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## CHAPTER 9. PUBLISHED TERMS AND CONDITIONS APPLICABLE TO 132-52

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**\*\*\*\*NOTE: If offering IT Professional Services with E-Commerce use SIN 132-51 and include the Terms and Conditions applicable to the IT Professional Services offered.**

### TERMS AND CONDITIONS

Note: These terms are in addition to those described in Chapter 1, General Information.

During the contract period, International Business Machines Corporation (IBM) and the Government agree that the following terms and conditions will apply to any order for IBM IT Professional Services that is placed by the Government under this Special Item. The term "Government" shall mean all Federal agencies (as defined in Paragraph (b) of 40 USC 472) the Senate, the House of Representatives, the Architect of the Capitol, and the Government of the District of Columbia, all of which are hereinafter referred to as the Government. The materials and services under this Special Item will be available to the Government within the United States, the District of Columbia and Puerto Rico. Such sales will be made to the Government within the United States, the District of Columbia and Puerto Rico. On a case-by-case basis IBM will deliver products and perform Services to overseas U.S. Government locations which are in support of national defense operations (including U.S. Embassies), and to locations which support the national interest of the United States.

#### 1) SCOPE

- a) The prices, terms and conditions stated under Special Item Number 132-52 Electronic Commerce (EC) Services apply exclusively to EC Services within the scope of this Information Technology Schedule.
- b) The Contractor shall provide services at the Contractor's facility and/or at the ordering activity location, as agreed to by the Contractor and the ordering activity.

#### 2) PERFORMANCE INCENTIVES I-FSS-60 Performance Incentives (April 2000)

- a) Performance incentives may be agreed upon between the Contractor and the ordering activity on individual fixed price orders or Blanket Purchase Agreements under this contract .
- b) The ordering activity must establish a maximum performance incentive price for the services and/or total solutions on individual orders or Blanket Purchase Agreements.
- c) Incentives should be designed to relate results achieved by the contractor to specified targets. To the maximum extent practicable, ordering activities shall consider establishing incentives where performance is critical to the ordering activity's mission and incentives are likely to motivate the contractor. Incentives shall be based on objectively measurable tasks. Incentives shall be based on objectively measurable tasks.

#### 3) ORDER

- a) Agencies may use written orders, EDI orders, blanket purchase agreements, individual purchase orders, or task orders for ordering services under this contract. Blanket Purchase

Agreements shall not extend beyond the end of the contract period; all services and delivery shall be made and the contract terms and conditions shall continue in effect until the completion of the order. Orders for tasks which extend beyond the fiscal year for which funds are available shall include FAR 52.232-19 (Deviation – May 2003) Availability of Funds for the Next Fiscal Year. The purchase order shall specify the availability of funds and the period for which funds are available.

- b) All task orders are subject to the terms and conditions of the contract. In the event of conflict between a task order and the contract, the contract will take precedence.

#### **4) PERFORMANCE OF SERVICES**

- a) The Contractor shall commence performance of services on the date agreed to by the Contractor and the ordering activity.
- b) The Contractor agrees to render services only during normal working hours, unless otherwise agreed to by the Contractor and the ordering activity.
- c) The ordering activity should include the criteria for satisfactory completion for each task in the Statement of Work or Delivery Order. Services shall be completed in a good and workmanlike manner.
- d) Any Contractor travel required in the performance of EC Services must comply with the Federal Travel Regulation or Joint Travel Regulations, as applicable, in effect on the date(s) the travel is performed. Established Federal Government per diem rates will apply to all Contractor travel. Contractors cannot use GSA city pair contracts.

#### **5) STOP-WORK ORDER (FAR 52.242-15) (AUG 1989)**

- a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either-
  - 1) Cancel the stop-work order; or
  - 2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.
- b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if-
- c) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and
- d) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action,

the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.

- e) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

## **6) INSPECTION OF SERVICES**

The Inspection of Services–Fixed Price (AUG 1996) (Deviation – May 2003) clause at FAR 52.246-4 applies to firm-fixed price orders placed under this contract. The Inspection–Time and Materials and Labor-Hour (JAN 1986) (Deviation – May 2003) clause at FAR 52.246-6 applies to time and materials and labor –hour orders placed under this contract.

