day written notification to IBM. In both preceding terminations, the non-compliant party will be given a reasonable opportunity to cure the default within the 30-day notification period.
- A.9.2.** If a Contract is terminated, the State shall be liable only for payment for products and/or services delivered and accepted, and for a mutually approved pro-rated amount for services that are in progress.

A.10. Termination for Convenience

- A.10.1.** The State may terminate this Agreement or a Contract, for convenience if the State Purchasing Director determines that termination is in the State's best interest. The State Purchasing Director shall terminate this Agreement or Contract by delivering to IBM a Notice of Termination for Convenience specifying the terms and effective date of Contract termination. The Contract termination date shall be a minimum of 60 days from the date the Notice of Termination for Convenience is issued by the State Purchasing Director.

The State may terminate a Contract immediately, without a 30-day written notice to IBM, when the Contract is found to be an impediment to the function of the State and detrimental to its cause, when conditions preclude the 30-day notice, or when the State Purchasing Director determines that an administrative error occurred prior to Contract performance.

- A.10.2.** If a Contract is terminated, the State shall be liable only for products and/or services delivered, a mutually approved pro-rated amount for services in process, costs and expenses, excluding profit, incurred up through the date of Termination.

A.10.3. Termination of Maintenance Service

For a maintenance Service, Customer may terminate without adjustment charge, provided any of the following circumstances occur:

- a. Customer permanently removes the eligible Product, for which the Service is provided, from productive use within Customer's Enterprise;
- b. the eligible location, for which the Service is provided, is no longer controlled by Customer (for example, because of sale or closing of the facility); or
- c. the Machine has been under maintenance Service for at least one year and Customer gives IBM one month's written notice prior to terminating the maintenance Service.

A.10.4. Withdrawal of Service or Support

IBM may withdraw a Service or support for an eligible Product on three months' written notice to Customer. If IBM withdraws a Service for which Customer has prepaid and IBM has not yet fully provided it to Customer, IBM will give Customer a prorated refund (based on the total amount divided by months of contract multiplied by months remaining). IBM will not withdraw a service or support if IBM continues to provide this service or support to other customers.

A.10.5. Survival of Terms

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

A.11. Compliance with Applicable Laws

The products and services supplied under a Contract shall comply with all applicable federal, state and local laws that are applicable to providers of Information Technology, and IBM shall maintain all applicable licenses and permits required. IBM is not responsible for determining the requirements of laws applicable to the State's agencies.

A.12. Mutual Responsibilities

The State and IBM agree that under this Agreement:

- a. Neither party grants the other the right to use any trademarks, trade names, or other designations in any promotion or publication without express written consent by the other party;
- b. This is a non-exclusive agreement and each party is free to enter into similar agreements with others;
- c. Each party grants the other only the licenses and rights specified. No other licenses or rights (including licenses or rights under patents) are granted;
- d. The rights and licenses granted to Customer under this Agreement may be terminated if Customer fails to fulfill its applicable payment obligations after given 30 days written notice;
- e. Customer is responsible for selecting the Products and Services that meet its needs and for the results obtained from the use of the Products and Services, including Customer's decision to implement any recommendation concerning Customer's business practices and operations;
- f. Where approval, acceptance, consent or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld;
- g. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control; and
- h. As reasonably required by IBM to fulfill its obligations under this Agreement, Customer agrees to provide IBM with sufficient and safe access (including remote access) to Customer's facilities, systems, information, personnel, and resources, all at no charge to IBM. IBM is not responsible for any delay in performing or failure to perform caused by Customer's delay in providing such access or performing other Customer responsibilities under this Agreement.

A.13. Sub-Contractors

IBM may use sub-contractors in support of a Contract; however the Contractor shall remain solely responsible for the performance of the Contract and all costs of the sub-contractor.

All payments for Products or Services shall be made directly to IBM. An agency reserves the right to approve any and all sub-contractors providing services under the Contract which sub-contractors are disclosed prior to the issuance of the Purchase Order. Such approval shall be timely and shall not be unreasonably withheld.

If required by the Contract Documents, all sub-contractor changes, including changes of the actual employees performing services on this contract, are subject to approval by the agency. Under such circumstances, no payments will be made to IBM for services performed pursuant to the Contract by unapproved employees of a sub-contractor.

A.14. Confidentiality

A.14.1. All information exchanged is non-confidential. If either party requires the exchange of confidential information, it will be made under the following terms.

A.14.2. Our Mutual objective under these confidentiality terms (also referred to as the "Confidentiality Agreement") is to provide protection for confidential information (Information) while maintaining our ability to conduct our respective business activities. Each of us agrees that the following terms apply when one of us (Discloser) discloses Information to the other (Recipient).

A.14.3. Disclosure

Information will be disclosed either:

- 1) in writing;
- 2) by delivery of items;
- 3) by initiation of access to Information, such as may be in data base; or
- 4) by oral or visual presentation.

Information will be reviewed and identified as confidential at the time of disclosure.

