



BMC DEVELOPER PROGRAM AGREEMENT

This BMC Developer Program Agreement (“**Agreement**”) governs your use of the Development Platform. This Agreement is between the entity or individual entering into this Agreement (“**Developer**”) and the BMC Contracting Entity for the applicable region as described in Section 8(k) below (“**BMC**”).

BY ACCEPTING THIS AGREEMENT BY CLICKING A BOX INDICATING YOUR ACCEPTANCE, 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 DEVELOPMENT PLATFORM.

You may not access the Development Platform if you are BMC’s direct competitor, except with BMC’s prior written consent.

The Agreement is effective between Developer and BMC as of the date of your acceptance (“**Effective Date**”). This Agreement was last updated on January 29, 2019.

1. **DEFINITIONS.**

- a. “**Development Platform**” means a cloud-based service offering offering the capabilities of the Platform Services for the express purpose of developing and testing applications as an enterprise-scale Software-as-a-Service offering.
- b. “**Platform Services**” means a BMC-provided platform subscription service used to create and run applications developed by BMC or third parties.
- c. “**Users**” means individuals (i) who are authorized by Developer to use and access the Development Platform, and (ii) who have been assigned unique user identifications and passwords by Developer.
- d. “**Developer Data**” means all electronic data or information(a) submitted to the Development Platform by Developer, an User on behalf of Developer, or as directed by Developer or (b) collected, processed or returned by the Development Platform..
- e. “**User Guide**” means the online help, functional guide and technical specifications for the Development Platform, as updated by BMC from time to time.

2. DEVELOPMENT PLATFORM ACCESS. Subject to the terms of this Agreement (including without limitation the Restrictions on Use set forth in Section 3 below) and the User Guide, BMC will provide Developer with worldwide access to the Development Platform, User, solely for the purpose of performing non-production application development work on the Platform Services. For clarity purposes, this Agreement does not grant Developer any specific rights to the Platform Services. Developer may exercise its rights under this Section 2 through its Users, and Developer is responsible for such Users’ compliance with this Agreement.

3. **RESTRICTIONS ON USE.**

- a. Developer agrees **NOT** to:
 - (i) use the Development Platform to (1) for production purposes or to process production data, including but not limited to publishing digital applications, or (2) distribute applications;
 - (ii) use the Development Platform with data or information that has not been backed up;
 - (iii) modify, copy or create derivative works based on the Development Platform or the Platform Services;
 - (iv) create Internet “links” to or reproduce any content forming part of the Development Platform, other than for its own internal non-production business purposes;
 - (v) disassemble, reverse engineer, or decompile the Development Platform or parts thereof or the Platform Services or parts thereof, or access it in order to copy any ideas, features, content, functions or graphics of the Development Platform or the Platform Services;
 - (vi) interfere with or disrupt the integrity or performance of the Development Platform;
 - (vii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material via the Development Platform;
 - (viii) send or store viruses or malicious code via the Development Platform;
 - (ix) attempt to gain unauthorized access to the Development Platform or its related software, systems, platforms or networks, including but not limited to the Platform Services;
 - (x) use any components provided with the Development Platform separately from Development Platform;



