

## **BMC MASTER SUBSCRIPTION SERVICES AGREEMENT**

THIS MASTER SUBSCRIPTION SERVICES AGREEMENT ("**AGREEMENT**") GOVERNS YOUR 30-DAY FREE TRIAL OF THE BMC SUBSCRIPTION SERVICES.

IF YOU PURCHASE THE BMC SUBSCRIPTION SERVICES, THIS AGREEMENT WILL ALSO GOVERN YOUR PURCHASE AND ONGOING USE OF THE BMC SUBSCRIPTION SERVICES.

BY ACCEPTING THIS AGREEMENT, EITHER BY CLICKING A BOX INDICATING YOUR ACCEPTANCE OR BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THESE TERMS AND CONDITIONS. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, YOU MUST NOT ACCEPT THIS AGREEMENT AND MAY NOT USE THE SERVICES.

You may not access the BMC Subscription Services if you are BMC's direct competitor, except with BMC's prior written consent. In addition, you may not access the BMC Subscription Services for purposes of monitoring their availability, performance or functionality, or for any other benchmarking or competitive purposes.

This Agreement was last updated on March 12, 2015. This Agreement is between the entity or individual entering into this Agreement ("**Customer**") and the BMC Contracting Entity for the applicable region as described in Section 12 ("**BMC**"). It is effective between Customer and BMC as of the date of your acceptance of this Agreement.

### **THIRTY DAY FREE TRIAL.**

BMC will make the BMC Subscription Services available to Customer on a trial basis free of charge until the earlier of (a) the thirtieth day after Customer's acceptance of this Agreement or (b) the start date of any Order for purchase of the BMC Subscription Services. Additional trial terms and conditions may appear on the trial registration web page. Any such additional terms and conditions are incorporated into this Agreement by reference and are legally binding.

**ANY DATA CUSTOMER ENTERS INTO THE BMC SUBSCRIPTION SERVICES, AND ANY CUSTOMIZATIONS MADE TO THE BMC SUBSCRIPTION SERVICES BY OR FOR CUSTOMER, DURING THE THIRTY DAY FREE TRIAL WILL BE PERMANENTLY LOST UNLESS CUSTOMER PURCHASES A SUBSCRIPTION TO THE SAME BMC SUBSCRIPTION SERVICES AS THOSE COVERED BY THE TRIAL, OR EXPORTS SUCH DATA BEFORE THE END OF THE THIRTY DAY TRIAL PERIOD.**

**NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THE AGREEMENT, DURING THE THIRTY DAY FREE TRIAL PERIOD THE BMC SUBSCRIPTION SERVICES ARE PROVIDED "AS IS" WITH NO WARRANTY.**

### **1. DEFINITIONS.**

**1.1 "Affiliate"** is an entity that controls, is controlled by or shares common control with BMC or Customer, where such control arises from either (a) a direct or indirect ownership interest of more than 50% or (b) the power to direct or cause the direction of the management and policies, whether through the ownership of voting stock by contract, or otherwise, equal to that provided by a direct or indirect ownership of more than 50%.

**1.2 "BMC Subscription Services"** means the hosted service which packages web-based access and the right-to-use the supported applications and associated reference, user and technical guides. One or more of BMC's subscription services offerings may be ordered pursuant to the terms of this Agreement. A list of the BMC Subscription Services available under this Agreement and an Order is provided on Attachment A.

**1.3 "Additional Services"** means the service(s) named and described in an Order for the purchase of such Additional Service.

**1.4 "Customer Data"** means all electronic data or information submitted to the BMC Subscription Services by Customer, a third party on behalf of Customer, or as directed by Customer.

**1.5 "Order"** means (i) the agreed ordering document for the purchase of the Services, (ii) that is subject to this Agreement, and (iii) that identifies the particulars of the purchase and fees to be paid.

**1.6 "Capacity"** means the amount of access to the BMC Subscription Services purchased as specified in an Order, which is counted in accordance with the Unit of Measure described in Exhibit A or the Order.

**1.7 "User Guide"** means the online documentation for the BMC Subscription Service, which includes functional guides and technical specifications, as updated by BMC from time to time.

**2. SCOPE.** Subject to Customer's payment of applicable fees, BMC will provide Customer with access to BMC's Subscription Service and with the Additional Services (together, the "**Services**") as set forth in this Agreement and the applicable Order. This Agreement contemplates the execution by the parties of one or more Orders. Orders may be entered under this Agreement by and between (a) BMC or an Affiliate of BMC; and (b) the Customer or an Affiliate of Customer. With respect to an Order, the terms "BMC" and "Customer" as used in this Agreement will be deemed to refer to the entities that execute that

Order, the Order will be considered a two party agreement between such entities, and BMC will separately invoice the Customer named in the Order for the associated subscription fees. Neither execution of this Agreement, nor anything contained herein, shall obligate either party to enter into any Orders.

