



BMC ONDEMAND SUBSCRIPTION SERVICES AGREEMENT

THIS BMC ONDEMAND SUBSCRIPTION SERVICES AGREEMENT ("**AGREEMENT**") GOVERNS YOUR PURCHASE AND ONGOING USE OF THE BMC 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 SERVICES.

You may not access the BMC Subscription Services if you are BMC's direct competitor, except with BMC's prior written consent. In addition, you may not access the BMC 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 May 24, 2016. 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 16 ("**BMC**"). It is effective between Customer and BMC as of the date of your acceptance of this Agreement ("**Effective Date**").

1. **SCOPE.** Subject to the terms of this Agreement, BMC will provide Customer with access to the BMC Subscription Service named in the applicable Order and any other Additional Services ordered pursuant to this Agreement (together, the "**Services**"). One or more BMC Subscription Service may be purchased pursuant to an Order referencing this Agreement. Each Order is deemed to be a discrete contract, separate from each other Order, unless expressly stated otherwise therein, and 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. 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 of the Services.
2. **DEFINITIONS.**
 - 2.1 "**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%.
 - 2.2 "**BMC Subscription Service**" means a hosted service which packages web-based access and the right-to-use the functionality of the applications. The specific BMC Subscription Service(s) being purchased by Customer will be identified in the Order (defined below).
 - 2.3 "**Capacity**" means the amount of access to the BMC Subscription Services purchased as specified in an Order, which is counted in accordance with the Unit of Measure described in Exhibit A or the Order.
 - 2.4 "**Customer Data**" means all information uploaded or entered by Customer to the BMC Subscription Services.
 - 2.5 "**Order**" means (i) the agreed ordering document for the purchase of the Services, (ii) that is subject to this Agreement, and (iii) that identifies the particulars of the purchase, BMC Subscription Service being ordered and fees to be paid.
 - 2.6 "**User Guide**" means the online documentation for the BMC Subscription Service, which includes functional guides and technical specifications, as updated by BMC from time to time
3. **BMC SUBSCRIPTION SERVICES.**
 - 3.1 **Access Rights.** Subject to the terms of this Agreement, BMC hereby grants to Customer a worldwide, non-exclusive, non-transferable, non-sublicenseable, limited license to access and use the BMC Subscription Service (i) up to the Capacity, (ii) for Customer's and its Affiliates' internal business operations, and (iii) in accordance with the User Guide and the applicable Order.
 - 3.2 **BMC Subscription Services Support.** BMC will provide support to Customer for the BMC Subscription Services as described on <http://www.bmc.com/support> ("**Support**"), which may be changed by BMC at any time.
 - 3.3 **Notifications to Customer.** Any general notifications from BMC OnDemand Operations to the Customer will be sent to the Customer contact stated in the Customer Information (ship to) section of the Order. The Customer contact in the Order has been assigned by the Customer as the Customer contact for operational issues that may arise. Customer shall notify BMC of any change to Customer contact details in writing, which may include via e-mail.
 - 3.4 **Customer Data Back-up and Recovery.** BMC provides daily incremental and weekly full system backups in a secure off-site facility within the same country as the primary facility, using a 90 day retention window for data recovery purposes.
 - 3.5 **Additional Services.** Customer may purchase additional services which include, without limitation, implementation, onboarding, activation and training services (all the "**Additional Services**") via an Order. Activation services are required with the initial purchase of a BMC Subscription Service. BMC offers other optional services which may be ordered pursuant to a separate BMC Master Services Agreement and statement of work. For purposes of clarity, such services may not be ordered under this Agreement.



3.6 **Use of Subcontractors.** Customer acknowledges and agrees that BMC uses subcontractors to provide portions of the 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 Services.