- (xi) access the Development Platform for purposes of monitoring or testing their availability, performance or functionality, or for any other benchmarking or competitive purposes;
 - (xii) modify, delete or remove any ownership, title, trademark, patent or copyright notices ("**Identification**") from any parts of the Development Platform; or
 - (xiii) use the Development Platform for any purpose other than as specifically provided in this Agreement.
- b. Developer will be responsible for maintaining the confidentiality of the passwords assigned to Developer. Developer will immediately notify BMC if it becomes aware that a password is lost, stolen, disclosed to an unauthorized third party, or otherwise compromised. Developer will be responsible for any and all activities under Developer's account and/or using Developer's passwords. Developer will (i) use commercially reasonable efforts to prevent unauthorized access to, or use of, the Development Platform, and notify BMC promptly of any such unauthorized access or use, and (ii) comply with all applicable laws in using the Development Platform.
- c. Developer is responsible for acquiring all necessary and required licenses for the use of any third party software, source code and/or libraries Developer may use as part of its development with the Development Platform. In addition to its other rights and remedies, BMC reserves the right, without liability to Developer, to immediately, at any time and for any reason, (i) refresh Developer's instance of the Development Platform; (ii) suspend Developer and/or its Users' access to the Development Platform; or (iii) reclaim Developer's instance of the Development Platform and terminate Developer and its Users' access to the Development Platform. Upon BMC's refreshing of Developer's instance of the Development Platform, Developer may lose all Developer Data submitted to or stored in said instance of the Development Platform. Upon BMC's reclaiming of Developer's instance of the Development Platform and terminating Developer and its Users' access to said instance of the Development Platform, BMC may destroy any Developer Data submitted to or stored therein. Developer is responsible for backing up any development work with Developer Data outside of the Development Platform.
- d. In no event shall Developer use with Development Platform any Open Source Software. For the purposes of this Agreement, "**Open Source Software**" means any software, library, utility, tool, or other computer or program code that requires as a condition of use, reproduction, modification, or distribution that other software or computer code distributed with it: (i) be disclosed or distributed in source code form; (ii) be licensed for the purpose of creating derivative works; (iii) be licensed under terms that allow reverse engineering, reverse assembly, or disassembly of any kind; or (iv) be redistributable at no charge.
- e. BMC, its affiliates, or licensors do not provide any technical support, maintenance services, or any other type of services for the Development Platform. BMC may monitor the Development Platform to ensure Customer's compliance with the terms of this Agreement.

4. FEEDBACK. Developer agrees that any suggestions, enhancement requests, recommendations or other feedback provided by Developer or Users relating to the Development Platform or the Platform Services (together, the "**Feedback**") shall be owned by BMC or its affiliates. Developer hereby assigns to BMC all rights, title and interest in the Feedback and all intellectual property therein. If requested by BMC, Developer agrees to execute such further instruments as BMC may reasonably request confirming BMC's ownership interest in such Feedback.

5. PROPRIETARY RIGHTS AND CONFIDENTIALITY.

- a. BMC, its affiliates or licensors retain all rights, title and interest to the Development Platform, the Platform Services and all related intellectual property, informational, industrial property and proprietary rights therein. The Development Platform, the Platform Services and all third party software provided with the Development Platform 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, user guides, templates, questionnaires, methodologies, models, charts, reports, ideas, features, content, functions, graphics, and any other items provided as a part of the Development Platform ("**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 Developer in this Agreement.
- b. "**Confidential Information**" means all proprietary or confidential information that is disclosed by BMC to Developer, and includes, among other things (i) any and all information relating to the Development Platform, the Platform Services or services provided by BMC, its financial information, software code, flow charts, techniques, specifications, development and marketing plans, strategies, and forecasts; (ii) the terms of this Agreement; and (iii) Feedback. Confidential Information does not include information that Developer can show: (A) was rightfully in Developer's possession without any obligation of confidentiality before receipt from BMC; (B) is or becomes a matter of public knowledge through no fault of Developer; (C) is



rightfully received by Developer from a third party without violation of a duty of confidentiality; or (D) is or was independently developed by or for Developer. Developer may not disclose Confidential Information of BMC to any third party or use the Confidential Information in violation of this Agreement. In the event Developer becomes legally compelled to disclose any Confidential Information, Developer shall provide BMC with prompt prior written notice of such requirement so that BMC may seek a protective order or other appropriate remedy. If such protective order or other remedy is not obtained, or if BMC waives in writing compliance with the terms of this Agreement, Developer agrees to furnish only that portion of the information which Developer is advised by written opinion of counsel is legally required and to exercise reasonable efforts to obtain confidential treatment of such information. Developer (1) will exercise the same degree of care and protection with respect to the Confidential Information that it exercises with respect to its own confidential information, and (2) will not, either directly or indirectly, disclose, copy, distribute, republish, or allow any third party to have access to any Confidential Information. Notwithstanding the foregoing, Developer may disclose Confidential Information to Developer's employees and agents who have a 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.

