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## CHAPTER 3. SPECIAL ITEM 334111: 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.

### MACHINES

A Machine is an IBM-branded device including its features, upgrades, and accessories.

### 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.

### 3.3 ACCEPTANCE

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

### 3.4 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**

IBM warrants that Machines used in their specified operating environment conform to their official published specifications. For a Machine, the warranty period is specified in the Attachment or Transaction Document. During its warranty period, IBM will repair or exchange the Machine without charge, as specified in the Attachment. Warranty does not apply to Machines that Client did not allow IBM to install as required by the Transaction Document. Client may purchase warranty service upgrades and post warranty support where available.

If a Machine does not function as warranted during its warranty period and IBM is unable to repair or replace it with a functional equivalent, Client may return it to IBM for a refund of the amount Client paid and Client's right to use it terminates.

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 does not warrant uninterrupted or error-free operation of a Product or that IBM will correct all defects or prevent third party disruptions or unauthorized third party access to an IBM Product. These warranties are the exclusive warranties and replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and , fitness for a particular purpose. IBM warranties will not apply if there has been misuse, modification, damage not caused by IBM, or failure to comply with instructions provided by IBM or if otherwise stated in an Attachment or Transaction Document. Non-IBM products are sold under the Agreement as-is, without warranties of any kind. Third parties may provide their own warranties to client.

Machines and parts removed or exchanged for upgrade, warranty service, or maintenance are IBM property and must be returned to IBM promptly. A replacement assumes the warranty or maintenance status of the replaced part. A Machine may include parts that are not new and in some instances Machines may have been previously installed. Regardless, IBM's warranty terms apply. Client will promptly install or allow IBM to install mandatory engineering changes. Client may only acquire Machines for Client's Enterprise and not for resale, lease or transfer.

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### 3.5 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).

### 3.6 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.

### 3.7 INSTALLATION

#### **Date of Installation**

**The warranty start date for each IBM Machine starts on the Machine's Date of Installation, which is:**

The date of installation and warranty start date for machines that require IBM installation will commence upon the earlier of the calendar day following the completion of the installation by IBM, or 45 days following shipment from IBM.

The date and installation and warranty start date for customer set up (CSU) machines will commence upon the earlier of two calendar days after delivery to IBM's end client by IBM's common carrier, or two calendar days after the standard transit allowance period from the last IBM location.

For a Machine that IBM is responsible to install, additional charges may apply for IBM installation more than six months after shipment.

### 3.8 OWNERSHIP

IBM will transfer title to the Government upon shipment of the Machine. Disputes associated with timely payment shall be resolved via the Disputes Act.

### 3.9 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.

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### 3.10 Machine Code and Built in Capacity

Machines may include Machine Code (MC) and Built in Capacity (BIC). MC is computer instructions, fixes, replacements and related materials, such as data and passwords relied on, provided, used with or generated by MC, that permit the operation of the machine's processors, storage or other functionality. MC is copyrighted and licensed (not sold). IBM only provides copies, fixes or replacements for MC for Machines under warranty or IBM maintenance, or under a separate written agreement which may be subject to additional charges. Client agrees that all copies, fixes or replacements for MC will be obtained solely as authorized by IBM. Client is granted a nonexclusive license to use MC only: i) on the Machine for which IBM provided it; and ii) to access and use BIC only to the extent paid for by Client, activated by IBM and subject to the Attachment called IBM Authorized Use Table for Machines (AUT) available from IBM and at