3.7 **Customer Responsibilities.**

- (a) Customer will maintain the confidentiality of all authentications and passwords for the Services and immediately notify BMC if it becomes aware that an unauthorized party has gained access to the Services. Customer will be responsible for use of the Services by its employees, consultants, contractors, agents, and Affiliates (all, "**Users**") in compliance with this Agreement. Customer will (i) use reasonable efforts to prevent unauthorized access to, or use of, the BMC Subscription Services, and notify BMC promptly of any such unauthorized access or use, and (ii) comply with all applicable laws in using the Services. Customer is responsible for the creation and implementation of a privacy policy and end user license 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 Services.
- (b) *Customer may not* (i) modify, copy or create derivative works based on the Services; (ii) create Internet "links" to or reproduce any content forming part of the BMC Subscription Services, other than for its own internal business purposes; (iii) disassemble, reverse engineer, or decompile the BMC Subscription Services or part thereof, or access it in order to copy any ideas, features, content, functions or graphics of the BMC Subscription Services; (iv) distribute, rent, lease, sublicense or provide the Services to any third party or use it in a service bureau, outsourcing environment, or for the processing third party data; (v) interfere with or disrupt the integrity or performance of the BMC Subscription Services (e.g., load, performance, or stress testing); (vi) 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 BMC Subscription Services; (vii) send or store viruses or malicious code via the BMC Subscription Services; (viii) attempt to gain unauthorized access to the BMC Subscription Services or its related software, systems, platforms or networks including any form of security and/or penetration testing; or (ix) use any components provided with the Services separately from the Services.

4. **WARRANTIES.**

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

- (a) the online availability of the BMC Subscription Service will be maintained in accordance with the service levels set forth in the applicable Exhibit B (the "**Service Level Agreement**" or "**SLA**"). Customer's exclusive remedy and BMC's sole obligation for breach of the warranty in this Section 4.1(a) is described in the Service Level Agreement;
- (b) the BMC Subscription Service (i) will perform in substantial accordance with the then-current on-line User Guide available via the BMC Subscription Service 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 4.1(b) will be BMC's use of commercially reasonable efforts to have the BMC Subscription Services perform in substantial accordance with the User Guide, or replace the non-conforming portion of the BMC Subscription Service within a reasonable period of time, or if BMC cannot have the BMC Subscription Service perform in substantial accordance with the User Guide or replace the BMC Subscription Service within such time period, then BMC will refund the amount paid by Customer for the BMC Subscription Service, pro-rated from the date of the notice of the claim. Customer's rights and BMC's obligations in this Section 4.1(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; and
- (c) the Additional Services will be performed in a manner consistent with industry standards reasonably applicable to the provision thereof. Customer's exclusive remedy and BMC's entire liability for breach of the warranty in this Section 4.1(c) shall be for BMC to re-perform any non-conforming portion of the Additional 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 Additional Services under the Order. Customer must notify BMC of any breach of the warranty in this Section 4.1(c) no later than 30 days after completion of the applicable Additional Services.

4.2 **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 SERVICES OR USE THEREOF. BMC, ITS AFFILIATES AND LICENSORS HEREBY EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY THAT 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.

5. **FEES AND PAYMENT.** The fees payable for the Services will be set forth in the Order. The fees will be invoiced in accordance with the relevant Order and are due upon receipt of invoice. 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 Services, which are exclusive of these taxes.

6. **TERM AND TERMINATION.**



6.1 Term.

- (a) **Agreement.** This Agreement begins on the Effective Date and will remain in effect unless terminated pursuant to Section 6.2 below.
- (b) **Order(s).** Each Order begins on the start date specified in the relevant Order and continues for the term specified therein.

6.2 Termination.

- (a) **Termination for Convenience.** Upon 30 days advance written notice, either party may terminate this Agreement for its convenience; however, such termination will have no effect on Orders executed by the parties prior to its effective date, including but not limited to payment obligations contained therein, and such Orders will remain in full force and effect under the terms of this Agreement for the term specified therein. Orders may not be terminated for convenience unless otherwise specified therein.
- (b) **Termination for Cause.** Either party may terminate this Agreement for cause: (i) upon 30 days written notice of a breach to the other party if such breach remains uncured at the expiration of such period; or (ii) immediately upon material breach by the other party; or (iii) 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.

6.3 **Effects of Termination for Cause.** Subject to Section 6.2(a), upon termination or expiration, all Orders terminate and the Services purchased pursuant to such Orders terminate and Customer will make no further use of the Services. No termination will relieve the Customer of the obligation to pay any fees accrued or payable to BMC.

6.4 **Termination Assistance.** Upon written request by Customer made within 30 days after the effective date of termination, BMC will make available to Customer a file containing the Customer Data in comma separated value (.csv) or database backup format. After such thirty day period, BMC shall have no obligation to maintain or provide any Customer Data and will thereafter, unless legally prohibited, delete Customer Data from the BMC Subscription Services.

