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## CHAPTER 1. GENERAL INFORMATION

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### 1. INFORMATION FOR ORDERING AGENCIES

Note 1: All non-professional labor categories must be incidental to and used solely to support hardware, software and/or professional services, and cannot be purchased separately.

Note 2: Offerors and Agencies are advised that the Group 70 – Information Technology Schedule is not to be used as a means to procure services which properly fall under the Brooks Act. These services include, but are not limited to, architectural, engineering, mapping, cartographic production, remote sensing, geographic information systems, and related services; FAR 36.6 distinguishes between mapping services of an A/E nature and mapping services which are not connected nor incidental to the traditionally accepted A/E Services.

Note 3: This solicitation is not intended to solicit for the reselling of IT Professional Services, except for the provision of implementation, maintenance, integration, or training services in direct support of a product. Under such circumstances the services must be performed by the publisher or manufacturer or one of their authorized agents.

#### 1.1 SPECIAL NOTICE TO AGENCIES: SMALL BUSINESS PARTICIPATION

SBA strongly supports the participation of small business concerns in the Federal Supply Schedules Programs. To enhance Small Business Participation SBA policy allows agencies to include in their procurement base and goals, the dollar value of orders expected to be placed against the Federal Supply Schedules, and to report accomplishments against these goals.

For orders exceeding the micropurchase threshold, FAR 8.404 requires agencies to consider the catalogs/pricelists of at least three schedule contractors or consider reasonably available information by using the GSA Advantage!<sup>TM</sup> on-line shopping service ([www.fss.gsa.gov](http://www.fss.gsa.gov)). The catalogs/pricelists, GSA Advantage!<sup>TM</sup> and the Federal Supply Service Home Page ([www.fss.gsa.gov](http://www.fss.gsa.gov)) contain information on a broad array of products and services offered by small business concerns.

This information should be used as a tool to assist ordering activities in meeting or exceeding established small business goals. It should also be used as a tool to assist in including small, small disadvantaged, and women-owned small businesses among those considered when selecting pricelists for a best value determination.

For orders exceeding the micropurchase threshold, customers are to give preference to small business concerns when two or more items at the same delivered price will satisfy their requirement.

### 1.2 GEOGRAPHIC SCOPE OF CONTRACT

*Domestic delivery* is delivery within the 48 contiguous states, Alaska, Hawaii, Puerto Rico, Washington, DC, and U.S. Territories. Domestic delivery also includes a port or consolidation point, within the aforementioned areas, for orders received from overseas activities.

*Overseas delivery* is delivery to points outside of the 48 contiguous states, Washington, DC, Alaska, Hawaii, Puerto Rico, and U.S. Territories.

Offerors are requested to check one of the following boxes:

- [ X ] The Geographic Scope of Contract will be domestic and overseas delivery.
- [ ] The Geographic Scope of Contract will be overseas delivery only.
- [ ] The Geographic Scope of Contract will be domestic delivery only.

On a case-by-case basis IBM will deliver products and perform Services to overseas US Government locations which are in support of national or mutual defense operations (including US Embassies), and to locations which support the national interest of the United States (See Appendix A for details). IBM does not guarantee any support services (including installation, maintenance or warranty service) if IBM has not approved the OCONUS location for each Government requirement.

### 1.3 CONTRACTOR’S ORDERING ADDRESS AND PAYMENT INFORMATION

Contractors are required to accept credit cards for payments equal to or less than the micro-purchase threshold for oral or written delivery orders. Credit cards will be acceptable for payment above the micro-purchase threshold. In addition, bank account information for wire transfer payments will be shown on the invoice.

