

CONTRACT
SOFTWARE MAINTENANCE AGREEMENT

by and between

CUYAHOGA COUNTY, OHIO

and

BMC SOFTWARE, INC.

THIS AGREEMENT (the "Contract") is made and entered into this ____ day of 2012, by and between Cuyahoga County, Ohio ("the County"), on behalf of the Cuyahoga County Information Services Center and BMC Software, Inc. ("BMC"), a Texas Corporation with offices located at, 2101 Citywest Blvd, Houston, TX 77042 (the Provider").

WHEREAS, the County has a present need for renewal of software maintenance service of BMC's Control Software Products, at the Information Services Center; and

WHEREAS, BMC, is the Licensor and an authorized service provider for maintenance and support service of BMC Software Products to the County as a State of Ohio Term Vendor Schedule # 534147; and

WHEREAS, the County desires to avail itself of BMC's software maintenance service on the Control Software Products located at the Cuyahoga County Information Services Center and BMC is willing to provide such service to the County all upon the terms and conditions set forth herein, and listed on Schedule A.

NOW, THEREFORE, in consideration of mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, BMC and the County agree as follows:

ARTICLE I – AGREEMENT AND TERM

1.1 Scope of Agreement. During the term of this Contract, BMC shall provide the County with annual maintenance BMC- Control Software Products, as listed on Schedule A - Support Renewal Quote 334363. In the event that a discrepancy exists between the terms of Schedule A and this agreement, the terms of this agreement will be controlling and binding.

1.2 Term. The term of this Contract shall commence as of January 31, 2012; and, unless earlier terminated in accordance with the provisions of this Contract shall continue in effect for a period of three year from the commencement date (1/31/12 – 1/30/15).

The cost of this Contract shall not exceed One Hundred Seventy Three Thousand Three Hundred Twenty One Dollars and Forty Cents (**\$173,321.40**).

ARTICLE II - SCOPE OF WORK

- 2.1 Rendering of Services. BMC hereby agrees to render the services identified in Article 1.1 and BMC's System Management Product Order Form & Renewal Quote # CUI10825344-2 and incorporated by reference as Schedule A at a total price not exceed One Hundred Seventy Three Thousand Three Hundred Twenty One Dollars and Forty Cents (**\$173,321.40**).

ARTICLE III – PAYMENT AND INVOICING

- 3.1 Payment. During the term of this contract, the County shall pay BMC yearly for the services outlined in Schedule A upon receipt of said invoice.
- 3.2 Invoicing. BMC shall invoice the County for the services outlined in Schedule A upon execution of this Contract. BMC shall submit original invoice(s) to the following address:

Cuyahoga County Information Services Center
Business Department
1255 Euclid Avenue, 4th floor
Cleveland, Ohio 44115

ARTICLE IV – SUBCONTRACTING, INDEMNITIES AND WARRANTIES

- 4.1 Subcontracting. This Contract was awarded to BMC based upon BMC's unique qualifications and skills, and no task required to be performed under this contract by BMC shall be subcontracted to third parties without the express written consent of Cuyahoga County.
- 4.2 Indemnities and Warranties. All provisions relating to indemnities and warranties contained in the State Master Maintenance Agreement shall inure to the benefit of Cuyahoga County.

ARTICLE V - DISPUTE RESOLUTION AND TERMINATION

- 5.1 Dispute Resolution.
- a) In the event of any dispute or disagreement between BMC and the County, either with respect to the interpretation of any provision of this Contract or with respect to the performance by BMC or the County hereunder, which cannot be resolved in the normal course of business, then upon written notice of either party, each party will appoint a designated officer whose task it will be to meet for the purpose of endeavoring in good faith to resolve such dispute or to negotiate for an adjustment to such section or provision of this Contract. The designated officers

shall meet as often as the parties reasonably deem necessary in order to gather and furnish to the other all information with respect to the matter in issue which the parties believe to be appropriate and germane in connection with its resolution. Such officers will discuss the problem and/or negotiate the applicable section or provision without the necessity of any formal proceedings relating thereto. During the course of such negotiation, all reasonable requests made by one party to the other for information will be honored in order that each of the parties may be fully advised in the negotiations. The specific format for such discussions will be left to the discretion of the designated officers but may include the preparation of agreed upon statements of fact or written statements of position furnished to the other party. No formal proceedings for the binding arbitration of such dispute may be commenced until (i) resolution as contemplated in this clause has been unsuccessful and (ii) either of the parties concludes in good faith that amicable resolution through continued negotiation of the matter in issue does not appear likely and so notifies the other party.

