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## CHAPTER 9. SPECIAL ITEM NUMBER 132-52: ELECTRONIC COMMERCE

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

### TERMS AND CONDITIONS

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

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

#### 1. SCOPE

The prices, terms and conditions stated under Special Item Number 132-52 Electronic Commerce (EC) Services apply exclusively to EC Services within the scope of this Information Technology Schedule.

#### 2. ELECTRONIC COMMERCE CAPACITY AND COVERAGE

The Ordering Activity shall specify the capacity and coverage required as part of the initial requirement.

#### 3. INFORMATION ASSURANCE

- a. The Ordering Activity is responsible for ensuring to the maximum extent practicable that each requirement issued is in compliance with the Federal Information Security Management Act (FISMA)
- b. The Ordering Activity shall assign an impact level (per Federal Information Processing Standards Publication 199 & 200 (FIPS 199, "*Standards for Security Categorization of Federal Information and Information Systems*") (FIPS 200, "*Minimum Security Requirements for Federal Information and Information Systems*") prior to issuing the initial statement of work. Evaluations shall consider the extent to which each proposed service accommodates the necessary security controls based upon the assigned impact level. The Contractor awarded SIN 132-52 is capable of meeting at least the minimum security requirements assigned against a low-impact information system (per FIPS 200).
- c. The Ordering Activity reserves the right to independently evaluate, audit, and verify the FISMA compliance for any proposed or awarded Electronic Commerce services. All

FISMA certification, accreditation, and evaluation activities are the responsibility of the ordering activity.

#### **4. INTEROPERABILITY.**

When an Ordering Activity requires interoperability, this requirement shall be included as part of the initial requirement. Interfaces may be identified as interoperable on the basis of participation in a sponsored program acceptable to the Ordering Activity. Any such access or interoperability with teleports/gateways and provisioning of enterprise service access will be defined in the individual requirement.

#### **5. ORDER**

- a. Agencies may use written orders, EDI orders, blanket purchase agreements, individual purchase orders, or task orders for ordering electronic services under this contract. Blanket Purchase Agreements shall not extend beyond the end of the contract period; all electronic services and delivery shall be made and the contract terms and conditions shall continue in effect until the completion of the order. Orders for tasks which extend beyond the fiscal year for which funds are available shall include FAR 52.232-19 (Deviation – May 2003) Availability of Funds for the Next Fiscal Year. The purchase order shall specify the availability of funds and the period for which funds are available.
- b. All task orders are subject to the terms and conditions of the contract. In the event of conflict between a task order and the contract, the contract will take precedence.

#### **6. PERFORMANCE OF ELECTRONIC SERVICES**

The Contractor shall provide electronic services on the date agreed to by the Contractor and the ordering activity.

#### **7. RESPONSIBILITIES OF THE CONTRACTOR**

The Contractor shall comply with laws, rules, and regulations (Federal, State, City, or otherwise) applicable to its business, use of a Cloud Service, and content, including applicable export and import laws..

## **IBM OFFERINGS**

### **1. IBM'S SOFTWARE AS A SERVICE OFFERING (SAAS)**

The terms stated herein are in addition to the terms of Appendix S Section 7, and the Terms of Use for the Specific SaaS Offering as outlined in 2.2 below.

#### **1.1 SAAS GENERAL TERMS OF USE**

Carefully read these IBM SaaS Terms of Use (“Terms of Use” or “ToU”) before using the IBM SaaS and any associated Enabling Software. Customer may use the IBM SaaS and Enabling Software only if Customer first accepts these Terms of Use.

The Government accepts these terms and conditions by issuing a funded delivery order to IBM for the SaaS offer.

These Terms of Use (“TOU”) for a SaaS Offering is composed of this General SaaS Terms of Use, and the SaaS Specific Offering Terms of Use which are available at <http://www-03.ibm.com/software/sla/sladb.nsf/sla/usg>.

Customer may use the IBM SaaS only during a valid Subscription Period.

## **1.2 DEFINITIONS**

Capitalized terms not defined in these Terms of Use are defined in the IBM International Passport Advantage Agreement (see Appendix S).

### ***2.2.2 NON-DISCLOSURE OF CONTENT***

IBM will not disclose or use Content made available to the IBM SaaS except to operate, maintain, and perform the IBM SaaS or to comply with laws. IBM SaaS is operated within an IBM data center that meets the security requirements of FISMA with an impact level of moderate.

