



## IBM Terms of Use

---

### IBM Emptoris Managed Cloud Delivery

The terms of this IBM Terms of Use are in addition to those of the IBM International Passport Advantage Agreement, the IBM International Passport Advantage Express Agreement, or the IBM International Agreement for Selected IBM SaaS Offerings as applicable (“Agreement”). Carefully read these IBM SaaS Terms of Use (“Terms of Use” or “ToU”) before using the IBM SaaS and any associated Enabling Software. Customer may use the IBM SaaS and Enabling Software only if Customer first accepts these Terms of Use. By ordering, accessing or using the IBM SaaS or Enabling Software or clicking on an “Accept” button, Customer agrees to these Terms of Use.

**IF YOU ARE ACCEPTING THESE TERMS ON BEHALF OF CUSTOMER, YOU REPRESENT AND WARRANT THAT YOU HAVE FULL AUTHORITY TO BIND CUSTOMER TO THESE TERMS OF USE. IF YOU DO NOT AGREE WITH THESE TERMS OF USE OR DO NOT HAVE FULL AUTHORITY TO BIND CUSTOMER TO THESE TERMS OF USE THEN DO NOT IN ANY MANNER USE OR PARTICIPATE IN ANY OF THE FUNCTIONALITY OFFERED AS PART OF THE IBM SAAS OR USE ANY ENABLING SOFTWARE.**

#### Part 1 – General Terms

##### 1. Purpose

These IBM SaaS Terms of Use (“Terms of Use”) are for the following IBM SaaS:

- IBM Emptoris Sourcing Managed Cloud Delivery
- IBM Emptoris Sourcing Managed Cloud Delivery Burst Mode
- IBM Emptoris Spend Analysis Managed Cloud Delivery
- IBM Emptoris Supplier Lifecycle Management Managed Cloud Delivery
- IBM Emptoris Program Management Managed Cloud Delivery
- IBM Emptoris Contract Management Buy Side Managed Cloud Delivery
- IBM Emptoris Contract Management Sell Side Managed Cloud Delivery
- IBM Emptoris Managed Cloud Delivery Virtual Private Network Connection
- IBM Emptoris Strategic Supply Management Managed Cloud Delivery Encrypted Database
- IBM Emptoris Edge Delivery Web Application Accelerator Managed Cloud Delivery
- IBM Emptoris Services Procurement Managed Cloud Delivery
- IBM Emptoris Rivermine Telecom Expense Management Managed Cloud Delivery
- IBM Emptoris Rivermine Telecom Expense Management Managed Cloud Delivery Extended Data Retention-1 Year
- IBM Emptoris Rivermine Telecom Expense Management Managed Cloud Delivery Encrypted Database

For the purpose of this ToU only, the term “IBM SaaS” refers to the specific IBM SaaS offering set forth in this Section 1.

Customer may use the IBM SaaS only during a valid Subscription Period.

##### 1.1 Associated IBM Programs

The IBM Emptoris Managed Cloud Delivery services do not include Subscription and Support for the associated IBM program. Customer represents that Customer has acquired the applicable (1) license entitlements and (2) Subscription and Support for the IBM program. During the Subscription Period of the IBM SaaS, to receive Subscription and Support for the IBM programs, Customer will need to maintain current Subscription and Support for the IBM programs.

##### 2. Definitions

Capitalized terms not defined in these Terms of Use are defined in the Agreement. For purposes of these ToU, the term “Program” includes the term “program” each as may be used in the applicable Agreement, and the term “Transaction Document” includes the term “IBM SaaS Quotation”.

**Enabling Software** – any Program and associated materials provided to Customer by IBM or a third party as part of the IBM SaaS offering in order to facilitate access to and use of IBM SaaS.

**Privacy Practice** – the Privacy Practice, located on the Internet at <http://www.ibm.com/privacy>, and any subsequent modification.

### **3. General Charge Terms**

#### **3.1 Metrics**

Instance is a unit of measure by which the IBM SaaS can be obtained. An Instance is access to a specific configuration of the IBM SaaS. Sufficient entitlements must be obtained for each Instance of the IBM SaaS made available to access and use during the measurement period specified in Customer's Proof of Entitlement (PoE) or Transaction Document.

Connection is a unit of measure by which the IBM SaaS can be obtained. A Connection is a link or association of a database, application, server, or any other type of device to the IBM SaaS. Sufficient entitlements must be obtained to cover the total number of Connections which have been or are made to the IBM SaaS during the measurement period specified in Customer's Proof of Entitlement (PoE) or Transaction Document.

