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## CHAPTER 3. SPECIAL ITEM 132-8: PURCHASE

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### TERMS AND CONDITIONS

Note: These terms and conditions are applicable to the purchase of IBM Information Technology equipment. These terms are in addition to those described in Chapter 1, General Information.

During the contract period, International Business Machines Corporation (IBM) will (1) sell the machines and field installable model conversions (2) provide warranty service for the machines to 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). 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 to overseas U.S. Government locations which are in support of National or mutual defense operations (including U.S. Embassies), and to locations which support the national interest of the United States.

IBM makes no representation that machines, attachments, special features, accessories or engineering changes which may be announced in the future, will be suitable for use on, or in connection with, the machines purchased hereunder.

### 3.1 ORDER

Written orders, EDI orders (GSA Advantage! and FACNET), credit card orders, and orders placed under blanket purchase agreements (BPA) shall be the basis for purchase in accordance with the provisions of this contract. If time of delivery extends beyond the expiration date of the contract, the Contractor will be obligated to meet the delivery and installation date specified in the original order.

For credit card orders and for funded BPA's, telephone orders are permissible.

### 3.2 TRANSPORTATION OF EQUIPMENT

FOB Destination. Prices cover equipment delivery to destination, for any location within the United States (including Alaska and Hawaii) and Puerto Rico. For shipments to other locations see Appendix A.

### 3.3 INSTALLATION AND TECHNICAL SERVICES

When the equipment provided under this contract is not normally self-installable, the Contractor's technical personnel shall be available to the ordering activity, at the ordering

activity's location, to install the equipment. Charges for additional training and services may be provided under SIN 132-51 of this Schedule

IBM's installation guidelines are specified in Item 3.11 of this Chapter.

### **3.4 INSTALLATION, DEINSTALLATION, REINSTALLATION**

The Davis-Bacon Act (40 U.S.C. 276a-276a-7) provides that contracts in excess of \$2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works with the United States, shall contain a clause that no laborer or mechanic employed directly upon the site of the work shall received less than the prevailing wage rates as determined by the Secretary of Labor. The requirements of the Davis-Bacon Act do not apply if the construction work is incidental to the furnishing of supplies, equipment, or services. For example, the requirements do not apply to simple installation or alteration of a public building or public work that is incidental to furnishing supplies or equipment under a supply contract. However, if the construction, alteration or repair is segregable and exceeds \$2,000, then the requirements of the Davis-Bacon Act applies.

The ordering activity issuing the task order against this contract will be responsible for proper administration and enforcement of the Federal labor standards covered by the Davis-Bacon Act. The proper Davis-Bacon wage determination will be issued by the ordering activity at the time a request for quotations is made for applicable construction classified installation, deinstallation, and reinstallation services under SIN 132-8.

**OPERATING AND MAINTENANCE MANUALS.** The Contractor shall furnish the ordering activity with one (1) copy of all operating and maintenance manuals which are normally provided with the equipment being purchased.

### **3.5 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.

### **3.5 ACCEPTANCE**

For newly installed machines: date of delivery to the location designated on the Purchase 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.

## 3.6 WARRANTY

The following warranty shall apply to IBM Machines, except when such Machines are relocated outside of the United States to a location where IBM is not providing such warranty services.

### **Warranty for IBM Machines**

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

The warranty period for an IBM Machine is a fixed period. For Machines, unless otherwise specified, the Date of Installation is the Warranty Start Date. IBM provides the warranty period for each Machine in our GSA pricelist. For System X Server and Workstation, refer to <http://www-1.ibm.com/services/us/index.wss/offering/its/a1001480>) and in the product announcement letter. During the warranty period, IBM provides repair and exchange Service for the IBM Machine, without charge, under the type of Service IBM designates for the IBM Machine.

If an IBM Machine does not function as warranted during the warranty period and IBM is unable to either 1) make it do so, or 2) replace it with one that is at least functionally equivalent, the Government may return it to IBM for a refund.

### **Warranty for Systems**

When IBM specifies in its proposal that it is providing Products to the Government that are intended to operate together as a system, IBM warrants that those Products are compatible and when installed in accordance with their Specifications, will operate with one another. This warranty is in addition to IBM's other applicable warranties.

### **Extent of Warranty**

If a Machine is subject to federal or state consumer warranty laws, IBM's statement of limited warranty included with the Machine applies in place of these Machine warranties.

The warranties stated above will not apply to the extent there has been misuse, (including but not limited to use of any Unauthorized Built-in Capacity or Circumvention of Technological Measures, accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper maintenance by the Government or a third party, or failure or damage caused by a product for which IBM is not responsible. The warranty for IBM Machines is voided by removal or alterations of Machine or parts identification labels.

For a Machine that IBM is responsible to install, if the Government elects to install the Machine itself or have a third party install the Machine, IBM may inspect the Machine at the Government's expense before providing warranty Service on the Machine. If the Machine is not in an acceptable condition for warranty Service, as solely determined by IBM, the Government may request that IBM restore it to an acceptable condition for Service or Customer may withdraw its request for warranty Service. IBM, at its sole discretion, will determine if restoration is possible. Restoration is provided as a billable Service.

**THESE WARRANTIES ARE THE GOVERNMENT'S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

### **Items Not Covered by Warranty**

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

IBM identifies Products that it does not warrant in the hardware pricelist or the IBM announcement letter.

Unless IBM specifies otherwise in a quote or proposal, IBM provides Materials, non-IBM products (including those provided with, or installed on, an IBM Machine at the Government's request), and non-IBM Services WITHOUT WARRANTIES OF ANY KIND. However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to you. Warranty, service, support and refund rights, if any, for non-IBM Products are provided directly to the Government by their manufacturer or supplier, not IBM.

### **Warranty Details**

IBM provides certain types of Service to keep Machines in, or restore them to, conformance with their Specifications. IBM will inform the Government of the available types of Service for a Machine. At its discretion, IBM will 1) either repair or exchange the failing Machine and 2) provide the Service either at the Government's location or a service center.

When the type of Service requires that the Government deliver the failing Machine to IBM, the Government agrees to ship it suitably packaged (prepaid unless IBM specifies otherwise) to a location IBM designates. After IBM has repaired or exchanged the Machine, IBM will return it to the Government at its expense unless IBM specifies otherwise. IBM is responsible for loss of, or damage to, the Government's Machine while it is 1) in IBM's possession or 2) in transit in those cases where IBM is responsible for the transportation charges.

The Government agrees to:

1. Obtain authorization from the owner to have IBM service a Machine that is not owned by the Government; and
2. Where applicable, before IBM provides Service -
  - a. Follow the problem determination, problem analysis, and service request procedures that IBM provides,
  - b. Secure all programs, data, and funds contained in a Machine, and
  - c. Inform IBM of changes in a Machine's location

When Service involves the exchange of a Machine or part, the item IBM replace becomes its property and the replacement becomes yours. If, however, the Government wishes to retain the replaced parts for security purposes, the Government agrees to pay IBM's then current purchase price for any retained parts. The Government represents that all removed items are genuine and unaltered. The replacement may not be new, but will be in good working order and at least functionally equivalent to the item replaced. The replacement assumes the warranty or

maintenance Service status of the replaced item. Before IBM exchanges a Machine or part, the Government agrees to remove all features, parts, options, alterations, and attachments not under IBM's service. The Government agrees to ensure that the item is free of any legal obligations or restrictions that prevent its exchange.

Some parts of IBM Machines are designed as Customer Replaceable Units (called "CRUs"), e.g., keyboards, memory, or hard disk drives. IBM provides CRUs to the Government for your replacement. The Government must return all defective CRUs to IBM within 30 days of receipt of the replacement one. The Government is responsible for downloading designated Machine Code and Licensed Internal Code updates from an IBM Internet Web site or from other electronic media, and following the instructions that IBM provides.

Any feature, conversion, or upgrade IBM services must be installed on a Machine which is 1) for certain Machines, the designated, serial-numbered Machine and 2) at an engineering-change level compatible with the feature, conversion, or upgrade.

Repair and exchange Service does not cover:

1. Accessories, supply items, and certain parts, such as batteries, frames, and covers;
2. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper maintenance by the Government
3. Machines with removed or altered Machine or parts identification labels;
4. Failures caused by a product for which IBM is not responsible;
5. Service of Machine alterations; or
6. Service of a Machine on which the Government is using capacity or capability, other than that authorized by IBM in writing.

IBM manages and installs applicable engineering changes that apply to IBM Machines and may also perform preventive maintenance.

IBM offers selected Warranty Service Options for System X Server and Workstation Products under this Contract, see "IBM ServicePac for Warranty and Maintenance Options (Warranty Service Upgrades - WSU)" under the System X Server and Workstation Products terms.

### **Limitation of Liability**

Except as otherwise provided by an express of implied warranty, the Contractor will not be liable to the ordering activity for consequential damages resulting from any defect or deficiencies in accepted items.

## **3.7 PURCHASE PRICE FOR ORDERED EQUIPMENT**

The price for a Machine or model conversion is the price shown in this Price List or as otherwise provided in a price quote from IBM to the Government (if an order is received during the specified validity period of the price quote). If IBM's established price for a Machine or model conversion has decreased, the Government shall have the benefit of the lower price as of the date of order receipt or the date of shipment.

### **3.8 RESPONSIBILITIES OF THE CONTRACTOR**

The Contractor shall comply with all laws, ordinances, and regulations (Federal, State, City or otherwise) covering work of this character, and shall include all costs, if any, of such compliance in the prices quoted in this offer.

### **3.9 TRADE-IN OF FEDERAL INFORMATION PROCESSING (FIP) EQUIPMENT**

When an agency determines that equipment will be replaced, the agency shall follow the contracting policies and procedures in the Federal Acquisition Regulation (FAR), the policies and procedures regarding Disposition of Information Technology Excess Personal Property in the Federal Property Management Regulations (FPMR) (41 CFR 101-46), and the policies and procedures on exchange/sale contained in FPMR 41 CFR part 101-46.

### **3.10 RISK OF LOSS OR DAMAGE**

IBM bears the risk of loss or damage for each Machine up to the time it is delivered to the IBM-designated carrier for shipment to you or your designated location. Thereafter, the Government assumes the risk. Each Machine will be covered by insurance, arranged and paid for by IBM for you, covering the period until it is delivered to you or your designated location. For any loss or damage, you must 1) report the loss or damage in writing to IBM within 10 business days of delivery and 2) follow the applicable claim procedures.

### **3.11 INSTALLATION**

The Government agrees to provide an environment meeting the requirements for the Machine as specified in its published documentation.