### **3. BMC SUBSCRIPTION SERVICES.**

**3.1 Access Rights.** Subject to the terms of this Agreement, BMC hereby grants to Customer a worldwide, non-exclusive, non-transferable, non-sublicenseable, limited license to access and use the BMC Subscription Services (i) up to the Capacity, (ii) for Customer's and its Affiliates' internal business operations, (iii) in accordance with the User Guide and the applicable Order.

**3.2 BMC Responsibilities.** BMC will (i) provide the BMC Subscription Services in a manner consistent with general industry standards reasonably applicable to the provision thereof; (ii) use commercially reasonable efforts to maintain the security of Customer passwords; (iii) provide the support described at <http://www.bmc.com/support/review-policies> ("**Support**") to Customer for the BMC Subscription Services, which may be changed by BMC upon prior notice to customer. If a service level agreement ("**SLA**") is provided for the BMC Subscription Services, the terms of such SLA will be attached to an Order.

**3.3 Customer Responsibilities and Restrictions.** (a) Customer will (i) prevent unauthorized access to, or use of, the BMC Subscription Services, and notify BMC promptly of any such unauthorized access or use, (ii) comply with all applicable laws in using the Services, and (iii) be responsible for obtaining its own Apple Push Notification certificate, if the Services are used to manage devices running iOS. (b) Customer will not (i) modify, copy or create derivative works based on the Services; (ii) create Internet "links" to or reproduce any content forming part of the BMC Subscription Services, other than for its own internal business purposes; (iii) disassemble, reverse engineer, or decompile the BMC Subscription Services or part thereof, or access it in order to copy any ideas, features, content, functions or graphics of the BMC Subscription Services; (iv) interfere with or disrupt the integrity or performance of the BMC Subscription Services; (v) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortious material, or send or store material in violation of any third party's privacy rights via the BMC Subscription Services; (vi) send or store viruses or malicious code via the BMC Subscription Services; (viii) attempt to gain unauthorized access to the BMC Subscription Services or its related software, systems, platforms or networks; (ix) use any components provided with the Services separately from the Services; or (x) distribute, rent, lease, sublicense or provide the Services to any third party or use it in a service bureau, outsourcing environment, or for the processing of third party data.

**3.4 Additional Services.** Customer may purchase Additional Services via an Order. BMC offers other optional services which may be ordered pursuant to a separate BMC Master Services Agreement and statement of work. For purposes of clarity, such services may not be ordered under this Agreement.

### **4. FEES AND PAYMENT.**

**4.1 Fees.** The fees payable for the Services will be set forth in the Order. The fees will be invoiced in accordance with the relevant Order and are due upon receipt of invoice.

**4.2 Taxes.** Customer will pay or reimburse BMC or, when required by law, the appropriate governmental agency, for taxes of any kind, including sales, use, VAT, excise, customs duties, withholding, property, and other similar taxes (other than taxes based on BMC's net income or arising from the employment relationship between BMC and its personnel) imposed in connection with the fees paid for the Services, which are exclusive of these taxes.

**4.3 Suspension of BMC Subscription Services.** In addition to its other rights and remedies, BMC reserves the right, without liability to the Customer, to suspend any and all access to the BMC Subscription Services if Customer's account becomes more than thirty (30) days past due until all accounts are paid in full. The unpaid balance of each late payment bears interest at a rate equal to the lesser of 1% per month or the maximum amount permitted by law.

### **5. TERM AND TERMINATION.**

**5.1 Term.** (a) **Agreement.** This Agreement begins on the Effective Date and will remain in effect unless terminated pursuant to Section 5.2 below. (b) **Order(s).** Each Order will begin on the start date specified in the relevant Order and continue for the subscription term specified therein.

**5.2 (a) Termination for Convenience.** Upon 30 days' advance written notice, either party may terminate this Agreement for its convenience; however, such termination will have no effect on Orders executed by the parties prior to its effective date, including but not limited to payment obligations contained therein, and such Orders will remain in full force and effect under the terms of this Agreement for the term specified therein. Orders may not be terminated for convenience unless otherwise specified therein; (b) **Termination for Cause.** Either party may terminate this Agreement for cause: (i) upon 30 days' written notice of a material breach to the other party if such breach remains uncured at the expiration of such period; or (ii) immediately if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors. (c) **Suspension of Services for Cause.** In addition to its other rights and remedies, BMC reserves the right, without liability to Customer, to immediately suspend any and all access to the Services if Customer commits a material breach of this Agreement or any relevant Order until such material breach is cured. If such material breach is (i) unable to be cured, or (ii) is not cured within 30 business days, then BMC may immediately terminate the Agreement and/or the affected Order.