#### **3.2 Charges & Billing**

##### **3.2.1 Billing Options**

The amount payable for IBM SaaS is specified in a Transaction Document as follows:

The subscription fee is billable on an annual, quarterly or monthly basis for the length of the term as specified in the Transaction Document. The amount payable per billing cycle will be based on the subscription fee plus any overage charges.

##### **3.2.2 Partial Month Charges**

The Partial Month charge is a pro-rated daily rate that will be charged to Customer. The Partial Month Charges are calculated based on the remaining days of the partial month starting on the date Customer is notified by IBM that their access to the IBM SaaS is available.

### **4. Account Creation and Access**

When IBM SaaS Users register for an account ("Account"), IBM may provide the IBM SaaS User with an Account identification and password. Customer is responsible for ensuring that each IBM SaaS User manages and keeps their Account information current. At any time Customer may request that any Personal Data provided as part of registering for an Account or use of the IBM SaaS be corrected or removed from Account information and this information will be corrected or removed, but removal may prevent access to the IBM SaaS.

Customer is responsible for ensuring that each IBM SaaS User protects their Account identification and password and controls who may access an IBM SaaS User Account or use any IBM SaaS on Customer's behalf.

### **5. Suspension of IBM SaaS and Termination**

#### **5.1 Suspension**

In the event of a breach of the Terms of Use, the Agreement, or the Acceptable Use Policy, misappropriation of IBM intellectual property or violation of applicable law by an IBM SaaS User, IBM reserves the right to suspend or revoke the offending IBM SaaS User's access to the IBM SaaS, and/or delete the offending IBM SaaS User's Content, at any time. IBM will notify Customer of any suspension or revocation action.

#### **5.2 Termination**

IBM may terminate Customer's access to IBM SaaS for cause if Customer does not comply with the terms of the Agreement, the Acceptable Use Policy, or this ToU and such noncompliance is not remedied within a reasonable time after receiving written notice from IBM. Upon termination, Customer's access and other rights to the IBM SaaS will be cancelled and cease. In such event Customer and its IBM SaaS Users must cease any further use of the IBM SaaS and destroy any copies of the associated Enabling Software within Customer's possession or control.

## **6. Renewal of a Subscription Period**

### **6.1 Automatic Renewal of a Subscription Period**

For IBM International Passport Advantage Agreement or IBM International Passport Advantage Express Agreement Customers, the terms of the first two paragraphs of Section 3.5.4 of the Agreement: Annual Renewal of Software Subscription and Support and Selected Support, including any applicable Country-unique terms, apply to this IBM SaaS offering except that for purposes of these Terms of Use the words “software subscription and support” or “Selected Support” are replaced by the words “IBM SaaS Subscription Period”.

### **6.2 Customer Renewal Required**

For IBM International Agreement for Selected IBM SaaS Offerings customers, notwithstanding anything to the contrary in that Agreement (including country unique terms), the IBM SaaS offering will not renew at the end of the initial Subscription Period. In order to continue use of the IBM SaaS beyond the initial Subscription Period, Customer must obtain a new subscription for the IBM SaaS under the terms of the IBM International Passport Advantage Agreement or IBM International Passport Advantage Express Agreement, as applicable.

## **7. Emergency Maintenance & Scheduled Maintenance**

IBM may perform regularly scheduled maintenance during maintenance windows defined by IBM. Other scheduled and non-scheduled down times may occur.

IBM SaaS will not be available during these times.

## **8. Updates; Applicable Terms and Authorization for Auto Updates**

These Terms of Use apply to all enhancements, modifications, variations, revisions, updates, supplements, add-on components, and replacements for the IBM SaaS (collectively, "Updates") that IBM may provide or make available for the IBM SaaS offering in general, subject to any additional terms provided by IBM applicable to such Updates. IBM and Customer will work together to determine when certain significant Updates will be installed. IBM has no obligation to, and nothing in these Terms of Use may be construed to require IBM to, create, provide, or install Updates.

## **9. Updates to Terms of Use**

IBM reserves the right to prospectively modify these Terms of Use and the Acceptable Use Policy, to account for an Updates that IBM may provide or make available for the IBM SaaS during the Subscription Period and as otherwise required by applicable law, by providing at least thirty (30) days prior notice of such modified terms to Customer. Subscription renewals will be governed by the Terms of Use in effect at the time of renewal.

## **10. Technical Support**

Technical support is provided for the IBM SaaS offering during the Subscription Period. Such technical support is included with the IBM SaaS and is not available as a separate offering.

Technical Support information can be found at the following URL: <http://www-01.ibm.com/software/commerce/emptoris/customer-support/>

E-mail and phone support access is also described at the technical support web site.

