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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

- a) 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.
- b) The Contractor shall provide services at the Contractor's facility and/or at the ordering activity location, as agreed to by the Contractor and the ordering activity.

#### 2) PERFORMANCE INCENTIVES I-FSS-60 Performance Incentives (April 2000)

- a) Performance incentives may be agreed upon between the Contractor and the ordering activity on individual fixed price orders or Blanket Purchase Agreements under this contract.
- b) The ordering activity must establish a maximum performance incentive price for the services and/or total solutions on individual orders or Blanket Purchase Agreements.
- c) Incentives should be designed to relate results achieved by the contractor to specified targets. To the maximum extent practicable, ordering activities shall consider establishing incentives where performance is critical to the ordering activity's mission and incentives are likely to motivate the contractor. Incentives shall be based on objectively measurable tasks. Incentives shall be based on objectively measurable tasks.

#### 3) ORDER



- a) Agencies may use written orders, EDI orders, blanket purchase agreements, individual purchase orders, or task orders for ordering services under this contract. Blanket Purchase Agreements shall not extend beyond the end of the contract period; all 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.

#### **4) PERFORMANCE OF SERVICES**

- a) The Contractor shall commence performance of services on the date agreed to by the Contractor and the ordering activity.
- b) The Contractor agrees to render services only during normal working hours, unless otherwise agreed to by the Contractor and the ordering activity.
- c) The ordering activity should include the criteria for satisfactory completion for each task in the Statement of Work or Delivery Order. Services shall be completed in a good and workmanlike manner.
- d) Any Contractor travel required in the performance of EC Services must comply with the Federal Travel Regulation or Joint Travel Regulations, as applicable, in effect on the date(s) the travel is performed. Established Federal Government per diem rates will apply to all Contractor travel. Contractors cannot use GSA city pair contracts.

#### **5) STOP-WORK ORDER (FAR 52.242-15) (AUG 1989)**

- a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either:
  - 1) Cancel the stop-work order; or
  - 2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.
- b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if-
- c) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

- d) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.
- e) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

## **6) RESPONSIBILITIES OF THE CONTRACTOR**

The Contractor shall comply with all laws, ordinances, and regulations (Federal, State, City, or otherwise) covering work of this character. If the end product of a task order is software, then FAR 52.227-14 (Deviation – May 2003) Rights in Data – General, may apply.

## **7) RESPONSIBILITIES OF THE ORDERING ACTIVITY**

Subject to security regulations, the ordering activity shall permit Contractor access to all facilities necessary to perform the requisite EC Services.

## **8) INDEPENDENT CONTRACTOR**

All EC Services performed by the Contractor under the terms of this contract shall be as an independent Contractor, and not as an agent or employee of the ordering activity.

## **9) ORGANIZATIONAL CONFLICTS OF INTEREST**

- a) Definitions.

“Contractor” means the person, firm, unincorporated association, joint venture, partnership, or corporation that is a party to this contract.

“Contractor and its affiliates” and “Contractor or its affiliates” refers to the Contractor, its chief executives, directors, officers, subsidiaries, affiliates, subcontractors at any tier, and consultants and any joint venture involving the Contractor, any entity into or with which the Contractor subsequently merges or affiliates, or any other successor or assignee of the Contractor.

An “Organizational conflict of interest” exists when the nature of the work to be performed under a proposed ordering activity contract, without some restriction on ordering activities by the Contractor and its affiliates, may either (i) result in an unfair competitive advantage to the Contractor or its affiliates or (ii) impair the Contractor’s or its affiliates’ objectivity in performing contract work.

- b) To avoid an organizational or financial conflict of interest and to avoid prejudicing the best interests of the ordering activity, ordering activities may place restrictions on the Contractors, its affiliates, chief executives, directors, subsidiaries and subcontractors at any tier when placing orders against schedule contracts. Such restrictions shall be consistent with FAR 9.505 and shall be designed to avoid, neutralize, or mitigate organizational conflicts of interest that might otherwise exist in situations related to individual orders placed against the schedule contract. Examples of situations, which may require restrictions, are provided at FAR 9.508.



## **10) INVOICES**

The Contractor, upon completion of the work ordered, shall submit invoices for EC services. Progress payments may be authorized by the ordering activity on individual orders if appropriate. Progress payments shall be based upon completion of defined milestones or interim products. Invoices shall be submitted monthly for recurring services performed during the preceding month.

## **11) PAYMENTS**

For firm-fixed price orders the ordering activity shall pay the Contractor, upon submission of proper invoices or vouchers, the prices stipulated in this contract for service rendered and accepted. Progress payments shall be made only when authorized by the order. For time and materials orders, the Payments under Time and Materials and Labor Hour Contracts at FAR 52.212-4 (OCT 2008) (ALTERNATE I – OCT 2008) (DEVIATION I – FEB 2007) applies to time and materials orders placed under this contract. For labor hour orders, the Payment under Time and Materials and Labor Hour Contracts at FAR 52.212-4 (OCT 2008) (ALTERNATE I – OCT 2008) (DEVIATION I – FEB 2007) applies to labor hour orders placed under this contract. 52.216-31(Feb 2007) Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Item Acquisition. As prescribed in 16.601(e)(3), insert the following provision:

- a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.
- b) The offeror must specify fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit. The offeror must specify whether the fixed hourly rate for each labor category applies to labor performed by—
  - 1) The offeror;
  - 2) Subcontractors; and/or
  - 3) Divisions, subsidiaries, or affiliates of the offeror under a common control.

## **12) INCIDENTAL SUPPORT COSTS**

Incidental support costs are available outside the scope of this contract. The costs will be negotiated separately with the ordering activity in accordance with the guidelines set forth in the FAR.

## **13) APPROVAL OF SUBCONTRACTS**

The ordering activity may require that the Contractor receive, from the ordering activity's Contracting Officer, written consent before placing any subcontract for furnishing any of the work called for in a task order.

## **14) DESCRIPTION OF ELECTRONIC COMMERCE (EC) SERVICES AND PRICING**

- a) The Contractor shall provide a description of each type of EC Service offered under Special Item Numbers 132-52 E-Commerce. Services and rates should be presented in the same manner as the Contractor sells to its commercial customers and other ordering activity customers. Please submit a description of all corresponding commercial EC services to be provided.

- b) Pricing for all EC Services shall be in accordance with the Contractor's customary commercial practices; e.g., hourly rates, monthly rates, term rates, unit prices and/or fixed prices.

