

EN BANC

[G.R. No. 218787, December 08, 2015]

LEO Y. QUERUBIN, MARIA CORAZON M. AKOL, AND AUGUSTO C. LAGMAN PETITIONERS, VS. COMMISSION ON ELECTIONS EN BANC, REPRESENTED BY CHAIRPERSON J. ANDRES D. BAUTISTA, AND JOINT VENTURE OF SMARTMATIC-TIM CORPORATION, TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. AND JARLTECH INTERNATIONAL CORPORATION, REPRESENTED BY PARTNER WITH BIGGEST EQUITY SHARE, SMARTMATIC-TIM CORPORATION, ITS GENERAL MANAGER ALASTAIR JOSEPH JAMES WELLS, SMARTMATIC CHAIRMAN LORD MALLOCH-BROWN, SMARTMATIC-ASIA PACIFIC PRESIDENT CESAR FLORES, AND ANY OR ALL PERSONS ACTING FOR AND ON BEHALF OF THE JOINT VENTURE, RESPONDENTS.

D E C I S I O N

VELASCO JR., J.:

Nature of the Case

Before the Court is a petition for certiorari or prohibition under Rule 64 of the Rules of Court, with prayer for injunctive relief, assailing the validity and seeking to restrain the implementation of the Commission on Elections (COMELEC) *en banc's* June 29, 2015 Decision^[1] for allegedly being repugnant to the provisions of *Batas Pambansa Blg. 68* (BP 68), otherwise known as the *Corporation Code of the Philippines*, and Republic Act No. 9184 (RA 9184) or the *Government Procurement Reform Act*.

The Facts

On October 27, 2014, the COMELEC *en banc*, through its Resolution No. 14-0715, released the bidding documents for the "Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System."^[2] Specified in the published Invitation to Bid^[3] are the details for the lease with option to purchase, through competitive public bidding, of twenty-three thousand (23,000) new units of precinct-based OMRs or OP-SCAN Systems, with a total Approved Budget for Contract of P2,503,518,000,^[4] to be used in the 2016 National and Local Elections.^[5] The COMELEC Bids and Awards Committee (BAC) set the deadline for the submission by interested parties of their eligibility requirements and initial technical proposal on December 4, 2014.^[6]

The joint venture of Smartmatic-TIM Corporation (SMTC), Smartmatic International Holding B.V., and Jarltech International Corporation (collectively referred to as "Smartmatic JV") responded to the call and submitted bid for the project on the scheduled date. Indra Sistemas, S.A. (Indra) and MIRU Systems Co. Ltd. likewise signified their interest in the project, but only Indra, aside from Smartmatic JV, submitted its bid.^[7]

During the opening of the bids, Smartmatic JV, in a sworn certification, informed the BAC that one of its partner corporations, SMTC, has a pending application with the Securities and Exchange Commission (SEC) to amend its Articles of Incorporation (AOI), attaching therein all pending documents.^[8] The amendments adopted as early as November 12, 2014 were approved by the SEC on December 10, 2014.^[9] On even date, Smartmatic JV and Indra participated in the end-to-end testing of their initial technical proposals for the procurement project before the BAC.

Upon evaluation of the submittals, the BAC, through its Resolution No. 1 dated December 15, 2014, declared Smartmatic JV and Indra eligible to participate in the second stage of the bidding process.^[10] The BAC then issued a Notice requiring them to submit their Final Revised Technical Tenders and Price proposals on February 25, 2015, to which the eligible participants complied. Finding that the joint venture satisfied the requirements in the published Invitation to Bid, Smartmatic JV, on March 26, 2015, was declared to have tendered a complete and responsive Overall Summary of the Financial Proposal.^[11] Meanwhile, Indra was disqualified for submitting a non-responsive bid.^[12]

Subsequently, for purposes of post-qualification evaluation, the BAC required Smartmatic JV to submit additional documents and a prototype sample of its OMR.^[13] The prototype was subjected to testing to gauge its compliance with the requirements outlined in the project's Terms of Reference (TOR).^[14]

After the conduct of post-qualification, the BAC, through Resolution No. 9 dated May 5, 2015, disqualified Smartmatic JV on two grounds, viz:^[15]

1. Failure to submit valid AOI; and
2. The demo unit failed to meet the technical requirement that the system shall be capable of writing all data/files, audit log, statistics and ballot images simultaneously in at least two (2) data storages.

