

## **BMC CLOUD SERVICES MASTER AGREEMENT**

THIS CLOUD SERVICES MASTER AGREEMENT (“**AGREEMENT**”) GOVERNS YOUR FREE TRIAL, IF ANY, OF THE SUBSCRIPTION SERVICES.

IF YOU PURCHASE THE SUBSCRIPTION SERVICES, THIS AGREEMENT WILL ALSO GOVERN YOUR PURCHASE AND ONGOING USE OF THE SUBSCRIPTION SERVICES.

BY ACCEPTING THIS AGREEMENT, EITHER BY CLICKING A BOX INDICATING YOUR ACCEPTANCE OR BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THESE TERMS AND CONDITIONS. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, YOU MUST NOT ACCEPT THIS AGREEMENT AND MAY NOT USE THE SUBSCRIPTION SERVICES.

You may not access the Subscription Services if you are BMC’s direct competitor, except with BMC’s prior written consent. In addition, you may not access the Subscription Services for purposes of monitoring their availability, performance or functionality, or for any other benchmarking or competitive purposes.

This Agreement was last updated on July 25, 2019. This Agreement is between the entity or individual entering into this Agreement (“**Customer**”) and the BMC Contracting Entity for the applicable region as described in Section 12 (“**BMC**”). It is effective between Customer and BMC as of the date of your acceptance of this Agreement. If Customer has a fully executed BMC Cloud Services Master Agreement then such fully executed BMC Cloud Services Master Agreement supersedes and replaces any clickwrap or click-through agreements (or other similar agreements) that Customer may be required to accept as a part of accessing or using the Subscription Services. For Customer’s convenience, prior versions of this Agreement are available at <https://www.bmc.com/legal/csma.html>.

### **FREE TRIAL.**

BMC may make the Subscription Services available to Customer on a trial basis free of charge. If BMC offers Customer a free trial, it will run until the earlier of (a) the end of the trial period stated on the trial registration web page or (b) the start date of any Order for purchase of the Subscription Services. Additional trial terms and conditions may appear on the trial registration web page. Any such additional terms and conditions are incorporated into this Agreement by reference and are legally binding.

ANY DATA CUSTOMER ENTERS INTO THE SUBSCRIPTION SERVICES, AND ANY CUSTOMIZATIONS MADE TO THE SUBSCRIPTION SERVICES BY OR FOR CUSTOMER, DURING A FREE TRIAL WILL BE PERMANENTLY LOST UNLESS CUSTOMER PURCHASES A SUBSCRIPTION TO THE SAME SUBSCRIPTION SERVICES AS THOSE COVERED BY THE TRIAL, OR EXPORTS SUCH DATA BEFORE THE END OF THE TRIAL PERIOD.

**NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THE AGREEMENT, DURING ANY FREE TRIAL PERIOD THE SUBSCRIPTION SERVICES ARE PROVIDED “AS IS” WITH NO WARRANTY.**

### **1. DEFINITIONS.**

1.1 “**Affiliate**” is an entity that controls, is controlled by or shares common control with BMC or Customer, where such control arises from either (a) a direct or indirect ownership interest of more than 50% or (b) the power to direct or cause the direction of the management and policies, whether through the ownership of voting stock by contract, or otherwise, equal to that provided by a direct or indirect ownership of more than

50%.

**1.2 “Subscription Services”** means the generally available hosted service which packages web-based access and the right-to-use the supported applications, installed agents and associated reference, user and technical guides.

**1.3 “Capacity”** means the amount of access to the Subscription Services purchased as specified in an Order, which is counted in accordance with the Unit of Measure described in the Order.

**1.4 “Customer Content”** means all electronic data or information (a) submitted to the Subscription Services by Customer, a third party on behalf of Customer, or as directed by Customer or (b) collected, processed or returned by the Subscription Services.

**1.5 “Order”** means (i) the agreed ordering document for the purchase of the Subscription Services, (ii) that is subject to this Agreement, and (iii) that identifies the terms of the purchase and fees to be paid. The term “Order” includes Customer’s online registration for and purchase of the Subscription Services, If any.

**1.6 “User Guide”** means the online help, functional guide and technical specifications for the Subscription Services, as updated by BMC from time to time.

**2. SCOPE.** Subject to the terms of this Agreement, Customer may purchase and BMC will provide Customer with access to the Subscription Services as set forth in this Agreement and the applicable Order. Subject to the Attachments to this Agreement, Customer may also purchase BMC Platform Services, BMC Consulting Services and BMC On Premise Subscription Services. In the event of a direct conflict between any Order and the terms of this Agreement, the terms of the Order will control only if the Order is executed by an authorized representative of each party. Each Order is deemed to be a discrete contract, separate from each other Order, unless expressly stated otherwise therein. Orders may be entered under this Agreement by and between (a) BMC or an Affiliate of BMC; and (b) Customer or an Affiliate of Customer. With respect to an Order, the terms “BMC” and “Customer” as used in this Agreement will be deemed to refer to the entities that execute that Order, the Order will be considered a two party agreement between such entities, and BMC will separately invoice the Customer named in the Order for the associated fees. Orders may also be placed via a BMC authorized reseller. Neither execution of this Agreement, nor anything contained herein, shall obligate either party to enter into any Orders.

### **3. ACCESS TO SUBSCRIPTION SERVICES.**

**3.1 Access Rights.** Subject to Customer’s payment of applicable fees and to the terms of this Agreement, BMC will provide Customer with worldwide access to the Subscription Services in accordance with the Order (i) up to the Capacity, (ii) for Customer’s and its Affiliates’ internal business operations, (iii) in accordance with the User Guide and the applicable Order. Customer may exercise its rights under this Section 3.1 through its service providers, outsourcers, employees, consultants, contractors, agents, and Affiliates (all, “Users”).

**3.2 BMC Subscription Services Support.** BMC will provide the support described at <http://www.bmc.com/support/review-policies> (“Support”) to Customer for the Subscription Services, which may be changed by BMC upon prior notice to Customer.

**3.3 Use of Subcontractors.** Customer acknowledges and agrees that BMC uses subcontractors to provide portions of the Subscription Services. BMC will provide a list of its current subcontractors upon Customer’s written request. BMC is responsible for the performance of all subcontractors providing any of the Subscription Services.

### **3.4 Customer Responsibilities and Restrictions.**

(a) Customer will (i) maintain the confidentiality of all authentications and passwords for the Subscription Services and immediately notify BMC if it becomes aware that an unauthorized party has gained access such authentications and passwords, (ii) be responsible for use of the Subscription Services by its Users in compliance with this Agreement, (iii) prevent unauthorized access to, or use of, the Subscription Services, and notify BMC promptly of any such unauthorized access or use, (iv) comply with all applicable laws in using the Subscription Services, and (v) be responsible for obtaining its own Apple Push Notification certificate, if the Subscription Services are used to manage devices running iOS. Customer is responsible for the creation and implementation of a privacy policy and end user agreement, if applicable, which will set forth the guidelines of how Customer uses and protects the data and personal information of its Users, and how said Users may utilize the Subscription Services.