## **IBM OFFERINGS**

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

#### **2.1. OVERVIEW OF SAAS OFFERINGS**

##### ***2.1.1 IBM'S SMARTCLOUD FOR GOVERNMENT***

IBM's Government Software as a Service Offering is provided within four environment options:

- Government Community Cloud
  - Multi-tenant private community cloud
  - Shared with other Federal Users
  - IBM owned and operated
  - FISMA moderate
- Government with Private Cloud
  - Unique, physically or virtually separated private cloud for Federal agencies
  - NIPRnet connectivity
  - FISMA High, Secret cleared personnel
- Government with Secret Enclave
  - GOCO, DOD, US Navy Base w/connectivity to second secured site
  - Multiple security levels from sensitive, but unclassified to DOD classified
  - NIPRnet and SIPRnet connectivity; SCIF
  - FISMA High, Top Secret cleared personnel
- Government Public Cloud
  - Public Cloud for Government only customers

IBM's offerings include:

- IBM SmartCloud eMail – Government
- IBM SmartCloud Sametime – Government

- IBM SmartCloud Connections – Government
- IBM SmartCloud eMail Suite – Government
- IBM SmartCloud Office Automation Suite – Government
- IBM Electronic Records Management
- IBM SmartCloud Archive Essentials

Provided below is a general description of the capabilities of each of the IBM SmartCloud offerings that IBM provides. Please contact an IBM Representative for more detailed information.

IBM SmartCloud email – Government:

- Mail, calendar, and contacts
- Web access only – no client downloads
- 5 GB mailbox entitlement
- Virus and spam protection
- Real-time updates against viruses and malware
- 24x7x365 monitoring

IBM SmartCloud email – Government Encryption:

- Designed to comply with Federal Information Processing Standard (FIPS) mail encryption requirements

IBM SmartCloud email – Government Traveller:

- Mobile mail support
- ActiveSync devices supported through the use of the system’s “Traveler” capability, which synchronizes the mobile device calendar, contacts, and messages to the account.
- A unique web address provided for mobile device support
- Client administrators can control access to the ActiveSynx web address by named account via the self-service portal
- Mobile data at rest is supported

Instant messaging is a web-based service and can be accessed directly via mobile browser

IBM SmartCloud email – Government Blackberry Service:

- Synchronization calendar, contacts, and messages to the account.
- Instant messaging is a web-based service and can be accessed directly via mobile browser.
- Optionally, instant messaging can be enabled via Blackberry Enterprise Service (BES) (client based) and controlled by the client administrator via the self-service portal.
- BES controlled by client administrator via self-service portal
- Mobile Data Services (MDS) optionally available as long as client environment allows.



**IBM SmartCloud Sametime – Government:**

- Collaboration with users both inside and outside the enterprise
- Share presentations, documents, web pages, applications, and desktop
- Group chat
- Polling
- Recording
- Administrator configurable access to video and audio chat
- Optional unified communications capabilities

**IBM SmartCloud Connections – Government:**

- Designed to help dynamically build new connections between people, the expertise they have, and the tasks they are executing
- Create content in blogs, wikis, and forums for discussions
- Activities to share and assign tasks
- Files for sharing documents, spreadsheets, presentations, videos, and other file types,
- Selection of privacy controls for access to all content
- Content can be individual or part of a community
- “Tag” content for easy searching
- “Social Analytics” to recommend content based on related tags or profiles within users social network
- “Rate” content, sort by “most popular”
- Users can share files with specific users who will email a link to the file
- Users have the ability to “follow” files, which will notify them if a new version of the file has been updated.
- Files can have comments, and the repository maintains a version history so users can get back to a previous version as required.

**IBM SmartCloud email Suite – Government:**

- Combines three services
  - IBM SmartCloud eMail – Government
  - IBM SmartCloud eMail – Government Encryption
  - IBM SmartCloud eMail – Government Traveller
- Disaster recovery

IBM SmartCloud office automation Suite – Government:

- Combines two services
  - IBM SmartCloud Sametime – Government
  - IBM SmartCloud Connections – Government Encryption

### **2.1.2 ELECTRONIC RECORDS MANAGEMENT**

The IBM solution offers Federal agencies both a comprehensive, enterprise-proved Records Management platform and the ability to expand to identify, classify, declare, store and manage content in a seamless, secure manner across the enterprise. Capabilities include, file plan administration, reporting capabilities, security, on demand processing and securing of files, SharePoint file collection, document import and eDiscovery support.

## **2.2 SAAS 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 IBM SaaS Terms of Use (“Terms of Use”) are for IBM SaaS offerings described in this Chapter.

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

### **2.2.1 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 GENERAL CHARGE TERMS**

See IBM’s Pricelist for applicable part number metrics and prices.

#### **2.2.2.1 CHARGE METRIC DEFINITION**

Authorized User - is a unit of measure by which the IBM SaaS offering may be purchased. An Authorized User is a unique person who is given access to IBM SaaS. Customer must obtain separate, dedicated entitlements for each Authorized User accessing the IBM SaaS offering in any manner directly or indirectly (for example: via a multiplexing program, device, or application server) through any means. An entitlement for an Authorized User is unique to that Authorized User and may not be shared, nor may it be reassigned other than for the permanent transfer of the Authorized User entitlement to another person.

Gigabyte is a unit of measure by which the IBM SaaS can be obtained. A Gigabyte is defined as 2 to the 30th power bytes of data (1,073,741,824 bytes). Sufficient entitlements must be obtained to cover the total number of Gigabytes processed by the IBM SaaS during the measurement period specified in Customer's Proof of Entitlement (PoE) or Transaction Document.

### **2.2.2.2 CHARGES AND BILLING**

#### **Billing Options**

The amount payable for IBM SaaS is specified in the GSA pricelist or IBM's proposal transaction document.

### **2.2.3 SET-UP**

IBM offers migration services of the Government's mailboxes to the IBM Federal Cloud. The migration services will be priced per mailbox by number of users.

See IBM's pricelist for details.

### **2.2.4 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 meet the allocated funding. Notwithstanding the requirement for a modification to increase funding, the Government remains responsible for paying invoices for monthly provisioning and usage.

### **2.2.5 REMOTE SERVICES (HUMAN BASED)**

IBM offers services to assist the Government with all aspects of integration services and technical requirements. These services will be offered based on the labor rates available under SIN 132-51.

### **2.2.6 ACCOUNT CREATION AND ACCESS**

When IBM SaaS Users register for an account ("Account"), IBM may provide the IBM SaaS User with an Account identification and password. Customer is responsible for ensuring that each IBM SaaS User manages and keeps their Account information current. At any time Customer may request that any Personal Data provided as part of registering for an Account or

use of the IBM SaaS be corrected or removed from Account information and this information will be corrected or removed, but removal may prevent access to the IBM SaaS.

Customer is responsible for ensuring that each IBM SaaS User protects their Account identification and password and controls who may access an IBM SaaS User Account or use any IBM SaaS on Customer's behalf.

### ***2.2.7 ENABLING SOFTWARE***

This IBM SaaS offering may include Enabling Software provided by IBM or a third party supplier. If Government Customer downloads or installs any Enabling Software, Government Customer agrees not to use such Enabling Software for any purpose other than to facilitate or enable Government Customer's access and use of the IBM SaaS. If Enabling Software is presented with a separate license agreement (for example, the IBM International License Agreement for Non-Warranted Programs ("ILAN") or other IBM or third party license agreement) at the time of installation or download, such separate agreement will govern its use. Government Customer agrees that Government Customer accepts such terms by accepting this ToU or downloading, installing, or using the Enabling Software.