The ruling prompted Smartmatic JV to move for reconsideration.^[16] In denying the motion, the BAC, through Resolution No. 10^[17] dated May 15, 2015, declared that Smartmatic JV complied with the requirements of Sec. 23.1(b) of the Revised Implementing Rules and Regulations of RA 9184 (GPRA IRR), including the submission of a valid AOI, but was nevertheless disqualified as it still failed to comply with the technical requirements of the project.^[18]

Aggrieved, Smartmatic JV filed a Protest,^[19] seeking permission to conduct another technical demonstration of its SAES 1800 plus OMR (OMR+), the OMR Smartmatic JV presented during the public bidding before the COMELEC *en banc*.^[20] Accordingly, on June 19, 2015, Smartmatic JV was allowed to prove compliance with the technical specifications for the second time, but this time before the electoral tribunal's Technical Evaluation Committee (TEC).^[21] This was followed, on June 23, 2015, by another technical demonstration before the Commission *en banc* at the Advanced Science and Technology Institute (ASTI) at the University of the Philippines, Diliman, Quezon City.^[22]

Ruling of the COMELEC *en banc*

Though initially finding that the OMR+'s ability to simultaneously write data in two storage devices could not conclusively be established,^[23] the TEC, upon the use of a

Digital Storage Oscilloscope (DSO) during the second demonstration,^[24] determined that the OMR+ complied with the requirements specified in the TOR.^[25] Adopting the findings of the TEC as embodied in its Final Report, the COMELEC *en banc*, on June 29, 2015, promulgated the assailed Decision granting Smartmatic JV's protest. The dispositive portion of the Decision reads:^[26]

WHEREFORE, the instant Protest is hereby **GRANTED**. Accordingly, the Commission hereby declares the Joint Venture of Smartmatic-TIM Corporation, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation, as the bidder with the lowest calculated responsive bid in connection with the public bidding for the lease with option to purchase of 23,000 new units of precinct-based Optical Mark Reader or Optical Scan System for use in the May 9, 2016 national and local elections. Corollarily, the scheduled opening of financial proposal and eligibility documents for the Second Round of Bidding is hereby **CANCELLED**, with specific instruction for the Bids and Awards Committee to **RETURN** to the prospective bidders their respective payments made for the purchase of Bidding Documents pertaining to the Second Round of Bidding.

Let the Bids and Awards Committee implement this Decision.

SO ORDERED.

The seven-man commission was unanimous in holding that Smartmatic JV's OMR+ sufficiently satisfied the technical requirements itemized in the TOR, reproducing in the assailed Decision, verbatim and with approbation, the entirety of the TEC's Final Report, thusly:^[27]

This is to report on the result of the public test conducted on 23 June of the claim of Smartmatic TIM (SMTT) that their proposed SAES 1800 (PCOS+) has the capability to write ballot images, audit logs, and elections results on two separate storage (devices) simultaneously.

Technical discussion, demonstrations, and design reviews were conducted over two day period before the actual demonstration to the Comelec En Banc. These reviews were conducted between SMTT engineers and a team of embedded electronics design engineers from the Advanced Science and Technology Institute of the Department of Science and Technology.

Though these reviews are important to validate the behavior and functionality of the PCOS+, the best way to validate the claim of SMTT is to use a specialized test instrument connected to the actual electrical inputs of both storage cards.

To visualize the electrical signals being sent to the memory cards, an Agilent DSO7054A Digital Storage Oscilloscope (DSO) from ASTI connected to the same data input line on two SD card adapters with a micro SD card inside. This was done to simulate an actual SC card and to make the DSO probe connections accessible and secure without modifying anything in the PCOS+ hardware or software. x x x

During normal operation such as on Election day, when the PCOS+ is accepting ballots from voters, the PCOS+ is designated to write data on both SD cards after the ballots has been determined to be valid and the voter

choices have been shown to the voter for verification.

The data being written on the storage devices consist mainly of the scanned ballots image of the front and back of the ballot at 200 dots per inch in both the horizontal and vertical dimension with each dot encoded into a 4 bit value corresponding to 16 shades of gray. The other data saved on the storage device consists of the vote interpretation and updates to the audit log. Each time that data is. written on the two storage device, the date is encrypted and a verification step is done to check that identical data is written on both devices. The entire write process lasts a few seconds for each ballot.

x x x x

The DSO display the time dimension on the horizontal axis and the electrical voltage in the vertical axis, the display is generated left to right over time (earlier events are on the left). The yellow line on top shows the electrical signal on the Data 2 pin of the main storage card and the green line shows the electrical signal on the Data 2 pin of the backup storage card. The orange dashed horizontal and vertical lines are used for measuring the differences in time and voltage.

