

# **IBM Agreement for Software Update Subscription for Microsoft Windows Datacenter**

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This IBM Agreement for IBM Software Update Subscription for Microsoft Windows Datacenter ( the "Agreement") governs your acquisition of IBM Software Update Subscription for Microsoft Windows Datacenter (the "Subscription"). The Subscription provides for updates and upgrades for a period of one year (a "Term") to the Microsoft Windows Datacenter Server operating system ("Datacenter") for which you are licensed. The Subscription includes IBM updates to firmware and device drivers certified by Microsoft for use with Datacenter and IBM servers ("Datacenter Server Solution"). IBM builds, tests, and provides the complete certified package of these components. An update may contain a new version, release, supplement, or service pack as specified by Microsoft and IBM. IBM does not warrant that updates or upgrades will be made available during the Term. For xSeries servers, the Subscription is for a single Designated System. A "Designated System" is a system for which you have a valid, registered the registered processor version of the Datacenter license for which you have obtained a Subscription from IBM or your IBM Business Partner.

IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote and market the Subscription. When you order a Subscription (marketed to you by IBM Business Partners) under this Agreement, IBM confirms that it is responsible for providing the Subscription to you under the terms of this Agreement. IBM is not responsible for 1) the actions of IBM Business Partners, 2) any additional obligations they have to you, or 3) any products or services that they supply to you under their agreements. In the event that your IBM Business Partner is no longer able to offer the Subscription, you may continue to receive the Subscription for the term of your Agreement by instructing IBM to transfer administration of your Subscription to either (1) another IBM Business Partner of your choice (who may require you to first execute one of their agreements) who is approved to offer you the Subscription, or (2) IBM.

Datacenter updates are subject to the terms of the Datacenter End User License Agreement ("EULA") shipped with Datacenter. The EULA is shipped as part of the Subscription.

This Agreement is the complete agreement regarding the Subscription, and replaces any prior oral or written communications between us concerning the Subscription.

Once in effect, 1) unless prohibited by local law or specified otherwise, any reproduction of this Agreement made by reliable means (for example, photocopy or facsimile) is considered an original and 2) any Subscription you order under this Agreement is subject to it.

## **1. Subscription Term ("Term")**

Charges cover a 12 month period. The Subscription entitlement period begins on the ship date of your Datacenter Server Solution. Datacenter configurations are custom solutions from IBM consisting of certified IBM hardware components, Microsoft software, and IBM services. The Subscription is intended to be purchased at the same time as your Datacenter Server Solution. If you order your Subscription after you have obtained your Datacenter Server Solution, your 12 month Subscription entitlement period is still considered to have begun on the ship date of your Datacenter Server Solution, not the date on which you ordered your Subscription.

## **2. Renewal**

IBM will renew an expiring Subscription under the Agreement terms in effect on that date, for an additional payment, for an additional one year Term if IBM or your IBM Business Partner receives (1) your order to renew (e.g., order form, order letter, purchase order) not later than the last day of the current Term or (2) your payment within 30 days of your receipt of the Subscription invoice for the next Term.

## **3. Charges**

### **Subscription acquired from an IBM Business Partner**

When you acquire a Subscription from an IBM Business Partner, the IBM Business Partner sets the charges and the terms governing charges. You will pay your IBM Business Partner directly.

### **Subscription acquired directly from IBM**

- 1) Charges are based on the one year Term and are non-refundable.
- 2) Amounts are due upon receipt of invoice and payable as specified in the invoice. You agree to pay accordingly, including any late payment fee. Depending on the particular circumstances, additional charges may apply (such as special handling). IBM will inform you in advance whenever additional charges apply.
- 3) If any authority imposes a duty, tax, levy or fee, excluding those based on IBM's net income, upon the Subscription IBM provides under this Agreement, then you agree to pay that amount as specified in the invoice or supply exemption documentation.
- 4) IBM may increase prepaid charges for a Subscription without notice. An increase will not apply to you if IBM receives your prepayment before the announcement date of the increase.
- 5) You receive the benefit of a decrease in charges for amounts that become due on or after the effective date of the decrease.