### ***2.2.8 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.

### ***2.2.9 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.

#### ***2.2.10 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.

For IBM's commercially available LotusLive service (offering 2.1.1), IBM publishes its regularly scheduled maintenance on the LotusLive support page at <https://www.lotuslive.com/support/>. During such times the Service will not be available for use. IBM has no obligation under these Terms of Use to provide support or maintenance service in connection with the Software or Service ("Technical Support"). IBM may elect to provide you with Technical Support at its sole discretion. Any enhancements, updates and other materials provided by IBM as part of any such Technical Support are considered to be part of the Service or Software, as applicable, and therefore governed by these Terms of Use.

For IBM's SmartCloud for Government offerings (offerings described under 2.1.2), IBM will provide the Government Customer a copy of our documented maintenance policies. Standard maintenance windows include the second and fourth Saturdays of each month, 8am EST – 2pm EST. In the event of an unscheduled maintenance is required, IBM will provide 72 hour notice to coordinate the activity. In the event emergency maintenance is required, IBM will provide as much lead time as possible to minimize impact to the Government.

#### ***2.2.11 UPDATES, APPLICABLE TERMS AND AUTHORIZATION FOR AUTO 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. Government Customer authorizes IBM to, and agrees that IBM may, in accordance with IBM's standard operating procedures, automatically transmit, access, install, and otherwise provide Updates to IBM SaaS without further notice or need for consent, except that the Government has a right to review any additional terms applicable to such Updates. IBM has no obligation to, and nothing in these Terms of Use may be construed to require IBM to, create, provide, or install Updates.

#### ***2.2.12 TECHNICAL SUPPORT***

Technical Support for the IBM SaaS is included during the Subscription Period. Technical support options will be identified on an IBM website or offering documentation.

##### ***2.2.12.1 ITEMS NOT COVERED BY TECHNICAL SUPPORT:***

Technical support does not include assistance with:

- a. the design and development of applications
- b. issues arising out of Customer's use of IBM SaaS in other than its specified operating environment, or
- c. assistance with Customer or third party products and services, or issues arising out of the use of IBM SaaS with Customer or third party products or services.

### ***2.2.13 DATA PRIVACY AND DATA SECURITY***

#### ***2.2.14 CUSTOMER OBLIGATIONS***

In relation to all Personal Data provided by or through Customer to IBM, Government Customer will be responsible as sole data controller for complying with all applicable data protection or similar laws such as EU Directive 95/46/EC (and laws implementing that Directive) that regulate the processing of Personal Data and special categories of data as such terms are defined in that Directive (and laws implementing that Directive).

Government Customer agrees to obtain all legally required consents, authorizations and approvals and make all necessary disclosures before (i) including any Personal Data in Content and (ii) using the Enabling Software and IBM SaaS.

Government Customer confirms and acknowledges that it is solely responsible for any Personal Data that may be contained in Content, including any information which any IBM SaaS User shares with third parties on Government Customer's behalf. Government Customer is solely responsible for determining the purposes and means of processing Government Customer Personal Data by IBM under this Agreement, including that such processing according to Customer's instructions will not place IBM in breach of applicable data protection laws.

IBM SaaS is not intended for the storage or receipt of any Sensitive Personal Information or Protected Health Information (as defined below), in any form, and Customer will be responsible for reasonable costs and other amounts IBM may incur relating to any such information provided to IBM or the loss or disclosure of such information by IBM, including those arising out of any third party claims. "Sensitive Personal Information" is; 1) Personal Data, the loss of which would trigger a data breach notification requirement, and includes, but is not limited to financial information, country identification number (e.g. Social Insurance Number (SIN), Social Security Number (SSN)) or other governmentally issued identification number such as driver's license or passport number, bank account number, credit card or debit card number; and 2) Personal Data relating to racial or ethnic origin, sexual orientation, or political opinions or religious, ideological or philosophical beliefs or activities or trade union membership. "Protected Health Information" is "individually identifiable health information" as defined under the Health Information Portability and Accountability Act of 1996 ("HIPAA"), as amended.

#### ***2.2.15 IBM'S OBLIGATIONS***

IBM will only process Government Customer Personal Data in a manner that is reasonably necessary to provide SaaS and only for that purpose.

IBM will only process Government Customer Personal Data in delivering IBM SaaS as described by IBM, and Customer agrees that the description provided by IBM is consistent with Government Customer's processing instructions. IBM will use its reasonable endeavors to apply any security measures set forth in this TOU, and Government Customer has determined that any such measures provide an appropriate level of protection.

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

If Government Customer or a Government Customer data controller is required by applicable data protection laws to provide information about or access to Government Customer Personal Data to any individual or to the relevant authority, IBM will reasonably cooperate with Government Customer in providing such information or access.

#### ***2.2.16 INTERNATIONAL TRANSFERS***

Government Customer agrees that when IBM reasonably determines it is useful in its provision of IBM SaaS, IBM may transfer Content, including Personal Data, across a country border to the entities and countries notified to Government Customer. Such transfer may be made to a country outside the European Economic Area, or to a country that has not been declared by the European Commission to provide an adequate level of data protection. Government Customer consents to the IBM SaaS being provided by these entities in these countries, and is solely responsible for determining that any transfer of Personal Data across a country border under the terms of the Agreement complies with applicable data protection laws. IBM shall reasonably cooperate with Government Customer, for Government Customer's own benefit or for the benefit of a Government Customer data controller, in its fulfillment of any legal requirement, including obtaining mandatory approvals.

#### ***2.2.17 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.

#### ***2.2.18 COPYRIGHT INFRINGEMENT***

It is IBM's policy to respect the intellectual property rights of others. To report the infringement of copyrighted material, please visit the Digital Millennium Copyright Act Notices Page at <http://www.ibm.com/legal/us/en/dmca.html>.

### ***2.2.19 WARRANTY AND EXCLUSIONS***

#### **Limited Warranty**

SUBJECT TO ANY STATUTORY WARRANTIES THAT CANNOT BE EXCLUDED, IBM MAKES NO WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, REGARDING THE IBM SaaS, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, AND TITLE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.

IBM does not make any representation that will provide uninterrupted, secure, or error-free operation of IBM SaaS or that IBM will be able to prevent third party disruptions of IBM SaaS or that IBM will correct all defects.

Government Customer is responsible for the results obtained from the use of the IBM SaaS.

### ***2.2.20 TRADE UPS***

Certain IBM SaaS offerings may be acquired for a reduced charge to replace qualifying IBM SaaS offerings. Customer agrees that IBM will terminate Customer's use of the replaced IBM SaaS offering when Customer is provided access to the replacement IBM SaaS offering.

### ***2.2.21 PROTECTION OF CONTENT***

Notwithstanding anything to the contrary in the SaaS terms:

- a. IBM will not intentionally disclose or use Customer's Content except to operate and perform the IBM SaaS as contemplated in this Agreement, subject to IBM's compliance with applicable laws.
- b. IBM will only process Customer Content on systems used to host and operate the IBM SaaS, on which IBM has implemented the security practices and procedures referenced below.

