



# IBM Agreement for Services Excluding Maintenance

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This IBM Agreement for Services Excluding Maintenance (called the "Agreement") governs transactions by which Customer acquires Services (including, without limitation, customized development and support, and business consulting Services) from International Business Machines Corporation ("IBM").

## 1. Attachments and Transaction Documents

Additional terms for Services are in documents called "Attachments" and "Transaction Documents" provided by IBM. In general, Attachments contain terms that may apply to more than one Services transaction, while Transaction Documents (such as a statement of work, supplement, schedule, invoice, exhibit, change authorization, or addendum) contain specific details and terms related to each individual transaction. Customer may receive one or more Transaction Documents for a single transaction. Attachments 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.

If there is a conflict among the terms of this Agreement, Attachments, and Transaction Documents, those of an Attachment prevail over those of this Agreement, and the terms of a Transaction Document prevail over those of both this Agreement and an Attachment.

## 2. Definitions

**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 the United States.

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

**Service** – performance of a task, assistance, support, or access to resources (such as an information database) that IBM makes available to Customer.

## 3. Acceptance of Terms

Customer accepts the terms in Attachments and Transaction Documents by i) signing them (by hand or electronically), ii) using the Service, or allowing others to do so, or iii) making any payment for the Service.

A Service becomes subject to this Agreement when IBM accepts Customer's order by sending Customer a Transaction Document or providing the Service.

Any Attachment or Transaction Document will be signed by both parties if requested by either party.

## 4. Charges and Payment

### 4.1 Charges

A Transaction Document specifies the amount payable for Services, based on one or more of the following types of charges: one-time, recurring, time and materials, or fixed price. Additional charges may apply (such as travel related expenses). IBM will inform Customer in advance whenever additional charges apply.

Charges for Services are billed as specified in a Transaction Document, which may be in advance, periodically during the performance of the Service, or after the Service is completed. Unless otherwise provided in this Agreement (including any applicable Attachment or Transaction Document): i) Services for which Customer prepays must be used within the applicable contract period; and ii) IBM does not give credits or refunds for any prepaid or other charges already due or paid.

If a Transaction Document provides an estimated total charge for time and materials or for usage charges, the estimate is for planning purposes only. IBM invoices charges based on actual time and materials expended or Customer's actual or authorized use, subject to any specified minimum commitment.

### 4.2 Usage Charges

One-time and recurring charges may be based on measurements of actual or authorized use. Customer agrees to provide actual usage data as described in an Attachment or Transaction Document.

If Customer makes changes to its environment that impact usage charges, Customer agrees to promptly notify IBM and pay any applicable charges. Recurring charges will be adjusted accordingly. In the event that IBM changes the basis of measurement, its terms for changing charges will apply.

#### **4.3 Changes to Charges**

From time to time, IBM may change its charges. Customer receives the benefit of a decrease in charges for amounts that become due on or after the effective date of the decrease.

Unless provided otherwise in an Attachment or Transaction Document, IBM may increase recurring charges, labor rates, and minimums for Services provided under this Agreement, by giving Customer three months' written notice. An increase applies on the first day of the invoice or charging period on or after the effective date IBM specifies in the notice.

IBM may increase one-time charges without notice.

Upon reasonable notice, IBM may verify the usage data and other information affecting the calculation of charges under this Agreement. Such verification will be conducted in a manner that minimizes disruption to Customer's business and may be conducted on Customer's premises, during Customer's normal business hours. Customer agrees to i) provide records, system tools outputs, and other electronic or hard copy system information reasonably necessary for such verification, and ii) promptly pay any additional, valid charges and other liabilities determined as a result of such verification.

#### **4.4 Payment**

Amounts are due upon receipt of invoice and payable as specified in a Transaction Document. Customer agrees to pay accordingly, including any late payment fee. Payment may be made electronically to an account specified by IBM or by other means agreed to by the parties.

#### **4.5 Taxes**

If any authority imposes upon any transaction under this Agreement a duty, tax, levy, or fee, excluding those based on IBM's net income, then Customer agrees to pay that amount as specified in an invoice, unless Customer supplies exemption documentation. Additional taxes and tax related charges may apply if IBM personnel are required to perform Services outside their normal tax jurisdiction. As practical, IBM will work to mitigate such additional tax and tax-related charges and will inform Customer in advance if these additional charges apply and are payable by Customer.

### **5. Changes to the Agreement Terms**

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

Customer acknowledges its agreement to have these changes apply for such transactions by i) placing new orders after the change effective date, ii) failing to request that the change effective date be deferred until the start of the next 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. Changes to charges are implemented as described in the Charges and Payment section above.

Otherwise, for a change to be valid, both parties must sign it.

### **6. Personnel**

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

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

### **7. Materials Ownership and License**

An Attachment or Transaction Document will specify Materials to be delivered to Customer and identify them as "Type I Materials," "Type II Materials," or otherwise as both parties agree. If not specified, Materials will be considered Type II Materials.

