

BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

In the matter of:

IBM Corporation

EPA Case No. 08-0113-00

**INTERIM AGREEMENT**

**BACKGROUND**

A. On March 27, 2008, the United States Environmental Protection Agency (EPA), suspended International Business Machines Corporation (IBM) from receiving Federal contracts, approved subcontracts, assistance, loans and other benefits in accordance with Subpart 9.4 of the Federal Acquisition Regulation, and 2 CFR Part 180.

B. The EPA suspension was based on information developed during the course of a Federal investigation into activities related to IBM's offer and negotiations pursuant to an EPA RFP Number PR-HQ-05-12521. The EPA Debarring Official found that the information presented before him constitutes adequate evidence to support allegations that IBM employees obtained protected source selection information from an EPA employee, which IBM officials knew was improperly acquired, and used the information during its negotiations to improve its chance of winning a contract in violation of Federal procurement procedures and the **Federal Procurement Policy Integrity Act**.

C. At the time the information was presented to the EPA Debarring Official, selection of the successful offeror and award of the multi-million dollar contract was imminent. The Debarring Official determined that immediate action was necessary to preclude award of a Federal contract to an offeror whose employees may have participated in illegal activities in receiving and using information about its competitors bid and other information to increase its chance of winning the contract award.

D. In electing the scope of the suspension, under Federal rules applicable to suspension, the Debarring Official determined that any attempt to identify an integral component within IBM as the entity listed in the Excluded Parties List System, would be ineffective to preclude award since IBM was the actual offeror under the procurement in question, and the only legal entity capable of receipt and performance of the award.

E. In response to the Notice of Suspension, IBM management officials and counsel initiated an immediate internal investigation into the allegations and promptly met with EPA investigative and debarment counsel to address the issues raised in the March 27<sup>th</sup> suspension notice. That investigation is continuing at the present time, and the subpoenaed individuals have been encouraged to cooperate.

F. At the present time, the information available to IBM indicates that one or more IBM employees appear to have obtained and used source selection information in apparent violation of the Procurement Integrity Act and IBM's internal procedures. IBM's investigation is continuing on the highest priority basis, and if this conclusion is supported on the full record, IBM acknowledges that the integrity of the subject procurement process has been adversely affected. Regardless of the outcome of that investigation, IBM has offered to withdraw, and shall withdraw, its offer from further consideration in the subject procurement and to waive any and all awards ordered, received or potential claims for costs incurred with respect to the subject procurement, including those associated with its GAO Protest, and the EPA shall be free to make a decision on the award of said contract as it, in its sole discretion, deems appropriate. Furthermore, IBM hereby agrees to refund to EPA any and all attorneys fees and costs that EPA paid to IBM in connection with the filing and pursuing of its GAO bid protest relating to the subject procurement.

G. IBM senior managers have pledged IBM's full commitment to conducting a full examination of IBM's Federal compliance program, and to take whatever corrective measures are necessary to be in compliance with the applicable rules, and thus have the confidence of EPA and other Federal agencies in the integrity of IBM bid and proposal development practices.

H. In furtherance of that commitment, IBM has already placed the five individuals suspended by the EPA pursuant to this matter on administrative leave pending completion of its own internal investigation, and any Federal investigation in the matter.

I. IBM has pledged to cooperate fully with EPA investigators and the United States Attorney's Office in bringing this matter to a prompt and appropriate conclusion.

J. IBM assures that it has not, within the last five years, been subject to any other notices or show cause letters for debarment, suspension, or voluntary exclusion; nor subject to obligations of an administrative or compliance agreement as a result of such actions.

K. Based upon the presumption of truthfulness and completeness as to IBM's representations and offers made, the EPA hereby agrees to terminate immediately the temporary suspension imposed on March 27, 2008, and to cause IBM's name to be removed immediately from the Excluded Parties List, subject to the following terms and conditions.

### **TERMS and CONDITIONS**

1. All offers made by IBM and recited in paragraphs F, G, H and I of the BACKGROUND section of this agreement are specifically incorporated into this paragraph and made a part of IBM's obligations under this agreement.

2. Within 5 business days of this agreement, IBM shall provide a complete and accurate written recitation of what it was told by its employees in the course of its preliminary internal investigation. As part of its submission under this paragraph, IBM shall include an organizational chart showing IBM's internal operating and management structure such that the EPA can evaluate the relationship between any individuals involved in the employee misconduct and any IBM sub-tier organizations and teams of which they were part, including identification of the position held by the person and any reporting line of authority above or below that person.

3. Within 60 calendar days of this agreement, IBM shall provide the SDD and the OIG with a detailed written update of the progress of IBM's initial internal investigation, including a preliminary assessment of the events leading to any IBM employee misconduct that took place regarding the subject procurement; and, a preliminary evaluation of why that misconduct occurred despite the existence of IBM's Federal compliance program. In preparing its update, IBM may seek clarification and guidance from the EPA Debarring Official so as to ensure that its update addresses any key areas of concern or interest. However, it is understood that the obligation to evaluate the efficacy of its existing Federal compliance program and/or modifications to it are the responsibility of IBM. IBM officials will implement any corrective actions necessary or desirable as a result of its preliminary evaluation. IBM shall identify a corrective action plan to institute such changes, and a means by which IBM plans to test its effectiveness.

4. IBM understands that it has made assertions to the EPA Debarring Official, the EPA Chief Hearing Officer, the OIG and the SDD that it is cooperating with the OIG and the U.S. Attorney's Office to comply with the pending subpoena and to bring the matter to a prompt and appropriate conclusion. In making that assertion, IBM will work closely with the U.S. Attorney's Office and forgo issuance of subpoenas and other similar demands in order to expedite and cooperate in the process to conclude the investigation and any legal proceedings that underlie the reason for initiating the EPA suspension, assuming the U.S. Attorney's Office is content to proceed in that manner. While those matters are within the jurisdiction of the United States Attorney's Office, the resolution of those proceedings is essential to bring this matter to a final conclusion.

5. If, during the course of this Agreement, IBM learns that the employee misconduct that occurred on the EPA procurement in question also occurred on other Federal contracts or non-procurement transactions, IBM will promptly notify the EPA Debarring Official, SDD, and EPA's Office of Inspector General, as well as the subject agency's Office of Inspector General, or responsible investigating authority, of the discovery.

6. This Agreement shall remain in effect until conclusion of the investigation and any criminal proceedings that may ensue under paragraph 4 hereof. In connection with or at the conclusion of those proceedings, IBM shall promptly notify the SDD and the EPA Debarring Official so that IBM may schedule a meeting to address any new or other factors that may have come to light, that IBM and/or the EPA Debarring Official were unaware of at the time of entry into this agreement. At that time, the EPA Debarring

Official will reevaluate this matter and decide whether additional obligations are necessary to fully protect Federal procurement and non-procurement interests.

7. If at any time during the course of the investigation, new information is received by the EPA Debarring Official that constitutes a separate cause for action or enlarges exposure to risk to the Federal Government, or is satisfied that IBM is in material breach of the agreement, EPA retains all powers under the Federal regulations to reinstate suspension in accordance with those rules. If reasonable time allows, however, the Debarring Official will provide IBM with an opportunity to address any new concerns in advance of issuing any such suspension.

8. By execution of this Agreement, IBM releases and shall hold harmless the United States, its instrumentalities, agents, and employees, in their official and personal capacities, of liability or claims arising out of or otherwise related to the negotiations leading to this Agreement and all matters contained herein.

9. During the period of this Agreement, the EPA may review IBM's compliance with the terms of this Agreement as follows.

a. In addition to any other right that the EPA may have by statute, regulation, or contract, the EPA and their duly authorized representatives may, solely and as reasonably necessary for the purpose of verifying and evaluating IBM's compliance with the terms of this Agreement, examine IBM's non-privileged books, records, and other documents and supporting materials.

b. The materials described above shall be made available by IBM during normal business hours for inspection and review.

c. For the purposes of subparagraph a. of this Article, the EPA or their authorized representatives may interview any IBM employee, who consents to be interviewed, at the employee's place of business during normal business hours or at such other place and time as may be mutually agreed between the employee and the interviewer. Consistent with IBM policy, employees may elect to be interviewed with or without their own counsel or a representative of IBM present.


d. IBM agrees to reimburse the U.S. Treasury for the reasonable costs actually incurred of conducting such reviews during the term of this Agreement. The Parties agree that "cost" shall include reasonable expense for travel, transportation, lodging and meals, to the extent normally authorized under Federal rules governing government travel; as such expenses are actually incurred by EPA personnel or its authorized agents in conducting site visits for the purpose of verifying compliance with this Agreement.

10. As an alternative to an on-site review of IBM's compliance with the terms of this Agreement, EPA may, at its sole election, conduct a review by mail in which instance IBM shall provide non-privileged documentation of its compliance with this Agreement including, but not limited to, copies of documentation maintained as required

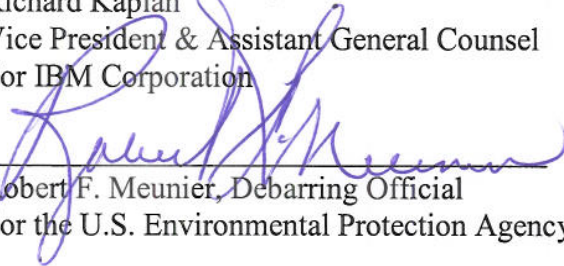
in this Agreement and such additional documentation and/or certifications as may be reasonably requested by EPA.

11. Respondent shall maintain documentation sufficient to demonstrate compliance with the requirements of this Agreement.

12. By signature hereto, the individual executing this Agreement on behalf of IBM certifies personally and on behalf of IBM, subject to criminal penalties of 18 U.S.C. 1001, that the facts recited herein are accurate to the best of his knowledge, information and belief.

  
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Richard Kaplan  
Vice President & Assistant General Counsel  
For IBM Corporation

4/3/08  
DATE

  
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Robert F. Meunier, Debarring Official  
For the U.S. Environmental Protection Agency

4/3/08  
DATE