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## PROFESSIONAL SERVICES

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### TERMS AND CONDITIONS

During the contract period, International Business Machines Corporation (IBM) and the Government agree that the following terms and conditions will apply to any order for IBM IT Professional Services that is placed by the Government under this Special Item. The term "Government" shall mean all Federal agencies (as defined in Paragraph (b) of 40 USC 472) the Senate, the House of Representatives, the Architect of the Capitol, and the Government of the District of Columbia, all of which are hereinafter referred to as the Government. The materials and services under this Special Item will be available to the Government within the United States, the District of Columbia and Puerto Rico. On a case-by-case basis IBM will deliver products and perform Services to overseas U.S. Government locations which are in support of national defense operations (including U.S. Embassies), and to locations which support the national interest of the United States.

### 7.1 SCOPE

- a. The prices, terms and conditions stated herein apply exclusively to Professional Services within the scope of this GSA Schedule.
- b. The Contractor shall provide services at the Contractor's facility and/or at the ordering activity location, as agreed to by the Contractor and the ordering activity.

GSA has negotiated hourly service rates but ordering activities are responsible for any necessary statement of work, the reasonableness of the number of hours and the reasonableness of the labor mix between labor categories.

IBM is not responsible for failure to fulfill its obligations under this Special Item due to causes beyond its control.

### 7.2 ORDER

- A. Agencies may use written orders, blanket purchase agreements (BPA's), individual purchase orders, credit cards or task orders for ordering services under this contract.
- B. All task orders are subject to the terms and conditions of the contract. In the event of conflict between a task order and the contract, the contract will take precedence, except as may be otherwise agreed to by both IBM and the user agency.

For Performance Based Services notwithstanding any other provisions in this contract, in the event of conflict between the unique terms, conditions and prices of each negotiated engagement and the GSA Schedule terms, the Performance Based Service's task order shall govern.

Whenever the Government requires that service to be provided at a domestic location by persons with security clearances, the Government shall state that requirement in each order issued. IBM



may, at its option, reject any such orders by written notice to the ordering office within 60 days of receipt. If a DD Form 254, DOD Contract Security Classification Specification is required for security purposes, Section 6.a of the DD Form 254 should show the same IBM address as on the delivery order for maintenance coverage.

### **7.3 PERFORMANCE OF SERVICES**

A. The Contractor agrees to render services only during normal working hours, unless otherwise agreed to by IBM and the ordering activity.

B. Any Contractor travel required in the performance of IT Services must comply with the Federal Travel Regulations or Joint Travel Regulations, as applicable, in effect on the date(s) the travel is performed. Established Federal Government per diem rates will apply to all contractor travel.

### **7.4 STOP WORK ORDER (FAR 52.242-15)(AUG 1989)**

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either-

(1) Cancel the stop-work order; or

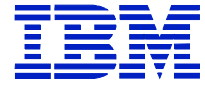
(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if-

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.



(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

## **7.5 INSPECTION OF SERVICES**

In accordance with FAR 52.212-4 CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS (MAR 2009) (DEVIATION I - FEB 2007) for Firm-Fixed Price orders and FAR 52.212-4 CONTRACT TERMS AND CONDITIONS COMMERCIAL ITEMS (MAR 2009) (ALTERNATE I OCT 2008) (DEVIATION I – FEB 2007) applies to Time-and-Materials and Labor-Hour Contracts orders placed under this contract.

Since the IBM services performed under this contract are commercial items, they will be performed in accordance with IBM's standard warranty provision and acceptance criteria.

## **7.6 RESPONSIBILITIES OF THE CONTRACTOR**

The Contractor shall comply with all laws, ordinances, and regulations (Federal, State, City, or otherwise) covering work of this character. If the end product of a task order is software, then FAR 52.227-14 Alt II or Alt III Rights in Data – General, may apply.

## **7.7 RESPONSIBILITIES OF THE ORDERING ACTIVITY**

Subject to security regulations, the ordering activity shall permit Contractor access to all facilities necessary to perform the requisite Services.