A.14.4. Obligations

The Recipient agrees to:

- 1) use the same care and discretion to avoid disclosure, publication or dissemination of the Discloser's Information as it uses with its own similar information that it does not wish to disclose, publish or disseminate; and
- 2) use the Discloser's Information for the purpose for which it was disclosed or otherwise for the benefit of the Discloser.

The Recipient may disclose Information to:

- 1) its employees who have a need to know, and employees of any legal entity that it controls, controls it, or with which it is under common control, who have a need to know for the purpose of performing any transaction described in the preface of this Agreement. Control means to own or control, directly or indirectly, over 50% of voting shares; and
- 2) any other party with the Discloser's prior written consent.

The Recipient may disclose Information to the extent required by law. The State of Oklahoma is subject to, and will comply with, the Oklahoma Open Records Act.

A.14.5. Confidentiality Period

Information disclosed under this Confidentiality Agreement will be subject to this Confidentiality Agreement for two years following the initial date of disclosure.

A.14.6. Exceptions to Obligations

The Recipient may disclose, publish, disseminate, and use Information that is:

- 1) already in its possession without obligation of confidentiality;
- 2) obtained from a source other than the Discloser without obligation of confidentiality;
- 3) publicly available when received, or subsequently becomes publicly available through no fault of the Recipient; or
- 4) disclosed by the Discloser to another without obligation of confidentiality.

The Recipient may use in its business activities the ideas and concepts contained in the Discloser's Information which are retained in the memories of Recipient's employees who have had access to the Information under this Agreement.

A.14.7. Disclaimers

THE DISCLOSER PROVIDES INFORMATION WITHOUT WARRANTIES OF ANY KIND.

Neither this Confidentiality Agreement nor any disclosure of Information made under it grants the Recipient any right or license under any trademark, copyright or patent now or subsequently owned or controlled by the Discloser.

A.14.8. General

This Confidentiality Agreement does not require either of us to disclose or to receive Information.

The receipt of Information under this Confidentiality Agreement will not in any way limit the Recipient from:

- 1) providing to others products or services which may be competitive with products or services of the Discloser;
- 2) providing products or services to others who compete with the Discloser; or
- 3) assigning its employees in any way it may choose.

A.15. Unauthorized Obligations

At no time during the performance of this contract shall IBM have the authority to obligate the State for payment of any goods or services over and above the awarded contract. If the need arises for goods or services over and above the awarded contract for this project, IBM shall submit to the State a change order prior to proceeding.

A.16. Software Ownership

Pursuant to 62 O.S. § 41.5u, if this contract involves the development of software for the use of State, IBM agrees to place the source code for the software and any upgrades supplied under this contract in escrow with a third party acceptable to State and to enter into source code escrow contract, acceptable to State, which includes a provision that entitles State to receive information held in escrow upon the occurrence of any of the following:

1. a bona fide material default of the obligations by IBM;
2. an assignment by IBM for the benefit of its creditors;
3. a failure by IBM to pay, or an admission by IBM of its inability to pay, its debts as they mature;
4. the filing of a petition in bankruptcy by or against IBM when such petition is not dismissed within 60 days of the filing date;
5. the appointment of a receiver, liquidator, or trustee appointed for any substantial part of IBM's property;
6. the inability or unwillingness of IBM to provide the maintenance and support services in accordance with this contract; or
7. the ceasing of IBM of maintenance and support of the software.

The fees of any third-party escrow agent subject to this section shall be borne by IBM.

"Source code" as used herein shall mean the programming instruction for a computer program in its original form, created by a programmer with a text editor or a visual programming tool and saved in a file.

A.17. Electronic and Information Technology Accessibility

Pursuant to Title 74, Section 85.7d and OAC 580:15-6-21 electronic and information technology procurements, solicitations, agreements, and contracts shall comply with applicable Oklahoma Information Technology Accessibility Standards issued by the Oklahoma Office of State Finance.

EIT Standards may be found at

www.ok.gov/DCS/Central_Purchasing/index.html or http://www.ok.gov/OSF/documents/isd_itas.doc.

- 1) **For Information Technology or Communications Products, Systems and Applications not requiring development and/or customization.** The Contractor shall provide a description of conformance with the applicable Oklahoma Information Technology Accessibility Standards for the proposed product, system or application by means of either a Voluntary Product Accessibility Template (VPAT) or other comparable document, upon request.

The Contractor shall indemnify and hold harmless the State of Oklahoma purchasing the products, systems, or applications not requiring development and/or customized by the Contractor from any claim arising out of the Contractor's failure to comply with applicable Oklahoma Information Technology Accessibility Standards subsequent to providing certification of compliance to such Standards.

