

## EN BANC

[ G.R. No. 188456, September 10, 2009 ]

**H. HARRY L. ROQUE, JR., JOEL R. BUTUYAN, ROMEL R. BAGARES, ALLAN JONES F. LARDIZABAL, GILBERT T. ANDRES, IMMACULADA D. GARCIA, ERLINDA T. MERCADO, FRANCISCO A. ALCUAZ, MA. AZUCENA P. MACEDA, AND ALVIN A. PETERS, PETITIONERS, VS. COMMISSION ON ELECTIONS, REPRESENTED BY HON. CHAIRMAN JOSE MELO, COMELEC SPECIAL BIDS AND AWARDS COMMITTEE, REPRESENTED BY ITS CHAIRMAN HON. FERDINAND RAFANAN, DEPARTMENT OF BUDGET AND MANAGEMENT, REPRESENTED BY HON. ROLANDO ANDAYA, TOTAL INFORMATION MANAGEMENT CORPORATION AND SMARTMATIC INTERNATIONAL CORPORATION, RESPONDENTS.**

**PETE QUIRINO-QUADRA, PETITIONER-IN-INTERVENTION.**

**SENATE OF THE PHILIPPINES, REPRESENTED BY ITS PRESIDENT, JUAN PONCE ENRILE, MOVANT-INTERVENOR.**

### D E C I S I O N

**VELASCO JR., J.:**

In a democratic system of government, the people's voice is sovereign. Corollarily, choosing through the ballots the men and women who are to govern the country is perhaps the highest exercise of democracy. It is thus the interest of the state to insure honest, credible and peaceful elections, where the sanctity of the votes and the secrecy of the ballots are safeguarded, where the will of the electorate is not frustrated or undermined. For when the popular will itself is subverted by election irregularities, then the insidious seeds of doubt are sown and the ideal of a peaceful and smooth transition of power is placed in jeopardy. To automate, thus breaking away from a manual system of election, has been viewed as a significant step towards clean and credible elections, unfettered by the travails of the long wait and cheating that have marked many of our electoral exercises.

The Commission on Elections (Comelec), private respondents, the National Computer Center and other computer wizards are confident that nationwide automated elections can be successfully implemented. Petitioners and some skeptics in the information technology (IT) industry have, however, their reservations, which is quite understandable. To them, the automated election system and the untested technology Comelec has chosen and set in motion are pregnant with risks and could lead to a disastrous failure of elections. Comelec, they allege, would not be up to the challenge. Cheating on a massive scale, but this time facilitated by a machine, is perceived to be a real possibility.

In this petition for *certiorari*, prohibition and mandamus with prayer for a restraining order and/or preliminary injunction, petitioners H. Harry L. Roque, Jr., *et al.*, suing as

taxpayers and concerned citizens, seek to nullify respondent Comelec's award of the 2010 Elections Automation Project (automation project) to the joint venture of Total Information Management Corporation (TIM) and Smartmatic International Corporation (Smartmatic)<sup>[1]</sup> and to permanently prohibit the Comelec, TIM and Smartmatic from signing and/or implementing the corresponding contract-award.

By Resolution<sup>[2]</sup> of July 14, 2009, the Court directed the respondents as well as the University of the Philippines (UP) Computer Center, National Computer Center (NCC) and Information Technology Foundation of the Philippines (Infotech, hereinafter) to submit their collective or separate comments to the petition on or before July 24, 2009. Before any of the comments could actually be filed, Atty. Pete Quirino-Quadra sought leave to intervene. In another resolution, the Court allowed the intervention and admitted the corresponding petition-in-intervention.<sup>[3]</sup>

On July 29, 2009, the Court heard the principal parties in oral arguments which was followed by the submission of their and the resource persons' instructive, albeit clashing, memoranda. The Senate, through the Senate President, would later join the fray *via* a Motion for Leave to Intervene. In a Resolution of August 25, 2009, the Court admitted the Senate's comment-in-intervention.

From the petition, the separate comments thereon, with their respective annexes, and other pleadings, as well as from admissions during the oral arguments, the Court gathers the following facts:

On December 22, 1997, Congress enacted Republic Act No. (RA) 8436 authorizing the adoption of an automated election system (**AES**) in the May 11, 1998 national and local elections and onwards. The 1998, 2001, and 2004 national and local polls, however, came and went but purely manual elections were still the order of the day. On January 23, 2007, the amendatory RA 9369<sup>[4]</sup> was passed authorizing anew the Comelec to use an AES. Of particular relevance are Sections 6 and 10 of RA 9369--originally Secs. 5 and 8, respectively of RA 8436, as amended--each defining Comelec's specific mandates insofar as automated elections are concerned. The AES was not utilized in the May 10, 2000 elections, as funds were not appropriated for that purpose by Congress and due to time constraints.

