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## APPENDIX S IBM PASSPORT ADVANTAGE AGREEMENT

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## APPENDIX S. IBM PASSPORT ADVANTAGE AGREEMENT

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### TERMS AND CONDITIONS

Note: These terms are in addition to those described in Chapter 1, General Information, Chapter 5, Perpetual Software License (SIN 132-33), and Chapter 9, Electronic Commerce Services (SIN 132-52).

The Passport Advantage terms and conditions (“Agreement”) governs transactions by which the Government may order Eligible Products (EPs) from IBM. Details regarding EPs are provided in Attachments, Service Descriptions, Terms of Use (as described in Chapter 9) and Transaction Documents (such as a quote or proposal), collectively TDs. This Agreement and applicable TDs are the complete agreement regarding transactions by which the Government acquires EPs. The U.S. Government Customer and IBM agree to distribute this Agreement and coordinate its administration within their organizations in support of the Contract Agreement. This Agreement is entered into with the understanding that both the U.S. Government Customer and IBM are bound by its terms. The U.S. Government Customer is responsible for compliance under this Agreement. The terms and conditions of this Agreement will prevail in the event of a conflict of any other IBM Commercial International Passport Advantage Agreement terms and conditions included in the documentation provided by IBM when the Government Customer enrolls in Passport Advantage.

If there is a conflict, a TD prevails over the terms of this Agreement.

### 1. GENERAL

#### 1.1 DEFINITIONS

**U.S. Government Customer** – is the agency or affiliated entity of the U.S. Government awarding a contract and subsequent Delivery Orders under such contract. This Government Customer is the legal entity that is authorized to execute and administer this Contract Agreement.

A Contract Agreement is the agreement for which IBM assigns a Passport Advantage Agreement Number.

**IPLA** – IBM’s Program License Agreement. The IPLA terms and conditions are described in Chapter 5 of this GSA Schedule.

#### 1.2 ACCEPTANCE OF TERMS

The terms of this Agreement are effective on the day IBM accepts a fully funded Delivery Order for Eligible Products. By enrolling in Passport Advantage and issuing a Delivery Order, the U.S.

Government Customer accepts this Agreement without modification. Once this Agreement is accepted, all Eligible Products ordered under this Agreement are subject to it.

Upon acceptance of the U.S Government Customer's order, IBM will either i) send the U.S Government Customer a Proof of Entitlement (PoE) including the level of authorized use, ii) make the Program or IBM SaaS available, iii) ship the Appliance, or iv) provide the support, service, or solution.

### **1.3 PAYMENT**

- a. Is due in accordance with the Prompt Payment Act.
- b. IBM will invoice and the Government agrees to pay applicable charges specified by IBM, including charges for use in excess of authorizations. IBM does not give credits or refunds for any prepaid, one-time charges, or other charges already due or paid.

### **1.4 CHANGES TO AGREEMENT TERMS**

Changes to terms of this Appendix S Agreement are not retroactive; they apply, as of the effective date, only to new orders and renewals. The Government accepts changes by placing new orders after the change effective date.

### **1.5 ELIGIBLE PRODUCTS**

IBM may add or withdraw EPs or add or withdraw a license metric for an EP at any time. EPs may not be used to provide commercial hosting or other commercial information technology services to third parties. For an EP, IBM may withdraw a Fixed Term License, IBM Software Subscription and Support, and Select Support, Monthly Licensing (ML) in its entirety, or a SaaS or an Appliance Service in its entirety (collectively Options) on 12 months' written notice to all then current Customers by published announcement letter, or e-mail. If IBM withdraws an Eligible Product from marketing, the U.S Government Customer will no longer be able to acquire it under this GSA Schedule. .

If IBM withdraws an Option the U.S Government Customer understands that as of the effective date of such withdrawal, the U.S. Government Customer may not increase its level of use, beyond the authorizations already acquired without IBM's written consent, renew or purchase that Option; and if the U.S. Government Customer renewed the Option prior to the notice of withdrawal, the Government may either (a) continue to use/receive that Option until the end of the then current term or (b) obtain a prorated refund.

