

## CONTRACT

by and between

**CUYAHOGA COUNTY, OHIO**

and

**INTERNATIONAL BUSINESS MACHINE CORPORATION**

THIS AGREEMENT is made and entered into this 7<sup>th</sup> day of Mar, 2014, by and between Cuyahoga County, Ohio (the "County"), the Department of Information Technology and **International Business Machine Corporation**. (IBM), with offices located at, 30 S. 17<sup>th</sup> St., Philadelphia, PA 19103 (the "Provider").

WHEREAS, the County has a present need for a software maintenance and support service of IBM z890 System Software at the Department of Information Technology, and

WHEREAS, IBM can provide maintenance and support for IBM z890 System Software based on the terms and conditions of the State of Ohio, DAS State Term Schedule Number 534133, and

WHEREAS, the County desires to avail itself of these services and IBM, is willing to provide such service to the County all upon the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, IBM and the County agree as follows:

### ARTICLE I - AGREEMENT AND TERM

1.1 Scope of Agreement. During the term of this Contract, IBM, shall provide IBM Software maintenance and support to the County as listed on the attached quote dated on 1/23/14 hereto as Schedule A to be contracted under the State of Ohio – DAS State of Ohio Term Schedule Number 534133. In the event that a discrepancy exists between the terms of Schedule A and this agreement, the terms of this agreement will be controlling and binding.

1.2 Term. The term of this Contract shall commence as of January 1, 2014; and, unless earlier terminated in accordance with the provisions of this Contract, shall continue in effect for a period of one year from commencement date. (1/1/14 through 12/31/14). The cost of this Contract shall not exceed Four Hundred Seventy Two Thousand Eight Hundred Forty Nine Dollars and Zero Cents (\$472,849.00)

### ARTICLE II - SCOPE OF WORK

2.1 Rendering of Services. IBM hereby agrees to provide IBM Software Maintenance and Support Services outlined in Schedule A at a total price, not to exceed Four Hundred Seventy Two Thousand Eight Hundred Forty Nine Dollars and Zero Cents (\$472,849.00)

### ARTICLE III -- PAYMENT AND INVOICING

3.1 Payment. During the term of this contract, the County shall pay IBM for the services outlined in Schedule A upon receipt of said quarterly invoices and approval of the County Executive.

3.2 Invoicing. IBM shall invoice the County for the services outlined in Schedule A, upon execution of this Contract. IBM shall submit original invoice(s) to the following address:

Cuyahoga County Department of Information Technology  
Business Department  
1255 Euclid Avenue, 4<sup>th</sup> floor  
Cleveland, Ohio 44115

### ARTICLE IV - INDEMNITIES

4.1 Contractor hereby indemnifies, defends and holds harmless the County and its respective officers, officials, directors, board members, employees, and agents, from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including attorney's fees and other costs of defense), of any nature, kind or description, that result from (a) the negligent acts or omissions of Contractor, including all of its officers, owners, principals, subcontractors, employees, and agents, or (b) breach or default by Contractor under any terms or provisions of this Contract.

4.2 Contractor acknowledges that, as a political subdivision of the State of Ohio, the County does not indemnify any person or entity. Contractor agrees that no provision of this Contract or any other contract or agreement between Contractor and the County may be interpreted to obligate the County to indemnify or defend Contractor or any other party.

### ARTICLE V - DISPUTE RESOLUTION AND TERMINATION

5.1 Termination for Default. Either party may terminate this Contract, in whole or in part, whenever such party determines that the other has failed satisfactorily to fulfill its obligations and responsibilities hereunder and is unable to cure such failure within a reasonable period of time, not to exceed thirty (30) calendar days or such longer period of time as may be specified in writing by the terminating party, taking into consideration the gravity and nature of the default. Such termination shall be referred to as "Termination for Default". Upon determination by either party hereto that the other has failed to satisfactorily perform its obligations and responsibilities hereunder, the party seeking termination shall notify the defaulting party in writing of the failure and of the time period that has been established to cure such failure, which time period shall be not less than ten (10) days. If the defaulting party is

unable to cure the failure within the specified time period, the party seeking to terminate may, by giving written notice thereof to the defaulting party, terminate this Contract, in full or in part, as of the date specified in the notice of termination. IBM, however, shall be paid for all services and/or materials provided on or prior to the date of termination. Termination under this section will not terminate the services provided by the applicable service provider, which may only be terminated under the service provider's terms and conditions.

