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## CHAPTER 3. SPECIAL ITEM 132-8: PURCHASE

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### TERMS AND CONDITIONS

Note: These terms and conditions are applicable to the purchase of IBM Information Technology equipment. These terms are in addition to those described in Chapter 1, General Information.

During the contract period, International Business Machines Corporation (IBM) will (1) sell the machines and field installable model conversions (2) provide warranty service for the machines to 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). 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 to overseas U.S. Government locations which are in support of National or mutual defense operations (including U.S. Embassies), and to locations which support the national interest of the United States.

IBM makes no representation that machines, attachments, special features, accessories or engineering changes which may be announced in the future, will be suitable for use on, or in connection with, the machines purchased hereunder.

### 3.1 ORDER

Written orders, EDI orders (GSA Advantage! and FACNET), credit card orders, and orders placed under blanket purchase agreements (BPA) shall be the basis for purchase in accordance with the provisions of this contract. If time of delivery extends beyond the expiration date of the contract, the Contractor will be obligated to meet the delivery and installation date specified in the original order.

For credit card orders and for funded BPA's, telephone orders are permissible.

#### **Material and Workmanship**

Each product that IBM offers under the Contract, per IBM's standard commercial warranty, will conform to its specifications when used in a specified operating environment.

### 3.2 TRANSPORTATION OF EQUIPMENT

FOB Destination. Prices cover equipment delivery to destination, for any location within the United States (including Alaska and Hawaii) and Puerto Rico. For shipments to other locations see Appendix A.

### 3.3 INSTALLATION AND TECHNICAL SERVICES

When the equipment provided under this contract is not normally self-installable, the Contractor's technical personnel shall be available to the ordering activity, at the ordering activity's location, to install the equipment. Charges for additional training and services may be provided under SIN 132-51 of this Schedule

IBM's installation guidelines are specified in Item 3.11 of this Chapter.

### 3.4 INSTALLATION, DEINSTALLATION, REINSTALLATION

The Davis-Bacon Act (40 U.S.C. 276a-276a-7) provides that contracts in excess of \$2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works with the United States, shall contain a clause that no laborer or mechanic employed directly upon the site of the work shall received less than the prevailing wage rates as determined by the Secretary of Labor. The requirements of the Davis-Bacon Act do not apply if the construction work is incidental to the furnishing of supplies, equipment, or services. For example, the requirements do not apply to simple installation or alteration of a public building or public work that is incidental to furnishing supplies or equipment under a supply contract. However, if the construction, alteration or repair is segregable and exceeds \$2,000, then the requirements of the Davis-Bacon Act applies.

The ordering activity issuing the task order against this contract will be responsible for proper administration and enforcement of the Federal labor standards covered by the Davis-Bacon Act. The proper Davis-Bacon wage determination will be issued by the ordering activity at the time a request for quotations is made for applicable construction classified installation, deinstallation, and reinstallation services under SIN 132-8.

**OPERATING AND MAINTENANCE MANUALS.** The Contractor shall furnish the ordering activity with one (1) copy of all operating and maintenance manuals which are normally provided with the equipment being purchased.

### 3.5 INSPECTION/ACCEPTANCE

The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The ordering activity reserves the right to inspect or test any equipment that has been tendered for acceptance. The ordering activity may require repair or replacement of nonconforming equipment at no increase in contract price. The ordering activity must exercise its post-acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

### 3.5 ACCEPTANCE

For newly installed machines: date of delivery to the location designated on the Purchase Order. Notwithstanding anything herein to the contrary, the parties agree as follows:

(i) the ordering activity may negotiate an extension regarding the time of acceptance before issuing a delivery order; and (ii) the parties may mutually agree on the acceptance period for overseas orders.

### **3.6 WARRANTY**

The following warranty shall apply to IBM Machines , except when such Machines are relocated outside of the United States to a location where IBM is not providing such warranty services.

#### **Warranty for IBM Machines**

For each IBM Machine, IBM warrants that it is free from defects in materials and workmanship and conforms to its Specifications.

The warranty period for an IBM Machine is a fixed period. For Machines, unless otherwise specified, the Date of Installation is the Warranty Start Date. IBM provides the warranty period for each Machine in our GSA pricelist. During the warranty period, IBM provides repair and exchange Service for the IBM Machine, without charge, under the type of Service IBM designates for the IBM Machine.

If an IBM Machine does not function as warranted during the warranty period and IBM is unable to either 1) make it do so, or 2) replace it with one that is at least functionally equivalent, the Government may return it to IBM for a refund.

#### **Warranty for Systems**

When IBM specifies in its proposal that it is providing Products to the Government that are intended to operate together as a system, IBM warrants that those Products are compatible and when installed in accordance with their Specifications, will operate with one another. This warranty is in addition to IBM's other applicable warranties.

#### **Extent of Warranty**

If a Machine is subject to federal or state consumer warranty laws, IBM's statement of limited warranty included with the Machine applies in place of these Machine warranties.

The warranties stated above will not apply to the extent there has been misuse, (including but not limited to use of any Unauthorized Built-in Capacity or Circumvention of Technological Measures), accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper maintenance by the Government or a third party, or failure or damage caused by a product for which IBM is not responsible. The warranty for IBM Machines is voided by removal or alterations of Machine or parts identification labels.

For a Machine that IBM is responsible to install, if the Government elects to install the Machine itself or have a third party install the Machine, IBM may inspect the Machine at the Government's expense before providing warranty Service on the Machine. If the Machine is not in an acceptable condition for warranty Service, as solely determined by IBM, the Government may request that IBM restore it to an acceptable condition for Service or Customer may

withdraw its request for warranty Service. IBM, at its sole discretion, will determine if restoration is possible. Restoration is provided as a billable Service.

**THESE WARRANTIES ARE THE GOVERNMENT'S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

### **Items Not Covered by Warranty**

IBM does not warrant uninterrupted or error-free operation of a Product or Service or that IBM will correct all defects.

IBM identifies Products that it does not warrant in the hardware pricelist or the IBM announcement letter.

Unless IBM specifies otherwise in a quote or proposal, IBM provides Materials, non-IBM products (including those provided with, or installed on, an IBM Machine at the Government's request), and non-IBM Services WITHOUT WARRANTIES OF ANY KIND. However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to you. Warranty, service, support and refund rights, if any, for non-IBM Products are provided directly to the Government by their manufacturer or supplier, not IBM.

## **3.7 PURCHASE PRICE FOR ORDERED EQUIPMENT**

The price for a Machine or model conversion is the price shown in this Price List or as otherwise provided in a price quote from IBM to the Government (if an order is received during the specified validity period of the price quote). If IBM's established price for a Machine or model conversion has decreased, the Government shall have the benefit of the lower price as of the date of order receipt or the date of shipment.

## **3.8 RESPONSIBILITIES OF THE CONTRACTOR**

The Contractor shall comply with all laws, ordinances, and regulations (Federal, State, City or otherwise) covering work of this character, and shall include all costs, if any, of such compliance in the prices quoted in this offer.

## **3.9 TRADE-IN OF FEDERAL INFORMATION PROCESSING EQUIPMENT**

When an agency determines that equipment will be replaced, the agency shall follow the contracting policies and procedures in the Federal Acquisition Regulation (FAR), the policies and procedures regarding Disposition of Information Technology Excess Personal Property in the Federal Property Management Regulations (FPMR) (41 CFR 101-46), and the policies and procedures on exchange/sale contained in FPMR 41 CFR part 101-46.

### 3.10 RISK OF LOSS OR DAMAGE

IBM bears the risk of loss or damage for each Machine up to the time it is delivered to the IBM-designated carrier for shipment to you or your designated location. Thereafter, the Government assumes the risk. Each Machine will be covered by insurance, arranged and paid for by IBM for you, covering the period until it is delivered to you or your designated location. For any loss or damage, you must 1) report the loss or damage in writing to IBM within 10 business days of delivery and 2) follow the applicable claim procedures.

### 3.11 INSTALLATION

The Government agrees to provide an environment meeting the requirements for the Machine as specified in its published documentation.

Within 30 calendar days of the shipment of a Machine, the Government agrees to install the Machine or, if IBM is responsible for the installation, to allow IBM to install the Machine. IBM has standard installation procedures. For a Machine that IBM is responsible to install, if the Machine is not made available for IBM to install within six months from shipment, installation will be subject to an installation charge. The installation charge will be calculated based on the machine per call class identified in the Hardware pricelist and the per call rates identified in Appendix B.

The Government shall be responsible for installing a Customer-Set-Up (or Government-Set-Up or CSU or GSU) Machine and a non-IBM Machine according to instructions provided by IBM or the Machine's manufacturer.

#### **Machine Upgrades and Engineering Changes**

IBM sells Machine Upgrades for installation on Machines, and in certain instances, only for installation on a designated serial numbered Machine. Within 30 days of the shipment of a Machine Upgrade, the Government agrees to install the Machine Upgrade or, if IBM is responsible for the installation, to allow IBM to install the Machine Upgrade. If the Machine Upgrade is not made available for IBM to install within six months from the date IBM ship the Machine Upgrade, installation will be subject to an installation charge.

The Government agrees to allow IBM to install mandatory Engineering Changes (such as those required for safety) on a Machine within 30 calendar days of IBM's notice to the Government unless otherwise agreed to by the parties.

Many Machine Upgrades and Engineering Changes require the removal of parts and the transfer of ownership and possession of the removed parts to IBM. The Government is responsible for the return of all removed parts to IBM upon installation of the Machine Upgrade or Engineering Change. As applicable, the Government represents that it has permission from the owner and any lien holders to i) install Machine Upgrades and Engineering Changes and ii) transfer ownership and possession of removed parts to IBM. The Government further represents that all removed parts are genuine, unaltered and in good working order. A part that replaced a removed part will assume the warranty or maintenance Service status of the replaced part.

IBM makes no representation that a specific transaction may qualify for any particular tax or accounting treatment, whether that transaction is referred to as an upgrade, or if a Machine's

serial number is retained despite a change being made to that Machine, or otherwise. The Government must make your own determination as to the tax or accounting treatment for each transaction.