## **11. Data Privacy and Data Security**

### **11.1 Customer's Obligations**

In relation to all Personal Data provided by or through Customer to IBM, Customer will be responsible as the sole data controller for complying with all applicable data protection or similar laws such as, but not limited to, EU Directive 95/46/EC (and laws implementing that Directive) that regulate the processing of Personal Data including special categories of data, as such terms are defined in that Directive (and laws implementing that Directive).

Customer agrees to obtain all legally required consents, authorizations and approvals and make all necessary disclosures before (i) including any Personal Data in Content and (ii) using the Enabling Software and IBM SaaS.

Customer confirms and acknowledges that it is solely responsible for any Personal Data that may be contained in Content, including any information which any IBM SaaS User shares with third parties on Customer's behalf. Customer is solely responsible for determining the purposes and means of

processing any Personal Data by IBM under these Terms of Use, including that such processing according to Customer's instructions will not place IBM in breach of applicable data protection laws.

IBM SaaS is not intended for the storage or receipt of any Sensitive Personal Information or Protected Health Information (as defined below), in any form, and Customer will be responsible for reasonable costs and other amounts IBM may incur relating to any such information provided to IBM or the loss or disclosure of such information by IBM, including those arising out of any third party claims. "Sensitive Personal Information" is: 1) Personal Data, the loss of which would trigger a data breach notification requirement, and includes, but is not limited to financial information, country identification number (e.g. Social Insurance Number (SIN), Social Security Number (SSN)) or other governmentally issued identification number such as driver's license or passport number, bank account number, credit card or debit card number; and 2) Personal Data relating to racial or ethnic origin, sexual orientation, or political opinions or religious, ideological or philosophical beliefs or activities or trade union membership. "Protected Health Information" is "individually identifiable health information" as defined under the Health Information Portability and Accountability Act of 1996 ("HIPAA"), as amended.

Customer agrees that when IBM reasonably determines it to be useful in its provision of IBM SaaS, IBM may transfer Content, including any Personal Data, across a country border to the entities and countries notified to Customer. Customer consents to IBM SaaS being provided by such entities in such countries, and is solely responsible for determining that any transfer of any Personal Data across a country border under the terms of the Terms of Use complies with applicable data protection laws. IBM shall reasonably cooperate with Customer, for Customer's own benefit or for the benefit of a Customer data controller, in its fulfillment of any legal requirement, including obtaining mandatory approvals.

If IBM makes a change to the way it processes or secures Personal Data as part of IBM SaaS and the change causes Customer to be noncompliant with data protection laws applicable to it, Customer may terminate the current Subscription Period for the affected IBM SaaS, by providing written notice to IBM within thirty (30) days of IBM's notification of the change to Customer. Any such termination will not obligate IBM to issue a refund or credit to Customer.

## **11.2 IBM's Obligations**

IBM will only process Personal Data in a manner that is reasonably necessary to provide IBM SaaS, and only for that purpose.

IBM will only process Personal Data in delivering IBM SaaS as described by IBM, and Customer agrees that the description provided by IBM is consistent with Customer's processing instructions.

Upon Customer's written request, following termination or expiry of either this ToU or the Agreement, IBM will destroy or return to Customer all Content that Customer identifies as Personal Data.

If Customer or a Customer data controller is required by applicable data protection laws to provide information about or access to Personal Data to any individual or to a relevant authority, IBM will reasonably cooperate with Customer in providing such information or access.

## **11.3 Protection of Content**

Notwithstanding anything to the contrary in the Agreement,

- a. IBM will not intentionally disclose or use Customer's Content except to operate and perform the IBM SaaS as contemplated in this Agreement, subject to IBM's compliance with applicable laws.
- b. IBM will only process Customer Content on systems used to host and operate the IBM SaaS, on which IBM has implemented the security practices and procedures referenced below.

## **11.4 Security Practices**

IBM implements and maintains practices and procedures, which may be revised periodically, regarding the systems used to host and operate the IBM SaaS. These practices and procedures are designed to reduce the vulnerability of our systems to accidental loss, unlawful intrusions, unauthorized access, disclosure or alteration, or wrongful conduct that may interfere with, misappropriate, or otherwise damage the Content or Customer's use of the IBM SaaS. A description of the practices and procedures applicable to the IBM SaaS, including applicable technical and operational measures, is available to Customer upon request. Customer is responsible for determining whether these practices and procedures are appropriate to meet Customer's requirements. By using the IBM SaaS, Customer acknowledges its acceptance of the IBM practices and procedures and their adequacy for Customer's purposes. Except as specifically provided in the Security Practices for the IBM SaaS, IBM makes no representations or warranties regarding any security functions.