- 2) **For Information Technology or Communications Products, Systems or Applications requiring development and/or customization.** The Contractor shall provide a description of conformance with the applicable Oklahoma Information Technology Accessibility Standards for the proposed product, system, or application developed and/or customized by means of either a Voluntary Product Accessibility Template (VPAT) or other comparable document, upon request. Additional requirements and documentation may be required and compliance will be necessary on the Contractor's part. Such requirements will be stated in documents such as State Bids, Request for Proposals, Contracts, Agreements, Purchase Orders, and Amendments.

The Contractor shall indemnify and hold harmless the State of Oklahoma purchasing the products, systems, or applications from the Contractor, from any claim arising out of the Contractor's failure to comply with applicable

Oklahoma Information Technology Accessibility Standards subsequent to providing certification of compliance to such Standards. However, the Contractor shall no longer have an obligation to indemnify the State for liability resulting from products, systems or applications developed and/or customized that are not in compliance with applicable Oklahoma Information Technology Accessibility Standards ("Standards") after the State has tested and confirmed that the product, system or application meets the accessibility requirements in the Standards.

A.18. Invoices and Compensation

- A.18.1.** IBM shall be paid upon submission of an accurate invoice(s) to the agency at the prices stipulated on the contract in accordance with 74 O.S. §85.44B, which requires that payment be made only after products have been provided or services rendered.
- A.18.2.** Invoices shall contain the purchase order number.
- A.18.3.** Failure to provide accurate invoices may result in delay of processing invoices for payment.
- A.18.4.** Interest on late payments made by the State is governed by 62 O.S. §41.4a and 62 O.S. §41.4b.
- A.18.5.** Payment against an agency contract shall be firm fixed at the quoted price.
- A.18.6.** Payment of all services shall be made in arrears. State shall not make any advance payments or advance deposits.
- A.18.7.** IBM will bill the State on a monthly basis for services. Claims for services shall be submitted within 90 calendar days of the provision of services. IBM will provide documentation of expenses to support requests for the reimbursement, which may include copies of invoices, evidence of payment by IBM and other documents, as requested by State. Expense encumbrances may be canceled upon a lapse of six months from the actual provision of services.
- A.18.8.** State will have 45 days from presentation of a proper invoice to issue payment to IBM.
- A.18.9.** If State finds that an overpayment or underpayment has been made to IBM, State may adjust any subsequent payments to IBM under the Contract to correct the account. A written explanation of the adjustment will be issued to IBM by State.

A.19. Patents and Copyrights

If in the performance of this contract, IBM uses any Product covered by a third party's patent or copyright, it is mutually agreed and understood without exception that the IBM contract prices shall include all royalties or cost charged by the third party arising from the use of such patent or copyright. If such royalties or costs are not covered in the IBM contract price, IBM's obligations are as outlined immediately below.

- A.19.1.** For purposes of this Section, the term "Product" includes Materials, Programs, Machine, and Products as defined in Section A.1 and Machine Code

If a third party claims that a Product Supplier provides to an Ordering Agency infringes that party's patent or copyright, Supplier will defend the State against that claim at Supplier's expense and pay all costs, damages, and attorney's fees that a court finally awards, provided that the State: (i) promptly notifies Supplier in writing of the claim; and (ii) to the extent authorized by the Attorney General of the State of Oklahoma, allows Supplier to control, and cooperates with Supplier in, the defense and any related settlement negotiations; provided however, that if the Attorney General of the State of Oklahoma does not authorize IBM to have sole control of the defense and any related settlement negotiations, then to the extent allowed by Oklahoma law, IBM shall have no obligation to indemnify the State of Oklahoma under this Section.

If such a claim is made or appears likely to be made, the State agrees to permit IBM to enable the State to continue use the Product, or to modify it, or replace it with one that is at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, the State agrees to return the Product to IBM on IBM's written request. IBM will then give the State a refund equal to the net book value for the Product, provided the State has followed applicable accounting principles. Net book value is the original cost of the product amortized over three (3) years using the straight line method.

This is IBM's entire obligation to the State regarding any claim of infringement.

- A.19.2.** IBM has no obligation regarding any claim based on any of the following: (i) anything the State provides which is incorporated into a Product; (ii) modification of a Product by any party other than Supplier or Supplier's subcontractor, or a Program's use in other than its Specified Operating Environment; (iii) the combination, operation, or use of a Product with other Products not provided by Supplier as a system, or the combination, operation or use of a Product with any product, data, or apparatus that Supplier did not provide; or (iv) infringement by a non-Supplier Product alone, as opposed to its combination with Products Supplier provides to the State as a system.

A.20. Equal Opportunity and Discrimination

The Contractor is an Equal Opportunity Employer, a provider of services and/or assistance, and is in compliance with the 1964 Civil Rights Act, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, as

amended and Executive Orders 11246 and 11375. The provider assures compliance with the Americans with Disabilities Act of 1990 (Public Law 101-336), all amendments to, and all requirements imposed by the regulations issued pursuant to this act.

A.21. Lobbying

The Contractor certifies compliance with the Anti-Lobbying law, Section 1325, Title 31 of the U.S. Code, and implemented at 45 CFR Part 93, for persons entering into a grant or cooperative agreement over \$100,000.00 as defined at 45 CFR 93, Section 93.105 and 93.110.