## **1.3 CHARGES AND BILLING**

The amount payable for each IBM SaaS is specified in the GSA pricelist. The Specific SaaS TOU and IBM’s proposal transaction document specifies the charge metric and billing options available for each SaaS

## **1.4 OVERAGE CHARGES**

If Customer's actual usage of the IBM SaaS exceeds the entitlement specified in a PoE or Transaction Document, then Customer will be invoiced for the overage in accordance with the overage rates specified in the applicable PoE or Transaction Document.

During the IBM SaaS Subscription Period, the Government may increase or decrease the subscribed level of an IBM SaaS offering. The Government is responsible for monitoring the funding allocated on their current order and issue a modification whenever the result of increases and /or decreases in charges exceed the allocated funding. Notwithstanding the requirement for a modification to increase funding, the Government remains responsible for paying invoices for monthly provisioning and usage.

## **1.5 ENABLING SOFTWARE**

Enabling Software is any program or associated material made available to the Government as part of the IBM SaaS. It may only be used for accessing or using the IBM SaaS, and will be subject to an applicable license agreement.

Should the Government's access to the IBM SaaS be terminated, Government's use of the Enabling Software will also be terminated. Government must remove all Enabling Software from their systems and destroy all copies.

## **1.6 SUSPENSION OF IBM SAAS AND CANCELLATION**

### **Suspension**

In the event of a breach of the Terms of Use, Acceptable Use Policy, misappropriation of IBM intellectual property or violation of applicable law by an IBM SaaS User, IBM reserves the right to suspend or revoke the offending IBM SaaS User's access to the IBM SaaS, and/or delete the offending IBM SaaS User's Content subject to the Contract Disputes Act and FAR 52.233-1 (Disputes), and IBM will notify Customer of any suspension or revocation action.

### **Termination**

The Government Customer may terminate the service at any time on one month's written notice. In such event, IBM will cease billing the monthly charge.

Subject to the Contract Disputes Act and FAR 52.233-1 (Disputes), IBM may terminate Government Customer's access to the IBM SaaS for cause if Government Customer does not comply with the SaaS Terms of Use and such noncompliance is not remedied within a reasonable time after receiving notice from IBM. 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.

### **Withdrawal**

IBM may withdraw the IBM SaaS in its entirety on 12 months' written notice by letter or e-mail.

## **1.7 RENEWAL OF A SUBSCRIPTION PERIOD**

Should the Government Customer wish to renew this service for a subsequent service period, a funded delivery order is required by the end of the current service period to avoid termination of service.

## **1.8 EMERGENCY MAINTENANCE & SCHEDULED MAINTENANCE**

IBM may perform regularly scheduled maintenance during maintenance windows defined by IBM. Other scheduled and non-scheduled down times may occur. IBM SaaS will not be available during these times.

## **1.9 UPDATES**

These Terms of Use apply to all enhancements, modifications, variations, revisions, updates, supplements, add-on components, and replacements for the IBM SaaS (collectively, "Updates")

that IBM may provide or make available for the IBM SaaS, subject to any additional terms provided by IBM applicable to such Updates, which the Government has a right to review before acceptance. IBM has no obligation to, and nothing in these Terms of Use may be construed to require IBM to, create, provide, or install Updates.

#### **1.10 UPDATES TO TERMS OF USE**

IBM reserves the right to prospectively modify the ToU to the extent necessary to account for any Updates that IBM may make available during the Subscription Period or as required by applicable law, by providing at least thirty (30) days notice of such modified terms to Customer. The Customer has the right to review any additional terms applicable to such Updates. Subscription renewals will be governed by the ToU in effect at the time of renewal

#### **1.11 DATA PRIVACY AND DATA SECURITY**

##### **Personal Data**

Government Customer 1) will obtain all legally required consents before making any Personal Data available to the IBM SaaS, and maintain those consents throughout the Subscription Period; and 2) will not use the IBM SaaS in conjunction with Personal Data to the extent that doing so would violate applicable data protection laws.

Unless expressly stated in the applicable SaaS Specifications, the IBM SaaS is not intended for the storage or receipt of any: 1) Personal Data and other data, the loss of which would trigger a data breach notification requirement, or 2) health information, including without limitation individually identifiable health information as defined under the Health Information Portability and Accountability Act of 1996 ("HIPAA"), as amended. Customer will be responsible for reasonable costs and other amounts IBM may incur relating to any such information made available by Government Customer to the IBM SaaS, including those arising out of any third party claims.

Upon Government Customer's written request, following termination or expiry of the IBM SaaS service, IBM will destroy or return to Customer all Personal Data made available to the IBM SaaS.