[http://www.ibm.com/systems/support/machine\\_warranties/machine\\_code/aut.html](http://www.ibm.com/systems/support/machine_warranties/machine_code/aut.html). BIC is computing resource (e.g., processors, storage and other functionality) that IBM provides for a Machine. Use of BIC may be restricted by contract, technological or other measures. Client agrees to IBM's implementation of technological and other measures that restrict, monitor, and report on use of BIC or MC, and to install any changes IBM provides. Client may not alter, reverse assemble, reverse compile, translate or reverse engineer the MC, or circumvent or interfere, by any means, with IBM's contractual, technological or other measures that restrict, monitor or report on use of BIC or MC. While Client's license to MC is in effect, Client may transfer possession of the entire MC along with all of Client's rights and obligations only with corresponding transfer of the Machine and a hardcopy of this MC license, and only if the transferee agrees to the terms of this MC license. Client's MC license terminates immediately upon transfer. This Agreement governs MC and BIC on Machines acquired from another party. Use of BIC in excess of authorizations from IBM is subject to additional charges

### 3.11 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.

### 3.12 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.

### 3.13 ENERGY EFFICIENT PRODUCTS

IBM's products certified as ENERGY STAR ® products or FEMP-designated products are available at the following websites.

<http://www-03.ibm.com/systems/power/hardware/energy-star/>

and <http://www-03.ibm.com/systems/storage/energy-star/index.html>

### 3.14 HARDWARE OFFERINGS

#### 3.14.1 ATTACHMENT FOR IBM POWER SYSTEMS TEMPORARY CAPACITY ON DEMAND

The terms of Chapter 1, Chapter 3 and this Attachment for IBM Power Systems Temporary Capacity on Demand govern IBM's provision and Government's acquisition and use of the IBM Power Systems On/Off Capacity on Demand offering ("On/Off CoD").

##### 1. Definitions

**Activate** – to enable On-Demand Capacity for use.

**Monitoring Program** -- software IBM licenses to Government (for example, the IBM Electronic Service Agent Program) that (i) monitors Activation of Temporary Capacity, and (ii) reports TCoD Units to IBM through a telecommunications connection.

**On-Demand Capacity** – the amount of resources, such as processors, storage, memory, that is installed on a TCoD Machine but that is not enabled for use (for example, resources which IBM documentation refers to as "on-demand processors").

**Requested Units** -- TCoD Units Government specifies when Government Activates On-Demand Capacity.

**TCoD Billing Feature** -- a feature, used for billing purposes, that specifies the price for each TCoD Unit. The TCoD Billing Feature is orderable in the quantity and type of TCoD Units that are Activated during a TCoD Billing Quarter.

**TCoD Billing Quarter** -- a calendar quarter for which Government's Activation of Temporary Capacity is monitored for billing purposes.

**TCoD Enablement Feature** -- a feature which, when included in the configuration of a TCoD Machine, (i) authorizes Government to perform Activations and use Temporary Capacity on the TCoD Machine, and (ii) provides a key (referred to in IBM documentation as the "TCoD Enablement Code") to enable Government Activation and Government management of Temporary Capacity on the TCoD Machine.

**TCoD Machine** -- an IBM Power Systems Machine that supports Temporary Capacity on Demand (“TCoD”) (which may also be referred to in IBM literature or otherwise known as “On/Off Capacity on Demand,” “On/Off CoD,” “On/Off Capacity Upgrade on Demand,” or “On/Off CUoD”) and for which IBM offers TCoD features. Each TCoD Machine will be specified in an IBM Supplement for IBM Power Systems Temporary Capacity on Demand (“Supplement”).

**TCoD Unit Maximum** -- a TCoD Enablement Feature’s maximum number of TCoD Units available for Activation. Once this maximum is reached, Government must obtain a new TCoD Enablement Feature in order to perform additional Activations.

**TCoD Units** -- the duration and amount of On-Demand Capacity that is Activated. For example, “Processor Days” (number of Activated processors multiplied by the number of 24-hour periods plus any partial 24-hour period), or “Memory Days” (the amount of Activated memory multiplied by the number of 24-hour periods plus any partial 24-hour period) are the TCoD Units measuring Activation of processors and memory, respectively. TCoD Units include both Requested Units and Unreturned Units.