### ***2.2.22 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. Except as specifically provided in the Security Practices for the IBM SaaS, IBM makes no representations or warranties regarding any security functions or that the IBM SaaS or Customer's content are secure from any intrusions or wrongful conduct.

### **2.2.23 MISCELLANEOUS SaaS TERMS**

#### **2.2.23.1**

In connection with Customer's use of the IBM SaaS, Government Customer acknowledges and agrees that: (i) IBM SaaS User names, titles, company names and photographs may be posted by an IBM SaaS User as part of a profile ("Profile") and that the Profile can be viewed by other IBM SaaS Users, and (ii) at any time Government Customer may request that an IBM SaaS User Profile be corrected or removed from the IBM SaaS and such Profile will be corrected or removed, but removal may prevent access to the IBM SaaS.

#### **2.2.23.2**

If Government Customer or an IBM SaaS User transmits Content to a third party website or other service that is linked to or made accessible by the IBM SaaS, Government Customer and the IBM User provide IBM with the consent to enable any such transmission of Content, but such interaction is solely between Government Customer and the third party website or service. IBM makes no warranties or representations about such third party sites or services, and shall have no liability for such third party sites or services.

#### **2.2.23.3**

In addition to the restrictions contained in the SaaS terms, Government Customer may not:

- a. Use the IBM SaaS on a "pass-through" basis to host collaboration among external guest users without Customer's active participation.
- b. Use the IBM SaaS on a timeshare or service bureau basis, or to operate a website or host an online business unless expressly permitted under another written agreement with IBM.
- c. Use the IBM SaaS to develop, offer or promote a service or product that is competitive with the IBM SaaS.

#### **2.2.23.4**

Profiles – In connection with Government Customer’s use of the IBM SaaS, Customer acknowledges and agrees that: (i) IBM SaaS User names, titles, agency/company names and photographs may be posted by an IBM SaaS User as part of a profile (“Profile”) and that the Profile can be viewed by other IBM SaaS Users, and (ii) at any time Customer may request that an IBM SaaS User Profile be corrected or removed from the IBM SaaS and such Profile will be corrected or removed, but removal may prevent access to the IBM SaaS.

### **2.2.23.5**

IBM SmartCloud Sametime and IBM SmartCloud Office Automation Suite include additional terms due to the technology supplied by Oracle USA, Inc.

The IBM SaaS includes Outside In filtering and document viewing technology (the "Outside In Technology") supplied by Oracle USA, Inc. ("Oracle"). The term "Outside In Technology" includes any technology licensed to Oracle by its suppliers. As used in this TOU and the agreement to which it is subject, the term "IBM supplier" shall be deemed to include Oracle and its suppliers. In addition to the terms and conditions of this TOU and the agreement to which it is subject, as a condition of using the Outside In Technology, Customer specifically agrees as follows:

- (1) Oracle USA, Inc. is a third party beneficiary to this TOU and the agreement to which it is subject.
- (2) Customer may only transfer subscriptions to the IBM SaaS by providing advance written notice to IBM and otherwise subject to the terms of the TOU and the agreement to which it is subject.
- (3) Customer may not publish the results of benchmark tests run on the Outside In Technology without prior written permission.
- (4) IBM may inform IBM suppliers of compliance verification results relating to such IBM suppliers' components.
- (5) To the extent allowed under applicable law, the Uniform Computer Information Transactions Act ("UCITA") does not apply.

### **2.2.24 GENERAL**

If any provision of these Terms of Use is held to be invalid or unenforceable, the remaining provisions of these Terms of Use remain in full force and effect. Failure by either party to insist on strict performance or to exercise a right when entitled does not prevent either party from doing so at a later time, either in relation to that default or any subsequent one. Any terms of these Terms of Use that by their nature extend beyond termination of these Terms of Use or the applicable Subscription Period remain in effect until fulfilled, and apply to respective successors and assignees.

### **2.2.25 ENTIRE AGREEMENT**

The complete agreement between the parties, replacing any prior oral or written communications between Government Customer and IBM, consists of these Terms of Use, and the IBM

International Passport Advantage terms (see Appendix S). If there is a conflict among the terms of these Terms of Use and IBM's Software as a Services and IBM Passport Advantage terms, then these Terms of Use 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.

## **2.3 OFFERING UNIQUE TERMS AND CONDITIONS**

### **2.3.1 IBM'S SMARTCLOUD FOR GOVERNMENT**

#### **2.3.1.1 BILLING OPTIONS**

The available billing option is monthly in arrears for the Subscription Period.

Storage use beyond what is included with the base IBM SaaS Authorized User entitlement will be charged on a metered basis. Customer will be invoiced monthly for actual usage in excess of the storage entitlements as identified in the Storage Limitations section below. The rate for the metered part number(s) will be specified in the IBM quote/Transaction Document, charged on a per Gigabyte basis, rounded up to the nearest gigabyte.

#### **2.3.1.2 PARTIAL MONTH CHARGES**

The partial month charge is a pro-rated daily rate that will be charged to Customer. The partial month charges are calculated based on the remaining days of the partial month starting on the date Customer is notified by IBM that their access to the IBM SaaS is available.

#### **2.3.1.3 STORAGE LIMITATIONS**

Each Authorized User entitlement of the IBM SaaS includes a standard storage capacity allowance, The included storage capacity is as follows:

- IBM SmartCloud email - Government - 5GB
- IBM SmartCloud Connections - Government – 1GB
- IBM SmartCloud email Suite - Government - 5GB
- IBM SmartCloud Office Automation - Government – 1GB

#### **2.3.1.4 RESTRICTED USE FOR IBM SMARTCLOUD SAMETIME – GOVERNMENT, IBM SMARTCLOUD CONNECTIONS – GOVERNMENT AND IBM SMARTCLOUD OFFICE AUTOMATION SUITE - GOVERNMENT**

If Customer has obtained a Proof of Entitlement for IBM SmartCloud Sametime – Government, IBM SmartCloud Connections – Government, or IBM SmartCloud Office Automation Suite –

Government, then each Authorized User may have up to 200 attendees on a IBM SmartCloud Web meeting. Only IBM SaaS Users who are employees or independent contractors of Customer for whom Customer has obtained an entitlement to use the services covered by these Terms of Use may access or utilize the functions of the offering. This restriction shall not affect guest users.

### **2.3.1.5 NOTICE REGARDING RECORDING MEETINGS**

IBM SmartCloud Sametime – Government and IBM SmartCloud Office Automation Suite – Government MAY ALLOW AN IBM SAAS USER TO RECORD MEETINGS. THE LAWS OF SOME JURISDICTIONS MAY REQUIRE THE CONSENT OF INDIVIDUALS PRIOR TO RECORDING THEIR COMMUNICATIONS. Customer will ensure that IBM SaaS Users obtain all necessary consents and make all necessary disclosures before recording meetings.

