APPENDIX S IBM PASSPORT ADVANTAGE AGREEMENT

APPENDIX S. IBM PASSPORT ADVANTAGE AGREEMENT

TERMS AND CONDITIONS

Note: These terms are in addition to those described in Chapter 1, General Information, and Chapter 5, Perpetual Software License (SIN 132-33). In the event of a conflict, this Agreement prevails over the terms of Chapter 1 or Chapter 5.

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

In the event of a conflict, an Attachment prevails over this Agreement and a TD prevails over both the Agreement and any Attachment.

1. GENERAL

1.1 DEFINITIONS

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

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

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

1.2 ACCEPTANCE OF TERMS

The terms of this Agreement are effective on the day IBM accepts a fully funded Delivery Order for Eligible Products. By enrolling in Passport Advantage and issuing a Delivery Order, the Client accepts this Agreement without modification. Once this Agreement is accepted, all Eligible Products ordered under this Agreement are subject to it.

Upon acceptance of the Client's order, IBM will either i) send the Client a PoE including the level of authorized use, ii) make the Program or Cloud Service available, iii) ship the Appliance, or iv) provide the support, service, or solution.

1.3 PAYMENT

a. Is due in accordance with the Prompt Payment Act.

b. IBM will invoice the Client applicable charges specified by IBM, including charges for use in excess of authorizations. IBM does not give credits or refunds for any prepaid, one-time charges, or other charges already due or paid, unless specified elsewhere within this contract.

c. Charges are exclusive of any customs or other duty, tax, and similar levies imposed by any authority resulting from Client's acquisitions under the Agreement and will be invoiced in addition to such charges.

d. If as a result of Client moving, accessing, or using an EP across a border, any authority imposes a customs duty, tax, levy or fee (including withholding taxes for the import or export of any such EP), then Client agrees that it is responsible for, and will pay, any such customs, tax, levy or fee. This exludes those taxes based on IBM's net income.

1.4 CHANGES TO AGREEMENT TERMS

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

1.5 ELIGIBLE PRODUCTS

IBM may add or withdraw EPs or add or withdraw a license metric for an EP at any time. EPs may not be used to provide commercial hosting or other commercial information technology services to third parties.

For an EP, IBM may withdraw a Fixed Term License, Monthly License (ML), IBM Software Subscription and Support, or Selected Support, or Cloud Service or an Appliance Service in its entirety on 12 months' written notice to all then current Customers by published announcement letter, or e-mail. If IBM withdraws an Eligible Product from marketing, the Client will no longer be able to acquire it under this GSA Schedule.

The Client understands that as of the effective date of such withdrawal, the Client may not increase its level of use, beyond the authorizations already acquired without IBM's written consent, renew or purchase that offering; and if the Client renewed the offering prior to the notice of withdrawal, IBM may either (a) continue to provide that offering until the end of the then current term or (b) provide a prorated refund.

1.6 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.

1.7 COMPLIANCE WITH LAWS

Each party is responsible for complying with: i) laws and regulations applicable to its business and Content, and ii) import, export and economic sanction laws and regulations, including the defense trade control regime of any jurisdiction, including the International Traffic in Arms Regulations and those of the United States that prohibit or restrict the export, re-export, or transfer of products, technology, services or data, directly or indirectly, to or for certain countries, end uses or end users. Client is responsible for its use of EPs.

If Client or any user exports or imports Content or makes use of any portion of an EP outside the country of Client's business address, IBM will not serve as the exporter or importer. If any provision of this Agreement is invalid or unenforceable, the remaining provisions remain in full force and effect. Nothing in this Agreement affects statutory rights of consumers that cannot be waived or limited by contract. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions under this Agreement.

1.8 GENERAL PRINCIPLES

a. The Client is responsible for selecting the Eligible Products that meet its needs and for the results obtained from the use of the Eligible Products, including Client's decision to implement any recommendation concerning Client's business practices and operations.

b. Where approval, acceptance, consent, or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.

d. As reasonably required by IBM to fulfill its obligations under this Agreement, the Client agrees to provide IBM with sufficient and safe access (including remote access) to Client'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 Client's delay in providing such access or performing other Client 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 Client may achieve.

f. Client is responsible for obtaining all necessary rights and permissions to enable, and grants such rights and permissions to, IBM, and its contractors and subprocessors to use, provide, store and process Content in any EP. This includes Client providing required information, making necessary disclosures and obtaining consent, if required, before providing individuals' information, including personal or other regulated information in such Content. If any Content could be subject to governmental regulation or may require security measures beyond those specified by IBM for an offering. Client will not input, provide, or allow such Content unless IBM has first agreed in writing to implement additional required security measures.