**Temporary Capacity** -- On-Demand Capacity that has been Activated.

**Unreturned Units** -- TCoD Units that remain Activated after expiration of the duration Government specified when Government Activated On-Demand Capacity.

## 2. Use of Temporary Capacity

Government agrees to the following:

- a. Government is responsible for the charges associated with each TCoD Unit measured on Government’s TCoD Machine during a TCoD Billing Quarter. This responsibility is satisfied when Government orders a sufficient quantity of TCoD Billing Features and pays IBM for the TCoD Billing Features. The amount due will be at IBM’s then-current GSA prices for the TCoD Billing Feature applicable to the associated TCoD Billing Quarter;
- 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 for the actual TCoD Units reported by the Monitoring Program, or as otherwise specified below.
- c. Government will install (unless preinstalled), configure, and maintain the Monitoring Program on each TCoD Machine in the manner specified by IBM in the Monitoring Program’s documentation, for the purpose of reporting TCoD Units to IBM at the interval(s) determined solely by IBM;
- d. if Government becomes aware that the Monitoring Program is disabled, disconnected or otherwise unable to accurately report TCoD Units to IBM, Government will promptly notify IBM, and allow IBM to access the TCoD Machine for the sole purpose of determining, if possible, the measurement of TCoD Units for which Government is responsible;



- e. if (a) 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 Government fails to promptly notify IBM and allow access as described in Section 2.d above, then Government will be responsible for TCoD Units as if all of the associated TCoD Machine's available On-Demand Capacity was Activated during the entire period for which the Monitoring Program did not measure or report TCoD Units to IBM. IBM may exercise its rights to discontinue the Government's use of the TCoD offering, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes); and
- f. upon reasonable notice, during normal business hours, and in a manner that minimizes disruption to Government's business, Government agrees to grant IBM sufficient access to TCoD Machines, including without limitation information regarding the use of IBM Programs on TCoD Machines, for the sole purpose of verifying Government's compliance with the terms of this Attachment and IBM Program license terms.

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

Government agrees to the following:

- a. Government represents and warrants that, at the time a TCoD Enablement Feature is ordered with, or for, a TCoD Machine, Government is either the owner of the TCoD Machine or Government has the permission from the owner and any lien holders for placing such order and Activating On-Demand Capacity;
- b. IBM is not responsible to notify any of Government's suppliers (for example, other software vendors who license their product on a per-processor basis) when Government Activates On-Demand Capacity;
- c. in addition to charges for Activation of On-Demand Capacity, Government is also responsible for 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);
- d. IBM reserves the right to change the process by which Temporary Capacity is made available for Government's use. Government will install (or if specified by IBM, allow IBM to install) and implement any such change on each applicable TCoD Machine within a commercially reasonable time period following receipt of notice from IBM reserves the right to change the Monitoring Program or the means by which IBM monitors Activation of On-Demand Capacity. Government will install (or if specified by IBM, allow IBM to install) and implement any such change within a commercially reasonable time period following receipt of notice from IBM;
- e. this offering is comprised solely of the computer resource identified as On-Demand Capacity available for a TCoD Machine. Government is responsible for providing all other computing resources (for example, memory, storage) that Government may require, adequate in type and quantity, to satisfy the needs of Government's computing environment; and
- f. prior to termination of this Attachment for a TCoD Machine, Government will provide IBM access to the TCoD Machine for IBM's removal of the TCoD Enablement Feature. If



Government transfers possession of a TCoD Machine without providing IBM such access, Government is, upon such transfer, responsible to IBM for the following charges associated with the transferred TCoD Machine:

- (1) unreported TCoD Units for Activated On-Demand Capacity, up to the TCoD Unit Maximum; and
- (2) any Unreturned Units, in excess of the TCoD Unit Maximum.

#### **4. Termination**

Government may terminate the rights under this offering for any specific TCoD Machine, by providing written notice to IBM. Such termination is effective the later of i) the date of termination Government specifies in such notice or ii) the date IBM completes the removal of the TCoD Enablement Feature from Government's applicable TCoD Machine(s), such removal to be performed at a mutually agreed upon time.