(b) Customer will not (i) modify, copy or create derivative works based on the Subscription Services; (ii) create Internet "links" to or reproduce any content forming part of the Subscription Services, other than for its own internal business purposes; (iii) disassemble, reverse engineer, or decompile the Subscription Services or part thereof; (iv) interfere with or disrupt the integrity or performance of the Subscription Services; (v) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material, or send or store material in violation of any third party's privacy rights via the Subscription Services; (vi) send or store viruses or malicious code via the Subscription Services; (viii) attempt to gain unauthorized access to the Subscription Services or its related software, systems, platforms or networks, including any form of security and/or penetration testing; (ix) use any components provided with the Subscription Services separately from the Subscription Services; or (x) distribute, rent, lease or provide the Subscription Services to any third party or use it in a service bureau, outsourcing environment, or for the processing of third party data.

#### **4. FEES AND PAYMENT.**

**4.1 Fees.** The fees payable for the Subscription Services and the payment period for such fees will be set forth in and paid in accordance with the Order. All invoices are due upon receipt of invoice.

**4.2 Late Fees.** The unpaid balance of each late payment bears interest at a rate equal to the lesser of 1% per month or the maximum amount permitted by law. All fees are nonrefundable and BMC will not provide any refunds or credits for partially used periods of the Subscription Services.

**4.3 Taxes.** Customer will pay or reimburse BMC or, when required by law, the appropriate governmental agency, for taxes of any kind, including sales, use, VAT, excise, customs duties, withholding, property, and other similar taxes (other than taxes based on BMC's net income or arising from the employment relationship between BMC and its personnel) imposed in connection with the fees paid for the Subscription Services, which are exclusive of these taxes.

#### **5. TERM, SUSPENSION AND TERMINATION.**

**5.1 Term.** This Agreement begins on the Effective Date and will remain in effect unless terminated pursuant to Section 5.2 below, regardless of the billing frequency selected in the Order.

##### **5.2 Termination.**

(a) Termination for Convenience. Customer may terminate this Agreement by providing BMC with at least 30 days prior written notice; provided, however, such termination will have no effect on Orders in effect at the time of such termination. Orders may not be terminated for convenience unless otherwise specified therein. Customer may notify BMC of its intent to terminate by

emailing BMC at order\_services@bmc.com.

(b) Termination for Cause. Either party may terminate this Agreement and/or an Order for cause: (i) upon 30 days' written notice of a material breach to the other party if such breach remains uncured at the expiration of such period; or (ii) immediately if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.

**5.3 Suspension of Subscription Services for Cause.** In addition to its other rights and remedies, BMC reserves the right, without liability to Customer, to immediately suspend any and all access to the Subscription Services if Customer commits a material breach of this Agreement or any relevant Order until such material breach is cured.

**5.4 Effects of Termination.** Upon termination or expiration of any Order or this Agreement, all rights and Licenses granted thereunder will terminate and Customer will make no further use of the Subscription Services. No termination will relieve the Customer of the obligation to pay any fees accrued or payable to BMC pursuant to any Order. Upon written request by Customer made within 30 days after the effective date of termination, BMC will make the Customer Content available to Customer for retrieval in an industry standard format. After such 30-day period, BMC shall have no obligation to maintain any Customer Content and will thereafter delete Customer Content.

**5.5 Termination Assistance.** Upon Customer's request and upon (a) the expiration of an Order or (b) the termination of an Order for any reason other than Customer's breach, BMC shall perform such services as the parties in good faith agree are reasonably necessary to facilitate the orderly transition of the Services to the successor service provider or to the Customer. BMC will provide any such services under the terms and conditions of the Agreement, and subject to payment of the then-current fees and charges, generally applicable to BMC's performance of such services, as agreed between the parties at such time.

## **6. LIMITED WARRANTY.**

**6.1 Warranties and Limited Remedies.** BMC warrants to Customer that:

(a) the online availability of the Subscription Services will be maintained in accordance with the service levels attached to the applicable Order, if any (the "**Service Level Agreement**" or "**SLA**"). Customer's exclusive remedy and BMC's sole obligation for breach of the warranty in this Section 6.1(a) is described in the Service Level Agreement; and

(b) the Subscription Services (i) will perform in substantial accordance with the then-current on-line User Guide available via the Subscription Services and (ii) will be performed in a manner consistent with industry standards reasonably applicable to the provision thereof. Customer's exclusive remedy and BMC's sole obligation for breach of the warranty in this Section 6.1(b) will be BMC's use of commercially reasonable efforts to have the Subscription Services perform in substantial accordance with the User Guide, or replace the non-conforming portion of the Subscription Services within a reasonable period of time, or if BMC cannot have the Subscription Services perform in substantial accordance with the User Guide or replace the Subscription Services within such time period, then BMC will refund the amount paid by Customer for the Subscription Services, pro-rated from the date of the notice of the claim. Customer's rights and BMC's obligations in this Section 6.1(b) are conditioned upon Customer's providing BMC with written notice of the claim, a complete description of the alleged defects and a specific reference to the User Guide to which such alleged defects are contrary.

**6.2 Disclaimer.** CUSTOMER ACKNOWLEDGES THAT, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, BMC, ITS AFFILIATES AND LICENSORS MAKE NO WARRANTY, EXPRESS, IMPLIED OR STATUTORY WITH RESPECT TO THE SUBSCRIPTION SERVICES OR USE THEREOF. BMC, ITS AFFILIATES AND LICENSORS HEREBY EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY THAT SUBSCRIPTION SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR WITHOUT DELAY, AND THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE, NON-INFRINGEMENT AND INFORMATION CONTENT.

## **7. PROPRIETARY RIGHTS AND CONFIDENTIALITY.**

**7.1 Proprietary Rights.** BMC, its Affiliates or licensors retain all right, title and interest to the Subscription Services and all related intellectual property and proprietary rights. The Subscription Services are protected by applicable copyright, trade secret, industrial and other intellectual property laws. BMC owns all right, title and interest in all software, programming, documentation, templates, questionnaires, methodologies, models, charts, reports, ideas, features, content, functions, graphics and any other items provided as part of the Subscription Services ("Service Items") and access to and use of the relevant Service Items will be governed by the terms of this Agreement. Subject to (i) BMC's or its licensor's ownership of any Service Items and (ii) section 3.4 (b) (i) of the Agreement, Customer owns all rights, title, and interest in Customer Applications, including all proprietary and intellectual property rights. BMC reserves any rights not expressly granted to Customer. Customer shall not access the Subscription Services in order to build a competitive product or service or copy any ideas, features, functions or graphics of the Subscription Services. "Confidential Information" means all proprietary or confidential information that is disclosed to the recipient ("Recipient") by the discloser ("Discloser"), and includes, among other things (i) any and all information relating to products or services provided by a Discloser, its customer-related and financial information, software code, flow charts, techniques, specifications, development and marketing plans, strategies, and forecasts; (ii) as to BMC, and its licensors, the Subscription Services and Service Items; and (iii) the terms of this Agreement, including without limitation, pricing information. Confidential Information does not include information that Recipient can show: (a) was rightfully in Recipient's possession without any obligation of confidentiality before receipt from the Discloser; (b) is or becomes a matter of public knowledge through no fault of Recipient; (c) is rightfully received by Recipient from a third party without violation of a duty of confidentiality; or (d) is or was independently developed by or for Recipient. Recipient may not disclose Confidential Information of Discloser to any third party or use the Confidential Information in violation of this Agreement. The Recipient (i) will exercise the same degree of care and protection with respect to the Confidential Information of the Discloser that it exercises with respect to its own Confidential Information and (ii) will not, either directly or indirectly, disclose, copy, distribute, republish, or allow any third party to have access to any Confidential Information of the Discloser. Notwithstanding the foregoing, Recipient may disclose Discloser's Confidential Information to Recipient's employees and agents who have need to know provided that such employees and agents have legal obligations of confidentiality substantially the same (and in no case less protective) as the provisions of this Agreement.

