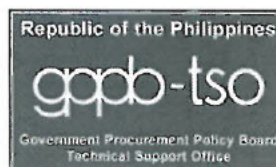




Republic of the Philippines  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
**TECHNICAL SUPPORT OFFICE**



**NPM No. 018-2019**

5 August 2019

**MS. CHARITY S. MALTO**  
*Officer-in-Charge*  
**Financial Market Operations Sub-sector (FMOSs)**  
**Bangko Sentral ng Pilipinas (BSP)**  
A. Mabini Street corner P. Ocampo Street  
Malate, Manila City

**Re: Terms and Conditions of Procurement Contracts**

**Dear Ms. Malto:**

This refers to your letters<sup>1</sup> inquiring on whether the BSP can agree to the standard terms and conditions set by ICE Data Services (ICE) and Moody's Investor Services (Moody's). As represented, both service providers would not agree to any amendment of their standard terms and conditions, specifically, the provisions on arbitration, liquidated damages, and warranty. They are also not amenable to the provisions on contract termination and limitations to liabilities of the contract awardees.

ICE is the identified index provider that can offer the subscription to indices compatible with the BSP's requirements for the management of its international reserves. The subscription was procured through Negotiated Procurement (Scientific, Scholarly or Artistic Work, Exclusively Technology and Media Services) in accordance with Section 53.6 and the Consolidated Guidelines for the Alternative Methods of Procurement or Annex H of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184.

On the other hand, Moody's is the sole provider of an in-depth analysis of the credit ratings of BSP's counterparties and Market Implied Ratings and also offers banking system reports and sovereign risk reviews, all necessary for the bank's risk analysis. The BSP engaged the services of Moody's through Direct Contracting under Section 50 of the 2016 revised IRR of RA No. 9184.

As with any government contract, the BSP shall ensure that the provisions it is agreeing to are not contrary to existing laws, particularly RA No. 9184, its IRR, and associated guidelines. In this case, Sections 6,<sup>2</sup> 6.1,<sup>3</sup> 6.2,<sup>4</sup> and 42<sup>5</sup> of RA No. 9184 and its

<sup>1</sup> Advance copies of letters, dated 20 June 2019 and 17 July 2019, were received through email on 4 July 2019 and 18 July 2019, respectively.

<sup>2</sup> **Sec. 6. Standardization of Procurement Process and Forms.** – Xxx the GPPB shall pursue the development of generic procurement manuals and standard bidding forms, the use of which once issued shall be mandatory upon all Procuring Entities.

<sup>3</sup> 6.1 To systematize the procurement process, avoid confusion and ensure transparency, the GPPB shall pursue the development and approval of generic procurement manuals, standard Bidding Documents, and forms, including those to be used for major procurement like drugs and textbooks.

<sup>4</sup> 6.2 Procuring Entities are mandated to use the Generic Procurement Manuals (GPMs), Philippine Bidding Documents (PBDs), and other standard forms issued by the GPPB. However, whenever necessary, to suit the particular needs of the Procuring Entity, modifications may be made, particularly for major and specialized procurement, subject to the approval of the GPPB.

revised 2016 IRR are instructive as they authorize the GPPB to issue the rules and regulations for contract implementation such as, but not limited to, the following: limitations to liabilities; delays in the supplier's performance; and termination for default, insolvency and convenience.<sup>6</sup> Accordingly, the BSP should review the contract provisions required by ICE and Moody's against relevant provisions to ensure that the provisions it is agreeing to are not contrary to existing laws, particularly RA No. 9184, its IRR, and associated guidelines.

Moreover, should there be a provision in the standard terms and conditions of ICE and Moody's that while not being contrary to those provided in RA No. 9184 is nonetheless inconsistent with its 2016 revised IRR or its annexes, the Philippine Bidding Documents (PBDs), or the Generic Procurement Manuals (GPMs),<sup>7</sup> the same may only be adopted by the BSP upon prior approval of the GPPB in accordance with Section 63<sup>8</sup> of RA No. 9184 and its IRR.

Allow us to further provide that the warranty security required under Section 63.1 of the 2016 revised IRR of RA No. 9184 is not applicable as what is provided by both ICE and Moody's are neither expendable<sup>9</sup> nor non-expendable supplies, but are in the nature of services<sup>10</sup> based on the representations made in your letter.<sup>11</sup> Thus, there is no manufacturing defect that would need to be rectified, which the warranty security should answer for.

