

EN BANC

[G.R. No. 216098, April 21, 2015]

BISHOP BRODERICK S. PABILLO, DD, PABLO R. MANALASTAS, JR., PHD, MARIA CORAZON AKOL, CONCEPCION B. REGALADO, HECTOR A. BARRIOS, LEO Y. QUERUBIN, AUGUSTO C. LAGMAN, FELIX P. MUGA, II, PHD, ATTY. GREGORIO T. FABROS, EVITA L. JIMENEZ, AND JAIME DL CARO, PHD, PETITIONERS, VS. COMMISSION ON ELECTIONS, EN BANC, REPRESENTED BY ACTING CHAIRPERSON CHRISTIAN ROBERT S. LIM, AND SMARTMATIC-TIM CORPORATION, REPRESENTED BY SMARTMATIC ASIA-PACIFIC PRESIDENT CESAR FLORES, RESPONDENTS.

[G.R. NO. 216562]

INTEGRATED BAR OF THE PHILIPPINES, PETITIONER, VS. COMMISSION ON ELECTIONS, REPRESENTED BY ITS ACTING CHAIRPERSON ROBERT S. LIM, AND SMARTMATIC-TIM CORPORATION, RESPONDENTS.

D E C I S I O N

PERLAS-BERNABE, J.:

"Procurement of electoral services and goods constitutes a major part of the organisation of elections in terms of planning, costs and implementation (purchasing and distribution). Integrity and transparency is thus essential; lack of integrity in the purchasing system may put the legitimacy of the whole electoral exercise at risk."^[1]

Before this Court are consolidated petitions for *certiorari* and prohibition^[2] assailing respondent the Commission on Elections' (COMELEC) Resolution No. 9922^[3] dated December 23, 2014, which approved^[4] a direct contracting arrangement with respondent Smartmatic-TIM Corporation (Smartmatic-TIM) for the diagnostics, maintenance, repair, and replacement of the COMELEC's Precinct Count Optical Scan (PCOS) machines, as well as the resulting contract thereof, the Extended Warranty Contract (Program 1)^[5] dated January 30, 2015.

The Facts

In 1997, Congress enacted Republic Act No. (RA) 8436,^[6] which authorized the COMELEC "to use an automated election system [(AES)] x x x for the process of voting, counting of votes and canvassing/consolidation of results [for the May 11, 1998] national and local elections,"^[7] as well as for subsequent national and local

electoral exercises. To achieve this purpose, the COMELEC was "to procure by purchase, lease or otherwise any supplies, equipment, materials[,] and services needed for the holding of the elections by an expedited process of public bidding of vendors, suppliers or lessors."^[8] RA 8436 further provided that the AES "shall be under the exclusive supervision and control of the [COMELEC]."^[9]

RA 9369,^[10] signed into law on January 23, 2007, later amended RA 8436 and was passed "to encourage transparency, credibility, fairness, and accuracy of elections." Thereunder, "the mandate and authority of the [COMELEC] to prescribe the adoption and use of the most suitable technology of demonstrated capability taking into account the situation prevailing in the area and the funds available for the purpose"^[11] were explicitly recognized. RA 9369 authorized the COMELEC "to use an [AES] or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes[,] and canvassing/consolidation and transmittal of results of electoral exercises,"^[12] and for such purpose, "to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities[,] and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations."^[13]

On March 18, 2009, the COMELEC published a Request for Proposal (RFP)^[14] for the public bidding of the lease with option to purchase of an AES to be used in the May 10, 2010 Automated Synchronized National and Local Elections.^[15] Item No. 18, Part V^[16] of the 2009 RFP states that "[t]he winning bidder shall assure the availability of parts, labor, and technical support and maintenance to the COMELEC for the duration of this [p]roject and for the next ten (10) years should the COMELEC opt to purchase the system after the lease period."^[17]

On June 9, 2009, the COMELEC *En Banc*, in Resolution No. 8608,^[18] resolved to approve the report/recommendation of the COMELEC Special Bids and Awards Committee (SBAC) dated June 3, 2009, confirming Smartmatic-TIM – a joint venture company formed by Smartmatic International Corporation (Smartmatic) and Total Information Management Corporation (TIM) – as "the bidder with the 'Lowest Calculated Responsive Bid' [LCRB] and to award the contract for the automation of the elections on May 10, 2010 to the said joint venture."^[19]

