

Amendment Number 6
to
Contract Number DIR-SDD-2108
between
State of Texas, acting by and through the Department of Information Resources
and
International Business Machines Corporation

This Amendment Number 6 to Contract Number DIR-SDD-2108 (“Contract”) is between the Department of Information Resources (“DIR”) and International Business Machines Corporation (“Vendor”). DIR and Vendor agree to modify the terms and conditions of the Contract as follows:

1. Contract, Section 2, Term of Contract is hereby amended as follows:

DIR and Vendor hereby agree to extend the term of the Contract through October 4, 2017, completing eleven (11) months of the third one-year renewal option or until terminated pursuant to the termination clauses contained in the Contract. No additional extension options remain.

2. Contract, Section 7, Software License and Service Agreements, F. Conflicting and Additional Terms is hereby restated in its entirety as follows:

F. Conflicting and Additional Terms

In the event that conflicting or additional terms in Vendor Software License Agreements, Shrink/Click Wrap License Agreements, Service Agreements or linked or supplemental documents amend or diminish the rights of DIR Customers or the State, such conflicting or additional terms shall not take precedence over the terms of this Contract.

In the event of a conflict, any linked documents may not take precedence over the printed or referenced documents comprising this contract; provided further that any update to such linked documents shall only apply to purchases or leases of the associated Vendor product or service offering after the effective date of the update; and, provided further, that, if Vendor has responded to a solicitation or request for pricing, no update of such linked documents on or after the initial date of Vendor’s initial response shall apply to that purchase unless Vendor directly informs Customer of the update before the purchase is consummated.

In the event that different or additional terms or conditions would otherwise result from accessing a linked document, agreement to said linked document shall not be effective until reviewed and approved in writing by Customer’s authorized signatory.

Vendor shall not without prior written agreement from Customer's authorized signatory, require any document that: 1) diminishes the rights, benefits, or protections of the Customer, or that alters the definitions, measurements, or method for determining any authorized rights, benefits, or protections of the Customer; or 2) imposes additional costs, burdens, or obligations upon Customer, or that alters the definitions, measurements, or method for determining any authorized costs, burdens, or obligations upon Customer.

If Vendor attempts to do any of the foregoing, the prohibited documents will be void and inapplicable to the contract between DIR and Vendor or Vendor and Customer, and Vendor will nonetheless be obligated to perform the contract without regard to the prohibited documents, unless Customer elects instead to terminate the contract, which in such case may be identified as a termination for cause against Vendor.

The foregoing requirements apply to all contracts, including, but not limited to, contracts between Customer and a reseller who attempts to pass through documents and obligations from its Manufacturer or Publisher.

3. Appendix A, Standard Terms and Conditions For Product and Related Services Contracts, is hereby restated in its entirety and replaced with the attached Appendix A, Standard Terms and Conditions For Product and Related Services Contracts dated 06/21/2016, except where previous authorized exceptions to Appendix A were allowed and documented as part of the Contract. In such cases, the previously authorized exceptions shall be applied to the portions of the new Appendix A which are comparable to those in the earlier Appendix A for which they were written, and this without regard for the numbering or lettering associated with any of the documents. Applied in such manner, the exceptions shall remain in full force and effect until such time the contract expires or is terminated.

4. Authorized Exceptions to Appendix A, Standard Terms and Conditions For Product and Related Service Contracts dated 06/21/2016.

A. Section 5. Intellectual Property Matters, A-L is hereby deleted and restated in its entirety as follows:

This contract does not contemplate, authorize or support acquisition of custom software products or services. If Vendor and Customer seek to contract for such product or service, they must use a separate contract or seek amendment with DIR of this contract. If DIR and IBM decide to authorize customized software or hardware products; then the parties will negotiate in good faith the intellectual property language contained in Appendix A.

B. Section 8. Pricing, Purchase Orders, Invoices, and Payments, C. Customer Price, 3) is hereby restated in its entirety as follows:

3) If pricing for products available under this Contract are provided at a lower price to The Cooperative Purchasing Network of Houston, Texas ("TCPN"), the NASPO ValuePoint and its participating members through their NASPO participating member agreements, or the U.S. General Services Administration ("GSA"), then the available Customer Price in this Contract shall be adjusted to that lower price. This requirement applies only to Vendor's list prices (less any applicable discount) for products for a quantity of one (1) under like terms and conditions, and does not apply to volume discount/rebate purchase programs, special bidding, promotional offers, special pricing purchases, or the like. This provision does not apply to any discounts or pricing Vendor may offer to Vendor's "business partners," authorized dealers, VARs or other resellers. This Contract shall be amended within ten (10) business days to reflect the lower price, which will be available for future transactions only.

