

IBM Business Partner Agreement

General Terms -- Table of Contents

1.	Definitions	2
2.	Agreement Structure, Acceptance, and Contract Duration.....	3
2.1	Agreement Structure	3
2.2	Acceptance	4
2.3	Contract Duration	4
2.4	Changes to Agreement Terms	4
3.	Our Relationship	5
3.1	Independent Contractors.....	5
3.2	Dispute Resolution	5
3.3	Assignment	5
3.4	Electronic Communications and Notices on IBM's Internet Website	5
3.5	Responsibilities	5
3.6	IBM's Review of Your Compliance with this Agreement.....	6
4.	Business Conduct Requirements	7
4.1	Compliance With Laws.....	7
4.2	Prohibition on Gifts	7
4.3	Code of Conduct	7
4.4	Export and Import.....	7
4.5	Special Bids	8
5.	Marketing Funds and Promotional Offerings.....	9
6.	Status Change	10
7.	Confidential Information and Nondisclosure.....	10
8.	Intellectual Property Protection	10
8.1	Third Party Claims.....	10
8.2	Remedies	10
8.3	Claims for Which IBM Is Not Responsible.....	11
9.	Liability	11
9.1	IBM's Liability	11
9.2	Items for Which IBM Is Not Liable	11
9.3	Your Liability.....	12
10.	IBM's Trademarks	12
11.	License and Other Product Terms	12
11.1	IBM License and Product Terms	12
11.2	Non-IBM License and Product Terms	13
11.3	IBM Machine Production Status	13
12.	Internal Use, Demonstration, Development, and Evaluation Products and Services	13
12.1	Acquisition.....	13
12.2	License and Other Product Agreements	13
12.3	Internal Use.....	13
12.4	Demonstration, Development, and Evaluation	14
13.	Agreement Termination.....	14
14.	Geographic Scope.....	15
15.	Governing Law.....	15

General Terms

The IBM Business Partner Agreement—General Terms (the “General Terms”) governs IBM’s relationship with you as an IBM Business Partner and transactions under such relationship in which you market and order Products and Services from IBM.

1. Definitions

Customer – either an End User or a Remarketer.

End User a party who acquires Products or Services for its own use and not for resale. The term “End User” does not include a party who is a part of the Enterprise of which you are a part.

Enterprise – any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent. The term “Enterprise” applies only to the portion of the Enterprise located in [<country variable>](#).

IBM Business Partner (also called “Business Partner”) – a business entity that has an IBM Business Partner Agreement with IBM under which it is approved to market Products or Services.

IBM License and Product Terms – the license and Product terms (collectively) described in section 11.1 (IBM License and Product Terms) of this Agreement.

Licensed Internal Code (called “LIC”) – Machine Code used by certain IBM Machines IBM specifies (called “Specific Machines”).

Machine – a hardware device, its features, conversions, upgrades, elements, or accessories, or any combination of them. The term “Machine” includes an IBM Machine and any non-IBM Machine (including other equipment) that IBM may approve you to market.

Machine Code – is microcode, basic input/output system code (called “BIOS”), utility programs, device drivers, diagnostics, and any other code (all subject to any exclusions in the license provided with it) delivered with an IBM Machine for the purpose of enabling the Machine’s function as stated in its Specifications. “Specifications” is information specific to a Machine in a document entitled “Official Published Specifications” which is available on request. The term “Machine Code” includes Licensed Internal Code.

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

Operations Guide (or “operations guide”) – details, processes, procedures, and other pertinent information which IBM provides to you in one or more published forms or through our electronic information systems or a combination of both.

Product – a Machine or Program.

Program – the following, including the original and all whole or partial copies:

- a. machine-readable instructions and data;
- b. components;
- c. audio-visual content (such as images, text, recordings, or pictures); and
- d. related licensed materials.

The term “Program” includes any ICA Program, IBM Program or non-IBM Program that IBM may approve you to market. The term “Program” does not include Machine Code. “ICA Programs” are IBM Programs that IBM licenses under part 4 of the IBM Customer Agreement.

Related Company – any corporation, company, or other business entity:

- a. more than 50 percent of whose voting shares are owned or controlled, directly or indirectly, by either party; or

- b. which owns or controls, directly or indirectly, more than 50 percent of the voting shares of either party; or
- c. more than 50 percent of whose voting shares are under common ownership or control, directly or indirectly, with the voting shares of either party.

However, any such corporation, company, or other business entity is considered to be a "Related Company" only so long as such ownership or control exists. "Voting shares" are outstanding shares or securities representing the right to vote for the election of directors or other managing authority.

Remarketer – a business entity that acquires Products or Services for the purpose of marketing.

Service – performance of a task, provision of advice and counsel, assistance, support, or access to a resource (such as an information database) that IBM may approve you to market.

Trademark – any title, trademark, registered trademark, or service mark (including without limitation the IBM Business Partner title and emblem) owned by International Business Machines Corporation, which International Business Machines Corporation may authorize you to use.

2. Agreement Structure, Acceptance, and Contract Duration

2.1 Agreement Structure

This Agreement includes the General Terms and additional terms provided by IBM in applicable Profiles, Attachments, Exhibits, and Transaction Documents, is the complete agreement regarding your relationship with IBM as an IBM Business Partner, and replaces any prior oral or written communications between you and IBM.

Attachments, Exhibits, and Transaction Documents are part of this Agreement only for those transactions to which they apply. Each transaction is separate and independent from other transactions.

2.1.1 Profiles

IBM specifies the details of our relationship (for example, the type of Business Partner you are and Products and Services you are approved to market) in a document called a "Profile."

2.1.2 Attachments

In general, Attachments may include terms that apply to the method of marketing Products and Services (for example, Remarketer Terms Attachment or Complementary Marketing Terms Attachment) and those that apply to the type of Business Partner you are (for example, a Distributor relationship is described in the Distributor Attachment). IBM specifies in a Profile the Attachments that apply to your IBM Business Partner relationship.

2.1.3 Exhibits

An Exhibit includes specific information about Products and Services (for example, lists of Products and Services, applicable marketing discounts and fees, and Machine installation information).

