

**WESTERN STATES CONTRACTING ALLIANCE**  
**INTERNATIONAL BUSINESS MACHINES CORPORATION**  
**MASTER PRICE AGREEMENT**  
**94-00151**

This Agreement is made and entered into by International Business Machines Corporation ("Contractor") and the New Mexico State Purchasing Agent ("NMSPA") on behalf of the State of New Mexico and the participating members of the Western States Contracting Alliance. The purpose of this document is to provide a mechanism for Contractor to deliver competitive and advantageous pricing to the members of WSCA for the specified goods and services, while allowing individual WSCA members to obtain the specified products and services of Contractor under their existing, approved purchasing agreements with Contractor.

The parties agree as follows:

1. Definitions

"Agreement Administrator" refers to the individual appointed by the NMSPA to administer this agreement on behalf of the State of New Mexico, the participating WSCA members and other authorized purchasers.

"Announced Promotion Prices" are prices offered nationally to specific categories of customers (including WSCA Participants) for defined time periods under defined terms and conditions.

"Documentation" refers to manuals, handbooks and other publications listed in the ESS or supplied with products listed in the ESS or supplied in connection with services.

"Educational Discount Price" means the price offered in a nationally announced promotion which is limited to educational customers only.

"Equipment" refers to desktop and laptop computers, servers, workstations, printers, displays, peripherals and LAN and hardware components and spare parts listed in the contractor's ESS.

"Equipment and Services Schedule" ("ESS") refers to a complete list, grouped by major product categories, of the equipment, software, services, media and documentation available for purchase by procuring agencies. The ESS contains an item number, item description and the maximum price for each product or service.

"Equipment and Service Schedule (ESS) prices" mean the prices offered to WSCA members exclusive of Announced Promotion Prices, Education Discount Prices, General Price Reduction Prices or Large Order Negotiated Prices.

"General Price Reduction Price" means the price offered to WSCA members under the WSCA agreement at prices lower than ESS pricing. Selection and pricing of General Price Reduction items shall be by mutual agreement of the parties. Either party can propose additions or deletions to the listing of General Price Reduction.

"General purpose" includes the following classes of software: operating systems, report generators, spreadsheets, text and test processing, workgroup management, database, project management, messaging and electronic mail, graphics construction and

presentation, publishing, data communications, statistical and/or analysis, imaging, compilers and interrupters, utilities, and programmer productivity tools. Educational software designed for K-12 public schools and/or universities is included.

“Large Order Negotiated Price” means the price offered to specific WSCA members or classes of WSCA members under defined additional terms and conditions. Selection and pricing of Large Order Negotiated Prices shall be by mutual agreement of the parties. Large Order Negotiated Prices shall apply only to those items which meet the applicable additional terms and conditions (e.g., order quantity, time limitation, product configuration) negotiated by the parties.

“Participating Addendum” means a written statement of agreement signed by the appropriate Participating Entity and Contractor indicating the entities’ willingness to purchase and Contractor’s willingness to provide Products and Services under the terms and conditions of this agreement, and the applicable existing contract between Contractor and the Participating Entity covering the Participating Entity’s purchase of goods and services generally from Contractor (as specified in the Participating Addendum). The terms and conditions contained in any Participating Addendum shall effect only the purchases of Procuring Agencies within the jurisdiction of the Participating Entity signing the Participating Addendum. A Participating Addendum shall have no effect whatsoever on any other Participating Addendum or the scope of this agreement. One signed and one electronic copy of each participating addendum shall be filed with the Agreement Administrator within five (5) days after execution.

“Participating Entity” means WSCA member state, a governmental entity within a WSCA member state or other authorized state or governmental entity that chooses to purchase products and services under the terms of this agreement by executing a participating addendum.

“Price Agreement” means an indefinite quantity contract under which the contractor may furnish products or services to a procuring agency which issues a valid purchase order.

“Procuring Agency” means any New Mexico or participating state agency or local public body. State agency means department, commission, council, board, committee, institution, legislative body, agency, government corporation or educational institution. Local public body means every political subdivision of the state and the agencies, instrumentalities and institutions thereof including all cities, counties, courts and public schools.

“Products” refers to Equipment, Software and Documentation or any other item furnished under this agreement but not to Services.

“Purchase Order” means an electronic or paper document issued by a procuring agency which directs the contractor to deliver products or services pursuant to this agreement.

“Servicing Subcontractors” refers to Contractor authorized subcontractors who may be assigned by a Procuring Agency or Contractor to service the Products listed in a purchase order. Servicing Subcontractors must be certified by Contractor to service the Products. Participating Entities may select and designate a list of Servicing Subcontractors from a list of potential Servicing Subcontractors who are otherwise certified to perform Services in a given geographic region.

“Services” refers to maintenance, training, technical support, disaster recovery and installation\ implementation consulting services related to Products offered or supplied. All

forms of application development services and other professional services are beyond the scope of this agreement and may not be procured under the terms of this agreement.

“Software” refers to general purpose software products preloaded on Equipment or listed separately in the ESS. The term “Software” applies to all parts of software, including new releases, updates and modifications of software. For software, the term “purchase” means “license.”