The following telephone number(s) can be used by ordering activities to obtain technical and/or ordering assistance:

Contact	Phone Number
<b>Classroom Training Inquiries</b>	1-800-426-8322
<b>GSA Schedule Orders for Hardware (132-8), Software(132-33), Cloud – SaaS, IaaS (132-52) should be sent to:</b>  IBM Corporation (including IBM Overseas Operations) Attn: CSO Federal Distribution Center 6710 Rockledge Dr. Bethesda, MD 20879 EMAIL: fednotes@us.ibm.	1-800-333-6705 1-888-520-0533 (Fax)
<b>Technical Assistance</b>  IBM Direct 7100 Highland Pkwy. Smyrna, GA 30082	1-800-426-2255 1-800-242-6329 (Fax)

Contact	Phone Number
<p><b>Maintenance (SIN 132-12); IT Professional Services, Machine Movement Service (SIN 132-51), Software Support Services (SIN 132-33)</b></p> <p>IBM Global Services Inside Sales 7100 Highland Pkwy. Smyrna, GA 30082</p>	<p>1-888-426-4343 1-800-426-7378 (Fax)</p>
<p><b>Warranty and Maintenance Repair Service (132-8) and SIN (132-12)</b></p> <p>Machines Service calls in the Continental US, Hawaii, Alaska and Puerto Rico</p>	<p>1-800-IBM-SERV</p>

**Payments should be directed to one of the following locations:**

**ACH Payments:**

IBM Corporation  
C/O PNC Bank Lockbox IBM# 643584  
500 First Avenue  
Pittsburgh, PA 15219  
Attn: Lockbox IBM# 643584 (877)762-0830  
ABA: 043000096 Acct#: 1017305745

**Mail:**

IBM Corporation  
Lockbox 643584  
PO Box 643584  
Pittsburgh, PA 15264-3584

Other authorized users of the GSA Schedule may submit payments to the address as shown on the invoice.

**Credit Card Orders**

IBM will accept telephone orders of \$250,000 or less (subject to the individual user's credit card limit) with payment made by Government commercial credit cards for acquisition of all products and services available under this Schedule.

To place a credit card order with IBM, a Government purchaser must call its IBM sales representative or the IBM Office shown elsewhere in this chapter and provide the cardholder's name and telephone number, the card type, account number and expiration date, and the products or services to be delivered.

Credit card transactions are not eligible for Prompt Payment Discounts.

The Government credit card program provides that invoices for credit card orders are not necessary; therefore, IBM will present such invoices to the Government only upon specific request for an individual order.

#### **1.4 LIABILITY FOR INJURY OR DAMAGE**

The Contractor shall not be liable for any injury to ordering activity personnel or damage to ordering activity property arising from the use of equipment maintained by Contractor unless such injury or damage is due to the fault or negligence of the Contractor, in which case liability will be in accordance with the limits stated at under the section “Limitation of Liability” of this Chapter.

#### **1.5 STATISTICAL DATA GOVERNMENT ORDERING OFC. COMPLETION OF STANDARD FORM 279**

Block 9: G. Order/Modification Under Federal Schedule

Block 16 DUNS number): : 835130485

Block 30: Type of Contractor: C. Large Business

Block 31: Woman-Owned Small Business: No

Block 34: Reserved

Block 36: Taxpayer ID Number: 13-087-1985

**Cage Code - 3BXY7**

#### **Central Contractor Registration**

IBM has registered with the Central Contractor Registration Database.

#### **1.6 FOB DESTINATION**

All items are shipped FOB Destination within the United States (including Puerto Rico, Hawaii and Alaska). For shipments to other locations see Appendix A. Expedited delivery or special transportation requirements can be provided. Charges for such services are outside the scope of this contract. Excess storage charges, waiting time or overtime charges, and any charges associated with dry runs, rigging, the expediting of shipments and any special handling shall be paid by the Government. Machines shall be preserved, packed, and marked in accordance with IBM's standard practice. Packaging materials shall be the property of the Government. The Government shall pay any transportation costs incurred by IBM as a result of the Government's re-designation of the installation site after the initial shipment.