2.1.4 Transaction Documents

Transaction Documents contain specific details and terms related to individual transactions. Examples of Transaction Documents (with descriptions of the information they may contain) are invoices (item, quantity, payment terms, and amount due), order acknowledgments (confirmation of Products and quantities ordered), and addendums.

2.1.5 Order of Precedence

If there is a conflict among the terms in the various Agreement documents, the terms of:

- a. a Transaction Document prevail over those of all Agreement documents;
- b. an Exhibit prevail over those of a Profile, an Attachment, and the General Terms;
- c. a Profile prevail over those of an Attachment and the General Terms; and
- d. an Attachment prevail over those of the General Terms.

The order of precedence within more than one of a single type of document (for example, two Attachments) will be stated in the applicable documents (for example, the Distributor Attachment states that its terms prevail over the terms of the Remarketer Terms Attachment).

2.2 Acceptance

Each of us agrees to the terms of the Profile, the General Terms, and applicable Attachments and Exhibits by signing a Profile that incorporates each of those documents. Any Attachment or Transaction Document will be signed by both parties if requested by either party.

Unless a handwritten signature is specifically required by IBM, a Profile and any other document required to be signed under this Agreement may be signed by hand or, where recognized by law, electronically.

2.2.1 IBM's Acceptance of Your Order

A Product or Service becomes subject to the Agreement when IBM accepts your order by (i) sending you a Transaction Document, (ii) shipping the Machine or making the Program available to you, or (iii) providing the Service.

2.2.2 Your Acceptance of Transaction Documents and Subsequent Attachments, Exhibits, and Profiles

You accept the terms of Transaction Documents and any Attachments, Exhibits, or Profiles provided by IBM after you sign a Profile accepting the terms of this Agreement by doing any of the following:

- a. signing them;
- b. marketing or ordering the Product or Service;
- c. accepting or using the Product or Service, or allowing others to do so;
- d. providing the Product or Service to your Customer; or
- e. making any payment or requesting a fee for the Product or Service.

2.3 Contract Duration

IBM specifies the contract start date and duration in the Profile. Unless IBM specifies otherwise in writing, the Agreement will be renewed automatically for subsequent two-year periods. However, you may advise IBM in writing not to renew the Agreement. Each of us is responsible to provide the other three months' written notice if this Agreement will not be renewed.

2.4 Changes to Agreement Terms

In order to maintain flexibility in our relationship, IBM may change the terms of this Agreement by providing you at least one month's written notice. However, these changes are not retroactive. They apply, as of the effective date IBM specifies in the notice, only to new orders, ongoing transactions that do not expire, and transactions with a defined renewable contract period. For transactions with a defined renewable contract period, you may request that IBM defer the change effective date until the end of the current contract period.

You acknowledge your agreement to have these changes apply for such transactions by (i) placing new orders for or marketing Products or Services after the change effective date, (ii) failing to request that the change effective date be deferred until the start of the new renewal period, (iii) allowing transactions to renew after receipt of the change notice, or (iv) failing to terminate non-expiring transactions prior to the change effective date.

It may be necessary for IBM to change certain terms without providing the advance notice described above. The following changes are effective immediately upon written notice from IBM or on the date specified in the notice and, unless otherwise stated in the notice, apply to new and ongoing transactions under this Agreement:

- a. those this Agreement states do not require advance notice;
- b. those of an Exhibit, unless otherwise limited by this Agreement; and
- c. those relating to safety and security.

Changes to the Agreement terms may be communicated electronically in accordance with section 3.4 (Electronic Communications and Notices on IBM's Internet Website).

Except as otherwise provided above, for a change to the Agreement to be valid, both of us must sign it. Additional or different terms in any written communication from you (such as an order), are void.

Price and discount changes and modifications to Product returns or inventory adjustments are only valid when contained in an IBM announcement letter, authorized special bid amendment, or other IBM written authorized channel program offering. Any modification to prices, discounts, returns, or inventory adjustment terms by any means other than the authorized documentation described in this paragraph is

invalid. Any attempt by you to change any of those terms, except as provided herein, will be a material breach of this Agreement.

3. Our Relationship

3.1 Independent Contractors

Both parties are independent contractors, and this Agreement is non-exclusive. Neither party is a legal representative or legal agent of the other. Neither party is legally a partner of the other (for example, neither party is responsible for debts incurred by the other), and neither party is an employee or franchisee of the other, nor does this Agreement create a joint venture between the parties.

Each party is responsible for its own expenses regarding fulfillment of its responsibilities and obligations under the terms of this Agreement.

Neither party will assume or create any obligations on behalf of the other or make any representations or warranties about the other, other than those authorized.

3.2 Dispute Resolution

Each party will allow the other a reasonable opportunity to comply before it claims the other has not met its obligations under this Agreement, unless otherwise specified in the Agreement. Unless otherwise required by applicable law without the possibility of contractual waiver or limitation, i) neither party will bring a legal action, regardless of form, arising out of or related to this Agreement or any transaction under it more than two years after the cause of action arose and ii) after such time limit, any legal action arising out of this Agreement or any transaction under it and all respective rights related to any such action lapse.

3.3 Assignment

IBM reserves the right to assign this Agreement, in whole or in part, on written notice. IBM is also permitted to assign its rights to payments without obtaining your consent. It is not considered an assignment for IBM to divest a portion of its business in a manner that similarly affects all of its Business Partners.

Your rights under this Agreement are not property rights and, therefore, you can not transfer them to another party or encumber them in any way. For example, you can not sell your approval to market IBM's Products or Services or your rights to use IBM's Trademarks.

You agree not to assign or otherwise transfer this Agreement, your rights under this Agreement, or any of its approvals, or delegate any duties, unless expressly permitted to do so in this Agreement. Otherwise, any attempt to do so is void.

3.4 Electronic Communications and Notices on IBM's Internet Website

3.4.1 Electronic Communications

Written communications, including notices to the receiving party's designated representative, are to be sent to the address (physical, e-mail or facsimile) specified in an applicable Profile, Attachment, or Transaction Document. The parties consent to the use of electronic means and facsimile transmissions to send and receive communication in connection with our business relationship arising out of this Agreement, and such communication is acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity.