### **1.6 NOTICES AND COMMUNICATIONS**

All notices under this Agreement must be in writing. To the extent permissible under applicable law, the parties consent to the use of electronic means and facsimile transmissions to send and

receive communications in connection with our business relationship arising out of this Agreement, and such communications are acceptable as a signed writing. An identification code (called a “user ID”) contained in an electronic document is sufficient to verify the sender’s identity and the document’s authenticity.

## 1.7 COMPLIANCE WITH LAWS

Each party is responsible for complying with: i) laws and regulations applicable to its business and content, and ii) import, export and economic sanction laws and regulations, including those of the United States that prohibit or restrict the export, re-export, or transfer of products, technology, services or data, directly or indirectly, to or for certain countries, end uses or end users. Government is responsible for its use of IBM and Non-IBM Products.

Both parties agree to the application of the laws of the country where the transaction is performed (or for services, the laws of the country of Government’s business address) to this Agreement, without regard to conflict of law principles. The rights and obligations of each party are valid only in the country where the transaction is performed or, if IBM agrees, the country where the product is placed in productive use, except all licenses are valid as specifically granted. If any provision is invalid or unenforceable, the remaining provisions remain in full force and effect. Nothing in this Agreement affects statutory rights of consumers that cannot be waived or limited by contract. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions under this Agreement.

## 1.8 OTHER PRINCIPLES OF OUR RELATIONSHIP

- a. The U.S Government Customer is responsible for selecting the Eligible Products that meet its needs and for the results obtained from the use of the Eligible Products, including Government’s decision to implement any recommendation concerning Government Customer’s business practices and operations.
- b. Where approval, acceptance, consent, or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.
- d. As reasonably required by IBM to fulfill its obligations under this Agreement, the U.S Government Customer agrees to provide IBM with sufficient and safe access (including remote access) to U.S Government Customer’s facilities, systems, information, personnel, and resources, all at no charge to IBM. IBM is not responsible for any delay in performing or failure to perform caused by U.S Government Customer’s delay in providing such access or performing other U.S Government Customer responsibilities under this Agreement.
- e. In entering into this Agreement, including each Attachment, ToU, and Transaction Document, neither party is relying on any representation that is not specified in this Agreement, including without limitation any representations concerning: i) performance or function of any Eligible Product, other than as expressly warranted in this Agreement; ii) the experiences or recommendations of other parties; or iii) any results or savings that U.S Government Customer may achieve.

- f. Government is responsible for obtaining all necessary permissions to use, provide, store and process content in any services, maintenance, or support, and grants IBM permission to do the same. Some of the Government's content may be subject to governmental regulation or may require security measures beyond those specified by IBM for an offering. Government will not input or provide such content unless IBM has first agreed in writing to implement additional required security measures.
- g. Government is responsible to pay communications charges associated with accessing SaaS, Appliance Services, IBM Subscription and Support, and Select Support unless IBM specifies otherwise in writing.
- h. IBM and its subcontractors may process the business contact information of Government, its employees and contractors for our business relationship, and Government has obtained the necessary consents. IBM will comply with requests to access, update, or delete such contact information. IBM may use personnel and resources in locations worldwide and third party suppliers to support the delivery of products and services.

## **1.9 ASSIGNMENT AND TRANSFERABILITY**

The Government may not assign this Agreement in whole or in part to any third party outside the US Government, without IBM's prior written consent. Any attempt to do so is void. IBM will not unreasonably withhold this consent.

EPs are for use within the Contract Agreement, and may not be resold, rented, leased, or transferred to third parties. These licenses may only be transferred within the Contract Agreement, as defined in Section 1.3, unless otherwise agreed to by IBM. The transfer, if such is permitted, of the license rights and obligations outside of the Contract Agreement terminates the Licensee's authorization to use the EP under the PoE. In addition, such EPs may not be used to provide commercial hosting or other commercial information technology services to third parties.

## **1.10 TERMINATION**

The U.S Government Customer may terminate this Agreement, a delivery order, or EP on one month's notice to IBM. The U.S Government Customer agrees to promptly discontinue use of and destroy all of the Government's copies of a Program upon termination of a license grant.

Either party may exercise its rights to terminate this Agreement if the other does not comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

Any terms of this Agreement that by their nature extend beyond its termination remain in effect until fulfilled, and apply to respective successors and assignees.