## **7) RESPONSIBILITIES OF THE CONTRACTOR**

The Contractor shall comply with all laws, ordinances, and regulations (Federal, State, City, or otherwise) covering work of this character. If the end product of a task order is software, then FAR 52.227-14 (Deviation – May 2003) Rights in Data – General, may apply.

## **8) RESPONSIBILITIES OF THE ORDERING ACTIVITY**

Subject to security regulations, the ordering activity shall permit Contractor access to all facilities necessary to perform the requisite EC Services.

## **9) INDEPENDENT CONTRACTOR**

All EC Services performed by the Contractor under the terms of this contract shall be as an independent Contractor, and not as an agent or employee of the ordering activity.

## **10) ORGANIZATIONAL CONFLICTS OF INTEREST**

- a) Definitions.

“Contractor” means the person, firm, unincorporated association, joint venture, partnership, or corporation that is a party to this contract.

“Contractor and its affiliates” and “Contractor or its affiliates” refers to the Contractor, its chief executives, directors, officers, subsidiaries, affiliates, subcontractors at any tier, and consultants and any joint venture involving the Contractor, any entity into or with which the Contractor subsequently merges or affiliates, or any other successor or assignee of the Contractor.

An “Organizational conflict of interest” exists when the nature of the work to be performed under a proposed ordering activity contract, without some restriction on ordering activities by the Contractor and its affiliates, may either (i) result in an unfair competitive advantage to the Contractor or its affiliates or (ii) impair the Contractor’s or its affiliates’ objectivity in performing contract work.

- b) To avoid an organizational or financial conflict of interest and to avoid prejudicing the best interests of the ordering activity, ordering activities may place restrictions on the Contractors, its affiliates, chief executives, directors, subsidiaries and subcontractors at any tier when placing orders against schedule contracts. Such restrictions shall be consistent with FAR 9.505 and shall be designed to avoid, neutralize, or mitigate organizational conflicts of interest that might otherwise exist in situations related to individual orders placed against the

schedule contract. Examples of situations, which may require restrictions, are provided at FAR 9.508.

## **11) INVOICES**

The Contractor, upon completion of the work ordered, shall submit invoices for EC services. Progress payments may be authorized by the ordering activity on individual orders if appropriate. Progress payments shall be based upon completion of defined milestones or interim products. Invoices shall be submitted monthly for recurring services performed during the preceding month.

## **12) PAYMENTS**

For firm-fixed price orders the ordering activity shall pay the Contractor, upon submission of proper invoices or vouchers, the prices stipulated in this contract for service rendered and accepted. Progress payments shall be made only when authorized by the order. For time and materials orders, the Payments under Time and Materials and Labor Hour Contracts at FAR 52.212-4 (OCT 2008) (ALTERNATE I – OCT 2008) (DEVIATION I – FEB 2007) applies to time and materials orders placed under this contract. For labor hour orders, the Payment under Time and Materials and Labor Hour Contracts at FAR 52.212-4 (OCT 2008) (ALTERNATE I – OCT 2008) (DEVIATION I – FEB 2007) applies to labor hour orders placed under this contract. 52.216-31(Feb 2007) Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Item Acquisition. As prescribed in 16.601(e)(3), insert the following provision:

- a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.
- b) The offeror must specify fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit. The offeror must specify whether the fixed hourly rate for each labor category applies to labor performed by—
  - 1) The offeror;
  - 2) Subcontractors; and/or
  - 3) Divisions, subsidiaries, or affiliates of the offeror under a common control.

## **13) INCIDENTAL SUPPORT COSTS**

Incidental support costs are available outside the scope of this contract. The costs will be negotiated separately with the ordering activity in accordance with the guidelines set forth in the FAR.

## **14) APPROVAL OF SUBCONTRACTS**

The ordering activity may require that the Contractor receive, from the ordering activity's Contracting Officer, written consent before placing any subcontract for furnishing any of the work called for in a task order.

## **15) DESCRIPTION OF ELECTRONIC COMMERCE (EC) SERVICES AND PRICING**

- a) The Contractor shall provide a description of each type of EC Service offered under Special Item Numbers 132-52 E-Commerce. Services and rates should be presented in the same manner as the Contractor sells to its commercial customers and other ordering activity

customers. Please submit a description of all corresponding commercial EC services to be provided.

- b) Pricing for all EC Services shall be in accordance with the Contractor's customary commercial practices; e.g., hourly rates, monthly rates, term rates, unit prices and/or fixed prices.

