

DEPARTMENTAL INPUT

CONTRACT/PROJECT MEASURE ANALYSIS AND RECOMMENDATION

New OTR Sole Source Legacy Emergency Previous Contract/Project No. BW9130-5/19-5
 Re-Bid Other LIVING WAGE APPLIES: YES NO
 Requisition No./Project No.: RQET1600021 TERM OF CONTRACT 1 YEAR(S) WITH 5 1 YEAR OTRs
 Requisition /Project Title: IBM Hardware, Software, Maintenance, and Professional Services

Description:

This contract will allow the Information Technology Department to contract with International Business Machines Corporation (IBM) for the purchase of hardware, software licenses, maintenance and support and professional services. This contract directly replaces Contract No. BW9130-5/19-5 which expires on 06/30/2016.

Issuing Department: ITD Contact Person: Santiago A. Pastoriza Phone: 305-375-1084
 Estimate Cost: \$8,221,319.00
 Funding Source: Internal Service Funds

ANALYSIS

Commodity Codes:	<u>20554</u>		
Contract/Project History of previous purchases three (3) years Check here <input type="checkbox"/> if this is a new contract/purchase with no previous history.			
	EXISTING	2ND YEAR	3RD YEAR
Contractor:	IBM	IBM	IBM
Small Business Enterprise:			
Contract Value:	\$ 12,976,500	\$ 9,934,000	\$ 9,728,400
Comments:			
Continued on another page (s): <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO			

RECOMMENDATIONS

	Set-aside	Sub-contractor goal	Bid preference	Selection factor
SBE				

Basis of recommendation:
IBM is the sole proprietor of the products/services

Signed: <u>Santiago A. Pastoriza</u>	Date sent to SBD: <u>03/10/2016</u>
	Date returned to ISD Procurement: _____



MASTER AGREEMENT No. TBD
for
IBM Hardware, Software, Maintenance, Support, and Services
between
IBM CORPORATION
and
Miami-Dade County, Florida

THIS HARDWARE, SOFTWARE, MAINTENANCE, SUPPORT, AND SERVICES AGREEMENT ("AGREEMENT") IS MADE AND ENTERED INTO BY AND BETWEEN MIAMI-DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, HAVING ITS PRINCIPAL OFFICE AT 111 N.W. 1ST STREET, MIAMI, FLORIDA 33128 (HEREINAFTER REFERRED TO AS THE "COUNTY" or "MDC"), AND IBM CORPORATION, A NEW YORK CORPORATION, HAVING ITS PRINCIPLE PLACE OF BUSINESS AT 1 ALHAMBRA PLAZA, SUITE 1415, CORAL GABLES, FL 33134 (HEREINAFTER REFERRED TO AS "IBM" or "SELLER").

WITNESSETH:

WHEREAS, IBM has offered to provide Hardware, Software, Maintenance, Support, and Services, that shall conform to the terms and conditions of this Agreement including all associated addenda and attachments, incorporated herein by referenced; and,

WHEREAS, the County desires to procure from IBM such Hardware, Software, Maintenance, Support, and Services for the County, in accordance with the terms and conditions of this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereby agree as follows:

ARTICLE 1. DEFINITIONS

The following words and expressions used in this Agreement shall be construed as follows, except when it is clear from the context that another meaning is intended:

- a) The term "Change Order" or "Extra Work" or "Additional Work" to mean work resulting in additions or deletions or modifications to the amount, type or value of the Work and Services as required in a mutually approved Statement of Work (SoW).
- b) The terms "Contract" or "Contract Documents" or "Agreement" to mean collectively these terms and conditions, and all associated addenda and attachments.
- c) The term "Contract Date" to mean the date on which this Agreement is effective.
- d) The terms "Contractor" or "Consultant" or "Vendor" or "Seller" to mean International Business Machines Corporation ("IBM"), ("IBM Corporation") and its permitted successors and assigns.

- e) The term "County" to mean Miami-Dade County, a political subdivision of the State of Florida, including any subcontractors, agents, authorized by the County to use the Licensed Software in accordance with this Agreement.
- f) The term "Days" to mean calendar days.
- g) The term "Deliverables" to mean all documentation and any items of any nature submitted by IBM to the County's Project Manager for review and approval pursuant to a mutually agreed to Statement of Work (SoW).
- h) The term "Existing Hardware" to mean the hardware currently installed at a Miami-Dade County site as identified in any attachments to this Agreement.
- i) The term "Hardware" to mean the new hardware components sold by the IBM under this Agreement.
- j) The term "Licensed Software" to mean the computer programs licensed by IBM under this Agreement.
- k) The term "Maintenance" to mean IBM Maintenance Services as set forth in the IBM product documentation as provided under this Agreement.
- l) The terms "Scope of Services" or "Scope of Work" to mean "Scope of Services" that details the work to be performed by IBM or Subcontractor under a mutually agreed upon Statement of Work (SoW).
- m) The terms "Subcontractor" or "Subconsultant" to mean any person, firm, entity or organization, other than the employees of IBM, who contracts with IBM to furnish labor, or labor and materials, in connection with the Work or Services to the County, whether directly or indirectly, on behalf of IBM as provided under this Agreement.
- n) The term "Third-Party" to mean any company or subcontractor, other than IBM, who will provide software, hardware, and/or services in order to fulfill the requirements under this Agreement.
- o) The term "Machine" to mean 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 provide to the County.
- p) The term "Service" to mean a performance of a task, assistance, support, or access to resources (such as information database) that IBM makes available to the County.
- q) The term "Program" to mean an IBM-branded computer program and related material available for license from IBM subject to payment of charges.
- r) The term "Attachments" to mean documents that are part of this Agreement that contain terms that may apply to more than one Product or Service transaction.
- s) The term "Transaction Documents" to mean documents that contain specific details and terms related to each individual transaction.
- t) The term "Date of Installation" to mean the following:
 - i. For an IBM Machine that IBM is responsible for installing, the business day after the day IBM installs it or, if the County defers installation, makes it available to the County for subsequent installation by IBM;