7. PROPRIETARY RIGHTS.

7.1 **Reservation of Rights.** BMC, its Affiliates or licensors retain all right, title and interest to the Services and all related software, programming, documentation, templates, questionnaires, methodologies, models, charts, specifications, reports, and any other intellectual property or items used to deliver the Services or made available to Customer as a result of the Services ("**Service Items**"). The Services and Service Items are protected by applicable copyright, trade secret, industrial and other intellectual property laws and rights under such laws ("**IPRs**"). As between Customer and BMC, BMC owns all rights, title, and interest in all Services, Service Items, and IPRs, and Customer's access and use of Services, Service Items, and IPRs shall be governed by the terms of this Agreement. BMC reserves any rights not expressly granted to Customer. Customer shall not access the Services in order to build a competitive product or service or copy any ideas, features, functions or graphics of the Services.

7.2 **Customer Data.** As between BMC and Customer, (i) Customer owns all right, title and interest in and to the Customer Data; and (ii) Customer is responsible for all content, accuracy, quality and legality of Customer Data. BMC will use the Customer Data only as necessary to provide the Services in accordance with this Agreement. At any time during the term of the BMC Subscription Services, Customer may request copies of all Customer Data from the BMC Subscription Services. Customer is responsible for loading and/or transferring Customer Data into the BMC Subscription Service and for ensuring that such transfer is completed unless BMC is performing this task pursuant to an Order or SOW.

8. MUTUAL CONFIDENTIALITY.

8.1 "**Confidential Information**" means all proprietary or confidential information that is disclosed to the recipient ("**Recipient**") by the discloser ("**Discloser**"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure, and specifically includes Customer Data, the Services, Service Items and 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. 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 without reference to Discloser's Confidential Information.

8.2 **Confidentiality Obligation.** Recipient may not disclose Confidential Information of Discloser to any third party or use the Confidential Information in violation of this Agreement. 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 (but in no event less than reasonable care) 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, contractors and agents who have the 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.



- 8.3 **Disclosure Required by Law.** Recipient may disclose Confidential Information to the extent required by law or court order, but must provide Discloser with advance notice to allow Discloser to seek a protective order. Recipient may only disclose the limited Confidential Information required to be disclosed by law or the court order.
- 8.4 **Customer Reference.** BMC may refer to Customer as a customer of BMC internally and only in externally published media if agreed to by Customer.
- 8.5 **Suggestions.** Customer agrees that BMC shall have a royalty-free, worldwide, transferable, sublicenseable, irrevocable, perpetual license to use or incorporate into any BMC products or services any suggestions, enhancement requests, recommendations or other feedback provided by Customer or Users relating to the Services or Service Items, excluding Customer Data.

9. INDEMNIFICATIONS.

- 9.1 **Indemnification by BMC.** If a third party asserts a claim against Customer asserting that Customer's use of the Services 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 Services. If BMC believes the Services may violate a right, then BMC will, at its expense: (i) modify the Services, or (ii) procure the right to continue using the Services, and if (i) or (ii) are not commercially reasonable, terminate Customer's right to use the Services and issue a pro-rata refund for the unexpired pre-paid portion of such 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 Customer Data or Customer's use of the Service in violation of this Agreement violates that third-party's patent, trade secret or copyright rights, or otherwise harms the third party ("**Claims**"), 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.
- 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, (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.

THIS SECTION CONTAINS EACH PARTY'S EXCLUSIVE REMEDIES AND THE INDEMNIFYING PARTY'S SOLE LIABILITY FOR INFRINGEMENT CLAIMS/CLAIMS.

10. LIMITATION OF LIABILITY

- 10.1 **DISCLAIMER OF DAMAGES.** EXCEPT FOR A BREACH OF SECTION 3.7 AND EACH PARTY'S RESPONSIBILITIES IN SECTION 9, NEITHER PARTY OR ITS AFFILIATES ARE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES RELATING TO OR ARISING OUT OF THIS AGREEMENT OR THE 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.
 - 10.2 **LIMITS ON LIABILITY.** EXCEPT FOR A BREACH OF SECTION 3.7 AND EACH PARTY'S RESPONSIBILITIES IN SECTION 9, NEITHER PARTY OR ITS AFFILIATES SHALL HAVE AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE SERVICES, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEEDING THE AMOUNTS ACTUALLY PAID BY AND DUE FROM CUSTOMER PURSUANT TO THE ORDER(S) GIVING RISE TO LIABILITY.
11. **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 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 Services under such regulations; d) will not acquire the Services for a person who is restricted under such regulations; e) will not use the Services in contradiction to such regulations; and f) will not use the Services for prohibited uses, including but not limited to nuclear, chemical, missile or biological weapons related end uses. For 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 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. Any failure to comply with these regulations will result in Customer forfeiting all rights to the Services.