**5.3 Effects of Termination.** Upon termination pursuant to 5.2(b) and (c) above, all rights and licenses granted herein will terminate and Customer will make no further use of the Services. No termination will relieve the Customer of the obligation to pay any fees accrued or payable to BMC. Upon written request by Customer made within 30 days after the effective date of

termination, BMC will make available to Customer a file containing the Customer Data. After such 30 day period, BMC shall have no obligation to maintain or provide any Customer Data and will thereafter delete Customer Data.

**6. LIMITED WARRANTY.** BMC warrants to Customer that the BMC Subscription Service (i) will perform in substantial accordance with the then-current on-line user guide available via the BMC Subscription Service and (ii) will be performed in a manner consistent with industry standards reasonably applicable to the provision thereof. Customer's exclusive remedy and BMC's sole obligation for breach of the warranty in this Section 6 will be BMC's use of commercially reasonable efforts to have the BMC Subscription Services perform in substantial accordance with the applicable user guide, or replace the non-conforming portion of the BMC Subscription Service within a reasonable period of time, or if BMC cannot have the BMC Subscription Service perform in substantial accordance with the user guide or replace the BMC Subscription Service within such time period, then BMC will refund the amount paid by Customer for the BMC Subscription Service, pro-rated from the date of the notice of the claim. Customer's rights and BMC's obligations in this Section 6 are conditioned upon Customer's providing BMC with written notice of the claim, a complete description of the alleged defects and a specific reference to the User Guide to which such alleged defects are contrary. CUSTOMER ACKNOWLEDGES THAT, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, BMC, ITS AFFILIATES AND LICENSORS MAKE NO WARRANTY, EXPRESS, IMPLIED OR STATUTORY WITH RESPECT TO THE SERVICES OR USE THEREOF. BMC, ITS AFFILIATES AND LICENSORS HEREBY EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY THAT SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR WITHOUT DELAY, AND THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE, NON-INFRINGEMENT AND INFORMATION CONTENT.

## **7. PROPRIETARY RIGHTS AND CONFIDENTIALITY.**

**7.1 Proprietary Rights.** BMC, its Affiliates or licensors retain all right, title and interest to the Services and all related intellectual property and proprietary rights. The Services are protected by applicable copyright, trade secret, industrial and other intellectual property laws. BMC owns all right, title and interest in all software, programming, documentation, templates, questionnaires, methodologies, models, charts, reports and any other items used to deliver the Services or made available to Customer as a result of the Services ("**Service Items**") and access to and use of the relevant Service Items will be governed by the terms of this Agreement. BMC reserves any rights not expressly granted to Customer. "**Confidential Information**" means all proprietary or confidential information that is disclosed to the recipient ("**Recipient**") by the discloser ("**Discloser**"), and includes, among other things (i) any and all information relating to products or services provided by a Discloser, its customer-related and financial information, software code, flow charts, techniques, specifications, development and marketing plans, strategies, and forecasts; (ii) as to BMC, and its licensors, the Services; and (iii) the terms of this Agreement, including without limitation, pricing information. Confidential Information does not include information that Recipient can show: (a) was rightfully in Recipient's possession without any obligation of confidentiality before receipt from the Discloser; (b) is or becomes a matter of public knowledge through no fault of Recipient; (c) is rightfully received by Recipient from a third party without violation of a duty of confidentiality; or (d) is or was independently developed by or for Recipient. Recipient may not disclose Confidential Information of Discloser to any third party or use the Confidential Information in violation of this Agreement. The Recipient (i) will exercise the same degree of care and protection with respect to the Confidential Information of the Discloser that it exercises with respect to its own Confidential Information and (ii) will not, either directly or indirectly, disclose, copy, distribute, republish, or allow any third party to have access to any Confidential Information of the Discloser. Notwithstanding the foregoing, Recipient may disclose Discloser's Confidential Information to Recipient's employees and agents who have need to know provided that such employees and agents have legal obligations of confidentiality substantially the same (and in no case less protective) as the provisions of this Agreement.