### **2.3.1.6 NOTICE REGARDING CONTENT FILTERING**

IBM SmartCloud eMail – Government and IBM SmartCloud eMail Suite – Government may employ tools to monitor the IBM SaaS, investigate spam and virus attacks and apply proprietary as well as industry standard technology measures in order to block or filter Content that appear to be unsolicited and bulk, and/or malicious in nature. IBM reserves the right (but shall have no obligation) to block communications from other entities on the Internet. IBM reserves the right (but shall have no obligation) to pre-screen, review, flag, filter, modify, refuse or remove any or all Content.

### **2.3.1.7 INVITING USER PARTICIPATION**

IBM SmartCloud Office Automation - The Government Customer that has purchased the SaaS Service may share documents with, or otherwise invite, individuals or entities, to participate in meetings and other social business tools for the purpose of collaboration ("Permitted Invitees"). Permitted Invitees may have access to certain aspects of the Service and must agree to these Terms of Use.

## **2.3.2 RESTRICTED USE FOR IBM HOSTED BLACKBERRY SERVICES**

**The following terms apply when you and your Users access and use Hosted Blackberry Services. ("BES Services").**

### **1. Use of Research In Motion Limited Software**

Use of any software (including any upgrades or updates) that is required by Research In Motion Limited (or any of its affiliates) ("RIM") to enable the use of the BES Services ("RIM Software") is subject to the terms and conditions of the license agreement(s) that govern such RIM Software. In order to provide the BES Services, IBM may be required to install or use certain RIM Software on your behalf. You authorize IBM to use such RIM Software on your behalf for the sole purpose of providing the BES Services to you.

In providing the BES Services, IBM will install the BES Software on your behalf. The BES Software is subject to the terms and conditions of RIM's BlackBerry Software License Agreement ("BlackBerry License"). Your acceptance of the BlackBerry License is a prerequisite to IBM's ability to provide you with the BES Services. You agree to log into the RIM-approved website that IBM provides to you and register your acceptance of the BlackBerry License. IBM may commence the BES Services once you have accepted the BlackBerry License.

The BlackBerry License is a separate agreement between you and RIM. You acknowledge that use of the BlackBerry solution is for your internal business purposes and that RIM may terminate the BlackBerry License in accordance with its provisions. In the event of a termination of the BlackBerry License, IBM will be required to cease providing the BES Services, and IBM will not be liable to you for any damages arising out of such discontinuation of the BES Services. RIM has no responsibility to you for any terms, conditions, representations and warranties related to the BES Services or to any IBM products that may be provided with the BES Services. RIM reserves the right, as a third party beneficiary, to enforce the acknowledgements included in this paragraph.

## **2. Third Party Service Interruptions**

The BES Services requires third party services that are separate and distinct from the services being provided by IBM. Such services include, for example, airtime services from an airtime service provider (e.g. voice and data plans from an airtime carrier) and the availability of RIM's Network Operation Centers ("NOCs"), which generally act as intermediaries between corporate mail servers and end users. IBM's ability to provide the BES Services may be impacted if, for example, if the NOCs are unavailable or fail to operate, or if your airtime service is temporarily interrupted or suspended. IBM is not responsible for any such interruptions and shall have no liability to you for such third party service interruptions. IBM is only responsible for providing the BES Services and to the extent a third party service interruption impacts IBM's ability to provide the BES Services, IBM will have no liability to you in such circumstances.

## **3. General**

- a. You authorize International Business Machines Corporation and its subsidiaries (and their successors and assigns and contractors) to access information about your Users as necessary for the purpose of providing the BES Services, including the name, email address, phone number, BlackBerry device pin number, IMEI number, and phone logs of Users.

### **2.4 ACCEPTABLE INTERNET USE POLICY FOR IBM SERVICES**

This Acceptable Use Policy ("Policy") outlines unacceptable use of IBM services which interact with, or access, the Internet (the "Services"). This Policy is in addition to any other terms and conditions under which IBM provides the Services to you.

Questions about this Policy (e.g., whether any contemplated use is permitted) and reports of violations of this Policy should be directed to [aup@us.ibm.com](mailto:aup@us.ibm.com).

The examples listed in this Policy are not exhaustive. Prohibited uses and activities include, without limitation, any use of the Services in a manner that, in IBM's reasonable judgment, involves, facilitates, or attempts any of the following:

- 
- a. violating any law of, or committing conduct that is tortuous or unlawful in, any applicable jurisdiction;
  - b. gambling activities;
  - c. displaying, performing, sending, receiving or storing any content that is obscene, pornographic, lewd, lascivious, or excessively violent, regardless of whether the material or its dissemination is unlawful;
  - d. advocating or encouraging violence against any government, organization, group, individual or property, or providing instruction, information, or assistance in causing or carrying out such violence, regardless of whether such activity is unlawful;
  - e. accessing, sending, receiving, displaying, performing, disclosing, storing, or executing any content
    - (1) in violation of any copyright, right of publicity, patent, trademark, service mark, trade name, trade secret or other intellectual property right,
    - (2) in violation of any applicable agreement, or
    - (3) without authorization;
  - f. deleting or altering author attributions, copyright notices, or trademark notices, unless expressly permitted in writing by the owner;
  - g. obtaining unauthorized access to any system, network, service, or account;
  - h. interfering with service to any user, site, account, system, or network by use of any program, script, command, or otherwise;
  - i. introducing or activating any viruses, worms, harmful code and/or Trojan horses;
  - j. sending or posting unsolicited messages or e-mail, whether commercial or not, a) to any recipients who have requested that messages not be sent to them, or b) to a large number of recipients, including users, newsgroups, or bulletin boards, at one time;
  - k. evading spam filters, or sending or posting a message or e-mail with deceptive, absent, or forged header or sender identification information;
  - l. propagating chain letters or pyramid schemes, whether or not the recipient wishes to receive such mailings;
  - m. holding IBM, its Affiliates, officers, employees and/or shareholders up to public scorn or ridicule; and/or
  - n. reselling IBM's services, in whole or in part, to any entity or individual, without IBM's prior written consent, or misrepresenting your relationship with IBM.



### 3. IBM SMARTCLOUD FOR GOVERNMENT AGREEMENT

The following terms and conditions 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.

#### 3.1 GENERAL

##### 3.1.1 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:**

This “Agreement” incorporates each of the following Attachments and the Acceptable Use Policy:

- 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).
- b. The Acceptable Use Policy for IBM Services is also part of this Agreement and can be found in section 2.4 above or as otherwise provided in accordance with section 3.1.2,.

In the event of a conflict, the terms of Attachments prevail over this Agreement, and the latest dated Attachment will prevail over an earlier version of an Attachment, except as may be expressly specified otherwise.

Throughout this Agreement, the term “Agreement” includes applicable Attachments and the Acceptable Use Policy. Attachments are part of this Agreement only for those Services to which they apply.

### **3.1.2 ON-LINE TERMS AND TRANSLATIONS**

Attachments and other referenced documents, information, and resources may be presented electronically, including on-line, within the SmartCloud for Government Web Interface or other IBM Web sites identified by IBM. Printed copies of all such documents are available upon request. Customer affirms that it has reviewed the Acceptable Use Policy, all electronically-presented Attachments that are part of this Agreement, and other referenced documents, prior to using any of the available Services. The current Acceptable Use Policy is published in section 2.4 of this Chapter.