## **7.8 INDEPENDENT CONTRACTOR**

All Services performed by the Contractor or its subcontractors under the terms of this contract shall be as an independent Contractor, and not as an agent or employee of the Government. IBM does not undertake to perform any of Client's regulatory obligations, or assume any responsibility for Client's business or operation.

## **7.9 INVOICING**

The Contractor, upon completion of the work ordered, shall submit invoices for services. Progress payments may be authorized by the ordering activity, if appropriate, on individual orders. Progress payments shall be based upon completion of defined milestones or interim products. Invoices shall be submitted monthly for recurring services performed during the preceding month.

In the event that a price change occurs from the date of issuance of a delivery order (for a new service) to the date of receipt, the price shall be that which is indicated in IBM's quote or that Schedule 36 Professional Services Terms July 12, 2018



which is agreed to in a statement of work (SOW), provided that the order is received within the timeframe specified. In the absence of an IBM quote or SOW, then the price shall be that which is in effect on the date of receipt by IBM.

## **7.10 PAYMENT**

For firm-fixed price orders the ordering activity shall pay the Contractor, upon submission of proper invoices or vouchers, the prices stipulated in this contract for service rendered and accepted. Progress payments shall be made only when authorized by the order. For time and materials orders, the Payments under Time and Materials and Labor Hour Contracts at FAR 52.212-4 (Feb 2007) (ALTERNATE I – Feb 2007) applies to time and materials orders placed under this contract. For labor hour orders, the Payment under Time and Materials and Labor Hour Contracts at FAR 52.212-4 (Feb 2007) (ALTERNATE I – Feb 2007) applies to labor hour orders placed under this contract. 52.216-31(Feb 2007) Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Item Acquisition. As prescribed in 16.601(e)(3), insert the following provision:

- (a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.
- (b) The offeror must specify fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit. The offeror must specify whether the fixed hourly rate for each labor category applies to labor performed by:
  - (1) The offeror;
  - (2) Subcontractors; and/or
  - (3) Divisions, subsidiaries, or affiliates of the offeror under a common control.

IBM professional service rates, as specified in Appendix C shall apply to (b)(1), (2), and (3) above.

## **7.11 RESUME**

Resumes shall be provided to the GSA Contracting Officer or the user agency upon request.

## **7.12 STATEMENT OF WORK**

A separate Statement of Work will be signed by both IBM and the Government for services provided other than hourly assist services. Upon acceptance by IBM, IBM agrees to provide the Services described in the Statement of Work.

The Statement of Work includes, for example:

- A. IBM's responsibilities
- B. The Government's responsibilities



- C. The specific conditions (Completion Criteria), if any, that IBM is required to meet to fulfill its obligations
- D. A performance period for Services and an estimated schedule for planning purposes, and
- E. Applicable charges (not including taxes) and any other terms.
- F. Resumes shall be provided by IBM upon request.

If a Statement of Work contains an estimated schedule, both IBM and the Government agree to make reasonable efforts to carry out our respective responsibilities according to that Schedule. If the Statement of Work contains Completion Criteria, IBM will inform the Government when each criteria is met. The Government then has 10 days to inform IBM if the Government believes that IBM has not met the criteria. The project is complete when IBM meets the Completion Criteria.

### **Changes to Statements of Work**

When both IBM and the Government agree to change a Statement of Work, IBM will prepare a written description of the agreed change which must be signed by both IBM and the Government. Any change in the Statement of Work may affect the charges, estimated schedule, or other terms. Depending on the extent and complexity of the requested changes, additional charges may be required for analysis of the changes. Additional work will not commence until funded authorization is received from the Government.

## **7.13 REQUIRED CONSENTS**

The Government is responsible for promptly obtaining and providing to IBM all Required Consents necessary for IBM to provide the Services described in a Statement of Work. A Required Consent means any consents or approvals required to give IBM or our subcontractors the right or license to access, use and/or modify (including creating derivative works) the hardware, software, firmware and other products, to enable IBM and our subcontractors to perform the Services set forth in the Statement of Work without infringing the ownership or license rights (including patent and copyright) of the providers or owners of such product. IBM will be relieved of the performance of any obligations that may be affected by your failure to promptly provide any Required Consents to IBM.