12. SECURITY AND DATA PROTECTION.

- 12.1 BMC obtains annual third party security audits of the BMC Subscriptions Services ("**Security Audit**") and will provide a copy of its most then-recent Security Audit upon Customer's request, subject to confidentiality requirements.



- 12.2** BMC will not access Customer Data except as required to provide the BMC Subscription Services or at Customer's specific request. BMC has implemented and will maintain procedures to logically segregate Customer Data. BMC uses industry standard security measures, including standard encryption protocols, to protect Customer Data.
- 12.3** Customer is responsible for complying with all legal requirements, including applicable privacy laws and regulations, relating to the collection, use, processing and transfer of Customer Data. BMC and Customer specifically agree that with regard to European Economic Area data protection laws (if applicable), Customer shall be considered the 'data controller', BMC the 'data processor' and both parties shall fulfill their respective legal obligations, including but not limited to any approval and/or notification obligations towards national data protection authorities. BMC will process Customer Data in accordance with Customer's lawful and explicit instructions and with its Controller and Processor Binding Corporate Rules Policy found at <http://media.cms.bmc.com/documents/External+Privacy+Binding+Coporate+Rules+Policy+-+Aug+04.pdf> (the "**BCR**") with respect to compliance with data protection laws and/or regulations. The BCR policy is incorporated into a BMC corporate wide policy, requiring all BMC entities, employees and third party providers to comply with and respect the BCR policy which is governing the collection, use, access, storage and transfer of Personal Data among BMC entities and third-party sub-processors. Personal data in Customer Data shall be limited to contact information and/or contract identification information (such as PO number) and shall not include sensitive personal data, i.e. data where processing or transfer of the data is prohibited according to applicable privacy laws or other data requiring the written consent of the data subject prior to processing in accordance with applicable law. BMC takes no responsibility with regard to data content processed on behalf of Customer and/or handling as per Customer's instructions. Customer acknowledges and consents that Services provided require Customer Data to be transferred to a country outside of Customer's country or the country where the Customer Data originated. BMC will provide all requested information regarding the processing of Customer's Data as Customer may reasonably require to enable Customer to comply with data protection laws. Customer shall indemnify and hold harmless BMC from any failure to comply with its obligations under this Section 12. Further information with regard to BMC's BCR is published at http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/bcr_cooperation/index_en.htm.
- 13. VERIFICATION.** Customer agrees that BMC may monitor the BMC 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 BMC Subscription Services, Customer agrees to pay the applicable fees for additional capacity. If Customer fails to pay fees for such additional capacity, BMC may suspend Customer's access to the BMC Subscription Services until such fees are paid in full.
- 14. NO CHARGE LICENSES.** BMC may make subscription services available to Customer without an Order and without charge. Such products are deemed to be "BMC Subscription Services" pursuant to this Agreement except as follows:
- 14.1 Trial Licenses.** Any subscription service provided as a trial is provided to Customer solely so that Customer may evaluate internally, for no more than a 30 day period, whether to acquire usage rights to such subscription service for a fee. Such subscription service (a) is provided "AS IS" without any warranty, service level agreement or support, and (b) cannot be put into productive use or included as part of Customer's business processes in any manner, unless or until it is expressly licensed and paid for under an Order. BMC may terminate all of Customer's rights and licenses to these subscription services for BMC's convenience upon notice to Customer. Upon termination of this Agreement, if Customer does not acquire a paid for license to access and use the Subscription Services, all Customer Data input into the Subscription Services during the trial period will be deleted. BMC'S ENTIRE LIABILITY FOR DIRECT DAMAGES RELATED TO ANY TRIAL OF THE SERVICES IS LIMITED TO THE GREATER OF THE AMOUNT ACTUALLY PAID BY CUSTOMER FOR SUCH TRIAL OR \$100.
- 14.2 "Lite Version".** Any subscription service provided as a "lite version" is provided to Customer (a) "AS IS" without any warranty, service level agreement or support, (b) subject to the restrictions set forth in Exhibit A, and (c) is subject to BMC's right to terminate such subscription service upon 90 days' prior written notice to Customer. BMC'S ENTIRE LIABILITY FOR DIRECT DAMAGES RELATED TO ANY LITE VERSION OF THE SERVICES IS LIMITED TO THE GREATER OF THE AMOUNT ACTUALLY PAID BY CUSTOMER FOR SUCH SERVICES OR \$100.
- 15. GOVERNING LAW AND DISPUTE RESOLUTION.** A party will provide written notice to the other party of any controversy, dispute or claim arising out of or relating to this Agreement, or to the formation, interpretation, breach, termination, or validity thereof ("**Controversy**"). The parties shall engage in good faith negotiations to resolve the Controversy. Only if the Controversy is not resolved through good faith negotiations within 15 days of the sending of the written notice of Controversy, the Controversy may be submitted to litigation or binding arbitration, based on the place of incorporation of the parties, as follows:
- (i) 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 sides hereby submit to the exclusive jurisdiction of the courts in Houston, Texas and waive all defenses based on forum non conveniens.
 - (ii) If both parties to this Agreement are entities incorporated in countries in the Europe, Middle East, or Africa regions, the arbitration shall be held in Amsterdam, Netherlands under the then-applicable rules of the International Chamber of Commerce and the substantive laws of the Netherlands will govern.
 - (iii) 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) 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.