(b) The rights and obligations of the parties under this provision shall not limit either party's right to terminate this Contract as may be otherwise permitted hereunder.

5.2 Termination covered under the license agreement and POF.

5.3 Termination for Financial Instability. In the event that BMC becomes financially unstable to the point of (i) no longer offering support for the Products (i) making a general assignment for the benefit of creditors, or (iii) suffering or permitting the appointment of a receiver for its business or its assets, or there is a filing by or against BMC of a meritorious petition in bankruptcy under any bankruptcy or debtor's law, the County may, at its option, immediately terminate this Contract, by giving written notice thereof.

ARTICLE VI – ADHERENCE TO ELECTRONIC SIGNATURE POLICY OF COUNTY

6.1 By entering into this Contract, BMC, its officers, employees, subcontractors, sub-grantees, agents or assigns, to conduct this transaction by electronic means by agreeing that all documents requiring county signatures may be executed by electronic means, and that the electronic signatures affixed by Cuyahoga County to said documents shall have the same legal effect as if that signature was manually affixed to a paper version of the document.

6.2 BMC further agrees to be bound by the provisions of Chapter 304 and 1306 of the Ohio Revised Code as they pertain to Electronic Transactions and to comply with the electronic signature policy of Cuyahoga County.

ARTICLE VII – MISCELLANEOUS

- 7.1 Notices. Wherever one party is required or permitted to give notice to the other pursuant to this Contract, such notice shall be deemed given when delivered by hand, via certified mail with return receipt requested, via overnight courier with signature required, and addressed as follows:

In the case of the County:

Cuyahoga County Information Services Center
ATTN: Tom Basco
1255 Euclid Avenue, 4th floor
Cleveland, Ohio 44115

In the case of BMC:

Anna-Marie Levy
BMC Software, Inc.
2101 Citywest Blvd.
Houston, TX 77042

Either party may from time to time change its designated recipient or address for notification purposes by giving the other party written notice of the new designated recipient or address and the date upon which it will become effective.

- 7.2 Severability. If, and only to the extent that, any provision of this Contract is declared or found to be illegal, unenforceable or void, then both parties shall be relieved of all obligations arising under such provision, it being the intent and agreement of the parties that this Contract shall be deemed amended by modifying such provision to the extent necessary to make it legal and enforceable while preserving its intent. If that is not possible, another provision that is legal and enforceable and achieves the same objective shall be substituted. If the remainder of this Contract is not affected by such declaration or finding and is capable of substantial performance, then the remainder shall be enforced to the extent permitted by law.
- 7.3 Waiver. No delay or omission by either party in the exercise of any right or power shall impair any such right or power or be construed to be a waiver thereof. A waiver by either of the parties of any of the covenants, conditions or agreements to be performed by the other or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant, condition or agreement herein contained. No change, waiver, or discharge hereof shall be valid unless in writing and signed by an authorized representative of the party against which such change, waiver, or discharge is sought to be enforced.
- 7.4 Survival of Terms. Termination or expiration of this Contract for any reason shall not release either party from any liabilities or obligations set forth in this Contract which (i) the parties have expressly agreed shall survive any such termination or expiration, or (ii) remain to be performed or by their nature would be intended to be applicable following any such termination or expiration.

- 7.5 Record Audit Retention. BMC agrees to make all pertinent contractual books and records and other documents pertaining to this Contract available to the County and its designated agents for purpose of audit and examination upon reasonable request during the term of this Contract and for a period of two (2) years from the expiration date or final payment under this Contract, whichever is later; provided however, that should BMC be notified that an audit has been commenced pursuant to Ohio Revised Code Sec. 117.11 during said period, for which the aforesaid books and records are material, the aforesaid records shall be retained pending the completion of said audit.
- 7.6 Headings and Interpretation. The article and section headings used herein are for reference and convenience only, and shall not enter into the interpretation hereof.
- 7.7 Governing Law. This Contract shall be subject to interpretation under the laws of the State of Ohio.
- 7.8 Assignment. BMC shall not assign, transfer, convey or otherwise dispose of this Contract, or its right to execute it, or its right, title or interest in or to it or any part thereof, or assign, by power of attorney or otherwise, any of the monies due or to become due under this Contract without approval of the County Executive by resolution.
- 7.9 Contract Processing. BMC shall submit one (1) original contractual agreement with original signature to the following:
- Cuyahoga County Information Services Center
1255 Euclid Avenue, 4th Floor
Cleveland, Ohio 44115
- 7.10 Commencement of Contract Performance. In order to protect the interest of Cuyahoga County this contract must be executed by the County Executive before compensation for the services or products set forth in this contract can be provided. In the event that services are provided by BMC prior to the execution of this agreement by the County Executive, the same will be provided at BMC's risk, and payment therefore cannot, and will not, be made unless and until this agreement is approved by the County Executive. Upon approval by the County Executive of this contract, however, any and all prior performance under this contract shall be deemed ratified and said performance shall be deemed to be included in this contract. Payment(s) for said prior performance shall not increase the amount of the contract limit.