3.4.2 Notices on IBM's Internet Website

IBM provides some Attachments, Transaction Documents, and Exhibits, information regarding changes to Agreement terms, and other important information regarding your relationship with IBM under this Agreement on IBM's Internet website at <http://www.ibm.com/partnerworld>. By accepting this Agreement, including any Attachment, Transaction Document, Exhibit, or Profile under this Agreement, you represent that you have reviewed the applicable terms on the IBM Internet website and you accept those terms. And you agree to monitor the website on a regular basis for changes.

3.5 Responsibilities

3.5.1 IBM's and Your Responsibilities

- a. IBM may withdraw a Product or Service from marketing at any time.

- b. Failure by either party to insist on strict performance or to exercise a right when entitled does not prevent either party from doing so at a later time, either in relation to that default or any subsequent one.
- c. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.
- d. IBM does not guarantee the results of any of its marketing plans.
- e. Each party grants 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. The rights and licenses granted to you under the Agreement may be terminated if you fail to fulfill your applicable payment obligations.
- f. Where approval, acceptance, consent or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.

3.5.2 Your Other Responsibilities

You agree:

- a. to be responsible for your Customer's satisfaction regarding all of your activities associated with your Business Partner relationship with IBM, and to participate in customer satisfaction programs as IBM determines;
- b. to maintain the criteria IBM specified when IBM approved you as an IBM Business Partner;
- c. to achieve and maintain the certifications that IBM requires for the Products and Services you are approved to market;
- d. to conduct business activities with IBM (including placing orders) as IBM specifies, which may be in an Operations Guide, using IBM's automated electronic system if available. You agree to pay all expenses associated with your use of IBM's system (for example, your equipment and communication costs);
- e. that when IBM provides you with access to IBM's information systems, such access is only in support of your marketing activities associated with your IBM Business Partner relationship. Programs IBM provides to you for your use with IBM's information systems, which are in support of your marketing activities, are subject to the terms of their applicable license agreements, except you may not transfer them. You agree you will comply with the license terms and the additional restrictions in this Agreement and use the Programs only for the purpose for which they were provided to you;
- f. promptly provide IBM with documents IBM may require from you or a Customer (for example, a license agreement signed by the End User) when applicable;
- g. as reasonably required by IBM to fulfill its obligations under this Agreement, you agree to provide IBM with sufficient and safe access (including remote access) to your facilities, systems, information, personnel, and resources, all at no charge to IBM. IBM is not responsible for any delay in performing or failure to perform caused by your delay in providing such access or performing your other responsibilities under this Agreement; and
- h. that you authorize International Business Machines Corporation and its subsidiaries (and their successors and assigns, contractors and IBM Business Partners) to store and use your contact information and any of your Customers' business contact information that you provide to IBM wherever they do business, in connection with IBM Products and Services or in furtherance of IBM's business relationship with you. If information you provide to us includes personal data, you will obtain any consents needed so that IBM can use the information for the intended purpose.

3.6 IBM's Review of Your Compliance with this Agreement

IBM may periodically review your compliance with this Agreement. You agree to provide IBM with relevant records on request. IBM may reproduce and retain copies of these records. IBM, or an independent auditor, may conduct a review of your compliance with this Agreement on your premises during your normal business hours.

If, during the review of your compliance with this Agreement, it is determined you have failed to comply with any material term of this Agreement, in addition to IBM's rights under law and the terms of this Agreement, for transactions that are the subject of the breach, you agree to refund the amount equal to

the discount (or fee, if applicable) IBM gave you for the applicable Products or Services or IBM may offset any amounts due to you from IBM.

4. Business Conduct Requirements

4.1 Compliance With Laws

Each of us will comply with all applicable laws and regulations, including, without limitation, the U.S. Foreign Corrupt Practices Act and the applicable anti-bribery laws and laws governing transactions with government and public entities, antitrust and competition laws, applicable insider trading, securities, and financial reporting laws, laws governing consumer transactions, and laws regarding data privacy.

4.2 Prohibition on Gifts

You agree that you will not offer or make payments or gifts (monetary or otherwise such as travel, entertainment, meals, and other items of value) to anyone for the purpose of wrongfully influencing decisions in favor of IBM, directly or indirectly. IBM may terminate this Agreement immediately in case of 1) a breach of this clause or 2) when IBM reasonably believes such a breach has occurred or is likely to occur.

4.3 Code of Conduct

You agree to comply with the IBM Code of Conduct, a current version of which is available on the following IBM Internet website:

http://www.ibm.com/partnerworld/pwhome.nsf/weblook/pub_join_memctr_agreement_code.html.

IBM may change the Code of Conduct at any time by posting a revised Code of Conduct on the above website or by providing you with notice as otherwise provided in this Agreement. You represent that you have read the Code of Conduct and agree to monitor the website regularly for changes to the Code of Conduct. Such changes are effective immediately when they are posted to the website.

4.4 Export and Import

You may not market Products and Services outside the geographic scope of this Agreement, and you agree not to use anyone else to do so. Products you export (or which are acquired by a Remarketer for export) outside the geographic scope of this Agreement will not count toward attainment of your objectives and will not qualify for applicable promotional offerings and marketing funds. IBM may also reduce future supply allocations to you by the number of exported Products.

4.4.1 Export and Import Restrictions

4.4.1.1 Compliance with Export and Import Laws

You warrant that you:

- a. are and will remain knowledgeable about, applicable export and import laws, regulations, orders, and policies, including, but not limited to, those of the United States (which, in some instances, prohibit or restrict in-country marketing to certain Customers);
- b. when you market Products, Services, and technical data, and otherwise in connection with this Agreement, will comply with such laws, regulations, orders, and policies and will secure all necessary clearance requirements, export and import licenses and exemptions, and make all proper filings;
- c. will comply with applicable prohibitions on delivery of Products, prototypes, and technical data and provision of Services to certain End Users and for certain end uses, including, but not limited to, nuclear facilities, space or missile systems, and weapons systems (whether chemical, biological, or otherwise);
- d. will use your best efforts to ensure that your Customer complies with such laws, regulations, orders, and policies; and
- e. will comply with all additional export and import restrictions in any applicable Attachment or Transaction Document under this Agreement.