On July 10, 2009, COMELEC and Smartmatic-TIM executed the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections^[20] (2009 AES Contract). The 2009 AES Contract pertinently provides that "in the event that [the] COMELEC exercises its option to purchase [(OTP)] the Goods x x x,"^[21] until December 31, 2010:^[22] **(1)** the COMELEC "shall pay [Smartmatic-TIM] an additional amount of [P2,130,635,048.15]";^[23] **(2)** "a warranty shall be required in order to assure that: [a] manufacturing defects shall be corrected; and/or [b] replacements shall be made by [Smartmatic-TIM], for a minimum period of three (3) months, in the case of supplies, and one (1) year, in the case of equipment, after performance of this Contract";^[24] and **(3)** for the "PCOS, [Smartmatic-TIM] shall warrant the availability of parts, labor and technical support and maintenance to [the] COMELEC

for ten (10) years, if purchased, x x x beginning May 10, 2010.”^[25]

The COMELEC was able to implement for the first time the AES on a nationwide scale during the May 10, 2010 Synchronized National and Local Elections.^[26]

On September 23, 2010, the COMELEC partially exercised the OTP when it purchased 920 units of PCOS machines with the corresponding canvassing/consolidation system (CCS) for the special elections in certain areas in Basilan, Lanao del Sur, and Bulacan.^[27] The option period was thereafter extended several times^[28] and on March 21, 2012, the COMELEC *En Banc* issued Resolution No. 9376^[29] approving the full exercise of the OTP.^[30] Thus, on March 30, 2012, the COMELEC and Smartmatic-TIM executed a Deed of Sale^[31] (2012 Deed of Sale) for the remaining PCOS and CCS machines, which the COMELEC used during the May 13, 2013 Synchronized National and Local Elections.^[32] Item 9 of the 2012 Deed of Sale states that the warranties under Articles 4 and 8 of the 2009 AES Contract are incorporated and that “pursuant to Article 4.3 of the [2009] AES Contract, the PCOS machines will be covered by a one (1) year warranty commencing from the acceptance by the [COMELEC] during the [Hardware Acceptance Test (HAT)] for every batch of 20,000 units as evidenced by the date of the Delivery Receipt; *Provided*, that no warranty period will expire earlier than 31 May 2013.”^[33]

Prior to the scheduled May 13, 2013 Synchronized National and Local Elections, petitioners in the consolidated cases of *Capalla v. COMELEC*^[34] (*Capalla*) challenged the validity and constitutionality of Resolution No. 9376. They further prayed for the issuance of a temporary restraining order (TRO) enjoining the implementation of the 2012 Deed of Sale, which the Court granted in a Resolution dated April 24, 2012. Nevertheless, the Court, in a Decision dated June 13, 2012, ruled in favor of the COMELEC, finding that the latter properly exercised its OTP, despite the extended period therefor, and, accordingly, declared the 2012 Deed of Sale legal and valid.^[35]

On November 11, 2013, the COMELEC received from Smartmatic-TIM a proposal letter^[36] to “extend the warranty” of the PCOS machines for three (3) years.^[37] The proposal covered labor, preventive maintenance, diagnostics, repair and/or replacement of parts from 2014 to 2016.^[38] A more detailed version of the said proposal was sent by Smartmatic-TIM to the COMELEC on November 19, 2013.^[39]

In its Resolution No. 2014-002^[40] dated August 13, 2014, the COMELEC Advisory Council (CAC)^[41] recommended, among others, the re-use of the existing technology for the upcoming 2016 Elections.^[42] The CAC also recommended that the COMELEC seriously consider the use of multiple or mixed technologies to promote interoperability and encourage innovative solutions, as well as engaging one or more secondary technologies, which shall be likewise selected through open public bidding.^[43]

The CAC’s technology recommendations were adopted “in general” by the COMELEC in its Minute Resolution No. 14-0628^[44] dated August 29, 2014.^[45] Negotiations between the COMELEC and Smartmatic-TIM thereafter ensued^[46] and on October

30, 2014, Commissioner Christian Robert S. Lim (Commissioner Christian Lim), who was the authorized negotiator for the COMELEC and the Chairperson of the Steering Committee,^[47] submitted to the COMELEC's Law Department the Final Extended Warranty Proposal^[48] of Smartmatic-TIM for review.^[49]