5.2 Termination for Financial Instability. In the event that IBM becomes financially unstable to the point of (i) ceasing to conduct business in the normal course, (ii) making a general assignment for the benefit of creditors, or (iii) suffering or permitting the appointment of a receiver for its business or its assets, or there is a filing by or against IBM of a meritorious petition in bankruptcy under any bankruptcy or debtor's law, the County may, at its option, immediately terminate this Contract under Section 5.2, the "Termination for Default" clause, by giving written notice thereof.

5.3 Termination for Convenience. The County may terminate this contract or any order under this contract for its convenience and without cause. Any notice of termination will be effective 30 days after the Contractor receives it. If the termination is for the convenience of the County, the Contractor will be entitled to compensation for any deliverable that the Contractor has delivered before termination. Termination under this section will not terminate the services provided by the applicable service provider, which may only be terminated under the service provider's terms and conditions.

5.4 Dispute Resolution.

a) In the event of any dispute or disagreement between IBM and the County, either with respect to the interpretation of any provision of this Contract or with respect to the performance by IBM or the County hereunder, which cannot be resolved in the normal course of business, then upon written notice of either party, each party will appoint a designated officer whose task it will be to meet for the purpose of endeavoring in good faith to resolve such dispute or to negotiate for an adjustment to such section or provision of this Contract. The designated officers shall meet as often as the parties reasonably deem necessary in order to gather and furnish to the other all information with respect to the matter in issue which the parties believe to be appropriate and germane in connection with its resolution. Such officers will discuss the problem and/or negotiate the applicable section or provision without the necessity of any formal proceedings relating thereto. During the course of such negotiation, all reasonable requests made by one party to the other for information will be honored in order that each of the parties may be fully advised in the negotiations. The specific format for such discussions will be left to the discretion of the designated officers but may include the preparation of agreed upon statements of fact or written statements of position furnished to the other party. No formal proceedings for the binding arbitration of such dispute may be commenced until (i) resolution as contemplated in this clause has been unsuccessful and (ii) either of the parties concludes in good faith that amicable resolution through continued negotiation of the matter in issue does not appear likely and so notifies the other party.

- (b) The rights and obligations of the parties under this provision shall not limit either party's right to terminate this Contract as may be otherwise permitted hereunder

#### ARTICLE VI – ADHERENCE TO ELECTRONIC SIGNATURE POLICY OF COUNTY

6.1. The Contractor agrees on behalf of the submitting business entity, it's officers, employees, subcontractors, subgrantees, agents or assigns, that all contract documents requiring County signatures may be executed by electronic means and that the electronic signatures affixed by the County to said documents shall have the same legal effect as if that signature was manually affixed to a paper version of the document. The Contractor also agrees on behalf of the aforementioned entity and person, to be bound by the provision of Chapters 304 and 1306 of the Ohio Revised Code as they pertain to electronic transactions, and to comply with the Electronic Signature Policy of Cuyahoga County.

#### ARTICLE VII – Contract Administration

7.1 Insurance. IBM shall procure, maintain and pay premiums for the insurance coverage and limits of liability indicated below with respect to products, services, work and/or operations performed in connection with this Contract.

##### **I. Mandatory Insurance Requirements**

The following three items (Worker's Compensation Insurance, Commercial General Liability Insurance, and Business Automobile Liability Insurance) are all mandatory requirements unless otherwise specified.

- (a) **Worker's Compensation Insurance** as required by the State of Ohio. Such insurance requirement may be met by either purchasing coverage from the Ohio State Insurance Fund or by maintaining Qualified Self-Insurer status as granted by the Ohio Bureau of Workers Compensation (BWC).

For contractors with employees working outside of Ohio, Worker's Compensation Insurance as required by the various state and Federal laws as applicable including Employers' Liability coverage with limits of liability not less than:

\$1,000,000 each accident for bodily injury by accident;  
\$1,000,000 each employee for bodily injury by disease;  
\$1,000,000 policy limit for bodily injury by disease.

Such insurance shall be written on the National Council on Compensation Insurance (NCCI) form or its equivalent.

- (b) **Commercial General Liability Insurance** with limits of liability not less than:

\$1,000,000 each occurrence bodily injury & property damage;  
\$1,000,000 personal & advertising injury;  
\$2,000,000 general aggregate;

\$2,000,000 products/completed operations aggregate.

Such insurance shall be written on an occurrence basis on the Insurance Services Office (ISO) form or its equivalent.

(c) **Business Automobile Liability Insurance** covering all owned, non-owned, hired, and leased vehicles. Such insurance shall provide a limit of not less than \$1,000,000 combined single limit (bodily injury & property damage) each accident;

Such insurance shall be written on an occurrence basis on the Insurance Services Office (ISO) form or its equivalent.