16. The following BMC contracting entities apply to this Agreement:

Region	Licensing Entity	Address of Licensing 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 Software do Brasil Ltda.	Av. das Nações Unidas, 8.501 – 22º Andar Condomínio Eldorado Business Tower São Paulo, Brasil – 05425-070
Mexico	BMC Software Distribution de México, S.A. de C.V.	Torre Esmeralda II Blvd. Manuel Avila, Camacho #36, Piso 23 Lomas de Chapultepec, CP11000, México D.F.
Argentina	BMC Software de Argentina S.A.	Ing. Butty 220 – Piso 18, Buenos Aires, Republica Argentina, C1001AFB
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	24 th Fl., ASEM Tower, , 1517, Yeongdong-daero, Gangnam-gu, Seoul 135-798, Korea South

17. U.S. FEDERAL ACQUISITIONS. This Section applies only to acquisitions of the commercial Services and User Guide 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 Services are delivered to the United States Government, the United States Government hereby agrees that the 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 Services, 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).”



18. MISCELLANEOUS TERMS. This Agreement contemplates the execution by the parties of one or more Orders, however, neither execution of this Agreement, nor anything contained herein, shall obligate either party to enter into any Orders. 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. This Agreement, including any Exhibits 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 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. 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 Services to a third party, whether by merger 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. Any additional documents presented to a BMC representative by Customer for signature as a condition for going on a Customer's site will be governed by this Agreement and to the extent that such document presents additional terms or conflicts with this Agreement, it shall be considered null and void. The 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 data privacy and other topics before using them.



EXHIBIT A
Units of Measure and Restrictions

A. Units of Measure. The following Units of Measure apply to certain BMC Subscription Services.

UNIT OF MEASURE	UNIT OF MEASUREMENT DEFINITION
per concurrent user - OnDemand	A subscription is required for the maximum number of individual employees or contractors of Customer to whom simultaneous access has been granted to the Service on a computer or multiple computers.
per named user - OnDemand	A subscription is required for all individual employees or contractors or clients of Customer for whom credentials have been created in the Service and who have access to the Service on a computer or multiple computers through the issuance of a unique ID or otherwise, regardless of whether the individual is actively using the Service at any given time.
per node - OnDemand	A subscription is required for every Node which the Service manages and/or monitors. " Node " means a laptop, desktop, or any virtual or physical computer that provides a service for other computers or users connected to it via the Internet, extranet, intranet, or other networked technologies.

B. Restrictions. The following Restrictions apply to certain BMC Subscription Services.

BMC Remedy on Demand: The license enables the Customer to use (a) up to 100 named users of MyIT Base OnDemand for each BMC Remedy on Demand named user – OnDemand and (b) up to 250 named users of MyIT Base OnDemand for each BMC Remedy on Demand licensed concurrent user – OnDemand.

