

**STATE OF TEXAS
DEPARTMENT OF INFORMATION RESOURCES**

CONTRACT FOR SERVICES

INTERNATIONAL BUSINESS MACHINES CORPORATION

1. Introduction

A. Parties

This Contract for services is entered into between the State of Texas, acting by and through the Department of Information Resources (hereinafter "DIR") with its principal place of business at 300 West 15th Street, Suite 1300, Austin, Texas 78701, and International Business Machines Corporation (hereinafter "Vendor"), with its principal place of business at One New Orchard Road, Armonk, New York 10504.

B. Compliance with Procurement Laws

This Contract is the result of compliance with applicable procurement laws of the State of Texas. DIR issued a solicitation on the Comptroller of Public Accounts' Electronic State Business Daily, Request for Offer (RFO) DIR-SDD-TMP-199, on October 30, 2012, for Cloud Services. DIR subsequently issued a BAFO opportunity for Cloud Assessment Services on July 8, 2013. Upon execution of this Contract, a notice of award for RFO DIR-SDD-TMP-199 shall be posted by DIR on the Electronic State Business Daily.

C. Order of Precedence

This Contract; Appendix A, Standard Terms and Conditions For Services Contracts; Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan; Appendix C, Pricing Index; Appendix D, Sample Statement of Work for Cloud Services; Appendix E, IBM Cloud Services Agreement; Exhibit 1, Vendor's Response to RFO DIR-SDD-TMP-199, including all addenda; and Exhibit 2, RFO DIR-SDD-TMP-199, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Appendix E, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

2. Term of Contract

The term of this Contract shall be one (1) year commencing on the last date of approval by DIR and Vendor. Prior to expiration of the original term, DIR and Vendor may extend this Contract, upon mutual agreement, for up to three (3) optional one-year terms. Protracted contract negotiations may, in DIR's sole discretion, result in fewer optional terms.

3. Service Offerings

Services available under this Contract are limited to those specified in Appendix C, Pricing Index. Vendor may incorporate changes to their services offering; however, any changes must be within the scope of services awarded based on the posting described in Section 1.B above. Vendor may not add services which were not included in the Vendor's response to the solicitation described in Section 1.B above.

4. DIR Administrative Fee

A) The administrative fee to be paid by the Vendor to DIR based on the dollar value of all sales to Customers pursuant to this Contract is three-fourths of one percent (.75%). Payment will be calculated for all sales, net of returns and credits. For example, the administrative fee for sales totaling \$100,000 shall be \$750.00.

B) All prices quoted to Customers shall include the administrative fee. DIR reserves the right to change this fee upwards or downwards during the term of this Contract, upon written notice to Vendor without further requirement for a formal contract amendment. Any change in the administrative fee shall be incorporated in the price to the Customer.

5. Notification

All notices under this Contract shall be sent to a party at the respective address indicated below.

If sent to the State:

Grace Windbigler
Enterprise Contract Management
Department of Information Resources
300 W. 15th St., Suite 1300
Austin, Texas 78701
Phone: (512) 475-4700
Facsimile: (512) 475-4759

If sent to the Vendor:

Carolyn Carlson
International Business Machines Corporation
1177 S. Belt Line Road
Coppell, TX 75019-4642
Phone: (972) 387-3828
E-mail: cjglass@us.ibm.com

6. Statements of Work, Service Agreement and Shrink/Click-wrap Agreements

A. Statement of Work and Service Agreement

Services provided under this Contract shall be based on the Sample Statement of Work as set forth in Appendix D of this Contract and the Service Agreement as set forth in Appendix E of this Contract. Customers may negotiate the terms and conditions of a

SOW and Service Agreement to suit their business needs, so long as the negotiated terms and conditions do not diminish Vendor's commitments set forth in the Appendix D, Sample Statement of Work, Appendix E, Service Agreement, or this Contract.

B. Shrink/Click-wrap Agreement

Regardless of any other provision or other license or service terms which may be issued by Vendor after the effective date of this Contract, and irrespective of whether any such provisions have been proposed prior to or after the issuance of a Purchase Order for products licensed under this Contract, or the fact that such other agreement may be affixed to or accompany software upon delivery (shrink-wrap), the terms and conditions set forth in this Contract shall supersede and govern the terms between Customers and Vendor. **It is the Customer's responsibility to read the Shrink/Click-wrap License/Service Agreement and determine if the Customer accepts the license terms as amended by this Contract. If the Customer does not agree with the license/service terms, Customer shall be responsible for negotiating with the Vendor to obtain additional changes in the Shrink/Click-wrap Agreement language.**

7. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Services Contracts.