With respect to arbitration, Section 59 of RA No. 9184 mandates that the process of arbitration shall be incorporated as a provision in the contract that will be executed pursuant to RA No. 9184. More importantly, the Supreme Court had the occasion to rule that settlement of disputes by arbitration under Section 59 is read into the contracts covered by RA No. 9184, absence thereof does not operate to waive its applicability.<sup>12</sup> The Court held:

The jurisdiction of CIAC over the construction controversy involving the said MOAs is questioned because the MOAs do not contain an arbitration clause. However, the said MOAs expressly state that they are covered by R.A. No. 9184. By virtue of R.A. No. 9184, which is the law that authorized the negotiated procurement of the construction contracts entered into by the parties, CIAC is vested with jurisdiction over the dispute. Applicable laws form part of, and are read into contracts; hence, the provision on settlement of disputes by arbitration under Section 59 of R.A. No. 9184 formed part of the MOAs in this case.

Relatedly, Section 59 of the 2016 revised IRR of RA No. 9184 provides that by mutual agreement, the parties may agree in writing to resort to other alternative modes of dispute resolution. Hence, the BSP and the service providers may elect to subject their dispute resolution to the law of the State of New York insofar as the terms and conditions thereon do not infringe on RA No. 9184 and its 2016 revised IRR.<sup>13</sup>

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<sup>5</sup> **Sec. 42. Contract Implementation and Termination.** – The rules and guidelines for the implementation and termination of contracts awarded pursuant to the provisions of this Act shall be prescribed in the IRR. The rules and guidelines shall include standard general and special conditions for contracts.

<sup>6</sup> Section 5 of the Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials or Annex "D" of the 2016 revised IRR of RA No. 9184.

<sup>7</sup> Issued by the GPPB by virtue of Sections 6 and 42 of RA No. 9184.

<sup>8</sup> **Sec. 63. Organization and Functions.** – A Government Procurement Policy Board (GPPB) is hereby established to: (a) protect national interest in all matters affecting public Procurement xxx; (b) formulate and amend, whenever necessary, the IRR and the corresponding standard forms for Procurement; xxx and (d) conduct an annual review of the effectiveness of this Act and recommend any amendments thereto, as may be necessary.

<sup>9</sup> Section 5(m) of the 2016 revised IRR of RA No. 9184.

<sup>10</sup> Section 5(r) of the 2016 revised IRR of RA No. 9184. **Goods.** xxx services essential to the operation of the Procuring Entity.

<sup>11</sup> ICE provides access to price indices with the required maturity buckets consistent with BSP's risk tolerance; meanwhile, Moody's provides credit ratings data necessary for BSP's risk analysis.

<sup>12</sup> *Tourism Infrastructure and Enterprise Zone Authority v. Global-V Builders Co.*, G.R. No. 219708, October 03, 2018.

<sup>13</sup> Entitled the "Alternative Dispute Resolution Act of 2004."

With respect to the imposition of liquidated damages, all contracts executed pursuant to RA No. 9184 shall contain a provision<sup>14</sup> thereon amounting to at least equal to one-tenth of one percent (0.001) of the cost of the unperformed portion for every day of delay.<sup>15</sup> Applying, the *TIEZA* ruling, absence of said provision in the contract with ICE and Moody's does not dispense with the said imposition in case of delay.

In sum, the BSP should review the terms and conditions required by ICE and Moody's in their respective contracts and ensure that the same does not contradict existing laws, particularly RA No. 9184, its IRR, and associated guidelines. If there are provisions that are inconsistent with the IRR of RA No. 9184 or its annexes, the PBDs, or the GPMs, the same maybe adopted upon approval of the GPPB, as long as they do not contravene the provisions of RA No. 9184.

The above opinion was made on the basis of the particular facts presented and circumstances availing, and may not, therefore, be applicable given a different set of facts and circumstances.

We hope to have sufficiently clarified the matter at hand.

Sincerely yours,

  
**ROWENA CARDICE M. RUIZ**  
*Executive Director V*

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**Copy furnished:**

**ANA THERESA B. DEL ROSARIO-BUEN**

*Director*

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<sup>14</sup> Section 68 of RA No. 9184.

<sup>15</sup> Section 68 of the 2016 revised IRR of RA No. 9184.