

## EN BANC

[ G.R. NO. 159139, June 15, 2005 ]

**INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES, MA. CORAZON M. AKOL, MIGUEL UY, EDUARDO H. LOPEZ, AUGUSTO C. LAGMAN, REX C. DRILON MIGUEL HILADO, LEY SALCEDO, AND MANUEL ALCUAZ JR., PETITIONERS, VS. COMMISSION ON ELECTIONS; COMELEC CHAIRMAN BENJAMIN ABALOS SR.; COMELEC BIDDING AND AWARD COMMITTEE CHAIRMAN EDUARDO D. MEJOS AND MEMBERS GIDEON DE GUZMAN, JOSE F. BALBUENA, LAMBERTO P. LLAMAS, AND BARTOLOME SINOCRUZ JR.; MEGA PACIFIC ESOLUTIONS, INC.; AND MEGA PACIFIC CONSORTIUM, RESPONDENTS.**

### RESOLUTION

**PANGANIBAN, J.:**

Our Decision<sup>[1]</sup> in the present case voided the Contract entered into by the Commission on Elections (Comelec) for the supply of automated counting machines (ACMs) because of “clear violation of law and jurisprudence” and “reckless disregard of [Comelec’s] own bidding rules and procedure.” Moreover, “Comelec awarded this billion-dollar undertaking with inexplicable haste, without adequately checking and observing mandatory financial, technical and legal requirements. x x x. The illegal, imprudent and hasty actions of the Commission have not only desecrated legal and jurisprudential norms, but have also cast serious doubts upon the poll body’s ability and capacity to conduct automated elections.” As a result, the ACMs illegally procured and improvidently paid for by Comelec were not used during the 2004 national elections.

In its present Motion, the poll body expressly admits that the Decision “has become final and executory,” and that “COMELEC and MPC-MPEI are under obligation to make mutual restitution.” Otherwise stated, this admission implies that the ACMs are to be returned to MPC-MPEI, and that the sum of over one billion pesos illegally paid for them be refunded to the public purse.<sup>[2]</sup> In short, ownership of the ACMs never left MPC-MPEI and the money paid for them still belongs, and must be returned, to the government.

Consequently, the ACMs, which “admittedly failed to pass legally mandated technical requirements” cannot be used during the forthcoming elections in the Autonomous Region for Muslim Mindanao (ARMM). Apart from formidable legal, jurisprudential, technical and financial obstacles, the use of the machines would expose the ARMM elections to the same electoral pitfalls and frauds pointed out in our Decision. If the ACMs were not good enough for the 2004 national elections, why should they be good enough now for the 2005 ARMM elections, considering that nothing has been done by Comelec to correct the legal, jurisprudential and technical flaws

underscored in our final and executory Decision?

### **The Motion**

Before us is the Commission on Election's "Most Respectful Motion for Leave to Use the Automated Counting Machines in [the] Custody of the Commission on Elections for use (sic) in the August 8, 2005 Elections in the Autonomous Region for Muslim Mindanao (ARMM)," dated December 9, 2004. In its January 18, 2005 Resolution, the Court required the parties to comment. After careful deliberation on all pleadings at hand, we now resolve the Motion.

### **Background Information**

At the outset, we stress that the Decision in the present case, promulgated on January 13, 2004, has long attained finality.<sup>[3]</sup> In our February 17, 2004 Resolution, we denied with finality Comelec's Motion for Reconsideration dated January 28, 2004, as well as private respondents' Omnibus Motion dated January 26, 2004. The Decision was recorded in the Book of Entries of Judgments on March 30, 2004.

Recall that our Decision declared Comelec to have acted with grave abuse of discretion when, by way of its Resolution No. 6074, it awarded the Contract for the supply of automated counting machines (ACMs) to private respondents. It did so, not only in clear violation of law and jurisprudence, but also with inexplicable haste and reckless disregard of its own bidding rules and procedures; particularly the mandatory financial, technical and legal requirements. It further manifested such grave abuse of discretion when it accepted the subject computer hardware and software even though, at the time of the award, these had patently failed to pass eight critical requirements designed to safeguard the integrity of the elections. Consequently, this Court was constrained to exercise its constitutional duty by voiding the assailed Resolution No. 6074 awarding the Contract to Mega Pacific Consortium, as well as the subject Contract itself executed between Comelec and Mega Pacific eSolutions, Inc.