Note: If the services required under this Contract include the repairing, servicing, parking or storing of vehicles, then the following insurance coverage shall also be required:

Garagekeepers Legal Liability Insurance with a limit of not less than \$1,000,000 combined single limit (bodily injury & property damage) each accident.

## **2. Additional Insurance Coverage**

(d) **Umbrella/Excess Liability Insurance** with limits of liability not less than:

\$5,000,000 each occurrence

\$5,000,000 general aggregate

\$5,000,000 products/completed operations aggregate

Such insurance shall be written on an occurrence basis and shall sit in excess of the limits and terms set forth in the preceding items (a)-(c).

(e) **All Risk Equipment Insurance** covering all risk of physical damage to equipment provided for use by Contractor.

(f) **Professional Liability Insurance/Errors & Omissions Liability Insurance** providing coverage for claims arising out of the provision of design, architectural, engineering and/or other professional services with a limit of liability not less than:

\$5,000,000 per claim;

\$5,000,000 aggregate.

Such insurance may be written on either an occurrence or claims-made basis. However, if written on a claims-made basis, the claims-made retroactive date on the policy shall be prior to the commencement of any design, architectural, engineering or other professional activity related to this Contract.

## **Insurance Coverage Terms and Conditions**

1. The insurance policies of the Contractor required for this contract, with the exception of the All Risk Equipment Insurance and Errors & Omissions Insurance, shall each name the "County of Cuyahoga, Ohio and its employees" as an Additional Insured and shall contain the following provisions:

- (i) Thirty (30) days prior notice of cancellation or material change;
  - (ii) A waiver of subrogation wherein the insurer(s) waives all rights of recovery against the County.
2. The insurance required for this contract shall be provided by insurance carrier(s) licensed to transact business and write insurance in the state(s) where operations are performed and shall carry a minimum A.M. Best's rating of A VII or above.
3. These insurance provisions shall not affect or limit the liability of the Contractor stated elsewhere in this Contract or as provided by law.
4. IBM shall require any and all of its subcontractors to procure, maintain, and pay premiums for the insurance coverages and limits of liability outlined above with respect to products, services, work and/or operations performed in connection with this Contract.
5. The County reserves the right to require insurance coverages in various amounts or to modify or waive insurance requirements on a case-by-case basis whenever it is determined to be in the best interest of the County.
6. If the Bid/Proposal/RFP specifies the need for higher limits of liability for any applicable insurance provision, the Bid/Proposal/RFP specifications shall govern.
7. IBM shall furnish a Worker's Compensation Certificate and Certificate of Insurance evidencing the insurance coverages required herein are in full force and effect. Acceptance of a non-conforming certificate of insurance by the County shall not constitute a waiver of any rights of the parties under this Contract.

#### ARTICLE VIII - MISCELLANEOUS

8.1 Notices. Wherever one party is required or permitted to give notice to the other pursuant to this Contract, such notice shall be deemed given when delivered by hand, via certified mail with return receipt requested, via overnight courier with signature required, and addressed as follows:

In the case of the County:

Cuyahoga County  
Department of Information Technology  
1255 Euclid Avenue, 4<sup>th</sup> Floor  
Cleveland, Ohio 44115

Jeff Mowry

In the case of IBM:

IBM Corporation  
30 S. 17<sup>th</sup> St.  
Philadelphia, PA 19103  
Grant Hamlen

Either party may from time to time change its designated recipient or address for notification purposes by giving the other party written notice of the new designated recipient or address and the date upon which it will become effective.

8.2 Survival of Terms. Termination or expiration of this Contract for any reason shall not release either party from any liabilities or obligations set forth in this Contract which (i) the parties have expressly agreed shall survive any such termination or expiration, or (ii) remain to be performed or by their nature would be intended to be applicable following any such termination or expiration.

8.3 Record Audit Retention. IBM agrees to make all pertinent contractual books and records and other documents pertaining to this Contract available to the County and its designated agents for purpose of audit and examination upon reasonable request during the term of this Contract and for a period of two (2) years from the expiration date or final payment under this Contract, whichever is later; provided however, that should IBM be notified that an audit has been commenced pursuant to Ohio Revised Code Sec. 117.11 during said period, for which the aforesaid books and records are material, the aforesaid records shall be retained pending the completion of said audit.

8.4 Governing Law/ Jurisdiction. This Contract shall be governed by, and shall be construed and enforced in accordance with, the laws of the State of Ohio. The parties agree that the state and federal courts sitting in Ohio will have exclusive jurisdiction over any claim arising out of this Contract, and each party consents to the exclusive jurisdiction of such courts. Contractor hereby agrees not to challenge this Governing Law and Jurisdiction provision, and further agrees not to attempt to remove any legal action outside of Cuyahoga County for any reason.