C. Section 8. Pricing, Purchase Orders, Invoices, and Payments, G. Changes to Prices is hereby restated in its entirety as follows:

Vendor may change the price of any product or service at any time, based upon changes to the MSRP, but discount levels shall remain consistent with the discount levels specified in this Contract. Price decreases shall take effect automatically during the term of this Contract and shall be passed onto the Customer immediately.

D. Section 9. Contract Administration, A. Contract Administrator, 2) Vendor Contract Administrator is hereby restated in its entirety as follows:

Vendor shall provide a dedicated Contract Administrator whose duties shall include but not be limited to: i) supporting the marketing and management of the Contract, ii) facilitating dispute resolution between a Order Fulfiller and a Customer, and iii) advising DIR of Order Fulfillers performance under the terms and conditions of the Contract. DIR reserves the right to require a change in Vendor's then-current Contract Administrator if the assigned Contract Administrator is not, in the opinion of DIR, adequately serving the needs of the State. If vendor disagrees with the request, then within ten (10) business days vendor may state its reasons for such disagreement; however, vendor must replace the contract administrator if DIR so requires.

E. Section 9. Contract Administration, B. Reporting and Administrative Fees, 2) Detailed Monthly Report is hereby amended to add the following:

The term "sales" shall mean actual sales that have been invoiced.

F. Section 9. Contract Administration, C. Records and Audit, subparagraph 3) is hereby restated in its entirety as follows:

Vendor and/or Order Fulfillers shall grant access to all paper and electronic records, books, documents, accounting procedures, practices and any other items relevant to the performance of the Contract to the DIR Internal Audit department or DIR Contract Management staff, including the compliance checks designated by the DIR Internal Audit department, DIR Contract Management staff, the State Auditor's Office, and of the United States, and such other persons or entities designated by DIR for the purposes of inspecting, Compliance Checking and/or copying such books and records. Vendor and/or Order Fulfillers shall provide copies and printouts requested by DIR without charge. DIR shall provide Vendor and/or Order Fulfillers ten (10) business days' notice prior to inspecting, Compliance Checking, and/or copying Vendor's and/or Order Fulfiller's records. Vendor's and/or Order Fulfillers records, whether paper or electronic, shall be made available during regular office hours. Vendor and/or Order Fulfiller personnel familiar with the Vendor's and/or Order Fulfiller's books and records shall be available to the DIR Internal Audit department, or DIR Contract Management staff and designees as needed. Vendor and/or Order Fulfiller shall provide adequate office space to DIR staff during the performance of Compliance Check. If Vendor is found to be responsible for inaccurate reports resulting in improper charges, DIR may invoice Vendor for the reasonable costs of the audit, upon which Vendor will either provide DIR with a credit for the agreed upon charges, or must pay DIR within thirty (30) days of receipt of the invoice, at DIR's option.

G. Section 9. Contract Administration, C. Records and Audit, new subparagraph 5) is hereby added as follows:

PERSONS PERFORMING AUDITS WILL COMPLY WITH REASONABLE AND NECESSARY SECURITY PROCEDURES TO THE EXTENT THAT THESE DO NOT INTERFERE WITH PERFORMANCE OF AUDITORS' FUNCTIONS. FOR THE AVOIDANCE OF DOUBT, THE FOREGOING DOES NOT PERMIT A DIR CUSTOMER TO ACCESS RECORDS RELATED TO VENDOR'S PERSONNEL, PROFITS, INTERNAL COST DATA, OR OTHER CUSTOMERS.

H. Section 10. Vendor Responsibilities, A. Indemnification, is hereby restated in its entirety as follows:

A1. Independent Contractor

1) INDEPENDENT CONTRACTOR VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, IT IS FURNISHING PRODUCTS AND SERVICES IN THE CAPACITY OF AN INDEPENDENT CONTRACTOR AND THAT VENDOR IS NOT AN EMPLOYEE OF THE CUSTOMER OR THE STATE OF TEXAS.

A2. Acts or Omissions

Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL THIRD PARTY LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES that a court finally awards or that are included in a settlement approved in writing by Vendor arising out of, or resulting from any acts or omissions of the Vendor or its agents, employees, subcontractors, Order Fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. Vendor retains the right to raise any and all defenses that may apply. Such indemnification obligation shall be subject to the following limitation of liability: Other than claims for personal injury (including death), damage to real or tangible personal property, infringement or breach of security or confidentiality, Vendor shall only be liable for direct damages up to the value of two (2) times the cost to the Customer for the products or services giving rise to the third party claim up to a cap of five million dollars (\$5,000,000); if the charges are recurring charges, 12 months' charges apply. Vendor and each DIR customer may agree to a higher limitation of liability on a transaction by transaction basis. In addition, if the Indemnified Party is subject to a limitation of liability for such third party claims, such limitation of liability will apply to Vendor as well. For the avoidance of doubt, the defense of sovereign immunity is not available to Vendor.