“WSCA” means the Western States Contracting Alliance, a cooperative group contracting consortium for state government departments, institutions, agencies and political subdivisions (i.e., colleges, school districts, counties, cities, etc.) for the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Minnesota, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington and Wyoming.

## 2. Scope of Work

Contractor shall deliver computing system Products and Services to Procuring Agencies in accordance with the terms of this agreement. This Agreement is a “price agreement.” Accordingly, Contractor shall provide Products or Services only upon the issuance and acceptance by Contractor of valid “purchase orders.” Purchase orders may be issued to purchase the license for Software or to purchase or lease Products listed on Contractor’s ESS. A Procuring Agency may purchase any quantity of Product or Service listed in Contractor’s ESS at the prices stated therein, subject to availability. For large orders, Contractor and a Procuring Agency may negotiate quantity price discounts below the ESS price(s) for a given purchase order. Contractor may offer authorized educational institutions Educational Discount Price that result in prices below the ESS listed prices.

## 3. Quantity Guarantees

This agreement is not an exclusive agreement. Procuring Agencies may obtain computing system products and services from other sources during the agreement term. The NMSPA and WSCA make no express or implied warranties whatsoever that any particular number of purchase orders will be issued or that any particular quantity or dollar amount of products or services will be procured.

## 4. Order of Precedence

Each purchase order that is accepted by Contractor will become a part of the agreement as to the type and quantities of the Products and Services listed on the purchase order only; additional terms and conditions contained in a purchase order are void.

Purchase transactions between the parties shall be governed by the terms and conditions of this agreement and any exhibits to this agreement. However, the parties may vary the terms of this agreement by executing a Participating Addendum. Where the parties execute a Participating Addendum and the terms of the Participating Addendum conflict with this agreement or an exhibit to this agreement, then the terms of the Participating Addendum shall govern where there is a conflict.

In the event an item included in a RFP or Contractor’s response is not covered in either the terms and conditions of this agreement, an attachment to this agreement, or an executed Participating Addendum, then the terms contained in Contractor’s response shall govern, and then, if this document does not cover an issue covered in an RFP, then the RFP shall govern for that term.

## 5. Payment Provisions

All payments for Products or Services purchased under this agreement and any provision of acceptance of such Products or Services shall be made in accordance with the applicable Procuring Entity's Participating Addendum. Invoices shall be submitted to the procuring agency.

#### 6. Agreement Term

The agreement is authorized by an award letter dated September 3, 1999 and is effective on the date signed by NMSPA and Contractor until September 2, 2002 and may be mutually renewed for two (2) additional one-year terms unless terminated pursuant to the terms of this agreement. In no event shall this agreement remain in effect longer than five (5) years from the effective date.

#### 7. Termination

The following provisions are applicable in the event that the agreement is terminated.

##### A. Termination for Convenience

At any time, the NMSPA may terminate this agreement, in whole or in part, by giving the contractor (30) days written notice. Individual purchase orders for goods and services purchased under this Agreement may be terminated under the Participating Addendum of the applicable Participating Agency. At any time, Contractor may terminate this agreement, in whole or in part, by giving the Agreement Administrator thirty (30) days written notice.

##### B. Termination for Cause

Either party may terminate this agreement for cause based upon material breach of this agreement by the other party, provided that the non-breaching party shall give the breaching party written notice specifying the breach and shall afford the breaching party a reasonable opportunity to correct the breach. If within thirty (30) days after receipt of a written notice the breaching party has not corrected the breach or, in the case of a breach which cannot be corrected in thirty (30) days, begun and proceeded in good faith to correct the breach, the non-breaching party may declare the breaching party in default and terminate the agreement effective immediately. The non-breaching party shall retain any and all other remedies available to it under the law.

##### C. A Procuring Agency's Rights

In the event the agreement expires or is terminated for any reason, a Procuring Agency shall retain its rights in all Products and Services accepted prior to the effective termination date.

##### D. The Contractor's Rights

In the event the agreement expires or is terminated for any reason, a Procuring Agency shall pay Contractor all amounts due for Products and Services ordered and accepted prior to the effective termination date or ordered before the effective termination date and ultimately accepted.

#### 8. Non-Appropriation

The terms of this agreement and any purchase order issued for multiple years under this agreement is contingent upon sufficient appropriations being made by the Legislature or

other appropriate governing entity. Notwithstanding any language to the contrary in this agreement or in any purchase order or other document, a procuring agency may terminate its obligations under this agreement, if sufficient appropriations are not made by the governing entity to pay amounts due for multiple year agreements. The procuring agency's decision as to whether sufficient appropriations are available shall be accepted by the contractor and shall be final and binding.

A procuring agency shall provide sixty (60) days notice, if possible, of its intent to terminate for non-appropriation. Such termination shall relieve the procuring agency, its officers and employees from any responsibility or liability for the payment of any further amounts under the relevant purchase order; provided, however, that the Procuring Agency shall be responsible for payment for any Products or Services delivered prior to the provision of notice.