### 1.7 DELIVERY SCHEDULE

a. TIME OF DELIVERY: The Contractor shall deliver to destination within the number of calendar days after receipt of order (ARO), as set forth below:

SPECIAL ITEM NUMBER	DELIVERY TIME (Days ARO)
132-3	30 days or as agreed to with ordering activity
132-8	30 Days
132-12	As agreed to with ordering activity
132-33	30 Days (if delivery is required)
132-51	As agreed to with ordering activity
132-62	As agreed to with ordering activity

If the Government wishes a specific receipt/installation date, it should be included in the delivery order. If IBM is unable to meet the requested delivery date, IBM will contact the Government to each agreement for an alternative date.

b. When the Federal Supply Schedule contract delivery period does not meet the bona fide urgent delivery requirements of an ordering activity, ordering activities are encouraged, if time permits, to contact the Contractor for the purpose of obtaining accelerated delivery. The Contractor shall reply to the inquiry within 3 workdays after receipt. (Telephonic replies shall be confirmed by the Contractor in writing.) If the Contractor offers an accelerated delivery time acceptable to the ordering activity, any order(s) placed pursuant to the agreed upon accelerated delivery time frame shall be delivered within this shorter delivery time and in accordance with all other terms and conditions of the contract.

### 1.8 DISCOUNTS

Prices shown are NET Prices; Basic Discounts have been deducted.

a. Government Educational Institutions

Government educational institutions who meet IBM's guidelines for Educational Allowance may take advantage of the discounts offered under that program as transactions under this Schedule contract. Such discounts are based upon the commercial list prices in effect, and are not discounts off of the prices negotiated herein.

b. Prompt Payment Discount

Invoices, issued against delivery orders accepted under this contract, for Hardware Monthly Maintenance Charges, Maintenance Usage Charges, Annual Hardware Maintenance Charges, Hard Drive Retention/Media Retention Maintenance Service, Software Remote Technical Support(see SIN 132-51 for offerings), Non-System z/Non-Passport Advantage Software Maintenance and associated US Citizen Support, and System z Monthly/Annual License Charge (MLC/ALC) Programs are eligible for a prompt payment discount when paid promptly as set

forth below, except when ordered via a Government credit card. See item titled "Credit Card Orders". Eligible invoices will be so annotated by IBM.

Paying offices are entitled to deduct a prompt payment discount of one percent (1.0%) of the invoice amount whenever payment of an eligible proper invoice received in the office specified by the Government is made on or before the twenty-fifth (25th) calendar day following the invoice date printed thereon. Whenever the twenty-fifth day falls on a Saturday, Sunday, or Federal holiday, payments made on the following business day will be considered qualifying payments for purposes of this discount. Payment shall be deemed to have been made on the date of the Government's check or on the date of the Government's wire transfer payment. Discounts taken which do not meet the foregoing criteria will be disallowed and will be re-invoiced to the applicable paying office. Eligible prompt payment discounts must be taken at the time the payment is made by the Government.

Agencies are reminded that the payment due date of this prompt payment discount is different from that of the Prompt Payment Act. Invoices not paid until the payment due date of the Prompt Payment Act will not qualify for this discount. In addition, failure to promptly renew orders for recurring charges disqualifies an agency from receiving the Prompt Payment Discount for the period prior to the delivery order's receipt by IBM. For example, if an agency provides a renewal delivery order on December 15, for monthly software charges and makes payment by December 25, Prompt Payment Discount may be taken for the entire month of December, but not for October and November.

## **1.9 STATE AND LOCAL TAXES**

Notwithstanding the provisions of FAR 52.229-3, Federal, State and Local Taxes, January 1991, the Contract price excludes all State and Local taxes levied on or measured by the Contract or sales price of the services or completed supplies furnished under this Contract. Taxes excluded from the Contract price pursuant to the preceding sentence shall be separately stated on IBM's invoices and the Government agrees either to pay to IBM amounts covering such taxes or to provide evidence necessary to sustain an exemption there from. For purposes of any other state and local taxes the Government shall be considered the owner of the equipment upon installation. It shall be the Government's responsibility to provide a tax exemption certificate to IBM, where appropriate.

Refer to SIN 132-3, for applicable taxes on leasing.

## **1.10 STATEMENT CONCERNING AVAILABILITY OF EXPORT PACKING**

Export packing is available outside the scope of this Contract. Charges will be furnished upon request.

### 1.11 SMALL REQUIREMENTS

There is \$100 minimum dollar value limitation on orders placed under this Schedule, except within SIN 132-3, Leasing. IBM will lease transactions for products which have an aggregate purchase price value equal to or greater than \$5,000.