**7.2 Notification Obligation.** If the Recipient becomes aware of any unauthorized use or disclosure of Discloser's Confidential Information, then Recipient will promptly and fully notify the Discloser of all facts known to it concerning such unauthorized use or disclosure. In addition, if the Recipient or any of its employees or agents are required (by oral questions, interrogatories, requests for information, or documents in legal proceedings, subpoena, civil investigative demand, or other similar process) to disclose any of Discloser's Confidential Information, the Recipient will not disclose the Discloser's Confidential Information without providing the Discloser with commercially reasonable advance prior written notice to allow Discloser to seek a protective order or other appropriate remedy or to waive compliance with this provision. In any event, the Recipient will exercise its commercially reasonable efforts to preserve the confidentiality of the Discloser's Confidential Information, including, without limitation, cooperating with Discloser to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded to the Confidential Information. Notwithstanding the foregoing, Customer agrees that BMC may refer to Customer as a customer of BMC, both internally and in externally published media.

**7.3 Customer Data.** As between BMC and Customer, Customer owns all rights, title and interest in and to Customer Data. Customer Data is deemed Confidential Information under this Agreement. BMC will use the Customer Data only as necessary to provide the Services in accordance with this Agreement. At any time during the term of the BMC Subscription Services, Customer may request copies of all Customer Data from the BMC Subscription Services. Customer is responsible for complying with all legal and contractual requirements, including applicable privacy laws and regulations and its agreements with third parties who generate and/or process the Customer Data, relating to the collection, use, processing and transfer of Customer Data. Customer acknowledges and consents that Services provided may require Customer Data to be transferred to a country outside of Customer's country or the country where the Customer Data originated. Customer is solely responsible

for the transmission of Customer Data to BMC and to the BMC Subscription Services. Customer is solely responsible for the encryption of any Customer Data.

**7.4 Suggestions.** Customer agrees that BMC shall have a royalty-free, worldwide, transferable, sublicenseable, irrevocable, perpetual license to use or incorporate into any BMC products or services any suggestions, enhancement requests, recommendations or other feedback provided by Customer relating to the Services.

## **8. DISCLAIMERS AND LIMITS ON LIABILITY.**

**8.1 Disclaimer.** CUSTOMER ACKNOWLEDGES THAT, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, BMC, ITS AFFILIATES AND LICENSORS MAKE NO WARRANTY, EXPRESS, IMPLIED OR STATUTORY WITH RESPECT TO THE SERVICES OR USE THEREOF. BMC, ITS AFFILIATES AND LICENSORS HEREBY EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY THAT SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR WITHOUT DELAY, AND THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE, NON-INFRINGEMENT AND INFORMATION CONTENT.

**8.2 DISCLAIMER OF DAMAGES.** EXCEPT FOR A BREACH OF SECTION 3.3 AND EACH PARTY'S RESPONSIBILITIES IN SECTION 9, NEITHER PARTY OR ITS AFFILIATES ARE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES RELATING TO OR ARISING OUT OF THIS AGREEMENT OR THE SERVICES (INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOST COMPUTER USAGE TIME, AND DAMAGE TO, OR LOSS OF USE OF, DATA), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND IRRESPECTIVE OF ANY NEGLIGENCE OF A PARTY OR WHETHER SUCH DAMAGES RESULT FROM A CLAIM ARISING UNDER TORT OR CONTRACT LAW.

**8.3 LIMITS ON LIABILITY.** EXCEPT FOR A BREACH OF SECTION 3.3 AND EACH PARTY'S RESPONSIBILITIES IN SECTION 9, NEITHER PARTY OR ITS AFFILIATES SHALL HAVE AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE SERVICES, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEEDING THE AMOUNTS ACTUALLY PAID BY AND DUE FROM CUSTOMER PURSUANT TO THE ORDER(S) GIVING RISE TO LIABILITY.

## **9. INFRINGEMENT CLAIMS.**

**9.1 Indemnification by BMC.** If a third party asserts a claim against Customer asserting that Customer's use of the Services in accordance with this Agreement violates that third-party's patent, trade secret or copyright rights ("**Infringement Claim**"), then BMC will, at its own expense: (a) defend or settle the Infringement Claim; and (b) indemnify Customer for any damages finally awarded against Customer based on infringement by the Services. If BMC believes the Services may violate a right, then BMC will, at its expense: (a) modify the Services, or (b) procure the right to continue using the Services, and if (a) or (b) are not commercially reasonable, terminate Customer's right to use the Services and issue a pro-rata refund for the unexpired pre-paid portion of such Services.