My IT OnDemand: Each MyIT user may only use the product on up to three Device Endpoints per user license purchased. A "**Device Endpoint**" is a personal digital assistant, smart-phone, tablet, laptop, desktop workstation or similar computing device. An additional user license is required for every 3 devices registered by a unique named user.

BMC AppZone Lite: BMC AppZone Lite does not include the right to distribute Mac and Windows desktop applications, to brand private App Stores or to manage banners for internal communication. Customer may not consume more than 2 GB of bandwidth per named user per month as a part of the BMC Subscription Services. At the termination of the BMC Subscription Services, unless Customer migrates to a paid-for subscription for BMC AppZone, Customer is responsible for retrieving any Customer Data from the BMC Subscription Services. BMC will not provide such Customer Data to Customer.

BMC AppZone: Customer may not consume more than 2 GB of bandwidth per named user per month as a part of the BMC Subscription Services.

BMC HR Case Management OnDemand: The license enables the Customer to use (a) up to 300 named users of MyIT Self Service OnDemand for each BMC HR Case Management OnDemand named user, and (b) up to 750 concurrent users of MyIT Self Service OnDemand for each BMC HR Case Management OnDemand licensed concurrent user.



**EXHIBIT B
Service Level Agreement**

Availability

BMC will use commercially reasonable efforts to make the BMC Subscription Service available at least 99.9%, except as provided below ("**Service Commitment**"). Availability will be calculated per month, as follows:

$$(Service\ Time - Non-excluded\ Downtime - Excluded\ Downtime) / (Service\ Time - Excluded\ Downtime) \times 100$$

Definitions

"**Service Time**" is the total minutes for a given calendar month.

"**Excluded Downtime**" is all unavailability caused by (1) scheduled or mutually agreed upon downtime to perform routine, non-emergency or emergency maintenance on the BMC Subscription Services; (2) downtime on nonproduction systems; (3) factors outside of BMC's reasonable control, including any force majeure event, including without limitation, acts of God, acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes or other labor problems (other than those involving BMC employees), or Internet service provider or power failures or delays; (4) failure of Customer's Internet access or related problems; (5) Customer's equipment, software or other technology and/or third party equipment, software or other technology (other than third party equipment within BMC's direct control); (6) actions or inactions of Customer or any third party; or (7) service suspensions or termination of Customer's right to use the BMC Subscription Services in accordance with the Agreement.

"**Non-excluded Downtime**" is all downtime that is not Excluded Downtime.

Service Credits

In the event BMC does not meet the Service Commitment, Customer will be eligible to receive a Service Credit as described below. Service Credits are calculated in accordance with the table below as a percentage of the total subscription charges paid by Customer for BMC Subscription Services for the month in which BMC does not meet the Service Commitment.

Monthly Availability Percentage	Service Credit Calculation
Below 99.9%	1 hour of credit based on monthly subscription charges for every hour below the Service Commitment

Service Credits will be applied against Customer's next invoice. A Service Credit will be applicable and issued only if the credit amount is greater than \$1 USD. Service Credits may not be transferred or applied to any other BMC service or account. Customer's sole and exclusive remedy for any unavailability or non-performance of the BMC Subscription Service or other failure by BMC to provide the BMC Subscription Service is the receipt of a Service Credit (if eligible) in accordance with the terms of this Exhibit B. Upon expiration or non-renewal of this Agreement and/or the applicable Order, all Service Credits will be forfeited (for example, if the Non-excluded Downtime occurs in the last month of the Order term and Customer does not renew, then the Service Credit is forfeited).

Credit Request and Payment Procedures

BMC will provide Customer with a monthly availability report. To receive a Service Credit, Customer must submit a request by sending an e-mail message to SLArequest@bmc.com. To be eligible, the credit request must (i) include Customer's account number in the subject of the e-mail message; (ii) include, in the body of the e-mail either the BMC-provided monthly availability report, or, the dates and times of each incident of Non-excluded Downtime that Customer claims to have experienced; and (iii) be received by BMC within 30 days after the end of the month in which the Downtime occurred. If the Monthly Availability Percentage applicable to the month of such request is confirmed by BMC and is less than the Monthly Availability Percentage, then BMC will confirm the Service Credit to Customer within 15 days of receipt of the Service Credit request. Customer's failure to provide the request and other information as required above will disqualify Customer from receiving a Service Credit.