

PARTICIPATING ADDENDUM
NASPO ValuePoint COOPERATIVE PURCHASING PROGRAM
Computer Equipment
Administered by the State of Minnesota (hereinafter "Lead State")

MASTER AGREEMENT
Master Agreement No: MNWNC-116
IBM Corporation
(hereinafter "Contractor")
And
State of ND
(hereinafter "STATE", "Participating State", or "Participating Entity")
ND State Contract #022-MNWNC-116-PA

1. Scope: This Participating Addendum allows for purchase of the following Computer Equipment/Services for use by the Participating State's entities, governmental boards and commissions, institutions under the jurisdiction of the State Board of Higher Education, other government entities (including counties, cities, townships, public primary and secondary educational entities, nonprofit entities established on behalf of public entities, tribal agencies, and the International Peace Garden. This Participating Addendum is not a purchase order and it does not guarantee any purchases will be made by any Participating State procuring agency. Each Participating State procuring agency is responsible for complying with any laws that regulate its individual purchase authority. The parties agree to the following terms and conditions and expressly agree that if any of the following terms and conditions are in conflict with any of the terms and conditions of the Master Agreement, then, notwithstanding any term in the Master Agreement, the following terms and conditions govern and control the rights and obligations of the parties. Any amendments to the Participating Addendum, or any other amendments, must be in writing and executed by each party.

The original solicitation contains the requirements and definitions establishing the following Product Bands allowed on the Master Agreement. The Master Agreement identifies the bands awarded to the Contract Vendor. The Products and Services available under this Participating Addendum include all Products and Services in scope for the Master Agreement, with the exception of the following change for the configuration limits:

- a. **Server and Storage category is increased to \$750,000.**
- b. **Printers and scanners in all categories are increased to \$30,000.**
- c. **The following copiers cannot be sold unless the Participating State and Participating Entity (applies to State Agencies only) has received prior contract exemption approval:**
 - i. **Convenience Black and White Copiers with Speed in Impressions per Minute (IPM) 90 or greater**
 - ii. **Convenience Hybrid Copiers with Speed in Impressions per Minute (IPM) 50 or greater**
 - iii. **Any Production Black and White Copiers**
 - iv. **Any Wide Format Copiers**

v. Any Color Production Copiers

To the extent applicable, this Participating Addendum is effective and will replace and supersede the existing Participating Addendum between Contractor and Participating State/Entity under the WSCA Master Price Agreement Number B27166, when executed by both parties.

This Participating Addendum will be coterminous with the Master Agreement and any extensions of the Master Agreement, unless terminated pursuant to MASTER AGREEMENT TERMS AND CONDITIONSB. WSCA-NASPO TERMS AND CONDITIONS, Section 6 Cancellation.

2. Participation: Use of specific NASPO ValuePoint cooperative contracts by state agencies, political subdivisions and other entities (including cooperatives) are authorized pursuant to N.D.C.C. § 54-44.4-13. Issues of interpretation and eligibility for participation shall be determined by the State Procurement Office.

3. Order of Precedence:

1. A Participating Entity's Participating Addendum ("PA");A Participating Entity's Participating Addendum shall not diminish, change, or impact the rights of the Lead State with regard to the Lead State's contractual relationship with the Contract Vendor under the Terms of Minnesota NASPO ValuePoint Master Agreement
2. Minnesota NASPO ValuePoint Master Agreement (includes negotiated Terms & Conditions)
3. The Solicitation including all Addendums; and
4. Contract Vendor's response to the Solicitation

These documents shall be read to be consistent and complementary. Any conflict among these documents shall be resolved by giving priority to these documents in the order listed above. Contract Vendor terms and conditions that apply to this Master Agreement are only those that are expressly accepted by the Lead State and must be in writing and attached to the Master Agreement as an Exhibit or Attachment. No other terms and conditions shall apply, including terms and conditions listed in the Contract Vendor's response to the Solicitation, or terms listed or referenced on the Contract Vendor's website, in the Contract Vendor quotation/sales order or in similar documents subsequently provided by the Contract Vendor. The solicitation language prevails unless a mutually agreed exception has been negotiated.

