

## **EN BANC**

**[ G.R. No. 201112, June 13, 2012 ]**

**ARCHBISHOP FERNANDO R. CAPALLA, OMAR SOLITARIO ALI AND  
MARY ANNE L. SUSANO, PETITIONERS, VS. THE HONORABLE  
COMMISSION ON ELECTIONS, RESPONDENT.**

**[G.R. NO. 201121]**

**SOLIDARITY FOR SOVEREIGNTY (S4S), REPRESENTED BY MA. LINDA  
OLAGUER; RAMON PEDROSA, BENJAMIN PAULINO SR., EVELYN  
CORONEL, MA. LINDA OLAGUER MONTAYRE, AND NELSON T.  
MONTAYRE, PETITIONERS, VS. COMMISSION ON ELECTIONS,  
REPRESENTED BY ITS CHAIRMAN, COMMISSIONER SIXTO S.  
BRILLANTES, JR., RESPONDENT.**

**[G.R. NO. 201127]**

**TEOFISTO T. GUINGONA, BISHOP BRODERICK S. PABILLO, SOLITA  
COLLAS MONSOD, MARIA CORAZON MENDOZA ACOL, FR. JOSE DIZON,  
NELSON JAVA CELIS, PABLO R. MANALASTAS, GEORGINA R. ENCANTO  
AND ANNA LEAH E. COLINA, PETITIONERS, VS. COMMISSION ON  
ELECTIONS AND SMARTMATIC TIM CORPORATION, RESPONDENTS.**

**[G.R. NO. 201413]**

**TANGGULANG DEMOKRASYA (TAN DEM), INC., EVELYN L. KILAYKO,  
TERESITA D. BALTAZAR, PILAR L. CALDERON AND ELITA T.  
MONTILLA, PETITIONERS, VS. COMMISSION ON ELECTIONS AND  
SMARTMATIC-TIM CORPORATION, RESPONDENTS.**

## **D E C I S I O N**

**PERALTA, J.:**

Pursuant to its authority to use an Automated Election System (AES) under Republic Act (RA) No. 8436, as amended by RA No. 9369, or the Automation Law and in accordance with RA No. 9184, otherwise known as the *Government Procurement Reform Act*, the Commission on Elections (Comelec) posted and published an invitation to apply for eligibility and to bid for the 2010 Poll Automation Project<sup>[1]</sup> (the Project). On March 18, 2009, the Comelec approved and issued a Request for Proposal<sup>[2]</sup> (RFP) for the Project consisting of the following components:

Component 1: Paper-Based Automation Election System (AES)

- 1-A. Election Management System (EMS)
- 1-B. Precinct Count Optical Scan (PCOS) System
- 1-C. Consolidation/Canvassing System (CCS)

Component 2: Provision for Electronic Transmission of Election Results using

Component 3: Overall Project Management<sup>[3]</sup>

On June 9, 2009, the Comelec issued Resolution No. 8608 awarding the contract for the Project to respondent Smartmatic-TIM.<sup>[4]</sup> On July 10, 2009, the Comelec and Smartmatic-TIM entered into a *Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections*,<sup>[5]</sup> (AES Contract, for brevity). The contract between the Comelec and Smartmatic-TIM was one of "lease of the AES with option to purchase (OTP) the goods listed in the contract." In said contract, the Comelec was given until December 31, 2010 within which to exercise the option.

On September 23, 2010, the Comelec partially exercised its OTP 920 units of PCOS machines with corresponding canvassing/consolidation system (CCS) for the special elections in certain areas in the provinces of Basilan, Lanao del Sur and Bulacan.<sup>[6]</sup> In a letter<sup>[7]</sup> dated December 18, 2010, Smartmatic-TIM, through its Chairman Cesar Flores (Flores), proposed a temporary extension of the option period on the remaining 81,280 PCOS machines until March 31, 2011, waiving the storage costs and covering the maintenance costs. The Comelec did not exercise the option within the extended period. Several extensions were given for the Comelec to exercise the OTP until its final extension on March 31, 2012.