Government's rights under this Attachment for a TCoD Machine terminate upon the earliest of the following: i) Government transfers possession or control of the TCoD Machine to another party (for example, Government returns the TCoD Machine to a lessor); ii) the Government's purchase order expires. .

IBM may exercise its rights to discontinue this TCoD offering if the Government fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52,233-1 (Disputes).

Any terms of this Attachment which by their nature extend beyond termination remain in effect until fulfilled.

#### **5. Warranty**

IBM hardware warranty terms apply. As such, the warranty period for On-Demand Capacity commences upon the Date of Installation of the On-Demand Capacity, regardless of when or whether Government Activates the On-Demand Capacity.

#### **6. Machine Code**

Government's use of Machine Code on a TCoD Machine is subject to the terms and restrictions governing such use as specified in the Agreement. Government's use of Temporary Capacity is governed by the terms and restrictions that govern Machine Code except as expressly provided in this Attachment. Machine Code does not include any Program or code provided under a separate license agreement, including without limitation an open source license agreement.

##### **6.1 Built-in-Capacity**

A TCoD Machine includes 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 is properly acquired directly from IBM or through an authorized IBM reseller (called "Built-in-Capacity"). Such computing resources and capabilities include without limitation 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 Government is the rightful possessor of a TCoD Machine, IBM grants Government a license to use the Machine Code (or any replacement IBM provides) on, or in conjunction with, only the TCoD Machine for which the Machine Code is provided, and only to the extent of authorizations Government has acquired

for access to and use of Built-in-Capacity. If Government's use of Built-in-Capacity exceeds such IBM authorizations, Government agrees IBM will invoice the Government for charges based on the full price of permanent, unrestricted use of the Built-in-Capacity at the then-current GSA price.

## ***6.2 Temporary License***

For the purpose of an Activation, IBM grants Government a temporary license to use the Machine Code on the TCoD Machine to support Government's use of Temporary Capacity, as authorized herein. Government's temporary license to use the Machine Code on a TCoD Machine will commence on the date Government performs the Activation and will terminate upon the earlier of the following: i) Government's Deactivation of the Temporary Capacity, and ii) expiration or termination of Government's rights under this Attachment for the TCoD Machine.

## ***6.3 Circumvention of Technological Measures***

Built-in-Capacity and Activation of Temporary Capacity are limited by certain technological measures in Machine Code. Government 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 Government with changes to such technological measures. Government agrees, at IBM's option, to apply or allow IBM to apply such changes.

This Attachment, including its Supplements, and Chapter 1 and Chapter 3 are the complete agreement regarding IBM's provision of On/Off CoD, and replace any prior oral or written communications between Government Customer and IBM. By issuing IBM an order for this offering, neither party is relying on any representation that is not specified in this Attachment including without limitation any representations concerning: i) performance or function of On/Off CoD; ii) the experiences or recommendations of other parties; or iii) results or savings Government Customer may achieve. Additional or different terms regarding this On/Off CoD offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

### **3.14.2 ATTACHMENT FOR DS8000 STANDBY CAPACITY ON DEMAND**

The terms of Chapter 1, Chapter 3 and of this Attachment for DS8000 Standby Capacity on Demand ("Attachment") govern IBM's provision and Government's use of IBM System Storage DS8000 Standby Capacity on Demand.

#### **1. Definitions**

**Activate/Activation/Activating** – Irrevocable enabling of On-Demand Storage for use.

**Authorized Disk Drives** – The quantity of disk drives permanently acquired on an Eligible System.

**Capacity** – Amount of resources, such as processors, disk drives, memory, adapters, supporting the functional capability of a Machine.

**Eligible Machine** – An IBM System Storage DS8000 Machine configured for Standby Capacity on Demand, and specified in an IBM Supplement for DS8000 Standby Capacity on Demand (“Supplement”).