Customer will own the copyright in Materials created as part of a Service that are identified as "Type I Materials," and each such Material will constitute a "work made for hire" to the extent permissible under U.S. copyright law. If any such Materials are not works made for hire under applicable law, IBM assigns the ownership of copyrights in such Materials to Customer. Customer grants IBM an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, sublicense, distribute, and prepare derivative works based on, Type I Materials.

IBM or its suppliers will own the copyright in Materials created as part of a Services transaction that are identified as Type II Materials. IBM grants Customer an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, and distribute (within Customer's Enterprise only) copies of Type II Materials.

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

Each of us agrees to reproduce the copyright notice and any other legend of ownership on any copies made under the licenses granted in this section.

## **8. Customer Resources**

If Customer is making available to IBM any facilities, software, hardware or other resources in connection with our performance of Services, Customer agrees to obtain any licenses or approvals related to these resources that may be necessary for IBM to perform the Services and develop Materials. IBM will be relieved of its obligations that are adversely affected by Customer's failure to promptly obtain such licenses or approvals. Customer agrees to reimburse IBM for any reasonable costs and other amounts that IBM may incur from Customer's failure to obtain these licenses or approvals.

Unless otherwise agreed in an Attachment or Transaction Document, Customer is responsible for i) any data and the content of any database Customer makes available to IBM in connection with a Service under this Agreement, ii) the selection and implementation of procedures and controls regarding access, security, encryption, use, and transmission of data, and iii) backup and recovery of the database and any stored data.

## **9. Warranty for IBM Services**

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

### **9.1 Extent of Warranty**

**THIS WARRANTY IS CUSTOMER'S EXCLUSIVE WARRANTY AND REPLACES ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY OF NON-INFRINGEMENT.**

#### **9.1.1 Items Not Covered by Warranty**

IBM does not warrant uninterrupted or error-free operation of any deliverable or Service or that IBM will correct all defects.

Unless otherwise specified in an Attachment or Transaction Document, IBM provides Materials and non-IBM Services **WITHOUT WARRANTIES OF ANY KIND**. However, non-IBM suppliers may provide their own warranties to Customer.

## **10. Automatic Service Renewal**

Renewable Services renew automatically for a same length contract period unless either of us provides written notification (at least one month prior to the end of the current contract period) to the other of its decision not to renew. During an automatic renewal period, Customer may terminate the Service on one month's written notice, and IBM will provide Customer a prorated credit for any unused Services for which Customer has paid in advance.

## **11. Intellectual Property Protection**

### **11.1 Third Party Claims**

If a third party claims that a Material IBM provides to Customer infringes that party's patent or copyright, IBM will defend Customer against that claim at IBM's expense and pay all costs, damages, and attorney's fees that a court finally awards or that are included in a settlement approved by IBM, provided that Customer:

- a. promptly notifies IBM in writing of the claim; and
- b. allows IBM to control, and cooperates with IBM in, the defense and any related settlement negotiations.

### **11.2 Remedies**

If such a claim is made or appears likely to be made, Customer agrees to permit IBM to enable Customer to continue to use the Material, or to modify it, or replace it with one that is at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, Customer agrees to return the Material to IBM on IBM's written request. IBM will then give Customer a credit equal to the amount Customer paid IBM for the creation of the Materials.

### **11.3 Claims for Which IBM is Not Responsible**

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

- a. anything provided by Customer or a third party on Customer's behalf that is incorporated into a Material or IBM's compliance with any designs, specifications, or instructions provided by Customer or a third party on Customer's behalf;
- b. modification of a Material by Customer or a third party on Customer's behalf;
- c. the combination, operation, or use of a Material with any product, hardware device, program, data, apparatus, method, or process that IBM did not provide as a system, if the infringement would not have occurred were it not for such combination, operation or use; or
- d. the distribution, operation or use of a Material outside Customer's Enterprise.

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

## **12. Limitation of Liability**

### **12.1 Items for Which IBM May be Liable**

Circumstances may arise where, because of a default on IBM's part or other liability, Customer is entitled to recover damages from IBM. Regardless of the basis on which Customer is 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 Service (including any Material provided with the Service) or otherwise arising under this Agreement will not exceed the amount of any actual direct damages up to the greater of \$100000, or the charges (if recurring, 12 months' charges apply) for the Service that is the subject of the claim.

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.

### **12.2 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.

### **13. IBM Business Partners**

IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote, market, and support certain products and Services. Customer may order IBM Services that are promoted or marketed to Customer by IBM Business Partners or other suppliers, however, i) this Agreement applies only if a Transaction Document subject to this Agreement is provided for the specific transaction, and ii) such Business Partners and suppliers remain independent and separate from IBM.

IBM is not responsible for the actions or statements of IBM Business Partners or other suppliers, any obligations either has to Customer, or any products or services that they supply to Customer under their agreements.

### **14. General Principles of Our Relationship**

#### **14.1 Notices and 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 Attachment or Transaction Document. The parties consent to the use of electronic means and facsimile transmissions to send and receive communications in connection with our business relationship arising out of this Agreement, and such communications are 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.