On March 6, 2012, the Comelec issued Resolution No. 9373<sup>[8]</sup> resolving to seriously consider exercising the OTP subject to certain conditions. On March 21, 2012, the Comelec issued Resolution No. 9376<sup>[9]</sup> resolving to exercise the OTP the PCOS and CCS hardware and software in accordance with the AES contract between the Comelec and Smartmatic-TIM in connection with the May 10, 2010 elections subject to the following conditions: (1) the warranties agreed upon in the AES contract shall be in full force and effect; (2) the original price for the hardware and software covered by the OTP as specified in the AES contract shall be maintained, excluding the cost of the 920 units of PCOS and related peripherals previously purchased for use in the 2010 special elections; and (3) all other services related to the 2013 AES shall be subject to public bidding. On March 29, 2012, the Comelec issued Resolution No. 9377<sup>[10]</sup> resolving to accept Smartmatic-TIM's offer to extend the period to exercise the OTP until March 31, 2012 and to authorize Chairman Brillantes to sign for and on behalf of the Comelec the Agreement on the Extension of the OTP Under the AES Contract<sup>[11]</sup> (Extension Agreement, for brevity). The aforesaid Extension Agreement was signed on March 30, 2012.<sup>[12]</sup> On even date, the Comelec issued Resolution No. 9378<sup>[13]</sup> resolving to approve the Deed of Sale between the Comelec and Smartmatic-TIM to purchase the latter's PCOS machines (hardware and software) to be used in the upcoming May 2013 elections and to authorize Chairman Brillantes to sign the Deed of Sale for and on behalf of the Comelec. The Deed of Sale<sup>[14]</sup> was forthwith executed.

Claiming that the foregoing issuances of the Comelec, as well as the transactions entered pursuant thereto, are illegal and unconstitutional, petitioners come before the Court in four separate Petitions for *Certiorari*, Prohibition, and *Mandamus* imputing grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the Comelec in issuing the assailed Resolutions and in executing the assailed Extension Agreement and Deed.

**G.R. No. 201112**

In G.R. No. 201112, petitioners Archbishop Fernando R. Capalla, Omar Solitario Ali and

Mary Anne L. Susano pray that a Temporary Restraining Order (TRO) be issued enjoining the Comelec from purchasing the PCOS machines until after final judgment of the instant case; a writ of prohibition be issued against the Comelec for the purchase of these defective PCOS machines; a writ of mandamus be issued compelling the Comelec to conduct the necessary bidding for the equipment and facilities which shall be used for the 2013 National and Local Elections; and to declare Comelec Resolution Nos. 9376, 9377, and 9378, on the purchase of PCOS machines, null and void.

Petitioners argue that if there is a necessity to purchase the PCOS machines, the Comelec should follow RA 9184 requiring competitive public bidding. They likewise argue that the OTP clause embodied in the contract with Smartmatic-TIM should be rendered invalid not only because the OTP has already lapsed but because of the fact that the OTP clause is a circumvention of the explicit provisions of RA 9184. Petitioners add that the current PCOS machines do not meet the rigorous requirements of RA 9369 that the system procured must have demonstrated capability and should have been successfully used in a prior electoral exercise here or abroad. Petitioners submit that there are intrinsic technical infirmities as regards the PCOS machines used during the 2010 elections which rendered it incapable for future use. Lastly, petitioners claim that the Comelec does not have the capability to purchase and maintain the PCOS machines, because of lack of trained manpower and technical expertise to properly maintain the PCOS machines; thus, the purchase is unfavorable to the general public.

#### **G.R. No. 201121**

In G.R. No. 201121, petitioners Solidarity for Sovereignty (S4S), represented by Ma. Linda Olaguer, Ramon Pedrosa, Benjamin Paulino, Sr., Evelyn Coronel, Ma. Linda Olaguer Montayre and Nelson T. Montayre, pray that a TRO be issued directing the Comelec to desist from implementing the contract; that Resolution No. 9376 be declared unconstitutional and all acts made pursuant thereto, including the purchase of the PCOS machines unlawful and void; that an Injunction be issued prohibiting the Comelec from further pursuing any act pursuant to Resolution No. 9376.<sup>[15]</sup>