### 1.12 MAXIMUM ORDER

Maximum order threshold for Special Item Numbers are identified below.

SIN 132-3:	Leasing	\$500,000
SIN 132-8:	Purchase	\$500,000
SIN 132-12:	Repair Parts only	\$10,000
SIN 132-33:	Perpetual SW	\$500,000
SIN 132-51:	IT Services	\$500,000
SIN 132-62	HSPD-12 Services	\$500,000

Notwithstanding these limits, agencies may place and IBM may honor orders exceeding these limits. Please refer to the section titled "Ordering Procedures for Federal Supply Schedule Contracts," within this Chapter for details on ordering procedures.

### 1.13 ORDERING PROCEDURES FOR FEDERAL SUPPLY SCHEDULE CONTRACTS

Ordering activities shall use the ordering procedures of Federal Acquisition Regulation (FAR) 8.405 when placing an order or establishing a BPA for supplies or services. These procedures apply to all Schedules.

### 1.14 CONTRACTOR TASKS/SPECIAL REQUIREMENTS (C-FSS-370)(Nov 2001)

- a. Security Clearances: The Contractor may be required to obtain/possess varying levels of security clearances in the performance of orders issued under this contract. All costs associated with obtaining/possessing such security clearances should be factored into the price offered under the Multiple Award Schedule
- b. Travel: The Contractor may be required to travel in performance of orders issued under this contract. Allowable travel and per diem charges are governed by Pub L. 99-234 and FAR Part 31, and are reimbursable by the ordering agency or can be priced as a fixed price item on orders placed under the Multiple Award Schedule. The Industrial Funding Fee does not apply to travel and per diem charges.

NOTE: Refer to FAR Part 31.205-46 Travel Costs, for allowable costs that pertain to official company business travel in regards to this contract.



- c. **Certifications, Licenses and Accreditations:** As a commercial practice, the Contractor may be required to obtain/possess any variety of certifications, licenses and accreditations for specific FSC/service code classifications offered. All costs associated with obtaining/possessing such certifications, licenses and accreditations should be factored into the price offered under the Multiple Award Schedule program.
- d. **Insurance:** As a commercial practice, the Contractor may be required to obtain/possess insurance coverage for specific FSC/service code classifications offered. All costs associated with obtaining/possessing such insurance should be factored into the price offered under the Multiple Award Schedule program.
- e. **Personnel:** The Contractor may be required to provide key personnel, resumes or skill category descriptions in the performance of orders issued under this contract. Ordering activities may require agency approval of additions or replacements to key personnel.
- f. **Organizational Conflicts of Interest:** Where there may be an organizational conflict of interest as determined by the ordering agency, the Contractor's participation in such order may be restricted in accordance with FAR Part 9.5.
- g. **Documentation/Standards:** The Contractor may be requested to provide products or services in accordance with rules, regulations, OMB orders, standards and documentation as specified by the agency's order.
- h. **Data/Deliverable Requirements:** Any required data/deliverables at the ordering level will be as specified or negotiated in the agency's order.
- i. **Government-Furnished Property:** As specified by the agency's order, the Government may provide property, equipment, materials or resources as necessary.
- j. **Availability of Funds:** Many Government agencies' operating funds are appropriated for a specific fiscal year. Funds may not be presently available for any orders placed under the contract or any option year. The Government's obligation on orders placed under this contract is contingent upon the availability of appropriated funds from which payment for ordering purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are available to the ordering Contracting Officer.

### 1.15 PURCHASE OF OPEN MARKET ITEMS

NOTE: Open Market Items are also known as incidental items, noncontract items, non-Schedule items, and items not on a Federal Supply Schedule contract.

For administrative convenience, an ordering office contracting officer may add items not on a Federal Supply Multiple Award Schedule (MAS) – referred to as open market items – to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order, **only if:**

1. All applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed (e.g., publicizing (Part 5), competition requirements (Part 6), acquisition of commercial items (part 12), contracting methods (Parts 13, 14, and 15), and small business programs (Part 19));

2. The ordering office contracting officer has determined the price for the items not on the Federal Supply Schedule is fair and reasonable;
3. The items are clearly labeled on the order as items not on the Federal Supply Schedule; and
4. All clauses applicable to items not on the Federal Supply Schedule are included in the order.