- ii. For a County-set-up Machine and a non-IBM Machine, the second business day after the Machine's standard transit allowance period; and For a Program:
 1. Basic license, the second business day after the Program's standard transit allowance period,
 2. Copy, the date (specified in a Transaction Document) on which IBM authorizes the County to make a copy of the Program, and
 3. Chargeable component (also called a feature), the date the County uses the chargeable component or copy. The County agrees to notify IBM of the chargeable component's Date of Installation.

ARTICLE 2. ATTACHMENTS AND TRANSACTION DOCUMENTS

Additional terms for Products and Services are included in documents called "Attachments" and Transaction Documents" provided by the Seller. In general, Attachments contain terms that may apply to more than one Product or 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. The County 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.

This Contract shall include the following attachments:

Attachment 1: IBM Client Relationship Agreement
IBM Client Relationship Agreement (CRA)
IBM Delegation of Authority
IBM Discount & Pricing Structure
IBM Conferences & Training

Attachment 2: Hardware, Hardware & Software Maintenance (SWMA)
Hardware Product Lines
Master Services Attachment for Service Elite
Master Service Optional Services
Attachment for IBM Power Systems Temporary Capacity on Demand

Attachment 3: zSeries & Passport Advantage Software Inventory & Agreements
IBM Passport Advantage (PA) Attachment to the Client Relationship Agreement (CRA)
IBM Agreement for Software Maintenance
Amendment for IBM System z Programs Sub-Capacity Pricing
Agreement for IBM System z Advanced Workload License Charges & Exhibit

Attachment 4: Passport Advantage Software
Listing of IBM Passport Advantage Software Point in Time Inventory
Link to IBM Passport Advantage Software Directory

Attachment 5: Professional Services
GS-35F-110DA GSA Labor Rates, IT Services Technical & Consulting
GSA Chapter 8, Special Item 132-62: Authentication Services
GSA Appendix B: Customer Engineering Maintenance Services/Per Call Charges

Attachment 6: IBM Sustainability & Energy Solutions (Green Initiatives)

Attachment 7: IBM Internet Delivered Offerings (Cloud)
Cloud Solutions & Capabilities

Should there be any inconsistency between the terms and conditions of this Agreement and any terms referenced in any Attachments to this Agreement, the terms and conditions of this Agreement shall take precedence unless modified by a mutually agreed to Amendment to this Agreement.

ARTICLE 3. AGREEMENT TERM

3.1 This Agreement shall succeed Contract No. BW9130-5/19 expiring on June 30, 2016, between Miami-Dade County, Florida ("Miami-Dade County" and IBM Corporation ("IBM"), which became effective December 9, 2009, including IBM Customer Agreement BW9130, December 9, 2009. Products and Maintenance Services purchased under Contract No. BW9130-5/19 shall continue to be governed by the terms and conditions of Contract No. BW9130-5/19, notwithstanding the expiration of that contract, for the remainder of the term identified in such purchase of Products or Maintenance Services or until the County elects to acquire those Products and Maintenance Services under the terms and conditions of this Agreement.

3.2 This Agreement shall become effective upon approval of the County's Board of County Commissioners and the expiration of any Mayoral veto period and shall be for the duration of one (1) year, with five (5) one (1) year options to renew, by mutual agreement of Miami-Dade County and the Seller.

3.3 Extension. By mutual agreement of Miami-Dade County and the Seller this Agreement may be extended for up to one hundred-eighty (180) calendar days beyond the current Agreement period or beyond any of the renewals.

3.4 Notification. By mutual agreement of Miami-Dade County and the Seller, this Agreement may be may be further extended beyond the initial one hundred-eighty (180) calendar day extension period.

ARTICLE 4. NOTICE REQUIREMENTS

All notices required or permitted under this Agreement shall be in writing and shall be deemed sufficiently served if delivered by overnight courier or certified mail, with return receipt requested; or delivered personally; or delivered via fax and followed with delivery of hard copy; and in any case addressed as follows with parallel e-mail notification:

(1) To the County Project Manager for each area:

Miami-Dade County
Information Technology Department
5680 S.W. 87th Avenue
Miami, FL 33173

Attention: Julian Manduley
Phone: 305-596-8610
Fax: 305-275-7696
E-mail: jmandul@miamidade.gov

and to the Contract Manager:

Miami-Dade County
Department of Procurement Management
111 N.W. 1st Street, Suite 1300
Miami, FL 33128-1974

Attention: Santiago A. Pastoriza
Phone: (305) 375- 1084
Fax: (305) 375- 5688
E-Mail: spastor@miamidade.gov.

(2) To the Seller

IBM Corporation

Attention: Emily B. Loos
1 Alhambra Plaza, Suite 1415
Coral Gables, FL 33134
Phone: 305-206-5022
Fax: 305-441-5155
E-mail: eloos@us.ibm.com

Either party may at any time designate a different address and/or contact person by giving notice as provided above to the other party. Such notices shall be deemed given upon receipt by the addressee.

ARTICLE 5. PRICING

The Seller may offer additional incentive discounts to those referenced in this Agreement to Miami-Dade County at any time during the contractual term and any extensions thereof. The Seller agrees all pricing offered under this Agreement shall not exceed the then current IBM GSA Schedule price list to include the GSA Labor Hourly Rates (Attachment 5: IBM GSA Schedule GS-35F-4983H, Information Technology Services Charges).

Offered prices under this contract are guaranteed for the life of the contract to the extent specified in published IBM GSA price tables or as otherwise as price table attachments to this Agreement; and, are under the then-current IBM GSA Schedule Contract, provided that: (1) Successor IBM GSA Schedule contract(s) are awarded to IBM in subsequent Government fiscal years, (2) Products and services for which prices are offered are available under the IBM GSA Schedule Contract in subsequent government fiscal years, and (3) The Seller continues to provide maintenance/services for these products.

ARTICLE 6. CHARGES AND PAYMENT FOR SERVICES/AMOUNT OBLIGATED

6.1 The Seller warrants that it has reviewed the County's requirements and has asked such questions and conducted such other inquiries as the Seller deemed necessary in order to determine the price the Seller will charge to provide the Work and Services to be performed under this Agreement. The compensation for all Work and Services performed under this Agreement, including all costs associated with such Work and Services, shall be in accordance with Article 5, "Pricing." The County shall have no obligation to pay the Seller any additional sum in excess of what is stated in Article 5, "Pricing", except for a change and/or modification to the Agreement, which is approved and executed in writing by the County and the Seller.

All Services undertaken by the Seller before County's approval of this Agreement shall be at the Seller's risk and expense.

6.2 Charges. Amount payable for Products or Services are based on one or more of the following types of charges: one-time, recurring, time and materials, or fixed price. Recurring charges for a Product begin on its Date of Installation. 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 the County prepays must be used within the applicable contract period; and ii) the Seller 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. The Seller invoices charges based on actual time and materials expended or the County's actual use, subject to any specified minimum commitment.

6.3 Usage Charges. One time and recurring charges may be based on measurements of actual or authorized use (for example, authorized capacity for Machines, number of users or processor size for Programs, or meter readings for maintenance services). The County agrees to provide actual usage data as described in an Attachment or Transaction Document.

If the County makes changes to its environment that impacts usage charges (for example, change authorized capacity for Machines or change processor size or configuration for Programs), the County agrees to promptly notify the Seller and pay any applicable charges. Recurring charges will be adjusted accordingly. In the event that the Seller changes the basis of measurement, its terms for changing charges will apply.

6.4 Changes to Charges. From time to time, the Seller may change its charges. The County 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, the Seller may increase recurring charges for Products and Services, as well as labor rates and minimums for Services provided under this Agreement in accordance with Article 5, "Pricing", by giving the County three (3) months' written notice. An increase applies on the first day of the invoice or charging period on or after the effective date the Seller specifies in the notice.

Upon reasonable notice, the Seller 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 the County's business and may be conducted on the County's premises, during the County's normal business hours. The County 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. Not sure why only the first paragraph of the ICA term is included here...suggest we delete and rely on CRA term.

6.5 Travel. With respect to travel costs and travel related expenses, the Seller agrees to adhere to Section 112.061 of the Florida Statutes as they pertain to out-of-pocket expenses including employee lodging, transportation, per diem, and all miscellaneous cost-and fees. The County shall not be liable for any such expenses that have not been approved in advance, in writing, by the County.

6.6 Invoices. All invoices issued by the Seller, shall be taken from the books of account kept by the Seller, shall be supported by any reasonable documentation required by the County, shall show the County's Agreement number, and shall have a unique invoice number assigned by the Seller. It is the policy of Miami-Dade County that payment for all purchases by County agencies and the Public Health Trust shall be made in a timely manner and that interest payments be made on late payments. In accordance with Florida Statutes, Section 218.74 and Section 2-8.1.4 of the Miami-Dade County Code, the time at which payment shall be due from the County or the Public Health Trust shall be forty-five (45) days from receipt of a proper invoice. Billings from prime vendors under either services or goods contracts pursuant to Sections 2-8.1.1.1.1 or 2-8.1.1.1.2, respectively, that are a SBE contract set-aside, bid preference or contain a subcontractor goal, shall be promptly reviewed and payment made to the certified small businesses on those amounts not in dispute, within fourteen (14) calendar days of receipt of such billing or invoice. All payments for undisputed amounts due from the County or the Public Health Trust, and not made within the time specified by this section, shall bear interest from thirty (30) days after the due date at the rate of one percent (1%) per month on the unpaid balance. Further, proceedings to resolve disputes for payment of obligations shall be concluded by final written decision of the County Mayor, or his or her designee(s), not later than sixty (60) days after the date on which the proper invoice was received by the County or the Public Health Trust.

In accordance with Miami-Dade County Implementing Order 3-9, Accounts Receivable Adjustments, if money is owed by the Seller to the County, whether under this Agreement or for any other purpose, the County reserves the right to retain such amount from payment due by County to the Seller under this Agreement. Such retained amount shall be applied to the amount owed by the Seller to the County. The Seller shall have no further claim to such retained amounts which shall be deemed full accord and satisfaction of the amount due by the County to the Seller for the applicable payment due herein.

Invoices and associated back-up documentation shall be submitted by the Seller to the County as follows:

(1) To the County Project Manager for each area:

Enterprise Technology Services Department
5680 S.W. 87th Avenue
Miami, FL 33173
Attention: Julian Manduley
Phone: 305-596-8610
E-mail: jmandul@miamidade.gov

The County may at any time designate a different address and/or contact person by giving written notice to the other party.

ARTICLE 7. CONFIDENTIALITY

7.1 As a political subdivision of the State of Florida, Miami-Dade County is subject to Florida's Public Records Law, Section 119 if the Florida Statutes. Notwithstanding anything else in this Article to the contrary, the County's compliance with, or good faith attempt to comply with the requirements of Chapter 119 of Florida Statute shall not be considered breach of this Agreement.

- a) All Developed Works and other materials, data, transactions of all forms, financial information, documentation, inventions, designs and methods obtained from the County in connection with the Services performed under this Agreement, made or developed by the Seller in the course of the performance of the Agreement, or which the County holds the proprietary rights, constitute Confidential Information and may not, without the prior written consent of the County, be used by the Seller or its employees, agents, subconsultants or suppliers for any purpose other than for the benefit of the County, unless required by law.
- b) In addition to the foregoing, all County employee information and County financial information shall be considered confidential information and shall be subject to all the requirements stated herein. Neither the Seller nor its employees, agents, subconsultants or suppliers may sell, transfer, publish, disclose, display, license or otherwise make available to others any part of such Confidential Information without the prior written consent of the County. Additionally, the Seller expressly agrees to be bound by and to defend, indemnify and hold harmless the County, and their officers and employees from the breach of any federal, state or local law in regard to the privacy of individuals.

7.2 Maintenance of Confidential Information. The Seller shall advise each of its employees, agents, subconsultants and suppliers who may be exposed to such Confidential Information of their obligation to keep such information confidential and shall promptly advise the County in writing if it learns of any unauthorized use or disclosure of the Confidential Information by any of its employees or agents, or subconsultants or supplier's employees, present or former. In addition, the Seller agrees to cooperate fully and provide any assistance necessary to ensure the confidentiality of the Confidential Information.

7.3 Injunctive Relief. It is understood and agreed that in the event of a breach of this Article damages may not be an adequate remedy and the County shall be entitled to injunctive relief to restrain any such breach or threatened breach. Unless otherwise requested by the County, upon the completion of the Services performed hereunder, the Seller shall immediately turn over to the County all such Confidential Information existing in tangible form, and no copies thereof shall be retained by the Seller or its employees, agents, subconsultants or suppliers without the prior written consent of the County.

7.4 Survival. Licensee's obligations under this Article 6 will survive the termination of this Agreement or of any license granted under this Agreement for whatever reason.

ARTICLE 8. INSURANCE

The Seller shall furnish to the Internal Services Department / Procurement Management Services, 111 NW 1st Street, Suite 1300, Miami, Florida 33128, Certificate(s) of Insurance which indicate that insurance coverage has been obtained which meets the requirements as outlined below:

- A. Worker's Compensation Insurance for all employees of the vendor as required by Florida Statute 440. Failure to maintain such insurance throughout the term of the contract shall be a cause for debarment under Section 10-38 of the County Code.
- B. Commercial General Liability Insurance on a comprehensive basis in an amount not less than \$300,000 combined single limit per occurrence for bodily injury and property damage. **Miami-Dade County must be shown as an additional insured with respect to this coverage.**
- C. Automobile Liability Insurance covering all owned, non-owned and hired vehicles used in connection with the work, in an amount not less than \$300,000 combined single limit per occurrence for bodily injury and property damage.
- D. Professional Liability Insurance in an amount not less than \$1,000,000.00

All insurance policies required above shall be issued by companies authorized to do business under the laws of the State of Florida, with the following qualifications:

The company must be rated no less than "A-" as to management, and no less than "Class VII" as to financial strength by Best's Insurance Guide, published by A.M. Best Company, Oldwick, New Jersey, or its equivalent, subject to the approval of the County Risk Management Division.

or

The company must hold a valid Florida Certificate of Authority as shown in the latest "List of All Insurance Companies Authorized or Approved to Do Business in Florida" issued by the State of Florida Department of Financial Services.

**NOTE: CERTIFICATE HOLDER MUST READ: MIAMI-DADE COUNTY
111 NW 1st STREET
SUITE 2340
MIAMI, FL 33128**

ARTICLE 9. DEFAULT AND TERMINATION

9.1 Termination. The County may terminate this Agreement if the Seller attempts to meet its obligations under this Agreement with the County through fraud, misrepresentation or material misstatement.

- a) The County may, as a further sanction, terminate or cancel any other Seller Agreement(s) has with the County
- b) The foregoing notwithstanding, if the Seller attempts to meet its obligations with the County under this Agreement through fraud, misrepresentation or material misstatement, the Seller may be debarred from County contracting for up to five (5) years in accordance with the County debarment procedures. The Seller may be subject to debarment for failure to perform and all other reasons set forth in Section 10-38 of the County Code.

9.2 Termination for Convenience. In addition to cancellation or termination as otherwise provided in this Agreement, the County may at any time, in its sole discretion, with or without cause, terminate this Agreement or any Transaction Document by written notice to the Seller and in such event:

- a) The Seller shall, upon receipt of such notice, unless otherwise directed by the County: (i) stop work on the [there is no 'work' under this agreement, only TDs.] date specified in the notice ("the Effective Termination Date"); (ii) take such action as may be necessary for the protection and preservation of the County's materials and property; (iii) take no action which will increase the amounts payable by the County under this Agreement; and
- b) In the event that the County exercises its right to terminate this Agreement pursuant to this Article the Seller will be compensated as stated in the payment Articles, herein, for the portion of the Services completed in accordance with the Agreement up to the Effective Termination Date; and
- c) All compensation pursuant to this Article are subject to audit.

9.3 Events of Default. This Agreement may be terminated by the non-defaulting party if any of the following events of default occur: (1) if a party materially fails to perform or comply with this Agreement or any provision hereof; (2) if either party fails to strictly comply with the provisions of Article 7 (Confidentiality) or makes an assignment in violation of Article 14 (Nonassignability); (3) if the Seller becomes insolvent or bankrupt, or makes an assignment for the benefit of creditors.

9.4 Effective Date of Termination. Termination due to a material breach of Articles 7 (Confidentiality), shall be effective on notice. In all other cases, termination shall be effective thirty (30) days after notice of termination to the defaulting party if the defaults have not been cured within such thirty (30) day period.

9.6 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. The County may terminate a Service, on notice to the Seller provided that the County has met all minimum requirements and paid any adjustment charges specified in the applicable Attachments and Transaction Documents. For a maintenance Service, the County may terminate without adjustment charge, provided any of the following circumstances occur:

- a) The County permanently removes the eligible Product, for which the Services is provided, from productive use within the County's Enterprise;
- b) the eligible location, for which the Service is provided, is no longer controlled by the County (for example, because of sale or closing of the facility); or
- c) the Machine has been under maintenance Service for at least one year and the County gives the Seller one month's written notice prior to terminating the maintenance Service.

The Seller may withdraw a Service or support for an eligible Product on three (3) months written notice to the County. If the Seller withdraws a Service for which the County has prepaid and the Seller has not yet fully provided it to the County, the Seller will give the County a prorated refund

ARTICLE 10. SHIPPING TERMS

Shipping will be done on an FOB Destination basis. Invoicing and Shipping Address will be provided in the individual Purchase Orders issued against this contract. The County may change this information by giving written notice to Seller.

ARTICLE 11. MANNER OF PERFORMANCE

11.1 The Seller shall provide the Services described herein in a competent and professional manner satisfactory to the County in accordance with the terms and conditions of this Agreement. The County shall be entitled to a satisfactory performance of all Services described herein and to full and prompt cooperation by the Seller in all aspects of the Services. At the written request of the County explaining cause, the Seller shall promptly remove from the Project any of the Seller's employee(s), Subcontractor, or any other person performing Services hereunder for cause. The Seller agrees that such removal of any of its employees does not require the termination or demotion of any employee by the Seller.

11.2 The Seller shall comply with all provisions of all federal, state and local laws, statutes, ordinances, and regulations that are applicable to the performance of this Agreement.

ARTICLE 12. EMPLOYEES ARE THE RESPONSIBILITY OF THE CONTRACTOR

All employees of the Seller shall be considered to be, at all times, employees of the Seller under its sole direction and not employees or agents of the County. The Seller shall supply competent employees. The County may require the Seller to remove an employee it deems careless, incompetent, insubordinate or otherwise objectionable and whose continued employment on County property is not in the best interest of the County. Each employee shall have and wear proper identification.

ARTICLE 13. INDEPENDENT CONTRACTOR RELATIONSHIP

The Seller is, and shall be, in the performance of all work services and activities under this Agreement, an independent contractor, and not an employee, agent or servant of the County. All persons engaged in any of the work or services performed pursuant to this Agreement shall at all times, and in all places, be subject to the Seller's sole direction, supervision and control. The Seller shall exercise control over the means and manner in which it and its employees perform the work, and in all respects the Seller's

relationship and the relationship of its employees to the County shall be that of an independent contractor and not as employees and agents of the County.

The Seller does not have the power or authority to bind the County in any promise, agreement or representation other than specifically provided for in this Agreement.

ARTICLE 14. NONASSIGNABILITY

The Seller shall not assign, transfer, convey or otherwise dispose of this Agreement, including its rights, title or interest in or to the same or any part thereof without the prior written consent of the County.

ARTICLE 15. INSPECTOR GENERAL REVIEWS

Pursuant to Miami-Dade County Administrative Order 3-20, the County has the right to retain the services of an Independent Private Sector Inspector General (hereinafter "IPSIG"), whenever the County deems it appropriate to do so. Upon written notice from the County, the Seller shall make available to the IPSIG retained by the County, all requested records and documentation pertaining to this Agreement for inspection and reproduction. The County shall be responsible for the payment of these IPSIG services, and under no circumstance shall the Seller's prices and any changes thereto approved by the County, be inclusive of any charges relating to these IPSIG services. The terms of this provision herein, apply to the Seller, its officers, agents, employees, subcontractors and assignees. Nothing contained in this provision shall impair any independent right of the County to conduct an audit or investigate the operations, activities and performance of the Contractor in connection with this Agreement. The terms of this Article shall not impose any liability on the County by the Seller or any third party.

Miami-Dade County Inspector General Review

According to Section 2-1076 of the Code of Miami-Dade County, as amended by Ordinance No. 99-63, Miami-Dade County has established the Office of the Inspector General which may, on a random basis, perform audits on all County contracts, throughout the duration of said contracts, except as otherwise provided below. The cost of the audit for this Contract shall be one quarter (1/4) of one (1) percent of the total contract amount which cost shall be included in the total contract amount. The audit cost will be deducted by the County from progress payments to the Seller. The audit cost shall also be included in all change orders and all contract renewals and extensions.

Exception: The above application of one quarter (1/4) of one percent fee assessment shall not apply to the following contracts: (a) IPSIG contracts; (b) contracts for legal services; (c) contracts for financial advisory services; (d) auditing contracts; (e) facility rentals and lease agreements; (f) concessions and other rental agreements; (g) insurance contracts; (h) revenue-generating contracts; (i) contracts where an IPSIG is assigned at the time the contract is approved by the Commission; (j) professional service agreements under \$1,000; (k) management agreements; (l) small purchase orders as defined in Miami-Dade County Administrative Order 3-2; (m) federal, state and local government-funded grants; and (n) interlocal agreements. ***Notwithstanding the foregoing, the Miami-Dade County Board of County Commissioners may authorize the inclusion of the fee assessment of one quarter (1/4) of one percent in any exempted contract at the time of award.***

Nothing contained above shall in any way limit the powers of the Inspector General to perform audits on all County contracts including, but not limited to, those contracts specifically exempted above. The Miami-Dade County Inspector General is authorized and empowered to review past, present and proposed County and Public Health Trust contracts, transactions, accounts, records and programs. In addition, the Inspector General has the power to subpoena witnesses, administer oaths, require the production of records and monitor existing projects and programs. Monitoring of an existing project or program may include a report concerning whether the project is on time, within budget and in conformance with plans, specifications and applicable law. The Inspector General is empowered to analyze the necessity of and reasonableness of proposed change orders to the Contract. The Inspector General is empowered to retain the services of independent private sector inspectors general (IPSIG) to audit, investigate, monitor, oversee, inspect and review operations, activities, performance and procurement process, including but not limited to project design, specifications, proposal submittals, activities of the Contractor, its officers, agents and employees, lobbyists, County staff and elected officials to ensure compliance with contract specifications and to detect fraud and corruption.

Upon written notice to the Seller from the Inspector General or IPSIG retained by the Inspector General, the Seller shall make all applicable requested records and documents available to the Inspector General or IPSIG for inspection and copying. The Inspector

General and IPSIG shall have the right to inspect and copy all applicable documents and records in the Seller's possession, custody or control which, in the Inspector General's or IPSIG's sole judgment, pertain to performance of the Agreement, including, but not limited to original estimate files, change order estimate files, worksheets, proposals and agreements form and which successful and unsuccessful subcontractors and suppliers, all project-related correspondence, memoranda, instructions, financial documents, construction documents, proposal and contract documents, back-charge documents, all documents and records which involve cash, trade or volume discounts, insurance proceeds, rebates, or dividends received, payroll and personnel records, and supporting documentation for the aforesaid documents and records.

ARTICLE 16. GOVERNING LAW

This Agreement, including Attachments, and all matters relating to this Agreement [whether in Agreement, statute, tort (such as negligence, or otherwise)] shall be governed and construed in accordance with the laws of the State of Florida, without application of the conflicts of law principles. The venue of any action on the Agreement shall be laid in Miami-Dade County, Florida, and any action to determine the rights of obligations of the parties hereto shall be brought in the courts of the State of Florida.

ARTICLE 17. COUNTY USER ACCESS PROGRAM (UAP)

17.1 User Access Fee: Pursuant to Miami-Dade County Budget Ordinance No. 03-192, this Contract is subject to a user access fee under the County User Access Program (UAP) in the amount of two percent (2%). All sales resulting from this Contract, or any contract resulting from this solicitation and the utilization of the County Contract price and the terms and conditions identified herein, are subject to the two percent (2%) UAP. This fee applies to all Contract usage whether by County Departments or by any other governmental, quasi-governmental or not-for-profit entity.

The Seller providing goods or Services under this Contract shall invoice the Contract price and shall accept as payment thereof the Contract price less the 2% UAP as full and complete payment for the goods and/or Services specified on the invoice. The County shall retain the 2% UAP for use by the County to help defray the cost of the procurement program. Vendor participation in this invoice reduction portion of the UAP is mandatory.

17.2 Joint Purchase: Only those entities that have been approved by the County for participation in the County's Joint Purchase and Entity Revenue Sharing Agreement are eligible to utilize or receive County Contract pricing and terms and conditions. The County will provide to approved entities a UAP Participant Validation Number. The Seller must obtain the participation number from the entity prior to filling any order placed pursuant to this section. Seller participation in this joint purchase portion of the UAP, however, is voluntary. The Seller shall notify the ordering entity, in writing, within 3 workdays of receipt of an order, of a decision to decline the order.

For all ordering entities located outside the geographical boundaries of Miami-Dade County, the Seller shall be entitled to ship goods on an "FOB Destination, Prepaid and Charged Back" basis. This allowance shall only be made when expressly authorized by a representative of the ordering entity prior to shipping the goods.

The County shall have no liability to the Seller for the cost of any purchase made by an ordering entity under the UAP and shall not be deemed to be a party thereto. All orders shall be placed directly by the ordering entity with the Seller and shall be paid by the ordering entity less the 2% UAP.

17.3 Seller Compliance: If a Seller fails to comply with this Article, that Seller may be considered in default by the County.

ARTICLE 18. ANNUAL APPROPRIATION

The County's performance and obligation to pay under this Agreement is contingent upon an annual appropriation by the Board of County Commissioners. Cancellation will not cause any penalty or expense to the County, except as to the portions of payments agreed upon and for which funds have been appropriated and budgeted. Service can be cancelled at any time that the Seller is notified in writing, at least thirty (30) days prior to cancellation. There will be no early termination charges from the Seller for canceling services during the year except for charges incurred for services performed under this Agreement prior to the County's cancellation notice, and Seller will deliver to County all Deliverables performed up to the cancellation notice.

ARTICLE 19. SEVERABILITY

If this Agreement contains any provision found to be unlawful, the same shall be deemed to be of no effect and shall be deemed stricken from this Agreement without affecting the binding force of this Agreement as it shall remain after omitting such provision.

ARTICLE 20. VENDOR REGISTRATION AND FORMS/CONFLICT OF INTEREST

a) Vendor Registration

The Contractor shall be a registered vendor with the County – Department of Procurement Management, for the duration of this Agreement. In becoming a Registered Vendor with Miami-Dade County, the Contractor confirms its knowledge of and commitment to comply with the following:

1. **Miami-Dade County Ownership Disclosure Affidavit**
(Section 2-8.1 of the County Code)
2. **Miami-Dade County Employment Disclosure Affidavit**
(Section 2-8.1(d)(2) of the County Code)
3. **Miami-Dade County Employment Drug-free Workplace Certification**
(Section 2-8.1.2(b) of the County Code)
4. **Miami-Dade Disability and Nondiscrimination Affidavit**
(Section 2-8.1.5 of the County Code)
5. **Miami-Dade County Debarment Disclosure Affidavit**
(Section 10.38 of the County Code)
6. **Miami-Dade County Vendor Obligation to County Affidavit**
(Section 2-8.1 of the County Code)
7. **Miami-Dade County Code of Business Ethics Affidavit**
(Section 2-8.1(i) and 2-11(b)(1) of the County Code through (6) and (9) of the County Code and Section 2-11.1(c) of the County Code)
8. **Miami-Dade County Family Leave Affidavit**
(Article V of Chapter 11 of the County Code)
9. **Miami-Dade County Living Wage Affidavit**
(Section 2-8.9 of the County Code)
10. **Miami-Dade County Domestic Leave and Reporting Affidavit**
(Article 8, Section 11A-60 11A-67 of the County Code)
11. **Subcontracting Practices**
(Ordinance 97-35)
12. **Subcontractor /Supplier Listing**
(Section 2-8.8 of the County Code)
13. **Environmentally Acceptable Packaging**
(Resolution R-738-92)
14. **W-9 and 8109 Forms**
(as required by the Internal Revenue Service)
15. **FEIN Number or Social Security Number**
In order to establish a file, the Contractor's Federal Employer Identification Number (FEIN) must be provided. If no FEIN exists, the Social Security Number of the owner or individual must be provided. This number becomes Contractor's "County Vendor Number". To comply with Section 119.071(5) of the Florida Statutes relating to the collection of an individual's Social Security Number, be aware that the County requests the Social Security Number for the following purposes:
 - Identification of individual account records
 - To make payments to individual/Contractor for goods and services provided to Miami-Dade County
 - Tax reporting purposes
 - To provide a unique identifier in the vendor database that may be used for searching and sorting departmental records
16. **Office of the Inspector General**
(Section 2-1076 of the County Code)
17. **Small Business Enterprises**
The County endeavors to obtain the participation of all small business enterprises pursuant to Sections 2-8.2, 2-8.2.3 and 2-8.2.4 of the County Code and Title 49 of the Code of Federal Regulations.
18. **Antitrust Laws**
By acceptance of any contract, the Contractor agrees to comply with all antitrust laws of the United States and the State of Florida.

b) Conflict of Interest

Section 2-11.1(d) of Miami-Dade County Code as amended by Ordinance 00-1, requires any county employee or any member of the employee's immediate family who has a controlling financial interest, direct or indirect, with Miami-Dade County or any person or agency acting for Miami-Dade County from competing or applying for any such contract as it pertains to this solicitation, must first request a conflict of interest opinion from the County's Ethic Commission prior to their or their immediate family member's entering into any contract or transacting any business through a firm, corporation, partnership or business entity in which the employee or any member of the employee's immediate family has a controlling financial interest, direct or indirect, with Miami-Dade County or any person or agency acting for Miami-Dade County and that any such contract, agreement or business engagement entered in violation of this subsection, as amended, shall render this Agreement voidable. For additional information, please contact the Ethics Commission hotline at (305) 579-2593.

ARTICLE 21. FORCE MAJEURE

21.1 Performance by each party shall be pursued with commercially reasonable efforts in all requirements under this Agreement; however, except as otherwise expressly provided herein, neither party shall be liable to the other for any loss or damage for delay due to causes that (i) were beyond the reasonable control and (ii) were not caused by the negligence or lack of commercially reasonable efforts of the affected party or its subcontractors or suppliers. The parties agree that, provided the conditions stated in (i) and (ii) above apply, the following are causes or events of force majeure: acts of civil or military authority (including courts and regulatory agencies), acts of God (excluding normal or seasonal weather conditions), riot or insurrection, inability to obtain required permits or licenses, blockades, embargoes, sabotage, epidemics and unusually severe floods. The party affected shall provide written notice to the other party indicating the nature, cause, date of commencement thereof, the anticipated extent of such delay and whether it is anticipated that any completion or delivery dates will be affected thereby, and shall exercise due diligence to mitigate the effect of the delay.

21.2 In the event of any delay resulting from such causes, and provided the affected party has promptly notified the other and exercised commercially reasonable efforts as provided in subsection a) above the time for performance under this Agreement (including the payment of monies) shall be extended for a period of time reasonably necessary to overcome the effect of such delay.

ARTICLE 22. EXTENSION OF TIME NOT CUMULATIVE

In the event the Seller shall be delayed concurrently by two or more of the causes identified in Article 21, "Force Majeure" above, the Seller shall be entitled to a separate extension of time for each one of the causes but only one time period of extension shall be granted for the delay. In addition, the Seller shall not be entitled, by reason of a delay, to an extension of time for the completion of the overall Work unless the overall Work is necessarily affected by the delay. Accordingly, in the event of a delay, the Seller shall proceed continuously and diligently with the performance of the unaffected portions of the Work.

ARTICLE 23. SURVIVAL

The parties acknowledge that any of the obligations in this Agreement will survive the term, termination and cancellation hereof. Accordingly, the respective obligations of the Seller and the County under this Agreement, which by nature would continue beyond the termination, cancellation or expiration thereof, shall survive termination, cancellation or expiration hereof.

ARTICLE 24. PRESS RELEASE OR OTHER PUBLIC COMMUNICATION

Under no circumstances shall the Seller without the express written consent of the County:

24.1 Issue or permit to be issued any press release, advertisement or literature of any kind which refers to the County, or the Work being performed hereunder, unless the Seller first obtains the written approval of the County. Such approval may be withheld if for any reason the County believes that the publication of such information would be harmful to the public interest or is in any way undesirable; and

24.2 Communicate in any way with any contractor, department, board, agency, commission or other organization or any person whether governmental or private in connection with the Services to be performed hereunder except upon prior written approval and instruction of the County; and

24.3 Except as may be required by law, the Seller and its employees, agents, subcontractors and suppliers will not represent, directly or indirectly, that any product or service provided by the Seller or such parties has been approved or endorsed by the County.

ARTICLE 25. FIRST SOURCE HIRING REFERRAL PROGRAM

Pursuant to Section 2-2113 of the Code of Miami-Dade County, for all contracts for goods and services, the Contractor, prior to hiring to fill each vacancy arising under a County contract shall (1) first notify the South Florida Workforce Investment Board ("SFWIB"), the designated Referral Agency, of the vacancy and list the vacancy with SFWIB according to the Code, and (2) make good faith efforts as determined by the County to fill a minimum of fifty percent (50%) of its employment needs under the County contract through the SFWIB. If no suitable candidates can be employed after a Referral Period of three to five days, the Contractor

is free to fill its vacancies from other sources. Contractor will be required to provide quarterly reports to the SFWIB indicating the name and number of employees hired in the previous quarter, or why referred candidates were rejected. Sanctions for non-compliance shall include, but not be limited to: (i) suspension of contract until Contractor performs obligations, if appropriate; (ii) default and/or termination; and (iii) payment of \$1,500/employee, or the value of the wages that would have been earned given the noncompliance, whichever is less. Registration procedures and additional information regarding the FSHRP are available at <https://iapps.southfloridaworkforce.com/firstsource/>.

ARTICLE 26. PUBLIC RECORDS AND CONTRACTS FOR SERVICES PERFORMED ON BEHALF OF A PUBLIC AGENCY

The Contractor shall comply with the state of FL Public Records Law, s. 119.0701, F.S., specifically to: (1) keep and maintain public records that ordinarily and necessarily would be required by the public agency in order to perform the service; (2) provide the public with access to public records on the same terms and conditions that the public agency would provide the records and at a cost that does not exceed the cost provided in Chapter 119, F.S., or as otherwise provided by law; (3) ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law; and (4) meet all requirements for retaining public records and transfer, at no cost, to the public agency all public records in possession of the Contractor upon termination of the contract and destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. All records stored electronically must be provided to the public agency in a format that is compatible with the information technology systems of the public agency. If the Contractor does not comply with a public records request, the public agency shall enforce contract provisions in accordance with the contract.

ARTICLE 27. PREPARATION OF CONTRACT

This Agreement is the result of negotiation between the parties hereto and has been typed by one party for the convenience of both parties, and the parties covenant that this Agreement shall not be construed in favor of any of the parties hereto.

IN WITNESS WHEREOF, the parties have executed this Contract effective as of the Date herein set forth below

IBM Corporation
By: _____

Name: Emily B. Loos

Title: Client Executive

Date: _____

Attest: _____

Corporate Seal/Notary Seal

Miami-Dade County, Florida
By: _____

Name: _____

Title: _____

Date: _____

Attest: _____

Clerk of the Board

Approved as to form
and legal sufficiency

Assistant County Attorney

DRAFT