A3. Infringements

a) Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES from any and all third party claims that a product or service acquired under this Agreement infringes any United States patents, copyrights, and trade and service marks in the PERFORMANCES OR ACTIONS OF VENDOR PURSUANT TO THIS CONTRACT. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. VENDOR SHALL BE LIABLE TO PAY ALL COSTS, DAMAGES, AND ATTORNEYS' FEES FINALLY AWARDED BY A COURT AGAINST CUSTOMER, OR AS INCLUDED IN A SETTLEMENT AGREED APPROVED BY VENDOR. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR

MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE OF THE OFFICE OF THE ATTORNEY GENERAL.

b) Vendor shall have no liability under this section if the alleged infringement is caused in whole or in part by: (i) use of the product or service for a purpose or in a manner for which the product or service was not designed, (ii) any modification made to the product without Vendor's written approval, (iii) any modifications made to the product by the Vendor pursuant to Customer's specific instructions, (iv) any intellectual property right owned by or licensed to Customer, (v) any use of the product or service by Customer that is not in conformity with the terms of any applicable license agreement; or (vi) the distribution, operation or use of the product for the benefit of a third party outside Customer's entity.

c) If Vendor becomes aware of an actual or potential claim, or Customer provides Vendor with notice of an actual or potential claim, Vendor may (or in the case of an injunction against Customer, shall), at Vendor's sole option and expense; (i) procure for the Customer the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that Customer's use is non-infringing.

I. Section 10, Vendor Responsibilities, I. Security of Premises, Equipment, Data and Personnel is hereby restated in its entirety as follows:

Vendor and/or Order Fulfiller may, from time to time during the performance of the Contract, have access to the personnel, premises, equipment, and other property, including data, files and /or materials (collectively referred to as "Data") belonging to the Customer. Vendor and/or Order Fulfiller shall use their best efforts to preserve the safety, security, and the integrity of the personnel, premises, equipment, Data and other property of the Customer, in accordance with the advance instruction of the Customer. Vendor and/or Order Fulfiller shall be responsible for damage to Customer's equipment, workplace, and its contents when such damage is caused by its employees or subcontractors. If a Vendor and/or Order Fulfiller fails to comply with Customer's security requirements, then Customer may immediately terminate its Purchase Order and related Service Agreement/Statement of Work.

J. Section 10. Vendor Responsibilities, K. Limitation of Liability, is hereby restated in its entirety as follows:

For any claim or cause of action arising under or related to the Contract: i) except for Vendor's indemnification obligations (addressed above), to the extent permitted by the Constitution and the laws of the State of Texas, none of the parties shall be liable to the other for punitive, special, or consequential damages, even if it is advised of the possibility of such damages; and ii) Vendor's liability for damages of any kind to the Customer shall be limited to two times the total amount paid to

Vendor (if recurring, 12 months' charges apply) under each Statement of Work or Purchase Order to this Contract, except for claims arising from death, personal injury, or real or tangible personal property damage, or Vendor's indemnification obligations. IN NO EVENT, SHALL VENDOR BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL OR INDIRECT DAMAGES (INCLUDING, WITHOUT LIMITATION, CLAIMS FOR LOST BUSINESS PROFITS OR REVENUE, LOSS OF DATA, INTERRUPTION IN USE, UNAVAILABILITY OF DATA, OR THE COST OF THE PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES) OR FOR PUNITIVE OR EXEMPLARY DAMAGES. However, this limitation of Vendor's liability shall not apply to claims of patent, trademark, or copyright infringement or indemnification obligation for acts and omissions.

K. Section 10. Vendor Responsibilities, N. Required Insurance Coverage, is hereby amended to restate in its entirety as follows:

As a condition of this Contract with DIR, Vendor shall provide the listed insurance coverage within 5 days of execution of the Contract if the Vendor is awarded services which require that Vendor's employees perform work at any Customer premises and/or use employer vehicles to conduct work on behalf of Customers. In addition, when engaged by a Customer to provide services on Customer premises, the Vendor shall, at its own expense, secure and maintain the insurance coverage specified herein, and shall provide proof of such insurance coverage to the related Customer within five (5) business days following the execution of the Purchase Order. Vendor may not begin performance under the Contract and/or a Purchase Order until such proof of insurance coverage is provided to, and approved by, DIR and the Customer. All required insurance must be issued by companies that are A-financially rated and duly licensed, admitted, and authorized to do business in the State of Texas. The Customer and DIR will be named as Additional Insureds on Commercial General Liability coverage and Business Automobile Liability Insurance. Required coverage must remain in effect through the term of the Contract and each Purchase Order issued to Vendor there under. The minimum acceptable insurance provisions are as follows:

1) Commercial General Liability

Commercial General Liability must include a combined single limit of \$500,000 per occurrence for coverage A, B, & C including products/completed operations, where appropriate, with a separate aggregate of \$500,000. The policy shall contain the following provisions:

- a) Blanket contractual liability coverage for liability assumed under the Contract;
- b) State of Texas, DIR and Customer listed as an additional insured;
- c) 30-day Notice of Termination in favor of DIR and/or Customer, which will be provided directly by Vendor should such termination occur; and

d) Waiver of Transfer Right of Recovery Against Others in favor of DIR and/or customer.

2) Workers' Compensation Insurance

Workers' Compensation Insurance and Employers' Liability coverage must include limits consistent with statutory benefits outlined in the Texas Workers' Compensation Act (Art. 8308-1.01 et seq. Tex. Rev. Civ. Stat) and minimum policy limits for Employers' Liability of \$250,000 bodily injury per accident, \$500,000 bodily injury disease policy limit and \$250,000 per disease per employee.

3) Business Automobile Liability Insurance

Business Automobile Liability Insurance must cover all owned and long-term leased vehicles with a minimum combined single limit of \$500,000 per occurrence for bodily injury and property damage. Where vendor rents vehicles on a short-term basis, Vendor shall acquire appropriate insurance through such rental companies. Alternative acceptable limits are \$250,000 bodily injury per person, \$500,000 bodily injury per occurrence and at least \$100,000 property damage liability per accident. The policy shall contain the following endorsements in favor of DIR and/or Customer:

- a) Waiver of Subrogation;
- b) 30-day Notice of Termination; and
- c) Additional Insured.

L. Section 10, Vendor Responsibilities, T. Deceptive Trade Practices; Unfair Business Practices is hereby restated in its entirety as follows:

a) Vendor represents and warrants that during the preceding five (5) years, Vendor certifies that there are no Subcontractors and has not been (i) found liable in any administrative hearing, litigation or judicial or administrative proceeding of Deceptive Trade Practices violations as defined under Chapter 17, Texas Business & Commerce Code, or (ii) has outstanding allegations of any Deceptive Trade Practice pending in any administrative hearing, litigation or other judicial or administrative proceeding within the State of Texas.

b) Vendor certifies that during the preceding five (5) years, Vendor has no officers who have served as officers of other entities who (i) have been found liable in any administrative hearing, litigation or other judicial or administrative proceeding of Deceptive Trade Practices violations as defined under Chapter 17, Texas Business & Commerce Code or (ii) have outstanding allegations of any Deceptive Trade Practice pending in any administrative hearing, litigation or other judicial or administrative proceeding.

M. Section 11, Contract Enforcement, B Termination, 3) Termination for Convenience is hereby restated in its entirety as follows:

DIR may terminate the Contract, in whole or in part, by giving the other party thirty (30) calendar day's written notice. A Customer may terminate a Purchase Order if it is determined by the Customer that Vendor will not be able to deliver product or services in a timely manner to meet the business needs of the Customer by giving Vendor thirty (30) days written notice.

5. **Appendix C, Pricing Index**, is hereby restated in its entirety and replaced with the attached Appendix C, Pricing Index.

6. **Appendix M, Master Services Attachment for Service Elite**, is hereby restated in its entirety and replaced with the attached Appendix M, Master Services Attachment for Service Elite.

All other terms and conditions of the Contract not specifically modified herein shall remain in full force and effect. In the event of a conflict among provisions, the order of precedence shall be this Amendment Number 6, then Amendment Number 5, then Amendment Number 4, then Amendment Number 3, then Amendment Number 2, then Amendment Number 1 and finally the Contract.

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IN WITNESS WHEREOF, the parties hereby execute this amendment to be effective as of the date of the last signature, but in all events, no later than November 4, 2016.

International Business Machines Corporation

Authorized By: Signature on File

Name: Eric Rice

Title: IBM Contracts Sales Manager

Date: 11/3/2016

The State of Texas, acting by and through the Department of Information Resources

Authorized By: Signature on File

Name: Hershel Becker

Title: Chief Procurement Officer

Date: 11/4/2016

Office of General Counsel: Signature on File 11/3/2016