### **Date of Installation**

The warranty period for each Machine starts on the Machine's Date of Installation, which is defined as follows: a) for an IBM Machine specified as "Customer Set Up" and for any non-IBM machines, on the second day after the standard transit allowance period; (b) for an IBM Machine not specified as "Customer Set Up", on the earlier of (i) the business day after IBM completes its standard installation procedures and (ii) 45 days following shipment from IBM. Such Date of Installation definition also applies to any IBM Services and other offerings which reference the Machine's Date of Installation.

## **3.12 ADDITIONAL IBM TERMS**

### **3.12.1 OWNERSHIP**

IBM will transfer title to the Government upon shipment of the Machine. Disputes associated with timely payment shall be resolved via the Disputes Act.

### **3.12.2 TITLE TO UPGRADE ORDERS**

Some Upgrades consist solely of Machine Code or OILC, or of a modification to Machine Code or OILC. Title for an Upgrade will not be transferred when the Upgrade consists solely of Machine Code or OILC.

### **3.12.3 NO HOMOLOGATION CERTIFICATION**

Unless IBM has specified otherwise in a Machine's published IBM announcement letter, the Machine is not certified for connection by any means to interfaces of public telecommunications networks. Certification may be required by law prior to making any such connection.

### **3.12.4 NOTICES**

The IBM document repository accessible at [http://www.ibm.com/servers/support/machine\\_warranties/support\\_by\\_product.html](http://www.ibm.com/servers/support/machine_warranties/support_by_product.html) identifies any applicable Product-specific environmental notices.



### 3.12.5 MACHINE CODE LICENSE AGREEMENT

By issuing a funded Delivery Order for a Machine, the Government (“Licensee”) agrees to the duties, restrictions and obligations with respect to such Machine Code as set forth in this IBM License Agreement for Machine Code (“License Agreement”).

Acquisition of the Covered Machine, in and of itself, provides no rights or authorizations to use the Machine Code provided with the Covered Machine. Licensee receives certain rights and authorizations to use Machine Code only as set forth in this IBM License Agreement for Machine Code (“License Agreement”) as follows:

This License Agreement applies to all Machine Code provided for the Covered Machine (or Upgrade, as applicable). With respect to Machine Code provided for an Upgrade, this License Agreement replaces all license agreement(s) for Machine Code previously provided for the Machine receiving the Upgrade. Any reference to the “IBM Agreement for Licensed Internal Code” in an agreement between Licensee and IBM means this License Agreement.

#### 1. Definitions

**Activated** – when IBM causes, directly or indirectly, the Authorized Built-in Capacity to be made available for Licensee’s use on the Covered Machine.

**Acceptance-By-Use Machine** – a Covered Machine specified by IBM as “Acceptance by Use” through this address:

[http://www.ibm.com/systems/support/machine\\_warranties/support\\_by\\_product.html](http://www.ibm.com/systems/support/machine_warranties/support_by_product.html).

**AUT** – the “IBM Authorized Use Table for Machines” which is provided at the following address: [www.ibm.com/systems/support/machine\\_warranties/machine\\_code/aut.html](http://www.ibm.com/systems/support/machine_warranties/machine_code/aut.html) and is in effect as of the acquisition date of the Covered Machine (or, if there is one or more Upgrades on the Covered Machine, then the acquisition date of the last such Upgrade). The AUT is incorporated by reference into this License Agreement.

**Authorized Built-in Capacity** – the Built-in Capacity for the Covered Machine that was Properly Acquired and Activated and is used in accordance with the AUT. For purposes of this definition, Activated means when IBM causes, directly or indirectly, the Authorized Built-in Capacity to be made available for Government’s use on a Covered Machine and Properly Acquired means lawfully acquired from IBM (or an authorized IBM reseller) for the agreed consideration.

**Authorized Use** – the use of IBM Machine Code to access and use Authorized Built-In Capacity to process the types of executable code, or certain percentages of portions thereof, as specified in this License Agreement and as actually implemented by IBM’s Technological Measures.

**Built-in Capacity** - the type and quantity of all resources and capabilities that IBM provides for a Machine, the access or use of which IBM has the ability to restrict by contract or Technological Measures. Built-In Capacity includes, without limitation, the type and quantity of the following: 1) processors, cores, processing capacity, processor performance setting and interactive processing capacity and capabilities; 2) memory; 3) storage; 4) cryptographic capability; 5) input/output ports, and 6) workload-specific resources and capabilities (including, for example, System z mainframe specialty processors such as zIIPs, zAAPs and IFLs, and other limited purpose products (including “appliances”). Built-in Capacity is either Authorized Built-in Capacity or Unauthorized Built-in Capacity.

**Circumvent** – to, directly or indirectly, by or through any means, alter, avoid, disrupt, subvert, go around, or otherwise interfere with.

**Covered Machine** – the specific Machine (identified by serial number or order number on a quote/proposal issued by IBM) for which use of Machines Code is licensed. A Covered Machine that received a Machine Upgrade remains a Covered Machine and a Machine that receives a Machine Upgrade becomes a Covered Machine.

**Licensed Internal Code (or LIC)** – another term for Machine Code commonly used for certain IBM product lines, such as for IBM System z Machines. LIC and Machine Code are interchangeable terms that have the same meaning.

**Licensee** – the party to which IBM is granting the right to use Machine Code with the Covered Machine (or Upgrade, as applicable).

**Machine** – a hardware device, including its resources, capabilities, features, conversions, Machine Upgrades, elements, or accessories, or any combination of them.

**Machine Code** – all of the following: (i) all code provided for an IBM Machine (including, without limitation, a Machine’s firmware and microcode), excluding code that is licensed under a license agreement other than this License Agreement (for example, IBM operating system and middleware products); and (ii) records, data, and structures created, used or relied on by the code in item (i) (for example, IBM System z mainframe LIC Configuration Control records and passwords that help restrict access or use of the code in item (i)). The term Machine Code includes any whole or partial copy of Machine Code, and any fix, patch, or replacement provided for Machine Code.

**Other Internal Licensed Code** – code for a Covered Machine that is separately provided by IBM and licensed by a third party.

**Properly Acquired** - lawfully acquired from IBM (or an authorized IBM reseller) for the agreed consideration.

**Technological Measures** – all means, methods, systems, processes, checks, tests, monitoring, validations, instruments, and other measures that IBM implements for the purpose of: (i) protecting, controlling, limiting, and restricting the use of Machine Code; (ii) protecting, controlling, limiting, and restricting the access to or use of Built-in Capacity (including, for clarity, both Unauthorized Built-in Capacity and Authorized Built-in Capacity); and (iii) monitoring and reporting use of the Machine Code, Authorized Built-in Capacity, and Unauthorized Built-In Capacity, including for the purpose of calculating usage-based charges for IBM Products. Without limiting the generality of the preceding sentence, Technological Measures may be implemented, in whole or in part, in Machine Code, IBM programs, other code, other IBM technology, and in the data created, used or relied upon by such Machine Code, IBM programs, other code, and IBM technology.

**Unauthorized Built-in Capacity** – all Built-in Capacity for the Covered Machine other than Authorized Built-in Capacity. For example and for the avoidance of any doubt, each of the following is Unauthorized Built-In Capacity: (i) in the case of a processor authorized to operate at less than its full processor performance setting, the capability to operate the processor at a greater processor performance setting, and (ii) in the case of a System z mainframe specialty

processor, the capability to use the specialty processor for anything other than Authorized Uses as defined in the AUT.

**Upgrade** – the following changes that IBM sells for installation on a Machine: a hardware or Machine Code change to modify, add, remove, enable or disable certain Built-in Capacity or other resources and capabilities. Each such change can be accomplished through a Machine conversion, or through the conversion, addition, removal, or exchange of a Machine’s feature(s).

## **2. Machine Code**

International Business Machines Corporation, one of its subsidiaries, or a third party owns the Machine Code (including, without limitation, ownership of all copies of Machine Code and ownership of all copyrights and other intellectual property in Machine Code). Machine Code is copyrighted and licensed (not sold). IBM licenses Machine Code to the Licensee only under the terms set forth in this License Agreement.

### ***2.1 License***

IBM grants Licensee a nonexclusive license to use Machine Code without Circumventing Technological Measures and only as follows:

- a. to enable the Covered Machine to function as designed by IBM;
- b. to access and use Authorized Built-in-Capacity; and
- c. to execute and display Machine Code as reasonably necessary to maintain the Covered Machine in accordance with the IBM-designated maintenance package for such Machine type.

No other licenses or rights (including licenses or rights under patents) are granted either directly, by implication, or otherwise. No other use of Machine Code is authorized.

Licensee acknowledges that if the Authorized Built-in Capacity is less than the Built-in Capacity of the Covered Machine (or Upgrade, as applicable), Licensee has paid a price lower than the full price for the Covered Machine (or Upgrade, as applicable) and may pay charges lower than the full amount for other IBM products, including without limitation, software, and services because its right to use the Machine Code is limited as provided in this License Agreement.

### ***2.2 Actions Licensee May Not Take***

Licensee shall use Machine Code only as expressly authorized in Section 2.1 above. Without limiting the foregoing, Licensee shall not, directly or indirectly, perform, attempt to perform, or allow any other party or product to do any of the following:

- a. access or use any Unauthorized Built-in Capacity;
- b. copy, display, transfer, adapt, modify, or distribute (electronically or otherwise) Machine Code, unless expressly permitted by applicable law without the possibility of contractual waiver;
- c. reverse assemble, reverse compile, otherwise translate, or reverse engineer Machine Code or other code implementing Technological Measures, unless expressly permitted by applicable law without the possibility of contractual waiver; or,

- d. assign this License Agreement, transfer Licensee's rights under this License Agreement, or sublicense, rent, or lease Machine Code.

For the avoidance of doubt, Licensee is fully responsible to IBM for ensuring that the actions of all parties that Licensee allows to access the Covered Machine or the Machine Code, (including, without limitation, independent software vendors, brokers, and third party maintainers), and the use of all non-IBM products and services that Licensee uses or allows to be used on or in conjunction with the Covered Machine, are in compliance with the terms and conditions of this License Agreement.

