

**AMENDMENT NUMBER 10**  
**to CONTRACT DIR-SDD-190 between**  
**the State of Texas, acting by and through the Department of Information Resources**  
**and International Business Machines Corporation**

**This Amendment Number 10** (this “Amendment”) to Contract DIR-SDD-190 (the “Contract”) is made between **the State of Texas, acting by and through the Department of Information Resources (“DIR”)**, and **International Business Machines Corporation (“Vendor”)** and effective the last date signed by either party. DIR and Vendor agree to modify the terms and conditions of the Contract as follows:

1. **Section 6 Contract, Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts, is hereby revised to include the following:**
  - DD. All references to Catalog Information System Vendors (CISV) in Appendix A are hereby deleted.
  - EE. All references to Texas Building and Procurement Commission (TBPC) are hereby revised and replaced with Texas Comptroller of Public Accounts (CPA).
2. **Appendix A, Section 2. Term**, this Contract is hereby extended through the period ending December 31, 2008, unless earlier terminated pursuant to the termination clauses contained in the Contract. No extension options remain.
3. **Appendix A, Section 4. Definitions, Customer**, is hereby restated in its entirety as follows: any Texas state agency, unit of local government, institution of higher education as defined in Section 2054.003, Texas Government Code, and those state agencies purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code, any local government as authorized through the Interlocal Cooperation Act, Chapter 791, Texas Government Code, and the state agencies and political subdivisions of other states as authorized by Section 2054.0565, Texas Government Code and, except for telecommunications services under Chapter 2170, Texas Government Code, assistance organizations as defined in Section 2175.001, Texas Government Code to mean:
  - a. A non-profit organization that provides educational, health or human services or assistance to homeless individuals;
  - b. A nonprofit food bank that solicits, warehouses, and redistributes edible but unmarketable food to an agency that feeds needy families and individuals;
  - c. Texas Partners of the Americas, a registered agency with the Advisory Committee on Voluntary Foreign Aid, with the approval of the Partners of the Alliance Office of the Agency for International Development;
  - d. A group, including a faith-based group, that enters into a financial or non-financial agreement with a health or human services agency to provide services to that agency’s clients;
  - e. A local workforce development board created under Section 2308.253;
  - f. A nonprofit organization approved by the Supreme Court of Texas that provides free legal services for low-income households in civil matters;
  - g. The Texas Boll Weevil Eradication Foundation, Inc., or an entity designated by the commissioner of agriculture as the foundation’s successor entity under Section 74.1011, Texas Agriculture Code;
  - h. A nonprofit computer bank that solicits, stores, refurbishes and redistributes used

- computer equipment to public school students and their families; and
- i. A nonprofit organization that provides affordable housing.

**4. Appendix A, Section 12.A Indemnification** is hereby restated in its entirety as follows:

**A1. Indemnification**

**1) Acts or Omissions**

Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES OR ASSIGNEES (collectively “**Texas Indemnified Parties**” or individually a “**Texas Indemnified Party**”) FROM AND AGAINST ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS (collectively, “Claims”), AND ALL RELATED REASONABLE ACTUAL COSTS, ATTORNEYS’ 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 or subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract that result in (a) damages for bodily injury (including death) and damage to real property and tangible personal property, or (b) the amount of any other actual direct damages, up to the greater of \$100,000 or the charges (if recurring, 12 months’ charges apply) for the Product or Service that is the subject of the claim, except to the extent caused by the negligence, gross negligence or intentional misconduct of any Texas Indemnified Party. The limit above also applies to any of Vendor’s subcontractors and Program developers. It is the maximum for which Vendor and its subcontractors are collectively responsible.

**2) Defense and Settlements**

With regard to Claims for which Vendor is obligated to indemnify and defend a Texas Indemnified Party under subsections 1) or 3) of this Section A1,

(a) the parties’ defense counsel shall obtain the consent of the Texas Indemnified Party, before entering into any settlements of Claims that require the Texas Indemnified Party to admit liability, cease using any Product provided by Vendor under this Contract or make a payment to the third party,

(b) VENDOR SHALL BE LIABLE TO PAY ALL REASONABLE ACTUAL COSTS OF DEFENSE INCLUDING ATTORNEYS’ FEES.,

(c) THE DEFENSE OF CLAIMS 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, and