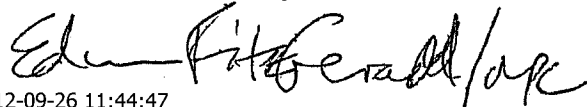
THIS AGREEMENT shall be subject to interpretation under the laws of the State of Ohio, and is subject to the review of the County Prosecutor's Office as to legal form and correctness.

IN WITNESS WHEREOF, the County and BMC have each caused this Contract to be signed and delivered by its duly authorized representative as of the date first written.

BMC SOFTWARE, INC.

CUYAHOGA COUNTY, OHIO

Edward FitzGerald, County Executive



2012-09-26 11:44:47

BY: 

BY: _____
Edward FitzGerald, County Executive





Schedule A

Product Order Form - System Management Perpetual**Order Date:** June 30, 2012**BMC Software, Inc.****Web:** www.bmc.com**Territory:** USA**2101 CityWest Boulevard****Customer:** Cuyahoga County**Houston, Texas 77042****Attn:** Order Services**Product Table:**

Products	Support Plan	Unit of Measurement	Licensed Capacity	Number of Units	Fees	
			Classification			
CONTROL-M for OS/390 - Old	BMC Continuous (7x24)	Per installed server	ND40	1		
Control D	BMC Continuous (7x24)	Per installed server	ND38	1		
Control M/Restart	BMC Continuous (7x24)	Per installed server	ND38	1		
Control V	BMC Continuous (7x24)	Per installed server	ND40	1		
Total Fee (in USD) exclusive of applicable taxes						\$173,321.40

- 1. Scope.** This order (the "**Order**") governs Customer's use of the products referenced in the Product Table (the "**Products**"). This Order is made to the Master Agreement (BMC No. 5058 and 1531) dated August 9, 1989 (the "**Agreement**"); as amended by Contract Addendum No. 1 dated September 3, 1991 (the "**Addendum**"); and further amended by Contract Addendum No 1 dated June 9, 1993 (the "**Addendum 2**"); collectively (the "**Agreement**"). (collectively the "**Agreement**").
- 2. Fee.** The fee for use of the Products up to the Licensed Capacity is the total fee indicated in the Product Table (the "**Fee**"). BMC will invoice and Customer agrees to pay such Fee in annual payments, plus applicable taxes subject to the laws where the Products are installed.

Annual Payments (in USD)	Payment Due Date
\$57,773.80	01-31, 2012
\$57,773.80	01-31, 2013
\$57,773.80	01-31, 2014

- 3. Support.** The annual fee for enrollment of the Products in BMC's maintenance, enhancement and support from January 30, 2012 to January 29, 2015 ("**Support Period**") is included in the Fee. Customer may not terminate or cancel BMC Support for the Products during the Support Period. Support fees for additional capacity acquired during the Support Period will be based upon the then current BMC Support price list less any applicable discount for the Products, divided by 365, and multiplied by the number of days between the order date for the additional capacity through the end of the Support Period.



Notwithstanding anything in the Agreement to the contrary, after the Support Period, unless terminated in writing at least 30 days prior to the Support anniversary date, Customer is enrolled in BMC's Support and agrees to pay the annual Support fee. The annual Support fee is based upon the then current BMC Support price list less any applicable discount for the Products, based upon the then current Licensed Capacity of the Products.