## **12. Compliance with Applicable Export Law**

Each party agrees to comply with all applicable import and export laws and regulations, including those of the United States regarding embargo and sanctions regulations and prohibitions on export by certain end users or for any prohibited end uses (including nuclear, space or missile, and chemical and biological weapons). Customer represents that Content will not, in whole or part, be controlled under the U.S. International Traffic in Arms Regulation (ITAR). Customer acknowledges that IBM may use global resources (non-permanent residents used locally and personnel in locations worldwide) to remotely support the delivery of IBM SaaS. Customer represents that no Content accessible to IBM for the IBM SaaS will require an export license or is restricted from export to any IBM global resource or personnel under applicable export control laws.

## **13. Indemnity**

Customer agrees to indemnify, defend and hold IBM harmless against any third party claim arising out of or relating to: 1) violation of the Acceptable Use policy by Customer or any IBM SaaS User; or 2) Content created within IBM SaaS or provided, uploaded, or transferred to IBM SaaS by Customer or any IBM SaaS User.

## **14. Copyright Infringement**

It is IBM's policy to respect the intellectual property rights of others. To report the infringement of copyrighted material, please visit the Digital Millennium Copyright Act Notices Page at <http://www.ibm.com/legal/us/en/dmca.html>.

## **15. Warranty and Exclusions**

### **15.1 No Warranty**

SUBJECT TO ANY STATUTORY WARRANTIES THAT CANNOT BE EXCLUDED, IBM MAKES NO WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, REGARDING THE IBM SaaS, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, AND TITLE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.

IBM does not make any representation that it will provide uninterrupted, secure, or error-free operation of IBM SaaS or that IBM will be able to prevent third party disruptions of IBM SaaS or that IBM will correct all defects.

Customer is responsible for the results obtained from the use of the IBM SaaS.

## **16. IBM SaaS Offering Unique Terms**

### **16.1 IBM SaaS User Profile**

In connection with Customer's use of the IBM SaaS, Customer acknowledges and agrees that: (i) IBM SaaS User names, titles, company names and photographs may be posted by an IBM SaaS User as part of a profile ("Profile") and that the Profile can be viewed by other IBM SaaS Users, and (ii) at any time Customer may request that an IBM SaaS User Profile be corrected or removed from the IBM SaaS and such Profile will be corrected or removed, but removal may prevent access to the IBM SaaS.

### **16.2 Third Party Site and Services**

If Customer or an IBM SaaS User transmits Content to a third party website or other service that is linked to or made accessible by the IBM SaaS, Customer and the IBM User provide IBM with the consent to enable any such transmission of Content, but such interaction is solely between Customer and the third party website or service. IBM makes no warranties or representations about such third party sites or services, and shall have no liability for such third party sites or services.

### **16.3 Restriction for Emptoris Sourcing Managed Cloud Delivery and Emptoris Sourcing Managed Cloud Delivery Burst Mode**

If a customer utilizes the Official Journal of the European Union (OJEU) feature where the sourcing system transmits data to the Tenders Electronic Daily (TED) site, the Customer is responsible for applying to the OJEU and passing the GAMMA testing. The data transmission is solely between the Customer and this third party site. IBM makes no warranties or representations about such third party sites or services and shall have no liability for such third party sites or services.

## **17. General**

If any provision of these Terms of Use is held to be invalid or unenforceable, the remaining provisions of these Terms of Use remain in full force and effect. Failure by either party to insist on strict performance or to exercise a right when entitled does not prevent either party from doing so at a later time, either in relation to that default or any subsequent one. Any terms of these Terms of Use that by their nature extend beyond termination of these Terms of Use or the applicable Subscription Period remain in effect until fulfilled, and apply to respective successors and assignees.

## **18. Entire Agreement**

The complete agreement between the parties, replacing any prior oral or written communications between Customer and IBM, consists of these Terms of Use and the Agreement. If there is a conflict among the terms of these Terms of Use and the Agreement, then these Terms of Use prevail over the Agreement.

Additional or different terms in any written communication from Customer (such as a purchase order, acknowledgement or e-mail) are void. These Terms of Use may only be amended as set forth herein.

## Part 2 – Country-unique Terms

The following terms replace or modify the referenced terms in Part 1. All terms in Part 1 that are not changed by these amendments remain unmodified and in effect. This Part 2 is comprised of amendments to this Terms of Use and is organized as follows:

- Americas country amendments,
- Asia Pacific country amendments; and
- Europe, Middle East, and Africa country amendments.