**Eligible System** – Two or more Eligible Machines that are directly connected and combining their respective Capacity such that they appear as one unit to other Machines to which they are connected.

**Function Authorization** – Enablement (technical or contractual) of a specific function on an Eligible Machine (for example, IBM’s “Licensed Functions”, such as “Operating Environment” and “FlashCopy”) at a given Capacity level.

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

**On-Demand Storage** – Capacity 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.

## 2. Activation of On-Demand Storage

- a. For each Eligible Machine, On-Demand Storage is available only in the Available On-Demand Storage Increment, as specified in the Supplement associated with that Eligible Machine.
- b. Government agrees to Activate the entire Available On-Demand Storage Increment when Government configures any portion of its On-Demand Storage for use.
- c. When Government Activates any On-Demand Storage on an Eligible Machine, Government agrees to the following:
  - (1) Government must issue an order to IBM prior to activating an upgrade
  - (2) IBM will invoice the Government for the upgrade associated with the Activation, including any associated Function Authorization upgrades applicable for that Eligible Machine. The amount invoiced will be at IBM’s then current GSA price and terms for the upgrade.
- d. Should Government Activate any On-Demand Storage on a selected Eligible Machine and not place an order prior to activation of the upgrade, IBM reserves the right to directly invoice Government, for the upgrade associated with the Activation, as well as for any associated Function Authorization upgrades applicable for that Eligible Machine. The sale of any such upgrade will be at IBM’s then current GSA prices and terms.
- e. Government understands that an Eligible System’s amount of On-Demand Storage may not exceed the lesser of a) one-half of the Authorized Disk Drives of that Eligible System or b) the largest Maximum On-Demand Capacity specified in any quote or proposal documentation associated with that Eligible System. In the event changes to an Eligible System cause Government to exceed this limit, Government agrees to immediately Activate

an appropriate amount of On-Demand Storage such that the Eligible System remains within this limit.

- f. Government agrees to Activate all On-Demand Storage on an Eligible Machine within the Activation Period specified in that Eligible Machine's documentation provided by IBM.
- g. 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.

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

Government agrees to the following:

- a. Government represents and warrants that, at the time of Activating On-Demand Storage, Government is the owner of the Eligible Machine or that Government has the permission from the owner and any lien holders for the Activation to be conducted as specified in this Attachment.
- b. In addition to charges for the Activation of On-Demand Storage, Government is responsible for any charges resulting from, or necessary for, the Activation, including those for requisite hardware, software, or services (for example, additional maintenance charges).
- c. Government is responsible for any required notification of Government's suppliers (for example, other software suppliers who license their product on an Eligible Machine Capacity basis) when Government Activates On-Demand Storage.
- d. IBM reserves the right to change the process by which On-Demand Storage is Activated. Government will install and implement, or will allow IBM to install and implement, as determined by IBM, such a change on each applicable Eligible Machine.
- e. Government will enable the IBM ESS Call Home function for each Eligible Machine in accordance with IBM's documentation. Government will not 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.
- f. In the event IBM changes the means by which it monitors the Capacity of an Eligible Machine, Government will implement any such change, as necessary, for example, by installing and running a new Monitoring Program.
- g. Government will Activate all On-Demand Storage on an Eligible Machine prior to upgrading that Eligible Machine to a new machine type or model, unless this provision is waived in writing by IBM.
- h. This offering is comprised solely of On-Demand Storage. Government is responsible for providing all other computing resources (for example, memory, processors, channels) that Government may require, adequate in type and quantity, to satisfy the needs of Government's computing environment.

- i. Government hereby acknowledges its understanding that any requirement for the reduction of a Function Authorization, in whole or in part, may require an outage of the associated Eligible Machine.
- j. Government will not circumvent technological measures intended to prevent unauthorized use of On-Demand Storage, or use a third party product to do so, or otherwise access or use unauthorized On-Demand Storage. Government will install, or allow IBM to install, as determined by IBM, changes to such technological measures if IBM determines such changes are appropriate.