**9.2 Indemnification by Customer.** Subject to the terms of this Agreement, if a third party asserts a claim against BMC asserting that the Customer Data or Customer's use of the Service in violation of this Agreement violates that third-party's patent, trade secret or copyright rights, or otherwise harms the third party ("**Claim**"), Customer will, at its own expense: (a) defend or settle the Claim; and (b) indemnify BMC for any damages finally awarded against BMC based on the Claim.

**9.3 Indemnity Process.** Neither party's obligations under this Section will apply if: (a) the indemnifying party's legal department does not receive prompt, detailed written notice of the Infringement Claim/Claim from the party being indemnified, (b) the indemnifying party is not able to retain sole control of the defense of the Infringement Claim/Claim and all negotiations for its settlement or compromise, (c) the indemnifying party does not receive all reasonable assistance from the party being indemnified. Neither party will bind the indemnified party to a monetary obligation in a settlement or compromise, or make an admission on behalf of the indemnified party, without obtaining that party's prior consent.

**9.4 THIS SECTION CONTAINS EACH PARTY'S EXCLUSIVE REMEDIES AND THE INDEMNIFYING PARTY'S SOLE LIABILITY FOR INFRINGEMENT CLAIMS/CLAIMS, RESPECTIVELY.**

**10. EXPORT CONTROLS.** Customer represents and warrants that it: a) will comply with the United States Export Administration Regulations and other U.S. or foreign export regulations; b) no individual accessing or using the Service is a citizen of or from an embargoed country (currently Iran, Syria, Sudan, Cuba and North Korea); c) is not prohibited from receiving the Service under such regulations; d) will not acquire the Service for a person who is restricted under such regulations; e) will not use the Service in contradiction to such regulations; and f) will not use the Service for prohibited uses, including but not limited to nuclear, chemical, missile or biological weapons related end uses. For Services exported from Ireland, EC No. 428/2009 sets up a Community regime for control of exports of dual-use items and technology, and it is declared that this Service is intended for civil purposes only. Therefore, Customer agrees to comply with both the U.S. regulations and those E.U. regulations and will not export in violation of the regulations and without all proper licenses. Any failure to comply with these regulations will result in Customer forfeiting all rights to the Service.

**11. GOVERNING LAW AND DISPUTE RESOLUTION.** A party will provide written notice to the other party of any controversy, dispute or claim arising out of or relating to this Agreement, or to the formation, interpretation, breach, termination, or validity thereof ("**Controversy**"). The parties shall engage in good faith negotiations to resolve the Controversy. Only if the Controversy

is not resolved through good faith negotiations within 15 days of the sending of the written notice of Controversy, the Controversy may be submitted to litigation or binding arbitration, based on the place of incorporation of the parties, as follows:

(i) If both parties to this Agreement are entities incorporated under the law of any state in the United States, the Controversy shall be tried in either state or federal court located in Houston, Texas and the laws of the State of Texas shall govern. Both sides hereby submit to the exclusive jurisdiction of the courts in Houston, Texas and waive all defenses based on forum non conveniens.

(ii) If both parties to this Agreement are entities incorporated in countries in the Europe, Middle East, or Africa regions, the arbitration shall be held in Amsterdam, Netherlands under the then-applicable rules of the International Chamber of Commerce and the substantive laws of the Netherlands will govern.

(iii) If both parties to this Agreement are entities incorporated in countries in the Asia Pacific region, the arbitration shall be held in Singapore under the then-applicable rules of the Singapore International Arbitration Centre and the substantive laws of Singapore will govern.

(iv) In all other instances, the arbitration shall be held in New York City, New York, under the then-applicable international rules of the American Arbitration Association and the substantive laws of the State of Texas will govern.

For all arbitrations conducted hereunder: (a) the arbitration shall be conducted in English; (b) the relevant arbitral institution shall determine the number of arbitrators, but any Controversy in which the amount in dispute is greater than \$10 million USD shall be decided by three arbitrators, with each party having the right to select one arbitrator; (c) the costs of such arbitration shall be borne equally, pending the arbitrator's award; (d) the arbitration award rendered shall be final and binding on the parties, shall not be subject to appeal to any court and shall be enforceable in any court having jurisdiction over the Parties; (e) the arbitration proceedings, award and pleadings shall all be confidential, unless disclosure of particular information is required for purposes of enforcing/challenging the award or to meet local securities law requirements; and (f) the party prevailing in arbitration shall be entitled to recover its reasonable attorneys' fees and the necessary costs incurred in connection with the arbitration.

The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. Nothing in this Agreement shall be deemed as preventing either party from seeking immediate injunctive relief from any court having jurisdiction over the parties and the subject matter of the dispute.