**7.2 Notification Obligation.** If the Recipient becomes aware of any unauthorized use or disclosure of Discloser's Confidential Information, then Recipient will promptly and fully notify the Discloser of all facts known to it concerning such unauthorized use or disclosure. In addition, if the Recipient or any of its employees or agents are required (by oral questions, interrogatories, requests for information, or documents in legal proceedings, subpoena, civil investigative demand, or other similar process) to disclose any of Discloser's Confidential Information, the Recipient will not disclose the Discloser's Confidential Information without providing the Discloser with commercially reasonable advance prior written notice to allow Discloser to seek a protective order or other appropriate remedy or to waive compliance with this provision. In any event, the Recipient will exercise its commercially reasonable efforts to preserve the confidentiality of the Discloser's Confidential Information, including, without limitation, cooperating with Discloser to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded to the Confidential Information.

**7.3 Customer Content.** As between BMC and Customer, Customer owns all rights, title and interest in and to Customer Content.

Customer Content is deemed Confidential Information under this Agreement. BMC will use the Customer Content only as necessary to provide the Subscription Services in accordance with this Agreement. At any time during the term of the Subscription Services, Customer may request copies of all Customer Content from the Subscription Services. Customer is responsible for complying with all legal and contractual requirements, including its agreements with third parties. With the exception of Customer Content collected by the Subscription Services, Customer is solely responsible for the transmission of Customer Content to BMC and to the Subscription Services. Customer is solely responsible for the encryption of any Customer Content.

**7.4 Suggestions.** Customer agrees that BMC shall have a royalty-free, worldwide, transferable, sublicensable, irrevocable, perpetual license to use or incorporate into any BMC products or services any suggestions, enhancement requests, recommendations or other feedback provided by Customer relating to the Subscription Services.

## **8. DISCLAIMER OF DAMAGES AND LIMITS ON LIABILITY.**

**8.1 DISCLAIMER OF DAMAGES.** NEITHER PARTY OR ITS AFFILIATES OR LICENSORS ARE LIABLE FOR ANY, SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES RELATING TO OR ARISING OUT OF THIS AGREEMENT OR THE SUBSCRIPTION SERVICES (INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOST COMPUTER USAGE TIME, AND DAMAGE TO, OR LOSS OF USE OF, DATA), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND IRRESPECTIVE OF ANY NEGLIGENCE OF A PARTY OR WHETHER SUCH DAMAGES RESULT FROM A CLAIM ARISING UNDER TORT OR CONTRACT LAW. THE FOREGOING LIMITATIONS DO NOT APPLY TO EACH PARTY'S RESPONSIBILITIES IN SECTION 9 OR INFRINGEMENT BY A PARTY OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS.

**8.2 LIMITS ON LIABILITY.** NEITHER PARTY OR ITS AFFILIATES OR LICENSORS SHALL HAVE AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE SUBSCRIPTION SERVICES, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEEDING THE AMOUNTS ACTUALLY PAID BY AND DUE FROM CUSTOMER FOR THE SUBSCRIPTION SERVICES PURSUANT TO THE ORDER(S) GIVING RISE TO LIABILITY THAT ARE IN EFFECT AS OF SUCH DATE. THE FOREGOING LIMITATIONS DO NOT APPLY TO EACH PARTY'S RESPONSIBILITIES IN SECTION 9 OR INFRINGEMENT BY A PARTY OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS.

## **9. INFRINGEMENT CLAIMS.**

**9.1 Indemnification by BMC.** If a third party asserts a claim against Customer asserting that Customer's use of the Subscription Services, including Platform Services, Deliverables and Licenses as defined in the Attachments to this Agreement, in accordance with this Agreement violates that third-party's patent, trade secret or copyright rights ("Infringement Claim"), then BMC will, at its own expense: (a) defend or settle the Infringement Claim; and (b) indemnify Customer for any damages finally awarded against Customer based on infringement by the Subscription Services, including court costs and reasonable attorney's fees. If BMC believes the Subscription Services may violate a right, then BMC will, at its expense: (a) modify the Subscription Services, or (b) procure the right to continue using the Subscription Services, and if (a) or (b) are not commercially reasonable, terminate Customer's right to use the Subscription Services and issue a pro-rata refund for the unexpired pre-paid portion of such Subscription Services.

**9.2 Indemnification by Customer.** Subject to the terms of this Agreement, if a third party asserts a claim against BMC asserting that the (i) Customer Content, (ii) Customer Applications as defined in Attachment A, (iii) Customer Property as defined in Attachment B or (iv) Customer's use of the Subscription Services in violation of this Agreement violates that third-party's patent, trade secret or copyright rights ("Claim"), Customer will, at its own expense: (a) defend or settle the Claim; and (b) indemnify BMC for any damages finally awarded against BMC based on the Claim, including court costs and reasonable attorney's fees.

**9.3 Indemnity Process.** Neither party's obligations under this Section will apply if: (a) the indemnifying party's legal department does

not receive prompt, detailed written notice of the Infringement Claim/Claim from the party being indemnified, (b) the indemnifying party is not able to retain sole control of the defense of the Infringement Claim/Claim and all negotiations for its settlement or compromise, or (c) the indemnifying party does not receive all reasonable assistance from the party being indemnified. Neither party will bind the indemnified party to a monetary obligation in a settlement or compromise, or make an admission on behalf of the indemnified party, without obtaining that party's prior consent.

**9.4 THIS SECTION 9 CONTAINS EACH PARTY'S EXCLUSIVE REMEDIES AND THE INDEMNIFYING PARTY'S SOLE LIABILITY FOR INFRINGEMENT CLAIMS/CLAIMS, RESPECTIVELY.**

**10. EXPORT CONTROLS.** Customer represents and warrants that it: a) will comply with the United States Export Administration Regulations and other U.S. or foreign export regulations; b) no individual accessing or using the Subscription Services is a citizen of or from an embargoed country (currently Iran, Syria, Sudan, Cuba and North Korea); c) is not prohibited from receiving the Subscription Services under such regulations; d) will not acquire the Subscription Services for a person who is restricted under such regulations; e) will not use the Subscription Services in contradiction to such regulations; and f) will not use the Subscription Services for prohibited uses, including but not limited to nuclear, chemical, missile or biological weapons related end uses. For Subscription Services exported from Ireland, EC No. 428/2009 sets up a Community regime for control of exports of dual-use items and technology, and it is declared that this Subscription Services is intended for civil purposes only. Therefore, Customer agrees to comply with both the U.S. regulations and those E.U. regulations and will not export in violation of the regulations and without all proper licenses. Customer' failure to comply with these regulations will result in an automatic termination of the Agreement and all rights to the Subscription Services thereunder.

**11. GOVERNING LAW AND DISPUTE RESOLUTION.** Any controversy, dispute or claim arising out of or relating to this Agreement, or to the formation, interpretation, breach, termination, or validity thereof (each, a "**Controversy**") will be resolved as follows:

(i) **UNITED STATES.** If both parties to this Agreement are entities incorporated under the law of any state in the United States, the Controversy shall be tried in either state or federal court located in Houston, Texas and the laws of the State of Texas shall govern. Both parties hereby submit to the exclusive jurisdiction of the courts in Houston, Texas and waive all defenses based on forum non conveniens.