#### **1.12 COMPLIANCE WITH APPLICABLE EXPORT LAW**

Each party agrees to comply with all applicable import and export laws and regulations, including those of the United States regarding embargo and sanctions regulations and prohibitions on export by certain end users or for any prohibited end uses (including nuclear, space or missile, and chemical and biological weapons). Government Customer represents that Content will not, in whole or part, be controlled under the U.S. International Traffic in Arms Regulation (ITAR). Government Customer acknowledges that IBM may use global resources (non-permanent residents used locally and personnel in locations worldwide) to remotely support the delivery of IBM SaaS, unless specified otherwise per the specific IBM SaaS offering. Government Customer represents that no Content accessible to IBM for the IBM SaaS will

require an export license or is restricted from export to any IBM global resource or personnel under applicable export control laws.

### **1.13 WARRANTY**

IBM warrants that the IBM SaaS will conform to the specifications set forth in the SaaS Specific Offering Terms (“IBM SaaS Specification”). If the IBM SaaS does not function as warranted, and IBM is unable to make it do so, upon Customer’s request, IBM will give Customer a prorated refund of amounts prepaid by Customer, and Customer’s right to use the IBM SaaS will terminate. This limited warranty remains in effect throughout the Subscription Period for the IBM SaaS offering.

### **1.14 SECURITY PRACTICES**

IBM implements and maintains practices and procedures, which may be revised periodically, regarding the systems used to host and operate the IBM SaaS. These practices and procedures are designed to reduce the vulnerability of our systems to accidental loss, unlawful intrusions unauthorized access, disclosure or alteration or wrongful conduct that may interfere with, misappropriate, or otherwise damage the Content or Customer's use of the IBM SaaS. A description of the practices and procedures applicable to the IBM SaaS, including applicable technical and operational measures, is available to Customer upon request. Customer is responsible for determining whether these practices and procedures are appropriate to meet Customer's requirements. By using the IBM SaaS, Customer acknowledges its acceptance of the IBM practices and procedures and their adequacy for Customer's purposes

### **1.15 ENTIRE AGREEMENT**

The complete agreement between the parties, replacing any prior oral or written communications between Government Customer and IBM, consists of these General Terms of Use, the Specific SaaS Offering Terms of Use, and the IBM International Passport Advantage terms (see Appendix S). If there is a conflict among the terms of these General Terms of Use and the Specific SaaS Offering Terms of Use, the Specific SaaS Offering Terms of Use will prevail.

Additional or different terms in any written communication from Government Customer (such as a purchase order, acknowledgement or e-mail) are void. These Terms of Use may only be amended as mutually agreed to by IBM and the Government.

## **2. IBM SMARTCLOUD FOR GOVERNMENT OFFER**

The following terms and conditions of the Federal Cloud Services Agreement apply to IBM SmartCloud for Government Offering. A Statement of Work detailing our services will be provided on a transaction basis to the Government agency.



## 2.1 GENERAL TERMS

The IBM SmartCloud for Government is an Infrastructure as a Service (IaaS) offering that is a private multi-tenant cloud specific for Federal Government users.

The SmartCloud for Government terms and conditions are incorporated into this IBM GSA IT Schedule Contract, herein after referred to as the “Agreement”, and govern the Customer’s access to and use of the SmartCloud for Government and associated Cloud services (“Services”) that Customer orders and IBM provides from IBM SmartCloud for Government.

### **Agreement Structure and Overview:**

The Order Document, the Service Description(s) for the selected Cloud Service(s) and the Federal Cloud Services Agreement will constitute the complete agreement for the Cloud Services and will supersede any prior discussions or representations regarding the Cloud Services. Any reproduction of this Agreement made by reliable means is considered an original. This “Agreement” incorporates each of the following Attachments:

- a. “Attachments” means the following Attachments which provide additional terms and details for each of the Services:
  - IBM SmartCloud for Government Services Description – describes the Services available from SmartCloud for Government, or as may be described within a specific Statement of Work provided with an IBM proposal;
  - Services Charges Schedule – describes the charges applicable to each Services offering, or as may be described within a specific IBM proposal. See IBM’s pricelist available on [www.ibm.com/easyaccess/gsa](http://www.ibm.com/easyaccess/gsa).

In the event of a conflict, the terms of Attachments prevail over this Agreement.