Within 30 calendar days of the shipment of a Machine, the Government agrees to install the Machine or, if IBM is responsible for the installation, to allow IBM to install the Machine. IBM has standard installation procedures. IBM will successfully complete these procedures before IBM considers an IBM Machine (other than a Machine for which the Government defers installation or a Government set-up Machine) installed. For a Machine that IBM is responsible to install, if the Machine is not made available for IBM to install within six months from shipment, installation will be subject to an installation charge. The installation charge will be calculated based on the machine per call class identified in the Hardware pricelist and the per call rates identified in Appendix B.

The Government shall be responsible for installing a Customer-Set-Up (or Government-Set-Up or CSU or GSU) Machine and a non-IBM Machine according to instructions provided by IBM or the Machine's manufacturer.

#### **Machine Upgrades and Engineering Changes**

IBM sells Machine Upgrades for installation on Machines, and in certain instances, only for installation on a designated serial numbered Machine. Within 30 days of the shipment of a Machine Upgrade, the Government agrees to install the Machine Upgrade or, if IBM is responsible for the installation, to allow IBM to install the Machine Upgrade.



The Government agrees to allow IBM to install mandatory Engineering Changes (such as those required for safety) on a Machine within 30 calendar days of IBM's notice to the Government unless otherwise agreed to by the parties.

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

IBM makes no representation that a specific transaction may qualify for any particular tax or accounting treatment, whether that transaction is referred to as an upgrade, or if a Machine's serial number is retained despite a change being made to that Machine, or otherwise. The Government must make your own determination as to the tax or accounting treatment for each transaction.

### **Date of Installation**

- A. For an IBM Machine, for which IBM is responsible for installation:
  - a. The business day after the day IBM installs the machine, or if the Government defers installation, the day IBM has made the machine available for subsequent installation to the Government.
- B. For a Customer Set-Up Machine:
  - a. Non System X Server and Workstation Products: The second business day after the machine's standard transit allowance period.
  - b. System X Server and Workstation Products: The date the Machine ships

### **3.11.1 CUSTOMER SET-UP MACHINES: GROUP Z**

The terms and conditions of this Special Item 132-8 shall apply, with the following modifications, to all orders for machines listed in this Price List with a Maintenance Group Z or when the product information specifies as a Customer Set-up machine.

#### **3.11.1.1 SET UP MACHINE**

- A. Notwithstanding any other provisions of this Contract to the contrary, for these machines, the Government shall be responsible for performing the following:
  - 1. Adequate site, system, and other vendor preparation.
  - 2. Physical set-up, connection of cables to communications lines/modems and IBM machines incorporating Government access areas, customization, switch setting, and

check-out Notifying IBM of intent to relocate CSU machines covered by IBM for Maintenance, and following IBM instructions for relocation.

3. Using and following the problem determination procedures related to CSU.

### **3.11.2 SITE PREPARATION**

Site preparation specifications as set forth in IBM's physical planning installation manuals shall be furnished by IBM. These specifications shall be in such detail so that the equipment to be installed shall operate efficiently from the point of view of environment.

The Government agrees to have the installation site prepared at its own expense in accordance with IBM's written site specifications at least thirty (30) days prior to the installation date.

Any alterations or modifications in site preparation which are directly attributable to incomplete or erroneous environmental specifications provided by IBM and which would involve additional expenses to the Government, shall be made at the expense of IBM.

Unless specified otherwise in IBM's proposal, all arrangements for procurement, installation, maintenance of, and payment for non-IBM communication media (telephone, internet etc.) necessary to the remote transmission of data are the responsibility of the Government. Any charges for such media in connection with installation, operation, or maintenance of machines shall be borne by the Government.

Physical planning assistance requested by the Government for initial installation of IBM machines, delivered by IBM, shall be provided at no additional charge, except in the case of Customer Set-Up machines. Physical planning assistance requested by the Government in connection with Customer Set-Up machines, or relocation, rearrangement, discontinuance, or reinstallation of systems or cables displaced as a result of new equipment installations may be obtained from IBM at additional cost.

## **3.12 TERMS AND CONDITIONS FOR SYSTEM X SERVER AND WORKSTATION PRODUCTS AND SERVICES**

### **3.12.1 IBM SERVICEPAC FOR WARRANTY AND MAINTENANCE OPTIONS (WARRANTY SERVICE UPGRADES – WSU)**

These terms and conditions, and the supported product list are the complete and exclusive terms for your acquisition of warranty service upgrade (called “Service”) for both IBM Machines and selected non-IBM Machines (collectively called “Machines”). Additional information on the supported product list and service levels may be found at <http://www-1.ibm.com/services/us/index.wss/offering/its/a1001480>.

This Service is designed to keep your Machines in, or restore them to, conformance with their Specifications. We reserve the right to inspect a Machine within one month from the activation date of this Service. If the Machine is not in an acceptable condition for Service, we will notify you, terminate coverage, and refund your money. Service for non-IBM Machines is subject to

availability of repair parts and technical support required from the original manufacturer. You may request that we use repair parts manufactured by the original manufacturer when these are available, but there may be an additional charge.

IBM will provide Service, either 9 hours per day 5 days a week (Monday through Friday, excluding national holidays in the United States) during normal business hours, or 24 hours per day, 7 days per week as specified by the part number that you ordered. IBM will provide this Service only in the country of acquisition for Machines identified in the supported product list.

**FOR IBM MACHINES, SERVICE IS AVAILABLE ONLY IF 1) FOR A WARRANTY SERVICE UPGRADE, IF IT WAS PURCHASED DURING THE MACHINE'S IBM INITIAL BASE WARRANTY PERIOD, AND 2) IN THE CASE OF 24x7x2 HOUR ON-SITE SERVICE IN THE U.S., THE MACHINE IS LOCATED WITHIN 50 MILES OF SELECTED METROPOLITAN LOCATIONS. (NOTE: CERTAIN REPAIRS TO A MOBILE MACHINE MAY REQUIRE SENDING THE MACHINE TO AN IBM REPAIR CENTER).**

Service does not cover accessories, supply items, and certain parts, such as batteries, frames, and covers. In addition, this Agreement does not cover Service of a Machine damaged by misuse, accident, modification, unsuitable physical or operating environment, improper maintenance by you, removal or alteration of Machine or parts identification labels, or failure caused by a product for which IBM is not responsible. For non-IBM Machines, this Agreement also does not cover Machine installation, engineering change activity, preventive maintenance, microcode/firmware activity, or features and parts not supplied by the original manufacturer or IBM in performance of this Service.

### **TYPES OF SERVICE FOR MACHINES**

IBM will provide repair or exchange Service either at your location, "called On-site," or at IBM's service center, "called EasyServ." Under On-site Service, if Service is required as determined by IBM, IBM will use reasonable efforts to respond as specified in the supported product list. Some parts of IBM Machines are considered Customer Replaceable Units (CRUs). IBM will ship these parts to you for your replacement. But for machines that IBM designates to be entirely CRU, IBM will ship such CRU parts as requested by customer even though customer had procured an on-site ServicePac upgrade. All defective CRUs must be returned to IBM. Under EasyServ Service, if Service is required as determined by IBM, you may deliver the failing Machine or ship it suitably packaged (prepaid, unless IBM specifies otherwise) to a location IBM designates, or IBM will use a courier to pick up and return the Machine as specified in the supported product list.

When a type of Service involves the exchange of a Machine or part, the item IBM replaces becomes its property and the replacement becomes yours. You represent that all removed items are genuine and unaltered. The replacement may not be new, but will be in good working order and at least functionally equivalent to the item replaced. The replacement assumes the Service status of the replaced item. Before IBM exchanges a Machine or part, you agree to remove all features, parts, options, alterations, and attachments not under IBM's Service. You also agree to ensure that the item is free of any legal obligations or restrictions that prevent its exchange. IBM is responsible for loss of, or damage to, your Machine while it is 1) in IBM's possession or 2) in transit in those cases where IBM is responsible for the transportation charges.

You agree to obtain authorization from the owner to have IBM service a Machine that you do not own. You agree to follow the instructions we provide and where applicable, before Service is provided: 1) follow the problem determination, problem analysis, and Service request procedures that we provide; and 2) secure all programs, data, and funds contained in a Machine.

You agree 1) that you are responsible for the results obtained from the Service; and 2) to provide IBM with sufficient, free, and safe access to your facilities for IBM to fulfill our obligations.

Your access to this Service will end either one, two, three, four or five years, as indicated by the part number that you ordered, from the date on your IBM Machine's sales receipt or your IBM Maintenance ServicePac's sales receipt, unless IBM informs you otherwise in writing. For a non-IBM Machine, your access to this Service will end either one or three years as indicated by the part number that you ordered, from the date you activate this Service.

### **IBM RETURN POLICY**

You may cancel this ServicePac within 30 days and obtain a refund or credit. To qualify for this refund (or credit, if appropriate), you must call IBM at 1-800-426-7235 within 30 days after the date IBM delivers the ServicePac to you to obtain a return-authorization form. You must return the ServicePac information to an IBM designated location by the date IBM specifies. A copy of your invoice and the shipping label must accompany the return. Shipping and handling charges will not be refunded.

### **LIMITED WARRANTY**

IBM warrants that it will perform Services using reasonable care and skill.

**THIS WARRANTY IS YOUR EXCLUSIVE WARRANTY AND REPLACES ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

### **GENERAL**

Nothing in these terms and conditions affects any statutory rights of consumers that cannot be waived or limited by contract.

A copy of your invoice is your proof of entitlement to Service.

Both you and IBM agree that, under this Agreement, all information exchanged is non-confidential. If either you or IBM requires the exchange of confidential information, it will be made under a signed confidentiality agreement.

You agree to allow IBM to store your contact information, such as names, phone numbers, and e-mail addresses, in any country where IBM does business and to use such information internally and to communicate with you for the purposes of our business relationship.

Neither you nor IBM will bring a legal action, under this Agreement, more than two years after the cause of action arose unless otherwise provided by local law without the possibility of contractual waiver or limitation.

Neither you nor IBM is responsible for failure to fulfill any obligation due to causes beyond its control.

### **3.12.2 RETURNS**

New, standard IBM Product, excluding IBM Workgroup Laser Printers and Multifunction (MFP) Options, may be returned for any reason within 30 days of the date of invoice and you may obtain a refund or credit. IBM does not provide refunds or credits for portions of a packaged offering provided at a single price. You may return the complete package for a refund or credit. To qualify for this credit or refund (as applicable), you must call your IBM customer support representation to obtain a return-authorization form. You must return the new IBM Product, including all documentation and accessories, intact and in its original packaging, to an IBM designated location by the date IBM specifies. A copy of the invoice, the return-authorization form, and the shipping label must accompany the return. Shipping and handling charges generally will not be refunded or credited. IBM Products authorized by IBM for return and returned without an IBM return-authorization form or returned after the date specified by IBM in the return-authorization form, may be subject to a restocking fee equal to 15% of the price paid. You agree to pay the restocking fee as IBM specifies.