4. **Miscellaneous.** Except as expressly modified in this Order, the terms of the Agreement are incorporated in this Order. The Product performance warranty applies only to Products licensed by Customer for the first time. To the extent BMC Products include third party code: if (a) such third party code is provided for use with a Product, it may be used only with that Product unless otherwise provided for in the Documentation; and (b) the Documentation contains terms that pertain to such third party code, those terms govern the third party code in place of the terms of this Order and the Agreement; except that the third party terms will not (i) negate or amend the rights granted by BMC to Customer or the obligations undertaken by BMC in this Order or the Agreement with respect to a Product; or (ii) impose any additional restrictions on Customer's use of the Product. In some circumstances, usually either for the convenience of its customers or in order to comply with the obligation to make source code available under specific license terms, BMC distributes to customers, without charge, products that are not governed by this Order or the Agreement. Such products are distributed separately from the BMC Products, are governed by the license terms that are included with them, and are provided by BMC AS IS, WHERE IS AND WITHOUT WARRANTIES OF ANY KIND, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED, AND EXCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND TITLE. The Products are accepted on the date BMC delivers the Product to the Customer either physically or by providing access codes for electronic download, whichever occurs first, however, such acceptance will not affect the Product Performance Warranty provided in this Agreement. In the event of any inconsistency or conflict between this Order and the Agreement, this Order will control. Any additional or conflicting terms of Customer's purchase order, if any, are rejected by BMC. Capitalized terms are defined in this Order, its Attachments, or in the Agreement. With regards to this Order, neither party may terminate this Order or the Agreement for its convenience. Customer agrees that BMC and its affiliates may refer to Customer as a customer of BMC, both internally and in externally published media.
5. **Special Terms.** Notwithstanding anything to the contrary contained in this document, the following special terms and conditions apply:
6. **Entire Agreement and Modifications.** The parties acknowledge they have read this Order and agree that it is the complete and exclusive statement of the agreement between the parties relating to the subject matter of this Order. This Order may not be modified or rescinded except in writing signed by both parties.

CUSTOMER INFORMATION

Company Name:	Cuyahoga County
Address:	1255 Euclid Ave Cleveland OH USA 44115
Contact:	Tom Basco
E-mail Address:	TBasco@cuyahogacounty.us
Other:	

BILL TO INFORMATION

Company Name:	Cuyahoga County
Address:	1255 Euclid Ave Cleveland OH USA 44115
Contact:	Accounts Payable
E-mail Address:	
Other:	



ATTACHMENTS INCORPORATED INTO ORDER

Attachment A – Additional Terms
Computer Information and Location Exhibit

'X'

X

X

(BMC) BMC Software, Inc.

(Customer) Cuyahoga County

By:

By:

Name:

Name:

Title:

Title:

Date:

Date:



ATTACHMENT A ADDITIONAL TERMS

This Attachment A is made to that certain Order dated **January 31, 2012** between BMC and Customer.

I. GENERAL DEFINITIONS: The following definitions apply to the Order and this Attachment A.

“Computer” or **“Server”** has the meaning generally given within the computer industry, which is a single machine, whether a central processing unit, such as a mainframe machine, or a distributed systems machine, such as a Unix or Intel based server. A mainframe machine would be an individual mainframe computer having single or multiple processors or engines. For purposes of distributed systems machines (excluding Control-M and Mainview product(s)), a Computer or Server may be physical or virtual.

“Documentation” means the technical publications relating to the software, such as release notes, reference, user, installation, systems administrator and technical guidelines, included with the Product.

“Enterprise” is the environment consisting of all hardware owned or leased by Customer in the Territory.

“Licensed Capacity” is the amount of each Product licensed as established in the Order. For licenses based on the power of a computer, Customer agrees to use BMC's then current computer classification scheme, which will be provided upon request.

II. LICENSE RESTRICTIONS: The following restrictions apply to certain Products as they are named today or may be named in the future.

CONTROL-M/Assist: Control-M/Assist may only be used to interface with the third party scheduler and may not be used to schedule or manage batch processes outside of the cross-scheduler dependencies.

III. UNITS OF MEASUREMENT: The following units of measurement apply to certain Products.

UNIT OF MEASUREMENT	UNIT OF MEASUREMENT DEFINITIONS
per installed server	A license is required for each Server (with a Classification at the appropriate Tier level, if applicable) upon which the Product or any of its components is installed.



EXHIBIT
COMPUTER INFORMATION AND LOCATION

Products	Computer Manufacturer and Model	Computer Location
CONTROL-M for OS/390 - Old		Cleveland, OH
Control-D		Cleveland, OH
Control M/Restart		Cleveland, OH
Control-V		Cleveland, OH