- c. If Developer becomes aware of any unauthorized use or disclosure of Confidential Information, then Developer will promptly and fully notify BMC of all facts known to it concerning such unauthorized use or disclosure. In addition, if Developer 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 the Confidential Information, Developer will not disclose the Confidential Information without providing BMC with commercially reasonable advance prior written notice to allow BMC to seek a protective order or other appropriate remedy or to waive compliance with this provision. In any event, Developer will exercise its commercially reasonable efforts to preserve the confidentiality of the Confidential Information, including, without limitation, cooperating with BMC to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded to the Confidential Information.
- d. Developer expressly agrees that (i) nothing in this Agreement shall be construed as prohibiting or restricting BMC from independently developing, acquiring, and marketing products, services, and other materials, which are similar to or competitive to the application(s) developed by Developer in the Development Platform, in any geographic area; and (ii) BMC shall be free to use for any purpose the Residuals resulting from access to the Developer Data and Developer's instance of the Development Platform. "**Residuals**" means information in non-tangible form, including ideas, concepts, know-how or techniques contained therein, that, without further reference to any materials that are written, stored in electronic or physical form or are otherwise fixed, is unintentionally retained in the unaided memory of persons who were permitted access to Developer's instance of the Development Platform and the Developer Data under the terms of this Agreement. A person's memory will be considered to be unaided if the person has not intentionally memorized Developer Data for the purpose of retaining and subsequently using or disclosing it.

6. TERM AND TERMINATION. This Agreement begins on the Effective Date and will remain in effect unless terminate pursuant to this Section 6. BMC may terminate this Agreement, and the access rights granted hereunder, immediately, and without notice, for its convenience. Upon termination, all rights granted herein will terminate, Developer shall cease accessing or using the Development Platform, and BMC will delete any Developer Data stored in the Development Platform. Sections 4, 5, 6, 7 and 8 survive the termination of Developer's access to the Development Platform or this Agreement.

If Developer desires to acquire a right to access and use the Platform Services in production, then Developer must acquire access to the Platform Services under the then-current subscription service terms with BMC or its appropriate subsidiary or affiliate.

7. DISCLAIMER OF WARRANTY, LIMITATION OF LIABILITY AND EXCLUSIVE REMEDY.

- a. THE DEVELOPMENT PLATFORM IS PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND WHATSOEVER. BMC, ITS AFFILIATES AND LICENSORS DO NOT WARRANT THAT THE DEVELOPMENT PLATFORM WILL SATISFY DEVELOPER'S REQUIREMENTS, THAT THE DEVELOPMENT PLATFORM IS WITHOUT DEFECT, VIRUS OR ERROR FREE, WITHOUT DELAY, OR THAT THE OPERATION OF THE DEVELOPMENT PLATFORM WILL BE UNINTERRUPTED. BMC, ITS AFFILIATES AND LICENSORS DISCLAIM ANY AND ALL REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED OR STATUTORY, MADE WITH RESPECT TO THE DEVELOPMENT PLATFORM, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE, NON-INFRINGEMENT AND INFORMATION CONTENT; AND
- b. BMC DISCLAIMS AND REJECTS ANY LIABILITY TO DEVELOPER, OR ANY OTHER INDIVIDUAL OR ENTITY, FOR ANY CLAIM, LOSS, DAMAGE OR EXPENSE FOR INDIRECT, SPECIAL, CONSEQUENTIAL, PUNITIVE OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE DEVELOPMENT PLATFORM (INCLUDING, WITHOUT LIMITATION, LOST



PROFITS, LOST COMPUTER USAGE TIME, AND DAMAGE TO, OR LOSS OF USE OF, DATA), EVEN IF BMC HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. BMC'S ENTIRE LIABILITY AND DEVELOPER'S EXCLUSIVE REMEDY FOR DIRECT DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE DEVELOPMENT PLATFORM, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, IS LIMITED TO THE GREATER OF THE AMOUNT ACTUALLY PAID BY DEVELOPER TO LICENSE THE DEVELOPMENT PLATFORM OR \$100.

- c. If a third party asserts a claim against BMC asserting that the Developer Data or Developer's use of the Development Platform in violation of this Agreement violates that third-party's patent, trade secret or copyright rights, or otherwise harms the third party ("**Claim**"), Developer will, at its own expense: (i) defend or settle the Claim; and (ii) indemnify BMC for any damages finally awarded against BMC based on the Claim.

