

## **BMC SUBSCRIPTION SERVICES AGREEMENT**

THIS SUBSCRIPTION SERVICES AGREEMENT ("**AGREEMENT**") GOVERNS YOUR FREE TRIAL, IF ANY, 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 January 17, 2017. 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.

### **FREE TRIAL.**

BMC may make the BMC Subscription Services available to Customer on a trial basis free of charge. If BMC offers Customer a free trial, it will run until the earlier of (a) the end of the trial period stated on the trial registration web page 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 A 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 TRIAL PERIOD.**

**NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THE AGREEMENT, DURING ANY 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, installed agents and associated reference, user and technical guides.

**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 (a) submitted to the BMC Subscription Services by Customer, a third party on behalf of Customer, or as directed by Customer or (b) collected by the BMC Subscription Services.

**1.5** "**Effective Date**" means the date of Customer's Order for the Services.

**1.6** "**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. The term "Order" includes Customer's online registration for and purchase of the Services.

**1.7** "**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 Attachment A or the Order.

**1.8** "**User Guide**" means the online help, functional guide and technical specifications for the BMC Subscription Services, 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. BMC reserves the right, at its sole discretion, to change, modify, add or remove portions of this Agreement at any time, for any reason or for no reason. BMC will notify Customer of any material changes by posting the amended Agreement at <http://www.bmc.com/legal/agreements.html>. Customer must review this Agreement on a regular basis to keep itself apprised of

any changes. If Customer does not agree to the revised terms and conditions, Customer's sole recourse is to immediately stop using the Services. Customer's continued use of the Services following any changes to this Agreement indicates Customer's acceptance and agreement to any and all such changes. 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.

**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 tortuous 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 and the payment period for such fees will be set forth in and paid in accordance with the Order. All invoices are due upon receipt of invoice. 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. All fees are nonrefundable and BMC will not provide any refunds or credits for partially used periods of the BMC Subscription Services.

**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.

### **5. TERM, SUSPENSION AND TERMINATION.**

**5.1 Term.** This Agreement begins on the Effective Date and will remain in effect unless terminated pursuant to Section 5.2 below, regardless of the billing frequency selected in the Order.

**5.2 (a) Termination for Convenience.** Customer may terminate this Agreement by providing BMC with written notice at least 30 days prior to the beginning of the next Order term. Customer may notify BMC of its intent to terminate by emailing BMC at [order\\_services@bmc.com](mailto:order_services@bmc.com). **(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 the affected Order. **(d) Termination by BMC.** BMC may terminate this Agreement if BMC generally discontinues its provision of the Services to all customers.

**5.3 Effects of Termination.** Upon termination pursuant to 5.2 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 pursuant to any Order. 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. DISCLAIMER OF WARRANTY.** BMC DOES NOT PROMISE THAT THE SERVICES, OR ANY CONTENT, COMPONENT, SITE OR FEATURE OF THE SERVICES WILL BE ERROR-FREE OR UNINTERRUPTED, OR THAT ANY DEFECTS WILL BE CORRECTED, OR THAT CUSTOMER'S USE OF SERVICES WILL PROVIDE SPECIFIC RESULTS. THE

SERVICES ARE DELIVERED ON AN "AS-IS" AND "AS-AVAILABLE" BASIS. BMC CANNOT ENSURE THAT ANY FILES OR OTHER DATA CUSTOMER DOWNLOADS FROM THE BMC SUBSCRIPTION SERVICES WILL BE FREE OF VIRUSES OR CONTAMINATION OR DESTRUCTIVE FEATURES. BMC AND SUCH THIRD PARTIES EXPRESSLY DISCLAIM TO THE FULLEST EXTENT PERMITTED BY LAW ALL EXPRESS, IMPLIED, AND STATUTORY WARRANTIES, INCLUDING, WITHOUT LIMITATION, THE WARRANTIES OF ACCURACY, MERCHANTABILITY, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. BMC AND ANY THIRD PARTY WHO MAKES ITS SOFTWARE OR CONTENT AVAILABLE IN CONJUNCTION WITH OR THROUGH THE BMC SUBSCRIPTION SERVICES DISCLAIM ANY WARRANTIES REGARDING THE SECURITY, RELIABILITY, TIMELINESS, AND PERFORMANCE OF THE BMC SUBSCRIPTION SERVICES AND SUCH THIRD PARTY SOFTWARE OR CONTENT. BMC DISCLAIMS ANY AND ALL LIABILITY FOR THE ACTS, OMISSIONS AND CONDUCT OF ANY THIRD PARTIES IN CONNECTION WITH OR RELATED TO CUSTOMER'S USE OF THE SERVICES.

CUSTOMER ASSUMES TOTAL RESPONSIBILITY FOR ITS USE OF THE SERVICES. CUSTOMER'S SOLE REMEDY AGAINST BMC FOR DISSATISFACTION WITH THE SERVICES IS TO STOP USING THE SERVICES. THIS LIMITATION OF REMEDY IS A PART OF THE BARGAIN BETWEEN THE PARTIES. CUSTOMER UNDERSTANDS AND AGREES THAT CUSTOMER'S USE OF THE SERVICES AND ALL THIRD PARTY SOFTWARE OR CONTENT MADE AVAILABLE IN CONJUNCTION WITH OR THROUGH THE SERVICES IS AT CUSTOMER'S OWN DISCRETION AND RISK AND THAT CUSTOMER WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGES TO CUSTOMER'S COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM THE USE OF THE SERVICES AND SUCH THIRD PARTY SOFTWARE AND CONTENT. SOME STATES OR OTHER JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, SO THE ABOVE EXCLUSIONS MAY NOT APPLY TO CUSTOMER. CUSTOMER MAY ALSO HAVE OTHER RIGHTS THAT VARY FROM STATE TO STATE AND JURISDICTION TO JURISDICTION.