A. Appendix A, Section 3, General Provisions, E. Survival, is hereby restated in its entirety as follows:

All applicable software license agreements, warranties or service agreements that were entered into between Vendor and a Customer under the terms and conditions of the Contract shall survive the expiration or termination of the Contract. All Purchase Orders issued and accepted by Vendor shall survive expiration or termination of the Contract. Rights and obligations under this Contract which by their nature should survive, including, but not limited to any and all payment obligations invoiced prior to the termination or expiration hereof; obligations of confidentiality; and, indemnification, will remain in effect after termination or expiration hereof.

B. Appendix A, Section 4. Intellectual Property Matters, is hereby restated in its entirety as follows:

This Contract does not contemplate, authorize or support acquisition of customer 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 Vendor decide to authorize customized software or hardware products; then the parties will negotiate in good faith the intellectual property language contained in Appendix A.

C. Appendix A, Section 7. Pricing, Purchase Orders, Invoices and Payments, C. Customer Price, Item 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 Western States Contracting Alliance (“WSCA”) and its participating members through their WSCA participating member agreements, and 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.

D. Appendix A, Section 8. Contract Administration, B. Reporting and Administrative Fees, 2) Detailed Monthly Report, is hereby restated in its entirety as follows:

Vendor shall electronically provide DIR with a detailed monthly report in the format required by DIR showing the dollar volume of any and all sales under the Contract for the previous month period. Reports shall be submitted to the DIR ICT Cooperative Contracts E-Mail Box at ict.sales@dir.texas.gov. Reports are due on the fifteenth (15th) calendar day after the close of the previous month period. The monthly report shall include, per transaction: the detailed sales for the period, Customer name, invoice date, invoice number, description, quantity, manufacturer’s suggested retail price, unit price, extended price, Customer Purchase Order number, contact name, Customer’s complete billing address, and other information as required by DIR. Each report must contain all information listed above per transaction or the report will be rejected and returned to the Vendor for correction in accordance with this section.

If Vendor submits three (3) monthly sales reports or administrative fee payments late within a 12-month period, Dir reserves the right to suspend or terminate this Contract for cause per Section 9.B.4.a. of Appendix A Termination for Cause. If Vendor is late with its monthly sales report, Vendor will pay DIR one hundred dollars (\$100) per day (“Late Payment”), for each day the monthly report is late, up to ten (10) days per month for a maximum monthly Late Payment amount of \$1000 for late monthly sales reports. If Vendor is late with its monthly administrative fee payment, Vendor will pay DIR one hundred dollars (\$100) per day (“Late Payment”), for each day the monthly administrative fee payment is late, up to ten (10) days per month for a maximum monthly Late Payment amount of \$1000 for late monthly administrative fee payments. DIR does not waive any other contractual remedy pursuant to this Contract.

E. Appendix A, Section 8. 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 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.

F. Appendix A, Section 8. Contract Administration, C. Records and Audit, new subparagraph 5), is hereby added as follows:

5) 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.

G. Appendix A, Section 9. Vendor Responsibilities, A. Indemnification, 1) INDEPENDENT CONTRACTOR, is hereby restated in its entirety as follows:

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.

H. Appendix A, Section 9. Vendor Responsibilities, A. Indemnification, 2) Acts or Omissions, is hereby restated in its entirety as follows:

2) 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.

I. Appendix A, Section 9. Vendor Responsibilities, A. Indemnification, 3) Infringements, is hereby restated in its entirety as follows:

3) 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 AGREEMENT 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.

J. Appendix A, Section 9. 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 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.

K. Appendix A, Section 9. 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) 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 aggregate liability for damages of any kind under the Contract other than for claims for third party patent, trademark or copyright infringement ("IP Claims") shall be limited to the lesser of: (A) thirty-six times the average monthly amount paid to Vendor under the Contract during the twelve months immediately preceding the accrual of the claim or cause of action; or (B) \$20,000,000. Vendor's aggregate liability under the Contract for IP Claims shall not exceed \$15,000,000. CUSTOMERS SHOULD EVALUATE THEIR RISK FOR EACH PURCHASE: IF NEEDED, CUSTOMERS MAY NEGOTIATE HIGHER LIMITATIONS OF LIABILITY.

L. Appendix A, Section 9. Vendor Responsibilities, O. Required Insurance Coverage, is hereby restated 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:

Vendor Contract No. _____

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

M. Appendix A, Section 9. Vendor Responsibilities, U. 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.

N. Appendix A, Section 10. 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.

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This Contract is executed to be effective as of the date of last signature.

International Business Machines Corporation

Authorized By: /Signature on File/ _____

Name: Stan Martin _____

Title: IBM Cloud Services Manager _____

Date: 04/21/15 _____

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

Authorized By: /Signature on File/ _____

Name: Dale Richardson

Title: Chief Operations Officer

Date: 04/23/15 _____

Office of General Counsel: /Signature on File/ 04/22/15 _____