Comelec was further ordered to refrain from implementing any other contract or agreement it had entered into with regard to the said project. We also declared that, as a necessary consequence of such nullity and illegality, the purchase of the ACMs and the software, along with all payments made for them, had no basis in law. Hence, the public funds spent must be recovered from the payees and/or the persons who made the illegal disbursements possible, without prejudice to possible criminal prosecutions against them.<sup>[4]</sup>

Likewise, our February 17, 2004 Resolution denying reconsideration found movants to have raised the same procedural and substantive issues already exhaustively discussed and definitively passed upon in our Decision. In that Resolution, we emphasized (and we reiterate here) that the Decision did not prohibit automation of the elections. Neither did the Court say that it was opposed to such project (or the use of ACMs) as a general proposition. We repeated our explanation that the reason for voiding the assailed Resolution and the subject Contract was the grave abuse of discretion on the part of Comelec; as well as its violations of law --specifically RA 9184, RA 8436, and RA 6955 as amended by RA 7718; prevailing jurisprudence (the latest of which was *Agan v. Philippine International Air Terminals Co., Inc.*<sup>[5]</sup>);

and the bidding rules and policies of the Commission itself.

### **Comelec's Claims**

Notwithstanding our Decision and Resolution, the present Motion claims, *inter alia*, that the ARMM elections are slated to be held on August 8, 2005, and are mandated by RA 9333 to be automated; that the government has no available funds to finance the automation of those elections; that considering its present fiscal difficulties, obtaining a special appropriation for the purpose is unlikely; that, on the other hand, there are in Comelec's custody at present 1,991 ACMs, which were previously delivered by private respondents; that these machines would deteriorate and become obsolete if they remain idle and unused; that they are now being stored in the Comelec Maxilite Warehouse along UN Avenue, at "storage expenses of P329,355.26 a month, or P3,979,460.24 annually."

The Motion further alleges that "information technology experts," who purportedly supervised all stages of the software development for the creation of the final version to be used in the ACMs, have unanimously confirmed that this undertaking is in line with the internationally accepted standards (ISO/IEC 12207) for software life cycle processes, "with its quality assurance that it would be fit for use in the elections x x x."

Comelec also points out that the process of "enhancement" of the counting and canvassing software has to be commenced at least six (6) months prior to the August 8, 2005 ARMM elections, in order to be ready by then. It asserts that its Motion is (a) without prejudice to the ongoing Civil Case No. 04-346 pending before the Regional Trial Court of Makati City, Branch 59, entitled "Mega Pacific eSolutions, Inc. v. Republic of the Philippines (represented by the Commission on Elections)," for the collection of a purported P200 million balance due from Comelec under the voided Contract; and (b) with a continuing respectful recognition of the finality and legal effects of our aforesaid Decision. At bottom, Comelec prays that it be granted leave to use the ACMs in its custody during the said ARMM elections.

### **Private Respondents' Contentions**

Commenting on the present Motion, private respondents take the position that, since the subject ACMs have already been delivered to, paid for and used by Comelec, the Republic of the Philippines is now their owner, without prejudice to Mega Pacific eSolutions, Inc.'s claim for damages in the case pending before the RTC of Makati; and that, consequently, as far as private respondents are concerned, the question of using the subject ACMs for the ARMM elections is dependent solely on the discretion of the owner, the Republic of the Philippines.

### **Petitioners' Comment**

On the other hand, petitioners contend that Comelec is asking this Court to render an advisory opinion, in contravention of the constitutional provision<sup>[6]</sup> that explicitly states that the exercise of judicial power is confined to (1) settling actual controversies involving rights that are legally demandable and enforceable; and (2) determining whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government.

Petitioners assert that there is no longer any live case or controversy to speak of -- an existing case or controversy that is appropriate or ripe for determination, not merely conjectural or anticipatory; and that Comelec's allegations in its Motion do not amount to an actual case or controversy that would require this Court to render a decision or resolution in the legitimate exercise of its judicial power. This lack of actual controversy is clearly seen in the relief prayed for in the Motion: the grant of a leave to use the ACMs during the ARMM elections. Obviously, Comelec merely seeks an advisory opinion from this Court on whether its proposal to use the ACMs during the said elections might be in violation of this Court's Decision dated January 13, 2004, and Resolution dated February 17, 2004.

Assuming *arguendo* that the present Motion might somehow be justified by the government's fiscal difficulties, petitioners further argue that permitting Comelec to use the ACMs would nevertheless allow it to do indirectly what it was not permitted by this Court to do directly. They argue that the instant Motion is merely a subterfuge on the poll body's part to resurrect a lost case via a request for an advisory opinion.