## IBM OFFERINGS

### LotusLive – Software as a Service Offering

LotusLive is a portfolio of cloud-delivered collaboration and messaging services. The terms and conditions of this offering include the terms of the Fixed Term Use and the LotusLive Terms of Use.

## FIXED TERM USE

The terms for Fixed Term Use and the governing Terms of Use for each Fixed Term Use offering are in addition to those of Passport Advantage Agreement found in the Chapter 5 terms, and govern the transaction when IBM provides access to and use of software functionality to you as a Service. For orders subject to the IBM Passport Advantage Agreement, the Customer Originating Site accepts the terms herein without modification.

The Customer Originating Site agrees to comply with the Terms of Use and you are responsible for compliance with the Terms of Use by your Users.

### Definitions

**Content** – information, software, and data that you provide, including, without limitation, any hypertext markup language files, scripts, programs, recordings, sound, music, graphics, images, applets or servlets that you or your Users create, install, upload or transfer in connection with your use of the Service.

**Software** – Programs, enabling code, client software and plug-ins, and all associated documentation provided to you by IBM to facilitate access to and use of the Service. Your use of underlying Software is solely for the purpose of accessing and using the Service. If Software is to be licensed, it will be under a separate agreement, e.g. the International Program License Agreement (IPLA), see SIN 132-33.

**Service** – access to Software and infrastructure over the Internet, and technical support as described in Section 3, that is governed by the terms herein. Service includes your right to (i) access Software (in object code and executable code format only), and (ii) use such Software solely for the purpose of accessing and using the Service. The Service is governed by the Terms of Use.

**Term** – period specified in the PoE as the “Software Subscription and Support Coverage Dates”. The Term begins on the date that your funded delivery order is accepted by IBM; on the calendar day following the expiration of a prior Term; or on the calendar day following the Anniversary Date, as applicable.

**Terms of Use** – sets forth the terms under which IBM will provide you with access to and use of the Service, i.e. the “Fixed Term Use” offering. The Terms of Use combine with the terms specific to the Service Offering (ie. LotusLive) govern your use of the Service (the “Fixed Term Use” offering).

**Users** – entities or individuals that access or use the Service.

## 1. Ownership

IBM and its suppliers own the Service and the underlying Software. You agree that title to, ownership of and all rights in and to patents, copyrights, trademarks, and all other intellectual property rights in the Service, and any copy or part of the Service will remain with IBM and its suppliers. IBM may subcontract the Service, or any part thereof, including technical support, to subcontractors selected by IBM.

## 2. Technical Support

a. IBM may provide the following technical support during the Term:

- (1) assistance for your routine, short duration usage (how-to) questions. Technical support is available only for the currently supported versions of the Service, client operating systems, Internet browsers, and Software.
- (2) assistance for code, defect, Service delivery and performance related questions. Technical support is available during the normal business hours (published prime shift hours) of the IBM Software as a Service (“SaaS”) support center. Consult the Terms of Use for details applicable to the Service.

## 3. Renewal of Fixed Term Use

Should the Government wish to renew this service for a subsequent year, a funded delivery order is required for the 12 month period by the end of the service period.

### 3.1 Anniversary Coordination

For Passport Advantage customers entering into this agreement for Terms of six months or more, initial or subsequent Terms entered into on a date other than the Anniversary may be renewed at the next Anniversary for an additional period, at a pro-rated renewal charge, in order to extend the Term to the following Anniversary.

## 4. Content

You are solely responsible for:

- a. all Content including, without limitation, its selection, creation, design, licensing, installation, accuracy, maintenance, testing, backup and support, including any rights, licenses and/or consents necessary for IBM to perform its obligations under this Attachment;
- b. all copyright, patent and trademark clearances in all applicable jurisdictions and usage agreements for any and all Content; and
- c. the selection of controls on the access to and use of Content.

## 5. Service Subscription Changes

You may increase but may not decrease your level of Service subscription during the Term. You may decrease your level of Service subscription by ordering a lower level for a subsequent Term.



## 6. Representations and Warranties

- a. You represent and warrant that your use of the Service and all Content will comply with the Acceptable Use Policy.
- b. IBM represents and warrants that it provides the Service using reasonable care and skill. IBM does not warrant uninterrupted or error-free operation of any Service or that IBM will correct all defects.