(ii) **EMEA.** If both parties to this Agreement are entities incorporated in countries in the Europe, Middle East, or Africa regions, the Controversy shall be tried in the District Court located in Amsterdam, the Netherlands and the substantive laws of the Netherlands shall govern. Both parties hereby submit to the exclusive jurisdiction of the District Court in Amsterdam, the Netherlands and waive all defenses based on forum non conveniens.

(iii) **ASIA PACIFIC.** If both parties to this Agreement are entities incorporated in countries in the Asia Pacific region, the arbitration shall be held in Singapore under the then-applicable rules of the Singapore International Arbitration Centre and the substantive laws of Singapore will govern.

(iv) **OTHER REGIONS.** In all other instances, the arbitration shall be held in New York City, New York, under the then-applicable international rules of the American Arbitration Association and the substantive laws of the State of Texas will govern.

For all arbitrations conducted hereunder: (a) the arbitration shall be conducted in English; (b) the relevant arbitral institution shall determine the number of arbitrators, but any Controversy in which the amount in dispute is greater than \$10 million USD shall be decided by three arbitrators, with each party having the right to select one arbitrator; (c) the costs of such arbitration shall be borne equally, pending the arbitrator's award; (d) the arbitration award rendered shall be final and binding on the parties, shall not be subject to appeal to any court and shall be enforceable in any court having jurisdiction over the parties; (e) the arbitration proceedings, award and pleadings shall all be confidential, unless disclosure of particular information is required for purposes of enforcing/challenging the award or to meet local securities law requirements; and (f) the party prevailing in arbitration shall be entitled to recover its reasonable attorneys' fees and the necessary costs incurred in connection with the arbitration.

The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. Nothing in this Agreement shall be deemed as preventing either party from seeking immediate injunctive relief from any court having jurisdiction over the parties and the subject matter of the dispute.

**12.** The following BMC contracting entities apply to this Agreement:

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Region	Contracting Entity	Address of Contracting Entity
United States and Latin America South (not a specified Central or South America country below)	BMC Software, Inc.	2103 CityWest Boulevard, Houston, Texas 77042
Canada	BMC Software Canada Inc.	50 Minthorn Boulevard, Suite 200 Markham, Ontario L3T 7X8 Canada
EMEA (Europe, Middle East and Africa)	BMC Software Distribution B.V.	Boeing Avenue 245, 1119 PD Schiphol Rijk, The Netherlands
Brazil	BMC Brasil Software Ltda.	Avenida Dra. Ruth Cardoso, n° 8.501, Condomínio Eldorado Business Tower, 22° andar, Pinheiros, São Paulo – SP, CEP: 05425-070
Mexico	BMC Software Distribution de México, S.A. de C.V.	Volcán 150, Piso 4, Col. Lomas de Chapultepec, C.P. 11000, Deleg. Miguel Hidalgo, Ciudad de México
Argentina	BMC Software de Argentina S.A.	Ing. Butty 220 - Piso 18, Catalinas Plaza Buenos Aires, República de Argentina, C1001A
S.E.A (Southeast Asia), Australia, New Zealand, Hong Kong, Taiwan	BMC Software Asia Pacific Pte Ltd	600 North Bridge Road, #20-01/10 Parkview Square, Singapore 188778
China	BMC Software (China) Limited	Room 502, Level 5, Tower W1, The Towers, Oriental Plaza, No. 1 East Chang An Ave., Dong Cheng Dist., Beijing 100738, China
Japan	BMC Software K.K.	Harmony Tower 24th Floor, 1-32-2 Honcho, Nakano-ku, Tokyo, 164-8721
Korea	BMC Software Korea Ltd	24th Fl., ASEM Tower, 1517, Yeongdong-daero, Gangnam-gu, Seoul 135-798, Korea South

**13. U.S. FEDERAL ACQUISITIONS.** This Section applies only to acquisitions of the commercial Subscription Services and Documentation subject to this Agreement by or on behalf of the United States Government, or by any prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement or other activity with the United States Government. In the event the Subscription Services are delivered to the United States Government, the United States Government hereby agrees that the Subscription Services qualify as “commercial items” within the meaning of the Federal acquisition regulation(s) applicable to this procurement. The terms and conditions of this Agreement shall pertain to the United States Government’s use and disclosure of the Product, and shall supersede any conflicting contractual terms and conditions. The following additional statement applies only to acquisitions governed by DFARS Subpart 227.4 (October 1988): “Restricted Rights – Use, duplication and disclosure by the

Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 (Oct. 1988).”

**14. DATA PROTECTION.** The processing of Customer Content under this Agreement is governed by the BMC Data Processing Agreement set forth on the Order.

**15. VERIFICATION.** Customer agrees that BMC or its agent may monitor the Subscription Services to ensure Customer’s compliance with the terms of this Agreement. If such monitoring reveals that Customer has exceeded the Capacity for the Subscription Services, Customer agrees to pay the applicable fees for additional capacity upon receipt of an invoice from BMC.

**16. MISCELLANEOUS TERMS.** BMC is not liable for its failure to perform any of its obligations under this Agreement during any period in which performance is delayed by Customer or circumstances beyond BMC's reasonable control. The parties are independent contractors and this Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties. Customer will receive system notifications from BMC and its licensors, if applicable (i.e. planned downtime notices, etc). This Agreement, including the Attachments and Orders constitutes the entire agreement between Customer and BMC and supersedes any prior or contemporaneous negotiations or agreements, whether oral or written concerning the Subscription Services. There are no representations, promises, warranties, covenants, or undertakings between the parties other than those expressly set forth in this Agreement. There are no third-party beneficiaries to this Agreement; Customer is not entering into a contractual relationship with BMC’s licensors and BMC’s licensors have no liability to Customer. Except as provided in Section 2 above, no modification or waiver of any provision hereof will be effective unless made in a writing signed by both BMC and Customer. Customer may not assign or transfer this Agreement or the Subscription Services to a third party, whether by merger, operation of law, or otherwise. Should any provision of this Agreement be invalid or unenforceable, the remainder of the provisions will remain in effect. Any additional or conflicting terms of any Customer purchase order are rejected by BMC and do not apply. The Subscription Services may contain hyperlinks to websites controlled by parties other than BMC. BMC is not responsible for and does not endorse the content or accept any responsibility for Customer’s use of these websites. Customer should refer to the policies posted by other websites regarding privacy and other topics regarding data privacy before using them.

<b>Attachments incorporated into Agreement</b>
Attachment A – Platform Services Attachment
Attachment B – Consulting Services Attachment
Attachment C – On Premise Subscription Services Attachment

**ATTACHMENT A**

**PLATFORM SERVICES ATTACHMENT**

**to the**

**BMC CLOUD SERVICES MASTER AGREEMENT**

Except as otherwise provided herein, the terms of the Cloud Services Master Agreement (the “**Base Agreement**”) are incorporated into this Platform Services attachment (the “**Attachment**”). Together, this Attachment and the Base Agreement (as incorporated into this Attachment) are referred to as the “Agreement” for purposes of Customer’s access and use of Platform Services, only if the Platform Services are set forth on an Order referencing the Base Agreement. For purposes of this Agreement, the term “Subscription Services” as defined in the Base Agreement shall be extended to include the Platform Services. In the event of a conflict between the Base Agreement and the terms of this Attachment, the terms of this Attachment will control for Customer’s access and use of the Platform Services only.