### **1.16 OVERSEAS ACTIVITIES**

The terms and conditions of this contract shall apply to all orders for installation, maintenance and repair of equipment in areas listed in the pricelist outside the 48 contiguous states and the District of Columbia, except as indicated below:

Please refer to Appendix A for details.

Upon request of the Contractor, the ordering activity may provide the Contractor with logistics support, as available, in accordance with all applicable ordering activity regulations. Such ordering activity support will be provided on a reimbursable basis, and will only be provided to the Contractor's technical personnel whose services are exclusively required for the fulfillment of the terms and conditions of this contract.

### **1.17 Blanket Purchase Agreements (BPAs)**

The use of BPAs under any schedule contract to fill repetitive needs for supplies or services is allowable. BPAs may be established with one or more schedule contractors. The number of BPAs to be established is within the discretion of the ordering activity establishing the BPA and should be based on a strategy that is expected to maximize the effectiveness of the BPA(s). Ordering activities shall follow FAR 8.405-3 when creating and implementing BPA(s).

Orders placed under such agreements shall be issued in accordance with all applicable regulations and the terms and conditions of the contract. Additional terms and conditions may be added under a BPA, provided they're clearly advantageous to the Government, upon the mutual agreement of IBM and the agency. Any other changes to terms and conditions must be agreed to by GSA, IBM and the agency.

### **1.18 CONTRACTOR TEAM ARRANGEMENTS**

Contractors participating in contractor team arrangements must abide by all terms and conditions of their respective contracts. This includes compliance with Clauses 552.238-74, Industrial Funding Fee and Sales Reporting, i.e., each contractor (team member) must report sales and remit the IFF for all products and services provided under its individual contract. For additional details on teaming with IBM, please call 1-800-333-6705.

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## 1.19 INSTALLATION, DEINSTALLATION, REINSTALLATION

The Davis-Bacon Act (40 U.S.C. 276a-276a-7) provides that contracts in excess of \$2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works with the United States, shall contain a clause that no laborer or mechanic employed directly upon the site of the work shall received less than the prevailing wage rates as determined by the Secretary of Labor. The requirements of the Davis-Bacon Act do not apply if the construction work is incidental to the furnishing of supplies, equipment, or services. For example, the requirements do not apply to simple installation or alteration of a public building or public work that is incidental to furnishing supplies or equipment under a supply contract. However, if the construction, alteration or repair is segregable and exceeds \$2,000, then the requirements of the Davis-Bacon Act applies.

The ordering activity issuing the task order against this contract will be responsible for proper administration and enforcement of the Federal labor standards covered by the Davis-Bacon Act. The proper Davis-Bacon wage determination will be issued by the ordering activity at the time a request for quotations is made for applicable construction classified installation, de-installation, and re-installation services under SIN 132-8.

## 1.20 SECTION 508 COMPLIANCE

If applicable, Section 508 compliance information on supplies and services in this contract, are available by calling IBM's Federal Information Call Center at 1-800-333-6705. Government customers may also view IBM's website and request a VPAT for a specific product: [http://www-03.ibm.com/able/product\\_accessibility/](http://www-03.ibm.com/able/product_accessibility/) IBM will indicate how applicable 508 requirements are met by either providing a VPAT or other supporting documentation per the agency standards as specified in the scope of work of the task order.

## 1.21 FEDERAL CONTRACTORS OR PRIME CONTRACTOR ORDERING FROM FEDERAL SUPPLY SCHEDULES

A class deviation to FAR Part 51 was granted by GSA's Senior Procurement Executive in accordance with FAR Subpart 1.404, Class deviations. The deviation permits federal contracting officers to authorize GSA contractors, who are performing an order on a time-and-material or labor-hour basis, to purchase supplies and services from schedule contractors. The guidance provided below for Prime Contractors apply to GSA contractors.