**THESE WARRANTIES ARE YOUR EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES AND CONDITIONS, EXPRESS OR IMPLIED INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTIES OF TITLE AND NON-INFRINGEMENT. THESE WARRANTIES GIVE YOU SPECIFIC LEGAL RIGHTS. YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE OR JURISDICTION TO JURISDICTION. SOME STATES OR JURISDICTIONS DO NOT ALLOW THE LIMITATION OR EXCLUSION OF EXPRESS OR IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. IN THAT EVENT, SUCH WARRANTIES ARE LIMITED IN DURATION TO THE WARRANTY PERIOD. NO WARRANTIES APPLY AFTER THAT PERIOD. SOME STATES OR JURISDICTIONS DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU.**

## 7. Charges

Charges for this service is billed at a fixed monthly rate at the beginning of the month for which the charges accrue, payable at the end of the month.

## 8. Termination

The Government may terminate the service at any time after the first anniversary on one month's written notice. In such event, IBM will cease billing the monthly charge, or the Government may obtain a prorated refund if billed an annual charge.

IBM may terminate this Service if the Government does not comply with any of its terms. In such an event IBM will provide written notice and allow a reasonable time to comply. Notwithstanding anything to the contrary in the terms, if IBM terminates your access to the Service due to your breach of any of the applicable terms herein or of the Passport Advantage Agreement, IBM is not obligated to issue a refund or credit for any unused portion of the Service. IBM may withdraw the Service in its entirety on 12 months' written notice to all then current Users by letter or e-mail. Any terms of this Service which by their nature extend beyond the termination remain in effect until fulfilled.

The complete agreement between the parties consists of the Passport Advantage Agreement, these Fixed Term Use terms, and the applicable Terms of Use for the specific service offering. If there is a conflict among the terms for Fixed Term Use and the Terms of Use, the Terms of Use prevail. In entering into this agreement, neither party is relying on any representation not specified in this agreement, including without limitation any representations concerning: i) performance or function of the Service, other than as expressly warranted in Section 8, ii) the experiences or recommendations of other parties; or iii) results or savings you may achieve.

## LOTUSLIVE TERMS OF USE

### LotusLive Engage, LotusLive Meetings, LotusLive iNotes, and LotusLive Connections

The Government accepts these terms and conditions of this offer, including the Acceptable Use Policy by issuing a funded delivery order for the LotusLive Services

**IF YOU DO NOT AGREE WITH THESE TERMS DO NOT IN ANY MANNER USE THE SERVICE OR SOFTWARE OR PARTICIPATE IN ANY OF THE FUNCTIONALITY OFFERED THEREIN.**

### PART 1 – GENERAL TERMS

#### 1. Purpose

These LotusLive Terms of Use (“Terms of Use”) set forth the terms under which IBM will provide you with access to and use the Service.

#### 2. Definitions

All capitalized terms defined in these Terms of Use have the meanings set forth below.

**Acceptable Use Policy** – the Acceptable Internet Use Policy for IBM Services, attached herein as Appendix A and located on the Internet at [www.ibm.com/services/e-business/aup.html](http://www.ibm.com/services/e-business/aup.html), and any subsequent modification.

**Affiliate** – any legal entity that, by more than 50% owns, is owned by, or is under common ownership with IBM.

**Content** – all data, software and information including, without limitation, any hypertext markup language files, email messages, scripts, programs, recordings, sound, video, music, graphics, images, applets or servlets that you create, install, upload, receive from a third party or transfer in connection with your use of the Service.

**Evaluation Period** – such period that begins when you agree to these Terms of Use and ends upon the earliest of (1) the end date specified by IBM when you were provided access to the Service or (2) the date on which your access to the Service is disabled by IBM. Should IBM provide you with an Evaluation Period, there is no charge for your use of the Service or Software, in accordance with these Terms of Use, during the Evaluation Period.

**Site** - "Site" means any location of a U.S. Government Agency issuing to IBM a Delivery Order hereunder for the Agency's own internal use.

The U.S. Government Agency Site issuing a Purchase Order to IBM is defined as the “Originating Site”.

Any Site, within the Agency that subsequently enrolls under Passport Advantage is defined as an “Additional Site”.