### **3.2 DEFINITIONS**

**Account** – the Customer account profile and usage information regarding the Services selected and enabled, including End User activities.

**Account Administrator** – a person(s) Customer assigns who has administrator access to the SmartCloud for Government Web Interface for managing End Users access to and overseeing the use of the Services for the Account, has the authority to act on Customer’s behalf regarding the Services including ordering Services, enabling and disabling Services; and is responsible for communications with IBM and receiving communications from IBM by email or by monitoring postings to the SmartCloud for Government Web Interface.

**Cloud Services Focal Point** – the IBM contact point(s) as specified by IBM to which Customer directs communications relative to the Services.

**Content** – all data, software, solutions, and information, including, without limitation, any hypertext markup language files, scripts, programs, recordings, sound, music, graphics, images, applets, or servlets that are created, installed, uploaded, or transferred in connection with the Services by Customer or End Users. Content also includes information provided by Customer for Account management including End User id’s and contact information.

**Customer** – the U.S. Federal Government Agency identified in the Customer information section of this Agreement and its End Users. The term Customer is a broad term and includes not only the reference to a U.S. Federal Government Agency but all the specific employees from that Agency involved in use of IBM’s SmartCloud for Government (i.e., Account Administrator, End Users).

**Enabling Software** – any software (such as programs, enabling code, utilities, client software, and plug-ins) and documentation IBM provides to Customer to facilitate Customer’s access to and use of the Services.

**End User** – those who access or use the Services using user account identification to access the SmartCloud for Government.

**SmartCloud for Government Services** – the specific Infrastructure as a Service (IaaS) offerings that IBM provides to Federal agencies.

**IBM Data Center** – the IBM managed facility where Services Components are located and delivered.



**Instance** – a virtual machine instance that IBM makes available to Customer as part of the Services. An Instance consists of virtual computer processing unit(s) i.e., virtual CPUs, virtual memory, virtual local storage and a selected Operating System.

**Services Components** – the hardware, software, images, tools, and any documentation (electronic or otherwise) IBM utilizes to provide the infrastructure and functionality of the Services and any images that IBM makes available to Customer as part of the Services.

**Service Instance** – a collection of interrelated Instances, storage and other Services Components that IBM makes available to Customer as part of the Services.

**Solution** – Customer created software application solution Customer makes available to Solution Recipients, using one or more Service Components in an Instance or a Service Instance.

### **3.3 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, Acceptable Use Policy, and other referenced documents.

#### **3.3.1 SERVICES RIGHTS, ACCESS, AND USE**

IBM will provide Customer access to and use of the Services upon receipt of a fully funded order. Optional upgrades may be added to the baseline Instance offering. IBM will enable the upgrade upon receipt of a funded order or modification to the Government's existing order.

Customer's acceptance of the services is the date IBM provides the Customer with access to the IBM SmartCloud for Government Interface.

IBM or its suppliers retain all rights, title, and interest in the Service Components. Customer agrees to not i) use, copy, modify, make derivative works based upon, link to, or distribute any portion of the Services or Service Components except as expressly provided in this Agreement; or ii) reverse assemble, reverse compile, or otherwise translate any of the Services or Service Components except as specifically permitted by law without the possibility of contractual waiver.

Customer agrees to use the Service Components only as part of the Services. Customer agrees not to resell direct access to any Services or Service Components, in whole or in part, as part of a service Customer provides to others without IBM's prior written consent, and any attempt to do so is void. Customer may utilize Services to provide a base infrastructure to support a Solution and make it available to Solution Recipients as set forth in section (Customer's Agreements with Solution Recipients).

### ***3.3.2 SERVICE COMPONENT THIRD PARTY SOFTWARE***

Third party software, including open source software, may be provided as part of the Services as a Service Component software. Any such third party software and its use will be licensed in accordance with the applicable third party license agreement (Third Party Agreement) identified in the Services Description or otherwise provided to Customer and is for use only within the Services. The Third Party Agreement is an agreement between Customer and the third party software owner or rights holder only. IBM is not a party to any such Third Party Agreement. For such third party software and for third party software that IBM may use to provide the services, Customer receives no warranties, indemnities or express or implied patent or other license from IBM with respect to any third party software. IBM's provision of Services hereunder does not constitute a distribution of the third party software by IBM.

### ***3.3.3 ENABLING SOFTWARE***

If Customer downloads or installs any Enabling Software, Customer agrees not to use such Enabling Software for any purpose other than to facilitate or enable Customer's access and use of the Services. The Services Description may include terms applicable to Enabling Software. Some Enabling Software is presented with separate license agreement (for example, the IBM Program License Agreement (IPLA) or other IBM or third party license agreement). The terms of the IPLA are included in Chapter 5 of this GSA IT Schedule Contract. Customer agrees that Customer accepts such terms by issuing IBM a delivery order incorporating this Agreement, or downloading, installing, or using the Enabling Software.

## **3.4 CONTENT**

### ***3.4.1 OWNERSHIP***

Customer (or Users, or Customer's third party suppliers) retains all right, title, and interest in Content. By any party using Customer's Account or Service Components associated with the Account and adding, creating, installing, uploading, or transferring Content for use in conjunction with the Services, Customer grants IBM and its subcontractors a non-exclusive, worldwide, royalty-free, paid-up, transferable license and approval to host, cache, copy, and display Content for the purpose of and in conjunction with providing the Services, for the terms of the Customer Agreement Customer represents that Customer has and will keep in effect during Customer's use of the Services, all such licenses and approvals necessary to grant IBM and its subcontractors these rights and that they will be provided at no charge to IBM. Customer is responsible for complying with the terms of any such license agreements including entitlements and permitted uses. Customer represents that by adding, creating, installing, uploading, or transferring Content for use in conjunction with the Services, Customer is not exceeding any specified entitlement or permitted use or violating applicable license agreements or applicable laws.

Customer agrees to reimburse IBM for any reasonable costs and other amounts that IBM may incur from Customer's failure to obtain these licenses or approvals.

### *3.4.2 CONTENT RESPONSIBILITIES*

Customer is responsible for all Content, including selection, creation, design, usage, licensing, maintenance, testing, backup, and support, unless one or more of these responsibilities is explicitly delegated to IBM as part of the Services. Customer is also responsible for any individual's personal information or any information Customer considers confidential that is included in the Content. The Services or Service Component may allow Customer to include within the Content personal information about others. The laws of some jurisdictions may require the consent of individuals prior to including their personal information in the Content or require compliance with laws, rules, and regulations (such as personal health information). Customer agrees to comply with all applicable laws, to obtain all necessary consents, and make all necessary disclosures before including personal information in the Content and using the Services. The Customer acknowledges and agrees that Customer is solely responsible for any personal information that may be contained in the Content, including any information which Customer shares with third parties, and that Customer is and remains in compliance with applicable data privacy and protection laws. Customer acknowledges that IBM does not control the transfer of data over telecommunications facilities, including the Internet. IBM complies with National Institute of Standards (NIST) Special Publication (SP) 800-53 revision 3 based on an impact categorization of NIST Federal Information Processing Standards (FIPS) Publication 199 Moderate. IBM does not warrant secure operation of the Services or that IBM will be able to prevent third party disruptions of the Services. Customer agrees that IBM shall have no liability for any security-related services or advice that IBM may voluntarily provide.