4.4.1.2 Exporting by You

You agree that if you export or import (for example, if you are approved for a geographic scope that includes multiple countries) Products, Services, and technical data, you, and not IBM, will act as the exporter or importer.

In addition to your obligations under section 4.4.1.1 (Compliance with Export and Import Laws) above, you agree that; i) Products and Services may not be marketed to Abu-Dhabi, Bahrain, Bangladesh, Dubai, Kuwait, Oman, Qatar and Saudi Arabia; and ii) Products may not be marketed to the following Latin American countries—Belize, Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua and Panama.

4.4.1.3 Export and Import Compliance Verification

IBM may, in its sole discretion, require you from time to time to provide IBM with written certification relating to your compliance with applicable export and import laws or prohibit you from doing business with certain Customers in order to ensure that you and IBM comply with applicable export and import laws.

4.4.2 Customer Exports

If a Customer exports a Product, IBM's responsibilities (including, but not limited to, warranty or support obligations), if any, under the IBM License and Product Terms or otherwise under this Agreement no longer apply to that Product, unless the Product's warranty or license terms state otherwise, and you agree to notify Customer of same. Before your sale of such Product, you agree to prepare a support plan for it and obtain your Customer's agreement to that plan. Within one month of sale, you agree to provide IBM with the Customer's name and address, Machine type/model, and serial number if applicable, date of sale, and destination country.

4.4.3 Marketing to Remarketers

If either by law or under the terms of this Agreement you may market to Remarketers and you market an eligible Product to a Remarketer who does not have a contract with IBM for marketing that Product, you agree you will require the Remarketer to comply with applicable export and import laws, regulations, orders, and policies, as specified under section 4.4.1 (Export and Import Restrictions).

If your Remarketer markets an eligible Product to a subsequent Remarketer who does not have a contract with IBM for marketing that Product, you further agree you will require your Remarketer to require the subsequent Remarketer to comply with applicable export and import laws, regulations, orders, and policies, as specified under section 4.4.1.

You further agree you will require your Remarketer to (i) notify its End Users and subsequent Remarketers of the restrictions and requirements specified under section 4.4.2 (Customer Exports) and (ii) require subsequent Remarketers to give such notice to their End Users.

4.4.4 Third Party Claims

You will indemnify IBM from all claims arising from: (i) your failure to comply with the provisions of this section 4.4; or (ii) your failure to require, in writing, your Remarketers who do not have a contract with IBM to market Products to comply with applicable export and import laws, regulations, orders or policies, as specified under section 4.4.1.1 and to further require your Remarketers to place a similar written requirement on any subsequent Remarketers to ensure all applicable Remarketers are required to comply.

4.5 Special Bids

Special bids (for example, a special discount or price) (called "Special Bids") are provided to you on the basis that the information you provided to IBM in your Special Bid request is truthful and accurate. If the information you provided in your Special Bid request changes, you must immediately notify IBM. In such event, IBM reserves the right to modify the terms of the Special Bid or to cancel your Special Bid authorization. If you fail to provide truthful and accurate information on Special Bid requests, then IBM shall be entitled to recover from you (and you shall be obligated to repay) the amount of any additional discounts IBM provided in the Special Bid and take any other actions authorized under this Agreement. Special Bid authorizations and the terms applicable to that Special Bid are IBM's confidential information, which is subject to the IBM Agreement of Exchange of Confidential Information.

You accept the terms of the Special Bid by:

- a. accepting the Products or Services for which you are receiving a Special Bid;
- b. providing the Products or Services to your Customer; or
- c. paying for the Products or Services.

The Special Bid discount or price for eligible Products or Services are subject to the following:

- a. no other discounts, incentive offerings, rebates, or promotions apply to the Products and Services, unless IBM specifies otherwise in writing;
- b. the applicable Products and Services are subject to availability;
- c. you agree to the additional terms contained in the Special Bid Addendum;
- d. you are required to advise *<C&N: insert the name of local IBM financing entity/organization – for example, in the U.S., IBM Global Financing>* of any Special Bid pricing for any Products or Services for which you arrange financing; and
- e. you or your Remarketer must resell the Product or Service to the End User associated with the Special Bid by the date indicated in the Special Bid request.

If you are a Distributor, you may only market the Products and Services to the Remarketer that you have stated in the Special Bid request is bidding to the End User for the transaction specified in the Special Bid request. You are responsible to require your Remarketers who do not have a contract with IBM to market such Products and Services to comply with the Special Bid terms contained in this Agreement and in the applicable Special Bid Addendum that IBM provides for the Special Bid.

If you are requesting a specific End User price or discount in your Special Bid, you agree that you will, or you will require your Remarketer to, as applicable, ensure that the intended End User receives the financial benefit of the Special Bid.

4.5.1 IBM's Audit of Special Bid Transactions

IBM may audit any Special Bid transactions in accordance with the terms of this section 4.5.1 and section 3.6 (IBM's Review of Your Compliance with this Agreement).