g. Client is responsible for arranging for and paying applicable charges to their selected suppliers of telecommunications, including internet, connectivity associated with accessing Cloud Services, Appliance Services, IBM Subscription and Support, and Select Support, unless IBM specifies otherwise in writing.

h. As applicable by law, IBM and its affiliates, and their contractors and subprocessors, may, wherever they do business, store and otherwise process business contact information (BCI) of Client, its personnel and authorized users, for example, name, business telephone, address, email, and user IDs, for business dealings with them. Where notice to or consent by the individuals is required for such processing, Client will notify and obtain such consent. IBM may use personnel and resources in locations worldwide, including third party contractors and subprocessors to support the delivery of EPs. IBM is responsible for the obligations under the Agreement even if IBM uses third party contractors or subprocessors unless otherwise set forth in a TD. IBM will require subprocessors with access to Content to maintain technical and organizational security measures that will enable IBM to meet its obligations for a Cloud Service. A current list of subprocessors and their roles will be provided upon request. Content consists of all data, software, and information that Client or its authorized users provides, authorizes access to, or inputs to an EP. Use of such EP will not affect Client's existing ownership or license rights in such Content. IBM and its contractors, and subprocessors may access and use the Content solely for the purpose of providing and managing the EP, unless otherwise described in a TD.

1.9 ASSIGNMENT AND TRANSFERABILITY

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

EPs are for use within the Contract Agreement, and may not be resold, rented, leased, or transferred to third parties. These licenses may only be transferred within the Contract Agreement, as defined in Section 1.1, unless otherwise agreed to by IBM. The transfer, if such is

permitted, of the license rights and obligations outside of the Contract Agreement terminates the Licensee's authorization to use the EP under the PoE. In addition, such EPs may not be used to provide commercial hosting or other commercial information technology services to third parties.

1.10 TERMINATION

The Client may terminate this Agreement, a delivery order, or EP without cause on one month's notice to IBM. The Client agrees to promptly discontinue use of and destroy all of the Client's copies of a Program upon termination of a license grant.

Any violation of the terms of this Passport Advantage Agreement shall be handled in accordance with the Contract's Disputes Act and the rights provided to the vendor under the Act.

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

Client agrees to create, retain, and provide to IBM and its auditors accurate written records, system tool outputs, and other system information sufficient to provide auditable verification that Client's use of all EPs is in compliance with this Agreement including the licensing and pricing qualification terms referenced in this Agreement (Passport Advantage Terms). Client is responsible for 1) ensuring that it does not exceed its authorized use, and 2) remaining in compliance with Passport Advantage Terms.

Upon reasonable notice, IBM may verify Client's compliance with Passport Advantage Terms at all Sites and for all environments in which Client uses (for any purpose) EPs subject to Passport Advantage Terms. Such verification will be conducted in a manner that minimizes disruption to Client's business, and may be conducted on Client's premises, during normal business hours. IBM may use an independent auditor to assist with such verification, provided IBM has a written confidentiality agreement in place with such auditor.

Client agrees that, upon written notice from IBM and the independent auditor, any confidential information provided to the independent auditor or to IBM through the independent auditor, as reasonably required for compliance verification, shall be provided, and Client consents to the exchange of such information, pursuant to such terms as IBM, the Client, and, if applicable, the auditor agree, within 60 days of a request for verification information.

IBM will notify Client in writing if any such verification indicates that Client has used any EPs in excess of its authorized use or is otherwise not in compliance with Passport Advantage Terms. Subject to the terms of the Contract Disputes Act (if applicable), FAR Part 33 (if applicable), and 28 U.S.C. § 1498, IBM will invoice for 1) any such excess use, 2) IBM Software Subscription and Support and Selected 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.

1.12 PATENT AND COPYRIGHT INDEMNITY

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

If a third party claims that a Product IBM provides to the Client infringes that party's patent or copyright, IBM will indemnify the Client, 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 Client:

A. Promptly notifies IBM in writing of the claim; and

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

Remedies

If such a claim is made or appears likely to be made, the Client agrees to permit IBM to enable the Client 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 Client agrees to return the Product to IBM on IBM's written request. IBM will then give the Client a credit equal to:

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

2.   For a Program, the amount paid by the Client or 12 months' charges (whichever is less). If the Product is an IBM Cloud Service or subject to Fixed Term charges, up to twelve months' charges.

