

system. During the rollout of the system in 2007 and 2008, the IBM Coalition faced not only an entrenched legacy of corruption and waste, but also the worst recession in recent history, a series of catastrophic floods, and the implementation of a massive new health care program—all of which increased the levels of aid applications beyond anything contemplated at the time of the contract. Almost two years into the contract, these factors led IBM and the State to agree to temporarily suspend rollout of the new system while working cooperatively, and with substantial success, to overcome the challenges facing the system.

3. Ultimately, the State elected to exercise its option under the contract to replace IBM as the lead contractor on the project and continue the rollout of the new system using IBM’s subcontractors, IBM’s technology, and IBM’s know-how. IBM does not dispute that the State had the right to terminate the contract for its own convenience. To the contrary, in drafting the contract, the parties spent considerable time contemplating this possibility and providing for fair payment to IBM if the State chose to terminate the contract. Among those required payments are deferred expenses and fees, and the costs of IBM equipment retained by the State after termination “for any reason”:

- **Deferred costs and fees.** During negotiation of the contract, the State asked to defer payment of certain expenses incurred and fees earned during the early years of the ten-year contract, so that the State’s payment schedule would remain relatively constant over the contract life. As an accommodation to the State, IBM agreed to defer payment of those amounts until later years, in return for the State’s promise that those deferred payments would be made immediately if the State chose to terminate the contract early, “for any reason.” That agreement is set out in the contract, and Schedule 24 of the contract sets out the amount of those unpaid State obligations now due, which total \$43,416,738. Having negotiated and agreed to pay IBM these amounts, the State is now refusing to do so.
- **IBM’s equipment that the State is using.** When the State took over as the principal contractor on the job, it retained certain of IBM’s computers, telephones, and other equipment that the State is now using in connection with the project, but for which the State has never paid. The cost (net of depreciation) of this equipment is

\$9,349,654.93. As with the deferred fees, this amount is due on the State's termination of the contract for any reason.

4. IBM has now spent months in an unsuccessful effort to obtain payment of these and like amounts owed, including working directly with the Governor's office. Regretfully, IBM has no remaining alternative for collecting these amounts owed, other than to file this action. Each of these amounts is owed, is not subject to any set-off, and should be paid at once.

PARTIES

5. The master contract that governed the project to modernize Indiana's social services eligibility system (the "Modernization Project") is known as the Master Services Agreement (the "MSA"). The MSA was executed on December 27, 2006, and is attached as Exhibit A.

6. Plaintiff IBM is incorporated under the laws of New York, with its corporate headquarters in Armonk, New York. IBM offers consulting services and advanced information technologies to support a wide range of clients, including a number of federal and state government organizations. IBM was a party to the MSA.

7. The State of Indiana was the other party to the MSA, acting on behalf of the Indiana Family and Social Services Administration (the "FSSA").

8. The FSSA administers the health care and social service programs in Indiana, including Food Stamps, Medicaid, the Healthy Indiana Plan ("HIP"), and the Temporary Assistance for Needy Families ("TANF") program. Pursuant to the terms of the MSA, as amended, the IBM Coalition had responsibility to provide services in support of each of these programs.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this case pursuant to Indiana Code section 34-13-1-1, which permits claims against the State arising out of express or implied contracts.

10. Section 18.3 of the MSA provides that the State “acknowledges and agrees” that IBM’s rights against the State include actions under IC 34-13-1. (Ex. A, MSA § 18.3.)

11. Venue is proper in Marion County pursuant to Trial Rule 75 because the relevant principal governmental offices of the State are located in Marion County.

12. Moreover, venue is proper because, under Section 21.3 of the MSA, “[a]ny Proceeding with respect to this Agreement shall be brought in the state courts in the State of Indiana in the County of Marion.” (Ex. A, MSA § 21.3.)

FACTUAL BACKGROUND

I. The State Sought to Modernize a System That Was, in Its Own Words, “Broken,” “Wasteful,” and “Fraudulent.”

13. The profound historical problems with Indiana’s legacy social services eligibility processing system are well documented. Indeed, throughout the public bidding process that led to the MSA, the State openly catalogued the serious problems with its legacy system. In his November 29, 2006, press conference announcing the Modernization Project, Governor Daniels described the system as “plagued by high error rates, fraud, wasted dollars, poor conditions for its employees, and very poor service to its clients.” In a word, “broken.”

