



## ATTACHMENT II

**TERMS AND CONDITIONS APPLICABLE TO TERM SOFTWARE LICENSES (SPECIAL ITEM NUMBER 132-32), PERPETUAL SOFTWARE LICENSES (SPECIAL ITEM NUMBER 132-33) AND MAINTENANCE AS A SERVICE (SPECIAL ITEM NUMBER 132-34) OF GENERAL PURPOSE COMMERCIAL INFORMATION TECHNOLOGY SOFTWARE  
For  
IBM SOFTWARE PRODUCTS**

### 1. INSPECTION/ACCEPTANCE

The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. Items delivered shall be considered accepted upon delivery. The ordering activity reserves the right to inspect or test any software that has been delivered. The ordering activity may require repair or replacement of nonconforming software at no increase in contract price. The ordering activity must exercise its postacceptance rights (1) within the warranty period; and (2) before any substantial change occurs in the condition of the software, unless the change is due to the defect in the software.

### 2. GUARANTEE/WARRANTY

- a. The Contractor's standard commercial guarantee/warranty as stated in the contract's commercial pricelist will apply to this contract.
- b. **Limitation of Liability.** Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the ordering activity for loss of profits, loss of use, business interruption, loss of data, or indirect, special, punitive, incidental, or consequential damages resulting from any defect or deficiencies in accepted items. Except for the indemnification obligations contained herein or a legal finding of gross negligence or willful misconduct resulting in personal injury, Contractor's liability shall not exceed the license fee paid by ordering activity under the particular order.

### 3. TECHNICAL SERVICES

Subject to payment of Software Maintenance, the Contractor, without additional charge to the ordering activity, shall provide a hot line technical support number as indicated in the Price List for the purpose of providing user assistance and guidance in the implementation of the software. The technical support number is available in the contract's price list.

### 4. SOFTWARE MAINTENANCE

- a. Software Maintenance as a Product (SIN 132-33) is defined in the Contractor's standard commercial license and maintenance terms.

Software maintenance as a product does NOT include the creation, design, implementation, integration, etc. of a software package. These examples are considered software maintenance as a service.

- b. Software Maintenance as a Service (SIN 132-34) is defined in the Contractor's standard commercial license and maintenance terms. Software maintenance as a service creates, designs, implements, and/or



integrates customized changes to software that solve one or more problems and is not included with the price of the software. Software maintenance as a service includes person-to-person communications regardless of the medium used to communicate: telephone support, on-line technical support, customized support, and/or technical expertise which are charged commercially. Software maintenance as a service is billed arrears in accordance with 31 U.S.C. 3324. Software Maintenance as a Service is further defined in the Contractor's standard commercial license and maintenance terms.

c. Invoices for maintenance service shall be submitted by the Contractor on a quarterly or monthly basis, after the completion of such period. Maintenance charges must be paid in arrears (31 U.S.C. 3324). PROMPT PAYMENT DISCOUNT, IF APPLICABLE, SHALL BE SHOWN ON THE INVOICE.

## **5. PERIODS OF MAINTENANCE (SIN 132-34)**

a. The Contractor shall honor orders for periods for the duration of the contract period or a lesser period of time.

b. Maintenance may be discontinued by the ordering activity on thirty (30) calendar days written notice to the Contractor.

c. Annual Funding. When annually appropriated funds are cited on an order for term licenses and/or maintenance, the period of the term licenses and/or maintenance shall automatically expire on September 30 of the contract period, or at the end of the contract period, whichever occurs first. Renewal of the term licenses and/or maintenance orders citing the new appropriation shall be required, if the term licenses and/or maintenance is to be continued during any remainder of the contract period.

d. Cross-Year Funding Within Contract Period. Where an ordering activity's specific appropriation authority provides for funds in excess of a 12 month (fiscal year) period, the ordering activity may place an order under this schedule contract for a period up to the expiration of the contract period, notwithstanding the intervening fiscal years.

e. Ordering activities should notify the Contractor in writing thirty (30) calendar days prior to the expiration of an order, if the term licenses and/or maintenance is to be terminated at that time. Orders for the continuation of term licenses and/or maintenance will be required if the term licenses and/or maintenance is to be continued during the subsequent period.