#### **4. Termination**

This offering terminates for an Eligible Machine upon the earliest occurrence of any of the following:

- a. Government transfers possession of the Eligible Machine, or any part of the Eligible Machine containing On-Demand Storage to a third party (for example, return the Eligible Machine to the leasing company at lease-end);
- b. Government removes, disables or fails to install a Monitoring Program on the Eligible Machine; or
- c. Upon Government's one month's written notice to IBM.

Government agrees to give IBM one month's written notice in the event Government anticipates termination under (a) or (b) above.

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

IBM may exercise its rights to discontinue the Government's use of the Standby Capacity offering, upon written notice to the Government, if the Government fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

#### **5. Warranty**

IBM hardware warranty terms apply. The warranty period for On-Demand Storage, including all associated parts, is based on the date On-Demand Storage is physically installed, regardless of when or whether Activation occurs.

This Attachment, including its Supplements, Chapter 1 and Chapter 3 comprise the complete agreement regarding IBM DS8000 Standby Capacity on Demand, and replace any prior oral or written communications between Government and IBM. In entering into this Attachment, neither party is relying on any representation that is not specified in the 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 Government may achieve. Additional or different terms in any written communication from Government (such as a purchase order) are void.

### 3.13.3 ATTACHMENT FOR XIV STANDBY CAPACITY ON DEMAND

The terms of this Attachment for XIV Standby Capacity on Demand (“Attachment”) are in addition to the terms of this Chapter 1 and Chapter 3, and govern IBM’s provision and Government’s acquisition and use of the IBM XIV Standby Capacity on Demand offering.

The IBM XIV Standby Capacity on Demand offering permits Government to order On-Demand Storage Capacity for an Eligible Machine that is in addition to useable Storage Capacity. Government may then Activate, as Government deems necessary, such On-Demand Storage Capacity, acquiring each increment of On-Demand Storage Capacity at the time of Activation. Within 24 months following the Eligible Machine’s Date of Installation, Government must Activate all of the Eligible Machine’s On-Demand Storage Capacity.

#### 1. Definitions

**Activation** -- The configuration (that is, the allocation, whether designated for volumes or reserved for snapshots) of a certain increment of On-Demand Storage Capacity enabling such increment to be available for storage of data.

**Authorized Storage Capacity** -- The extent of Storage Capacity for which entitlement for use has been acquired. An Eligible Machine’s initial Authorized Storage Capacity is specified in the Eligible Machine’s Supplement.

**Eligible Machine** -- An IBM XIV Storage System Machine (designated by IBM as either Machine type 2810 or 2812) configured with the “CoD Interface Module” feature (designated by IBM as either feature code 1145, 1147, 2027, 2027, 2127 or 2137) and the “CoD Data Module” (designated by IBM as either feature code 1146, 1148, 2028, or 2038) and specified in an IBM Supplement for XIV Standby Capacity on Demand (“Supplement”).

**On-Demand Storage Capacity** -- The useable disk capacity installed on an Eligible Machine but not Activated. An Eligible Machine’s initial On-Demand Storage Capacity is specified in the Eligible Machine’s Supplement.

**Storage Capacity** -- The total usable disk capacity (including Authorized Storage Capacity and On-Demand Storage Capacity) installed within an Eligible Machine for the storage of data. An Eligible Machine’s initial Storage Capacity is specified in the Eligible Machine’s Supplement.

**TB** -- Terabyte

**XIV Program** – The IBM XIV Storage System Software Program (designated by IBM as 5639-XXA) licensed for use with an Eligible Machine.