### ***2.3 Replacements, Fixes, and Patches***

If Licensee requires a replacement, fix or patch for Machine Code, Licensee shall acquire such Machine Code directly from IBM in accordance with IBM's standard policies and practices. Unless and until IBM provides a replacement license agreement for Machine Code, the terms of this License Agreement apply to all Machine Code on the Covered Machine, including, for clarity, any replacement, fix or patch for, or additional copy of, Machine Code for the Covered Machine, even if the prior license agreement was the IBM Agreement for Licensed Internal Code.

### ***2.4 Machine Code Transfers***

Licensee acknowledges that it does not own and does not have the right to sell, license, sublicense or otherwise transfer rights in the Machine Code. Provided that Licensee has not breached any term or condition of this License Agreement, Licensee may transfer possession of (but not the right to use) the Machine Code on the Covered Machine to a transferee of the Covered Machine who has a signed written agreement with IBM to comply with the then-current IBM License Agreement for Machine Code for the Covered Machine. In the event of such transfer of Machine Code, Licensee shall immediately destroy all of Licensee's copies of that Machine Code, except for any copies that reside on the Covered Machine. Absent IBM's grant of a license to the transferee to use the Machine Code for the Covered Machine, the transferee of the Covered Machine is not authorized to use or otherwise access Machine Code, or access and use any Built-in Capacity. Any attempt by Licensee to transfer this License Agreement or any other rights for use of the Machine Code to transferee is void and constitutes a breach of this License Agreement.

### ***2.5 Remedies; Termination***

Licensee's rights under this License Agreement terminate when Licensee ceases to have any rights to the Covered Machine. In addition, IBM may exercise its rights subject to the Contract Disputes Act and FAR 52.233-1 (Disputes), if Licensee breaches any term or condition of this License Agreement, IBM may exercise one or more of the following rights: (i) require Licensee to Properly Acquire and Activate all Unauthorized Built-In Capacity on the Covered Machine at the then-applicable IBM price; (ii) for all IBM products licensed to and all IBM services provided for the Covered Machine, invoice Licensee for all one-time and recurring charges (at the then-applicable IBM prices) that would have been due if Licensee had also Properly Acquired and Activated the Unauthorized Built-In Capacity for such products and services, retroactive to the first use of any Unauthorized Built-In Capacity on the Covered Machine; (iii) terminate this License Agreement, the licenses for IBM products used on the Covered Machine,

and any other agreements relating to the Covered Machine; and (iv) pursue all other rights and remedies available at law or in equity.

### **3. Technological Measures**

Licensee agrees to IBM's implementation of Technological Measures, including without limitation, measures that may impact availability of data or performance of the Covered Machine. As an express condition of this License Agreement, Licensee shall not (i) Circumvent or attempt to Circumvent Technological Measures or use a third party or third party product to do so, or (ii) in any way access or use or attempt to access or use Unauthorized Built-in Capacity.

IBM reserves the right to change Technological Measures, and Licensee shall, as an express condition of this License Agreement (i) either apply such changes within thirty (30) days after IBM provides notice of the availability of such changed Technological Measures or allow IBM to apply such changes at any time, and (ii) if Licensee applies such changes itself, then at IBM's request, provide IBM with a written certification confirming such application within such thirty (30) day period. Licensee shall maintain a copy of this License Agreement, including a copy of any written certification provided to IBM pursuant to this License Agreement, and provide a copy to IBM upon request.

IBM maintains an Authorized Use Table ("AUT") which provides the complete list of Authorized Uses of IBM Machine Code by type of Built-in Capacity. Authorized Use is based on product-specific built-in capacity. The AUT is effective as of the date of hardware acquisition and replaces all prior IBM authorizations for the use of IBM Machine Code and Built-In Capacity. The AUT applies until IBM supersedes it by issuing an AUT of a later effective date. IBM maintains the current AUT at [www.ibm.com/systems/support/machine\\_warranties/machine\\_code/aut.html](http://www.ibm.com/systems/support/machine_warranties/machine_code/aut.html).

### **4. Authorized Use Table**

For each type of Built-in Capacity listed in the Authorized Use Table the corresponding section describes all Authorized Uses. No other use of Built-in Capacity is authorized. The processing identified as Authorized Uses for a zIIP, zAAP and IFL, whether of an IBM, an independent software vendor (ISV) or a customer program, represent "Eligible Workloads" for the corresponding processor. To the extent of any conflict between the descriptions of the Authorized Uses in the table and IBM's actual implementation of the Authorized Uses through IBM's Technological Measures, the more limited scope of Authorized Uses takes precedence.

#### **No Circumvention of Technological Measures**

Subject to the Contract Disputes Act and FAR 52.233-1 (Disputes), all Authorized Uses are voided for a Covered Machine if there is any Circumvention or attempted Circumvention of Technological Measures for such Covered Machine.

#### **Modification of the AUT**

IBM retains the exclusive right, without advance notice, to modify the AUT. If IBM adds Authorized Uses, any Authorized Uses added to the AUT apply to all existing and subsequently acquired Authorized Built in Capacity, as applicable. If IBM restricts Authorized Uses, restrictions on Authorized Uses apply only to subsequently acquired Authorized Built in Capacity.

Subsequently acquired Authorized Built in Capacity includes, without limitation (i) acquisition of additional Authorized Built-In Capacity, (ii) re-characterization of Authorized Built-In Capacity (for example, conversion of an IFL into a zIIP), and (iii) carrying forward existing Authorized Built-In Capacity from one product family to its successor product family, with or without a charge (for example, carrying a zIIP forward as part of an upgrade from a IBM System z10 machine to an IBM System z196 machine).

#### **Authorization for Other Internal Licensed Code**

OILC is licensed under, and Customer's use is governed by, the terms of the applicable license agreement(s) for such OILC provided at [http://www.ibm.com/servers/support/machine\\_warranties/support\\_by\\_product.html](http://www.ibm.com/servers/support/machine_warranties/support_by_product.html), which are hereby incorporated by reference into this Agreement.

#### **3.12.6 PRODUCTION STATUS**

Items purchased under Special Item 132-8 of this Contract will be newly manufactured and may contain some serviceable used parts and/or features. In any event, IBM's warranty terms identified under "Warranty", shall apply.

#### **3.12.7 INVOICING / PAYMENT**

The Government will be invoiced for products upon shipment.

In the event that the Government is of the opinion that any charges or credits on an invoice are not billed properly, every effort should be made to promptly pay the portion of the invoice not in question and give detailed written notice to IBM concerning the items in question.

#### **3.12.8 ENERGY EFFICIENT PRODUCTS**

IBM's products certified as ENERGY STAR ® products or FEMP-designated products are available at the following websites.

<http://www-03.ibm.com/systems/power/hardware/energy-star/>

and <http://www-03.ibm.com/systems/storage/energy-star/index.html>

## 3.13 HARDWARE OFFERINGS

### 3.13.1 ATTACHMENT FOR IBM POWER SYSTEMS TEMPORARY CAPACITY ON DEMAND

The terms of Chapter 1, Chapter 3 and this Attachment for IBM Power Systems Temporary Capacity on Demand govern IBM's provision and Government's acquisition and use of the IBM Power Systems On/Off Capacity on Demand offering ("On/Off CoD").

#### 1. Definitions

**Activate** – to enable On-Demand Capacity for use.

**Monitoring Program** -- software IBM licenses to Government (for example, the IBM Electronic Service Agent Program) that (i) monitors Activation of Temporary Capacity, and (ii) reports TCoD Units to IBM through a telecommunications connection.

**On-Demand Capacity** – the amount of resources, such as processors, storage, memory, that is installed on a TCoD Machine but that is not enabled for use (for example, resources which IBM documentation refers to as "on-demand processors").

**Requested Units** -- TCoD Units Government specifies when Government Activates On-Demand Capacity.

**TCoD Billing Feature** -- a feature, used for billing purposes, that specifies the price for each TCoD Unit. The TCoD Billing Feature is orderable in the quantity and type of TCoD Units that are Activated during a TCoD Billing Quarter.

**TCoD Billing Quarter** -- a calendar quarter for which Government's Activation of Temporary Capacity is monitored for billing purposes.

**TCoD Enablement Feature** -- a feature which, when included in the configuration of a TCoD Machine, (i) authorizes Government to perform Activations and use Temporary Capacity on the TCoD Machine, and (ii) provides a key (referred to in IBM documentation as the "TCoD Enablement Code") to enable Government Activation and Government management of Temporary Capacity on the TCoD Machine.

**TCoD Machine** -- an IBM Power Systems Machine that supports Temporary Capacity on Demand ("TCoD") (which may also be referred to in IBM literature or otherwise known as "On/Off Capacity on Demand," "On/Off CoD," "On/Off Capacity Upgrade on Demand," or "On/Off CUoD") and for which IBM offers TCoD features. Each TCoD Machine will be specified in an IBM Supplement for IBM Power Systems Temporary Capacity on Demand ("Supplement").

**TCoD Unit Maximum** -- a TCoD Enablement Feature's maximum number of TCoD Units available for Activation. Once this maximum is reached, Government must obtain a new TCoD Enablement Feature in order to perform additional Activations.

**TCoD Units** -- the duration and amount of On-Demand Capacity that is Activated. For example, "Processor Days" (number of Activated processors multiplied by the number of 24-hour periods plus any partial 24-hour period), or "Memory Days" (the amount of Activated memory multiplied by the number of 24-hour periods plus any partial 24-hour period) are the TCoD Units

measuring Activation of processors and memory, respectively. TCoD Units include both Requested Units and Unreturned Units.

**Temporary Capacity** -- On-Demand Capacity that has been Activated.

**Unreturned Units** -- TCoD Units that remain Activated after expiration of the duration Government specified when Government Activated On-Demand Capacity.