## **7.14 CONTROL AND SUPERVISION**

IBM and the Government is each responsible for the supervision, direction, control, and compensation of their respective personnel.

The tasks on which assigned personnel assist shall remain the responsibility of the Government. Therefore, IBM does not guarantee that the Government's task will be accomplished under this contract, only that assistance shall be provided. No estimate made by IBM of the assistance to be provided to the Government is guaranteed to any extent or in any way.



## 7.15 PERSONNEL

Each party will assign personnel that are qualified to perform the tasks required of such party under this Agreement and is responsible for the supervision, direction, control, and compensation of its personnel. Subject to the foregoing, each party may determine the assignment of its personnel and its contractors.

IBM may engage subcontractors to provide or assist in providing Services, in which case IBM remains responsible for the fulfillment of its obligations under this Agreement and for the performance of the Services.

## 7.16 Government Resources

If Government is making available to IBM any facilities, software, hardware or other resources in connection with IBM's performance of Services, Government agrees to obtain any licenses or approvals related to these resources that may be necessary for IBM to perform the Services and develop project Materials. IBM will be relieved of its obligations that are adversely affected by Government's failure to promptly obtain such licenses or approvals. Government 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 an Attachment or Transaction Document, Government is responsible for i) any data and the content of any database Government 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. IBM's responsibilities regarding such data or databases, including any confidentiality and security obligations, are governed by the Attachments and Transaction Documents applicable to the particular Services transaction.

## 7.17 MATERIALS OWNERSHIP AND LICENSE

An Attachment or Transaction Document will specify Materials to be delivered to the Government 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.

The Government will own the copyright in Materials created as part of a Service that are identified as "Type I Materials" and each such Material will constitute a "work made for hire" to the extent permissible under U.S. copyright law. If any such Materials are not works made for hire under applicable law, IBM assigns the ownership of copyrights in such Materials to the Government. The Government 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.

IBM or its suppliers will own the copyright in Materials created as part of a Services transaction that are identified as Type II Materials. IBM grants the Government an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, and distribute (for the specific Government Contract, unless otherwise agreed to by IBM) copies of Type II Materials.





IBM or its suppliers retains ownership of the copyright in any of IBM's or its suppliers' works that pre-exist or were developed outside of the Government Agreement and any modifications or enhancements of such works that may be made under the Government's Agreement. To the extent they are embedded in any Materials, such works are licensed in accordance with their separate licenses provided to the Government, if any, or otherwise as Type II Materials. Each party agrees to reproduce the copyright notice and any other legend of ownership on any copies made under the licenses granted in this section.

## **7.18 ACCEPTANCE**

- A. For items having Completion Criteria (in the statement of work), when IBM meets the Completion Criteria.
- B. For hourly service, upon completion of the service hours.

## **7.19 WARRANTY FOR IBM SERVICES**

IBM warrants that it performs each IBM Service using reasonable care and skill and according to its current description (including any completion criteria) contained in this Agreement, Attachment, or a Transaction Document. Government agrees to provide timely written notice of any failure to comply with this warranty so that IBM can take corrective action.

### **EXTENT OF WARRANTY/ITEMS NOT COVERED BY WARRANTY**

If a Machine is subject to federal or state consumer warranty laws, IBM's statement of limited warranty included with the Machine applies in place of these Machine warranties.

The warranties stated herein will not apply to the extent there has been misuse, accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper maintenance by the Government, or failure caused by a product for which IBM is not responsible. With respect to Machines, the warranty is voided by removal or alteration of Machine or parts identification labels.

**THESE WARRANTIES ARE YOUR 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.**

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

Unless IBM specifies otherwise, it provides Materials, non-IBM Products, and non-IBM Services **WITHOUT WARRANTIES OF ANY KIND**. However non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to you. Warranties, if any, for Other IBM Programs (IBM Programs licensed under a separate IBM license agreement, e.g., IBM International Program Licensing Agreement) and Non-IBM Programs (Programs licensed under a separate third party License agreement) may be found in their license agreements.





