

## EN BANC

**[ G.R. No. 159139, January 13, 2004 ]**

**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.**

### DECISION

#### **PANGANIBAN, J.:**

There is grave abuse of discretion (1) when an act is done contrary to the Constitution, the law or jurisprudence;<sup>[1]</sup> or (2) when it is executed whimsically, capriciously or arbitrarily out of malice, ill will or personal bias.<sup>[2]</sup> In the present case, the Commission on Elections approved the assailed Resolution and awarded the subject Contract not only in clear violation of law and jurisprudence, but also in reckless disregard of its own bidding rules and procedure. For the automation of the counting and canvassing of the ballots in the 2004 elections, Comelec awarded the Contract to "Mega Pacific Consortium" an entity that had not participated in the bidding. Despite this grant, the poll body signed the actual automation Contract with "Mega Pacific eSolutions, Inc.," a company that joined the bidding but had not met the eligibility requirements.

Comelec awarded this billion—peso undertaking with inexplicable haste, without adequately checking and observing mandatory financial, technical and legal requirements. It also accepted the proffered computer hardware and software even if, at the time of the award, they had undeniably failed to pass eight critical requirements designed to safeguard the integrity of elections, especially the following three items:

- They failed to achieve the accuracy rating criteria of 99.9995 percent set—up by the Comelec itself
- They were not able to detect previously downloaded results at various canvassing or consolidation levels and to prevent these from being inputted again
- They were unable to print the statutorily required audit trails of the count/canvass at different levels without any loss of data

Because of the foregoing violations of law and the glaring grave abuse of discretion committed by Comelec, the Court has no choice but to exercise its solemn “constitutional duty”<sup>[3]</sup> to void the assailed Resolution and the subject Contract. 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. Truly, the pith and soul of democracy — credible, orderly, and peaceful elections — has been put in jeopardy by the illegal and gravely abusive acts of Comelec.

### *The Case*

Before us is a Petition<sup>[4]</sup> under Rule 65 of the Rules of Court, seeking (1) to declare null and void Resolution No. 6074 of the Commission on Elections (Comelec), which awarded “Phase II of the Modernization Project of the Commission to Mega Pacific Consortium (MPC);” (2) to enjoin the implementation of any further contract that may have been entered into by Comelec “either with Mega Pacific Consortium and/or Mega Pacific eSolutions, Inc. (MPEI);” and (3) to compel Comelec to conduct a re—bidding of the project.

### *The Facts*

The following facts are not disputed. They were culled from official documents, the parties’ pleadings, as well as from admissions during the Oral Argument on October 7, 2003.

On June 7, 1995, Congress passed Republic Act 8046,<sup>[5]</sup> which authorized Comelec to conduct a nationwide demonstration of a computerized election system and allowed the poll body to pilot—test the system in the March 1996 elections in the Autonomous Region in Muslim Mindanao (ARMM).

On December 22, 1997, Congress enacted Republic Act 8436<sup>[6]</sup> authorizing Comelec to use an automated election system (AES) for the process of voting, counting votes and canvassing/consolidating the results of the national and local elections. It also mandated the poll body to acquire automated counting machines (ACMs), computer equipment, devices and materials; and to adopt new electoral forms and printing materials.

Initially intending to implement the automation during the May 11, 1998 presidential elections, Comelec — in its Resolution No. 2985 dated February 9, 1998<sup>[7]</sup> — eventually decided against full national implementation and limited the automation to the Autonomous Region in Muslim Mindanao (ARMM). However, due to the failure of the machines to read correctly some automated ballots in one town, the poll body later ordered their manual count for the entire Province of Sulu.<sup>[8]</sup>

In the May 2001 elections, the counting and canvassing of votes for both national and local positions were also done manually, as no additional ACMs had been acquired for that electoral exercise allegedly because of time constraints.

On October 29, 2002, Comelec adopted in its Resolution 02—0170 a modernization program for the 2004 elections. It resolved to conduct biddings for the three (3) phases of its Automated Election System; namely, Phase I — Voter Registration and Validation System; Phase II — Automated Counting and Canvassing System; and Phase III — Electronic Transmission.

On January 24, 2003, President Gloria Macapagal—Arroyo issued Executive Order No. 172, which allocated the sum of P2.5 billion to fund the AES for the May 10, 2004 elections. Upon the request of Comelec, she authorized the release of an additional P500 million.

On January 28, 2003, the Commission issued an "Invitation to Apply for Eligibility and to Bid," which we quote as follows:

**"INVITATION TO APPLY FOR ELIGIBILITY AND TO BID**

The Commission on Elections (COMELEC), pursuant to the mandate of Republic Act Nos. 8189 and 8436, invites interested offerors, vendors, suppliers or lessors to apply for eligibility and to bid for the procurement by purchase, lease, lease with option to purchase, or otherwise, supplies, equipment, materials and services needed for a comprehensive Automated Election System, consisting of three (3) phases: (a) registration/verification of voters, (b) automated counting and consolidation of votes, and (c) electronic transmission of election results, with an approved budget of TWO BILLION FIVE HUNDRED MILLION (Php2,500,000,000) Pesos.

Only bids from the following entities shall be entertained:

- a. Duly licensed Filipino citizens/proprietorships;
- b. Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines;
- c. Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;
- d. Manufacturers, suppliers and/or distributors forming themselves into a joint venture, *i.e.*, a group of two (2) or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract, provided that Filipino ownership thereof shall be at least sixty percent (60%); and
- e. Cooperatives duly registered with the Cooperatives Development Authority.