## 1.11 COMPLIANCE VERIFICATION

The U.S Government Customer will i) maintain, and provide upon request, records and system tools output, and access to U.S Government Customer premises, as reasonably necessary for IBM and its independent auditor to verify Government's compliance with this Agreement, including Machine Code and Program licenses and metrics, such as sub-capacity usage, and ii) promptly order any required entitlements at IBM's then current rates, (including uses in excess of Government's authorization or entitlements, and associated IBM Subscription and Support and Selected Support). IBM will invoice for any additional charges determined as a result of the verification. These compliance verification obligations remain in effect during the terms of the Agreement and for two years thereafter. The U.S Government Customer is responsible for retaining adequate records. If the Government's records are inadequate to determine IBM Subscription and Support or Selected Support charges, IBM's charges for any excess usage will include two years of associated maintenance and IBM Subscription and Support or Selected Support. For purposes of this (Compliance Verification), "Passport Advantage Terms" means 1) this Agreement and applicable Attachments, Transaction Documents, and SaaS Terms of Use (described in Chapter 9)

## 1.12 PATENT AND COPYRIGHT INDEMNITY

For purposes of this Section, the term "Product" includes Materials, Machine Code and Licensed Internal Code.

If a third party claims that a Product IBM provides to the U.S Government Customer infringes that party's patent or copyright, IBM will indemnify the Government, its officers, agents, and employees against liability, at IBM's expense and pay all costs, damages, and attorneys fees that a court finally awards or that are included in a settlement approved by IBM, provided that the Government:

- A. Promptly notifies IBM in writing of the claim; and
- B. Gives IBM such opportunity as is offered by applicable laws, rules or regulations to participate in the defense thereof. The U.S Government Customer shall make every effort to permit IBM to fully participate in the defense and/or in any settlement of such claim. However, IBM understands that such participation will be under the control of the Department of Justice.

### Remedies

If such a claim is made or appears likely to be made, the U.S Government Customer agrees to permit IBM to enable the U.S Government Customer to continue to use the Product, or to modify it, or replace it with one that is at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, the U.S Government Customer agrees to return the Product to IBM on IBM's written request. IBM will then give the U.S Government Customer a credit equal to:

1. For a Machine, the Government's net book value, provided the U.S Government Customer has followed generally-accepted accounting principles.

2. For a Program, the amount paid by the U.S Government Customer or 12 months' charges (whichever is less). If the Product is an IBM SaaS or subject to Fixed Term charges, up to twelve months' charges.
3. For Materials, the amount the U.S Government Customer paid IBM for the creation of the Materials.

This is subject to the Government's right to require continued use of the Products pursuant to the provisions of 28USC1498. In the event of such continued use, the U.S Government Customer shall notify IBM in writing of its election to continue use and agrees to undertake at the Government's expense the defense of any action against the U.S Government Customer and IBM shall have no further indemnification obligation; it being understood that IBM may participate at its expense in the defense of any such action if such claim is against IBM.

**Claims for Which IBM is Not Responsible:**

IBM has no obligation regarding any claim based on any of the following:

- A. The Government's modification of a Product, or a Program's use in other than its Specified Operating Environment;
- B. Anything the U.S Government Customer provides which is incorporated into a Product or IBM's compliance with any designs, specifications, or instructions provided by the U.S Government Customer or by a third party on behalf of the Government;
- C. The combination, operation, or use of a Product with other Products not provided by IBM as a system, or the combination, operation or use of a Product with any product, data, apparatus, or business method that IBM did not provide, or the distribution, operation or use of a Product for the benefit of a third party;
- D. Infringement by a non-IBM Product.
- E. Product's use other than in accordance with its applicable licenses and restrictions or use of a non-current version or release of a Product, when a claim could have been avoided or the risk of a claim reduced by using the current version or release;
- F. the distribution, operation, or use of the Product outside Government's Passport Advantage Agreement Number or for the benefit of any third party; or
- G. Separately Licensed Code, if any, as identified in the LI for the Product.

The LI for the Product or other documents may permit the U.S Government Customer to copy, modify, or redistribute all or portions of the Product without paying additional licensing fees to IBM. The indemnification obligation under this Patent and Copyright provision only applies to copies of the Product provided to the U.S Government Customer by IBM and additional copies expressly authorized in a PoE. IBM has no obligation for claims relating to copies of the Product neither provided by IBM nor specifically authorized by a POE, even if permitted by the LI for the Product or other documents.