3.   For Materials, the amount the Client paid IBM for the creation of the Materials.

This is subject to the Client's right to require continued use of the Products pursuant to the provisions of 28USC1498. In the event of such continued use, the Client shall notify IBM in writing of its election to continue use and agrees to undertake at the Client's expense the defense of any action against the Client 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 Client's modification of a Product, or a Program's use in other than its Specified Operating Environment;

B. Anything the Client provides which is incorporated into a Product or IBM's compliance with any designs, specifications, or instructions provided by the Client or by a third party on behalf of the Client;

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 Client's Passport Advantage Agreement Number or for the benefit of any third party; or

G. Separately Licensed Code, if any, as identified in the LI for the Product.

The LI for the Product or other documents may permit the Client 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 Client by IBM and additional copies expressly authorized in a PoE. IBM has no obligation for claims relating to copies of the Product neither provided by IBM nor specifically authorized by a PoE, even if permitted by the LI for the Product or other documents.

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

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

1.13 LIMITATION OF LIABILITY

Circumstances may arise where, because of a default on IBM's part or other liability, the Client is entitled to recover damages from IBM. In each such instance, regardless of the basis on which the Client 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 Client's right to (i) excess reprocurement 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 Client's statutory remedies in the event of fraud.

2. WARRANTIES

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

The warranty for an IBM Program is stated in its license agreement. IBM warrants it provides IBM Software Subscription and Support, Selected Support, Cloud Services, and Appliance Services using commercially reasonable care and skill as described in this Agreement, Attachment, and TD. These warranties end when such support or service ends.

IBM warrants that an IBM Machine Component of an Appliance used in its specified operating environment conforms to its official published specifications. The warranty period for an IBM Machine Component of an Appliance is a fixed period commencing on its date of installation (also called "Warranty Start Date") specified in a TD. If an IBM Machine Component of an Appliance 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, Client may return it to the party from whom Client acquired it for a refund.

The warranty for IBM Cloud Services is stated in its TD.

IBM does not warrant uninterrupted or error-free operation of an EP or that IBM will correct all defects or prevent third party disruptions or unauthorized third party access to an EP. These warranties are the exclusive warranties from IBM and replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and fitness for a particular purpose. IBM warranties will not apply if there has been misuse, modification, damage not caused by IBM, failure to comply with instructions provided by IBM, or if otherwise stated in an Attachment or TD. Third parties may provide their own warranties to Client.

IBM will identify IBM EPs it does not warrant.

Unless otherwise specified in an Attachment or TD, IBM offers non-IBM EPs, without warranties of any kind. Third parties provide services and licensed products directly to Client under their own agreements.

3. RENEWAL

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

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

IBM may pro-rate charges for IBM Software Subscription and Support, Selected Support, Fixed Term Licenses of six months or more, and Appliance Services to align with the Client's Passport Advantage Agreement Anniversary.

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

For an ML, Client selects a renewal option at the time of order. At each renewal of an ML Commitment Term, IBM may change the charges applicable to the renewed Commitment Term by providing Client a renewal quote no less than 60 days prior to the expiration of the then current term. Client accepts renewal quote by providing IBM a fully funded Delivery Order prior to the expiration of the then current term. Client may change their selected renewal option for a Commitment Term by giving IBM notice in writing no less than 30 days before the end of the Commitment Term.

For a Cloud Service, Client selects a renewal option at the time of order.

4. PROGRAMS AND IBM SOFTWARE SUBSCRIPTION AND SUPPORT

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

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

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

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

4.1 IBM TRADE-UPS AND COMPETITIVE TRADE-UPS

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

4.2 MONTHLY LICENSES

Monthly License Programs (ML Programs) are IBM Programs provided to the Client for a monthly license charge. Monthly Licenses have a term that begins on the date that Client's order is accepted by IBM and continues for a period Client commits to pay IBM (a Commitment Term) as specified in the TD. Client may terminate a current Commitment Term before its end date by giving at least 30 days' written notice to IBM and will receive a prorated refund for any whole months of remaining prepaid term.

4.3 FIXED TERM LICENSES

Fixed Term Licenses have a term that begins on the date that Client's order is accepted by IBM; on the calendar day following the expiration of a prior Fixed Term; or on the Anniversary date. A Fixed Term License is for the definite time period specified by IBM in a TD. Client may terminate a current Fixed Term License before its end date by giving at least 30 days' written notice to IBM and will receive a prorated refund for any whole months of remaining prepaid terms.

4.4 TOKEN LICENSES

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

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

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

4.5 IBM SOFTWARE SUBSCRIPTION AND SUPPORT

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

IBM Software Subscription and Support begins on the date of IBM Program acquisition and ends on the last day of the corresponding month in the following year, unless the date of acquisition is

the first day of the month, in which case coverage ends on the last day of the month, 12 months from the date of acquisition.