**Service** – the LotusLive software-as-a-service (“SaaS”) offering.

**Software** – the software and all associated documentation and other materials provided to you by IBM or its Affiliates to facilitate access to and use of the Service. If Software is to be licensed, it

will be under a separate agreement, e.g. the IBM International Program License Agreement (terms included in Chapter 5).

### **3. Access to Service; Suspension and Cancellation**

Subject to your compliance with these Terms of Use, IBM hereby grants you a revocable, non-exclusive, nontransferable right to access and use the Service. You agree that IBM is not providing you with access to the Internet in order to use the Service and that you remain responsible for Internet access. Certain Software that forms part of the Service may be licensed under separate terms and conditions which will be presented to you at the time of download. In the event of a conflict between such additional terms and conditions and these Terms of Use, these Terms of Use will prevail. Separately licensed Software provided with the Service can only be used in conjunction with the Service. The Service is provided with Restricted Rights for U.S. Government users. IBM reserves the right to suspend or discontinue the Service, revoke your access to the Service or delete your Content if IBM believes that you are in breach of these Terms of Use or the Acceptable Use Policy. Upon any cancellation of these Terms of Use, your access and other rights to the Service will be cancelled and cease. In such event you must cease any further use of the Service and destroy any copies of the associated Software within your possession or control.

### **4. Inviting users to participate in LotusLive**

The entity that has purchased the Service may share documents with, or otherwise invite, individuals or entities, to participate in LotusLive for the purpose of collaboration (“Permitted Invitees”). Permitted Invitees may have access to certain aspects of the Service and must agree to these Terms of Use. For Permitted Invitees, IBM may revoke access to the Service for any reason in its sole discretion.

### **5. Restrictions**

The Service is to be used by individuals and entities solely for messaging, Web conferencing, collaboration and related activities in which you are an active participant with others, and only as permitted under these Terms of Use and Acceptable Use Policy. Under no circumstances may you resell, redistribute, or sublicense the Services, or use the Services on a timeshare or service bureau basis, or to operate a Website or host an online business unless expressly permitted under another written agreement between you and IBM. You may not use the Services for the development, production or marketing of a service or product substantially similar to the Services.

#### **5.1 Restricted Use for LotusLive Engage for Enterprise Deployment**

If you are an entity that has acquired a PoE for LotusLive Engage for Enterprise Deployment, then you may not allow any employee within your Site to utilize any of the functions of LotusLive Engage in any capacity, including as a Permitted Invitee, unless you have acquired a LotusLive Engage for Enterprise Deployment PoE for such employee. This restriction shall not affect Permitted Invitees who are not employees of your Site.

### **6. Scheduled Downtime; No Training or Technical Support**

The regularly scheduled maintenance window for each LotusLive service is posted on the LotusLive support page at <https://www.lotuslive.com/support/>. Other scheduled and non-scheduled down times may occur. During such times the Service will not be available for use.



IBM has no obligation under these Terms of Use to provide support or maintenance services in connection with the Software or Service (“Technical Support”). IBM may elect to provide you with Technical Support at its sole discretion. Any enhancements, updates and other materials provided by IBM as part of any such Technical Support are considered to be part of the Service or Software, as applicable, and therefore governed by these Terms of Use.

## **7. Updates; Applicable Terms and Authorization for Auto Updates**

These Terms of Use apply to all updates, supplements, add-on components, features, or other functionality or messages related thereto, including without limitation alterations of functionality, features, storage, security, availability, content, and other information relating to the Software or Service (collectively, "Updates") that IBM may provide or make available generally to its customers after the date that the Service commences, subject to any additional terms provided by IBM applicable to such Updates. You hereby authorize IBM to, and agree that IBM may, in accordance with IBM's standard operating procedures, automatically and in good faith transmit, access, install, and otherwise provide Updates to the Software or Service without further notice or need for consent. IBM has no obligation to, and nothing in these Terms of Use may be construed to require IBM to, create, provide, or install Updates.

## **8. NOTICE REGARDING RECORDING**

THE SOFTWARE AND/OR SERVICE MAY ALLOW YOU TO RECORD MEETINGS. THE LAWS OF SOME JURISDICTIONS MAY REQUIRE THE CONSENT OF INDIVIDUALS PRIOR TO RECORDING THEIR COMMUNICATIONS. You agree to comply with all applicable laws and to obtain all necessary consents and make all necessary disclosures before using the Software and/or Service.