On November 4, 2014, the COMELEC's Law Department issued a memorandum,^[50] with subject heading "Review of the Draft Contract for the 2014 Extension to the Warranty (Program 1); Repair and Maintenance of the Precinct Count Optical Scan (PCOS) Machines." In the said memorandum, the COMELEC's Law Department stated that it was not provided with the copies of the annexes of the draft contract and, thus, was constrained to limit its review only on the general provisions and structure thereof, excluding the activities and negotiations conducted in the acquisition of the subject services.^[51] Furthermore, it mentioned that prior to its review of the Final Extended Warranty Proposal, a similar proposal for the "refurbishment/preventive maintenance/extended warranty/program updates of the PCOS machines," also from Smartmatic-TIM, was submitted for its review on June 13, 2014 specifically on the aspect of procuring the same services through direct contracting under RA 9184,^[52] otherwise known as the Government Procurement Reform Act (GPPRA).^[53] Therein, it stressed that the procedure for direct contracting shall only be applied *if* the conditions to resort to the method are present or complied with, and that the Bids and Awards Committee (BAC) and the COMELEC's Information Technology Department (ITD) should first determine and confirm if indeed Smartmatic-TIM is the sole provider of the services to be procured or otherwise the only entity capable of executing such project, to the exclusion of others, as well as if the ITD itself, given sufficient manpower, budget, and resources, will be able to conduct the same.^[54] In this relation, it noted that the previous Smartmatic-TIM proposal was similar to the current one^[55] and, thus, gave the same recommendation to the subject contract under review. Based on its understanding, it remarked that the ITD personnel were in the process of conducting routine and preventive maintenance of the PCOS machines (which were stored at the Cabuyao warehouse) in order to maintain satisfactory operating condition by providing for systematic inspection, detection, and correction of incipient failures either before they occur or before they develop into major defects, as well as to prevent faults from occurring by conducting a battery of maintenance tests, measurements, adjustments, and parts replacement, if necessary.^[56] As such, it opined that the conduct of repair was premature, considering that the units requiring repair, if any, was yet to be determined.^[57] The same was said of the replacement servers and network equipment, as well as of the need to update the MTD^[58] modem firmware, which were yet to be evaluated.^[59] Finally, the COMELEC's Law Department drew attention to Item No. 8, Part V of the 2009 RFP, which provides that all proposals for the AES procurement project require an extensive training and education program on the preparation of election systems, counting and canvassing systems and transmission systems for technical personnel, as well as for repair, troubleshooting, tuning up and maintenance of machines and electronic transmission facility.^[60] In this regard, the COMELEC's Law Department stated that since the AES procurement project must necessarily form part of the 2009 AES Contract, Smartmatic-TIM must train the COMELEC's technical personnel specifically on the foregoing respects.^[61]

These notwithstanding, the COMELEC *En Banc*, in its **Resolution No. 9922**^[62] **dated December 23, 2014 (Resolution No. 9922)**, approved Program 1 of Smartmatic-TIM's PCOS Extended Warranty Proposal amounting to P300,000,000.00, exclusive of Value-Added Tax (VAT), through direct contracting, in view of the following reasons:

First, time is of the essence in the preparation for the May 9, 2016 National and Local Elections such that the Commission and the Bids and Awards Committee are constrained by the tight time schedule if public bidding are to be conducted in the refurbishment and/or repair of the machines considering all the procurement activities lined up.^[63]

Second, to give the refurbishment and/or the repair of the PCOS Machines to any third party provider other than SMARTMATIC, the original manufacturer will be too great a risk considering the highly technical nature of the refurbishment and/or the repair to be conducted on the machines.^[64]

Third, given that no public bidding will be conducted, it is still legal under RA 9184 for the COMELEC to resort to direct contracting in the present case.^[65]

The Extended Warranty Contract meets the requirements of the procurement law on direct contracting, particularly,

- a) The goods procured are of propriety nature, which can be obtained only from the proprietary source of the PCOS licensed technologies and from the exclusive manufacturer, which in the case of the PCOS is SMARTMATIC.
- b) The procurement of critical component of the AES solution from SMARTMATIC-TIM is a condition precedent to hold it to guarantee the project performance in accordance with the provisions of the contract.
- c) The PCOS is exclusively manufactured in the Philippines by SMARTMATIC, which does not have sub-dealers and there is no direct substitute for the product.^[66]

Last, the proposed extended warranty that is a part of the 2009 AES Contract – which was a product of a validly conducted public bidding – is still valid and enforceable.^[67]

The COMELEC further pointed that it was constrained to pursue a direct contracting arrangement with Smartmatic-TIM for the re-use of the existing technology since its proposed budget for the purchase of all new technology was rejected.^[68]

After negotiations by the parties, the contract amount was reduced to P240,000,000.00, exclusive of VAT, and the scope of work expanded to include all major repairs and replacement of irreparable units, up to four percent (4%) of all inventoried PCOS machines.^[69]