While IBM Software Subscription and Support is in effect, IBM makes available defect corrections, restrictions, bypasses, and any new versions, releases, or updates IBM makes generally available. Once IBM Software Subscription and Support has been allowed to lapse, these benefits will no longer be available to Client if they had been made available while IBM Software Subscription and Support was in effect and Client chose not to exercise that right.

While IBM Software Subscription and Support is in effect, IBM provides the Client assistance for

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

For selected Program versions or releases, as listed in the IBM Software Support Handbook, after Support been withdrawn for such versions or releases and while Client has current Software Subscription and Support coverage in effect for such Programs, IBM will provide support for Client's i) routine, short duration installation and usage (how-to) questions; and ii) code-related questions. However, in such cases, IBM will only provide existing code patches and fixes and will not develop or provide new patches or fixes for those versions or releases.

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

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

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

4.6 SELECTED SUPPORT

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

The IBM Software Subscription and Support section above applies to Selected Programs under Selected Support except that 1) IBM may provide Client with assistance in designing and developing applications based on Client's subscription level; 2) the IBM "Software Support Lifecycle" policy does not apply; and 3) no new versions, releases or updates are provided by IBM.

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

4.7 MONEY-BACK GUARANTEE

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

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

If there is a conflict between this Agreement (Appendix S), including its Attachments and TDs, and those of the IPLA (Chapter 5), including its LI, the terms of this Agreement prevail.

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

EPs that meet the operating system, processor technology, and virtualization environment requirements for Sub-Capacity usage may be licensed under Sub-Capacity Licensing terms (an Eligible Sub-Capacity Product); see https://www-01.ibm.com/software/passportadvantage/subcaplicensing.html. Product deployments that cannot meet Sub-Capacity Licensing requirements must be licensed using Full Capacity terms.

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

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

If at any time IBM becomes aware of circumstances indicating that Client is not operating all or a portion of Client's environment in accordance with applicable Sub-Capacity Licensing requirements, IBM may declare Client, or any applicable portion of Client, ineligible for Sub-Capacity Licensing and will provide Client with notice of any such determination. Client shall have 30 days to provide IBM information sufficient for IBM to determine that Client is in full compliance with the applicable Sub-Capacity Licensing requirements, in which case IBM shall withdraw its determination of ineligibility. Otherwise, Client agrees to acquire sufficient additional licenses and IBM Software Subscription and Support entitlements necessary for full capacity usage within the identified Client environment at then current prices.

Client's Reporting Responsibilities

For Sub-Capacity usage of EPs, Client agrees to install and configure the most current version of IBM's license metric tool (ILMT) within 90 days of Client's first Sub-Capacity-based Eligible Sub-Capacity Product deployment, to promptly install any updates to ILMT that are made available, and to collect deployment data for each such EP. Exceptions to this requirement are i) when ILMT does not yet provide support for the Eligible Sub-Capacity Product, ii) if Client has fewer than 1,000 employees and contractors, Client is not a Service Provider (an entity that provides information technology services for end user customers, either directly or through a reseller), and Client has not contracted with a Service Provider to manage Client's environment in which EPs are deployed, and the total physical capacity of Client's servers measured on a full capacity basis, but licensed under Sub-Capacity Licensing terms, is less than 1,000 PVUs, or iii) when Client's servers are licensed to full capacity.

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

For all PVU-based EP licenses, reports must contain the information in the example Audit Report available at https://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html. Reports (generated by ILMT or manual if Client meets manual reporting exemptions) must be prepared at least once per quarter and retained for a period of not less than 2 years. Failure to generate Reports or provide Reports to IBM will cause charging under full capacity for the total number of physical processor cores activated and available for use on the server.

Client will promptly install new versions, releases, modifications, or code corrections ("fixes") of the ILMT that IBM makes available. Client will subscribe to the IBM Support notifications via https://www.ibm.com/support/mynotifications in order to be notified when such fixes become available.

Client will not alter, modify, omit, delete, or misrepresent by any means, directly or indirectly, i) the ILMT audit records, ii) the ILMT Program, or iii) Audit Reports that Client submits to IBM or to an independent auditor. The foregoing does not apply to changes, modifications or updates to ILMT expressly provided by IBM, including through notifications.

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

6. APPLIANCES

An Appliance is an EP which is any combination of Program Components, Machine Components (MCs) and any applicable Machine Code Components offered together as a single offering and designed for a particular function. Unless otherwise provided, terms that apply to a

Program apply to the Program Component of an Appliance. Client shall not use an Appliance component independently of the Appliance of which it is a part.