## **7.20 TRAVEL REIMBURSEMENT AND OTHER CHARGES**

Contractor travel will be in accordance with the Federal Travel Regulation or Joint Travel Regulations, as applicable. Established Federal Government per diem rates will apply.

The Government agrees to pay charges for these services including Billable Travel Time, if applicable, described hereafter in accordance with the rates set forth below. A one-hour minimum charge applies.

Costs for transportation and per diem (lodging, meals and incidental expense) are directly reimbursable by the ordering agency. Not-to-Exceed (NTE) amounts will be negotiated with the agency prior to the acceptance of each delivery order as appropriate. Travel time, as defined below, is billable at the same hourly rates as set forth in the Services price list.

Billable Travel Time is travel time in excess of one hour spent in traveling to and one hour spent in traveling from the Government's location. Travel time will be calculated as the lesser of the actual travel time incurred, or the normal travel time from/to the nearest IBM Location to/from the Government's location, or the normal travel time from/to the individual's assigned IBM location.

In the event the Government requires a specific technical skill which is not available from the normal servicing IBM Location, Billable Travel Time means the actual travel time in excess of one hour spent in traveling to and one hour spent in traveling from the Government's location. In such event, the Government will be notified in advance and its authorization obtained when such billable travel time is to be incurred.

In addition to the charges laid out herein, there may be charges applicable to this contract for special or unusual expenses incurred by IBM which are necessary to perform these services. If applicable, these charges will be set out separately in the Government's order.

## **7.21 TECHNICAL AND CONSULTING SERVICES PROJECT TERMINATION**

Subject to the Contract Disputes Act and FAR 52.233-1 (Disputes), either party (IBM or the Government) may terminate a project on written notice if the other party does not meet its obligations concerning the Statement of Work. Upon termination, IBM will stop work in an orderly manner as soon as practical.

The Government agrees to pay IBM for all Services provided and any Products and Materials delivered through the project's termination and any charges IBM incurs in terminating subcontracts, if any. The provisions of the Government's rights to Terminate for Convenience shall be in accordance with FAR 52.249-2.



## 7.22 PATENT AND COPYRIGHT INDEMNITY

For purposes of this Section, the term "Product" includes EP, Materials, Machine Code and Licensed Internal Code.

If a third party claims that a Product IBM provides to the Client infringes that party's patent or copyright, IBM will indemnify the Client, its officers, agents, and employees against liability, at IBM's expense and pay all costs, damages, and attorneys fees that a court finally awards or that are included in a settlement approved by IBM, provided that the Client:

- A. Promptly notifies IBM in writing of the claim; and
- B. Gives IBM such opportunity as is offered by applicable laws, rules or regulations to participate in the defense thereof. The U.S Government Customer shall make every effort to permit IBM to fully participate in the defense and/or in any settlement of such claim. However, IBM understands that such participation will be under the control of the Department of Justice.

### Remedies

If such a claim is made or appears likely to be made, the Client agrees to permit IBM to enable the Client to continue to 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 Client agrees to return the Product to IBM on IBM's written request. IBM will then give the Client a credit equal to:

1. For a Machine, the Client's net book value, provided the Client has followed generally-accepted accounting principles.
2. For a Program, the amount paid by the Client or 12 months' charges (whichever is less). If the Product is an IBM Cloud Service or subject to Fixed Term charges, up to twelve months' charges.
3. For Materials, the amount the Client paid IBM for the creation of the Materials.

This is subject to the Client's right to require continued use of the Products pursuant to the provisions of 28USC1498. In the event of such continued use, the Client shall notify IBM in writing of its election to continue use and agrees to undertake at the Client's expense the defense of any action against the Client and IBM shall have no further indemnification obligation; it being understood that IBM may participate at its expense in the defense of any such action if such claim is against IBM.