## 2. Use of Temporary Capacity

Government agrees to the following:

- a. Government is responsible for the charges associated with each TCoD Unit measured on Government's TCoD Machine during a TCoD Billing Quarter. This responsibility is satisfied when Government orders a sufficient quantity of TCoD Billing Features and pays IBM for the TCoD Billing Features. The amount due will be at IBM's then-current GSA prices for the TCoD Billing Feature applicable to the associated TCoD Billing Quarter;
- b. To issue a funded delivery order for the amount of the estimated TCoD Units to be used during the Activation period in order to initialize the TCoD Enablement Feature. It is the responsibility of the Government to monitor the funding on the order and to provide additional funding if TCoD Units are required beyond the amount estimated on the original order. Should the Government use TCoD Units beyond the estimated amount and an order is not placed prior to the end of the TCoD Billing Quarter, IBM reserves the right to directly invoice the Government for the actual TCoD Units reported by the Monitoring Program, or as otherwise specified below.
- c. Government will install (unless preinstalled), configure, and maintain the Monitoring Program on each TCoD Machine in the manner specified by IBM in the Monitoring Program's documentation, for the purpose of reporting TCoD Units to IBM at the interval(s) determined solely by IBM;
- d. if Government becomes aware that the Monitoring Program is disabled, disconnected or otherwise unable to accurately report TCoD Units to IBM, Government will promptly notify IBM, and allow IBM to access the TCoD Machine for the sole purpose of determining, if possible, the measurement of TCoD Units for which Government is responsible;
- e. if (a) Government removes, disables, disconnects, or otherwise prevents the Monitoring Program from accurately reporting TCoD Units to IBM; or (b) the Monitoring Program becomes disabled, disconnected or otherwise unable to accurately report TCoD Units to IBM and Government fails to promptly notify IBM and allow access as described in Section 2.d above, then Government will be responsible for TCoD Units as if all of the associated TCoD Machine's available On-Demand Capacity was Activated during the entire period for which the Monitoring Program did not measure or report TCoD Units to IBM. IBM may exercise its rights to discontinue the Government's use of the TCoD offering, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes); and
- f. upon reasonable notice, during normal business hours, and in a manner that minimizes disruption to Government's business, Government agrees to grant IBM sufficient access to TCoD Machines, including without limitation information regarding the use of IBM



Programs on TCoD Machines, for the sole purpose of verifying Government's compliance with the terms of this Attachment and IBM Program license terms.

### 3. Government's Additional Responsibilities

Government agrees to the following:

- .a Government represents and warrants that, at the time a TCoD Enablement Feature is ordered with, or for, a TCoD Machine, Government is either the owner of the TCoD Machine or Government has the permission from the owner and any lien holders for placing such order and Activating On-Demand Capacity;
- .b IBM is not responsible to notify any of Government's suppliers (for example, other software vendors who license their product on a per-processor basis) when Government Activates On-Demand Capacity;
- .c in addition to charges for Activation of On-Demand Capacity, Government is also responsible for any charges resulting from, or necessary for, the Activation, including those for requisite hardware, software, (for example, software license upgrades) or services (for example, additional maintenance charges);
- .d IBM reserves the right to change the process by which Temporary Capacity is made available for Government's use. Government will install (or if specified by IBM, allow IBM to install) and implement any such change on each applicable TCoD Machine within a commercially reasonable time period following receipt of notice from IBM reserves the right to change the Monitoring Program or the means by which IBM monitors Activation of On-Demand Capacity. Government will install (or if specified by IBM, allow IBM to install) and implement any such change within a commercially reasonable time period following receipt of notice from IBM;
- .e this offering is comprised solely of the computer resource identified as On-Demand Capacity available for a TCoD Machine. Government is responsible for providing all other computing resources (for example, memory, storage) that Government may require, adequate in type and quantity, to satisfy the needs of Government's computing environment; and
- .f prior to termination of this Attachment for a TCoD Machine, Government will provide IBM access to the TCoD Machine for IBM's removal of the TCoD Enablement Feature. If Government transfers possession of a TCoD Machine without providing IBM such access, Government is, upon such transfer, responsible to IBM for the following charges associated with the transferred TCoD Machine:
  - (01) unreported TCoD Units for Activated On-Demand Capacity, up to the TCoD Unit Maximum; and
  - (02) any Unreturned Units, in excess of the TCoD Unit Maximum.

### 4. Termination

Government may terminate the rights under this offering for any specific TCoD Machine, by providing written notice to IBM. Such termination is effective the later of i) the date of termination Government specifies in such notice or ii) the date IBM completes the removal of

the TCoD Enablement Feature from Government's applicable TCoD Machine(s), such removal to be performed at a mutually agreed upon time.

Government's rights under this Attachment for a TCoD Machine terminate upon the earliest of the following: i) Government transfers possession or control of the TCoD Machine to another party (for example, Government returns the TCoD Machine to a lessor); ii) the Government's purchase order expires. .

IBM may exercise its rights to discontinue this TCoD offering if the Government fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52,233-1 (Disputes).

Any terms of this Attachment which by their nature extend beyond termination remain in effect until fulfilled.

## **5. Warranty**

IBM hardware warranty terms apply. As such, the warranty period for On-Demand Capacity commences upon the Date of Installation of the On-Demand Capacity, regardless of when or whether Government Activates the On-Demand Capacity.

## **6. Machine Code**

Government's use of Machine Code on a TCoD Machine is subject to the terms and restrictions governing such use as specified in the Agreement. Government's use of Temporary Capacity is governed by the terms and restrictions that govern Machine Code except as expressly provided in this Attachment. Machine Code does not include any Program or code provided under a separate license agreement, including without limitation an open source license agreement.

### ***6.1 Built-in-Capacity***

A TCoD Machine includes computing resources or capabilities that are to remain inactive, or the use of which is restricted, until the right to access and use the resources or capabilities is properly acquired directly from IBM or through an authorized IBM reseller (called "Built-in-Capacity"). Such computing resources and capabilities include without limitation processors, memory, storage, and/or workload specific resources or capabilities (such as limitations on the use for a specific operating system, programming language or application). If Government is the rightful possessor of a TCoD Machine, IBM grants Government a license to use the Machine Code (or any replacement IBM provides) on, or in conjunction with, only the TCoD Machine for which the Machine Code is provided, and only to the extent of authorizations Government has acquired for access to and use of Built-in-Capacity. If Government's use of Built-in-Capacity exceeds such IBM authorizations, Government agrees IBM will invoice the Government for charges based on the full price of permanent, unrestricted use of the Built-in-Capacity at the then-current GSA price.

### ***6.2 Temporary License***

For the purpose of an Activation, IBM grants Government a temporary license to use the Machine Code on the TCoD Machine to support Government's use of Temporary Capacity, as authorized herein. Government's temporary license to use the Machine Code on a TCoD Machine will commence on the date Government performs the Activation and will terminate upon the earlier of the following: i) Government's Deactivation of the Temporary Capacity, and ii) expiration or termination of Government's rights under this Attachment for the TCoD Machine.

### 6.3 Circumvention of Technological Measures

Built-in-Capacity and Activation of Temporary Capacity are limited by certain technological measures in Machine Code. Government may not i) circumvent such technological measures or use a third party or third party product to do so, or ii) otherwise access or use unauthorized Built-in-Capacity. If IBM determines that changes are necessary to the technological measures designed to limit access to, or use of, Built-in-Capacity, IBM may provide Government with changes to such technological measures. Government agrees, at IBM's option, to apply or allow IBM to apply such changes.

This Attachment, including its Supplements, and Chapter 1 and Chapter 3 are the complete agreement regarding IBM's provision of On/Off CoD, and replace any prior oral or written communications between Government Customer and IBM. By issuing IBM an order for this offering, neither party is relying on any representation that is not specified in this Attachment including without limitation any representations concerning: i) performance or function of On/Off CoD; ii) the experiences or recommendations of other parties; or iii) results or savings Government Customer may achieve. Additional or different terms regarding this On/Off CoD offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

#### 3.13.2 ATTACHMENT FOR DS8000 STANDBY CAPACITY ON DEMAND

The terms of Chapter 1, Chapter 3 and of this Attachment for DS8000 Standby Capacity on Demand ("Attachment") govern IBM's provision and Government's use of IBM System Storage DS8000 Standby Capacity on Demand.

##### 1. Definitions

**Activate/Activation/Activating** – Irrevocable enabling of On-Demand Storage for use.

**Authorized Disk Drives** – The quantity of disk drives permanently acquired on an Eligible System.

**Capacity** – Amount of resources, such as processors, disk drives, memory, adapters, supporting the functional capability of a Machine.

**Eligible Machine** – An IBM System Storage DS8000 Machine configured for Standby Capacity on Demand, and specified in an IBM Supplement for DS8000 Standby Capacity on Demand ("Supplement").

**Eligible System** – Two or more Eligible Machines that are directly connected and combining their respective Capacity such that they appear as one unit to other Machines to which they are connected.

**Function Authorization** – Enablement (technical or contractual) of a specific function on an Eligible Machine (for example, IBM's "Licensed Functions", such as "Operating Environment" and "FlashCopy") at a given Capacity level.

**Monitoring Program** – A function licensed to Government by IBM to monitor the Capacity being used on an Eligible Machine.

**On-Demand Storage** – Capacity used for storage of data, installed on an Eligible Machine but not Activated. On-Demand Storage is Activated, that is, enabled, when it is configured for use.

