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. LIMTED 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 any Deliverable, unless otherwise authorized by BMC in writing. THIS WARRANTY AND CONDITION IS IN LIEU OF ALL OTHER WARRANTIES AND CONDITIONS. THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

6. 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 OR 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 4.1, 4.2 and 6. NOTHING IN THIS AGREEMENT SHALL LIMIT LIABILITY FOR DEATH OR PERSONAL INJURY CAUSED BY EITHER PARTY’S NEGLIGENCE.

7. INFRINGEMENT INDEMNITY.

7.1. 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-
10. 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.

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 laws of England and subject to the exclusive jurisdiction of the English courts. 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 adds to or 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.