These Patent and Copyright terms do not obligate in any manner any third-party supplier of code (including Separately Licensed Code) included with or part of the Product.

The foregoing states the entire obligation of IBM with respect to infringement of patents or copyrights.



### 1.13 LIMITATION OF LIABILITY

Circumstances may arise where, because of a default on IBM's part or other liability, the U.S Government Customer is entitled to recover damages from IBM. In each such instance, regardless of the basis on which the U.S Government Customer is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM is liable only for:

- A. Payments referred to in IBM's Patents and Copyrights terms described herein;
- B. Damages for bodily injury (including death) and damage to real property and tangible personal property; and
- C. The amount of any other actual direct damages or loss, up to the greater of: (i) \$100,000; OR (ii) the contract price (if recurring, 12 months' charges apply) for the Product or Service that is the subject of the claim. For purposes of this item, the term "Product" includes Materials, Machine Code and Licensed Internal Code. Nothing in this subsection C shall limit the Government's right to (i) excess procurement costs in the event of a Termination for Default; or (ii) the contractual remedies prescribed under the Price Reductions clause (GSAR 552.238-75) (May 2004)(Alternate I- May 2003) and GSAR 552.215-72, Price Adjustment – Failure to Provide Accurate Information (Aug 1997).
- D. For classroom training or education material, IBM is liable for the charges associated with the corresponding item provided.

This limit also applies to any of IBM's subcontractors and Program developers. It is the maximum for which IBM and its subcontractors and Program developers are collectively responsible.

Items for which IBM is not liable:

Under no circumstances is IBM, or its subcontractors, or Program developers liable for any of the following even if informed of their possibility:

- A. Loss of, or damage to data; or
- B. Special, incidental, or indirect damages or for any economic consequential damages, or
- C. Lost profits, business, revenue, goodwill or anticipated savings
- D. Any third party claims against you except as described in the Patents and Copyrights section or as permitted by the Limitation of Liability section for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable

The parties acknowledge that nothing in this provision shall restrict the Government's statutory remedies in the event of fraud.

## 2. WARRANTIES

Unless IBM specifies otherwise, the following warranties apply only in the country of acquisition.

The warranty for an IBM Program is stated in its license agreement. IBM warrants it provides IBM Software Subscription and Support, Selected Support and Appliance Services using reasonable care and skill.

IBM warrants that a Machine Component of an Appliance used in its specified operating environment conforms to its official published specifications. The warranty period for an IBM Machine Component of an Appliance is a fixed period commencing on its date of installation (also called “Warranty Start Date”) specified in a TD. If a Machine Component does not function as warranted during the warranty period and IBM is unable to either i) make it do so or ii) replace it with one that is at least functionally equivalent, U.S Government Customer may return it to the party from whom U.S Government Customer acquired it for a refund.

The warranty for IBM SaaS is stated in its TD.

IBM does not warrant uninterrupted or error-free operation of an EP or that IBM will correct all defects or prevent third party disruptions or unauthorized third party access to an EP. These warranties are the exclusive warranties from IBM and replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and fitness for a particular purpose. IBM warranties will not apply if there has been misuse, modification, damage not caused by IBM, failure to comply with instructions provided by IBM, or if otherwise stated in an Attachment or TD. Non-IBM Products are sold under this Agreement as is, without warranties of any kind.

Third parties may provide their own warranties to Government.

IBM will identify IBM EPs it does not warrant.

Unless otherwise specified in an Attachment or TD, IBM provides non-IBM EPs, **WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND**. Third parties provide and license products and services directly to U.S Government Customer under their own agreements.

### 3. RENEWAL

The U.S Government Customer may renew its expiring Fixed Term License, Token License, IBM Software Subscription and Support, Selected Support, or Appliance Service by providing IBM with a fully funded Delivery Order for the subsequent Term prior to the expiration of the term.

Software subscription and support or Selected Support acquired or renewed on the Anniversary is renewable for an additional term of 12 full months.

IBM may pro-rate charges for IBM Software Subscription and Support or Selected Support, Fixed Term Licenses of six months or more, Appliance Services to align with the Government’s PA Anniversary.