#### **14.2 Assignment and Resale**

Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other. Any attempt to assign without consent is void. The assignment of this Agreement, in whole or in part, within the Enterprise of which either party is a part or to a successor organization by merger or acquisition does not require the consent of the other. IBM is also permitted to assign its rights to payments without obtaining Customer's 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 customers.

Customer agrees not to resell any Service without IBM's prior written consent. Any attempt to do so is void.

#### **14.3 Compliance with Laws**

IBM will comply with laws applicable to IBM generally as a provider of information technology products and Services. IBM is not responsible for determining the requirements of laws applicable to Customer's business, including those relating to Services that Customer acquires under this Agreement, or that IBM's provision of or Customer's receipt of particular Services under this Agreement meets the requirements of such laws. Neither party is obligated to take any action that would violate applicable law.

Each party will comply with applicable export and import laws and regulations, including those of the United States that prohibit or limit export for certain uses or to certain end users.

#### **14.4 Dispute Resolution**

Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this 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.

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

#### **14.5 Other Principles of Our Relationship**

- a. Neither party grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent.
- b. The exchange of any confidential information will be made under a separate, signed confidentiality agreement. However, to the extent confidential information is exchanged in connection with any Service under this Agreement, the applicable confidentiality agreement is incorporated into, and subject to, this Agreement.

- c. This Agreement and any transaction under it do not create an agency, joint venture, or partnership between Customer and IBM. Each party is free to enter into similar agreements with others to develop, acquire, or provide competitive products and services.
- d. 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 Customer under this Agreement may be terminated if Customer fails to fulfill its applicable payment obligations.
- e. Customer authorizes International Business Machines Corporation and its subsidiaries (and their successors and assigns, contractors and IBM Business Partners) to store and use Customer's business contact information wherever they do business, in connection with IBM products and Services or in furtherance of IBM's business relationship with Customer.
- f. 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 Customer except as described in the Intellectual Property Protection section above or as permitted by the Limitation of Liability section above for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.
- g. Customer is responsible for selecting the Services that meet its needs and for the results obtained from the use of the Services, including Customer's decision to implement any recommendation concerning Customer's business practices and operations.
- h. Where approval, acceptance, consent or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.
- i. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.
- j. As reasonably required by IBM to fulfill its obligations under this Agreement, Customer agrees to provide IBM with sufficient and safe access (including remote access) to Customer's 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 Customer's delay in providing such access or performing other Customer responsibilities under this Agreement.

## **15. Geographic Scope and Governing Law**

The rights, duties, and obligations of each party are valid only in the United States except that all licenses are valid as specifically granted.

Both parties agree to the application of the laws of the State of New York to govern, interpret, and enforce all of Customer's 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 this Agreement remain in full force and effect.

Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.

## **16. Termination**

### **16.1 Agreement Termination**

Either party may terminate this Agreement on written notice to the other following the expiration or termination of the terminating party's obligations under this Agreement, including any applicable Attachment or Transaction Document.

Either party may terminate this Agreement if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply.

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

### **16.2 Termination and Withdrawal of a Service**

Either party may terminate a Service transaction if the other materially fails to meet its obligations concerning the Service.

Customer may terminate a Service, on notice to IBM provided Customer has met all minimum requirements and paid any adjustment charges specified in the applicable Attachments and Transaction Documents.

Customer agrees to pay IBM for i) all charges for Services IBM provides and any products and Materials IBM delivers through Service termination, and ii) reimbursable expenses IBM incurs through Service termination. If Customer terminates without cause, Customer also agrees to pay any applicable adjustment or termination charges and for expenses IBM incurs as a result of such termination (which IBM will take reasonable steps to mitigate).

IBM may withdraw a Service or support for an eligible product on three months' written notice to Customer. If IBM withdraws a Service for which Customer has prepaid and IBM has not yet fully provided it to Customer, IBM will give Customer a prorated refund.

Any terms which by their nature extend beyond termination or withdrawal remain in effect until fulfilled and apply to respective successors and assignees.

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This Agreement, including its applicable Attachments and Transaction Documents, is the complete agreement regarding transactions by which Customer acquires Services from IBM, and replaces any prior oral or written communications between Customer and IBM. In entering into this Agreement, including each Attachment and Transaction Document, neither party is relying on any representation that is not specified in this Agreement including without limitation any representations concerning: i) estimated completion dates, hours, or charges to provide any Service; ii) the performance of any Material or system; iii) the experiences or recommendations of other parties; or iv) results or savings Customer may achieve. Additional or different terms in any written communication from Customer (such as a purchase order) are void.

Agreed to:

Agreed to:

**Enterprise name:**

**International Business Machines Corporation**

By \_\_\_\_\_

By \_\_\_\_\_

Authorized signature

Authorized signature

Title:

Title:

Name (type or print):

Name (type or print):

Date:

Date:

Enterprise number:

Agreement number:

Customer address:

IBM address: