



APPENDIX S IBM PASSPORT ADVANTAGE AGREEMENT

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APPENDIX S. IBM PASSPORT ADVANTAGE AGREEMENT

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 acquires Eligible Products. The Originating U.S. Government Customer and IBM agree to coordinate the administration of this Agreement within their respective Enterprises. This Agreement is entered into with the understanding that both the Originating U.S. Government Customer and IBM are bound by its terms. Both the Originating U.S. Customer and IBM agree to distribute these terms and conditions within their respective participating Enterprise. The Originating U.S. Government Customer is responsible for all Sites’ compliance with the terms of this Agreement. The terms and conditions of this Agreement will prevail in lieu 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.

The GSA Schedule terms and conditions of this Appendix, Chapter 5, SIN 132-33 Perpetual Software Licenses, Chapter 1, General Information, including any applicable Attachments, Chapter 9, SIN 132-52 Electronic Commerce Services - IBM Software as a Service Terms, and any Transaction Documents is the complete agreement (hereinafter referred to as “Agreement”) regarding transactions by which the Government Customer acquires Eligible Products, and replace any prior oral or written agreements, communications, representations, statements, understandings, warranties, promises, covenants, commitments, or undertakings between the Government Customer and IBM concerning Passport Advantage.

If there is a conflict among the terms of this Appendix, Attachments, SaaS Terms of Use (as described in Chapter 9, SIN 132-52), and Transaction Documents, the conflict shall be resolved by giving precedence in the following order:

- (a) the terms of a Transaction Document
- (b) the Terms of Use
- (c) the terms of an Attachment to this Agreement
- (d) the terms of this Agreement

The terms of this Agreement are effective on the day IBM accepts a fully funded Delivery Order for Eligible Products. Once this Agreement is accepted, 1) unless prohibited by applicable law or specified otherwise, any reproduction of it or a Transaction Document made by reliable means (for example, electronic image, photocopy or facsimile) is considered an original and 2) all Eligible Products ordered under this Agreement are subject to it.



1. GENERAL

1.1 APPENDIX STRUCTURE

This Appendix is organized in five Parts:

Part 1 – General

Part 2 – Warranties

Part 3 – Programs and Subscription and Support

Part 4 – Appliances

Part 5 – IBM SaaS

1.2 ATTACHMENTS AND TRANSACTION DOCUMENTS

Additional terms for Eligible Products are in documents called "Attachments" and "Transaction Documents" provided by IBM. Attachments may have different names. In general, Attachments contain terms that may apply to more than one transaction, while Transaction Documents (such as a quote/proposal, invoice, exhibit, or addendum) contain specific details and terms related to an individual transaction. Government Customer may receive one or more Transaction Documents for a single transaction. Attachments and Transaction Documents are part of this Agreement only for those transactions to which they apply. Each transaction is separate and independent from other transactions.

1.3 DEFINITIONS

Additional Site – Any Site within the Enterprise that subsequently enrolls under Passport Advantage.

Anniversary – the first day of the month that follows the anniversary of the Effective Date, unless the Effective Date is the first day of a month, in which event the anniversary of the Effective Date is the Anniversary.

Appliance – an Eligible Product, designed for a particular function and not for general purpose computing tasks, that may be a Program (in the case of a "Virtual Appliance") or composed of a Program Component, a Machine Component, and any Machine Code Component that IBM may provide to Government Customer.

Audit Reports – a set of reports available in the IBM License Metric Tool ("ILMT"), or by another method acceptable to IBM as specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. These reports provide the Processor Value Unit ("PVU") license requirements based on the Virtualization Capacity available to the Eligible Sub-Capacity Product.

Content – information, software, and data, including, without limitation, any Personal Data, hypertext markup language files, scripts, programs, recordings, sound, music, graphics, images,



applets, or servlets that are created, provided, uploaded, or transferred by Government Customer and any user authorized by Government Customer.

Government Customer – the Government Customer Enterprise that is ordering Eligible Products.

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

Government Customer-set-up Machine Component – an IBM Machine Component that Government Customer is responsible for installing according to instructions provided with it.

Date of Installation

- a. for a Government Customer-set-up Machine Component, the date on Government Customer's purchase invoice or sales receipt for the Appliance is the Date of Installation, unless IBM informs Government Customer otherwise.
- b. for an IBM Machine Component that IBM is responsible for installing, the business day after the day IBM installs it or, if Government Customer defers installation, makes it available to Government Customer for subsequent installation by IBM;

Effective Date – the date IBM accepts the Government Customer's initial delivery order for Eligible Products.

Eligible Operating System Technology – an operating system for which Sub-Capacity Licensing is available and specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

Eligible Processor Technology – a processor technology for which Sub-Capacity Licensing is available and specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

Eligible Products – commercially available IBM Programs, Non-IBM Programs, Selected Support, authorizations to increase Government Customer's use of a Program, IBM Trade-ups, Competitive Trade-ups, Annual IBM Software Subscription and Support Renewals, IBM Software Subscription and Support Reinstatement, Annual Third Party Software Subscription and Support Renewals, Third Party Software Subscription and Support Reinstatement, Selected Support renewals, IBM SaaS, and Appliances.

Eligible Sub-Capacity Product – a Product for which Sub-Capacity Licensing is available and specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

Eligible Virtualization Environment – a server or a group of servers cooperating as a single computing entity that contain an Eligible Processor Technology, an Eligible Operating System Technology, and an Eligible Virtualization Technology.

Eligible Virtualization Technology – a virtualization technology for which Sub-Capacity Licensing is available and specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. An Eligible Virtualization Technology is capable of restricting processor capacity to a subset of the total physical capacity, sometimes referred to as partition, LPAR, or virtual machine.



Enabling Software – any Program and associated materials provided to Government Customer by IBM or a third party as part of the IBM SaaS offering in order to facilitate access to and use of IBM SaaS

Engineering Change – an update to modify certain aspects of the design of an installed Machine Component, including without limitation the design of a certain Machine Component part(s) or Machine Code Component.

Enterprise – 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 Agreement

Fixed Term – a definite period of time specified by IBM in a Transaction Document, for example, in a Program’s PoE.

Full Capacity – The total number of physical processor cores activated and available for use on a server.

IBM – the IBM Enterprise company that is providing Eligible Products.

IBM Machine Component – a Machine Component bearing an IBM logo.

IBM Originating Company – the legal entity within International Business Machines Corporation’s Enterprise that accepts the Originating U.S. Government Customer’s orders.

IBM Program – a Program acquired under this Agreement and subject to the IPLA, including its LI.

IBM Software as a Service (“IBM SaaS”) – offerings IBM makes available to 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 Government Customer to download enabling software in order to use it. IBM SaaS is an Eligible Product.

IBM SaaS User – one who accesses IBM SaaS using a user account identification and password associated with Government Customer’s IBM SaaS account and provided by Government Customer.

IBM Software Subscription and Support – software subscription and support provided for IBM Programs licensed under the IPLA. See IBM Software Subscription and Support for further description.

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

License Information (“LI”) – a document that provides information and any additional terms specific to a Program. The Program’s LI is available at <http://www.ibm.com/software/sla/>. The LI can also be found in the Program’s directory, by the use of a system command, or as a booklet included with the Program.

Machine Code Component – microcode, basic input/output system code (called “BIOS”), utility programs, device drivers, diagnostics, and any other code (all subject to any exclusions in the license provided with it) delivered with an IBM Machine Component for the purpose of enabling the Machine Component’s function, as stated in its Specifications.



Machine Component – a hardware device, features, conversions, Upgrades, elements, or accessories, or any combination of them. The term "Machine Component" includes an IBM Machine Component and any non-IBM Machine Component (including other equipment) that IBM may provide to Government Customer.

Non-IBM Program – a Program that is governed by the terms of the third party end user license agreement that accompanies it. IBM is not a party to the third party end user license agreement and assumes no obligations under it.

Originating Site – any location of a U.S. Government Customer issuing IBM a Delivery Order hereunder for the Government Customer's own internal use.

Personal Data – any information that can be used to identify a specific individual, such as name, email address, home address, or phone number that is provided to IBM to store, process, or transfer on Government Customer's behalf.

Privacy Practice – the Privacy Practice, located on the Internet at www.ibm.com/privacy, and any subsequent modification.

Processor Chip – Electronic circuitry containing one or more Processor Cores that plugs into a Processor Socket.

Processor Core – A physical functional unit within a computing device that interprets and executes program instructions and consists of at least one instruction control unit and one or more arithmetic and logic units. A multi-core technology allows two or more Processor Cores to be active on a single Processor Chip. A System z Integrated Facility for Linux (IFL) engine is considered a single Processor Core.

Processor Socket – Electronic circuitry that accepts a Processor Chip.

Processor Value Unit ("PVU") – A metric used by IBM to assign a value to a Processor Core. The Processor Value Unit licensing model is described at http://www.ibm.com/software/lotus/passportadvantage/pvu_licensing_for_Government_Customers.html.

Program – 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.

Program Component – an IBM Program or Non-IBM Program that is preinstalled on a Machine Component.

Proof of Entitlement ("PoE") – the document in which IBM specifies an Eligible Product's level of authorized use. This PoE, supported by Government Customer's matching paid invoice or receipt, is evidence of Government Customer's level of authorized use.

Selected Program – a Non-IBM Program or an IBM Program licensed under the terms of the IBM License Agreement for Non-Warranted Programs.

Selected Support – Support for specified Selected Programs.

Service Provider – an entity that provides information technology services for end user Government Customers, either directly or through a reseller.



Site – any defined entity of the Originating Site, such as a physical location or organizational unit, e.g., a department, division, subsidiary or cost center, of Government Customer’s Enterprise and for which IBM assigns a Passport Advantage Site Number.

Specifications – information specific to a Machine Component. IBM Machine Component Specifications are in a document entitled "Official Published Specifications."

Sub-Capacity Licensing – Licensing of Eligible Sub-Capacity Products based on Virtualization Capacity.

Subscription Period – the time during which IBM SaaS is made available to Government Customer as specified in the Government Customer’s Delivery Order.

Term – the period that begins either on the date IBM accepts the Government Customer’s initial order (in the case of the initial Term) or on the Anniversary (in the case of subsequent Terms), and ends on the day immediately prior to the next Anniversary.

Terms of Use (“ToU”) – additional terms under which IBM makes IBM SaaS offerings available to the Government Customer. IBM’s Software as a Service Offerings and SaaS Terms of Use are described in Chapter 9, section 2. .

Third Party Software Subscription and Support – software subscription and support provided under the third party’s terms for Non-IBM Programs. See the section titled Software Subscription and Support for further description.

Upgrade – a change to a Machine Component to modify, add, remove, enable, or disable a certain Machine Component resource or function. Each such change can be accomplished through a Machine Component conversion, or through the conversion, addition, removal, or exchange of a Machine Component’s feature(s), but only to the extent announced and supported by IBM for the Machine Component.

Virtualization Capacity – the highest peak processor capacity available to an Eligible Sub-Capacity Product when deployed on an Eligible Virtualization Environment in accordance with the rules specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

1.4 ACCEPTANCE OF TERMS

By issuing a Delivery Order, the Originating U.S. Government Customer accepts the terms of this Agreement without modification.

An Eligible Product becomes subject to this Agreement when IBM accepts the Government Customer’s Delivery Order by i) sending Government Customer a Transaction Document, ii) making the Program or IBM SaaS available to Government Customer or, when applicable, shipping the Appliance, or iii) providing the support, service, or solution.

Any Attachment or Transaction Document provided with IBM’s quote/proposal will be considered as accepted upon issuance of a Government Customer’s delivery order.



Delivery

For Programs IBM provides to the Government Customer in tangible form, IBM fulfills its shipping and delivery obligations upon delivery of such Programs to the IBM-designated carrier, unless otherwise agreed to in writing by the Government Customer and IBM.

1.5 PAYMENT

- a. Is due in accordance with the Prompt Payment Act.
- b. The amount payable for a Program license may either be a one-time charge or a charge for a Fixed Term, depending on the type of license.

1.6 CHANGES TO AGREEMENT TERMS

Changes to terms of the Agreement shall be mutually agreed to in writing. Delivery Orders issued hereunder shall be subject to the Agreement terms and conditions in effect at the time of the Order.

1.7 ELIGIBLE PRODUCTS

IBM may add or withdraw Eligible Products at any time. If IBM withdraws an Eligible Product from marketing, the Government Customer will no longer be able to acquire it under this Agreement.

If IBM withdraws a Program or a version of a Program from marketing, the Government Customer may not increase its level of use, beyond the authorizations already acquired, on or after the effective date of withdrawal without IBM's prior written consent, which IBM will not unreasonably withhold.

1.8 INTELLECTUAL PROPERTY PROTECTION

For purposes of this the term "Product" means an IBM Program, Machine Code Component, or IBM Machine Component. IBM's Patent and Copyright Indemnity Clause is described in Chapter 1.

1.9 GENERAL PRINCIPLES OF OUR RELATIONSHIP

1.9.1 NOTICES AND COMMUNICATIONS

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.

1.9.2 COMPLIANCE WITH LAWS

IBM will comply with laws applicable to IBM generally as a provider of information technology products and services. IBM is not responsible for determining the requirements of laws applicable to Government Customer's business, including those relating to Eligible Products that Government Customer acquires under this Agreement, or that IBM's provision of or Government Customer's receipt of particular Eligible Products under this Agreement meets the requirements of such laws. Notwithstanding anything in this Agreement to the contrary, neither party is obligated to take any action that would violate law applicable to that party.

Each party agrees to comply with all applicable export and import laws and regulations including without limitation United States embargo and sanctions regulations and prohibitions on export for certain end uses or to certain users.

1.9.3 OTHER PRINCIPLES OF OUR RELATIONSHIP

- a. The 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. Eligible Products may not be used to provide commercial hosting or other commercial information technology services to third parties.
- c. 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 Government Customer agrees to provide IBM with sufficient and safe access (including remote access) to 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 Government Customer’s delay in providing such access or performing other 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 Government Customer may achieve.

1.9.4 ASSIGNMENT AND TRANSFERABILITY

The Government may not assign these PA terms 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.

Eligible Products the Government obtains under these PA terms may not be resold, rented, leased, or transferred to third parties. These licenses may only be transferred within a Site (refer to definition of Site above), unless otherwise agreed to by IBM. The transfer of the license rights and obligations outside of a Site terminates the Licensee's authorization to use the Program under the PoE. In addition, such Eligible Products may not be used to provide commercial hosting or other commercial information technology services to third parties.

1.10 TERMINATION

IBM may terminate the Passport Advantage Offering on three months' written notice. If a Government Customer acquired or renewed either IBM Software Subscription and Support for any IBM Programs or IBM SaaS prior to the notice of termination, IBM may either continue to provide IBM Software Subscription and Support to Government Customer for those Programs or those IBM SaaS offerings for the remainder of the current term or give Government Customer a prorated refund. If Government Customer acquired or renewed Third Party Software Subscription and Support for any Non-IBM Programs prior to the notice of termination, the third party may continue to provide Third Party Software Subscription and Support to Government Customer for that Non-IBM Program license for the remainder of the current term. If the third party does not do so, Government Customer may obtain a prorated refund.

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

In addition to the Compliance Verification terms provided in Chapter 5, Special Item 132-33, Perpetual Software License, the following terms apply to this Passport Advantage offering.

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)

1.11.1 RESOLUTION

IBM will notify Government Customer in writing if any such verification indicates that Government Customer has used any Eligible Product in excess of its authorized use or is otherwise not in compliance with the terms of this Appendix S. IBM will invoice the



Government Customer for the charges that IBM specifies in an invoice for 1) any such excess use, 2) software subscription and support for such excess use for the lesser of the duration of such excess use or two years, and 3) any additional charges and other liabilities determined as a result of such verification.

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 Government 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 Government 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 Government agrees to permit IBM to enable the Government 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 Government agrees to return the Product to IBM on IBM's written request. IBM will then give the Government a credit equal to:

1. For a Machine, the Government's net book value, provided the Government has followed generally-accepted accounting principles.
2. For a Program, the amount paid by the Government 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 Government 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 Government 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 Government 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 Government provides which is incorporated into a Product or IBM's compliance with any designs, specifications, or instructions provided by the Government 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 Enterprise 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 Government 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 Government 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.

LIMITATION OF LIABILITY

Circumstances may arise where, because of a default on IBM's part or other liability, the Government is entitled to recover damages from IBM. In each such instance, regardless of the basis on which the Government 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

2.1 WARRANTY FOR IBM PROGRAMS

The warranty for an IBM Program is stated in its license agreement. The warranty details are described in Chapter 5 of this GSA Schedule, IBM Program License Agreement (IPLA) terms and conditions.

2.2 WARRANTY FOR IBM SOFTWARE SUBSCRIPTION AND SUPPORT AND SELECTED SUPPORT

IBM warrants that it provides IBM Software Subscription and Support and Selected Support using reasonable care and skill.

2.3 WARRANTY FOR IBM MACHINE COMPONENTS OF IBM APPLIANCES

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



The warranty period for an IBM Machine Component is a fixed period commencing on its Date of Installation (also called “Warranty Start Date”) and specified in a Transaction Document. During the warranty period, IBM provides repair and exchange service for the IBM Machine Component, without charge, under the type of service IBM designates in a Transaction Document for the IBM Machine Component. If an IBM 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, Government Customer may return it to the party from whom Government Customer acquired it for a refund.

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

If the IBM Machine Component does not function as warranted during the warranty period, refer to the service documentation that shipped with the IBM Machine Component for support assistance and problem determination procedures.

If Government Customer is unable to resolve the problem with the service documentation, contact IBM to obtain warranty service. Contact information for IBM is provided in the “Warranty Information” that ships with IBM Machine Component. If Government Customer does not register the IBM Machine Component with IBM, Government Customer may be required to present proof of purchase as evidence of Government Customer’s entitlement to warranty service.

2.4 WARRANTY FOR IBM SAAS

The warranty for IBM SaaS is stated in the Terms of Use. IBM’s SaaS Terms of Use are described in Chapter 9, section 2 of this GSA Schedule.

2.5 EXTENT OF WARRANTY

THESE WARRANTIES ARE GOVERNMENT CUSTOMER’S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, AND FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.

The warranties stated in Section 2.3 will not apply to the extent that there has been misuse (including, but not limited to, use of any Machine Component capacity or capability, other than that authorized by IBM in writing), accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper



maintenance by Government Customer or a third party, or failure or damage caused by a product for which IBM is not responsible. The warranty for IBM Machine Components is voided by removal or alteration of Machine Components or parts identification labels.

Items Not Covered by Warranty

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

IBM will identify IBM Eligible Products that it does not warrant.

Unless otherwise specified in an Attachment or Transaction Document, IBM provides non-IBM Eligible Products, **WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND**. However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to Government Customer.

3. PROGRAMS AND SUBSCRIPTION AND SUPPORT

To acquire additional authorizations to use Programs under this Agreement, the Government Customer must have already acquired the Program code.

3.1 IBM PROGRAMS

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.

3.1.1 VERSIONS AND PLATFORMS

Government Customer may use Programs and their associated user documentation in accordance with the terms of this Agreement in any commercially available national language version up to the level of use authorized in the PoE. Government Customer is authorized to use the Program(s) that Government Customer acquires under this Agreement on any platform or operating system for which IBM currently makes Program code available under this Agreement unless the Program is designated as platform or operating system specific at the time Government Customer acquired it.

3.1.2 IBM TRADE-UPS

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



3.1.3 COMPETITIVE TRADE-UPS

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

3.1.4 MONEY-BACK GUARANTEE

The IPLA's "money-back guarantee" only applies the first time Government Customer licenses the IBM Program. If an IBM Program license is for a Fixed Term that is subject to renewal, Government Customer may obtain a refund only if 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 a Program Component of an Appliance.

3.1.5 CONFLICT BETWEEN THE TERMS OF THIS AGREEMENT AND THOSE OF THE IPLA

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

3.2 PROGRAMS IN A VIRTUALIZATION ENVIRONMENT

3.2.1 AUTHORIZATIONS

- a. A PoE must be acquired for the total number of PVUs associated with the Virtualization Capacity available to an Eligible Sub-Capacity Product.
- b. Prior to an increase in an Eligible Sub-Capacity Product's Virtualization Capacity, Government Customer must first acquire sufficient additional authorizations, including IBM Software Subscription and Support, if applicable, to cover that increase.
- c. IBM does not give credits or refunds for charges already due or paid if an Eligible Product's use falls below the authorized level of use.

3.2.2 IBM'S RESPONSIBILITIES

IBM will make available and authorize Government Customer to use:

- a. the ILMT at no charge, when ordered by Government Customer or Government Customer's IBM Reseller. IBM provides the ILMT to Government Customer for Government Customer's compliance with these Sub-Capacity Licensing terms; and
- b. the information center included with the ILMT to aid Government Customer's compliance with these Sub-Capacity Licensing terms.



Government Customer may make copies of the ILMT and information center for Government Customer's compliance with these Sub-Capacity Licensing terms.

3.2.3 GOVERNMENT CUSTOMER'S RESPONSIBILITIES UNDER SUB-CAPACITY LICENSING TERMS

Government Customer agrees to:

- a. install and configure the most current version of ILMT in accordance with the ILMT information center, within 90 days of Government Customer's first Eligible Sub-Capacity Product deployment on an Eligible Virtualization Environment, to enable Government Customer to collect Virtualization Capacity data by Eligible Sub-Capacity Product and generate Audit Reports in accordance with these Sub-Capacity Licensing terms. Exceptions to this requirement are:
 - (1) when ILMT does not yet provide support for the Eligible Virtualization Environment
 - (2) if Government Customer's Enterprise has fewer than 1,000 employees and contractors, Government Customer is not a Service Provider, and Government Customer has not contracted with a Service Provider to manage Government Customer's Eligible Virtualization Environment
 - (3) if the total physical capacity of Government Customer's Enterprise servers with an Eligible Virtualization Environment, measured on a Full Capacity basis, but licensed using sub-capacity terms is less than 1,000 PVUs.
 - (4) when Government Customer's servers with Eligible Sub-Capacity Products are licensed to the Full Capacity of the servers

For these exceptions, use of ILMT, while recommended, is not required for Sub-Capacity Licensing. In lieu of ILMT, Government Customer is required to manually manage and track Government Customer's Eligible Virtualization Environment, and manually prepare Audit Reports documenting the Virtualization Capacity by Eligible Sub-Capacity Product for Government Customer's Eligible Virtualization Environment during each calendar or fiscal quarter. These Audit Reports must contain the information listed in the example Audit Report available at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. These Audit Reports must be prepared as frequently as is required to maintain a history of increases to Virtualization Capacity, but not less often than once per quarter, and must be maintained for at least two years to demonstrate ongoing compliance with these Sub-Capacity Licensing terms;

- b. promptly install new versions, releases, modifications, or code corrections ("fixes") of the ILMT that IBM makes available. Government Customer must subscribe to Tivoli Support notifications via <http://www.ibm.com/support/mynotifications> in order to be notified when these become available;
- c. not alter, modify, omit, delete, or otherwise misrepresent by any means, directly or indirectly, the:
 - (1) ILMT audit records;
 - (2) ILMT, except for changes provided by IBM; or

- (3) Audit Reports that Government Customer submits to IBM.
- d. generate, using ILMT or manually, Audit Reports at least each calendar or fiscal quarter and retain for a period of not less than two years the Audit Reports and make these reports available to IBM upon notice as specified in Section Failure to generate Audit Reports or make Audit Reports available to IBM will result in charging for Eligible Sub-Capacity Products under Full Capacity terms;
 - e. assign a person in Government Customer's organization with authority to manage and promptly resolve any questions on Audit Reports or inconsistencies between Audit Report contents, license entitlement, or ILMT configuration;
 - f. promptly place an order with IBM or request that IBM invoice the Government Customer if the Audit Reports reflect Eligible Sub-Capacity Product use in excess of Government Customer's authorized level. IBM Software Subscription and Support coverage will be determined to begin at the time Government Customer exceeded Government Customer's authorized level.

3.2.4 ADDITIONAL TERMS

Product deployments that are not able to meet these Sub-Capacity Licensing requirements must be licensed using Full Capacity terms.

3.3 FIXED TERM LICENSING

Fixed Term Licenses have a term that begins on the date that Government Customer's order is accepted by IBM; on the calendar day following the expiration of a prior Fixed Term; or on the calendar day following the Anniversary date, as applicable.

3.3.1 RENEWAL OF FIXED TERM LICENSES

The Government Customer may renew Government Customer's expiring Fixed Term License by issuing IBM a funded Delivery Order prior to the expiration date, in accordance with the terms of this Agreement.

If Government Customer chooses not to renew the Fixed Term License, Government Customer agrees to discontinue use of the Program on the expiration date.

If, after the expiration date, Government Customer chooses to resume use of the Program, Government Customer must pay charges associated with an initial Fixed Term License rather than a Fixed Term License renewal.



3.3.2 ANNIVERSARY COORDINATION

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

3.3.3 WITHDRAWAL OF FIXED TERM LICENSE FOR A PARTICULAR PROGRAM

If IBM withdraws Fixed Term licensing for a particular IBM Program, Government Customer understands that

- a. Government Customer may not renew the Fixed Term License for that IBM Program; and
- b. if Government Customer renewed the Fixed Term License for that IBM Program prior to the notice of withdrawal, Government Customer may either (a) continue to use the Program under the Fixed Term License terms until the end of the then current Fixed Term or (b) obtain a prorated refund.

3.4 SOFTWARE SUBSCRIPTION AND SUPPORT AND SELECTED SUPPORT

3.4.1 SOFTWARE SUBSCRIPTION AND SUPPORT

- a. For purposes of this Agreement, “software subscription and support” means both IBM Software Subscription and Support and Third Party Software Subscription and Support. IBM provides IBM Software Subscription and Support with each IBM Program licensed under the IPLA. IBM Software Subscription and Support is a single offering not available as separate components. IBM does not provide IBM Software Subscription and Support for (i) Non-IBM Programs or for (ii) Programs that are licensed under the IBM License Agreement for Non-Warranted Programs (together “Selected Programs”).
- b. IBM Software Subscription and Support begins on the date of 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.
- c. While IBM Software Subscription and Support is in effect for an IBM Program license:
 - (1) IBM will make available to the Government Customer IBM Program defect corrections, restrictions, and bypasses, if any, that it develops.
 - (2) IBM will make available to the Government Customer and authorize the Government Customer to use the most current commercially available version, release, or update, should any be made available.
 - (3) IBM provides the Government Customer assistance for Government Customer’s i) routine, short duration installation and usage (how-to) questions; and ii) code-related questions (together “Support”). Such Support for a particular version or release of an IBM Program is available only until IBM or the third party, as applicable, withdraws Support for that IBM Program’s version or release. When Support is withdrawn,

Government Customer must upgrade to a supported version or release of the IBM Program in order to continue to receive Support. The IBM “Software Support Lifecycle” policy is available at <http://www.ibm.com/software/info/supportlifecycle/>.

- (4) IBM provides Support via electronic access and, if available, telephone, only to Government Customer’s information systems (IS) technical support personnel during the normal business hours (published prime shift hours) of Government Customer’s IBM support center. (This assistance is not available to Government Customer’s end users.) IBM provides Severity 1 assistance 24 hours a day, every day of the year. Consult the IBM Software Support Handbook for details at <http://www.ibm.com/software/support>.
 - (5) IBM may request that the Government Customer allow it to remotely access Government Customer’s system to assist Government Customer in isolating the software problem cause. Government Customer remains responsible for adequately protecting Government Customer’s system and all data contained in it whenever IBM remotely accesses it with Government Customer’s permission.
- d. IBM Software Subscription and Support does not include assistance for 1) the design and development of applications, 2) Government Customer’s use of IBM Programs in other than their specified operating environment or 3) failures caused by products for which IBM is not responsible under this Agreement.

FOR THE AUTHORIZED USE OF EACH IBM PROGRAM INSTALLED AND IN SERVICE AT A GOVERNMENT CUSTOMER’S SITE, GOVERNMENT CUSTOMER HAS THE OPTION TO MAINTAIN IBM SOFTWARE SUBSCRIPTION AND SUPPORT FOR EITHER (a) ALL OF THE AUTHORIZED USE OR (b) NONE OF THE AUTHORIZED USE.

THERE IS NO OPTION FOR MAINTAINING IBM SOFTWARE SUBSCRIPTION AND SUPPORT COVERAGE FOR ONLY A PORTION OF AUTHORIZED USE INSTALLED AND IN SERVICE FOR AN IBM PROGRAM AT A GOVERNMENT CUSTOMER SITE.

GOVERNMENT CUSTOMER SHALL NOT USE ANY OF THE IBM SOFTWARE SUBSCRIPTION AND SUPPORT BENEFITS SPECIFIED IN SUBSECTION C OF THIS SECTION 3.4.1, INCLUDING THE APPLICATION OR USE OF ANY FIXES, UPDATES, OR UPGRADES, FOR IBM PROGRAMS FOR WHICH GOVERNMENT CUSTOMER HAS NOT FULLY FUNDED FOR IBM SOFTWARE SUBSCRIPTION AND SUPPORT. IF GOVERNMENT CUSTOMER USES ANY OF THESE BENEFITS FOR WHICH IT HAS NOT FULLY FUNDED, THEN GOVERNMENT CUSTOMER AGREES TO ACQUIRE IBM SOFTWARE SUBSCRIPTION AND SUPPORT REINSTATEMENT SUFFICIENT TO COVER ALL SUCH UNAUTHORIZED USE OF SUCH BENEFITS AT THEN CURRENT APPLICABLE IBM PRICES.

3.4.2 SELECTED SUPPORT

Selected Programs eligible for Selected Support are listed at <http://www.ibm.com/lotus/PASelectSupportPrograms>.



Selected Support begins on the date of 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.

While Selected Support is in effect for a Selected Program:

- a. IBM will make available to Government Customer Selected Program defect corrections, if any, that it develops.
- b. IBM provides Government Customer assistance for Government Customer's 1) routine, short duration installation and usage (how-to) questions; and 2) code related questions. Selected Support for a particular version or release of a Program is available only until IBM withdraws Selected Support for that Program's version, release, or modification. When such Selected Support is withdrawn, Government Customer must upgrade to a supported version or release of the Program in order to continue to receive such support. The IBM "Software Support Lifecycle" policy does not apply to Selected Support.
- c. IBM may provide Government Customer with assistance in designing and developing applications based on Government Customer's subscription level.
- d. IBM may provide assistance via electronic access and, if available, telephone, depending on Government Customer's location and the subscription level Government Customer acquires. Such assistance is provided only to Government Customer's information systems (IS) technical support personnel during the normal business hours (published prime shift hours) of Government Customer's IBM support center. Consult the IBM Software Support Handbook for details applicable to Selected Support at <http://www.ibm.com/software/support>.
- e. IBM may request that Government Customer allow it to remotely access Government Customer's system to assist Government Customer in isolating the software problem cause. Government Customer remains responsible for adequately protecting Government Customer's system and all data contained in it whenever IBM remotely accesses it with Government Customer's permission.

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

3.4.3 GOVERNMENT CUSTOMER DATA AND DATABASES

To assist Government Customer in isolating the cause of a problem with a Program under either IBM Software Subscription and Support or Selected Support, IBM may request that Government Customer 1) allow IBM to remotely access Government Customer's system or 2) send Government Customer information or system data to IBM. IBM uses information about errors and problems to improve its products and services, and assist with its provision of related support offerings. For these purposes, IBM may use IBM entities and subcontractors (including in one or more countries other than the one in which Government Customer is located), and Government Customer authorizes IBM to do so.

Government Customer remains responsible for 1) any data and the content of any database Government Customer makes available to IBM, 2) the selection and implementation of procedures and controls regarding access, security, encryption, use, and transmission of data (including any personally-identifiable data), and 3) backup and recovery of any database and any stored data. Government Customer will not send or provide IBM access to any personally-



identifiable information, whether in data or any other form, and will be responsible for reasonable costs and other amounts that IBM may incur relating to any such information mistakenly provided to IBM or the loss or disclosure of such information by IBM, including those arising out of any third party claims.

3.4.4 ANNUAL RENEWAL OF SOFTWARE SUBSCRIPTION AND SUPPORT AND SELECTED SUPPORT

The Government Customer may renew its expiring software subscription and support or Selected Support by providing IBM with a fully funded Delivery Order for the subsequent Term.

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

Software subscription and support or Selected Support acquired on a date other than the Anniversary is renewable at the next Anniversary for an additional term of less than 12 full months for a pro-rated charge, thereby extending the coverage to the following Anniversary.

To reinstate any expired software subscription and support coverage, Government Customer must acquire IBM Software Subscription and Support Reinstatement or Third Party Software Subscription and Support Reinstatement, as applicable.

3.4.5 WITHDRAWAL OF SOFTWARE SUBSCRIPTION AND SUPPORT OR SELECTED SUPPORT FOR A PARTICULAR PROGRAM

If IBM or the third party, as applicable, withdraws software subscription and support or Selected Support for a particular Program, Government Customer understands that

- a. IBM will not make software subscription and support renewal or Selected Support renewal available for that Program; and
- b. if Government Customer renewed IBM Software Subscription and Support for that IBM Program license or Selected Support for a Selected Program license prior to the notice of withdrawal, IBM may either continue to provide IBM Software Subscription and Support or Selected Support to Government Customer for that Program license until the end of the then current term or Government Customer may obtain a prorated refund. If Government Customer renewed Third Party Software Subscription and Support for that Non-IBM Program prior to the notice, the third party may continue to provide Third Party Software Subscription and Support to Government Customer for that Non-IBM Program license until the end of the then current term. If the third party does not do so, Government Customer may obtain a prorated refund.



4. APPLIANCES

4.1 VIRTUAL APPLIANCE

Government Customer is licensed to use the Program(s) pursuant to the terms of this Appendix.

4.2 APPLIANCES COMPRISING BOTH PROGRAM AND MACHINE COMPONENTS

IBM provides Appliances comprising both Program Components and Machine Components as a single product. Government Customer shall not use either such component independently of the Appliance of which it is a part for any purpose.

4.3 PROGRAM COMPONENTS

Government Customer is licensed to use the Program Component(s) pursuant to the terms of this Appendix, but only on the Machine Component supplied by IBM or an authorized reseller or any replacement of a Machine Component provided to Government Customer by IBM or an authorized reseller. Government Customer may not transfer its license to use the Program Component(s) to another Enterprise.

4.4 MACHINE COMPONENTS

4.4.1 PRODUCTION STATUS

Each IBM Machine Component is will be newly manufactured and may contain some serviceable used parts and/or features. Regardless, IBM's applicable warranty terms described above apply.

4.4.2 TITLE AND RISK OF LOSS

When IBM accepts the Government Customer's order, IBM agrees to sell Government Customer the Machine Component described in a Transaction Document. IBM transfers title to the Government Customer or, if applicable, Customer's lessor when the Machine Component is shipped to Government Customer or its designated location.

For each Machine Component, IBM bears the risk of loss or damage up to the time it is delivered to the IBM-designated carrier for shipment to Government Customer or Government Customer's designated location. Thereafter, Government Customer assumes the risk. Each Machine Component will be covered by insurance, arranged and paid for by IBM for Government Customer, covering the period until it is delivered to Government Customer or Government Customer's designated location. For any loss or damage, Government Customer must i) report

the loss or damage in writing to IBM within 10 business days of delivery and ii) follow the applicable claim procedure.

4.4.3 INSTALLATION

a. Machine Component Installation

- (1) Government Customer agrees to provide an environment meeting the requirements for the Machine Component as specified in its published documentation.
- (2) Government Customer is responsible for installing a Government Customer-set-up Machine Component and a non-IBM Machine Component according to instructions provided by IBM or the Machine Component's manufacturer.
- (3) For a Machine Component that IBM is responsible for installing, IBM has standard installation procedures. IBM will successfully complete these procedures before it considers a Machine Component (other than a Machine Component for which Government Customer defers installation or a Government Customer-set-up Machine Component) installed. For an IBM Machine Component that IBM is responsible to install, if the IBM Machine Component is not made available for IBM to install within six months from shipment, installation will be subject to an installation charge.

b. Upgrades and Engineering Changes

- (1) IBM sells Upgrades for installation on Machine Components, and, in certain instances, only for installation on a designated, serial-numbered Machine Component. Within 30 days of the shipment of an Upgrade, Government Customer agrees to install the Upgrade or, if IBM is responsible for the installation, to allow IBM to install the Upgrade. Certain Upgrade orders may be terminated at IBM's discretion if not made available for IBM to install within 30 days of shipment, in which case Government Customer must return the Upgrade at Government Customer's expense. In all cases, if the Upgrade is not made available for IBM to install within six months from the date IBM ships the Upgrade, installation will be subject to an installation charge.
- (2) Government Customer agrees to allow IBM to install mandatory Engineering Changes (such as those required for safety) on a Machine Component within 30 days of IBM's notice to Government Customer unless otherwise agreed to by the parties.

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



4.4.4 MACHINE CODE COMPONENT

A Machine Code Component is licensed under the terms and restrictions of the Machine Code license agreement (e.g., IBM License Agreement for Machine Code, IBM Agreement for Licensed Internal Code, or an equivalent) provided with the Machine Code Component. Government Customer acceptance of the terms of this Agreement includes acceptance of IBM's Machine Code license agreements, current versions of which are available at the following URL: http://www.ibm.com/servers/support/machine_warranties/support_by_product.html or by contacting an IBM representative. Machine Code license agreements may be amended by IBM from time to time. Such amended license terms will apply only to Machine Code Component that is supplied after such amended terms become effective.

A Machine Code Component is licensed only for use to enable a Machine Component to function in accordance with its Specifications and only for the capacity and capability for which Government Customer has acquired IBM's written authorization. Government Customer agrees to use the Machine Code Component only as specified in this Agreement and as may be further authorized or restricted in its applicable license agreement. Without limiting additional restrictions in the applicable license, Government Customer may not

- a. otherwise copy, display, transfer, adapt, modify, or distribute (electronically or otherwise) the Machine Code Component, except as IBM may authorize in the Machine Component's user documentation or in writing to Government Customer;
- b. reverse assemble, reverse compile, otherwise translate, or reverse engineer the Machine Code Component unless expressly permitted by applicable law without the possibility of contractual waiver;
- c. sublicense or assign the license for the Machine Code Component; or
- d. lease the Machine Code Component or any copy of it.

International Business Machines Corporation, one of its subsidiaries, or a third party owns the Machine Code Component including all copyrights in the Machine Code Component and all copies of the Machine Code Component (this includes the original Machine Code Component, copies of the original Machine Code Component, and copies made from copies). The Machine Code Component is copyrighted and licensed (not sold).

Title will not be transferred when IBM supplies features, conversions, or upgrades that consist solely of Machine Code Component.

The capacity of certain Machine Components may be limited by technological measures in the Machine Code Component. Government Customer agrees to IBM's implementation of such technological measures to limit Machine Component capacity.

4.4.5 DELIVERY

Delivery dates for Appliances with Machine Components are estimates unless otherwise specifically agreed in a Transaction Document.



4.4.6 ACCEPTANCE

Appliances: 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.

5.0 IBM SAAS

Government Customer agrees that IBM is not providing it with access to the Internet in order to use IBM SaaS and that Government Customer remains responsible for Internet access.

Government Customer acknowledges that International Business Machines Corporation and its subsidiaries (1) do not control the transfer of data over telecommunications facilities, including the Internet, and (2) in a public Internet environment cannot commit to particular confidentiality obligations.

The exchange of any confidential information made under a separate, signed confidentiality agreement, pursuant to 1.14.5b of this Agreement, does not apply to Content. IBM assumes no confidentiality obligations regarding Content, notwithstanding the terms of any separate confidentiality agreement between the Government Customer and IBM.

5.1 OWNERSHIP

IBM and its suppliers own IBM SaaS. Government Customer agrees that title to, ownership of and all rights in and to patents, copyrights, trademarks, and all other intellectual property rights in IBM SaaS, and any copy or part of IBM SaaS will remain with IBM and its suppliers. IBM may subcontract IBM SaaS, or any part of it, including technical support, to subcontractors selected by IBM.

5.2 GOVERNMENT CUSTOMER'S RIGHT TO USE

Government Customer may use an IBM SaaS offering in accordance with its Terms of Use, up to the specified level of use authorized in the Proof of Entitlement, on condition that:

- a. Government Customer accepts the Terms of Use of the IBM SaaS offering;
- b. Government Customer ensures that anyone who uses the IBM SaaS offering does so only on Government Customer's behalf and complies with the terms of this Agreement and the applicable Terms of Use; and
- c. Government Customer does not



- (1) use, copy, modify, or make the IBM SaaS offering available, in whole or on part, to third parties except as expressly permitted in this Agreement and the applicable Terms of Use;
- (2) reverse assemble, reverse compile, otherwise translate, or reverse engineer the IBM SaaS offering, unless expressly permitted by applicable law without the possibility of contractual waiver;
- (3) use any of the IBM SaaS offering's components, files, modules, audio-visual content, or related licensed materials separately from that of the IBM SaaS offering;
- (4) rent, sublicense, or lease the IBM SaaS offering;
- (5) create Internet "links" to or from the IBM SaaS offering; or
- (6) "frame" or "mirror" any content forming part of an IBM SaaS offering, other than on Government Customer's own intranets in connection with Government Customer's authorized use of the IBM SaaS offering.

5.3 SUBSCRIPTION TO IBM SAAS

5.3.1 TERMS FOR A SPECIFIC IBM SAAS OFFERING

The terms of a specific IBM SaaS offering are provided in its Terms of Use and may include without limitation definitions, description of subscription and services, charge metrics, and restrictions. See Chapter 9 for the Terms of Use that apply to IBM's SaaS offerings.

5.3.2 IBM SAAS SUBSCRIPTION PERIOD

An IBM SaaS Subscription Period begins on the date that IBM receives a fully funded Delivery Order, or at a later date as specified in the Delivery Order. The end date of a Subscription Period as specified in the Government Customer's delivery order or in an IBM Transaction Document must be the last day of a month.

During an IBM SaaS Subscription Period, Government Customer may increase or decrease the subscribed level of an IBM SaaS offering. IBM will provide monthly reports identifying the Government Customer's usage and the percentage of remaining funds available on the delivery order. The Government Customer is responsible for monitoring this report, the funds remaining on the current order, and issue a modification to increase the funds available as appropriate. Notwithstanding the requirement for a modification to increase funds, the Government Customer remains responsible for paying invoices for monthly provisioning and usage.

5.3.3 IBM SAAS SUBSCRIPTION PERIOD RENEWAL

The Government Customer may renew an IBM SaaS offering at the end of a Subscription Period by providing IBM with a funded delivery order prior to the end of the Subscription Period. If a renewal order is received by IBM with a coverage commencement date later than the first day

following the end date of the prior Subscription Period, the Government Customer shall promptly modify the order to reflect the day following the end date of the of the prior Subscription Period.

5.3.4 IBM SAAS TECHNICAL SUPPORT

During an IBM SaaS Subscription Period:

- a. IBM provides assistance, as specified in the ToU, for Government Customer's offering-specific, task-oriented questions regarding the use of IBM SaaS; and
- b. IBM SaaS technical support is available only for the currently supported versions of IBM SaaS, client operating systems, Internet browsers, and software. IBM technical support is available during the normal business hours (published prime shift hours) of the IBM SaaS support center. Consult the Terms of Use for details applicable to a specific IBM SaaS offering.

5.3.5 CONTENT

IBM provides only services for Content. IBM is not the publisher of Content transmitted within IBM SaaS.

Government Customer has sole responsibility for the following:

- a. ensuring the adequacy of any IBM SaaS elements to satisfy any Government Customer requirements;
- b. all Content including, without limitation, its selection, creation, design, licensing, installation, accuracy, maintenance, testing, backup and support;
- c. having all necessary authorizations to allow IBM and its subcontractors to host, cache, record, copy, and display Content, and Government Customer represents that it has and will keep in effect during its use of IBM SaaS all such authorizations and approvals necessary to grant IBM and its subcontractors these rights, and that such rights are provided at no charge to IBM. Government Customer retains all right, title, and interest in and to its Content; and
- d. the selection and implementation of procedures and controls regarding access, security, encryption, use, transmission, and backup and recovery of Content.

Government Customer grants to IBM and its subcontractors a nonexclusive, irrevocable, worldwide, royalty-free, fully-paid, transferable license to host, cache, record, copy, and display Content, solely for the purpose of making IBM SaaS available.

5.3.6 TERMINATION OF IBM SAAS

IBM may withdraw the IBM SaaS in its entirety on 12 months' written notice to all then current Government Customers by letter or e-mail.



Notwithstanding anything to the contrary in this Appendix and subject to the Contract Disputes Act and FAR 52.233-1 (Disputes), IBM may terminate the Government Customer's access to the IBM SaaS due to Government Customer's breach of any of the applicable terms of this Appendix. Upon termination, the Government Customer's access and other rights to the IBM SaaS will be cancelled and cease. In such event the Government Customer and its IBM SaaS Users must cease any further use of the IBM SaaS and destroy any copies of the associated Enabling Software within your possession or control.