This Returns policy does not apply to IBM Product(s) that you acquire for which IBM creates a unique machine type model (MTM) not generally available for purchase by all IBM customers or for IBM Workgroup Laser Printers and Multifunction (MFP) Options. For these printers and MTMs, IBM accepts returns only if the Product ships as a result of an IBM error, IBM will initiate a return of the Product with appropriate documentation at no charge to you if IBM is notified of the error within 30 days of the date of the invoice.

### **3.12.3 OTHER SERVICES**

IBM offers a variety of factory, shipping, installation, and implementation services for your xSeries Server and Workstation Products including, but not limited to Customization & Personalization, Asset Tagging, RAID Configuration, Rack Installation and Remote Technical Support. Please contact your IBM Sales Representative for additional details.

## **3.13 ADDITIONAL IBM TERMS**

### **3.13.1 OWNERSHIP**

IBM will transfer title to the Government upon shipment of the Machine. If the Government doesn't make timely payment or defaults on payment, title shall revert to IBM.

### **3.13.2 TITLE TO UPGRADE ORDERS**

Some Upgrades consist solely of Machine Code or OILC, or of a modification to Machine Code or OILC. Title for an Upgrade will not be transferred when the Upgrade consists solely of Machine Code or OILC.

### 3.13.3 NO HOMOLOGATION CERTIFICATION

Unless IBM has specified otherwise in a Machine's published IBM announcement letter, the Machine is not certified for connection by any means to interfaces of public telecommunications networks. Certification may be required by law prior to making any such connection.

### 3.13.4 NOTICES

The IBM document repository accessible at [http://www.ibm.com/servers/support/machine\\_warranties/support\\_by\\_product.html](http://www.ibm.com/servers/support/machine_warranties/support_by_product.html) identifies any applicable Product-specific environmental notices.

### 3.13.5 MACHINE CODE

By issuing a funded Delivery Order for a Machine, the Government ("Licensee") agrees to the duties, restrictions and obligations with respect to such Machine Code as set forth in this IBM License Agreement for Machine Code ("License Agreement").

Acquisition of the Covered Machine, in and of itself, provides no rights or authorizations to use the Machine Code provided with the Covered Machine. Licensee receives certain rights and authorizations to use Machine Code only as set forth in this IBM License Agreement for Machine Code ("License Agreement") as follows:

This License Agreement applies to all Machine Code provided for the Covered Machine (or Upgrade, as applicable). With respect to Machine Code provided for an Upgrade, this License Agreement replaces all license agreement(s) for Machine Code previously provided for the Machine receiving the Upgrade. Any reference to the "IBM Agreement for Licensed Internal Code" in an agreement between Licensee and IBM means this License Agreement.

#### Definitions

**Activated** – when IBM causes, directly or indirectly, the Authorized Built-in Capacity to be made available for Licensee's use on the Covered Machine.

**Acceptance-By-Use Machine** – a Covered Machine specified by IBM as "Acceptance by Use" through this address:

[http://www.ibm.com/systems/support/machine\\_warranties/support\\_by\\_product.html](http://www.ibm.com/systems/support/machine_warranties/support_by_product.html).

**AUT** – the "IBM Authorized Use Table for Machines" which is provided at the following address: [www.ibm.com/systems/support/machine\\_warranties/machine\\_code/aut.html](http://www.ibm.com/systems/support/machine_warranties/machine_code/aut.html).

and is in effect as of the acquisition date of the Covered Machine (or, if there is one or more Upgrades on the Covered Machine, then the acquisition date of the last such Upgrade). The AUT is incorporated by reference into this License Agreement.

**Authorized Built-in Capacity** – the Built-in Capacity for the Covered Machine that was Properly Acquired and Activated and is used in accordance with the AUT.

**Authorized Use** – the use of IBM Machine Code to access and use Authorized Built-In Capacity to process the types of executable code, or certain percentages of portions thereof, as specified in this License Agreement and as actually implemented by IBM's Technological Measures.

**Built-in Capacity** - the type and quantity of all resources and capabilities that IBM provides for a Machine, the access or use of which IBM has the ability to restrict by contract or Technological Measures. Built-In Capacity includes, without limitation, the type and quantity of the following: 1) processors, cores, processing capacity, processor performance setting and interactive processing capacity and capabilities; 2) memory; 3) storage; 4) cryptographic capability; 5) input/output ports, and 6) workload-specific resources and capabilities (including, for example, System z mainframe specialty processors such as zIIPs, zAAPs and IFLs, and other limited purpose products (including “appliances”). Built-in Capacity is either Authorized Built-in Capacity or Unauthorized Built-in Capacity.

**Circumvent** – to, directly or indirectly, by or through any means, alter, avoid, disrupt, subvert, go around, or otherwise interfere with.

**Covered Machine** – the specific Machine for which use of Machine Code is licensed under the terms of this License Agreement. Each Covered Machine is a serial numbered IBM Machine that is identified by serial number or order number on a proposal to the acquiring party. A Covered Machine that receives an Upgrade remains a Covered Machine and a Machine that receives an Upgrade becomes a Covered Machine; a Covered Machine includes without limitation a Machine specified by IBM as an Acceptance-By-Use Machine.

**Licensed Internal Code (or LIC)** – another term for Machine Code commonly used for certain IBM product lines, such as for IBM System z mainframes. LIC and Machine Code are interchangeable terms that have the same meaning.

**Licensee** – the party to which IBM is granting the right to use Machine Code with the Covered Machine (or Upgrade, as applicable).

**Machine** – a hardware device, including its resources, capabilities, features, conversions, Upgrades, elements, or accessories, or any combination of them.

**Machine Code** – all of the following: (i) all code provided for an IBM Machine (including, without limitation, a Machine’s firmware and microcode), excluding code that is licensed under a license agreement other than this License Agreement (for example, IBM operating system and middleware products); and (ii) records, data, and structures created, used or relied on by the code in item (i) (for example, IBM System z mainframe LIC Configuration Control records and passwords that help restrict access or use of the code in item (i)). The term Machine Code includes any whole or partial copy of Machine Code, and any fix, patch, or replacement provided for Machine Code.

**Other Internal Licensed Code** – code for a Covered Machine that is separately provided by IBM and licensed by a third party.

**Properly Acquired** - lawfully acquired from IBM (or an authorized IBM reseller) for the agreed consideration.

**Technological Measures** – all means, methods, systems, processes, checks, tests, monitoring, validations, instruments, and other measures that IBM implements for the purpose of: (i) protecting, controlling, limiting, and restricting the use of Machine Code; (ii) protecting, controlling, limiting, and restricting the access to or use of Built-in Capacity (including, for clarity, both Unauthorized Built-in Capacity and Authorized Built-in Capacity); and (iii) monitoring and reporting use of the Machine Code, Authorized Built-in Capacity, and

Unauthorized Built-In Capacity, including for the purpose of calculating usage-based charges for IBM Products. Without limiting the generality of the preceding sentence, Technological Measures may be implemented, in whole or in part, in Machine Code, IBM programs, other code, other IBM technology, and in the data created, used or relied upon by such Machine Code, IBM programs, other code, and IBM technology.

**Unauthorized Built-in Capacity** – all Built-in Capacity for the Covered Machine other than Authorized Built-in Capacity. For example and for the avoidance of any doubt, each of the following is Unauthorized Built-In Capacity: (i) in the case of a processor authorized to operate at less than its full processor performance setting, the capability to operate the processor at a greater processor performance setting, and (ii) in the case of a System z mainframe specialty processor, the capability to use the specialty processor for anything other than Authorized Uses as defined in the AUT.

**Upgrade** – the following changes that IBM sells for installation on a Machine: a hardware or Machine Code change to modify, add, remove, enable or disable certain Built-in Capacity or other resources and capabilities. Each such change can be accomplished through a Machine conversion, or through the conversion, addition, removal, or exchange of a Machine's feature(s).

### **Machine Code**

International Business Machines Corporation, one of its subsidiaries, or a third party owns the Machine Code (including, without limitation, ownership of all copies of Machine Code and ownership of all copyrights and other intellectual property in Machine Code). Machine Code is copyrighted and licensed (not sold). IBM licenses Machine Code to the Licensee only under the terms set forth in this License Agreement.

### **License**

IBM grants Licensee a nonexclusive license to use Machine Code without Circumventing Technological Measures and only as follows:

- a. to enable the Covered Machine to function as designed by IBM;
- b. to access and use Authorized Built-in-Capacity; and
- c. to execute and display Machine Code as reasonably necessary to maintain the Covered Machine in accordance with the IBM-designated maintenance package for such Machine type.

No other licenses or rights (including licenses or rights under patents) are granted either directly, by implication, or otherwise. No other use of Machine Code is authorized.

Licensee acknowledges that if the Authorized Built-in Capacity is less than the Built-in Capacity of the Covered Machine (or Upgrade, as applicable), Licensee has paid a price lower than the full price for the Covered Machine (or Upgrade, as applicable) and may pay charges lower than the full amount for other IBM products, including without limitation, software, and services because its right to use the Machine Code is limited as provided in this License Agreement.

### **Actions Licensee May Not Take**

Licensee shall use Machine Code only as expressly authorized in Section 2.1 above. Without limiting the foregoing, Licensee shall not, directly or indirectly, perform, attempt to perform, or allow any other party or product to do any of the following:



- a. access or use any Unauthorized Built-in Capacity;
- b. copy, display, transfer, adapt, modify, or distribute (electronically or otherwise) Machine Code, unless expressly permitted by applicable law without the possibility of contractual waiver;
- c. reverse assemble, reverse compile, otherwise translate, or reverse engineer Machine Code or other code implementing Technological Measures, unless expressly permitted by applicable law without the possibility of contractual waiver; or,
- d. assign this License Agreement, transfer Licensee's rights under this License Agreement, or sublicense, rent, or lease Machine Code.

For the avoidance of doubt, Licensee is fully responsible to IBM for ensuring that the actions of all parties that Licensee allows to access the Covered Machine or the Machine Code, (including, without limitation, independent software vendors, brokers, and third party maintainers), and the use of all non-IBM products and services that Licensee uses or allows to be used on or in conjunction with the Covered Machine, are in compliance with the terms and conditions of this License Agreement.

### **Replacements, Fixes, and Patches**

If Licensee requires a replacement, fix or patch for Machine Code, Licensee shall acquire such Machine Code directly from IBM in accordance with IBM's standard policies and practices. Unless and until IBM provides a replacement license agreement for Machine Code, the terms of this License Agreement apply to all Machine Code on the Covered Machine, including, for clarity, any replacement, fix or patch for, or additional copy of, Machine Code for the Covered Machine, even if the prior license agreement was the IBM Agreement for Licensed Internal Code.