**1. SCOPE.** Subject to the terms of this Agreement, BMC will provide Customer with access to the Platform Service named in the

applicable Order. Customer may only use the Platform Services to store, retrieve, query, serve, and process Customer Content that is owned, licensed or lawfully obtained by Customer. As part of Customer's subscription to the Platform Services, Customer may be allowed to run certain Applications on the Platform Services that are either (i) sold by BMC, (ii) sold by a Third Party Publisher, or (iii) owned or licensed by Customer.

## **2. DEFINITIONS.**

**2.1 "Application"** is the object code, its definitional structures, and data created to fulfill a particular purpose, which runs on the Platform Services. An Application may also include its documentation and User Guide.

**2.2 "BMC Application Services"** means a generally available Application that is provided as a subscription by BMC to customers, including all items delivered by BMC to Customer under Support related to such Application.

**2.3 "Customer Applications"** means Applications that are owned or licensed by Customer, not including any Third Party Applications, and which run on the Platform Services.

**2.4 "Customer Content"** means all information uploaded or entered by Customer to the Platform Services, excluding Customer Applications.

**2.5 "Development Platform"** means a BMC provided development platform which allows Customer to develop a custom application to run on the Platform Services. The Development Platform is a separate environment from the Platform Services.

**2.6 "Platform Services"** means the generally available BMC-provided platform specified on the Order and its capabilities to run Applications. The specific Platform Services being will be identified in the Order.

**2.7 "Third Party Applications"** means Applications that are owned by a Third Party Publisher with a valid independent software vendor agreement in place with BMC, and are licensed by said Third Party Publisher to customers.

**2.8 "Third Party Publisher"** means a party other than BMC or a BMC Affiliate that is the owner and licensor of a Third Party Application, and has a valid independent software vendor agreement in place with BMC. For the sake of clarity, Customer is informed that Third Party Publishers are not BMC Subcontractors.

## **3. BMC PLATFORM SERVICES.**

**3.1 BMC Platform Services Support.** BMC will provide Support only for Platform Services and BMC Application Services. Customer is responsible for its own support for Customer Applications and Third Party Applications.

**3.2 Notifications to Customer.** Any general notifications from BMC Operations to Customer will be sent to the Customer contact stated in the Customer Technical Contact Information section of the Order. The Customer contact in the Order has been assigned by Customer as the Customer contact for operational issues that may arise. Customer shall notify BMC of any change to the Customer contact details in writing, which may include via e-mail.

**3.3 Subcontractors.** For the sake of clarity, Customer is informed that Third Party Publishers are not BMC Subcontractors.

**3.4 Customer Responsibilities.** In addition to the Customer Responsibilities set forth in the Base Agreement, Customer may not (i) transfer an Application outside of the Platform Services; or (ii) tamper with or circumvent any controls or make unauthorized copies of a BMC Application.

## **4. CUSTOMER APPLICATIONS AND THIRD PARTY APPLICATIONS.**

**4.1** Any Third Party Applications or Customer Applications that run on the Platform Services are hereby

excluded from the defined terms “Subscription Services”, “BMC Application Services” and “Platform Services”. Such Third Party Applications are governed by the terms provided with the Third Party Applications, and are by and between Customer and the applicable Third Party Publisher. Customer and Third Party Publishers shall agree upon their respective obligations with respect to the processing of personal data by Third Party Publishers. Customer acknowledges and agrees that this Agreement does not govern Customer’s subscription, use and access of any Third Party Applications or Customer Applications, and said Third Party Applications and Customer Applications are specifically excluded from this Agreement.

**4.2** Customer may utilize the Development Platform to create an Application to run on the Platform Services. Customer’s use of the Development Platform is governed by the terms of this Agreement subject to the restrictions set forth in sections 4.2.1 to 4.2.6 below. Customer’s development of an Application must meet the best practices development guidelines set forth in the User Guide. Each Customer Application shall at all times materially conform to policies and best practices set forth in the User Guide. Prior to the deployment of any Customer Applications in a production or non-production environment of the Platform Services, Customer must conduct security and functional tests of each Customer Application and submit the results of such tests to BMC for review. BMC reserves the right to reject Customer’s deployment request of a Customer Application based on the results of Customer’s security and functional tests. Additionally, BMC reserves the right, during the term of this Agreement, to request Customer conduct additional security and functional tests and provide the results of said tests to BMC for review. Notwithstanding the foregoing, Customer must ensure that at all times Customer Applications are secure.

**4.2.1 Scope of use.** The right to access and use the Development Platform is granted solely for the purpose of performing non-production application development work on the Development Platform.

**4.2.2 Restrictions of use.** Customer agrees not to:

- (i) use the Development Platform to (1) process production data or for any other production purposes, including but not limited to publishing digital applications, or (2) distribute applications;
- (ii) use the Development Platform with data or information that has not been backed up; or
- (iii) modify, delete or remove any ownership, title, trademark, patent or copyright notices.

**4.2.3 Customer Responsibilities.** Customer is responsible for acquiring all necessary and required licenses for the use of any third party software, source code and/or libraries Customer may use as part of its development with the Development Platform. In addition to its other rights and remedies, BMC reserves the right, without liability to Customer, to immediately, at any time and for any reason refresh Customer’s instance of the Development Platform. Upon BMC’s refreshing of Customer’s instance of the Development Platform, Customer may lose all Customer Content submitted to or stored in said instance of the Development Platform. Upon expiration or termination of the applicable Order, BMC may destroy any Customer Content submitted to or stored therein. Customer is responsible for backing up any development work with Customer Content outside of the Development Platform.

**4.2.4 Open Source.** Customer may not use any software, library, utility, tool, or other computer or program code (“**Code**”) with the Subscription Services that in any way that would (i) weaken BMC’s intellectual property rights in the Services, or (ii) require the Subscription Services to become or be disclosed or distributed as Open Source Software. For purposes of this Section, “**Open Source Software**” means any Code that is substantially similar to, (A) the Affero General Public License, (B) the GNU

General Public License (GPL) or Lesser/Library GPL (LGPL), (C) the Artistic License (e.g. PERL), (D) the Mozilla Public License, (E) the Netscape Public License, (F) the Sun Community Source License (SCSL), (G) the Sun Standards License (SISL), or (H) any “copyleft” license, or any other license that requires as a condition of use, reproduction, modification, or distribution that such Code or other software or computer code distributed with it: (1) be disclosed or distributed in source code form; (2) be licensed for the purpose of creating derivative works; (3) be licensed under terms that allow reverse engineering, reverse assembly, or disassembly of any kind; (4) be subject to a patent non-assert or royalty-free patent license; or (iv) be redistributable at no charge.