#### 9. Price Guarantees

The Procuring Agencies shall pay the lower of the prices contained in the ESS or an Announced Promotion Price, Educational Discount Price, General Price Reduction Price or Large Order Negotiated Price. Only General Price Reduction Price decreases will apply to all subsequent orders accepted by Contractor after the date of the issuance of the revised prices. Contractor agrees to maintain ESS Product prices in accordance with the price discounts offered and filed with the Agreement Administrator. Prices set forth in the ESS are subject to change without prior notice.

#### 10. Equipment and Service Schedule

Contractor agrees to maintain the ESS in accordance with the following provisions:

- A. The ESS prices for Products and Services will conform to the price discounts offered by the Contractor.
- B. Contractor may change the price of any product or service at any time, based upon list price changes, but price discount levels shall remain consistent during the agreed period.
- C. Contractor may make product model changes, add new products, product upgrades or services to the ESS at any time and the pricing for the same shall incorporate, to the extent possible, similar or comparable price discount levels provided herein, as agreed by the parties.
- D. Contractor agrees to delete obsolete and discontinued products from the ESS on a timely basis.
- E. Major product model changes shall be incorporated in the ESS as soon as possible after the announcement. In conjunction therewith or as soon as possible, the parties shall negotiate a price discount level for the new product line as comparable as possible to the price discount level quoted herein for similar Products.
- F. The ESS shall be maintained by Contractor on an Internet web site.

#### 11. Product Substitutions

Contractor may make substitutions either to the internal system components, options or external peripherals as long as the substitute item is the same or better technology at the same or lower price. Delivery order modifications will not be required. The invoice will reflect

the actual Product shipped NOT the Product ordered. To effect administrative savings, Procuring Agencies are instructed to make payments in accordance with this paragraph without requiring a delivery order modification. The following note will appear on the invoice.

"In accordance with the Product Substitutions paragraph in the Master Price Agreement, International Business Machines Corporation has substituted a product on this order. The substitution is the same or better technology at the same or lower price."

#### 12. Technical Support

Toll-free telephone warranty support for Contractor's Products shall be available during the initial warranty period for the Products. Additional technical support is available for an additional charge. Contractor does not provide warranty or technical support for non-IBM products, including operating systems.

#### 13. Year 2000

All Products to be included on the ESS will be designated as "Year 2000 Ready." When IBM has identified a Product as "Year 2000 Ready" in the Product's Official Published Specifications, it means that the Product, when used in accordance with its documentation and with any required Program Temporary Fixes, Corrective Service Deliverables or other similar requirements installed, is capable of correctly processing, providing, and/or receiving date data within and between the 20<sup>th</sup> and 21<sup>st</sup> centuries, provided that all other products (including hardware, software and firmware) used with the product properly exchange accurate date data with it.

#### 14. Impracticality of Performance

A party shall be excused from performance under this agreement for any period that the party is prevented from performing as a result of an act of God, strike, war, civil disturbance, epidemic, or court order, provided that the party has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance. Subject to this provision, such non-performance shall not be deemed a default or a ground for termination.

#### 15. Records and Audit

Contractor agrees to maintain detailed records pertaining to the price of services rendered and products delivered for a period of three years from the date of acceptance of each purchase order. These records shall be subject to inspection by the Procuring Agency and appropriate governmental authorities with the Procuring Agency's state; provided, however, that the number of audits shall not exceed two audits a year. The Procuring Agency shall have the right to audit billings either before or after payment. Payment under this agreement shall not foreclose the right of the Procuring Agency to recover excessive or illegal payments.

#### 16. Independent Contractor

The contractor and its agents and employees are independent contractors and are not employees of the State of New Mexico or of any Participating Entity. Contractor has no authorization, express or implied to bind the State of New Mexico, WSCA or any Participating Entity to any agreements, settlements, liability or understanding whatsoever, and agrees not to perform any acts as agent for the State of New Mexico, WSCA, or any Participating Entity, except as expressly set forth herein. Contractor and its agents and

employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico or Participating Entity as a result of this agreement.

#### 17. Use of Subcontractors

Contractor may subcontract installation, training, warranty or maintenance services. However, Contractor shall remain solely responsible for the performance of its obligations under this agreement. All Procuring Agency payments for Products or Services shall be made directly to Contractor.

#### 18. Amendments

The agreement shall only be amended by written instrument executed by the parties.

#### 19. Scope of Agreement

This agreement replaces all of the agreements of the parties concerning the subject matter of this agreement, and all prior agreements have been merged into this agreement. No prior agreements, verbal or otherwise, of the parties or their agents shall be valid or enforceable.

#### 20. Invalid Term or Condition

If any term or condition of this agreement shall be held invalid or unenforceable, the remainder of this agreement shall not be affected and shall be valid and enforceable.

#### 21. Enforcement of Agreement

A party's failure to require strict performance of any provision of this agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

#### 22. Web Site Maintenance

IBM agrees to maintain and support an Internet website for access to the ESS, configuration assistance, product descriptions and product specifications in accordance with the written agreements of the parties.