A.22. Drug-Free Workplace

The Contractor certifies compliance in providing or continuing to provide a drug-free workplace in accordance with the Drug-Free Workplace Act of 1988, and implemented at 45 CFR part 76, Subpart F, for grantees, as defined at 45 CFR Part 76, Sections 76.605 and 76.610.

A.23. Environmental Protection

If the payments pursuant to the contract are expected to exceed \$100,000.00, then the Contractor must comply with the Section 306 of the Clean Air Act (42 U.S.C. 1857 (L)), Section 508 of the Clean Water Act (33 U.S.C. 1638), Executive Order 11738, and Environmental Protection Agency Regulations (40 C.F.R Part 15), which prohibit the use under nonexempt Federal contract, grant or loans of facilities included on the EPA List of Violating Facilities.

A.24. Assignment

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

The State agrees not to resell any Service provided by IBM under a Contract without IBM's prior written consent. Any attempt to do so is void.

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

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

A.25. Travel

Travel expenses incurred by IBM pursuant to a Contract are included in the Contract award amount. No additional travel expenses will be considered or paid.

A.26. Severability

If any provision of this Agreement or a Contract shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Agreement or Contract is invalid or unenforceable, but that by limiting such provision it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

A.27. Employment Relationship

This Agreement or a Contract does not create an employment relationship. Individuals performing services required by a Contract are not employees of the State of Oklahoma. IBM's employees shall not be considered employees of the State of Oklahoma for any purpose and as such shall not be eligible for benefits accruing to state employees. The State retains the right to request replacement of assigned staff.

Neither party may solicit the employee of the other party without written consent of the other party.

A.28. Failure to Enforce

Failure by either party at any time to enforce the provisions of the contract shall not be construed as a waiver of any such provisions. Such failure to enforce shall not affect the validity of this Agreement or a Contract or any part thereof or the right of either party to enforce any provisions at any time in accordance with its terms.

A.29. Insurance

Contractor shall obtain and retain insurance, including workers' compensation, automobile insurance, and general liability, as applicable, or as required by State or Federal law, prior to commencement of any work in connection with the Contract. Contractor shall timely renew the policies to be carried pursuant to this section throughout the term of the Contract and shall upon request provide the Central Purchasing Division and the procuring agency with evidence of such insurance and renewals.

Either party may at any time designate any other address by giving written notice to the other party.

A.30. Notices

All notices, requests, demands, or other communications required or permitted to be given hereunder, which specifically affect the State, shall be in writing and shall be directed to IBM or State at their respective addresses set forth herein unless otherwise specified in writing, and shall be given by certified mail, return receipt requested, or by recognized overnight delivery service. Any such notice, request, demand, or communication shall be deemed given on receipt or refusal thereof.

If to Using Agency:

By Mail: Department of Central Services, Central Purchasing Division
P.O. Box 528803
Oklahoma City, OK 73152-8803
Attn: Central Purchasing Director

By Delivery: Department of Central Services, Central Purchasing Division
Will Rogers Office Building
2401 N. Lincoln, Suite 116
Oklahoma City, OK 73105
Attn: Central Purchasing Director

If to IBM:

By Mail: IBM Corporation
6301 Waterford Blvd Ste 103
Oklahoma City, OK 73118
Attn: Dan Aleto

By Delivery: IBM Corporation
6301 Waterford Blvd Ste 103
Oklahoma City, OK 73118
Attn: Dan Aleto

Either party may at any time designate any other address by giving written notice to the other party.

A.31. Debarment, suspension, and Other Responsibility Matters

The individual signing on behalf of IBM certifies that, to the best of his/her personal knowledge and belief, IBM is not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency.

A.32. Legal Representatives

Nothing herein contained shall be construed to make the parties hereto partners or joint venture's, nor either party the legal representative or agent of the other party, nor shall either party have the right or authority to assume, create or incur any liability or any obligation of any kind, either expressed or implied, in the name of or on behalf of the other party.

A.33. Limitation of Liability

A.33.1. On April 14, 2006, the Attorney General of Oklahoma issued Attorney General Opinion No. 06-11 that, among other things, opined that under the Oklahoma State Constitution contractual limitation of liability provisions contained in agreements with State agencies are void and unenforceable unless the amount of liability the State assumes is certain and budgeted for. While the parties to this agreement acknowledge the Attorney General's Opinion, the Parties further recognize that Supplier disagrees with the Attorney General's Opinion and contends that contractual limitation of liability provisions such as the one contained in this agreement are enforceable and do not violate the State Constitution. As a result, in the event that the Parties to this agreement have a dispute in which the enforceability of a contractual limitation of liability clause is relevant, then the Parties agree that either Party may initiate suit in the State District Court for Oklahoma County seeking a declaratory judgment or any other relief available in law or equity regarding, among other things, the enforceability of a contractual limit of

liability. Further, the parties shall have the right to appeal any ruling from the District Court to the extent permitted by applicable law.