14. The FSSA agreed with Governor Daniels’ assessment. In August 2006, the FSSA published a report entitled, “Eligibility Modernization: The Need for Change,” that identified problems “inherent in the current system”: (a) “inconsistent application of rules, regulations and policy”; (b) “overly burdensome caseloads for caseworkers”; (c) “high case error rates”; (d) “inappropriate delays”; (e) “dissatisfied clients”; and (f) a system “conducive to fraud.”

15. The FSSA report recognized that the root cause of many of these problems was an outdated eligibility processing model that relied on “30-year-old technology” and a “manual process [that is] difficult, time-consuming and conducive to errors.” The report concluded that “[t]he status quo is simply not acceptable.” The State set out to find an outside vendor as a partner in modernizing the legacy system.

A. After a Competitive Bidding Process, the State Chose the IBM Coalition as Its Partner to Modernize the System.

16. In late 2005, the Indiana Department of Administration and the FSSA issued Request for Information 6-C (the “RFI”), soliciting services “to assist the [S]tate in improving public assistance client eligibility determination processes and systems.” The RFI again painted a bleak picture of the State’s system.

17. The RFI contemplated a modernized system based on advances in information technology, where “clients [could] apply in person, through the Internet, over the phone, by fax or mail.” The State sought to reduce face-to-face interviews and specifically requested a system that would “enable Indiana citizens to enroll [in benefit programs] with a minimum of personal visits.” Among the desired outcomes, the RFI also emphasized increasing the self-sufficiency of applicants for social services.

18. The IBM Coalition, led by IBM as the prime contractor, submitted a response to the RFI. The largest portion of the work among the IBM Coalition members went to ACS State and Local Solutions, Inc. (“ACS”), whose role was to directly employ and supervise the personnel completing eligibility applications on a day-to-day basis as a front-end to the ultimate authorization of benefits made by an FSSA State Eligibility Consultant.

19. The State then invited the IBM Coalition, along with one other competitive bidder, to participate in the State’s Request for Proposal 6-58 for Eligibility Determination

Services (the “RFP”), which it issued on February 9, 2006. Like the RFI, the RFP requested that respondents “help clients reduce dependency on welfare assistance” Soon thereafter, the State announced its intent to award the eligibility modernization contract to the IBM Coalition.

B. After an Already Extensive Review Process, the Governor Appointed a “Review Committee” That Significantly Revised the State’s Modernization Parameters.

20. Just days later, in response to opposition from local labor groups and other critics of “privatization,” Governor Daniels suspended the procurement process to conduct a special review of the IBM Coalition’s proposal. The Governor appointed a Review Committee of high-ranking State officials from six State agencies. As the Governor explained in a May 26, 2006, letter to the Executive Director of the local American Federation of State, County and Municipal Employees (“AFSCME”), this review was an “extra step to the normal procurement decision process”

21. For seven months, the Review Committee examined every detail of the Modernization Project and demanded numerous changes to align the project with the Review Committee vision. On November 22, 2006, the final Report and Recommendation of the Inter-Agency Review Committee recommended that the State move forward with the IBM Coalition based on the program set out in the report. In its extensive review of the modernization approach, the Review Committee reaffirmed the move away from face-to-face meetings and approved the introduction of “specialization” among case workers, so that they would develop expertise in processing complex applications, which was “expected to reduce errors and provide faster and more reliable service to FSSA’s clients.”

22. The Review Committee emphasized that the final plan was *not* primarily the IBM Coalition’s, but rather was “*primarily the product of significant Review Committee revisions*” (Emphasis added.)

II. The State and the IBM Coalition Entered into the MSA: A Comprehensive Agreement Detailing the Modernization Project.

23. The legal documentation of the project was extensive. Both parties were represented by counsel, including an outside law firm hired by the State, throughout the process of negotiating this arm's length transaction, culminating in the MSA—179-page contract, signed on December 27, 2006, that included 323 pages of appendices, exhibits, and schedules.

A. The Parties' Responsibilities Under the MSA.

24. The MSA set forth each party's responsibilities for various functions related to the performance of the Services in a detailed "Statement of Work." (Ex. B, MSA Schedule 1.) Under the terms of the MSA, the IBM Coalition would first take over the existing social services application system from the State in all of Indiana's 92 counties and operate application processing according to the State's existing procedures. (Ex. A, MSA § 3.1.3; Ex. C, MSA Schedule 4.) The IBM Coalition would then roll out the Modernization Project in phases, on a region-by-region basis. Upon the completion of this transition period—when the modernized system had rolled out to *all counties*—the Modernization Project would reach "Steady State," defined in the MSA as "the fully implemented Vendor Service Environment." (Ex. D, MSA Appendix I at 20.) During each phase, the IBM Coalition was responsible for processing and completing the application, but the State employees still made the final determinations of eligibility.

25. The IBM Coalition's performance was judged against the detailed performance standards listed in the 17 pages of Schedule 10 of the MSA. (Ex. E, MSA Schedule 10.) Schedule 10 set forth four categories of performance measurements: (1) Critical Transition Milestones, which were major milestones over the life of the project; (2) Transition Key Performance Indicators, which were performance measurements in place during the transition

period; (3) Key Performance Indicators, which were performance measurements in force only during Steady State (*i.e.*, after rollout was complete in all counties); and (4) Service Level Metrics, which were service level measurements also in force only during Steady State. Notably, all of these standards included liquidated damages provisions that the State could enforce if the IBM Coalition failed to meet any of these standards.

B. Material Assumptions Governing the MSA.

26. Certain “Material Assumptions” governed the MSA. These Material Assumptions formed the basis for the parties’ expectations concerning the cost and scope of the Modernization Project. In the event that a Material Assumption turned out to be wrong, the MSA required the parties to “engage in good faith negotiations of any Changes to address any inaccuracy or error in one or more of the Material Assumptions.” (Ex. A, MSA § 4.1.3.) The Material Assumptions included the following: “During the Term, there will be no (i) material economic downturn in the State of Indiana, from that which existed as of the Effective Date” (Ex. F, MSA Schedule 11.)

C. Termination Provisions.

27. Of central relevance to this Complaint, the MSA specified the conditions under which the contract could be terminated. Under Article 16 of the MSA, the contract could be terminated by either party for cause, by the State for the State’s convenience, or by mutual agreement.

III. The Modernization Project Moves Forward.

28. The IBM Coalition began work immediately following the execution of the MSA on December 27, 2006. On March 19, 2007, the IBM Coalition took over all eligibility applications statewide under the State’s legacy system. As of April 30, 2007, ten days ahead of schedule, the IBM Coalition had met all three of its Critical Transition Milestones, as defined in

Schedule 10 of the MSA, including offering employment to nearly all of the State's FSSA employees. That same month, the first reports of the IBM Coalition's work began to roll in. Notwithstanding higher than expected application volumes, the IBM Coalition exceeded the statewide timeliness performance of the State's legacy social services system during the same month in 2006.

29. But the Modernization Project was already seeing the impact of major developments affecting the program.

A. The Deteriorating Economy Begins to Impact Application Volume.

30. Daily monitoring of application volumes early in the Modernization Project showed that the IBM Coalition already was processing more applications than the State had during the same period in the prior year. In April 2007, for example, the IBM Coalition dealt with approximately 4,000 additional applications when compared to the volume handled by the State during the same month in 2006. Through June 2007, the overall volume of applications continued to trend upward as compared to the State's historical application volume. In the summer of 2007, the IBM Coalition redoubled its efforts to deal with the increased and unanticipated application volumes, authorizing large amounts of overtime for IBM Coalition employees.

31. It is incontrovertible that, despite the parties' Material Assumption to the contrary, the State of Indiana, along with the rest of the country and most of the world, suffered a massive economic downturn, the effects of which began to be felt in Indiana shortly after the Modernization Project got underway. The recession began officially in December 2007 and hit Indiana's economy the hardest during 2008 and 2009—the same time period when the Modernization Project was rolling out. In November 2006, just before the MSA was executed, Indiana's unemployment rate stood at 4.5%. By November 2009, Indiana's unemployment rate

stood at over 9%, after reaching over 10% for a period, more than doubling the unemployment rate during the term of the MSA. Echoing the economic downturn, the FSSA had seen social services program enrollment rise 31% since 2005.

32. When the IBM Coalition began administering the existing system in March 2007, the State received about 65,000 applications for aid. By May 2008, the number had jumped to 80,000. From September 2008 forward, applications were consistently in the 100,000 range, with peaks near 120,000. The Material Assumption that there would be no “material economic downturn in the State of Indiana” was simply wrong.

B. Complicating Modernization, the State Significantly Expanded the Scope of the MSA by Adding the Healthy Indiana Plan.

33. In the spring of 2007, the Indiana Legislature passed an entirely new, expansive public health initiative known as the Healthy Indiana Plan (“HIP”), which provides health insurance to uninsured Indiana residents below a certain income level. HIP significantly increased the scope and cost of the Modernization Project by adding design, development, implementation, continuing services, and reporting requirements. (Ex. G, CR-23.)

34. By agreement with the State, the IBM Coalition planned for approximately 4,200 HIP applications per month. (Ex. H, MSA Schedule 8A, § 2.2.3(c).) In fact, HIP application volume regularly exceeded 10,000 applications per month and several times approached 15,000, placing an additional strain on the Modernization Project.

C. The Rollout of Modernized Services Nevertheless Met with Success.

35. Despite these obstacles, on October 29, 2007, after months of operating the legacy system under the State’s close supervision, the State approved the rollout of the Modernization Project to a 12-county pilot area of north-central Indiana, representing approximately ten percent of the State’s social services caseload.

36. During this critical pilot phase, the State's 12-person Modernization Project team intensely scrutinized the IBM Coalition's performance, including the readiness of the Modernization Project's service center, document processing center, general infrastructure, and application processing. The team, including State officials all the way up to the Secretary of the FSSA, E. Mitchell Roob, regularly met with the IBM team during the Pilot Phase and throughout the Modernization Project. The State also employed an outside vendor to oversee the IBM Coalition's performance.

37. As of March 10, 2008, the State concluded that the IBM Coalition had successfully completed the Pilot Phase of the Modernization Project. On March 24, 2008, after the State completed a detailed "Go/No Go" analysis, the IBM Coalition received the State's "Go" and began providing Modernized Services in Region 2A (27 counties in southern and central Indiana). After two months of operating these counties under the modernized system, again under the State's detailed scrutiny, the State gave its approval to the rollout of the Modernization Project in Region 2B, an additional 20 counties divided between southwest and northeast Indiana.

38. With the Modernization Project moving forward in 59 counties, serving a total of 430,000 social service clients, the State regularly reported favorably on the Modernization Project and IBM's role in it. On June 30, 2008, the State awarded the IBM Coalition a \$35 million expansion of the Modernization Project. On August 1, 2008, in a report to the federal government, the FSSA stated that "[t]he Eligibility Modernization Project is in its second year and has already made substantial progress toward its goals and objectives." [REDACTED]

Redacted Pursuant to Contract Confidentiality Provision

[REDACTED]

[REDACTED]

39. Despite obvious progress toward repairing Indiana’s “broken” welfare system, opposition from organized labor and some members of the Indiana legislature—opposition that had been vocal even before the project began—intensified during this time. In March 2008 the ACLU filed a lawsuit against the FSSA alleging that the FSSA’s final eligibility determinations had unfairly terminated the social services benefits of certain individuals. [REDACTED]

[REDACTED] Redacted Pursuant to Contract Confidentiality Provision [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IV. 2008: Multiple Catastrophic Floods Hit Indiana, Further Straining the System.

40. In the midst of the crisis caused by the economic downturn and the influx of new HIP applications, Indiana was hit by a series of catastrophic floods. From May 30, 2008, to June 6, 2008, a severe weather system battered Indiana with heavy rains, strong winds, and tornados, causing widespread flooding, power outages, and significant property damage. Compounding the devastation, severe flooding and high winds from the remnants of Hurricane Ike caused further damage across the State in September 2008.

41. As a result of these disasters, Governor Daniels declared a State of Disaster Emergency in dozens of counties across the state. The State also received approval from the

United States Department of Agriculture to issue emergency Food Stamps to disaster victims who suffered disaster-related losses, many of whom were not already receiving social services assistance and had never before received public assistance. The State needed help to screen these new applicants for social services, and it turned to the IBM Coalition.

42. When the State asked for assistance in dealing with this huge increase in application volume, the IBM Coalition joined together with State personnel to provide on-site support at *ad hoc* one-stop assistance centers created in the affected counties to assist flood victims in applying for emergency or replacement Food Stamps, cash assistance (TANF), Medicaid, or child-care assistance. At the request of the State, the IBM Coalition shifted its resources from the ongoing Modernization Project to the response effort, offering additional technology and staff to assist with the disaster relief.

43. The FSSA praised the IBM Coalition's performance during the disaster in an August 1, 2008, update sent to the federal government, explaining that "[d]iversion of resources for disaster relief won high praise from community groups and those individuals affected." In fact, the FSSA attributed its prompt disaster relief assistance to the IBM Coalition's efforts: "The ability to mobilize multiple state agencies and provide computers and phones for Hoosiers to apply for state and federal assistance was made possible by the infrastructure already in place as a result of eligibility modernization."

44. As a result of the significant shift of personnel and technology resources away from the Modernization Project and to disaster relief efforts, and the vastly above-average application volumes arising from the recession, the State and the IBM Coalition mutually agreed to delay the planned rollout of the Modernization Project to Regions 3 and 4. On September 29, 2008, the parties memorialized this agreement in Change Request 69, which noted that the

continued rollout was “delayed by mutual decision,” in part “to accommodate disaster relief efforts.” (Ex. I, CR-69.) Change Request 69 made no suggestion that the temporary suspension of the rollout was attributable to any failure on the part of the IBM Coalition.

45. With the rollout suspended, the IBM Coalition and the State took the opportunity to critically evaluate the state of the Modernization Project. Realizing that the existing situation presented a reality far different from that anticipated by the parties when the Modernization Project was designed, the IBM Coalition and the State developed a series of proposals for systemic changes to bring the Modernization Project in line with reality.

46.

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

V. 2009: The FSSA Abandons Former Secretary Roob’s Plans and Terminates the MSA.

47. Shortly after approving the IBM Coalition’s proposed reforms, Secretary Roob was appointed Indiana’s Secretary of Commerce and CEO of the State’s Economic Development Corporation. He was replaced as Secretary of FSSA by Anne Murphy, Secretary Roob’s Chief of Staff.

48. At the same time, critics of the Modernization Project became increasingly vocal. In the same month that Secretary Murphy took over, Representative Suzanne Crouch introduced House Bill 1691, which was designed to halt any further rollout of the privatization efforts. On

February 25, 2009, the Indiana House of Representatives passed House Bill 1691 and it moved to the Indiana Senate, where it was never ultimately passed.

49. Notwithstanding the fact that the IBM Coalition had finished implementing some of its proposals and had begun development work on several others, the State's support for the IBM Coalition's recommendations and any return to the rollout schedule quickly evaporated under Secretary Murphy. In March 2009, just weeks after House Bill 1691 threatened to halt the Modernization Project, the State abruptly demanded that the IBM Coalition stop work on all improvement projects, even though many were ready to be implemented.

50. At the same time, Secretary Murphy sent a letter to the IBM Coalition requesting a Corrective Action Plan ("CAP") under Section 15.4.1 of the MSA to address "multiple issues with the Modernization Project." The State's letter identified 36 such "issues" ranging from timeliness complaints to excessive wait times in offices. [REDACTED]

Redacted Pursuant to Contract Confidentiality Provision

51. On March 31, 2009, the IBM Coalition responded to the State's March 13, 2009, letter. The IBM Coalition denied that a formal Corrective Action Plan was required under the MSA because the MSA only required a Corrective Action Plan in the event of a breach of the MSA, and no breach of the MSA had occurred. Nevertheless, the IBM Coalition was committed to continue addressing all of the issues raised by the State, as it had been doing from the start.

52. Between March and July 2009, the IBM Coalition crafted an informal Corrective Action Plan. [REDACTED]

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[REDACTED] Despite having requested the initiatives in the first place, the State refused to permit the IBM Coalition to implement many of

them. Nevertheless, by mid-October 2009, the IBM Coalition had resolved more CAP items, including issues that had no contractual requirement or Performance Standard under the MSA.

53. Despite the strides that the IBM Coalition had taken in meeting the goals set out in the CAP, on October 15, 2009, Secretary Murphy sent a letter to IBM terminating the MSA. Although the Secretary's letter stated that the State was terminating the contract for cause, that position was baseless, and in fundamental conflict with the State's public statements up to and including those made by the Governor on the day the letter was sent. Secretary Murphy's letter set December 14, 2009, as the Services Termination Date.

VI. Even While Terminating IBM's Involvement in the Modernization Project, the State Praised IBM's Performance and Results.

54. On October 15, 2009, Governor Daniels held a press conference to announce that the State was terminating IBM's involvement in the Modernization Project, and "assum[ing] the role of integrator or prime contractor going forward." During the course of his remarks, the Governor commended IBM for its work, citing a litany of benefits that the IBM Coalition had conferred on the State:

- (a) "The fraud that was rampant in Indiana's welfare system has apparently stopped. There hasn't been a single allegation, let alone conviction, whereas there were dozens. And the official reports say over \$100 million was stolen in the last year before we began to try to make this change."
- (b) "I think everyone who has looked at the system prefers a paperless system to the boxes of files and the chaos that really existed—has existed before."
- (c) "IBM brought a thousand new separate private-sector jobs to Indiana at Daleville and Anderson. And those people are at work today . . . in productive employment because of this contract. And so for that also we're grateful."
- (d) Asked how much the State had already spent on the contract, Governor Daniels responded: "Much less than we would have spent if we hadn't gone to it. Again, we are saving—we projected initially maybe 50 million a year over the first 10 years. Now it looks more like 40. But this is much less expensive even than had we had a hands-off approach"

- (e) “Sifting the data for positive signs in the modernized counties, the welfare-to-work rate—record was dramatically better than in the old counties.”

55. In fact, the only things that Governor Daniels offered as reasons for the termination were two “fundamental flaws” in the basic concept of the Modernization Project: “saving welfare applicants the burden of a face-to-face meeting” and breaking up the determination process into “discrete tasks . . . done by specialists.” However, these “fundamental flaws” were key objectives the State identified in its own RFI, RFP, and inter-agency Review Committee report. The Governor explained that the State was “abandoning” the concepts and “going back to a system in which clients, applicants, will be required to come in face to face to make their application.” He noted further, “[t]he system itself won’t change, except that we will as quickly as possible migrate back to face-to-face application and to a so-called case-based as opposed to task-based determination of eligibility, yes or no.” The State has kept the IBM Coalition nearly intact, leaving all but one of the IBM subcontractors in place.

56. After the State terminated the MSA, IBM spent months working closely with the State to transition the Modernized System to the State’s control.

VII. The State Refuses to Pay Amounts Due Under the Contract in the Event of Termination.

57. Since termination of the MSA, IBM has requested that the State make payment to IBM of amounts owed under the MSA in the event of early termination by the State and the State has refused to pay those amounts.

58. Among other things, the MSA specified certain payments to IBM in the event that the State, *for any reason*, terminated the MSA before the end of its full ten-year life span. The parties agreed that certain costs and fees due to IBM in the early years of the contract would be spread over the life of the contract. Rather than making an up-front payment to IBM for the

money owed in the early years of the MSA, the State preferred to make a regular payment that did not radically change from year to year. To assist the FSSA in addressing these budget issues, IBM agreed to the concept of “Deferred Fees.”

59. In the final MSA, Schedule 24 detailed the “Deferred Fees” due to IBM in the early years of the MSA that would be spread over the life of the contract. (Ex. J, MSA Schedule 24.)