To reinstate any expired Software Subscription and Support coverage, Selected Support, a Fixed Term License or Appliance Services, U.S Government Customer may not renew and must acquire IBM Software Subscription and Support Reinstatement, Selected Support Reinstatement, Appliance Services Reinstatement or a new initial Fixed Term License.

For an ML, U.S Government Customer selects a renewal option at the time of order.

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## **4. PROGRAMS AND IBM SOFTWARE SUBSCRIPTION AND SUPPORT**

IBM Programs acquired under this Agreement are governed by the terms of the IPLA as described in Chapter 5, Perpetual Software License SIN 132-33 of this GSA Schedule.

A Program may include the following, including the original and all whole or partial copies: 1) machine-readable instructions and data, 2) components, 3) audio-visual content (such as images, text, recordings, or pictures), 4) related licensed materials, and 5) license use documents or keys, and documentation.

With the exception of certain Programs that IBM designates as platform or operating system specific, U.S Government Customer may use and install in any commercially available national language for any platform or operating system available from IBM up to the level of Government's authorizations.

### **4.1 IBM TRADE-UPS AND COMPETITIVE TRADE-UPS**

Licenses for certain Programs that replace qualifying IBM Programs or qualifying Non-IBM Programs may be acquired for a reduced charge. U.S Government Customer agrees to terminate U.S Government Customer's use of the replaced IBM Programs when U.S Government Customer installs the replacement Programs.

### **4.2 MONTHLY LICENSES**

Monthly License Programs (ML Programs) are IBM Programs provided to the Government for a monthly license charge. Monthly Licenses have a term that begins on the date that Government's order is accepted by IBM and continues for a period Government commits to pay IBM (a Commitment Term) as specified in the TD.

### **4.3 FIXED TERM LICENSING**

Fixed Term Licenses have a term that begins on the date that U.S Government Customer's order is accepted by IBM; on the calendar day following the expiration of a prior Fixed Term; or on the Anniversary date. A Fixed Term License is for the definite time specified by IBM in a TD.

### **4.4 TOKEN LICNESES**

EPs which are Eligible Token Products or ETPs are assigned a Token Value. As long as the total Tokens required for all ETPs used concurrently does not exceed the number of Tokens authorized in Government's PoE(s), Government may use Token(s) for a single ETP or for a combination of ETPs.

Prior to exceeding current Token authorizations or using an Eligible Token Product not authorized, Government must acquire sufficient additional Tokens and authorizations.

ETPs may contain a disabling device that will prevent them from being used after the end of the Fixed Term. U.S Government Customer agrees not to tamper with this disabling device and take precautions to avoid any loss of data.

#### **4.5 IBM SOFTWARE SUBSCRIPTION AND SUPPORT**

IBM provides IBM Software Subscription and Support with each IBM Program licensed under the IPLA.

IBM Software Subscription and Support begins on the date of IBM Program acquisition and ends on the last day of the corresponding month in the following year, unless the date of acquisition is the first day of the month, in which case coverage ends on the last day of the month, 12 months from the date of acquisition.

IBM Software Subscription and Support includes defect corrections, restrictions, bypasses, and any new versions, releases, or updates IBM makes generally available.

(2) IBM provides the U.S Government Customer assistance for U.S Government Customer's i) routine, short duration installation and usage (how-to) questions; and ii) code-related questions (together "Support"). Consult the IBM Software Support Handbook for details at <http://www.ibm.com/software/support>. Support for a particular version or release of an IBM Program is available only until IBM withdraws Support for that IBM Program's version or release. When Support is withdrawn, U.S Government Customer must upgrade to a supported version or release of the IBM Program to continue to receive Support. The IBM "Software Support Lifecycle" policy is available at <http://www.ibm.com/software/info/supportlifecycle/>.

If U.S Government Customer elects to continue IBM Software Subscription and Support for an IBM Program at a designated site, U.S Government Customer must maintain IBM Software Subscription and Support for all uses and installations of the IBM Program at that site.

If U.S Government Customer requests to renew expiring IBM Software Subscription and Support at a lesser quantity of IBM Program uses and installations than the expiring quantity, U.S Government Customer must provide a report that verifies current IBM Program usage and installation, and may be required to provide other compliance verification information.