#### 23. Equal Opportunity Compliance

The contractor agrees to abide by all applicable laws, regulations, and executive orders pertaining to equal employment opportunity, including federal laws and the laws of the state in which it's primary place of business is located. In accordance with such laws, regulations, and executive orders, the contractor agrees that no person in the United States shall, on the grounds of race, color, religion, national origin, sex, age, veteran status or handicap, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed by Contractor under this agreement. If Contractor is found to be not in compliance with these requirements during the life of this agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

#### 24. Limitation of Liability and Indemnification

Contractor's liability to a Procuring Agency for any cause whatsoever, including any obligation of indemnification, shall be as set forth in the applicable Participating Entity's

Participating Addendum. In no event shall Contractor be liable for any indirect, special or consequential damages (including any lost profits) arising out of this agreement or the use of the Products purchased by the Procuring Agency hereunder, even if Contractor has been advised of the possibility of such damages.

#### 25. Applicable Law

This agreement shall be governed by the laws of the State of New Mexico; provided that the laws of the State of the Procuring Agency shall apply to individual purchases. The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs.

#### 26. Change in Contractor Representatives

Contractor shall appoint a primary representative to work with the Agreement Administrator to maintain, support and market this agreement. The NMSPA reserves the right to request a change in Contractor's then-current primary representative if the assigned representative is not, in the opinion of the NMSPA, serving the needs of the State of New Mexico and the participating entities adequately.

#### 27. Release

Contractor, upon final payment of the amount due under this agreement, releases the NMSPA, State of New Mexico and participating entities its officers and employees, from claims for further payment or charges. Contractor agrees not to purport to bind the State of New Mexico or any participating entity to any obligation to any third party, unless the contractor has express written authority to do so, and then only within the strict limits of the authority.

#### 28. Confidentiality

Any exchange of confidential information will be handled under a separate written confidentiality agreement specifically defining the receiving parties' obligation of confidentiality.

#### 29. Replacement Parts

Replacement parts may be refurbished.

#### 30. FCC Certification

Contractor agrees that hardware supplied by the contractor meets all applicable FCC Certifications. Improper, falsely claimed or expired FCC certifications are grounds for termination.

#### 31. Site Preparation

A Procuring Agency shall prepare and maintain its site in accordance with written instructions furnished by Contractor prior to the scheduled delivery date of any Equipment or Service and shall bear the costs associated with the site preparation.

#### 32. Assignment

Contractor may assign its rights and obligations, including its right to payment, under the contract, but agrees not to make any such assignment unreasonably.

### 33. Agreement Administrator

The NMSPA shall appoint an Agreement Administrator whose duties shall include but not be limited to the following:

- A. Provide instructions concerning the contents of Contractor's website.
- B. Facilitate dispute resolution between the contractor and procuring agencies. Unresolved disputes shall be presented to the NMSPA for resolution.
- C. Promote the use of the agreement by WSCA members and other participating entities.
- D. The administrator shall advise the NMSPA regarding Contractor's performance under the terms and conditions of the agreement.
- E. Receive and approve quarterly price agreement utilization reports and the administration fee payments.
- F. Periodically verify the product prices in the ESS conform with the contractor's volume price guarantees.

### 34. Survival

Software licenses, lease, warranty and service agreements that were entered into under the terms and conditions of this agreement shall survive this agreement.

### 35. Lease Agreements

Contractor may lease equipment to Procuring Agencies in accordance with terms and conditions approved by the appropriate governing authority for the Procuring Agency's jurisdiction. Such approval shall be indicated in the Participating Addendum.

### 36. Succession

This agreement shall be entered into and be binding upon the successors and assigns of the parties.

### 37. Notification

Either party may give written notice to the other party in accordance with the terms of this paragraph 45. Any written notice required or permitted to be given hereunder shall be deemed to have been given on the date of delivery if delivered by personal service or hand delivery or three business days after being mailed.

To NMSPA:

New Mexico State Purchasing Agent  
Purchasing Division  
Joseph M. Montoya State Building, Room 2016  
1100 St. Francis Drive  
Santa Fe, New Mexico 87505

or

P.O. Drawer 26110  
Santa Fe, New Mexico 87502-0110

To Contractor:

Heidi Chase  
IBM Corporation  
2052 Galisteo Street  
Suite A  
Santa Fe, NM 87505

And/or

Office of the Regional Counsel  
IBM Corporation  
1507 LBJ Freeway  
Dallas, Texas 75234

Either party may change its representative or address above by written notice

### 38. Administration Reporting and Fees

Contractor agrees to provide periodic price agreement utilization reports to the Agreement Administrator in accordance with the following schedule:

| <b>Period End</b> | <b>Report Due</b> |
|-------------------|-------------------|
| June 30           | July 31           |
| September 30      | October 31        |
| December 31       | January 31        |
| March 31          | April 30          |

The periodic report shall include the gross sales for the period subtitled by Procuring Agency name or identifying number, within the Procuring Agency's state name. The report shall be accompanied with a check payable to Western States Contracting Alliance for an amount equal to one-tenth of one percent (0.0010) of the gross sales for the period (the "Utilization Fee"). The Utilization Fee to be collected by IBM on behalf of WSCA shall be included in the charges for the Products and Services set forth in the ESS. The identified fee is an administrative fee and Contractor's obligation to pay such amounts shall be suspended to the extent that its payment of collection violates any state or federal laws.