RA 9369 calls for the creation of the Comelec Advisory Council<sup>[5]</sup> (CAC). CAC is to recommend, among other functions, the most appropriate, applicable and cost-effective technology to be applied to the AES.<sup>[6]</sup> To be created by Comelec too is the Technical Evaluation Committee (TEC)<sup>[7]</sup> which is tasked to certify, through an established international certification committee, not later than three months before the elections, by categorically stating that the AES, inclusive of its hardware and software components, is operating properly and accurately based on defined and documented standards.<sup>[8]</sup>

In August 2008, Comelec managed to automate the regional polls in the Autonomous Region of Muslim Mindanao<sup>[9]</sup> (ARMM), using direct recording electronics (DRE) technology<sup>[10]</sup> in the province of Maguindanao; and the optical mark reader/recording (OMR) system, particularly the Central Count Optical Scan (CCOS),<sup>[11]</sup> in the rest of ARMM.<sup>[12]</sup> What scores hailed as successful automated ARMM 2008 elections paved the way for Comelec, with some prodding from senators,<sup>[13]</sup> to

prepare for a nationwide computerized run for the 2010 national/local polls, with the many lessons learned from the ARMM experience influencing, according to the NCC, the technology selection for the 2010 automated elections.<sup>[14]</sup>

Accordingly, in early March 2009, the Comelec released the *Request for Proposal (RFP)*, also known as *Terms of Reference (TOR)*, for the nationwide automation of the voting, counting, transmission, consolidation and canvassing of votes for the May 10, 2010 Synchronized National and Local Elections. What is referred to also in the RFP and other contract documents as the 2010 Elections Automation Project (Automation Project) consists of three elaborate components, as follows:

**Component 1:** Paper-Based AES.<sup>[15]</sup> 1-A. Election Management System (EMS); 1-B Precinct-Count Optic Scan (**PCOS**)<sup>[16]</sup> System and 1-C. Consolidation/Canvassing System (CCS);

**Component 2:** Provision for Electronic Transmission of Election Results using Public Telecommunications Network; and

**Component 3:** Overall Project Management

And obviously to address the possibility of systems failure, the RFP required interested bidders to submit, among other things: a continuity plan<sup>[17]</sup> and a back-up plan.<sup>[18]</sup>

Under the two-envelope system designed under the RFP,<sup>[19]</sup> each participating bidder shall submit, as part of its bid, an *Eligibility Envelope*<sup>[20]</sup> that should *inter alia* establish the bidder's eligibility to bid. On the other hand, the second envelope, or the *Bid Envelope* itself, shall contain two envelopes that, in turn, shall contain the technical proposal and the financial proposal, respectively.<sup>[21]</sup>

Subsequently, the Comelec Special Bids and Awards Committee (SBAC), earlier constituted purposely for the aforesaid project, caused the publication in different newspapers of the *Invitation to Apply for Eligibility and to Bid*<sup>[22]</sup> for the procurement of goods and services to be used in the automation project.<sup>[23]</sup> Meanwhile, Congress enacted RA 9525 appropriating some PhP 11.3 billion as supplemental budget for the May 10, 2010 automated national and local elections.

Of the ten (10) invitation-responding consortia which obtained the bid documents, only seven (7) submitted sealed applications for eligibility and bids<sup>[24]</sup> which, per Bid Bulletin No. 24, were to be opened on a pre-set date, following the convening of the pre-bid conference. Under the RFP, among those eligible to participate in the bidding are manufacturers, suppliers and/or distributors forming themselves into a joint venture. A *joint venture* is defined as a group of two or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract.<sup>[25]</sup>

Among the submitted bids was that of the joint venture (JV) of TIM and Smartmatic, the former incorporated under the Corporation Code of the Philippines. Smartmatic, on the other hand, was organized under the laws of Barbados.<sup>[26]</sup> For a stated amount, said JV proposed to undertake the whole automation project, inclusive of the

delivery of 82,200 PCOS machines. After the conclusion of the eligibility evaluation process, only three consortia<sup>[27]</sup> were found and thus declared as eligible. Further on, following the opening of the passing bidders' *Bid Envelope* and evaluating the technical and financial proposals therein contained, the SBAC, per its Res. No. 09-001, s.-2009, declared the above-stated bid of the JV of TIM-Smartmatic as the *single complying calculated bid*.<sup>[28]</sup> As required by the RFP, the bid envelope contained an outline of the joint venture's back-up and continuity or contingency plans,<sup>[29]</sup> in case of a systems breakdown or any such eventuality which shall result in the delay, obstruction or nonperformance of the electoral process.

After declaring TIM-Smartmatic as the best complying bidder, the SBAC then directed the joint venture to undertake post-qualification screening, and its PCOS prototype machines--the Smarmatic Auditable Electronic System (**SAES**) 1800--to undergo end-to-end<sup>[30]</sup> testing to determine compliance with the pre-set criteria.