Prime Contractors (on cost reimbursement contracts) placing orders under Federal Supply Schedules, on behalf of an ordering activity, shall follow the terms of the applicable schedule and include a copy of the authorization letter with each order.

Refer to FAR 51 for guidance. –

- a. A copy of the authorization from the ordering activity with whom the contractor has the prime contract (unless a copy was previously furnished to the Federal Supply Schedule contractor); and
- b. The following statement:

This order is placed under written authorization from \_\_\_\_\_ dated \_\_\_\_\_. In the event of any inconsistency between the terms and conditions of this order and those of your Federal Supply Schedule contract, the latter will govern.

### **1.22 PRIVACY ACT**

All delivery orders that contain specific privacy requirements must be submitted by the Ordering Office directly to the Manager, GSA Schedules, IBM Corporation, 6710 Rockledge Drive, Bethesda, Maryland 20817, for the privacy requirements to be operative. Only if the delivery order is so submitted and IBM does not thereafter reject such order within 60 days of receipt, will provisions of the order with regard to obligations under the Privacy Act become applicable.

### **1.23 PERSONNEL**

IBM will be using professional service personnel to perform services procured hereunder.

### **1.24 ON-LINE INFORMATION**

Information regarding this Schedule contract may be obtained thru GSA Advantage! on the Internet: <http://www.gsa.gov>. Current information about IBM products and prices, special promotions and contract terms and conditions is available on IBM's Home Page which is <http://www.ibm.com/easyaccess/gsa>.

### **1.25 ORDERING**

A written order, credit card order, fax, electronic order via a website, or in the case of funded BPAs, telephone orders, shall be the only basis for ordering under this contract unless otherwise provided in a Special Item. All written orders shall be time stamped upon receipt by IBM and the time-stamped date shall be considered to be the date of receipt unless the order shall have been sent by Certified Mail/Return Receipt Requested in which event the date of receipt shall be the date indicated on the certified mail receipt.

All Government delivery orders and modifications to delivery orders will be considered to be accepted by IBM unless IBM rejects the order/modification in writing within thirty (30) days of its receipt unless otherwise indicated under SINS elsewhere in this schedule.

Orders/modifications will not be signed or returned by IBM to the ordering agency.

### **1.26 TRADE AGREEMENT ACT**

As required by FAR 52.225-6, IBM certifies that all end products supplied under this contract are US-made or designated country end products. IBM identifies hardware end products as those items with a Machine Type/Model number. IBM makes no representation of origin on any IBM

installed product features or upgrades, or on components of end products (e.g., features, upgrades and parts).

Regarding software end products, in accordance with Customs and Border Protection rulings, the place of recording on media determines the country of origin. IBM offers no country of origin on software we deliver electronically (however, on request, IBM will deliver this software via tangible media and the place of recording on media will determine the country of origin).

Acquisition of certain services is subject to the Trade Agreements Act. Pursuant to FAR 25.402(a)(2), the origin of services subject to the Trade Agreements Act is the country in which the contractor is established. IBM Corporation is established in the United States

Note: Customer Set Up (CSU) product features and upgrades are not available under this Schedule and may only be purchased as Open Market items unless the Customer elects to have IBM install them (installation rates may be found under the Professional Services SIN for Machine Movement and Modification Services).

### **1.27 TERM OF ORDERS**

Any order issued during the effective period of this contract may specify a period of performance that extends beyond the expiration date of this contract. IBM shall complete all schedule orders within the time specified in the order, or as mutually agreed between IBM and the ordering agency. Those task orders that have a period of performance beyond this contract will continue to be governed by all the terms and conditions in the contract and any other special ordering procedures pursuant to FAR Part 8.402.

### **1.28 PRICE LIST EXPLANATORY NOTES**

Agencies should refer to the hardware, software and maintenance legends for an explanation of information provided in the corresponding price lists.

### **1.29 THIRD PARTY PRODUCTS**

For non-IBM Products including Programs, the manufacturer's product terms will apply, including, but not limited to warranty support, Patent and Copyright Infringement, and refund rights.