- a. Upon IBM's request, you will promptly provide IBM or its auditors with all relevant documentation to enable IBM to verify that all information provided in support of a Special Bid request was truthful and accurate and that IBM Products have been or will be supplied to the End User in accordance with the terms of the Special Bid, including, but not limited to, i) documentation that identifies the dates of sale and delivery and End User prices for IBM Products, such as invoices, delivery orders, contracts and purchase orders by and between you and any Remarketer and by and between you or any Remarketer and an End User and ii) documentation that demonstrates that you or your Remarketer, as applicable, own and use the Special Bid Products for at least the Service Period to provide the service offering described in the terms of the Special Bid to End Users (collectively, items i) and ii) being the "Documentation").
- b. In any case where you are unable to provide the Documentation because of confidentiality obligations owed to an End User, whether arising by written contract or applicable law, you will promptly provide IBM with written evidence of, and any Documentation not subject to, those obligations. In addition, you will promptly and in writing seek the End User's consent to waive confidentiality restrictions to permit IBM to conduct its audit as intended. Should the End User refuse to grant that consent, you will i) provide IBM with a copy of the waiver request and written proof of that refusal and ii) identify appropriate contacts at the End User with whom IBM may elect to discuss the refusal.
- c. You hereby waive any objection to i) IBM sharing Special Bid information directly with the End User, notwithstanding the terms of any agreement that would prohibit IBM from doing so, and otherwise communicating (both orally and in writing) with the End User, as IBM deems necessary and appropriate to complete its desired compliance review and ii) the End User sharing Special Bid information directly with IBM. In this subsection (c), "Special Bid information" includes, but is not limited to, the types and quantity of Products and anticipated End User prices and delivery dates set forth in a Special Bid.
- d. IBM may invalidate a Special Bid if in respect of such Special Bid, you fail to comply with this Section 4.5.1 or the applicable Special Bid terms. In that event, IBM shall be entitled to recover from you (and you shall be obligated to repay) the amount of any additional discounts IBM provided in the Special Bid. IBM may also take any other actions authorized under the Agreement or applicable law.

5. Marketing Funds and Promotional Offerings

IBM may provide marketing funds and promotional offerings to you. If we do, you agree to use them according to IBM's guidelines and to maintain records of your activities regarding the use of such funds

and offerings for no less than three years. IBM may withdraw or recover marketing funds and promotional offerings from you if you fail to comply with any terms of the Agreement. Upon notification of termination of the Agreement, marketing funds and promotional offerings will no longer be available for use by you, unless IBM specifies otherwise in writing.

6. Status Change

You agree to give IBM prompt written notice (unless precluded by law or regulation) of any change or anticipated change in your financial condition, business structure, or operating environment (for example, a material change in equity ownership or management or any substantive change to information you provided to IBM when you applied to become an IBM Business Partner). Upon notification of such change, (or if you fail to give notice of such change) IBM may, at its sole discretion, terminate this Agreement on written notice to you.

7. Confidential Information and Nondisclosure

If either party desires to exchange confidential information, such exchange will be governed by the IBM Agreement for Exchange of Confidential Information ("AECI"). Each party accepts the terms of the AECI by signing the AECI or by accepting the IBM Business Partner Agreement or another document that incorporates the AECI by reference. Except as provided in this section 7, confidential information should be marked with a restrictive legend or otherwise identified by the disclosing party as confidential at the time of disclosure subject to the terms of the AECI. If there is a conflict between the terms of this section 7 and those of the AECI, the terms of this section 7 will prevail.

Generally, all information exchanged between IBM and you is considered nonconfidential. However, the following information is always considered confidential, regardless of whether it is marked with a restrictive legend or otherwise identified as confidential at the time of disclosure:

- a. information on IBM's Internet website that is contained in a restricted-access database to which IBM provides you access;
- b. IBM's sales leads and information regarding IBM's prospects or customers;
- c. unannounced information regarding Products and Services; and
- d. IBM's business and marketing plans and strategies.

You agree not to disclose confidential information to IBM unless IBM specifically requests it.

Neither party will disclose the terms of this Agreement, unless both parties agree in writing to do so, or unless required by law.

8. Intellectual Property Protection

For the purposes of this Intellectual Property Protection section, the term "Product" also includes Machine Code.

8.1 Third Party Claims

If a third party asserts a claim against you that an IBM Product IBM provides to you under this Agreement infringes that party's patent or copyright, IBM will defend you against that claim at IBM's expense and pay all costs, damages, and attorney's fees that a court finally awards against you, or that are included in a settlement approved in advance by IBM, provided that you:

- a. promptly notify IBM in writing of the claim;
- b. allow IBM to control, and cooperate with IBM in, the defense and any related settlement negotiations; and
- c. are and remain in compliance with the Product's applicable license terms and your other obligations in this section, including under 8.2 (Remedies) below.

8.2 Remedies

If such a claim is made or appears likely to be made, you agree to permit IBM, in IBM's sole discretion, either to (i) enable you to continue to market or use the Product, (ii) modify it, or (iii) replace it with one that is at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, then on IBM's written request, you agree to promptly return the Product to IBM and discontinue its use. IBM will then give you a credit equal to the lesser of:

- a. the price you paid IBM for the Product (less any price-reduction credit); or

- b. for a Machine, your net book value calculated according to generally-accepted accounting principles, or for an ICA Program, the amount you paid IBM for the Program's license or twelve months' charges (whichever is less).

If the claim relates to a Product you distributed to your Customer, you are responsible for requiring your Customer to return the Product to you in order for you to fulfill your obligations in this section.

8.3 Claims for Which IBM Is Not Responsible

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

- a. anything provided by you, your Customer, or a third party on behalf of you or your Customer that is incorporated into a Product or IBM's compliance with any designs, specifications, or instructions provided by you, your Customer, or a third party on behalf of you or your Customer;
- b. a 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, to the extent a claim could have been avoided by using the current release or version;
- c. any modification of a Product made by you, your Customer, or a third party on behalf of you or your Customer or the combination, operation, or use of a Product with any other Product, hardware device, program, data, apparatus, method, or process;
- d. the distribution, operation, or use of a Product outside your entity or for the benefit of any third party, except to the extent that such distribution was i) authorized by IBM under this Agreement and ii) done in your role as an IBM Business Partner under this Agreement;
- e. infringement related to interactive voice response functionality or use of a Product in a telephone call processing environment; or
- f. a non-IBM Product or an IBM Program that is not licensed under Part 4 of the IBM Customer Agreement (for example, an IBM Program licensed under a separate license agreement such as the International Program License Agreement).

This Intellectual Property Protection section states IBM's entire obligation and your exclusive remedy regarding any third party intellectual property claims.

9. Liability

Circumstances may arise where, because of a default or other liability, one of us is entitled to recover damages from the other. The following terms apply as your exclusive remedy and our exclusive liability.