THE BMC SUBSCRIPTION SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. BMC IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS

## **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. With the exception of Customer Data collected by the BMC Subscription Services, 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. DISCLAIMER OF DAMAGES AND LIMITS ON LIABILITY.**

**8.1 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.

**8.2 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, or (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 9 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:

Region	Licensing Entity	Address of Licensing Entity
United States and Latin America South (not a specified Central or South America country below)	BMC Software, Inc.	2103 CityWest Boulevard, Houston, Texas 77042
Canada	BMC Software Canada Inc.	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.	Av. das Nações Unidas, 8.501 – 22º Andar Condomínio Eldorado Business Tower São Paulo, Brasil – 05425-070
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, Mexico D.F.
Argentina	BMC Software de Argentina S.A.	Ing. Butty 220 – Piso 18, Buenos Aires, Republica Argentina, C1001AFB
S.E.A (Southeast Asia), Australia, New Zealand, Hong Kong, Taiwan	BMC Software Asia Pacific Pte Ltd	600 North Bridge Road, #20-01/10 Parkview Square, Singapore 188778
China	BMC Software (China) Limited	Room 502, Level 5, Tower W1, The Towers, Oriental Plaza, No. 1 East Chang An Ave., Dong Cheng Dist., 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	24 <sup>th</sup> Fl., ASEM Tower, 1517, Yeongdong-daero, Gangnam-gu, Seoul 135-798, Korea South

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 European data protection laws. In respect of Personal Data processed under this Agreement, the parties agree that Customer and BMC both agree that BMC will process Personal Data in accordance with Customer’s lawful and explicit instructions, the applicable data protection laws and its Controller and Processor Binding Corporate Rules Policy found at: <http://www.bmc.com/legal/data-privacy-binding-corporate-rules.html> (the “**BCR**”) with respect to compliance with data protection laws and/or regulations. The BCR policy is incorporated into a BMC corporate wide policy, requiring all BMC entities, employees and third party providers to comply with and respect the BCR policy which is governing the collection, use, access, storage and transfer of Personal Data among BMC entities and third-party sub-processors. Customer acknowledges that Personal Data shall be limited to contact information and/or contract identification information (such as PO number) and shall not include Special Categories of Data, i.e. data where processing or transfer of the data is prohibited according to applicable privacy laws or other data requiring the written consent of the data subject prior to processing in accordance with applicable law. BMC shall have no liability with regard to data content processed on behalf of Customer and/or arising from the processing of Personal Data in accordance with Customer’s instructions. BMC 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 European data protection laws 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. Customer acknowledges and consents that Services provided require Customer Data to be transferred to a country outside of Customer’s country or the country where the Customer Data originated. BMC will provide all requested information regarding the processing of Customer’s Data as Customer may reasonably require to enable Customer to comply with data protection laws. BMC shall promptly inform Customer 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 BCR is published at [http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/bcr\\_cooperation/index\\_en.htm](http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/bcr_cooperation/index_en.htm).

**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 Attachments 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. Except as provided in Section 2 above, 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. The BMC Subscription Services may contain hyperlinks to websites controlled by parties other than BMC. BMC is not responsible for and does not endorse the content or accept any responsibility for Customer’s use of these websites. Customer should refer to the policies posted by other websites regarding privacy and other topics regarding data privacy before using them.

## ATTACHMENT A

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

UNIT OF MEASUREMENT	UNIT OF MEASUREMENT DEFINITION
<b>per Data Point – OnDemand</b>	A subscription is required for each data point collected by the Service on a monthly basis. A “ <b>Data Point</b> ” is a single measurement of a metric from a source at one point in time.
<b>per Data Stream – OnDemand</b>	A subscription is required for each data stream collected by the Service on a monthly basis. A “ <b>Data Stream</b> ” is a unique combination of a metric, source and set of properties.
<b>per enterprise – OnDemand</b>	A subscription is required per Customer and per Client each, regardless of the number of times Customer installs the Product in its Enterprise or its Client’s Enterprise. “ <b>Client</b> ” means a third party whose data is processed by Customer and is only permitted if Customer is an authorized BMC service provider.
<b>per Event – OnDemand</b>	A subscription is required for each event collected by the Service on a monthly basis.
<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>per third-party software – OnDemand</b>	A subscription is required for each installation of or integration to the third-party software product that interfaces with the Services.
<b>per transaction – OnDemand</b>	A subscription is required for each transaction performed by the Services.

B. **RESTRICTIONS.** The following Restrictions apply to the BMC Subscription Services:

BMC TrueSight Pulse. The following restriction applies to the BMC TrueSight Pulse Subscription Service:

**BMC TrueSight Pulse – Free:** Customer may not monitor more than five servers, with a total of eight monitored metrics, when using any version of the BMC TrueSight Pulse – Free Subscription Service. In addition, BMC will not retain Customer Data in the BMC Subscription Service for longer than 24 hours. In the event any of BMC’s underlying third party service providers at any time suspend or terminate services which affect BMC’s ability to provide the BMC TrueSight Pulse Subscription Services, BMC may suspend or terminate the BMC TrueSight Pulse Subscription Services at any time without penalty.