## 2.2 SMARTCLOUD FOR GOVERNMENT SERVICES

SmartCloud for Government Services are provided on a private, multi tenant cloud infrastructure environment using Services Components located at an IBM Data Center. IBM will provide selected Services as described in the applicable Attachments which include IBM and Customer responsibilities. IBM’s ability to provide the Services is dependent upon Customer managing and performing of its responsibilities, at no charge to IBM. Customer is responsible for the use of the Services by End Users and the access and use of any Service Components, including the actions of any End User and for ensuring that each End User complies with this Agreement, including Attachments

## 3.0 IBM FEDERAL CLOUD SERVICES AGREEMENT (FCSA)

This Agreement governs Customers acquisition and use of IBM Cloud Services. A Cloud Service is an IBM branded offering hosted or managed by IBM and made available via a network. The Cloud Service is described in the Service Description document that will be provided on an order basis. Customer may select Cloud through an Order Document which is the subject of mutual written agreement between you and IBM. The Order Document will

specify the Cloud Services and quantities selected, IBM charges and other details of your order. The Order Document, the Service Description(s) for the selected Cloud Service(s) and this Federal Cloud Services Agreement will constitute the complete agreement for the Cloud Services and will supersede any prior discussions or representations regarding the Cloud Services.

### **3.1 SERVICE PERFORMANCE AND COMMITMENTS**

When IBM accepts your funded Order Document for a Cloud Service, IBM will provide you the entitlements specified in the Order Document. You may access the Cloud Service from any location via a network connection. Cloud Services are designed to be available 24/7 subject to maintenance. You will be notified of scheduled maintenance. Service Level commitments, if applicable, are specified in the Service Description. In addition, some Cloud Services include entitlement to use enabling software on your machines. If applicable, descriptions and details of the software and permitted use granted by IBM or third parties will be included in the Service Description.

You may access and use each Cloud Service that you order only to the extent of entitlements acquired by you. You are responsible for use of Cloud Services by any party who accesses the Service with your account credentials.

IBM does not authorize use of any Cloud Service for any unlawful or inappropriate purposes, such as gambling, obscenity, pornography, violence, misappropriation, unauthorized access or interference, viruses or harmful code, harassment, unsolicited or deceptive messages, or evading filters. Any such use is prohibited. Unless expressly provided in this Agreement, you are not authorized to use the Cloud Services to provide hosting or timesharing services to any third party.

### **3.2 INTEGRATION, CONFIGURATION AND CUSTOM SERVICES**

IBM may offer additional standard customization and configuration Services. Such Services are detailed in an additional Service Description and may be ordered pursuant to the Order Document. At your request, IBM may perform additional custom services, as specified in a mutually agreed Statement of Work or another authorized contract vehicle.

### **3.3 CONFIDENTIALITY AND DATA PROTECTION**

Each Cloud Service is designed to protect the proprietary content that you input into the Cloud Service and to provide for access and use of such content only in accordance with the provision of the Cloud Service. Except as otherwise specified in a Service Description, Cloud Services limit access and use of your proprietary content to IBM employees and contractors as needed to deliver the Cloud Service. IBM will not disclose your proprietary content, and will return or destroy your content upon the expiration or cancellation of the Cloud Service, or earlier upon your request. IBM reserves the right to charge for certain activities performed at your request or direction (such as delivering content in a specific format).

The Service Description for each Cloud Service describes the security functions and features applicable to the Cloud Service. IBM Cloud Services comply with the US-EU and US-Swiss Safe Harbor Frameworks, unless otherwise specified in the Service Description. IBM agrees to provide you notice of any unauthorized third party access to your content of which we become aware and to provide reasonable efforts to remediate identified security vulnerabilities. If your content is lost or damaged, IBM will assist you in restoring the content to the Cloud Service from your last available back up copy in compatible format.

Some of your content or other data may be subject to governmental regulation or otherwise may require security measures beyond those specified by IBM for the Cloud Service. You agree not to input such content in the Cloud Services or to otherwise provide such data in conjunction with other Services unless we have first agreed in writing to provide additional required security measures. You are responsible for all necessary permissions to include the content in the Cloud Service and you grant IBM permission to use, store and process the content in the delivery of the Cloud Services.

### **3.4 CHARGES, PAYMENTS & TAXES**

You agree to pay all applicable charges for a Service as set forth in the Agreement and any charges for use in excess of entitlements, any custom, duty, tax (including withholding tax), levy or fee imposed by any authority resulting from your purchase or use of a Service. Amounts are due upon receipt of the invoice and payable within 30 days of the invoice date to an account specified by IBM. IBM reserves the right to invoice for any charges for use in excess of Authorizations.

### **3.5 CHANGES**

IBM may modify the computing environment used to provide a Cloud Service, provided that such change does not degrade the functionality or the security features of the Cloud Service. Other changes to the Service Description made by IBM will not apply until any agreed renewal or extension.

