

## **ADDITIONAL TERMS TO:**

### **SERVICES ORDER FORM – OR -- STATEMENT OF WORK**

BMC Software GmbH, Lyoner Strasse 9, 60528 Frankfurt, Germany (“**BMC**”) agrees to render to customer (“**Customer**”) implementation, training or other services (“**Services**”) as described in the Services Order Form or the Statement of Work (each a “**SOW**”) to which these Additional Terms are attached (collectively, this “**Agreement**”). In the event of any conflict between the terms of the SOW and these Additional Terms, these Additional Terms shall prevail except for matters of service fees, payment and reimbursement of expense terms if further specified in the SOW. Neither the execution nor fulfillment of the services will relieve or alter BMC’s or Customer’s acceptance, obligations, and responsibilities with respect to the affected BMC Software products licensed under the applicable software license agreement.

**1. SERVICE FEES AND EXPENSES.** The fees payable to BMC for the Services to be rendered will be detailed in the SOW. BMC will submit invoices to Customer for such fees and incurred expenses either upon completion of the Services, or at stated intervals, in any case accordance with the applicable SOW. Customer shall pay amounts invoiced plus applicable taxes within 30 days following receipt of the invoice.

**2. EDUCATION.** Customer may acquire Learning Pass Credits and Education Services (collectively, “**BMC Education**”) on a SOW. The BMC Education terms that govern such SOWs are set forth in the Education Program Guide located at <http://media.cms.bmc.com/documents/education-program-guide.pdf>, and is incorporated herein by this reference.

**3. TERM AND TERMINATION.** This Agreement shall continue in effect until either (i) completion of the SOW, or (ii) termination by a party, for its convenience, upon 30 days’ prior written notice. Upon termination, Customer shall promptly pay BMC for Services rendered, and expenses incurred, through the date of termination.

#### **4. PROPRIETARY RIGHTS AND CONFIDENTIALITY.**

**4.1 License.** Subject to the terms of this Agreement, BMC grants Customer a perpetual, non-exclusive, non-transferable, non-sublicensable license to use and modify all programming, documentation, reports, and any other deliverables delivered to Customer as a result of the Services provided under the SOW (“**Deliverables**”) solely for its own internal use. Except as expressly permitted by applicable law and this Agreement, Customer may not sell, rent, lease, sublicense, timeshare, outsource or otherwise use the Deliverables.

**4.2 Mutual Confidentiality.** “**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 Discloser’s financial information, customers, employees, products or services, including, without limitation, software code, flow charts, techniques, specifications, development and marketing plans, strategies, forecasts, and proposal related documents and responses; (ii) as to BMC, the Deliverables; 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 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, contractors and agents who have the 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.

**4.3 Ownership.** BMC owns all right, title and interest in the Deliverables, including all intellectual property rights embodied therein. All business information, systems, software and any other materials provided by Customer under this Agreement (“**Customer Property**”) remains the property of Customer.

#### **5. QUALITATIVE DEFECTS.**

**5.1** In case BMC provides Services not of the nature of a work and manufacturing contract (acc. to § 631 BGB) and such Services are defective due to a fault of BMC, BMC shall re-perform the Services free of charge within a reasonable timeframe and in compliance with the SOW, provided however that the Customer immediately notifies BMC of any defects, at the latest within 2 weeks after knowledge. If BMC fails to successfully re-perform the Services in substantial parts, and also within a reasonable respite expressly set by the Customer, for reasons attributable to BMC the Customer is entitled to cancel the respective SOW without notice.

**5.2** In this case BMC is entitled to fees and expenses for Services rendered according to the SOW until the cancellation of the SOW comes into effect, unless the Customer is able to show evidence within 4 weeks after termination that those Services are of no use and of no interest for him.

**5.3** The right to terminate the Agreement for cause remains unaffected.

**5.4** Any further claims of the Customer that are based on qualitative defects are excluded. Such exclusion does not apply in cases of intent, gross negligence or in cases of injury to life, limb or health or insofar as the Product Liability Act (Produkthaftungsgesetz) applies.

**6. WARRANTY.** BMC will perform all agreed upon Services in accordance with the SOW. If BMC provides Services not of the nature of a work and manufacturing contract (acc. to § 631 BGB) Customer is not entitled to any warranty claims other than those set forth under section 4. Otherwise BMC shall within a reasonable timeframe remove any defects that were reported in writing by the Customer or shall offer a solution that circumvents the defect. The warranty period commences upon acceptance and lasts twelve months. If BMC fails to remove the defect or if BMC has not offered an alternative solution even after a reasonable respite expressly set by the Customer in writing, the Customer shall be entitled, at its discretion and irrespective of claims of damages, to demand a reduction of the agreed remuneration. Customer’s rights regarding claims of damages are exclusively set forth in section 7 below.

**7. LIMITATION ON LIABILITY.** Regardless of the legal basis, BMC’s liability shall be as follows:

(a) BMC shall be liable for damages caused by willful intent or gross negligence.

(b) For damages caused by simple or slight negligence, BMC shall be liable only for the breach of major contractual duties, which are necessary to achieve the intended purpose of the contract (“**Kardinalpflicht**”). In such cases BMC’s liability shall however be limited to the typically foreseeable damages of such contract.

