

Amendment to the BMC End User License Agreement

This Amendment to End User License Agreement for All BMC Software License Agreements ("Amendment") is effective as of the date that it is fully executed ("Effective Date") and is between BMC Software Incorporated ("BMC"), and the U.S. General Services Administration ("GSA"). In consideration of the mutual promises and covenants contained in this Amendment, the parties agree as follows:

This Amendment agreed to by both parties, applies to GSA and any agency or organization ("Ordering Activity") that places an order for a BMC Software product under the GSA Multiple Award Schedule Contracts approved by BMC and identified in the Purchase Order, Statement of Work, or similar document (the "GSA Contract"). This Amendment together with the applicable Software License Agreement or End User License Agreement for the applicable BMC Software (each such license generally referred to herein as the "License Agreement"), governs the Ordering Activity's installation and use of such BMC Software. This Amendment only applies to the License Agreements for those BMC Software products sold under the GSA Contract either directly by BMC or a BMC Reseller that is expressly authorized by BMC to under the GSA Contract. Unless expressly stated to the contrary herein, all capitalized terms in this Amendment shall have the meaning ascribed to them in the applicable License Agreement for the applicable BMC Software.

a. Pursuant to Section 12.212 of the Federal Acquisition Regulations ("FAR"). BMC and GSA agree that the modifications to the License Agreements are appropriate to ensure compliance with federal laws and to meet the U.S. Government's needs. Accordingly the License Agreements is hereby modified by this Amendment as it pertains to use of BMC's software by any Ordering Activity pursuant to a task order placed under the GSA Contract.

b. This Amendment only applies to Ordering Activities of the U.S. Government (including agencies and departments from the Executive Branch, the Congress, or the Military) and independent federal agencies that are authorized to purchase IT Schedule 70 goods and services under the GSA Contract. This Amendment shall not apply to prime contractors, state/local government entities, or other entities authorized to make purchases under the GSA contract. In addition, this Amendment shall apply to the Ordering Activity itself, shall only apply to the installation and use of the BMC Software for official government business only on behalf of the Ordering Activity, and shall not apply to any individual who utilizes the BMC Software Products for his or her personal use or for a use.

c. Installation and use of the software shall be in accordance with the License Agreement, unless an Ordering Activity determines that it requires different terms of use and BMC agrees in writing to such terms in a valid task order placed pursuant to the GSA Contract.

1. **Scope:** Any provisions restricting additions or modifications to the License Agreement are hereby superseded by this Amendment to the extent they would preclude this Amendment or any valid task orders placed under the GSA Contract. To the extent the License Agreement conflicts with this Amendment or any relevant task orders, the conflict should be resolved according to the following order of precedence: (1) Federal law, (2) the FAR, (3) terms of the Schedule Contract, (4) this Amendment, (5) any other amendment that BMC and the Ordering Activity may separately enter into to vary the terms of the License Agreement to accommodate unique license terms under a Task Order, and (6) the License Agreement. This Amendment may only be modified upon written consent of both parties.

2. **Contacting Authority:** Pursuant to FAR 1.601(a) and 43.102, all provisions in the License Agreement which would allow any individual, except for an authorized contracting officer, to bind the U.S. Government to the terms of the License Agreement or any modifications thereto are hereby deleted. Such provisions include the ability of the software manufacture to unilaterally modify the terms of the License Agreement and any requirement to accept terms by means of use, download, or click-through agreements. Notwithstanding the foregoing, GSA and Ordering Activity expressly agree that when an authorized contracting officer of the Ordering Activity places a task order for the BMC Software pursuant to the GSA Contract, all terms of the License Agreement in the effect at the time the product was added to the GSA Contract shall be legally binding on Ordering Activity and shall be given full and legal effect. In the event that Ordering Activity receives BMC Software through a task order that is not authorized by the Ordering Activity's authorized contracting officer or Ordering Activity fails to acknowledge in writing to BMC Software that the License Agreement is binding on Ordering Activity, Ordering Activity shall not be deemed to have any license to the BMC Software and BMC reserves all rights, remedies, and enforcement actions and venues available to BMC under state and federal law, including but not limited to all intellectual property laws without regard to the Dispute Resolution Process or Governing Law provisions of this Amendment.