### **3.6 TERM, TERMINATION, SUSPENSION**

The term of a Cloud Service is effective upon IBM's acceptance of an Order and continues until expiration as described in the Order Document. IBM may withdraw a Cloud Service on 12 months' notice, unless otherwise stated in an Agreement or Attachment. IBM will either continue to provide the Cloud Service for the remainder of Client's unexpired term or work with Client to migrate to another IBM Service. IBM may limit use of a Cloud Service if in IBM's sole discretion there is a breach of security, use in violation of the terms of the Agreement, breach of your obligations or violation of law. Charges will continue to accrue for the Cloud Service during any such limitation period. If the cause of the limitation is reasonably capable of being remedied, IBM will provide you notice of what actions you must take to reinstate the Cloud Service.

### 3.7 WARRANTIES AND DISCLAIMERS

IBM warrants it will provide the Cloud Service using commercially reasonable care and skill in accordance with the Services Description. For the Cloud Service, the warranty period is the term of the Service.

**IBM does not warrant uninterrupted or error-free operation of a Cloud Service. These warranties are the exclusive warranties from IBM. They replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and fitness for a particular purpose.**

### 3.8 COMPLIANCE WITH LAWS

Each party remains responsible for complying with laws, rules and regulations applicable to its business, use of a Cloud Service, and content, including applicable export and import laws.

### 3.9 GENERAL

IBM may use third party suppliers to support the delivery of Cloud Services. Assignment of the Agreement and the rights and obligations under it, including Authorizations to the Cloud Service is not permitted.

### 3.10 COMMERCIAL CLOUD SERVICES

Cloud Services are commercial services available in the commercial marketplace and customarily used by the general public or by non-government customers for other than government purposes and have been “offered for sale, sold, leased, or licensed to the general public” in substantial quantity. The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government herein

Cloud Services are therefore offered under the terms and conditions customarily associated with commercial services as defined in FAR Part 2.1, herein and shall not be subject to any Cost Accounting Standards (CAS), cost reimbursement, cost or pricing data, or associated audit clauses.

### 3.11 LICENSE AND USE RIGHTS TO USE SERVICES.

Subject to the terms and conditions of this Agreement, IBM grants the Customer a non-exclusive, non-transferable, non-sublicenseable, revocable right in the Cloud Services solely to: (a) use and access the Cloud Services for internal purposes; and (b) use the Cloud Services to create, offer and provide services as specified in the contract.

### 3.12 OWNERSHIP OF SITE

A Cloud Site is the combination of computer software, computer hardware, intellectual property, other forms of property, facilities, and infrastructure provided by IBM to enable the delivery of Cloud Services. IBM (or its licensors) own all legal right, title and interest in and to the Cloud Site and the Cloud Services provided by IBM, including, without limitation, any intellectual property or other proprietary rights which subsist in the Site and Cloud Services (whether such rights are registered or unregistered, and wherever in the world those rights may exist). All materials on the Cloud Site, including, but not limited to, graphics, user and visual interfaces, images, software, applications, and text, as well as the design, structure, selection, coordination, expression, "look and feel", and arrangement of the Site and its content (except for Customer Content), and the domain names, trademarks, service marks, proprietary logos and other distinctive brand features found on the Cloud Site, are all owned by IBM or its licensors.

### 3.13 GOVERNMENT RIGHTS

IBM provides the Cloud Services for ultimate federal government end use solely in accordance with the following license rights to use, modify, reproduce, release, perform, display, or disclose: Government technical data and software rights related to the Cloud Services include only those rights customarily provided to the public. This customary commercial license is provided in accordance with the Federal Acquisition Regulation ("FAR") at 48 C.F.R. 12.211 (Technical Data) and FAR 12.212 (Software) for civilian agencies of the federal government, and, for Department of Defense transactions, the Defense Federal Acquisition Regulation Supplement ("DFARS") at 48 C.F.R. 252.227-7015 (Technical Data – Commercial Items), 48 C.F.R. 227.7202-3 (Rights in Commercial Computer Software or Computer Software Documentation). This U.S. Government Rights clause, consistent with 48 C.F.R. 12.211, 48 C.F.R. 27.212 (federal civilian agencies) or 48 C.F.R. 227.7202-4 (DoD agencies) is in lieu of, and supersedes, any other FAR, DFARS, or other clause or provision that addresses U.S. Government rights in computer software, computer software documentation or technical data related to the IBM Commercial Computer Software and Commercial Computer Software Documentation licensed under this Agreement or in any contract or subcontract under which this IBM Commercial Computer Software and Commercial Computer Software Documentation is acquired or licensed.