In its Memorandum of June 01, 2009, on the Subject: *Systems Evaluation Consolidated Report and Status Report on the Post-Qualification Evaluation Procedures*, the SBAC Technical Working Group (TWG) stated that it was undertaking a 4-day (May 27 to May 30, 2009) test evaluation of TIM and Smartmatic's proposed PCOS project machines. Its conclusion: "The demo systems presented **PASSED** all tests as required in the 26-item criteria specified in the [RFP]" with 100% accuracy rating.<sup>[31]</sup> The TWG also validated the eligibility, and technical and financial qualifications of the TIM-Smartmatic joint venture.

On June 9, 2009, Comelec, upon the recommendation of its SBAC, the CAC and other stakeholders, issued Resolution No. (Res.) 8608<sup>[32]</sup> authorizing the SBAC to issue, subject to well-defined conditions, the notice of award and notice to proceed in favor of the winning joint venture.

Soon after, TIM wrote Comelec expressing its desire to quit the JV partnership. In time, however, the parties were able to patch up what TIM earlier described as irreconcilable differences between partners.

What followed was that TIM and Smartmatic, pursuant to the Joint Venture Agreement (JVA),<sup>[33]</sup> caused the incorporation of a joint venture corporation (JVC) that would enter into a contract with the Comelec. On July 8, 2009, the Securities and Exchange Commission issued a certificate of incorporation in favor of Smartmatic TIM Corporation. Two days after, or on July 10, 2009, Comelec and Smartmatic TIM Corporation, as provider, executed a contract<sup>[34]</sup> for the lease of goods and services under the contract for the contract amount of PhP 7,191,484,739.48, payable as the "Goods and Services are delivered and/or progress is made in accordance [with pre-set] Schedule of Payments."<sup>[35]</sup> On the same date, a *Notice to Proceed*<sup>[36]</sup> was sent to, and received by, Smartmatic TIM Corporation.

Meanwhile, or on July 9, 2009, petitioners interposed the instant recourse which, for all intents and purposes, impugns the validity and seeks to nullify the July 10, 2009 Comelec-Smartmatic-TIM Corporation automation contract adverted to. Among others, petitioners pray that respondents be permanently enjoined from implementing the automation project on the submission that:

PUBLIC RESPONDENTS COMELEC AND COMELEC-SBAC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN AWARDING THE 2010 ELECTIONS AUTOMATION PROJECT TO PRIVATE RESPONDENTS TIM AND SMARTMATIC FOR THE FOLLOWING REASONS:

x x x COMELEC DID NOT CONDUCT ANY PILOT TESTING OF THE x x x PCOS MACHINES OFFERED BY PRIVATE RESPONDENTS SMARTMATIC AND TIM, IN VIOLATION OF [RA] 8436 (AS AMENDED BY [RA] 9369)

THE [PCOS] MACHINES [THUS] OFFERED BY PRIVATE RESPONDENTS x x x DO NOT SATISFY THE *MINIMUM SYSTEM CAPABILITIES* SET BY [RA] NO. 8436 (AS AMENDED BY [RA] 9369).

PRIVATE RESPONDENTS x x x DID NOT SUBMIT THE REQUIRED DOCUMENTS DURING THE BIDDING PROCESS THAT SHOULD ESTABLISH THE DUE EXISTENCE, COMPOSITION, AND SCOPE OF THEIR JOINT VENTURE, IN VIOLATION OF THE SUPREME COURT'S HOLDING IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES, vs. COMELEC (G.R. No. 159139, Jan. 13, 2004)*.

THERE WAS NO VALID JOINT VENTURE AGREEMENT [JVA] BETWEEN PRIVATE RESPONDENTS SMARTMATIC AND TIM DURING THE BIDDING, IN VIOLATION OF THE SUPREME COURT'S HOLDING IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES vs. COMELEC* x x x WHICH REQUIRES A JOINT VENTURE TO INCLUDE A COPY OF ITS [JVA] DURING THE BIDDING.

THE ALLEGED JOINT VENTURE COMPOSED OF PRIVATE RESPONDENTS SMARTMATIC AND TIM, DOES NOT SATISFY THE SUPREME COURT'S DEFINITION OF A "JOINT VENTURE" IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES vs. COMELEC* x x x WHICH "REQUIRES A COMMUNITY OF INTEREST IN THE PERFORMANCE OF THE SUBJECT MATTER."

Filed as it was before contract signing, the petition understandably did not implead Smartmatic TIM Corporation, doubtless an indispensable party to these proceedings, an incident that did not escape Comelec's notice.<sup>[37]</sup>

As a preliminary counterpoint, either or both public and private respondents question the legal standing or *locus standi* of petitioners, noting in this regard that the petition did not even raise an issue of transcendental importance, let alone a constitutional question.

As an additional point, respondents also urge the dismissal of the petition on the ground of prematurity, petitioners having failed to avail themselves of the otherwise