The failure to file the utilization reports and fees on a timely basis shall constitute grounds for suspension of the price agreement or termination of the price agreement for cause.

### 39. Servicing Subcontractor

Servicing Subcontractors shall be authorized dealers of the contractor and approved by the participating entity. If the Procuring Agency fails to specify a Servicing Subcontractor, Contractor may assign a Servicing Subcontractor.

IN WITNESS WHEREOF, the parties have executed this agreement as of the date of execution by the New Mexico State Purchasing Agent, below.

State of New Mexico

Contractor

State Purchasing Agent

International Business Machines Corporation

By: Louis T. Higgins  
Louis T. Higgins

By: [Signature]  
Title: Client Executive

Date: 10-7-99

Date: Oct. 7, 1999

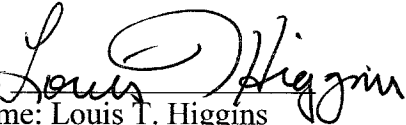
AMENDMENT #1  
WESTERN STATES CONTRACTING ALLIANCE  
**International Business Machines Corporation**  
MASTER PRICE AGREEMENT #94-00151

This bilateral Amendment #1 is entered into by International Business Machines Corporation (“Contractor”) and the New Mexico State Purchasing Agent (“NMSPA”) on behalf of the State of New Mexico and the participating members of the Western States Contracting Alliance and other authorized purchasers. This Amendment #1 to the Master Price Agreement (the “Agreement”) is effective on date signed by NMSPA (“Effective Date”), and is issued to modify the Agreement as enumerated in the following:

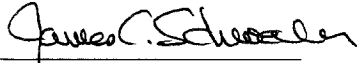
Paragraph 6, Agreement Term, is amended to read as follows: The agreement is effective September 3, 1999 through September 2, **2003 with one (1) one-year optional renewal**. In no event shall this agreement remain in effect longer than five (5) years from the effective date.

IN WITNESS WHEREOF, the Parties have caused this Amendment #1 to be signed by their duly authorized representatives, in two (2) original counterparts, on the date(s) indicated below.

STATE OF NEW MEXICO

By:   
Name: Louis T. Higgins  
New Mexico State Purchasing Agent  
Date: 8.22.2002

INTERNATIONAL BUSINESS MACHINES  
CORPORATION

By:   
Name: JAMES C. SCHREINER  
Title: IBM WSCA NATIONAL PROGRAM MANAGER  
Date: 7-19-02

AMENDMENT #2  
WESTERN STATES CONTRACTING ALLIANCE  
**International Business Machines Corporation**  
MASTER PRICE AGREEMENT #94-00151

This bilateral Amendment #2 is entered into by International Business Machines Corporation ("Contractor") and the New Mexico State Purchasing Agent ("NMSPA") on behalf of the State of New Mexico and the participating members of the Western States Contracting Alliance and other authorized purchasers. This Amendment #2 to the Master Price Agreement (the "Agreement") is effective on date signed by NMSPA ("Effective Date"), and is issued to modify the Agreement as enumerated in the following:

Paragraph 6, Agreement Term, is amended to read as follows: The agreement is effective September 3, 1999 through September 2, **2004**. In no event shall this agreement remain in effect longer than five (5) years from the effective date.

Paragraph 46, Administration Reporting and Fees, is amended to read as follows:

The Contractor agrees to provide periodic price Agreement utilization reports to the Agreement Administrator in accordance with the following schedule:

| <u>Period End</u> | <u>Report Due</u> |
|-------------------|-------------------|
| June 30           | July 31           |
| September 30      | October 31        |
| December 31       | January 31        |
| March 31          | April 30          |

The periodic report shall include the gross sales for the period subtotaled by Procuring Agency name or identifying number, within the Procuring Agency's state name. The report shall be accompanied with a check payable to Western States Contracting Alliance for an amount equal to **one-half of** one-tenth of one percent (**0.0005**) of the gross sales for the periods **from October 1, 2002 through September 2, 2004**. The Agreement Administrator will provide the reports, as requested, to each Participating Entity

The failure to file the utilization reports and fees on a timely basis shall constitute grounds for the removal of the Contractor's primary representative, suspension of the price Agreement or termination of the price Agreement for cause.

IN WITNESS WHEREOF, the Parties have caused this Amendment #2 to be signed by their duly authorized representatives, in two (2) original counterparts, on the date(s) indicated below.

STATE OF NEW MEXICO

By: 

*ja* New Mexico State Purchasing Agent

Date: 1-13-03

INTERNATIONAL BUSINESS MACHINES  
CORPORATION

By: 

Name: JAMES C. SCHROEDER

Title: IBM WSCA National Program Manager

Date: 12-19-02

**WSCA/NASPO Contract Administration**

112 Administration Building

50 Sherburne Avenue

St. Paul, MN 55155

Fax: 651.297.3996

TTY: MN Relay Service 1.800.627.3529

<http://www.mmd.admin.state.mn.us>

## ASSIGNMENT AGREEMENT

This Assignment Agreement is by and among the State of Minnesota, acting through its commissioner of Administration ("Assigned Lead State"), the State of New Mexico, acting through its secretary of General Services ("Original Lead State"), and (IBM Corporation) ("Contractor").