### Claims for Which IBM is Not Responsible:

IBM has no obligation regarding any claim based on any of the following:

- A. The Client's modification of a Product, or a Program's use in other than its Specified Operating Environment;
- B. Anything the Client provides which is incorporated into a Product or IBM's compliance with any designs, specifications, or instructions provided by the Client or by a third party on behalf of the Client;
- C. The combination, operation, or use of a Product with other Products not provided by IBM as a system, or the combination, operation or use of a Product with any product, data, apparatus, or



business method that IBM did not provide, or the distribution, operation or use of a Product for the benefit of a third party;

D. Infringement by a non-IBM Product.

E. Product's use other than in accordance with its applicable licenses and restrictions or use of a non-current version or release of a Product, when a claim could have been avoided or the risk of a claim reduced by using the current version or release;

F. the distribution, operation, or use of the Product outside Client's Passport Advantage Agreement Number or for the benefit of any third party; or

G. Separately Licensed Code, if any, as identified in the LI for the Product.

The LI for the Product or other documents may permit the Client to copy, modify, or redistribute all or portions of the Product without paying additional licensing fees to IBM. The indemnification obligation under this Patent and Copyright provision only applies to copies of the Product provided to the Client by IBM and additional copies expressly authorized in a PoE. IBM has no obligation for claims relating to copies of the Product neither provided by IBM nor specifically authorized by a PoE, even if permitted by the LI for the Product or other documents.

These Patent and Copyright terms do not obligate in any manner any third-party supplier of code (including Separately Licensed Code) included with or part of the Product.

The foregoing states the entire obligation of IBM with respect to infringement of patents or copyrights.

### **7.23 LIMITATION OF LIABILITY**

Circumstances may arise where, because of a default on IBM's part or other liability, the Client is entitled to recover damages from IBM. In each such instance, regardless of the basis on which the Client is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM is liable only for:

A. Payments referred to in IBM's Patents and Copyrights terms described herein;

B. Damages for bodily injury (including death) and damage to real property and tangible personal property; and

C. The amount of any other actual direct damages or loss, up to the greater of: (i) \$100,000; OR (ii) the contract price (if recurring, 12 months' charges apply) for the Product or Service that is the subject of the claim. For purposes of this item, the term "Product" includes Materials, Machine Code and Licensed Internal Code. Nothing in this subsection C shall limit the Client's right to (i) excess procurement costs in the event of a Termination for Default; or (ii) the contractual remedies prescribed under the Price Reductions clause (GSAR 552.238-75) (May 2004)(Alternate I- May 2003) and GSAR 552.215-72, Price Adjustment – Failure to Provide Accurate Information (Aug 1997).

D. For classroom training or education material, IBM is liable for the charges associated with the corresponding item provided.

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

Items for which IBM is not liable:

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

- A. Loss of, or damage to data; or
- B. Special, incidental, or indirect damages or for any economic consequential damages, or
- C. Lost profits, business, revenue, goodwill or anticipated savings
- D. Any third party claims against you except as described in the Patents and Copyrights section or as permitted by the Limitation of Liability section for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable.

The parties acknowledge that nothing in this provision shall restrict the Client's statutory remedies in the event of fraud.

#### **7.24 EUROPEAN UNION GENERAL DATA PROTECTION REGULATION (GDPR)**

The European Union passed the General Data Protection Regulation (EU/2016/679) (GDPR), effective 25 May 2018. The GDPR is designed to ensure a consistent level of protection of the rights and freedoms of natural persons with regard to the processing of their data and to establish one set of data protection rules for Personal Data. IBM is committed to GDPR readiness.

Regarding GDPR, you represent as follows:

- a. Either you do not require IBM to process Personal Data within the meaning of GDPR (e.g., because no processing of Personal Data occurs in the European Union (EU); no monitoring of Personal behavior takes place in EU; or your activities are otherwise exempt from GDPR); and you will communicate to IBM in writing, without undue delay, any anticipated change affecting this representation, or
- b. You agree to IBM's Data Processing Addendum at <http://ibm.com/dpa> (DPA) and applicable DPA Exhibit, which apply and supplement the contract. Please contact your IBM representative for the applicable Data Processing Exhibit.