**4.2.5 No Support.** BMC, its affiliates, or licensors do not provide Support for the Development Platform.

**4.2.6 Disclaimer of Warranty, Limitation of Liability and Exclusive Remedy.** Notwithstanding anything to the contrary in the applicable Order or this Agreement:

a. THE DEVELOPMENT PLATFORM IS PROVIDED “AS IS” WITHOUT ANY WARRANTY OF ANY KIND WHATSOEVER. BMC, ITS AFFILIATES AND LICENSORS DO NOT WARRANT THAT THE DEVELOPMENT PLATFORM WILL SATISFY CUSTOMER’S REQUIREMENTS, THAT THE DEVELOPMENT PLATFORM IS WITHOUT DEFECT, VIRUS OR ERROR FREE, WITHOUT DELAY, OR THAT THE OPERATION OF THE DEVELOPMENT PLATFORM WILL BE UNINTERRUPTED. BMC, ITS AFFILIATES AND LICENSORS DISCLAIM ANY AND ALL REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED OR STATUTORY, MADE WITH RESPECT TO THE DEVELOPMENT PLATFORM, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE AND INFORMATION CONTENT; AND

b. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY, FOR ANY CLAIM, LOSS, DAMAGE OR EXPENSE FOR INDIRECT, SPECIAL, CONSEQUENTIAL, PUNITIVE OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE DEVELOPMENT PLATFORM (INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOST COMPUTER USAGE TIME, AND DAMAGE TO, OR LOSS OF USE OF, DATA), EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EITHER PARTY’S ENTIRE LIABILITY AND THE OTHER PARTY’S EXCLUSIVE REMEDY FOR DIRECT DAMAGES ARISING OUT OF OR RELATED TO THE DEVELOPMENT PLATFORM, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, IS LIMITED TO \$100.

**4.3 License to Customer Applications.** Subject to the terms and conditions of this Agreement, Customer hereby grants BMC a worldwide, limited, nonexclusive license during the term of the applicable Order for the Platform Services to host, copy, transmit, adapt and display Customer Applications solely for the purpose of fulfilling BMC’s obligations under this Agreement.

**4.4 Functionality of Customer Applications.** Customer is solely responsible for the operation of Customer Applications, including but not limited to any information stored in or transmitted by Customer Applications. Customer is responsible for monitoring the usage of each Customer Application. Customer is responsible for the configuration, functionality, performance, compliance with applicable data protection laws and security of all Customer Applications, including any interfaces used to connect to Customer Applications.

**4.5 Use of Customer Applications.** Customer has sole responsibility for the accuracy, quality, integrity, legality, reliability, and appropriateness of Customer Applications and all Customer Content entered therein by Customer, its Users or on Customer’s behalf, the means by which Customer acquired such Customer Content, and the use of such Customer Content. Without limiting Customer’s obligations under the terms of this Agreement, Customer must (i) provide any necessary notice to, and obtain any necessary consent from, Users for the collection, use, transfer, and storage of Customer Content (including by BMC), and (b) collect, use, transfer, and store Customer Content in accordance with any privacy notice you provide, and all applicable

laws.

**4.6 Use of Third Party Applications.** Customer is responsible for monitoring its usage of each Third Party Application, and such Third Party Publisher's usage and license compliance is governed by the terms of the agreement entered into between Customer and the Third Party Publisher. Customer is responsible for all applicable fees associated with Customer's use of Third Party Applications. Please note, Customer's usage of such Third Party Applications may incur additional license fees between Customer and the applicable Third Party Publisher, as well as additional Platform Services fees.

**4.7** Customer will provide information or other materials related to a Customer Applications as reasonably requested by BMC to verify Customer's compliance with the Agreement and the User Guide. BMC may monitor Customer Applications and Third Party Applications running on the Platform Services to verify Customer's compliance with the Agreement. Customer will not block or interfere with BMC's monitoring. Customer will cooperate with BMC to identify the source of any problem with the Platform Services that BMC reasonably believes may be attributable to Customer Applications or Third Party Applications, or any Customer Content.

**4.8** If BMC reasonably believes any Customer Content, Customer Applications or Third Party Applications violates the law, infringes or misappropriates the rights of any third party or otherwise violates a material term of the Agreement (including the User Guide) ("**Prohibited Content**"), BMC will notify Customer of the Prohibited Content and may request that such content be removed from the Platform Services or access to it be disabled. If Customer does not remove or disable access to the Prohibited Content within two (2) business days of BMC's notice, BMC may remove or disable access to the Prohibited Content or suspend the Platform Services to the extent BMC is not able to remove or disable access to the Prohibited Content. Notwithstanding the foregoing, BMC may remove or disable access to any Prohibited Content without prior notice in connection with illegal content, where the content may disrupt or threaten the Platform Services, pursuant to the Digital Millennium Copyright Act or as required to comply with law or any judicial, regulatory or other governmental order or request. In the event that BMC removes content without prior notice, BMC will provide prompt notice to Customer unless prohibited by law.

**4.9** Customer's use of the Platform Services, BMC Application Services, Customer Applications and/or Third Party Applications may be immediately suspended and/or terminated due to (i) reasonable security threats regarding the Platform Services, Customer Applications or Third Party Applications, (ii) Customer Applications or Third Party Applications interfering with, disrupting or threatening the integrity or performance of the Subscription Services and/or the Platform Services or BMC Application Services, or (iii) a third party's claim that Customer Applications or Third Party Applications may violate applicable law or third party rights. In the event of (i) or (ii) above apply to Customer Applications, Customer is required to remediate any such issue to BMC's commercially reasonable satisfaction before use of Customer Applications can resume.

**4.10** Customer's access to Third Party Applications may be immediately suspended and/or terminated by BMC at the direction of the Third Party Publisher. Customer acknowledges and understands that access to Customer Applications and/or Third Party Applications used in connection with the Platform Services may be suspended due to Customer's non-payment to BMC for use and access to the Platform Services or other breach of this Agreement. In no case will any such suspension or termination under the terms of this Agreement give rise to any BMC liability to Customer for a refund or other compensation.

**4.11** Except with regard to applicable data protection laws, BMC takes no responsibility with regard to Customer Content (i) processed by Third Party Publishers and/or (ii) through the use by Customer of Third Party Applications.

**4.12** BMC may conduct periodic security evaluations of all Customer Applications, which may include security review, a qualitative assessment involving review of a completed questionnaire, and an interview with appropriate Customer personnel. BMC conducts such security evaluations for its own benefit and Customer may not rely on the successful results of such evaluation. BMC may conduct such testing itself or, subject to the confidentiality obligations set forth in the Agreement, through a third party. BMC will provide reasonable notice to Customer before starting such testing. BMC will also cooperate reasonably with Customer to minimize the effects of such

testing on Customer's business and operations. Customer agrees to cooperate reasonably with such testing. Despite the foregoing, such testing may in rare cases cause downtime or other adverse effects on Customer Applications, Third Party Applications, the Platform Services or other BMC Application Services used by Customer. Any nonpublic information to which BMC obtains access in the course of such security testing will be considered Customer's Confidential Information.

4.13 Customer Responsibilities. Customer's obligations set forth in section 3.4 (a) of the Base Agreement shall apply in full to Platform Services, Customer Applications and Third Party Applications.

**5. WARRANTIES.** Customer warrants to BMC that: (a) each Customer Application will perform materially in accordance with the User Guide; (b) Customer owns all right, title, and interest in and to Customer Content, including but not limited to any Customer Content uploaded or entered into Customer Applications or Third Party Applications; (c) Customer has the necessary rights to use and access any Customer Applications and Third Party Applications deployed in a production or non-production environment of the Platform Services; (d) Customer has all rights in the Customer Content and Customer Applications necessary to grant the rights contemplated by this Agreement; (e) none of the Customer Content or Customer Applications or Users' use of Customer Content or Customer Applications will violate the Agreement and the User Guide; (f) Customer's security and functional tests of Customer Applications was conducted in a commercially reasonable manner and the results of said tests provided to BMC for review are correct and valid; and (g) none of the Third Party Applications or Users' use of Third Party Applications will violate the Agreement or the User Guide.