**WHEREAS**, the Original Lead State has an agreement with the Contractor, Contract No. (SPD #94-000-00-00151), effective (September 3, 1999), through (September 2, 2004), to provide direct-from-manufacturer computer equipment, software and services; and

**WHEREAS**, the Original Lead State wishes to assign all management and administration of this Contract to the Assigned Lead State;

**NOW THEREFORE**, the parties agree to the following:

1. This Assignment Agreement will become effective upon its approval and execution by the parties and approval of the appropriate Assigned Lead State officials, pursuant to Minn. Stat. § 16C.05, subd. 2.
2. The Contractor hereby acknowledges the requirement of the Original Lead State to assign to the Assigned Lead State all the overall management and administration interests, rights, responsibilities, duties, and other provisions set forth in the Contract, which is attached and incorporated as Attachment B, provided the Original Lead State, the Assigned Lead State and the Contractor agree to all provisions set forth in this Assignment Agreement, including Attachment A.
3. The Original Lead State will provide the Assigned Lead State all participating addendums, web files in its possession, and utilization reports of the Original Lead State. The Original Lead State has no knowledge of any default by the Contractor of any of its obligations under the contract as of the date of execution of this assignment agreement.
4. The Assigned Lead State is ready, willing, and able to perform all of the duties, obligations, and responsibilities of the Contract, and the Assigned Lead State accepts assignment of all the provisions of the Contract.

**IN WITNESS WHEREOF**, the parties have caused this Assignment Agreement and Attachment A to this Assignment Agreement (attached) to be duly executed intending to be bound thereby.

August 16, 2004

Assignment Agreement  
WSCA PC Contract NM SPD # 94-000-00-00151 with IBM Corporation  
from  
State of New Mexico to State of Minnesota

Page 1 of 6 Pages



**WSCA/NASPO Contract Administration**

112 Administration Building

50 Sherburne Avenue

St. Paul, MN 55155

Fax: 651.297.3996

TTY: MN Relay Service 1.800.627.3529

<http://www.mmd.admin.state.mn.us>

**1. ORIGINAL LEAD STATE**

The Original Lead State certifies that the appropriate person(s) have executed this document on behalf of the Original Lead State as required by law.

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**2. CONTRACTOR**

The Contractor certifies that the appropriate person(s) have executed this document on behalf of the Contractor as required by applicable articles, bylaws, resolutions, or ordinances.

By: James C. Schweder

Title: IBM WSCA/NASPO NATIONAL Prog. Mgr.

Date: AUGUST 16, 2004

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**3. ASSIGNED LEAD STATE**

**MATERIALS MANAGEMENT DIVISION**

In accordance with Minn. Stat. § 16C.03, Subd. 3.

By: Bernadette Kopischke

Title: Acquisition Management Specialist

Date: 8/16/04

**4. ASSIGNED LEAD STATE**

**COMMISSIONER OF ADMINISTRATION**

Or delegated representative.

By: [Signature]

Date: 16 AUG 04


**WSCA/NASPO Contract Administration**

112 Administration Building

50 Sherburne Avenue

St. Paul, MN 55155

Fax: 651.297.3996

TTY: MN Relay Service 1.800.627.3529

<http://www.mmd.admin.state.mn.us>

## ATTACHMENT A

The Contract being assigned by this Assignment Agreement are amended to include this, Attachment A. These are basic requirements of Minnesota statute and policy, if they are in direct conflict with clauses or requirements in the Original Contract (as amended), Minnesota statute and policy shall prevail.

Contractors have agreed to these statutory and policy requirements in the Participating Addendum entered into between the Contractor(s) and Minnesota. Those clauses included in the existing Participating Addendum are identified in **bold**.

1. **GOVERNING LAW.** The Contract will be construed in accordance with and performance governed by the laws of the State of Minnesota. Except to the extent that the provisions of the Contract are clearly inconsistent therewith, the Contract will be governed by the Uniform Commercial Code (UCC) as adopted by the State of Minnesota. To the extent the Contract entails delivery or performance of services, the services will be deemed "goods" within the meaning of the UCC, except when to deem such services as "goods" is unreasonable.
2. **LAWS AND REGULATIONS.** Any and all services, articles or equipment offered and furnished must comply fully with all local, State, and federal laws and regulations, including Minn. Stat. § 181.59 prohibiting discrimination.
3. **JURISDICTION AND VENUE.** The Contract, amendments and supplements thereto, shall be governed by the laws of the State of Minnesota. Venue for all legal proceedings arising out of the Contract or breach thereof shall be in the State or federal court with competent jurisdiction in Ramsey County, Minnesota.
4. **SEVERABILITY.** If any provision of the Contract, including items incorporated by reference, is declared or found to be illegal, unenforceable, or void, then both the State and Contractor will be relieved of all obligations arising under the provision; if the remainder of the Contract is capable of performance, it will not be affected by the declaration or finding and will be fully performed.
5. **SURVIVABILITY.** The following rights and duties of the State and responder will survive the expiration or cancellation of the resulting Contract(s). These rights and duties include, but are not limited to the paragraphs on Indemnification and Hold Harmless, State Audits, Government Data Practices Act, Governing Law, Jurisdiction and Venue, Intellectual Property Indemnification, and Publicity.
6. **ASSIGNMENT.** The Contractor shall not sell, transfer, assign, or otherwise dispose of the Contract or any portion hereof or of any right, title, or interest herein without the prior written consent of the State's authorized agent. Such consent shall not be unreasonably withheld. The Contractor shall give written notice to the State's authorized agent of such a possibility at least 30 days prior to the sale, transfer, assignment, or other disposition of the Contract. Failure to do so may result in the