### **Machine Code Transfers**

Licensee acknowledges that it does not own and does not have the right to sell, license, sublicense or otherwise transfer rights in the Machine Code. Provided that Licensee has not breached any term or condition of this License Agreement, Licensee may transfer possession of (but not the right to use) the Machine Code on the Covered Machine to a transferee of the Covered Machine who has a signed written agreement with IBM to comply with the then-current IBM License Agreement for Machine Code for the Covered Machine. In the event of such transfer of Machine Code, Licensee shall immediately destroy all of Licensee's copies of that Machine Code, except for any copies that reside on the Covered Machine. Absent IBM's grant of a license to the transferee to use the Machine Code for the Covered Machine, the transferee of the Covered Machine is not authorized to use or otherwise access Machine Code, or access and use any Built-in Capacity. Any attempt by Licensee to transfer this License Agreement or any other rights for use of the Machine Code to transferee is void and constitutes a breach of this License Agreement.

### **Remedies; Termination**

Licensee's rights under this License Agreement terminate when Licensee ceases to have any rights to the Covered Machine. In addition, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes), if Licensee breaches any term or condition of this License Agreement, IBM may exercise one or more of the following rights: (i) require Licensee to pay immediately to

IBM to Properly Acquire and Activate all Unauthorized Built-In Capacity on the Covered Machine at the then-applicable IBM price; (ii) for all IBM products licensed to and all IBM services provided for the Covered Machine, require Licensee to pay immediately to IBM for all one-time and recurring charges (at the then-applicable IBM prices) that would have been due if Licensee had also Properly Acquired and Activated the Unauthorized Built-In Capacity for such products and services, retroactive to the first use of any Unauthorized Built-In Capacity on the Covered Machine; (iii) terminate this License Agreement, the licenses for IBM products used on the Covered Machine, and any other agreements relating to the Covered Machine; and (iv) pursue all other rights and remedies available at law or in equity. IBM's remedies for any breach of this License Agreement by Licensee survive termination.

### **Technological Measures**

Licensee agrees to IBM's implementation of Technological Measures, including without limitation, measures that may impact availability of data or performance of the Covered Machine. As an express condition of this License Agreement, Licensee shall not (i) Circumvent or attempt to Circumvent Technological Measures or use a third party or third party product to do so, or (ii) in any way access or use or attempt to access or use Unauthorized Built-in Capacity.

IBM reserves the right to change Technological Measures, and Licensee shall, as an express condition of this License Agreement (i) either apply such changes within thirty (30) days after IBM provides notice of the availability of such changed Technological Measures or allow IBM to apply such changes at any time, and (ii) if Licensee applies such changes itself, then at IBM's request, provide IBM with a written certification confirming such application within such thirty (30) day period. Licensee shall maintain a copy of this License Agreement, including a copy of any written certification provided to IBM pursuant to this License Agreement, and provide a copy to IBM upon request.

IBM maintains an Authorized Use Table ("AUT") which provides the complete list of Authorized Uses of IBM Machine Code by type of Built-in Capacity. Authorized Use is based on product-specific built-in capacity. The AUT is effective as of the date of hardware acquisition and replaces all prior IBM authorizations for the use of IBM Machine Code and Built-In Capacity. The AUT applies until IBM supersedes it by issuing an AUT of a later effective date. IBM maintains the current AUT at [www.ibm.com/systems/support/machine\\_warranties/machine\\_code/aut.html](http://www.ibm.com/systems/support/machine_warranties/machine_code/aut.html).

### **Authorized Use Table**

For each type of Built-in Capacity listed in the Authorized Use Table the corresponding section describes all Authorized Uses. No other use of Built-in Capacity is authorized. The processing identified as Authorized Uses for a zIIP, zAAP and IFL, whether of an IBM, an independent software vendor (ISV) or a customer program, represent "Eligible Workloads" for the corresponding processor. To the extent of any conflict between the descriptions of the Authorized Uses in the table and IBM's actual implementation of the Authorized Uses through IBM's Technological Measures, the more limited scope of Authorized Uses takes precedence.

### **No Circumvention of Technological Measures**

Subject to the Contract Disputes Act and FAR 52.233-1 (Disputes), all Authorized Uses are voided for a Covered Machine if there is any Circumvention or attempted Circumvention of Technological Measures for such Covered Machine.

### **Modification of the AUT**

IBM retains the exclusive right, without advance notice, to modify the AUT. If IBM adds Authorized Uses, any Authorized Uses added to the AUT apply to all existing and subsequently acquired Authorized Built in Capacity, as applicable. If IBM restricts Authorized Uses, restrictions on Authorized Uses apply only to subsequently acquired Authorized Built in Capacity.

Subsequently acquired Authorized Built in Capacity includes, without limitation (i) acquisition of additional Authorized Built-In Capacity, (ii) recharacterization of Authorized Built-In Capacity (for example, conversion of an IFL into a zIIP), and (iii) carrying forward existing Authorized Built-In Capacity from one product family to its successor product family, with or without a charge (for example, carrying a zIIP forward as part of an upgrade from a IBM System z10 machine to an IBM System z196 machine).

### **Authorization for Other Internal Licensed Code**

OILC is licensed under, and Customer's use is governed by, the terms of the applicable license agreement(s) for such OILC provided at [http://www.ibm.com/servers/support/machine\\_warranties/support\\_by\\_product.html](http://www.ibm.com/servers/support/machine_warranties/support_by_product.html), which are hereby incorporated by reference into this Supplement.

### **3.13.6 PRODUCTION STATUS**

Items purchased under Special Item 132-8 of this Contract will be newly manufactured and may contain some serviceable used parts and/or features. In any event, IBM's warranty terms identified under "Warranty", shall apply.

### **3.13.7 INVOICING / PAYMENT**

The Government will be invoiced for products upon shipment.

In the event that the Government is of the opinion that any charges or credits on an invoice are not billed properly, every effort should be made to promptly pay the portion of the invoice not in question and give detailed written notice to IBM concerning the items in question.

## **3.14 HARDWARE OFFERINGS**

### **3.14.1 CAPACITY ON DEMAND**

Capacity on Demand is a offering which allows Government customers the ability to have "extra" processor capacity built directly in the Machine which can be activated in a quick, non-disruptive method. Terms and Conditions are stated below for the overall offering and for specific platforms.

**Definitions:**

**Eligible Machine** - an Machine configured to support Capacity Upgrade on Demand as specified herein.

**Capacity** - amount of resources, such as processor, storage, memory, channels, supporting the computing capability of a Machine.

**On-Demand Capacity** - Capacity installed in an Eligible Machine but not Activated for use.

**Machine** - an IBM machine, its features, conversions, upgrades, elements, or accessories, or any combination of them.

**Activation/Activating** - enabling of On-Demand Capacity for use.

**Monitoring Program** - a function licensed to the Government by IBM to monitor the Capacity being used on an Eligible Machine.

**Test Period** - a period of time specified herein, during which the On-Demand Capacity is Activated for the sole purpose of testing the Activation capability of an Eligible Machine.

**Activation of On-Demand Capacity**

Other than in connection with a Test Period, prior to or after the Government's Activation of any On-Demand Capacity on an Eligible Machine, you must 1) place an order for the upgrade associated with the Activation, including any associated Function Authorization upgrades applicable for that Eligible Machine within the period specified herein ("Order Placement Period") with IBM and, where specified within the Processor or Storage terms, and 2) give IBM access to the Eligible Machine. Giving IBM access to the Eligible Machine may require an outage.

The effective date of installation for Activated On-Demand Capacity is the date of Activation.

Should the Government Activate any On-Demand Capacity on a selected Eligible Machine and not place an order for it within the Order Placement Period specified herein, IBM reserves the right to directly invoice the Government, and you agree to pay, for the upgrade associated with the Activation as well as for any associated Function Authorization upgrades applicable for that Eligible Machine. IBM will invoice the Government based on the GSA price at the time of Activation.

**Government's Responsibility**

The Government agrees to the following:

1. The Government represents and warrants that, at the time of Activating On-Demand Capacity, you are the owner of the Eligible Machine or that you have the permission from the owner and any lien holders for the Activation to be conducted, as specified herein.
2. In addition to charges for the Activation of On-Demand Capacity, the Government also agrees to provide IBM a funded delivery order for any charges resulting from, or necessary for, the Activation, including those for requisite hardware, software, (for example, software license upgrades, including those which may result from Capacity Upgrade on Demand capability tests, if applicable) or services (for example, additional maintenance charges). The Government is responsible for contacting IBM regarding the applicability of associated charges and to obtain a price quote for these charges, prior to the Activation of On-Demand Capacity.

3. The Government agrees to notify any suppliers (for example, other software suppliers who license their product on a per-processor basis), as appropriate and necessary, when you Activate On-Demand Capacity.
4. IBM reserves the right to change the process by which On-Demand Capacity is Activated. The Government agrees to install and implement such a change on each applicable Eligible Machine.
5. The Government will install and implement Monitoring Programs or otherwise permit IBM to monitor the Capacity of each Eligible Machine, as specified herein. In the event IBM changes the means by which it monitors the Capacity of an Eligible Machine, the Government agrees to implement any such change, as necessary, for example, by installing and running a new Monitoring Program.
6. The Government agrees not to modify a Monitoring Program or in any way attempt to prevent or disable a Monitoring program or modify an Eligible Machine, such that IBM cannot accurately monitor the Machine's Capacity and Activation status.
7. If this offering terminates for an Eligible Machine, the Government will follow any termination provisions associated with that Eligible Machine, as specified herein.
8. The Government agrees not to circumvent technological measures intended to prevent unauthorized use of On-Demand Processors, or use a third party product to do so, or otherwise access or use unauthorized On-Demand Processors. The Government agrees to install, or allow IBM to install, changes to such technological measures if IBM determines such changes are appropriate.

### **Termination**

This offering terminates for a specific Eligible Machine upon occurrence of any of the following:

1. The Government sells or otherwise transfers possession outside your Department or agency of the Eligible Machine, or any part of the Eligible Machine containing On-Demand Capacity.
2. You remove, disable or fail to install a Monitoring Program on the Eligible Machine.
3. IBM is prevented from monitoring the Capacity of the Eligible Machine.
4. Upon your one month's written notice to IBM.

The Government also agrees to give IBM, one month's written notice in the event that you anticipate termination under 1) or 2) above.

IBM will provide a one month's written notice to the Government in the event we terminate this offering.

Notwithstanding anything to the contrary in this Agreement, the Government's obligation for performance of this Agreement is contingent on the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this Agreement beyond the end of the fiscal year until funds are made available to the Contracting Officer for performance and until we receive notice of availability to be confirmed in writing by the Contracting Officer.