IBM cannot commit to particular confidentiality obligations regarding any Content or Customer confidential information Customer uses in connection with the Services. IBM assumes no confidentiality obligations regarding Content, regardless of the terms in the Agreement or any separate confidentiality agreement between Customer and IBM.

Customer will have root access to Customer's Instances and is responsible for managing Content and access to Content. IBM does not have access to Customer's Instances nor to directly disclose Content except i) when Customer expressly authorizes IBM to do so in connection with use of Services; ii) as necessary to provide Services; or iii) to the extent required by law or as necessary to comply with the request of a governmental or regulatory body or order from a court of competent jurisdiction. To the extent that IBM is reasonably able, IBM will try to provide notice to Customer to enable Customer opportunity to obtain a protective order to prevent such legally required disclosures.

Customer agrees that IBM has no responsibility for Content, including if Content is modified or lost. Customer acknowledges that Customer has reviewed the security features and responsibilities as described in the applicable Services Description and has determined that they meet Customer's security needs. Customer is solely responsible for determining the appropriate procedures and controls regarding security of Customer's Instances (such as encryption, monitoring or scanning, and backup of all Content) and for the implementation of any such procedures and controls unless one or more of these responsibilities is explicitly delegated to IBM as part of the Services.

### *3.4.3 CONTENT ACCESS*

IBM will not access Customer's Instances or Content except i) when Customer expressly authorizes IBM to do so in connection with use of Services; ii) solely as necessary to provide Services; iii) as specifically described in a Services Description; or iv) to the extent required by law or as necessary to comply with the request of a governmental or regulatory body or order from a court of competent jurisdiction. In the event of any such valid legal or governmental request and to the extent that IBM is reasonably able; IBM will try to provide notice to Customer to enable Customer an opportunity to obtain a protective order.

### *3.4.4 CONTENT CONFIDENTIALITY*

For Services options for which IBM specifically has sole root access to manage Instances or Services and IBM or subcontractor personnel have direct access to Content as specifically described in the applicable Services Description and such Content is clearly identified as Customer confidential, IBM will, in addition to IBM's obligations set forth in section 5.2.1 above:

- a. use the same care and discretion to avoid disclosure of such Customer confidential information as it uses to avoid disclosure of its own similar information;
- b. disclose Customer confidential information only to its employees or employees within its Enterprise who have a need to know to provide the Services; and
- c. disclose Customer confidential information to subcontractors who have a need to know to provide the Services and IBM will have appropriate agreements in place with its subcontractors to meet the confidentiality obligations as set forth in this section.

IBM may disclose Customer confidential information to the extent required by law. However, IBM will, to the extent possible, give the Customer prompt notice to allow Customer a reasonable opportunity to obtain a protective order.

IBM is under no obligation for any information Customer identified as Customer confidential that is:

- a. already in IBM's possession without obligation of confidentiality;
- b. developed independently;
- c. obtained from a source other than the exposure during the provision of the Services without obligation of confidentiality;
- d. publicly available through no fault of IBM; or
- e. disclosed by Customer to another without obligation of confidentiality.

IBM is free to use in its business activities the ideas, concepts and know-how contained in any Content which are retained in the memories of IBM employees who have had access to the Customer confidential information during the performance of the Services.

### **3.4.5 CUSTOMER'S AGREEMENTS WITH SOLUTION RECIPIENTS**

Subject to the terms of this Agreement, IBM hereby grants Customer a non-exclusive, non-transferable right to utilize the Services to support a Solution Customer creates or uploads to an Instance or Service Instance and to provide access to such Solution within such Customer Instance or Service Instance to Solution Recipients. Customer is responsible for having appropriate agreement(s) in place with Customer's Solution Recipients that: i) include terms and conditions that are no less protective of IBM's interest in the Services than the terms contained herein; and ii) do not provide Solution Recipients with any direct End User access to any cloud management portal, or any sublicensing rights to directly access or use the Services or Service Components, including any Service Component software.

Without limiting the generality of the foregoing, Customer agrees to include provisions in each agreement with Solution Recipients to the effect that:

- a. Solution Recipients represent and warrant that Solution Recipients' use of Customer's Solution within the Services and all Content Solution Recipient may use in conjunction with such use will, at all times, comply with the Acceptable Use Policy located on the Internet at [www.ibm.com/services/e-business/aup.html](http://www.ibm.com/services/e-business/aup.html) and any subsequent modification;
- b. any contractual limitation of liabilities or remedies, monetary or otherwise, apply equally as well to Customer's suppliers and subcontractors;
- c. any disclaimer of warranties and indemnities, whether express or implied, and any disclaimer of direct, indirect, consequential, special, incidental, punitive, or other damages apply equally as well to Customer's suppliers and subcontractors; and
- d. Solution Recipients acknowledge and agree that Solution Recipients' exclusive remedy for any and all costs or damages arising out of, or relating to, use of Customer's Solution within the Services, is against Customer and not IBM.

## **3.5 CHARGES & PAYMENT**

### **3.5.1 CHARGES**

IBM SmartCloud for Government pricing is published on IBM's GSA website [www.ibm.com/easyaccess/gsa](http://www.ibm.com/easyaccess/gsa), under Special Item 132-52, Electronic Commerce Services. Specified charges for Services are offered on a monthly subscription basis.

Commitments and options selected by Customer will affect the total charges IBM will invoice. IBM's invoices will be based upon the following:

- a. Charges are fixed price monthly charges ("MRC") are for a full month usage per virtual machine Instance and selected options, IBM does not provide partial month billing. IBM will invoice the Customer at the end of each month.
- b. Any applicable non-recurring charges ("NRC") will be billed when such Services are ordered.

### ***3.5.2 PAYMENT***

Amounts are due upon receipt of invoice in accordance with the Prompt Payment Act. IBM does not give credits or refunds for any charges already due or paid.

## ***3.6 CHANGES***

### ***3.6.1 AGREEMENT AND SERVICES CHANGES***

IBM may from time to time add new Services or options, or in its reasonable discretion, change Agreement terms or withdraw existing Services or options, in whole or in part. IBM will notify Customer of any such new or changed Services, terms or Services withdrawals and the effective date of such by providing notice directly to Account Administrator using current contact information in Customer's Account control page. For any withdrawal of Services or for any change in Agreement terms that affects existing Services, IBM will provide at least one month's notice prior to the effective date of a change. Changes will be effective upon the effective date specified in the notice, unless otherwise specified in an Attachment.