8.5 Social Security Act. IBM shall be and remain an independent supplier with respect to all services performed hereunder and agrees to and does hereby accept full and exclusive liability for payment of any and all contributions or taxes for social security, unemployment insurance, or old age retirement benefits, pensions, or annuities now or hereafter imposed under any Local, State or Federal Law which are measured by the wages, salaries, or other remuneration paid to persons employed by IBM for work performed under the terms of this contract and further agrees to obey all lawful rules and regulations and to meet all lawful requirements which are now or hereafter may be issued or promulgated under said respective laws by and duly authorized State or Federal

officials; and said IBM also agrees to indemnify and save harmless Cuyahoga County from such contributions or taxes or liability.

8.6 Assignment. IBM shall not assign, transfer, convey or otherwise dispose of this Contract, or its right to execute it, or its right, title or interest in or to it or any part thereof, or assign, by power of attorney or otherwise, any of the monies due or to become due under this Contract without approval of the County Executive.

8.7 Contract Processing. IBM shall submit one (1) original contractual agreement with original signature to the following:

Cuyahoga County Department of Information Technology  
ATTN: Business Department  
1255 Euclid Avenue, 4th Floor  
Cleveland, Ohio 44115

8.8 Commencement of Contract Performance. In order to protect the interest of Cuyahoga County this contract must be executed by the County Executive before compensation for the services or products set forth in this contract can be provided. In the event that services are provided by IBM prior to the execution of this agreement by the County Executive, the same will be provided at IBM's risk, and payment therefore cannot, and will not, be made unless and until this agreement is approved by the County Executive. Upon approval by the County Executive of this contract, however, any and all prior performance under this contract shall be deemed ratified and said performance shall be deemed to be included in this contract. Payment(s) for said prior performance shall not increase the amount of the contract limit.

8.9 Schedules Incorporated by Reference. The following Schedule is attached hereto and is incorporated herein:

Schedule A

8.10 Applicable County Ordinances. All contracts with the County, including this Contract, are subject to all applicable laws, ordinances, resolutions, regulations, rules and policies of the County, including but not limited to the Cuyahoga County Ethics Ordinance, the Cuyahoga County Inspector General Ordinance, the Cuyahoga County Contracting and Purchasing Procedures Ordinance, and the Cuyahoga County Debarment Law, Procedures and Review Board Ordinance. Copies of all County ordinances are available on the County Council website at <http://council.cuyahogacounty.us/>.

8.11 Ethics Requirements. The Provider agrees to remain in compliance with all County Ethics requirements including, as applicable, Vendor Ethics Registration, Vendor Ethics Training, and Registration of all Lobbyists retained by the Contractor. The Contractor shall consult the Cuyahoga County Office of Inspector General to ensure it is in full compliance with all County Ethics requirements. The Inspector General's website may be found at: <http://inspectorgeneral.cuyahogacounty.us/>.



## ARTICLE IX – LIMITATION OF LIABILITY

9.1 Limitation of Liability. IBM shall not be liable for any special, punitive, indirect, incidental or consequential damages, including, but not limited to, loss of or damage to data, loss of anticipated revenue or profits, work stoppage or impairment of other assets, whether or not foreseeable and whether or not IBM has been advised of the possibility of such damages. IBM's total cumulative liability to the County in connection with this Contract, whether in contract, tort or other theory, will not exceed the total amount of fees actually paid or payable by the County to IBM under this Contract.

THIS AGREEMENT shall be subject to interpretation under the laws of the State of Ohio, and is subject to the review of the Cuyahoga County Department of Law as to legal form and correctness.

IN WITNESS WHEREOF, the County and IBM have each caused this Contract to be signed and delivered by its duly authorized representative as of the date first written.

**INTERNATIONAL BUSINESS  
MACHINE CORPORATION**

**CUYAHOGA COUNTY, OHIO**

BY: 

GRANT HAMLEN  
CLIENT REPRESENTATIVE  
3-7-2014

Edward FitzGerald, County Executive

BY: 

Edward FitzGerald, County Executive

## IBM - Workload Pricer MLC with MSUs

This tool is for estimation only. These stated prices are for your information only and subject to change.  
Applicable taxes are not shown. Licensed Programs are available only under the IBM Customer Agreement, International Program License Agreement, or any equivalent agreement in effect between the customer and IBM.