U.S Government Customer shall not use IBM Software Subscription and Support benefits for IBM Programs for which U.S Government Customer has not fully funded for IBM Software Subscription and Support. If U.S Government Customer does, U.S Government Customer must acquire IBM Software Subscription and Support reinstatement sufficient to cover all such unauthorized use at then current IBM prices.

#### **4.6 SELECTED SUPPORT**

Selected Support may be available for (i) Non-IBM Programs or for (ii) Programs licensed under the IBM License Agreement for Non-Warranted Programs (together "Selected Programs").

The IBM Software Subscription and Support section above applies to Selected Programs under Selected Support except that 1) IBM may provide Government with assistance in designing and

developing applications based on Government's subscription level; 2) the IBM "Software Support Lifecycle" policy does not apply; and 3) no new versions, releases or updates are provided by IBM.

IBM does not provide licenses under this Agreement for Selected Programs.

#### **4.7 MONEY-BACK GUARANTEE**

The IPLA's "money-back guarantee" only applies the first time U.S Government Customer licenses the IBM Program under this Agreement or any other valid agreement. If an IBM Program license is for a Fixed Term that is subject to renewal or for an initial Commitment Term, the U.S Government Customer may obtain a refund only if U.S Government Customer returns the Program and its PoE within the first 30 days of its initial term. The IPLA's "money-back guarantee" does not apply to Appliances.

#### **4.8 CONFLICT BETWEEN THE TERMS OF THIS AGREEMENT AND THOSE OF THE IPLA**

If there is a conflict between this Agreement (Appendix S), including its Attachments and TDs, and those of the IPLA, including its LI, the terms of this Agreement prevail. The LIs are available on the Internet at <http://www.ibm.com/software/sla>.

### **5. PROGRAMS IN A VIRTUALIZATION ENVIRONMENT (SUB-CAPACITY LICENSING TERMS)**

EPs that meet the operating system, processor technology, and virtualization environment requirements for sub-capacity usage may be licensed based on processor value units (PVUs) under Sub-Capacity Licensing terms (an Eligible Sub-Capacity Product) <http://www-01.ibm.com/software/passportadvantage/subcaplicensing.html>. Product deployments that cannot meet Sub-Capacity Licensing requirements must be licensed using Full Capacity terms.

PVU based licenses for Eligible Sub-Capacity Products must be acquired for the total number of PVUs associated with the virtualization capacity available to the Eligible Sub-Capacity Product as measured at <https://www-112.ibm.com/software/howtobuy/passportadvantage/valueunitcalculator/vucalc.wss>.

Prior to an increase in an Eligible Sub-Capacity Product's virtualization capacity, U.S Government Customer must first acquire sufficient licenses, including IBM Software Subscription and Support, if applicable, to cover that increase.

#### **Government's Reporting Responsibilities**

For Sub-Capacity usage of EPs, U.S Government Customer agrees to install and configure the most current version of IBM's license metric tool (ILMT) within 90 days of Government's first Sub-Capacity based Eligible Sub-Capacity Product deployment, to promptly install any updates to ILMT that are made available, and to collect deployment data for each such EP. Exceptions to this requirement are i) when ILMT does not yet provide support for the Eligible Sub-Capacity

Product, ii) if U.S Government Customer has fewer than 1,000 employees and contractors, Government is not a Service Provider (an entity that provides information technology services for end user customers, either directly or through a reseller), and Government has not contracted with a Service Provider to manage Government's environment in which EPs are deployed, iii) if the total physical capacity of U.S Government Customer's servers measured on a full capacity basis, but licensed under Sub-Capacity terms is less than 1,000 PVUs, or iv) when Government's servers are licensed to full capacity.

For all instances where ILMT is not used, and for all non PVU based licenses, U.S Government Customer is required to manually manage and track Government's licenses as described in the Compliance Verification section above.

For all PVU based EP licenses, reports must contain the information in the example Audit Report available at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. Reports must be prepared at least once per quarter. Failure to generate Reports or provide Reports to IBM will cause charging under full capacity for the total number of physical processor cores activated and available for use on the server.