## **6. CONVERSION FROM TERM LICENSE TO PERPETUAL LICENSE**

a. Term License conversion is not offered.

## **7. TERM LICENSE CESSATION**

a. Term Licenses are not offered.

## **8. UTILIZATION LIMITATIONS - (SIN 132-33, AND SIN 132-34)**

a. **Software acquisition is limited to commercial computer software defined in FAR Part 2.101.** The Software is "commercial computer software" as that term is described in 48 C.F.R. 252.227-7014(a)(1). If acquired by or on behalf of a civilian agency, the U.S. Government acquires this commercial computer software and/or commercial computer software documentation subject to the terms of Contractor's commercial license and maintenance agreement as specified in 48 C.F.R. 12.212 (Computer Software) and 48 C.F.R. 12.211 (Technical Data) of the Federal Acquisition Regulations ("FAR") and its successors. If acquired by or on behalf of any agency within the Department of Defense ("DOD"), the U.S. Government acquires this



commercial computer software and/or commercial computer software documentation subject to the terms of Contractor's commercial license and maintenance agreement as specified in 48 C.F.R. 227.7202-3 of the DOD FAR Supplement ("DFAR") and its successors. IBM's commercial agreements are available at <http://www-01.ibm.com/software/lotus/passportadvantage/agreementsandforms.html>.

b. When acquired by the ordering activity, commercial computer software and related documentation so legend shall be subject to the following unless otherwise restricted by the terms of or referenced in 8a above:

(1) Title to and ownership of the software and documentation shall remain with the Contractor and manufacturer, unless otherwise specified.

(2) Software licenses are licensed by ordering activity. An ordering activity is defined as an independent ordering activity. The software may be used by any subdivision of the ordering activity (service, bureau, division, command, etc.) that has access to the site the software is placed at, even if the subdivision did not participate in the acquisition of the software. Further, the software may be used on a sharing basis where multiple agencies have joint projects that can be satisfied by the use of the software placed at one ordering activity's site. This would allow other agencies access to one ordering activity's database. For ordering activity public domain databases, user agencies and third parties may use the computer program to enter, retrieve, analyze and present data. The user ordering activity will take appropriate action by instruction, agreement, or otherwise, to protect the Contractor's proprietary property with any third parties that are permitted access to the computer programs and documentation in connection with the user ordering activity's permitted use of the computer programs and documentation. For purposes of this section, all such permitted third parties shall be deemed agents of the user ordering activity.

(3) Except as is provided in paragraph 8.b(2) and 8.b(3) above, the ordering activity shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the Contractor. Third parties do not include prime Contractors, subcontractors and agents of the ordering activity who have the ordering activity's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the ordering activity to use software, documentation, or information therein, which the ordering activity may already have or obtains without restrictions.

(4) The ordering activity shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred, or in cases of Disaster Recovery, the ordering activity has the right to transfer the software to another site if the ordering activity site for which it is acquired is deemed to be unsafe for ordering activity personnel; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; to transfer a copy of the software to another site for purposes of benchmarking new hardware and/or software; and to modify the software and documentation or combine it with other software, provided that the unmodified portions shall remain subject to these restrictions.

(5) "Commercial Computer Software" may be marked with the Contractor's standard commercial restricted rights legend, but the schedule contract and schedule pricelist, including this clause, "Utilization Limitations" are the only governing terms and conditions, and shall take precedence and supersede any different or additional terms and conditions included in the standard commercial legend.



**9. SOFTWARE CONVERSIONS - (132-33)**

Full monetary credit will be allowed to the ordering activity when conversion from one version of the software to another is made as the result of a change in operating system , or from one computer system to another. Under a perpetual license (132-33), the purchase price of the new software shall be reduced by the amount that was paid to purchase the earlier version.

**10. DESCRIPTIONS AND EQUIPMENT COMPATIBILITY**

The Contractor shall include, in the schedule pricelist, a complete description of each software product and a list of equipment on which the software can be used. Also, included shall be a brief, introductory explanation of the modules and documentation which are offered.

**11. RIGHT-TO-COPY PRICING**

Right to copy licenses are not offered.