#### 2. Activation of On-Demand Storage

Upon each Activation beyond an Eligible Machine’s Authorized Storage Capacity, Government agrees to place an order with IBM for each of the following prior to such Activation:

- a. the Eligible Machine’s “CoD Activation” feature, designated by IBM as one of the following:
  - (1) as feature code 1149, if the Eligible Machine includes feature code 1145;
  - (2) as feature code 1150, if the Eligible Machine includes feature code 1147;



- (3) as feature code 2029, if the Eligible Machine includes feature code 2027;
  - (4) as feature code 2129, if the Eligible Machine includes feature code 2127;
  - (5) as feature code 2039, if the Eligible Machine includes feature code 2027; or
  - (6) as feature code 2139, if the Eligible Machine includes feature code 2137; and,
- b. The Eligible Machine's XIV Program "Basic License Charge" feature (designated by IBM as feature code 0001).

Once acquired by Government, each such CoD Activation feature increases the Eligible Machine's Authorized Storage Capacity by one On-Demand Storage Increment as specified in the Eligible Machine's Supplement; and each such Basic License Charge feature increases the Eligible Machine's XIV Program license authorization by one On-Demand Storage Increment as specified in the Eligible Machine's Supplement. Government agrees to order sufficient quantity of CoD Activation features and Basic License Charge features such that the Eligible Machine's amount of Authorized Storage Capacity and the Eligible Machine XIV Program license authorization is equal to or greater than the total amount of Storage Capacity that has been Activated on the Eligible Machine.

For a CoD Activation feature and Basic License Charge feature ordered directly from IBM, applicable charges will be based on the prices specified in the associated Supplement.

### 3. Term and Termination

- a. The term of this Attachment begins once IBM receives a funded delivery order and ends upon termination or upon expiration of the Government's purchase order.

For each Eligible Machine, Government's rights under this Attachment terminate upon the earlier of the following:

- (1) Expiration of the "Authorization Period" specified in the Eligible Machine's Supplement;
- (2) Transfer of the Eligible Machine to another party, including without limitation return of the Eligible Machine to a leasing company;
- (3) The effective date specified in Government's written request to IBM

Upon such termination the Government agrees to Activate any remaining On-Demand Storage Capacity for the Eligible Machine; the terms of Section 2 above apply to such Activation. In addition, Customer's rights under the CoD Attachment or CoD Agreement terminate if Government Activates all available On-Demand Storage Capacity on an Eligible Machine without also ordering additional On-Demand Storage Capacity for the Eligible Machine.

- b. IBM may exercise its rights to discontinue the Government's Standby Capacity offering if the Government fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).
- c. Any terms of this Attachment which by their nature extend beyond termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.



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#### 4. General Offering Terms

- a. Government represents and warrants that Government is either the owner of the Eligible Machine or Government has the permission of the owner and any lien holders for Activation of the Eligible Machine's On-Demand Storage Capacity. For Eligible Machines owned by IBM or IBM Global Financing, such permission is hereby granted.
- b. Government is responsible for any increase to Program or service charges that result from an Activation.
- c. Government is responsible for any required notification to Government's suppliers (for example, other software suppliers who license their product on an Authorized Storage Capacity basis), as appropriate and necessary, when Government performs an Activation.
- d. IBM will make available to Government reasonable instructions to properly perform an Activation. Government agrees to follow such instructions. IBM reserves the right to change such instructions upon written notice to Government. Government agrees to follow updated instructions provided such change is no charge to Government.
- e. Government agrees to enable the IBM XIV Informational Event Notification function for the Eligible Machine in accordance with IBM's documentation. Government will not modify such function, attempt to prevent or disable such function, or modify an Eligible Machine such that the amount of capacity used on the Eligible Machine cannot be accurately monitored by IBM.
- f. Government agrees to grant IBM access to the Eligible Machine, including usage data for the Eligible Machine, upon reasonable prior request for the sole purpose of verifying Government's use of the Eligible Machine's Storage Capacity. Such access will be at a mutually agreed upon time during normal business hours and will not require an interruption to the operation of the Eligible Machine.
- g. In the event IBM changes the means by which it monitors the amount of capacity used on the Eligible Machine, Government agrees to implement such change if provided at no charge to Government.
- h. The IBM XIV Standby Capacity on Demand offering only provides additional capacity for use on an Eligible Machine. Government is responsible to provide other computing resources (for example memory, processors, adapters) that Government may require, adequate in type and quantity, to satisfy the needs of Government's storage and computing environment.
- i. Government will not circumvent any technological measures intended to prevent unauthorized use of On-Demand Storage Capacity, or use a third party product to do so, or otherwise access or use unauthorized On-Demand Storage Capacity other than as specified herein. Government agrees to install, or allow IBM to install, additional technological measures or changes to such technological measures if IBM determines such changes are appropriate. Any such change, and its installation, will be at no charge to Government, with installation being at a mutually agreed upon time within a commercially reasonable period following IBM's notice to Government.