## Warranty

Warranty terms are stated elsewhere within this Hardware section. The warranty period for On-Demand Capacity, including all associated parts, is based on the date On-Demand Capacity is physically installed, regardless of when or whether Activation occurs.

## General Terms

Both of us agree that:

1. Each of us may communicate with the other by electronic means and such communication is acceptable as a signed writing. An identification code (called as "user ID") contained in an electronic document is legally sufficient to verify the sender's identity and the document's authenticity. Commitments made by IBM or the Federal Government must be from an authorized signature.
2. Each of us will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations;
3. Neither of us is responsible for failure to fulfill any obligations due to causes beyond its control;
4. Either of us may terminate this offering if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply;
5. Any terms of this offering which by their nature extend beyond the termination date remain in effect until fulfilled.
6. Capacity on Demand is offered only in the United States.
7. The Government grants IBM a purchase money security interest in the Eligible Machine, including any of its Capacity, features, conversions and upgrades, to secure any amounts that are due or become due under this offering.
8. This offering is comprised solely of On-Demand Products. The Government is responsible for providing all other computing resources (for example, memory, storage, channels) that may be required, adequate in type and quantity, to satisfy the needs of your computing environment. It is the Government's responsibility to contact IBM for additional product requirements.

### 3.14.1.2 PLATFORM-SPECIFIC TERMS (STORAGE)

#### Definitions

##### On-Demand Storage

Capacity, for example, disk, tape or other parts used for storage of data installed on an Eligible Machine but not Activated. On-Demand Storage is Activated, that is, enabled, when it is configured for use.

##### Capacity

Amount of resources, such as processors, storage, memory, channels, supporting the computing capability of a Machine.

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**Eligible Machine**

An IBM Machine configured for Storage Capacity Upgrade on Demand, "Standby Capacity on Demand" or "A Step Ahead.". On-Demand Storage for an Eligible Machines is available only in 8-pack array increments.

**Monitoring Requirement**

The Government agrees to enable the IBM ESS Call Home function for each Eligible Machine in accordance with IBM's documentation.

**Activate/Activation/Activating**

Enabling of On-Demand Storage for use.

**Function Authorization**

Enablement (technical or contractual) of a specific function on an Eligible Machine (for example, IBM's "ESS Advanced Functions", such as "Flashcopy") at a given Capacity level.

**Termination**

Upon termination, as defined herein, the Government agrees to order and pay for Activation of all On-Demand Storage on an Eligible Machine.

**Activation Period of On-Demand Storage**

The Government agrees to Activate all On-Demand Storage on an Eligible Machine within one year of the date On-Demand Storage is installed. The Government may defer this duty in increments of one year. For each one year increment that the Government defers Activation of all On-Demand Storage, the Government, prior to the next anniversary date On-Demand Storage was installed, a) install additional Capacity on the Eligible Machine, and b) purchase a renewal feature for that purpose. A funded delivery order must be issued to IBM prior to the one year expiration for the full amount remaining on the On-Demand Storage Machine or the additional capacity per the deferral.

The Government agrees to allow IBM reasonable access to an Eligible Machine when On-Demand Storage is no longer available on that Eligible Machine. This access is for the sole purpose of properly establishing the extent of all applicable Function Authorizations.

The Government agrees to Activate all On-Demand Storage on an Eligible Machine prior to upgrading that Eligible Machine to a new machine type of model.

This offering is comprised solely of On-Demand Storage. The Government is responsible for providing all other computing resources (for example, memory, processors, channels) that you may require, adequate in type and quantity, to satisfy the needs of your computing environment.

The Government understands that any requirement for the de-Activation or removal of a Function Authorization may require an outage of the associated Eligible Machine.

**Test Period**

None.

## Order Placement Period

If the Government Activates any On-Demand Storage (other than for use in a Test Period), you agree to place an order for Activated On-Demand Storage with IBM prior to or within 14 calendar days following the Activation.

## Built-in-Capacity and LIC

LIC does not include programs and code provided under separate license agreements, including but not limited to open source license agreements. An Eligible Machine may include computing resources or capabilities that are to remain inactive, or the use of which is restricted, until the right to access and use the resources or capabilities are acquired (call "Built-in-Capacity"). Examples of such computing resources and capabilities include but are not limited to processors, memory, storage, and/or workload specific resources or capabilities (such as limitations on the use for a specific operating system, programming language or application). If you are the rightful possessor of an Eligible Machine, IBM grants you a license to use the LIC (or any replacement IBM provides) on, or in conjunction with, only the Eligible Machine for which the LIC is provided, and only to the extent of authorizations you have acquired for access to and use of Built-in-Capacity. You agree that if your use of Built-in-Capacity exceeds the authorizations you have acquired for the Eligible Machine, you will be liable to IBM for the full price of permanent, unrestricted use of the Built-in-Capacity at IBM's current list price.

## Circumvention of Technological Measures

Built-in-Capacity is protected by certain technological measures. The Government agrees to IBM's implementation of such technological measures to protect Built-in-Capacity, including measures that may impact availability of data or performance of your Specific Machine. You may not circumvent such technological measures, or use a third party or third party product to do so, or otherwise access or use unauthorized Built-in-Capacity. In the event IBM determines that changes are necessary to the technological measures, IBM may provide you with changes to such technological measures. You agree, at IBM's option, to apply or allow IBM to apply such changes.

In addition, you acknowledge, authorize and agree to the following: Code or other measures introduced on an Eligible Machine that circumvents the technological measures designed to prevent unauthorized usage may result in the automatic power down of the Eligible Machine, reduced function of the Eligible Machine and/or the disablement of the Eligible Machine. A re-IPL (initial program load) or re-IML (initial microcode load) of the Eligible Machine (or other actions that may be disruptive) may be required to restore the Eligible Machine's operation.

### 3.14.2 IBM eSERVER ON/OFF CAPACITY ON DEMAND

#### 1. Definitions

##### **TCOD Machine**

An IBM Machine that supports Temporary Capacity On Demand ("TCOD") (which may also be referred to in IBM literature or otherwise known as "On/Off Capacity Upgrade on Demand" or "On/Off CUoD") and for which IBM offers TCOD features.



<b>On-Demand Capacity</b>	Amount of resources, such as processors, storage, memory, channel, that is installed on a TCOB Machine but that is not enabled for use (e.g., On-Demand Processors)
<b>Activation/Activated/Activate</b>	Enabling On-Demand Capacity for use.
<b>Temporary Capacity</b>	On-Demand Capacity that may be Activated for a specified duration.
<b>TCOD Unit</b>	The duration and amount of Temporary Capacity that is Activated. For example, “Processor Days” (number of processors multiplied by the number of 24 hour periods and partial 24 hour periods Activated) are the TCOB Units measuring Activation of processors.
<b>Requested Units</b>	TCOD Units you specify when you Activate Temporary Capacity
<b>Unreturned Unit(s)</b>	TCOD Units that remain Activated after expiration of the duration you specified when you Activated Temporary Capacity.
<b>Monitoring Program</b>	Software IBM licenses to you that monitors requests for Temporary Capacity On Demand and reports Activated Temporary Capacity On Demand to IBM through a telecommunications connection, e.g. Electronic Service Agent.
<b>TCOD Enablement Feature</b>	A feature offered by IBM, which authorizes you to use Temporary Capacity On Demand according to the terms of this Attachment, and provides a key (“TCOD Enablement Code”) to enable you to Activate and manage Temporary Capacity On Demand on the TCOB Machine.
<b>TCOD Unit Maximum</b>	A TCOB Enablement Feature’s maximum number of TCOB Units available for Activation. Once this maximum is reached, you must obtain a new TCOB Enablement Feature in order to Activate additional Temporary Capacity On Demand.
<b>TCOD Billing Quarter</b>	A calendar quarter for which your Activation of Temporary Capacity On Demand is monitored for billing purposes.
<b>TCOD Billing Feature</b>	A feature used for billing purposes that specifies the IBM price for a TCOB Unit. The feature is orderable in the quantity of TCOB Units that are Activated during the TCOB Billing Quarter.

## 2. Use of Temporary Capacity On Demand

Government agrees:

- a. It is liable to IBM for payment for each TCOB Unit (both Requested Units and Unreturned Units) on your TCOB Machine. This liability is discharged when the Government pays IBM for

the TCOD Units. The amount due each TCOD Billing Quarter will be based on the TCOD Billing Feature, which specifies the quantity of TCOD Units Activated during that time period.

b. To issue a funded delivery order for the amount of the estimated TCOD Units to be used during the Activation period in order to initialize the TCOD Enablement Feature. It is the responsibility of the Government to monitor the funding on the order and to provide additional funding if TCOD Units are required beyond the amount estimated on the original order. Should the Government use TCOD Units beyond the estimated amount and an order is not placed prior to the end of the TCOD Billing Quarter, IBM reserves the right to directly invoice the Government, and you agree to pay, for the actual TCOD Units reported by the Monitoring Program, or as otherwise specified below.

c. That it will install (unless preinstalled), configure, and maintain the Monitoring Program on the TCOD Machine in a manner specified by IBM to regularly (at intervals as IBM specifies) report Activated TCOD Units to IBM. In circumstances where special security requirements preclude the use of the Monitoring Program, IBM will suspend this requirement. The Government will be required to deliver to IBM via facsimile or e-mail (as specified by IBM) a screen image of the TCOD Machine's screen entitled "DISPLAY TEMPORARY SYSTEM CAPACITY" once per calendar month. If the Government fails to submit the required information in a timely manner, you agree that IBM may treat this failure as if the Government disabled the Monitoring Program as described herein. In such circumstance, IBM may take all remedial measures specified, including but not limited to charging you for TCOD Units based on assumed 100% Activation during the period when reports are not submitted.

d. That, in the event the Monitoring Program becomes disabled, disconnected or otherwise unable to accurately report TCOD Units to IBM, the Government will promptly notify its IBM service contact, and allow IBM or its agent to access the TCOD Machine to attempt to determine the TCOD Units for which you are liable;

e. That in the event that (a) the Government removes, disables, disconnects, or otherwise prevents the Monitoring Program from accurately reporting TCOD Units to IBM, or (b) the Monitoring Program becomes disabled, disconnected or otherwise unable to accurately report TCOD Units to IBM and the Government fails to notify IBM service and allow access as described in the previous paragraph, then it will be liable for, and agree to pay for, TCOD Units based on the assumption that 100% of Temporary Capacity On Demand was Activated during the entire period for which the Monitoring Program did not report TCOD Units. IBM retains all other remedies it may have in the event of such actions, including termination of your right to use Temporary Capacity;

f. To provide access to the TCOD Machine for IBM to perform random audits pertaining to Activation of Temporary Capacity On Demand.

g. That the Government will not circumvent technological measures intended to prevent use of unauthorized On-Demand Capacity, or use a third party or third party product to do so, or otherwise Activate or use unauthorized On-Demand Capacity.