## 2. Activation of On-Demand Storage

- a. For each Eligible Machine, On-Demand Storage is available only in the Available On-Demand Storage Increment, as specified in the Supplement associated with that Eligible Machine.
- b. Government agrees to Activate the entire Available On-Demand Storage Increment when Government configures any portion of its On-Demand Storage for use.
- c. When Government Activates any On-Demand Storage on an Eligible Machine, Government agrees to the following:
  - (1) Government must issue an order to IBM prior to activating an upgrade
  - (2) IBM will invoice the Government for the upgrade associated with the Activation, including any associated Function Authorization upgrades applicable for that Eligible Machine. The amount invoiced will be at IBM's then current GSA price and terms for the upgrade.
- d. Should Government Activate any On-Demand Storage on a selected Eligible Machine and not place an order prior to activation of the upgrade, IBM reserves the right to directly invoice Government, for the upgrade associated with the Activation, as well as for any associated Function Authorization upgrades applicable for that Eligible Machine. The sale of any such upgrade will be at IBM's then current GSA prices and terms.
- e. Government understands that an Eligible System's amount of On-Demand Storage may not exceed the lesser of a) one-half of the Authorized Disk Drives of that Eligible System or b) the largest Maximum On-Demand Capacity specified in any quote or proposal documentation associated with that Eligible System. In the event changes to an Eligible System cause Government to exceed this limit, Government agrees to immediately Activate an appropriate amount of On-Demand Storage such that the Eligible System remains within this limit.
- f. Government agrees to Activate all On-Demand Storage on an Eligible Machine within the Activation Period specified in that Eligible Machine's documentation provided by IBM.
- g. Government agrees to allow IBM reasonable access to an Eligible Machine when On-Demand Storage is no longer available on that Eligible Machine. This access is for the sole purpose of properly establishing the extent of all applicable Function Authorizations.

## 3. Government's Additional Responsibilities

Government agrees to the following:

- a. Government represents and warrants that, at the time of Activating On-Demand Storage, Government is the owner of the Eligible Machine or that Government has the permission

from the owner and any lien holders for the Activation to be conducted as specified in this Attachment.

- .b In addition to charges for the Activation of On-Demand Storage, Government is responsible for any charges resulting from, or necessary for, the Activation, including those for requisite hardware, software, or services (for example, additional maintenance charges).
- .c Government is responsible for any required notification of Government's suppliers (for example, other software suppliers who license their product on an Eligible Machine Capacity basis) when Government Activates On-Demand Storage.
- .d IBM reserves the right to change the process by which On-Demand Storage is Activated. Government will install and implement, or will allow IBM to install and implement, as determined by IBM, such a change on each applicable Eligible Machine.
- .e Government will enable the IBM ESS Call Home function for each Eligible Machine in accordance with IBM's documentation. Government will not modify a Monitoring Program or in any way attempt to prevent or disable a Monitoring Program or modify an Eligible Machine, such that IBM cannot accurately monitor the Machine's Capacity and Activation status.
- .f In the event IBM changes the means by which it monitors the Capacity of an Eligible Machine, Government will implement any such change, as necessary, for example, by installing and running a new Monitoring Program.
- .g Government will Activate all On-Demand Storage on an Eligible Machine prior to upgrading that Eligible Machine to a new machine type or model, unless this provision is waived in writing by IBM.
- .h This offering is comprised solely of On-Demand Storage. Government is responsible for providing all other computing resources (for example, memory, processors, channels) that Government may require, adequate in type and quantity, to satisfy the needs of Government's computing environment.
- .i Government hereby acknowledges its understanding that any requirement for the reduction of a Function Authorization, in whole or in part, may require an outage of the associated Eligible Machine.
- .j Government will not circumvent technological measures intended to prevent unauthorized use of On-Demand Storage, or use a third party product to do so, or otherwise access or use unauthorized On-Demand Storage. Government will install, or allow IBM to install, as determined by IBM, changes to such technological measures if IBM determines such changes are appropriate.

#### **4. Termination**

This offering terminates for an Eligible Machine upon the earliest occurrence of any of the following:

- .a Government transfers possession of the Eligible Machine, or any part of the Eligible Machine containing On-Demand Storage to a third party (for example, return the Eligible Machine to the leasing company at lease-end);
- .b Government removes, disables or fails to install a Monitoring Program on the Eligible Machine; or
- .c Upon Government's one month's written notice to IBM.

Government agrees to give IBM one month's written notice in the event Government anticipates termination under (a) or (b) above.

Upon termination Government agrees to order and pay for Activation of all On-Demand Storage on an Eligible Machine,

IBM may exercise its rights to discontinue the Government's use of the Standby Capacity offering, upon written notice to the Government, if the Government fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

## **5. Warranty**

IBM hardware warranty terms apply. The warranty period for On-Demand Storage, including all associated parts, is based on the date On-Demand Storage is physically installed, regardless of when or whether Activation occurs.

This Attachment, including its Supplements, Chapter 1 and Chapter 3 comprise the complete agreement regarding IBM DS8000 Standby Capacity on Demand, and replace any prior oral or written communications between Government and IBM. In entering into this Attachment, neither party is relying on any representation that is not specified in the Attachment (or the documents specified in the preceding sentence), including without limitation any representations concerning: i) performance or function of any Product or system, other than as documented in its Specifications; ii) the experiences or recommendations of other parties; or iii) results or savings Government may achieve. Additional or different terms in any written communication from Government (such as a purchase order) are void.

### **3.13.3 ATTACHMENT FOR XIV STANDBY CAPACITY ON DEMAND**

The terms of this Attachment for XIV Standby Capacity on Demand ("Attachment") are in addition to the terms of this Chapter 1 and Chapter 3, and govern IBM's provision and Government's acquisition and use of the IBM XIV Standby Capacity on Demand offering.

The IBM XIV Standby Capacity on Demand offering permits Government to order On-Demand Storage Capacity for an Eligible Machine that is in addition to useable Storage Capacity. Government may then Activate, as Government deems necessary, such On-Demand Storage Capacity, acquiring each increment of On-Demand Storage Capacity at the time of Activation. Within 24 months following the Eligible Machine's Date of Installation, Government must Activate all of the Eligible Machine's On-Demand Storage Capacity.

## **1. Definitions**

**Activation** -- The configuration (that is, the allocation, whether designated for volumes or reserved for snapshots) of a certain increment of On-Demand Storage Capacity enabling such increment to be available for storage of data.

**Authorized Storage Capacity** -- The extent of Storage Capacity for which entitlement for use has been acquired. An Eligible Machine's initial Authorized Storage Capacity is specified in the Eligible Machine's Supplement.

**Eligible Machine** -- An IBM XIV Storage System Machine (designated by IBM as either Machine type 2810 or 2812) configured with the "CoD Interface Module" feature (designated by IBM as either feature code 1145, 1147, 2027, 2027, 2127 or 2137) and the "CoD Data Module" (designated by IBM as either feature code 1146, 1148, 2028, or 2038) and specified in an IBM Supplement for XIV Standby Capacity on Demand ("Supplement").

**On-Demand Storage Capacity** -- The useable disk capacity installed on an Eligible Machine but not Activated. An Eligible Machine's initial On-Demand Storage Capacity is specified in the Eligible Machine's Supplement.

**Storage Capacity** -- The total usable disk capacity (including Authorized Storage Capacity and On-Demand Storage Capacity) installed within an Eligible Machine for the storage of data. An Eligible Machine's initial Storage Capacity is specified in the Eligible Machine's Supplement.

**TB** -- Terabyte

**XIV Program** -- The IBM XIV Storage System Software Program (designated by IBM as 5639-XXA) licensed for use with an Eligible Machine.

## 2. Activation of On-Demand Storage

Upon each Activation beyond an Eligible Machine's Authorized Storage Capacity, Government agrees to place an order with IBM for each of the following prior to such Activation:

- a the Eligible Machine's "CoD Activation" feature, designated by IBM as one of the following:
  - (1) as feature code 1149, if the Eligible Machine includes feature code 1145;
  - (2) as feature code 1150, if the Eligible Machine includes feature code 1147;
  - (3) as feature code 2029, if the Eligible Machine includes feature code 2027;
  - (4) as feature code 2129, if the Eligible Machine includes feature code 2127;
  - (5) as feature code 2039, if the Eligible Machine includes feature code 2027; or
  - (6) as feature code 2139, if the Eligible Machine includes feature code 2137; and,
- b The Eligible Machine's XIV Program "Basic License Charge" feature (designated by IBM as feature code 0001).

Once acquired by Government, each such CoD Activation feature increases the Eligible Machine's Authorized Storage Capacity by one On-Demand Storage Increment as specified in the Eligible Machine's Supplement; and each such Basic License Charge feature increases the Eligible Machine's XIV Program license authorization by one On-Demand Storage Increment as specified in the Eligible Machine's Supplement. Government agrees to order sufficient quantity

of CoD Activation features and Basic License Charge features such that the Eligible Machine's amount of Authorized Storage Capacity and the Eligible Machine XIV Program license authorization is equal to or greater than the total amount of Storage Capacity that has been Activated on the Eligible Machine.

For a CoD Activation feature and Basic License Charge feature ordered directly from IBM, applicable charges will be based on the prices specified in the associated Supplement.

### **3. Term and Termination**

- .a The term of this Attachment begins once IBM receives a funded delivery order and ends upon termination or upon expiration of the Government's purchase order.

For each Eligible Machine, Government's rights under this Attachment terminate upon the earlier of the following:

- (01) Expiration of the "Authorization Period" specified in the Eligible Machine's Supplement;
- (02) Transfer of the Eligible Machine to another party, including without limitation return of the Eligible Machine to a leasing company;
- (03) The effective date specified in Government's written request to IBM

Upon such termination the Government agrees to Activate any remaining On-Demand Storage Capacity for the Eligible Machine; the terms of Section 2 above apply to such Activation. In addition, Customer's rights under the CoD Attachment or CoD Agreement terminate if Government Activates all available On-Demand Storage Capacity on an Eligible Machine without also ordering additional On-Demand Storage Capacity for the Eligible Machine.

- .b IBM may exercise its rights to discontinue the Government's Standby Capacity offering if the Government fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).
- .c Any terms of this Attachment which by their nature extend beyond termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.

### **4. General Offering Terms**

- .a Government represents and warrants that Government is either the owner of the Eligible Machine or Government has the permission of the owner and any lien holders for Activation of the Eligible Machine's On-Demand Storage Capacity. For Eligible Machines owned by IBM or IBM Global Financing, such permission is hereby granted.
- .b Government is responsible for any increase to Program or service charges that result from an Activation.
- .c Government is responsible for any required notification to Government's suppliers (for example, other software suppliers who license their product on an Authorized Storage Capacity basis), as appropriate and necessary, when Government performs an Activation.
- .d IBM will make available to Government reasonable instructions to properly perform an Activation. Government agrees to follow such instructions. IBM reserves the right to change



such instructions upon written notice to Government. Government agrees to follow updated instructions provided such change is no charge to Government.

