

DIR-TSO-3996 Appendix E

Cloud Services Agreement



This Cloud Services Agreement (CSA) and Transaction Documents (TDs) are the complete agreement regarding transactions under DIR Contract DIR-TSO-3996, as amended (“DIR Contract DIR-TSO-3996”) and this CSA (together, the “Agreement”) under which Customer may order Cloud Services. TDs, such as service descriptions, order documents or statements of work, contain specific details related to an order for a Cloud Service and there may be more than one TD providing the details of an order. In the event of conflict, DIR Contract DIR-TSO-3996 prevails over this CSA and TD, and a TD prevails over this CSA.

1. Cloud Services

- a. A Cloud Service is an IBM branded offering provided by IBM and made available via a network. Each Cloud Service is described in an Attachment or a TD. Cloud Services are designed to be available 24/7, subject to scheduled and emergency maintenance. Customer will be notified of scheduled maintenance. Technical support and service level commitments, if applicable, are specified in an Attachment or TD.
- b. Customer accepts TD by ordering, enrolling, using, or making a payment for the Cloud Service. When IBM accepts Customer's order, IBM provides Customer the authorizations specified in the TD. The term, including any renewal term, for a Cloud Service is described in TD.
- c. IBM will provide the facilities, personnel, equipment, software, and other resources necessary to provide the Cloud Services and generally available user guides and documentation to support Customer's use of the Cloud Service. Customer will provide hardware, software and connectivity to access and use the Cloud Service, including any required Customer-specific URL addresses and associated certificates. An Attachment or TD may have additional Customer responsibilities.
- d. Customer may access a Cloud Service only to the extent of authorizations acquired by Customer. Customer is responsible for use of Cloud Services by any user who accesses the Cloud Service with Customer's account credentials. A Cloud Service may not be used in any jurisdiction for unlawful, obscene, offensive or fraudulent Content or activity, such as advocating or causing harm, interfering with or violating the integrity or security of a network or system, evading filters, sending unsolicited, abusive, or deceptive messages, viruses or harmful code, or violating third party rights. If there is a complaint or notice of violation, use may be suspended until resolved, and terminated if not resolved promptly. Customer may not i) resell direct access to a Cloud Service to a third party outside Customer's Enterprise; or ii) combine Cloud Services with Customer's value add to create a commercially available Customer branded solution for which Customer charges a fee.

2. Content and Data Protection

- a. Content consists of all data, software, and information that Customer or its authorized users provides, authorizes access to, or inputs to the Cloud Service. Use of the Cloud Service will not affect Customer's existing ownership or license rights in such Content. IBM and its contractors, and subprocessors may access and use the Content solely for the purpose of providing and managing the Cloud Service, unless otherwise described in a TD.
- b. Customer is responsible for obtaining all necessary rights and permissions to enable, and grants such rights and permissions to, IBM, and its contractors and subprocessors to use, provide, store and process Content in the Cloud Service. This includes Customer making necessary disclosures and obtaining consent, if required, before providing individuals' information, including personal or other regulated information in such Content. If any Content could be subject to governmental regulation or may require security measures beyond those specified by IBM for an offering, Customer will not input, provide, or allow such Content unless specifically permitted in the terms of the relevant TD or unless IBM has otherwise first agreed in writing to implement additional security and other measures.
- c. Upon request by either party, IBM, Customer or their affiliates will enter into additional agreements as required by law in the prescribed form for the protection of personal or regulated personal data included in Content. The parties agree (and will ensure that their respective affiliates agree) that such additional agreements will be subject to the terms of the Agreement.
- d. IBM will return or remove Content from IBM computing resources upon the expiration or cancellation of the Cloud Service, or earlier upon Customer's request. IBM may charge for certain activities performed at Customer's request (such as delivering Content in a specific format). IBM does not archive Content, however some Content may remain in Cloud Service backup files until expiration of such files as governed by IBM's backup retention practices.
- e. Each Cloud Service is designed to protect Content as described in the Agreement. IBM's Data Security and Privacy Principles for IBM Cloud Services (DSP), at <http://www.ibm.com/cloud/data-security>, apply for generally available Cloud Service offerings or as described in the applicable TD. IBM will treat all Content as confidential by not disclosing Content except to IBM employees, contractors, and subprocessors, and only to the extent necessary to deliver the Cloud Service, unless otherwise specified in a TD. Specific security features and functions of a Cloud Service may be provided in an Attachment and TDs. Customer is responsible to assess the suitability of each Cloud Service for Customer's intended use and Content. By using the Cloud Service, Customer acknowledges that it meets Customer's requirements and processing instructions.
- f. Customer acknowledges that i) IBM may modify the DSP from time to time at IBM's sole discretion and ii) such modifications will supersede prior versions. The intent of any modification to the DSP will be to i) improve or clarify existing commitments, ii) maintain alignment to current adopted standards and applicable laws, or iii) provide additional commitments. No modification to the DSP will materially degrade the security of a Cloud Service.

