

DSWD OPINION NO. 29 S. 2024

DRN: LS-L-LO-24-01-14262-C

MEMORANDUM

FOR : JULIUS B. GOROSPE
Assistant Secretary and Chief Information Officer

FROM : THE ASSISTANT SECRETARY FOR GENERAL
ADMINISTRATION AND SUPPORT SERVICES GROUP AND
CONCURRENT OFFICER-IN-CHARGE, LEGAL SERVICE

SUBJECT : LEGAL OPINION ON A.G. DATACOM CONTRACT
WARRANTY PROVISION

DATE : 24 JANUARY 2024

This pertains to your MEMORANDUM¹ dated 10 January 2024 seeking legal guidance on the proper interpretation of a warranty provision in an existing contract involving the DSWD and the service provider, A.G. Datacom Phils., Inc.

Based on your report, a security incident occurred that affected DSWD Servers on 07 December 2023 and upon investigation, it was discovered that no security patch or update was being applied to one of the servers covered by the contract. Under the Hardware Warranty Certificate, A.G. Datacom Phils. Inc shall provide Software Security Patch Support to DSWD. This undertaking was also stated as the Service Provider's compliance to the Technical Specifications submitted during the bid opening for this procurement.

In bringing this matter to the Legal Service, you mentioned the following actions ought to have been done in applying the warranty undertaking by A.G. Datacom Phils. Inc:

1. The Service Provider has an active obligation to inform and notify DSWD whenever there is an update/patch to be installed;
2. That failure to inform and notify DSWD is a breach of their warranties/obligations to provide and maintain optimal settings to servers;
3. That as the provider, it shall have knowledge of any security update/patch that should be made available to its clients as soon as possible and that;
4. Failure to install the security patches/update originating from the failure of the service provider to perform its obligations makes the latter liable for breach of contract and/or any damage the DSWD may or may have suffered because of the security incident.

The present query hinges on the legal options that could be pursued in order to protect and enforce the rights and interests of the Department.

¹ Annex A

Volume 2 of the Government Procurement and Policy Board (GPPB) Generic Procurement Manual defines “**technical specifications**” as “the physical description of the goods, services, as well as the Procuring Entity’s requirements in terms of the functional, performance, environmental interface and design standard requirements to be met by the goods to be manufactured or supplied, or the services to be rendered. The technical specifications must include the testing parameters for goods, when such testing is required in the contract.” As such, compliance with the technical specifications forms part of the deliverables on the part of the Supplier.

The Revised Implementing Rules and Regulations (IRR) of Republic Act No. 9184 or the Government Procurement Reform Act provides **warranties** against manufacturing defects, viz:

Section 62. Warranty

62.1 For the procurement of Goods, in order to assure that manufacturing defects shall be corrected by the supplier, a warranty security shall be required from the contract awardee for a minimum period of three (3) months, in the case of Expendable Supplies, or a minimum period of one (1) year, in the case of Non-expendable Supplies, after acceptance by the Procuring Entity of the delivered supplies.

The obligation for the warranty shall be covered by either retention money in an amount equivalent to at least one percent (1%) but not to exceed five percent (5%) of every progress payment, or a special bank guarantee equivalent to at least one percent (1%) but not to exceed five percent (5%) of the total contract price. The said amounts shall only be released after the lapse of the warranty period or, in the case of Expendable Supplies, after consumption thereof: Provided, however, That the supplies delivered are free from patent and latent defects and all the conditions imposed under the contract have been fully met.

The warranty provided for the procured subscription is not covered by Section 62.1 of the 2016 Revised IRR of RA 9184. Thus, per the Technical Specifications² required, the Software Security Patch Support is covered by Service Level Agreement (SLA) between the Parties and the Hardware Warranty Certificate provided by the Service Provider.

A Service Level Agreement (SLA) is a document that describes the level of service that a client must expect from a service provider. It defines the set of deliverables that the service provider must accomplish for the client and the work scope to which both parties must adhere.

On the other hand, Government Procurement Policy Board (GPPB) Non-Policy Matter (NPM) No. 018-2019 elaborated that the warranty security required under Section 62.1 of the 2016 Revised IRR of RA No. 9184 is not applicable as the

² Annex B

present procurement contract with A.G. Datacom Phils. Inc. are neither expendable nor non-expendable supplies, but are in the nature of services based on the representations made in the Technical Specifications.

Given that the procured subscription provides for a SLA that binds the Service Provider to ensure proper and uninterrupted delivery of service under that subscription, the Service Provider must faithfully comply to the contractual obligations and the warranties provided. Anything that falls short of the required deliverables which materially affect the quality, value and nature of service required as per the Technical Specifications is a breach by the Service Provider of its contractual obligations under the agreement.

In compliance with the law and rules, we recommend that the DSWD, through your office, as the end-user, must immediately notify the service provider of the defect so that it will be apprised of your issue and demand compliance pursuant to the SLA and Hardware Warranty Certificate.

Lastly, please fill out the attached Customer Feedback Form and return the same to the Legal Service.

For your consideration.

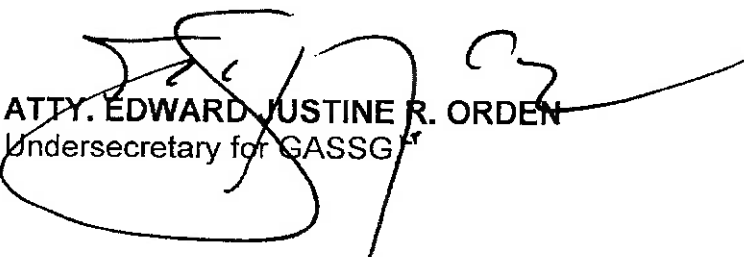
Thank you.



ATTY. GINA V. WENCESLAO


CMUG/SIFR/10065


Approved by:



ATTY. EDWARD JUSTINE R. ORDEN
Undersecretary for GASSG