



**BMC SOFTWARE**  
**PRERELEASE SUBSCRIPTION SERVICES AGREEMENT**

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**The Subscription Services Prerelease Service is still under development and testing. BMC has NOT made any Subscription Service Prerelease Service generally available as a formal BMC product available for purchase by its customers (“GA Service”). You should not place the Prerelease Service into a production environment.**

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This Prerelease Subscription Services Agreement (“**Agreement**”) governs your use of the Prerelease Service (as defined below). This Agreement is between the entity or individual entering into this Agreement (“**Customer**”) and the BMC Contracting Entity for the applicable region as described in Section 7(l) (“**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 PRERELEASE SERVICE.

BMC and/or its affiliates and licensors owns the beta, alpha or other preliminary version of all BMC Subscription Services, related object code, documentation, software and any pre-generally available updates, new versions and upgrades, if any (collectively, the “**Prerelease Service**”), or has the rights to license use of the Prerelease Service, and is willing to grant to Customer a limited license to access and use such Prerelease Service, on the following terms. “**Subscription Services**” means the hosted service which packages web-based access and the right-to-use the supported applications and associated reference, user and technical guides. You may not access the Prerelease Service if you are BMC’s direct competitor, except with BMC’s prior written consent.

The Agreement is effective between Customer and BMC as of the date of your acceptance. This Agreement was last updated on July 3, 2018.

**1. PRERELEASE LICENSE.** Subject to the terms of this Agreement and the Restrictions on Use set forth below, BMC grants to Customer, from time to time and effective upon each time BMC grants Customer access to use a Prerelease Service, a worldwide, non-exclusive, non-sub-licensable, and non-transferable limited license for End Users to access and use the Prerelease Service in accordance with the terms of this Agreement, solely for the purpose of performing internal testing of the Prerelease Service. “**End Users**” means individuals (i) who are authorized by Customer to use and access the Prerelease Service, and (ii) who have been assigned unique user identifications and passwords by Customer. Customer is responsible for End Users’ compliance with this Agreement. As part of BMC’s grant to Customer for access to the Prerelease Service, Customer hereby grants BMC’s technical staff access to all data, including but not limited to Customer Data, that is either (a) entered into the Prerelease Service by Customer, or (b) obtained by the Prerelease Service as part of the Prerelease Service’s functionality. This data will be used to further the development of the Prerelease Service and to debug problems raised by Customer. The data will not be retained beyond the end of Customer’s use of the Prerelease Service.

**2. RESTRICTIONS ON USE.**

a. Customer agrees **NOT** to:

- (i) use the Prerelease Service to process production data, or where it may be used as would the GA Service;
- (ii) use the Prerelease Service with data or information that has not been backed up;
- (iii) modify, copy or create derivative works based on the Prerelease Service;
- (iv) create Internet “links” to or reproduce any content forming part of the Prerelease Service, other than for its own internal non-production business purposes;
- (v) disassemble, reverse engineer, or decompile the Prerelease Service or part thereof, or access it in order to copy any ideas, features, content, functions or graphics of the Prerelease Service;
- (vi) interfere with or disrupt the integrity or performance of the Prerelease Service;
- (vii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material via the Prerelease Service;
- (viii) send or store viruses or malicious code via the Prerelease Service;
- (ix) attempt to gain unauthorized access to the Prerelease Service or its related software, systems, platforms or networks;
- (x) use any components provided with the Prerelease Service separately from Prerelease Service;



- (xi) access the Prerelease Service for purposes of monitoring their availability, performance or functionality, or for any other benchmarking or competitive purposes;
  - (xii) sell, distribute, rent, lease, sublicense, display, modify, time share, outsource or otherwise provide the Prerelease Service to any third party or use it in a service bureau, outsourcing environment, or for the processing of third party data;
  - (xiii) release any results of performance tests related to Prerelease Service to any third party without BMC's prior written consent;
  - (xiv) modify, delete or remove any ownership, title, trademark, patent or copyright notices ("Identification") from any Prerelease Service; or
  - (xv) use the Prerelease Service for any purpose other than as specifically provided in this Agreement.
- b. Customer will be responsible for maintaining the confidentiality of the passwords assigned to Customer. Customer will immediately notify BMC if it becomes aware that a password is lost, stolen, disclosed to an unauthorized third party, or otherwise compromised. Customer will be responsible for any and all activities under Customer's account and/or using Customer passwords. Customer will (i) use commercially reasonable efforts to prevent unauthorized access to, or use of, the Prerelease Service, and notify BMC promptly of any such unauthorized access or use, and (ii) comply with all applicable laws in using the Prerelease Service.
- c. Customer is responsible for complying with all legal requirements, including applicable privacy laws and regulations, relating to the collection, use, processing and transfer of Customer Data. "Customer Data" means all electronic data or information submitted by Customer to the Prerelease Service. Customer acknowledges and consents that the Prerelease Service provided may require Customer Data to be transferred to a country outside of Customer's country or the country where the Customer Data originated.

**3. FEEDBACK.** Customer shall promptly provide to BMC any relevant feedback on the functionality and performance of the Prerelease Service and any test results (together, the "Feedback"). Customer agrees to provide the Feedback in writing if requested by BMC. BMC or its affiliates owns all Feedback relating to the Prerelease Service. Customer hereby assigns to BMC all rights, title and interest in the Feedback and all intellectual property therein. If requested by BMC, Customer agrees to execute such further instruments as BMC may reasonably request confirming BMC's ownership interest in such Feedback.