Bid documents for the three (3) phases may be obtained starting 10 February 2003, during office hours from the Bids and Awards Committee (BAC) Secretariat/Office of Commissioner Resurreccion Z. Borra, 7<sup>th</sup> Floor, Palacio del Gobernador, Intramuros, Manila, upon payment at the Cash Division, Commission on Elections, in cash or cashier's check, payable to the Commission on Elections, of a non—refundable amount of FIFTEEN THOUSAND PESOS (Php15,000.00) for each phase. For this purpose, interested offerors, vendors, suppliers or lessors have the option to participate in any or all of the three (3) phases of the comprehensive Automated Election System.

A Pre—Bid Conference is scheduled on 13 February 2003, at 9:00 a.m. at the Session Hall, Commission on Elections, Postigo Street, Intramuros,

Manila. Should there be questions on the bid documents, bidders are required to submit their queries in writing to the BAC Secretariat prior to the scheduled Pre—Bid Conference.

Deadline for submission to the BAC of applications for eligibility and bid envelopes for the supply of the comprehensive Automated Election System shall be at the Session Hall, Commission on Elections, Postigo Street, Intramuros, Manila on 28 February 2003 at 9:00 a.m.

The COMELEC reserves the right to review the qualifications of the bidders after the bidding and before the contract is executed. Should such review uncover any misrepresentation made in the eligibility statements, or any changes in the situation of the bidder to materially downgrade the substance of such statements, the COMELEC shall disqualify the bidder upon due notice without any obligation whatsoever for any expenses or losses that may be incurred by it in the preparation of its bid.”<sup>[9]</sup>

On February 11, 2003, Comelec issued Resolution No. 5929 clarifying certain eligibility criteria for bidders and the schedule of activities for the project bidding, as follows:

“1.) Open to Filipino and foreign corporation duly registered and licensed to do business and is actually doing business in the Philippines, subject to Sec. 43 of RA 9184 (An Act providing In the Modernization Standardization and Regulation of the Procurement Activities of the Government and for other purposes etc.)

2.) Track Record:

a) For counting machines — should have been used in at least one (1) political exercise with no less than Twenty Million Voters;

b) For verification of voters — the reference site of an existing data base installation using Automated Fingerprint Identification System (AFIS) with at least Twenty Million.

3.) Ten percent (10%) equity requirement shall be based on the total project cost; and

4.) Performance bond shall be twenty percent (20%) of the bid offer.

RESOLVED moreover, that:

1) A. Due to the decision that the eligibility requirements and the rest of the Bid documents shall be released at the same time, and the memorandum of Comm. Resurreccion Z. Borra dated February 7, 2003, the documents to be released on Friday, February 14, 2003 at 2:00 o'clock p.m. shall be the eligibility criteria, Terms of Reference (TOR) and other pertinent documents;

B. Pre—Bid conference shall be on February 18, 2003; and

C. Deadline for the submission and receipt of the Bids shall be on March 5, 2003.

2) The aforementioned documents will be available at the following offices:

a) Voters Validation: Office of Comm. Javier

b) Automated Counting Machines: Office of Comm. Borra

c) Electronic Transmission: Office of Comm. Tancangco”<sup>[10]</sup>

On February 17, 2003, the poll body released the Request for Proposal (RFP) to procure the election automation machines. The Bids and Awards Committee (BAC) of Comelec convened a pre—bid conference on February 18, 2003 and gave prospective bidders until March 10, 2003 to submit their respective bids.

Among others, the RFP provided that bids from manufacturers, suppliers and/or distributors forming themselves into a joint venture may be entertained, provided that the Philippine ownership thereof shall be at least 60 percent. *Joint venture* is defined in the RFP 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>[11]</sup>

Basically, the public bidding was to be conducted under a *two—envelope/two stage system*. The bidder’s first envelope or the Eligibility Envelope should establish the bidder’s eligibility to bid and its qualifications to perform the acts if accepted. On the other hand, the second envelope would be the Bid Envelope itself. The RFP outlines the bidding procedures as follows:

#### “25. *Determination of Eligibility of Prospective Bidders*

“25.1 The eligibility envelopes of prospective Bidders shall be opened first to determine their eligibility. In case any of the requirements specified in Clause 20 is missing from the first bid envelope, the BAC shall declare said prospective Bidder as ineligible to bid. Bid envelopes of ineligible Bidders shall be immediately returned unopened.

“25.2 The eligibility of prospective Bidders shall be determined using simple ‘pass/fail’ criteria and shall be determined as either eligible or ineligible. If the prospective Bidder is rated ‘passed’ for all the legal, technical and financial requirements, he shall be considered eligible. If the prospective Bidder is rated ‘failed’ in any of the requirements, he shall be considered ineligible.

#### “26. *Bid Examination/Evaluation*

“26.1 The BAC will examine the Bids to determine whether they are complete, whether any computational errors have been made, whether required securities have been furnished, whether the documents have been properly signed, and whether the Bids are generally in order.

“26.2 The BAC shall check the submitted documents of each Bidder against the required documents enumerated under Clause 20, to ascertain if they are all present in the Second bid envelope (Technical Envelope). In case one (1) or more of the required documents is missing, the BAC shall rate the Bid concerned as ‘failed’ and immediately return to