## **ATTACHMENT B**

### **CONSULTING SERVICES ATTACHMENT**

**to the**

### **BMC CLOUD SERVICES MASTER AGREEMENT**

Except as otherwise provided herein, the terms of the Cloud Services Master Agreement (the "**Base Agreement**") are incorporated into this Consulting Services attachment (the "**Attachment**"). Together, this Attachment and the Base Agreement (as incorporated into this Attachment) are referred to as the "**Agreement**" for purposes of Customer's purchase of Consulting Services, only if Consulting Services are set forth on an Order referencing the Base Agreement. For purposes of this Agreement, the term "Subscription Services" as defined in the Base Agreement shall be extended to include Consulting Services. In the event of a conflict between the Base Agreement and the terms of this Attachment, the terms of this Attachment will control for Customer's purchase of Consulting Services only. The parties agree that the following Sections of the Base Agreement do not apply to the Consulting Services provided under this Attachment: Section 3.2 (Support), Section 4 (Fees and Payment), and Section 6 (Limited Warranty).

1. **SCOPE.** BMC agrees to render to Customer Consulting Services under the terms of this Agreement and as further described in an Order. BMC will render the Consulting Services in the location(s) as set forth in the Order. The performance of the Consulting Services will not relieve or alter the rights, obligations and responsibilities of Customer and of the BMC Affiliate providing Subscription Services and/or Licenses with respect to Subscription Services and/or Licenses under the applicable agreement in.

2. **SERVICE FEES AND EXPENSES.** The fees payable to BMC for the Consulting Services to be rendered will be detailed in the Order. BMC will submit invoices to Customer for such fees and incurred expenses either upon completion of the Consulting Services, or at stated intervals, in any case in accordance with the applicable Order. Customer shall pay amounts invoiced within 30 days following receipt of the invoice.

3. **EDUCATION.** Customer may acquire Learning Pass Credits and Education Services (collectively, "**BMC Education**") on a Order. The BMC Education terms that govern such Orders are set forth in the Education Program Guide located at <https://www.bmc.com/content/dam/bmc/education/education-program-guide.pdf>, and is incorporated herein by this reference.

**4. STATEMENTS OF WORK.** Consulting Services may require the execution of a Statement of Work, in which case, such Statement of Work will be considered an Order for Consulting Services. In the event of any conflict between the terms of a Statement of Work and this Agreement, the Agreement shall prevail except for matters of service fees, payment and reimbursement of expense, and termination of Consulting Services if further specified in the Statement of Work. During the term of an applicable Statement of Work, and for a period of six months thereafter, neither party will solicit for employment any employees, agents, or subcontractors of the other party or its affiliates who, within six months prior to such solicitation, had contact with the soliciting party based in whole or in part upon Consulting Services provided under this Agreement. The restrictions in this section shall be deemed not to apply to general solicitations for employment posted on Internet job sites or printed in newspapers or trade or professional journals.

**5. PROPRIETARY RIGHTS AND RIGHTS IN DELIVERABLES.**

**5.1 Ownership of Materials Used in the Consulting Services.** Unless specifically provided in an Order, Customer shall supply all of the facilities; equipment; supplies; computer programs; information about Customer's business, systems, software and needs; and other materials necessary for completion of the Consulting Services ("**Customer Property**"), and BMC shall supply the people described in the Order, the know-how and the tools necessary to provide the Consulting Services, which may include, among other things, software, templates, questionnaires, graphs, methodologies, models, charts and reports ("**BMC Property**"). Customer Property and copies and modifications of Customer Property will remain the sole property of Customer or if applicable, Customer's licensors, and BMC Property and copies and modifications of BMC Property will remain the sole property of BMC or if applicable, BMC's licensors. Customer hereby grants to BMC a royalty-free, paid-up, non-exclusive, non-sublicensable and non-transferable license to use the Customer Property for the purpose of providing the Consulting Services.

**5.2 Deliverables.** Deliverables are those created under the Order, including, but not limited to, software, software scripts, routines, libraries or other code, or appliances, methodologies, templates, tools, policies, records, working papers, reports, methodologies, know-how, data, or other intellectual property, written or otherwise, including any derivative works or modifications to the above, whether pre-existing or created during the performance of the Consulting Services and all proprietary and intellectual property rights embedded therein delivered as a result of the Consulting Services as specified under the Order. BMC owns all right, title and interest in the Deliverables. Provided Customer has paid in full for the Consulting Services that resulted in the Deliverables, BMC will deliver the Deliverables to Customer in accordance with the applicable Order. Subject to compliance with the terms of this Agreement and the applicable Order, BMC grants Customer a non-exclusive, non-transferable, non-sublicensable, royalty-free, paid-up license to use, create derivative works of and modify all Deliverables solely for its internal business operations.

**5.3 Copyright Notice.** Each party agrees to reproduce the copyright notice and any other legend or ownership notice on any copies made under the licenses granted pursuant to this Section 5.

**5.4 Retention.** Customer acknowledges that BMC provides similar services to other customers and that nothing in this Agreement shall be construed as operating to prevent BMC from carrying on such business. Further BMC may use ideas, concepts, or know-how developed or acquired by BMC during performance of the Consulting Services to the extent acquired by BMC's personnel as impressions and general learning.

**6. LIMITED WARRANTY.** BMC warrants that it will perform the Consulting Services in conformance with generally accepted practices within the software services industry and in accordance with the Order. Customer must notify BMC of any breach of this warranty no later than 90 days after completion of the Consulting Services under the Order. Customer's exclusive remedy and BMC's entire liability under this warranty shall be for BMC to re-perform any non-conforming portion of the Consulting Services within a reasonable period of time, or if BMC cannot remedy the breach during such time period then refund the portion of the fee attributable to such non-conforming portion of the Consulting Services under the Order. This warranty will not apply to the extent Customer, its contractors or agents have modified any Deliverable, unless otherwise authorized by BMC in writing.

**THIS WARRANTY AND CONDITION IS IN LIEU OF ALL OTHER WARRANTIES AND CONDITIONS. THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

**7. INSURANCE.** BMC will provide and maintain the following insurance, but only for losses arising out of BMC's provision of Consulting Services under this Attachment:

7.1 Worker's Compensation insurance as prescribed by the law of the state applicable to the employees performing the Consulting Services;

7.2 Employer's Liability insurance with a limit of one million US dollars (\$1,000,000) for each occurrence;

7.3 Commercial General Liability insurance with one million US dollars (\$1,000,000) per occurrence combined single limit and five million US dollars (\$5,000,000) general aggregate, including coverage for Products Liability and Completed Operations;

7.4 Automobile Liability insurance, including coverage for Hired and Non-owned vehicles of one million US dollars (\$1,000,000) for combined single limit for bodily injury and/or property damage; and

7.5 Professional Liability insurance covering Errors and Omissions in the amount of one million US dollars (\$1,000,000) for each occurrence and in the aggregate associated with Consulting Services performed under this AGREEMENT.

8. **MUTUAL INDEMNITY**. Each party shall indemnify and hold harmless the other party from all claims, liabilities or expenses for physical damage to real property or tangible personal property and bodily injury, including death, to the extent caused by the gross negligence or willful misconduct of the indemnifying party's employees or contractors arising out of this Agreement and while at the Customer's premises. The foregoing indemnities are contingent upon the party seeking indemnity giving prompt written notice to the indemnifying party of any claim, demand or action, and cooperating with the indemnifying party in the defense or settlement of any such claim, demand or action.