The vertical dashed line on the left marks the start of the data being written on the main and backup storage card and the vertical dashed line on the right marks the ends of the writing operation for one ballot. The time difference in this case is about 2.616 seconds as shown near the bottom left corner of the display.

The yellow and green vertical lines in between the two vertical dashed lines represent the digital ones and zeros being written on both storage cards. The yellow and green traces are not exactly identical because the main car also contains the operating system of the PCOS+ and additional data operations are being performed on it. Because the time scale is the same on both probes, we conclude that the PCOS+ is writing on both cards simultaneously during this time interval.

Notwithstanding Smartmatic JV's compliance with the technical requirements in the TOR, Commissioner Luie Tito F. Guia (Guia) would nonetheless dissent in part, questioning the sufficiency of the documents submitted by the Smartmatic JV.^[28] Taking their cue from Commissioner Guia's dissent, petitioners now assail the June 29, 2015 Decision of the COMELEC through the instant recourse.

The Issues

Petitioners framed the issues in the extant case in the following wise:^[29]

A. Procedural Issues

- I. WHETHER OR NOT THE PETITION IS THE PROPER REMEDIAL VEHICLE TO ASSAIL THE SUBJECT DECISION OF THE COMELEC EN BANC;
- II. WHETHER OR NOT THE SUPREME COURT HAS THE RIGHT AND DUTY TO ENTERTAIN THIS PETITION;
- III. WHETHER OR NOT A JUSTICIABLE CASE OR CONTROVERSY EXISTS;

IV. WHETHER OR NOT THE CASE OR CONTROVERSY IS RIPE FOR JUDICIAL ADJUDICATION;

V. WHETHER OR NOT UNDER THE CIRCUMSTANCES, THE RULE ON "HIERARCHY OF COURTS" MAY BE DISPENSED WITH;

VI. WHETHER OR NOT THE PETITIONERS POSSESS LOCUS STANDI;

B. Substantive Issues

VII. WHETHER OR NOT THE COMELEC EN BANC ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN GRANTING THE PROTEST AS WELL AS IN DECLARING THE JOINT VENTURE OF SMARTMATIC-TIM CORPORATION, TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. AND JARLTECH INTERNATIONAL CORPORATION AS THE BIDDER WITH THE LOWEST CALCULATED RESPONSIVE BID IN CONNECTION WITH THE PUBLIC BIDDING FOR THE LEASE WITH OPTION TO PURCHASE OF 23,000 NEW UNITS OF PRECINCT-BASED OPTICAL MARK READER OR OPTICAL SCAN SYSTEM FOR USE IN THE MAY 9, 2016 NATIONAL AND LOCAL ELECTIONS

VIII. WHETHER OR NOT A WRIT OF PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER SHOULD ISSUE

In challenging the June 29, 2015 Decision, petitioners; filing as taxpayers, alleged that the COMELEC *en banc* acted with grave abuse of discretion amounting to lack or excess of jurisdiction in declaring Smartmatic JV as the bidder with the lowest calculated responsive bid.^[30] According to petitioners, Smartmatic JV cannot be declared eligible, even more so as the bidder with the lowest calculated responsive bid, because one of its proponents, SMTC, holding 46.5% of the shares of Smartmatic JV, no longer has a valid corporate purpose as required under Sec. 14 of BP 68, which pertinently reads:

Section 14. *Contents of the articles of incorporation.* - All corporations organized under this code shall file with the Securities and Exchange Commission articles of incorporation in any of the official languages duly signed and acknowledged by all of the incorporators, containing substantially the following matters, except as otherwise prescribed by this Code or by special law:

x x x x

2. The **specific purpose or purposes for which the corporation is being incorporated**. Where a corporation has more than one stated purpose, the articles of incorporation shall state which is the primary purpose and which is/are the secondary purpose or purposes: Provided, That a nonstock corporation may not include a purpose which would change or contradict its nature as such x x x.

As proof, petitioners cite the primary purpose of SMTC as stated in the company's AOI, which was submitted to the COMELEC on December 4, 2014 as part of the joint venture's eligibility documents. To quote SMTC's primary purpose therein:^[31]

To do, perform and comply with all the obligations and responsibilities of, and accord legal personality to, the joint venture of Total Information Management