(c) The above mentioned limitations of liability shall not apply in

case of lack of characteristics of the Services guaranteed by BMC; offence to life, limb or health, or insofar as the Product Liability Act (Produkthaftungsgesetz) applies.

(d) In case of (c) above the statutory prescription shall apply. In all other cases claims for damages and for the reimbursement of expenses shall prescribe two years after they accrued and the possibility to have knowledge of the circumstances by the Customer. The prescription agreed upon in section 5 (Warranty) above remains unchanged.

(e) Due data back-up is incumbent on the Customer. In the event of data loss, BMC is only liable for the typical recovery expenses necessary to restore the lost data, which arise given proper data back-up, unless BMC has caused such loss of data by willful intent or gross negligence.

(f) Insofar as BMC' liability has been excluded or limited above this shall also apply to its employees, legal representatives, officers and other vicarious agents in the event Client has direct claims against them.

## **8. INFRINGEMENT INDEMNITY.**

**8.1** If a third party asserts a claim against Customer asserting that Customer's use of a Deliverable in accordance with this Agreement violates that third-party's patent, trade secret or copyright ("**Customer Infringement Claim**"), then BMC will, at its own expense: (a) defend or settle the Customer Infringement Claim; and (b) indemnify Customer for any damages finally awarded against Customer, but only if: Customer promptly notifies BMC of the Customer Infringement Claim, BMC retains sole control of the defense of the Customer Infringement Claim and all negotiations for its settlement or compromise, and Customer provides all reasonable assistance requested by BMC. BMC's obligations above will not apply if the Customer Infringement Claim is based on (i) the use of the Deliverable in combination with products not supplied or approved by BMC in writing or in the Deliverable's user manuals, (ii) modification of the Deliverable other than by BMC, or (iii) the failure of Customer to use any updates to such Deliverable within a reasonable time after such updates are made available to Customer. If BMC believes a Deliverable may violate a right, then BMC will, at its expense: (a) modify the Deliverable, or (b) procure the right to continue using the Deliverable, and if (a) or (b) are not commercially reasonable, terminate Customer's right to use the Deliverable and issue a refund prorated over five years from the completion date of the related SOW.

**8.2** If a third party asserts a claim against BMC asserting that BMC's use of Customer Property in accordance with this Agreement violates that third-party's patent, trade secret or copyright ("**BMC Infringement Claim**"), then Customer will, at its own expense: (a) defend or settle the BMC Infringement Claim; and (b) indemnify BMC for any damages finally awarded against BMC, but only if: BMC promptly notifies Customer of the BMC Infringement Claim, Customer retains sole control of the defense of the BMC Infringement Claim and all negotiations for its settlement or compromise, and BMC provides all reasonable assistance requested by Customer.

**8.3** This section contains each party's exclusive remedy and sole liability for Infringement Claims.

**9. NON-SOLICITATION.** During the term of this Agreement, and for a period of six months thereafter, Customer will not solicit for

employment any employees of BMC or its affiliates who, within six months prior to such solicitation, directly performed under this Agreement.

**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 Deliverables is a citizen of or from an embargoed country (currently Iran, Syria, Sudan, Cuba and North Korea); c) is not prohibited from receiving the Deliverables under such regulations; d) will not acquire the Deliverables for a person who is restricted under such regulations; e) will not use the Deliverables in contradiction to such regulations; and f) will not use the Deliverables for prohibited uses, including but not limited to nuclear, chemical, missile or biological weapons related end uses. For Deliverables 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 Deliverable 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 Deliverables.

**11. PERSONAL DATA.** The processing of personal data under this Agreement is governed by the Data Processing Agreement set forth on the SOW, unless BMC already has a signed Data Processing Agreement with Customer for such BMC offerings; in which case, the signed version governs the processing of personal data. In the event there is no signed Data Processing Agreement or no reference to the applicable Data Processing Agreement in the SOW, BMC and Customer agree that the Data Processing Agreement applicable on the date of the SOW, a copy of which may be viewed at <https://www.bmc.com/content/dam/bmc/corporate/bmcdpa.pdf>, applies to the BMC offerings under this Agreement.

**12. MISCELLANEOUS TERMS.** All of the services performed by BMC will be performed as an independent contractor. If any provision of this Agreement is held to be unenforceable, the remaining provisions shall nonetheless be enforceable. No failure by either party in exercising any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise of a right. This Agreement shall be governed by the substantive laws of the Federal Republic of Germany, excluding the United Nations Convention on the International Sale of Goods and the parties hereby submit to the exclusive jurisdiction of the courts located in Frankfurt am Main. Except for assignments to parent entities or majority owned subsidiaries, neither party may assign or transfer this Agreement, in whole or in part, to any third party without first obtaining the prior written consent of the other party. This Agreement constitutes the entire agreement between the parties, and supersedes all prior agreements and understandings, relating to this subject matter. Any amendment or change must be in a writing of the parties. Any additional documents presented to a BMC employee or consultant by Customer for signature will be governed by this Agreement and to the extent that such document adds to or conflicts with this Agreement, it shall be considered null and void.