**12. The following BMC contracting entities apply to this Agreement:**

<b>Territory</b>	<b>BMC Contracting Entity</b>	<b>Address of Contracting Entity</b>
United States and Latin America South (not a specified Central or South America country below) Canada	BMC Software, Inc.  BMC Software Canada Inc.	2101 CityWest Boulevard, Houston, Texas 77042  50 Minthorn Boulevard, Suite 200 Markham, Ontario L3T 7X8 Canada
EMEA (Europe, Middle East and Africa)	BMC Software Distribution B.V.	Boeing Avenue 245, 1119 PD Schiphol Rijk, The Netherlands
Brazil	BMC Software do Brasil Ltda.	Rua Leopoldo Couto de Magalhães Jr, 758 - 14º andar, São Paulo – SP – Brazil
Mexico	BMC Software Distribution de México, S.A. de C.V.	Torre Esmeralda II Blvd. Manuel Avila, Camacho #36, Piso 23 Lomas de Chapultepec, CP11000, México D.F.
Argentina	BMC Software de Argentina S.A.	Ing. Butty 220 – Piso 14, Buenos Aires, Republica Argentina, C1001AFB
S.E.A (Southeast Asia), Australia, New Zealand, Hong Kong, Taiwan	BMC Software Asia Pacific Pte Ltd	210 Middle Road, #12-01/08 IOI Plaza, Singapore 188994
China	BMC Software (China) Limited	Suite 501-504, Level 5, Tower W1, The Towers, Oriental Plaza, #1 East Chang An Ave., Dong Cheng, Beijing 100738, China
Japan	BMC Software K.K.	Harmony Tower 24th Floor, 1-32-2 Honcho, Nakano-ku, Tokyo, 164-8721
Korea	BMC Software Korea Ltd	33 <sup>rd</sup> Fl., ASEM Tower World Trade Center, 159-1, Samsung-dong, Kangnam-ku, Seoul 135-798

**13. U.S. FEDERAL ACQUISITIONS.** This Section applies only to acquisitions of the commercial Services and Documentation subject to this Agreement by or on behalf of the United States Government, or by any prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement or other activity with the United States Government. In the event

the Services are delivered to the United States Government, the United States Government hereby agrees that the Products qualify as "commercial items" within the meaning of the Federal acquisition regulation(s) applicable to this procurement. The terms and conditions of this Agreement shall pertain to the United States Government's use and disclosure of the Product, and shall supersede any conflicting contractual terms and conditions. The following additional statement applies only to acquisitions governed by DFARS Subpart 227.4 (October 1988): "Restricted Rights – Use, duplication and disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 (Oct. 1988)."

**14. DATA PROTECTION.** BMC and Customer specifically agree that when Customer is located in the European Economic Area ("EEA") the terms "Personal Data", "Process", "Data Controller", "Special Categories of Data", "Processing", "Data Subject", "Third Party Processing" and "Data Processor" will have the meanings given to them in the EU Directive 95/46 EC. In respect of Personal Data processed under this Agreement, the parties agree that the Customer is the Data Controller and BMC is the Data Processor. Customer and BMC both agree that they will process data in accordance with the local data protection laws. In addition, the Data Processor agrees that it will only collect, process and use Personal Data for the sole purpose of performance of the BMC Subscription Services described hereunder and in accordance with the Data Controller's instructions. Customer acknowledges that Personal Data shall not include Special Categories of Data. BMC shall have no liability arising from the processing of Personal Data in accordance with Customer's written instructions. The Data Processor shall take appropriate technical and organizational measures to adequately protect Personal Data against (i) unauthorized access, (ii) unauthorized disclosure, (iii) misuse, (iv) corruption, and (v) loss, in accordance with the requirements of the EU Directive 95/46 EC as implemented under each local law and industry best practices. The parties agree that BMC may subcontract the processing of Personal Data to a subcontractor (the "**Subcontractor**") provided that BMC shall remain solely responsible for the acts and omissions of such Subcontractor. The Data Processor and its Subcontractor may transfer and/or store Personal Data within the European Economic Area (the "**EEA**"). The Data Processor may also transfer Personal Data to and store Personal Data in accordance with U.S. Safe Harbor requirements, provided that the Data Processor and its subcontractor are and remain Safe Harbor certified. The Data Processor shall promptly inform the Data Controller and follow up with a subsequent written notice if it becomes aware of any unauthorized or unlawful or improper processing, loss of, damage to, or destruction of any Personal Data (singly or collectively referred to as "**Security Breach**"). Further information with regard to BMC's processing of data is published at [www.bmc.com/legal/privacy](http://www.bmc.com/legal/privacy).