4. Participating State Modifications or Additions to Master Agreement Award – Exhibit A, section B, WSCA-NASPO Terms and Conditions and where applicable, section C - Minnesota Terms and Conditions:

(Other modifications or additions apply only to actions and relationships within the Participating Entity.)

- a. **Prepayment.** STATE will not make any advance payments before performance by CONTRACTOR under this Participating Addendum (this section modifies Exhibit A, sectionB).
- b. **Payment of Taxes by State.** STATE is not responsible for and will not pay local, state, or federal taxes. STATE sales tax exemption number is E-

2001. STATE will furnish certificates of exemption upon request by CONTRACTOR (this section modifies Exhibit A, section B).

- c. Applicable Law and Venue. This Participating Addendum is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Participating Addendum must be brought and solely litigated in the District Court of Burleigh County, North Dakota. Each party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens* (this section modifies Exhibit A, sections B and C).**
- d. Insurance. CONTRACTOR shall secure and keep in force during the term of this Participating Addendum and CONTRACTOR shall require all subcontractors, prior to commencement of an agreement between CONTRACTOR and the subcontractor, to secure and keep in force during the term of this PARTICIPATING ADDENDUM, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages (this section modifies Exhibit A, section B):**
 - i. Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.**
 - ii. Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.**
 - iii. Workers compensation coverage meeting all statutory requirements. The policy must provide coverage for all states of operation that apply to the performance of this Participating Addendum.**
 - iv. Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.**

The insurance coverages listed above must meet the following additional requirements:

- v. Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the CONTRACTOR.**
- vi. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.**
- vii. The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.**

viii. The state of North Dakota and its agencies, officers, and employees shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the CONTRACTOR.

ix. The insurance required in this agreement, through a policy or endorsement, shall include:

1. Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State.
2. A provision that CONTRACTOR's insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of CONTRACTOR's insurance and shall not contribute with it only with respect to liability arising out of CONTRACTOR'S negligence and as respects this Addendum only.
3. Cross liability/severability of interest for all policies and endorsements.
4. The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest.
5. The insolvency or bankruptcy of the insured CONTRACTOR shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured CONTRACTOR from meeting the retention limit under the policy.

x. CONTRACTOR shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.

xi. Failure to provide insurance as required in this agreement is a material breach of Participating Addendum entitling STATE to terminate this agreement immediately.

xii. CONTRACTOR shall provide at least 30 day notice of any cancellation of the policies.

e. **Indemnification.** In addition to any indemnity obligations found within the Master Agreement, CONTRACTOR agrees that any attorney appointed to represent the STATE must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08(this section modifies Exhibit A, sectionsB and C).

f. **Limitation of Liability.** Except for direct damages that cannot be limited under N.D.C.C. § 32-12.2-15, CONTRACTOR's limitation of liability shall be that specified in Section 17 of Exhibit C to the Master Agreement (this

section modifies Exhibit A, section C).

- g. Confidentiality.** CONTRACTOR shall not use or disclose any information it receives from STATE under this Participating Addendum that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Participating Addendum or as authorized in advance by STATE. STATE shall not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues for five (5) years beyond the term of this Participating Addendum (this section modifies Exhibit A, section B), unless a longer time period is required by law or statute without the possibility of contractual waiver.
- h. Compliance with Public Record Law.** CONTRACTOR understands that, except for disclosures prohibited in this Participating Addendum, STATE must disclose to the public upon request any records it receives from CONTRACTOR. CONTRACTOR further understands that any records obtained or generated by CONTRACTOR under this Participating Addendum, except for records that are confidential under this Participating Addendum, may, under certain circumstances, be open to the public upon request under the North Dakota public records law. CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to the request (this section modifies Exhibit A, section B).
- i. Severability.** If any term of the Master Agreement, including this Participating Addendum, is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the parties are to be construed and enforced as if the Master Agreement or Participating Addendum did not contain that term (this section modifies Exhibit A, sections B and C).
- j. Spoliation – Notice of Potential Claims.** CONTRACTOR shall promptly notify STATE of all potential claims that arise or result from this Participating Addendum. CONTRACTOR shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect the evidence, including the scene of an accident (this section modifies Exhibit A, section B).
- k. Alternative Dispute Resolution – Jury Trial.** STATE does not agree to any form of binding arbitration, mediation, or other forms of mandatory

alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial (this section modifies Exhibit A, section B).

l. **Attorney Fees and Costs.** In the event a lawsuit is instituted by STATE to obtain performance under this Participating Addendum, and STATE is the prevailing party, CONTRACTOR shall, except when prohibited by N.D.C.C. §28-26-04, pay STATE's reasonable attorney fees and costs in connection with the lawsuit (this section modifies Exhibit A, section B).

m. **State Audit.** All records, regardless of physical form, and the project procedures of CONTRACTOR relevant to this Participating Addendum are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors. CONTRACTOR shall maintain all of these records for at least three (3) years following completion of this Participating Addendum and be able to provide them at any reasonable time. STATE, State Auditor, or Auditor's designee shall provide reasonable notice (this section modifies Exhibit A, sections B and C).

n. **Takeback and Other Environmental Programs.** Takeback and/or recycling of products by agencies covered by this Addendum are subject to approval of OMB State Surplus Property pursuant to N.D.C.C. § 54-44.4-05.5 (this section modifies Exhibit A, section B).

5. **Primary Contacts:** The primary contact individuals for this Participating Addendum areas follows (or their named successors):

Contractor	
Name	Karen A. Schneider
Address	4660 La Jolla Village Drive, Ste. 300, San Diego, CA 92122
Telephone	720-397-5563
Fax	N/A
E-mail	kasch@us.ibm.com

Participating Entity	
Name	Tricia Opp
Address	North Dakota State Procurement Office, 600 East Boulevard Avenue, Dept 012, Bismarck, ND 58505-0310
Telephone	701-328-1721
Fax	701-328-1615
E-mail	topp@nd.gov

6. **Partner Utilization:** Each state represented by NASPO ValuePoint participating in this Master Agreement independently has the option of utilizing partners. Only partners approved by this Participating State may be deployed. The Participating State will define the process to add and remove

partners. The Contractor's partners' participation will be in accordance with the terms and conditions set forth in the aforementioned Master Agreement. The Contractor will identify and define the partner programs available and instructions on how to utilize those partners will be listed on the Contractor's web site for this State's participating Addendum.

7. **Terms.** The Participating State/Entity is agreeing to the terms of the Master Agreement only to the extent the terms are not in conflict with applicable law.

8. **Orders:** Any Order placed by a Participating Entity or Purchasing Entity for a Product and/or Service available from the Master Agreement must have the Contract number on the Purchase Order in order to be deemed to be a sale under (and governed by the prices and other terms and conditions of) the Master Agreement.

IN WITNESS WHEREOF, the parties have executed this Participating Addendum as of the date of execution by both parties below.

Participating State:	Contractor:
By: <i>Tricia Opp</i>	By: <i>K. Schneider</i>
Name: <i>Tricia Opp</i>	Name: <i>Karen Schneider</i>
Title: <i>Procurement Officer II</i>	Title: <i>NASPO ValuePoint Program Mgr</i>
Date: <i>9/10/15</i>	Date:

For questions on executing a participating addendum, please contact:

NASPO ValuePoint	
Cooperative Development Coordinator	Tim Hay
Telephone	503-428-5705
E-mail	thay@naspovalucpoint.org

[Please email fully executed PDF copy of this document to PA@naspovalucpoint.org to support documentation of participation and posting in appropriate data bases]