### **1.30 RESALE TO THIRD PARTIES**

The Government agrees that it is acquiring machines under this contract with the intent to use them within the Government in support of Government operations and not for reselling, re-marketing, leasing, or transferring the machines (or components thereof) to a third party unless the Government is arranging lease-back financing for the machines, or has prior written consent from IBM.

### 1.31 PATENT AND COPYRIGHT INDEMNITY

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

If a third party claims that a Product IBM provides to the Government infringes that party's patent or copyright, IBM will indemnify the Government, 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 Government:

- 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 Government 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 Government agrees to permit IBM to enable the Government 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 Government agrees to return the Product to IBM on IBM's written request. IBM will then give the Government a credit equal to:

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

This is subject to the Government's right to require continued use of the Products pursuant to the provisions of 28USC1498. In the event of such continued use, the Government shall notify IBM in writing of its election to continue use and agrees to undertake at the Government's expense the defense of any action against the Government 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 Government's modification of a Product, or a Program's use in other than its Specified Operating Environment;

- B. Anything the Government provides which is incorporated into a Product or IBM's compliance with any designs, specifications, or instructions provided by the Government or by a third party on behalf of the Government;
- 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 Government's Enterprise 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 Government 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 Government 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.

### **1.32 LIMITATION OF LIABILITY**

Circumstances may arise where, because of a default on IBM's part or other liability, the Government is entitled to recover damages from IBM. In each such instance, regardless of the basis on which the Government 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 Government'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, or
- 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 Government's statutory remedies in the event of fraud.

### **1.33 COMPLETE AGREEMENT**

IBM's GSA IT Schedule, its Published Terms, and any RFP, Proposal and Statement of Work issued against the Contract constitute the complete Agreement of the parties and supersede all prior communications, agreement or understandings on this subject.

Any terms of this Agreement which by their nature extend beyond the Agreement termination remain in effect until fulfilled.

### **1.34 OTHER PRINCIPLES OF OUR RELATIONSHIP**

1. If confidential information is exchanged in connection with this agreement, it shall be marked as confidential. Parties will not disclose confidential information without a separate, signed confidentiality agreement, as applicable. If confidential information is exchanged in connection with a transaction under this Schedule, the applicable confidentiality agreement is incorporated into, and subject to, this Agreement.
2. Each of us grants the other only the licenses and rights specified in this Agreement. No other licenses or rights (including licenses or rights under patents) are granted either directly, by implication, or otherwise.
3. Each of us may communicate with the other by electronic means and such communication is acceptable as a signed writing. An identification code (called a "user ID") contained in an



electronic document is legally sufficient to verify the sender's identity and the document's authenticity.

4. Each of us will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations.
5. Neither of us is responsible for failure to fulfill any obligations due to causes beyond its control.
6. This Agreement will not create any right or cause of action for any third party, nor will IBM be responsible for 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.
7. Government is responsible for selecting the Products and Services that meet its needs and for the results obtained from the use of the Products and Services, including the Government's decision to implement any recommendation concerning Government's business practices and operations.
8. As reasonably required by IBM to fulfill its obligations under this Agreement, the Government agrees to provide IBM with sufficient, free, and safe access (including remote access) to Government facilities, systems, personnel, and resources at no charge to IBM. IBM is not responsible for delay in performing or failure to perform caused by Government's delay in providing such access or performing other Government responsibilities under this Agreement.
9. Government agrees that IBM may process the business contact information of Government employees and contractors and information about Government as a legal entity (contact information) in connection with IBM Products and Services or in furtherance of IBM's business relationship with Government. This contact information can be stored, disclosed internally and processed by International Business Machines Corporation and its subsidiaries, Business Partners and subcontractors wherever they do business, solely for the purpose described above provided that these companies comply with applicable data privacy laws related to this processing. Where required by applicable law, Government has notified and obtained the consent of the individuals whose contact information may be stored, disclosed internally and processed and will forward their requests to access, update, contract or delete their contact information to IBM who will then comply with those requests.

### **1.35 DEFINITION OF TERMS**

**Note:** The definitions and explanations noted here are an integral part of the terms and conditions of this Schedule. Additional definitions applicable to a specific SIN are included in the respective Chapter.