- j. Government authorizes IBM and its subsidiaries (and their successors and assigns, contractors, and IBM Business Partners) to store and use Government's business contact information wherever they do business in connection with IBM Products and Services or in furtherance of IBM's business relationship with Government.

This Attachment, including its Supplement(s), Chapter 1 and Chapter 3 are the complete agreement regarding the IBM XIV Standby Capacity on Demand offering, and replace all prior oral or written communications, representations, undertakings, warranties, promises, covenants, and commitments between Government and IBM. In entering into this Attachment, neither party is relying on any representation that is not specified in the Attachment or the Agreement. Additional or different terms regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

### 3.13.4 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 Government Customer.

#### 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. The Customer may not transfer the Machine that is subject to this CoD offering or delegate the Customer's obligations under the terms of this offering 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, IBM will invoice for charges based on the full price of permanent, unrestricted use of the Built-in-Capacity at the then-current price. The Customer is not authorized to use such Built-in-Capacity until additional funding is received by IBM.

### ***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 removes or 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 offering, or terminate Customer's rights under this CoD offering for any specific Eligible Machine, upon one month's prior written notice in accordance with the terms of the Agreement. Such notice must be provided to IBM if an Eligible Machine is removed seeks to transfer possession as stated above.

IBM may exercise its rights to discontinue the Customer's CoD offering upon written notice if the Customer fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

Upon termination of this CoD offering, this 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 Schedule terms 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 regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

#### **3.13.4.1 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 removes or 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); or iii) the RC Attachment terminates. IBM may exercise its rights to discontinue the Customer's CBU offering upon written notice if the Customer fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

### **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 offering for a CBU Machine, Customer will:

Deactivate any CBU Upgrade from the CBU Machine and place an order with IBM for removal of the CBU Capability Feature(s) from the CBU Machine. When ordered from IBM, such removal shall be provided for no charge; the Customer will 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.

### **General**

Customer is not entitled to any prorated refund or credit from IBM for paid charges in the event of termination of this CBU offering unless such 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 Schedule terms 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 regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

### 3.13.4.2 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 Government Customer 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 removes or otherwise transfers possession 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; or iii) IBM withdraws this offering.

IBM may exercise its rights to discontinue this offering upon written notice if the Customer fails to comply with any of the terms and conditions of this RC Attachment, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes). 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 regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.

### **3.13.4.3 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 Government Customer 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 removes or otherwise transfers possession 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 offering terminates; or iii) this CPE offering terminates.

IBM may exercise its rights to discontinue this CPE offering upon written notice if the Government fails to comply with any of its terms, subject to the Contract Disputes Act and FAR 52.233-1 (Disputes).

## **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.

### **General**

Customer is not entitled to any prorated refund or credit from IBM for paid charges if this CPE Attachment terminates unless such 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 this CPE Attachment, neither party is relying on any representation that is not specified in the CPE 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 regarding this offering identified in a Government Delivery Order, unless provided in an IBM proposal or quote, are void.