8. **MISCELLANEOUS.**

- a. **No-Guarantee as to New Versions.** Developer acknowledges and agrees that BMC is under no obligation to provide any maintenance releases, updates or new versions of the Development Platform. BMC does not guarantee that the Platform Services will be similar in functionality to the Development Platform provided under this Agreement. This Agreement creates no obligation on behalf of Developer to acquire the Platform Services, or for BMC to provide the Platform Services to Developer.
- b. **Entire Agreement and Modifications.** This Agreement is the entire understanding between Developer and BMC and replaces any prior or contemporaneous communication, agreement or understanding of any kind, oral or written, concerning this subject matter. This Agreement may only be changed if mutually agreed to in writing by the parties. Should any provision of this Agreement be invalid or unenforceable, the remainder of the provisions will remain in effect.
- c. **Enforceability, Non-Waiver and Non-Assignment.** If any part of this Agreement is found to be invalid or unenforceable, that part will be modified to the extent necessary to eliminate its invalidity or unenforceability, and the remaining terms will be in full force and effect. A waiver by a party of any breach of any term of this Agreement will not be construed as a waiver of any continuing or succeeding breach. Developer may not assign or otherwise transfer this Agreement or any of its rights or obligations without the prior written consent of BMC.
- d. **Governing Law and Dispute Resolution.** Any controversy, dispute or claim arising out of or relating to this Agreement, or to the formation, interpretation, breach, termination, or validity thereof (each, a "**Controversy**") will be resolved as follows:
 - (i) **United States.** 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 parties hereby submit to the exclusive jurisdiction of the courts in Houston, Texas and waive all defenses based on forum non conveniens.
 - (ii) **EMEA.** If both parties to this Agreement are entities incorporated in countries in the Europe, Middle East, or Africa regions, the Controversy shall be tried in the District Court located in Amsterdam, the Netherlands and the substantive laws of the Netherlands shall govern. Both parties hereby submit to the exclusive jurisdiction of the District Court in Amsterdam, the Netherlands and waive all defenses based on forum non conveniens.
 - (iii) **Asia Pacific.** 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) **Other Regions.** 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.

- e. **Independent Contractor.** Nothing in this Agreement will be construed as creating a joint venture, partnership, franchise, fiduciary, employment or principal/agent relationship between the parties.
- f. **U.S. Federal Acquisitions.** This Section applies only to acquisitions of the commercial Development Platform and User Guide 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 Development Platform is delivered to the United States Government, the United States Government hereby agrees that the Development Platform qualifies 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 Development Platform, 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).
- g. **Export Controls.** Developer 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 Development Platform is a citizen of or from an embargoed country (currently Iran, Syria, Sudan, Cuba and North Korea); c) is not prohibited from receiving the Development Platform under such regulations; d) will not acquire the Development Platform for a person who is restricted under such regulations; e) will not use the Development Platform in contradiction to such regulations; and f) will not use the Development Platform for prohibited uses, including but not limited to nuclear, chemical, missile or biological weapons related end uses. For Development Platform 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 Development Platform is intended for civil purposes only. Therefore, Developer 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 Developer forfeiting all rights to the Development Platform.
- h. **Third Party Code.** The Development Platform may contain third party software which is delivered to Developer as part of the Development Platform and may not be taken out of the Development Platform or used separately from the Development Platform and for which additional terms may be included in the User Guide.
- i. **Data Protection.** BMC and Developer agree that the Data Processing Agreement, a copy of which may be viewed at <https://www.bmc.com/content/dam/bmc/corporate/bmcdpa.pdf>, applies to this Agreement unless BMC already has a signed Data Processing Agreement with Developer for such BMC Products; in which case, the signed version applies.
- j. **Links to Third Party Websites:** The Development Platform 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 Developer’s use of these websites. Developer should refer to the policies posted by other websites regarding data privacy and other topics before using them.
- k. **BMC Entities.** The following licensing entities apply to this Agreement:

Region	Contracting 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



Region	Contracting Entity	Address of Licensing Entity
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, México 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 th Fl., ASEM Tower, , 1517, Yeongdong-daero, Gangnam-gu, Seoul 135-798, Korea South