9.1 IBM's Liability

Regardless of the basis on which you are entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM's entire liability for all claims in the aggregate arising from or related to each Product or Service or otherwise arising under this Agreement will not exceed the amount of any actual direct damages up to the greater of U.S. \$100,000 (or equivalent in local currency) or the charges (if recurring, 12 months' charges apply) for the Product or Service that is the subject of the claim. For purposes of this Liability section, the term "Product" includes Machine Code and Materials.

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.

The following amounts are not subject to a cap on the amount of damages:

- a. payments referred to in the Intellectual Property Protection section above; and
- b. damages for bodily injury (including death) and damage to real property and tangible personal property for which IBM is legally liable.

9.2 Items for Which IBM Is Not Liable

Except as expressly required by law without the possibility of contractual waiver, under no circumstances is IBM, its subcontractors, or Program developers liable for any of the following even if informed of their possibility:

- a. loss of, or damage to, data;
- b. special, incidental, exemplary, or indirect damages, or for any economic consequential damages; or
- c. lost profits, business, revenue, goodwill or anticipated savings.

No right or cause of action for any third party is created by this Agreement, or any transaction under it, nor is IBM responsible for any third party claims against you except as described in the Intellectual Property Protection section above or as permitted by this Liability section for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.

9.3 Your Liability

In addition to damages for which you are liable under applicable law or the terms of this Agreement, you will indemnify IBM for claims made against IBM by others arising out of your conduct under this Agreement or as a result of your relationship with any third party, including without limitation, any claim based on representations, statements, claims or warranties not authorized by IBM.

10. IBM's Trademarks

For the purpose of this section 10, "IBM" means "International Business Machines Corporation."

You may use the IBM Business Partner title and emblem and any other Trademark IBM may specify to you. YOU ARE NOT AUTHORIZED TO USE IBM's "8-BAR" LOGO. IBM will specify Trademarks you are authorized to use in the applicable Operations Guide for the specific Trademark initiative. You agree that your use of such Trademarks may be subject to additional terms and limitations in a separate agreement with IBM. You agree to comply with all terms governing your use of IBM's Trademarks.

IBM will notify you in writing of the applicable IBM Business Partner title and emblem you are authorized by IBM to use. You may not modify the IBM Business Partner emblem in any way. IBM makes written guidelines regarding the use of the IBM Business Partner title and emblem available to you on IBM's Internet website at http://www-01.ibm.com/partnerworld/pwhome.nsf/weblook/emblem_welcome.html. You are responsible for monitoring the website on a regular basis for any changes IBM may make to the guidelines.

You may use the Trademarks only:

- a. within the geographic scope of this Agreement;
- b. in association with IBM's Products and Services you are approved to market; and
- c. as described in the written guidelines provided to you by IBM.

The royalty normally associated with non-exclusive use of the Trademarks will be waived, since the use of this asset is in conjunction with marketing activities for IBM's Products and Services.

You agree to promptly modify, at your expense, any advertising or promotional materials that do not comply with IBM's guidelines. If you receive any complaints about your use of a Trademark, you agree to promptly notify IBM. When this Agreement terminates, you agree to promptly stop using IBM's Trademarks. If you do not, you agree to pay any expenses and fees IBM incurs in getting you to stop.

You agree not to register or use any mark that is confusingly similar to any of IBM's Trademarks.

IBM's Trademarks, and any goodwill resulting from your use of IBM's Trademarks, belong to IBM.

11. License and Other Product Terms

11.1 IBM License and Product Terms

IBM Products are subject to additional terms. In particular:

- a. IBM Programs are licensed under the terms of the applicable license agreement (for example, the IBM International Program License Agreement or IBM International License Agreement for Non-warranted Programs and each's associated License Information documents) for each IBM Program. The license agreements applicable to a Program are referred to in this section as its "License Documents." IBM makes License Documents available to you on the following IBM Internet website: <http://www-03.ibm.com/software/sla/sladb.nsf>;
- b. Machine Code (including LIC) is licensed under the terms and restrictions of the applicable Machine Code license agreement (for example, the IBM License Agreement for Machine Code, IBM Agreement for Licensed Internal Code, or an equivalent) provided with the Machine Code. Machines containing Machine Code will be identified in the Exhibit. IBM makes Machine Code license agreements available to you on the following IBM Internet website: http://www-1.ibm.com/servers/support/machine_warranties/. International Business Machines Corporation, one of its subsidiaries, or a third party owns Machine Code including all copyrights in Machine Code and all copies of Machine Code (this includes the original Machine Code, copies of

the original Machine Code, and copies made from copies). Machine Code is copyrighted and licensed (not sold); and

- c. unless otherwise indicated, IBM Machines are provided subject to the terms of the IBM Statement of Limited Warranty ("SOLW"). We make the SOLW available to you on the following IBM Internet website: http://www.ibm.com/servers/support/machine_warranties/.

Collectively, the License Documents, Machine Code license agreements, and SOLW are referred to in this section as "License and Product Terms." IBM may provide additional instructions regarding License and Product Terms in the applicable Operations Guide.

11.2 Non-IBM License and Product Terms

Non-IBM Products are subject to the terms of any agreements provided by the non-IBM supplier or manufacturer of that Product.

IBM provides non-IBM Products WITHOUT WARRANTIES OF ANY KIND, unless IBM specifies otherwise. However, non-IBM manufacturers, suppliers, or publishers may provide their own warranties.

For non-IBM Products IBM approves you to market, you agree to inform your Customer in writing 1) that the Products are non-IBM, 2) the manufacturer or supplier who is responsible for warranty (if any), and 3) of the procedure to obtain any warranty service.

11.3 IBM Machine Production Status

Each IBM Machine is manufactured from parts that may be new or used. In some cases, a Machine may not be new and may have been previously installed. Regardless, IBM's appropriate warranty terms apply. You agree to inform your Customer of these terms in writing (for example, in your proposal or brochure).

