



## Agreement for Services Including Maintenance

This IBM Agreement for Services Including Maintenance (called the "Agreement") governs transactions by which you acquire Services from IBM Philippines, Inc. ("IBM").

### 1. Definitions

**Enterprise** is 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 Philippines.

**Machine** is a machine, 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) for which IBM may provide Services.

**Machine Code** is microcode, basic input/output system code (called "BIOS"), utility programs, device drivers, and diagnostics delivered with an IBM Machine.

**Materials** are literary works or other works of authorship (such as programs, program listings, programming tools, documentation, reports, drawings and similar works) that IBM may deliver to you as part of a Service. The term "Materials" does not include licensed program products available under their own license agreements.

**Pre-existing Materials are Materials which you or a third party have all right, title, and interest (including ownership of copyright) which are used by IBM to provide the Services.**

**Service** is performance of a task, provision of advice and counsel, assistance, support, or access to a resource (such as access to an information database) IBM makes available to you.

### 2. Agreement Structure

IBM provides additional terms for Services in documents called Statement of Works or Supplements which are also part of this Agreement.

### 3. Charges and Payment

Charges for Services are billed as IBM specifies in the applicable Statement of Works or Supplement agreed to by both parties..

Services for which you prepay must be used within the applicable contract period. Unless IBM specifies otherwise, IBM does not give credits or refunds for unused prepaid Services.

#### Charges

One-time and recurring charges may be based on measurements of actual or authorized use (for example, meter readings for maintenance Services or connect time for network Services). You agree to provide actual usage data if IBM specifies.

IBM may increase recurring charges, as well as labor rates and minimums for Services provided under this Agreement, by giving you 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.

#### Payment

Amounts are due upon receipt of invoice and payable as IBM specifies in a Statement of Works or Supplements. You agree to pay accordingly, including any late payment fee.

If any authority imposes a duty, tax, levy, or fee, excluding those based on IBM's net income, upon any transaction under this Agreement, then you agree to pay that amount as specified in an invoice or supply exemption documentation.

### 4. Changes to the Agreement Terms

IBM may change the terms of this Agreement by giving you 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, renewals, and on-going transactions that do not expire. Changes to charges will be implemented as described in the Charges and Payment section above.

Otherwise, for a change 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.

### 5. Materials Ownership and License

The intellectual property rights, including copyright, in all Materials created as a result of the Services performed under this Agreement shall remain with IBM unless otherwise agreed to by both parties. IBM grants to you an irrevocable, non-exclusive, paid up license to use these Materials within your own business enterprise. Pre-existing Materials supplied by you during the performance of the Service, remain your property or the property of a third party.

### 6. Service for Machines

IBM provides certain types of Service to keep Machines in, or restore them to, conformance with their specifications. IBM will inform you of the available types of Service for a Machine. At its discretion, IBM will 1) either repair or exchange the failing Machine and 2) provide the Service either at your location or a service center.

When the type of Service requires that you deliver the failing Machine to IBM, you agree to ship it suitably packaged (prepaid unless IBM specifies otherwise) to a location IBM designates. After IBM has repaired or exchanged the Machine, IBM will return it to you at its expense unless IBM specifies otherwise. IBM is responsible for loss of, or damage to, your Machine while it is 1) in IBM's possession or 2) in transit in those cases where IBM is responsible for the transportation charges.

Any feature, conversion, or upgrade IBM services must be installed on a Machine which is 1) for certain Machines, the designated, serial-numbered Machine and 2) at an engineering-change level compatible with the feature, conversion, or upgrade.

IBM manages and installs selected engineering changes that apply to IBM Machines and may also perform preventive maintenance.

You agree to:

1. obtain authorization from the owner to have IBM service a Machine that you do not own; and

2. where applicable, before IBM provides Service --
  - a. follow the problem determination, problem analysis, and service request procedures that IBM provides,
  - b. secure all programs, data, and funds contained in a Machine, and
  - c. inform IBM of changes in a Machine's location.

### **Replacements**

When Service involves the exchange of a Machine or part, the item IBM replaces becomes its property and the replacement becomes yours. You represent that all removed items are genuine and unaltered. The replacement may not be new, but it will be in good working order and at least functionally equivalent to the item replaced. The replacement assumes the warranty or maintenance Service status of the replaced item. Before IBM exchanges a Machine or part, you agree to remove all features, parts, options, alterations, and attachments not under IBM's service. You also agree to ensure that the item is free of any legal obligations or restrictions that prevent its exchange.

Some parts of IBM Machines are designated as Customer Replaceable Units (called "CRUs"), e.g. keyboards, memory, or hard disk drives. IBM provides CRUs to you for replacement by you. You must return all defective CRUs to IBM within 30 days of your receipt of the replacement CRU. You are responsible for downloading designated Machine Code updates from an IBM Internet Web site or from other electronic media, and following the instructions that IBM provides.