60. The language of the MSA states clearly and unambiguously that in the event of early Termination, the parties agreed that the State would pay IBM the balance of Deferred Fees to compensate IBM for already incurred efforts and expenditures and avoid any undeserved windfall to the State. (Ex. A, MSA §§ 14.8.1(3)(B), 16.6.6(1).)

61. The MSA also provided that “[i]n the event of a Termination of this Agreement *for any reason . . .* the State shall pay Vendor, to the extent applicable, the charges set forth in Sections 16.6.6(2) and 16.6.6(3)(F) below.” (*Id.* § 16.6.6(1) (emphasis added).) Section 16.6.6(3)(F) of the MSA provided for the payment of “Vendors and its Subcontractors’ unamortized balance of the Deferred Fees, as set forth in Schedule 24 [Deferred Fees].” (*Id.* § 16.6.6(3)(F).)

62. As required by the MSA, IBM delivered an invoice to the State for the Deferred Fees in the amount of \$43,416,738. (Ex. K, IBM Invoice # INDT001, Oct. 23, 2009.)

63. To date, the State has made no Deferred Fees payment to IBM.

64. Additionally, to provide services under the MSA, IBM purchased and leased millions of dollars worth of hardware, such as computer workstations and servers. IBM also purchased over 1,000 pieces of furniture (*e.g.*, cubicles, desks, and chairs) that were put to use in county offices and service centers operated by the IBM Coalition. The State has appropriated

and continues to use this equipment today without reimbursing IBM for that expense, even though it was never part of the bargain that the State could keep these assets at the conclusion of the MSA term.

65. The MSA specifically provided that upon Termination, IBM shall be compensated for the “transfer of all dedicated Equipment to the Successor, to the extent included within the Early Termination Close Out Payments or otherwise purchased by the Successor” (Ex. A, MSA § 16.6.1(4).)

66. When the State terminated the MSA, it kept much of the dedicated equipment paid for by IBM, including non-leased hardware, leased hardware, and furniture (the “Dedicated Equipment”).

67. Pursuant to the MSA, IBM sought reimbursement for the value of the hardware and furniture, but the State refused to pay anything for the Dedicated Equipment.

68. Despite IBM’s request for compensation for the Dedicated Equipment, the State is holding the Dedicated Equipment, which is IBM’s property, and unlawfully converting the Dedicated Equipment to the State’s use, in violation of Indiana law.

69. As required by the MSA, IBM delivered an invoice to the State for the Dedicated Equipment in the amount of \$9,349,654.93. (Ex. L, IBM Invoice # INDT003, Dec. 11, 2009.)

70. To date, the State has made no Dedicated Equipment payment to IBM.

71. In addition, Section 16.6.6(3) of the MSA provides for certain early termination close out payments to IBM, including:

“(B) Vendor’s and its Subcontractors’ prepaid costs for software licenses which have not been fully amortized as of the Services Termination Date;

(C) Vendor’s and its Subcontractors’ early lease termination costs applicable to the period commencing with the Services Termination Date;

(D) Vendor's and its Subcontractors' unamortized leasehold improvements net of any applicable depreciation or amortization as of the Services Termination Date”

72. IBM has requested payment for these contractually required items, and the State has refused to comply.

COUNT I
(Breach of Contract)

73. IBM and the State were parties to the MSA, which is a valid contract executed by the parties on or about December 27, 2006. (Ex. A.)

74. Article 16 of the MSA specified the exclusive means and grounds for the premature termination of the MSA.

75. The State had no grounds to terminate IBM “for cause” under Article 16 of the MSA.

76. Pursuant to Article 19 of the MSA, IBM has pursued and discharged its obligations to pursue dispute resolution.

77. By refusing to pay amounts due under the MSA, the State materially breached the MSA.

78. Under Section 15.3 of the MSA, the State has no right of set-off with respect to disputed amounts.

79. IBM is entitled to both pre-judgment and post-judgment interest, as required under the MSA and Indiana law.

WHEREFORE, Plaintiff IBM prays for a judgment against the State in the amount of \$52,766,392.93, plus applicable interest, and for such further relief as warranted under the contract and Indiana law and as the Court deems just and proper.

Dated: May 13, 2010

Respectfully Submitted,

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