12. Internal Use, Demonstration, Development, and Evaluation Products and Services

12.1 Acquisition

In addition to the terms of this Agreement, some IBM Business Partners (for example, non-Remarketer relationships, such as Complementary relationships) may be required to have a separate agreement with IBM to acquire Products and Services for internal use, demonstration, and development purposes. IBM will specify in an applicable Attachment if this requirement applies to your IBM Business Partner relationship. For Remarketer relationships, additional terms of the IBM Business Partner Agreement—Remarketer Terms Attachment regarding the acquisition of Products and Services apply.

12.2 License and Other Product Agreements

Products you acquire for internal use or for demonstration, development, or evaluation purposes will be subject to this Agreement and additional terms, including the IBM License and Product Terms referenced in section 11 (License and Other Product Terms), and the IBM Customer Agreement or an equivalent agreement between you and IBM (the "ICA") or the additional terms of section 7 (ICA Programs) of the IBM Business Partner Agreement—Remarketer Terms Attachment (as applicable) if you acquire any ICA Programs.

12.3 Internal Use

You may acquire Products you are approved to market for your internal use within your IBM Business Partner operations. You may also acquire Services you are approved to market for such purposes if IBM specifies in the Exhibit that the Services are available for such purposes. You are required to advise IBM when you order Products or Services for your internal use.

IBM will specify in the Exhibit the discount or price, as applicable, at which you may acquire the Products or Services for internal use. Such Products and Services do not count toward:

- a. your minimum attainment;
- b. determination of your discount or price, as applicable; or
- c. determining your marketing or promotional funds.

Any value-added enhancement or systems integration services otherwise required by your IBM Business Partner relationship is not applicable when you acquire Products or Services for internal use. You must retain such Products and Services for a minimum of 12 months, unless IBM specifies otherwise in the Exhibit. Products and Services acquired for internal use may not be used for work-for-charge.

12.4 Demonstration, Development, and Evaluation

You may acquire Products you are approved to market for your demonstration and development purposes, and for evaluation purposes, unless IBM specifies otherwise in the Exhibit. You may also acquire Services for such purposes if IBM specifies in the Exhibit that the Services are available for such purposes. Such Products and Services must be used primarily in support of your Products and Services marketing activities and may not be used for work-for-charge.

IBM will specify in the Exhibit the Products and Services IBM makes available to you for such purposes, the applicable discount or price, and the maximum quantity of such Products and Services you may acquire and the period they are to be retained. The maximum number of input/output devices you may acquire for a Product is the number supported by the system to which they attach.

If you acquired the maximum quantity of Machines, you may still acquire a field upgrade, if available.

IBM may decrease the discount it provides for such Products and Services on one month's written notice.

You may make these Products and Services available to a Customer only for the purpose of demonstration and evaluation. Such Products and Services may be provided to an End User for no more than three months.

For a Program, you agree to ensure the Customer has been advised of the requirement to accept the terms of a license agreement before using the Program.

13. Agreement Termination

Regardless of the contract duration specified in the Profile, or any renewal period in effect, either party may terminate this Agreement on three months' written notice to the other. If, under applicable law, a longer notice period is mandatory, then the notice period is the minimum notice period allowable.

If either party fails to comply with a material term of this Agreement, the other party may terminate this Agreement on written notice to the non-compliant party. Examples of a "material breach" by you are if you (i) fail to maintain customer satisfaction, or to comply with the terms of a Transaction Document (for example, if you fail to pay an invoice or to meet your obligations under a statement of work), (ii) repudiate this Agreement, or (iii) make any material misrepresentations to IBM. You agree that IBM's only obligation to you regarding notice of termination is to provide the notice called for in this section 13 (Agreement Termination) and IBM is not liable for any claims against you or losses you may incur if IBM terminates this Agreement with no additional notice.

License termination is specified in the applicable Program license agreement. Termination of a Service is specified in the IBM Business Partner Agreement—Remarketer Terms Attachment.

Upon Agreement termination:

- a. you agree to (i) pay for or return to IBM, at IBM's discretion, any Product or Service for which you have not paid and (ii) allow IBM, at IBM's discretion, to acquire any such Product or Service that is in your possession or control, at the price you paid to IBM, less any credits issued to you. You must return the Product to IBM at your expense free of all liens, claims, or encumbrances;
- b. each party agrees to settle any accounts with the other as soon as reasonably practicable. IBM may offset any amounts due you against amounts due to IBM, or any of IBM's Related Companies as allowable under applicable law; and
- c. for a Remarketer, a Product must either be in your inventory or in transit to you from IBM on the day this Agreement terminates. Further, the Product must be returned to IBM in its original packaging, unopened (with the tamper-proof seal intact), and undamaged. IBM will inspect the returned Product and reserves the right of rejection.

You agree that if IBM permits you to perform certain activities after Agreement termination or non-renewal (for example, to complete the fulfillment of an order to your Customer), you will do so within the period of time IBM specifies and under the terms of this Agreement.

Any terms of this Agreement, which by their nature extend beyond Agreement termination, remain in effect until fulfilled and apply to respective successors and assignees.

Termination of certain Attachments may result in the termination of (i) IBM's approval for you to market a Product or a Service or (ii) a particular Business Partner relationship. IBM will specify in the applicable Attachment or in a written notice to you if such termination will result.

14. Geographic Scope

The rights, duties and obligations of each party are valid only in *<country variable>* except that all licenses are valid as specifically granted.

15. Governing Law

Both parties agree to the application of the laws of *<country variable>* to govern, interpret, and enforce all of your and IBM's respective rights, duties and obligations arising from, or relating, in any manner to, the subject matter of this Agreement, without regard to conflict of law principles.

If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of the Agreement remain in full force and effect.

The "United Nations Convention on Contracts for the International Sale of Goods" does not apply.

COUNTRY-UNIQUE TERMS

NORTH AMERICA

Listing of the North America countries and group of countries follows:

Canada

Caribbean North District:

Bahamas and its sales territories of Turks and Caicos Islands
Barbados and its sales territories of Antigua, Dominica, Grenada, St. Kitts, St. Lucia and Tortolla
Bermuda
Jamaica and its sales territory of Cayman Islands
Netherlands Antilles and its sales territories of St. Maarten, Bonaire, and Aruba
Suriname
Trinidad and its sales territory of Guyana

United States

CANADA AND UNITED STATES

The following terms apply to Canada and the United States:

Section 12.4 - Demonstration, Development, and Evaluation Products:

Add the following as the fourth sentence in the first paragraph in this section:

Additionally, such Products do not count, unless we specify otherwise in the Exhibit, toward:

- a. your minimum attainment,
- b. determination of your discount or price, as applicable, or
- c. determining your marketing or promotional funds.