3. Changes

- a. IBM may modify a Cloud Service, without degrading its functionality or security features.
- b. IBM may withdraw a Cloud Service on 12 months' notice, unless otherwise stated in a TD. IBM will continue to provide the Cloud Service for the remainder of Customer's unexpired term or work with Customer to migrate to another IBM offering.
- c. Since this CSA may apply to many future orders, IBM may modify this CSA by providing Customer at least three months' written notice. Changes are not retroactive; they apply, as of the effective date, only to new orders, ongoing Cloud Services that do not expire, and renewals. For transactions with a defined renewable contract period, Customer may request that IBM defer the change effective date until the end of the current contract period. Customer accepts changes by placing new orders or continuing use after the change effective date or allowing transactions to renew after receipt of the change notice. Except as provided above, all changes to the Agreement must be in writing accepted by both parties.

4. Warranties

- a. IBM warrants that it provides Cloud Services using commercially reasonable care and skill in accordance with the applicable Attachment or TD. The warranty for a Cloud Service ends when the Cloud Service ends.
- b. **IBM does not warrant uninterrupted or error-free operation of a Cloud Service or that IBM will correct all defects or prevent third party disruptions or unauthorized third party access. These warranties are the exclusive warranties from IBM and replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and fitness for a particular purpose. IBM warranties will not apply if there has been misuse, modification, damage not caused by IBM, failure to comply with instructions provided by IBM, or if otherwise stated in a statement of work or TD. Non-IBM services are sold outside of DIR Contract DIR-TSO-3996.**

5. Charges and Payment

- a. Customer agrees to pay all applicable charges specified for a Cloud Service, and charges for use in excess of authorizations, in accordance with Appendix C, Pricing Index of DIR Contract DIR-TSO-3996. IBM does not give credits or refunds for any prepaid, one-time charges, or other charges already due or paid. IBM may change charges on thirty days' notice or as specified in a TD.

6. Liability and Indemnity

- a. Liability and Indemnity shall be in accordance with the terms of Section 10. A. and 10. K. of Appendix A of DIR Contract DIR-TSO-3996.

7. Termination

- a. IBM may suspend, revoke or limit Customer's use of a Cloud Service if IBM determines there is a material breach of Customer's obligations, a security breach, or violation of law. If the cause of the suspension can reasonably be remedied, IBM will provide notice of the actions Customer must take to reinstate the Cloud Service. If Customer fails to take such actions within a reasonable time, IBM may terminate the Cloud Service.
- b. Either party may terminate this CSA: i) without cause on at least one month's notice to the other after expiration or termination of its obligations under the Agreement; or ii) immediately for cause if the other is in material breach of the Agreement, provided the one who is not complying is given notice and reasonable time to comply. Any terms that by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to successors and assignees. Termination of this CSA does not terminate TDs, and provisions of this CSA as they relate to such TDs remain in effect until fulfilled or otherwise terminated in accordance with their terms.
- c. Customer may terminate a Cloud Service on one month's notice: (i) at the written recommendation of a government or regulatory agency following a change in either applicable law or the Cloud Services; (ii) if IBM's modification to the computing environment used to provide the Cloud Service causes Customer to be noncompliant with applicable laws; or (iii) if IBM notifies Customer of a modification that has a material adverse effect on Customer's use of the Cloud Service, provided that IBM will have 90 days to work with Customer to minimize such effect. In the event of such termination, IBM shall refund a portion of any prepaid amounts for the applicable Cloud Service for the period after the date of termination. If the Agreement is terminated for any other reason, Customer shall pay to IBM the amounts due per the Agreement. Upon expiration or termination for any reason, IBM shall, if Customer so requests, assist Customer in transitioning Customer's Content to an alternative technology for an additional charge and under separately agreed terms.