## **9. Notice Regarding Spam, Content Blocking and Filtering**

IBM administrators monitor the Service, investigate spam attacks and apply proprietary as well as industry standard technology measures in order to block or filter messages that appear to be unsolicited and bulk, and/or malicious in nature. IBM reserves the right (but shall have no obligation) to block electronic communications from other entities on the Internet. You should be aware that such blocking or filtering may take place if deemed necessary by IBM. IBM reserves the right (but shall have no obligation) to pre-screen, review, flag, filter, modify, refuse or remove any or all Content.

## **10. Privacy**

- a. IBM’s Privacy Policy is in accordance with the Privacy Policy at <http://www.ibm.com/privacy/>. In connection with your use of the Service, you acknowledge and agree that: (i) your name, title, company name and photograph posted by you (“Profile”) can be viewed by other users of the Service, and (ii) at any time you may request that your Profile information be removed from the Service and such Profile information will be removed.
- b. Personal Information included in your Content. THE SOFTWARE AND/OR SERVICES MAY ALLOW YOU TO INCLUDE IN YOUR CONTENT PERSONAL INFORMATION ABOUT OTHERS, THE LAWS OF SOME JURISDICTIONS MAY REQUIRE THE CONSENT OF INDIVIDUALS PRIOR TO INCLUDING THEIR PERSONAL INFORMATION IN YOUR CONTENT. You agree to comply with all applicable laws to obtain all necessary consents and make all necessary disclosures before including personal

information in your Content and using the Software and Service. You confirm that you are solely responsible for any personal information that may be contained in your Content, including any information which you share with third parties, and that you are in compliance with applicable data protection laws. In connection with your use of the Service, certain features of the Service may permit you to interact or share your Content with third party websites or services. If you choose to transmit your Content or provide any other information to such third parties, you agree to be bound by any applicable third party terms of use, and IBM accepts no responsibility or liability for any such third party services.

### **11. Ownership of Content**

By virtue of your agreeing to these terms, IBM does not claim ownership of any Content. You confirm that you have all necessary authorities to allow IBM to host, cache, record, copy, and display Content solely for the purpose of providing the Service to you. Except as set forth in this Section 11, you retain your right, title, and interest in and to the Content, and to display and transfer Content. If you choose to transmit your Content to a third party site which may be linked to or accessible by the Service, you are providing IBM with the consent to enable such transmission of Content, and you remain liable for such transmission.

### **12. Representations and Warranties About Content**

You represent and warrant that you: (i) are the owner or authorized licensee of any and all Content; and (ii) will not publish, post, upload, record, or otherwise distribute or transmit Content that violates the Acceptable Use Policy or applicable law, and (iii) that you have all required permissions and consents from any third party whose personal information you may have posted or uploaded to the Service.

### **13. Confidentiality**

You agree not to disclose to others your account number and/or password for the Service. You remain responsible for all uses of your account in accordance with these Terms of Use, whether or not actually or expressly authorized by you. All information exchanged is non-confidential. If either of us requires the exchange of confidential information, it will be made under a signed confidentiality agreement.

### **14. Compliance with Applicable Law**

Regardless of your location when you access the Service, you agree to comply with all applicable export control and sanctions laws and regulations, including but not limited to those of the United States. You may not export, re-export, divert, transfer, disclose or permit access to any portion of the Service, Software or technical information, directly or indirectly, in violation of any applicable export control or sanctions law or regulation. You are also responsible for complying with all other laws, rules, and regulations that may be applicable to your use of the Service and Software. You agree that the Services shall not be used in support of any prohibited end uses, including but not limited to, nuclear facilities, space or missile, and weapons systems (including chemical and biological) or by any prohibited end users, including but not limited to, nationals of Country Group E, identified in Supplement No. 1 to Section 740 of the U.S. Export Administration Regulations, wherever they may be located.

## 15. DISCLAIMER OF WARRANTIES

THE SERVICE AND SOFTWARE (INCLUDING ANY ASSOCIATED DOCUMENTATION, INFORMATION AND MATERIALS) ARE PROVIDED TO YOU “AS IS” AND IBM, ITS AFFILIATES AND SUPPLIERS EXPRESSLY DISCLAIM ALL WARRANTIES AND CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.

SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF EXPRESS OR IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. IN THAT EVENT, SUCH WARRANTIES ARE LIMITED IN DURATION TO THE WARRANTY PERIOD. NO WARRANTIES APPLY AFTER THAT PERIOD. SOME STATES OR JURISDICTIONS DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU.

### Miscellaneous

If any part of these Terms of Use is determined to be invalid or unenforceable, the remainder of the Terms of Use will continue in effect. If any provision(s) is found to be invalid, unenforceable, or contrary to law, then such provision(s) will be construed, as nearly as possible, to reflect the intentions of the parties with the other provisions remaining in full force and effect. IBM's failure to exercise or enforce any right or provision of these Terms of Use will not constitute a waiver of such right or provision unless agreed to by IBM in a writing signed by a duly authorized representative of IBM. IBM reserves the right to modify these Terms of Use, and related Acceptable Use Policy at any time by providing such revised terms to you. Your continued use of the Software or Service constitutes your acceptance to be bound by any such revised terms

## 16. Entire Agreement

The Government agrees that these Terms of Use for the LotusLive offering, the Passport Advantage terms, the Fixed Term Use Attachment constitutes the entire agreement between IBM and You with respect to the Service and supersede all other (prior or contemporaneous) communications and proposals, whether electronic, oral, or non-electronic, between IBM and You regarding the Service. In the event of a conflict between these Terms of Use and the Passport Advantage terms, the Fixed Term Use Attachment or the IPLA, the Terms of Use shall prevail. Any terms or conditions contained in any document, including but not limited to a purchase order, acknowledgement, email, or other document that You may now or later provide to IBM, will have no effect. These Terms of Use may only be amended as set forth herein.



## APPENDIX A

### ACCEPTABLE INTERNET USE POLICY FOR IBM SERVICES

This Acceptable Use Policy ("Policy") outlines unacceptable use of IBM services which interact with, or access, the Internet (the "Services"). This Policy is in addition to any other terms and conditions under which IBM provides the Services to you.

IBM may make reasonable modifications to this Policy from time to time by posting a new version of this document on the IBM Web site at <http://www.ibm.com/services/aup.html> (or any successor URL(s)). Revisions are effective immediately upon posting. Accordingly, we recommend that you visit the IBM Web site regularly to ensure that your activities conform to the most recent version.

Questions about this Policy (e.g., whether any contemplated use is permitted) and reports of violations of this Policy should be directed to [aup@us.ibm.com](mailto:aup@us.ibm.com).

The examples listed in this Policy are not exhaustive. Prohibited uses and activities include, without limitation, any use of the Services in a manner that, in IBM's reasonable judgment, involves, facilitates, or attempts any of the following:

- a. violating any law of, or committing conduct that is tortious or unlawful in, any applicable jurisdiction;
- b. gambling activities;
- c. displaying, performing, sending, receiving or storing any content that is obscene, pornographic, lewd, lascivious, or excessively violent, regardless of whether the material or its dissemination is unlawful;
- d. advocating or encouraging violence against any government, organization, group, individual or property, or providing instruction, information, or assistance in causing or carrying out such violence, regardless of whether such activity is unlawful;
- e. accessing, sending, receiving, displaying, performing, disclosing, storing, or executing any content
  - (1) in violation of any copyright, right of publicity, patent, trademark, service mark, trade name, trade secret or other intellectual property right,
  - (2) in violation of any applicable agreement, or
  - (3) without authorization;
- f. deleting or altering author attributions, copyright notices, or trademark notices, unless expressly permitted in writing by the owner;
- g. obtaining unauthorized access to any system, network, service, or account;
- h. interfering with service to any user, site, account, system, or network by use of any program, script, command, or otherwise;



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- i. introducing or activating any viruses, worms, harmful code and/or Trojan horses;
  - j. sending or posting unsolicited messages or e-mail, whether commercial or not, a) to any recipients who have requested that messages not be sent to them, or b) to a large number of recipients, including users, newsgroups, or bulletin boards, at one time;
  - k. evading spam filters, or sending or posting a message or e-mail with deceptive, absent, or forged header or sender identification information;
  - l. propagating chain letters or pyramid schemes, whether or not the recipient wishes to receive such mailings;
  - m. holding IBM, its Affiliates, officers, employees and/or shareholders up to public scorn or ridicule; and/or
  - n. reselling IBM's services, in whole or in part, to any entity or individual, without IBM's prior written consent, or misrepresenting your relationship with IBM.