### AMERICAS COUNTRY AMENDMENTS

#### UNITED STATES OF AMERICA

##### 16. IBM SaaS Offering Unique Terms

*The following is added as Section 16.4 Derived Benefit Locations*

##### 16.4 Derived Benefit Locations

This offering provides services for Customer's licensed software. In certain jurisdictions in the United States, the IBM SaaS may be subject to a duty, tax, levy or fee (collectively, a "Tax"), based on the sales tax jurisdiction in which the benefit of the Managed Services is derived. Accordingly, the following applies to customers purchasing this offering in the United States:

By accepting the terms of use for this offering, Customer is identifying the sole location where benefit is derived from the Managed Services (the "Derived Benefit Location") as the "ship to" address listed on the IBM order quotation that will be provided by IBM in conjunction with a purchase of the IBM SaaS. If the "ship to" address listed on the IBM order quotation is not the correct Derived Benefit Location or there are multiple Derived Benefit Locations, Customer must provide the IBM sales representative with the correct Derived Benefit Location information in writing prior to purchasing the Managed Services and accepting the terms of use for this offering.

If the Derived Benefit Location changes at any time during the term of the IBM SaaS agreement, Customer must promptly notify IBM of the change in writing and is liable for any amounts that may be due to the relevant tax authorities as a result of any such change, including, but not limited to, any and all Taxes, fines, penalties or back payments.

### ASIA PACIFIC COUNTRY AMENDMENTS

#### AUSTRALIA

##### 15.2. Disclaimer

*The following is added to the end of Section 15:*

Although IBM specifies that there are no warranties, Customer may have certain rights under the Competition and Consumer Act 2010 or other legislation and are only limited to the extent permitted by the applicable legislation.

#### NEW ZEALAND

##### 15.2. Disclaimer

*The following is added to the end of Section 15:*

Although IBM specifies that there are no warranties, Customer may have certain rights under the Consumer Guarantees Act 1993 or other legislation which cannot be excluded or limited. The Consumer Guarantees Act 1993 will not apply in respect of any goods which IBM provides, if Customer requires the goods for the purposes of a business as defined in that Act.

## **EUROPE, MIDDLE EAST, AFRICA (EMEA) COUNTRY AMENDMENTS**

### **EUROPEAN UNION MEMBER STATES**

*The following is added to Section 15: Warranty and Exclusions:*

In the European Union ("EU"), consumers have legal rights under applicable national legislation governing the sale of consumer goods. Such rights are not affected by the provisions set out in this Section 15: Warranty and Exclusions.

### **AUSTRIA**

#### **15. Warranty and Exclusions**

*If you paid a charge for the IBM SaaS then the Section 15 Warranty and Exclusions is replaced in its entirety by the following:*

##### **15. Warranties and Exclusions**

IBM provides the IBM SaaS in conformity with its descriptions as contained in the IBM SaaS announcement and maintains it in this condition for the term of the IBM SaaS. IBM, its Affiliates and suppliers disclaim all further warranties ("Ausschluß der Gewährleistung").

Warranties, if any, for Enabling Software supplied as part of this IBM SaaS may be found in their license agreements.

### **GERMANY**

#### **15. Warranty and Exclusions**

*If you paid a charge for the IBM SaaS then the Section 15 Warranty and Exclusions is replaced in its entirety by the following:*

##### **15. Warranties and Exclusions**

IBM provides the IBM SaaS in conformity with its descriptions as contained in the IBM SaaS announcement and maintains it in this condition for the term of the IBM SaaS. IBM, its Affiliates and suppliers disclaim all further warranties ("Ausschluß der Gewährleistung").

Warranties, if any, for Enabling Software supplied as part of this IBM SaaS may be found in their license agreements.

### **IRELAND**

#### **15. Warranty and Exclusions**

*The following paragraph is added:*

Except as expressly provided in these terms and conditions, or Section 12 of the Sale of Goods Act 1893 as amended by the Sale of Goods and Supply of Services Act, 1980 (the "1980 Act"), all conditions or warranties (express or implied, statutory or otherwise) are hereby excluded including, without limitation, any warranties implied by the Sale of Goods Act 1893 as amended by the 1980 Act (including, for the avoidance of doubt, Section 39 of the 1980 Act).

### **IRELAND AND UNITED KINGDOM**

#### **18. Entire Agreement**

*The following sentence is added at the beginning of this Section 18:*

Nothing in the following paragraphs shall have the effect of excluding or limiting liability for fraud.