9. **INDEPENDENT CONTRACTOR**. All of the services performed by BMC under this Agreement will be performed as an independent contractor.

## **ATTACHMENT C**

### **ON PREMISE SUBSCRIPTIONS ATTACHMENT**

**to the**

### **BMC CLOUD SERVICES MASTER AGREEMENT**

Except as otherwise provided herein, the terms of the Cloud Services Master Agreement (the "**Base Agreement**") are incorporated into this On Premise Subscriptions attachment (the "**Attachment**"). Together, this Attachment and the Base Agreement (as incorporated into this Attachment) are referred to as the "**Agreement**" for purposes of Customer's purchase and ongoing use of On Premise Subscriptions, only if On Premise Subscriptions are set forth on an Order referencing the Base Agreement. For purposes of this Agreement, the term "Subscription Services" as defined in the Base Agreement shall be extended to include On Premise Subscriptions. In the event of a conflict between the Base Agreement and the terms of this Attachment, the terms of this Attachment will control for Customer's purchase of On Premise Subscriptions only. The parties agree that the following Sections of the Base Agreement do not apply to the On Premise Subscriptions provided under this Attachment: Section 3.1 (Access Rights), Section 3.4 (Customer Responsibilities and Restrictions), Section 6 (Limited Warranty) and Section 14 (Verification).

#### **1. DEFINITIONS**

1.1 "**Documentation**" means the technical publications relating to the software, such as release notes, license entitlement descriptions, reference, user, installation, systems administrator and technical guidelines, included with the On Premise Subscription.

1.2 "**Licensed Capacity**" is the amount of each On Premise Subscription licensed as established in the Order.

1.3 "**On Premise Subscription**" is the object code of the software and all accompanying Documentation delivered to Customer, including all items delivered by BMC to Customer under Support.

2. **LICENSE**. Subject to the terms, conditions, payment requirements and restrictions set forth in this Agreement, BMC grants Customer a non-exclusive, non-transferable, non-sub-licensable term license to install in the Territory, access and use the On Premise Subscription during the term specified on the Order (i) up to the Licensed Capacity, (ii) for Customer's and its Affiliates internal business operations, (iii) in accordance with the Documentation and the applicable Order, and (iv) make one copy of the On Premise

Subscription for archival purposes only (collectively a "**License**"). Affiliates may use and access the On Premise Subscriptions under the terms of this Agreement, and Customer is responsible for its Affiliates compliance with the terms of this Agreement.

**3. RESTRICTIONS.** Customer will not: (a) copy, operate or use any On Premise Subscription in excess of the applicable Licensed Capacity or other than as set forth in the License above; (b) modify, delete or remove any ownership, title, trademark, patent or copyright notices ("**Identification**") from any On Premise Subscription, or copy or partial copy of an On Premise Subscription; (c) disassemble, reverse engineer, decompile or otherwise attempt to derive any On Premise Subscription source code from object code, except to the extent expressly permitted by applicable law despite this limitation without possibility of contractual waiver; (d) distribute, rent, lease, sublicense or provide the On Premise Subscription to any third party; (e) use the On Premise Subscriptions in an outsourcing or service bureau environment on behalf of non-Affiliate third parties, or allow the On Premise Subscriptions to be used by an outsourcing or service bureau provider on Customer's behalf; (f) provide a third party with the results of any functional evaluation, or performance tests, without BMC's prior written approval; or (g) attempt to disable or circumvent any of the licensing mechanisms within the On Premise Subscription.

**4. ON PREMISE SUBSCRIPTION PERFORMANCE WARRANTY.** BMC warrants that (a) the On Premise Subscription will perform in substantial accordance with its Documentation for a period of one year from the date of the first Order, (b) BMC has used commercially reasonable efforts consistent with industry standards to scan for and remove software viruses, and (c) other than passwords that may be required for the operation of the On Premise Subscription, BMC has not inserted any code that is not addressed in the Documentation and that is designed to delete, interfere with or disable the normal operation of the On Premise Subscription in accordance with the License. This warranty will not apply to any problems caused by hardware, Computers, or software other than the On Premise Subscription, or misuse of the On Premise Subscription, use of the On Premise Subscription other than as provided by the applicable License, modification of the On Premise Subscription, or claims made either outside the warranty period or not in compliance with the notice and access requirements set forth below. No warranty is provided for additional Licensed Capacity, On Premise Subscription provided pursuant to Support. BMC's entire liability, and Customer's exclusive remedy, for breach of the above warranty is limited to: BMC's use of commercially reasonable efforts to have the On Premise Subscription perform in substantial accordance with its Documentation, or replacement of the non-conforming On Premise Subscription within a reasonable period of time, or if BMC cannot have the On Premise Subscription perform in substantial accordance with its Documentation replace the On Premise Subscription within such time period, then BMC will refund the amount paid by Customer for the License for that On Premise Subscription. Customer's rights and BMC's obligations in this Section are conditioned upon Customer's providing BMC during the warranty period (i) full cooperation and access to the On Premise Subscription in resolving any claim; and (ii) written notice addressed to the BMC Legal Department that includes notice of the claim, a complete description of the alleged defects sufficient to permit their reproduction in BMC's development or support environment, and a specific reference to the Documentation to which such alleged defects are contrary.

**EXCEPT FOR THE EXPRESS WARRANTIES IN THIS ATTACHMENT, THE ON PREMISE SUBSCRIPTION IS PROVIDED WITH NO OTHER WARRANTIES WHATSOEVER, AND BMC, ITS AFFILIATES AND LICENSORS DISCLAIM ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. BMC DOES NOT WARRANT THAT THE OPERATION OF THE ON PREMISE SUBSCRIPTION WILL BE UNINTERRUPTED OR ERROR FREE, OR THAT ALL DEFECTS CAN BE CORRECTED.**

**5. DELIVERY.** For On Premise Subscriptions that are delivered electronically, upon request from BMC, Customer agrees to provide BMC with documentation supporting that the designated On Premise Subscription was received electronically. If Customer accepts any On Premise Subscription in a non-electronic format, there may be an additional charge and it is the sole responsibility of Customer to bear any sales/use tax obligation, penalties, and interest. All On Premise Subscriptions are licensed FCA ("Free Carrier" as per Incoterms 2000) shipping point. The On Premise Subscriptions are accepted on the date BMC delivers the On Premise Subscription to the Customer either physically or by providing access codes for electronic download, whichever occurs first, however, such acceptance will not affect the On Premise Subscription Performance Warranty provided in this Agreement.

**6. AUDIT.** If requested by BMC, and not more than once a year, Customer agrees to deliver to BMC, within 30 days of such request, as specified by BMC either (a) periodic product usage reports generated from specific products or (b) written periodic product usage reports, to be provided solely when the product does not generate reports ("**Report**"). Additionally, if requested by BMC not more than once a year, Customer agrees to

allow BMC to perform an audit ("**Audit**") at the locations where the On Premise Subscriptions are installed, during normal business hours to ensure compliance with the terms of this Agreement. Customer agrees to cooperate during any such Audit and to provide reasonable access to its information and systems. If an Audit or Report reveals that Customer has exceeded the Licensed Capacity for a On Premise Subscription, Customer agrees to pay the applicable fees for additional capacity upon receipt of invoice. If the understated capacity exceeds 5% of the Licensed Capacity of the applicable On Premise Subscription, then Customer agrees to also pay BMC's reasonable costs of conducting the audit.