#### **4. PROPRIETARY RIGHTS AND CONFIDENTIALITY.**

- a. BMC, its affiliates or licensors retain all rights, title and interest to the Prerelease Service and all related intellectual property and proprietary rights. The Prerelease Service and all third party software provided with the Prerelease Service is protected by applicable copyright, trade secret, industrial and other intellectual property laws. BMC owns all right, title and interest in all software, programming, documentation, templates, questionnaires, methodologies, models, charts, reports and any other items used to deliver the Prerelease Service or made available to Customer as a result of the Prerelease Service ("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 Customer in this Agreement.
- b. "Confidential Information" means all proprietary or confidential information that is disclosed by BMC to Customer, and includes, among other things (i) any and all information relating to the Prerelease Service 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 Customer can show: (A) was rightfully in Customer's possession without any obligation of confidentiality before receipt from BMC; (B) is or becomes a matter of public knowledge through no fault of Customer; (C) is rightfully received by Customer from a third party without violation of a duty of confidentiality; or (D) is or was independently developed by or for Customer. Customer may not disclose Confidential Information of BMC to any third party or use the Confidential Information in violation of this Agreement. In the event Customer becomes legally compelled to disclose any Confidential Information, Customer 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, Customer agrees to furnish only that portion of the information which Customer is advised by written opinion of counsel is legally required and to exercise reasonable efforts to obtain confidential treatment of such information. Customer (i) 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 (ii) 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, Customer may disclose Confidential Information to Customer'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 Customer becomes aware of any unauthorized use or disclosure of Confidential Information, then Customer will promptly and fully notify BMC of all facts known to it concerning such unauthorized use or disclosure. In addition, if Customer 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, Customer 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, Customer 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.

**5. TERMINATION.** The license of Section 1 granted under this Agreement terminates on the earlier of:

- a. ninety (90) days after Customer's being granted access to a Prerelease Service; or
- b. immediately upon BMC's notice of termination for convenience.

Upon termination of any license or this Agreement, all rights and licenses granted herein will terminate and Customer shall cease accessing or using the Prerelease Service. Sections 3, 4, 5, 6, and 7 survive the termination of any Prerelease Service license or this Agreement.

If a GA Service is announced that replaces a Prerelease Service and Customer desires to acquire a license to access and use that GA Service, then Customer must acquire access to that GA Service under the then-current subscription service terms with BMC or its appropriate subsidiary or affiliate.

**6. DISCLAIMER OF WARRANTY, LIMITATION OF LIABILITY AND EXCLUSIVE REMEDY.**

- a. THE PRERELEASE SERVICE IS PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND WHATSOEVER. BMC, ITS AFFILIATES AND LICENSORS DO NOT WARRANT THAT ANY PRERELEASE SERVICE WILL SATISFY CUSTOMER'S REQUIREMENTS, THAT ANY PRERELEASE SERVICE IS WITHOUT DEFECT, ERROR FREE OR WITHOUT DELAY, OR THAT THE OPERATION OF ANY PRERELEASE SERVICE 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 PRERELEASE SERVICE, 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 CUSTOMER, 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 PRERELEASE SERVICE (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 CUSTOMER'S EXCLUSIVE REMEDY FOR DIRECT DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE PRERELEASE SERVICE, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, IS LIMITED TO THE GREATER OF THE AMOUNT ACTUALLY PAID BY CUSTOMER TO LICENSE THE APPLICABLE PRERELEASE SERVICE OR \$100.
- c. If a third party asserts a claim against BMC asserting that the Customer Data or Customer's use of the Prerelease Service in violation of this Agreement violates that third-party's patent, trade secret or copyright rights, or otherwise harms the third party ("**Claim**"), Customer 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.

**7. MISCELLANEOUS.**

- a. **No-Guarantee as to New Versions.** Customer acknowledges and agrees that BMC is under no obligation to provide any maintenance releases, updates or new versions of the Prerelease Service. BMC does not guarantee that any Prerelease Service will become a GA Service. If a GA Service is announced replacing a Prerelease Service, BMC does not guarantee that the GA Service will be similar in functionality to the comparable Prerelease Service version licensed under this Agreement. This Agreement creates no obligation on behalf of Customer to acquire any GA Service, or for BMC to provide any GA Service to Customer.



- b. **Entire Agreement and Modifications.** This Agreement is the entire understanding between Customer 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. Customer 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 Prerelease Service and Documentation 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 Prerelease Services are delivered to the United States Government, the United States Government hereby agrees that the Prerelease Services qualify 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 Prerelease Service, 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.** Customer 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 Prerelease Service is a citizen of or from an embargoed country (currently Iran, Syria, Sudan, Cuba and North Korea); c) is not prohibited from receiving the Prerelease Service under such regulations; d) will not acquire the Prerelease Service for a person who is restricted under such regulations; e) will not use the Prerelease Service in contradiction to such regulations; and f) will not use the Prerelease Service for prohibited uses, including but not limited to nuclear, chemical, missile or biological weapons related end uses. For Prerelease Service 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 Prerelease Service 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 Prerelease Service.
- h. **Third Party Code.** The Prerelease Service may contain third party software which is delivered to Customer as part of the Prerelease Service and may not be taken out of the Prerelease Service or used separately from the Prerelease Service and for which additional terms may be included in the Documentation.
- i. **Data Protection.** BMC and Customer 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 the Prerelease Service. A list of additional third party Sub-processors is available to the Customer upon request.
- j. **Links to Third Party Websites:** The Subscription Services 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 Customer's use of these websites. Customer 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	Licensing 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
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 <sup>th</sup> Fl., ASEM Tower, , 1517, Yeongdong-daero, Gangnam-gu, Seoul 135-798, Korea South