**15. VERIFICATION.** Customer agrees that BMC or its agent may monitor the BMC Subscription Services to ensure Customer's compliance with the terms of this Agreement. If such monitoring reveals that Customer has exceeded the Capacity for the BMC Subscription Services, Customer agrees to pay the applicable fees for additional capacity.

**16. MISCELLANEOUS TERMS.** BMC is not liable for its failure to perform any of its obligations under this Agreement during any period in which performance is delayed by Customer or circumstances beyond BMC's reasonable control. The parties are independent contractors and this Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties. Customer will receive system notifications from BMC and its licensors, if applicable (i.e. planned downtime notices, etc). This Agreement, including any Exhibits and Orders constitutes the entire agreement between Customer and BMC and supersedes any prior or contemporaneous negotiations or agreements, whether oral or written concerning the Services. There are no representations, promises, warranties, covenants, or undertakings between the parties other than those expressly set forth in this Agreement. There are no third party beneficiaries to this Agreement; Customer is not entering into a contractual relationship with BMC's licensors and BMC's licensors have no liability to Customer. No modification or waiver of any provision hereof will be effective unless made in a writing signed by both BMC and Customer. Customer may not assign or transfer this Agreement or the Services to a third party, whether by merger or otherwise. Should any provision of this Agreement be invalid or unenforceable, the remainder of the provisions will remain in effect. Any additional or conflicting terms of any Customer purchase order are rejected by BMC and do not apply. Any additional documents presented to a BMC representative by Customer for signature as a condition for going on a Customer's site will be governed by this Agreement and to the extent that such document presents additional terms or conflicts with this Agreement, it shall be considered null and void.

**ATTACHMENT A  
UNITS OF MEASUREMENT AND SERVICES DESCRIPTIONS**

**A. UNITS OF MEASUREMENT.** The following Units of Measurement apply to certain BMC Subscription Services.

UNIT OF MEASUREMENT	UNIT OF MEASUREMENT DEFINITION
<b>per instance - OnDemand</b>	A subscription is required for each named occurrence of the Service on a computer or multiple computers.
<b>per managed asset - device endpoint - OnDemand</b>	A subscription is required for every Device Endpoint that is monitored, managed, or discovered by the Service. A " <b>Device Endpoint</b> " can be any virtual or physical Non-Server Client Computer (e.g. laptop, desktop computer, PDA, smart phone); any network device (e.g. router, switch, firewall, load balancer) standalone or chassis-based device/card/processor using a unique-IP address (also includes virtual network devices managed through the IP address of its physical host); and independent storage device (e.g. a disk array, a tape library, a switch director and any physical switch). When applicable, the license must be computed at the appropriate tier level.
<b>per managed server</b>	A license is required for each Server managed by the Product or one of its components whether locally or remotely. When applicable, this license must be computed at the appropriate tier level based on the cumulative count of managed servers. Network Devices are not counted as Servers. This license does not include the Product's installation on or management of Integrated Facility for Linux (IFL) engines. " <b>Network Device</b> " means a standalone or chassis-based network device/card/processor.
<b>per named user - OnDemand</b>	A subscription is required for all individual employees or contractors or clients of Customer for whom credentials have been created in the Service and who have access to the Service on a computer or multiple computers through the issuance of a unique ID or otherwise, regardless of whether the individual is actively using the Service at any given time.
<b>per node - OnDemand</b>	A subscription is required for every Node which the Service manages and/or monitors. " <b>Node</b> " means a laptop, desktop, or any virtual or physical computer that provides a service for other computers or users connected to it via the Internet, extranet, intranet, or other networked technologies.

**B. SERVICES DESCRIPTIONS.** The following BMC Subscription Services may be ordered under the terms of this Agreement.

1. BMC Mobile Device Management Core OnDemand which requires one of or a mix of the following:
  - BMC Mobile Device Management OnDemand - Hosting Fee Shared
  - BMC Mobile Device Management OnDemand - Hosting Fee Dedicated
2. BMC Mobile Device Content Locker OnDemand which requires BMC Mobile Device Management Core OnDemand and associated Hosting Fee in addition to one of or a mix of the following:
  - BMC Mobile Device Content Locker OnDemand - Hosting Fee Shared
  - BMC Mobile Device Content Locker OnDemand - Hosting Fee Dedicated
3. BMC Mobile Device Content Locker OnDemand - Additional Storage 25GB which requires BMC Mobile Device Management Core OnDemand and associated Hosting Fee and BMC Mobile Device Content Locker OnDemand and associated Hosting Fee
4. BMC Mobile Device Remote Control OnDemand which requires BMC Mobile Device Management Core OnDemand and associated Hosting Fee

In the event any of the four above-referenced BMC Subscription Services contain a click-through agreement from AirWatch Technologies, LLC, ("**AirWatch Agreement**") such AirWatch Agreement shall be of no effect. The Agreement shall govern BMC's provision of the Subscription Services in lieu of such AirWatch Agreement.