- .e Government agrees to enable the IBM XIV Informational Event Notification function for the Eligible Machine in accordance with IBM's documentation. Government will not modify such function, attempt to prevent or disable such function, or modify an Eligible Machine such that the amount of capacity used on the Eligible Machine cannot be accurately monitored by IBM.
- .f Government agrees to grant IBM access to the Eligible Machine, including usage data for the Eligible Machine, upon reasonable prior request for the sole purpose of verifying Government's use of the Eligible Machine's Storage Capacity. Such access will be at a mutually agreed upon time during normal business hours and will not require an interruption to the operation of the Eligible Machine.
- .g In the event IBM changes the means by which it monitors the amount of capacity used on the Eligible Machine, Government agrees to implement such change if provided at no charge to Government.
- .h The IBM XIV Standby Capacity on Demand offering only provides additional capacity for use on an Eligible Machine. Government is responsible to provide other computing resources (for example memory, processors, adapters) that Government may require, adequate in type and quantity, to satisfy the needs of Government's storage and computing environment.
- .i Government will not circumvent any technological measures intended to prevent unauthorized use of On-Demand Storage Capacity, or use a third party product to do so, or otherwise access or use unauthorized On-Demand Storage Capacity other than as specified herein. Government agrees to install, or allow IBM to install, additional technological measures or changes to such technological measures if IBM determines such changes are appropriate. Any such change, and its installation, will be at no charge to Government, with installation being at a mutually agreed upon time within a commercially reasonable period following IBM's notice to Government.
- .j Government authorizes IBM and its subsidiaries (and their successors and assigns, contractors, and IBM Business Partners) to store and use Government's business contact information wherever they do business in connection with IBM Products and Services or in furtherance of IBM's business relationship with Government.

This Attachment, including its Supplement(s), Chapter 1 and Chapter 3 are the complete agreement regarding the IBM XIV Standby Capacity on Demand offering, and replace all prior oral or written communications, representations, undertakings, warranties, promises, covenants, and commitments between Government and IBM. In entering into this Attachment, neither party is relying on any representation that is not specified in the Attachment or the Agreement. Additional or different terms regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

### 3.13.4 ATTACHMENT SYSTEM z CAPACITY ON DEMAND OFFERINGS

Terms and Conditions for the System z COD offering apply to the z10 and future System z product announcements.

The terms stated herein for IBM System z Capacity on Demand Offerings (“CoD Attachment”) govern IBM’s provision and Customer’s acquisition and use of IBM System z Capacity on Demand Offerings. When used in the terms below, “Customer” means the Government Customer.

#### 1. Associated Attachments

This CoD Attachment provides terms that apply in general to all IBM System z Capacity on Demand Offerings. Additional terms are set forth in one or more Associated Attachments which govern each specific Capacity on Demand Offering. The terms of this CoD Attachment apply only when Customer has contracted for a Capacity on Demand Offering under one or more Associated Attachments.

If there is a conflict between the terms of this CoD Attachment and an Associated Attachment, the terms of the Associated Attachment prevail over those of this CoD Attachment. If there is a conflict among the terms of the Associated Attachments, the order of precedence will be as set forth in the applicable Associated Attachments.

#### 2. Definitions

**Activate** – to cause an Upgrade to be available for general use on an Eligible Machine.

**Associated Attachment** – a separate Attachment which specifies additional terms governing IBM’s provision and Customer’s acquisition and use of one or more Capacity on Demand Offerings, and which references this CoD Attachment.

**Built-in-Capacity** – any Capacity or capability of an Eligible Machine that may be included with an Eligible Machine and which is to remain inactive, or for which use is restricted, until the right to access and use the resource or capability is properly acquired directly from IBM or through an authorized IBM reseller. Such computing Capacity and capabilities include, without limitation, processors, memory, storage, and/or workload-specific resources or capabilities (such as a specific operating system, programming language, or application to which use of the Machine is limited).

**Capability Feature** – a Feature which designates that a Machine is enabled for Customer’s general use of a certain Capacity on Demand Offering.

Capacity -- resources (for example, general-purpose processors or memory) supporting the computing capability of an Eligible Machine.

**Capacity on Demand Offering** – an IBM System z offering for authorized use of Built-in-Capacity.

**Deactivate** – to cause an Upgrade to no longer be available for use on the Eligible Machine.

**Eligible Machine** – an IBM System z Machine for which Customer has acquired and installed one or more Capability Features.

**Feature** – Machine resources or function delivered by IBM through parts, LIC or entitlements to LIC, or any combination of the preceding.

**Supplement** – a Transaction Document between Customer and IBM which specifies certain terms or other information applicable to an Associated Attachment, and which references such Associated Attachment and this CoD Attachment.

**Upgrade** – a modification IBM makes to the Licensed Internal Code (“LIC”) of an Eligible Machine such that Customer may use additional Capacity, either permanently or temporarily, as specified by IBM in the applicable Associated Attachment. The term “Upgrade” includes any type of Upgrade offered under an Associated Attachment.

### 3. Charges

When Customer orders Upgrades or Features from IBM, applicable charges will be specified in a Transaction Document (i.e. IBM proposal, IBM quote).

### 4. General Offering Terms

- a. Customer represents and warrants that Customer is the owner of the Eligible Machine for which Customer orders an Upgrade or that Customer has the permission of the owner and any lien holders of the Eligible Machine to install an Upgrade.
- b. An Upgrade consists solely of a modification to an Eligible Machine’s LIC. Accordingly, no title to an Upgrade is transferred.
- c. IBM will make available to Customer commercially reasonable instructions to properly Activate and Deactivate an Upgrade. Customer agrees to follow such instructions.
- d. Program or service charges may increase for an Eligible Machine as the result of installation of an Upgrade.
- e. If an Eligible Machine is upgraded (for example, conversion to a higher model or installation of additional features: 1) entitlements provided herein for the Eligible Machine will not change and 2) any Upgrade request will upgrade the Eligible Machine either (i) by the same amount of Capacity, but not necessarily the same amount of additional performance (based on performance characteristics of the Eligible Machine); or (ii) to the maximum amount of Capacity available on the Eligible Machine (based on the Eligible Machine’s then-current model designation and installed Features), whichever is less. Upon Customer’s request, IBM will provide Customer with estimated performance characteristics of an Eligible Machine.
- f. Customer is responsible for maintaining each Eligible Machine in an operational condition sufficient for implementation and use of an Upgrade. If Customer does not maintain such an operational condition of an Eligible Machine, Customer may not be able to Activate or use an Upgrade until such condition is restored.
- g. IBM may make commercially reasonable updates to the procedure by which an Upgrade is ordered, installed, Activated, or Deactivated. Customer agrees to install and implement such update within a commercially reasonable period of time following IBM’s notice to Customer of such update, provided IBM generally requires its customers to implement the same procedure update.

- h. The Customer may not transfer the Machine that is subject to this CoD offering or delegate the Customer's obligations under the terms of this offering without the prior written consent of IBM. Any attempt to such assignment or transfer without such consent is void. IBM will not unreasonably withhold such consent.

## **5. Licensed Internal Code**

Customer's use of LIC is subject to the terms and restrictions governing such use as specified in the Agreement. Customer's use of an Upgrade is governed by the terms and restrictions that govern LIC except as expressly provided in this Attachment or an Associated Attachment. LIC does not include any Program or code provided subject to a separate license agreement, including without limitation an open source license agreement.

### ***5.1 Built-in-Capacity***

An Eligible Machine may include Built-in-Capacity. If Customer is the rightful possessor of an Eligible Machine, IBM grants Customer a nonexclusive license to use the LIC on, or in conjunction with, only the Eligible Machine for which IBM provided the LIC, and only to the extent of IBM authorizations Customer has acquired for access to and use of Built-in-Capacity. If Customer's use of Built-in-Capacity exceeds such IBM authorizations, IBM will invoice for charges based on the full price of permanent, unrestricted use of the Built-in-Capacity at the then-current price. The Customer is not authorized to use such Built-in-Capacity until additional funding is received by IBM.

### ***5.2 Circumvention of Technological Measures***

Built-in-Capacity, Upgrades, and certain Features are limited by certain technological measures in LIC. Customer may not i) circumvent such technological measures or use a third party or third party product to do so or ii) otherwise access or use unauthorized Built-in-Capacity. If IBM determines that changes are necessary to the technological measures designed to limit access to, or use of, Built-in-Capacity, IBM may provide Customer with changes to such technological measures. Customer agrees, at IBM's option, to apply or allow IBM to apply such changes.

## **6. Term and Termination**

### ***6.1 Term***

The term of this CoD Attachment begins once IBM receives a funded delivery order and ends upon termination as specified in Section 6.2 below.

### ***6.2 Termination***

This CoD Attachment terminates for a specific Eligible Machine when the Customer removes or transfers possession outside your Department or agency (including military department) of the Eligible Machine, or any part of the Eligible Machine containing On-Demand Capacity.

Customer may terminate this CoD offering, or terminate Customer's rights under this CoD offering for any specific Eligible Machine, upon one month's prior written notice in accordance with the terms of the Agreement. Such notice must be provided to IBM if an Eligible Machine is removed seeks to transfer possession as stated above.

IBM may exercise its rights to discontinue the Customer's CoD offering upon written notice if the Customer fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

Upon termination of this CoD offering, this Attachment, all Associated Attachments, and all rights under the Associated Attachments terminate for Eligible Machines.

Any terms of this CoD Attachment and all Associated Attachments which by their nature extend beyond termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.