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

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

When Client acquires an Appliance directly from IBM, IBM transfers title to a MC to Client or, if applicable Client's lessor, upon shipment. For an upgrade acquired for an Appliance, IBM transfers title of the MC once IBM receives all removed parts, which then become IBM's property.

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

A Machine Code Component is computer instructions, fixes, replacements and related materials, such as data and passwords relied on, provided, used with or generated by a Machine Component, that permit the operation of the Machine Component's processors, storage or other functionality as stated in its specifications. Client acceptance of this Agreement includes acceptance of IBM's Machine Code license agreements provided with the Appliance and in Chapter 3 of this Schedule. A Machine Code Component is licensed only for use to enable a Machine Component to function under its specifications and only for the capacity and capability for which Client has acquired IBM's written authorization. The Machine Code Component is copyrighted and licensed (not sold).

6.1 INSPECTION /ACCEPTANCE

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

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

Notwithstanding anything herein to the contrary, the parties agree as follows:

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

6.2 IBM APPLIANCE SERVICES

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

One year of Appliance Services, starting on the Warranty Start Date specified in a TD, is included with the purchase of an Appliance. Thereafter, Client may renew appliance services by issuing IBM a funded delivery order. All renewals will be fulfilled with Appliance Services offered at the same level of service, if available, that Client was entitled to during that first year. Parts removed or exchanged for upgrade, warranty service, or maintenance are IBM property and must be returned to IBM within 30 calendar days. A replacement takes on the warranty or maintenance status of the replaced part. When Client returns an Appliance to IBM, Client will remove all features not supported under Appliance Services, securely erase all data, and ensure that it is free of any legal restrictions that would prevent its return.

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

7. CLOUD SERVICES

Cloud Services are EP provided by IBM and made available via a network. Cloud Services are not Programs but may require Client to download enabling software to use a Cloud Service as specified in a TD.

Client may access and use Cloud Service only to the extent of authorizations acquired by Client. Client may be responsible for use of Cloud Services by any party who accesses the Cloud Service with Client's account credentials. Cloud Service may not be used in any jurisdiction for unlawful, obscene, offensive or fraudulent Content or activity, such as advocating or causing harm, interfering with or violating the integrity or security of a network or system, evading filters, sending unsolicited, abusive or deceptive messages, viruses or harmful code, or violating third party rights. If there is a complaint or notice of violation, use may be suspended until resolved, in addition to any rights under the Contracts Disputes Act.

Additional terms, including data protection terms, for Cloud Services are provided in the General Terms for Cloud Offerings Terms of Use. Each Cloud Service is described in a TD. Terms of Use and Service can be viewed at https://www-03.ibm.com/software/sla/sladb.nsf/sla/saas/.

Cloud Services are designed to be available 24/7, subject to maintenance. Client will be notified of scheduled maintenance. Technical support and service level commitments, if applicable, are specified in a TD.

IBM will provide the facilities, personnel, equipment, software, other resources necessary to provide the Cloud Services, and generally available user guides and documentation to support Client's use of the Cloud Service. Client will provide hardware, software, and connectivity to

access and use the Cloud Service, including any required Client-specific URL addresses and associated certificates. A TD may have additional Client responsibilities.

A Cloud Service subscription period begins on the date that IBM notifies Client that Client has access and ends on the last date specified in the TD.

During a Cloud Service subscription period, Client may increase Client's subscribed level, but may only decrease the subscribed level at the end of a subscription period when renewing.

Acceptance:

The Client's acceptance of a Cloud Service offering is when IBM provides the Client authorization to access the Cloud Service offering.

8. European Union General Data Protection Regulation (GDPR)

The European Union passed the General Data Protection Regulation (EU/2016/679) (GDPR), effective 25 May 2018. The GDPR is designed to ensure a consistent level of protection of the rights and freedoms of natural persons with regard to the processing of their data and to establish one set of data protection rules for Personal Data. IBM is committed to GDPR readiness.

Regarding GDPR, you represent as follows:

a. Either you do not require IBM to process Personal Data within the meaning of GDPR (e.g., because no processing of Personal Data occurs in the European Union (EU); no monitoring of Personal behavior takes place in EU; or your activities are otherwise exempt from GDPR); and you will communicate to IBM in writing, without undue delay, any anticipated change affecting this representation, or

b. You agree to IBM's Data Processing Addendum at http://ibm.com/dpa (DPA) and applicable DPA Exhibit, which apply and supplement the contract. Please contact your IBM representative for the applicable Data Processing Exhibit.