3. **Remedies:** Pursuant to 28 U.S.C. § 1498, any provisions of the License Agreement providing for equitable remedies against the U.S. Government, including an injunction, in the event of a dispute concerning patent or copyright infringement are hereby deleted (subject to the third sentence of this Section 3). Any provisions of the License Agreement which would preclude continued performance of the contract during resolution of any disputes are hereby deleted, including any provisions requiring the U.S. Government to agree that an injunction is appropriate in the event of a breach of the License Agreement (subject to the third sentence of this Section 3). Notwithstanding the foregoing, any License Agreement clause providing for equitable remedies against the U.S. Government, including an injunction, in the event of a dispute concerning patent or copyright infringement or any other breach of the License Agreement shall continue to apply if an equitable remedy is available under United States Federal Law. If the Ordering Activity breaches one of the following (a) reverse engineers, decompiles, disassembles, or otherwise attempts to discover the source code of the software, (b) unbundles the constituent component parts of the software, or (c) provides use of the software in a computer service business, third party outsourcing facility or service, service bureau arrangement, or time sharing basis, BMC may terminate the License Agreement; however prior to terminating this License

Agreement, BMC shall inform the Ordering Activity of one of the breaches named above as soon as possible, and provide Ordering Activity thirty (30) days from notice to cure such breach. If the breach is not cured in thirty (30) days, the Ordering Activity may terminate the Order for convenience of the Government in accordance with FAR 52.212-4(l); however, Ordering Activity has no rights to a refund, in whole or part of any License Fee paid if this License Agreement is terminated for such breach. Nothing in this paragraph shall prevent BMC from filing a claim or limit BMC's damages under the Contract Disputes Act at 41 USC §§ 7101-7109.

4. **Payments and Deliveries:** Pursuant to the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B), the U.S. Government does not agree to commit to pay any future maintenance or support costs or fees under the License Agreement or this Amendment. Any provisions of the License Agreement providing for automatic renewal absent some action by the U.S. Government are hereby deleted.

5. **Public Access to Information:** BMC agrees that the License Agreement and this Amendment contain no confidential or proprietary information and acknowledges the License Agreement and this Amendment will be available to the public, provided however, that GSA and BMC agree that other items identified in the License Agreement (such as, without limitation, source code and other technical data) provided to the Ordering Activity is confidential and proprietary information and shall not be disclosed.

Advertisements and Endorsements: Any provisions allowing BMC to use the name or logo of GSA or any Ordering Activity to advertise or to imply an endorsement of BMC's products or services are hereby deleted. Unless specifically authorized by an Ordering Activity, such use of the name or logo any U.S. Government entity is prohibited.

6. **DISCLAIMER OF DAMAGES; LIMITS ON LIABILITY:** Any limitation of liability in the License Agreement is hereby deleted and the following provisions shall apply:

Neither BMC nor an Ordering Activity shall be liable for any indirect, incidental, special, or consequential damages, or any loss of profits, revenue, data, or data use. Further, neither BMC nor an Ordering Activity shall be liable for punitive damages except to the extent this limitation is prohibited by applicable law. This clause shall not impair the U.S. Government's right to recover for fraud or crimes arising out of or related to this Contract under federal fraud statute, including the False Claims Act, 31 U.S.C. §§ 3729-3733.

Dispute Resolution and Venue: Any provisions in the License Agreement requiring the U.S. Government to follow a specific procedure to raise claims or to resolve disputes are hereby deleted. Any provisions in the License Agreement selecting a particular judicial forum or form of alternative dispute resolution for resolving claims relating to the License Agreement are hereby deleted. Any disputes relating to the License Agreement and to this Amendment shall be resolved in accordance with FAR and the Contract Disputes Act 41 U.S.C. §§ 601-613, GSA and Ordering Activity expressly acknowledge that BMC shall have standing to bring such claim under the Contract Disputes Act.

7. **Termination:** Termination of the License Agreement and this Amendment shall be governed by the FAR and the Contracts Disputes Act, 41 U.S.C. §§ 601-613, and any provisions of the License Agreement relating to termination are hereby deleted, including any provision permitting BMC to unilaterally terminate the License Agreement subject the following exceptions:

- a. BMC is entitled to cancel or terminate the License Agreement if such remedy is granted to it after conclusion of the Contracts Disputes Act dispute resolution processed in Section 6 above or if such remedy is otherwise available to BMC under United States federal law.
- b. BMC is entitled to cancel or terminate the License Agreement if one of the events identified in Section 3 above apply.

8. **Audit:** Any provision in the License Agreement permitting BMC to audit, inspect, or monitor use of the software for compliance with the License Agreement shall be binding on Ordering Activity but is contingent upon reasonable notice to the Ordering Activity and adherence to reasonable security measures the Ordering Activity deems reasonably appropriate, including any requirements for personnel to be cleared prior to accessing sensitive facilities if clearances are required.

9. **Governing Law:** The License Agreement and this Amendment shall be governed by the laws of the United States, unless there is no applicable law of the United States which would apply, in which case the laws of the State of Texas shall apply. Any provisions in the License Agreement stating that the License Agreement shall only be governed by the law of any particular U.S. State or U.S. Territory or district, or foreign nation, is hereby deleted.