### **The OSG's Comment**

The Office of the Solicitor General (OSG) declares in its Comment that, in compliance with this Court's directive for it to "take measures to protect the government and vindicate public interest from the ill effects of the illegal disbursements of public funds made by reason of the void [Comelec] Resolution and Contract," it filed on behalf of the Republic on July 7, 2004, an Answer with Counterclaim in Civil Case No. 04-346. The OSG prayed for the return of all payments made by Comelec to Mega Pacific under the void Contract, amounting to P1,048,828,407.

The OSG also manifests that it received a copy of the Complaint-Affidavit dated September 15, 2004, filed with the Office of the Ombudsman by the Bantay Katarungan Foundation and the Kilosbayan Foundation against the Comelec commissioners who had awarded the Contract for the ACMs; and the private individuals involved, including the incorporators and officers of Mega Pacific eSolutions, Inc. This Complaint-Affidavit was for violation of the Anti-Plunder Law (RA 7030), the Anti-Graft and Corrupt Practices Act (RA 3019 as amended), and the Code of Conduct and Ethical Standards for Public Officials and Employees (RA 6713).

The complainants alleged immense kickbacks and horrendous overpricing involved in the purchase of the 1,991 ACMs. Based on the OSG's available records, it appears that Comelec withdrew from Land Bank P1.03 billion, but actually paid Mega Pacific only P550.81 million. Furthermore, commercial invoices and bank applications for documentary credits reveal that each ACM cost only P276,650.00, but that Comelec agreed to pay Mega Pacific P430,394.17 per unit -- or a differential of P153,744.17 per unit or an aggregate differential of P306.10 million. Moreover, Mega Pacific charged P83.924 million for value-added taxes (VAT) and P81.024 million more for customs duties and brokerage fees, when in fact -- under the nullified Contract -- it was supposed to be exempt from VAT, customs duties and brokerage fees. Lastly, Comelec agreed to peg the ACM price at the exchange rate of P58 to \$1, when the exchange rate was P55 to \$1 at the time of the bidding, resulting in additional losses for the government amounting to about P30 million.

The OSG hews to the view that the automation of elections, if properly carried out, is a desirable objective, but is mindful of the need for mutual restitution by the parties as a result of the final Decision nullifying the Contract for the ACMs. Nevertheless, in apparent response to Comelec's clamor to use the ACMs in the ARMM elections, the OSG manifests that it has no objection to the proposal to use the machines, **provided however** that (1) Comelec should show with reasonable certainty that the hardware and software of the ACMs can be effectively used for the intended purpose; (2) Mega Pacific should be made to return to the Republic at least a substantial portion of the overprice they charged for the purchase of the ACMs; and (3) the use of these machines, if authorized by this Court, should be without prejudice to the prosecution of the related criminal cases pending before the Office of the Ombudsman (OMB).

### **The OMB's Manifestation**

For its part, the Office of the Ombudsman manifested that as a result of the nullification of the Contract, various fact-finding investigations had been conducted, and criminal and administrative charges filed before it against the persons who appeared to be responsible for the anomalous Contract; and that the various cases had been consolidated, and preliminary investigation conducted in respect of the non-impeachable Comelec officials and co-conspirators/private individuals. Furthermore, the OMB is in the process of determining whether a verified impeachment complaint may be filed against the poll body's impeachable officials concerned.

A Supplemental Complaint prepared and filed by the Field Investigation Office of the Ombudsman reveals that the ACMs were overpriced by about P162,000.00 per unit; that, additionally, Mega Pacific unduly benefited by including VAT and import duties amounting to P194.60 million in its bid price for the ACMs, despite Section 8 of RA 8436 exempting such equipment from taxes and duties; that Comelec nonetheless awarded the Contract to Mega Pacific at the same bid price of P1.249 billion, inclusive of VAT, import duties and so on; and that the Commission allowed Mega Pacific to peg the ACM price using an exchange rate of P58 to \$1 instead of P53 to \$1, which further inflated Mega Pacific's windfall.

The foregoing notwithstanding, the OMB had allegedly prepared a comment on the present Motion, stating its position on the issue of utilizing the ACMs, but upon further reflection decided not to file that comment. It came to the conclusion that ventilating its position on the matter might engender certain impressions that it had already resolved factual and/or legal issues closely intertwined with the elements of the offenses charged in the criminal and administrative cases pending before it. "For one, utilizing illegally procured goods or the intentional non-return thereof to the supplier may have a bearing on the determination of evident bad faith or manifest partiality, an essential element in any prosecution under the anti-graft law, and may, at the same time, be constitutive of misconduct penalized under relevant disciplinary laws."

Consequently, out of prudential considerations, the OMB prayed to be excused from commenting on the merits of the present Motion, to avoid any perception of prejudgment, bias or partiality on its part, in connection with the criminal and administrative cases pending before it.