Petitioners argue that the Comelec's act of exercising its OTP the PCOS machines from Smartmatic-TIM after the period had already lapsed is illegal and unlawful.<sup>[16]</sup> They explain that the period within which the Comelec may exercise the OTP could last only until December 31, 2010 without extension as provided in the Comelec's bid bulletin.<sup>[17]</sup> They further assert that the Comelec's acceptance of Smartmatic-TIM's unilateral extension of the option period constitutes substantial amendment to the AES contract giving undue benefit to the winning bidder not available to the other bidders.<sup>[18]</sup> Petitioners also contend that the Comelec's decision to purchase and use the PCOS machines is unconstitutional, as it allows the Comelec to abrogate its constitutional duty to safeguard the election process by subcontracting the same to an independent provider (Smartmatic-TIM), who controls the software that safeguards the entire election process. The purchase of the PCOS machines for use in the May 2013 elections would be tantamount to a complete surrender and abdication of the Comelec's constitutional mandate in favor of Smartmatic-TIM. The control of the software and process verification systems places the Comelec at the end of the process as it merely receives the report of Smartmatic-TIM. This, according to petitioners, amounts to a direct transgression of the exclusive mandate of the Comelec completely to take charge of the enforcement and administration of the conduct of elections.<sup>[19]</sup> Lastly, petitioners aver that the Comelec's act of deliberately ignoring the palpable infirmities and defects of the PCOS machines, as duly confirmed by forensic experts, is in violation of Section 2, Article V of the Constitution, as it fails to safeguard the integrity of the votes. They went on by saying that the subject PCOS machines lack security features which can guaranty the secrecy and sanctity of our votes in direct contravention of RA 9369 which requires that the automated election system must at least possess an

adequate security feature against unauthorized access. In deciding to purchase the PCOS machines despite the above-enumerated defects, the Comelec's decision are claimed to be unconstitutional.<sup>[20]</sup>

#### **G.R. No. 201127**

In G.R. No. 201127, petitioners Teofisto Guingona, Bishop Broderick S. Pabillo, Solita Collas Monsod, Maria Corazon Mendoza Acol, Fr. Jose Dizon, Nelson Java Celis, Pablo R. Manalastas, Georgina R. Encanto and Anna Leah E. Colina pray that the Court issue a TRO enjoining and restraining respondents Comelec and Smartmatic-TIM from implementing Comelec Resolution No. 9376 and the Deed of Sale for the acquisition and purchase of the PCOS machines and related equipment; issue writ of preliminary injunction; declare Comelec Resolution No. 9376 void and unconstitutional and annul the Deed of Sale; and direct the Comelec to conduct public bidding soonest for the automated election system to be used for the 2013 elections.<sup>[21]</sup>

Petitioners fault the Comelec in totally disregarding the recommendation of the Comelec Advisory Council (CAC) not to exercise the OTP. They point out that in its Resolution No. 2012-2003, the CAC resolved to recommend that the Comelec should exert all efforts to procure the necessary AES only through public bidding. The CAC likewise allegedly recommended that the OTP should not be exercised if as a consequence, the rest of the system must come from the same vendor as the Comelec would lose the opportunity to look for better technology; would prevent the Comelec from taking advantage of the best possible technology available; would prevent other prospective vendors from competitively participating in the bidding process; and may erode the public trust and confidence in the electoral process. In its report to the Congressional Oversight Committee after the 2010 elections, the CAC supposedly concluded that the Comelec does not need to use the same PCOS machines and that the Comelec would be better off not exercising the OTP the PCOS machines so it can look for an even better solution for the May 2013 elections.<sup>[22]</sup> Like the other petitioners, it is their position that Comelec Resolution No. 9376 is totally null and void having been issued in violation of the express provisions of RA 9184 and the AES contract. According to petitioners, the Comelec itself provided in its bid bulletins for a fixed and determinate period, and such period ended on December 31, 2010. Thus, Smartmatic-TIM could not have unilaterally extended the option period and the Comelec could not have also given its consent to the extension. In extending the option period, it is tantamount to giving the winning bidder a benefit that was not known and available to all bidders during the bidding of the 2010 AES, which is a clear violation of the bidding rules and the equal protection clause of the Constitution.<sup>[23]</sup> Considering that the option period already expired, the purchase of the PCOS machines requires competitive public bidding. Lastly, petitioners claim that the Comelec committed grave abuse of discretion in opting to buy the PCOS machines and allied paraphernalia of Smartmatic-TIM for the 2013 elections, despite incontrovertible findings of the glitches, malfunctions, bugs, and defects of the same.<sup>[24]</sup>