(d) VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

### **3) Infringements: Patents and Copyrights**

#### **a) Indemnity**

Vendor shall indemnify and hold harmless the State of Texas Indemnified Party from any and all third party claims, costs, damages and reasonable actual attorneys' fees that a court finally awards or that are included in a settlement approved in writing by Vendor that any Product that Vendor provides a Texas Indemnified Party infringes such third party's United States patents or copyrights in connection with the PERFORMANCES OR ACTIONS OF VENDOR PURSUANT TO THIS CONTRACT, provided that Customer promptly notifies Vendor in writing of the claim. The limits in this Contract also apply to any of Vendor's subcontractors and Program developers. It is the maximum for which Vendor and its subcontractors are collectively responsible. For purposes of this section, the term "Product" includes Materials, Machine Code and LIC.

#### **b) Remedies**

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 obtain rights to permit Vendor to enable DIR or the applicable Customer (as used herein collectively "Customer") to continue to use the Product, or to modify it, or replace it with one that is at least functionally equivalent. If Vendor determines that none of these alternatives is reasonably available, Customer agrees to promptly return the Product to Vendor on Vendor's written request. Vendor will then give Customer a credit equal to:

1. for a Machine, your net book value provided Customer has followed generally-accepted accounting principles;
  2. for a Vendor Program (as defined in this Agreement), the amount paid by Customer or 12 months' charges (whichever is less); and
  3. for Materials, the amount Customer paid Vendor for the creation of the Materials.
- This is Vendor's entire obligation to Customer regarding any claim of infringement.

#### **c) Claims for Which Vendor is Not Responsible**

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

1. anything Customer provides which is incorporated into a Product or Vendor's compliance with any designs, specifications, or instructions provided by Customer or by a third party on Customer's behalf;
2. Customer' modification of a Product, or a Vendor Program's use in other than its Specified Operating Environment;
3. the combination, operation, or use of a Product with other products not provided by Vendor as a system, or the combination, operation or use of a Product with any product, data, apparatus, or business method that Vendor did not provide, or the distribution, operation or use of a Product for the benefit of a third party outside Customer's Enterprise; or
4. infringement by a non-Vendor Product or a third party's program alone.

### **4) Limitations.**

Under no circumstances is Vendor, its subcontractors, or its Program developers liable for any of the following: (a) third-party claims against the Texas Indemnified

Party for damages (other than those under items A.1.1)(a) and (b) above); (b) loss of, or damage to, the Customer's records or data; or (c) special, incidental, or indirect damages or for any economic consequential damages (including lost profits or savings), even if Contractor is informed of their possibility.

**5) Independent Contractor**

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

**A2. Taxes/Worker's Compensation/UNEMPLOYMENT INSURANCE**

1) VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, VENDOR SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF VENDOR'S AND VENDOR'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS CONTRACT. VENDOR AGREES TO COMPLY WITH ALL STATE AND FEDERAL LAWS APPLICABLE TO ANY SUCH PERSONS, INCLUDING LAWS REGARDING WAGES, TAXES, INSURANCE, AND WORKERS' COMPENSATION. VENDOR AGREES AND ACKNOWLEDGES THAT VENDOR ITS EMPLOYEES, REPRESENTATIVES, AGENTS OR SUBCONTRACTORS SHALL NOT BE ENTITLED TO ANY STATE BENEFIT OR BENEFIT OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER. THE CUSTOMER AND/OR THE STATE SHALL NOT BE LIABLE TO THE VENDOR ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR ANY BENEFIT AVAILABLE TO A STATE EMPLOYEE OR EMPLOYEE OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER.

2) VENDOR AGREES TO INDEMNIFY AND HOLD HARMLESS TEXAS INDEMNIFIED PARTIES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, INCLUDING RELATED REASONABLE ACTUAL COSTS, ATTORNEYS' FEES, AND EXPENSES, RELATING TO TAX LIABILITY, UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR EXPECTATIONS OF BENEFITS BY VENDOR, ITS EMPLOYEES, REPRESENTATIVES, AGENTS OR SUBCONTRACTORS IN ITS PERFORMANCE UNDER THIS CONTRACT. VENDOR SHALL BE LIABLE TO PAY ALL REASONABLE ACTUAL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. 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.