**Customer:** Cuyahoga County

### Standalone

#### System

Machine Name	Machine No	System Serial	MSUs
IBM zSeries 890	2086-210	38E0B	8
<b>Totals</b>			<b>8</b>

#### Software

Product ID	Entitlement Description	MSUs	Monthly
5625DB2	DB2 UDB for z/OS	8	5,921.00
5625DB2	QMF Classic Edition	8	2,121.00
5655J38	IMS V9 Database Manager	8	5,335.00
5655J38	IMS V9 Extended Terminal Opt	8	395.00
5655J38	IMS V9 Transaction Manager	8	6,316.00
5655M32	Compatibility Fonts		0.00
5655M32	PSF V4 for z/OS		2,013.00
5655N60	Transforms to AFP		250.00
5655P20	AFP2PDF		575.00
5655I03	DIITTO/ESA for MVS	0	290.00
5688190	PPFA/370		260.00
5688191	OGL/370		370.00
5694A01	z/OS V1 Base	8	5,671.00
5694A01	z/OS V1 DFSMS dss	8	242.00
5694A01	z/OS V1 DFSORT	8	324.00
5694A01	z/OS V1 GDDM-PGF	8	248.00
5694A01	z/OS V1 RMF	8	224.00
5694A01	z/OS V1 SDSF	8	324.00
5694A01	z/OS V1 Security Server	8	352.00
5695013	IBM Compiler for REXX/370	0	530.00
5695014	IBM Library for REXX/370	0	263.00
5697E93	CICS TS for z/OS V2	8	5,078.00
<b>Total Price</b>			<b>37,102.00</b>

WLPricer File:	Cuyahoga County Apr12.wlp
Prices Date:	1/7/2014
Location:	United States
Currency:	USD
Report Date:	1/14/2014

*x 12 (1 year)*  
 \$ 445,224.00  
 + 27,625.00  


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 \$ 472,849.00

**SUBSCRIPTION AND SUPPORT:**

S & S	Product ID	Title	License	Currently		Newly	Value		Annual	Price	Annual		Months	S & S Charge		Annual
				Entitled	Value	Entitled	Units	to	Charge for	Per	Value	Units		Until	Renewal	Charge for
			Product ID	Value	Units	Value	Units	Order	Value	Unit	Added	Renewal	Renewal	Renewal	Renewal	Total
	5608S68	IBM Tiv OMEGAMON XE DB2	5655CXE	0	6	6	6	6	3,150.00	525.00	3,150.00	12	12	3,150.00		3,150.00
	5655E93	IMS Database Repair S&S	5655E03	0	7	7	7	7	189.00	27.00	189.00	12	12	189.00		189.00
	5655E29	IMS HP Printer Checker S&S	5655E09	0	7	7	7	7	938.00	134.00	938.00	12	12	938.00		938.00
	5655E27	IMS HP Load S&S	5655M26	0	7	7	7	7	812.00	116.00	812.00	12	12	812.00		812.00
	5655E23	IMS Index Builder S&S	5655R01	0	7	7	7	7	756.00	108.00	756.00	12	12	756.00		756.00
	5648D68	DB2 Utilities Suite S&S	5697E98	0	20	20	20	20	2,620.00	131.00	2,620.00	12	12	2,620.00		2,620.00
	5608S74	IBM Tiv OMEGAMON XE CICS	5698A32	0	6	6	6	6	1,800.00	300.00	1,800.00	12	12	1,800.00		1,800.00
	5608S81	IBM Tiv OMEGAMON XE z/OS	5698A33	0	6	6	6	6	3,600.00	600.00	3,600.00	12	12	3,600.00		3,600.00
	5608S75	IBM Tiv OMEGAMON XE IMS	5698A34	0	6	6	6	6	3,150.00	525.00	3,150.00	12	12	3,150.00		3,150.00
	5608S76	IBM Tiv OMEGAMON XE MFN	5698A35	0	6	6	6	6	1,692.00	282.00	1,692.00	12	12	1,692.00		1,692.00
	5608S77	IBM Tiv OMEGAMON XE Stor	5698A37	0	6	6	6	6	1,488.00	248.00	1,488.00	12	12	1,488.00		1,488.00
	5608S72	IBM Tiv OMEGAMON DE S&S	5698B40	0	6	6	6	6	1,800.00	300.00	1,800.00	12	12	1,800.00		1,800.00
	5741SNS	z/VM Subscription & Support	5741A05	0	10	10	10	10	5,630.00	563.00	5,630.00	12	12	5,630.00		5,630.00
<b>TOTALS:</b>										27,625.00		27,625.00		27,625.00		27,625.00