4. LIMITED WARRANTY. BMC warrants that it will perform the Services in conformance with generally accepted practices within the software services industry and in accordance with the SOW. Customer must notify BMC of any breach of this warranty no later than 90 days after completion of the Services under the SOW. Customer’s exclusive remedy and BMC’s entire liability under this warranty shall be for BMC to re-perform any non-conforming portion of the Services within a reasonable period of time, or if BMC cannot remedy the breach during such time period then refund the portion of the fee attributable to such non-conforming portion of the Services under the SOW. This warranty will not apply to the extent Customer, its contractors or agents have modified or resold the Deliverables. "Confidential Information" includes, without limitation, the terms of this Agreement, intellectual property, marketing or promotion of any product or service of either party, business policies or practices of either party, customers or suppliers of either party, or information received from others that either party is obligated to treat as confidential. "Confidential Information" does not include information that was (a) previously known without restriction, (b) received from a third party without restriction, (c) independently developed without use of the Confidential Information, or (d) information that becomes publicly available through no fault of the receiving party.

5. LIMITATION ON LIABILITY. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INCIDENTAL, OR INDIRECT DAMAGES ARISING OUT OF THIS AGREEMENT (INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, BUSINESS OR DATA, OR COSTS OF RECREATING LOST DATA), EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE. IN NO EVENT WILL BMC’S LIABILITY FOR DIRECT DAMAGES EXCEED AMOUNTS PAYABLE BY CUSTOMER UNDER THE SOW. NONE OF THE ABOVE LIMITATIONS AFFECT THE LIABILITY OF EITHER PARTY FOR A BREACH OF SECTIONS 3.1 AND 3.2. NOTHING IN THIS AGREEMENT SHALL LIMIT LIABILITY FOR DEATH OR PERSONAL INJURY CAUSED BY EITHER PARTY’S NEGLIGENCE.

6. INFRINGEMENT INDEMNITY. 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.

6.2. 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.

6.3. This section contains each party’s exclusive remedy and sole liability for Infringement Claims.

7. MUTUAL INDEMNITY. Each party shall indemnify and hold harmless the other party from all claims, liabilities or expenses for physical damage to real property or tangible personal property and bodily injury, including death, to the extent caused by the gross negligence or wilful misconduct of the indemnifying party’s employees or contractors arising out of this Agreement and while at the Customer’s premises. The foregoing indemnities are contingent upon the party seeking indemnity giving prompt written notice to the indemnifying party of any claim, demand or action, and cooperating with the indemnifying party in the defence or settlement of any such claim, demand or action.

8. 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.

1.1 EXPORT CONTROLS. Customer represents and warrants that: a) it 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) it is not prohibited from receiving the Deliverables under such regulations; d) it will not acquire the Deliverables for a person who is restricted under such regulations; e) it will not use the Deliverables in contradiction to such regulations; and f) it 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 Product 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.

9. MISCELANEOUS 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 laws of England. 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 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 conflicts with this Agreement, it shall be considered null and void. Any amendment or change must be in a writing of the parties. Except as expressly provided elsewhere in this Agreement, a person who is not a party to this Agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.