5. BMC Remedyforce Service Desk  
 BMC Remedyforce Service Desk – Mobility  
 BMC Remedyforce Service Desk – Sandbox \*  
 BMC Remedyforce Service Desk – Additional File Storage 1GB  
 BMC Remedyforce Service Desk – Additional Data Storage 500MB

\*Quantity must match quantity of BMC Remedyforce Service Desk on new orders. For add-on orders, total quantity must match total quantity of BMC Remedyforce Service Desk for current term.

For the BMC Subscription Services described in #5, the following terms apply:

**End user** – Customers receive 250 end user licenses at no additional cost for each Remedyforce standard named user license they purchase. Remedyforce end users can access the Remedyforce self service portal to search the knowledge base, submit service requests and check the status of service requests. End users can also approve records and use Chatter.

**Standard user** (Licensed Product) – Remedyforce Service Desk Staff have full functionality of Remedyforce features and can create and manage incidents, problems, changes, broadcasts, tasks, knowledge articles, configuration items, service requests, service level agreements, reports, dashboards, Chatter, and other service desk related functions, including change assessments and approvals.

6. BMC Application Performance Management as a Service (APMaaS) is a BMC hosted and managed web application performance monitoring and management solution which requires the purchase of both of the following add-ons:

**A. BMC End User Experience Management as a Service**

- BMC End User Experience Management as a Service –
- BMC Application Performance Management as a Service – Base Subscription (includes 50 hits/second and 1 agent)

And for which Customer may optionally purchase:

- BMC End User Experience Management as a Service - Traffic Unit License Add-on (1 Traffic Unit = 50 hits/second)

**B. BMC Application Diagnostics as a Service**

- BMC Application Diagnostics as a Service – Activation
- BMC Application Performance Management as a Service – Base Subscription (includes 50 hits/second and 1 agent)

And for which Customer may optionally purchase:

- BMC Application Diagnostics as a Service – Agent License Add-on

7. BMC Client Management OnDemand is a BMC-provided Asset Management product solution that includes Inventory Management, Deployment Management, Patch Management, Remote Management/Control, and Compliance Management capabilities.

8. BMC MyIT OnDemand. The following restrictions apply to the BMC MyIT OnDemand Subscription Service:

BMC has two MyIT OnDemand offerings: MyIT Base and MyIT Premium.

BMC Remedyforce Service Desk - with MyIT: This license enables the Customer to use up to 250 named users of MyIT Base OnDemand for each BMC Remedyforce Service Desk named user – OnDemand.

Each MyIT user may only use the product on up to three Device Endpoints per user license purchased. A “**Device Endpoint**” is a personal digital assistant, smart-phone, tablet, laptop, desktop workstation or similar computing device. An additional user license is required for every 3 devices registered by a unique named user.

9. BMC AppZone. The following restrictions apply to the BMC AppZone Subscription Service:

**BMC AppZone Lite:** BMC AppZone Lite does not include the right to distribute Mac and Windows desktop applications, to brand private App Stores or to manage banners for internal communication. Customer may not consume more than 2 GB of bandwidth per named user per month as a part of the BMC Subscription Services. At the termination of the BMC Subscription Services, unless Customer migrates to a paid-for subscription for BMC AppZone, Customer is responsible for retrieving any Customer Data from the BMC Subscription Services. BMC will not provide such Customer Data to Customer.

**BMC AppZone:** Customer may not consume more than 2 GB of bandwidth per named user per month as a part of the BMC Subscription Services.

**BMC AppZone and BMC AppZone Lite: NOTWITHSTANDING ANYTHING IN THE AGREEMENT TO THE CONTRARY, THE FOLLOWING SECTIONS OF THE AGREEMENT DO NOT APPLY TO BMC APPZONE OR BMC APPZONE LITE: SECTIONS 6 AND 9.1. IN ADDITION, ANY CUSTOMER DATA PLACED INTO BMC APPZONE OR BMC APPZONE LITE IS NOT CONSIDERED CONFIDENTIAL INFORMATION UNDER SECTION 7 OF THE AGREEMENT. BMC MAY SUSPEND OR TERMINATE THE BMC APPZONE OR BMC APPZONE LITE SERVICES AT ANY TIME WITHOUT PENALTY.**