#### **G.R. No. 201418**

In G.R. No. 201418, petitioners Tanggulang Demokrasya (Tan Dem), Inc., Evelyn L. Kilayko, Teresita D. Baltazar, Pilar L. Calderon and Elita T. Montilla pray that the Court annul Resolution No. 9376 and the March 30, 2012 Deed of Sale, and prohibit the Comelec and Smartmatic-TIM from implementing the same; and declare said Resolution and Deed of Sale invalid for having been issued and executed by the Comelec with grave abuse of discretion and for violating the provisions of R.A. 9184.<sup>[25]</sup>

Petitioners claim that the Comelec committed grave abuse of discretion amounting to lack or excess of jurisdiction in contracting for the purchase of AES goods and services from

Smartmatic-TIM in spite of the below par performance of the latter's PCOS machines, CCS and other software and hardware in the May 2010 elections and non-compliance with the minimum functional capabilities required by law.<sup>[26]</sup> They echo the other petitioners' contention that the Comelec's decision to buy the CCS, PCOS machines, software and hardware of Smartmatic violates RA 9184's requirement of a prior competitive public bidding. Since the Comelec is bent on pursuing the purchase of the subject goods, which is an entirely new procurement, petitioners contend that there must be a public bidding. They argue that there is enough time to conduct public bidding for the 2013 elections, considering that for the May 2010 elections, the Comelec only had 10 months and they were able to conduct the public bidding. Petitioners are of the view that there is no more OTP to speak of, because the option period already lapsed and could not be revived by the unilateral act of one of the contracting parties.<sup>[27]</sup>

On April 24, 2012, the Court issued a TRO enjoining the implementation of the assailed contract of sale. The consolidated cases were later set for Oral Arguments on the following issues:

I. Whether or not the Commission on Elections may validly accept the extension of time unilaterally given by Smartmatic-TIM Corporation within which to exercise the option to purchase under Article 4 of the Contract for the Provision of an Automated Election System for the May 2010 Synchronized National and Local Elections; and

II. Whether or not the acceptance of the extension and the issuance of Comelec En Banc Resolution No. 9376 violate Republic Act No. 9184 or the Government Procurement Reform Act and its Implementing Rules, and Republic Act No. 9369 or the Automated Election Systems Act.

The parties were, thereafter, required to submit their Memoranda.

The petitions are without merit.

Simply stated, petitioners assail the validity and constitutionality of the Comelec Resolutions for the purchase of the subject PCOS machines as well as the Extension Agreement and the Deed of Sale covering said goods mainly on three grounds: (1) the option period provided for in the AES contract between the Comelec and Smartmatic-TIM had already lapsed and, thus, could no longer be extended, such extension being prohibited by the contract; (2) the extension of the option period and the exercise of the option without competitive public bidding contravene the provisions of RA 9184; and, (3) despite the palpable infirmities and defects of the PCOS machines, the Comelec purchased the same in contravention of the standards laid down in RA 9369.

For its part, the Comelec defends the validity and constitutionality of its decision to purchase the subject PCOS machines, pursuant to the OTP under the AES contract with Smartmatic-TIM, on the following grounds: (1) Article 6.6 of the AES contract which states the option period was amended by the extension agreement; (2) the exercise of the OTP is not covered by RA 9184, because it is merely an implementation of a previously bid contract; (3) taking into account the funds available for the purpose, exercising the OTP was the prudent choice for the Comelec and is more advantageous to the government; and (4) the exercise of the OTP is consistent with the technical requirements of RA 9369.

Stated in another way, Smartmatic-TIM insists on the validity of the subject transaction based on the following grounds: (1) there is no prohibition either in the contract or provision of law for it to extend the option period; rather, the contract itself allows the