August 16, 2004

Assignment Agreement

Page 3 of 6 Pages

WSCA PC Contract NM SPD # 94-000-00-00151 with IBM Corporation

from

State of New Mexico to State of Minnesota

**WSCA/NASPO Contract Administration**

112 Administration Building

50 Sherburne Avenue

St. Paul, MN 55155

Fax: 651.297.3996

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Contractor being held in default. This consent requirement includes reassignment of the Contract due to a change in ownership, merger, or acquisition of the Contractor its subsidiary or affiliated corporations. This section shall not be construed as prohibiting the Contractor's right to assign the Contract to corporations to provide some of the services hereunder. Notwithstanding the foregoing acknowledgment, the Contractor shall remain solely liable for all performance required and provided under the terms and conditions of the Contract.

7. **CANCELLATION OF THE CONTRACT.** The contract may be cancelled by the State or the commissioner of Administration at any time, with or without cause, upon 30 days' written notice to the Contractor. In the event the Contractor is in default, the contract is subject to immediate cancellation to the extent allowable by applicable law. In the event of cancellation, the Contractor shall be entitled to payment, determined on a pro rata basis, for work or services satisfactorily performed and accepted.
8. **FORCE MAJEURE.** Neither party hereto shall be considered in default in the performance of its obligations hereunder to the extent that performance of any such obligations is prevented or delayed by acts of God, war, riot or other catastrophes beyond the reasonable control of the party unless the act or occurrence could have been reasonably foreseen and reasonable action could have been taken to prevent the delay or failure to perform. A party defaulting under this provision must provide the other party prompt written notice of the default and take all necessary steps to bring about performance as soon as practicable.
9. **COPYRIGHTED MATERIAL WAIVER.** The State reserves the right to use, reproduce, and publish responses in any manner necessary for State agencies and local units of government to access the responses, including but not limited to photocopying, State Intranet/Internet postings, broadcast faxing, and direct mailing. In the event that a response contains copyrighted or trademarked materials, it is the responder's responsibility to obtain permission for the State to reproduce and publish the information, regardless of whether the responder is the manufacturer or reseller of the products listed in the materials. By signing its response, the responder certifies that it has obtained all necessary approvals for the reproduction and/or distribution of the contents of its response and agrees to indemnify, protect, save and hold the State, its representatives and employees harmless from any and all claims arising from the violation of this section and agrees to pay all legal fees incurred by the State in the defense of any such action.
10. **INSURANCE.** Certificates of insurance, including workers' compensation insurance coverage requirements of Minn. Stat. Ch. 176, must be submitted upon request.

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11. **STATE AUDITS (Minn. Stat. § 16C.05, Subd. 5).** The books, records, documents, and accounting procedures and practices of the Contractor and its employees, agents, or subcontractors relevant to the Contract must be made available to and subject to examination by the Legislative Auditor and/or the State Auditor for a minimum of six years after the end of the Contract.
12. **SUBCONTRACTORS.** In the event the Contractor hires subcontractors IN MINNESOTA to perform all or some of the duties of the Contract, the Contractor understands that Minn. Stat. § 16A.1245 requires that any such subcontractor be paid within 10 days of the Contractor's receipt of payment from the State for undisputed services provided by the subcontractor. The Contractor agrees to take all steps necessary to comply with said statute. A consultant is a subcontractor under the Contract. In the event the Contractor fails to make timely payments to a subcontractor, the State may, at its sole option and discretion, pay a subcontractor any amounts due from the Contractor for work performed under the Contract and deduct said payment from any remaining amounts due the Contractor. Before any such payment is made to a subcontractor, the State shall provide the Contractor written notice that payment will be made directly to a subcontractor. The Contractor shall ensure that the subcontractor transfers all intellectual or industrial property rights to the State, including but not limited to any copyright it may have in the work performed under the Contract, consistent with the intellectual property rights ownership section of the Contract. In the event the Contractor does not obtain the intellectual property rights of the subcontractor consistent with the transfer of rights under the Contract, the State may acquire such rights directly from the subcontractor. Any and all costs associated with such a direct transfer may be deducted from any amount due the Contractor.
13. **RISK OF LOSS OR DAMAGE.** The State is relieved of all risks of loss or damage to the equipment during periods of transportation, installation, and during the time the equipment is in possession of the State, unless and until such time as unencumbered title for the goods is vested in the State and the goods are in exclusive possession of the State.
14. **INDEMNIFICATION AND HOLD HARMLESS.** The Contractor shall hold the Lead State (Minnesota), Participating Entities and its agencies and employees harmless and shall indemnify the Lead State (Minnesota), Participating Entities and its agencies and employees against any and all claims, suits, actions, liabilities and costs of any kind, including attorney's fees for personal injury or damage to real property or tangible personal property arising from the negligent or willful acts or omissions of the contractor, its agents, officers, employees or subcontractors. Contractor shall not be liable for damages that are the result of negligence by the Lead State (Minnesota), Participating Entity, or its employees.
15. **GOVERNMENT DATA PRACTICES ACT.** The Contractor must comply with the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13, as it applies to all data provided by the State in accordance contract, and as it applies to all data created, collected, received, stored, used, maintained, or disseminated by the responder in accordance with this contract. The civil remedies of Minn. Stat. § 13.06, apply to the release of the data referred to in this article by either the responder or the State.