### **3. Government's Additional Responsibilities**

The Government agrees to the following:

To represent and warrant that, at the time Temporary Capacity On Demand is requested, it is the owner of the TCOD Machine for which the request is made, or that it has the permission from

the owner and any lien holders for the use of Temporary Capacity On Demand to be conducted as specified in this Attachment.

- a. To notify any suppliers (for example, other software suppliers who license their product on a per-processor basis), as appropriate and necessary, when you make a request for Temporary Capacity.
- b. In addition to charges for the Activation of Temporary Capacity On Demand, you also agree to pay any charges resulting from, or necessary for, the Activation, including those for requisite hardware, software, (for example, software license upgrades) or services (for example, additional maintenance charges).
- c. IBM reserves the right to change the process by which Temporary Capacity On Demand is made available for the Government's use. You agree to install and implement such a change on each applicable TCOD Machine.
- d. In the event IBM changes the Monitoring Program or the means by which it monitors Activated TCOD Units, the Government agrees to implement any such change, as necessary.
- e. This offering is comprised solely of the computer resource identified as On-Demand Capacity. The Government is responsible for providing all other computing resources (for example, memory, storage, channels) that you may require, adequate in type and quantity, to satisfy the needs of your computing environment.

#### **4. Termination**

1. The Government's right to use Temporary Capacity On Demand terminates for a specific TCOD Machine upon occurrence of any of the following:
  - a. You transfer possession of the TCOD Machine, or any part of the TCOD Machine containing On-Demand Capacity to a third party (for example, return of the TCOD Machine to the leasing company at lease end). You agree to provide IBM at least one month written notice prior to such transfer.
  - b. At your option, provided you provide one month's written notice to IBM. Notification shall also be provided to IBM at fiscal year end if the Government does not require the use of the Requested Units ordered; otherwise, a funded order for those remaining Units is required for the new fiscal year.
  - c. At IBM's option, if IBM is prevented from, or unable to: 1) monitor (through use of the Monitoring Program) TCOD Units or 2) perform random audits of the TCOD Machine.
2. In addition to the foregoing, either of us may terminate this Agreement if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time, not to exceed 30 days, to comply.
3. Your right to use Temporary Capacity On Demand terminates for all TCOD Machines upon termination of this Agreement.
4. In the event of termination of Temporary Capacity On Demand for one or more TCOD Machines, you agree to provide IBM access to each such TCOD Machine to disable the TCOD Enablement Feature. If you transfer possession of a TCOD Machine without providing IBM access to disable the TCOD Enablement Feature, you agree:

- a. to immediately pay to IBM, at the time of transfer, for all Temporary Capacity On Demand that remains available for Activation by means the TCOD Enablement Feature transferred with the TCOD Machine up to the TCOD Unit Maximum.
- b. to pay for any Unreturned Units, in excess of the TCOD Unit Maximum, that may result from the TCOD Enablement Feature, transferred with the TCOD Machine, that has not been disabled by IBM.

## 5. Warranty

Standard IBM warranty terms apply. The warranty period for On-Demand Capacity, including all associated parts, is based on the date capacity is physically installed on a TCOD Machine, regardless of when or whether requests for Temporary Capacity On Demand are ever made.

### 3.14.3 ATTACHMENT SYSTEM Z CAPACITY ON DEMAND OFFERINGS

Terms and Conditions for the System z COD offering apply to the z10 and future System z product announcements.

The terms stated herein for IBM System z Capacity on Demand Offerings (“CoD Attachment”) govern IBM’s provision and Customer’s acquisition and use of IBM System z Capacity on Demand Offerings. When used in the terms below, “Customer” means the Originating US Government customer (defined as an Agency or an affiliated entity of the US Government) that is acquiring the IBM System z Capacity on Demand Offering, subject to the Agreement.

#### 1. Associated Attachments

This CoD Attachment provides terms that apply in general to all IBM System z Capacity on Demand Offerings. Additional terms are set forth in one or more Associated Attachments which govern each specific Capacity on Demand Offering. The terms of this CoD Attachment apply only when Customer has contracted for a Capacity on Demand Offering under one or more Associated Attachments.

If there is a conflict between the terms of this CoD Attachment and an Associated Attachment, the terms of the Associated Attachment prevail over those of this CoD Attachment. If there is a conflict among the terms of the Associated Attachments, the order of precedence will be as set forth in the applicable Associated Attachments.

#### 2. Definitions

**Activate** – to cause an Upgrade to be available for general use on an Eligible Machine.

**Associated Attachment** – a separate Attachment which specifies additional terms governing IBM’s provision and Customer’s acquisition and use of one or more Capacity on Demand Offerings, and which references this CoD Attachment.

**Built-in-Capacity** – any Capacity or capability of an Eligible Machine that may be included with an Eligible Machine and which is to remain inactive, or for which use is restricted, until the right to access and use the resource or capability is properly acquired directly from IBM or through an authorized IBM reseller. Such computing Capacity and capabilities include, without limitation, processors, memory, storage, and/or workload-specific resources or capabilities (such as a specific operating system, programming language, or application to which use of the Machine is limited).

**Capability Feature** – a Feature which designates that a Machine is enabled for Customer’s general use of a certain Capacity on Demand Offering.

Capacity -- resources (for example, general-purpose processors or memory) supporting the computing capability of an Eligible Machine.

**Capacity on Demand Offering** – an IBM System z offering for authorized use of Built-in-Capacity.

**Deactivate** – to cause an Upgrade to no longer be available for use on the Eligible Machine.

**Eligible Machine** – an IBM System z Machine for which Customer has acquired and installed one or more Capability Features.

**Feature** – Machine resources or function delivered by IBM through parts, LIC or entitlements to LIC, or any combination of the preceding.

**Supplement** – a Transaction Document between Customer and IBM which specifies certain terms or other information applicable to an Associated Attachment, and which references such Associated Attachment and this CoD Attachment.

**Upgrade** – a modification IBM makes to the Licensed Internal Code (“LIC”) of an Eligible Machine such that Customer may use additional Capacity, either permanently or temporarily, as specified by IBM in the applicable Associated Attachment. The term “Upgrade” includes any type of Upgrade offered under an Associated Attachment.

### 3. Charges

When Customer orders Upgrades or Features from IBM, applicable charges will be specified in a Transaction Document (i.e. IBM proposal, IBM quote).

### 4. General Offering Terms

- a. Customer represents and warrants that Customer is the owner of the Eligible Machine for which Customer orders an Upgrade or that Customer has the permission of the owner and any lien holders of the Eligible Machine to install an Upgrade.
- b. An Upgrade consists solely of a modification to an Eligible Machine’s LIC. Accordingly, no title to an Upgrade is transferred.
- c. IBM will make available to Customer commercially reasonable instructions to properly Activate and Deactivate an Upgrade. Customer agrees to follow such instructions.
- d. Program or service charges may increase for an Eligible Machine as the result of installation of an Upgrade.
- e. If an Eligible Machine is upgraded (for example, conversion to a higher model or installation of additional features: 1) entitlements provided herein for the Eligible Machine will not change and 2) any Upgrade request will upgrade the Eligible Machine either (i) by the same amount of Capacity, but not necessarily the same amount of additional performance (based on performance characteristics of the Eligible Machine); or (ii) to the maximum amount of Capacity available on the Eligible Machine (based on the Eligible Machine’s then-current model designation and installed Features), whichever is less. Upon Customer’s request, IBM will provide Customer with estimated performance characteristics of an Eligible Machine.

- f. Customer is responsible for maintaining each Eligible Machine in an operational condition sufficient for implementation and use of an Upgrade. If Customer does not maintain such an operational condition of an Eligible Machine, Customer may not be able to Activate or use an Upgrade until such condition is restored.
- g. IBM may make commercially reasonable updates to the procedure by which an Upgrade is ordered, installed, Activated, or Deactivated. Customer agrees to install and implement such update within a commercially reasonable period of time following IBM's notice to Customer of such update, provided IBM generally requires its customers to implement the same procedure update.
- h. If Customer exports an Eligible Machine that Customer acquired in the United States outside of the United States, Customer will enter into a similar agreement with IBM in the importing country to govern IBM's provision and Customer's use of Capacity on Demand Offerings in that country.
- i. Customer may not assign, or otherwise transfer, this CoD Attachment or any Associated Attachment, in whole or in part, or delegate Customer's obligations without the prior written consent of IBM. Any attempt to such assignment or transfer without such consent is void. IBM will not unreasonably withhold such consent.

## **5. Licensed Internal Code**

Customer's use of LIC is subject to the terms and restrictions governing such use as specified in the Agreement. Customer's use of an Upgrade is governed by the terms and restrictions that govern LIC except as expressly provided in this Attachment or an Associated Attachment. LIC does not include any Program or code provided subject to a separate license agreement, including without limitation an open source license agreement.

### ***5.1 Built-in-Capacity***

An Eligible Machine may include Built-in-Capacity. If Customer is the rightful possessor of an Eligible Machine, IBM grants Customer a nonexclusive license to use the LIC on, or in conjunction with, only the Eligible Machine for which IBM provided the LIC, and only to the extent of IBM authorizations Customer has acquired for access to and use of Built-in-Capacity. If Customer's use of Built-in-Capacity exceeds such IBM authorizations, Customer agrees to pay IBM charges based on the full price of permanent, unrestricted use of the Built-in-Capacity at the then-current price. Customer is not authorized to use such Built-in-Capacity until such payment is made.

### ***5.2 Circumvention of Technological Measures***

Built-in-Capacity, Upgrades, and certain Features are limited by certain technological measures in LIC. Customer may not i) circumvent such technological measures or use a third party or third party product to do so or ii) otherwise access or use unauthorized Built-in-Capacity. If IBM determines that changes are necessary to the technological measures designed to limit access to, or use of, Built-in-Capacity, IBM may provide Customer with changes to such technological measures. Customer agrees, at IBM's option, to apply or allow IBM to apply such changes.

## **6. Term and Termination**

### **6.1 Term**

The term of this CoD Attachment begins once IBM receives a funded delivery order and ends upon termination as specified in Section 6.2 below.

### **6.2 Termination**

This CoD Attachment terminates for a specific Eligible Machine when the Customer sells or otherwise transfers possession outside your Department or agency (including military department) of the Eligible Machine, or any part of the Eligible Machine containing On-Demand Capacity.