This CoD Attachment, including its Associated Attachments and Supplements, and the Schedule terms comprise the complete agreement regarding IBM System z Capacity on Demand Offering transactions and replace any prior oral or written communications between Customer and IBM. In entering into this CoD Attachment, neither party is relying on any representation that is not specified in the CoD Attachment (or the documents specified in the preceding sentence), including without limitation any representations concerning: i) performance or function of any Product or system, other than as documented in its Specifications; ii) the experiences or recommendations of other parties; or iii) results or savings Customer may achieve. Additional or different terms regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

#### **3.13.4.1 ATTACHMENT IBM SYSTEM Z CAPACITY BACK UP**

The terms of this Attachment for IBM System z Capacity Back Up (“CUB Attachment”) are in addition ii) Attachment for IBM System z Capacity on Demand Offerings identified above (“CoD Attachment”), and iii) the Attachment for IBM System z Replacement Capacity Offerings identified below (“RC Attachment”) and govern IBM’s provision and Customer’s acquisition and use of the IBM System z Capacity Back Up (“CUB”) offering. When used in this Attachment, “Customer” means the Originating US Government customer (defined as an Agency or an affiliated entity of the US Government) that is acquiring the IBM System z Capacity on Demand Offering, subject to the Agreement.

##### **Associated Attachments**

This CUB Attachment, the RC Attachment and the CoD Attachment provide terms that apply to the IBM System z Capacity Back Up offering. This CUB Attachment is i) an “Associated Attachment” to the CoD Attachment and ii) an “RC Associated Attachment” to the RC Attachment.

If there is a conflict among the terms of this CUB Attachment and the RC Attachment or the CoD Attachment, those of this CUB Attachment prevail over those of the RC Attachment and the CoD Attachment.

##### **Definitions**

Capitalized terms not defined in this CUB Attachment or in the Agreement have the meaning ascribed to them in the RC Attachment or the CoD Attachment, as applicable.

**CUB Capability Feature** – an RC Enablement Feature specifying that an RC Eligible Machine is authorized by IBM to be temporarily upgraded with a CUB Upgrade.

**CUB Machine** – an RC Eligible Machine for which Customer has acquired and installed one or more CUB Capability Features.

**CBU Test** – a procedure that Customer conducts to test the Emergency Activation process for a CBU Machine.

**CBU Upgrade** – a certain RC Upgrade whereby the CBU Machine performs temporarily as an Upgraded CBU Machine.

**Emergency** – an event that Customer declares due to Customer’s unforeseen loss of substantial IBM System z or IBM System/390 Machine Capacity at one or more sites within Customer’s Enterprise.

**Emergency End** – the earlier of i) reasonable restoration of Lost Capacity or ii) ninety (90) days following Activation of a CBU Upgrade for purpose of an Emergency.

**Lost Capacity** – for the purpose of this CBU Attachment, “Lost Capacity” means the Capacity which Customer is authorized to use and was the basis for Customer declaring an Emergency.

**Production Workload** – software products and programs which execute in support of Customer’s business. Examples of Production Workload include without limitation, those characterized as “productive”, “production”, “development”, “maintenance” and “test” workloads.

**Upgraded CBU Machine** – the Upgraded RC Eligible Machine for a CBU Machine.

## **Term and Termination**

### ***Term***

The term of this CBU Attachment begins once IBM receives a funded delivery order and ends upon termination as specified in accordance with the Termination section below.

### ***Termination***

This CBU Attachment terminates for a specific Eligible Machine when the Customer removes or transfers possession outside your Department or agency of the Eligible Machine, or any part of the Eligible Machine containing On-Demand Capacity.

Customer may terminate this CBU Attachment, or terminate Customer’s rights under this CBU Attachment for any specific CBU Machine, by providing written notice to IBM. Such termination is effective the later of i) the date of termination Customer specifies in such notice or ii) the date IBM completes the removal of all CBU Capability Features from Customer’s CBU Machine(s).

Customer’s rights under this CBU Attachment for a CBU Machine terminate upon the earliest of the following events: i) the CBU term acquired from IBM for the CBU Machine ends; ii) Customer transfers possession or control of the CBU Machine to another party (for example, Customer returns the CBU Machine to a lessor, or transfers the CBU Machine outside of its Department or Agency – including military department); or iii) the RC Attachment terminates IBM may exercise its rights to discontinue the Customer’s CBU offering upon written notice if the Customer fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

### **Temporary LIC License**

Customer’s temporary license to use the LIC on a CBU Machine will commence on the date Customer Activates the CBU Upgrade and will terminate upon the later of the following: i) the

Emergency End (applicable only to a CBU Upgrade which Customer Activates as result of an Emergency) or ii) expiration or termination of Customer's rights under this CBU Attachment for the CBU Machine.

### **CBU Upgrade Authorizations**

IBM's authorization for Customer to Activate a CBU Upgrade and operate a CBU Machine as an Upgraded CBU Machine is valid only in the event of an Emergency or for the purpose of a CBU Test, as specified below in this section:

#### **Emergency Authorization**

In the event of an Emergency, such authorization will commence on the date Customer Activates the CBU Upgrade and will terminate upon the Emergency End.

During an Emergency, Customer is authorized to execute, on the Capacity of the CBU Upgrade, only workload from within Customer's Enterprise which previously was being executed on the Lost Capacity.

#### **CBU Test Authorization**

For the purpose of performing a CBU Test, such authorization will commence on the date Customer Activates the CBU Upgrade and will terminate upon the earlier of the following: i) the date Customer completes the CBU Test or ii) expiration of ten (10) days following Activation of the CBU Upgrade. Termination in either of the preceding events is the "CBU Test End".

The number of CBU Tests Customer is entitled to conduct on a CBU Machine is the amount acquired from IBM or an IBM Business Partner and installed on the CBU Machine.

During a CBU Test, on the Capacity of the CBU Upgrade, Customer may :

1. execute non-Production Workload (which may include one or more copies of Customer's Production Workload, provided the Production Workload is simultaneously executed on another Customer's Machine; or
2. execute Production Workload, provided an amount of System z Production Workload Capacity equivalent to the CBU Upgrade Capacity is shut down or otherwise made unusable by Customer for the duration of the CBU Test.

#### **Customer's Responsibilities**

Customer agrees as follows:

Customer will not perform a CBU Test for any reason, or in any manner, other than as authorized under the terms of this CBU Attachment;

Customer will not use a CBU Capability Feature or an Upgraded CBU Machine other than for the purpose authorized under the terms of this CBU Attachment;

Customer will execute workload on the Capacity of a CBU Upgrade only as authorized under the terms of this CBU Attachment;

Customer will Deactivate the CBU Upgrade from the CBU Machine no later than the Emergency End or CBU Test End, as specified in this CBU Attachment; and

Prior to expiration or termination of this CBU offering for a CBU Machine, Customer will:

Deactivate any CBU Upgrade from the CBU Machine and place an order with IBM for removal of the CBU Capability Feature(s) from the CBU Machine. When ordered from IBM, such removal shall be provided for no charge; the Customer will grant IBM sufficient access to the CBU Machine for IBM to remove the CBU Capability Feature(s). Such access will be at a time mutually agreed upon by Customer and IBM but shall not be later than the date this CBU Attachment expires or terminates for the CBU Machine.

If Customer fails to place an order or grant IBM sufficient access to remove the CBU Capability Feature(s) or CBU Upgrade(s), as specified above, Customer will be obligated for all charges subsequently incurred for any CBU Upgrade Activated for the CBU Machine.

### **General**

Customer is not entitled to any prorated refund or credit from IBM for paid charges in the event of termination of this CBU offering unless such termination is due to IBM's non-compliance with the terms of this CBU Attachment, RC Attachment, CoD Attachment or the Agreement.

This CBU Attachment, the RC Attachment, the COD Attachment, and the Schedule terms comprise the complete agreement regarding the IBM System z Capacity Back Up offering, and replace any prior oral or written communications between Customer and IBM. In entering into this CBU Attachment, neither party is relying on any representation that is not specified in the CBU Attachment (or the documents specified in the preceding sentence), including without limitation any representations concerning: i) performance or function of any Product or system, other than as documented in its Specifications; ii) the experiences or recommendations of other parties; or iii) results or savings Customer may achieve.

Additional or different terms regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

#### **3.13.4.2 ATTACHMENT SYSTEM Z REPLACEMENT CAPACITY OFFERINGS**

The terms of this Attachment for IBM System z Replacement Capacity Offerings ("RC Attachment") are in addition to i) the Attachment for IBM System z Capacity on Demand Offerings in effect between Customer and IBM and identified above ("CoD Attachment") and govern IBM's provision and Customer's acquisition and use of an IBM System z Replacement Capacity Offering. When used in this Attachment, "Customer" means the Government Customer that is acquiring the IBM System z Capacity on Demand Offering, subject to the Agreement.

#### **Associated Attachments**

This RC Attachment and the CoD Attachment provide terms that apply in general to all IBM System z Replacement Capacity Offerings. This RC Attachment is an Associated Attachment to the CoD Attachment. Additional terms as set forth in RC Associated Attachments govern each specific Replacement Capacity Offering. The terms of this RC Attachment apply only when Customer has contracted for a Replacement Capacity Offering under one or more RC Associated Attachments.

If there is a conflict between the terms of the RC Attachment and the CoD Attachment, the terms of this RC attachment prevail. If there is a conflict between the terms of this RC Attachment and



an RC Associated Attachment, the terms of the RC Associated Attachment prevail over those of this RC Attachment. If there is a conflict among the terms of the RC Associated Attachments, the order of precedence will be as set forth in the applicable RC Associated Attachments.

### **Definitions**

Capitalized terms not defined in this RC Attachment or in the Agreement have the meaning ascribed to them in the CoD Attachment.

**IBM Program License** -- a license agreement containing terms and restrictions which govern the use of an IBM Program.

**Lost Capacity** – Capacity which Customer is authorized to use but is not able to use.

**RC Eligible Machine** – an Eligible Machine for which Customer has acquired and installed one or more RC Enablement Features.

**RC Enablement Feature** -- a Capability Feature specifying that an Eligible Machine is authorized by IBM to be temporarily upgraded with an RC Upgrade.

**Replacement Capacity Associated Attachment (also called an “RC Associated Attachment”)** -- a separate Attachment between Customer and IBM which specifies terms in addition to those in this RC Attachment and the CoD Attachment governing IBM’s provision and Customer’s acquisition and use of a certain Replacement Capacity Offering, and which references this RC Attachment and the CoD Attachment.