8. Governing Laws and Geographic Scope

- a. Each party is responsible for complying with: i) laws and regulations applicable to its business and Content; and ii) import, export and economic sanction laws and regulations, including defense trade control regime of any jurisdiction, including the International Traffic in Arms Regulations and those of the United States that prohibit or restrict the export, re-export, or transfer of products, technology, services or data, directly or indirectly, to or for certain countries, end uses or end users. Customer is responsible for its use of IBM and non-IBM products and services.
- b. Both parties agree to the application of the laws of the State of Texas, United States, without regard to conflict of law principles. The rights and obligations of each party are valid only in the country of Customer's business address. If Customer or any user exports or imports Content or use of any portion of the Cloud Service outside the country of Customer's business address, IBM will not serve as the exporter or importer. If any provision of the Agreement is invalid or unenforceable, the remaining provisions remain in full force and effect. Nothing in the Agreement affects statutory rights of consumers that cannot be waived or limited by contract. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions under the Agreement.

9. General

- a. IBM is an independent contractor, not Customer's agent, joint venturer, partner, or fiduciary, and does not undertake to perform any of Customer's regulatory obligations, or assume any responsibility for Customer's business or operations. Each party is responsible for determining the assignment of its personnel, and all contractors and subprocessors, and for their direction, control, and compensation.
- b. IBM maintains a robust set of business conduct and related guidelines covering conflicts of interest, market abuse, anti-bribery & corruption, and fraud. IBM and its personnel comply with such policies and require contractors and subprocessors to have similar policies.
- c. Account Data (the logon information required to verify an authentication service; it can be the user name, password, and the authentication service which the logon information is stored, but it cannot provide or facilitate access to stored data belonging to Customer) is information Customer provides to IBM, other than Content, about Customer or its users that IBM needs to enable Customer's acquisition or use of an IBM Product or information collected concerning such acquisition or use. IBM, its contractors and subprocessors may process, store and use Account Data wherever they do business to enable product features, administer use, personalize experience, and otherwise support or improve use of an IBM Product as described in IBM's Online Privacy Statement.
- d. Neither party may assign the Agreement, in whole or in part, without the prior written consent of the other. Assignment of IBM rights to receive payments or assignment by IBM in conjunction with the sale of the portion of IBM's business that includes a service is subject to Customer approval.
- e. This CSA applies to IBM and Customer and their respective Enterprise companies who avail themselves of the CSA. The parties shall coordinate the activities of Enterprise companies under the Agreement. Enterprise companies include (i) companies within the same country that Customer or IBM control (by owning greater than 50% of the voting shares), and (ii) any other entity that controls, is controlled by or is under common control with Customer or IBM and has signed a participation agreement.
- f. All notices under the Agreement must be in writing and sent to the business address specified for the Agreement, unless a party designates in writing a different address. The parties consent to the use of electronic means and facsimile transmissions for communications as a signed writing. Any reproduction of the Agreement made by reliable means is considered an original. The Agreement supersedes any course of dealing, discussions or representations between the parties.
- g. No right or cause of action for any third party is created by the Agreement or any transaction under it. Neither party will bring a legal action arising out of or related to the Agreement more than four years after the cause of action arose. Where approval, acceptance, consent, access, cooperation or similar action by either party is required, such action will not be unreasonably delayed or withheld.
- h. IBM may use personnel and resources in locations worldwide, including third party contractors and subprocessors to support the delivery of the Cloud Services. IBM may transfer Content, including personally identifiable information, across country borders, unless otherwise agreed to in a Transaction Document. A list of countries where Content may be processed for a Cloud Service is available at www.ibm.com/cloud/datacenters or as described in the Attachment or TD. IBM is responsible for the obligations under the Agreement even if IBM uses a third party contractor or subprocessors unless otherwise set forth in a TD. IBM will require subprocessors with access to Content to maintain technical and organizational security measures that will enable IBM to meet its obligations for a Cloud Service. A current list of subprocessors and their roles will be provided upon request.
- i. IBM may offer additional customization, configuration or other services to support Cloud Services, as detailed in a TD.