#### **4. Termination and Withdrawal**

Either of us may terminate this Agreement if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply. IBM may withdraw a Subscription on six months' written notice to you. Any terms of this Agreement which by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.

#### **5. Transferability**

You may transfer your Subscription only to a location that is within your Enterprise and within the country where you purchased your Subscription. "An Enterprise" in this Agreement is any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent.

#### **6. Redesignation**

You may redesignate your Subscription only to another eligible machine that is 1) at the same or more current release of the Datacenter and 2) located within your Enterprise within the country where you purchased your Subscription.

#### **7. Mutual Responsibilities**

Both of us agree that under this Agreement:

- 1) neither of us grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent;
- 2) all information exchanged is nonconfidential. If either of us requires the exchange of confidential information, it will be made under a signed confidentiality agreement;
- 3) each may communicate with the other by electronic means and such communication is acceptable as a signed writing to the extent permissible under applicable law. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity;
- 4) neither of us will bring a legal action more than two years after the cause of action arose unless otherwise provided by local law without the possibility of contractual waiver or limitation; and
- 5) neither of us is responsible for failure to fulfill any obligations due to causes beyond its control.

#### **8. Your Responsibilities**

You agree:

- 1) to have specified equipment or programs installed at your location;
- 2) to notify IBM or your IBM Business Partner of your wish to cancel your Subscription associated with a specific designated machine prior to its renewal date; and [Use if you are using option (2) in section 2. Renewal.]
- 3) to notify IBM of any processor upgrade (e.g., from 8-way to 16-way) to a Subscription designated system. A new Subscription contract reflecting the upgrade must be ordered and registered with IBM.
- 4) not to assign, or otherwise transfer, this Agreement or your rights under this Agreement, or delegate your obligations, without IBM's prior written consent. Any attempt to do so is void.

#### **9. No Warranty**

**SUBJECT TO ANY STATUTORY WARRANTIES WHICH CAN NOT BE EXCLUDED, IBM MAKES NO WARRANTIES OR CONDITIONS EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT**

**LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, REGARDING THE SUBSCRIPTION.**

The exclusion also applies to any of IBM's subcontractors or suppliers (collectively called "Suppliers").

**10. Changes to the Agreement Terms**

- 1) IBM may change the terms of this Agreement by giving you three months' written notice. These changes are not retroactive. They apply, as of the effective date IBM specifies in the notice, only to new orders and renewals.
- 2) In the case of renewals, you may request that IBM defer the change effective date until the end of the current Subscription Term if 1) the change affects your current Term and 2) you consider the change unfavorable.
- 3) You agree that you have consented to any such change if 1) you do not notify IBM in writing, prior to the effective date specified in IBM's written notice, that you disagree with the change or 2) you place an order or pay an invoice for the Subscription after the effective date. Otherwise, for a change to be valid, both you and IBM must sign it. Additional or different terms in any order or written communication from you are void.

**11. Limitation of Liability**

**NEITHER IBM NOR ITS SUPPLIERS WILL BE LIABLE FOR ANY DIRECT OR INDIRECT DAMAGES, INCLUDING WITHOUT LIMITATION, LOST PROFITS, LOST SAVINGS, OR ANY INCIDENTAL, SPECIAL, OR OTHER ECONOMIC CONSEQUENTIAL DAMAGES, EVEN IF IBM IS INFORMED OF THEIR POSSIBILITY. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE EXCLUSION OR LIMITATION MAY NOT APPLY TO YOU.**

**12. Geographic Scope**

All your rights and all IBM's obligations are valid only in the country where you purchased your Subscription.

**13. Governing Law**

Both You and IBM consent to the application of the laws of the State of New York to govern, interpret, and enforce all of your and IBM's rights, duties, and obligations arising from, or relating in any manner to, the subject matter of this Agreement, without regard to conflict of law principles. In the event that any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect.

Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.