**Customer-Set-Up (CSU)-Machine:** An IBM Machine that the Government installs according to instructions provided with it

**Designated Machine:** a Machine of a type specified in the Mainframe Exhibits provided at the following address:

<http://www.ibm.com/systems/z/resources/swprice/reference/exhibits/hardware.html>.

**Engineering Change** – an update to modify certain aspects of the design of an installed Machine, including without limitation the design of a certain Machine part or Machine Code.

**Enterprise** – the agency or affiliated entity of the Government awarding a contract and subsequent Order under such contract. This Government Customer is the legal entity that is authorized to execute and administer the contract.

**Existing Works** – Works of authorship delivered to Customer, but not created, under the Attachment or Transaction Document and any modifications or enhancements of such Works made under the Attachment or Transaction Document.

**IBM Machine** – a Machine bearing an IBM logo.

**IBM Product** – an IBM Machine, ICA Program, or Other IBM Program.

**Licensed Internal Code:** (called "LIC") another term for Machine Code commonly used for certain IBM product lines, such as for IBM System z Machine. LIC and Machine Code are interchangeable terms that have the same meaning.

**Machine:** a hardware device, including its resources, capabilities, features, conversions, Machine Upgrades, elements, or accessories, or any combination of them. The term "Machine" includes an IBM Machine and any non-IBM Machine (including other equipment).

**Machine Upgrade** – the following changes that IBM sells for installation on a Machine: a hardware or Machine Code change to modify, add, remove, enable or disable certain Built-in Capacity or other resources and capabilities. Each such change can be accomplished through a Machine conversion, or through the conversion, addition, removal, or exchange of a Machine's feature(s).

**Materials** – literary works or other works of authorship (such as software programs and code, documentation, reports, and similar works) that IBM may deliver to Customer as part of a Service. The term "Materials" does not include Programs, Machine Code, Existing Works, or other items available under their own license terms or agreements.

**Other IBM Program** – an IBM Program licensed under a separate IBM license agreement (e.g., IBM Program License Agreement (IPLA)).

**Product:** A Machine or a Program.

**Program ("Program" or "Licensed Program"):** is the following, including the original, any portion thereof, and all whole or partial copies:

- a. one or more sequences of instructions suitable for processing by a computer;
- b. components;
- c. related licensed materials such as publications and other documentation,
- d. audio-visual content (such as images, text, recordings, or pictures) defined within or generated by the execution of, such sequence(s) of instructions; and
- e. control data (such as control blocks, event logs, configuration files) defined within or generated by the execution of such sequence(s) of instructions. Control data includes without limitation data that is designed to (i) manage or limit the operation of programs, or (ii) help monitor, record, manage, or limit the consumption of software or hardware resources, including, without limitation, data used in IBM's implementation of Technological Measures.

The term Program includes an ICA Program, Other IBM Program, or Non-IBM Program and any fix, patch or replacement that IBM may provide for a Program. The term does not include Machine Code, Existing Works licensed under a Service Agreement (SIN 132-51) or under their own license terms or agreements.

**Types of Programs:**

**ICA Programs:** those Programs licensed under the ICA, see SIN 132-33 terms.

ICA Programs are perpetual licenses only to the extent that the government pays the monthly/annual license charges.

**Other IBM Program:** is an IBM Program licensed under the terms of IBM Program License Agreement (IPLA), see SIN 132-33 terms.

**Service:** performance of a task, assistance, support, or access to a resource (such as information database) that IBM makes available to the Government.

**Specifications:** information specific to a Product. IBM Machine Specifications are in a document entitled Official Published Specifications. ICA Programs Specifications are in a document entitled Licensed Program Specifications.

**Specified Operating Environment:** the Machines and Programs with which an ICA Program is designed to operate, as described in its Licensed Program Specifications.

**Transaction Document** Documents used to confirm the specific details of the transaction. Examples of these documents include, but are not limited to, purchase order, delivery order, exhibits, change authorizations (to an existing Service statement of work), and statements of work (outlines scope of Services, responsibilities, deliverables, completion criteria).