Customer may terminate this CoD Attachment, or terminate Customer's rights under this CoD Attachment for any specific Eligible Machine, upon one month's prior written notice in accordance with the terms of the Agreement.

Either party may terminate this CoD Attachment if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time, not to exceed 30 days, to comply.

Upon termination of this CoD Attachment, all Associated Attachments, and all rights under the Associated Attachments terminate for Eligible Machines.

Any terms of this CoD Attachment and all Associated Attachments which by their nature extend beyond termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.

This CoD Attachment, including its Associated Attachments and Supplements, and the Agreement comprise the complete agreement regarding IBM System z Capacity on Demand Offering transactions and replace any prior oral or written communications between Customer and IBM. In entering into this CoD Attachment, neither party is relying on any representation that is not specified in the CoD Attachment (or the documents specified in the preceding sentence), including without limitation any representations concerning: i) performance or function of any Product or system, other than as documented in its Specifications; ii) the experiences or recommendations of other parties; or iii) results or savings Customer may achieve. Additional or different terms in any written communication from Customer (such as a purchase order) are void.

### **3.14.3.1 ATTACHMENT IBM SYSTEM Z CAPACITY BACK UP**

The terms of this Attachment for IBM System z Capacity Back Up ("CBU Attachment") are in addition ii) Attachment for IBM System z Capacity on Demand Offerings identified above ("CoD Attachment"), and iii) the Attachment for IBM System z Replacement Capacity Offerings identified below ("RC Attachment") and govern IBM's provision and Customer's acquisition and use of the IBM System z Capacity Back Up ("CBU") offering. When used in this Attachment, "Customer" means the Originating US Government customer (defined as an Agency or an affiliated entity of the US Government) that is acquiring the IBM System z Capacity on Demand Offering, subject to the Agreement.

## Associated Attachments

This CBU Attachment, the RC Attachment and the CoD Attachment provide terms that apply to the IBM System z Capacity Back Up offering. This CBU Attachment is i) an “Associated Attachment” to the CoD Attachment and ii) an “RC Associated Attachment” to the RC Attachment.

If there is a conflict among the terms of this CBU Attachment and the RC Attachment or the CoD Attachment, those of this CBU Attachment prevail over those of the RC Attachment and the CoD Attachment.

## Definitions

Capitalized terms not defined in this CBU Attachment or in the Agreement have the meaning ascribed to them in the RC Attachment or the CoD Attachment, as applicable.

**CBU Capability Feature** – an RC Enablement Feature specifying that an RC Eligible Machine is authorized by IBM to be temporarily upgraded with a CBU Upgrade.

**CBU Machine** – an RC Eligible Machine for which Customer has acquired and installed one or more CBU Capability Features.

**CBU Test** – a procedure that Customer conducts to test the Emergency Activation process for a CBU Machine.

**CBU Upgrade** – a certain RC Upgrade whereby the CBU Machine performs temporarily as an Upgraded CBU Machine.

**Emergency** – an event that Customer declares due to Customer’s unforeseen loss of substantial IBM System z or IBM System/390 Machine Capacity at one or more sites within Customer’s Enterprise.

**Emergency End** – the earlier of i) reasonable restoration of Lost Capacity or ii) ninety (90) days following Activation of a CBU Upgrade for purpose of an Emergency.

**Lost Capacity** – for the purpose of this CBU Attachment, “Lost Capacity” means the Capacity which Customer is authorized to use and was the basis for Customer declaring an Emergency.

**Production Workload** – software products and programs which execute in support of Customer’s business. Examples of Production Workload include without limitation, those characterized as “productive”, “production”, “development”, “maintenance” and “test” workloads.

**Upgraded CBU Machine** – the Upgraded RC Eligible Machine for a CBU Machine.

## Term and Termination

### *Term*

The term of this CBU Attachment begins once IBM receives a funded delivery order and ends upon termination as specified in accordance with Section 3.2 below.

### *Termination*

This CBU Attachment terminates for a specific Eligible Machine when the Customer sells or otherwise transfers possession outside your Department or agency of the Eligible Machine, or any part of the Eligible Machine containing On-Demand Capacity.



Customer may terminate this CBU Attachment, or terminate Customer's rights under this CBU Attachment for any specific CBU Machine, by providing written notice to IBM. Such termination is effective the later of i) the date of termination Customer specifies in such notice or ii) the date IBM completes the removal of all CBU Capability Features from Customer's CBU Machine(s).

Customer's rights under this CBU Attachment for a CBU Machine terminate upon the earliest of the following events: i) the CBU term acquired from IBM for the CBU Machine ends; ii) Customer transfers possession or control of the CBU Machine to another party (for example, Customer returns the CBU Machine to a lessor, or transfers the CBU Machine outside of its Department or Agency – including military department); iii) the RC Attachment terminates; or iv) this CBU Attachment terminates.

Either party may terminate this CBU Attachment if the other fails to comply with any of its terms, provided the one who is not complying is given written notice and reasonable time, not to exceed 30 days, to comply.

### **Temporary LIC License**

Customer's temporary license to use the LIC on a CBU Machine will commence on the date Customer Activates the CBU Upgrade and will terminate upon the later of the following: i) the Emergency End (applicable only to a CBU Upgrade which Customer Activates as result of an Emergency) or ii) expiration or termination of Customer's rights under this CBU Attachment for the CBU Machine.

### **CBU Upgrade Authorizations**

IBM's authorization for Customer to Activate a CBU Upgrade and operate a CBU Machine as an Upgraded CBU Machine is valid only in the event of an Emergency or for the purpose of a CBU Test, as specified below in this section:

#### **Emergency Authorization**

In the event of an Emergency, such authorization will commence on the date Customer Activates the CBU Upgrade and will terminate upon the Emergency End.

During an Emergency, Customer is authorized to execute, on the Capacity of the CBU Upgrade, only workload from within Customer's Enterprise which previously was being executed on the Lost Capacity.

#### **CBU Test Authorization**

For the purpose of performing a CBU Test, such authorization will commence on the date Customer Activates the CBU Upgrade and will terminate upon the earlier of the following: i) the date Customer completes the CBU Test or ii) expiration of ten (10) days following Activation of the CBU Upgrade. Termination in either of the preceding events is the "CBU Test End".

The number of CBU Tests Customer is entitled to conduct on a CBU Machine is the amount acquired from IBM or an IBM Business Partner and installed on the CBU Machine.

During a CBU Test, on the Capacity of the CBU Upgrade, Customer may :

1. execute non-Production Workload (which may include one or more copies of Customer's Production Workload, provided the Production Workload is simultaneously executed on another Customer's Machine; or
2. execute Production Workload, provided an amount of System z Production Workload Capacity equivalent to the CBU Upgrade Capacity is shut down or otherwise made unusable by Customer for the duration of the CBU Test.

### **Customer's Responsibilities**

Customer agrees as follows:

Customer will not perform a CBU Test for any reason, or in any manner, other than as authorized under the terms of this CBU Attachment;

Customer will not use a CBU Capability Feature or an Upgraded CBU Machine other than for the purpose authorized under the terms of this CBU Attachment;

Customer will execute workload on the Capacity of a CBU Upgrade only as authorized under the terms of this CBU Attachment;

Customer will Deactivate the CBU Upgrade from the CBU Machine no later than the Emergency End or CBU Test End, as specified in this CBU Attachment; and

Prior to expiration or termination of this CBU Attachment for a CBU Machine, Customer will:

Deactivate any CBU Upgrade from the CBU Machine and place an order with IBM or Customer's IBM Business Partner, as applicable, for removal of the CBU Capability Feature(s) from the CBU Machine. When ordered from IBM, such removal shall be provided for no charge; and grant IBM sufficient access to the CBU Machine for IBM to remove the CBU Capability Feature(s). Such access will be at a time mutually agreed upon by Customer and IBM but shall not be later than the date this CBU Attachment expires or terminates for the CBU Machine.

If Customer fails to place an order or grant IBM sufficient access to remove the CBU Capability Feature(s) or CBU Upgrade(s), as specified above, Customer will be obligated for all charges subsequently incurred for any CBU Upgrade Activated for the CBU Machine, even if the CBU Machine is not within Customer's possession or control.

### **General**

Customer is not entitled to any prorated refund or credit from IBM for paid charges in the event of early termination of this CBU Attachment unless such early termination is due to IBM's non-compliance with the terms of this CBU Attachment, RC Attachment, CoD Attachment or the Agreement.

This CBU Attachment, the RC Attachment, the COD Attachment, and the Agreement comprise the complete agreement regarding the IBM System z Capacity Back Up offering, and replace any prior oral or written communications between Customer and IBM. In entering into this CBU Attachment, neither party is relying on any representation that is not specified in the CBU Attachment (or the documents specified in the preceding sentence), including without limitation any representations concerning: i) performance or function of any Product or system, other than as documented in its Specifications; ii) the experiences or recommendations of other parties; or

iii) results or savings Customer may achieve. Additional or different terms in any written communication from Customer (such as a purchase order) are void.

### 3.14.3.2 ATTACHMENT SYSTEM Z REPLACEMENT CAPACITY OFFERINGS

The terms of this Attachment for IBM System z Replacement Capacity Offerings (“RC Attachment”) are in addition to i) the Attachment for IBM System z Capacity on Demand Offerings in effect between Customer and IBM and identified above (“CoD Attachment”) and govern IBM’s provision and Customer’s acquisition and use of an IBM System z Replacement Capacity Offering. When used in this Attachment, “Customer” means the Originating US Government customer (defined as an Agency or an affiliated entity of the US Government) that is acquiring the IBM System z Capacity on Demand Offering, subject to the Agreement.

#### **Associated Attachments**

This RC Attachment and the CoD Attachment provide terms that apply in general to all IBM System z Replacement Capacity Offerings. This RC Attachment is an Associated Attachment to the CoD Attachment. Additional terms as set forth in RC Associated Attachments govern each specific Replacement Capacity Offering. The terms of this RC Attachment apply only when Customer has contracted for a Replacement Capacity Offering under one or more RC Associated Attachments.

If there is a conflict between the terms of the RC Attachment and the CoD Attachment, the terms of this RC attachment prevail. If there is a conflict between the terms of this RC Attachment and an RC Associated Attachment, the terms of the RC Associated Attachment prevail over those of this RC Attachment. If there is a conflict among the terms of the RC Associated Attachments, the order of precedence will be as set forth in the applicable RC Associated Attachments.

#### **Definitions**

Capitalized terms not defined in this RC Attachment or in the Agreement have the meaning ascribed to them in the CoD Attachment.

**IBM Program License** -- a license agreement containing terms and restrictions which govern the use of an IBM Program.

**Lost Capacity** – Capacity which Customer is authorized to use but is not able to use.

**RC Eligible Machine** – an Eligible Machine for which Customer has acquired and installed one or more RC Enablement Features.

**RC Enablement Feature** -- a Capability Feature specifying that an Eligible Machine is authorized by IBM to be temporarily upgraded with an RC Upgrade.

**Replacement Capacity Associated Attachment (also called an “RC Associated Attachment”)** -- a separate Attachment between Customer and IBM which specifies terms in addition to those in this RC Attachment and the CoD Attachment governing IBM’s provision and Customer’s acquisition and use of a certain Replacement Capacity Offering, and which references this RC Attachment and the CoD Attachment.

**Replacement Capacity Offering (also called an “RC Offering”)** – a Capacity on Demand Offering governed by this RC Attachment.

**Replacement Capacity Upgrade (also called an “RC Upgrade”)** -- an IBM modification to the LIC of an RC Eligible Machine that enables the RC Eligible Machine to perform temporarily as an Upgraded RC Eligible Machine.

**Upgraded RC Eligible Machine** -- an RC Eligible Machine for which Built-in-Capacity has been Activated as authorized under terms of this RC Attachment and an RC Associated Attachment.

### **Temporary LIC License**

IBM authorizes Customer to Activate an RC Upgrade and operate an RC Eligible Machine as an Upgraded RC Eligible Machine, for a limited period of time, as specified in an RC Associated Attachment. For purpose of such Activation, IBM grants Customer a temporary license to use the LIC on the RC Eligible Machine to the extent Customer is authorized to Activate an RC Upgrade for such RC Eligible Machine, as specified herein and in the RC Associated Attachment.

### **IBM Program and Machine Maintenance Service Charges**

Customer’s authorization to Activate an RC Upgrade does not entitle Customer to any additional authorizations for use of IBM Programs. Upon reasonable notice, during normal business hours, and in a manner that minimizes disruption to Customer’s business, Customer agrees to grant IBM sufficient access to RC Eligible Machines, including without limitation information regarding the use of IBM Programs on RC Eligible Machines, for the sole purpose of verifying Customer’s compliance with IBM Program License terms.

An RC Upgrade that Customer Activates in accordance with the terms specified in either this RC Attachment or an RC Associated Attachment will not change IBM Program charges (provided Customer does not exceed its authorization for use of IBM Programs) or IBM maintenance Service charges. During the period that an RC Upgrade is Activated, Customer will continue to be responsible for all recurring charges for IBM Programs and IBM Machine maintenance Service at the rate applicable prior to the RC Upgrade being Activated and subject to the terms of each applicable IBM Program License and IBM maintenance Service agreement. Should Customer exceed its authorizations for use of IBM Programs, Customer will be responsible for all applicable license charges, in addition to IBM’s other remedies that may be available under the terms of this Contract.

### **Term and Termination**

#### ***Term***

The term of this RC Attachment begins once IBM receives a funded order from the Government and ends upon termination as specified in Section 5.2 below.

#### ***Termination***

This RC Attachment terminates for a specific RC Eligible Machine when the Customer sells or otherwise transfers possession outside your Department or agency (including military department) of the RC Eligible Machine, or any part of the RC Eligible Machine containing On-Demand Capacity.

Customer may terminate this RC Attachment, or terminate Customer’s rights under this RC Attachment for any specific RC Eligible Machine, by providing written notice to IBM. Such termination is effective the later of a) the date of termination Customer specifies in such notice or

b) the date IBM completes the removal of the RC Enablement Feature from each RC Eligible Machine(s) associated with such termination.

Customer's rights under this RC Attachment for an RC Eligible Machine terminate upon the earliest of the following events: i) IBM withdraws maintenance Service for the Machine type and model of the RC Eligible Machine; ii) the CoD Attachment terminates; or iii) this RC Attachment terminates.

Either party may terminate this RC Attachment if the other fails to comply with any of its terms, provided the one who is not complying is given written notice and reasonable time, not to exceed 30 days, to comply.

Upon termination of this RC Attachment, all RC Associated Attachments, and all rights for RC Eligible Machines under the RC Associated Attachments, terminate.

### **Customer's Responsibilities**

Customer is responsible for acquiring, at Customer's expense, adequate memory, channels, and other system resources necessary to satisfy Customer's operational requirements for use of an Upgraded RC Eligible Machine.

This RC Attachment, including its RC Associated Attachments, the CoD Attachment, and the Agreement comprise the complete agreement regarding IBM Replacement Capacity Offerings, and replace any prior oral or written communications between Customer and IBM. In entering into this RC Attachment, neither party is relying on any representation that is not specified in the RC Attachment (or the documents specified in the preceding sentence), including without limitation any representations concerning: i) performance or function of any Product or system, other than as documented in its Specifications; ii) the experiences or recommendations of other parties; or iii) results or savings Customer may achieve. Additional or different terms in any written communication from Customer (such as a purchase order) are void.

### **3.14.3.3 ATTACHMENT SYSTEM Z CAPACITY FOR PLANNED EVENTS**

The terms of this Attachment for IBM System z Capacity for Planned Events ("CPE Attachment") are in addition to i) Attachment for IBM System z Capacity on Demand Offerings identified above ("CoD Attachment"), and iii) the Attachment for IBM System z Replacement Capacity Offerings identified above ("RC Attachment") and govern IBM's provision and Customer's acquisition and use of the IBM System z Capacity for Planned Events ("CPE") offering. When used in this Attachment, "Customer" means the Originating US Government customer (defined as an Agency or an affiliated entity of the US Government) that is acquiring the IBM System z Capacity on Demand Offering, subject to the Agreement.

### **Associated Attachments**

This CPE Attachment, the RC Attachment and the CoD Attachment provide terms that apply to the IBM System z Capacity for Planned Events offering. This CPE Attachment is i) an "Associated Attachment" to the CoD Attachment and ii) an "RC Associated Attachment" to the RC Attachment.

If there is a conflict among the terms of this CPE Attachment and the RC Attachment or the CoD Attachment, those of this CPE Attachment prevail over those of the RC Attachment and the CoD Attachment.

### **Definitions**

Capitalized terms not defined in this CPE Attachment or in the Agreement have the meaning ascribed to them in the RC Attachment or the CoD Attachment, as applicable.

**CPE Capability Feature** – an RC Enablement Feature specifying that an RC Eligible Machine is authorized by IBM to be temporarily upgraded with a CPE Upgrade.

**CPE Machine** – an RC Eligible Machine for which Customer has acquired and installed one or more CPE Capability Features.

**CPE Upgrade** – a certain RC Upgrade whereby the CPE Machine performs temporarily as an Upgraded CPE Machine.

**Event End** – the earlier of i) reasonable restoration of Lost Capacity or ii) three (3) days following Activation of a CPE Upgrade for purpose of a Planned Event.

**Lost Capacity** – for the purpose of this CPE Attachment, "Lost Capacity" means the Capacity which Customer is authorized to use and was the basis for Customer declaring a Planned Event.

**Planned Event** – an event that Customer declares due to any loss of substantial IBM System z or IBM System/390 Machine Capacity at one or more sites within Customer's Enterprise.

**Upgraded CPE Machine** – the Upgraded Eligible Machine for a CPE Machine.

### **Term and Termination**

#### ***Term***

The term of this CPE Attachment begins once IBM receives a funded delivery order and ends upon termination as specified in accordance with Section 3.2 below.

#### ***Termination***

This CPE Attachment terminates for a specific CPE Machine when the Customer sells or otherwise transfers possession outside your Department or agency (including military department) of the CPE Machine, or any part of the CPE Machine containing On-Demand Capacity.

Customer may terminate this CPE Attachment, or terminate Customer's rights under this CBU Attachment for any specific CBU Machine, by providing written notice to IBM. Such termination is effective the later of i) the date of termination Customer specifies in such notice or ii) the date IBM completes the removal of all CPE Capability Features from Customer's CPE Machine(s).

Customer's rights under this CPE Attachment for a CPE Machine terminate upon the earliest of the following events: i) Customer transfers possession or control of the CPE Machine to another party (for example, Customer returns the CPE Machine to a lessor, transfers the CPE Machine outside of the Department or agency – including military department); ii) the RC Attachment terminates; or iii) this CPE Attachment terminates.

Either party may terminate this CPE Attachment if the other fails to comply with any of its terms, provided the one who is not complying is given written notice and reasonable time, not to exceed 30 days, to comply.

### **Temporary LIC License**

Customer's temporary license to use the LIC on a CPE Machine will commence on the date Customer Activates the CPE Upgrade and will terminate upon the later of the following: i) the Event End or ii) termination of the rights under this CPE Attachment for the CPE Machine.

### **CPE Upgrade Authorizations**

IBM's authorization for Customer to Activate a CPE Upgrade and operate a CPE Machine as an Upgraded CPE Machine is valid only for a Planned Event. In the event of Planned Event, such authorization will commence on the date Customer activates the CPE Upgrade and will terminate upon the Event End. During a Planned Event, Customer is authorized to execute, on the Capacity of the CPE Upgrade, only workload from within Customer's Enterprise which previously was being executed on the Lost Capacity.

### **Customer's Responsibilities**

Customer agrees as follows:

Customer will not use a CPE Capability Feature or an Upgraded CPE Machine other than for the purpose authorized under the terms of this CPE Attachment;

Customer will execute workload on the Capacity of a CPE Upgrade only as authorized under the terms of this CPE Attachment;

Customer will Deactivate the CPE Upgrade from the CPE Machine no later than the Event End; and Prior to expiration or termination of this CPE Attachment for a CPE Machine, Customer will:

Deactivate any CPE Upgrade from the CPE Machine and place an order with IBM or Customer's IBM Business Partner, as applicable, for removal of the CPE Capability Feature(s) from the CPE Machine. When ordered from IBM, such removal shall be provided for no charge.; and

grant IBM sufficient access to the CPE Machine for IBM to remove the CPE Capability Feature(s). Such access will be at a time mutually agreed upon by Customer and IBM, but shall not be later than the date this Addendum expires or terminates for the CPE Machine.

If Customer fails to place an order or grant IBM sufficient access to remove the CPE Capability Feature(s) or CPE Upgrade(s), as specified above, Customer will be obligated for all charges subsequently incurred for any CPE Upgrade Activated for the CPE Machine, even if the CPE Machine is not within Customer's possession or control.

### **General**

Customer is not entitled to any prorated refund or credit from IBM for paid charges if this CPE Attachment terminates early unless such early termination is due to IBM's non-compliance with the terms of this CPE Attachment, RC Attachment, CoD Attachment or the Agreement.

This CPE Attachment, the RC Attachment, the COD Attachment and the Agreement comprise the complete agreement regarding the IBM System z Capacity for Planned Events offering, and replace any prior oral or written communications between Customer and IBM. In entering into

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