For Canada, modify the above sentence as follows:

Additionally, such Products do not count (except for Printing Systems Products, which do count), unless we specify otherwise in the Exhibit, toward:

The following terms apply in North America, as noted:

CANADA

Section 1 – Definitions

The following replaces the second sentence of definition "Enterprise":

The term Enterprise applies only to the portion of the Enterprise located in Canada.

Section 4 – Business Conduct Requirements

The following is added after the second paragraph in Section 4.1:

In addition to the parties' obligations under any existing agreements, the following provisions shall apply in the event that one party makes Personal Data available to the other: "Personal Data" refers to information relating to an identified or identifiable individual made available by one party or its personnel in connection with an agreement between them.

- a. General
 - (1) Each of the parties is responsible for complying with any obligations applying respectively to each of the parties under applicable Canadian data privacy laws and regulations (Laws).
 - (2) Neither party will request Personal Data beyond what is necessary to fulfill the purpose(s) for which it is requested. The purpose(s) for requesting Personal Data shall be reasonable. Each

of the parties will agree in advance as to the type of Personal Data which is required to be made available.

b. Security Safeguards

- (1) Each of the parties acknowledges that it is solely responsible for determining and communicating to the other the appropriate technological, physical and organizational security measures required to protect Personal Data.
- (2) Each of the parties will ensure that Personal Data is protected in accordance with the security safeguards communicated by the other.
- (3) Each of the parties will ensure that any third party to whom Personal Data is transferred is bound by the applicable terms of these provisions.
- (4) Additional or different services required to comply with the Laws will be deemed a request for new services.

c. Use

- (1) Each of the parties agrees that Personal Data will only be used, accessed, managed, transferred, disclosed to third parties or otherwise processed to fulfill the purpose(s) for which it was made available.

d. Access Requests

- (1) Each of the parties agrees to reasonably cooperate with the other in connection with access requests for Personal Data.
- (2) Each of the parties agrees to reimburse the other for any reasonable charges incurred in providing each other assistance.
- (3) Each of the parties agrees to amend Personal Data only upon receiving instructions to do so from the other party or its personnel.

e. Retention

Each of the parties will promptly return to the other or destroy all Personal Data which is no longer necessary to fulfill the purpose(s) for which it was made available, unless otherwise instructed by the other party or its personnel or required by law.

Section 9- Liability

The reference to the amount of "US \$100,000" stated in the opening paragraph in subsection 9.1 is replaced with the amount of "\$100,000".

The following replaces item b in the subsection 9.1, "Our Liability":

- b. bodily injury (including death), and damage to real property and tangible personal property caused by IBM's negligence for which IBM is legally liable to that third party.

The following is added as new point d) in the subsection 9.2, "Items for Which We Are Not Liable":

- d. third-party claims against you for damages (other than those under the first two items above in the subsection entitled 'Our Liability')."

Section 14 – Geographic Scope

The following replaces this section:

The rights, duties and obligations of each party are valid only in Canada.

Section 15- Governing Law

The following replaces the first paragraph in this Section:

Both parties agree to the applicable laws in the Province of Ontario to govern, interpret and enforce all of your and IBM's respective rights, duties and obligations arising from, or relating, in any manner to, subject matter of this Agreement, without regard to conflict of law principles.

CARIBBEAN NORTH DISTRICT

Section 9 – Liability

The following replaces items b, c and d in the subsection 9.1, "Our Liability":

- b. bodily injury (including death), and damage to real property and tangible personal property caused by our negligence; and
- c. the amount of any other actual direct damage arising from our negligence or breach of this Agreement, including fundamental breach, tort or our misrepresentation, up to the greater of US \$100,000 or the charges (if recurring, 12 months' charges apply) for the Product that is the subject of the claim.

The following replaces item "a" in the subsection 9.2, "Items for Which We Are Not Liable":

- a. third-party claims against you for damages (other than those under the first two items above in the subsection entitled 'Our Liability');"

UNITED STATES

Section 1 – Definitions

In the definition of "Enterprise", insert the following as the country variable:

the United States

Section 2 – Agreement Structure, Acceptance, and Contract Duration

In section 2.2 (Acceptance), in the second paragraph, delete:

, where recognized by law,

Section 3 – Our Relationship

In 3.2 (Dispute Resolution), add the following as the final paragraph of this section:

Each party waives any right to a jury trial in any proceeding arising out of or related to this Agreement.

Section 4.5 – Special Bids

In the third paragraph, item d, delete the C&N instruction and insert the following as the variable:

IBM Global Financing

Section 12 – Internal Use, Demonstration, Development, and Evaluation Products and Services

In 12.3 (Internal Use), the following replaces the third sentence in the first paragraph:

Except for Products and Services IBM specifies, you are required to advise IBM when you order Products and Services for your internal use.

Add the following as the second sentence in the second paragraph:

Such Products and Services do not count, unless IBM specifies otherwise in the Exhibit, toward:

- a. your minimum attainment; or
- b. determining your marketing or promotional funds.

Section 13 – Agreement Termination

Delete "or" after item (ii) and add the following examples to the second sentence of the second paragraph as new items (iv) and (v):

(iv) if you request fees or other compensation for the marketing of Products and Services to Public Sector End Users while holding a contract with the Public Sector End User to advise on the selection of products and services or if you submit a project form for a fee payment under this Agreement requesting approval to market IBM Products and Services to Public Sector End Users while holding a contract with the Public

Sector End User to advise on the selection of products and services; or (v) if you do not fulfill your responsibilities regarding licensing agreements.

Section 14 – Geographic Scope

Insert the following as the country variable:

the United States

Section 15- Governing Law

Insert the following as the country variable:

the State of New York