### ***3.6.2 ACCEPTANCE OF SERVICE OR IBM POLICY CHANGES***

Customer may elect to discontinue use of Services or not renew Services affected by a change. If Customer does not accept a change, Customer is responsible to discontinue use of affected Services prior to the effective date of the change by providing IBM with written notice.

## ***3.7 WARRANTIES AND DISCLAIMERS***

IBM warrants that it will provide the Services using reasonable care and skill and according to the current description in the Agreement.

### ***3.7.1 ITEMS NOT COVERED BY WARRANTY***

IBM DOES NOT WARRANT UNINTERRUPTED, SECURE, OR ERROR-FREE OPERATION OF THE SERVICES, SERVICES COMPONENTS, THIRD PARTY SOFTWARE, OR ENABLING SOFTWARE OR THAT IBM WILL BE ABLE TO PREVENT THIRD PARTY DISRUPTIONS OF THE SERVICES OR THAT IBM WILL CORRECT ALL DEFECTS. SUBJECT TO ANY STATUTORY WARRANTIES THAT CANNOT BE EXCLUDED, IBM MAKES NO WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, REGARDING THE SERVICES, SERVICES COMPONENTS, OR ENABLING SOFTWARE, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF SATISFACTORY QUALITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.

THE DISCLAIMERS AND EXCLUSIONS IN THIS SECTION ALSO APPLY TO ANY OF IBM'S PROGRAM DEVELOPERS AND SUPPLIERS.

### **3.8 TERM, TERMINATION AND SUSPENSION**

The term of this Agreement is effective upon the day IBM receives a fully funded order, or as otherwise specified in the delivery order. IBM will automatically terminate the service on the term expiration date as specified in the delivery order unless IBM receives a modification or a new funded delivery order prior to the expiration date.

Customer understands that when a Service is terminated all Customer Content will be lost unless it has been previously backed up by the Customer outside the SmartCloud for Government environment. Customer is responsible for managing and implementing backup of all Customer Content unless this is specifically procured as part of the Services.

#### ***3.8.1 CUSTOMER TERMINATION AND CLOSING ACCOUNT***

Customer may terminate the Service or any of the optional upgrades by providing IBM written notice. The effective date of termination will be the first of the month following IBM's receipt of the Government's written notice. Upon such termination request, IBM will disable the specific Service upgrade or close Customer's Account. Customer agrees to discontinue access and use of the Service. Customer remains responsible for the full monthly charge through the effective date of termination.

#### ***3.8.2 SUSPENSION OR TERMINATION OF THE SERVICES BY IBM***

IBM may suspend Customer's access to Services, in whole or in part or any option, or prevent access to any new Services if: (i) in IBM's sole discretion there is an emergency situation, including but not limited to breach of security; (ii) continued provision of Services, in whole or in part or Customer's use of Services in whole or in part may cause IBM to violate any law, rule, regulation, governmental policy, or court order; (iii) use of Services in whole or in part, is inconsistent with a contractual commitment or intellectual property right of a third party; (iv) Customer materially violates the terms of this Agreement; or (v) there is a violation of the Acceptable Use Policy.

IBM will provide Customer written notice of a suspension and the reason for such and if the cause of the suspension is reasonably capable of being remedied, IBM will inform Customer of what actions Customer must take to reinstate the Services or Customer's eligibility to request new Services. If Customer fails to take such actions within a reasonable time, IBM may terminate suspended Services or the Agreement upon written notice.

Charges will continue to accrue for Services provided during any such suspension and Customer is responsible for paying all charges due and payable up to the date of termination including applicable termination charges.

#### ***3.8.3 SUSPECTED VIOLATIONS***

IBM reserves the right to investigate complaints relating to use of the Services by Customer, Customer End Users, or someone using Customer's Account, or any potential violation of the terms of this Agreement (including but not limited to the Acceptable Use Policy, image terms or

other separate license agreement). Notwithstanding any other terms, policies, or other rights available, IBM may take any action it deems appropriate, including without limitation, disclosing information to enforcement agencies. In addition to any other remedies available to it, IBM reserves the right to:

- a. suspend or restrict Customer's access to or terminate any of the Services, as described above;
- b. remove or require the removal of offending Content; or
- c. exercise other rights and remedies available at law or in equity.

Except for an emergency as determined by IBM or as may otherwise be required by law, before undertaking the remedies described in this section (Suspension or Termination of Services by IBM), IBM will attempt to notify the Account Administrator by email or any reasonable practical means under the circumstances.

### **3.8.4 SURVIVAL**

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

## **3.9 GENERAL PRINCIPLES OF OUR RELATIONSHIP**

### **3.9.1 NOTICES**

IBM will provide any notice required or permitted under this Agreement to the Account Administrator. Unless stated otherwise in this Agreement, notices are effective upon the date they are emailed. Customer is responsible to have the Account Administrator review any notices or other information posted to it regarding Customer's Account.

Notices required or permitted under this Agreement by Customer are to be provided to the Cloud Services Focal Point. Subject to the foregoing, Customer and IBM consent to the use of electronic means, email, 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.

### **Compliance with Laws**

IBM will comply with laws applicable to IBM generally as a provider of information technology services. IBM is not performing Customer's regulatory or management obligations and is not responsible for determining the requirements of laws applicable to Customer's business, including those relating to Services hereunder. Customer is responsible for complying with laws, rules, and regulations that may be applicable to Content and Customer's use of the Services. Customer agrees not to place or allow any Content within the Services that require any specific legal or regulatory compliance by IBM except as expressly stated in the Agreement.

Regardless of where Customer or End Users are located when accessing the Services, Customer agrees to comply with all applicable export and import laws and regulations, including those of the United States regarding embargo and sanctions regulations and prohibitions on export for certain end users or by any prohibited end users. Customer is prohibited from exporting, re-



exporting, diverting transfer, disclosing or permitting access to any portion of the Services, Enabling Software, Content, or related technical information, directly or indirectly, in violation of such export and import laws and regulations.

Customer is also responsible for complying with all other laws, rules, and regulations that may be applicable to Customer's use of the Services.

Notwithstanding anything in this Agreement to the contrary, neither party is obligated to take any action that would violate applicable law.

### ***3.9.2 OTHER PRINCIPLES OF OUR RELATIONSHIP***

- a. Neither party grants the other the right to use its trademarks, trade names, or other designations in any promotion, publication, or Web site without prior written consent or as expressly provided in this Agreement.
- b. IBM, including its suppliers or subcontractors may use information regarding Customer's usage of Services to validate compliance with the terms of the Agreement or an applicable Third Party Agreement.
- c. Customer is responsible for selecting Services that meet Customer's needs and the results obtained from Customer's use of the Services.
- d. Neither party is relying on any representation that is not specified in this Agreement including without limitation any representations concerning: i) total charges for the Services or ii) the experiences or recommendations of other parties; or iii) results or savings you may achieve.
- e. Neither party is responsible for failure to fulfill any non-monetary obligations due to events or causes beyond its control.
- f. Each party grants only the licenses and rights specified in this Agreement. No other licenses or rights (including licenses or rights under patents) are granted either directly, by implication, by estoppels or otherwise.