**Replacement Capacity Offering (also called an “RC Offering”)** – a Capacity on Demand Offering governed by this RC Attachment.

**Replacement Capacity Upgrade (also called an “RC Upgrade”)** -- an IBM modification to the LIC of an RC Eligible Machine that enables the RC Eligible Machine to perform temporarily as an Upgraded RC Eligible Machine.

**Upgraded RC Eligible Machine** -- an RC Eligible Machine for which Built-in-Capacity has been Activated as authorized under terms of this RC Attachment and an RC Associated Attachment.

### **Temporary LIC License**

IBM authorizes Customer to Activate an RC Upgrade and operate an RC Eligible Machine as an Upgraded RC Eligible Machine, for a limited period of time, as specified in an RC Associated Attachment. For purpose of such Activation, IBM grants Customer a temporary license to use the LIC on the RC Eligible Machine to the extent Customer is authorized to Activate an RC Upgrade for such RC Eligible Machine, as specified herein and in the RC Associated Attachment.

### **IBM Program and Machine Maintenance Service Charges**

Customer’s authorization to Activate an RC Upgrade does not entitle Customer to any additional authorizations for use of IBM Programs. Upon reasonable notice, during normal business hours, and in a manner that minimizes disruption to Customer’s business, Customer agrees to grant IBM sufficient access to RC Eligible Machines, including without limitation information regarding the use of IBM Programs on RC Eligible Machines, for the sole purpose of verifying Customer’s compliance with IBM Program License terms.

An RC Upgrade that Customer Activates in accordance with the terms specified in either this RC Attachment or an RC Associated Attachment will not change IBM Program charges (provided Customer does not exceed its authorization for use of IBM Programs) or IBM maintenance Service charges. During the period that an RC Upgrade is Activated, Customer will continue to be responsible for all recurring charges for IBM Programs and IBM Machine maintenance Service at the rate applicable prior to the RC Upgrade being Activated and subject to the terms of each applicable IBM Program License and IBM maintenance Service agreement. Should Customer exceed its authorizations for use of IBM Programs, Customer will be responsible for all applicable license charges, in addition to IBM's other remedies that may be available under the terms of this Contract.

## **Term and Termination**

### ***Term***

The term of this RC Attachment begins once IBM receives a funded order from the Government and ends upon termination as specified in Section 5.2 below.

### ***Termination***

This RC Attachment terminates for a specific RC Eligible Machine when the Customer removes or otherwise transfers possession of the RC Eligible Machine, or any part of the RC Eligible Machine containing On-Demand Capacity.

Customer may terminate this RC Attachment, or terminate Customer's rights under this RC Attachment for any specific RC Eligible Machine, by providing written notice to IBM. Such termination is effective the later of a) the date of termination Customer specifies in such notice or b) the date IBM completes the removal of the RC Enablement Feature from each RC Eligible Machine(s) associated with such termination.

Customer's rights under this RC Attachment for an RC Eligible Machine terminate upon the earliest of the following events: i) IBM withdraws maintenance Service for the Machine type and model of the RC Eligible Machine; or iii) IBM withdraws this offering.

IBM may exercise its rights to discontinue this offering upon written notice if the Customer fails to comply with any of the terms and conditions of this RC Attachment, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes). Upon termination of this RC Attachment, all RC Associated Attachments, and all rights for RC Eligible Machines under the RC Associated Attachments, terminate.

## **Customer's Responsibilities**

Customer is responsible for acquiring, at Customer's expense, adequate memory, channels, and other system resources necessary to satisfy Customer's operational requirements for use of an Upgraded RC Eligible Machine.

This RC Attachment, including its RC Associated Attachments, the CoD Attachment, and the Agreement comprise the complete agreement regarding IBM Replacement Capacity Offerings, and replace any prior oral or written communications between Customer and IBM. In entering into this RC Attachment, neither party is relying on any representation that is not specified in the RC Attachment (or the documents specified in the preceding sentence), including without limitation any representations concerning: i) performance or function of any Product or system,

other than as documented in its Specifications; ii) the experiences or recommendations of other parties; or iii) results or savings Customer may achieve.

Additional or different terms regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

### **3.13.4.3 ATTACHMENT SYSTEM Z CAPACITY FOR PLANNED EVENTS**

The terms of this Attachment for IBM System z Capacity for Planned Events (“CPE Attachment”) are in addition to i) Attachment for IBM System z Capacity on Demand Offerings identified above (“CoD Attachment”), and iii) the Attachment for IBM System z Replacement Capacity Offerings identified above (“RC Attachment”) and govern IBM’s provision and Customer’s acquisition and use of the IBM System z Capacity for Planned Events (“CPE”) offering. When used in this Attachment, “Customer” means the Government Customer that is acquiring the IBM System z Capacity on Demand Offering, subject to the Agreement.

#### **Associated Attachments**

This CPE Attachment, the RC Attachment and the CoD Attachment provide terms that apply to the IBM System z Capacity for Planned Events offering. This CPE Attachment is i) an “Associated Attachment” to the CoD Attachment and ii) an “RC Associated Attachment” to the RC Attachment.

If there is a conflict among the terms of this CPE Attachment and the RC Attachment or the CoD Attachment, those of this CPE Attachment prevail over those of the RC Attachment and the CoD Attachment.

#### **Definitions**

Capitalized terms not defined in this CPE Attachment or in the Agreement have the meaning ascribed to them in the RC Attachment or the CoD Attachment, as applicable.

**CPE Capability Feature** – an RC Enablement Feature specifying that an RC Eligible Machine is authorized by IBM to be temporarily upgraded with a CPE Upgrade.

**CPE Machine** – an RC Eligible Machine for which Customer has acquired and installed one or more CPE Capability Features.

**CPE Upgrade** – a certain RC Upgrade whereby the CPE Machine performs temporarily as an Upgraded CPE Machine.

**Event End** – the earlier of i) reasonable restoration of Lost Capacity or ii) three (3) days following Activation of a CPE Upgrade for purpose of a Planned Event.

**Lost Capacity** – for the purpose of this CPE Attachment, “Lost Capacity” means the Capacity which Customer is authorized to use and was the basis for Customer declaring a Planned Event.

**Planned Event** – an event that Customer declares due to any loss of substantial IBM System z or IBM System/390 Machine Capacity at one or more sites within Customer’s Enterprise.

**Upgraded CPE Machine** – the Upgraded Eligible Machine for a CPE Machine.

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## **Term and Termination**

### ***Term***

The term of this CPE Attachment begins once IBM receives a funded delivery order and ends upon termination as specified in accordance with the Termination section below.

### ***Termination***

This CPE Attachment terminates for a specific CPE Machine when the Customer removes or otherwise transfers possession of the CPE Machine, or any part of the CPE Machine containing On-Demand Capacity.

Customer may terminate this CPE Attachment, or terminate Customer's rights under this CBU Attachment for any specific CBU Machine, by providing written notice to IBM. Such termination is effective the later of i) the date of termination Customer specifies in such notice or ii) the date IBM completes the removal of all CPE Capability Features from Customer's CPE Machine(s).

Customer's rights under this CPE Attachment for a CPE Machine terminate upon the earliest of the following events: i) Customer transfers possession or control of the CPE Machine to another party (for example, Customer returns the CPE Machine to a lessor, transfers the CPE Machine outside of the Department or agency – including military department); ii) the RC offering terminates; or iii) this CPE offering terminates.

IBM may exercise its rights to discontinue this CPE offering upon written notice if the Government fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

### **Temporary LIC License**

Customer's temporary license to use the LIC on a CPE Machine will commence on the date Customer Activates the CPE Upgrade and will terminate upon the later of the following: i) the Event End or ii) termination of the rights under this CPE Attachment for the CPE Machine.

### **CPE Upgrade Authorizations**

IBM's authorization for Customer to Activate a CPE Upgrade and operate a CPE Machine as an Upgraded CPE Machine is valid only for a Planned Event. In the event of Planned Event, such authorization will commence on the date Customer activates the CPE Upgrade and will terminate upon the Event End. During a Planned Event, Customer is authorized to execute, on the Capacity of the CPE Upgrade, only workload from within Customer's Enterprise which previously was being executed on the Lost Capacity.

### **Customer's Responsibilities**

Customer agrees as follows:

Customer will not use a CPE Capability Feature or an Upgraded CPE Machine other than for the purpose authorized under the terms of this CPE Attachment;

Customer will execute workload on the Capacity of a CPE Upgrade only as authorized under the terms of this CPE Attachment;

Customer will Deactivate the CPE Upgrade from the CPE Machine no later than the Event End; and Prior to expiration or termination of this CPE Attachment for a CPE Machine, Customer will:

Deactivate any CPE Upgrade from the CPE Machine and place an order with IBM or Customer's IBM Business Partner, as applicable, for removal of the CPE Capability Feature(s) from the CPE Machine. When ordered from IBM, such removal shall be provided for no charge.; and

Grant IBM sufficient access to the CPE Machine for IBM to remove the CPE Capability Feature(s). Such access will be at a time mutually agreed upon by Customer and IBM, but shall not be later than the date this Addendum expires or terminates for the CPE Machine.

If Customer fails to place an order or grant IBM sufficient access to remove the CPE Capability Feature(s) or CPE Upgrade(s), as specified above, Customer will be obligated for all charges subsequently incurred for any CPE Upgrade Activated for the CPE Machine.

### **General**

Customer is not entitled to any prorated refund or credit from IBM for paid charges if this CPE Attachment terminates unless such termination is due to IBM's non-compliance with the terms of this CPE Attachment, RC Attachment, CoD Attachment or the Agreement.

This CPE Attachment, the RC Attachment, the COD Attachment and the Agreement comprise the complete agreement regarding the IBM System z Capacity for Planned Events offering, and replace any prior oral or written communications between Customer and IBM. In entering into this CPE Attachment, neither party is relying on any representation that is not specified in the CPE Attachment (or the documents specified in the preceding sentence), including without limitation any representations concerning: i) performance or function of any Product or system, other than as documented in its Specifications; ii) the experiences or recommendations of other parties; or iii) results or savings Customer may achieve. Additional or different terms regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