### **Items Not Covered**

Repair and exchange Services do not cover:

1. accessories, supply items, and certain parts, such as batteries, frames, and covers;
2. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper maintenance by you;
3. Machines with removed or altered Machine or parts identification labels;
4. failures caused by a product for which IBM is not responsible;
5. service of Machine alterations; or
6. service of a Machine on which you are using any capacity or capability, other than that authorized by IBM in writing.

### **Start of Maintenance Service**

When you order Machine maintenance Service under this Agreement, IBM will inform you of the date on which maintenance Service will begin. IBM may inspect the Machine within one month following that date. If the Machine is not in an acceptable condition for service, you may have IBM restore it for a charge. Alternatively, you may withdraw your request for maintenance Service. However, you will be charged for any maintenance Service which IBM has performed at your request.

## **7. 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.

**THIS WARRANTY IS YOUR 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.**

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

## **8. 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. .

## **9. Termination and Withdrawal of a Service**

Either of us may terminate a Service if the other does not meet its obligations concerning the Service.

You may terminate a Service on notice to IBM provided you have met all minimum requirements and paid any adjustment charges specified in the applicable Statement of Works and/or Supplement.

You agree to pay IBM for 1) all Services IBM provides and any Materials IBM delivers through Service termination, 2) all expenses IBM incurs through Service termination, and 3) any charges IBM incurs in terminating the Service.

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

## **10. Limitation of Liability**

IBM's entire liability under this agreement, excluding personal injury and property damage, is limited to the total amount paid us for the engagement. IBM will not be liable for loss of or damage to data, special (including nominal and exemplary damages), moral, incidental or indirect damages, or for any economic consequential damages.

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

1. All information exchanged is nonconfidential. If either of us requires the exchange of confidential information, it will be made under a signed confidentiality agreement.
2. Neither of us will bring a legal action arising out of or related to this Agreement more than two years after the cause of action arose.
3. Neither of us may assign this Agreement, in whole or in part, without the prior written consent of the other. Any attempt to do so is void. Neither of us will unreasonably withhold such consent. The assignment of this Agreement, in whole or in part, within the Enterprise of which either of us 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 payment under this Agreement 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 customers.
4. You agree not to resell any Service without IBM's prior written consent. Any attempt to do so is void

5. You agree that this Agreement will not create any right or cause of action for any third party, nor will IBM be responsible for any third party claims against you except as 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.
6. You agree that you are responsible for the results obtained from the use of the Services.
7. You agree to allow International Business Machines Corporation and its subsidiaries to store and use your contact information, including names, phone numbers, and e-mail addresses, anywhere they do business. Such information will be processed and used in connection with our business relationship, and may be provided to contractors, Business Partners, and assignees of International Business Machines Corporation and its subsidiaries for uses consistent with their collective business activities, including communicating with you (for example, for processing orders, for promotions, and for market research).
8. You agree to comply with all applicable export and import laws and regulations.

**12. Agreement Termination**

Either of us may terminate this Agreement on written notice to the other following the expiration or termination of the terminating party's obligations.

Either of us 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 which by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.

**13. Geographic Scope and Governing Law**

The rights, duties, and obligations of each of us are valid only in the Philippines.

Both you and IBM consent to the application of the laws of the Philippines to govern, interpret, and enforce all of your and IBM's 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.

In the event that any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of the 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.

**14. Arbitration**

Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Metro Manila, Philippines in accordance with the laws of the Philippines then in effect. The arbitration award shall be final and binding for the parties without appeal and shall be in writing and set forth the findings of fact and the conclusions of law.

The number of arbitrators shall be three, with each side to the dispute being entitled to appoint one arbitrator. The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. Vacancies in the post of chairman shall be filled by the president of the Philippine Dispute Resolution Center, Inc. . Other vacancies shall be filled by the respective nominating party. Proceedings shall continue from the stage they were at when the vacancy occurred.

If one of the parties refuses or otherwise fails to appoint an arbitrator within 30 days of the date the other party appoints its, the first appointed arbitrator shall be the sole arbitrator, provided that the arbitrator was validly and properly appointed.

All proceedings shall be conducted, including all documents presented in such proceedings, in the English language. The English language version of this Agreement prevails over any other language version.

This Agreement and its applicable Statement of Works and/or Supplements are the complete agreement between us, and replace any prior oral or written communications, regarding the acquisition of Services. No machines or licensed program products are acquired under this Agreement. By signing below for our respective Enterprises, both of us agree to the terms of this Agreement without modification. Once signed, 1) any reproduction of this Agreement, an Attachment, or Transaction Document made by reliable means (for example, photocopy or facsimile) is considered an original and 2) all Services ordered under this Agreement are subject to it.

Agreed to:  
Customer Company name:

Agreed to:  
**IBM Philippines, Inc.**

By \_\_\_\_\_  
Authorized Signature

By \_\_\_\_\_  
Authorized Signature

Name (type or print):

Name (type or print):

Date:

Date:

Customer identification number:

Agreement number:

Customer address:

IBM address:  
IBM Plaza  
Eastwood City Cyberpark,  
E Rodriguez Jr. Ave., Libis,  
Quezon City

*After signing, please return a copy of this Agreement to the "IBM address" shown above.*