For purposes of this agreement, the contractual limit of liability subject to the paragraph above is as follows:

In the event that due to a default on the part of the Contractor or other liability, the State is entitled to recover damages from the Contractor (regardless of the basis on which the State is entitled to claim damages from the Contractor including but not limited to fundamental breach, negligence, misrepresentation, or other contract or tort claim) then the Contractor is liable for no more than;

- Payments referred to in A18, Patents and Copyrights;
- Damages for bodily injury (including death) and damages to real property and tangible personal property (these damages shall not be subject to any limitation on direct or consequential damages contained within this provision;) and
- The amount of any other actual direct damages up to the greater of \$100,000 or the charges for the products or services that are the subject of the claim.

This limit also applies to any of the Contractor's subcontractors and program developers. It is the maximum for which contractor and its subcontractors and program developers are collectively responsible.

Items for which the Contractor is not liable:

Under no circumstances is the Contractor, its subcontractors, or program developers liable for any of the following even if informed of their possibility:

- Loss of or damage to data;
- Special, incident, punitive, exemplary or indirect damages or for any economic consequential damages; or
- Lost profits, business, revenue, goodwill, or anticipated savings.

A.33.2. No right or cause of action for any third party is created by this Agreement or any transaction under it, nor is IBM responsible for any third party claims against Customer except as described in the Intellectual Property Protection section above or as permitted by the Limitation of Liability section above for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.

A.33.3. The following language relates only to Section A.17, Electronic and Information Technology Accessibility. To the extent the obligations are requirements of the Contractor under the applicable Oklahoma law and administrative rules and subject to the exceptions found in the applicable Oklahoma law and administrative rules, IBM accepts the language found in Section A. 17.

A.34. Extent and Disclaimer of Warranties

IBM's applicable warranties will not apply to the extent there has been misuse (including, but not limited to, unauthorized use of any Machine capacity or capability), accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper maintenance by a party other than IBM, removal or alteration of Product or parts identification labels, or failure caused by a product for which IBM is not responsible.

THE WARRANTIES FOUND IN SECTIONS A.39.1, A.40.7, A.41.1 & A.42 ARE THE STATE'S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.

Items Not Covered by Warranty

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

IBM will identify IBM Machines and ICA Programs that it does not warrant.

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

A.35. Charges

A.35.1. Recurring charges for a Product begin on its Date of Installation.

A.35.2. Usage Charges

One-time and recurring charges may be based on measurements of actual or authorized use (for example, authorized capacity for Machines, number of users or processor size for Programs, or meter readings for maintenance Services). Customer agrees to provide actual usage data as described in the Contract Document.

If Customer makes changes to its environment that impact usage charges (for example, change authorized capacity for Machines or change processor size or configuration for Programs), Customer agrees to promptly notify IBM and pay any applicable charges. Recurring charges will be adjusted accordingly. In the event that IBM changes the basis of measurement previously provided the State and used for charges, its terms for changing charges will apply.

A.35.3. Changes to Charges

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

A.35.4. In the absence of a written agreement establishing a fixed rate for a fixed period of time, or unless provided otherwise in a Contract Document, IBM may increase recurring charges for Products and Services, as well as labor rates and minimums for Services provided under this Agreement, by giving Customer three months' written notice. An increase applies on the first day of the invoice or charging period on or after the effective date IBM specifies in the notice.

A.35.5. IBM may increase one-time charges without notice. However, an increase to one-time charges does not apply to Customer if i) IBM receives the order before the announcement date of the increase and ii) one of the following occurs within three months after IBM's receipt of the order:

- a. IBM ships Customer the Machine or makes the Program available to Customer;
- b. Customer makes an authorized copy of a Program or distributes a chargeable component of a Program to another Machine; or
- c. a Program's increased use charge becomes due.

A.35.6. Upon reasonable notice, IBM may verify the usage data and other information affecting the calculation of charges under this Agreement. Such verification will be conducted in a manner that minimizes disruption to Customer's business and may be conducted on Customer's premises, during Customer's normal business hours. Customer agrees to i) provide records, system tools outputs, and other electronic or hard copy system information reasonably necessary for such verification, and ii) promptly pay any additional, valid charges and other liabilities determined as a result of such verification.

A.35.7. Notwithstanding the above, if the parties have agreed upon a fixed price for a period of time, no changes and charges will be effective until approved, in writing, by the State Purchasing Director or Agency Representative.

A.36. IBM Business Partners

IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote, market, and support certain Products and Services. An IBM Business Partner is an independent business and separate from IBM. IBM is not responsible for the actions or statements of IBM Business Partners to the State, or any products or services that they supply to the State under their separate agreements. This Agreement applies only to transactions between an authorized IBM Business Partner and the State that is supported by a Statement of Work (SOW) that refers to this Agreement.

A.37. Conflict of Interest

IBM must disclose any contractual relationship or any other relevant contact with any state personnel, or other State contractors involved in the development of a request for proposal (RFP) that results in a Contract. Any conflict of interest shall, at the sole discretion of State, be grounds for termination of this Agreement or a Contract; provided that such termination must be made within a reasonable time after disclosure of such relationship or contact.

In addition to any requirements of law or through a professional code of ethics or conduct, the IBM employees performing services for the State are required to disclose any outside activities or interests that conflict or may conflict with the best interests of the State. Further, such employees shall not plan, prepare, or engage in any activity that conflicts or may conflict with the best interests of the State of Oklahoma during the period of this agreement without prior written approval of the State. Prompt disclosure is required under this paragraph if the activity or interest is related, directly or indirectly, to any person or entity currently under contract with or seeking to do business with the State.

A.38. Information Security

A.38.1. User Logon Authorization

IBM will not be granted access to State information systems without the prior completion and approval of Logon Authorization Request for Non-State Employees, Form 05SC004E (MID-1-A). Certain types of access may require that a background check and verification be performed prior to granting access. IBM will notify State promptly when employees are terminated that have access to State systems.

A.38.2. Background Checks and Verifications

At the sole discretion of State, IBM may be requested to provide user background checks, depending on the information systems IBM accesses or types of data State provides. IBM must submit the required background

check information to State in a timely manner. State will not process any access agreements prior to completion of user background verification.

A.38.3. Auditing and Compliance

The State, Information Security Office may, at its discretion and subject to mutually agreeable procedures, audit IBM for compliance with the security requirements set out in the Contract as it pertains to an agency Contract. IBM must supply corrective action plans for non-compliant audit findings within 30 business days from the receipt of the final audit report from State. Failure to comply with these requirements may result in Contract cancellation.

A.38.4. Data Destruction

Prior to disposal, all floppy disks, CDs, magnetic tape, hard drives (desktop and server), data DVDs, or other media containing State sensitive information must be destroyed in accordance with the Office of State Finance Information Security Policy, Procedures and Guidelines section on Media Sanitization Procedures for the Destruction or Disposal of all Electronic Storage Media.

All hardcopy records that contain State sensitive information must be disposed of through a cross cut paper shredder (shredding both vertically and horizontally) or an equivalent secure destruction process.

A.39. Specific Terms for Machines

A.39.1. Warranty

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

The warranty period for a Machine is a specified, fixed period commencing on its Date of Installation and specified in a Contract Document. During the warranty period, IBM provides repair and exchange Service for the IBM Machine, without charge, under the type of Service IBM designates for the IBM Machine. If a Machine does not function as warranted during the warranty period, IBM will repair it or replace it with one that is at least functionally equivalent, without charge. If IBM is unable to do so, the State may return it to IBM and IBM will refund the amount paid for the Machine.

A.39.2. Production Status

Each IBM Machine is manufactured from new parts or new and used parts. In some cases, the Machine may not be new and may have been previously installed. Regardless of the Machine's production status, IBM's warranty terms apply.

A.39.3. Installation

For the Machine to function properly, it must be installed in a suitable physical environment. The State has responsibility for providing an environment meeting IBM's specified requirements for the Machine.

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

A.39.4. Upgrades and Engineering Changes

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

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

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

A.39.5. Machine Code

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

Machine Code is licensed only for use to enable a Machine to function in accordance with its Specifications and only for the capacity and capability for which Customer has acquired IBM's written authorization. Customer

agrees to use Machine Code only as specified in this Agreement and as may be further authorized or restricted in its applicable license agreement. Without limiting additional restrictions in the applicable license, Customer may not:

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

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

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

A.40. Specific Terms for ICA Programs

A.40.1. License

When IBM accepts Customer's order, IBM grants Customer a nonexclusive license to use the ICA Program only within Customer's Enterprise in the United States. ICA Programs are owned by International Business Machines Corporation, one of its subsidiaries, or a third party and are copyrighted and licensed (not sold).

Authorized Use

Under each license, IBM authorizes Customer to:

- a. use the ICA Program's machine-readable portion on only the Designated Machine. If the Designated Machine is inoperable, Customer may use another machine temporarily. If the Designated Machine cannot assemble or compile the ICA Program, Customer may assemble or compile the ICA Program on another machine.
- b. If Customer changes a Designated Machine previously identified to IBM, Customer agrees to notify IBM of the change and its effective date;
- c. use the ICA Program to the extent of authorizations Customer has obtained;
- d. make and install copies of the ICA Program, to support the level of use authorized, provided Customer reproduces the copyright notices and any other legends of ownership on each copy or partial copy; and
- e. use any portion of the ICA Program IBM i) provides in source form, or ii) marks restricted (for example, "Restricted Materials of IBM") only to --
 - (1) resolve problems related to the use of the ICA Program, and
 - (2) modify the ICA Program so that it will work together with other products.

A.40.2. Customer's Additional Obligations

For each ICA Program, Customer agrees to:

- a. comply with any additional or different terms in its Licensed Program Specifications or an Attachment or Contract Document, all of which will be made available to the State; provided, however, that no such contract document may change the Patent and Copyright Section A.19, the Limitation of Liability Section A.33 or the Choice of Law Section 7 or Choice of Venue Section 8.
- b. ensure that anyone who uses it (accessed either locally or remotely) does so only for Customer's authorized use and complies with IBM's terms regarding ICA Programs; and
- c. maintain a record of all copies and provide it to IBM at its request.

A.40.3. Actions Customer May Not Take

Customer agrees not to:

- a. reverse assemble, reverse compile, otherwise translate, or reverse engineer the ICA Program unless expressly permitted by applicable law without the possibility of contractual waiver; or
- b. sublicense, assign, rent, or lease the ICA Program or transfer it outside Customer's Enterprise.

Distributed System License Option

For some ICA Programs, Customer may make a copy under a Distributed System License Option (called a "DSLO" copy). IBM charges less for a DSLO copy than for the original license (called the "Basic" license). In return for the lesser charge, Customer agrees to do the following while licensed under a DSLO:

- c. have a Basic license for the ICA Program;
- d. provide problem documentation and receive Program Services (if any) only through the location of the Basic license; and
- e. distribute to, and install on, the DSLO's Designated Machine, any release, correction, or bypass that IBM provides for the Basic license.

A.40.4. Program Support Services

IBM provides Program Support Services for warranted ICA Programs. If IBM can reproduce Customer's reported problem in the Specified Operating Environment, IBM will issue defect correction information, a restriction, or a bypass. IBM provides Program Support Services for only the unmodified portion of a current release of an ICA Program.

IBM provides Program Support Services i) on an on-going basis (with at least six months' written notice before IBM terminates Program Support Services), ii) until the date IBM specifies, or iii) for a period IBM specifies.

A.40.5. Compliance Verification

IBM's right to verify Customer's usage data and other information affecting the calculation of charges also includes the right to verify Customer's compliance with other terms of this Agreement (including applicable Attachments and Contract Documents) relating to Customer's use of ICA Programs at all sites and for all environments in which Customer installs or uses ICA Programs for any purpose. IBM may use an independent auditor to assist with such verification, provided IBM has a written confidentiality agreement in place with such auditor.

Customer agrees to create, retain, and provide to IBM and its auditors written records, system tools outputs, and other system information sufficient to provide auditable verification that Customer's installation and use of ICA Programs complies with the Agreement terms, including IBM's applicable licensing and pricing terms. IBM will notify Customer in writing if any such verification indicates that Customer is not in compliance with Agreement terms. The rights and obligations in this section remain in effect during the period any ICA Programs are licensed to Customer and for two years thereafter.

A.40.6. License Termination

Customer may terminate the license for an ICA Program at any time on one month's written notice to IBM.

For ICA Program licenses that Customer acquired for a one-time charge, replacement licenses may be acquired for an upgrade charge, if available. When Customer obtains licenses for these replacement ICA Programs, Customer agrees to terminate the license of the replaced ICA Programs when charges become due, unless IBM specifies otherwise.

IBM may terminate Customer's license if Customer fails to comply with the license terms. If IBM does so, Customer's authorization to use the ICA Program is also terminated.

Customer agrees to promptly destroy all copies of the Program after either party has terminated the license.

A.40.7. Warranty

IBM warrants that each warranted ICA Program, when used in the Specified Operating Environment, will conform to its Specifications.

During the warranty period, IBM provides defect-related Program Services without charge. Program Services are available for a warranted ICA Program for at least one year following its general availability. The warranty period for an ICA Program expires when its Program Services are no longer available.

If an ICA Program does not function as warranted during the first year after Customer obtains its license and IBM is unable to make it do so, Customer may return the ICA Program and the charges Customer paid for the license will be refunded. To be eligible for a refund, Customer must have obtained its license while Program Services (regardless of the remaining duration) were available for the ICA Program.

A.41. Specific Terms for Custom Services

A.41.1. Warranty

IBM warrants that it will perform each IBM Service using reasonable care and skill and according to the Statement of Work related to the contract.

A.41.2. Custom Services

Each party agrees to make reasonable efforts to carry out our respective responsibilities according to a schedule of work describing the services. The process by which IBM will inform the State when it has met each of the

defined completion criteria described in the statement of work and the process by which the State will inform IBM if the State believes that IBM has not met those criteria will be set out in the statement of work. The project is complete when IBM meets the completion criteria.

A.41.3. Personnel

Each party will designate a coordinator who will represent each party, respectively, in all matters concerning the Services and be responsible for the supervision, direction and control of its respective personnel.

A.41.4. Materials and Ownership and License

A Contract will specify Materials to be delivered to Customer and identify them as "Type I Materials", "Type II Materials", or otherwise as both parties agree. If not specified, Materials will be considered Type II Materials.

IBM or its suppliers retain ownership of the copyright in any of IBM's or its suppliers' work that pre-exist or were developed outside of this Agreement or a Contract and any modifications or enhancements of such works that may be made under this Agreement or a Contract. To the extent they are embedded in any materials, such works are licensed in accordance with their separate licenses provided to Customer, if any, or otherwise as Type II Materials.

Each of us agrees to reproduce the copyright notice and any other legend of ownership on any copies made under the licenses granted in this section.

A.41.5. Customer Resources

If Customer is making available to IBM any facilities, software, hardware or other resources in connection with IBM's performance of Services, Customer agrees to obtain any licenses or approvals related to these resources that may be necessary for IBM to perform the Services and develop Materials. IBM will be relieved of its obligations that are adversely affected by Customer's failure to promptly obtain such licenses or approvals. Customer agrees to reimburse IBM for any reasonable costs and other amounts that IBM may incur from Customer's failure to obtain these licenses or approvals.

Unless otherwise agreed in a Contract, Customer is responsible for i) any data and the content of any database Customer makes available to IBM in connection with a Service under this Agreement, ii) the selection and implementation of procedures and controls regarding access, security, encryption, use, and transmission of data, and iii) backup and recovery of the database and any stored data.

A.41.6. Service for Machines

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

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

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

Customer agrees:

- a. to obtain authorization from the owner to have IBM service a Machine that Customer does not own;
- b. where applicable, before IBM provides Service, to --
follow the problem determination and service request procedures that IBM provides,
secure all programs, data, and funds contained in a Machine, and
inform IBM of changes in a Machine's location.
- c. to follow the Service instructions that IBM provides (which may include installing Machine Code and other software updates either downloaded from an IBM Internet Web site or copied from other electronic media); and
- d. when Customer returns a Machine to IBM for any reason --
 - (1) to securely erase from any Machine all programs not provided by IBM with the Machine and data, including without limitation, the following: i) information about identified or identifiable individuals or legal entities ("Personal Data") and ii) Customer's confidential or proprietary information and other data. If removing or deleting Personal Data is not possible, Customer agrees to transform such information (e.g., by making it anonymous) so that it no longer qualifies as Personal Data under applicable law;

- (2) to remove all funds from ATM Machines returned to IBM. IBM is not responsible for any funds, programs not provided by IBM with the Machine, or data contained in a Machine that Customer returns to IBM; and
- (3) IBM may ship all or part of the Machine or its software to other IBM or third party locations around the world to perform its responsibilities under this Agreement, and Customer authorizes IBM to do so.

A.41.7. Replacements

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

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

A.41.8. Items Not Covered

Repair and exchange Services do not cover:

- a. accessories, supply items, consumables (such as batteries and printer cartridges), and structural parts (such as frames and covers);
- b. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper maintenance by Customer or a third party;
- c. Machines with removed or altered Machine or parts identification labels;
- d. failures caused by a product for which IBM is not responsible;
- e. service of Machine alterations; or
- f. service of a Machine on which Customer is using capacity or capability, other than that authorized by IBM in writing.

A.41.9. Warranty Service Upgrade

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

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

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

A.41.10. Maintenance Coverage

When Customer orders maintenance Service for Machines, IBM will inform Customer of the date on which maintenance Service will begin. IBM may inspect the Machine within one month following that date. If the Machine is not in an acceptable condition for service, Customer may have IBM restore it for a charge or Customer may withdraw its request for maintenance Service. However, Customer will be charged for any maintenance Service that IBM has performed at Customer's request.

A.41.11. Service Renewal

Renewable Services can be renewed by either party providing written notification (at least one month prior to the end of the current contract period) to the other of its decision to renew.

During a renewal period, Customer may terminate the Service on one month's written notice, and IBM will provide Customer a prorated credit for any unused Services for which Customer has paid in advance.

A.42. Specific Terms for Systems

IBM warrants that when IBM specifies in a Contract Document that it is providing Products to the State that are intended to operate together as a system, such Products provided to the State as a system are compatible and, when installed according to their Specifications, will operate with one another.

A.43. Additional Terms

A Contract constitutes the entire Contract and understanding between the parties and supersedes all prior and/or contemporaneous discussions, representations, or Contracts (whether written or oral) of the parties relating to the work to be performed as described in the Contract. A Contract includes by reference, this Agreement and the purchase order issued by the Central Purchasing Division of the Department of Central Services.

This Agreement is the complete agreement regarding transactions by which Customer purchases Machines, licenses ICA Programs, obtains Program licenses, and acquires Services from IBM, and replaces any prior oral or written communications between State and IBM. 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: i) estimated completion dates, hours, or charges to provide any Service; ii) performance or function of any Product or system, other than as expressly warranted herein; iii) the experiences or recommendations of other parties; or iv) results or savings Customer may achieve.

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

Signature of authorized IBM representative

Date

Signature of authorized DCS representative

Date