In the event the Contractor receives a request to release the data referred to in this article, the responder must immediately notify the State. The State will give the responder instructions

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concerning the release of the data to the requesting party before the data is released.

16. **ORGANIZATIONAL CONFLICTS OF INTEREST.** The Contractor warrants that, to the best of its knowledge and belief, and except as otherwise disclosed, there are no relevant facts or circumstances which could give rise to organizational conflicts of interest. An organizational conflict of interest exists when, because of existing or planned activities or because of relationships with other persons, a vendor is unable or potentially unable to render impartial assistance or advice to the State, or the vendor's objectivity in performing the contract work is or might be otherwise impaired, or the vendor has an unfair competitive advantage. The Contractor agrees that, if after award, an organizational conflict of interest is discovered, an immediate and full disclosure in writing must be made to the Assistant Director of the Department of Administration's Materials Management Division which must include a description of the action which the contractor has taken or proposes to take to avoid or mitigate such conflicts. If an organization conflict of interest is determined to exist, the State may, at its discretion, cancel the contract. In the event the Contractor was aware of an organizational conflict of interest prior to the award of the contract and did not disclose the conflict to the contracting officer, the State may terminate the contract for default. The provisions of this clause must be included in all new subcontracts for work to be performed similar to the service provided by the prime contractor, and the terms "contract," "contractor," and "contracting officer" modified appropriately to preserve the State's rights.

August 16, 2004

Assignment Agreement  
WSCA PC Contract NM SPD # 94-000-00-00151 with IBM Corporation  
from  
State of New Mexico to State of Minnesota

Page 6 of 6 Pages



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**AMENDMENT NUMBER: THREE (3)**  
**TO CONTRACT NUMBER: formerly NM SPD # 92-000-00-00151**  
**now MN A62174**

**THIS AMENDMENT** is by and between the State of Minnesota, acting through its commissioner of Administration, for the WSCA/NASPO ("Lead State") and IBM Corporation (Contractor).

**WHEREAS**, the Lead State has a Contract with the Contractor identified as No. NM SPD # 92-000-00-00151/MN A62174, effective September 3, 1999, through September 2, 2004, to provide direct-from-manufacturer computer equipment, software and services; and

**WHEREAS**, Minn. Stat. § 16C.03, subd. 5, affords the commissioner of Administration, or delegate pursuant to Minn. Stat. § 16C.03, subd. 16, the authority to amend contracts; and

**WHEREAS**, the terms of the Contract and previous amendments thereto expressly state that the term of the Contract ends on September 2, 2004.

**SINCE**, WSCA/NASPO and the Contractor are currently engaged in entering into a new Contract for direct-from-manufacturer contract which will become effective on September 1, 2004, both parties have agreed that extending Contract MN A62174 will protect currently authorized participating entities from not having access to a contract to support their technology purchasing requirements.

**NOW, THEREFORE**, it is agreed by the parties to amend the Contract as follows:

1. That Contract No. NM SPD # 92-000-00-00151/MN A62174 is extended through December 31, 2004.
2. That the Contractor agrees that as soon as each individual Participating Addenda is fully executed, this extension will no longer be effective and the Contractor will treat all subsequent transactions under the terms and conditions of the new contract.
3. That, if the Lead State and the Contractor fail to enter into the new contract by September 1, 2004, this amendment is not valid and all contractual relationships with the Contractor will cease.

This Amendment is effective beginning on September 2, 2004, and shall remain in effect until December 31, 2004, or until the Contract is canceled or lapses, based on 3 above, whichever occurs first.

Except as herein amended, the provisions of the original Contract between the parties hereto are expressly reaffirmed and remain in full force and effect.

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IN WITNESS WHEREOF, the parties have caused this Amendment to be duly executed intending to be bound thereby.

**1. CONTRACTOR**

The Contractor certifies that the appropriate person(s) have executed this document on behalf of the Contractor as required by applicable articles, bylaws, resolutions, or ordinances.

By: James C. Schroeder

Title: IBM WSCA/NASPO NATIONAL P.P. MGR.

Date: AUGUST 16, 2004

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**2. LEAD STATE**

**MATERIALS MANAGEMENT DIVISION**

In accordance with Minn. Stat. § 16C.03, Subd. 3.

By: Bernadette Kopschke

Title: Acquisition Management Specialist

Date: 8/16/04

**3. LEAD STATE**

**COMMISSIONER OF ADMINISTRATION**

Or delegated representative.

By: [Signature]

Date: 16 AUG 04