**5. Appendix A, Section 12.B Vendor Certifications** is hereby restated in its entirety as follows:

Vendor certifies that it and its designated Order Fulfillers: (i) have not given, offered to give, and do not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with this Contract; (ii) are not currently delinquent in the payment of any franchise tax owed the State of Texas and are not ineligible to receive payment under §231.006 of the Texas Family Code and acknowledge this Contract may be terminated and payment withheld if this certification is inaccurate; (iii) neither they, nor anyone acting for them, have violated the antitrust laws of the United States or the State of Texas, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage; (iv) have not received payment from DIR or any of its employees for participating in the preparation of this Contract; (v) under Section 2155.004, Texas Government Code, Vendor certifies that the individual or business entity named in this Contract is not ineligible to receive the specified contract and acknowledges that this Contract may be terminated and payment withheld if this certification is inaccurate; (vi) to the best of their knowledge and belief, there are no suits or proceedings pending or threatened against or affecting them, which if determined adversely to them will have a material adverse effect on the ability to fulfill their obligations under the Contract; (vii) are not suspended or debarred from doing business with the federal government as listed in the *Excluded Parties List System (EPLS)* maintained by the General Services Administration; and (viii) as of the effective date of the Contract, are not listed in the prohibited vendors list authorized by Executive Order #13224, "*Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*", published by the United States Department of the Treasury, Office of Foreign Assets Control. In addition, Vendor acknowledges the applicability of §2155.444 and §2155.4441, Texas Government Code, in fulfilling the terms of the Contract.

**6. Appendix A, Section 12 Vendor Responsibilities, Subsections J, K and L** are hereby added to read as follows:

**J. Limitation of Liability**

“To the extent permitted by law, the total liability of Vendor, DIR, and each Customer, whether in contract, warranty, tort, strict liability, statute or otherwise, shall be limited to an amount not to exceed three hundred thousand dollars (\$300,000) for all claims arising out of this Contract, except for indemnity claims under Section 12.A1.1)(a) with respect to defective Products that directly cause death, personal injury or tangible property damage and claims by Vendor against DIR or Customer for sums due on Vendor’s invoices or DIR or a Customer’s violations of Vendor’s intellectual property rights. IN NO EVENT, WHETHER AS A RESULT OR BREACH OF CONTRACT, WARRANTY, TORT, STRICT LIABILITY, STATUTE OR OTHERWISE, SHALL VENDOR, THE DIR, OR CUSTOMER BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL OR INDIRECT DAMAGES (INCLUDING, WITHOUT LIMITATION, CLAIMS FOR LOST BUSINESS PROFITS OR REVENUE, LOSS OF DATA, INTERRUPTION IN USE, UNAVAILABILITY OF DATA, OR THE COST OF THE PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES) OR FOR PUNITIVE OR EXEMPLARY DAMAGES. The remedies set forth in this Contract shall be Vendor’s, the DIR’s, and Customer’s sole and exclusive remedies for any claims under or related to this Contract.

**K. Overcharges**

Vendor hereby assigns to DIR any and all of its claims for overcharges associated with this contract which arise under the antitrust laws of the United States, 15 U.S.C.A. Section 1, et seq., and which arise under the antitrust laws of the State of Texas, Tex. Bus. and Comm. Code Section 15.01, et seq.

**L. Prohibited Conduct**

Vendor represents and warrants that, to the best of its knowledge as of the date of this certification, neither Vendor nor any Order Fulfiller, subcontractor, firm, corporation, partnership, or institution represented by Vendor, nor anyone acting for such Order Fulfiller, subcontractor, firm, corporation or institution has: (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws; or (2) communicated its response to the Request for Offer directly or indirectly to any competitor or any other person engaged in such line of business during the procurement for the Contract.

All other terms and conditions of the Contract, not specifically modified herein, shall remain in full force and effect. In the event of conflict among the provisions, the order of precedence shall be as follows: this Amendment Number 10, then Amendment Number 9, then Amendment Number 8, then Amendment Number 7, then Amendment Number 6, then Amendment Number 5, then Amendment Number 4, then Amendment Number 3, then Amendment Number 2, then Amendment Number 1 and then the Contract.

**IN WITNESS WHEREOF**, the parties hereby execute this Amendment to be effective as of the last date signed by either party.

**Vendor: International Business Machines Corporation**

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

Authorized By: signature on file  
Name: Ronald E. Wilt  
Title: Client Unit Director

Authorized By: signature on file  
Name: Cindy Reed  
Title: Deputy Executive Director, Operations & Statewide Technology Sourcing

Date: 5/13/08

Date: 5/20/08

Legal: Cynthia Kreider, 5/19/08