Government will assign a person in U.S Government Customer's organization with authority to manage and promptly resolve questions on Audit Reports or inconsistencies between report contents, license entitlement, or ILMT configuration; and promptly place an order with IBM or U.S Government Customer's IBM reseller or request that IBM invoice the U.S Government Customer, if reports reflect EP use over U.S Government Customer's authorized level. IBM Software Subscription and Support and Selected Support coverage will be determined to begin as of the date U.S Government Customer exceeded U.S Government Customer's authorized level.

## 6. APPLIANCES

An Appliance is an EP which is any combination of Program Components, Machine Components (MCs) and any applicable Machine Code Components offered together as a single offering and designed for a particular function. Unless otherwise provided, terms that apply to a Program apply to the Program Component of an Appliance. U.S Government Customer shall not use an Appliance component independently of the Appliance of which it is a part.

Each Appliance will be newly manufactured and may contain some serviceable used parts. Regardless, IBM's applicable warranty terms apply.

For each Appliance, IBM bears the risk of loss or damage up to the time it is delivered to the IBM-designated carrier for shipment to U.S Government Customer or U.S Government Customer's designated location. Thereafter, U.S Government Customer assumes the risk. Each Appliance will be covered by insurance, arranged and paid for by IBM for U.S Government Customer, covering the period until it is delivered to U.S Government Customer or U.S Government Customer's designated location. For any loss or damage, U.S Government Customer must i) report the loss or damage in writing to IBM within 10 business days of delivery and ii) follow the claim procedure.

When U.S Government Customer acquires an Appliance directly from IBM, IBM transfers title to a MC to U.S Government Customer or, if applicable U.S. Government Customer's lessor,

upon shipment. For an upgrade acquired for an Appliance, IBM transfers title of the MC once IBM receives all removed parts, which then become IBM's property.

If IBM is responsible for installation, U.S Government Customer will allow installation within 30 calendar days of shipment or additional charges may apply. U.S Government Customer will promptly install or allow IBM to install mandatory engineering changes. U.S Government Customer installs a U.S Government Customer-set-up Appliance according to instructions provided with it.

A Machine Code Component is computer instructions, fixes, replacements and related materials, such as data and passwords relied on, provided, used with or generated by MC, that permit the operation of the MC's processors, storage or other functionality as stated in its Specifications. U.S Government Customer acceptance of this Agreement includes acceptance of IBM's Machine Code license agreements provided with the Appliance. A Machine Code Component is licensed only for use to enable a Machine Component to function under its Specifications and only for the capacity and capability for which U.S Government Customer has acquired IBM's written authorization. The Machine Code Component is copyrighted and licensed (not sold).

## 6.1 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.

The acceptance date is the date of delivery to the location designated on the Delivery 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.

## 6.2 IBM APPLIANCE SERVICES

IBM provides Appliance Services for Appliances consisting of Machine maintenance and IBM Software and Support as a single offering as further described in the Appliance Support Handbook at <http://www.ibm.com/software/appliance/support>.

One year of Appliance Services, starting on the Warranty Start Date specified in a TD, is included with the purchase of an Appliance. Thereafter, U.S Government Customer may renew appliance services by issuing IBM a funded delivery order. All renewals will be fulfilled with Appliance Services offered at the same level of service, if available, that U.S Government Customer was entitled to during that first year. Parts removed or exchanged for upgrade, warranty service, or maintenance are IBM property and must be returned to IBM within thirty

days. A replacement assumes the warranty or maintenance status of the replaced part. When U.S Government Customer returns an Appliance to IBM, U.S Government Customer will remove all features not supported under Appliance Services, securely erase all data, and ensure that it is free of any legal restrictions that would prevent its return.

Appliance Services cover undamaged and properly maintained and installed Appliances used as authorized by IBM with unaltered identification labels. Services do not cover alterations, accessories, supply items, consumables (such as batteries), structural parts (such as frames and covers), or failures caused by a product for which IBM is not responsible

## 7. IBM SAAS

IBM Software as a Service (IBM SaaS) is an EP offering IBM provides to the U.S Government Customer remotely through the Internet providing access to (i) functionality of Programs, (ii) infrastructure, and (iii) technical support. IBM SaaS is not a Program but may require U.S Government Customer to download enabling software to use it.

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Acceptance:

The Government's acceptance of a SaaS offering is when IBM provides the Government authorization to access the SaaS offering.

